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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

Reporter's Transcript of Proceedings
Volume 1
San Diego, California
June 10, 11, 12, 2002

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Reported By: Peter C. Stewart, CSR No. 3184
Official

1 SAN DIEGO, CALIFORNIA, TUESDAY, JUNE 11, 2002; 2:00 P.M.

2 (The voir dire proceedings were reported but are not
3 transcribed herein.)

4 MR. PANTONI: Good afternoon, ladies and gentlemen. Let
5 me remind you again that my name is Anthony Pantoni. I'm the
6 attorney for Tony Czarnik, plaintiff in the case.

7 Ladies and gentlemen, Tony Czarnik, the person who is
8 bringing this claim before you today, the plaintiff in this
9 courtroom, Tony Czarnik is literally a world-famous scientist.
10 He's one of the recognized leaders in his field of science. We'll
11 hear he'd made many important scientific inventions. He's taught
12 chemistry as a university professor for many years. He's
13 frequently invited to do public speaking. He speaks at scientific
14 symposiums and scientific seminars and conferences. And he's very
15 prolific in terms of publications. He's published articles in
16 leading scientific journals and leading scientific magazines.

17 And that background, those things that I just told you about
18 Tony Czarnik, is why presumably Illumina was attracted to Dr.
19 Czarnik in the first place. You see, they contacted him to help
20 join the company. In fact help found the company. He was one the
21 founders of Illumina, and those things I described to you in terms
22 of his background and accomplishments were presumably reasons why
23 they were interested in him in the first place.

24 There's two things about Dr. Czarnik. I call him Dr.
25 Czarnik because he's got a Ph.D in chemistry. There's two things
26 about Dr. Czarnik Illumina did not know when they brought him on
27 board in the first place. First thing that they didn't know, you
28 might be surprised to learn, that despite his accomplishments and

1 despite his being an internationally recognized expert in this
2 field, that Dr. Czarnik has a mental illness. It's a disease or
3 an illness known as depression. As I said, Illumina did not know
4 about this when they first brought him on board.

5 Second thing that Illumina didn't know about Tony Czarnik
6 was that he's too honest. When he sees something he doesn't like,
7 when he sees something that's wrong, he mentions it. He complains
8 about it. This case will involve two things that Dr. Czarnik saw
9 that were wrong and that he complained about and that ultimately
10 led to the termination of his employment.

11 First is, and I'll explain to you how, but when his
12 colleagues found out that he suffers from depression, the people
13 who founded the company along with Dr. Czarnik found out he has
14 depression, they discriminated against him because of his
15 depression. And he complained about it.

16 The second thing is that when he was convinced the company,
17 this is a scientific-based company, when he was convinced that the
18 company was running sloppy scientific experiments, bad scientific
19 experiments, at a time when he knew the company was trying to
20 raise money to go public, and making misrepresentations about this
21 bad science to potential investors would be wrong, he complained
22 about it, he blew the whistle on this.

23 So some things Illumina didn't know about him when they
24 brought him on board, that he suffers from depression and he
25 speaks up when something is wrong, I'm going to show you hopefully
26 through the evidence we present that that led to his termination.

27 There are three different claims in this case. You are
28 going to be asked to decide each one of them. There are three

1 separate claims. They are somewhat related because they are
2 separate claims. You are going to have to make a decision on all
3 three of them.

4 The first is discrimination. The claim is that Illumina
5 took negative employment action against Dr. Czarnik. I'll
6 describe in detail what that is, but took negative employment
7 information against Dr. Czarnik because they learned he has a
8 mental illness.

9 Now, Illumina has already stipulated, or agreed in legal
10 terms, that they have agreed that Dr. Czarnik does suffer from
11 depression, he has major depression, that he's suffered from
12 depression for many years, and they've agreed that depression is a
13 disability for purposes of our laws that prohibit discrimination
14 on the basis of disability. So you are going to have to decide a
15 lot of issues in this case, but one of the issues you are not
16 going to have to concern yourself with is does Dr. Czarnik have
17 depression and is that a disability. The company has agreed and
18 stipulated it is. The company, they took action against Dr.
19 Czarnik because of his depression.

20 The second claim is something commonly called retaliation.
21 We're going to prove to you that Dr. Czarnik complained about
22 discrimination internally inside the company and formally with the
23 California state agency that governs these matters. He complained
24 about discrimination during his employment and Illumina retaliated
25 against him, punished him for making that claim.

26 Then the third claim, this is the claim Miss Kearns in her
27 voir dire gave you the heads-up is going to involve some science,
28 third claim in this case is commonly called whistleblowing. As I

1 said, we're going to prove to you that Illumina also fired Dr.
2 Czarnik in part because he was complaining about bad scientific
3 experiments and the fact that Illumina shouldn't use those
4 scientific experiments or conclusions from those scientific
5 experiments when they were trying to raise money from investors
6 when they were going public. He blew the whistle on that.

7 Now, we've prepared a timeline that I think will help me
8 explain to you what the evidence is going to be in the case that
9 we think supports each one of those claims. We're going to try to
10 walk through some of the key facts in the case. Hopefully
11 everybody can see the top line. We can put the first slide up,
12 please.

13 May 7, 1998. That's when Dr. Czarnik signed his offer
14 letter agreeing to go to work for Illumina. Again, he was one of
15 the founders of Illumina. He was one of the people who built this
16 company from scratch. And I believe the evidence will show he was
17 the first, I think the very first employee to sign this offer
18 letter agreeing to go to work for Illumina.

19 Now, this offer letter is also important, and you'll see it
20 in the case, because it specifically says Dr. Czarnik is a
21 founder, and it says the company will recognize the fact that he
22 is a founder, will respect that, will recognize it, you are a
23 founder of this company. That's important because we're going to
24 show you later that after Dr. Czarnik disclosed that he has
25 depression and started complaining about various things, the
26 company didn't honor that commitment and no longer recognized him
27 as a founder of the company.

28 Next slide, please. June 11, 1998. Dr. Czarnik starts his

1 first day of work at Illumina. As I told you, when he started
2 that day, no one affiliated with Illumina knew that he suffered
3 from depression. Dr. Czarnik will tell you there's a certain
4 stigma attached to depression. Depression is not something
5 everyone understands, and it's certainly not something he was
6 publicizing at the time. And when treated properly, as Dr.
7 Czarnik was, with anti-depressant medications, it doesn't affect
8 one's ability to do the job or do it well.

9 So when Dr. Czarnik joined Illumina, no one knew or really
10 had to know that he suffered from depression.

11 Now, at the very beginning of the company, there were
12 basically three founders. I'll give you their names. Three
13 founders who worked as senior managers. I'll give you their names
14 because you are going to hear them again, they are going to
15 testify, and they are key players in the case. Three initial
16 senior managers who founded Illumina were John Stuelpnagel, who is
17 seated at the far end of defense counsel table. He was the acting
18 CEO of the company. He was in charge of the company, running the
19 company and two key scientists who worked under him. One is Tony
20 Czarnik, who was the chief scientific officer. That was his
21 title, chief science officer. And he was in charge of chemistry.
22 The other scientist was a person named Mark Chee. You'll learn
23 more about him later. He was in charge of molecular biology.

24 Basically Dr. Stuelpnagel running the company along with his
25 two other co-founders, Dr. Czarnik and Dr. Chee.

26 During this very initial stage of the company, the company
27 was being built, these three individuals, Dr. Stuelpnagel, Dr.
28 Chee, Dr. Czarnik, they worked together to plan the future of the

1 company. They met together for strategic planning purposes. They
2 decided what research and what experiments should be done, decided
3 how they should go about raising money for the company. They
4 decided what business opportunities to pursue. They basically
5 together, the three of them, mapped out a blueprint for the future
6 of the company and the success of the company. And they all had
7 big financial stakes in the company. They all, as you'll hear,
8 had literally hundreds of thousands of shares of Illumina stock
9 that they were able to acquire at a penny a share or few pennies a
10 share. So they all had big financial stakes in the company.

11 Now, in these early stages, these formative stages the
12 company was being built, Dr. Czarnik was allowed to participate.
13 In fact, he was invited to participate. They wanted his input.
14 They wanted his involvement. He was a meaningful member of senior
15 management. And that again changed later. We'll show you
16 evidence that after he disclosed depression, complained about it,
17 complained about science, he was no longer treated as a meaningful
18 member of senior management.

19 Next slide, please. In November, 1998, there was a
20 discussion between John Stuelpnagel and Tony Czarnik, and I'm
21 going to get back to this discussion in a minute. I'll tell you
22 something else that will relate to this. The next slide, please.

23 April 6, 1999. Dr. Czarnik suffered what can only be
24 described as a complete breakdown at work. As I said earlier,
25 when he joined the company back in 1998, nobody knew, nobody had a
26 clue he had depression. Events occurred in April of 1998 which
27 I'll describe to you which led to Dr. Czarnik disclosing the fact
28 he does have depression.

1 As of this date, April 6 of 1999, Dr. Czarnik was working on
2 a project. It happened to be a grant application. Basically an
3 application to the government to get some money to fund some of
4 the research that Illumina was doing. At this time Dr. Czarnik
5 suffered a very bad bout of depression. This occurred because he
6 had changed -- his doctor had changed his medication. Some
7 medications have sexual side effects. Medication Dr. Czarnik had
8 been taking had sexual side effects, and his doctor changed his
9 medication. The problem was, new medication wasn't effective. It
10 didn't work. Dr. Czarnik sunk into what he describes as a very
11 deep depressive episode.

12 He's working on his grant application, and it was only a few
13 days away, the deadline, from having it completed, and he found,
14 he'll describe in his own words, he found that he couldn't work on
15 that project. Couldn't write that grant application. And on
16 April 6, 1999, he suffered this breakdown. He broke down
17 emotionally at the office. This internationally recognized
18 expert, scientific expert, was literally in the office of John
19 Stuelpnagel crying. John Stuelpnagel was there, Mark Chee was
20 there, the other founders. Dr. Czarnik was emotional. He was
21 crying. He said I can't work on this project.

22 The evidence will show, ladies and gentlemen, that John
23 Stuelpnagel's response to that, seeing his co-founder broken down,
24 crying in his office, was callous and hurtful and discriminatory.
25 At this meeting with Dr. Czarnik for the first time exhibiting any
26 indication that he had depression, John Stuelpnagel told him,
27 "Hey, if the job is too stressful for you, you should consider
28 leaving the company." He said other things which you'll hear at

1 trial.

2 So Dr. Czarnik asked for permission to go home that day.
3 Try to take care of himself. At that time he didn't know what his
4 role with the company was going to be or really should be. He
5 went home. Turns out he only missed one day of work.

6 April 8, 1999, Dr. Czarnik returned to work. He'll tell you
7 why he missed only one day. His brother is a physician. His
8 brother told him when you are experiencing very deep depression,
9 sometimes taking an amphetamine will have a dramatic and quick
10 effect on the depression. So Dr. Czarnik had an amphetamine, it
11 was in the medicine cabinet for other reasons, took it. He'll
12 tell you he felt like Superman. Really worked. He came back on
13 March 8, 1999, ready, willing and able to resume his duties,
14 hopefully as a meaningful member of senior management.

15 Now, when he returned to work on April 8, 1999, the evidence
16 will show that Dr. Czarnik was brave enough or foolish enough,
17 depending on your point of view, to tell his co-founders what had
18 happened. He told them why he had broken down, why he had been
19 crying, why he couldn't work, and he told them, "I suffer from
20 depression. It's a disease. I've had depression for most of my
21 working life, many years. It's treatable. I'm taking anti-
22 depressants. And I'm ready, willing and able to return to my
23 duties."

24 If we go back a minute back up to the November 1998
25 discussion, the reason I mention it is the defense is going to
26 make a big deal about this discussion in November of 1998 because
27 it happened before what I just told you, it happened before the
28 breakdown, before the disclosure of depression. That discussion,

1 November, 1998, the defense is going to characterize it as a
2 counseling session or warning session to Tony Czarnik. It
3 happened before the disclosure of depression. The evidence will
4 show that this discussion in November of 1998 was about the
5 company not making its goals, not meeting its performance
6 objectives.

7 The company was founded in May of 1998. By November of
8 1998, Dr. Stuelpnagel felt we should be a lot further along than
9 we are now. He blamed not Tony Czarnik, he blamed everybody, even
10 including himself. It was a company problem. When you hear that
11 evidence, bear in mind that it's not a counseling session directed
12 at Tony Czarnik, it's a discussion about the entire company's
13 progress.

14 We'll move forward again. April 6 the breakdown. April 8th
15 he discloses his depression. Now, next April 11, 1999, just a few
16 days later, John Stuelpnagel and Mark Chee discuss replacing Dr.
17 Czarnik as CSO. Just three days after he disclosed the
18 depression. They considered replacing him. Thought better of it,
19 and they allowed Dr. Czarnik to remain at SCO, chief science
20 officer. At least they let him have the title.

21 We're going to show you through evidence the problem is they
22 didn't allow him to act as a real chief scientific officer. They
23 didn't allow him to have and continue to have a meaningful and
24 real role in the company. Yet he was invited to meetings after
25 the disclosure. We all know it's one thing to be at a meeting
26 physically sitting there. It's another thing to be respected as a
27 meaningful participant in the meeting. We're going to show you
28 that after the disclosure Dr. Czarnik was not allowed to be a

1 meaningful participant in management.

2 Now, Dr. Czarnik will testify that after he disclosed to Dr.
3 Stuelpnagel that he had mental illness, he had depression, after
4 the breakdown, for literally weeks Dr. Stuelpnagel wouldn't even
5 talk to him. Didn't speak to him. They'd pass in the hall, he
6 wouldn't make [eye]¹ contact with him. They didn't communicate.
7 Dr. Stuelpnagel wouldn't communicate unless it was absolutely
8 necessary, and then when he did communicate, it was typically
9 e-mail. For weeks this occurred where Dr. Stuelpnagel wouldn't
10 even talk to Dr. Czarnik after the breakdown.

11 Next slide, please. In late May of 1999, this was a
12 Saturday, and both John Stuelpnagel and Dr. Czarnik were working
13 in the office on Saturday, they finally had a discussion. John
14 finally sat down with Tony, and Tony Czarnik told John Stuelpnagel
15 he hoped they could put whatever differences they had aside, and
16 he hoped they could work together again, and this did break the
17 ice a little bit. It improved their relationship to the extent
18 that John Stuelpnagel was now at least talking to Tony Czarnik.
19 But it didn't change anything else. It didn't change the fact
20 that John Stuelpnagel and Mark Chee were not allowing Tony Czarnik
21 to serve in a meaningful way as chief science officer.

22 So that was the situation at Illumina until the other
23 gentleman sitting at counsel table, defense counsel table, Jay
24 Flatley, came on board as the new chief executive officer, the new
25 person running the company. John Stuelpnagel stayed on board with
26 the company. In fact, he still is with the company in a different
27 senior position. But Jay Flatley became the new chief executive
28 officer on October 18, 1999.

¹ Original transcript read "high".

1 Now, Mr. Flatley claims when he came on board, he had no
2 idea that Tony Czarnik had depression. Even though the breakdown
3 had occurred only a few months earlier, even though the disclosure
4 had occurred only a few months earlier, even though the former
5 CEO, John Stuelpnagel, had actually talked about replacing Tony
6 Czarnik, and now Tony Czarnik was going to report to Jay Flatley,
7 Jay Flatley said nobody told me anything about this breakdown,
8 nobody told me anything about depression, nobody told me anything
9 they were thinking about replacing Tony Czarnik. We're going to
10 prove to you that's not true.

11 Jay Flatley will claim to you that he came on board in
12 October of 1999 with a clean slate with respect to Tony Czarnik.
13 He will tell you that he had no plans to get rid of Tony Czarnik.
14 He'll tell you he had no plans to replace him, he had no plans to
15 fire him. Everyone was starting from scratch, including Tony
16 Czarnik. Complete clean slate. Again we're going to prove to you
17 that's not true. Tony Czarnik did not have a clean slate with Jay
18 Flatley.

19 Next slide, please.

20 About a week or two after Jay Flatley started as CEO, Dr.
21 Czarnik asked Jay Flatley to have lunch with him. Tony Czarnik
22 asked for this lunch because Jay Flatley really hadn't spent any
23 time with him. Even though Tony Czarnik was chief science
24 officer, Jay Flatley was chief executive officer, Tony Czarnik
25 asked for this lunch.

26 At this lunch, you'll hear about what was discussed. Nobody
27 used the word "depression" at this lunch. When you'll hear the
28 testimony, you will be convinced they were talking about

1 depression without using that word. They were more cryptic about
2 what they were talking about, his condition. There's a little bit
3 of tap dancing going on, the evidence will show, but nobody
4 actually used the word "depression" at that lunch. Later on, yes.

5 Next slide, please.

6 November 4, 1999, Mr. Flatley has a very important lunch
7 meeting with the person named Larry Bock. Larry Bock is a venture
8 capitalist. He was one of the investor-founders of Illumina. He
9 was on Illumina's board of directors. Larry Bock is a board
10 member.

11 You'll note this lunch occurred only a few weeks after Jay
12 Flatley came on board, when Jay Flatley presumably was operating
13 with his so-called "clean slate" with respect to Dr. Czarnik. Yet
14 only a few weeks into the job, Jay Flatley tells Larry Bock he's
15 got problems with Tony Czarnik and changes need to be made.

16 The inference from this evidence is Jay Flatley had already
17 made up his mind. There was no clean slate.

18 Let's move on to the year 2000 now. January of 2000. This
19 is a few months in the job for Jay Flatley. Mr. Flatley makes a
20 presentation at a conference called H and Q conference. Important
21 conference, where leaders of the company stand up and tell you
22 about the company, give you background. Remember I told you
23 before that Dr. Czarnik's offer letter said he's a founder. It's
24 in black and white in the offer letter, and it's an historical
25 fact, he was a founder. Yet on January 10, 2000, in this public
26 conference, Jay Flatley makes a slide presentation similar to what
27 I'm doing now and he describes the company, he describes the
28 background, and he lists the founders of the company, and he lists

1 only Stuelpnagel and Chee.

2 Somehow Jay Flatley found out Stuelpnagel and Chee were
3 founders but didn't, claims he didn't know Tony Czarnik was a
4 founder at the time.

5 Tony complained about this and Jay Flatley sent him an
6 e-mail saying oops, that was an error, it was an oversight on my
7 part. I didn't know you were a founder. We're going to show you
8 evidence that that so-called error or mistake happened again and
9 happened again and happened again, where Jay Flatley, knowing Tony
10 Czarnik was a founder, didn't recognize that fact.

11 Next slide, please.

12 Also in January, 2000, the evidence will show that Jay
13 Flatley took away job responsibilities from Tony. Tony was still
14 chief science officer, but important job responsibilities are
15 stripped from Dr. Czarnik in January of 2000. We're going to show
16 you there was no legitimate reason for that. No legitimate
17 reasons for stripping Dr. Czarnik of job responsibilities in
18 January of 2000.

19 The evidence will show that just like John Stuelpnagel did,
20 Jay Flatley didn't use Tony Czarnik as a real CSO, like a real
21 chief science officer. He didn't use him as a sounding board on
22 science matters. He didn't meet with him regularly, he didn't
23 seek his input, didn't seek his advice, he didn't use him as a
24 real CSO. So at some point in time in the same time frame,
25 January of 2000, Tony goes to Jay and says I'm willing to give up
26 my CSO title, take a different job with the company.

27 The defense is going to emphasize Tony "volunteered" to give
28 up his CSO title, and in part that's true, he did go to Jay and

1 say okay about my CSO title. But as I showed you before, the
2 evidence will show you he was never really acting as a real CSO,
3 never allowed to act as a true CSO once he disclosed his
4 depression.

5 Next slide, please.

6 Early February, February 1, 2000, Dr. Czarnik has a
7 breakfast with a person named David Walt. David Walt is a board
8 member. He's actually the person who invented the technology that
9 the company was based on. He's the key inventor whose technology
10 gave rise to Illumina. Dr. Czarnik has breakfast with David Walt,
11 February 1, 2000, and David Walt asks him a serious question. He
12 says, "Are you still interested in staying at Illumina?"

13 Dr. Czarnik answers emphatically, yes, I am still interested
14 in staying at Illumina.

15 Unbeknownst to Dr. Czarnik, plans were already underway to
16 replace him as CSO.

17 Next slide, please.

18 February 4, Jay Flatley contacted a person named David
19 Barker about becoming the new CSO. Jay Flatley and Dave Barker
20 had worked together at a prior company, so he contacts him and
21 says are you interested in joining Illumina. A few days later,
22 next slide, please, three days later, Dr. Czarnik and Jay Flatley
23 have a dinner meeting. At this dinner meeting, there's some small
24 talk and chit-chat. Jay Flatley talks about Tony Czarnik's
25 depression. Again he's going to claim he didn't know about
26 depression, he didn't know in February Tony Czarnik had
27 depression. Dr. Czarnik will describe his dinner meeting. One of
28 the first things Jay does at this dinner meeting, he says, "How

1 are you feeling? How is your depression?" Uses the word
2 "depression."

3 He asks Dr. Czarnik, "Do you think your depression is caused
4 by work?" So Jay Flatley did know about depression and he talked
5 to Tony Czarnik about it then.

6 At this same dinner, Jay confirms, "Hey, are you still
7 willing to give up your CSO title?"

8 Dr. Czarnik says, "Yes, I'm willing to give up my CSO title,
9 but I want to be involved in finding who the new CSO is. I'm a
10 founder, I have a big stake in the company, I want to be involved
11 in who the new chief science officer is."

12 [He asked Jay on February 7, "Can I be involved" and Jay
13 Flatley doesn't even]² mention the fact that three days earlier he
14 had already contacted somebody else about the CSO position[; that person]³
15 eventually became CSO.

16 Next slide.

17 February 28, Dr. Czarnik sends an e-mail to Mr. Flatley
18 repeating his request again, "Please can I be involved in finding
19 a new CSO?"

20 The next day, March 1 of 2000, day after that e-mail, Jay
21 Flatley tells Tony Czarnik he's no longer CSO and the new guy is
22 starting the next day, David Barker.

23 David Barker starts work as the chief science officer for
24 Illumina on March 6, 2000. Tony Czarnik takes a different role
25 with the company that I'll describe in a minute.

26 Next slide, please.

27 On March 15 of 2000, Illumina prepares a draft of what's
28 called an S1 registration statement. S1 registration statement is

² Original transcript read, "He asked Jay on February 7 can I be involved and Jay Flatley. Doesn't even".

³ Original transcript read, ", person".

1 an important government document that's prepared by the company,
2 filed with the United States government, with the Securities
3 Exchange Commission, the SEC, in Washington D.C. And in this
4 document, the first draft of the S1 registration statement, where
5 they describe the company and the background, in this document,
6 Dr. Czarnik is described, as it says, Dr. Czarnik "helped found
7 Illumina." He was a founder.

8 That might seem a minor distinction. It doesn't say
9 "founder," it says "help found," but in that document John
10 Stuelpnagel is called a founder, Mark Chee is called a founder,
11 Tony Czarnik helped.

12 Dr. Czarnik complained about that. He says I'm a founder,
13 equal footing with Stuelpnagel and Chee. From that point forward,
14 Dr. Czarnik wasn't shown any more drafts of this S1 document.
15 They didn't send him any drafts to comment on.

16 Next slide.

17 A few days later, March 21 of 2000, Jay Flatley sends an
18 e-mail to Dr. Czarnik. He attaches basically a new employment
19 contract. Mr. Flatley wanted Tony Czarnik to sign a new contract
20 that reduced his salary and slashed his stock dramatically, taking
21 stock vesting away from Dr. Czarnik. Tony refused to sign the new
22 contract. Jay Flatley became upset. Eventually the evidence will
23 show that Jay Flatley's own lawyers told him that it was illegal
24 to make a stock change unless Tony Czarnik agreed to it. He
25 wouldn't agree to it, so Jay Flatley couldn't cut his stock at
26 that time.

27 Next slide, please. April -- One at a time, please.

28 April 3, 2000. Illumina files its first S1 registration

1 statement with the SEC. The first document I told you about was a
2 draft, it hadn't yet been filed. This is the first actual filing
3 with the SEC.

4 Now, Tony Czarnik saw this draft. Saw this filing, rather.
5 Because it was filed with the government, it was available on the
6 Internet, and he found it on the Internet. They weren't sending
7 him any drafts anymore, but he saw this on the Internet. Now,
8 this draft, Tony Czarnik is not mentioned as a founder. This
9 draft[, nothing even about 'helped to found']⁴. This filing with the SEC
10 he's not even mentioned at all in terms of being a founder.
11 Nothing.

12 Now, ladies and gentlemen, as a result of these events that
13 I just described to you, Tony Czarnik felt that he was being
14 discriminated against because he disclosed his depression. Tony
15 Czarnik told Jay Flatley, "I think you are discriminating against
16 me." He also sent several e-mails. You'll have them in evidence,
17 you'll see them. He sent several e-mails saying, "This is wrong,
18 you are discriminating against me."

19 Next slide, please.

20 April 3rd, the date he saw that S1 on the Internet, he sent
21 an e-mail to Jay Flatley claiming discrimination.

22 Next slide, please.

23 April 5th, Dr. Czarnik sent another e-mail to Jay Flatley.
24 This one he says I'm not going to sign your new contract, and he
25 again claims discrimination.

26 By the way, Tony and Jay met to discuss this new contract,
27 the one that would cut his stock, and when Tony Czarnik told Jay
28 Flatley I'm not going to sign a new contract, Mr. Flatley

⁴ Original transcript read, "nothing even about help found".

1 threatened him and said, "Do you know what this means?" Tony
2 Czarnik will testify he knew exactly what that meant.

3 Next slide.

4 April 18, 2000. More e-mails. About discrimination. Now
5 as you can see, Dr. Czarnik complained about discrimination on
6 numerous occasions. Orally and then three e-mails, April 3, April
7 5, April 18. Illumina never investigated Dr. Czarnik's claim of
8 discrimination. They have an HR department, they've got a policy
9 manual. The company policy is any claims of discrimination we'll
10 investigate, we'll investigate thoroughly, and we'll investigate
11 promptly. The evidence will show Illumina never even investigated
12 this complaint internally.

13 Next slide, please.

14 I told you before when Dr. Czarnik stepped down as CSO he
15 got a new job position, something called research fellow. Now
16 what I want you to understand about this research fellow position
17 is that it's a purely science position. Purely scientific
18 responsibilities. The CSO job had science plus management duties.
19 When he's made research fellow, his duties are purely science. So
20 who does he report to? The chief science officer. The new guy,
21 David Barker. It makes sense. His job responsibilities are
22 purely science, he should report to the chief science officer, and
23 that's originally what happened. He reported to the new guy,
24 David Barker.

25 Now, there were no written goals in place. We talked during
26 the jury selection about written goals. There were no written
27 goals in place for this new position. It's a brand new position.
28 So Tony Czarnik worked with David Barker, his new boss, and came

1 up with a set of goals, and what I have on the easel here are the
2 goals. It's hard to see, very hard to see, maybe impossible to
3 see, but my point is that these goals were approved by David
4 Barker, the new CSO. Tony Czarnik and David Barker worked
5 together. They came up with these goals. David Barker said they
6 are aggressive goals, but fair. So we thought these were going to
7 be Tony Czarnik's goals. It turns out they weren't. We'll get to
8 that in a minute.

9 Next slide, please.

10 Less than a week after Tony Czarnik and David Barker agree
11 on these goals, there's an Illumina board meeting, and at this
12 board meeting, Jay Flatley makes statement to the board indicating
13 that he's going to assign goals to Dr. Czarnik that can't be met.
14 Jay Flatley told the board Tony Czarnik doesn't know it yet but
15 he's going to be getting goals that cannot be met.

16 How do we know that? Dr. Czarnik wasn't at the meeting. We
17 know that, next slide, please, because two days after the board
18 meeting, Dr. Czarnik had a telephone conversation with somebody
19 who was at the meeting, David Walt, a board member, and David Walt
20 told Dr. Czarnik what Jay Flatley said at the board meeting he was
21 going to get new goals that couldn't be met.

22 David Walt is going to be a witness at this trial, being
23 called by -- He's going to be a witness at the trial. He may or
24 may not admit to those statements. Tony Czarnik will tell you
25 David Walt absolutely told him about Jay Flatley's statement to
26 him. It's going to be up to you to decide credibility, who is
27 telling the truth.

28 Next slide, please.

1 Within a week or two of that board meeting, the one we claim
2 Jay Flatley said he's going to give him goals that can't be met,
3 Jay Flatley changes the reporting relationship. Says Czarnik is
4 no longer reporting to the chief science officer, he's reporting
5 to me, to Jay. He's his new boss on May 4 of 2000. Now, this, I
6 think, you'll find to be a very curious decision on the part of
7 Jay Flatley. Jay Flatley has no science background. David Barker
8 has plenty of science background and he's the chief science
9 officer, and the goals that are being given to Czarnik are all
10 science-related, yet Jay Flatley says this person who has a
11 science job is now going to report to him, not to chief science
12 officer.

13 Next slide, please.

14 Same day, May 4 of 2000, Jay Flatley gives Dr. Czarnik a
15 counseling memo. First counseling memo the man ever received from
16 Illumina. On the same day, 5-4 of 2000, Dr. Czarnik then decides
17 he's going to file a formal complaint of discrimination. We
18 showed you the e-mails he had submitted earlier. Nothing
19 happened. He's going to file a formal charge of discrimination
20 with the government, with the California Department of Fair
21 Employment and Housing. He's still working there, but he's going
22 to file this charge.

23 Next slide, please.

24 They set a meeting May 17. Dr. Czarnik says I'm going to
25 schedule a meeting. The next day, May 18, May 18, 2000, Tony
26 Czarnik files his formal complaint of discrimination with the
27 California Department of Fair Employment and Housing, accusing
28 Illumina formally now with the government of discriminating.

1 Next slide, please.

2 The very next day, May 19th, 2000, the day after he filed
3 the charge, Mr. Flatley meets with Tony Czarnik and gives him new
4 goals. Ultimately this is what the company is going to say led to
5 Czarnik's firing.

6 I'm going to try to move this up a little bit. As I said,
7 this was assigned to Dr. Czarnik the day after he filed his charge
8 of discrimination. The evidence is going to show, ladies and
9 gentlemen, that these new goals assigned by Tony Czarnik's new
10 boss were a sham and were designed to set up a pretext upon which
11 to fire Dr. Czarnik. The evidence is going to show, ladies and
12 gentlemen, this is Jay Flatley's own goals, 5-19-2000, discussed
13 and given to Tony at a meeting. The evidence will show when Jay
14 Flatley handed these goals to Tony Czarnik, he had already decided
15 he was going to fire him. Jay Flatley will deny that. He'll tell
16 you I had no preconceived idea I was going to fire him on May 19
17 when I handed him these goals. We're going to show you that he
18 did.

19 In legal terms we call this a pretext. This is an excuse to
20 fire Dr. Czarnik.

21 Now we'll take a look at the goals for a second. I'll first
22 point out these were the old goals, the ones approved by Dr.
23 Czarnik's first boss. Now, defense may point out there are more
24 goals on this list, more rows, right? The new goals only have
25 three rows. They are going to try to tell you those are easier
26 goals, or at least not harder. There are only three here, there
27 are many more here. We're going to prove to you that these goals
28 were impossible, virtually impossible, to meet. In particular the

1 second line

2 Illumina as part of their technology involves doing
3 experiments called decoding. This second line is asking Dr.
4 Czarnik to do something in a new area of decoding, I can't
5 pronounce it, binary oligo encoding. He's given 30-day goals, 60-
6 day goals, 90-day goals and year goals. On the 90-day goal, for
7 example, on this line, to demonstrate binary oligo encoding. This
8 90-day goal asks him to show experimental feasibility of this
9 process with 2 to 12th power of codes. 2 to the 12th power is a
10 number that's over 4000. When you hear the testimony at trial,
11 you'll understand, I believe, that that number is absurdly high.
12 The company had been doing decoding from the very beginning, back
13 in 1998. They had been doing decoding with a different method.
14 At this point in time, May of 2000, the entire company, all the
15 scientists working at the company, from the very beginning of the
16 company, working together, hadn't shown the decoding to a number
17 of 4000. The entire company, every scientist, [from the beginning of]⁵ the
18 company until now, hadn't reached that number with a
19 different way of doing the decoding. Illumina asked within 90 days
20 do it alone, by yourself, something that the entire company hadn't
21 done in its entire existence.

22 We submit that's an unreasonable expectation for one man to
23 do in 90 days.

24 And this year goal, that number, the library of all 10mers,
25 it's a big, big number. It's a number over a million. So the 90-
26 day, 4000; by the end of the year, a million. The evidence is
27 going to show you that that is absurd and that that was an excuse
28 to ultimately fire Dr. Czarnik.

⁵ Original transcript read, "beginning".

1 One more thing I want to point out about these goals. First
2 line and the third line are basically already on this chart. They
3 added the killer goal, goal number 2, but they made an interesting
4 addition to the third line. The third line, "Contribute to
5 company IP portfolio." That was on the original goal.
6 "Contribute to company IP portfolio," but you see they added one
7 thing to that line. They added, "Submit a grant application."
8 It's no accident that they added that. Remember I told you what
9 the breakdown was about? April 6 of 1999. He broke down when he
10 was working on a grant application. That was the incident that
11 caused him to be crying in John Stuelpnagel's office. For some
12 reason, they attempted to subtly tack that on.

13 Next slide, please.

14 May 22, Dr. Czarnik sends an e-mail to Jay Flatley saying
15 these goals are unfeasible. Tony talked to Jay. Jay stated
16 ["proceed with those goals"]⁶. And again Jay Flatley is going to tell you he
17 hadn't decided, he's going to claim he hadn't decided to
18 fire Dr. Czarnik as of May. We're going to prove to you he had
19 already decided to fire him.

20 Next slide, please.

21 Despite the fact that the goals were unreasonable, Dr.
22 Czarnik began working on the goals. June 30th of 2000, he sends
23 Jay Flatley some initial work on the project. Work that he had
24 done to prepare a plan to try to achieve these goals.

25 Next slide, please.

26 Now, Jay Flatley made himself Tony Czarnik's boss. We told
27 you he decided no longer report to the CSO, he's going to [report]⁷
28 to me. He made himself Tony Czarnik's boss even though he wasn't

⁶ Original transcript read, "proceed with goals".

⁷ Original transcript read, "reported".

1 going to be available to supervise him. For reasons I'll tell you
2 in a minute, he wasn't even going to be around Illumina.

3 July 3rd he goes on vacation. Next slide, please. July 10,
4 something called a roadshow begins. You'll be hearing about this
5 roadshow. This is a traveling presentation, a traveling series of
6 presentations where Jay and other members of Illumina management
7 met with people who might be investing money in the initial public
8 offering. The company was planning on going public. So a
9 roadshow is a series of meetings, city after city after city,
10 where they make presentations about the company and why people
11 might think about investing in the IPO.

12 This roadshow lasted the entire month of July. So Jay
13 Flatley, Tony's new boss, wasn't even around to supervise him on
14 this project.

15 Next slide. In any event, since Jay is his boss, he sends
16 him an e-mail on July 12 attaching his plan, his work plan, to go
17 about trying to achieve these goals.

18 Now I want to speak a little bit about the whistleblowing
19 claim because it relates directly to this roadshow that I
20 mentioned. We're going to present evidence to you ladies and
21 gentlemen that Dr. Czarnik was fired not only because of his
22 disclosure of depression and the fact he complained about
23 depression, but he was also fired because he was complaining about
24 the scientific matter in the context of this roadshow that was
25 happening.

26 The evidence is going to show you that Dr. Czarnik was
27 critical and complaining about certain sloppy science from the
28 beginning of his employment, all the way up through and including

1 the time of the roadshow. But this issue really came to a head
2 during the roadshow in an experiment, key experiment called the
3 768 decode experiment. This slide relates to the 768 decode
4 experiment. This is a number, 768, that corresponds somewhat to
5 -- remember I told you he was being asked to show 4000 codes.
6 This was an experiment using a different method or methodology
7 that dealt with 768.

8 Now, one of the things that Illumina's technology does is
9 identify different types of DNA. One step in this process is
10 called decoding. We're talking about it in this experiment. Now,
11 this decoding experiment used three different colors of -- three
12 different colored dyes. This will be really important when I tell
13 you what happened with this experiment. Experiment uses
14 fluorescent dyes, and in this one there were three different
15 colors, blue, green, and red.

16 Now, one of the main, the main point of the decoding, to
17 determine how the decoding works, you've got to see what color
18 each spot lights up. That's the whole point of this experiment.
19 There's a series of decoding steps. Each step they have to
20 determine what color lit up, blue, green or red. What makes it
21 light up this way is that dye I told you about, fluorescent dye
22 that's [used- that's]⁸ what makes these colors light up. The whole
23 point is to determine does a spot light up blue, green or red in
24 this experiment.

25 Now, it turns out this experiment, the 768 decoding
26 experiment, was a mix-up with one of the dyes. The vendor they
27 bought the dye from put the wrong label on some bottles, on some
28 lots of dye, and there were labels on the bottle that said green

⁸ Priginal transcript read, "used. That's".

1 when in fact the dye inside the bottle was red, and inadvertently
2 some of this mislabeled dye was used in conducting this
3 experiment. They thought they were using green because that's
4 what the bottle said. In fact, some of the green was actually
5 red.

6 Now, we contend that this obviously screwed up this
7 experiment. Dr. Czarnik thinks so. He's an expert in
8 fluorescence, which is what this concerns. He's going to tell you
9 that it's important if you are going to use green dye that there
10 actually be green dye in the bottle.

11 We submit that you are going to hear evidence from
12 Illumina's scientists that will be scientific doubletalk to try --
13 designed to confuse this issue. We're going to show you, Dr.
14 Czarnik will tell you, it does matter. When you are trying to
15 find what spot lights up green, it matters that you use green dye.

16 Now, I said Dr. Czarnik was a whistleblower. To be a
17 whistleblower a person has to complain about something they
18 reasonably believe is illegal. What evidence are we going to show
19 you that something illegal may have been going on here or that Dr.
20 Czarnik had a belief that something illegal was going on here?
21 Doing a bad experiment alone is not illegal. What makes it
22 illegal is if a company uses bad scientific results or draws
23 conclusions from bad scientific experiments when they are trying
24 to raise money in an IPO, when they are trying to encourage people
25 to invest money in the company, when they are on a roadshow. And
26 that, ladies and gentlemen, the evidence is going to show, is what
27 Dr. Czarnik believed was occurring at Illumina.

28 Next slide, please.

1 On July 13, 2000, Mark Chee sent an e-mail to the roadshow
2 team. This is while they were on the roadshow trying to convince
3 investors to spend their money to buy stock. Mark Chee attached
4 this slide to his e-mail, the one I just showed you, and he sent
5 it off to the roadshow team. The evidence will show he did that
6 for possible use by the roadshow team in connection with the
7 actual roadshow presentations. He sent a copy to several people,
8 including everybody on the roadshow. Of course he didn't send a
9 copy of this to Dr. Czarnik.

10 Next slide, please.

11 On July 24, this is still during the roadshow I described,
12 Molecular Probes, that's the vendor who sells the dye to Illumina,
13 they sent a letter to the company regarding this mislabeled dye.

14 Now, Dr. Czarnik found out that this had happened. He found
15 out about the mislabeling on the dye. He knew that the experiment
16 was being conducted for purposes of the roadshow. He thought it
17 was likely, in fact he thought it did happen, he thought it was
18 likely these results would be sent to the roadshow team, and he
19 blew the whistle.

20 Dr. Czarnik spoke to Mark Chee, who was the person in charge
21 at Illumina during the roadshow. Flatley was on the roadshow,
22 again. He appointed Mark Chee as the person in charge of the
23 company. Dr. Czarnik talked to Mark Chee, told Mark Chee the
24 results of this experiment were not reliable because of the mix up
25 in the dye. He told Mark Chee he should contact the roadshow team
26 immediately because they shouldn't be relying on this experiment,
27 and he told Mark Chee if he didn't do that, he could be defrauding
28 investors at the roadshow.

1 A few weeks later, Dr. Czarnik was fired.

2 Next slide, please.

3 July, 2000, is the date of the initial public offering.
4 Illumina goes public. I'll show you what the result of going
5 public was. Flatley sends an e-mail to everybody at Illumina.
6 The good news, Illumina raised in this initial public offering
7 \$100 million. That's what was at stake here. That's what we are
8 going to show you motivated Jay Flatley and others to fire Dr.
9 Czarnik because of his whistleblowing about this matter. That day
10 89 million is deposited into Illumina's bank account. Total of
11 \$103 million raised at the roadshow.

12 Now, on the -- I'm sorry, the day of the IPO, the day the
13 company went public, Illumina had a contingent right there on the
14 NASDAQ floor to commemorate the occasion, celebrate the occasion.
15 Jay Flatley was there to celebrate. John Stuelpnagel was there to
16 celebrate. Mark Chee, one of the other founders, who wasn't even
17 on the roadshow, they flew him to New York to celebrate. There
18 was one senior manager/founder who wasn't asked to go to New York
19 to celebrate.

20 Next slide, please.

21 August of 2000, August 1, Jay Flatley gives Tony Czarnik his
22 first written feedback on his progress toward the 30-day goals.
23 This was about two months after he gave the goals to Dr. Czarnik
24 to begin with. August 1st he gives his first written feedback.

25 Next slide.

26 A week later, to make up for lost time, he gives Dr. Czarnik
27 his feedback on his 60-day goals.

28 Next slide, please.

1 August 15, 2000, Illumina's response to Dr. Czarnik's
2 complaint of discrimination. This was nearly three months after
3 he filed the complaint. And again the evidence will show Illumina
4 never bothered to investigate his complaint internally at all.

5 Next slide.

6 August 25, 2000, Dr. Czarnik sends an e-mail to David Walt.
7 Again David Walt is the inventor of the technology, he's on the
8 board of directors, and Dr. Czarnik implores David Walt to please
9 dig into this decoding problem. And make no mistake about it,
10 ladies and gentlemen, the evidence will show this decoding was a
11 big, big problem at Illumina.

12 September 1, Jay Flatley speaks at a company-wide meeting.
13 He's talking to all the employees. He describes decoding as being
14 a problem that's a 4 on a scale of 1 to 3, with 3 being worst.
15 This is a 4. This is off the scale. Fixing decoding is the
16 biggest problem at Illumina at that time.

17 Next slide, please.

18 September 5, 2000, Dr. Czarnik sends an e-mail to Mark Chee
19 about this problem, about the roadshow decoding experiment.

20 Next, please.

21 September 5, 2000, Dr. Czarnik sends an e-mail to Jay
22 Flatley about the decoding problem.

23 Now Illumina I think is going to claim this was some last
24 minute attempt by Dr. Czarnik to make something out of nothing.
25 The evidence is going to show you this was a big problem, and Dr.
26 Czarnik was talking about sloppy science and bad science at the
27 experiments for a long time, not just at the end of his
28 employment.

1 Next slide.

2 September 5, same day. Tony Czarnik is fired.

3 Now, the official reason Jay Flatley gave Tony Czarnik when
4 he met with him was that he didn't meet the goals. These goals.
5 That's the official reason he gave Tony Czarnik. He didn't meet
6 his goals. Again we're going to show you these were unreasonable
7 to begin with, and that he had already decided to fire him way
8 back in May. But that was his official reason.

9 However, at the termination meeting, we'll make sure you can
10 read this, these are Jay Flatley's own notes. The evidence is
11 going to show, ladies and gentlemen, these notes were a result of
12 a discussion that Jay had with Jennifer Kearns, the company's
13 lawyer; that they worked together to essentially write a script of
14 what to tell Tony Czarnik when he was fired. These are notes in
15 Jay Flatley's own writing, and they were used as, as I said,
16 basically a script of what to tell Dr. Czarnik at the termination
17 meeting.

18 Now, the first line of the notes, again this is said to him
19 on September 5 when he was fired, first line, first thing Jay
20 Flatley talks about at the termination meeting, it's a little hard
21 to follow, but, "I understand you have expressed some strong
22 opinions in the last few days about the state of decoding."
23 Decoding is this experiment we talked about. We submit there is a
24 connection, a strong connection, between Tony Czarnik complaining
25 about this decoding and the termination meeting. This was what
26 Jay Flatley said.

27 He did more than say, "I understand you've been raising some
28 concerns about decoding," he went on to threaten Tony Czarnik, if

1 you tell anyone else outside the company about this reagent
2 problem, we're going to come after you with everything we have.

3 Ladies and gentlemen, let me talk to you just for a minute
4 or two about the damages that Tony Czarnik suffered as a result of
5 the termination. Told you before that he had acquired stock at
6 the beginning of his employment at a penny a share or few pennies
7 a share. This is a letter that Illumina sent to Dr. Czarnik about
8 a week after they fired him. It basically says we're going to buy
9 back some of the shares of stock. Illumina had a written contract
10 with Dr. Czarnik that said if you were no longer employed,
11 basically said as he's being employed, he gets to keep certain
12 chunks of stock that he had bought at the beginning of his
13 employment. Bought it all on day one or early on in his
14 employment. As he works, Illumina no longer can buy it back from
15 him. But the contract said that if you are terminated, anything
16 that hadn't vested yet we can buy back from you, we can buy it
17 back at the original purchase price of a penny a share.

18 So September 12 they write to Dr. Czarnik and basically say
19 we're buying back 226,000 shares of common stock and another
20 25,000 shares that you had, we're buying it back at the original
21 purchase price of a penny a share, or nine cents a share, and they
22 sent Dr. Czarnik a check for \$4500.

23 On September 12, 2000, based on the closing price of
24 Illumina stock on the NASDAQ Stock Exchange, public stock
25 exchange, based on the closing price that day, the shares they
26 bought back for \$4500 had a fair market value of over \$10 million.

27 So pursuant to the report, Dr. Czarnik is going to tender
28 back his shares, trading publicly for \$10 million, he gets a check

1 for 4000.

2 Ladies and gentlemen, when Miss Kearns gets up to make her
3 closing -- I'm sorry, her opening statement, maybe her closing,
4 too, but when she stands up to make her opening, she's going to
5 say something like, I predict, there's no evidence of
6 discrimination in this case. That's what defense lawyers
7 typically say in discrimination cases. That's because there very
8 rarely is direct evidence of discrimination. Employers don't say
9 we're doing this to you because you are a woman or we're doing it
10 to you because of your race or we're doing it to you because of
11 your age or your disability. They don't say that. You are not
12 going to have that in direct testimony from anybody. You are not
13 going to see an e-mail. Employers don't say that.

14 You will see plenty of evidence in this case, some direct
15 evidence, some what we call circumstantial evidence, but plenty of
16 evidence that shows that Dr. Czarnik was discriminated against,
17 retaliated against, and fired because he blew the whistle, and he
18 was not fired legitimately for failure to meet those goals.

19 Thank you.

20 THE COURT: We'll take a recess. We'll be in recess
21 until 3:30. Please remember the admonition, do not form or
22 express any opinions about the case, do not discuss the case among
23 yourselves or with anyone else.

24 We'll be in recess until 3:30. 3:30. Leave your notepads
25 on your chairs. They'll be there for you when you get back.

26 (Recess)

27 THE COURT: Record will indicate all the jurors are
28 present, counsel and parties present.

1 Miss Kearns, you ready to proceed at this time?

2 MS KEARNS: Thank you, your Honor.

3 Good afternoon, members of the jury.

4 Well, I have to tell you I felt at times during
5 Mr. Pantoni's opening like I have the hardest job in the world,
6 sitting there listening to things being said about my client which
7 I believe the evidence is going to show to be absolutely not true,
8 and then I realized my client actually had the harder job of it,
9 much more so than I.

10 As I mentioned earlier in the case, my name is Jennifer
11 Kearns, and it's my privilege to represent Illumina. Also my
12 co-counsel, Nicky Espinosa, is a former law partner of mine. A
13 few years ago she elected to leave the law firm and become vice
14 president of intellectual property at Illumina. So she'll be
15 working throughout this case to present Illumina's case.

16 In the opening you've heard from Mr. Pantoni the various
17 theories that Dr. Czarnik holds relating to his employment at
18 Illumina. Mr. Pantoni gave you a preview of Dr. Czarnik's view of
19 the case. As every one of us knows, there are two sides to every
20 story. I think Mr. Pantoni has done an excellent job of weaving
21 the smatterings of fact here and there to create a story that at
22 first blush may seem to hold true or hang together, but what I'm
23 going to give you a preview of is what Illumina believes the
24 evidence is going to show you very convincingly and to show you
25 the ways in which plaintiff's story actually will unravel if even
26 you do so much as to pull a little piece of thread.

27 I'm going to go ahead and ask that we put up our first board
28 of the chronology. I'm not going to discuss it at this moment,

1 but I wanted to make sure that we have it up here so that when I
2 do, I'm going to have it on the overhead and also here on the
3 board so everyone can read it very clearly.

4 Now, as the plaintiff in this action, Dr. Czarnik has the
5 burden of proof, and when you are finally instructed at the close
6 of the case, one the things that Judge Prager will tell you about
7 is what the burden of proof is and what the standard is. But very
8 briefly, Dr. Czarnik is the person who has the burden of
9 convincing you by a preponderance of the evidence that each of his
10 three theories is correct, or that some of them are correct.
11 Illumina does not have the burden to convince you that he's wrong.
12 Rather he has the burden to convince you that he's right.

13 Illumina actually does not have the burden to put on evidence to
14 dispute whatever it is that Dr. Czarnik is going to put before
15 you. In fact is we will be putting on quite a bit of evidence to
16 dispute the theories that Dr. Czarnik has advanced and is offering
17 up to you as explanations for what happened, but it's important to
18 remember at all times that it's Dr. Czarnik who bears this burden.

19 A preponderance of the evidence is something you will be
20 instructed on, but in lay terms, it means tipping the scale. It
21 means convincing you that Dr. Czarnik's theory is more likely true
22 than not, and if it's a draw, if you were to conclude on one
23 theory or all three theories that it's equally balanced, you'll be
24 instructed that you have to rule against Dr. Czarnik and in favor
25 of Illumina, because Dr. Czarnik is the person who has the burden.

26 Now, in this case we have the three different theories that
27 have been mentioned by Mr. Pantoni, and as I said, Dr. Czarnik
28 bears the burden on each and every one of those. Because he is

1 the plaintiff, Dr. Czarnik gets to go first, which is why I and my
2 clients had to sit and listen to an opening chaffing at the bit, I
3 admit, to respond to some of those statements.

4 As the judge has already instructed you, it's very important
5 to wait until all the evidence is in before forming any
6 conclusion, final impression or decision. And as Judge Prager
7 told you, our best estimate of the duration of the trial is about
8 three weeks. We're going to try to bring it in a little under
9 three weeks. We all know there's that holiday weekend
10 approaching, but our best estimate at this time is that we're all
11 going to be engaged in this process for about three weeks.

12 So my request to each of you, and certainly the Court's
13 instruction, is to keep an open mind throughout the process. Keep
14 an open mind until all evidence is in. Because we don't get to
15 put our evidence on until Mr. Pantoni has put everything he wants
16 to put on into the case.

17 Now let me go into a discussion about Illumina's
18 perspective. It's important to hear this perspective, because as
19 you've heard in the course of Mr. Pantoni's opening, there's a lot
20 going on in this case. There are a lot of events, a lot of time
21 line events, and there are -- there is a better explanation in
22 our view for what happened and what occurred at Illumina.

23 Now, we've all heard the phrase trying to fit a square peg
24 in a round hole, and that actually, that well-known phrase, is
25 something that describes Dr. Czarnik's relationship with Illumina
26 to a tee.

27 Now, Mr. Pantoni mentioned Dr. Czarnik is a world-famous
28 scientist in chemistry, and I don't dispute that. What I will say

1 is that Illumina is not a company that is focused solely in his
2 area of expertise. Dr. Mark Chee, one of the other scientific
3 founders, is also a world-famous scientist, highly renowned,
4 highly respected, and when Illumina came to be formed, it was
5 formed from nothing, as I said. It was a start-up.

6 Now, Dr. Czarnik is somebody, the evidence is going to show,
7 who had a history and work history of working in the area of
8 combinatorial chemistry and fluorescence, and he had generally
9 been in roles that required a great deal of scientific expertise.
10 Dr. Czarnik was first identified, as were several other people,
11 by some of the investors who were thinking of forming a company
12 around a technology.

13 Let me say a couple of words just about how Illumina even
14 came to be formed. Dr. John Stuelpnagel, who is with me today, is
15 one of the founders of Illumina. Dr. Stuelpnagel was at the time
16 working in a company called CW Group. This was a group that
17 identifies opportunities to develop companies, and then analyzes
18 the technology, decides whether the technology is good enough to
19 form a company around it, and then if they go forward, they look
20 to raise money to get the company off and running, they look to
21 identify and hire management personnel to run this new company,
22 and that's what Dr. Stuelpnagel was doing. It is Dr. Stuelpnagel
23 who identified or found the technology that ultimately Illumina
24 came to be based upon.

25 Dr. Stuelpnagel and his colleague at CW Group, Larry Bock,
26 took a look at the technology, evaluated it, and thought it looked
27 pretty good, but they didn't rest upon their own opinions. What
28 they saw was need to find other people knowledgeable in the field,

1 solicit their opinions on whether this technology really was as
2 good as we think it is before we go off and raise money and start
3 a company around the technology. And that's a process that took
4 sometime, and Dr. Czarnik was one the people identified by Dr.
5 Stuelpnagel and Larry Bock whose opinion they decided to solicit.

6 Dr. Czarnik is not the only one they talked to by any
7 means. They talked to a lot of different people and said what do
8 you think of this technology, does it look good, should we start a
9 company.

10 So after Dr. Stuelpnagel identified the technology, he did
11 seek Dr. Czarnik's input on the technology, as he had with others,
12 and they started discussing not only the merits of the technology,
13 but whether Dr. Czarnik might be interested in joining the company
14 if the decision was made to go forward.

15 And remember, the evidence is going to show you at the time
16 they had this initial meeting, it was a breakfast meeting at
17 Milton's in Del Mar, at the time this breakfast meeting occurred,
18 the decision to form a company had not been reached. The whole
19 process was one in which they were determining whether to form the
20 company, and they did ask Dr. Czarnik what do you think of the
21 technology, and if we decide to form a company, might you have an
22 interest in being involved. And he indicated that he might have
23 an interest.

24 Now, one of the things to remember with the start-up
25 companies is that they start out with some finite or limited
26 amount of money, and it's usually called seed money, like sowing
27 the seeds for your garden, but one of the first tasks that's
28 really important for start-up companies is to raise more money,

1 because your seed money will only go so far. When you run out of
2 money, there's not much left to do. So raising money is very,
3 very important in the early days.

4 Let me tell you a little bit, though, about what Illumina's
5 focus is. Illumina is a life sciences company. There are lots of
6 different kinds of companies that are engaged in what we call life
7 sciences. Pharmaceutical or drug development companies are in
8 life sciences. Companies that make medical devices like
9 pacemakers or blood serum measurement apparatus, those are also
10 life sciences companies. And Illumina's focus is a little bit
11 different. I'm going to try my best to put into understandable
12 terms, because trust me, I'm not the expert in this area either,
13 but what it is that Illumina does.

14 Now, Illumina has an amazing technology, and that's one of
15 the reasons I asked in jury selection about people's reactions to
16 hearing scientific evidence, because you are going to get, as
17 jurors in this case, an insider's peek at some really amazing
18 science that's going on at Illumina. And again Illumina is still
19 a young company, but the potential applications for some of this
20 technology are pretty amazing.

21 Now, we all have genetic differences in our makeup. We're
22 all humans, we all have the same number of chromosomes, but there
23 are some very slight differences in our genetic makeup, and some
24 of those differences manifest or show themselves in differences in
25 hair color, height, eye color. These differences, though, aren't
26 really medically significant. It doesn't really matter if I have
27 dark hair and somebody else has blonde hair. But the same genetic
28 difference that can cause me to be dark haired and dark eyed and

1 somebody else light hair and light eyed can also cause me to be
2 susceptible to certain diseases and cause the other person to be
3 very resistant to disease. The same genetic differences can cause
4 me to respond very well to a certain medication and have somebody
5 else respond not at all to the same medication.

6 Today medicine is still not an exact science, and for a
7 number of diseases the determination of what medication is going
8 to work best for a given patient is still very hit and miss. Very
9 often with a number of diseases the patient has to go through
10 trying medication A, and when that doesn't work move on to
11 medication B and then medication C, and it can be very frustrating
12 for the patient and his or her family and the physicians.

13 We're hoping, we're not there yet, but we're hoping that one
14 day Illumina's technology might even be used in an application to
15 develop some individualized or personalized medicine. Again,
16 we're a long way off, but we're very hopeful that some day
17 Illumina's technology may be part of a technology that enables
18 doctors or scientists to look at somebody's genetic makeup and say:
19 ['This person is at risk for developing these diseases; let's watch
20 them']⁹. And if they do develop a certain disease, we hope that the
21 technology may some day enable us to say[, 'Given this person's
22 genetic makeup, the first drug of choice to treat this should be
23 drug A']¹⁰. If that doesn't work, the next best one is drug C. So
24 that's where we're hoping to head.

25 Now, you've heard the term "public company." It's true that
26 in the summer of 2000, Illumina, as we say, went public. Its
27 stock became available for purchase on the NASDAQ. But prior to
28 that time, it was a shoestring start-up company. I think that we

⁹ Original transcript did not include quote marks or semi-colon.

¹⁰ Original transcript did not include quote marks.

1 heard in jury selection a number of people have had family and
2 friends who have worked in start-ups. We've all heard about the
3 dot-com boom, and then the dot-com doom. And so I think we all
4 understand that start-ups, a lot of start-ups fail. A lot of them
5 fail because they don't raise enough money to keep going. A lot
6 of them fail because they mismanaged the money they do have. But
7 as I said before, you are going to hear evidence in this case that
8 Illumina started up with seed money that would have been
9 sufficient to keep it going for only a matter of months, and so
10 raising additional capital was very, very critical.

11 Now, the evidence in this case is going to show a couple of
12 things, and some of these things are a little difficult for me to
13 say, but I have to say them because they are the truth and we
14 believe the evidence is going to support them entirely.

15 As intelligent, and as well known in his field as Dr.
16 Czarnik may be, the evidence is going to show very clearly that
17 from June of 1998, which is when Dr. Czarnik joined the company,
18 he simply lacked the energy, the dedication, the drive, the work
19 ethic that the other people who were at Illumina had at that time.
20 You are going to hear evidence of the kinds of hours, the kinds of
21 effort, the kinds of absolute dedication to this company that
22 others were living and breathing, day in and day out, often seven
23 days a week, week after week. And Dr. Czarnik did not possess
24 that level of drive, dedication and energy.

25 Now, remember that Dr. Czarnik was the chief scientific
26 officer when he came on board, and as the chief scientific
27 officer, his role encompassed not only making contributions to the
28 company's science, but he was supposed to be in a leadership role.

1 Not just heading up a group of scientists, but developing
2 scientific strategy, identifying opportunities and saying you
3 know, this is where I think we should focus our efforts or this is
4 an application that I think our science could be geared toward and
5 could make us money.

6 There were also a couple, at the very beginning, a couple of
7 different scientific groups, notably chemistry, which was headed
8 up by Dr. Czarnik, and molecular biology, which was headed up by
9 Dr. Mark Chee. You'll meet Dr. Chee during the course of this
10 trial.

11 These two groups you will see from some evidence in the case
12 needed to work very closely with one another, because frankly each
13 depended upon the other for various tasks to be done before they
14 could move forward with what they needed to do.

15 Dr. Czarnik, as the head and chief scientific officer of
16 the entire scientific program, had the responsibility to develop a
17 cohesive or good working relationship between these two groups.
18 You are going to hear evidence of things Dr. Czarnik did that were
19 very divisive, that pitted the groups against one another, and
20 that created something of an us-versus-them environment, between
21 two peak scientific groups that had to work together.

22 The evidence is also going to show that Dr. Czarnik, apart
23 from having less drive, less energy, less dedication, had some
24 very lazy tendencies. It will show he was a procrastinator, and
25 people who are his [friends]¹¹, people who liked Dr. Czarnik and worked
26 with Dr. Czarnik, are going to say that was unfortunately one
27 of his faults.

28 Dr. Czarnik is also going to be shown through the evidence

¹¹ Original transcript read, "friend".

1 as somebody who liked to delegate almost all of his work or his
2 tasks to others. There's nothing wrong with that to a certain
3 extent, but the evidence is going to show that Dr. Czarnik avoided
4 any task or any assignment for which he would have personal
5 responsibility, personal accountability. And in fact the grant
6 application which Mr. Pantoni referred to, and which was due in
7 April of 1999, that was the first assignment or task ever given to
8 Dr. Czarnik where he had personal responsibility. He was the one
9 person that the company was to look to to say do this and do it by
10 a certain date. The evidence is also going to show that he had
11 that assignment on his plate for some five months before he
12 disclosed that he wouldn't finish it.

13 Now I'm going to make a timeline of key events. I may look
14 back at a certain point to this overhead, but we will be trying to
15 duplicate it directly here on the board, which is a little bit
16 closer to you.

17 The first thing that happened on the timeline is in early
18 April, 1998, and this is of course after the introductory
19 breakfast at Milton's, and on this date Dr. Czarnik had not been
20 offered employment with Illumina, although by this point in time,
21 early April, 1998, it had been determined that there was going to
22 be a company forming around this technology, the technology looked
23 good and the decision to go forward had been made. The evidence
24 is going to show on April 3rd, 1998, Dr. Czarnik sent a written
25 communication to Dr. John Stuelpnagel, who was acting president
26 and CEO at the time, and Dr. Czarnik was soliciting from Dr.
27 Stuelpnagel a job offer. In essence, you are going to see the
28 communication and see that Dr. Czarnik is the one, the first one,

1 who said I'd like to come work for the company but here are my
2 terms. And you will see in that letter that Dr. Czarnik was
3 asking for some fairly unusual terms, some unreasonable terms,
4 frankly, because the evidence is going to show that Dr. Czarnik
5 didn't have any belief that he was coming to a big money, big
6 company with lot of perks. The evidence is going to show he
7 understood he was coming to a start-up that had a little bit of
8 seed money and that would run out of money if it didn't raise more
9 quickly. But Dr. Czarnik was proposing a number of unreasonable
10 perks for himself, and you'll hear evidence that he agrees that
11 some of those things that he was requesting for himself are things
12 he'd never give somebody else if he was on the other side of the
13 negotiating contract.

14 The evidence is going to show that an offer was eventually
15 made to Dr. Czarnik, albeit -- although not on the very enriched
16 terms that he was asking for, but an offer was eventually made by
17 Dr. Stuelpnagel. Dr. Czarnik accepted that offer and he began
18 work on June 15th, 1998.

19 Now I'm going to try not to extend this opening too long by
20 mentioning each and every point that Mr. Pantoni raised, and
21 frankly I don't think I could dredge them all up at this point.
22 One thing I do remember Mr. Pantoni mentioning was Dr. Czarnik was
23 the first employee to sign an offer letter with Illumina, meaning
24 he was the first person to commit to going. You'll hear evidence
25 and see evidence that refutes that, that is not true. There may
26 have been a suggestion that Dr. Czarnik was the first person to
27 actually show up and begin performing work at Illumina. You will
28 hear evidence that will absolutely refute that as well. That is

1 not true.

2 Now, during the very early days, June 15th, 1998, when Dr.
3 Czarnik began, the company was being operated literally on a
4 shoestring out of some spare offices that the venture investor CW
5 Group had up in Cardiff, California. It was very tight quarters.
6 You can see everyone coming and going out of this office suite.
7 And during that period of time, the summer of 1998, the number one
8 key task for the team was [to develop]¹² a very good written
9 business plan, because the written business plan is what the
10 company shops around to investors and convinces them that we've
11 got a good thing going here and it makes sense for you to invest
12 money in us.

13 During those first few months, it was expected and
14 anticipated that all of the people who were on board at that early
15 stage, and most importantly the senior management, which consisted
16 of Dr. Stuelpnagel, Dr. Chee and Dr. Czarnik, will all be putting
17 full effort into developing this business plan.

18 You are going to hear evidence that Dr. Czarnik made very
19 few contributions to the development of this business plan, either
20 in contribution of ideas or in actually writing portions of the
21 plan. In fact, the evidence is going to show he didn't write any
22 portion of the plan until Dr. Stuelpnagel specifically assigned a
23 couple of sections to him, and that other persons who weren't even
24 in management had voluntarily drafted portions and submitted
25 content for inclusion in the plan.

26 The evidence is going to show that by August of 1998, just
27 two months into Dr. Czarnik's employment, two months into Dr.
28 Chee's employment, Dr. Stuelpnagel and Dr. Chee both became very,

¹² Original transcript read, "to, A, develop".

1 very concerned about Dr. Czarnik's low level of contribution, and
2 as a result, they had a talk with him. They wanted to get out of
3 the office because, remember, Illumina was sort of camping out in
4 CW's space, so you had people who were employed by CW Group in the
5 suite and there may have been another company sharing space as
6 well. So mindful of Dr. Czarnik's privacy and company privacy,
7 Dr. Stuelpnagel and Dr. Chee asked Tony Czarnik to take a walk
8 with them outside the offices. They talked to him about his low
9 level of contribution and expressed concern. It wasn't a
10 discussion, you are going to hear, the evidence is going to show
11 you, it wasn't a discussion in which they said we're working so
12 much harder, it was a discussion in which they said we just don't
13 think your level of contribution is consistent with someone at
14 your level, and we've got new people coming in and we all need to
15 really set a good example, because for the new folks coming on
16 board, we're going to ask them all to work very, very hard, long
17 hours.

18 In this discussion, Dr. Czarnik assured Dr. Stuelpnagel and
19 Chee once the company moved to its own space he would be
20 productive. Why would he link it to the company's move to its own
21 space? Remember, during the Cardiff days, they are sort of
22 squatting in CW's space. They were working out of tiny offices,
23 but they knew, they knew at that point in August that within a
24 month they would be moving to their own facility, have much more
25 space, and they would have laboratory facilities, where scientists
26 could begin doing experiments.

27 So Drs. Chee and Stuelpnagel very much hoped that Dr.
28 Czarnik would make good on his promise and be engaged and be

1 contributory and work hard once they moved to their new space.

2 The company moved in September of 1998 to space on Towne
3 Centre Drive with laboratories, and unfortunately the evidence is
4 going to show that Dr. Czarnik's work ethic and his contribution
5 did not increase at that time. He didn't begin working
6 particularly harder or longer. He didn't particularly contribute
7 to the development of experiments.

8 He did do some things, though, that I think the evidence is
9 going to show were very helpful to building some morale and team
10 building at Illumina. He took other employees out to lunch,
11 sometimes footing the bill for the entire group. At the time we
12 were a small company, sometimes 10 employees or fewer, but that's
13 a generous gesture. Dr. Czarnik also would host a regular popcorn
14 get-together in the company's kitchen at the end of the day and
15 encouraged people to come down, share popcorn and talk. He bought
16 some radio-controlled boats, and on Fridays would encourage the
17 employees to come all outside at 5 o'clock and race the boats.
18 And these aren't negative things. They are team building. These
19 are morale building activities. And yet they aren't the kind of
20 high level scientific and business contributions that Illumina was
21 expecting for Dr. Czarnik to make to the company and for which
22 they were paying him a salary of \$185,000 a year.

23 In fact, Dr. Czarnik was the highest compensated employee at
24 Illumina at the time. He was paid more than Dr. Stuelpnagel, he
25 was paid more than Dr. Chee, and the evidence is going to show
26 that the contributions that he was making were absolutely
27 insufficient in comparison with the position he held and the level
28 of compensation he was receiving.

1 Now, one point I do want to make is that Dr. --
2 Mr. Pantoni mentioned Dr. Czarnik's role as a founder. I have to
3 say that the term "founder" is not legally defined. There are a
4 number of people who arguably are founders in this company.
5 Mr. Pantoni identified Dr. Czarnik, Dr. Stuelpnagel and Dr. Chee
6 as founders, and at a later point he identified Larry Bock from CW
7 Group as an investor/founder. But the evidence is going to show
8 there were a number of other people who were founders, most
9 notably David Walt, the scientist whose technology Illumina is
10 based on, and others.

11 The founder status is not something that is legally
12 significant. You are not going to hear any evidence that somebody
13 who is a founder has a right of entitlement any greater than an
14 early employee.

15 Now, the next entry on the timeline is November of 1998, and
16 I really have to focus upon this because this is a talk Dr.
17 Stuelpnagel had with Tony Czarnik. Tony characterized it as a
18 talk not about Tony Czarnik's performance but about Illumina's
19 performance as a whole and Illumina not achieving its research
20 goals as a whole, and Mr. Pantoni submitted to you the evidence is
21 going to show that this was not, absolutely not, a discussion that
22 John had with Tony specifically about Tony's performance.

23 Well, you are going to hear some contrary evidence. You are
24 going to hear evidence that is going to show that Tony Czarnik
25 himself has described that meeting with John Stuelpnagel as a
26 scolding; that Tony Czarnik described that meeting as a meeting in
27 which John Stuelpnagel sat him down, closed the door and told him
28 that his efforts, Tony Czarnik's efforts, and the results of his

1 efforts, were insufficient and disappointing. That's the evidence
2 that you are going to hear. And so it is our position that that
3 November, 1998 discussion absolutely was a performance counseling.
4 No question about it.

5 THE COURT: We're going to have to break in here
6 somewhere, Counsel.

7 MS KEARNS: At 4 o'clock?

8 THE COURT: Yes.

9 MS KEARNS: I think we may as well break for today.
10 Thank you for your attention today.

11 THE COURT: Ladies and gentlemen, we'll take our
12 evening recess at this time. We'll be in recess until 9:00 a.m.
13 tomorrow morning.

14 Please, before you leave, fill in the forms that the bailiff
15 has passed out. Hand it to the bailiff on the way out.

16 So we'll be in recess until 9:00 a.m. tomorrow morning.
17 Please be here promptly at that time because we can't start -- We
18 expect to start right at 9:00 a.m. We can't start until all of
19 you are here. So please be here promptly at 9:00.

20 Remember, do not form or express any opinions about the
21 case, do not discuss the case amongst yourselves or with anyone
22 else. We'll be in recess until 9:00 a.m. tomorrow morning. Have
23 a pleasant evening. Leave your note pads on your chairs.
24 They'll be there for you when you return tomorrow morning.

25 (Proceedings resumed outside the presence of the jury.)

1 SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 12, 2002; 9:05 A.M.

2 THE COURT: Record will indicate all the jurors are
3 present, counsel and the parties present.

4 When we left off yesterday, Miss Kearns, you were in the
5 process of giving your opening statement. You want to continue at
6 this time?

7 MS KEARNS: Yes, of course.

8 Good morning, everyone.

9 I want to thank you for your attention yesterday and
10 apologize that just given the schedule that we have that my
11 opening was broken up, but I'm sure that you all preferred to go
12 home at 4 o'clock rather than stay for another hour. So I'll
13 resume this morning.

14 I was thinking last evening one question that may have been
15 created by some of my remarks yesterday is if Dr. Czarnik lacked
16 the drive, the energy, motivation that I believe the evidence is
17 going to show was the case, you may be wondering why did Illumina
18 hire him in the first place, why did Dr. Stuelpnagel choose him to
19 become the CSO. What you are going to hear in this case is
20 evidence that's going to show that during the process in which Dr.
21 Stuelpnagel and Dr. Czarnik were negotiating for Dr. Czarnik to
22 join the company, Dr. Czarnik assured Dr. Stuelpnagel that he
23 would be, and I'm quoting, "Illumina's hardest working employee."
24 You'll hear evidence that Dr. Czarnik gave Dr. Stuelpnagel
25 examples of how he used to keep a sleeping bag in his office when
26 he was a professor at Ohio State University so that he could pull
27 all-nighters if need be. So what you are going to hear is
28 evidence showing that at the time that Dr. Stuelpnagel was

1 considering bringing Dr. Czarnik on board, he was getting a lot of
2 reassurance from Dr. Czarnik that he was going to be fully
3 engaged, working extremely hard, in fact he'd be the hardest
4 working employee.

5 I left off on our timeline with a discussion of the
6 November, 1998 private meeting between Dr. Stuelpnagel and Tony
7 Czarnik in which Dr. Czarnik's poor performance to date had been
8 discussed. Remember, this wasn't the first performance counseling
9 meeting, it was the second. The first one occurred in Cardiff
10 when Mark Chee and Dr. Stuelpnagel took Tony Czarnik outside the
11 office to express concerns about his low productivity and low
12 contribution level. So the evidence, as I said yesterday, is
13 going to show very clearly that the November 1998 meeting between
14 John Stuelpnagel and Tony Czarnik was not a meeting in which Dr.
15 Stuelpnagel was only expressing his concerns about Illumina's
16 progress or Illumina's productivity towards its research and
17 development goals, this was a very Tony Czarnik-specific meeting,
18 and you will see in evidence the handwritten notes that John
19 Stuelpnagel made in preparation for this meeting, a list of pros
20 and cons or positives and negatives, and these are all Tony
21 Czarnik-specific, these are not Illumina-specific.

22 Now, the evidence is also going to show an important point.
23 It's a small piece of the case, but it's a very important element
24 here. We've got evidence that's going to show that in August, Dr.
25 Czarnik was counseled about his productivity, contribution, his
26 work ethic, that this happened again in November of 1998, and the
27 evidence is going to show that in early 1999, in the first quarter
28 of 1999, Dr. Czarnik consults with an attorney about his

1 employment at Illumina. Now, this is important to remember
2 because what we have here is evidence that Dr. Czarnik is
3 consulting with an attorney in early 1999, Q-1, in other words
4 it's before April, it's before he has his breakdown, and it's
5 before he discloses he has depression. Before any of that
6 happens, he's consulting with an attorney about his employment at
7 Illumina.

8 And we believe that the evidence is going to show that the
9 reason he was consulting with an attorney at that point is he knew
10 he was in trouble. He'd had two performance counselings already
11 and he knew that he was having some problems at Illumina, and
12 that's why he consulted an attorney.

13 Now, looking at our timeline, we have my first entry in 1999
14 is a late March entry, Czarnik's walk with Chee, offers to resign
15 as CSO. A few days before the April 6th, 1999 breakdown, Dr.
16 Tony Czarnik asked Mark Chee, who was one of the other founders,
17 one of the other senior scientists, he asked Mark Chee to take a
18 walk around the block outside the facilities, and during that walk
19 with Dr. Mark Chee, Tony Czarnik expressed to Dr. Chee a concern
20 that he wasn't sure he was the right person to be the CSO of the
21 company, he wasn't sure he was doing a good job of it, and he
22 offered to Dr. Chee the CSO position. He in essence said to Dr.
23 Chee, Mark, if you'd like to become the CSO, I'll step down, you
24 can be the CSO, and this is the first occasion on which Dr.
25 Czarnik formally offered to step down as CSO.

26 Dr. Chee, from whom you'll hear in testimony in this case,
27 was a little taken aback by this. He, too, had had concerns about
28 Tony Czarnik's performance, but he tried to buck up Dr. Czarnik to

1 give him some reinforcement and reassurance. He told Dr. Czarnik
2 he didn't want to take over the CSO position, and nothing more was
3 said about that at that time.

4 A couple of days later, April 6, 1999, is the date on which
5 Dr. Czarnik had his breakdown at work.

6 Now, Mr. Pantoni in his opening statement described this
7 event, and one of the things that's important to remember about
8 trials is there are two sides to every story. People remember
9 events very differently. And I have heard from Mr. Pantoni and
10 from Dr. Czarnik himself in deposition what their recollection of
11 the event is. We believe the evidence is going to show a very
12 different situation than the one which has been described to you
13 by plaintiff's counsel. We believe the evidence is going to show
14 first of all that this grant application assignment was given to
15 Dr. Czarnik in November of 1998, at or about the time that John
16 Stuelpnagel counseled him about his poor performance, his low
17 productivity, his lack of personal accountability.

18 Now, writing grants is something that Dr. Czarnik had
19 significant experience with. Dr. Czarnik, as I'm sure you'll hear
20 when he takes the stand and testifies on direct, was a university
21 professor for a number of years. And as a university professor,
22 he wrote a number of grant applications. These are applications
23 to the government or other funding entities, and essentially you
24 say I've got a great research project, here is the idea, here is
25 what I intend to do, here's the list of people I intend or here
26 are the positions of types of people I intend to have work on the
27 project, and here's what it's going to cost. The point of a grant
28 application is to try to get funding so that you can do the

1 research project.

2 So what the evidence is going to show is that Tony Czarnik
3 had quite a bit of experience writing these grant applications.
4 They are competitive. There are a number of researchers competing
5 for the same pot of money. Not all of them are successful. But
6 you've got to write a good grant application to even have a shot
7 at getting that money.

8 So the assignment in November of 1998 to Tony Czarnik of a
9 grant application task was not something that was out of the realm
10 of reasonableness. It's not something he hadn't done before. He
11 hadn't done it at Illumina before, although Mark Chee had
12 submitted and written a number of grant applications, but in
13 November of 1998, John Stuelpnagel wanted to give Tony Czarnik a
14 task for which he'd assumed personal responsibility, and the
15 writing of this grant seemed like a good task. It's something
16 he'd done before, and more importantly, it was a big grant. If
17 the grant had been awarded, it would have been very significant in
18 terms of the money that could have supported Illumina's research
19 program.

20 So Dr. Czarnik had this grant assignment in November of
21 1998. He took a special out-of-town seminar for the purpose of
22 learning how to best write the grant for this particular funding
23 group, NIST. He also had taken several days immediately before
24 April 6, 1999, he'd taken several days out of the office from
25 Illumina to work on the grant at home so that he could work on it
26 without distraction.

27 What happened on April 6, 1999, is Dr. Czarnik came into the
28 office, and the evidence is going to show that he asked for a

1 meeting with John Stuelpnagel and Mark Chee behind closed doors.
2 They go into the office, the door is closed, and the evidence is
3 going to show that Dr. Czarnik started the discussion very matter
4 of factly by simply saying, "I'm not going to be able to finish
5 the grant." Now bear in mind the grant deadline was a matter of
6 days away, and Dr. Czarnik had had this assignment on his plate
7 for almost five months.

8 Dr. Stuelpnagel did express some disappointment,
9 frustration, didn't understand why Dr. Czarnik wasn't going to be
10 able to complete this grant, and questioned him, you know, why
11 can't you finish this, at which point the evidence is going to
12 show Dr. Czarnik broke down and began crying.

13 Now, I have to point out that there are going to be two
14 absolutely opposite versions here. According to the plaintiff's
15 version, Dr. Czarnik came into the meeting and dissolved in tears
16 immediately. In fact, we believe the evidence is going to show
17 that he came in, he matter of factually said he can't finish the
18 grant, Dr. Stuelpnagel was expressing frustration and disbelief,
19 and at that point Dr. Czarnik broke down.

20 We believe the evidence is going to show as soon as Dr.
21 Czarnik broke down, Dr. Stuelpnagel stopped all inquiry about why
22 he couldn't do it, what the reasons were, and became very
23 concerned for Dr. Czarnik's welfare. He told Dr. Czarnik the most
24 important thing for him to do was to take care of himself, to go
25 home, to get some rest, to feel better. And during this meeting
26 when Dr. Czarnik is admittedly very emotional, breaking down, he
27 told Dr. Stuelpnagel and Dr. Chee that perhaps he should leave the
28 company.

1 Now, you heard Mr. Pantoni say yesterday that it was John
2 Stuelpnagel who said something to Tony Czarnik like, "If the job
3 is too tough for you, maybe you should just leave." But in fact
4 we believe the evidence is going to show that in his emotional
5 state, Dr. Czarnik said, "If you want me to, I'll leave the
6 company. I'll resign. I'll step down as CSO." He did express
7 the desire to continue working at Illumina, but also said that if
8 the other two felt it was in the company's best interests, he
9 would step down or leave the company entirely.

10 Now, our next entry is April 8, 1999. Dr. Czarnik returns
11 to work on that day, as Mr. Pantoni mentioned, after
12 self-medicating with Dexedrine at home. He comes to work, and
13 immediately upon arriving he asks for a closed-door meeting with
14 Dr. Stuelpnagel and Rich Pytelewski. Mark Chee was not on site
15 that day. Otherwise, presumably, he would have been included as
16 well.

17 But now that Dr. Czarnik was back, he wanted to meet with
18 his other senior managers and give a little bit of explanation
19 about what had happened two days earlier, because remember, the
20 evidence is actually uncontroverted that in the meeting on April
21 6th, Dr. Czarnik did breakdown, he did become emotional, but he
22 didn't tell anyone at that time what was wrong. He didn't say he
23 suffered from depression.

24 So on April 8, during this meeting with Dr. Stuelpnagel and
25 Rich Pytelewski, at that point Dr. Czarnik explained that he
26 suffered from depression, that he'd had the condition for over 10
27 years, that he found his condition to be very well controlled by
28 medication, and that some short period of time prior to April he

1 had changed medications, and that the medication to which he
2 changed simply wasn't as good as the one he used to take, it
3 wasn't controlling his depression, and he spiraled into a
4 depression.

5 He then told Dr. Stuelpnagel and Mr. Pytelewski he now had
6 gone to his doctor and he was going to resume his earlier
7 medication regimen, the one that had controlled his depression
8 well, that he was feeling better, that he was capable of resuming
9 work immediately, and that was about it. And Rich Pytelewski said
10 let's go back to work, and everyone went back to work.

11 Incidentally, the evidence is going to show that Dr. Czarnik
12 asked John Stuelpnagel to brief Mark Chee, to tell him what had
13 happened, because Mark Chee of course had been in the prior
14 meeting where Dr. Czarnik broke down.

15 Now, one of the things on the plaintiff's timeline was the
16 fact that on April 9 -- April 11, 1999, Stuelpnagel and Chee
17 discussed replacing Czarnik as CSO. Lawyers, myself included, do
18 tend to put our own spin on words. It's not disputed that there
19 was a discussion on April 11, 1999. But given what the evidence
20 is going to show, what we have is this: We have Dr. Czarnik
21 walking around with Mark Chee in late March, 1999, saying I'm not
22 sure I'm doing a good job, I'm not sure I'm the right person to be
23 CSO, do you want the position? I'm willing to step down. We then
24 have that same offer repeated during the breakdown on April 6 to
25 Dr. Stuelpnagel and Chee. You know, if you want me to leave, I'll
26 leave. If you want me to step down, I'll step down.

27 So on April 11, Dr. Stuelpnagel and Dr. Chee happened to be
28 traveling out of town for a business meeting, and during this

1 meeting, they discuss the fact that Dr. Czarnik had twice in the
2 last month offered to step down as CSO. And they were not
3 discussing it, the evidence is going to show, they weren't
4 discussing it as a concept that they were suggesting, they were
5 discussing how they felt about Dr. Czarnik's offer made twice in
6 the last few days to step down.

7 What Dr. Stuelpnagel and Dr. Chee concluded is that although
8 they had some concerns about Dr. Czarnik's abilities to really be
9 an effective CSO and lead the company, they also noted that it
10 didn't make sense for Dr. Chee to assume the CSO role because they
11 needed somebody who was more cross-functional, and also Dr. Chee
12 had a tremendous amount of scientific experiments he was
13 overseeing, and they also determined that since they didn't have
14 an identified candidate to step into that role, it didn't make
15 sense for Dr. Czarnik to step down.

16 Now, the next entry that we have on our timeline is April
17 23, 1999. Within a matter of weeks after his breakdown, Dr.
18 Czarnik began seeing a psychiatrist here in town named Allan
19 Mallinger. He saw Dr. Mallinger roughly weekly, and the reason I
20 mention Dr. Mallinger is because you are going to hear from him in
21 this case.

22 The important aspect of Dr. Mallinger's testimony, which
23 I'd like to ask you to remember when you hear from him, is this:
24 Dr. Mallinger is somebody who was seeing Tony Czarnik just about
25 every single week from April 23 through a period of nine months to
26 a year. During these treatment sessions, Dr. Czarnik told Dr.
27 Mallinger a number of things about what was going on with him at
28 work. It's a typical counseling session. Remember, these are the

1 statements that Tony Czarnik was making to his psychiatrist at the
2 time of the events at Illumina. And what you are going to see is
3 the evidence is going to show that Dr. Czarnik clearly had a
4 grudge against John Stuelpnagel, but he wasn't telling Dr.
5 Mallinger that he was being excluded, he wasn't telling Dr.
6 Mallinger that he was being discriminated against, he didn't talk
7 to Dr. Mallinger about any whistleblowing issue. And essentially
8 what we have is notes that show that by May, and you'll see those
9 notes, Dr. Czarnik was telling Dr. Mallinger that things were much
10 better at work, that things between him and John Stuelpnagel were
11 going much more smoothly, and he also recounted, or told Dr.
12 Mallinger, that he and John Stuelpnagel had had a very rocky
13 working relationship, and there's a statement in the early
14 treatment notes that says that his boss, John Stuelpnagel, had
15 been unhappy with his performance for the last six months, and if
16 you go back six months from the first treatment notes, it puts you
17 squarely in the November, 1998 time frame, which is when John
18 Stuelpnagel had his first very pointed sit-down meeting with Dr.
19 Czarnik to go over the positives he contributed but also the
20 negative things he needed to work on.

21 It's important to remember that these are statements made by
22 Dr. Czarnik to his psychiatrist at the time of the events.
23 Although there may be an attempt to recharacterize them now that
24 we're in a lawsuit, or there may be a change in the way that Dr.
25 Czarnik now remembers the events, the fact is Dr. Mallinger's
26 notes reflect what Dr. Czarnik said about what was going on in his
27 life at the time.

28 Now, the evidence is going to show that as the organization

1 grew, Dr. Stuelpnael realized that the company needed more depth
2 in its senior management team. In particular he even concluded a
3 stronger CEO was going to be needed. Now, remember Dr.
4 Stuelpnagel at the time was the acting CEO, but he concluded that
5 for the good of the company, it was going to be better to find
6 somebody who had more experience, more depth, preferably somebody
7 who had already had experience with taking a company public, which
8 John Stuelpnagel did not, so he began looking for a new candidate,
9 and he happened to be aware of Jay Flatley, because there had been
10 some business dealings, or I should say business negotiation
11 meetings, between Jay Flatley, when he was with a company called
12 Molecular Dynamics, and Illumina. There might have been a
13 collaboration that would have worked between the two companies.
14 And Dr. Stuelpnagel was aware Mr. Flatley might be available.
15 Molecular Dynamics, which was Jay Flatley's earlier company, had
16 been acquired by another corporation and it was well known in the
17 industry that Mr. Flatley had a one-year transition contract. He
18 was obligated to remain on board with what had been Molecular
19 Dynamics for a year to help the transition team take over the
20 company, but he was going to be, as we say, loose in the socket,
21 at the end of a year and he'd be looking for another exciting
22 opportunity.

23 As a result, Dr. Stuelpnagel spearheaded an effort to speak
24 with Jay Flatley about his interest in coming on board as
25 Illumina's new CEO, and in fact the entire senior management team,
26 including Dr. Tony Czarnik, interviewed and approved of
27 Mr. Flatley. Mr. Flatley actually joined Illumina as its new CEO
28 in November -- October of 1999.

1 Now, one point I missed is the end of April, 1999 entry.
2 Stuelpnagel counsels Czarnik on a Saturday about performance.
3 This was the entry which appeared on the plaintiff's timeline as
4 having occurred May 29th, 1999. Again people remember events
5 differently. Both Dr. Czarnik and Dr. Stuelpnagel remember this
6 discussion as having taken place on a Saturday when they were both
7 at the office. But Dr. Stuelpnagel specifically remembers that it
8 was toward the end of April.

9 They were in the office on a Saturday. Dr. Czarnik has
10 described this or characterized this meeting as a talk about
11 putting personal differences aside, and in fact we believe the
12 evidence will show that this was a talk again about performance
13 and Dr. Czarnik's need to step it up and start contributing.

14 Now, what we have from April through October is no change in
15 Dr. Czarnik's responsibilities. No change in what it is he was
16 included in, what it is he was asked to do. And then we have, as
17 I mentioned, Jay Flatley coming on board in November as the new
18 CEO.

19 Now, a couple of points to make here is that Dr. Czarnik
20 contacted Jay Flatley in a somewhat unusual way. He knew that
21 Jay Flatley was coming on board as the new CEO. On September 24,
22 1999, well before Jay Flatley was actually beginning at Illumina,
23 Tony Czarnik e-mails Jay Flatley at home asking for a special
24 schedule to allow him to go swimming in the middle of the workday,
25 and whether or not that's an appropriate request, it struck
26 Mr. Flatley as strange. It struck him as something that certainly
27 could have waited until he was at Illumina to discuss, and it was
28 a little bit of a red flag.

1 Another issue to remember is that on the same date,
2 September 24th, 1999, this is a date on which Jay Flatley, knowing
3 that he was coming on board as CEO in less than a month, traveled
4 to San Diego and met one-on-one with each of the individual senior
5 managers, including Tony Czarnik. So I bring that point to your
6 attention because there was a statement by Mr. Pantoni that the
7 evidence is going to show that after Jay Flatley came on board he
8 didn't meet with Dr. Czarnik as CSO, he didn't use him as CSO. In
9 fact on September 24th there were these one-on-one meetings where
10 Jay met with each of the people who would be on his senior
11 management team and learned what was going on, what they had
12 going.

13 Now, contrary to Dr. Czarnik's beliefs, John Stuelpnagel did
14 not brief Jay Flatley about performance issues, about disability
15 issues. John Stuelpnagel truly did allow Jay Flatley to form his
16 own impressions, and part of the reason for this, and you'll hear
17 this from Dr. Stuelpnagel directly, to some degree Tony Czarnik
18 was a reflection upon him in that he'd hired Tony Czarnik, he'd
19 managed Tony Czarnik, he hadn't been able to draw out of Tony
20 Czarnik the type of performance that he thought he should have,
21 and so to some degree John Stuelpnagel will admit he was a little
22 embarrassed about Tony Czarnik's performance under his leadership
23 and he was also very hopeful. He was hopeful, although perhaps
24 not convinced, but hopeful that a new, more experienced CEO might
25 be able to pull out of Tony Czarnik the kind of dedication and
26 performance that he, John Stuelpnagel, had not been able to do.

27 So for those reasons, he didn't brief Mr. Flatley about any
28 issues relating to Tony Czarnik, nor did he brief Mr. Flatley

1 about any issues relating to Rich Pytelewski, with whom Dr.
2 Stuelpnagel also had some performance concerns.

3 Now, the next entry that we have here is November 22, 1999.
4 This is very shortly after Jay Flatley came on board as CEO. As I
5 said, Dr. Stuelpnagel wanted for Mr. Flatley to form his own
6 impressions of Tony Czarnik. Within a very short period of time,
7 Jay Flatley did indeed form some very strong impressions of Dr.
8 Czarnik and his performance.

9 On November 22, 1999, we had an off-site strategic meeting.
10 At the time, Jay Flatley was living in a temporary apartment, very
11 close to Illumina's facilities, and he had his senior managers,
12 Tony Czarnik, Rich Pytelewski, John Stuelpnagel, Mark Chee, join
13 him in the apartment for all-day strategic meeting. Dr. Czarnik
14 made a very poor impression on Jay Flatley during this meeting.
15 He came ill-prepared. Each senior manager had been assigned a
16 module or more than one module of a topic for discussion and
17 preparation and to lead a discussion. The evidence is going to
18 show that Dr. Czarnik came very ill-prepared and basically
19 contributed very little in terms of strategic contribution.

20 The next thing that occurred that made a very negative
21 impression upon Jay Flatley is the January, 2000 Scientific
22 Advisory Board meeting. Now let me talk a little bit about what a
23 Scientific Advisory Board is. A Scientific Advisory Board for a
24 company like Illumina is a group of sort of hand-picked scientists
25 from around the world, and the purpose of having a Scientific
26 Advisory Board is to have some very highly regarded, world-
27 renowned scientists who spend sometime each year getting together,
28 taking a look at Illumina's technology, brainstorming with us,

1 offering us constructive criticism. Basically it's a form of
2 having some very esteemed scientists who are outside the company
3 take a role in evaluating our technology and helping us to make it
4 better. These people are very highly qualified. They are --
5 They come from many places throughout the world, and it's
6 expensive. When we have a Scientific Advisory Board meeting,
7 Illumina flies these people in, puts them up in hotels, does some
8 entertainment of them, and these meetings are usually pretty lean.
9 They are usually a one- or two-day meeting, typically one day, and
10 it's important that time be used productively.

11 Remember, the people who are on the Scientific Advisory
12 Board, are busy, successful people. They are taking time out of
13 their schedules to take time and add value to Illumina. So it's
14 important these meetings be well run, well organized, and they
15 actually accomplish something.

16 Now, Dr. Czarnik, as chief scientific officer, was
17 responsible for spearheading the Scientific Advisory Board
18 meetings. The January 2000 Scientific Advisory Board meeting is
19 the first one which Dr. Czarnik had run and which Jay Flatley
20 observed. It was, you will hear evidence in this case, that Dr.
21 Czarnik ran this meeting in a very disorganized and, frankly,
22 amateurish manner. It was an embarrassment to the company.

23 And Mr. Flatley shortly after that got feedback from one of
24 the Scientific Advisory Board members, David Walt, who was very
25 disappointed in Dr. Czarnik's performance at this meeting. Now,
26 remember, Dr. Walt is also a founder. He's the person whose
27 technology Illumina's technology is based upon, and he was a
28 Scientific Advisory Board member, and he was at this meeting.

1 After the meeting, the evidence is going to show that Dr.
2 David Walt had a discussion with Jay Flatley in which he expressed
3 grave concerns about Dr. Czarnik's performance at that Scientific
4 Advisory Board meeting and also expressed a concern to Jay Flatley
5 that Tony Czarnik just didn't seem engaged, he didn't seem
6 interested, he didn't seem engaged, and Dr. Walt was questioning
7 whether Dr. Czarnik even had a desire to continue his affiliation
8 with Illumina.

9 As a result, Dr. Walt asked Jay Flatley whether it made
10 sense for him to have breakfast with Tony Czarnik to sort of
11 discuss these issues. Dr. Walt had known Tony Czarnik for awhile,
12 and Jay Flatley said by all means, go ahead, please, do that.

13 The evidence is going to show that Dr. Walt in fact did have
14 that breakfast meeting with Tony Czarnik, and that the evidence is
15 going to show that his impression is that Tony Czarnik said yes,
16 he still wanted to be with Illumina, and it was Dr. Walt's belief
17 that Tony Czarnik rationalized all of his shortcomings, but just
18 still did not seem engaged. He didn't have that fire in the
19 belly, as they say.

20 So as a result of this, Dr. Czarnik's performance had had to
21 be addressed, and Jay Flatley made a determination that he would
22 ask Dr. Czarnik to have a private dinner, and this dinner occurred
23 on February 7th, 2000.

24 Now, the initial intention on Mr. Flatley's part was to have
25 a very tough discussion with Tony Czarnik about his poor
26 performance.

27 Another performance issue which I neglected to mention,
28 which occurred again right around the time of the dinner, is that

1 there was a collaboration between Illumina and Chevron. There had
2 been a contact by a Chevron employee who was spearheading the
3 project. It was a joint project between Chevron and Illumina.
4 Tony Czarnik was the lead on Illumina's side, and this other
5 individual was the lead on Chevron's side.

6 There was a meeting at Illumina where the Chevron
7 representatives were conferring or meeting with their Illumina
8 counterparts, but after the general meeting was over, the Chevron
9 lead representative asked to have a private one-on-one with Jay
10 Flatley, and behind closed doors, the Chevron representative told
11 Jay Flatley that he was very disappointed in the way that Tony
12 Czarnik was leading up the effort on behalf of Illumina; that he
13 asked for certain things to be done which weren't done or which
14 weren't done in a timely manner.

15 So bear in mind, by the time Jay Flatley has dinner with
16 Tony Czarnik on February 7th, there are issues relating to his
17 performance at the Scientific Advisory Board meeting, there are
18 issues relating to how he performed at the off-site strategic
19 meeting, there are customer or collaborator complaints about his
20 contributions.

21 Now, during the dinner on February 7th, Jay Flatley intended
22 to address these issues, but they started talking, and the
23 conversation veered toward the fact that the company might be
24 going public, so there was some discussion between Mr. Flatley and
25 Dr. Czarnik about the fact that the company might be going public.
26 At this point Tony Czarnik tells Jay Flatley in so many words,
27 "I've offered before to step down as CSO, and if you think it's in
28 the company's best interest, particularly if we're going public,

1 I'll step down as CSO." This was in fact a big relief to Jay
2 Flatley because it no longer required him to go through point by
3 point and discuss the ways in which Dr. Czarnik was failing, but
4 rather Dr. Czarnik was again renewing his offer to resign and step
5 down as CSO, and Dr. Czarnik proposed a different role for
6 himself. He said I'll become a research fellow. He said a
7 research fellow is a very high level scientific position where
8 essentially the person just focuses on doing experiments and doing
9 science. They don't have to manage or supervise other people,
10 they don't have to make contributions to business strategy. They
11 just do pure science.

12 And this sounded very attractive to Jay Flatley. It
13 essentially solved his problem of having a CSO whose performance
14 needed to improve dramatically. But the problem is he didn't have
15 a candidate yet.

16 Now, Tony Pantoni said to you that he contacted -- that Jay
17 Flatley contacted David Barker, someone with whom he worked at
18 Molecular Dynamics. And this is true. Dr. Barker was proven,
19 strong lead scientist. Jay Flatley had worked with him for a
20 number of years. And Jay Flatley knew certainly by January that
21 he had a weak CSO. He did call David Barker on or about February
22 4th, 2000, and inquired of David whether he might have an
23 interest. He did not offer him a position. He just felt him out,
24 do you have an interest, might you be interested in coming on
25 board.

26 One of the reasons that Jay Flatley only could see if there
27 was some interest is because he was supposedly under a no-hire
28 contract with his former company, not to hire people from that

1 company for a year, and he may have been prepared, you'll hear
2 from Mr. Flatley, he may have been prepared to wait a full year to
3 bring David Barker on board if that was the intention, but at this
4 point he was just soliciting a statement from Dr. Barker of
5 whether there's any interest whatsoever.

6 So by the time of the dinner, he wasn't sure if he could
7 hire David Barker even if David Barker wanted to come on board.
8 But David Barker did indicate he was interested.

9 Jay Flatley then began a process of communication with his
10 former employer to find out whether they would allow him to hire
11 David Barker, and ultimately the decision of the other company was
12 that they would allow Jay Flatley to hire David Barker.

13 Now, at the close of the [Daley's]¹³ dinner, Jay Flatley did not
14 tell Tony Czarnik he would be replaced as CSO. He told him I will
15 consider your proposal, I need to think about it. He needed to
16 think about it, and frankly he needed to see whether or not he
17 could find another CSO candidate to come on board. He had David
18 Barker in mind, but he didn't know he could hire him, and a few
19 weeks later, or week or two later, Dr. Czarnik was in the office
20 and Jay Flatley met with him and told him I am going to take you
21 up on your offer, I am going to have you step down as CSO and
22 become research fellow, and at this time Mr. Flatley told Tony
23 Czarnik since his job duties would be different and he would no
24 longer be managing people, he was going to reduce his salary from
25 \$185,000 a year, which is what he had been earning as CSO, to
26 \$165,000 a year. It's about a 10 percent reduction.

27 He also told Tony Czarnik that he was going to think about
28 reducing his stock vesting, and at this initial discussion of this

¹³ Original transcript read, "Daily's".

1 concept, Tony Czarnik did not object to either aspect of it.

2 Now, shortly thereafter Tony Czarnik did object to a
3 reduction in his stock, and Jay Flatley did confer with his
4 attorneys. He was working with a different firm than me, mine, at
5 the time. And he did then communicate back to Tony Czarnik, I'm
6 told by my attorneys that I can't reduce your stock unless you
7 agree to it. Will you agree to it? Tony Czarnik [said, 'No, I
8 won't']¹⁴, so the stock was never reduced.

9 So Tony Czarnik has been told that his offer to become a
10 research fellow is being accepted, and Tony Czarnik announces to
11 the company by way of e-mail that he decided to step down as CSO
12 and become a research fellow, and in that e-mail he acknowledges
13 his strengths are scientific and not so much on the business end.

14 Although things appeared to be moving along well, shortly
15 after his public announcement that he was becoming the research
16 fellow, Tony Czarnik went in to speak privately with Jay Flatley,
17 and he told Jay Flatley I just can't do this. I want to leave. I
18 want to leave immediately. And I want severance. I want
19 severance and I want to take all of my stock.

20 Now, remember, you are going to hear evidence about the
21 stock grants in this case, and in essence when Tony Czarnik came
22 on board, he was given the opportunity to purchase 400,000 shares
23 of Illumina stock at a penny a share. So an investment, if you
24 will, of \$4000. The scheme or the structure of the stock plan is
25 that Tony Czarnik had to be employed for a full year to have
26 ownership rights in any of that stock. Technically speaking, he
27 bought it for a penny a share, but the company at all times had a
28 right to buy it back at a penny a share. After one year, Tony

¹⁴ Original transcript read, "said no, I won't".

1 Czarnik had vested, and I use that term loosely because it's
2 actually a diminishing right of repurchase, but the bottom line is
3 after one year, as to one-fifth of that stock, or 80,000 shares,
4 Tony Czarnik owned those 80,000 shares and they could not be
5 bought back by the company. But the remaining 320,000 shares were
6 still subject to a right of repurchase by the company if Tony left
7 the company for any reason, regardless of whether the company
8 fired him or he quit. And then after he cleared the one-year
9 cliff, Tony Czarnik began vesting in shares monthly at the rate of
10 about 6666.67 shares per month. So the idea is that at the end of
11 five years, he would own all 400,000 shares free and clear, but
12 the ownership accrued over time.

13 So what Tony Czarnik was proposing to Jay Flatley is he
14 wanted to resign, he wanted to leave immediately, and he wanted to
15 have full ownership right to all of his stock, all 400,000 shares,
16 and Mr. Flatley was rather taken aback by this. The evidence is
17 going to show that he communicated to Tony Czarnik that the
18 company generally didn't pay severance to people who quit.

19 Now, Mr. Flatley had recently terminated or advised
20 Mr. Pytelewski of his intention to terminate his employment, and
21 this again was a company-initiated action, but Mr. Pytelewski and
22 Mr. Flatley worked out a separation agreement and a severance
23 plan. So in light of that, Mr. Flatley, although Tony Czarnik was
24 resigning, Mr. Flatley was prepared to do something for him that
25 would be fair, equitable and fairly consistent with whatever it
26 was he was giving Mr. Pytelewski.

27 But that wasn't enough for Dr. Czarnik. And so there began
28 in the spring of 2000, beginning in March, continuing into April,

1 a back and forth negotiation of what it is the company would be
2 willing to give Tony Czarnik in severance and Tony Czarnik
3 continued to demand a fairly rich package, and finally an impasse
4 was reached.

5 Now, one of the things to remember is that Dr. Czarnik had
6 resigned. The initial mind set on the part of Jay Flatley is
7 given the fact that he's resigned and says he doesn't want to be
8 here, he's not going to be here. So most of the energies were
9 trying to reach an agreement on the severance package. But those
10 negotiations broke down, and so it became necessary to actually
11 then shift focus and start focusing upon what is it that Tony
12 Czarnik is going to do as a research fellow.

13 During this time that they were negotiating, Dr. Czarnik
14 knew that the previous offer of research fellow was going to be at
15 a salary of \$165,000 a year. He knew his stock couldn't
16 unilaterally be changed. On April 4, 2000, the actual change in
17 position was in effect. Dr. Czarnik as of that date was a
18 research fellow, was not CSO.

19 On the same date, even though he had known for quite
20 sometime that it was going to be at a lower salary, Dr. Czarnik
21 sent Jay Flatley an e-mail claiming that the terms of his original
22 contract, meaning his CSO position, had been changed in a manner
23 that he considered discriminatory. He also sent Jay Flatley an
24 e-mail in which he then went beyond simply using the word
25 discriminatory and talked about discrimination based on a medical
26 condition. The evidence is going to show when Jay Flatley got
27 this e-mail, he had no idea what Tony Czarnik was talking about,
28 and at that point he went to John Stuelpnagel and [said, "Do you know"]¹⁵

¹⁵ Original transcript read, "said do you know".

1 [what he's talking about, what medical condition?]¹⁶. At that point,
2 and never before, but at this point for the very first time, John
3 Stuelpnagel told Jay Flatley about Tony Czarnik's April, 1999
4 breakdown and history of depression.

5 Now, after the severance negotiations broke down, they
6 started moving forward with an attempt to develop goals for the
7 research fellow position. Tony Czarnik was asked to go ahead and
8 develop an initial draft of goals and to show them to David
9 Barker. He did so, and then he provided them to Jay Flatley. Jay
10 Flatley then conferred with David Barker, Mark Chee and John
11 Stuelpnagel about the goals that Tony Czarnik had developed.

12 Now, you'll see those goals. In fact Mr. Pantoni put up the
13 ['Tony Czarnik Goals' and then the 'Final Goals']¹⁷. And the evidence is
14 going to show that the ['Tony Czarnik proposed goals']¹⁸ were all soft
15 goals. They were not measurable, they were not specific, they
16 were not action-oriented, they were not realistic, and they
17 weren't time-dated. And so there's an acronym, SMART, S-m-a-r-t,
18 which means specific, measurable, action-oriented, realistic and
19 time-dated, and these are the kind of goals that Illumina wants to
20 give to its employees. As a result, there was a refinement in
21 Tony Czarnik's goals. Rather than giving him as a goal things
22 like mentor scientists, how do you measure mentor scientists, he
23 was given a set of SMART goals. The binary oligo goal which
24 Mr. Pantoni referred to was a project that Tony Czarnik had
25 proposed sometime earlier, so they were giving him as a goal one
26 of his own proposed projects to perform.

27 Now I have to comment briefly upon the fact in going through
28 the goals, Mr. Pantoni made the point that Dr. Czarnik was being

¹⁶ Original transcript read, "what he's talking about, what medical condition".

¹⁷ Original transcript read, "Tony Czarnik goals and then the final goals".

¹⁸ Original transcript read, "Tony Czarnik proposed goals".

1 asked to do things that had never been done in the company before.
2 Well, that's the point of a research and development program. You
3 do new things. You make new discoveries. You create new science.
4 You don't just replicate and do over that which you've done
5 before. You do something new, and that's what he was being asked
6 to do.

7 Mr. Pantoni focused upon the numbers of beads that Dr.
8 Czarnik was supposed to demonstrate feasibility of decoding. I
9 won't dwell on it now, but let me just put this out there. There
10 is a huge difference between an experiment that demonstrates
11 feasibility of decoding a great number of beads and an experiment
12 which actually decodes a great number of beads. You'll hear more
13 about that from our scientists, but the bottom line is an
14 experiment that simply demonstrates feasibility is what we call a
15 proof of principle experiment. It is less specific, it is less
16 rigorous. It simply demonstrates that, at a high level of
17 complexity, when you've got a lot of different bead types, the
18 concept works. On the other hand, an actual decoding of, you
19 know, 5000 bead types means that you have actually decoded the DNA
20 on each of those bead types. That's not the kind of experiment
21 that Tony Czarnik was being asked to do. He was being asked to do
22 the easier type of experiment, which was to demonstrate
23 feasibility.

24 So now we get to the May time frame. Mr. Flatley had
25 regular scheduled meetings, or he had a regularly scheduled
26 meeting with Tony Czarnik for May 18th, 2000, and it was
27 understood by both of them that the purpose of this May 18 meeting
28 was for Jay Flatley to assign Tony Czarnik his goals as research

1 fellow, to sit down and discuss them and then understand them.
2 However, Tony Czarnik elected on that day to go to the Department
3 of Fair Employment and Housing and to file a charge against
4 Illumina for disability discrimination. As a result, he missed
5 his meeting with Jay Flatley, didn't phone Jay Flatley from the
6 DFEH to say he was running late and wouldn't be there, but he
7 missed the meeting.

8 So the following day, when he was in the office, Jay Flatley
9 and Tony Czarnik did meet and Tony Czarnik was given his goals. I
10 point that out because Jay Flatley [was]¹⁹ ready, willing and able to
11 assign those goals on May 18, but it was Tony Czarnik who elected
12 not to be in the office and not to be available to get his goals.

13 The evidence is going to show that any suggestion that Jay
14 Flatley developed and gave goals on May 19th to retaliate for Tony
15 Czarnik having gone to the DFEH is just not supported at all. He
16 was ready to give these goals on May 18th.

17 We then have a situation in which as of May 19, 2000, Dr.
18 Czarnik has some specific measurable goals that he needs to start
19 working on. Mr. Flatley schedules regular meetings with him to
20 discuss his progress toward these goals. You'll hear evidence
21 that in one of the early meetings, Dr. Czarnik shows up at the
22 meeting empty handed, nothing to show for his efforts, and at the
23 closure of the meeting asks Mr. Flatley can I have another copy of
24 my goals.

25 We believe the evidence is going to show that from the time
26 the goals were assigned to Dr. Czarnik, he never took them
27 seriously, he never made a serious effort to work toward those
28 goals, and that he -- and ultimately that led to his termination.

¹⁹ Original transcript read, "way".

1 He wasn't even trying.

2 We have the July 2000 IPO roadshow. Now, during this period
3 of time, Jay Flatley was out of the office on the roadshow.
4 Incidentally, although there was a suggestion made by Mr. Pantoni
5 that it would have been more appropriate to have Tony Czarnik
6 reporting to David Barker, I also have to say the evidence is
7 going to show that David Barker was on the roadshow during the
8 entire same month of July.

9 Now why is this that Jay Flatley had Tony Czarnik report to
10 him rather than David Barker? Well, the evidence is going to show
11 first of all that initially Tony Czarnik had resigned, so there
12 was no reason to transition him to David Barker since he was going
13 to be leaving. Then once he became research fellow, it was clear
14 on a couple of levels. There was discussion between David Barker
15 and Jay Flatley about the fact that Tony Czarnik did have some
16 performance issues that were going to need to be managed very
17 closely. David Barker was coming in and fulfill the role
18 previously held by Tony Czarnik and he did not want to be viewed
19 by Tony's former subordinates, the chemistry team, as coming in
20 and beating up on the person who held the job before.

21 So it was decided that Jay Flatley would manage Tony
22 Czarnik, but the evidence is also going to show that in evaluating
23 whether Tony was making progress toward these goals, Jay Flatley
24 didn't make that determination on his own. He conferred with
25 David Barker, who from a scientific perspective was able to look
26 at what it is Dr. Czarnik had proposed, which was very little, and
27 to tell Jay Flatley this does not represent a very good effort.

28 Now, we talked a little about the roadshow yesterday. The

1 roadshow is a fast and furious whirlwind tour over the course of
2 about a month. In Illumina's roadshow, the team visited 17
3 different cities throughout world, and in each city sometimes made
4 multiple presentations to various groups about Illumina and why
5 the company was an exciting company.

6 Now, there was an experiment going on during the summer of
7 2000 which is known as the 768 decoding experiment. That's the
8 experiment you are going to hear a lot of scientific evidence
9 about. It's pretty interesting once our scientists start
10 explaining it. But importantly, first of all, our scientists are
11 going to testify that this is an experiment that was being done,
12 it was one in a series. We started out doing 16-bead decoding
13 experiments. We then ramped it up to the level of 128-bead
14 decoding experiments, and in the summer of 2000, we were taking a
15 shot at doing 768-bead type decoding experiment. This experiment
16 was not being done specifically for the roadshow. It was simply
17 part of the progression of the decoding experiments. But it is
18 true that while the roadshow team was on the roadshow, Mark Chee,
19 who was spearheading this experiment, sent an e-mail to the team
20 on the roadshow and said here's the latest data from the 768
21 decoding experiment.

22 Now, Mr. Flatley is an experienced CEO who has taken more
23 than one company public, and you will hear from him that once you
24 go on your roadshow and start making presentations to investors,
25 you keep the presentations as identical as possible from group to
26 group to group so each gets the same information. The 768 decode
27 data which was sent to the roadshow team half-way through the
28 roadshow was never mentioned to the roadshow audiences, never

1 shown to them, never discussed.

2 Now, there is some discussion about the fact that toward the
3 very end of the roadshow, July 26 actually, Illumina receives a
4 letter from the vendor that sold it some of the dye that was used
5 in the 768 decode experiment. I have to touch upon this, because
6 the evidence is going to show something very different than what
7 Mr. Pantoni suggested it would. I'm not the best person to
8 describe the 768 decode experiment, but the bottom line is you
9 have these beads with DNA, you have complementary strands of DNA
10 that would find their mates that hybridize, and the complementary
11 strands of DNA were labeled with dyes.

12 The dye lots that we got were small. There wasn't enough
13 dye in a single vial to do the experiment. So I believe the
14 evidence is going to show that for each color, there were
15 approximately 11 vials of dye used. So if you had green, red,
16 blue, you'd have 11 vials of green, 11 vials of red, 11 vials of
17 blue. You'd pool all the blue vials together and have a bunch of
18 blue dye and you'd label certain beads with blue dye. You'd pool
19 all the green vials together, and so forth.

20 So what Mr. Pantoni suggested is that the experiment
21 resulted in us thinking that we had green dye but we had blue dye,
22 or something to that effect. In fact, here's what happened: We
23 thought we were working with three distinct colors. We were
24 working with three distinct colors. The problem is we had red,
25 blue, green, and I'm not sure which color it is that was impaired,
26 but think of it this way. If you've got red and you've got 11
27 vials of red, you've got a really pure lot of red dye. If you've
28 got blue and you've got 11 vials of blue, you've got a really pure

1 lot of blue dye. And then let's say in your green dye you've got
2 seven vials of green but four of them were blue, and you mix them
3 all together and you think that's your green dye. Well, it is
4 your green dye. It's not as green as it would have been if all 11
5 vials had been green, but it is still distinguishable from the
6 blue dye. It is still distinguishable from the red dye.

7 You will hear evidence from the scientists who did this
8 experiment that will explain that although it would have been
9 ideal for all of the dye lots to be absolutely pure, the fact that
10 a few vials, it's not the entire lot that was mislabeled, it was
11 just a few vials of the 11, the fact that a few of the vials of 11
12 were mislabeled did not mean the experiment was worthless, it
13 didn't mean the results were invalid. It simply meant that
14 instead of having bright red, bright blue, bright green, you had
15 bright red, bright blue and a green that was, you know, not quite
16 as pure or not quite as green as you'd like, but they were still
17 all distinguishable from one another. And you'll see the
18 scientific data that actually shows it in the form of kind of a
19 distribution or gathering, and you see there are three distinct
20 clusters.

21 So this 768 decode experiment had a problem with the dye.
22 The problem did not impair the integrity of the experiment or make
23 it useless. And what the evidence is going to show is that this
24 wasn't a secret. Everyone at Illumina knew this had happened.
25 And interestingly, Dr. Czarnik did not engage in whistleblowing
26 activity.

27 Now, it's Mr. Pantoni's contention that Dr. Czarnik went to
28 Mark Chee and talked about the problem with the dye and expressed

1 some concerns about whether the 768 data was going to be shown on
2 the roadshow. We believe the evidence is going to show that that
3 did not occur, and in fact we believe the evidence is going to
4 show that the first time that Tony Czarnik raised this issue with
5 Mark Chee was when he sent him his e-mail hours before he
6 suspected he was about to be terminated.

7 The evidence is also going to show this: Mark Chee wasn't
8 on the roadshow. David Barker was, Jay Flatley was, Tim Kish was,
9 John Stuelpnagel was. The roadshow team came back right after the
10 IPO, or right after the roadshow, and the evidence is going to
11 show that Tony Czarnik did not go and talk to Jay Flatley, he did
12 not talk to John Stuelpnagel, he did not talk to David Barker and
13 he did not talk to Tim Kish to inquire[, "Was there some data from
14 the 768 disclosed on the roadshow, I'm worried about that?"]²⁰. He
15 didn't go to talk to any of them about it.

16 The evidence in this case is going to show then that after
17 the roadshow, there were a series of meetings between Mr. Flatley
18 and Tony Czarnik about his continued lack of performance. You
19 will hear about those meetings. You'll see the memoranda that
20 documented these meetings. But in short, Tony Czarnik had decided
21 that the goals he had he didn't like, he characterized them as
22 unreasonable, that he didn't even make a good faith effort to even
23 try to work on any of these goals. He became divisive. He was
24 posting his goals above his desk and calling in other chemists
25 saying look at these, aren't these ridiculous. He wasn't giving
26 it a good effort.

27 Finally, there was a scheduled meeting for September 5,
28 2000. It was one of the regularly scheduled performance meetings

²⁰ Original transcript did not include quotation marks or question mark.

1 between Dr. Czarnik and Jay Flatley, and days before this, a week
2 before this, actually, there had been another such meeting. Tony
3 Czarnik came to that meeting with nothing in hand, no experimental
4 results. He had not done any experiments. And Mr. Flatley
5 concluded at this point that he wanted to terminate Tony Czarnik's
6 employment. He had just had it. When I say he had just had it, I
7 mean he had been working with Tony Czarnik, he'd been meeting with
8 him nearly weekly, he'd been giving him every opportunity to step
9 up to the plate and give it even a little bit of effort, and yet
10 faced with someone who continued week after week not to give it
11 any effort, to come to the meetings empty handed, to sit there
12 pretty silently and to say I have nothing, Jay Flatley had to make
13 a decision, do I continue to dedicate company resources of
14 \$165,000 a year in salary alone, to letting somebody basically not
15 produce, and he couldn't do that.

16 Mr. Flatley is the CEO of the company, has great
17 responsibilities to the company, its shareholders and to its other
18 employees to manage the company properly, and in the face of
19 somebody who was really not going to give it any effort, he
20 finally made the decision he was ready to terminate Tony Czarnik's
21 employment.

22 So on September 5th, Tony Czarnik shows up for his scheduled
23 meeting with Jay Flatley at about 6 p.m., but interestingly, he
24 sends to Mark Chee this "Code Blew" e-mail, which you will see in
25 this case. In this e-mail he's inquiring whether Mark Chee ever
26 told Jay Flatley about the problem with the 768 decode experiment.

27 We do suggest this was an e-mail sent for the purpose of
28 creating some sort of paper trail supporting a whistleblower

1 claim. If Tony Czarnik was concerned whether or not Jay Flatley
2 knew about this, why didn't he talk to Jay Flatley about it. He
3 was meeting with Jay Flatley virtually weekly to go over his own
4 performance, and yet he chose not to address this with Jay
5 Flatley. He chose to address it to Mark Chee a few hours before
6 he knew he was going into a meeting at which he was likely to be
7 terminated because he hadn't produced anything.

8 In closing my opening, I guess I'd like to just remind you
9 that the evidence will take place over the course of both
10 Mr. Pantoni's case and mine. I'd like to ask you to keep an open
11 mind. I believe that when all is said and done, the evidence is
12 going to support the version of facts which I've articulated to
13 you yesterday and this morning, that this is a situation in which
14 it was a bad fit from the beginning, and yet Illumina gave Tony
15 Czarnik every opportunity to succeed, and that the reason that
16 Tony Czarnik did not succeed is he elected not to. He elected not
17 to work hard, he elected not to work on the goals that were
18 assigned to him, and the reason he was let go had nothing to do
19 with his history of depression, and there was no whistleblowing.

20 THE COURT: Thank you, Counsel.

21 That concludes the opening statements, ladies and gentlemen.
22 Now we begin presentation of the evidence.

23 Call your first witness, Mr. Pantoni.

24 MR. PANTONI: Your Honor, it will be a little bit of
25 set-up I need to do.

26 THE COURT: We'll take our morning recess at this time.
27 We'll be in recess until 10:25. 10:25. Please remember the
28 admonition not to form or express any opinions about the case, not

1 to discuss the case. We'll be in recess until 10:25.

2 (Recess.)

3 THE COURT: The record will indicate that all the
4 jurors are present, counsel and the parties present.

5 You may call your first witness, Mr. Pantoni.

6 MR. PANTONI: Thank you, your Honor. I'll call the
7 Plaintiff, Anthony Czarnik.

8 THE COURT: Very well.

9 ANTHONY CZARNIK,
10 called as a witness in his own behalf, having been first duly
11 sworn, was examined and testified as follows:

12 THE CLERK: Would you please state your full name and
13 spell your last name for the record.

14 THE WITNESS: Anthony William Czarnik, Jr. Last name
15 is spelled C-z-a-r-n-i-k.

16 THE CLERK: Thank you.

17 THE COURT: You may proceed.

18 MR. PANTONI: Thank you, your Honor.

19 DIRECT EXAMINATION

20 BY MR. PANTONI:

21 Q Dr. Czarnik, you looking forward to testifying in this
22 case?

23 A I've been looking forward to telling this story for
24 almost two years now.

25 Q [I'll try]²¹ my best to give you the opportunity to do that.
26 Let's first give the jury some background information on
27 yourself. First of all, how old are you, sir?

28 A 44.

²¹ Original transcript read, "Try".

1 Q And where were you born?

2 A In Appleton, Wisconsin.

3 Q Is that where you grew up?

4 A Yes.

5 Q And did you come from a large family, small family?

6 A I'm the oldest of 10 kids, seven boys, three girls.

7 Q I'm going to be referring from time to time to one or
8 more of your siblings in this case. I'd like you to tell the jury
9 a little about your siblings.

10 A I have a very close group of siblings, stay in touch
11 with my brothers and sisters on a regular basis. Everybody has
12 gone on to do interesting things. Some of the more interesting
13 things are I have two brothers who are M.D.'s, I have two brothers
14 who are in military service, one who works at the Pentagon and one
15 who has recently deployed, and I have a brother who is an
16 attorney, who I love very much for having helped me through this.

17 Q And are you married, sir?

18 A Yes.

19 Q What's your wife's name?

20 A Rebecca.

21 Q Do you have any children?

22 A Yes, I have one daughter, Kelly, 16.

23 Q Dr. Czarnik, could you give the jury a brief
24 description of your educational background. Start with college.

25 A I received my bachelor of science degree in
26 biochemistry from the University of Wisconsin at Madison in 1977.
27 I received my Ph.D in chemistry from the University of Illinois
28 Champagne- Urbana in 1981. I've completed my post-doctoral

1 studies at Columbia University as an NIH post-doctoral fellow in
2 1983.

3 Q So you have a BS degree?

4 A Yes.

5 Q And a Ph.D?

6 A Yes.

7 Q You also have a masters degree?

8 A Yes. Yes, in biochemistry.

9 Q Where did you obtain the masters degree?

10 A University of Illinois, [Champaign]²²-Urbana.

11 Q And Dr. Czarnik, when did you do your post-doctoral
12 work at Columbia?

13 A From August of 1981 through August of 1983.

14 Q Could you give the jury a little flavor of the type of
15 work you did when you were doing post-doctoral work?

16 A I worked in the department of chemistry at Columbia
17 with a very well known organic chemist named Ronald Breslow, who
18 has -- He's well known for his research, but also served as
19 president of the American Chemical Society, and I worked with him
20 on a class of compounds called artificial enzymes in which we're
21 using the tools of chemistry to try to make molecules that act as
22 enzymes but aren't really enzymes.

23 Q And what is the first employment you had after
24 completing your education?

25 A I started as an assistant professor at Ohio State
26 University in August of 1983.

27 Q And you taught chemistry at Ohio State University?

28 A Yes, for ten years taught chemistry and did research.

²² Original transcript read, "Champagne".

1 Q Did you obtain tenure while you were at Ohio State?

2 A Yes.

3 Q Did you receive any Honors or awards during the time
4 that you were teaching as a chemistry professor at Ohio State?

5 A [A couple]²³. One is called the Camille and Henry [Dreyfus]²⁴
6 Teacher Scholar Award. That's a pretty good one to have. Another
7 one is called the Dupont Award for Advancement in the Art of
8 Organic Synthesis. There's the -- I'm sorry, I've forgotten some
9 of the awards. But there are several.

10 Q We're going to take a look at your resume, your CV, I
11 think, for additional information.

12 You taught at Ohio State for 10 years, and then what did you
13 do with respect to employment?

14 A In 1993 I've been at Ohio State for 10 years, and a
15 recruiter contacted me regarding an open position at Parke-Davis
16 Pharmaceutical Company, and I went through sort of a, I don't
17 know, a life evaluation to decide whether I wanted to stay in
18 academics or do something else as well, and this is the kind of
19 self-evaluation that lots of my friends in academics go through.
20 Not many of them actually follow through and leave academics, but
21 I left, and I went to Parke-Davis Pharmaceutical Company and
22 headed a group that was intended to do sort of blue-sky research,
23 whatever we thought was important and new.

24 Q So will you tell us why you decided to leave academia
25 and go into private business?

26 A Well, one reason was certainly that during that period
27 in the mid-90's it was becoming more competitive to get funding
28 for research groups, and this is something that a lot of people

²³ Original transcript read, "Couple".

²⁴ Original transcript read, "Dryfuss".

1 don't know about academicians at universities, but you typically
2 spend 8 to 5 teaching and directing your graduate students and
3 then you spend from 5 to 10 writing papers and writing grant
4 applications, and that often includes weekends and holidays. And
5 at that time the success rate of grant writing was decreasing, so
6 I was finding I was spending more time writing grants that were
7 unsuccessful. So the chance to go to private industry was a
8 chance to do research without the need to raise grants,
9 fundraising.

10 In addition, it was becoming clear to me that many of the
11 important problems that there were to solve were problems that
12 industry was aware of and didn't [publicize]²⁵, and I wanted the
13 chance to be involved in doing research that really would have an
14 impact on people's lives.

15 Q So you mention you did have considerable experience at
16 Ohio State writing grant applications?

17 A Yes, I must have written about 40 grants.

18 Q Did you find that work to be difficult?

19 A In the beginning I found it fun. In the beginning it
20 was a real pleasure to just write things on a piece of paper and
21 have them send money back to you. But I think very much like
22 having a family, after awhile you start to realize that it's not
23 just a neat thing to do, that it's something that requires
24 maintenance, and you really need to keep it coming in. So you
25 take it very seriously and take it on more as a job than as
26 something that's fun.

27 Q Did you enjoy the grant writing part of your time as a
28 professor at Ohio State?

²⁵ Original transcript read, "publicized".

1 A I enjoyed it the first five years. I enjoyed it less
2 the last five years.

3 Q Why is that?

4 A A significant part of the reason was that it was
5 becoming more competitive at the second five years, and you could
6 spend a lot of time writing grants, and if they weren't funded,
7 typically you'd get very little feedback as to why they weren't
8 funded. You'd just get a notice back that sorry, you are not
9 going to be getting any money, and then there are a lot of
10 ramifications to that.

11 Q Are these grants competitive in the sense there are a
12 lot of people applying for the same money?

13 A Yes. Yes, they are, nationally. In fact, many of the
14 grant programs, people are allowed to apply from Canada and Mexico
15 for grant programs that are run in the United States, and they are
16 very competitive.

17 Q In terms of your experience writing these grants, you
18 say you did about 40 while you were at Ohio State. Can you give
19 us an idea of approximately how long it takes to write a typical
20 grant application?

21 A I would say on average I could write a grant
22 application in about three days. At the very beginning I was
23 writing a grant application in one day, but as they were getting
24 more and more competitive, it stretched out to typically two to
25 three days.

26 Q Now, you mention that your first job in private
27 industry was at Parke-Davis?

28 A That's right.

1 Q Is that a small company, medium size, big company?

2 A No, Parke-davis is a -- was a medium-size
3 pharmaceutical company with something on the order of 20,000
4 employees, based in Ann Arbor, Michigan, which created kind of a
5 conundrum for me because Ohio State and Michigan are severe rivals
6 in football, so I had to change my license plates quickly.

7 But we moved up to Ann Arbor and I started working at
8 Parke-Davis, and eventually Parke-Davis was purchased by Pfizer
9 Pharmaceutical Company, which is a giant pharmaceutical company.

10 Q At that time you became part of what's called "Big
11 Pharma"?

12 A Yes.

13 Q What was your position at Parke-Davis?

14 A A director of a group called bio-organic chemistry.
15 That group was intended to do very creative, very novel cutting-
16 edge blue-sky research in whatever area we thought was important
17 but still relevant to pharmaceutical discovery.

18 Q Did you have a number of scientists reporting to you at
19 that time?

20 A Yes, I had a total group size of 10, roughly half
21 Ph.D's and roughly half lab assistants.

22 Q During your time at Parke-Davis, did you actually
23 conduct research in the sense that you were at the laboratory
24 bench and you were conducting research?

25 A No. At that level, at the director level or above, you
26 are accomplishing research through scientists. You are really
27 never in the lab yourself.

28 Q How long did you stay at Parke-Davis?

1 A For three years. I left Parke-Davis in 1996.

2 Q And why did you leave Parke-Davis in 1996?

3 A Well, two main reasons. One was that it became clear
4 that supporting my group politically internally was getting more
5 difficult, and there's always a tug between people who want to see
6 things that are going to be done tomorrow and a group that says
7 well, it's important stuff but it's not going to be done tomorrow
8 so we're going to look a little further out.

9 Right at that time the group thinking it was going to be
10 done tomorrow was beginning to be more in authority, and at the
11 same time I had been hosting the visits by a lot of start-up
12 companies to Parke-Davis. It was essentially part of my job to
13 bring in these little start-ups and have them talk about the
14 technology that they are developing, and to host them, because
15 sometimes Parke-Davis would say this is relevant to us, we want to
16 know more about you, we might want to invest in you, we might want
17 to do a joint project with you. So I was the principal liaison
18 between Parke-Davis and start-up companies around the country.

19 Q Where did you go to work after Parke-Davis?

20 A In 1996 I accepted an offer at a company here in San
21 Diego called IRORI. IRORI is a company that invented and
22 commercialized tools for doing the kind of chemistry called
23 combinatorial chemistry.

24 Q What type of a company was IRORI in terms of how long
25 it had been in existence?

26 A IRORI had been in existence for about two years. They
27 started literally as one of the typical start-ups here with a
28 little garage, almost, in Sorrento Valley, and after a year they

1 became large enough that they were able to move to real space up
2 on North Torrey Pines, and by the time I joined the company, they
3 had been on North Torrey Pines for about a year already, and there
4 were about 10 people in the company.

5 Q 10 people when you joined?

6 A Yes.

7 Q And what was your position with this start-up called
8 IRORI?

9 A My initial position was senior director of chemistry,
10 and then about a year later I was promoted to vice president of
11 chemistry.

12 Q And what were your duties at IRORI when you were vice
13 president of chemistry?

14 A I had a wide raft of duties, which included not only
15 setting the research directive, at least being involved in setting
16 the research directions for the company, but directing the
17 research itself, making sure that it was done in such a way that
18 when we talked about it it was right. I set up a collaboration,
19 the company's first collaboration with a big pharmaceutical
20 company, where we were making collections of potential drug
21 candidates for them, and I was extraordinarily rigorous about
22 making sure that we didn't transfer this to them before it was
23 ready, and in large part for that reason the company got a lot of
24 additional contracts afterwards because we got a reputation for
25 really delivering on what we said we were going to deliver.

26 I was involved in giving board presentations. I got quite
27 involved in going around the world giving talks about IRORI. Some
28 trying to get research collaborations for the company, and some

1 just selling equipment. That was actually quite an experience for
2 me, after going from being a university professor to driving
3 around in a car on the east coast going from pharmaceutical
4 company to pharmaceutical company as a salesman, basically.

5 Q And again when you were at IRORI, did that at all
6 involve you doing actual research in the sense that you were a
7 scientist sitting at the bench, working in the laboratory, doing
8 the research?

9 A No. At that level you are accomplishing research
10 through scientists. That's why there [is]²⁶ a class of employee
11 known as scientific managers, because their time is much better
12 spent helping scientists at the bench solve problems rather than
13 spending their own time at the lab bench.

14 Q How long did you work at IRORI?

15 A I was at IRORI for two years.

16 Q Then what was your next employment after IRORI?

17 A I accepted employment as chief scientific officer at
18 Illumina.

19 Q We'll certainly get back to your experience at Illumina
20 in some detail.

21 You worked at Illumina from what date to what date, sir?

22 A From June of 1998 until September of 2000.

23 Q And you were fired by Illumina, true?

24 A On September 5th at 6:00 p.m.

25 Q What was your next employment after leaving Illumina?

26 A In February of 2001, I started employment as chief
27 scientific officer at a company near Washington D.C. called
28 Sensors for Medicine and Science.

²⁶ Original transcript read, "are".

1 Q Are you currently employed at Sensors for Medicine and
2 Science?

3 A Yes.

4 Q In what role?

5 A As the chief scientific officer.

6 Q You've been the chief scientific records at Sensors the
7 entire time you've been there?

8 A Yes.

9 Q Briefly describe for the jury what type of business
10 your current employer is in, Sensors for Medicine and Science?

11 A We're a start-up company, like most start-up companies,
12 in that we're trying to develop a technology that's a little bit
13 too new for big companies to work on because it's a little bit too
14 risky for them. We show that we can do it, and then after we've
15 shown we can do it, either we sell it or we collaborate with a big
16 company in terms of doing it.

17 This is actually a very cool company, because we're
18 developing a sensor about the size of a grain of rice that
19 diabetics will use, so that instead of having to prick your finger
20 for blood in order to measure your glucose, you'll be able to go
21 to your doc and have this little grain of rice inserted under your
22 skin just with a needle, and on top of that you'll wear a watch,
23 and this grain of rice and the watch will communicate with each
24 other through your skin and you'll be able to determine your
25 glucose concentration just by looking at the watch. There will be
26 an alert on it telling you if you are going too high or too low.

27 This was especially attractive for me because when I was a
28 professor at Ohio State, I actually invented the first molecules

1 that were sensors for glucose, and this company took my invention
2 from Ohio State together with another invention that is making
3 this little grain of rice thing, put them together to come up with
4 this glucose sensor for diabetics.

5 Q I was going to ask you about some inventions that you
6 made in the course of your career. Just briefly, because I take
7 it you've made several inventions?

8 A Yes.

9 Q Can you just give the jury a flavor of some of the key
10 inventions?

11 A I would say after about 10 years too late I'm being
12 recognized as having made some very early contributions in this
13 field called chemosensors, which are compounds that bind to
14 something and change their fluorescence. So in the case of the
15 glucosensor, this sensing molecule binds to glucose and it becomes
16 more fluorescent, so you can tell how much glucose is there by how
17 much fluorescent light is there. It's like what you see on black
18 light poster. You hold the black light near it and off comes
19 fluorescence, blue, green. You'll see a lot of colors here
20 because it's similar to Illumina's research as well. But I was at
21 least extremely early in that field.

22 Q Have you been recognized in the literature for that?

23 A That's starting to happen. I'm pleased to see that I'm
24 starting -- I've seen twice people have called me a pioneer in
25 this area. It feels good. It's a little late, but it feels good.

26 Q Any other inventions of note?

27 A Yes, while I was at Parke-Davis -- A lot of
28 inventions, but the ones I think are going to survive me are at

1 Parke-Davis we did some of the very earliest work in the field
2 that became known as combinatorial chemistry. This is a way of
3 enabling chemists, instead of making a potential new drug one at a
4 time, to make them a million at a time. And in part because of my
5 work at Parke-Davis, I was offered to become the editor of a new
6 journal called Journal of Combinatorial Chemistry by the American
7 Chemical Society, and I accepted that.

8 Also today drugs are discovered by looking to see if a
9 potential molecule will bind to a protein. Protein is one of the
10 three main types of polymers that are in your body. What we
11 showed, you could also discover drugs that were small molecules
12 bound to RNA. I could go on for hours, but essentially it just
13 told the world hey, you don't have to focus on one of the three
14 types of molecules to target. There are three out there, it works
15 for the second, now everyone go to it.

16 Q And you say you were an editor of a journal?

17 A I still am the editor of this journal.

18 Q What's the name of journal?

19 A American Chemical Society's Journal of Combinatorial
20 Chemistry.

21 Q You've heard in opening statements that I as well as
22 Miss Kearns referred to you as a world-famous scientist. If I
23 could ask you this without having you have to boast about it,
24 would you agree with that characterization?

25 A Well, seeing people refer to me as a pioneer, you can't
26 avoid it any longer. This is something that everybody hopes that
27 they can achieve in their life. Not necessarily doing something
28 huge, but making some contribution that's really new that gets

1 people to think about chemistry in a different way. And yep, I
2 think I'm at that point where there are people [who]²⁷ think about
3 chemistry in a different way around the world because of work I've
4 done.

5 Q Do you do much in the way of public speaking, sir?

6 A Yes, I do lots of public speaking. Did as a professor,
7 did at Parke-Davis, did at IRORI, do now at Sensors.

8 Q What type of speaking generally?

9 A Most often I'll be talking to an audience of
10 scientists, anywhere from 10 to 500, who are there to listen to
11 new science, and so you give one kind of a presentation to that
12 kind of a group. I've also given talks to groups of teachers,
13 I've given talks to local chapters of the Juvenile Diabetes
14 Research Foundation. I've given talks at my daughter's grade
15 school. So very wide range of audiences.

16 Q How often on average do you speak at scientific
17 conferences or seminars or symposiums?

18 A It has varied somewhat, but I would say on average
19 twice a month for the last 15 years.

20 Q You do anything in the way of publishing in scientific
21 journals or scientific magazines?

22 A Yes. One of the primary expectations at the university
23 level is that you are going to do new work that's publishable,
24 meaning it's recognized as new and significant, and so I published
25 regularly while at the university, I don't know, something like a
26 120 papers.

27 And then at Parke-Davis it wasn't really an expectation to
28 publish, but Parke-Davis was very open to publishing, and that was

²⁷ In original transcript, the word "who" was not present.

1 a great way of sort of motivating scientists to do new stuff,
2 because they like to see that their work is published.

3 We published at IRORI. Part of the reason is that it's a
4 way of getting the story out for a new company. Gets into the
5 scientific literature, scientists get to read about it, they start
6 to talk about it, start to think it's pretty cool.

7 Did some publication while at Illumina. Not so much
8 scientific publications, but more magazine-style articles where we
9 talked about the company and the potential, and I'm in the process
10 of writing an article right now for Sensors.

11 Q If we could take a look at Exhibit 359. Try to put it
12 on the screen.

13 What is this document, sir?

14 A It's the first page of my resume.

15 Q This is a lengthy resume, so we will move through it
16 fairly rapidly. It's going to be in evidence if anyone wants to
17 look at it more closely.

18 The first page sets out your academic training, educational
19 background?

20 A Yes.

21 Q What's the next section?

22 A Basically all of the different work experiences that I
23 had at graduate school. I was a teaching assistant, for example,
24 and post-[doctoral]²⁸ fellow is considered a work position, and then
25 assistant professor, director, vice president, co-founder/CSO at
26 Illumina and CSO at Sensors. So work experience.

27 Q Toward the bottom of the page.

28 A Different organizations I'm involved in. Awards I've

²⁸ Original transcript read, "doctor".

1 gotten. Scientific advisory boards that I sit on.

2 Q If we could go to the next page. That's a continuation
3 of what you just described?

4 A Yeah, that's the second page and the top are just other
5 notable activity that I've been involved in, honors, that sort of
6 thing.

7 Q What's indicated under the section called "Service"?

8 A Those are things for which you are giving your time in
9 a way that you don't expect to be recognized for. There's no pay,
10 there's no [reward]²⁹. You are doing it for the community. And
11 basically you do it because your colleagues expect you to
12 contribute some of these activities, volunteer your time for some
13 of these activities in the community. There's a whole scientific
14 world out there, and there are a lot of activities for which
15 there's no pay.

16 Q Then under that there's a line that says "Publications,
17 115." What's that in reference to?

18 A It's the number of papers I have in scientific
19 journals. This is probably a little bit dated. It's closer to
20 120 now.

21 Q "Patent"?

22 A That's dated, too. That's up to about eight.

23 Q What's that in reference to?

24 A There's a big difference between a scientific
25 publication and a patent. Basically a patent is something you
26 write that says this is a new idea and this is how it can work,
27 and you send that to the U.S. Patent Office, and an examiner looks
28 at it and agrees with you or doesn't agree with you. If they

²⁹ Original transcript read, "award".

1 agree with you that it's new and you've shown it can work, then
2 they'll grant you a patent. A patent, at the end of the day a
3 patent is just a way that you can legally tell somebody else look,
4 I discovered this, I deserve the right to try to commercialize it,
5 and you need to stay away from it unless we come to some
6 agreement.

7 Q Then we have "Invited seminars, 120."

8 A That's close.

9 Q And then what is that in reference to?

10 A Just the number of talks I've given either at
11 scientific groups or community groups.

12 Q How is that different from the next point,
13 "Presentations at meetings, 130"?

14 A There are two annual meetings of the American Chemical
15 Society and many more of the local section, and while I was at
16 Ohio State and after, I've given many scientific talks at these
17 professional meetings, which you write an abstract, you submit it,
18 somebody decides it's worth hearing about or not, it's accepted,
19 then you go and you spend 15 to 20 minutes talking about the
20 topic.

21 Q We'll quickly flash through the rest of the resume
22 without much detail. The next section are books that you've
23 written?

24 A Right. Edited.

25 Q Next page, please. Continuation. Next page. That's
26 just summary of your background?

27 A Sometimes people want a one-paragraph summary of your
28 resume. That's what this is.

1 Q Next page. This section is a summary of your
2 publications?

3 A Books and publications, right.

4 Q Are these further publications?

5 A Yes, these are more publications.

6 Q I think we get the point.

7 You look at Exhibit 359, sir. For the record, tell us how
8 long the resume is?

9 A I should look at 359?

10 Q Please do.

11 A It's 28 pages.

12 Q Most of which is a list of publications and speaking
13 that you've done in the scientific area?

14 A That's right.

15 Q All right. Dr. Czarnik, will you tell the jury how you
16 first became acquainted with the enterprise that ultimately became
17 Illumina?

18 A Yes. In November of 1997, I received a phone call. I
19 don't remember if this was from John or from Larry Bock. But the
20 essence of it was that Larry Bock was considering starting a new
21 company and would I like to get together for a breakfast meeting
22 to hear about the technology and maybe make some comments on it.
23 And I said yes, because obviously it was in general in the area of
24 my research interest or he wouldn't be calling me, and secondly,
25 Larry Bock is a really famous guy in the start-up world. Larry
26 has been responsible for starting well over a dozen start-up
27 companies which have literally all been successful. It's an
28 amazing track record.

1 Q Did you know Larry Bock before he contacted you?

2 A I'd met Larry in my role at Parke-Davis, where we're
3 bringing people from start-ups through. Larry had been on one of
4 those trips out to Parke-Davis and I was his host, but really
5 didn't know him well.

6 Q When you were contacted by Larry Bock, where were you
7 employed?

8 A At IRORI.

9 Q You still were at IRORI?

10 A That's correct.

11 Q You say Larry Bock invited you to this breakfast?

12 A Either Larry or John did.

13 Q Had you met John Stuelpnagel before this?

14 A No.

15 Q Did you know anything about him?

16 A Nothing.

17 Q So did you have this breakfast meeting?

18 A Yes, at Milton's.

19 Q Again when was this breakfast meeting?

20 A In November of 1997.

21 Q Will you tell the jury what was discussed at the
22 breakfast meeting in November, 1997?

23 A Yep. We essentially three of us sat at a table,
24 myself, John Stuelpnagel, Larry Bock, and what became apparent
25 very quickly was that Larry was allowing John to do the
26 presentation of a new technology they were thinking about starting
27 a company on. I was a little surprised by that at first because
28 Larry was the reason that I was there, but what became clear very

1 quickly is that John was serving as Larry's sort of apprentice and
2 John was watching how Larry was doing.

3 So Larry went through the presentation with me, asked me if
4 I thought it was interesting, asked me if I thought it might be
5 the basis for a company, asked me specifically what I thought
6 might be good or bad points about the technology, and then we
7 spent about an hour doing that, and then at the end of it Larry
8 said to me as we're leaving, "Does this look like something that,
9 if we started a company on, you might be interested in joining?"
10 and I said yes, because I felt the technology was interesting, had
11 significant scientific challenges that were solvable, and that if
12 we solved them, it had tremendous potential.

13 So I said, "Yes, if you decide to start a company, give me a
14 call."

15 Q Who first brought up the subject of you possibly
16 joining what became known as Illumina?

17 A Larry did.

18 Q At the end of that breakfast?

19 A That's right.

20 Q So what happened next with respect to you possibly
21 affiliating with Illumina?

22 A [I'd]³⁰ just like to add to the end of that story that after
23 Larry asked me if I was interested and I said yes, I followed on
24 by saying, "But I'd only be interested as chief scientific
25 officer," and Larry responded to me by saying, "That's the
26 position we have in mind for you."

27 Q Chief scientific officer?

28 A Yes.

³⁰ Original transcript read "I".

1 Q Why did you tell Larry Bock that you'd only consider
2 joining Illumina if you were made chief scientific officer?

3 A I currently had a job at an established start-up
4 company here in San Diego. I had the title of vice president of
5 chemistry. To make the decision to leave a company that was up
6 and running and selling things and going to something that was
7 just barely on paper, there's a classic risk/reward benefit in all
8 of these things, so you are taking on a huge amount of risk going
9 to something that is just barely an idea, and as part of the
10 reward for that, I expected to move up one position, from vice
11 president of chemistry to chief scientific officer, and that's a
12 very classic request.

13 Q And you first broached that subject of being chief
14 scientific officer?

15 A Yes.

16 Q Larry Bock responded immediately?

17 A Yes, immediately, he said, "That's what we have in mind
18 for you." Frankly at that point, you know, if that notion of my
19 being chief scientific officer had been abhorrent by Larry, they
20 didn't want to consider it, it was fine. Actually I liked where I
21 was, and if they didn't want to offer me the position that would
22 move me, I'd stay.

23 Q What happened next with respect to you possibly joining
24 Illumina after this breakfast?

25 A Well, I continued working at that time IRORI, and I was
26 essentially just waiting to hear whether anything was going to
27 come of this. So at some point a couple of months later I sent
28 John an e-mail, John Stuelpnagel an e-mail, and asked John if the

1 company was going to proceed, and John said that they were still
2 negotiating to try to get the license from Tufts University, and
3 that once they got that license, then they would make a decision
4 about actually starting the company.

5 Q And then who made the next contact after that?

6 A I got a call from John asking me -- letting me know
7 they gotten the license, asking me if I wanted to come and talk
8 about a position. So I drove to the office in Cardiff and the
9 three of us had a meeting, described the technology, what they
10 viewed the company was going to be. At the time it had just a
11 working name of "Newco." We tentatively gave it a name of "Sensa
12 Technologies," which was my suggestion, but it ultimately wasn't
13 the one that stuck, and we talked about employment.

14 And rather than spending a lot of time at that meeting
15 talking about specifics of employment and an offer, I did what is
16 quite standard in the executive field, I guess, which is I went
17 home and I thought about what offer would move me. When you are
18 letting someone know what kind of an offer you are asking for, you
19 never ask for something that if they -- You have to do it in such
20 a way that if they say yes to everything you ask for, you'll go,
21 because if you don't do that, then you just get a bad reputation.
22 You say okay, we'll give you everything you want and you are
23 asking for, and then if you don't go, it's like why did you waste
24 my time. So you ask for a lot when you are negotiating with
25 someone over a new position and then you look to see where both
26 sides settle.

27 So I went home and I wrote up what would be an acceptable
28 offer from my part, an offer that, if they met every one of the

1 provisions, I would just say yes, I'll go.

2 Q Had there been any negotiation prior to you sending
3 that letter?

4 A No.

5 Q If we could take a look up at the screen at Exhibit 21.
6 This is a letter dated April 3, 1998. Recognize this, sir?

7 A Yes. This is the letter that I faxed to John
8 Stuelpnagel at CW Group. I'm sure that -- Well, I'm fairly sure
9 we would have met earlier that day and then that evening I would
10 have gone home, written this, and then faxed it to John at CW
11 Group.

12 Q What was the purpose of sending this letter?

13 A It was to let him know under what conditions of
14 employment I would definitely go and join this new company.

15 Q Move to the second page, please. This is a
16 continuation of the terms you were asking for?

17 A That's correct.

18 Q And what is the appendix at the bottom of this letter?

19 A I had a list of speaking engagements that I had already
20 committed to, and other activities, and I just wanted to be up
21 front with John and Larry that these were commitments that I had
22 made and that I was going to honor them if I joined Sensors --
23 excuse me, if I joined Illumina.

24 Q Next page, please.

25 So you sent that letter to John Stuelpnagel on April 3, and
26 then what happened next with respect to your possible employment?

27 A John called me back and asked if I would come in and
28 talk about the position. And so on April 6th, I went to the

1 office, and John and Larry were there, and we negotiated back and
2 forth based on my initial set of what I'd like to see in the
3 position, and they made a stock offer, which was acceptable. They
4 made a salary offer which I thought was low based just on
5 comparables in other companies. I attempted to negotiate it up,
6 but they wouldn't move, and so I settled on what they had offered.
7 We came to agreement on terms, and then I signed a letter saying
8 that I would join the company.

9 Q Will you explain to the jury why stock was important to
10 you at that point?

11 A Well, again, start-up companies are really on the far
12 fringe of this risk/reward scale. So if you are working at a
13 large company, this isn't as true anymore, but it used to be if
14 you were working at a large company like a pharmaceutical company,
15 it had it's ups and downs, but you could be pretty confident you
16 were going to be employed for a long time, whereas in a start-up
17 company, you join it and you start with a small amount of money,
18 you do have to be raising money from the very beginning, and
19 there's a very real chance that the company will fold. So as an
20 inducement to get people to join these companies that start from
21 nothing, you are given or allowed to buy stock at almost nothing,
22 which is what the company is worth at that point, and then the
23 whole motivation behind this system is that if you work in such a
24 way that the rest of the world recognizes, your company gets more
25 valuable, then your stock gets more valuable, and so the stock
26 that you have, which was initially worth next to nothing, becomes
27 worth something.

28 And so stock is a very major part of the motivation for

1 virtually anyone going into a start-up company. It's the chance
2 to realize the benefit of the value that you bring to a company
3 and being involved in bringing it from worth nothing to worth
4 something.

5 Q Dr. Czarnik, in the course of the discussions about you
6 possibly joining Illumina, did John Stuelpnagel say anything to
7 you with respect to why he thought you might be a good fit?

8 A Yes, John had done research with David Walt, Clark
9 Still, a number of other people, and he concluded, and I frankly
10 agreed, that my scientific background and my experience in both
11 academics and in companies was an almost ideal fit for Illumina,
12 because I was experienced in fluorescence, I was experienced in
13 solid phase synthesis, working with these little beads, I was
14 experienced in combinatorial chemistry, I was experienced leading,
15 directing and constructively criticizing research groups. So it
16 really looked like almost a perfect match.

17 Q And you discussed that with Dr. Stuelpnagel?

18 A That's what John told me.

19 Q And did you accurately represent to John Stuelpnagel
20 what your background and experience had been?

21 A You mean prior to talking -- prior to -- Yes,
22 absolutely. My professional life is an open book, as described in
23 my vitae, and so I don't think we discussed my vitae very much,
24 but it's there.

25 Q Did you submit your curriculum vitae?

26 A Yes, at some point I did submit by curriculum vitae.
27 It was sometime in early '98. I don't remember exactly when.

28 Q If we could look at Exhibit 24, please. Put that up on

1 the screen. This is a letter dated May 6, 1998, Dr. Czarnik. Do
2 you recognize this letter?

3 A Yes.

4 Q What is Exhibit 24?

5 A This is the offer letter I signed after we had decided
6 that the company would not be called Sensa Technology but it would
7 be called Illumina. And through much of April, John, Mark and I
8 were thinking through what the name of the company should be.
9 Mark and I were really insistent that it be a name that you could
10 get the Internet site for. So whatever the name was, we had to
11 get that dot com. And we came up with a number of ideas. I had
12 some, Mark had some. Ultimately John came up with the name that
13 we all liked, which was Illumina.com. It kind of infers wisdom,
14 it refers to light, and the company has everything to do with
15 light, and we could get Illumina.com pretty inexpensively.

16 Q So you say this was the offer letter you signed?

17 A Yes.

18 Q This sets forth the terms and conditions of your
19 employment at Illumina?

20 A Yes.

21 Q You were hired into what position?

22 A Chief scientific officer.

23 Q The letter describes what your responsibilities would
24 be?

25 A Yes.

26 Q If we could move to the next page, please.

27 These are further listing of your responsibilities as CSO?

28 A No, the bullet points are the responsibilities as

1 specifically listed in the letter.

2 Q Scroll down, please.

3 The letter says you are going to report to the acting
4 president?

5 A That's correct.

6 Q Who was the acting president at that time?

7 A John Stuelpnagel.

8 Q Next page. What is described in the section called
9 "Equity"?

10 A What is described is what they -- what the company,
11 what John and Larry had offered me and I'd accepted, which is the
12 ability to purchase 400,000 shares of Illumina stock at one penny
13 a share, and at that time that's what the stock was worth, because
14 the company was -- I was the first employee, so at that point the
15 company was some intellectual property that had been licensed, a
16 venture company that wanted to develop it, which is valuable, and
17 me.

18 Q Scroll down, please.

19 A section of the offer letter that deals with recognition of
20 CW Group's founding role. It states, "You agree that in future
21 press releases and public disclosures, CW Group's role in founding
22 and supporting the company will be acknowledged, as is your
23 founding role." Is that important to you, Dr. Czarnik?

24 A Absolutely.

25 Q Why is that?

26 A In the start-up -- In the biotech world, being the
27 founder of a company that becomes successful is the measure by
28 which you get future opportunities. For example, the fact that

1 Jay was a founder of Molecular Dynamics and that it became
2 successful is a very important part of the reason for all other
3 opportunities that he'll have in his career, including at
4 Illumina. So being acknowledged as a founder is uniquely
5 important.

6 Q Scroll down. This was sent -- You recognize that
7 signature as Dr. Stuelpnagel's?

8 A Yes.

9 Q And you signed the letter agreeing to accept that
10 offer?

11 A Yes.

12 Q You signed it on May 7, 1998?

13 A That's right.

14 Q If you can move to Exhibit 28, please.

15 Can you tell us what Exhibit 28 is.

16 A Yeah. That is a certificate for the 400,000 shares of
17 stock that I purchased on April 27, 1998.

18 Q You purchased those 400,000 shares at what price?

19 A One penny a share.

20 Q If we could move to Exhibit 92, please.

21 Tell us what Exhibit 92 is, sir.

22 A That is a certificate for 25,000 shares of stock that I
23 purchased in 1999 at a cost of nine cents per share, and this was
24 a certificate given -- It's a certificate for 25,000 shares of
25 stock.

26 Q How did you come to acquire these shares?

27 A This was a milestone-based reward, essentially, hitting
28 a certain milestone and the board of directors awards you with

1 additional stock.

2 Q What day did you start working at Illumina as an
3 employee?

4 A On June 11, 1998.

5 Q When you first joined the company, Dr. Czarnik, who
6 were the members of the company's senior management team?

7 A When I joined the company, there were a total of three
8 of us who were working actively on behalf of Illumina: John
9 Stuelpnagel, Mark Chee and myself. Mark Chee and I were employees
10 of Illumina. John Stuelpnagel was an employee of the venture firm
11 called CW Group, but he was working on behalf of CW Group to start
12 this company.

13 Q When to your knowledge did Dr. Stuelpnagel actually
14 join as an employee?

15 A In September of 1998.

16 Q So during the initial stages of the company, Dr.
17 Czarnik, would you describe for the jury essentially what role
18 each of you had, the three senior managers, yourself, Mark Chee
19 and John Stuelpnagel?

20 A Well, John was acting president, and so John had really
21 the lead role, as you would expect, for a president to have in a
22 company. He set out the outline for how we would spend our time,
23 and he did it very well. John -- We sat down and we evaluated
24 the technology that we'd licensed from Tufts so everyone was very
25 familiar with it, and then we began to list the areas in which
26 that technology might really be useful, and then we pared that
27 list down, because a start-up company can't work on everything at
28 once. It will end up accomplishing nothing, and then the company

1 is worth nothing. So you have to focus on one thing or two things
2 at most, and that is a big part of the job of the founders, is to
3 evaluate the opportunities, the technology, and as a group make
4 the decision[, "Here's the thing that we're going to sink or swim on."]³¹

5 Q Let's just for the record establish specifically what
6 position each of you had at the company at that point in time.

7 A John was the acting president. I was the chief
8 scientific officer and Mark was the vice president for genomics.

9 Q Did Mark Chee report to you?

10 A No, Mark did not report to me.

11 Q Can you tell the jury why that's not the case if you
12 were chief science officer, why Mark Chee didn't report to you.

13 A I came to learn shortly after I joined the company that
14 Mark had been interested in the chief scientific officer position.
15 It had been a requirement for me to join the company, and at that
16 time Larry and John decided that they wanted me badly enough to
17 make me the chief scientific officer even though it was a position
18 that Mark wanted.

19 So at the beginning of the company, as a way of really
20 accommodating Mark, we decided that he would not report to me,
21 that I would have the title of chief scientific officer, he would
22 have the title vice president of genomics, but that we would not
23 have a reporting relationship. Instead each of us would be
24 reporting to John.

25 Q All right. You told the jury that initially your task
26 was to try to determine what to do with David Walt's technology
27 which you had licensed. Would you describe for the jury as
28 basically as you can what that technology was.

³¹ Original transcript did not include quotation marks.

1 A Yeah. This is one of the few areas in which I agree
2 with Miss Kearns, it's really a remarkable technology.

3 Many of you are probably familiar with optical fiber in the
4 context of communication. Optical fibers being laid all over the
5 place through which you can send phone conversations. Some of you
6 probably have lived in areas where you had to wait for cable modem
7 until they finished the optical fiber upgrade of the neighborhood.
8 It just turns out it's a lot faster to carry light than it is
9 electrons. So communications through light cables, almost all
10 communications now are through light cables in one form or
11 another. Certainly ones that [support]³² cellular.

12 So the existing technology was that if you took one of these
13 optical fibers, that's what it's called, a stringy thing, made of
14 glass, and you shine light in one end and almost all the light
15 comes out the other end. None of the light comes out the middle.
16 Many of you have probably seen this. You put a light in it, you
17 see it coming out at you.

18 It's been known for years you could take say a hundred of
19 these optical fibers, put them together in a bundle and put it in
20 a machine that heated it up and then pulled it, and when you
21 pulled it, you can get a new fiber, but this time it was a fiber
22 bundle that had a hundred individual fibers in it but it was the
23 same diameter. And you could do this process over and over and
24 over again until finally you had something that was the same
25 diameter, about the size of a piece of pencil lead, but it had
26 maybe 5000 individual fibers in it.

27 So that was known. It was also known that if you took one
28 of these bundles, fiber bundles, and dipped it in acid, that at

³² Original transcript read, "report".

1 the end of every one of the fibers you'd have a little pit. It
2 just etched out a little bit of the glass at the end of each one
3 of those fibers. If you dipped a fiber bundle in acid and rinsed
4 it off, now under a microscope you'd see 5000 little pits at the
5 end of it.

6 What David discovered and patented was you could take that
7 etched bundle, that thing with all the pits, and put it into water
8 that had tiny little beads in it, and that based just on physical
9 forces, the beads would be driven from {suspension}³³ into the pits. So
10 that you just put it in suspension, pull it out, and most of those
11 pits now have beads in them.

12 The way it works is very much like the way that dust clings
13 to clothes or glass. A small particle that's small enough feels a
14 very strong force by something that's much larger than it. It
15 just gets attracted to it.

16 So David showed that you could make these arrays of beads in
17 a very simple one-step process, and furthermore David realized
18 that since the beads would be random, this array would be useful
19 only if you could decode what bead was in what position at the end
20 of it. If the bead doesn't have anything on it, it doesn't
21 matter, the array is just glass beads. If each bead has something
22 on it, when they assemble now you have an array of whatever was on
23 the glass beads, but it's only useful if you know what bead has
24 what on it.

25 Q When say "beads," can you give the jury an idea what
26 we're talking about, the size, what they are made out of?

27 A David worked with beads primarily on the order of a
28 hundred micrometers, which is a 10th of a millimeter. On the

³³ Original transcript read, "solution".

1 order of the width of a human hair. By the time I was fired from
2 Illumina, we were working with beads that were three microns,
3 which is about a hundredth the width of a human hair.

4 Q Each bead being 100th of the size of a human hair?

5 A The diameter, yes.

6 Q What are the beads made out of?

7 A Made out of glass.

8 Q The technologies to get these beads on the edge -- on
9 the end of each one of these fiber optic --

10 A Bundles.

11 Q Bundles. It's only valuable if there's something
12 attached to the beads?

13 A Correct.

14 Q So you and the other founders, did you discuss what
15 applications you might put this technology to?

16 A Yes. One possibility was that you could put just dyes
17 on the beads, and at the end you end up with an array of colored
18 dyes and that that array could be used to determine if something
19 was in the air. So if there was gasoline in the air or a solvent
20 or some chemical that was in the air, that kind of array might be
21 used to tell what it is.

22 You could put protein molecules on the beads, and by making
23 that array, you could use it for drug discovery. You have an
24 array of proteins, you stick it in a solution with potential drugs
25 in it, you can see which of those proteins bind to the drug
26 molecule.

27 Because things are so small, you can have a very small
28 amount of material and get a lot of experiments done at the same

1 time. Or you can put DNA on the beads, and if you put DNA on the
2 beads, now you can do a test to see what kind of DNA is in
3 solution, because DNA has this thing where it binds to its
4 partner, something that is -- its complement. So if you have an
5 array of DNA on this fiber, you stick it into solution, its
6 complement will bind to it, and that ends up being a very simple
7 test to know what kind of DNA was in solution.

8 At the end of the day, that's what we decided to focus on
9 because the market opportunity was huge, and it was an unmet need,
10 that is there was no tool that would allow the researchers to test
11 DNA in the way that was going to be needed.

12 Q Can you explain to the jury to what degree you
13 participated in the discussions and the decisions in terms of what
14 business area to focus on?

15 A Completely and fully. I was involved in every
16 discussion that I was aware of. I participated in every
17 discussion that I was aware of regarding ideas, regarding business
18 directions. And I have to say this notion that somehow I wasn't
19 involved has come as a complete shock and something that sounds
20 like revisionist history. I can't imagine someone saying that I
21 wasn't involved in these discussions. I was there. I was
22 there --

23 MS KEARNS: Objection, move to strike the last comment.

24 THE COURT: Motion to strike granted. The part
25 starting with "I can't imagine," the jury admonished to disregard.

26 MR. PANTONI: Q You say you were there. What did
27 you do when you were there?

28 A The three of us, Mark, John and I, sat at a table, and

1 the three of us talked about the technology, talked about its
2 pros, talked about its limitations. Each of us went up to the
3 board, physically picked up a piece of chalk, and said here's an
4 area where it might be useful, and we would draw a scheme. And so
5 I personally had about three or four of these areas where I
6 thought this array could be used for this, and I'd walk up to the
7 board and I drew the scheme. And often that scheme that you would
8 put up on the board would become a patent application.

9 So I had ideas. I wrote them on the board. We thought this
10 is interesting, we'd write a patent application. Mark would go up
11 to the board, hey, this is interesting. Well, that could be
12 become a patent application.

13 And most of the -- most of this back and forth actually
14 occurred between Mark and I because Mark and I were the two who
15 had really the most direct scientific training. John was
16 absolutely involved, but most of this discussion involved Mark and
17 I.

18 Q You say the consensus was to focus on one particular
19 application?

20 A Yes, at the end of this -- Well, by the middle of
21 July, we had decided we were going to focus on the application
22 called genomics. It's called genomics because it relates to
23 genes, and genes are made out of DNA. So we were going to put DNA
24 on the beads, make arrays of those beads with DNA on it, and use
25 that array as a tool for measuring DNA in solutions.

26 Q Dr. Czarnik, again back to the initial formative stages
27 of the company, were you involved at all in decisions with respect
28 to fundraising, how to raise money for the company?

1 A I was involved in every aspect of fundraising. We
2 talked actively about the fact that fundraising was important from
3 very early on. When I joined the company, the company had about
4 \$750,000 in the bank.

5 Q How did it get \$750,000?

6 A It was given by a company which is typically known as a
7 venture capital company. It's one of the really novel aspects of
8 our system, that if you have a good idea, you can often find
9 somebody who will give you money to test it. Well, you don't go
10 to the bank for that money because they don't know how to evaluate
11 ideas. You go to firms called venture capital firms. These are
12 firms that get money from individuals, from retirement funds,
13 people and companies who want to put 5 percent of their investment
14 into something very risky but something that really might have a
15 very big return.

16 So we talked about our need to -- well, that initial
17 \$750,000 I believe came entirely from CW Group, which was the --
18 both that John and Larry were working with, and we immediately
19 began talking about our need to begin raising money for the
20 company because that wasn't going to last us very long.

21 Q But the initial \$750,000 was what you've referred to as
22 the seed?

23 A Seed money, that's right. At that time the only real
24 expenses the company had were my salary and Mark's salary. John's
25 salary was being paid by CW Group.

26 Q So what was your role with respect to fundraising?

27 A Well, the three of us sat down and wrote a list of what
28 was needed to add value to the company, so that when we went to

1 the venture capital firms, we could say we'd like you to buy some
2 of our stock, not at a penny a share, because we think it's more
3 than that, not a dime a share, but at a dollar a share. And
4 ultimately that's what this, from a financial standpoint, that's
5 what the whole start-up universe is about, starting a company
6 whose stock is worth a penny a share and doing things so that it's
7 worth \$10 a share.

8 Most companies don't succeed at it. But when you do, you
9 turn every penny into \$10. And so we wanted to know, and we
10 discussed, ["What do we need to do"]³⁴ so we could go to the venture
11 firms and say we want you to buy some of our stock at a dollar a
12 share. And each of us went up to the board, we wrote ideas about
13 the things that we were going to need to do. Each of us
14 contributed things that had to do with, not doing any science at
15 that point because we didn't have any lab space, but with having
16 intellectual property, with putting together a scientific advisory
17 board, which I, essentially John and I did that, some of Mark's
18 involvement later; having a place to work, so we went and found
19 lab space that we'd be working in; making the key employee hires.
20 I physically went out and made recruiting trips to Boston a couple
21 of times to talk with potential employees. All of those things
22 that allowed us to go to the venture groups and say a dollar a
23 share.

24 Q Miss Kearns referred to the company being on a
25 shoestring budget for a period of time. When did you next get
26 money in terms of fundraising into the company after you joined
27 it?

28 A We closed our first major round of financing in

³⁴ Original transcript did not include quotation marks.

1 November of 1998.

2 Q So the initial seed money of \$750,000 covered what
3 period?

4 A From April of 1998 to November of 1998.

5 Q And had Illumina spent that entire \$750,000 by November
6 of 1998?

7 A No. We were very frugal with our money at all times,
8 and the reason for that, as all of us understood, is that if you
9 need to go raise money, the worst possible time to do it is if you
10 don't have any money, so you need to preserve your capital so that
11 no venture capitalist can stand over you and say you'll take it at
12 my terms or else.

13 Q How much money did you get into the company in November
14 of 1998?

15 A It was on the order of \$9 million.

16 Q 9 million cash?

17 A Checks. I remember actually receiving checks and
18 walking them over to Bank of America and depositing them.

19 Q So then as of November of 1998, Illumina had \$9 million
20 in the bank?

21 A Yes.

22 Q How often in the early, formative stages of the
23 company, when it was the three founders who initially started
24 working there, you, John and Mark, how often did the three of you
25 meet?

26 A Well, we met literally every day during the week. So
27 Monday through Friday. There were dates when I was out of town.
28 There were the dates that I had told John and Larry that I needed

1 to be out of town, was going to meet those commitments. And we
2 would occasionally meet on weekends, although frankly our progress
3 was going very well and I actually would often suggest we get
4 together on a Saturday to do something and as a team we decided we
5 didn't really need to because we were making very, very good
6 progress.

7 Q When you say you met every day, you mean every day the
8 three of you were there?

9 A Well, I can only talk about the days that I was there.
10 I was out a few days, as I said, but every other day it was John,
11 Mark and I in the office.

12 Q To talk about what sorts of things?

13 A To talk about and to plan for business development for
14 the company, to talk about space, to talk about employees, to call
15 and do phone interviews about potential employees, to talk about
16 our next round of fundraising, to talk about what area of science
17 to focus on, to talk about how we were going to do it, to do
18 everything that's needed to create a company from nothing.

19 Q You mentioned hiring employees. When did you begin to
20 hire scientists?

21 A Well, we hired an engineer named Steve Auger very
22 [early]³⁵ in the company[-]³⁶ in June of 1998. Steve spent most of that
23 summer out on the east coast still. He was working for the
24 company, but out there.

25 In August of 1998, we hired a chemist named Steve Barnard,
26 and shortly after that another chemist named Todd Dickenson and a
27 molecular biologist named Kevin Gunderson.

28 Q What was your role in building Illumina's scientific

³⁵ Original transcript read, "little".

³⁶ Original transcript did not include hyphen.

1 staff?

2 A Well, at the time the company had started, John had
3 talked with David Walt about some people that had worked with
4 David Walt that he thought might be interested in a company like
5 this and had the right background. So David had suggested Todd
6 and Steve, and I physically flew out to Boston and met with Steve
7 and Todd and Steve Auger, and talked with them about the company,
8 why I thought it was exciting, why I thought they really should
9 want to join us.

10 I can tell you that all three of them didn't want to leave
11 Boston. We talk about it being really paradise here, but people
12 in Boston think where they live [is]³⁷ paradise. And none of them
13 really wanted to come out, but at the end of the day we convinced
14 all three of them to come out and come to San Diego and join the
15 company.

16 Q Who accompanied you on these trips?

17 A It was just me.

18 Q We heard during Miss Kearns' opening she questioned
19 your work ethic and how hard you worked at the company. Let's
20 talk about the early formative stages of the company. Tell the
21 jury how hard you worked at Illumina.

22 A I loved every minute of the first summer that I worked
23 at Illumina. It was exciting. I was working with a group of
24 people who were knowledgeable. We had different areas of
25 expertise. John's was primarily business. It was a wonderful
26 work experience. We worked very hard. I worked very hard. I
27 worked -- I'm hearing some of this revisionist history, but I
28 would typically work from 8 in the morning until 7 at night, and

³⁷ Original transcript read, "in".

1 then at 7 at night the three of us would decide we've done enough
2 for the day and then close shop.

3 I would often suggest that we should come in on Saturday and
4 work, and the consensus was no, we really didn't need to come in
5 on Saturday. So I worked very hard and I really enjoyed it.

6 Q Why would you leave at 7 o'clock typically?

7 A John would say we're done for the day.

8 Q Were you married at this time, sir?

9 A Yes.

10 Q Living at home with you was whom?

11 A My wife Becky and my daughter Kelly.

12 Q And to your knowledge, your cofounders, Dr.

13 Stuelpnagel and Dr. Chee, what was their marital or family status?

14 A Both single.

15 Q Did Dr. Stuelpnagel on average work longer hours than
16 you did?

17 A Not in the summer of 1998. In the summer of 1998, we
18 all worked equally hard.

19 Q Same question as to Mark Chee.

20 A Yes, summer of 1998 we all worked equally hard.

21 Q And after that, did there come a point in time where
22 Dr. Stuelpnagel or Dr. Chee from your point of view tended to work
23 more hours?

24 A Yes. At the time that we moved into the research
25 facility, John's hours shifted. John's typical schedule was to
26 -- and he was very proud of this -- to arrive at work at 6 a.m.,
27 to read the L.A. Times in his car from 6 to 7, and then to go to
28 his office at 7 o'clock, and then very typically to work until 9

1 or 10 at night.

2 Q What type of hours were you working when you moved to
3 the Cardiff office?

4 A When we moved to the San Diego office?

5 Q I'm sorry, the San Diego office.

6 A I would arrive at 8. I live in Rancho Bernardo, so I
7 would typically get up at about 6:30, get in my car at 7 or a
8 little bit after 7, fight the traffic on south 15, and get to work
9 at or before 8 o'clock. And a typical day would have me ending
10 the day at 6:30 or 7 o'clock at night.

11 Q Now, you mentioned preexisting commitments that you had
12 when you first joined Illumina. Generally speaking, what were
13 those preexisting commitments?

14 A Talks that I had been invited to give. At this point
15 in my career people don't ask me to come out and give a talk on a
16 subject, they just ask me if I'll come out and give a talk, and
17 after I joined Illumina, I began talking about what we were doing
18 at Illumina. So they were to go to places that had invited me to
19 give scientific talks and talks about Illumina.

20 Q And did you disclose your schedule of preexisting
21 commitments to Dr. Stuelpnagel and Illumina before you joined the
22 company?

23 A Yes.

24 Q Did you do so in writing?

25 A Yes.

26 Q In fact we saw one of the letters you sent in April.

27 A I wanted to be up front with John and Mark from the
28 very beginning, because I had commitments, I expected to meet

1 them, and I didn't want them to hire me unless that was okay with
2 them.

3 Q Let's take a look at Exhibit 18, please. Could you
4 tell us what this document is?

5 A This is a document, essentially an updated version of
6 the document that we've seen previously, in which some of the
7 earlier dates are gone and a couple of new dates are added at the
8 end, but it is the list of dates that I knew I had to be gone over
9 the next year.

10 Q What was your purpose in preparing this document?

11 A To be absolutely clear that John and Mark knew where I
12 was going to be, why I was going to be there. I didn't want it to
13 ever become an issue that because I wasn't there on a certain day
14 they thought that I might not be working.

15 Q So what did you do with this document, Exhibit 18?

16 A I sent this to John Stuelpnagel, who at the time was
17 the CEO.

18 Q All right. Dr. Czarnik, I'd like to get back into
19 another area of testimony that relates to some degree to science.
20 Can you describe for the jury how the company went about trying to
21 develop the technology that you described in the area of genomics
22 or DNA research, DNA identification which you described?

23 A So the way that you develop what's to become a product
24 like this is to start at the end and to say what is it that would
25 be good enough that someone would be willing to buy it. So you
26 sit down and you write specifications about what this thing needs
27 to do and the people who would use this product that we were going
28 to make, would be primarily researchers and researchers in

1 pharmaceutical companies.

2 And the goal is, as Miss Kearns described previously,
3 everybody in this room and in the whole world has DNA that's 99.99
4 percent identical. The things that make us different at least
5 from a physical standpoint, not from a soul standpoint but
6 physical standpoint, are this 100th of one percent of our DNA
7 that's a little bit different. So the goal is to be able to get
8 DNA information for a lot of people, get information about their
9 medical history, trying to do all of this private, without letting
10 out a lot of information, which I know is a big issue right now,
11 and then to see if there aren't things you can predict about
12 people about how they are going to respond to a certain drug based
13 on their DNA.

14 So if your child has an ear infection you go in and the
15 first thing the doc does is prescribe Amoxicillin. It's
16 relatively inexpensive, it works well, and you can get it in
17 bubblegum flavor. But Amoxicillin doesn't work on every kid. If
18 it doesn't work, you have to go back to the doctor and the doctor
19 has to try the next one.

20 Well, the goal of this whole area is to take a little bit of
21 the person's saliva or blood, put it in a machine, and the machine
22 says based on your DNA, Amoxicillin isn't going to work with you,
23 start with tetracycline. It's literally personalized medicine.

24 To answer your question, what we did was sit down and lay
25 out the specifications of how good did our tool have to be able to
26 measure the amount of DNA in solution, different kinds of DNA, in
27 order for people to want to use it, to buy it. So we set out how
28 well it had to work. It had to work with 99 percent accuracy over

1 95 percent of the sample, or something like that, which was sort
2 of the standard at the time, and then we worked backwards.

3 And what we needed was fiber optic bundles that were the
4 right length, the right shape, the right optical clarity. If
5 those bundles fluoresced themselves, that's just background noise.
6 That's stuff you don't want. You want it to be clear as glass,
7 not give off any color. The beads have to be the right size, the
8 right clarity. You don't want the beads to fluoresce because
9 that's going to throw you off. You need to learn how to attach
10 the DNA to the bead in a way that gets as much DNA on it as
11 possible, or as least as is useful, to do it in a manner that's
12 repetitive and just works every time, to show how long the beads
13 with DNA on them survive. You want to know the shelf life. You
14 want to learn the best way of assembling the beads into the
15 fibers. You want to do a test to see if everything you did worked
16 pretty well. You get all that all assembled, you do the molecular
17 biology tests on it, see if these tests work on DNA when DNA is
18 sitting on glass like this.

19 Q What are those tests called?

20 A There's a variety of them in the genomics area. They
21 are called either genotyping or expression profiling, and we
22 specifically set out to develop a tool initially that would allow
23 researchers to do what's called SNP genotyping, single nucleotide
24 polymorphism.

25 Q What is SNP genotyping?

26 A Well, in your DNA, a hundredth of one percent is
27 different, and it turns out most of the places where it's
28 different isn't in some big chunk of DNA, it's just a tiniest of

1 things. It's like you have A, T, G and C. Where two people are
2 different, again it isn't because it's a big chunk, it's either an
3 A there or [a G]³⁸ there, and that's it, either an A or [a G]³⁹. The
4 other option is either a T or a C. So single nucleotide
5 polymorphism means at one of those places where there's a single
6 letter that's different, which letter is it.

7 Q Let make it a little technical and somewhat mechanical,
8 but how was the device, the bead array that Illumina was working
9 on, how was that intended to be used to do SNP, how could you do
10 that?

11 A Well, a company would buy a block that had say 96 of
12 our fibers on it. Each of those fibers had maybe 10,000 or 20,000
13 beads on it. And the company would then take that product, and in
14 something called a microtiter plate, just a plate that has a lot
15 of wells in it, they would put samples from people that had been
16 prepared, and the way the company would use it would be to dip our
17 block of fibers into the microtiter plate sample, let it basically
18 agitate for awhile, and then put that whole thing in a machine
19 that could look down the fiber and see every one of those beads.
20 And we designed the test so that whether it was an A at that
21 position or [a G]³⁹ at that position would be the difference between
22 seeing a green color or a red color.

23 So there's a lot [of]⁴⁰ sophisticated chemistry and molecular
24 biology that goes into that, but at the end of the day you want to
25 know at a certain place in your DNA is an A or G, and our test
26 would allow each bead to tell you that by whether it was a red or
27 a green color.

28 Q Now, you described essentially two groups working at

³⁸ Original transcript read, "a AG".

³⁹ Original transcript read, "AG".

⁴⁰ Original transcript did not include the word "of".

1 Illumina, chemistry and molecular biology?

2 A That's right.

3 Q Which group did you head up?

4 A The chemistry group.

5 Q Who headed up molecular biology?

6 A Mark Chee.

7 Q Did both groups work on this process of trying to
8 develop the bead array to be used for DNA identification?

9 A Absolutely. We had decided during the summer that we
10 were going to do this as our first project. You have to do your
11 first project well or nobody believes you on the next project.
12 And there was just a sequence of tasks that needed to be done. On
13 the chemistry side, we needed to learn how to make thousands and
14 tens of thousands of small pieces of DNA, and it turned out that
15 nobody had really ever done that before. So I had the
16 responsibility of coming up with a way to do that.

17 Then after we had those little pieces of DNA, we had to
18 learn to attach them to the beads, put the beads in the fibers, QC
19 it as we envisioned it. That's where the chemistry responsibility
20 would cut off and the molecular biology responsibility would kick
21 in. They would take these arrays we had made in quality control
22 and then use them to develop the tests, the assays, that would let
23 you see green or yellow or green or red and know what DNA was
24 there.

25 Q You say you were charged with the task of learning how
26 to make the DNA strands?

27 A Yes.

28 Q Why was that a necessary task?

1 A Primarily because the assay for the test for
2 determining what kind of DNA was there, the one that was most
3 attractive to us is one that required little pieces of DNA to
4 attach to the DNA on the beads, and so to do tens of thousands of
5 tests was initially going to require 40 or 50,000 little pieces of
6 DNA.

7 Q So who worked on that test?

8 A That was my responsibility, to get those what we call
9 high throughput DNA synthesis accomplished, and I accomplished
10 that goal by identifying [Michal]⁴¹ Lebl, who had a way of making
11 tens of thousands of things but not DNA. A way of making tens of
12 thousands of proteins.

13 And [Michal]⁴¹ didn't know at the time, or frankly because of
14 his area wasn't interested in DNA at all, but I knew that what he
15 had was something we could use to solve our problem. So I brought
16 [Michal]⁴¹ into Illumina for a seminar, really to show everybody that
17 look, this is a great solution to our problem, and everyone agreed
18 it was a great solution to our problem, and we hired [Michal]⁴¹.

19 Q Did you know [Michal]⁴¹ Lebl before that?

20 A Yes.

21 Q How did you know him?

22 A [Michal's]⁴² activity in the area of chemistry known as
23 combinatorial chemistry. I'm the editor of the journal, so I knew
24 of him through his work in the literature, had met him at
25 meetings. He's actually on the advisory board of my journal.

26 Q What did [Michal]⁴¹ Lebl's machine do?

27 A [Michal's]⁴² machine would permit a researcher by way of a
28 computer to say[, "Okay"⁴³ machine, I want you to make these thousands

⁴¹ Original transcript read, "Michael".

⁴² Original transcript read "Michael's".

⁴³ Original transcript read, "okay".

1 [of pieces of DNA."]⁴⁴ You turn it on, you go home, you come back the
2 next morning, and there are a thousand little pieces of DNA.

3 Q When you first heard about this machine, to your
4 knowledge had anyone used the machine for purposes of making DNA?

5 A No.

6 Q What was the machine being used for?

7 A For making peptides or proteins.

8 Q Who identified [Michal]⁴¹ Lebl's machine as being possibly
9 the machine to use at Illumina for purposes of making the DNA
10 strands?

11 A I did, and I'm very proud of it.

12 Q Did you -- Were you involved at all in recruiting
13 [Michal]⁴¹ Lebl to join --

14 A Yes, I talked with [Michal]⁴¹ initially after we had him
15 -- after I had identified that [Michal]⁴¹ had this machine that I
16 knew we could use, I invited [Michal]⁴¹ to come in and give a
17 seminar. He gave the talk. The three of us in management agreed
18 this was really a unique solution to this problem. I mean it was
19 really a great solution to a very tough problem, and it was a
20 solution that almost existed already. It wasn't going to require
21 a lot of invention where you had to test things. [Almost]⁴⁵ all we
22 had to do was apply his machine to what we needed. It wasn't
23 quite that simple, but it was almost that simple.

24 And at that point we all agreed that we wanted to bring
25 [Michal]⁴¹ on board. [Michal]⁴¹ was working for another company. It
26 was a little complicated because that other company had some
27 rights to the patents to this machine, and really John and I
28 together strategized how best to attract [Michal]⁴¹ to Illumina and

⁴⁴ Original transcript read, "pieces of DNA."

⁴⁵ Original transcript read, "It almost".

1 to get access to the patent [we]⁴⁶ would need to get the
2 machine.

3 Q How significant was this identification of [Michal]⁴¹
4 Lebl?

5 A Well, personally I think that we're the first people in
6 the world to be able to make small pieces of DNA, thousands at a
7 time. At least in the amount that's important for doing these
8 kind of experiments. It was absolutely necessary for Illumina to
9 meet its goals, and it also as it turns out was also the first
10 thing that Illumina sold was these thousands of pieces of DNA that
11 the machine would make.

12 Q What was the machine known as --

13 THE COURT: Counsel, we're going to have to break.

14 We'll take our noon recess at this time. We'll be in recess
15 until 1:15. Please remember the admonition not to form or express
16 any opinion about the case, not to discuss the case. We'll be in
17 recess until 1:15. Please return promptly at that time. We can't
18 start until all of you return at 1:15. Thank you.

19 (Lunch recess taken at 12 p.m.)

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⁴⁶ Original transcript read, "we need where we".

1 SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 12, 2002; 1:15 P.M.

2 THE COURT: The record will indicate all the jurors are
3 present, counsel and parties present.

4 You may continue your examination, Mr. Pantoni.

5 MR. PANTONI: Thank you, your Honor.

6 DIRECT EXAMINATION (Continued)

7 BY MR. PANTONI:

8 Q Dr. Czarnik, when we broke you were talking about
9 [Michal]⁴¹ Lebl, identification of [Michal]⁴¹ Lebl and his machine that
10 you ultimately used at Illumina to make DNA strands. What was
11 that machine known as after he came on board at Illumina?

12 A Well, eventually it became known as the oligator, which
13 was sort of a play on words, because the short pieces of DNA are
14 oligos, so the machine that makes them is the oligator, and I
15 think the name is trademark name now owned by Illumina.

16 Q The purpose of this machine?

17 A The purpose of the machine is to make thousands of
18 different kinds of DNA at the same time, literally to be able to
19 put in the sequence of letters for a thousand different kinds of
20 DNA. Press a button, go home, come back the next day, and have
21 them all there. And as I've said previously, this is -- this was
22 completely unknown, and it was my responsibility to not
23 necessarily to invent it, but to solve that as an issue for the
24 company.

25 Q And who did [Michal]⁴¹ Lebl report to when he came on
26 board as an employee?

27 A To me.

28 Q How long did he report to you?

1 A Through December of 1999.

2 Q What happened in December of 1999 on that issue?

3 A Well, [Michal]⁴¹-- Literally what happened was after the
4 Christmas break, when we got back in January, a series of things
5 happened, one of which was that [Michal]⁴¹ stopped reporting to me
6 and began to report to Jay Flatley.

7 Q We'll get to that.

8 Dr. Czarnik, did you have any role at Illumina with respect
9 to trying to promote the company and get the company known
10 generally?

11 A Yeah, I'm proud to say I took a lead role in that.

12 Q How did you go about doing that?

13 A Well, over the years I had come to have a network with
14 a variety of different science writers and editors of journals and
15 magazines, scientific writers, and when I made the move to
16 Illumina, I contacted many of them, simply said I was going to be
17 getting involved in a new venture, this is something that
18 scientifically was extremely interesting, and if it's something
19 you'd like to write about at some point, I'm available, contact
20 me, and I'll be happy to talk to you about it.

21 In addition, I authored at least one paper that went into a
22 scientific magazine, again wide distribution, tens of thousands of
23 scientists.

24 Q Did you talk with John Stuelpnagel in terms of whether
25 he wanted you to engage in those type of activities?

26 A Yes, it was something that as a team we discussed and
27 we all agreed it was valuable for the company.

28 Q What about with respect to the public speaking that you

1 described, did you use public speaking at all as a way to try to
2 promote Illumina?

3 A Absolutely. Yes, we all agreed it was a valuable
4 activity for the company, to be at scientific meetings, talking
5 about what the company was working on, what its interim results
6 were, what our hopes were for the future, and I'd like to think
7 that I was in a unique position to help the company in that
8 regard.

9 Q Could we take a look please at Exhibit 37.

10 Could you identify what Exhibit 37 is, please, for the
11 record?

12 A Yes. This is an article about Illumina that I wrote
13 for a scientific magazine called Modern Drug Discovery. I'm on
14 the editorial advisory board of this magazine, and regularly at
15 annual meetings we'll talk about what would we like to see in the
16 magazine over the next year, and I offered to write about
17 Illumina. That was accepted, so I wrote this article and it was
18 published.

19 Q The SNP genomic code, that relates to the SNP
20 genotyping application you described?

21 A Yes, it is, that's correct. This is a kind of a play
22 on the term "genetic code," because people are thinking in terms
23 of whole genomes, we thought we'd refer to it as a genomic code.

24 Q Exhibit 43, please.

25 Identify what Exhibit 43 is.

26 A Yes. This is an article that I wrote that appeared in
27 the scientific journal Nature. The two most prestigious journals
28 in at least in the physical sciences, chemistry and biology --

1 well, in chemistry or biology, are the journals Nature and
2 Science. This is an article that I wrote that went into Nature.
3 They actually approached me and asked me if I'd be willing to
4 write an article on this subject, and I told them I would be
5 willing to write an article, and wrote it and it was published.

6 Q Does this relate to Illumina?

7 A Yes, it relates to Illumina in the sense that the
8 technology that we had licensed from David Walt, one of the
9 potential applications was in making detectors for land mines, and
10 being able to tell where a land mine was buried just the way that
11 a dog would. So it was a potential application, and the editors
12 of Nature knew in general that I was very well versed in this
13 sensor area, so they approached me to write this article. This
14 article isn't really written about Illumina's work, but it's
15 written about work from a professor at MIT, but I was asked to
16 review it.

17 Q Exhibit 45, please.

18 Can you identify what this Exhibit 45 is?

19 A Yes, this is an article that's written about Illumina
20 by a scientific writer named Bill Wells. I'd gotten to know Bill
21 Wells as a result of conferences that I'd attended, and also he
22 wrote an article about IRORI when I was there, so we had gotten to
23 know each other as a result of that interaction. And when I made
24 the move to Illumina, like others, I informed him that I was
25 moving to this interesting company, you know, it was really
26 extremely interesting technology, something that his readers might
27 be interested in. He contacted me and said, you know, I'd like to
28 write an article about your company.

1 Q Was this published?

2 A Yes, this was published both on the Internet and in the
3 journal called Chemistry and Biology.

4 Q Exhibit 48, please.

5 Can you describe what Exhibit 48 is?

6 A Yes. This is an article written in the newspaper the
7 Los Angeles Times about Illumina.

8 Q Did you have any role or involvement in terms of
9 getting this published?

10 A Yes. It's actually kind of an interesting story about
11 this article. As I mentioned, John is, John Stuelpnagel, is an
12 avid reader of the Los Angeles Times, and one day at work we were
13 talking as a team and he was sort of complaining about the fact
14 that this company had never been written in the L.A. Times. I
15 know some of the writers up at the L.A. Times in the science
16 section, so I contacted them and said look, we have this
17 interesting company, it's right in your own backyard, I think your
18 readers would be interested in it, and I sent them John
19 Stuelpnagel's card and said you should call our CEO John
20 Stuelpnagel, and the reporter did and this was the article that
21 resulted from that.

22 Q This was published?

23 A Yes, in the L.A. Times.

24 Q Exhibit 53, please.

25 Well, not a very good picture of it. Can you identify what
26 Exhibit 53 is?

27 A Yes. This is a cover of the magazine Science. I
28 mentioned that Science and Nature are the two most highly regarded

1 journals in the chemistry and life sciences areas, and in February
2 of 1999, this picture was on the cover of Science, and this is a
3 picture that depicts what Illumina does, that is having these
4 wells, tiny wells filled by little beads. So I'm actually very,
5 very proud of having made it possible for Illumina to have the
6 cover of this magazine. This is the scientific equivalent of
7 getting the cover of Time or something like that.

8 Q And did John Stuelpnagel talk to you about the
9 importance of this getting Illumina on the cover of Science
10 Magazine?

11 A John actually included this as the very first page in
12 the board report, board of directors report, the following board
13 meeting, saying this was really a fabulous advance for Illumina.
14 The day it was published, we all celebrated, and I remember
15 actually asking Mark if he wanted to --

16 THE COURT: Asking who?

17 THE WITNESS: I'm sorry, to ask Mark Chee if he wanted
18 to guess how much we'd added to the value of Illumina by getting
19 this kind of exposure, and Mark said it was incalculable.

20 MR. PANTONI: Q When was this published?

21 A In February of 1999.

22 MS KEARNS: I'll move to strike the portion of the
23 answer relating to a comment allegedly made by Mark Chee. It's
24 not responsive to the question asked.

25 THE COURT: Very well.

26 MR. PANTONI: I could ask.

27 Q Did Mark Chee make any comments to you with respect to
28 this cover of Science Magazine?

1 A Yes, Mark said he thought that the value of this to the
2 company was incalculable.

3 Q Let me take you back, sir, to the fall of 1998. Can
4 you describe for the jury what the morale was like in the office,
5 from your perspective?

6 A Well, in September of '98, we had moved from our
7 Cardiff meeting room into our first space on Towne Centre Drive,
8 and so there was a lot of enthusiasm at the company. Really a
9 great team spirit. People were willing to do anything and
10 everything to get the company up and running.

11 We had an empty lab space with nothing in it, so we needed
12 to buy the equipment, we needed to buy a fax machine, we needed to
13 buy the printer, we needed to get desks and get them moved in, and
14 in September the atmosphere in the company was extremely high,
15 extremely high spirited, collegial.

16 I remember myself, I went out and rented a Ryder truck,
17 drove it to Staples, loaded up Staples, the Ryder truck, with
18 tables and chairs, drove it over to Illumina and brought them into
19 the facility.

20 Q Now, did that change in terms of the morale in the
21 office from your perspective?

22 A Yes. It absolutely changed. And it changed in just
23 about December of 1998. The morale of the company had been very
24 high, but by December of 1998, especially John Stuelpnagel had the
25 sense, not just the sense, John said he was unhappy with the rate
26 of progress that the company was making in terms of making
27 scientific progress. That absolutely spilled over into every
28 aspect of the company. Especially John began to attend company

1 meetings and dictating what timelines the company had to make and
2 when they had to make them, based on discussions that I had with
3 Rich Pytelewski. They were extraordinarily stretch goals. In my
4 industry, we determine between goals that are stretch and those
5 that are stupid. These were just bordering on stupid. John was
6 otherwise doing a good job as a CEO, and we just busted our butt
7 to try to meet those deadlines.

8 Q Did there come a point in time where you felt that the
9 scientists reporting to you were not happy?

10 A Yes. In January of 1998, it had gotten to the point
11 that several of my [chemists]⁴⁷ told me to my face that they were
12 seriously thinking about leaving the company.

13 Q You said January of '98?

14 A I'm sorry, of '99. January of '99. Steve Barnard
15 approached me, said you know, I think I'm going to leave, and Todd
16 Dickenson approached me and said he was going to leave.

17 Q Did they say why?

18 A Because -- Yes, both of them were concerned that the
19 attitude, the atmosphere of the company, had changed so
20 dramatically, not because of the hard work, because all of us were
21 very happy to work hard on the company's behalf, but instead of
22 working as a team to solve problems, John Stuelpnagel had become
23 very dictatorial and was using -- really using the stick much more
24 than a team approach to drive the company to meeting certain
25 goals.

26 Q Did you do anything to try to improve morale in the
27 office at that point in time?

28 A Yes. My approach to getting things done is very

⁴⁷ Original transcript read, "chemist".

1 different from John's. I personally believe that if you've got a
2 task to solve, you've got motivated people, you get everyone
3 together, you gather input, you get some form of consensus on
4 what's the right approach. Sometimes you go with the consensus,
5 sometimes as a leader you have to make your own decision, but in
6 any case, you involve people in that decision-making process, and
7 then you strategize about how you are going to solve those
8 problems and then you get going and you do it.

9 And that, frankly, requires being able to work together.
10 These are close environments. People are on top of each other.
11 When you are being driven day after day, being told that you are
12 working hard but what you are doing isn't nearly enough, after a
13 time it takes a terrible toll on getting people to want to come in
14 and to accomplish goals.

15 So I began a program of very, very simple things to take the
16 edge [off]⁴⁸ of what people were experiencing at work. The first
17 thing that I did was I bought a popcorn popper, and about the
18 middle of January I just started making popcorn at 6 o'clock every
19 night. Everybody was working until 6. So at 6 o'clock we would
20 make popcorn, people would go in the lunch room and talk for 15 or
21 20 minutes over popcorn and then go back to work. That was really
22 a valuable activity from my standpoint. It was really valuable.
23 I think we kept people at Illumina because we did things like
24 that.

25 I went to lunch with the scientists every day. This was a
26 two-minute walk away from the building, just a deli right nearby.
27 So I went to lunch with them every day, and we largely talked
28 about what was going on at work, and we communicated about what

⁴⁸ Original transcript read, "of what".

1 the problems were and what needed to be solved, and most of all
2 how we were going to solve them.

3 John Stuelpnagel's approach to management again is very
4 different from mine. John's approach is set goals and people
5 either meet them or they don't. If they don't meet them, it's
6 their responsibility. Whereas my approach was look, we've got
7 problems. I don't want to hold anybody responsible for failing to
8 meet goals, I want us to strategize on how to succeed, and that
9 requires communicating.

10 So we would typically do that over lunch, because hard as it
11 is to believe, communicating between the groups was actually
12 discouraged by John during the day. To this day I don't know why.
13 But communication was actively discouraged.

14 One other item I did was --

15 Q Did you do anything to try to improve communications
16 between the two groups, chemistry and molecular biology?

17 A Yes, I started a series of lunches. We would have
18 company meetings every morning on Wednesday, and initially there
19 had been the talk about progress, but as time went on John turned
20 it into a forum to really complain how we weren't meeting certain
21 deadlines, and the scientists were extremely frustrated, because
22 they didn't have the time in those meetings to talk about the
23 really basic important scientific issues that had to be solved for
24 us to be successful as a company.

25 So I started a lunch that occurred on that Wednesday
26 afternoon, so we'd have the company morning meeting, which was
27 frustrating, and then the Wednesday lunch, where people could
28 spend time talking more at length about the scientific issues, and

1 it was essential that people across the disciplines knew what the
2 problems were on the other side and also what the other side was
3 expecting that they were going to be getting. And the lunch I
4 think was a very big factor in helping to address that.

5 Q What feedback, if any, did you get from the staff?

6 A I received positive feedback from everyone, from Steve
7 Barnard, Todd Dickenson, Steve Auger, Kevin Gunderson. Everyone
8 who was there at the time thought these lunches were a really good
9 idea.

10 I should mention that I also made sure that lunch was
11 supplied for these Wednesday noon meetings.

12 Q Just so I understand it, was it a lunch just for
13 chemistry or just for molecular biology or for everyone?

14 A No, this was a meeting to which anyone in the company
15 was welcome, but it was spent describing specific scientific
16 issues either in chemistry or in molecular biology, or most
17 importantly those issues that really involve both groups, in order
18 to solve the problems. That was the best forum that we had to
19 really talk in detail about what were the hurdles that we [needed]⁴⁹ to
20 get past and how were we going to do it.

21 Q All right, Dr. Czarnik. You heard Miss Kearns in her
22 opening say John Stuelpnagel gave you a counseling session in
23 August of 1998 when you still were at the Cardiff offices. Did
24 John Stuelpnagel ever counsel you with respect to performance
25 while you were at the Cardiff offices?

26 A No, absolutely not.

27 Q Did you and John Stuelpnagel ever have a discussion
28 where you told him you'd start working harder once you got over to

⁴⁹ Original transcript read, "need".

1 the new facility which had a laboratory?

2 A Absolutely not.

3 Q Now, do you recall a discussion with John Stuelpnagel
4 in November, 19998, after you moved to the new offices?

5 A Yes, I remember one discussion in particular in which
6 John seemed to be extremely agitated and angry about the company's
7 inability to meet technical milestones.

8 Q Have you ever, sir, characterized this discussion on
9 the part of John Stuelpnagel as a scolding?

10 A Yes.

11 Q What did you mean when you characterized it as a
12 scolding?

13 A John had a meeting with me that lasted about half an
14 hour. He then had a meeting with Mark Chee that lasted for about
15 a half an hour. And certainly in my meeting, which was the one I
16 was present at, John spent the whole time talking about how upset
17 he was that the company wasn't meeting its milestones. He was
18 frustrated because he had -- Not he, we, had written the business
19 plan [--]⁵⁰ that we were going to meet technical milestones, and it was a
20 simple fact we weren't meeting the date set in the business plan,
21 and John was -- I can really only characterize it as a venting.
22 It was literally a half-hour session of venting, in which how
23 upset John was over our inability to meet the milestones was sort
24 of repeated over and over and over again.

25 Q Who, if anyone, did he blame for that situation?

26 A John blamed all three of us who were in charge of
27 management. John is very much that kind of person. Not to just
28 say this is my issue, he believed he was responsible, I was

⁵⁰ Original transcript did not include the "--".

1 responsible, Mark was responsible, and that if we weren't meeting
2 our milestones, it must be because the three of us weren't doing
3 our job.

4 Q Did he point out anything specifically that you,
5 Anthony Czarnik, weren't doing properly?

6 A No.

7 Q What if anything did he suggest that you should do?

8 A There was only one constructive comment that came out
9 of that session, and it came out near the end, and it was that we,
10 based on what we knew at that point, that Mark and I write a
11 detailed research plan, which he felt would get us to meet our
12 milestones more rapidly.

13 Q Did Dr. Stuelpnagel say anything in terms of whether he
14 was going to meet with Mark Chee on the same subject?

15 A Yes, he said he was going to meet with Mark immediately
16 after meeting with me.

17 Q When you left the office, did you observe Mark Chee?

18 A Yes.

19 Q What happened?

20 A Mark went into the office, he was in there for about a
21 half an hour, the same length of time as I was in there, and he
22 came out, Mark appeared shaken to me, and we got together, we
23 commiserated a bit about the half-hour we had spent with John.

24 Q What did Mark Chee say to you?

25 A Mark said let's get together this afternoon and do what
26 John asked us to do, which is to create a detailed research plan
27 based on where we are now, and I simply agreed and met him that
28 afternoon and we started to work on the plan.

1 Q Dr. Czarnik, did you and John Stuelpnagel ever, ever
2 have a discussion in which he criticized your work?

3 A Right through April we discussed everything as a team.
4 This was very important to John, and it was something that I was
5 very happy to be a part of, to be viewing problems to solve as
6 something for the management team to solve rather than putting
7 responsibility on one person's head or another. So --

8 MS KEARNS: I'm going to object. The answer doesn't
9 seem to be responding to the question.

10 THE COURT: Sustained.

11 Motion to strike?

12 MS KEARNS: And I move to strike.

13 THE COURT: Granted.

14 MR. PANTONI: Q I'm asking about counseling
15 sessions, if any. Did John Stuelpnagel ever counsel you and point
16 out specific problems with your performance, performance of
17 Anthony Czarnik?

18 A No, he didn't.

19 Q Did John Stuelpnagel ever issue any, you, any kind of
20 counseling memo?

21 A No.

22 Q Or warning?

23 A Absolutely not.

24 Q Was anything to your knowledge put into your personnel
25 file before Jay Flatley became chief executive officer of the
26 company?

27 A Nothing.

28 Q Dr. Czarnik, I want to shift gears a bit. Do you

1 suffer, sir, from any form of mental illness?

2 A Yeah, I suffer from severe depression.

3 Q And when were you first diagnosed with depression?

4 A In 1992.

5 Q Can you explain to the jury essentially what depression
6 is?

7 A Well, depression in a clinical sense is an imbalance of
8 brain chemicals, and it has a genetic basis, because it tends to
9 run in families, and it is a disease that causes one to seriously
10 question their own self-worth, their value, their value of any
11 type. In extreme cases it causes people to think to themselves
12 over and over and over again that there's nothing pleasurable
13 happening in life, and after living that way for a long enough
14 period of time, many people will start to ask themselves if
15 there's nothing pleasurable in life, then why go on with life.

16 Q Did you go through that?

17 A Yes, I've gone through that cycle about three times.

18 Q What type of treatment, if any, do you take for your
19 depression?

20 A I take medication. I'm currently using two medications
21 that are called Wellbutrin and Effexor.

22 Q How long have you been taking anti-depressants?

23 A Since 1992.

24 Q When you first were diagnosed?

25 A That's right.

26 Q What other treatment, if any, have you received for
27 depression other than taking anti-depressants?

28 A Well, the current standard of care is a combination of

1 medicines and talk therapy, and the doctor evaluates the patient
2 to determine if the talk therapy is necessary, and I've really
3 only had one period in my life where my physician felt that it was
4 necessary.

5 Q When was that?

6 A That was beginning in April of 1999.

7 Q Dr. Czarnik, when you were discussing possibly joining
8 Illumina, did you disclose to anyone affiliated with Illumina the
9 fact you suffer from depression?

10 A No, I didn't.

11 Q Why not?

12 A Because no one has a right to know that, other than my
13 doctor.

14 Q Were you embarrassed by it?

15 A No, I wasn't embarrassed by it, but I'm fully aware of
16 the stigma that is attached to it.

17 Q Now, did there come a point in time, sir, that you
18 switched your anti-depressant medication?

19 A Yep, in September of 1998, on consultation with my
20 physician at Scripps Clinic in Rancho Bernardo, I switched from
21 what I had been using, which was a medicine called Effexor, to a
22 medicine called Wellbutrin, and I sort of made a cold-turkey
23 switch.

24 Q So this was a few months into your employment at
25 Illumina?

26 A That's correct.

27 Q And very briefly, what was your reason for switching
28 medications?

1 A Well, an unfortunate but very prevalent side effect
2 with anti-depressant medicines is loss of libido, loss of sexual
3 desire, and my wife and I discussed this because I was
4 experiencing it, and we agreed that we would try this medicine
5 called Wellbutrin, which had been brought out, marketed by
6 Wellcome, and it specifically was touted to have good anti-
7 depressant activity but without the sexual side effect.

8 Q So you began taking that new medication when?

9 A In September of '98.

10 Q At some point in time, sir, did you come to observe
11 that the new medication was not working?

12 A Yes.

13 Q How and when did you come to learn that?

14 A Sometime in the first couple of months of '99, maybe in
15 February, I started to note the symptoms that I'm very familiar
16 with, which was the constant cycling of black thoughts, seeming
17 inability to get pleasure out of things, and I went back to my
18 physician and -- That's not responsive to your question. Sorry.

19 I went back to my physician and said look, this medicine
20 isn't working, we need to try something else.

21 Q At what point, if at all, did it begin to affect your
22 work?

23 A I think it certainly began to affect my work near the
24 end of March of 1999.

25 Q What way did you notice it began to affect your work?

26 A Well, I was having the cycling black thoughts, as I
27 mentioned. I was having some difficulty focusing. I was finding
28 that I wasn't sleeping very well.

1 Q Now, at about this time, sir, did you have
2 responsibility to complete a certain grant application?

3 A Yes, I had responsibility to complete a grant
4 application to the National Institute of Standards and Technology,
5 to a program called Advanced Technology Program, the ATP.

6 Q And when did you first learn that you were going to
7 have to write this grant?

8 A Well, it wasn't a matter of hearing that I had to write
9 it. In approximately November, as a team, we had made the
10 decision Mark was going to be applying for NIH grants and I was
11 going to apply for this grant.

12 Q What subject matter were you to write about in the
13 grant application?

14 A We didn't make that decision in November. In fact, we
15 kind of just let it percolate for awhile because the grant
16 deadline was about six months off. So in January I did go to a
17 meeting in San Francisco, one-day meeting, to try to get an idea
18 of what areas this government agency was mainly interested in, and
19 in fact in late February I traveled to Washington to talk to the
20 director of the program to see if I could get some idea from him
21 what the agency was most interested in.

22 Q How long did you expect it would take you to write this
23 grant application?

24 A About five days.

25 Q What was that based on?

26 A It was based on having written dozens of grants in the
27 past.

28 Q Were you anyway concerned or upset or fearful of

1 the fact you were going to have to write a grant application?

2 A Certainly not when we discussed it in November. I
3 thought it was a great opportunity for us. I thought the fact we
4 were separating what I was writing into one government agency and
5 what Mark was writing to another was a good idea, and was looking
6 forward to writing it.

7 Q When did you actually start attempting to write the
8 grant application?

9 A On April 1st.

10 Q April 1st, 1999?

11 A Yes.

12 Q Do you recall at about that same point in time having a
13 discussion with Mark Chee where you discussed your role with the
14 company?

15 A Yes.

16 Q When was that discussion?

17 A It was about a day or two before I started writing the
18 grant, on maybe March 29th.

19 Q And how were you feeling as of that date when you spoke
20 to Mark Chee with respect to your depression?

21 A I was feeling pretty bad. I was having some difficulty
22 focusing and was having circular black thoughts, very low self-
23 esteem, things, you know, things that I had experienced before. I
24 recognized the symptoms, but this is a bit like watching a train
25 wreck happen in slow motion, because normally you can't fix it
26 quickly. You start on a new medication and it requires several
27 weeks for the medication to actually take effect.

28 Q Did you seek Mark out for this talk or did he seek you

1 out?

2 A I sought Mark out.

3 Q What was your purpose in wanting to talk to Mark?

4 A Twofold. I knew I was dealing with depression, and I
5 really needed a reality check as to how I was doing my job.
6 Because at that point you just focus on black thoughts, and often
7 people around you don't even know what you are experiencing
8 because you just get good at hiding it, you work through it.

9 So I trusted Mark, and I asked him to go out for a walk to
10 find out from his standpoint how my performance was. And at the
11 same time there was still a lot of pressure from John in terms of
12 not meeting milestones, not meeting timelines, and ultimately the
13 timelines for us were Mark's timelines. We had to do decoding in
14 a certain number, et cetera, et cetera. And I honestly felt if
15 Mark felt it was better for the company for him to be CSO, then
16 let's do it, let's do what's best for the company.

17 Q So what did you say to Mark and what did he say?

18 A We took a walk around the block and I said to Mark --
19 First I told him I wasn't feeling well, and then I asked him how
20 he thought I was doing as CSO, and I think he was a little
21 surprised that I asked that question, but Mark answered that he
22 thought I was doing just fine.

23 I said, "Does John feel the same way?"

24 He said, "Well, to the best of my knowledge, John is just
25 upset that you missed some days last summer."

26 So I felt great about that. I felt that what I was feeling,
27 which is both being ill and the pressure of meeting timelines, you
28 know, those things were both real, but at least from Mark's

1 standpoint there wasn't any need for me to be concerned about my
2 performance as the CSO.

3 But I did ask him, I did ask Mark at that time if he thought
4 it would be better for the company if he was the CSO, because the
5 timelines that we weren't meeting were molecular biology
6 timelines, and Mark responded simply no, he thought that we needed
7 to work through this together but he didn't see any reason that we
8 needed to change any sort of titles or positions.

9 Q Then a few days later you started working on the grant
10 application?

11 A That's right.

12 Q Tell the jury what your experience was when you began
13 actually trying to write the grant application.

14 A Well, I can tell you from experience that creative
15 writing is one of the most difficult things to do when you are in
16 a state of deep depression. You are so focused on negative
17 thoughts that being creative is -- it's next to impossible. And
18 I'm not the only person to have experienced this. [A]⁵¹ lot
19 of people have written about their experiences dealing with
20 depression over the last couple of decades. It's become almost
21 its own industry, writing about how people dealt with their own
22 depression. But it's next to impossible.

23 So I was faced with a powerful desire to make this
24 contribution, which had been planned for a long time, for months,
25 and at the same time with a physical, medical inability to write.
26 And I spent that weekend at home trying to write. My family was
27 -- Becky and Kelly were off at my in-laws, so I had given myself
28 the whole weekend to work on this, and I just found I couldn't. I

⁵¹ Original transcription read, "This is a".

1 found I would write for a few minutes and I was just shaking, and
2 at one point I would go into the bathroom and actually stick my
3 head under the faucet just as a way to snap out of this, just snap
4 out of it.

5 The first time you go through it, you think to yourself
6 look, just fix it, it's in your head, you just fix it. It's your
7 own head, fix it. The reality is that you can't just fix it.
8 It's a disease. It's like diabetes. You can't wish yourself out
9 of diabetes. It's a medical illness.

10 So I worked very hard that weekend to try to write the
11 grant, but I made very little progress.

12 Q How much writing, if any, did you do?

13 A I had maybe a page or two done by the end of the
14 weekend out of what's probably a 15-page grant.

15 Q Did you continue to work on the grant application when
16 the work week began on Monday?

17 A Yes, I went into work and worked on the application on
18 Monday. At least tried. Made very little progress. And then
19 Tuesday morning by about 11 o'clock in the morning, I had been
20 trying to write this all morning long, had only been able to write
21 a couple of sentences, and at that point I realized that I was
22 almost certain not to make the deadline of April 15th. This was
23 April 6th. I realized that even though the -- even though it was
24 nine days away, which in an ordinary time frame is plenty of time
25 to write a grant, there was a very good chance I wasn't going to
26 be able to write it because of the medical state that I was in.

27 Q This was April 6, 1999?

28 A Yes.

1 Q And, sir, what did you do then on April 6, 1999?

2 A Well, when I reached a determination I wasn't going to
3 be able to write the grant, I decided I had to tell Mark and John,
4 because it was going to affect the company, it was my
5 responsibility, and the ideal thing, the thing that should have
6 happened was for me to write it, but if I couldn't write it, the
7 most important thing was the company submit a grant. So if I told
8 Mark and John, it was going to be embarrassing, but at least we
9 wouldn't miss out on the chance to write this grant.

10 So I called them together into a room and explained to them
11 that I wouldn't be able to write it.

12 Q Where was this meeting held?

13 A This was in John's office.

14 Q Who was present?

15 A Me and John Stuelpnagel and Mark Chee.

16 Q Sir, describe for the jury as best you can what
17 occurred during that meeting.

18 A Well, I went in knowing this was going to be not
19 received well, because it was my assignment and it was something I
20 wanted to do very badly, it was my assignment, but I wasn't going
21 to be able to do it, and at the time I was obviously very deep in
22 a depressive episode. So it's bad enough to have these thoughts
23 constantly circling in terms of you're worthless, people don't
24 respect you, people don't like you, things all of us feel
25 sometimes, but when you are in a deep depressive episode, there's
26 nothing else you can think about. You can't think yourself out of
27 it or past it. So to have layered on top of that --

28 MS KEARNS: I'm sorry, I'll object. I would ask the

1 Court to ask the witness to respond to the question, which is what
2 happened in this meeting.

3 THE COURT: Sustained.

4 MS KEARNS: Move to strike the prior answer.

5 THE COURT: Granted. Motion to strike granted.

6 MR. PANTONI: Q Describe to the jury what your state
7 of mind was entering that meeting.

8 A I was in a state of deep depression. I was trembling.
9 But it was clear that the people I was working with weren't aware
10 of it. I had an assignment that I wanted desperately to complete
11 but wasn't going to be able to complete it, and it was essential
12 to the company that I go in and tell John and Mark that I wasn't
13 going to be able to complete it, and I was extraordinarily
14 apprehensive about doing that, but I knew I had to do it.

15 Q Tell the jury, please, what happened at the meeting in
16 John Stuelpnagel's office on April 6, 1999.

17 A So I got John and Mark together, and sat in John's
18 office, and I sat in a chair, and I had been bucking myself up to
19 just deliver this in as straightforward and as monotone way as
20 possible. And I started to say that I wasn't going to be able to
21 write this grant, and as I was saying it, I just all of the
22 emotion just came together at the same time and I started crying.
23 I mean frankly I'm not -- I'm certainly not proud of crying, but
24 I'm not really embarrassed by it either. It didn't happen in
25 front of the whole company. I had gotten my colleagues together
26 to tell them what I had to tell them. But right in the middle of
27 the sentence when I was explaining to them, I really broke down
28 and was crying in my chair.

1 Q To that point what had you been able to communicate?

2 A I had been able to communicate that I was having
3 difficulty writing the grant. I didn't think I was going to make
4 the deadline. And if one of them wanted to work on trying to
5 complete the grant, there was enough time for them to do it if we
6 decided someone should do it.

7 Q Did you say anything at that time in terms of how you
8 were feeling?

9 A I certainly told them that I was feeling very bad. It
10 was obvious from looking at -- I did say that I was feeling ill,
11 that I was feeling very bad.

12 Q What was John Stuelpnagel's response to what you said?

13 A John's response was just -- sorry.

14 John began yelling at me. I'd never experienced anything
15 like that before. I certainly had people -- Sorry, I'm getting
16 off topic.

17 John began yelling about not meeting this deadline, and I
18 could see that Mark was clearly uncomfortable with John's yelling
19 and wanted to interrupt, but John stopped him and continued
20 yelling at me, berating me for not meeting this deadline, which I
21 had had for quite sometime, and being in his office and telling
22 him that I didn't think I was going to be able to meet it.

23 Q What do you recall John saying when he was yelling at
24 you?

25 A Well, John looked at me as I'm breaking down in the
26 chair and he looked me straight in the face and says, "Well, then
27 what can you do?" and the intent was really clear that --

28 MS KEARNS: I'll object as to speculation about Dr.

1 Stuelpnagel's intent.

2 THE COURT: It's nonresponsive and speculative as to
3 what someone else's intent was.

4 THE WITNESS: Yeah.

5 MR. PANTONI: Q Tell us again, Dr. Czarnik, what did
6 Dr. Stuelpnagel say to you when he was shouting.

7 A The first thing he said was, "Well, what can you do?"
8 and I just continued to lose it more, and, you know, at that point
9 [it]⁵² became clear that this was not going to be a simple discussion,
10 and so I explained to John and Mark that I had been feeling bad,
11 was obviously really having a hard time, and I suggested that
12 maybe it would be a good time for me to take some sort of a leave,
13 to get back to the point where I was feeling well again.

14 John immediately seized on that as an opportunity, and he
15 said, "Well, you know, Jack Chabala flamed out at Pharmacoepia."

16 Q Who was Jack Chabala?

17 A Jack, I think Jack was the chief scientific officer at
18 a company called Pharmacoepia in New Jersey.

19 Q Had you and Dr. Stuelpnagel discussed Jack Chabala on
20 prior occasions?

21 A Yes, I had asked [John]⁵³ once why Jack Chabala left
22 Pharmacoepia, and John told me it was because Jack's daughter had
23 some kind of mental disturbance.

24 Q All right. So on April 6, 1999, he refers again to
25 Jack Chabala?

26 A Yep.

27 Q What did he say?

28 A He said, "Well, Jack Chabala flamed out at

⁵² Original transcript read, "in".

⁵³ Original transcript read, "Jack".

1 Pharmacopeia. I guess maybe you just shouldn't stay."

2 Q What was your response when John said, "I guess you
3 shouldn't stay"?

4 A Well, I think I realized for the first time that John
5 -- I realized that John didn't want me to get well. He wanted me
6 to leave, to leave the company. And as soon as I realized that, I
7 just said out loud, "I want to stay." In fact, I said "I want to
8 stay" four times in a row.

9 Q What did you mean, four consecutive times?

10 A Yeah, four -- I said, "I want to stay."

11 Q Dr. Czarnik, at any point during this meeting did John
12 Stuelpnagel ever ask you what was wrong?

13 A No.

14 Q Did he ask you why you were crying?

15 A No.

16 Q Did he ask you whether you were having any problems?

17 A No.

18 Q Did Mark Chee ask you any of those questions?

19 A No.

20 Q You say at one point in time Mark Chee attempted to say
21 something?

22 A Yes.

23 Q What did John Stuelpnagel do?

24 A John stopped Mark from talking.

25 Q How did he do that?

26 A He looked at Mark. Mark was beginning to talk. John
27 looked at Mark and he went like this (witness indicating), and
28 Mark stopped talking.

1 Q For the record, you are indicating he held out his hand
2 with his index finger?

3 A Yes. And Mark stopped talking and didn't say anything
4 until John was finished talking.

5 Q How did this meeting end?

6 A It ended by my saying that I felt I had to go home and
7 try to get better. There was no comment from John about this
8 whatsoever. There was no comment to the extent of well, you need
9 to go home, you need to take care of yourself. Literally after I
10 made that statement, "I want to stay," four times, John didn't say
11 anything anymore. I think he realized that I didn't want to go, I
12 wasn't going to leave, and I just said I need to go home and get
13 better, and then I left the office.

14 Q And did what?

15 A Well, I went back to my desk to get some things
16 together so I could go, and Rich Pytelewski, who hadn't known
17 about any of this, came up to me and, his timing couldn't have
18 been worse, Rich essentially said, "You know, I've got
19 responsibility for this chemical safety plan. There's a hundred-
20 page document that needs to be written. I've got too much to do.
21 Here, it's yours."

22 Q Did you respond to Rich?

23 A No, I just turned ashen.

24 Q Then what did you say?

25 A I didn't say anything to Rich. I just slowly walked
26 out of the building and got in my car and drove away.

27 Q Where did you go?

28 A I went home.

1 Q What did you do when you went home?

2 A Got into bed.

3 Q How long did you stay in bed?

4 A For about a day.

5 Q This would take us into April 7 of 1999?

6 Let's take a look please at Exhibit 60. Exhibit 60 is a
7 copy of an e-mail dated April 6, 1999. Did you send this e-mail?

8 A Yes.

9 Q This was the date of the breakdown at John's office?

10 A Yes.

11 Q Where did you send this from?

12 A From my home.

13 Q What was your purpose in sending this e-mail?

14 A Well, I expected that Mark and John had been pretty
15 surprised by what they'd observed, and I wanted to give them some
16 explanation.

17 Q You referred to what you'd experienced in this e-mail
18 as mood swings?

19 A Yeah.

20 Q You didn't use the word "depression"?

21 A No.

22 Q Why not?

23 A Because it has a stigma associated with it.

24 Q All right. The next day when you were at home, what if
25 anything did you do to try to get yourself out of the depression
26 or depressive episode?

27 A Well, I stayed in bed for pretty much the whole
28 morning, and then by noon I was feeling like I should try to get

1 out of the house, so I left the house and I ran an errand, and
2 then came back about half an hour later and then just stayed in
3 bed the rest of the day.

4 Q Did you speak to anyone that day?

5 A Well, that morning I had called Mark Chee, left a
6 message on his answering machine, saying I wasn't going to be able
7 to make it for the weekly company meeting and so would he please
8 run it, and then later that night, at about 10 o'clock, I called
9 one of my brothers, because I was very, very deep in a depressive
10 episode, and was feeling pretty hopeless. And I called one of my
11 brothers who is a physician, and I asked him -- I asked him if I
12 was -- I asked him if he was aware -- I'm sorry (witness
13 crying). I asked him if he was aware of anything I could do on an
14 emergency basis. I asked him if there was anything I could do on
15 an emergency basis to pull out of it.

16 Q Were you suicidal at that point?

17 A Well, it was rough.

18 Q Which brother did you call?

19 A My brother Tam.

20 Q He's a medical doctor?

21 A Yeah.

22 Q And what did you and he discuss?

23 A I asked him if he was aware of any treatments that I
24 could take that would help on a short term basis, because the
25 change in medication takes weeks, and I just didn't really feel
26 that I could make it for weeks, so we talked about different
27 options. And one of the options he talked about is something
28 called shock therapy, and he sort of gave me the pros and cons of

1 that, and then he told me that there was a treatment that used to
2 be used but isn't used any longer, which is to give the patient an
3 amphetamine, which has almost every time it has a very rapid
4 reversal of depression, but it's not used anymore because of the
5 addiction concern with amphetamine, so doctors just don't
6 prescribe it for this use anymore.

7 Q Did you have an amphetamine in the house available to
8 you?

9 A Yeah.

10 Q Did you take it?

11 A The next morning.

12 Q What effect, if any, did that have?

13 A Well, my brother had told me not to take it at night
14 because it's a stimulant and it keeps you up, so I stayed in bed
15 that night, and the next morning I woke up at about 5, just on my
16 own, and he had told me to take it in the morning, so I got up at
17 5 and I took it, and I went back to sleep.

18 Q At some point did you notice that the amphetamine had
19 any effect?

20 A Yeah.

21 Q When did you notice it and what did you notice?

22 A I woke up again at 7, and it was just unbelievable.

23 Q Unbelievable in what sense?

24 A From the sense that over the course of two hours of
25 sleeping, after having been in this for weeks, I went from, you
26 know, being in a fetal position in my bed to feeling like the king
27 of the world, and able to take any task and take on any
28 responsibility. I mean it's just an unbelievable transition that

1 -- it's indescribable almost.

2 Q This would have been April 8, 1999?

3 A The morning, yes.

4 Q After you took the amphetamine and noticed that
5 improvement, what if anything did you do with respect to Illumina?

6 A I was feeling good, so I got in the shower and took my
7 shower, and at the end of the shower I thought[, "Hey, I'm feeling
8 fabulous"⁵⁴]. I mean like I could, you know, weather anything, do
9 anything. So I got dressed and I drove to work, and I got to work
10 and looked to see if I could find Mark and John, because I wanted
11 to explain to them exactly, exactly what had been going on. At
12 that point I was able to say anything.

13 Q What did you do when you returned to work?

14 A I looked for John and Mark, but Mark wasn't there.
15 Mark's schedule often started a little later in the morning. John
16 was there, Rich Pytelewski was there.

17 Q By the way, tell the jury what Rich Pytelewski was.

18 A He was the vice president for operations at Illumina.

19 Q At that time another member of senior management?

20 A That's right.

21 Q Did you meet with John Stuelpnagel and Rich Pytelewski?

22 A That is right. I called them into John's office, and
23 in a very short meeting, maybe five, ten minutes, I said, "Look,
24 obviously this breakdown was something you guys didn't expect. I
25 owe you an explanation. I can give you an explanation today.
26 I've been suffering with depression for 10 years. It has certain
27 side effects, I changed my medication. The medication didn't
28 help, and so what I had experienced the day before was a severe

⁵⁴ Quotation marks added.

1 depressive episode."

2 I told them that I was getting treatment, but it was going
3 to work because it had always worked in the past; that I was back
4 to work, and that I was going to try finishing the grant.

5 Q Did you try finishing the grant?

6 A Yeah.

7 Q What happened?

8 A I wrote it. In fact, I pulled an all-nighter to finish
9 it.

10 Q Did you submit the grant application?

11 A Yes, it was submitted on April 14th.

12 Q Was that on time?

13 A Yes.

14 MR. PANTONI: This might be an appropriate --

15 THE COURT: Okay. We'll take our afternoon recess at
16 this time. We'll be in recess until 20 minutes before 3. Please
17 remember the admonition not to form or express any opinions about
18 the case, not to discuss the case among yourselves or with anyone
19 else. We'll be in recess until 2:40. 2:40.

20 (Recess.)

21 THE COURT: Record will indicate all the jurors are
22 present, counsel and parties present.

23 I received a question from Juror Smith. The question is --
24 This is the only question you can ask. The question is, "Can you
25 ask questions?" The answer is no.

26 Actually, no, I don't want to go into a great deal of
27 detail, but a lot of thought has gone into the procedures that you
28 are implicating here with your question, and for a lot of reasons

1 that I don't really want to go into, it's thought that it's best
2 not to allow jury questions during trial. So the answer is no.

3 You can resume your examination.

4 MR. PANTONI: Thank you, your Honor.

5 Q Dr. Czarnik, when we left off you had testified that
6 April 8th, 1999, you notified John Stuelpnagel and Rich Pytelewski
7 of the fact that you suffer from depression.

8 A That's correct.

9 Q Did you discuss with anyone else affiliated with
10 Illumina that you suffered from depression?

11 A Well, on that day Mark got into the office about an
12 hour or so later.

13 Q Referring to Mark Chee?

14 A Mark Chee. Got into the office about an hour later,
15 and I had intended to [talk]⁵⁵ with Mark and John at the same time,
16 but couldn't. So when I saw that Mark came in, I went to his
17 office, closed the door, really told him exactly what I had told
18 John and Rich. He really had no response, just listened, and I
19 left his office and went back and began working on the grant.

20 Q So for the record, on that same day you told Mark Chee
21 about the depression?

22 A Yes.

23 Q Did you ever tell anyone else affiliated with Illumina
24 during the time you worked there that you suffer from depression?

25 A Yes, I told Deborah Flamino.

26 Q Who is Deborah Flamino?

27 A Deborah is -- Well, at least at the time director,
28 Deborah was the director of human resources.

⁵⁵ Original transcript read, "talking".

1 Q When did you tell Deborah Flamino about your
2 depression?

3 A On April 6, 1999. Excuse me, April 6, 2000.

4 Q About a year after your breakdown?

5 A Yes.

6 Q We'll get to that in connection with your future
7 testimony.

8 Who else, if anyone, did you disclose your depression to in
9 management?

10 A No one.

11 Q Dr. Czarnik, after you disclosed your depression on
12 April 8, 1999, was there a change in your relationship with John
13 Stuelpnagel and Mark Chee?

14 A There was a very big change.

15 Q Explain to the jury how your relationship with John
16 Stuelpnagel and or Mark Chee changed.

17 A John stopped talking with me. It's as simple as that.
18 Whereas up to that point we had been strategizing as a team, John
19 virtually ignored me while we were at the company, just left me
20 where I was working. When we would pass each other in the hall,
21 John would avert his eyes so he didn't have to look at me.
22 Previously John would call me or Mark and I into his office on a
23 regular basis and we would talk through something that had
24 happened or some business development opportunity that had
25 presented itself or some technical problem that looked like it was
26 holding us up. And after that date, that didn't happen any
27 longer, and that would be up to and including applying pressure
28 regarding timelines. Literally John and I just weren't talking

1 after that point.

2 Q Did you continue to attend any regularly scheduled
3 management meetings?

4 A Yes, we had a weekly management meeting. I believe I
5 attended all of them.

6 Q Was there any change in terms of your ability to
7 participate in those meetings after you disclosed the depression?

8 A My opinions had been valued prior to the disclosure and
9 after the disclosure they were no longer valued.

10 Q Why do you say that? How do you know that?

11 A Well, I would be asked my opinion prior to that, and
12 after that date, I was no longer asked my opinion. I was no
13 longer called into John's office for the little impromptu sessions
14 we used to have, setting strategy and talking about patent issues.
15 Those things just stopped.

16 Q What about your involvement in business development
17 activities for the company?

18 A That stopped as well. Up until this point, we had been
19 singly focused on delivering one application, and that was the
20 genotyping application that I described to you. All three of us
21 had been involved in getting other companies interested in us.
22 John, Mark and I went to a company called Novartis here in town
23 and told them about the technology.

24 I gave a talk in April to UCSD, and there was an individual
25 from a company called ABI there, and well before the talk we
26 discussed whether I should actually give the talk, and we
27 discussed[, "Yes, I should give the talk"]⁵⁶ because there could be a
28 business opportunity there. So I gave the talk, and then I

⁵⁶ Quotation marks added.

1 learned some months later in fact they had begun business
2 development activities with ABI. In fact, it led to a very
3 important collaboration, that I literally didn't know about until
4 the point where they were drafting a contract.

5 And that was a complete change from what had occurred prior
6 to that. I had been involved in strategizing, negotiating, all
7 the things that are required for business development activities.

8 Q After your disclosure of depression, prior to Jay
9 Flatley's arrival, in that period of time were you asked to do
10 anything in the way of business development activities with
11 respect to meeting with potential business collaborators?

12 A Well, at that time the company was already looking
13 forward to doing its next round of financing, which occurred in
14 November of 1999, and we were courting two companies, Chevron and
15 Dow, with respect to their making an investment in our company at
16 the next financing. Now, their interest in the technology was
17 from this optical nose end, so --

18 Q None of the jurors knows what the optical nose is.

19 A Sorry. It sounds kind of weird when you hear it for
20 the first time.

21 Q What does the optical nose do, in a nutshell?

22 A It's a way of using the array to sniff chemicals in the
23 air. Instead of having DNA on the beads, you have dye molecules
24 on the beads. When the chemical in the air hits the dye
25 molecules, they change the color, and the pattern in which they
26 change color gives you what it was.

27 Q You testified earlier that the company had decided to
28 focus on the genotyping application.

1 A Yes, that's correct.

2 Q That's what the scientists were working on?

3 A Everyone in the company was working on that.

4 Q Was anyone working on the o-nose projects?

5 A No.

6 Q What were you instructed to do on business development
7 activities after disclosure of the depression?

8 A I was never told this directly, but the only activities
9 I was involved in were this optical nose project. So if Chevron
10 came to town or Dow came to town for a meeting, I'd be asked to
11 participate in those meetings.

12 Q Had you had discussions with John Stuelpnagel and Mark
13 Chee about the optical nose project and importance of that project
14 to the company in the early stages of the development of the
15 company?

16 A Yes.

17 Q What was the consensus of senior management with
18 respect to the importance of the optical nose project?

19 A The consensus was that it wasn't a big market; that
20 working on that project would be a diversion from what we all
21 agreed was the company's focus, which was genomics. But John felt
22 strongly that there was an opportunity to have chemical companies
23 make an investment in Illumina, and so we should continue talking
24 with them about the optical nose.

25 Q Were there any discussions among senior management in
26 terms of whether the company was going to do any research,
27 experiments, scientific development in the o-nose area?

28 A There was a consensus we would actually do research on

1 this topic if one of the chemical companies provided research
2 support to do it.

3 Q After your disclosure of depression, were you asked to
4 become involved in any business development activities with
5 potential business partners that related to the primary
6 application of the company, genotyping?

7 A No.

8 Q Were you asked to do any business development
9 activities that related to any application other than this o-nose?

10 A Nothing in business development.

11 Q After your disclosure of depression, who was involved
12 in the business development activities in the primary application
13 for Illumina, genotyping?

14 A Mark Chee and John Stuelpnagel.

15 Q Prior to your disclosure, before you disclosed
16 depression, were you involved in business development activities
17 relating to the primary application of genotyping?

18 A Yes, we worked on it as a team, all three of us.

19 Q Now, you mention this business collaboration with ABI?

20 A Yes.

21 Q What does ABI stand for?

22 A It stands for Applied Biosciences Incorporated.

23 Q Did you have any discussions with respect to what
24 involvement, if any, you would have concerning ABI?

25 A Well, as I mentioned, in April there was a seminar that
26 I was to give at UCSD in which Mike [Albin]⁵⁷ from ABI was going to
27 be present, and he would have been our contact for business
28 development activities. So we agreed I should give that talk.

⁵⁷ Original transcript read, "Galvan".

1 Q Let me interrupt for a second. Did you agree before or
2 after your disclosure of depression?

3 A Before. Before. That was a long-planned talk.

4 Q Okay. Continue, please.

5 A So I gave the presentation. Mike was present in the
6 audience. And then because Mike and I both served on a special
7 board at UCSD called the Faculty Industry Liaison Board, we were
8 at dinner together that night.

9 Q Before we get to dinner, what did you talk about during
10 the presentation?

11 A Strictly Illumina. I talked about what the company
12 was, what the technology was, that we were focusing on genotyping
13 as its principal application, talked about what we saw as
14 advantages over existing technologies, and really tried to
15 communicate the vision of the company and the excitement that we
16 had for what we were doing.

17 Q And in management discussions with John and Mark before
18 this presentation, was there any talk about whether it was going
19 to be important to specifically pitch or make a presentation
20 geared toward ABI?

21 A The discussion that we had was it was certainly just a
22 good thing that Mike was going to be -- just was going to be in
23 the audience for this meeting, because it was right around the
24 time that we were looking for partners to help us support the work
25 of the genotyping area, and that if I had the opportunity to talk
26 with Mike one-on-one about the company, that I should do it.

27 Q Did you have that opportunity after you gave the talk?

28 A Yes, at dinner.

1 Q What did you do?

2 A Sat next to Mike, asked him if he enjoyed the talk. He
3 said he did enjoy the talk. I asked him if this was an area that
4 they were interested in. He said yes, it was an area that we were
5 interested in.

6 I said, "Well, is there any information I can give you?"

7 He said, "I think I'd like to follow-up on this and learn
8 more," and at that point I gave him John Stuelpnagel's name and
9 said, "John is the person you should communicate with."

10 Q Now, after that point, and after you disclosed your
11 depression to the company, did you attempt to get involved in the
12 negotiations with ABI?

13 A Well, I didn't actually know that negotiations with ABI
14 had begun until they were quite well underway.

15 Q How did you find out negotiations were underway?

16 A I think I learned from -- just from one of the
17 administrative assistants that John and Mark were gone up to
18 Foster City, which is where ABI is located. When they came back,
19 I asked John if they had been up to ABI, and John said yes, they
20 had. I asked him we were having negotiations with them, and John
21 said yes, we are.

22 I said, "Well, you know, I've been involved in this, I want
23 to be involved in the discussions with ABI." Not only because I'm
24 part of this team, not only because I was involved in helping to
25 bring ABI to the company, but what we were going to need to
26 deliver to ABI was actually primarily in the chemistry regime and
27 I was going to be responsible for delivering what we needed to
28 give them.

1 Q What was John's response when you asked to be allowed
2 to participate in these discussions?

3 A John didn't respond. I said this directly to John's
4 face, and John just gave me one of his grimaces and walked away.

5 Q Were you ever asked to participate in the ABI
6 negotiations?

7 A I was asked to participate at the point when there had
8 been a set of draft goals exchanged by the companies.

9 Q What was the extent of your participation at that
10 point?

11 A It was essentially to comment on the goals. I mean
12 these were going to be largely things that I was responsible for
13 delivering, so the draft was passed by me for any comment.

14 Q Were these internal discussions with Illumina people or
15 discussions with ABI that you were involved?

16 A Internal.

17 Q Were you ever asked to attend any meetings or give any
18 presentations or participate in anyway in the negotiations with
19 ABI?

20 A Pre-deal, no. Post-deal, when we were talking about
21 implementation, yes, I was invited up to ABI once.

22 Q But after the deal had been cut?

23 A After the deal had been cut.

24 Q Did you come to learn, Dr. Czarnik, that the company
25 had awarded any sort of stock grants in connection with the ABI
26 deal?

27 A Yeah, in roughly early September of '99, John and Mark
28 got Rich Pytelewski and I in a room and John simply announced that

1 he and Mark were each getting a hundred thousand share grants for
2 closing the ABI deal, and it was shocking.

3 Q What, if anything, were you awarded in way of a grant
4 with respect to ABI?

5 A Well, there was each Rich and I were each given a block
6 of 25,000 shares, tied with achieving the goals of the deal.

7 Q Not tied with closing the deal?

8 A No.

9 Q Tied to performing on the deal?

10 A Correct.

11 Q All right, Dr. Czarnik. You mentioned before that
12 prior to your disclosure of depression you were involved in
13 discussions about raising money, financing.

14 A Yes.

15 Q And you were involved in the second round of financing,
16 a series B round?

17 A Yes, I was involved in planning for it, in making
18 presentations for it, everything, to the best of my knowledge, to
19 the very end of the closing.

20 Q It's a round that netted around \$9 million?

21 A Right.

22 Q After your disclosure of depression, did the company
23 have another round of financing?

24 A Yes, it closed another round of financing in November
25 of '99.

26 Q A series C financing round?

27 A Right.

28 Q Third financing round?

1 A Right.

2 Q Were you asked to be involved in any way, shape or form
3 with respect to this next round of financing after your disclosure
4 of depression, the series C round?

5 A No, I wasn't asked to be involved with it in anyway.

6 Q Now, you are aware at some point in time Illumina hired
7 a new CEO?

8 A Yes.

9 Q Jay Flatley?

10 A Yes.

11 Q Did you know the company was searching for a new CEO?

12 A There had been -- We had had general talks from early
13 on that at some point we would need to have a new CEO to take the
14 company public.

15 Q And Jay Flatley came on board when as CEO of Illumina?

16 A Jay was in an office at Illumina starting about the end
17 of September, '99, and he began work in the middle, formally in
18 the middle of October of '99.

19 Q So this was five or six months after your disclosure of
20 depression?

21 A Yes.

22 Q Were you involved at all in management discussions
23 about who the new CEO should be?

24 A No.

25 Q Now, after Jay Flatley came on board at Illumina, in
26 the immediate aftermath of him coming on board, what was the
27 nature of your interactions with Jay Flatley, if any?

28 A From the time that Jay occupied an office in the end of

1 September to the middle of October when he formally started, Jay
2 had roughly 15-minute talks with everybody in the company, and so
3 I had one of those 15-minute talks with him.

4 Q One 15-minute talk?

5 A That's right.

6 Q And you were still the chief scientific officer of
7 Illumina at that point?

8 A That's correct.

9 Q At any point in time after Jay Flatley came on board as
10 the new CEO, did he sit down with you to get a briefing on the
11 science of Illumina?

12 A No.

13 Q Did he ever ask you about the state of the experiments
14 being conducted?

15 A Certainly nothing with regard to what the company was
16 working on, which was genomics.

17 Q Did Jay Flatley meet with you to talk about what he
18 viewed to be his -- strike that.

19 Jay Flatley talk to you and tell you what his view would be
20 of what role you would have as chief science officer under his --

21 A No, at no point.

22 Q Take a look at Exhibit 85, please.

23 Scroll down to the bottom. At the bottom of this exhibit it
24 appears to be an e-mail dated September 24, 1999, subject work
25 schedule.

26 A Right.

27 Q Did you send that e-mail to Jay Flatley?

28 A Yes.

1 Q Did you send it to his home e-mail address, work e-mail
2 address?

3 A At that time I only had Jay's MSN address.

4 Q Which was what?

5 A JayFlatley@MSN.com.

6 Q I mean his home or his business?

7 A I wasn't aware if he had an Illumina address, so I had
8 only the MSN address.

9 Q The e-mail refers to a meeting or discussion that
10 morning?

11 A Right.

12 Q "One area I had intended to address this morning is my
13 standard weekly work schedule." Is that the 15-minute meeting
14 you referred to earlier?

15 A Yes.

16 Q You described your work schedule as typically being
17 there from 8 in the morning until 7 at night, and some part of
18 Saturday morning?

19 A That's right.

20 Q What was your purpose, in any event, in sending an
21 e-mail to Jay Flatley dealing with your work schedule?

22 A Primarily I wanted to make sure that I got off to a
23 good start with the new CEO. I was really hoping, really hoping
24 that having a new CEO would mean that we could get off to a fresh
25 start on the company management, one that wasn't colored by things
26 that had happened before he got there, and my motivation was
27 really just to let Jay know what I thought was a good job and make
28 sure that he agreed it was doing a good job.

1 Q Your reference to taking an hour mid-afternoon swim,
2 when did you begin that practice?

3 A In early September.

4 Q Why did you begin that practice of taking a mid-
5 afternoon swim?

6 A Well, I had a membership at the Shiley Center on North
7 Torrey Pines, and I had been going to swim over my lunch hour.
8 But ever since the episode with John in his office, I was having a
9 really terrible stress headache in the late afternoon of every
10 day, and this is three years later and I have this damn headache
11 every day still at about -- starting at about 3 o'clock. So I had
12 been talking with my doc about it for sometime, and he suggested
13 that, you know, standard over-the-counter headache medicines don't
14 help, try getting out and getting some activity about the time
15 that it starts to set in. So I was letting Jay know that I was
16 experimenting with trying this in the middle of the afternoon,
17 really in lieu of a lunch hour.

18 Q All right. Scroll up that exhibit. There appears to
19 be an e-mail from Jay Flatley to you dated September 26, 1999.

20 A No. This was an e-mail I think Jay just in error sent
21 to a different address and they recorded it to me October 19.

22 Q He recorded it to you later?

23 A Right.

24 Q So you received this e-mail on October 19th, 1999?

25 A Right.

26 Q An e-mail you received, Jay indicated he had no problem
27 with the work schedule that you described?

28 A Right. This was really the day after Jay formally

1 started working.

2 Q What day did Jay formally start working as an employee?

3 A October 19th.

4 Q 1999?

5 A Right.

6 Q Exhibit 89, please. Did you send this e-mail to Jay
7 Flatley on his first day at work?

8 A Yes.

9 Q Requesting a lunch meeting with him?

10 A Yes.

11 Q Why did you request the lunch meeting?

12 A Well, Jay had occupied an office as of about three
13 weeks prior to that, and he wasn't in every day, but he was in
14 most days, and early on he was busy unpacking his boxes, et
15 cetera, and I expected he just needed sometime to set up his
16 office. But by the time he started working, it had been three
17 weeks, and he had never asked me to come in and talk with him in
18 my role as chief scientific officer, about the company or about
19 his plans, et cetera, and I thought well, gee, maybe I better take
20 a little initiative here and set up an appointment where I talk
21 with him.

22 So I sent him an e-mail and said I'd like to get together
23 and let's talk.

24 Q Did you have lunch with Jay Flatley later in October of
25 1999?

26 A Yes.

27 Q Can you tell the jury a little bit about what was
28 discussed in that lunch with Jay Flatley in October, 1999?

1 A We talked about some of the early days at the company.
2 I talked about what I thought were some of the key areas where we
3 really needed to focus resources to solve problems. We were not
4 really doing the main thing the company needed to do very well,
5 which was to decode beads in an array, and it was an essential
6 activity for the company. So I was making it clear to Jay that I
7 thought this area needed some resources, gave him my ideas about
8 how we would go about doing that.

9 We talked some about personnel in the company. We talked a
10 little about Rich Pytelewski. And really that was about it.

11 Q Then you returned to the office at Illumina?

12 A Yes.

13 Q Did you have any further discussion with Jay Flatley
14 when you returned to Illumina after this lunch?

15 A There were two important things. One is we left the
16 restaurant, Jasmine, great place, and we got in the car and
17 started to drive off, and --

18 Q You drove in the same car?

19 A We drove in my car.

20 Q Did you have a discussion in the car?

21 A We had a brief discussion before we started the drive
22 back to work. And I turned to Jay and said, "One other thing that
23 might be good for you to know about me is that I can be kind of
24 cynical sometimes," and Jay looked at me and said, "Are you sure
25 it isn't more than that?"

26 Q What's your response?

27 A I said, "Well, there's really nothing I want to talk
28 about with you right now," and he said, "Well, how will I know

1 when you are feeling this way?" and I said, "Over the years I've
2 gotten good at gaging it. I'll let you know."

3 Q Did anybody use the word "depression" in that
4 discussion?

5 A No.

6 Q Did you have any further discussion with Jay Flatley
7 that day?

8 A Well, when we got back to work, I thought it had been a
9 pretty good lunch, except for the realization that Jay obviously
10 was aware that I had a medical issue. When we got back to work,
11 just before I went back to my desk, Jay said, "So are you the kind
12 of guy who needs a weekly meeting or can we just have kind of an
13 informal get-together when I think things aren't going the way
14 they should be going?"

15 I said, "I'm fine just getting together when you think that
16 -- when you think it's important."

17 But after Jay had said that about regarding, you know, are
18 you sure it isn't more than that, I thought gee, I better be a
19 little proactive about this, and I said, "We have to have an
20 understanding, and that is that unless I hear from you, I can
21 assume I'm doing an excellent job," and Jay said, "Okay, fine."
22 And then we ended that session.

23 Q So did you have weekly meetings at that point?

24 A No, no weekly meetings.

25 Q Dr. Czarnik, did Jay Flatley ever use you as a true
26 chief scientific officer?

27 A No, he didn't.

28 Q Did Jay Flatley ever ask for your input on scientific

1 matters?

2 A We had a very brief discussion of the optical nose at
3 one point, but we really had no discussions about genotyping.

4 Q Did you have any discussions about -- strike that.

5 Did Jay Flatley ask for your input with respect to decoding
6 at any point in time?

7 A No. I did offer comments about decoding, but there
8 weren't any asked for.

9 Q Dr. Czarnik, do you recall that after Jay Flatley
10 started as the new CEO, he put together a number of project teams
11 to work on various projects?

12 A Yes.

13 Q What type of project teams were formed?

14 A There were an ABI project team, there were fiber team,
15 bead team, DNA synthesis team. Teams addressed that central
16 technological challenges of the company.

17 Q Were you asked to head up any of those teams?

18 A No, none.

19 Q Were you put on any of those teams?

20 A No.

21 Q When did Jay Flatley put together these project teams?

22 A In January of 2000.

23 Q Were any projects or areas of responsibility that you
24 had had before Jay Flatley, were they taken away from you in
25 January of 2000?

26 A Yes. Two major areas of technical responsibility
27 related to genotyping.

28 Q What were those two areas that were taken away from

1 you?

2 A The whole area for oligo synthesis, the oligator
3 project, was taken away from me.

4 Q This is the area headed by [Michal]⁴¹ Lebl?

5 A That's right.

6 Q Who was [Michal]⁴¹ Lebl reassigned to?

7 A To report directly to Jay.

8 Q Were any other responsibilities taken away from you in
9 January of 2000?

10 A Yes, at that point my group was responsible for
11 synthesizing a type of DNA called a decoder, which is a little
12 piece of DNA that has a dye at the end of it, and my group was
13 responsible for making those.

14 Q Was that an important scientific area the Illumina?

15 A Critical, because --

16 Q In what sense?

17 A It was critical because assembling arrays is great, but
18 unless you can decode them, the array has no value. We have to
19 know what's where for doing genotyping experiments.

20 Q Had that been your area of responsibility from the
21 beginning of your employment?

22 A No. Early on they had been purchased, so that people
23 who needed them paid an external company to make these, but by the
24 end of 1999, when the oligator was successfully making oligos,
25 then it became my responsibility to use those oligos and turn them
26 into decoders.

27 Q All right. In that second area, turning the oligos
28 into decoders, it was taken away from you, who was it assigned to?

1 A To Mark Chee.

2 Q Now, you had described earlier, Dr. Czarnik, that prior
3 to your disclosure you had been involved in recruiting new
4 scientists to the company and interviewing new scientists?

5 A Prior to my disclosure, yes.

6 Q What about after disclosure?

7 A Yes.

8 Q How many new scientists were hired after your
9 disclosure, while you still were CSO?

10 A Well, during 1999, we probably hired on the order of 15
11 scientists and engineers.

12 Q Let's take a look, please, at Exhibit 111. Do you
13 recognize what Exhibit 111 is, Dr. Czarnik?

14 A This was the opening slide, the title slide for a
15 presentation that Jay gave at a venture capital conference or
16 biotech conference.

17 Q Could you move to the next page, please. You recognize
18 this as one of the slides from that presentation?

19 A Yes.

20 Q The first bullet point talks about who founded the
21 company.

22 A That's correct.

23 Q It says the company was founded by John Stuelpnagel and
24 Mark Chee?

25 A Yes, it does.

26 Q Now, how did you come to see this slide?

27 A Well, in early February, John invited me to join an on-
28 site presentation to another company.

1 Q Who invited you?

2 A John Stuelpnagel invited me to a company was coming on
3 site and he asked me if I wanted to sit in on it, so I did.

4 Q Actually let's take a look if we could move to Exhibit
5 128. You recognize this Exhibit 128?

6 A Yes.

7 Q Did you receive the bottom e-mail, the e-mail from John
8 Stuelpnagel to yourself sent on February 8, 2000?

9 A Yes.

10 Q His is an e-mail inviting you to a presentation that
11 was going to be made?

12 A Yes.

13 Q To Caliper Technologies?

14 A That's right.

15 Q Now, at any point in time after you disclosed your
16 depression to John Stuelpnagel, had he invited you to any other
17 company presentations that were being made to possible business
18 collaborators?

19 A No.

20 Q This is the first invitation you received to attend
21 such a presentation after you disclosed the depression?

22 A Yes.

23 Q Did John Stuelpnagel use slides at that presentation?

24 A Yes.

25 Q What slides did he use?

26 A I came to learn later that he used the slides for the
27 talk that Jay had given at this biotech conference.

28 Q Including the slide that listed only himself and Mark

1 Chee as founders?

2 A That's correct.

3 Q What did you do, sir, after you saw this slide that
4 only John and Mark had been listed as founders?

5 A Well, sir, I was absolutely flabbergasted. I was
6 sitting in the presentation, and that slide went up, and I saw
7 that, and I had a flash of anger, because John Stuelpnagel is a
8 meticulous man, and it's beyond my comprehension that he might
9 have noted -- he might have missed that as an error. So I was
10 very angry, very angry, but I didn't say or do anything during the
11 presentation.

12 Q John Stuelpnagel conducted this presentation?

13 A Yes.

14 Q What if anything did you do after the presentation?

15 A Literally as soon as the presentation was over, I sent
16 John an e-mail and I said, "You know, I don't normally learn new
17 things in these kind of presentations, so I was really surprised
18 to see I was no longer a founder of the company, and would you
19 please change that so you don't make that mistake again."

20 Q Exhibit 131, please. You recognize Exhibit 131?

21 A Yes.

22 Q The bottom e-mail sent February 18, you sent that to
23 John Stuelpnagel?

24 A Yes.

25 Q That's the e-mail you just described where you asked
26 him to change that slide?

27 A Yes.

28 Q But received this response, this responsive e-mail from

1 Jay Flatley the same day regarding the slide change?

2 A Yes.

3 Q He said it's his error?

4 A Yes.

5 Q And he'd fix it?

6 A Yes.

7 Q At that point did you have any discussion with Jay
8 Flatley about this error?

9 A No. Jay said it was an error. I assumed he would fix
10 it.

11 Q Dr. Czarnik, do you recall a dinner you had with Jay
12 Flatley in February of 2000?

13 A Yes.

14 Q You recall the date of that dinner?

15 A I think it was February 7.

16 Q Where was the dinner held?

17 A At a restaurant called [Daley's]¹³.

18 Q So in terms of the chronology, that dinner would have
19 been before Jay sent you this e-mail saying he made this error?

20 A Right.

21 Q Who set up this dinner that Jay Flatley on February
22 7th, 2000?

23 A Jay did.

24 Q Could you tell the jury what was discussed at this
25 dinner meeting with you and Jay Flatley in February, on February 7
26 of 2000?

27 A Yes. Jay and I met at [Daley's]¹³. We ordered. We had
28 some small talk. The subject turned very quickly to my

1 depression, and --

2 Q Who brought up the subject of your depression?

3 A Jay brought it up.

4 Q Did Jay Flatley use the word "depression" in this
5 dinner on February 7th of 2000?

6 A Yes, he did.

7 Q What did he say about depression?

8 A Jay asked me how I was dealing with the depression, and
9 I said I was doing fine, that the new medication had kicked in,
10 and I was doing great. He then asked me if I thought that my
11 episode of depression had been work-related, and I said that based
12 on my reading, that episodes could be either not a function of the
13 environment at all or could be a complex function of brain
14 chemistry and being in a stressful environment.

15 Q And you had never told Jay Flatley you suffered from
16 depression?

17 A No.

18 Q After Mr. Flatley asked you about your depression, what
19 else, if anything, did you talk about at the February 7 dinner?

20 A Well, the morning of February 1st I'd had breakfast
21 with David Walt, who is scientific founder of the company,
22 academic, head of the scientific advisory board. And David had
23 had something that he wanted to talk with me about for a couple of
24 weeks, but we hadn't had an opportunity to speak. So we had
25 breakfast, and at that breakfast David asked me on February 1st if
26 I were still interested in the company, and I was shocked, but I
27 assured him I was not only totally interested in the company but
28 very highly what we call incentivized to make the company

1 successful.

2 So I told Jay that I'd had the breakfast with David and
3 David had asked me that question, and Jay then asked me if I was
4 interested in staying with the company, and I told Jay the same
5 thing, I was very interested in staying with the company and had
6 very strong motivation to see the company be successful.

7 Q Did you and Jay Flatley talk about your role at
8 Illumina?

9 A Yes, we did.

10 Q What did you say about that?

11 A Jay and I had a conversation at Illumina about two
12 weeks prior to this, about the middle of January, and by this
13 point, it was pretty clear that Jay wasn't using me as a CSO. He
14 just wasn't using me in that capacity. It would have been foolish
15 for him to interact with me the way that he did. And my
16 conclusion, which is a very logical one in this industry, is that
17 he had made the decision he wanted to bring in someone he knew as
18 the CSO, and frankly that's his right, he has the right to bring
19 in someone he wants for his CSO.

20 So in the middle of January I took Jay aside and I said,
21 "Look, you must be thinking about this. If you decide you want to
22 have your own CSO, chief scientific officer, I want what's best
23 for the company. If you decide you want to assign me to a new
24 role, something that is good for the company, I'm not going to
25 fight it. Let do it."

26 So at this dinner on the 7th, that was the topic that Jay
27 and I discussed.

28 Q And who brought up that subject?

1 A Jay brought it up.

2 Q What did he say?

3 A He asked me if what I had said several weeks previous
4 was sincere, if I really meant it. So first I had told him yes, I
5 was very interested in the company, very strongly motivated to
6 make it successful. He asked if I was still sincere about the
7 offer I made, I said yes.

8 The only position he and I had talked about was vice
9 president of chemistry, and Jay said well, would you still be
10 interested if it wasn't a management position. You know, I knew
11 that wasn't good, but at the same time I was one of the people who
12 founded this company, and to be perfectly frank, CEO's come and
13 go, and if for whatever reason Jay was not happy with me in a
14 management position, that could be completely different in a year.

15 So I wanted to stay with the company, and I told Jay that if
16 he wanted me in a non-management role, something that would help
17 us to solve the big scientific problems we had, I'd be willing to
18 do that.

19 Q Did you talk about what your new position might be?

20 A Well, we talked about what an appropriate title might
21 be, because neither of us had talked about it previously, and I
22 suggested to him that in large companies, when a scientist reaches
23 the highest level possible, it's called research fellow, and
24 that's on the scientific ladder the same place as a vice
25 president. So I said I'll take this position on the scientific
26 side that's on the same level as a vice president level, and Jay
27 didn't really accept that or turn it down, he just took it in.

28 Q Did you have any discussion at that point, again the

1 dinner on February 7, about who the new CSO, chief scientific
2 officer, would be?

3 A No. But I simply told Jay if he was thinking about a
4 CSO, I'd really like to be involved in the search, because I cared
5 a lot about the company, frankly I know a lot of scientists, so I
6 have a good network of identifying people, and I was also trying
7 to follow John Stuelpnagel's lead. John had been the acting
8 president of Illumina, and when he hired Jay, he stepped back to
9 be vice president of business development.

10 Well, this was not only, you know, a semi-noble thing for
11 John to do, but it was also very realistic. It almost never
12 happens that someone who founds a company stays on as CEO. It
13 almost never happens.

14 So John stepped back, and the venture guys who invested in
15 the company saw that and said[, 'This is really great, John, that you
16 did this on your own, we didn't have to kick you out, there's
17 25,000 shares of stock']⁵⁸.

18 I told Jay I'd like to follow that lead, that if someone was
19 going to be brought in at a more experienced level, I'd like to be
20 involved in finding that person.

21 Q Did Jay Flatley tell you anything to the effect that he
22 had already been in discussions with anyone about the CSO
23 position?

24 A No.

25 Q What did Jay say when you asked can I please be
26 involved in a search for the new CSO?

27 A I don't recall any answer to that question.

28 Q Do you know, Dr. Czarnik, whether any new members of

⁵⁸ Quotation marks added.

1 the board of directors of Illumina were added after Jay Flatley
2 came on board?

3 A There were two. The one who was added while I was
4 still there is a person named George Poste.

5 Q When was George Poste added to the board of directors?

6 A In early 2000.

7 Q And did you play any role whatsoever with respect to
8 discussions with this potential new board member, interviews with
9 this potential new board member, anything?

10 A No.

11 Q Were you asked to meet with George Poste?

12 A No.

13 Q Before he came on as a board member?

14 A No, I wasn't.

15 Q Do you know anything about George Poste's background?

16 A He is an eminent scientist, he serves on various
17 presidential commissions, et cetera. I believe at one time he was
18 head of all research at a large pharmaceutical company called
19 Smith Kline Beechum.

20 Q So he had a scientific background?

21 A He's a scientist.

22 Q When George Poste came on board as a new board member,
23 were you still the chief science officer?

24 A I don't know whether Dr. Poste actually started in
25 February of 2000 or April of 2000. If it was February, yes. If
26 it was April, no.

27 Q In any event, you were either chief science officer or
28 research fellow?

1 A Yes.

2 Q Both involving scientific responsibilities?

3 A That's correct.

4 Q Move to Exhibit 178, please. The next page.

5 Do you recognize this document, Dr. Czarnik?

6 A Yes.

7 Q You can take a look at the one in the binder. I think

8 it's in --

9 A What's the number?

10 Q 178.

11 Q It's not the best color. You can tell the jury what
12 those colors are.

13 In any event, let's talk about the goal-setting process at
14 Illumina before I ask you specifically about this. Had you had
15 written goals before Jay Flatley came on board at Illumina?

16 A There was an effort in the summer of '99 by John to
17 create written goals, but we actually never completed that
18 process.

19 Q You started the process but didn't complete it?

20 A Right.

21 Q What did you do in the summer of 1999 in an effort to
22 try to set written goals?

23 A I wrote a set of draft goals based on what the company
24 needed to achieve and based on the resources I had and sent them
25 to John. I think everyone did that, and John commented on it and
26 sent it back.

27 Q How about for the year 2000, did you have written goals
28 going into that year?

1 A Not going into the year.

2 Q When did you first get written goals with respect to
3 2000?

4 A Well, this was near the end of January, and Jay was
5 preparing for his February board meeting.

6 Q You are speaking of this exhibit, Exhibit 178?

7 A Right.

8 Q What is this document?

9 A This is a document that I prepared in response to Jay's
10 request from everyone for goals, so Jay said we've got an upcoming
11 board meeting. In fact it was kind of last minute because we had
12 to stay until quite late to work on these things. So he asked
13 each of us to put together a set of goals based on the format
14 we've been using, and I composed this, sent it to Jay for
15 inclusion in the goal packet.

16 Q Did you hear back from Jay with respect to the goals
17 for 2000?

18 A Yes. A little bit later that night I got an e-mail
19 back from him saying I've just reformatted these, but same
20 content.

21 Q The right-hand column, Dr. Czarnik, where it says
22 "Status" at the top?

23 A Right.

24 Q What does that reflect?

25 A Well, in the company we used colors to try to represent
26 whether we were meeting these goals or not. The green meant
27 everything is fine. Yellow meant there's some danger that we're
28 not going to hit the goal, and red meant obviously you don't --

1 warning, we're not going to hit this goal in time, we need to deal
2 with it.

3 Q You are talking about this key portion down here?

4 A Yes.

5 Q And white meant what?

6 A That it was done.

7 Q In terms of your status as to these goals, are there
8 any red boxes?

9 A No.

10 Q Are there any yellow boxes?

11 A One yellow box.

12 Q That is one goal that needed attention?

13 A Correct.

14 Q And this color is reflected as what?

15 A I'm sorry, which color?

16 Q These here.

17 A Those are all green.

18 Q And those green status boxes indicate what?

19 A That I didn't foresee any difficulty in our actually
20 achieving that goal within the timeline.

21 Q Of course if it's white or appearing blank up here,
22 it's already been completed?

23 A Right.

24 Q Those were goals that applied to you still when you
25 were chief scientific officer?

26 A These are goals I created as chief scientific officer.
27 While I was chief scientific officer, based on prioritization of
28 projects.

1 Q Did you ever hear back from Jay Flatley these goals
2 were in anyway inappropriate in any way, shape or form?

3 A No.

4 Q Exhibit 136, please.

5 You recognize this document, Exhibit 136?

6 A Yes, I do.

7 Q On the bottom is that an e-mail you sent to Jay Flatley
8 on February 28, 2000?

9 A Yes.

10 Q What's the purpose in sending that e-mail?

11 A I was reiterating the offer I had made in the middle of
12 January, and on February 7, that if Jay wanted to search for his
13 own CSO, that I wanted to take the lead in that search.

14 Q Where you say the symmetry makes sense, what were you
15 referring to?

16 A I had talked with Jay specifically in January about the
17 fact that John had stepped back to allow a more experienced person
18 to be CSO. It had certainly appeared that Jay wanted to bring in
19 his own CSO, and I wanted to play the same role in terms of
20 finding my replacement.

21 Q By this point in time, February 28, 2000, did you know
22 whether Jay had been interviewing anyone for CSO or had contacted
23 anyone for CSO?

24 A No.

25 Q Did he send you an e-mail back the same day saying he'd
26 like to speak with you about this when he returned to the office,
27 correct?

28 A Right.

1 Q Did he speak to you when he returned to the office?

2 A Yes.

3 Q When did he speak to you?

4 A On the morning of March 1st. It was a Wednesday.

5 That's a leap year.

6 Q So two days later?

7 A Right.

8 Q And what did Jay Flatley say to you when he spoke to
9 you about this?

10 A He said -- He said, "You are no longer CSO." He said,
11 "The new CSO is coming in tomorrow and I'd like you to create the
12 schedule for his visit."

13 Q Who was the new chief scientific officer?

14 A Scientist named David Barker.

15 Q Now, Dr. Czarnik, when you and Jay Flatley talked about
16 you stepping down at CSO, did you talk about any change in your
17 compensation?

18 A No.

19 Q At what point in time, if any, did Jay Flatley tell you
20 that he had in mind any changes in your compensation?

21 A On March 1st at the meeting at which he told me I was
22 no longer CSO.

23 Q What did he say?

24 A He said your new position is research fellow, your new
25 salary is \$20,000 less, and we're going to buy back something on
26 the order of 150,000 shares of stock from you that you won't be
27 able to keep.

28 Q 150,000 shares?

1 A Right.

2 Q What percentage of shares that you still had [not]⁵⁹ vested did
3 150,000 shares reflect?

4 A About two-thirds.

5 Q So he was telling you he was going to buy back
6 two-thirds of the remaining stock that you were going to vest?

7 A That's right.

8 Q And you would keep one-third?

9 A Right.

10 Q Exhibit 143, please.

11 The bottom of this exhibit, does that reflect an e-mail that
12 you sent to Jay Flatley on March 2, 2000?

13 A Yes.

14 Q So this would have been the day after he told you about
15 his proposed cut in your stock?

16 A Yes.

17 Q You indicate, "Most of what we discussed yesterday
18 seems fine, but the stock offer is demonstrably incorrect based
19 just on good accounting." First of all, what did you mean when
20 you said most of what we discussed seems fine?

21 A Well, we had talked previously about my stepping into
22 the research fellow position, and I had already told Jay if that's
23 what you think is best for the company, then that's what I'll do.
24 So that wasn't really a big surprise.

25 The decrease in salary and stock was a big surprise. It was
26 a big surprise. Frankly, if I had had any inkling that Jay was
27 planning on doing this, I probably wouldn't have been quite so
28 generous to offer to step back as CSO. We had never discussed

⁵⁹ Original transcript did not include the word, "not".

1 this previously, and this really just came like a bolt from the
2 blue.

3 So what I had concluded that night after talking with my
4 wife, that initially I did, I think what most people do, which is
5 just to sort of rationalize this and say well, he's the CEO and
6 maybe he knows best, and maybe he really is doing this for some
7 good reason that I can't see, but it must be there, and then the
8 more I thought of it, the more I thought you know, there's no good
9 reason for cutting back on the stock like this. The salary, maybe
10 you can argue. Comps, maybe you can argue. The industry
11 standard, this sort of thing. But that stock is set at the time
12 you join a company, and [there]⁶⁰ is a very well-used saying in the
13 venture community, which is, if somebody is unhappy with a deal
14 later, the response is, "This deal was okay then, why isn't it
15 okay now?"

16 The reality was that I had signed onto Illumina as a founder
17 when there was nothing there, I signed on in large part because of
18 the ability to buy 400,000 shares of stock, and Jay was saying you
19 know that's changing, and the more I thought of it, the more I
20 thought I can accept a lot, but this is just plain not right. Not
21 only is it not right, it costs the company next to nothing to --
22 whether I have the additional shares or not. And so this can't be
23 done for some good, justifiable reason.

24 Q Let move to Exhibit 144.

25 Dr. Czarnik, you are looking at the bottom half of this. Do
26 you recognize this as an e-mail you sent to Jay Flatley the next
27 day?

28 A Yes, I do.

⁶⁰ Original transcript read, "his".

1 Q March 3, 2000?

2 A Yes.

3 Q You request a meeting?

4 A Yes.

5 Q What was your purpose in requesting a meeting?

6 A Well, by March 3rd, there was simply no doubt but that
7 what I thought had occurred, which is that Jay had come on with a
8 clean slate, was evaluating people based on what they had done,
9 that that just plain couldn't be the case because Jay hadn't
10 interacted enough by this point for him to have made a decision.
11 I mean I was just never used in the capacity up to that date that
12 I know I was capable of and what I signed on for.

13 So much as I hated to do it, the conclusion was actually
14 completely inescapable, which is that Jay had made this decision
15 to replace me long before this date and that there had been a
16 communication between him and John about what had occurred the
17 previous year.

18 So at this meeting, what I was planning on doing was saying
19 look, I haven't shared anything negative with you about John.
20 There's been a lot, but I haven't shared any of it with you. For
21 the first time I'm going to sit down and tell you some of what
22 happened before you got here, because it's not fair, you should be
23 making a decision based on getting information from one person and
24 not be soliciting it from another person. So what I was planning
25 on doing was both listing what I had contributed to the company
26 and also what my interaction with John had been like and how he
27 had really behaved in a very inexcusable manner, and I had planned
28 on sharing that with Jay at this meeting, so I told him you are

1 going to hear this, and if you want to invite John to this meeting
2 as well, because I want this to be sort of full public disclosure.

3 MR. PANTONI: Your Honor, actually this would be a very
4 convenient breaking point if it's acceptable.

5 THE COURT: Okay. We'll take our recess at this time,
6 ladies and gentlemen. Remember we're not in session tomorrow,
7 which is Thursday. There's other matters previously scheduled.
8 We're not in session on Friday.

9 We'll resume on Monday morning at 9:00 a.m. Monday at 9:00
10 a.m. Please remember the admonition not to form or express any
11 opinions about the case, not to discuss the case among yourselves
12 or with anyone else. We'll be in recess until 9:00 a.m. Monday
13 morning, 9:00 a.m.

14 You can leave your notebooks on your seats. They'll be
15 there for you when you return. Have a pleasant weekend. We'll
16 see [everyone]⁶¹ at 9:00 a.m. Monday morning.

17 (Proceedings resumed outside the presence of the jury.)

⁶¹ Original transcript read, "I".

3 DIRECT EXAMINATION (Continued)

4 BY MR. PANTONI:

5 Q Morning, Dr. Czarnik. When we left off yesterday, we
6 were talking about some events that occurred when Jay Flatley had
7 already become CEO. I need to backtrack a bit and cover a few
8 items that occurred earlier in time.

9 You testified that when you had your breakdown in April of
10 1999, you were working on a particular grant application?

11 A That's correct.

12 Q I'd like to take a look at that grant application,
13 please. It's Exhibit 61.

14 Can you identify what Exhibit 61 is, Dr. Czarnik?

15 A It's an application to the National Institute of
16 Standards and Technology asking for support of a research program
17 at Illumina that we were hoping to run.

18 Q This was the project you were working on in April of
19 1999 when you had your breakdown?

20 A The writing of this grant is what I was working on,
21 yes.

22 Q I'd like to scroll through the document, get an idea
23 what the grant application looks like.

24 Stop here. This is the beginning of a particular section of
25 the application?

26 A Yes, this is the executive summary.

27 Q You had to draft that from scratch?

28 A Yes.

1 Q Continue on, please.

2 These are all portions you drafted?

3 A Yes.

4 Q The scientific charts and graphs, did you prepare those
5 yourself or did you obtain those?

6 A I prepared them myself.

7 Q For the record, how many pages was the grant
8 application you prepared? It's Exhibit 61 in your binders.

9 A 46 pages.

10 Q That grant application, was that submitted on time?

11 A Yes.

12 Q Now, you mention on the first day of your testimony
13 that there was a period of time after you disclosed depression to
14 Dr. Stuelpnagel and Dr. Chee that Dr. Stuelpnagel didn't talk to
15 you?

16 A Yes, that's correct.

17 Q And approximately how long of a period of time was
18 that?

19 A It was approximately two months.

20 Q And could you describe for the jury the circumstances
21 in which you had a discussion, your first discussion with Dr.
22 Stuelpnagel, after you disclosed your depression?

23 A I was working on a Saturday morning at Illumina. It
24 was the last Saturday in May of 1999, and John and I had not had
25 any significant discussion or even eye meeting for two months.
26 Anyway, I was working on my computer in the morning and John was
27 at work, I think we were the only two people at work that day, and
28 John [passed]⁶² by where I sat, noticed I was there, and sort of

⁶² Original transcript read, "past".

1 strolled into the room, and as he was strolling out again he
2 started to make small talk, which was a relief because, you know,
3 for weeks he literally would have walked past me and walked the
4 other way without having said a word. So if John said something
5 on that day, which was a really -- it began a series of small
6 talk conversations back and forth, and ultimately we talked for
7 about 10 minutes that morning.

8 Q What did you talk about?

9 A We talked primarily about recognizing that we had had
10 this very difficult relationship, and that especially over the
11 last two months, and John raised the idea that even though our
12 relationship clearly was poor, that we should keep that to
13 ourselves so as not to harm the company, and John suggested it and
14 I thought it was exactly what I wanted to do. Frankly, I would
15 rather have had a good relationship with John. But if we couldn't
16 have that, at least we would keep it to ourselves so it wasn't
17 going to affect other people.

18 Q Now, Dr. Czarnik, did this discussion you had with Dr.
19 Stuelpnagel in late May of 1999, did that affect your relationship
20 going forward?

21 A Yes, my personal relationship with John got better,
22 pure and simple. You know, it had started so poorly, that it had
23 nowhere to go but up. But just the fact he would look at me, he
24 would talk to me over the course of the next couple of weeks, we
25 would be sitting in meetings and we would talk to each other in
26 meetings. So there was a very enhanced level of communication and
27 a recognition from John that I was in the room, and that was a big
28 improvement.

1 Q What about an improvement with respect to your business
2 relationship in terms of how Dr. Stuelpnagel was using you, did
3 that change after this discussion?

4 A No. There was no change with respect to how John was
5 using me as the chief scientific officer. No change.

6 Q Dr. Czarnik, on the first day of your testimony you
7 explained that you had on at least two occasions requested that
8 you be allowed to help in the search for your replacement as chief
9 scientific officer.

10 A That's correct.

11 Q I'm not sure I asked you, and if I didn't I want to
12 make it clear on the record, did you ever have any involvement or
13 role in selecting the new CSO, new chief scientific officer?

14 A No.

15 Q How and when did you first meet David Barker, who ended
16 up to be the new chief scientific officer?

17 A Well, Illumina was short on meeting room, so we were
18 literally conducting interviews with candidates in[--]⁶³ sometimes in
19 hallways. I would often bring candidates up to the front of the
20 building where we could sit, at least be in private --

21 MS KEARNS: Objection -- I'm sorry for interrupting,
22 but I move to strike. I believe the question was when Dr. Czarnik
23 first met David Barker. This answer didn't seem responsive.

24 MR. PANTONI: I actually asked him to describe the
25 circumstances.

26 THE COURT: Overruled.

27 THE WITNESS: So I was sitting out in front
28 interviewing the candidate in front of the building, and the front

⁶³ Original transcript did not contain "--".

1 doors to the building are locked, and at that time we had a semi-
2 functional system where somebody who came to the front door
3 sometimes could reach the receptionist and sometimes they
4 couldn't.

5 So I noticed a fellow came up to the front door and was
6 trying to open it and couldn't get in, so I excused myself from my
7 candidate and walked over and said can I help you, and he said he
8 was here to visit Illumina. I asked him who he was here to visit,
9 and he said Jay Flatley. I said let me bring you up.

10 So I just brought him upstairs and brought him to Jay's
11 office, and got to Jay's door and knocked on Jay's door. Jay
12 looked over and I said, "Jay, obviously there's someone here to
13 see you," and Jay looked at me and said, "Do you two know each
14 other?" and I said something like, "Oh, yeah, we're great buds
15 back from Stanford days." I actually had no idea who he was.
16 This was just a little snippet.

17 But Jay quickly realized that no, we didn't know each other,
18 so at that point I left the guest with Jay and went back to my
19 candidate. I learned about a month later the fellow who I had
20 hosted up to Jay's office was the guy who was going to replace me.

21 Q All right. If we could fast forward to where we left
22 off on day one. You had testified about Jay Flatley telling you
23 your compensation was going to be changed after he told you you
24 weren't chief science officer?

25 A That's correct.

26 Q Take a look please at Exhibit 142. This is an e-mail
27 dated March 2 of 2000. Is this an e-mail you sent to Jay Flatley?

28 A Yes, it is.

1 Q And in terms of the timing, March 2, 2000, would have
2 been how long after you were informed that you were no longer CSO?

3 A This was the day immediately after I was informed of
4 the change.

5 Q In the last paragraph of this e-mail you state that the
6 board must have gotten quite a one-sided view of you over the last
7 year, and you asked for the chance to answer questions from the
8 board of directors?

9 A Yes.

10 Q Asking for 15 minutes of time at the next meeting?

11 A That's correct.

12 Q The next meeting was scheduled for when?

13 A For April, the next month.

14 Q Initially did Jay Flatley respond to your request to
15 have 15 minutes with the board?

16 A Yes, Jay in one of the meetings around this time
17 decided that it would be okay for me to have 15 minutes with the
18 board to answer questions that they might have about things that
19 they must have heard about me.

20 Q Did you actually get those 15 minutes with the board?

21 A No.

22 Q Tell the jury what happened.

23 A Well, there was a lot of events between the time of
24 this memo and the time of the board meeting. It was about six
25 weeks later. By the time six weeks later, I'd had a chance to
26 tell Jay very clearly that not only that I felt that the changes
27 were unfair, but that I felt that they were discriminatory and
28 they were based on reasons that he had no right on which to make

1 them, and by the time of the April board meeting, I wasn't allowed
2 or invited to participate in any part of that board meeting.

3 Q Did Jay Flatley specifically comment one way or another
4 in terms of whether you would get 15 minutes at the April board
5 meeting?

6 A Well, Jay had said yes, you can have 15 minutes at the
7 board meeting, and then as the board meeting came closer, I asked
8 Jay if he was going to schedule me in. He said, "No, you are not
9 going to be speaking at this board meeting."

10 Q All right.

11 Exhibit 149, please.

12 Exhibit 149 is an e-mail dated March 8, 2000. Did you send
13 this e-mail?

14 A Yes.

15 Q Who did you send it to?

16 A I sent it at Jay's request to everyone at Illumina.

17 Q What was your purpose in sending this e-mail?

18 A Well, I had already told the company verbally, actually
19 that morning at the company meeting, that I was going to be
20 changing positions based on my discussion with Jay, and Jay simply
21 asked me to codify that by putting it in an e-mail and sending it
22 out to everybody, so that's what this is.

23 Q Did Jay Flatley ever comment on how you handled your
24 announcement when you stepped down as CSO?

25 A Yes, Jay said I had done it very professionally. It
26 was very hard.

27 Q Dr. Czarnik, at some point did you come to learn that
28 Illumina was preparing something called an S1 registration

1 statement?

2 A Yes.

3 Q What is your understanding of what an S1 registration
4 statement was?

5 A An S1 registration statement is a form that companies
6 fill out and submit to the Securities Exchange Commission, the
7 SEC, and they fill this out when they are getting ready to do an
8 initial public offering, and it's a document that's very carefully
9 written and it involves description of the company, the company's
10 science, some of the company's finances. There are a lot of
11 provisos in there about forward-thinking statements. So it's a
12 very carefully written document for the SEC.

13 Q In anticipation of the company going public?

14 A Going public, right.

15 Q Now, Dr. Czarnik, did you ask to be allowed to
16 participate in the actual drafting, the writing, of the S1
17 registration statement?

18 A Yes, I asked both verbally and I asked in writing.

19 Q Whom did you ask?

20 A To Jay Flatley.

21 Q What did Mr. Flatley say in response to your request?

22 A Effectively that I wasn't needed in drafting the S1,
23 which frankly I thought was kind of amazing, because even though
24 David Barker was the new CSO, I was the one who had been living
25 the science day-to-day for the previous year, year and a half, and
26 I was really surprised that I wouldn't have been asked to help him
27 writing at least those sections.

28 Q Did you tell Mr. Flatley that?

1 A Yes.

2 Q If we could look please at Exhibit 151.

3 The e-mail that's shown on the lower portion of this page,
4 is than a e-mail you received with respect to the S1 drafting
5 session?

6 A Yes, that's correct.

7 Q Thursday's session referenced in the bottom e-mail
8 directed to Team Illumina. What was happening that Thursday, to
9 your knowledge?

10 A I don't know what specific part of the drafting was
11 being done.

12 Q We could scroll up into the next e-mail. That's an
13 e-mail dated March 8th from you to Jay Flatley?

14 A Yes.

15 Q Where was this S1 drafting session, where did that take
16 place?

17 A I was told it was being held up at the corporate
18 attorney's office, which I believe was in the Bay Area.

19 Q In this e-mail you requested to the -- you told Jay if
20 he wanted you, you were available to help?

21 A I had told Jay that previously, and in this e-mail,
22 since I knew that they were going up to draft it and I hadn't been
23 invited to join them, I was saying, you know, I'm sure that I
24 haven't been invited because I would have heard before today, so
25 if there was something I could do to help in drafting it, I'd like
26 to.

27 Q Then the e-mail at the top, this is an e-mail Jay
28 Flatley sent to you telling you you wouldn't be needed in this

1 session?

2 A Correct.

3 Q Let's look please at Exhibit 153. Do you recognize
4 Exhibit 153?

5 A Yes, I do.

6 Q How do you recognize it?

7 A This is a document that was sent out to various people
8 at Illumina, and on the S1 drafting team, which was received on
9 March 10th, and it was draft of the section in which they
10 described the management team at Illumina.

11 Q This was a draft of something that was going to go into
12 the S1?

13 A Correct.

14 Q And various members of Illumina are described, their
15 background and so forth?

16 A Correct.

17 Q If we note with respect to John Stuelpnagel, it says
18 that he co-founded Illumina?

19 A Yes.

20 Q Reference to what he did prior to founding Illumina?

21 A Yep.

22 Q Scroll up to Mark Chee. Describes Mark Chee as a
23 co-founder of Illumina?

24 A Yes.

25 Q References what he did prior to founding Illumina?

26 A Correct.

27 Q Scroll down to the reference to you, sir. With respect
28 to you, this draft S1 says you helped found Illumina?

1 A Yes, it sure does.

2 Q Rather than describing what you did prior to founding
3 Illumina, as with respect -- as was the case with Stuelpnagel and
4 Chee, this draft describes what you did prior to joining Illumina?

5 A Yes, it does. It made me mad as hell.

6 Q What did you do about it?

7 A I immediately wrote an e-mail to the person who I knew
8 was doing the hands-on job of drafting it, Bryan Roberts, and sent
9 him an e-mail in which I filled in the blanks for him so he had
10 the additional information, and I said Bryan, I can't tell you for
11 sure why this happened, but I'm being distinguished from the other
12 people I [founded]⁶⁴ the company with. Make sure that that change gets
13 incorporated into the S1 document.

14 Q Who is Bryan Roberts?

15 A Bryan Roberts was an associate at a venture called
16 Venrocks. They are the venture arm of the Rockefeller family.

17 Q Look at Exhibit 154. Scroll down to the bottom.

18 Is this e-mail, this is an e-mail you sent on March 12th to
19 Tom Pyke?

20 A Yes, that's correct.

21 Q Who is Tom Pyke?

22 A All I knew was Tom Pyke was an attorney who was some
23 way involved in the drafting of the S1 document.

24 Q Where you say you had a couple of edits in the first
25 Illumina S1 draft, what were you referring to?

26 A That I had sent Bryan an e-mail saying here's
27 information to fill in the blanks and make sure you change this
28 "helped found" nonsense to "co-founder," the same as the other

⁶⁴ Original transcript read, "found".

1 people I co-founded the company with.

2 Q Scroll up to the next e-mail. Is this a e-mail you
3 received back, response from Tom Pyke?

4 A That's correct.

5 Q Same day?

6 A I think it was the next day.

7 Q Next day.

8 Attorney Pyke indicates he will check with Jay and make sure
9 your issues are addressed?

10 A Yes.

11 Q Please move to Exhibit 157.

12 Is this an e-mail you sent on March 15, 2000, to Jay
13 Flatley?

14 A Yes.

15 Q Was this still during the drafting session?

16 A Yes.

17 Q And in this e-mail you asked Jay to please confirm that
18 the help to found Illumina part of your bio is corrected?

19 A Yes.

20 Q Did Mr. Flatley get back to you on that?

21 A No.

22 Q Now, after you reviewed and commented on this first
23 draft of the S1 registration statement, were you sent any further
24 drafts of the S1 from anyone affiliated with Illumina?

25 A No, and there were at least a dozen additional drafts.

26 Q Exhibit 158, please. Is this an e-mail you sent to Jay
27 Flatley on March 15th, 2000?

28 A Yes.

1 Q You start out by saying, "I'm coming to know you as a
2 fair person."

3 A Yes. It's ironic in retrospect, isn't it?

4 Q Why did you make that statement?

5 A Because I asked Jay for 15 minutes at the board
6 meeting, and by that point Jay had said I could have 15 minutes at
7 the board meeting, and I thought that was a pretty fair thing for
8 him to have agreed to.

9 Q You say that you were going to accept the original
10 salary and stock proposal if you can get one consideration. Is
11 that right?

12 A That's right.

13 Q And the original salary and stock proposal included the
14 reduction in salary as well as about a 60 percent reduction in
15 your stock?

16 A Yes.

17 Q What was the one consideration you were asking for?

18 A Simply that if he would amend my contract that the
19 remainder of my stock, that portion that he'd allowed me to keep,
20 couldn't be taken away from me on a whim. In other words, I would
21 have to have done something wrong in order for them to have the
22 ability to take it back.

23 Q That's what you meant by you wanted this if you were
24 terminated without cause?

25 A Without cause is the phrase normally used to mean you
26 did something illegal or something strongly against company
27 interests.

28 Q Did you send this e-mail to Mr. Flatley?

1 A Yes.

2 Q Did you have a discussion with Mr. Flatley about the
3 subject matter?

4 A Yes.

5 Q Will you describe for the jury what happened during
6 that discussion?

7 A Essentially I told Jay at this meeting, and we'd been
8 discussing this for almost two weeks at this point, that I really
9 thought this was unfair, it was unwarranted. I still had not
10 talked with Jay at this point about why I felt it was really going
11 on, that is that he knew that I had had this breakdown and all
12 these changes were occurring because they were concerned that
13 something I might do in the future, but after two weeks of sort of
14 going back and forth and you realize you don't have much power in
15 a situation like this, I told Jay hey, this stinks, but I'll
16 accept this proposal, the stock change and the salary change, if
17 you just give me this guarantee that you are not going to turn
18 around and do it again to me in a week or in a month or after the
19 IPO.

20 So that's essentially what this is asking for. And I said
21 so if you just give me that assurance, then we'll -- I'll accept
22 your proposal. And --

23 Q What was Mr. Flatley's response?

24 A Jay turned to me and said, "Why would I do that?"

25 And I said to Jay, "Jay, this isn't the way you treat a
26 valued employee," and Jay didn't answer that question. He had
27 plenty of time to answer that question. Instead Jay just looked
28 at me, and that look said absolutely everything, which is, you

1 know, which to me I took to mean in no uncertain terms you are not
2 a valued employee. You better take this because I'm doing you a
3 big favor, and if you don't take this, life is going to be tough
4 for you in the future.

5 Q Dr. Czarnik, after that discussion, at some point did
6 you begin to discuss with Mr. Flatley a possible severance package
7 in which you would leave Illumina?

8 A Yes, I did. I brought it up sometime shortly after
9 this meeting, and my thinking was very clear. Once you know that
10 you are not valued at a place, if you are not in some sort of a
11 union that can protect individual workers' rights, you are totally
12 on your own, and really you are doing the negotiating for
13 yourself, and your boss has a vast amount of power and authority
14 to just make changes however he or she wants to do it.

15 Q What did you say to Mr. Flatley when you first broached
16 the subject of a possible severance package?

17 A I remember being fairly upset. I was upset. Jay had
18 made it clear that I needed to accept this or nothing else, and I
19 said, "Look, Jay, if you want me here, then I want to stay, but if
20 you don't want me here, I'm not going to be able to stay here.
21 Let's talk about some means by which I can be gone, which is
22 clearly what you want, and I'm not getting financially punished
23 for what you are doing to me." That's when I raised the subject
24 of severance.

25 Q If we could please take a look at Exhibit 166. It's
26 Exhibit 166, is this a copy of an e-mail you received from Jay
27 Flatley on March 27th?

28 A It was sent on the 27th. I don't know if I received it

1 on the 27th.

2 Q Mr. Flatley indicates he's back in the Bay Area again
3 for the final drafting session?

4 A That's right.

5 Q That relates to the S1 registration?

6 A Yes, that's correct.

7 Q He goes on to say, "I'm sensitive to the fact we did
8 not reach closure on your situation on Thursday afternoon." Is
9 Thursday afternoon the discussion that you just related to the
10 jury?

11 A Yes, it would have been the Thursday of the previous
12 week.

13 Q If we could move please to Exhibit 164. All the way to
14 the bottom, please.

15 Is at the bottom is this an e-mail you sent to Jay Flatley
16 on March 27th?

17 A Yes, it is.

18 Q This is in response to the e-mail we just looked at?

19 A I believe it is, yes.

20 Q You say in this e-mail you believe you made a fair
21 proposal regarding severance the last time you spoke. What was
22 your initial proposal?

23 A I proposed to Jay that from my standpoint the fairest
24 thing to me if I wasn't going allowed to stay and work for my
25 stock was to simply let me vest my stock and then leave the
26 company.

27 Q This is the response you received?

28 A Right.

1 Q From Jay Flatley on March 27th?

2 A Yes.

3 Q Mr. Flatley says in this e-mail, "Companies usually
4 don't give any severance for employees who resign their
5 positions." Did you ever resign your employment at Illumina?

6 A Absolutely not. At no time. Never. Did not resign my
7 employment at Illumina.

8 Q Mr. Flatley's e-mail goes on to say, "Granting you
9 three months of pay and stock is generous." Is that an offer that
10 Mr. Flatley had made to you?

11 A Yes.

12 Q When did he make the offer to give you three months
13 salary and three months stock?

14 A He made the offer as a counter-proposal to my offer
15 that I vest the remainder of my stock.

16 Q He ends this e-mail by saying that you are going to
17 give him a counter-proposal to his offer?

18 A Yes.

19 Q If we could scroll up to the top, please.

20 Is this an April 3, 2000 e-mail that he -- that you sent to
21 Jay Flatley responding to his e-mail?

22 A Yes.

23 Q And you reduce your severance proposal to 340,000
24 shares and nine months of salary?

25 A Yes.

26 Q You say, "If I resign, I won't view it as a voluntary
27 resignation"?

28 A That's correct.

1 Q You indicate that the reduction in the original
2 contract you'd consider to be discriminatory and punitive?

3 A That's correct.

4 Q You sent that e-mail on to Jay Flatley?

5 A Yes.

6 Q Let move please to Exhibit 169.

7 THE CLERK: Excuse me, Counsel, the exhibit you just
8 referred to was 166, is that correct?

9 MR. PANTONI: I referred to 166 and then 164.

10 THE CLERK: I'm sorry. Thank you.

11 MR. PANTONI: Q You recognize Exhibit 169?

12 A Yes, I recognize it.

13 Q What is it, sir?

14 A This is the first S1 document that Illumina actually
15 filed with the SEC, so this wasn't a draft any longer, this was
16 the first actual filing.

17 Q Filed on April 3, 2000?

18 A That's right.

19 Q And you testified earlier that you hadn't been sent any
20 drafts of the S1 after you first complained when you saw the
21 initial draft?

22 A Yes, that's correct.

23 Q How did you come to see this document?

24 A I received a notification from an e-mail alerting
25 service that Illumina had filed a document with the SEC, and those
26 documents are almost immediately available at the SEC site, so I
27 went to the SEC site on the Internet and called up the file and
28 read it.

1 Q And was that on April 3rd of 2000?

2 A Yes.

3 Q Move forward with the document.

4 First portion is a description of the directors and
5 executive officers, correct?

6 A Yes.

7 Q By this point you are not listed?

8 A I'm gone.

9 Q At this point you were no longer chief science officer,
10 correct?

11 A That's correct.

12 Q Let's scroll down, please.

13 Then there are descriptions of individuals within the
14 company?

15 A That's correct.

16 Q Indicates David Barker is the new chief science
17 officer, correct?

18 A Correct.

19 Q Again John Stuelpnagel is one of the founders, correct?

20 A Correct.

21 Q Mark Chee is one of the founders?

22 A That's correct.

23 Q Next page, please. Descriptions of other people,
24 including Larry Bock, one of the founders?

25 A Yes.

26 Q Scroll down, please.

27 Did you find any reference in the first S1 registration
28 statement that was filed with the SEC to your founding status?

1 A Nothing.

2 Q Did your offer letter say that the company would
3 recognize your founder status in all public disclosures?

4 A It's right in my contract.

5 Q So what if anything did you do on this issue after you
6 saw the S1 that had actually been filed?

7 A I remember it was a Saturday morning, and I went in to
8 Illumina to confront Jay about it. John and Jay were talking in
9 Jay's office, and Jay was quite nonchalant about it. He just
10 tried to make me -- indicated [--]⁶⁵ tried to make me think this was no
11 big deal, this is just, you know, normal course of things, a minor
12 change, really didn't affect anybody at the drafting meeting.
13 Nobody was really much concerned about it.

14 Q What did you say?

15 A Well, I said I thought it was like Stalinist Russia
16 where people were written out of a picture.

17 Q The date of the filing of the initial S1 was April 3rd?

18 A Yes.

19 Q Let's go to Exhibit 173. Is this an e-mail you sent to
20 Jay Flatley two days later, two days after seeing the S1?

21 A Yes.

22 Q You indicate that it appears to you the company has
23 indicated through its actions that you are not wanted.

24 A That's correct.

25 Q Again you say you don't agree with the reduction
26 because it's discriminatory?

27 A That's right.

28 Q You won't sign a new contract?

⁶⁵ Original transcript did not contain this “—“.

1 A That's right.

2 Q This was the second e-mail where you used the word
3 "discriminatory"?

4 A Yes.

5 Q You talk about again continuing with discussions about
6 a fair severance package?

7 A Right.

8 Q Scroll down.

9 This is what you tell Mr. Flatley you would like to see the
10 severance package reflect?

11 A Yes.

12 Q It says that you were one of the two founding
13 employees. Is that a typo?

14 A No, at the time that we founded Illumina in the summer
15 of 1998, there were three of us who founded, but John Stuelpnagel
16 wasn't an employee of Illumina.

17 Q Became a employee shortly thereafter?

18 A In September.

19 Q Did you get any response to this?

20 A No.

21 Q Exhibit 185, please. Did you receive this e-mail from
22 Carmela Haskell on April 17, 2000?

23 A Yes.

24 Q Who was Carmela Haskell?

25 A Carmela Haskell is the executive assistant at Illumina.

26 Q Executive assistant to whom?

27 A To Jay Flatley.

28 Q She forwarded on a staff meeting agenda?

1 A She sent an agenda to everyone who was on the staff at
2 that time.

3 Q And then after receiving this e-mail, did you get this
4 e-mail from Jay Flatley?

5 A Yes.

6 Q You are not a manager anymore so he doesn't need you at
7 the staff meetings?

8 A That's right.

9 Q Scroll up, please.

10 You indicate you assumed your part of last week's meeting
11 was as an invited presenter. What did you mean by that?

12 A I had participated in the last staff meeting, I guess
13 on April 10th or the week before that, so it was -- I was
14 surprised not to be invited any longer, but I simply said I guess
15 the last time I was there it wasn't because I was on management,
16 it's because I was giving a talk to the management, and Jay simply
17 goes on to say yep, that's right.

18 Q He says that's correct, and then you respond to that
19 e-mail?

20 A Yes, I did.

21 Q Indicating, "However you resolve [our disagreement, as
22 pitcher]⁶⁶ you'll be credited with the outcome. Are you sure you
23 want to take a loss based on errors made by the previous pitcher?"
24 What does that mean?

25 A What it means is by this point it's very clear to me,
26 very clear based on actions, that Jay was aware of the breakdown
27 that I'd had, was aware of the fact that John Stuelpnagel had
28 tried to convince me to leave the company, was aware of the fact

⁶⁶ Original transcript read, "your disagreement as pitcher,"

1 that John didn't want me at the company, but now that John had
2 passed the baton off to Jay, Jay was the one who was expected to
3 execute the things that John wanted to see happen. John didn't
4 want his hands dirtied with this.

5 Q Previous pitcher is a reference to who?

6 A John Stuelpnagel.

7 Q Scroll up to the next e-mail.

8 Is this an e-mail that you received from Jay Flatley the
9 next day, April 18?

10 A Yes.

11 Q In response to that prior e-mail?

12 A Yes.

13 Q It says he's trying hard to resolve your issue with the
14 company regarding position and compensation changes. Right?

15 A That's right.

16 Q Then he says, "Any issues you have had with John are
17 history and are not in my mind at all related to our current
18 discussions." Correct?

19 A That's what he says.

20 Q Did you respond to that statement?

21 A Yeah, I did respond to it.

22 Q Is this next e-mail an e-mail you sent to Jay Flatley
23 in response?

24 A Yes.

25 Q You tell Jay, "Of course they are related. The
26 discrimination I experienced before you arrived continued after
27 you arrived." Did you send that e-mail on to Jay Flatley?

28 A Yes, I did.

1 Q Scroll up, please.

2 You say that you are ready to discuss, let me know when you
3 are available. He says 11 o'clock, you say great?

4 A Right.

5 Q Did you have a meeting with Jay?

6 A Yes.

7 Q Do you recall what was discussed at that meeting?

8 A Yeah, at that meeting I told Jay in no uncertain terms
9 that I was certain that the reason that he was making all of these
10 changes to my position and wasn't negotiating with me in any way,
11 shape or form, and just wanted me gone from the company and was
12 trying to write me out of the company's history, was based on
13 discrimination for a medical problem that I can't control, and I
14 told him that in no uncertain terms. And as far as I started to
15 talk with Jay, he told me to leave the room, asked me to go into
16 an adjacent room with David Barker and explain my situation to
17 David Barker.

18 Q David Barker again being the new chief science officer?

19 A Correct.

20 Q Did you go ahead and meet with David Barker?

21 A Yes, immediately.

22 Q What transpired at that meeting?

23 A I gave David Barker a full history of what had
24 transpired, of the problem that I'd had with depression about a
25 year earlier, the fact that I'd gotten past it very quickly, the
26 fact I had never been seen really a full member of the senior
27 staff, and frankly David seemed sympathetic. David said
28 depression is a very serious thing. Someone in his family had had

1 experience with it so he understood it.

2 MR. PANTONI: Your Honor, I move to strike reference to
3 someone else due to the privacy.

4 THE COURT: Any objection?

5 MS KEARNS: No.

6 THE COURT: Granted. Jury is to disregard that
7 statement.

8 MR. PANTONI: Q Any event, you discussed your
9 situation with David Barker?

10 A Right.

11 Q And what if anything was decided at that meeting?

12 A Nothing was decided.

13 Q Now, Dr. Czarnik, did Jay Flatley ever increase his
14 severance offer to you from the original offer of three months'
15 salary and three months' stock vesting?

16 A Yes, he moved it up to six months' vesting and six
17 months' salary.

18 Q Approximately when did Mr. Flatley increase his offer
19 to you to six months' severance pay and six months' stock vesting?

20 A It was sometime in this -- in this general time frame.

21 Q During the same time that you were telling him you felt
22 you were discriminated against?

23 A In this general time frame, yes.

24 Q We've been talking about April of 2000. Were you aware
25 of an impending meeting of Illumina's board of directors scheduled
26 for April of 2000?

27 A Yes, there was a regularly scheduled board meeting near
28 the end of April.

1 Q We have board minutes. I don't think I need to refer
2 to them. If I were to suggest to you this meeting took place on
3 April 25 of 2000, any quarrel with that?

4 A That sounds right.

5 Q Was this the April board meeting that you had requested
6 that you be permitted to attend to give a 15-minute presentation?

7 A Yes.

8 Q By the time of the board meeting, Jay Flatley had
9 denied that request?

10 A Yes.

11 Q So were you at the April 2000 board meeting?

12 A No.

13 Q Did you speak with any member of Illumina's board of
14 directors with respect to what occurred at the April 2000 board of
15 directors meeting?

16 A Yes.

17 Q Who did you speak to on that subject?

18 A To David Walt.

19 Q Did he contact you or did you contact him?

20 A David contacted me.

21 Q How long had you known David Walt?

22 A David and I worked in the same field of science. I
23 would say at that point I had known him for about 15 years.

24 Q Tell the jury, please, what -- strike that.

25 David Walt was a member of the Illumina board of directors
26 at that time?

27 A David was a member of the board of directors and the
28 head of the Scientific Advisory Board.

1 Q From your prior testimony, he was also the inventor of
2 the technology on which the company was based?

3 A That's correct.

4 Q Tell the jury, please, what David Walt told you when he
5 contacted you about the April 2000 board meeting.

6 A David called --

7 MS KEARNS: Your Honor, I'll make a preliminary
8 objection. To the extent it's seeking testimony regarding hearsay
9 statements, I'll make a hearsay objection.

10 THE COURT: Sustained.

11 MR. PANTONI: It's a clear admission against interest.

12 THE COURT: What's his role, Mr. Walt's role at this
13 time in the company?

14 MR. PANTONI: At the time he was speaking he was board
15 of directors, he was a director of the company.

16 THE COURT: Overruled, subject to motion to strike if
17 it's not an admission.

18 MR. PANTONI: Q In this telephone call -- strike
19 that. Was it a telephone call?

20 A Yes.

21 Q In this telephone call, did David Walt say anything to
22 you about the subject of goals that you were going to be assigned?

23 A Yes.

24 Q What did David Walt, board member, say to you about the
25 subject of goals?

26 A David was trying to convince me to accept a package for
27 leaving, and I told David that I didn't think it was fair, I
28 didn't think it was fair that I was being asked to leave at all.

1 MS KEARNS: Your Honor --

2 THE COURT: Not responsive. Sustained.

3 MS KEARNS: Motion to strike

4 THE COURT: Motion to strike granted.

5 MR. PANTONI: Q Let's set the background for this
6 discussion. What did David Walt say to you when he contacted you
7 on this occasion?

8 A David said that he wanted to see if he could help to
9 resolve the disagreement that Jay and I were having regarding
10 severance negotiation from the company.

11 Q What else did he say?

12 A He said that he thought it would be the best thing for
13 all of the parties involved if I would accept a severance package
14 and leave the company and sort of not look back.

15 Q Did David Walt make any reference to any prior
16 resignation that you had allegedly tendered?

17 A No, nothing.

18 Q In trying to convince you to take a severance package,
19 what did David Walt say to you?

20 A At one point I told David that what he was offering to
21 me simply wasn't fair and I wasn't going to accept it, and David
22 said that, "You know, you really should accept this, because Jay
23 has told the board already that he's going to give you goals that
24 you can't meet."

25 Q What did David Walt offer you, if anything, in this
26 telephone call with respect to severance?

27 A Jay told me that -- Excuse me, David told me that he'd
28 been authorized by the board to negotiate from six months of

1 salary and stock up to nine months of salary and stock, but that
2 he'd been directed by John Stuelpnagel to go up one week at a
3 time.

4 Q What else, if anything, did he say on the subject of
5 severance?

6 A He said that he very strongly encouraged me to accept
7 it because, you know, he knew that ramifications of my not
8 accepting it were going to be very bad.

9 Q What offer, if any, did he put on the table?

10 A David offered nine months of salary and nine months of
11 stock vesting.

12 Q How much money did nine months salary reflect for you
13 at that point in time?

14 A About \$120,000.

15 Q How many shares of stock would nine months additional
16 stock vesting have meant?

17 A 60. 60,000.

18 Q 60,000 shares?

19 A Right.

20 Q Did you respond to David Walt when he made you this
21 severance offer?

22 A Yes, I told David that I would not accept it, I would
23 accept 12 months of salary and vesting.

24 Q Did you talk about any scientific issues in this
25 discussion with David Walt in April of 2000?

26 A We did have a brief conversation during this phone
27 discussion about my concerns, what would happen to Illumina if I
28 wasn't there, because I had been, I think, a real champion for

1 making sure experiments were being done carefully in a controlled
2 way, so when we said something was right, it was really right, and
3 I was concerned if I wasn't there any longer, that I didn't know
4 who was going to fight that fight.

5 Q Did you make any specific reference to decoding in this
6 conversation?

7 A I told David that decoding was a major problem at the
8 company, and it seemed to me that Mark Chee was saying that
9 decoding was working at a high level when in fact it wasn't
10 working at a high level.

11 Q Did David Walt make any response to your statement
12 about scientific experiments and decoding?

13 A No, David really listened to that and said nothing.

14 Q Do you recall anything else from this conversation with
15 David Walt?

16 A Well, at the end, David said, you know, -- said John
17 will never accept 12 months, John Stuelpnagel will never accept 12
18 months of stock and 12 months of vesting. So I said maybe there's
19 some sort of a way we can get to it without going past the number
20 that John said, and we sort of concluded that maybe I could do
21 nine months of vesting and nine months of salary and then I could
22 join the Scientific Advisory Board, so at least I could keep
23 contributing to the company, and I would be able to vest that last
24 three months of stock by way of serving on the Scientific Advisory
25 Board.

26 Q What, if anything, did David Walt say with respect to
27 whether it was a good idea to have you on the Scientific Advisory
28 Board?

1 A He said he thought it was a good idea, but he didn't
2 know if John and Jay would accept it.

3 Q Is that how the discussion was left?

4 A Yes.

5 Q Did you speak with any other members of Illumina's
6 board of directors concerning this same meeting of April, 2000?

7 A Yes, I talked with a fellow named Bill Rastetter, who
8 was on the board and is in town, and I talked with Bob Nelson, who
9 is a venture capitalist. Talked with Bill in person and Bob by
10 phone.

11 Q And what was the nature of your discussion with board
12 member Bill Rastetter?

13 MS KEARNS: Again I'll assert the same objection
14 previously to the extent the question calls for a hearsay answer
15 that's not an admission.

16 THE COURT: Okay. Subject to motion to strike.

17 MR. PANTONI: Q Tell the jury what the nature was of
18 your discussion with Bill Rastetter.

19 A I wanted to know from Bill and Bob, who I both
20 considered not close personal friends but persons -- certainly
21 people I had a very good working relationship with, why in the
22 hell this was happening to me, why I was being forced out of the
23 company. I wanted to get a sense of they seemed to be aware of
24 the history that I'd had with John Stuelpnagel, the fact I thought
25 I was being treated in a discriminatory way, so I had to find out
26 from them what was going on and maybe from them see if there was a
27 way we could just reverse this so I could just stay and keep
28 working.

1 Q So what did you and Bill Rastetter discuss?

2 A We talked about the problem I was having at Illumina,
3 the issue I was having in terms of being forced out, and really
4 Bill said that if something had been said about me at a board
5 meeting he wasn't aware of it, that he had stepped out to make
6 some phone calls during that meeting and so maybe he missed it
7 during those phone calls, but he simply went on to say that --

8 MS KEARNS: Your Honor, I'm --

9 THE COURT: At this point it's not an admission. It's
10 stricken unless there's some admission. Everything, including the
11 witness -- He's elaborating a lot on his state of mind. That's
12 all
13 inadmissible.

14 MS KEARNS: I'll move to strike all the statements
15 about Dr. Czarnik's own state of mind.

16 THE COURT: So far it's not an admission. So motion to
17 strike granted unless you can bring an admission from this
18 conversation.

19 MR. PANTONI: We're speaking still of the Rastetter?

20 THE COURT: Yes.

21 MR. PANTONI: Q Did you tell Bill Rastetter you felt
22 you were discriminated against?

23 A Yes.

24 Q You say you also spoke with Bob Nelson?

25 A Yes.

26 THE COURT: So everything about the Rastetter
27 conversation including the last question is stricken.

28 MR. PANTONI: May I speak to that?

1 THE COURT: The second conversation. So far there's no
2 admission there. The witness is saying he didn't recall anything
3 he said at the meeting, and other than that it's just the
4 statements made by Dr. Czarnik.

5 MR. PANTONI: I do want -- May I speak to that?

6 THE COURT: Yes.

7 MR. PANTONI: I do want to establish that among many
8 other people, Dr. Czarnik reported discrimination to a board
9 member and then later on point out the company did nothing in the
10 way of investigating.

11 THE COURT: Why don't you go right to that.

12 MR. PANTONI: I tried to in the last question.

13 THE COURT: Okay. I didn't understand that's where you
14 were going, Counsel.

15 MR. PANTONI: Q Did you speak to Bill Rastetter
16 about what you thought to be discrimination?

17 A Yes.

18 Q Did you tell him you thought you were being
19 discriminated against?

20 A Yes.

21 MR. PANTONI: This might be an appropriate time.

22 THE COURT: We'll take our morning recess at this time.
23 We'll be in recess -- Is there anything either counsel want to
24 take up during the recess?

25 MS KEARNS: Yes, there's one item.

26 THE COURT: Okay.

27 MS KEARNS: Actually it may be premature, your Honor.
28 We can address it []⁶⁷

⁶⁷ The end of this line is missing and has not yet been recovered.

1 THE COURT: We'll be in recess until 20 minutes before
2 11. Please remember the admonition not to form or express
3 anything about the case, not to discuss the case. That's an
4 important admonition. Do not form or express any opinions about
5 the case. Do not discuss the case with anyone else or amongst
6 yourselves. We'll be in recess until 20 minutes before 11.
7 (Proceedings resumed outside the presence of the jury.)

5 THE COURT: Record will indicate all the jurors are
6 present, counsel and parties present.

7 You may continue your examination, Mr. Pantoni.

8 MR. PANTONI: Thank you, your Honor.

9 Q Dr. Czarnik, what was your job position after you were
10 CSO, chief science officer of Illumina?

11 A The title is research fellow.

12 Q And on what date did you become the research fellow?

13 A It would have been March, I guess, March 1.

14 Q Of 2000?

15 A Right.

16 Q Would you describe for the jury what you understand
17 this new position to be, the research fellow position?

18 A Well, a research fellow is a scientist. Typically a
19 scientist who manages other scientists, but -- or directs their
20 research, but doesn't have managerial responsibility the way a
21 scientific manager or director, for example. It's a position in
22 which it's your science that is the reason that you are there.
23 It's a scientific position, and in large companies it's on the
24 corporate ladder right next to vice president level on the
25 management side.

26 Q Did you have any job duties as research fellow other
27 than purely scientific job responsibilities?

28 A No, just scientific responsibilities.

1 Q So, for example, did you have any of the administrative
2 duties that you had had when you were chief science officer?

3 A No.

4 Q Now, who did you first report to when you were made
5 research fellow?

6 A I first reported to David Barker, who was the new CSO.

7 Q The new chief science officer?

8 A That's right.

9 Q Did that reporting relationship make sense to you?

10 A It made perfect sense.

11 Q Why is that?

12 A David is a very scientifically oriented guy. He has
13 his Ph.D in chemistry. He actually did his graduate studies with
14 a very famous chemist named Linus Pauling, so he's got a
15 scientific union card, and I really felt that he could be a good
16 guy to work for.

17 Q Was the research fellow position a brand new position
18 at Illumina?

19 A Yes.

20 Q Will you please take a look at Exhibit 138. Can you
21 identify what this exhibit is, please, Exhibit 138?

22 A Yeah. This is a description of the position research
23 fellow as -- There hadn't been a position previously at the
24 company, so I wrote up a description for what the job should be.
25 David Barker and I looked over it together. David made some minor
26 changes. I incorporated those changes, and I believe this is the
27 final draft that I wrote, the final version that I wrote.

28 Q Does this document accurately describe the duties and

1 responsibilities of the position as you understood them?

2 A Yes.

3 Q Did you ever submit this job description, the research
4 fellow job description, to Jay Flatley?

5 A Yes, David, Jay and I had a meeting at which we all
6 reviewed this document. At the end we all agreed that document
7 was fine.

8 Q Now, were there any written goals in place for the
9 research fellow position at the time you became research fellow?

10 A No.

11 Q Can you describe for the jury the process in which the
12 first set of written goals were developed for research fellow?

13 A Yes. I was working with David Barker, who I was
14 reporting to, and we agreed that I should write-up a draft set of
15 goals, so I created a document in which I took each of those
16 responsibilities and put it in the left column, and then in the
17 rest of the table I indicated what I thought I should be doing in
18 each of those areas over the next year. So I created a list of
19 job responsibilities based on this -- a list of goals, rather,
20 based on this set of job responsibilities. I wrote it and then
21 gave it to David for his editing.

22 Q David being David Barker?

23 A David Barker.

24 Q Two Davids in this case.

25 A Okay.

26 Q If we could move to Exhibit 163. Can you identify what
27 this exhibit is, Exhibit 163?

28 A Yes. The typed version is what I had originally --

1 what I had originally drafted and given to David, and then there
2 are two notes on there in my own hand for additions and two notes
3 handwritten by David Barker.

4 Q Whose writing is this (indicating)?

5 A That's mine.

6 Q Whose writing is this (indicating)?

7 A Mine.

8 Q Over here, whose writing is that (indicating)?

9 A David Barker, and David Barker.

10 Q Did you actually meet with David Barker for the purpose
11 of reviewing the goals?

12 A Yes.

13 Q Was it at that meeting that David Barker gave you these
14 comments?

15 A Yes.

16 Q And physically wrote on the goal sheet?

17 A Yes.

18 Q What, if anything, did David Barker say about your
19 goals, the difficulty, if any, which he thought the goals had?

20 MS KEARNS: Objection, hearsay.

21 THE WITNESS: David --

22 THE COURT: It would be hearsay unless it comes within
23 an exception to the hearsay rule.

24 MR. PANTONI: Again it's an admission. David Barker is
25 chief science officer

26 THE COURT: Let's hear what it is, subject to motion to
27 strike.

28 MR. PANTONI: Q What did David Barker tell you about

1 the goals you and he had agreed to?

2 A At the end of the session where we worked on this
3 document, David looked at it and told me he thought that they look
4 like aggressive goals.

5 MS KEARNS: Move to strike. I don't see it --

6 THE COURT: I think it could be construed as an
7 admission. Overruled.

8 MR. PANTONI: Q Was Jay Flatley involved in any way,
9 Dr. Czarnik, with respect to dealing with your initial set of
10 goals?

11 A Yes, shortly after David and I came to agreement on
12 this set of goals, David and I met in Jay's office, we showed Jay
13 the documents the two of us had crafted, Jay reviewed them, and
14 there were no changes that were suggested.

15 Q When you say you reviewed the two documents, which two
16 documents are you referring to?

17 A The set of goals, which is this document, and the
18 research fellow position description.

19 Q Okay.

20 Please move to Exhibit 188. Can you tell us what this
21 document is, please, sir?

22 A Yes, this is the -- We had a program at Illumina where
23 you could set up meetings by blocking in a period of time and then
24 the computer would automatically go off and see if the other
25 people who were needed at the meeting were available and give them
26 a chance to accept or not accept the date. So this was a meeting
27 that I had set up at Jay's request to review the research fellow
28 document, job description document, and the goals.

1 Q You wanted the meeting to review job description and
2 the goals?

3 A Correct.

4 Q Meeting was set up for Wednesday, April 19, 2000?

5 A Right.

6 Q Is that the day the meeting was held?

7 A To the best of my recollection, yes, that's the date it
8 was held.

9 Q That date is prior to, it's before, the April board
10 meeting that you testified to earlier?

11 A By about a week.

12 Q If we move to Exhibit 202, please. Is Exhibit 202 an
13 e-mail you sent to David Barker on May 1 of 2000?

14 A Yes.

15 Q This was after the board meeting in April?

16 A Yes.

17 Q Were you still reporting to David Barker as of May 1 of
18 2000?

19 A Yes.

20 Q In this e-mail you request weekly meetings with David
21 Barker?

22 A Yes.

23 Q Why were you making that request?

24 A I was reporting to David, and when I had been reporting
25 to Jay, Jay asked if I needed a weekly meeting or if I just wanted
26 him to talk, have a talk when things weren't going well, off
27 track, and I told Jay it was fine with me if we didn't have a
28 regular meeting. And then when all of this stuff was happening in

1 terms of it's clear Jay didn't value me as an employee, et cetera,
2 I thought maybe it was a mistake to not have the weekly meeting
3 with Jay. And so I asked David if we could have a weekly meeting,
4 hoping maybe that was really what he wanted regardless of --
5 irregardless of what Jay had said.

6 Q Did you send this then to David Barker on May 1st?

7 A Yes.

8 Q Exhibit 214, please.

9 Is Exhibit 214 a copy of an e-mail you received from Jay
10 Flatley a few days later, May 4, 2000?

11 A The whole company received it.

12 Q That's what "all of us" is meant to indicate?

13 A Yes.

14 Q You were one of the people who received that?

15 A Yes.

16 Q This is announcing that effective immediately, you were
17 going to report directly to Jay Flatley?

18 A Correct.

19 Q But you had a prior discussion with Jay Flatley about
20 that subject?

21 A I hadn't had a prior discussion with Jay about
22 reporting to him directly. But so we had not had a prior
23 discussion about that.

24 Q To your knowledge, Dr. Czarnik, does Jay Flatley have
25 any formal scientific training or education?

26 A No, Jay's training is primarily as an engineer.

27 Q If we could look please at Exhibit 206. Do you
28 recognize this document, Dr. Czarnik?

1 A Yes.

2 Q There is a memo from Jay Flatley to you dated May 4 of
3 2000?

4 A Yes.

5 Q Indicates it's a copied to your personnel file?

6 A Yes.

7 Q This references a meeting held the morning of May 4,
8 2000?

9 A Yes.

10 Q Scroll up, please.

11 Dr. Czarnik, at any point in time before May 4 of 2000, from
12 the beginning of your employment all the way up through this day,
13 had you ever before received a counseling memo or warning memo
14 from anyone affiliated with --

15 A No.

16 Q What transpired on that meeting on May 4, 2000?

17 A Jay asked for a meeting. I went to Jay's office.
18 Deborah Flamino was already in Jay's office. She's the head of HR
19 at the time. Jay said that it seemed we had been talking through
20 -- to each other through other people, and he wanted to be talking
21 with me directly. He noted that I had turned down David Walt's
22 offer of nine months' severance and stock. He asked me if that in
23 fact was the case, and I said yes, that was the case.

24 MS KEARNS: I apologize for interrupting the witness,
25 your Honor, but it seems the question didn't necessarily call for
26 a -- The question called for a narrative response, and if the
27 narrative response is permitted, then I have no ability to make
28 appropriate objections.

1 THE COURT: Sustained. It's a narrative.

2 MR. PANTONI: Q What did Jay Flatley say at the
3 meeting?

4 A Jay asked me if it was correct that I had turned down
5 David Walt's proposal. I said yes. He said, "Well, in that case
6 I have no option but to immediately change your reporting
7 relationship so that you are reporting to me, and here is a
8 counseling memo that is chastising you for some things that I
9 think you did wrong."

10 Q Now, in the second paragraph of this memo it indicates
11 that Mr. Flatley had been informed over the last few months by two
12 individuals that you have historical pattern of leaving the
13 facility for expended periods when John and Jay currently are
14 traveling in the past -- or when John and Jay currently are
15 traveling. Did Mr. Flatley tell you who the two individuals were?

16 A No.

17 Q Did Mr. Flatley provide you any of the specific dates
18 that he believes establish this historical pattern?

19 A No. And I asked him for them.

20 Q What did you say?

21 A I sent Jay an e-mail, response to this, saying look,
22 this is wrong, I totally disagree. If somebody is saying this,
23 obviously I'd like to know who it is, but if I can't know who it
24 is, would you at least have them anonymously give me a list of
25 dates so I can go and look and tell you what I was doing.

26 Q This memo also talks about Mr. Flatley's indication
27 that you should not be "taking shots" on the other employees?

28 A Yes, it says that.

1 Q Did you know what Mr. Flatley was referring to?

2 A Well, he was referring -- I don't know what he meant
3 by employees, but he was referring to a comment that I had made on
4 April the 6th.

5 Q Let me note his memo at the end he cites a recent
6 example where you referred to the "indictment of John Stuelpnagel"
7 in front of a large group.

8 A Yes.

9 Q Did you make that statement?

10 A In a humorous context, yes, I did.

11 Q What was the context?

12 A Deborah Flamino brought in a copy of that day's Bio
13 World. It's like a newspaper for the biotech arena, and there was
14 an announcement in Bio World that we were going to do an IPO. So
15 Deborah came into the big room where we were all working and said,
16 "Look, Illumina has made the front cover," and I said something
17 which I regret today on a variety of levels, which is I said, "Oh,
18 was John Stuelpnagel finally indicted?" That's where that came
19 from.

20 Q All right. Get back to that in a minute. But were you
21 aware of any other examples -- strike that.

22 Did Jay Flatley give you any other examples of where he
23 thought you were taking shots at other employees?

24 A No.

25 Q You asked him to do so?

26 A Yes.

27 Q Going back to the example you testified to with respect
28 to indictment of John Stuelpnagel, which you said was meant as a

1 joke, did you speak to Dr. Stuelpnagel about that, about that
2 comment?

3 A Yes, about five minutes after I made that comment,
4 Deborah Flamino, the head of HR, came back in the room and said
5 John wanted to see me. So we went into a little conference room.
6 John was there, Deborah was there and I was there, and John closed
7 the door and told me that he was unhappy with the fact that I'd
8 made that comment.

9 Q What did you say?

10 A I apologized to him for making the comment. I told him
11 I hadn't meant to be offensive. It had been said in a humorous
12 vein. I felt confident no one could have imagined I was serious,
13 but nonetheless, John was still upset.

14 Q Exhibit 211, please. First of all, you recognize this
15 as an e-mail received from Jay Flatley that same day, May 4, 2000?

16 A Yes.

17 Q At 7:40 in the evening?

18 A Yes.

19 Q And there was an attachment to the e-mail?

20 A Correct.

21 Q That was the warning memo we just looked at?

22 A Yes.

23 Q Is this how you received the warning memo, via e-mail,
24 or had you been given it during the meeting?

25 A No, I received it in this e-mail.

26 Q Then you responded on May 5 to Jay Flatley?

27 A Right.

28 Q The bottom line you indicate, "I appreciate knowing the

1 dates mentioned in your warning memo as I may be able to put your
2 mind at ease on some or all of them. If you're comfortable
3 sending the dates, please do so." Correct?

4 A Correct.

5 Q Did you ever receive any indication from Jay Flatley
6 what dates he claimed you were out of the office?

7 A No.

8 Q Exhibit 232, please.

9 Is this a memo that you wrote Dr. Czarnik?

10 A Yes.

11 Q Dated May 26 of 2000?

12 A Correct.

13 Q And you asked that go into your personnel file?

14 A Yes.

15 Q Why is that?

16 A I wanted there to be something in my personnel file
17 showing that I disagreed with the memo that Jay had placed in my
18 personnel file.

19 Q You again requested you be provided with dates and
20 times so you could check?

21 A Right.

22 Q Ever get a response to this?

23 A No.

24 Q With respect to the statement that you were away from
25 the office on May 3rd, you were out of the office that day in the
26 afternoon?

27 A Yes.

28 Q For what purpose?

1 A To swim.

2 Q Why were you swimming?

3 A I traditionally took a swim in the afternoon at about 3
4 o'clock.

5 Q Then the last portion of your memo is your response to
6 the indictment joke you made about John Stuelpnagel. Correct?

7 A Yes.

8 Q You asked for specifics about of other examples where
9 you have allegedly taken shots at other employees, indicating if
10 you get some specifics, you can respond?

11 A Right.

12 Q Did you ever get any information from Jay Flatley on
13 that subject?

14 A No.

15 Q Now, at some point, Dr. Czarnik, did you decide you
16 were going to file a formal complaint of disability discrimination
17 with the California Department of Fair Employment and Housing?

18 A Yes, I did.

19 Q Exhibit 222, please.

20 Is this an e-mail you sent to Jay Flatley on May 17 of 2000?

21 A Yes.

22 Q In this e-mail you were informing Jay Flatley you had
23 an interview scheduled with the California Department of Fair
24 Employment and Housing?

25 A Yes.

26 Q You reference that you should be able to be here for
27 our 4:00 p.m. weekly meeting. You see this?

28 A Yes.

1 Q What meeting was scheduled that day with Jay Flatley?

2 A I had a weekly meeting with Jay scheduled for 4 o'clock
3 on the 18th. My recollection is that they were normally at 6:00,
4 so I don't remember why this one was at 4:00, but it was obviously
5 at 4:00 that day.

6 Q How long had you been having regular weekly meetings
7 with Jay Flatley?

8 A Maybe two weeks.

9 Q Did you end up -- By the way, you are indicating in
10 this e-mail your scheduled meeting would be tomorrow. That would
11 be May 18 of 2000?

12 A That's correct.

13 Q Did you actually go to the California Department of
14 Fair Employment and Housing?

15 A Yes.

16 Q On May 18, 2000?

17 A Yes.

18 Q Did you file a formal charge of discrimination on May
19 18th of 2000 against Illumina?

20 A Yes.

21 Q Exhibit 231, please.

22 Do you recognize this as a letter from the Department of
23 Fair Employment and Housing to Jay Flatley?

24 A I didn't receive this letter.

25 Q Next page, please. Keep going.

26 This is part of this exhibit. Do you recognize this
27 document?

28 A Yes.

1 Q There is a complaint of discrimination?

2 A Yes.

3 Q And did you file this complaint of discrimination?

4 A Yes.

5 Q Against Illumina?

6 A Yes.

7 Q You are indicating the type of discrimination claimed
8 is disability?

9 A Correct.

10 Q And retaliation for claiming disability discrimination?

11 A Yes.

12 Q Is that your signature at the bottom?

13 A Yes.

14 Q You signed and filed it May 18th, 2000?

15 A Yes.

16 Q To your knowledge, Dr. Czarnik, has Illumina ever
17 investigated your complaint of discrimination that you filed?

18 A Certainly not by talking with me.

19 Q Did anyone, including Deborah Flamino of human
20 resources or anyone else affiliated with Illumina, ever talk with
21 you or interview you with respect to your complaint?

22 A Incredibly, no.

23 Q We can move to Exhibit 208.

24 Dr. Czarnik, do you recognize the first page of this
25 exhibit, an e-mail you sent to Jay Flatley on May 4, 2000?

26 A Yes.

27 Q This is the same day that Jay Flatley told you that you
28 were going to be reporting to him?

1 A Yes.

2 Q The same day he gave you the first counseling memo?

3 A Yes.

4 Q And you were forwarding on a set of goals modified by
5 David Barker, correct?

6 A Correct.

7 Q You can go to the next page, please.

8 What is this page, Dr. Czarnik?

9 A This is -- This is the set of goals that had been
10 drafted by me, edited by David, and approved in the meeting the
11 two of us had with Jay.

12 Q Approved by whom?

13 A I thought only David needed to approve it, but I guess
14 Jay approved it also.

15 Q This is sometime on or about April 19 of 2000?

16 A Right.

17 Q Why were you forwarding these goals on to Jay Flatley
18 on May 4 of 2000?

19 A On the meeting of the 4th when Jay told me I was going
20 to be reporting to him, he told me he was going to be changing my
21 goals and so I should send him the previous set of goals that we'd
22 written so that he could make changes.

23 Q At this point did Jay Flatley tell you why he was
24 changing your goals?

25 A Jay didn't need to tell me why.

26 Q Did Jay tell you why he was changing your goals?

27 A No.

28 Q When did you get the new set of goals from Mr. Flatley?

1 A It would have been on May 19th.

2 Q May 19 of 2000?

3 A Yes.

4 Q That's the day after you went to the California
5 Department of Fair Employment and Housing to file your complaint
6 of discrimination?

7 A I got the goals the day after I filed the complaint.

8 MS KEARNS: Objection, leading.

9 MR. PANTONI: Q Exhibit 227, please.

10 Do you recognize this document, Dr. Czarnik?

11 A Yes.

12 Q What is Exhibit 227?

13 A This is the set of goals that Jay gave me at our
14 meeting on May 19th.

15 Q Do you recognize the writing at the bottom where it
16 says, "5-19, Discussed and given to Tony at meeting 11:00"?

17 A Yes.

18 Q Whose writing?

19 A That's Jay's writing.

20 Q I'm going to use a board to bring this a little closer
21 to the jury, Judge.

22 THE COURT: Fine.

23 MR. PANTONI: Q Dr. Czarnik, the first line of your
24 goals, had that been already part of the initial set of goals that
25 David Barker and Jay Flatley had previously approved?

26 A Yes, that was the major experimental goal in the
27 original set of goals.

28 Q This second line, where the project is indicated,

1 "Demonstrate binary oligo encoding technology," had that been on
2 prior set of goals?

3 A No, that line was new.

4 Q What about the third line, where it deals with
5 contributing to the company's IP portfolio?

6 A The section about contributing to the company's IP
7 portfolio was the same as in the goals, but there's something
8 added to this line.

9 Q Get to that in a moment.

10 Dr. Czarnik, when you received these goals from Jay Flatley
11 on May 19, 2000, did you think they were reasonable?

12 A Well, no. When I received the goals, the meeting in
13 which I was given the goals lasted for just about 60 seconds.

14 Q Let's cover that. What did Jay Flatley tell you at the
15 meeting which you received the goals?

16 MS KEARNS: Objection, hearsay.

17 THE WITNESS: Jay simply --

18 THE COURT: Hold on. It would be hearsay.

19 MR. PANTONI: I just offer it as an admission.

20 THE COURT: Subject to motion to strike.

21 THE WITNESS: Jay told me that these were my new goals.

22 MR. PANTONI: Q Did you respond at all at that
23 meeting with respect to the goals?

24 A No.

25 Q Why not?

26 A Because there wasn't time to have even read or absorbed
27 them. I had to do some math before I could calculate what the
28 goals really meant.

1 Q All right. Dr. Czarnik, very briefly would you
2 describe for the jury the nature of the first goal, first
3 responsibility and the first project you were being asked to do.

4 A Yes. This was decoding is central to what Illumina
5 does, and I had invented a method of decoding, meaning had dreamt
6 up a method of --

7 Q I'm sorry to interrupt. I'm talking about the first
8 line.

9 A Yes. Using antibodies to do decoding. So this first
10 line had to do with using the invention that I'd created to use
11 antibodies to create codes on beads.

12 Q Had any work been done in that area previously?

13 A No, no work.

14 Q Now, with respect to the second line, "Demonstrate
15 binary oligo encoding technology" -- After the meeting with Jay
16 Flatley, did you have an opportunity to review these goals?

17 A Yes.

18 Q When you reviewed them, did you believe that any of the
19 goals were unreasonable?

20 A Yes.

21 Q Which goal or goals did you believe were unreasonable?

22 A The entire second line is unreasonable.

23 Q What does the second line deal with, which project,
24 binary oligo encoding technology?

25 A It deals with a different invention I had made at
26 Illumina, which is a different way of decoding beads using a
27 different technology. This technology would use DNA instead of
28 antibodies.

1 Q It's a different way to do decoding?

2 A Yes.

3 Q How long had Illumina been working on decoding
4 experiments?

5 A At that point we had been at the lab space for 18
6 months and we had been working on decoding the entire 18 months.

7 Q What method were you using for decoding that entire 18-
8 month period?

9 A We were using a method that internally we just called
10 oligo decoding.

11 Q That's something different than --

12 A It's different.

13 Q -- than this type, the binary oligo encoding?

14 A I know they sound similar, but the word "binary"
15 implies something very different.

16 Q All right. Now, with respect to the goals that you
17 were assigned for demonstrating binary oligo encoding, the 30-day
18 goal asked you to compose a plan and the budget, correct?

19 A Yep.

20 Q And it also asked you to show experimental proof of
21 concept of binary oligo encoding with 2 to the 4th power of codes?

22 A Right.

23 Q What number is 2 to the 4th power?

24 A It's exactly equal to 16.

25 Q So you were being asked within 30 days on this one goal
26 to show experimental proof of this type of decoding for 16
27 different codes?

28 A Correct.

- 1 Q Is code the same as bead type?
- 2 A Not quite. Very similar.
- 3 Q Explain that.
- 4 A Bead type means what kind of DNA is on that bead, and
5 code means what is the code that tells us what kind of DNA is on
6 that bead.
- 7 Q Getting to the same end result?
- 8 A Yes. Knowing what kind of DNA is on every bead in an
9 array.
- 10 Q Now, the 60-day goal for binary oligo encoding asks you
11 to show experimental proof of concept with 2 to the 8th power of
12 codes.
- 13 A Right.
- 14 Q What number is 2 to the 8th power?
- 15 A It's 256.
- 16 Q 256?
- 17 A Right. Yes.
- 18 Q Now, the method that was actually being used for
19 decoding, for this 18-month period that you described, who
20 invented that method of decoding?
- 21 A Mark Chee.
- 22 Q Now, using Mark Chee's method of decoding, as of May
23 19, 2000, when you were given this set of goals, how many
24 different bead types was Illumina able to decode?
- 25 A 128.
- 26 Q Your 60-day goal was to show experimental proof of
27 concept for twice that, 256?
- 28 A Correct.

1 Q And with respect to your 90-day goal, you were being
2 asked to show experimental feasibility of your method of decoding
3 with 2 to the 12th power. For all of our benefit, what number is
4 2 to the 12th power?

5 A It's 4096.

6 Q You were being asked to do that within 90 days?

7 A Yes, I was.

8 Q Let's take a look at your goal for binary oligo
9 encoding. You were asked to make a combinatorial library of all
10 10-mers that can be decoded using the binary coding scheme,
11 correct?

12 A Yes.

13 Q To make and decode an array of all 10-mers and verify
14 identities of a representative subset of decoded 10-mers.

15 For all of our benefit, how many codes are in a library of
16 10-mers?

17 A It's one million and change

18 Q As to this goal, the one-year goal, did you understand
19 this to be -- to show experimental feasibility within one year?

20 A No, it says you have a working system.

21 Q What does that mean?

22 A It means it works so you can just be doing experiments
23 day after day and be decoding a million bead types.

24 Q Within a year?

25 A That's what it says.

26 Q And again using Mark Chee's method, what number had
27 been achieved as of May 19th, 2000?

28 A 128.

1 Q You mentioned, Dr. Czarnik, that there was an addition
2 to the third goal listed on the new goals that Jay Flatley gave
3 you?

4 A Right.

5 Q Your initial set of goals had had some specific goals
6 to reach in the area of contributing to the IP portfolio, correct?

7 A Correct.

8 Q What was the matter that was added on that line to the
9 goals that Jay Flatley gave you?

10 A Jay had added a goal that I write a new grant
11 application every three months.

12 Q And specifically under the 60-day goal, you are being
13 asked to submit one SBIR grant application?

14 A Right.

15 Q And had a grant writing goal been included on the
16 initial set of goals that David Barker and Jay Flatley had
17 approved?

18 A Nope, this was new.

19 Q And again the grant writing goal -- strike that.
20 Writing a grant, which is what you were doing when you had
21 your breakdown in April of 1999?

22 A Yep.

23 Q Now, Dr. Czarnik, after you had a chance to review
24 these new goals, did you conclude that as a set they were
25 reasonable or unreasonable?

26 A They were outrageously unreasonable.

27 Q Say again?

28 A Outrageously unreasonable.

1 Q And did you tell Jay Flatley that you thought the goals
2 were unreasonable?

3 A Not with the word "outrageous." I told him they were
4 unreasonable and frankly were not possible to achieve with the --
5 either the time or resources that was being dedicated or with the
6 machines that we had for reading those codes.

7 Q Tell us why, if at all, you believe this goal on the
8 second line, was unreasonable?

9 A Well, to start with, the goals that had been agreed
10 upon previously, the one on the top line had given me 30 days to
11 propose a project plan and a budget, and that's very common. You
12 have time to create a project plan, get it approved and get
13 started, ordering your chemicals, et cetera.

14 On the second line I was told to compose a project plan and
15 to have done the work within the first 30 days, which is just
16 outrageous.

17 In addition, the method of doing decoding, the method that I
18 had invented, Jay was aware I had invented it, needed a different
19 piece of equipment than what was available at Illumina.

20 Q This method being binary oligo encoding?

21 A Absolutely.

22 Q What equipment was required?

23 A We needed a different type of laser than existed at
24 Illumina.

25 Q Why did you need a different laser?

26 A Because if you have a very small number of bead types,
27 like 16, every bead is big, and you shine some light on it and it
28 glows and you can see that color of the bead very easily, very

1 easily. But as the numbers get larger, literally as soon as you
2 get up to 128, the beads are getting smaller and smaller, and they
3 give off less light and less light. And it's just like a black
4 light poster. If you hold a little bit of a black light on it you
5 get a little bit of color. If you hold a lot of black light on it
6 you get a lot of color.

7 For beads that were this small, we really needed to have a
8 lot of light so that we could see the color of the beads and we
9 could really be confident that is the color, was the color of the
10 bead.

11 Q What specific equipment did you believe you needed to
12 even approach this goal, the binary oligo encoding?

13 A It was a laser called an argon-krypton laser. The main
14 advantage it had was that it gave powerful light, not at one
15 color, but at multiple colors, and those were going to really help
16 us to distinguish between blue beads, green beads, yellow beads,
17 red beads.

18 Q Did Illumina is have an argon-krypton laser?

19 A No. We had ordered one. I had been pushing that we
20 have it in-house so that it would be a useful tool for the work we
21 were doing, so we had one on order, but it hadn't arrived yet.

22 Q All right. Now, what about with respect to the numbers
23 of codes that you were being asked to show experimental proof of
24 concept for, 16 codes in 30 days, 256 in 60 days, 4000 in 90 days.
25 What was your view in terms of whether those were realistic time
26 frames?

27 A 30 days was not a realistic time frame to deliver a 16-
28 bead experiment. Longer time, the right equipment, possibly that

1 is an experiment that you could deliver. But certainly not 30
2 days and without the piece of equipment that I needed.

3 The 256 was a number that was more than the whole company
4 was doing, so there was certainly risk whether it was even
5 possible, and the 4000 number was more than the company was even
6 hoping to do at that point, and that just -- it was just obvious
7 to me that was there to intimidate me.

8 MS KEARNS: Move to strike the last comment regarding
9 the witness' speculation regarding the goal.

10 THE COURT: Sustained. It is stricken. The jury
11 admonished to disregard the testimony beginning with "It was
12 obvious to me." It's stricken.

13 MR. PANTONI: Q What was your view with respect to
14 this goal to do in 90 days, show experimental feasibility of this
15 method with over 4000 codes?

16 A It would not have been possible for one person to do it
17 in a way that gave a result that you could believe.

18 Q And the one-year goal, which deals with a number of
19 over one million different codes, did you view that to be
20 reasonable?

21 A You might as well have asked me to move the sun.

22 Q Now, by the way, Dr. Czarnik, were you given any staff
23 members or any sort of assistance to meet any of these goals that
24 you were assigned by Jay Flatley?

25 A No.

26 Q Were you given any research help by the way of any
27 staff assistance helping?

28 A No.

1 Q On the other hand, the method that had been used at
2 Illumina, Mark Chee's method for decoding, how many different
3 scientists, to your knowledge, have worked in an effort to try to
4 decode beads using Mark Chee's method?

5 A At that point in May of 2000, it would have been
6 approximately 25 scientists and engineers.

7 Q Over the course of that entire 18-month period?

8 A Ramping up from smaller number up to 25. Most of those
9 25 for the whole year before that.

10 Q Now, at anytime, Dr. Czarnik, did you ask for any sort
11 of assistance in having any staff member help you with this second
12 project?

13 A Well, I had asked David Barker for an assistant when he
14 and I were talking about goals, and David said he thought this was
15 a reasonable thing to be asking for.

16 Q Was this before or after Jay Flatley gave you the new
17 goals?

18 A Before.

19 Q You asked David Barker about getting an assistant?

20 A Right.

21 Q What did David Barker say?

22 A David said he felt that was an appropriate thing and we
23 should do it.

24 Q That was with respect to the first set of goals?

25 A Right.

26 Q What about after you were given the new goals, did you
27 reiterate your request to have some assistance?

28 A Yes.

1 Q To whom did you make that request?

2 A To Jay.

3 Q After he became your new supervisor?

4 A Correct.

5 Q What did Jay say in answer to your request to have some
6 assistance?

7 A Jay said no.

8 Q Now, had Illumina done any experimental work whatsoever
9 in this area, binary oligo encoding, before you were given the
10 goals on May 19, 2000?

11 A No.

12 MR. PANTONI: I'm going to propose to use Exhibit 229.
13 I'm sorry, 229A.

14 My mistake, 229.

15 MS KEARNS: That's fine.

16 MR. PANTONI: Q If we could please look at Exhibit
17 229. I want to ask you about your e-mail to Jay Flatley dated May
18 22, 2000. Did you send this e-mail to Jay Flatley?

19 A Yes.

20 Q You indicate that at your meeting on Tuesday, is that
21 your next scheduled weekly meeting?

22 A Yes.

23 Q You were going to make the case that binary oligo
24 encoding is technically unfeasible right now?

25 A Right.

26 Q Again, that was the second line of the goals that we
27 had just discussed?

28 A Right.

1 Q Did you try to make the case in your meeting with Jay
2 Flatley?

3 A I did make a case.

4 Q What did you say?

5 A I said that even at the 128 decoding level that the
6 company is doing today, there isn't enough light coming from the
7 beads to have confidence that it's working well. So for me to
8 hope to go to larger numbers and with this different method, we
9 definitely needed a different light source, a different laser, in
10 order to pursue the work.

11 Q Exhibit 234, please.

12 Dr. Czarnik, did you receive this e-mail from Jay Flatley on
13 June 5 of 2000?

14 A Yes.

15 Q And where Jay Flatley says, "As a follow-up to our last
16 meeting," what meeting is that referring to?

17 A It would have been our weekly meeting, the -- whatever
18 weekly meeting we had immediately preceding this date.

19 Q And he tells you he wants you to proceed with oligo-
20 based decoding?

21 A Right.

22 Q Again that's that second line you said was
23 unreasonable?

24 A Right.

25 Q By the way, this target down program that's referenced
26 here, did you -- Do you know what that is?

27 A Yeah.

28 Q What is the target down program?

1 A It's a method that Illumina and others have attempted
2 to use in which, instead of trying to analyze a person's DNA by
3 putting beads in and letting the DNA bind to the beads, that
4 instead you let the person's DNA go down on the beads and then you
5 do the analysis.

6 Q Who was working on that at Illumina?

7 A A molecular biologist named Jian-Bing Fan.

8 Q If we could turn to 263.

9 Move up to the top, please.

10 Had you recognize this e-mail that is dated July 10 of 2000?

11 A Yes.

12 Q Is this an e-mail you sent to Jay Flatley?

13 A Yes.

14 Q You indicate your offer to leave and take 12-months
15 salary and stock severance is now off the table?

16 A Yes.

17 Q You prefer to stay at Illumina and work for your
18 vestable stock?

19 A Yes.

20 Q Why did you take your severance offer off the table

21 A By this point I knew what had been said at the board
22 meeting, and Jay was starting on the roadshow, and I knew that he
23 was going to be proceeding on his path of giving me goals that
24 would allow him to terminate me, and I frankly decided that I
25 would have preferred to stay and work, and if I wasn't going to be
26 allowed to work, then I wanted my day in court.

27 Q In this paragraph, third paragraph of your e-mail, you
28 state to Jay Flatley that the primary issue for you to discuss,

1 how your reporting relationship can go forward following your
2 learning that you told the board -- rather that Jay Flatley told
3 the board in April that you would not be successful in achieving
4 your goals.

5 My question for you, Dr. Czarnik, is did Jay Flatley ever
6 respond to your statement that he had allegedly told the board
7 that you would not be successful in achieving your goals?

8 A Not to the best of my recollection.

9 Q Did he send you any e-mail responding to your e-mail
10 denying what you had said in your July 10, 2000 e-mail?

11 A Not to the best of my recollection.

12 Q Look at 248, please.

13 Is this an e-mail you sent to Jay Flatley on July 19, 2000?

14 A Yes.

15 Q This is during the period that you were working on your
16 goals?

17 A Yes.

18 Q You refer to the Ar-K laser system which are either in
19 or coming. What are you referring to there?

20 A I'm referring to the both the laser system that was
21 required for the experiments and the filters. Filters very
22 similar to the filters you would use on a camera. They let
23 certain light through and other light not through.

24 Q Again which goal did you think you needed the argon-
25 krypton laser system?

26 A For the second goal, the oligo binary coding goal.

27 Q Move to Exhibit 255, please. Do you recognize this?

28 A Yes.

1 Q What is this exhibit?

2 A This is my cover letter to the part of the work plan
3 that I put in Jay's mailbox on June 30th.

4 Q You note it's not the finished work plan?

5 A Right.

6 Q So what was included in your submission?

7 A What was included in this submission was a lot of the
8 work that I had done going through catalogs and things, finding
9 the reagents that were going to work for these methods. So I had
10 to take time looking for the right antibodies, the right enzymes,
11 all the right reagents that were going to be needed for the
12 decoding project.

13 Actually the plan itself was complete, but Jay was going to
14 be gone the first week of July, and rather than sending that draft
15 of the work plan, I hung onto it and worked on it for a couple of
16 additional days so I could send him a fully up-to-date work plan.

17 Q If we could please move to 267. Can you identify what
18 Exhibit 267 is, sir?

19 A Yeah. This was the work plan that I actually sent to
20 Jay by e-mail. I had a chance to fully update it, and I sent it
21 to him just at the end of his vacation.

22 Q This was dated July 11 of 2000?

23 A Right.

24 Q In which of the goals that we have looked at, the new
25 goals you were given by Jay Flatley, which of the goals does this
26 work plan address?

27 A It addresses the method for working toward goals 1 and
28 2, the lines 1 and 2.

1 Q Those are the two experimental goals?

2 A Right.

3 Q This is apparently a 13-page work plan, correct?

4 A It's 13 pages without the appendices.

5 Q If we could scroll through this, please, give the jury
6 an idea of the work plan.

7 These are the appendices?

8 A That's right.

9 Q Nine appendices.

10 What is that?

11 A Those are dyes of different colors, and where the peak
12 shows up determines what the color is.

13 Q What is that?

14 A Those are the choice of the five small pieces of DNA I
15 had chosen to use for the binary oligo decoding project.

16 Q What's reflected on this page?

17 A That's a set of enzymes that I had concluded from
18 catalogs could be obtained in very pure form inexpensively for an
19 enzyme decoding project. This was actually a third method I had
20 invented, and I certainly wanted it all put together in one place.

21 Q The next exhibit, Exhibit 268. At the bottom there's
22 an e-mail dated July 12th, 2000, from you to Jay Flatley?

23 A Correct.

24 Q And is this the e-mail where you submitted the work
25 plan to Jay Flatley?

26 A Yes.

27 Q That's the work plan we just looked at?

28 A Right.

1 MR. PANTONI: Your Honor, I'm about to shift to a
2 completely different subject matter and we're going to be taking a
3 witness out of order. It might be a good time to break a little
4 early for lunch. If you prefer, I'll use the next 10 minutes,
5 but --

6 THE COURT: We have some other things we have to
7 discuss.

8 MR. PANTONI: We do.

9 THE COURT: Yes. So if you don't mind, we'll break at
10 this time. Why don't we reconvene at 1:15 as usual. Is that
11 okay?

12 Please remember the admonition not to form or express any
13 opinions about the case, not to discuss the case among yourselves
14 or with anyone else. We'll be in recess until 1:15. 1:15.

15 (Proceedings resumed outside the presence of the jury.)

1 SAN DIEGO, CALIFORNIA, MONDAY, JUNE 17, 2002; 1:15 P.M.

2 THE COURT: Record will indicate all the jurors are
3 present, counsel are present, parties.

4 You wanted to interrupt at this time the testimony of Dr.
5 Czarnik?

6 MS ESPINOSA: Yes, your Honor.

7 THE COURT: That's to put on a witness out of order.
8 This is a defense witness, is that correct?

9 MS ESPINOSA: Yes, your Honor.

10 THE COURT: Is there any objection?

11 MR. PANTONI: No, your Honor.

12 THE COURT: Very well.

13 Ladies and gentlemen of the jury, often we have to
14 accommodate witnesses' schedules, we have to deviate from the
15 normal order. We're interrupting Dr. Czarnik's testimony to put
16 on a witness who would have been called in the defense case but is
17 only available at this time. Just keep that in mind, this is a
18 defense witness.

19 MS ESPINOSA: Dr. David Walt.

20 DAVID ROBERT WALT,
21 called as a witness by the Defendant, having been first duly
22 sworn, was examined and testified as follows:

23 THE CLERK: Would you please state your full name and
24 spell your last name for the record.

25 THE WITNESS: David Robert Walt, W-a-l-t.

26 THE CLERK: Thank you

27 DIRECT EXAMINATION

28 BY MISS ESPINOSA:

1 Q I'm Nicky Espinosa. Dr. Walt, do you understand you
2 are under oath today to tell the truth?

3 A Absolutely.

4 Q And is there any reason that you might not be able to
5 testify fully today? Is there any reason your memory would be
6 impaired?

7 A None whatsoever.

8 Q Where do you currently live?

9 A I live at Lexington, Massachusetts, a suburb of Boston.

10 Q Where are you currently employed?

11 A I'm employed at Tufts University, which is in Medford,
12 Massachusetts, which is also a suburb the Boston, Massachusetts.

13 Q When did you arrive here in San Diego?

14 A I arrived here last night.

15 Q So we apologize for making you travel on father's day.

16 A I missed father's day and spending the day with my
17 daughters.

18 Q So we apologize for your inconvenience.

19 Why are you here today, Dr. Walt?

20 A I'm here today because I've read the deposition of Dr.
21 Czarnik and I have --

22 MR. PANTONI: I'll object. That's argumentative.

23 THE COURT: That sounds like it's leading to something
24 argumentative. Sustained.

25 MS ESPINOSA: Q Dr. Walt, maybe if you could start by
26 telling us your educational background.

27 A Sure. I received my bachelors in chemistry degree from
28 the University of Michigan in Ann Arbor. I then proceeded to get

1 my Ph.D at the State University of New York, and that was followed
2 by two years of post-doctoral experience at MIT.

3 Q And what is your current employment title?

4 A My current employment title, I am Robinson Professor of
5 Chemistry, which is something called an endowed chair at Tufts
6 University, where I've been for the last 21 years.

7 Q What is an endowed chair?

8 A An endowed chair is an honorary position that's
9 bestowed upon a certain member of the academic community of the
10 university for people who have achieved a certain level of
11 stature, and they generally are given in recognition of one's
12 accomplishments at the university. It covers my salary. So some
13 benefactor long ago gave certain amount of money to cover this
14 particular endowed chair, which goes on forever, and the
15 university does not pay my salary, it comes directly out of the
16 endowment that the benefactor gave long ago.

17 Q Could you describe your field of expertise?

18 A I'm trained in organic chemistry, and my area of
19 expertise is in the field of chemical sensors.

20 Q So does your background overlap with that of Dr.
21 Czarnik's?

22 A It overlaps substantially, yes.

23 Q And can you also summarize for us, then, any
24 professional positions you've held since joining Tufts. Is that
25 your sole employment position?

26 A Yes. I've been employed at Tufts ever since leaving
27 MIT.

28 Q Are you describe any honors or awards you received in

1 your professional experience?

2 A Sure. Instead of going through questions, maybe I can
3 just give you some of my credentials. I have approximately 140
4 peer-reviewed scientific publications. I've given on the order of
5 about 300 talks internationally, so 300 talks at conferences and
6 other universities. I've received awards from the National
7 Science Foundation, special creativity award. I received an
8 award, bio-electronics and bio-sensors award. I received an award
9 from Eastman Kodak, a company, for special creativity. I recently
10 received an award in glass science.

11 I've received the outstanding faculty award at my
12 university, at Tufts University, twice, once in 1996 and once just
13 last year, for contributions to the university.

14 I serve on quite a few government panels. My work in
15 sensors takes me to Washington quite frequently, particularly
16 recently to talk about briefing the government on bioterrorism and
17 on how one can use detectors, sensors, to prevent bioterrorist
18 threats.

19 Q You mentioned that you have many, many peer-reviewed
20 papers?

21 A That's correct.

22 Q Can you explain why scientists have to review one
23 another's papers?

24 A A peer-reviewed paper is where, if my students and I
25 come up with a discovery, a scientific discovery, and conduct
26 certain experiments that in our hands work quite well, we write a
27 paper on that, describing all the ideas behind it, describing the
28 experimental procedures for carrying out that work, and then we

1 send that paper to a journal, where the editor of that journal
2 then would select several experts in the field, and those experts
3 then would receive copies of that paper, of that manuscript. It's
4 not a paper, it's not a publication at this point, it's just a
5 manuscript, a typed version of our paper that we'd like to have
6 published.

7 The next step would be those reviewers would get those
8 manuscripts and look at them and read them very carefully to make
9 sure that the logic, the scientific logic in there is correct;
10 that the experimental procedures that were carried out were
11 carried out sufficiently well to make sure that we, as the
12 submitters of the paper, did not miss anything, to make sure that
13 everything was done soundly, and that nothing was really missed in
14 terms of the ideas or the actual carrying out of the experiments.

15 Usually then those go back to the editor with comments, "I'd
16 like to see an additional experiment conducted," or, "These words
17 are misspelled," those kind of things come back. And then you
18 usually get it back and the editor looks at the reviews from
19 peers, because peers means your colleagues who are also experts in
20 the field, gets that, read those reviews, and sees that those
21 particular reviewers either recommend the paper or they say I
22 don't think this is particularly interesting work, doesn't belong
23 in this journal, or this work was carried out in a very sloppy
24 manner, or this is excellent work and it should be published.

25 And then I would get, anybody who submits a paper, would get
26 a report from the editor saying, "I'm pleased to inform you we
27 accept your paper," or, "We do not accept your paper, but we are
28 willing to consider revisions," or, "We don't accept it at all."

1 So some decision is made on the credibility of the paper and
2 the value of the paper.

3 The peer review process is a way in which the scientific
4 community makes sure that the quality of the publications remains
5 high, that is, it's not just up to one person, it's not up to most
6 to say this is good work and I should get it published, it's not
7 up to the editor to say this is good work and should get it
8 published. It's up to experts in the field that know something
9 about the kind of work that my students and I do in our
10 laboratory.

11 So that's the peer-review process. It really is designed to
12 make sure that things are done in a proper way and that mistakes
13 are caught before they get into the public literature.

14 Q So besides having your own papers published through
15 this process, have you also reviewed papers of other scientists?

16 A Yes, it's a professional obligation.

17 Q And about how many papers have you reviewed?

18 A Oh, I would say 21 years, probably 500 papers I've
19 reviewed of other people.

20 Q When was the first time you ever learned of Dr. Czarnik
21 or his work?

22 A There's a bit uncomfortable because Tony doesn't even
23 know that this occurred, but I understand why you are asking the
24 question. The first time was when I reviewed a paper of his while
25 he was a faculty member at Ohio State University.

26 Q And he was not aware that you were one of the
27 reviewers?

28 A No. In fact, I should mention this entire process of

1 peer review is entirely anonymous. Reviewers are not known to the
2 people who submit the papers. So all the reviews that come back
3 are in fact completely anonymous, there are no names associated
4 with them.

5 Q Did you review his paper?

6 A Yes, I did.

7 MR. PANTONI: Objection, relevance and 352.

8 THE COURT: It seems like it's -- When was this, Dr.
9 Walt?

10 THE WITNESS: This was while Tony was a faculty member
11 at Ohio State.

12 THE COURT: In your own mind, you could just answer
13 this yes or no, does this have any direct bearing on the issues in
14 this case?

15 THE WITNESS: I believe it does.

16 THE COURT: Then I'm going to have to see the attorneys
17 outside the presence of the jury, have some kind of offer of proof
18 on this before I could rule. It's the first I've heard of this.
19 If I could see you in the back with the court reporter.

20 (Proceedings at sidebar.)

21 THE COURT: What is your offer of proof?

22 MS ESPINOSA: Your Honor, Dr. Czarnik has testified
23 about his. Dr. Czarnik has testified about his world-renowned
24 status as a scientist, and that Dr. Walt was the person who
25 recommended Dr. Czarnik to Illumina, and part of the basis for his
26 recommendation of Dr. Czarnik was his reputation in the field, his
27 capabilities, and his impressions of Dr. Czarnik as a scientist.

28 THE COURT: That's Dr. Czarnik said Dr. Walt

1 recommended him because of his world-renowned status and
2 scientific accomplishments?

3 MS ESPINOSA: Correct.

4 MR. PANTONI: I'm not sure that's accurate, but --

5 THE COURT: It sounds vaguely familiar to me from the
6 testimony.

7 MS ESPINOSA: Generally he certainly emphasized his
8 world-renowned status.

9 THE COURT: They said Dr. Walt -- On the other hand
10 they said Dr. Walt had some impact on recommending Dr. Czarnik.

11 MS ESPINOSA: Certainly, his name was submitted to
12 Illumina. Dr. Czarnik's name was submitted through Dr. Walt. Dr.
13 Walt will say yes, he did recommend Dr. Czarnik, but when he
14 initially, the impression he had of Dr. Czarnik initially, was
15 that he had written a paper in which he inappropriately attributed
16 scientific credit.

17 MS KEARNS: Took credit, failed to attribute to --

18 MR. PANTONI: This is back at Ohio State.

19 MS ESPINOSA: Yes.

20 MR. PANTONI: It's 10-years ago.

21 THE COURT: It seems like negative character evidence.
22 I understand what the relevance is, but it seems like it's
23 negative character evidence. It really doesn't -- Dr. Walt will
24 admit he is the one who recommended Dr. Czarnik, so he doesn't
25 really impeach in him that way.

26 MS ESPINOSA: That can come later on because Dr. Walt
27 then later started hearing comments from Dr. Czarnik about what
28 was going on at board meetings, what the state of technology was,

1 we'll show that in his mind it rekindled the memories of the prior
2 experience he had.

3 THE COURT: I think it's too remote in time. It's like
4 a prior bad act. I think that the prejudicial value outweighs the
5 probative value under 352, so I'll exclude that particular bit of
6 evidence

7 (Proceedings resumed in open court.)

8 THE COURT: You may proceed, your next question,
9 Counsel.

10 MS ESPINOSA: Q Dr. Walt, were you deposed in this
11 lawsuit?

12 A No, I was not.

13 Q Do you recall an attempt to schedule a time at which
14 you could be deposed?

15 MR. PANTONI: Objection, relevance.

16 THE COURT: Seems like that's irrelevant. Sustained.

17 MS ESPINOSA: Q Do you consider yourself to be a
18 friend of Dr. Czarnik's?

19 A I consider myself to have been a friend of Dr.
20 Czarnik's and he was a friend of mine, up until the point that I
21 read his deposition.

22 Q What is it about reading his deposition that changed
23 your feelings?

24 MR. PANTONI: Objection, leading and argumentative.

25 THE COURT: It's actually asking for this witness to
26 give an opinion on credibility. Now, he's a very eminent
27 scientist, but no one is qualified to opine on someone else's
28 credibility. So the objection is sustained.

1 MS ESPINOSA: Q Dr. Walt, would you consider Dr.
2 Czarnik to be a world-renowned scientist?

3 A I would consider him to have been at that level before
4 he left Ohio State University, but since he has left, he has job-
5 hopped from company to company to company and has not really made
6 any independent scientific contributions of his own.

7 MR. PANTONI: Objection, lack of foundation,
8 argumentative. Move to strike. He doesn't know the circumstances
9 of any of Dr. Czarnik's employments since leaving Ohio State.

10 THE COURT: I think it would be more pertinent if you
11 could confine the questions to matters about which the witness has
12 knowledge, and then I'm going to strike that question at this time
13 and then I might allow you to ask a similar question based on the
14 matters that are -- that he knows about which will be revealed by
15 his testimony, but at this time I think there's inadequate
16 foundation, so I'll sustain the objection.

17 I'd like you to move on. I know we've already heard
18 testimony about certain matters that Dr. Walt may have witnessed
19 and those matters about which he has personal knowledge. I think
20 that's what you should ask him about.

21 MS ESPINOSA: Q Dr. Walt, when did you first meet Dr.
22 Czarnik person-to-person?

23 A I met him while he was on a -- he was giving a
24 lecture, seminar, at Tufts University. This is probably 10-years
25 or so ago. He was a faculty member at Ohio State University at
26 the time and he was giving a seminar.

27 Q And between the time you met him and the time you
28 recommended him to the company that became Illumina, what were

1 your interactions with him like?

2 A I saw him occasionally at some scientific conferences
3 where we met or attended similar kinds of sessions because of our
4 scientific interest overlapped, and then we were supposed to meet
5 for lunch one time at a -- I believe it was actually in San Diego
6 at an American Chemical Society meeting, and we missed lunch and
7 missed connecting together because Dr. Czarnik had forgotten to
8 meet at the appointed place. So he was paying off a bet by taking
9 me out to dinner in San Diego on a visit that I had here, and I
10 was -- had the chance to collect on the bet. He took me out to
11 dinner at a place on Harbor, seafood restaurant on Harbor, and
12 then he proceeded to take me on a brief tour of the company,
13 IRORI, before dropping me back at my hotel that evening.

14 Q We heard testimony you were the person that recommended
15 Dr. Czarnik to Dr. Stuelpnagel as a potential hire for Illumina,
16 is that correct?

17 A That's correct, to both Dr. Stuelpnagel and to Larry
18 Bock.

19 Q At the time you made that recommendation, did you have
20 any basis to know anything about his ability to manage scientists?

21 A No, I have no basis.

22 Q Did you have any information about his business
23 abilities, his strategic thinking abilities?

24 A Not really.

25 Q Did you know anything about his work ethic?

26 A No, I did not. I assumed that having been a faculty
27 member at a university, which generally involves working a lot of
28 -- Contrary to what most people think, faculties and scientists

1 actually work quite a bit. We tend to put in 60 or so hours a
2 week with all of our teaching duties and research duties, and I
3 would have assumed that he would have had a very pretty strong
4 work ethic to succeed in academics.

5 Q We also heard you described as the person who is the
6 inventor of Illumina's technology?

7 A That's correct.

8 Q Would you describe what technology is being referred
9 to?

10 A This is a technology that's based on fiber optics. Do
11 you want me to go into detail on this?

12 Q Just at a general level so the jury has an
13 understanding what was done at Tufts.

14 A Sure. What my students and I had developed at Tufts
15 was taking a bundle of optical fibers. This is the same kind of
16 fibers, similar to the fibers used to carry signals, light signals
17 so you can talk on the telephone. And we had developed a way of
18 putting them in bundles, creating on the very end -- So there's
19 two ends of these strands. On the very end we create a bunch of
20 tiny little wells at the end of each fiber, and then we had come
21 up with a way of putting very tiny beads into each one of those
22 wells so each well that was created on each optical fiber in that
23 bundle carried with it a little bead, kind of like marbles fitting
24 into a little array of holes.

25 And what was revolutionary about that is we actually had a
26 particular type of sensing chemistry that we put on each one of
27 those beads. Sensing means detecting something. For example, we
28 could put something that measured glucose on one bead and oxygen

1 sensors on another kind of bead, but we could continue that by
2 putting lots of different chemistries on different beads.

3 What we had also come up with was a way of attaching a
4 certain number of dyes to each one of those beads that enabled you
5 to figure out which kind of chemistry was on the bead so that when
6 you randomly distributed those little beads in the little wells on
7 the ends of fibers, you could figure out whether there was a
8 glucose sensor in there, an oxygen sensor there or something else.
9 That was the basis of the technology that was invented at Tufts.

10 Q How is that technology -- Did you help transfer that
11 technology to Illumina?

12 A Yes, there were people from Illumina, both my students,
13 former students of mine who were familiar with the technology,
14 actually went to work for the company and had some familiarity
15 with that, and there were some Illumina employees who came to my
16 laboratory, got trained on how to do it. They spent time in the
17 laboratory, and then they carried the capability back with them to
18 the company.

19 Q Have you yourself ever been employed by Illumina?

20 A No, I've never been an employee of the company.

21 Q So what affiliations do you have with the company?

22 A I'm considered the inventor of the technology. I'm a
23 director of the company, so I'm on the board of directors, and I
24 am a head of the Scientific Advisory Board for the company.

25 Q In those roles have you received any Illumina stock?

26 A I received stock in my capacity as an inventor of the
27 technology, yes.

28 Q About how many shares of Illumina stock do you hold?

1 A I have, my family has, about 1.4 million shares.

2 Q And to date have you sold any of those shares?

3 A I have not sold any shares, no.

4 Q What do you view your responsibilities as a board --
5 as a director for the company to be?

6 A Well, I guess I have -- There's several aspects,
7 several answers to that question. The first is as a director of
8 the company, we have a responsibility for making sure that the
9 company is managed properly, that the progress of the company is
10 going along properly. As an inventor of the technology, and as
11 one of the few scientists on the board of directors, I also feel a
12 responsibility, a specific responsibility, to make sure that I
13 keep my eyes open to make sure the technology's developing and
14 that there's -- and that if there are issues that I can
15 contribute in any way that I possibly can to help with that.

16 Q Similarly, what do you view your duties to be as the
17 chair of the Scientific Advisory Board?

18 A Scientific Advisory Board meets two times a year to
19 review the technical and scientific progress within the company.
20 There are I think five members of the Scientific Advisory Board.
21 We meet, as I said, twice a year to look at the progress and to
22 set some sort of strategic -- come up with some strategic thinking
23 about where the next advances could come from and offer some
24 support to try to help the company solve their technical problems.

25 Q What's the perceived value of having a Scientific
26 Advisory Board for the company?

27 A The value for a Scientific Advisory Board is it's
28 almost like the peer-review process that we went through before.

1 Just to make sure that everything is going along okay, to get some
2 outside people to come in. You know, you have a company and
3 there's lots of employees who are -- there's employees who are
4 working on a day-to-day basis, and they are very focused on the
5 things that they are working on, and they oftentimes don't have
6 time to just sort of take a breath and think about the bigger
7 picture, what are some new developments that are going on in the
8 field, in the scientific field and the technical fields, are there
9 things happening that we have an opportunity to contribute that
10 may in fact help the company go to their next level of
11 development.

12 Q You mentioned in transferring the technology to
13 Illumina some people came to Tufts. Did Dr. Czarnik and Dr. Chee
14 come to Tufts to learn about your technology before the company
15 was formed?

16 A Yes, they did. Both of them came even before they had
17 decided to join the company.

18 Q What did Dr. Chee do to learn about your technology?

19 A Dr. Chee came to my -- to the university. We spoke
20 for maybe an hour or so, and then he went into my laboratory and
21 spent about three days nonstop working side-by-side with the
22 students who were developing the technology. And then at the end
23 of that third day, I took him out to dinner. I pretty much hadn't
24 seen him since that first day because he was clearly -- If you are
25 going to join a company and you don't know if a technology is
26 going to work or not or you are not sure, what you'd like to be
27 able to do is make sure things are working before you devote your
28 life to it. So he was very diligent about making sure that

1 everything worked with his own hands.

2 He didn't even allow, by the end of the process, he didn't
3 allow any of the students to touch anything, just to make sure he
4 could get these things to work, putting these little beads in
5 these little wells, because it was kind of an unbelievable thing
6 at the time.

7 So the last day we went to dinner and then he was off, and
8 shortly thereafter joined the company.

9 Dr. Czarnik came and we met in my office for couple of
10 hours, and I gave him an overview of the technology and he asked
11 me questions about it.

12 Q Did Dr. Czarnik go into the lab and try the technology?

13 A I don't recall. He may have talked to -- He may have
14 talked briefly to a few students, but --

15 Q Dr. Walt, have you personally had any experience in
16 applying for grant money?

17 A Yes, I have to in order to support my students. I have
18 graduate students who are Ph.D students who -- They are Ph.D
19 candidates who are working toward getting their doctoral degrees
20 doing their research, so they have to write theses. I have post-
21 doctoral students who study with me to improve their scientific
22 expertise, so in order -- My average group runs between 10 and 14
23 people, so I have to pay their salaries. As a consequence, and in
24 addition to their salaries I have to pay for all the supplies and
25 all the equipment that to run my laboratory, so it costs quite a
26 bit to keep that many people employed. So grants are the bread
27 and butter of what we do. If we don't get grants, we can't have
28 students working on our research.

1 Q About how many grant applications have you submitted
2 over the 20 or so years you've been at Tufts?

3 MR. PANTONI: Objection, relevance, with respect to Dr.
4 Walt's experience with grants.

5 THE COURT: This sounds like expert-type testimony.
6 Has he been designated as an expert on the subject of grants?

7 MR. PANTONI: No.

8 THE COURT: So the objection is sustained.

9 MS ESPINOSA: Q Dr. Walt, about how much time does it
10 take you to put together a grant application?

11 MR. PANTONI: Same objection.

12 THE COURT: Sustained.

13 MS KEARNS: Your Honor, I think it might bear on the
14 foundation and the ability of the witness to opine on the
15 reasonableness of Dr. Czarnik's grant issue.

16 THE COURT: Isn't that the nature of expert testimony?
17 Unless he's a percipient witness to that process, he should have
18 been designated as an expert. I don't doubt his qualifications,
19 but I think he hasn't been properly designated as an expert
20 witness in this area.

21 Unless he's -- If he'd had personal involvement in some of
22 these grants Dr. Czarnik has testified about, that might be
23 different.

24 You may proceed.

25 MS ESPINOSA: Q Dr. Walt, have you been involved in
26 Scientific Advisory Board meetings that were conducted by Dr.
27 Czarnik?

28 A Yes.

1 Q Can you recall how many?

2 A I believe Tony and I together were at three Scientific
3 Advisory Board meetings.

4 Q You worked together to prepare for these meetings?

5 A That's correct.

6 Q Just obvious, but have you attended all the SAB
7 meetings of Illumina?

8 A Yes, I have.

9 Q Can you describe how you divvied up the responsibility
10 of preparing for these meetings with Dr. Czarnik?

11 A Well, I'm chair of the Scientific Advisory Board, but
12 -- and I've never been chair of a Scientific Advisory Board
13 before. I have been on other Scientific Advisory Boards, so I've
14 attended Scientific Advisory Board meetings of other companies and
15 other institutions, but I have not chaired one. And when Tony and
16 I started discussing how we would, as the company founded, and
17 before our first Scientific Advisory Board meeting, it seemed to
18 me, and I think he agreed with this, that as the person who was
19 responsible for the day-to-day scientific activities at the
20 company, really it was his show, in a sense, that I would convene
21 the meeting but he would really set the -- set up the agenda in a
22 detailed way and invite the people that he thought were
23 appropriate to invite to the company. And that in fact is the way
24 that the subsequent scientific, head of science, David Barker, has
25 proceeded on a very similar way in subsequent Scientific Advisory
26 Board meetings since Dr. Czarnik has left the company.

27 Q As far as the meetings that were run by Dr. Czarnik,
28 what was your impression how those were managed?

1 A They were last minute. Planned at the last minute.
2 They were -- I would characterize them as being disorganized, not
3 particularly productive.

4 The last scientific Advisory Board meeting that he presided
5 over we had agreed on an agenda probably a week in advance of the
6 meeting, and when I flew to California from Boston, and arrived at
7 my hotel at about 11 o'clock that night, the agenda was waiting
8 for me at the front desk. So it was clearly a last minute type of
9 agenda preparation.

10 Q And can you describe for the jury who is on a
11 Scientific Advisory Board and if this lateness had any impact on
12 the effectiveness of the meeting?

13 A You want the specific names of the people who are on
14 the Scientific Advisory Board?

15 Q And where they are from.

16 A Sure. Leroy Hood, who is head of the Institute for
17 Systems Biology, probably one of the five most important
18 scientists in the country today. Paul Schimmel from Scripps
19 Institute. Terry Sejnowski from the Salk Institute. Clark Still,
20 who just stepped down from Columbia University. And myself
21 and --

22 Q Where does Dr. Hood reside or what --

23 A Dr. Hood resides at the Institute -- He works at the
24 Institute for Systems Biology. That's in Seattle, Washington.

25 Q Was there any problem with everyone receiving the
26 agenda materials the night before the meeting? Does that affect
27 the running of the meeting?

28 A Nobody could have had the opportunity to prepare and

1 perhaps comment on the agenda. I would say it's more the
2 appearance than anything of showing that this is not an
3 organization that had its act together.

4 Q Let me back up to your comment about Dr. Czarnik
5 visiting Tufts when he was learning about technology. To your
6 knowledge, did Dr. Czarnik do any experiments to research about
7 your inventions?

8 A No, he did not.

9 Q Let's go to this meeting you are referring to. Do you
10 know when that meeting occurred?

11 A I believe it was in January of 2000.

12 Q At the outset of that meeting did Dr. Czarnik say
13 anything about the lateness of the agenda?

14 A Not that I recall.

15 Q And you also mention that you've attended SAB meetings
16 conducted by Dr. Barker?

17 A That's correct.

18 Q What is your observation of how Dr. Barker runs the
19 meetings?

20 MR. PANTONI: Objection, relevance.

21 THE COURT: Overruled.

22 THE WITNESS: I would characterize them as being very
23 well organized, very productive in terms of coming up with paths
24 forward for the company, some recommendations, specific
25 recommendations for how the company could benefit from the
26 application of some of the recommendations from the Scientific
27 Advisory Board members. So quite a contrast.

28 MS ESPINOSA: Q At the time you recommended Dr.

1 Czarnik to John Stuelpnagel and Larry Bock, were you aware he
2 suffers from mental depression?

3 A To be completely candid here, which I know I'm
4 obligated to do, the first time I saw the word "depression"
5 associated with Dr. Czarnik was on the plane yesterday when I was
6 reading the depositions on the way out.

7 Q Do you recall a breakfast meeting that you had with Dr.
8 Czarnik sometime shortly after the January SAB meeting?

9 A Yes, I do.

10 Q And do you recall what brought that breakfast meeting
11 about?

12 A I had felt that there was -- I'm not sure "attitude"
13 is the right word. It just seemed as if there was sort of lack of
14 commitment or lack of luster that he was bringing to the position,
15 and I was concerned about that because Tony is a very enthusiastic
16 person. I'm sure you've seen that. And he has, when he's engaged
17 in something, he really is very lively about it and really gets
18 quite animated about it. And I just did not see this passion for
19 his work that he had taken on that was evident during his earlier
20 days with the company.

21 And as a friend of his, and as I said I considered myself a
22 friend of his, I wanted to make sure that everything was okay. So
23 I asked him to meet me for breakfast and to talk about that.

24 Q What did you say to Dr. Czarnik about that?

25 A I don't recall exactly the words, but it was something
26 to the effect -- I started breakfast before we even ordered, or
27 we ordered, and then I said, "Is everything okay with you at the
28 company? I just get the sense that you are just not as committed

1 as you used to be."

2 Q What did Dr. Czarnik say to you?

3 A He said, "Why are you asking me that question?" That
4 was his response. And I told him what I just told you, and he
5 then seemed to indicate everything was fine.

6 Q Now, was this all based on your observations of him
7 during this SAB meeting or did you have some other basis for
8 believing he seemed to be losing interest in Illumina?

9 A On one of my activities to the company, when I got
10 finished with my business for the day, at this time the company
11 was in their former facility, so everybody was pretty much in one
12 big open room with desks scattered about, and it was about 5
13 o'clock in the afternoon, and everybody was working except that
14 Tony's desk was empty and everything was neat and computer turned
15 off.

16 Q Did you say anything about this to anyone?

17 A Yeah, I raised that issue with -- I just made a
18 passing comment to John Stuelpnagel, Dr. Stuelpnagel, who was at
19 the time in charge of the company, and I said John, it's kind of
20 surprising. It's not the way somebody who is at a start-up
21 company and is in charge of the scientific enterprise of the
22 company, that's not the kind of example that would set for
23 somebody who was really enthusiastic about a company at this
24 particular stage of the company's development.

25 Q Were there other scientists working for Dr. Czarnik
26 that was still there?

27 A Everyone else was still there.

28 Q Let me put up on the projector there a document that's

1 been Bates numbered as Illumina 2022. It's not a trial exhibit.

2 I'm sorry, dated December 15th, '99. It's Illumina 1993.

3 If you could scroll down to the first message. Can you read
4 that?

5 A I can.

6 Q If you could focus on the language that says, "Will do,
7 David" in the center there.

8 A Okay.

9 Q Do you see the language that says, "Will do, David"?
10 Is that an e-mail you received from Tony Czarnik?

11 A Yes, it is.

12 Q Could you scroll down onto the response. I guess it's
13 right there. What was your response, can you read that?

14 A "Tony, I don't understand this e-mail from you."

15 Q What did you interpret his e-mail to you to mean?

16 A I really wasn't sure. It sounded as if -- It sounded
17 to me as if he was concerned that there were things going on at
18 the board meeting that people were talking behind his back about
19 something.

20 MR. PANTONI: Objection, calls for speculation. Move to
21 strike.

22 THE COURT: Sustained. What's the sequence of these
23 messages?

24 MS ESPINOSA: It starts at the bottom and typically
25 scroll up, but it looks like there was an e-mail from Dr. Czarnik
26 to Dr. Walt and it says in quotations "Czarnik," Tony wrote. That
27 was the message from Dr. Czarnik to Dr. Walt. Above that is Dr.
28 Wall's response to Dr. Czarnik.

1 THE WITNESS: I think, if I may, I think the first
2 message was from me saying that the only reason we should have a
3 dinner is if there's general interest and most everyone at the
4 meeting would be able to attend. And then his response was, "Will
5 do, David." First board meeting in which I was able to stay the
6 whole time was a little strange. I'm sure the conversations were
7 conducted, but I'm if you would allude to items that affect me
8 directly, meaning items which I should talk about, not at work,
9 whatever.

10 Then my response was, "Tony, I don't understand this e-mail
11 from you," and then his response to that is above there, saying
12 more directly, "I'd value your help in staying on top of board
13 discussions that directly affect me but I was not in the room."

14 Q Is it typical at board of directors meetings to discuss
15 the senior management team of Illumina?

16 A No, that's -- Management, employment issues, employee
17 issues are the responsibility of management. The directors don't
18 get involved in those kinds of things, unless it has to do with
19 kind of a big hire and compensation.

20 Q Let's move forward ahead in time to a meeting took
21 place of the board of directors that took place April 24th, 2000.
22 Do you recall that meeting?

23 A Yes, I do.

24 Q Were you there in San Diego in person for that meeting?

25 A Yes, I was.

26 Q Who conducted that meeting?

27 A That meeting was conducted by Jay Flatley.

28 Q And was Dr. Czarnik mentioned at that board meeting?

1 A Yes, he was.

2 Q What did Dr. Flatley say about Dr. Czarnik?

3 A The discussion came up at the very end of the board
4 meeting, after the board had handled all of its business, and the
5 issue was one of trying to come up with some kind of compensation
6 package so that Dr. Czarnik would leave the company under amicable
7 circumstances, where he felt he was being compensated
8 appropriately, and the company was able to then break its
9 connection with Dr. Czarnik.

10 Q Were any particular settlement offers or severance
11 negotiations described to you?

12 A Yes, they were.

13 Q What was that?

14 A Jay Flatley said that his offer was for six months
15 compensation and six months vesting of stock, and the board felt
16 that -- board had a fairly long discussion about this, centering
17 exclusively on compensation. That's all we discussed was what
18 kind of severance package to put into place. The board really,
19 for purposes of just making this problem go away and having
20 everybody be happy, authorized an offer of nine months
21 compensation, nine months salary and nine months stock vesting.

22 Q And did Mr. Flatley describe how he would communicate
23 that offer to Dr. Czarnik?

24 A He did not want to -- He did not want to communicate
25 that. He felt that the six months and six months was more than
26 adequate, and I think there was general dissent among the board
27 that that was more than adequate, but that we wanted this -- we
28 really wanted this issue to end on an amicable, friendly basis.

1 We discussed how -- The board discussed how to present this offer,
2 and as a friend of Tony's, I volunteered to make a call to him and
3 to present this offer, because I thought as a friend I have no
4 hidden agenda, that he would listen to me.

5 Q By doing that volunteering, did you feel it would put
6 you in any kind of conflict of interest position as a friend
7 versus a board member?

8 A No. None whatsoever. Everything that -- I'm a very
9 honest, very candid person. Anybody who deals with me knows that
10 if somebody asked me a question, I've worked this way my entire
11 life, I give them the full story. I'm not afraid to tell people
12 bad news, and there was nothing discussed at the meeting that I
13 wasn't completely comfortable conveying to Tony.

14 Q For instance, did Mr. Flatley say he had intended to
15 fire Dr. Czarnik at that meeting?

16 A Absolutely not.

17 Q Did he ever mention that Dr. Czarnik was raising the
18 issue of discrimination because of a disability?

19 A No. I never heard and nobody on the board, at least at
20 the board meeting, ever heard anything about discrimination
21 mentioned.

22 Q Did Dr. -- Did Mr. Flatley describe to you what had
23 caused the severance negotiations to start up in the first place?

24 MR. PANTONI: Objection, hearsay.

25 THE COURT: It is hearsay.

26 MS ESPINOSA: It's along the lines of communications
27 between Mr. Flatley to the board of directors. That's been put in
28 issue by Mr. Pantoni.

1 MR. PANTONI: It's hearsay.

2 THE COURT: Has anybody testified about communications
3 between the board of directors?

4 MS ESPINOSA: Dr. Czarnik has. He claims the source of
5 that information was Dr. Walt.

6 THE COURT: Once part of a conversation is admitted,
7 the entire conversation may come in. The objection is overruled.
8 You may answer.

9 THE WITNESS: Would you repeat the question, please.

10 MS ESPINOSA: Actually I've forgotten the --

11 THE COURT: The reporter can read back the last
12 question, please.

13 (Record read by the court reporter.)

14 THE WITNESS: Only that there was, as I recall, only
15 that there was a desire for Dr. Czarnik to end his association
16 with the company. I did not know where that really originated.

17 MS ESPINOSA: Q Did Mr. Flatley say anything about Dr.
18 Czarnik being given some specific goals that he would not be able
19 to achieve?

20 A Absolutely not.

21 Q Did Mr. Flatley say anything about performance goals at
22 all?

23 A There was nothing mentioned about performance goals
24 until the June board meeting.

25 Q So after the April board meeting, what happened with
26 respect to your discussions with Dr. Czarnik about the board
27 meeting?

28 A We arranged a phone conversation, and I believe I was

1 in my office at the time, and I believe Tony called me, not really
2 relevant, and I presented the board's position, and I told him
3 that the board had authorized me to make an offer of nine months
4 salary and nine months stock.

5 Q What was Dr. Czarnik's response?

6 A He said that was not acceptable.

7 Q During the course of this discussion, did you ever say
8 to him that Dr. Stuelpnagel was very angry at him?

9 A No, because I never heard anybody express that Dr.
10 Stuelpnagel was angry with him.

11 Q Prior to this April board meeting, had Mr. Flatley ever
12 discussed Dr. Czarnik's change of position at Illumina?

13 A Yes.

14 MR. PANTONI: Objection, hearsay.

15 THE COURT: It is hearsay.

16 MS ESPINOSA: Q Did you discuss with Dr. Czarnik what
17 the repercussions would be if he did not accept your offer from
18 the board of directors?

19 A I don't think -- I don't think the word "repercussions"
20 is appropriate. What I made clear to him, I made this very clear,
21 was that was it, that was the final offer, that it was beyond
22 where Jay had felt comfortable, but the board felt that just to
23 not get into any protracted issues associated with his leaving the
24 company that they wanted to make an offer that was closer to what
25 he was asking for. Just to again just to make this as painless
26 for everybody as possible.

27 At the end of the conversation, I said something to the
28 effect that if he doesn't accept the offer, then I was not going

1 to be able to intervene on his behalf; that he was -- that I was
2 not going to be able to really participate any further, so this
3 really was his last opportunity to deal with someone who was a
4 friend as opposed to somebody at the company or at levels beyond
5 my control. So I had volunteered to intervene and to really --

6 I offered my services as a friend to be able to sort of come
7 to closure on this issue so we avoided this kind of situation that
8 we're all here today, and he did not accept it, and I said well,
9 that's it, I can't do anything else.

10 Q Can you estimate how long this phone conversation
11 lasted?

12 A I would say -- I would estimate 30 to 45 minutes.

13 Q Other than the severance negotiations, did you ever
14 tell him anything else that happened at the board meeting?

15 A There was nothing else that I could have told him
16 because the only thing that was discussed at the board meeting
17 that had any relevance to him was the severance issue.

18 Q Did he inquire of you about anything else that happened
19 at the board meeting?

20 A I don't recall.

21 Q Let's go to the July 2000 time period. Do you recall
22 that Illumina went public in July, 2000?

23 A Yes.

24 Q Did you attend any of the IPO roadshow meetings?

25 A I attended the -- I was invited to attend the meeting
26 in Boston, which would have made the most sense because it was
27 local, but I was actually traveling that day and was unable to
28 attend. So I tracked down John Stuelpnagel, called him and asked

1 him if it would be okay if I attended the one in New York, and he
2 said he'd check with Jay, and I think he put the phone down and
3 asked Jay and came back and said that would be great.

4 As the inventor of the technology, to see something go from
5 an invention, a discovery in your laboratory, to something going
6 on with the stock exchange, introduced as a public company, you
7 know, was something that, a once-in-a-lifetime opportunity, that I
8 really -- I was proud of it and really wanted to participate in
9 that. So I flew down to New York, stayed in a hotel at my own
10 expense, and participated in that.

11 Q When you say you participated, did you actually present
12 anything at the IPO roadshow presentations?

13 A No. I was introduced toward the end when there was a
14 list of the people who had -- when the board of directors was
15 listed, and I was asked to stand up. There were several other
16 members of the board present. They stood up. This was at the
17 luncheon.

18 Q This was a luncheon meeting?

19 A This was a luncheon meeting where there was a
20 presentation about the technology by Jay and by other members of
21 the Illumina staff to prospective investors.

22 Q Did you actually listen to all of Mr. Flatley's
23 presentation?

24 A Yes.

25 Q Did he say anything about the state of the technology,
26 the decoding technology at Illumina?

27 A The only -- For investors, these are business people.
28 Their eyes glaze over if you get a little too technical with them.

1 So it's kept at a somewhat technical level but not at a very
2 detailed level. There are details that are in the documentation
3 that's provided, but at the presentation, it never got to the --
4 The decoding was presented just as a concept, not specifics about
5 how many or how it was done.

6 Q So specifically did Mr. Flatley mention anything about
7 an experiment called the 768 decoding experiment?

8 A No, that would not have been appropriate for that
9 presentation.

10 Q Were you there when the Illumina stock began trading
11 for the first time?

12 A Yes, I was, that was the following morning.

13 Q And where were you when this happened?

14 A That was at Goldman Sachs. At their offices. Downtown
15 Manhattan.

16 Q So you weren't on the floor of the Stock Exchange or
17 anything like that?

18 A No. This was on their trading floor within their
19 offices.

20 Q Let me ask -- I want to put on Exhibit 315, please.

21 Do you see the message dated August 25, 2000 at 11:15 to you
22 at the top there?

23 A Yes.

24 Q Do you recall receiving an e-mail from Dr. Czarnik
25 after the roadshow and after the public offering to you?

26 A Yeah, I do.

27 Q Let me point out some language at the top there. It
28 says, "I encourage you to dig into the topic of coding at

1 Illumina." Do you recall him asking you to dig into coding at
2 Illumina?

3 A Only from this correspondence.

4 Q So do you remember receiving this e-mail?

5 A Yes, I do.

6 Q Did you respond to this e-mail at all?

7 A I don't believe I responded to that e-mail.

8 Q Why not?

9 A Because if you look at the date, it's August 25th,
10 2000, and I think my message to him back in April was pretty clear
11 that I wasn't going to be able to help him with his, whatever
12 issues he was feeling personally, and this to me seemed like a
13 case of delusion or paranoia. So I just ignored it.

14 MR. PANTONI: Objection, move to strike.

15 MS ESPINOSA: Q At the time of this message --

16 MR. PANTONI: I made an objection.

17 MS ESPINOSA: Sorry.

18 THE COURT: The portion "just seemed to me like
19 delusion or paranoia" will be stricken. The jury admonished to
20 disregard it. That's the portion you wanted stricken, is that
21 correct, Counsel?

22 MR. PANTONI: That's right.

23 MS ESPINOSA: Q At that time, August 25th, 2000, were
24 you familiar with what was going on at Illumina in terms of
25 coding?

26 A I had to. I'm the chair of the Scientific Advisory
27 Board and member of the board of directors. That was a critical
28 issue for the company, decoding, and it was discussed at every

1 single meeting.

2 Q So as far as you were concerned, were you aware of any
3 problems with decoding at Illumina at that time?

4 A At this late stage in the company's existence, as far
5 as I was aware, there were absolutely no issues with decoding. In
6 fact, it was quite the contrary. The group that was responsible
7 for decoding was well ahead of the goals that had been set for
8 them.

9 Q Do you see the statement, "My personal insistence on
10 experimental rigor may be one of the reasons I'm on the outside
11 looking in"? Do you recall Dr. Czarnik having informed you of any
12 problems he was having with experimental rigor and being on the
13 outside because of that?

14 A Other than this document, no.

15 Q It says, "I no longer have the clout to drive this
16 point, but if you want to avoid being part of a Dr.Koop.com
17 debacle, I encourage you to check this for yourself." Do you know
18 what he was referring to as far as Dr.Koop.com debacle?

19 A I wasn't really sure. I thought it had something to do
20 with some dot-com company failing.

21 Q It says here, "You are basically not affected except
22 for Jay's pronouncement at the April board meeting that I
23 described my bout with depression, that he didn't believe me, and
24 was about to assign goals that couldn't be met." Did you know
25 what he was referring to there?

26 A Now that I look at this, I may not have even read this
27 paragraph, because as I testified earlier, the first time I was
28 aware of -- that this -- The way it was presented to me by Dr.

1 Stuelpnagel, and he was very deliberate in making sure that, -- I
2 recall he was deliberate with his terminology. When he raised the
3 issue of health issues, it really had to do -- That was the way
4 it was described to me. He said Tony has had some prolonged
5 health issues. This was prior to this memo. He never said
6 depression. Jay Flatley never said depression. And in this
7 particular -- At that particular meeting that's being alluded to,
8 the issue of health issues was never even raised. It was the
9 issue was simply severance. That was the only thing that was
10 discussed at that April meeting.

11 At the June meeting, which predated this memo, there was a
12 discussion of goals that were set for Dr. Czarnik, but they were
13 presented in the context of Jay Flatley presented them to the
14 board and said that we're beyond the severance issue, because that
15 was the topic of our April meeting.

16 At the June meeting when we had the next opportunity to
17 meet, we got an update on the severance issue, and it was clear
18 that Tony was staying with the company, and in order to make that
19 a productive employment, he was -- he and Jay had together set
20 some specific goals for his performance at the company.

21 So that's how it was presented, was that Jay said Tony and I
22 have met and we have agreed to some short-term and long-term goals
23 with respect to what Tony was expected to accomplish. The word
24 health issues, depression, goals that could not be met, none of
25 that was said.

26 And in fact I really need to interject something here. The
27 board of directors of Illumina is a group of people who have the
28 absolute highest integrity. These are people --

1 MR. PANTONI: Your Honor, I object.

2 THE COURT: There's no question. I'm sorry, Doctor,
3 but we have to go on a question-and-answer basis.

4 MS ESPINOSA: Q Would you agree, Dr. Walt, April board
5 meeting there was no reference to goals?

6 A The April board meeting there was no reference to
7 goals. The only discussion revolved around the preference.

8 Q At the later June meeting there was a discussion of
9 goals?

10 A At the June meeting there was a discussion of goals in
11 the context of that Tony and Jay had met and had agreed to a set
12 of goals that both of them were comfortable with.

13 Q And did Mr. Flatley ever say that he thought Dr.
14 Czarnik would not meet these goals?

15 A Absolutely not. And my -- Am I allowed to respond to
16 that with the comment I was about to say?

17 Q I don't know --

18 THE COURT: Hold on.

19 THE WITNESS: It --

20 THE COURT: I don't think it's responsive, Doctor. I
21 know you want to say, you already said half of it, but it's not
22 responsive to that question. So you answered the question.

23 MS ESPINOSA: I think I'm done, your Honor. I just
24 want to check my notes.

25 THE COURT: Okay.

26 MS ESPINOSA: Q Have you ever seen the goals that
27 Mr. Flatley referred to?

28 A Just briefly before I came here.

1 Q Let me show you what was assigned to Dr. Czarnik as his
2 research fellow goals. Let me point you to a sentence that says,
3 "Make a combinatorial library of all 10-mers that can be decoded
4 using binary coding scheme." Do you know what a 10-mer is?

5 A Yes, I do.

6 Q Do you know what a combinatorial library of all 10-mers
7 is?

8 A Yes, I do.

9 Q Could you explain to the jury what that is, please?

10 A Sure. Could I use the --

11 THE COURT: Sure.

12 THE WITNESS: If you had say four letters, A, B, C and
13 D. This is what I do for a living. This is easy when I'm
14 standing up. A, B, C and D. You wanted to make a combinatorial
15 library of all 10-mers. Well, in the DNA code, in the code of our
16 DNA we have four letters. It's actually A, C, G and T. I'm just
17 going to use things that are easy for you to recognize here.

18 What all possible 10-mers would be would be a string of
19 letters like a word that's 10 letters long. So we'll just write
20 one of them. So there's one of them. That's one possible 10-mer.
21 One possible string of 10 letters of those four letters.

22 It turns out if you have four letters and you have a string
23 of 10 that you want to make, the equation would be 4 to the 10th,
24 which would come out to be approximately a million words. So if
25 you took four letters and made a string of those letters, four
26 letters, a string of those 10-letter words, you could come up with
27 a million of those.

28 So what that is asking, what that particular goal is asking

1 is for Dr. Czarnik, that was for Dr. Czarnik to make one million
2 of those particular compounds.

3 Q Would a computer be able to generate those 10-letter
4 words for you?

5 A Yes, that would be a trivial thing.

6 Q How long would that take?

7 A For the computer to generate it? A few seconds.

8 Q Dr. Czarnik was being asked to make a combinatorial
9 library of all 10-mers.

10 A That's correct. So he was being asked to make every
11 one of those 10-letter words.

12 Q Using DNA?

13 A Using DNA, correct.

14 Q And based on the resources that Dr. Czarnik had
15 available to him at Illumina, would that be a reasonable thing to
16 ask someone to do within a time period of one year?

17 A Actually it's a very easy thing to do, because you
18 don't have to make a million -- don't have to run a million
19 different -- If I had to write that a million of those words, if
20 I had to write the entire set of a million, that would be a
21 difficult thing to do. But it turns out that there is a way to do
22 this that involves running 10 reactions in four different test
23 tubes. So that's where that 4 to the 10th comes from. You could
24 divide this into a problem where you made it in four different
25 vessels and you ran 10 reactions in each vessel.

26 What you would do after each step is you would mix those
27 four vessels together and then you would divide everything into
28 the four vessels again, attach the next letter. So the way that

1 would work would be you'd have a vessel that contained your first
2 step would make A, so here's a reaction vessel, here's a reaction
3 vessel, here's one, and here's one. You would first put only A
4 into the word. Then you'd put B into this word, C into this word,
5 D into this word. Then what you would do you would mix all of
6 those. So in the next step, what you would have, you would have
7 A, B, C, D in this vessel, you would have A, B, C, D. So you
8 would mix all of them and divide them again into four, A, B, C, D
9 in this vessel, A, B, C, D in this vessel. And now you would
10 attach A to these four things and that would put an A on each one
11 of them. You would attach B to each one of these, B. You would
12 attach C to each one of these, and you would attach D to each one
13 of these.

14 So what you've done is you've made 4 to the 2nd, which is
15 equal to 4 times 4, which is 16. If you count, there's precisely
16 16 different two-letter words there. If you repeat that process
17 again, where you take all of those letters, put them all together
18 and then divide them again and carry out that reaction again, then
19 you've got 4 to the 3rd, or 64. If you do that 10 times, you get
20 all one million of those 10-letter words.

21 So that's called a mix and split combinatorial synthesis,
22 which is very easy to do.

23 Q Is this what people refer to as combinatorial
24 chemistry?

25 A This is one aspect of combinatorial chemistry, yes.

26 Q Did you believe that Dr. Czarnik had expertise in the
27 combinatorial chemistry?

28 A Yes.

1 Q How long did you think it would take to do an
2 experiment of this sort?

3 A With the resources that would have been available for
4 him at Illumina, it should take a week or two at the most.

5 Q Thank you, Dr. Walt.

6 THE COURT: Anything further?

7 MS ESPINOSA: No.

8 THE COURT: We'll take our afternoon recess at this
9 time. We'll be in recess until 10 minutes before 3. Please
10 remember the admonition not to form or express any opinions about
11 the case, not to discuss the case. We'll be in recess until 2:50.
12 2:50.

13 (Proceedings resumed outside the presence of the jury.)

24 CROSS-EXAMINATION

25 BY MR. PANTONI:

26 Q Good afternoon, Dr. Walt.

27 A Good afternoon.

28 Q By name is Anthony Pantoni. I'm the attorney for Dr.

1 Czarnik.

2 We haven't met before, have we, sir?

3 A No, we haven't.

4 Q We haven't even spoken before?

5 A That's correct.

6 Q Dr. Walt, do you agree that Tony Czarnik is a founder
7 of Illumina?

8 A Yes, I agree.

9 Q You've seen business publications on the part of
10 Illumina describing Dr. Czarnik as a founder, have you not?

11 A Yes, I have.

12 Q Have you seen Dr. Czarnik's offer letter where Illumina
13 contractually agreed to recognize his founder status?

14 MS KEARNS: Your Honor, I'm going to object to the
15 characterization of the offer letter.

16 THE COURT: Best evidence. Sustained. The letter
17 speaks for itself.

18 MR. PANTONI: Q Are you aware that Dr. Czarnik's
19 offer left has a provision with regard to his founder status?

20 MS KEARNS: Same objection.

21 THE COURT: Sustained.

22 MR. PANTONI: Q Let's take a look at it. I didn't
23 think we were going to have to use it, Judge.

24 THE COURT: I don't know whether or not the witness is
25 aware of it. He's not disputing it, and the letter speaks for
26 itself. I'm sure it's going to be submitted into evidence, I
27 presume.

28 MR. PANTONI: I believe it has already.

1 THE COURT: Okay.

2 MR. PANTONI: Q Dr. Walt, did you become aware at
3 some point in time that Illumina issued some public documents
4 where Dr. Czarnik was described as something other than being a
5 founder of Illumina?

6 A It was brought to my attention I believe after things
7 had been rectified.

8 Q When was it brought to your attention, sir?

9 A I'm not sure exactly who told me. I think it was Dr.
10 Stuelpnagel told me that there had been -- that Dr. Czarnik had
11 been not -- the word "founder" was not associated with his name
12 in the offering document and then it was corrected and added.

13 Q Did Dr. Stuelpnagel tell you who corrected it and added
14 it?

15 A No, I don't believe so.

16 Q Did he tell you when that had occurred?

17 A No. It was a minor issue. It was just informing me
18 that that had taken place.

19 Q It was a minor issue to whom?

20 A To me. It was simply I was informed of it after
21 everything had been resolved, so I wasn't even aware that it had
22 been an issue. So once it was resolved, it didn't seem like it
23 was worth spending a lot of time on.

24 Q You described earlier that when you had your breakfast
25 meeting with Dr. Czarnik in February of 2000, you had thought that
26 he hadn't been exhibiting the same type of passion for Illumina as
27 he had exhibited earlier?

28 A That's correct.

1 Q How and when did it first come to your attention that
2 Dr. Czarnik in the early stages of Illumina was passionate about
3 the company?

4 A I could see the way he approached his -- Whenever I
5 was present during discussions where he was describing technology,
6 he was very enthusiastic. When I had run into colleagues who had
7 come into contact with Tony, they had said, you know, he was very
8 excited about the company and about the opportunities that the
9 company presented.

10 Q And timingwise when was it that you first believed Dr.
11 Czarnik was not as passionate about Illumina as he had been
12 earlier?

13 A I would say that January Scientific Advisory Board
14 meeting he was very detached. He really did not contribute to
15 the discussion and seemed to be very disengaged from both the
16 discussion as well as the people who were working for him.

17 Q That was January of 2000?

18 A Yes, that's correct.

19 Q That's after Jay Flatley had come on board as the
20 company's new CEO?

21 A That would be correct.

22 Q That's the first time you felt he showed something less
23 than passion toward Illumina?

24 A That was, yeah, that was first time that it was very
25 clear.

26 Q You testified about one occasion I believe early on at
27 Illumina where you were at the office and Dr. Czarnik wasn't at
28 his desk, described his desk being neat and the computer shutdown?

1 A Yes.

2 Q When was that one occasion, sir?

3 A I think that may have been around that same visit. I
4 probably had come in the day before the SAB -- No, I did not. It
5 may have been at the board meeting, then. It may have been at a
6 board meeting, right at the end of the day, after the meeting, he
7 was not at his desk.

8 Q Can you place an approximate date on that one occasion?

9 A Well, it was probably -- I would say it was kind of
10 that January or February time frame.

11 Q Of 2000?

12 A Yeah.

13 Q Where was Dr. Czarnik on that one occasion where you
14 didn't see him at his desk?

15 A I didn't say there was only one occasion where he
16 wasn't at his desk. I was saying that that was a very pointed
17 situation where it was 5 o'clock and everybody was working and I
18 knew he was there in the morning because I had said hello, we did
19 our business, then I came out and he wasn't there.

20 Q Do you know where he was at 5 o'clock?

21 A No, I have no idea.

22 Q Do you know if he was conducting Illumina business?

23 A I have no idea.

24 Q Do you know if at the library doing research?

25 A He had gone. He had left for the day.

26 Q You have no idea where he was or why he was gone?

27 A I inquired of one of the other employees or several of
28 the other employees. Some of my former students worked there. I

1 asked them where Tony was. They say he left for the day.

2 Q You don't know where he was or where he went, do you?

3 A No.

4 Q Now, you testified that at some point in time, John
5 Stuelpnagel talked to you about Tony Czarnik's health issues?

6 A Yes.

7 Q When did Dr. Stuelpnagel talk to you about Tony
8 Czarnik's health issues?

9 A Actually it was exactly the day that you had -- that
10 we were just talking about, where he wasn't at his desk. I went
11 to John, I think I was going to John, with John to dinner, and
12 some other people, and I said, "You know, John," I say the
13 comments I did before, he's not behaving the way somebody who
14 would be really engaged in a start-up company should be behaving
15 and setting an example for his staff. And actually when John
16 raised the issue of health issues, he said it in a very -- in
17 Tony's defense. What he said was, he said, "You know, we have to
18 cut him some slack because he's experiencing some health issues."

19 So that was the context in which John raised that issue, and
20 I didn't want to pry any further because it was clear that John
21 was simply at that point on the verge of almost breaching
22 confidentiality, that he didn't want to tell me that, but because
23 I raised the issue of his, of Tony's commitment to the company,
24 that John was sort of, you know, hold back, give him a chance.

25 Q So you raised the issue about Tony's commitment to the
26 company, and in response Dr. Czarnik told you Tony has some health
27 issues?

28 A Dr. Stuelpnagel mentioned it in the context of trying

1 to explain why maybe he had not been as committed to the company,
2 because of some personal health issues that he had been
3 experiencing.

4 Q I want to be sure I understand. His raising the issue
5 of health issues was in response to you saying that you thought he
6 lacked, Dr. Czarnik lacked some commitment?

7 A That's correct.

8 Q When Dr. Stuelpnagel raised the issue of Tony Czarnik's
9 health issues, was Tony Czarnik still chief scientific officer of
10 Illumina?

11 A I don't think -- I don't believe he was at that point.

12 Q When did Dr. Czarnik, when was he replaced as chief
13 scientific officer?

14 A I'm estimating sort the end of '99.

15 Q If I were to tell you that the evidence so far has
16 suggested it was in March of 2000, would you quarrel with that?

17 A No.

18 Q Therefore, if you had your discussion with Dr.
19 Stuelpnagel about health issues in January or February, it would
20 have been while Dr. Czarnik still was chief science officer?

21 A Okay.

22 Q You have no quarrel with that, do you?

23 A No. We're talking about a period of months that was
24 more than two years ago, so give or take a few months, that's
25 fine.

26 Q You told the jury during direct examination that
27 yesterday on the plane ride flying here is the first time you
28 heard anything or knew anything about Dr. Czarnik's depression.

1 MS KEARNS: Objection, asked and answered.

2 THE COURT: Cross-examination. Overruled. You may
3 answer.

4 THE WITNESS: Yes, that's correct.

5 MR. PANTONI: Q You testified that's the first time
6 you heard that word depression associated with Dr. Czarnik?

7 A That's correct.

8 Q Look at Exhibit 315, please. You recall that this was
9 e-mail you received from Dr. Czarnik on or about August 25?

10 A And when we were going this --

11 Q Is that right, sir?

12 A Yes, that's correct.

13 Q You recall receiving this e-mail?

14 A Yes, I do.

15 Q And you'll note that Dr. Czarnik does use the word
16 "depression" in describing the circumstances?

17 A Uh-huh.

18 Q Is that right?

19 A It's right there in black and white.

20 Q Does that refresh your recollection, sir, in terms of
21 whether you heard the word depression before?

22 A As I said, I'm not sure I even got this far down in the
23 paragraph, because this was a letter that was drawing into
24 question a topic that I was intimately familiar with, and that was
25 decoding, and that issue was not one of concern, because it had
26 been discussed at every Scientific Advisory Board meeting. As the
27 inventor of the technology, I was familiar with the decoding
28 issue. As a board member we were inundated with data about this

1 particular topic of decoding, so it was not an issue.

2 Q Tell the jury where in this e-mail you stopped reading.

3 A I think probably after the first paragraph. I may have
4 scanned the rest of the e-mail. I'm a busy person. I did not
5 give much credence to this at this point. There was -- I knew
6 this was coming from an employee who was -- who we had already
7 discussed a severance package with.

8 Q Excuse me for a minute. I'm trying to see where you
9 believe you stopped reading.

10 A I believe I stopped reading at the end of the first
11 paragraph, the word "yourself."

12 Q Where he talks about coding?

13 A Where he talks about decoding, and then "if you want to
14 avoid being part of a DrKoop.com debacle."

15 Q It's your testimony you stopped reading and you didn't
16 read the second paragraph of this e-mail?

17 A My testimony is I do not recall ever having seen the
18 word "depression" associated with Dr. Czarnik before yesterday on
19 the airplane. It certainly was never mentioned orally by any
20 member of the Illumina staff, and the fact that it's here, I may
21 have seen it, but since it was coming from Dr. Czarnik, I probably
22 did not give much credence to it at this particular point.

23 Q Okay.

24 Now, you say you were the chair of the Scientific Advisory
25 Board?

26 A That's correct.

27 Q Have you been the chair of the Scientific Advisory
28 Board the entire time the SAB has been in existence?

1 A Yes, I have.

2 Q What are your responsibilities, sir, as chair of the
3 Scientific Advisory Board?

4 A My responsibilities were at the outset to select the
5 people who were involved, the people who would be asked to serve
6 on the Scientific Advisory Board, so I suggested several names.
7 The names of other people were suggested to me, and I talked to
8 those people and agreed that they'd be interesting, worthwhile
9 people to have on the SAB. And then to sort of convene in a very
10 pro forma way -- The meetings are very informal, so sort of call
11 them to order and then make sure that all the appropriate
12 discussion got out that should get out.

13 Q So is it your testimony that after helping build the
14 Scientific Advisory Board, helping decide who would be on the
15 board, your responsibilities as chair have been limited to
16 starting the meeting and making sure the discussion took place?

17 A No, to also discuss in concert with the person who is
18 in charge of the -- the scientific officer or person in charge of
19 research at Illumina, to help set the agenda for the meeting, so,
20 yeah.

21 Q Would you agree, sir, that one of the purposes of a
22 scientific advisory board is to discuss scientific problems and
23 scientific challenges being faced by a company?

24 A Absolutely.

25 Q Now, with respect to the January 2000 meeting of the
26 SAB, which you testified to, this was the one where the agenda you
27 say was left for you at the hotel desk that day?

28 A That evening. The evening before.

1 Q Evening before meeting.

2 A Yes.

3 Q Isn't it true, sir, with respect to that agenda for
4 that Scientific Advisory Board meeting, that Dr. Czarnik had
5 prepared an initial agenda and then had to revise it?

6 A That may be. I don't recall.

7 Q In fact isn't it true that Dr. Czarnik came to you and
8 told you that he had placed as agenda items on that January 2000
9 SAB, that he had placed as agenda items a discussion of scientific
10 problems and scientific challenges facing Illumina?

11 A I don't believe that's correct.

12 Q Are you sure? You are just not sure?

13 A For purposes of making sure that I don't say anything
14 that's incorrect, I'd say I'm not sure.

15 Q I'll try to refresh your recollection. Do you recall
16 Dr. Czarnik coming to you and saying that he had been instructed
17 by John Stuelpnagel or Mark Chee to delete references on the
18 Scientific Advisory Board agenda because they did not want to talk
19 about scientific problems or challenges at the --

20 A If they had said that, I would have picked up the phone
21 and called both of them and screamed as loudly as I possibly could
22 if that were the case.

23 Q Because that would be wrong to do, wouldn't it?

24 A That would absolutely be wrong.

25 Q Because the purpose of an SAB is to have an open and
26 frank discussion about scientific problems and scientific
27 challenges?

28 A Yes.

1 Q Now, you are also on a member of the Illumina's board
2 of directors?

3 A Yes, I am.

4 Q Have you been a board member the entire time you've
5 been with the company?

6 A Yes.

7 Q Have you ever been chairman the board?

8 A No, I have not.

9 Q Have you attended regular meetings of the Illumina
10 board of directors?

11 A I've attended all but one meeting.

12 Q Isn't it true, sir, you typically received your agenda
13 for the Illumina board of director meetings either the day of the
14 meeting or the night before?

15 A That's correct.

16 Q In fact, very often the board packet for the discussion
17 at the Illumina board of directors meeting is waiting for you at
18 the table when you walk into a board meeting, true?

19 A It is a very well prepared document of extensive length
20 that enables you to flip through and familiarize yourself with all
21 the things that are going to happen at the meeting.

22 Q Well, talking about timing, isn't it true that most
23 often for the board of director meeting, the board of directors of
24 Illumina, the board packet, agenda, is waiting for you to see for
25 the first time at the meeting?

26 A No, it's not at the meeting. It's always delivered to
27 my office several days in advance.

28 Q Has it ever been the case where the board packet was

1 waiting for you at the meeting?

2 A One time, and that time I was out of the office for an
3 extended period of time and there was no way for the package to
4 have been mailed to me so I could have received it ahead of time.

5 Q There were other times when you received the agenda for
6 the director's meeting the day before the meeting, true?

7 A On a couple of occasions it arrives the day before,
8 yes.

9 Q And the agenda for the SAB meeting that Dr. Czarnik put
10 together for January of 2000, you also found the day before the
11 meeting?

12 A Yes, one piece of paper.

13 Q It was the first opportunity you had to review it was
14 the night before the meeting?

15 A Yes.

16 Q Since it was only one paper, it was, I take it, a short
17 review?

18 A There was really nothing to look at, unfortunately.

19 Q It was a short review?

20 A It was simply a list of items for discussion. That was
21 it. Whereas the board packet was a substantive thing where I can
22 flip through on the plane and see everything and make notes. Got
23 a long plane ride, so I have the opportunity to really look at the
24 documentation ahead of time and highlight those areas that I'm
25 particularly interested in focusing on.

26 Q I take it from your testimony that you believe that the
27 SAB meetings are important?

28 A I believe they are important, and they serve an

1 important role for the company, yes.

2 Q Do you know whether John Stuelpnagel when he was acting
3 president of the company thought that the SAB meetings were
4 important?

5 MS KEARNS: Objection, relevance, foundation.

6 THE COURT: Sustained

7 MR. PANTONI: Q isn't it true, Dr. Walt, John
8 Stuelpnagel told you he thought the SAB meetings were not very
9 important?

10 MS KEARNS: Objection, relevance, hearsay.

11 MR. PANTONI: Your Honor, he's being criticized
12 allegedly for not conducting himself properly at SAB meetings. I
13 want to establish Dr. Stuelpnagel didn't think they were very
14 important.

15 THE COURT: Sustained.

16 MR. PANTONI: Q How often were the SAB meetings
17 held?

18 A Twice a year.

19 Q You testified you saw three meetings that were
20 conducted by Dr. Czarnik?

21 A That's correct.

22 Q Do you recall the approximate dates?

23 A I really don't. They were spaced roughly every six to
24 eight months.

25 Q The last one you saw was the January 2000 meeting?

26 A Yes.

27 Q How many SAB meetings have been held at Illumina after
28 that meeting, January of 2000?

1 A Three meetings.

2 Q Can you tell me approximately when those meetings were,
3 sir?

4 A I would think probably last December, and then probably
5 six months before that and then six months before that. I know
6 there was a delay after David Barker arrived in holding the first
7 meeting, so it could be that two meetings have been held. We have
8 another one coming up next month.

9 Q I was going to ask you that. After this January 2000
10 board meeting, where you are critical of Dr. Czarnik's
11 performance, when is the next time Illumina even had an SAB
12 meeting after that?

13 A David Barker came on board and then it took a bit of
14 time before he scheduled the next SAB meeting because he was
15 really coming up to speed, and we had discussed this at length and
16 he really wanted to have certain people in place and certain goals
17 met before we had an SAB meeting to make it particularly
18 effective. So I would say it was probably 10 months after, it was
19 probably like October, maybe, of 2000.

20 Q 10 months after the January 2000 meeting?

21 A That's probably right.

22 I go to Illumina eight times a year. We have six board
23 meetings and two SAB meetings. And it would probably be better
24 for everyone if you just said when the dates were, because eight
25 meetings a year, they get kind of confusing. I remember specific
26 board meetings and what was talked about, but in terms of dates,
27 they are every two months, so that's a pretty easy thing to
28 remember. For SAB meetings, they are not scheduled as regularly.

1 Q And you remember the reason why the first SAB meeting
2 under David Barker, why it took so long to schedule that was Dr.
3 Barker needed to get up to speed on the science?

4 A He needed to get up to speed and then we had some
5 serious scheduling issues when everybody could be there, and he
6 insisted that everyone on the SAB be available for the first
7 meeting that he was going to be in attendance at.

8 Q Now, you testified about that April, 1999 board
9 meeting. You deny that Jay Flatley said to the board something to
10 the effect that Dr. Czarnik doesn't know it yet but he's going to
11 be given goals that cannot be met.

12 A I emphatically deny it. That is not true.

13 Q You do admit that shortly after that meeting you
14 contacted Tony Czarnik?

15 A Yes, within a day or two of my returning to the
16 university.

17 Q The purpose of you contacting Dr. Czarnik was to
18 communicate a severance offer?

19 A That's correct.

20 Q Isn't it true, sir, you tried to convince Dr. Czarnik
21 that he should take the severance?

22 A Yeah, I felt that it was extremely equitable offer.

23 Q You tried to convince him it was in his best interests
24 to take the offer, true?

25 A You know, I really can't infer what his best interests
26 were. I was presenting what the board had authorized me to
27 present and I had again volunteered as a friend to present this in
28 a way that I thought was going to be non-confrontational, that was

1 an open and honest discussion, and that when Tony heard from me,
2 that I felt that this was as equitable of an offer that could
3 possibly be made under the circumstances. I thought that he would
4 respond positively to that and at least compromise in some way
5 over his position.

6 Q As his friend, did you try to suggest to him why it
7 might make sense for him to take the settlement offer?

8 A The only thing that -- Well, yeah. What I said to him
9 was that I felt that I did not think that any action that he would
10 possibly take -- By refusing to do this, it was simply going to
11 make protracted negotiations. He clearly was disengaged from the
12 company. It was evident he was not interested in the company and
13 directing the scientific staff of the company at that point, and
14 it really was in the best interests of the company to sever its
15 relationship with Dr. Czarnik, and vice versa, for Dr. Czarnik to
16 sever his relationship with the company and move on with his life
17 and try and reestablish his professional career.

18 Q Did you tell him you thought he should take a severance
19 offer?

20 A I told him I thought that the nine-month salary,
21 nine-month stock deal was very fair and that it was a very good
22 package.

23 Q Dr. Walt, did you ever recommend that Dr. Czarnik be
24 replaced as chief science officer?

25 A No, I did not.

26 Q Is there anything you saw or heard or observed that you
27 ever recommended that any discipline be taken against Dr. Czarnik?

28 A I never recommended any discipline be taken against

1 him, no. It wasn't my role.

2 Q Did you -- Did I hear correctly, did you say you
3 never, ever were told that Dr. Czarnik made a claim of
4 discrimination against the company?

5 A What I said was as of the April and probably June board
6 meetings of 2000, that was never -- That issue was never raised.

7 Q It was never raised in April or June of 2000 at the
8 board meetings?

9 A That's correct.

10 Q Didn't Jay Flatley inform the board that Dr. Czarnik
11 had filed a formal charge of discrimination with the state
12 government?

13 A I don't recall.

14 Q Did Jay Flatley ever tell you he was going to conduct
15 any investigation into any allegations of discrimination?

16 A I'm not sure I understand the question.

17 Q Did Jay Flatley ever tell you that he was going to
18 order or authorize the company to investigate the charge of
19 discrimination?

20 A Not that I recall.

21 Q When is the first time you heard that Dr. Czarnik was
22 claiming discrimination?

23 A Sometime later. Certainly after April of 2000. It may
24 have been at the June meeting, or it could have been at a
25 subsequent board meeting. But somewhere in that time frame.

26 Q When was the next meeting after June, next board of
27 directors?

28 A It was probably August.

1 Q August of 2000?

2 A Yeah.

3 Q Dr. Walt, when you were talking to Tony Czarnik in
4 April of 2000 about the severance package, didn't Dr. Czarnik tell
5 you he wanted to stay at Illumina?

6 A Yes, he did.

7 Q And you testified that as of June of 2000, at the June
8 board meeting, Jay Flatley -- strike that.

9 As of the June 2000 board meeting, it was clear to you that
10 Tony Czarnik was going to stay at Illumina?

11 A That's correct.

12 Q Did Jay Flatley tell you that the goals that were
13 eventually assigned to Dr. Czarnik, that Dr. Czarnik had agreed to
14 those goals?

15 A He said that the two of them had sat down and agreed to
16 some short-term and longer-term goals, yes. In fact, he told me
17 both before that board meeting, because I'd, flying in the night
18 before, it's three hours later for me, so I would tend to come to
19 Illumina, do a little snooping around in the morning and talking
20 to people how things were going, and Jay took me aside and said
21 Tony and he had had a productive discussion about goal setting and
22 that -- So we talked about this. He just mentioned that before
23 the board meeting to me and then reiterated that at the board
24 meeting later in the day.

25 Q Which board meeting?

26 A The June board meeting.

27 Q If we could put up 227, please.

28 Q These are the goals, Dr. Walt, that you believe were

1 agreed to by --

2 A I have no --

3 Q Jay Flatley and Tony Czarnik?

4 MS KEARNS: Objection, foundation.

5 THE WITNESS: I have no knowledge of this. The first
6 time I saw it was in the room right before my testimony.

7 MR. PANTONI: Q I see. Without specifically knowing
8 what the goals were, what you knew was that after June of 2000,
9 Tony Czarnik sat down with Jay Flatley, they had a productive
10 meeting, and they agreed to goals?

11 A I did not say they had a productive meeting. I said
12 that Jay Flatley and Tony had sat down and agreed to goals. I
13 never -- It was your word, "productive" was your word.

14 Q I believe you said that, sir. But the record will
15 reflect what you say.

16 You were asked some questions about these goals. Let me ask
17 you --

18 A Sure.

19 Q Speaking about binary oligo encoding, the 30-day goal
20 is experimental proof of concept of binary oligo encoding with 2
21 to the 4th codes. How much is that, sir?

22 A 16.

23 Q 60-day goal, 2 to the 8th power, how many would that
24 be?

25 A 256.

26 Q And the 90-day goal, 2 to the 12th power?

27 A Wait, I'm sorry, 2 to the 8th is 512. 512, sorry. 2
28 to the 12th --

- 1 Q Do you want to use the board?
- 2 A You are asking me about 2 to the 12?
- 3 Q No, 2 to the 8th.
- 4 A 2 to the 8th is 512. I'm sorry.
- 5 Q I thought its 256?
- 6 A It's 256. I was right the first time. 2 to the 8th is
- 7 256.
- 8 Q And the 90-day goal, 2 to the 12th, how many codes is
- 9 that, sir?
- 10 A 2 to the 12th is 4000.
- 11 Q A little over 4000, right?
- 12 A A little over 4000.
- 13 Q Assuming, sir, these goals were given to Dr. Czarnik on
- 14 May 19th, this was couple of months before the roadshow, what
- 15 decoding experiments were going on at Illumina at that time?
- 16 A I think at that point they were closing in on about a
- 17 thousand codes.
- 18 Q What do you base that on?
- 19 A Are you asking about the technology that's based on?
- 20 Q What experiments suggest to you they were closing in on
- 21 a thousand codes?
- 22 A I recall that, just from all the meetings that we had,
- 23 we were -- for 2000 we were in the range of, our goal for the
- 24 year 2000 was on the order of about a thousand codes.
- 25 Q Company's goal for the year 2000 was one thousand
- 26 codes?
- 27 A Something on that order, yes.
- 28 Q The entire company goal?

1 A The goal to have about a thousand qualified codes, yes.

2 Q Decoding is critical for the success of Illumina, would
3 you agree with that?

4 A Yes.

5 Q It's fundamental to your technology?

6 A That's right.

7 Q When was the 16-bead experiment conducted at Illumina?

8 A 16 experiment was done fairly early on, say probably in
9 very early '99, maybe even toward the end of '98.

10 Q How many scientists were working on the 16-bead
11 experiment?

12 A The 16, probably 3 or 4.

13 Q By the way when you were doing the research at Tufts
14 University, did you do any research in decoding? Did you conduct
15 any experiments?

16 A We actually had a different way of doing coding. We
17 did something called in-coding, which involved putting beads into
18 beads, rather than decoding, which is to figure out what sequences
19 on the beads after you've already put them into an array. So its
20 a complementary process, but -- yes.

21 Q Something different than decoding?

22 A Something different than decoding, yes.

23 Q Going back to Illumina's coding efforts, you described
24 several scientists working on the 16-bead experiment. Do you
25 recall the 128-bead experiment at Illumina?

26 A Yes.

27 Q How long did Illumina work on the 128-bead experiment?

28 A That probably took about four to six months.

1 Q How many scientist at Illumina worked on the 128
2 decoding experiment?

3 A I would think somewhere around four to six scientists.
4 But that's just a guess. I know, I really wasn't -- I'm not a
5 day-to-day person. I'm a director. We were presented with
6 results as opposed to managing the individuals. We do things
7 we're ramping up.

8 Q I thought when we showed you that e-mail Dr. Czarnik
9 sent you in August you said you didn't need to read it carefully
10 because you knew all about decoding?

11 MS KEARNS: Objection, argumentative.

12 THE COURT: Sustained.

13 MR. PANTONI: Q Are you familiar with an experiment
14 called 768-decoding experiment?

15 A Yes.

16 Q What was the purpose of the 768-decoding experiment?

17 A Actually the purpose of all the increasing numbers is
18 simply to demonstrate that one could put more and more DNA
19 sequences on the end of the optical fiber bundle that I described
20 before. So as you go from 16 to 128 to 768 to 1536 you have the
21 ability to put more and more complexity and do more tests per
22 fiber than you would with smaller numbers. So the purpose of all
23 these experiments we were going through, it gave the company
24 increasing capability to do DNA genetic testing.

25 Q What's the significance of 7-6-8 when you talk about
26 the 768-decoding experiment, what does that number mean?

27 A I'm not sure I know the answer to that question.

28 Q You know the experiment was called the 768-decoding

1 experiment?

2 A Yes. It was the number of distinct codes, if that's
3 what you are getting at, the number of distinct codes or sequences
4 of DNA that could be connected or decoded and subsequently
5 analyzed on the end of a fiber.

6 Q So was the purpose of the 768 decode experiment to see
7 whether through experimental proof and principle whether Illumina
8 could decode up to 768 different codes?

9 A Yes, that's correct.

10 Q When were these experiments conducted to determine
11 whether Illumina could decode 768 codes?

12 A It was in the time frame that we're talking about, sort
13 of that middle of 2000, early to middle of 2000 time frame.

14 Q Didn't those experiments, sir, begin in January of
15 2000?

16 A If you say so. I mean, again, that's about the time --
17 I wouldn't be surprised if that's when they began.

18 Q They were continuing at least through the roadshow,
19 that is July of 2000, correct?

20 A I think they probably had already done the proof of
21 concept, proof of principle on the 768 at that point.

22 Q Sir, how long did the 768 decoding experiments
23 continue, to what date?

24 A I really don't know.

25 Q Do you have any estimate at all for the jury?

26 A Well, I know that it got to 1536 not that long after
27 that period, so the 768 was sort of an interim milestone. It was
28 a critical path, but it wasn't -- I really don't know.

1 Q Can you give me your best estimate, please, of the
2 entire duration, how long Illumina was working on various versions
3 of the 768 decoding code?

4 A It would be a guess.

5 Q Would you agree it was at least six months?

6 A I would say six months sounds about right.

7 Q How many Illumina scientists were working on the
8 experiment to determine whether Illumina could decode 768
9 different --

10 A I have no idea.

11 Q Could you give me estimate at all?

12 A I would say it would be an effort of six to eight
13 people, approximately.

14 Q Now, when you were asked about these codes, rather
15 these goals, on direct examination, you gave a little discussion
16 on the board about the one-year goal for binary oligo encoding, do
17 you remember that?

18 A That's correct.

19 Q You talked about what it was to make a library of
20 10-mers.

21 A Yes, that's correct.

22 Q That's what you demonstrated up on the board, right?

23 A That's correct.

24 Q You only talked what it took to make a library?

25 A That's correct.

26 Q What about the rest of this goal, where it says to make
27 and decode an array of all 10-mers? That goal was more than just
28 to make that library you described, wasn't it?

1 A Well --

2 Q Yes?

3 MS ESPINOSA: Objection,

4 MR. PANTONI: Let me withdraw the question.

5 Q Isn't it true, Dr. Walt, that your goal that you
6 started to talk about was more than just make a library, it was
7 also to decode the array?

8 A I think you are leaving out a key piece of information
9 here, and that is that when one sets scientific goals, and I do
10 with my students all the time, you set short-term goals and you
11 set long-term goals. What it says right there, again I haven't
12 seen this, but what that says is, "Compose project plan and
13 budget." This is under goal 30-day, "Show experimental proof of
14 context of binary oligo encoding with 2 to the --" I can't read
15 the number now, but 2 to the 4th," 16 codes.

16 So if that particular experiment does not work, at least
17 somebody has done the experiment, demonstrated the proof of
18 concept will not work, and then you move on and set other goals.

19 MR. PANTONI: Your Honor, I object and move to strike.
20 I'm asking about the year goal.

21 MS ESPINOSA: Your Honor, he's entitled to complete his
22 answer. That's a continuum of a single goal. The complete --

23 THE COURT: Motion to strike denied. You may complete
24 your answer.

25 THE WITNESS: So in setting up and designing scientific
26 experiments, one measures progress by the initial goals. Putting
27 something down like this as a one-year goal, the assumption, my
28 assumption here, is that at every one of those goals, 30 days, 60

1 days, 90 days, there would be an evaluation of the progress that
2 was taking place on each of those previous goals to make sure that
3 the technology was capable of working.

4 MR. PANTONI: Q You talked about experimental proof
5 of concept. The 768-decoding experiment that the several
6 scientists were working on, that's the same type of experiment,
7 that's an experiment, proof-of-concept experiment?

8 A The 768 was beyond proof of concept.

9 Q Is it your testimony that the 768-decode experiment was
10 not a proof-of-concept experiment?

11 A I would say the 768 probably would have been in that
12 -- probably would have been in that one-year goal or beyond sort
13 of time frame.

14 Q Let me ask it in these terms: Was the 768-decode
15 experiment designed to be able to illustrate that Illumina could
16 decode 768 different codes or to prove experimental proof of
17 concept that suggested that the company could do so?

18 A I don't think it was either one of those.

19 Q What was it?

20 A I think it was at that point, it was -- I think at
21 that point it was at the stage where it was clear that the company
22 was going to be able to decode 768 different codes, and it was
23 really just putting in the resources to get that accomplished.

24 Q Are you aware, Dr. Walt, that Illumina's first 768-
25 decoding experiment didn't work?

26 A I wouldn't be surprised.

27 Q That it failed?

28 A I wouldn't be surprised. In fact, without getting into

1 too many technical details, there was a selection process that
2 went on that the way that the codes were selected is maybe 4000
3 different codes were made and then the best 768 were selected from
4 those 4000 to pick which ones would work the most efficiently.

5 Q Do you know after the first 768-decoding experiment
6 failed, when Illumina started the second 768-decoding experiment?

7 A No. As I mentioned, I'm not involved in the day-to-day
8 operations of the company.

9 Q I want to again focus on this year goal. Ask you a
10 specific question. Isn't it true that that year goal is asking
11 Dr. Czarnik, in addition to making the library which you described
12 to actually make and decode the array of all 10?

13 MS ESPINOSA: Objection, lacks foundation, and he's not
14 reading the entire goal.

15 THE COURT: Can you see the entire goal?

16 THE WITNESS: "Make a combinatorial library of all
17 10-mers." So that sounds actually to me like a very reasonable
18 goal in the context of the 90-day goal.

19 Q Isn't it true, sir, that goal involved not only making
20 the library that you described on that board but also doing
21 decoding?

22 A Well, maybe making a library with the resources that
23 Illumina -- What it meant was Tony had to go down the hall and
24 tell somebody he wanted a split and mix synthesis of all 10-mers,
25 and somebody actually would have done that for him and given him a
26 bottle that contained all of those, all of those materials,
27 probably within a couple of weeks. He then had to demonstrate
28 that he could perform the binary decoding, and I really need to

1 interject something here.

2 This is -- There's a very important piece of information
3 that's missing from your questioning.

4 MR. PANTONI: Your Honor, I prefer he answer the
5 questions.

6 THE COURT: You have to just answer the questions, Dr.
7 Walt.

8 THE WITNESS: Okay.

9 MR. PANTONI: Q I want to clarify one point, Dr.
10 Walt. When you were going through the examination by Miss
11 Espinosa, and you got up and made your talk about making the
12 library of 10-mers, and this is something you claimed the computer
13 could do --

14 A The computer could design them, but the synthesis had
15 to be done by the technical staff.

16 Q Isn't it true you were describing only the first
17 sentence of this year goal, you were describing what it took to
18 make a combinatorial library?

19 A But --

20 Q Isn't it true, sir?

21 A You are talking about the one-year goal, make a
22 combinatorial library of all 10-mers, yes. So the one-year goal
23 of all 10-mers that can be decoded using the binary coding scheme,
24 that I contend can be done in a week or two.

25 Q You are talking about the first sentence?

26 A That's correct.

27 Q The rest of that goal involved actually decoding, is
28 that correct?

1 A That's correct.

2 Q By the way, did you read Dr. David Barker's deposition
3 testimony when you were flying in on the plane today?

4 A No, I did not. I only had the testimony where my name
5 was mentioned.

6 Q How about Dr. Kevin Gunderson, did you read his
7 deposition?

8 A No, I did not.

9 Q Now, on the roadshow -- And for the record, could you
10 describe for the jury what a roadshow is.

11 A A roadshow is where the executives of the company and
12 -- the executives of the company go to various investment firms,
13 banks, financial institutions, and give a presentation about the
14 technology that the company has, what the market opportunities
15 are, who the people that are associated with the company are, and
16 really just describe the technology and what the opportunities
17 are. And there is sort of a range of stock price that's put on,
18 it's called a cover price, which ranges in value, and what it's
19 designed to do is get people to subscribe to buy the stock at the
20 time that it's introduced on the stock market.

21 Q And you attended how many sessions?

22 A One meeting.

23 Q And when you heard the roadshow presentation, did they
24 make any representations that decoding works?

25 A You know, I heard the presentation from Jay. I suspect
26 that what was described was, "Here is how we do it." I don't
27 think anything was described with respect to how many.

28 Q I didn't say how many. Was it described that the

1 concept of decoding works?

2 A You know, the decoding concept I don't believe was even
3 discussed. I don't believe the decoding was discussed. I think
4 it was simply stated that what we do is we put the beads randomly
5 into the array and then decode them by a process that we've
6 developed.

7 Q So was the word "decode" and "code" used in any way,
8 shape or form?

9 A I'm sure it was.

10 Q Again, the technology is pretty much worthless if the
11 decode doesn't work, agreed?

12 A No, because as I mentioned, my laboratory develops
13 encoding approaches that could have been used as well.

14 Q As far as what Illumina is trying to do with his
15 technology, decoding is essential?

16 A No, what I said is correct, there are alternatives, so
17 what Illumina is doing is allow the technology to proceed.

18 The decoding, that approach that they are taking, works
19 well, and there was no reason to not pursue it.

20 Q How many different codes or bead types can Illumina
21 decode today?

22 A You know, I'm not sure how many at the research stage,
23 but there's certainly 1536, and I believe that the ultimate goal
24 is 2000, but that's sort of as many as they need.

25 Q Let me ask you a quick question about something called
26 the o-nose. Are you familiar with the o-nose?

27 A Yes, I developed the technology in my lab.

28 MS ESPINOSA: This is outside the scope of direct.

1 MR. PANTONI: This is my only opportunity to take him.
2 We're taking him out of order.

3 THE COURT: Call him as your witness on this?

4 MR. PANTONI: Q Simple question, Dr. Walt. Do you
5 have any concerns or do you feel that Illumina has not developed
6 the o-nose the way it should have?

7 A I think it's generally recognized within the company
8 that the o-nose has not been developed to the extent that it
9 should, and there are discussions that are going on to rectify
10 that with respect to getting that technology addressed in a very
11 aggressive way.

12 Q Who is working on the o-nose project today?

13 A Today? I believe there are only three people working
14 on that project.

15 Q And their names, please?

16 A I don't know.

17 Q Do you know any of them?

18 A I don't recall who they are, no.

19 Q Put up Exhibit 315 again.

20 Did you ever respond to this e-mail?

21 MS ESPINOSA: Asked and answered, your Honor.

22 THE COURT: But it's cross-examination.

23 THE WITNESS: I don't believe I did.

24 MR. PANTONI: Q Did you say you didn't respond to
25 this e-mail because you thought it was just an issue that was
26 personal to Tony Czarnik?

27 A What I think I said was that I thought this was
28 paranoia on his part, and that was struck from the record, but

1 I'll use it again because that's precisely what this reads as.

2 Q Did you ever, where the e-mail says, "Jay's
3 pronouncement at the April board meeting that I'd described his
4 bout with depression, that he didn't believe me, and he was about
5 to assign me goals that couldn't be met," did you ever send
6 another e-mail to Dr. Czarnik or a phone call or a memo or any
7 response at all denying those accusations?

8 MS KEARNS: Foundation. Object the question is
9 argumentative given the witness' prior testimony that he doesn't
10 have any recollection of having seen this. So I think given that
11 prior testimony, the inquiry is argumentative.

12 THE COURT: The question is what portion of this?

13 MR. PANTONI: Q Did you ever send anything to Dr.
14 Czarnik or even telephone him or any way, shape or form respond to
15 his, Dr. Czarnik's, accusation that Jay Flatley had said some
16 things at the April board meeting?

17 THE COURT: Sustained. He said he never read that.

18 MR. PANTONI: If I can clarify.

19 Q Did you not read -- Did you stop reading altogether or
20 did you skim the rest of it? I'm not sure.

21 MS KEARNS: Asked and answered.

22 THE COURT: Overruled. You may answer.

23 THE WITNESS: What I said is I believe I stopped
24 reading after the first paragraph.

25 Q You didn't even skim the second paragraph?

26 A I don't recall having done that, no.

27 Q You take your duties as a board member seriously, don't
28 you, sir?

1 A Absolutely.

2 Q You take your role at chair of the advisory board
3 seriously, don't you?

4 A Absolutely. Very seriously.

5 Q Having seen the first paragraph of this e-mail that
6 talked about coding, you didn't even bother to read the second
7 paragraph to see whether Dr. Czarnik would say anything further on
8 this subject?

9 MS KEARNS: Objection, argumentative

10 THE COURT: Sustained.

11 MR. PANTONI: Q If you took your responsibilities
12 seriously as a board member and as a SAB chair, when you saw the
13 first paragraph that dealt with decoding, weren't you interested
14 in what the rest of the e-mail said?

15 MS KEARNS: Same objection, argumentative.

16 THE COURT: Sustained.

17 MR. PANTONI: Q In your view, Dr. Walt, how many
18 times should an experiment be successfully repeated before the
19 results are presented publicly?

20 MS KEARNS: Objection, lacks foundation, vague.

21 THE COURT: Calls for expert opinion and he hasn't been
22 designated an as expert. Sustained.

23 MR. PANTONI: Q Dr. Walt, you said you currently
24 have 1,400,000 shares of Illumina stock?

25 A That's correct.

26 Q At the time of the roadshow, how many shares of
27 Illumina stock did you own?

28 A Exactly the same number except for 10,000 shares that I

1 earned last year by serving on the board of directors.

2 Q So again you own roughly 1.4 million shares during the
3 roadshow, is that right?

4 A That's correct.

5 Q What about as of the date of this Exhibit 315, as of
6 August 25, 2000, how many shares of Illumina stock did you own
7 that day?

8 A I've owned the same number of shares pretty much from
9 day one. That was almost stable. I put some money into the
10 company a little bit earlier on just to buy a few extra shares,
11 but about the same number.

12 Q And when you received this e-mail from Dr. Czarnik on
13 August 25th of 2000, when he encouraged you to dig into coding,
14 what was the share price approximately of the 1.4 million shares
15 of stock that you owned?

16 MS KEARNS: Objection, foundation, relevance.

17 THE COURT: Do you know what the share price was on
18 that date, Doctor?

19 THE WITNESS: It would be a guess.

20 THE COURT: Sustained.

21 MR. PANTONI: Q Can you give me an estimate at all?

22 MS KEARNS: Objection, asked and answered. The witness
23 has indicated it will be a guess.

24 THE COURT: He said it would be a guess. Sustained.

25 MR. PANTONI: Q What about on the day the company
26 went public, at the IPO, what was the share price on that day?

27 MS KEARNS: Objection, relevance.

28 THE COURT: Didn't we argue it earlier on and the

1 objection was overruled?

2 MR. PANTONI: Yes.

3 THE COURT: Overruled. You may answer.

4 THE WITNESS: The stock was introduced at a price of
5 \$16 per share.

6 Q \$16 per share at the opening bell?

7 A That was the price that everyone purchased it at. At
8 the opening bell I think it ended up going out at about 29.

9 Q \$29 a share?

10 A Uh-huh.

11 Q You had 1.4 million shares?

12 A Today it's about 5, and I haven't sold any shares.

13 Q So what is the current value of the shares of stock
14 that you do own on today's market at today's price?

15 A I'm not sure what relevance that has to the -- The
16 reason I'm here is because my integrity is being questioned.

17 THE COURT: Dr. Walt, you just have to answer the
18 question. I decide if it's relevant or not.

19 THE WITNESS: Okay. Sorry.

20 THE COURT: We can do the math, Counsel. You've got
21 the numbers.

22 MR. PANTONI: I want to be sure we're all on the same
23 page.

24 Q You sit here today testifying you own 1.4 million
25 shares and the shares are priced at around \$5 a share?

26 A And I haven't sold any shares.

27 Q Is that correct, sir?

28 A That's correct.

1 Q So in the open market, your shares of stock as you sit
2 here today testifying have market value of around \$7 million?

3 A I couldn't sell them if I wanted to.

4 Q You can answer the question, please.

5 THE COURT: We can just take judicial notice of what 5
6 times 1.4 million is, Counsel.

7 MR. PANTONI: Fair enough.

8 No further questions.

9 THE COURT: Any questions on redirect?

10 MS ESPINOSA: Yes, your Honor.

11 THE COURT: Go ahead.

12 REDIRECT EXAMINATION

13 BY MISS ESPINOSA:

14 Q Dr. Walt, I think you were about to explain you
15 couldn't sell your shares if you wanted to. What did you mean by
16 that?

17 A Well, if you are a member of the board of directors or
18 have -- or executive position or have any kind of inside
19 information about a company that's publicly traded, you are
20 precluded from selling shares except during certain periods, which
21 are called open periods, when all the information that's known
22 about the company is known to the public.

23 With companies of this type, that's a rare occasion, because
24 there's always information that's confidential, things that are
25 happening, and if I were to go and sell any stock or buy stock, it
26 would be considered insider information, so there are very -- The
27 Securities and Exchange Commission -- I'm just a professor. I
28 learn all this stuff after my technology was successfully invented

1 by the company. You learn that you really don't have the
2 opportunity to -- on paper you could be worth a lot of money, but
3 trying to get it is impossible.

4 Q Going back to the SAB meetings versus the board
5 meetings, are the people on the Scientific Advisory Board the same
6 people that are on the board of directors?

7 A The only overlap is myself.

8 Q And you also mention that it's hard to schedule things
9 occasionally. Is it hard to schedule all of the people on the SAB
10 meeting to come together for an SAB meeting?

11 A It's almost impossible. These are very well-known
12 scientists with extremely tight travel schedules, and just trying
13 to get everybody at the company at the same time is something that
14 you have to plan at least six months in advance.

15 Q That was my next question, how far in advance do you
16 know --

17 A At least six months in advance, and even then people
18 may cancel.

19 Q Could you put up Trial Exhibit 116, please.

20 THE CLERK: I'm sorry?

21 MS ESPINOSA: 116.

22 THE CLERK: Thank you.

23 MS ESPINOSA: Q We've heard about this January 2000
24 SAB meeting.

25 A Uh-huh.

26 Q Let me show you Trial Exhibit 116. Does this look like
27 the agenda that was given to you at the hotel the evening before?

28 A I can't see it.

1 Q Could you look in the binders behind you there. The
2 same trial exhibits are there. It's number 116.

3 A Could somebody come and organize my office like this?
4 This is great.

5 Yes, this is the schedule.

6 Q I think Mr. Pantoni asked you whether or not you would
7 call Dr. Czarnik asking to revise that agenda. Do you have any
8 recollection of that?

9 A I recall his question. I don't recall the revision.

10 Q I think he also asked you about whether or not
11 scientific problems or scientific challenges were an appropriate
12 topic for an SAB meeting.

13 A And I said yes.

14 Q Do you see that anywhere on the agenda?

15 A No, I do not.

16 Q Would it have been appropriate for that general topic
17 to be listed as an agenda item on an SAB meeting agenda?

18 A Yes.

19 Q Do you have any knowledge that anyone prevented that
20 from being placed on the agenda?

21 A No. I would assume that if there were concerns about
22 that that it would have been brought to my attention.

23 Q Are scientific problems or scientific challenges, is
24 that sort of an overarching goal of having an --

25 A That's the primary purpose of having the meetings.

26 Q So would it be appropriate to have that as the single
27 goal or the single item of an agenda?

28 A That could be the agenda, but I would say that book,

1 maybe something like that should have appeared with details about
2 what those problems were so that the members of the Scientific
3 Advisory Board could have familiarized themselves with the
4 specifics on the agenda.

5 Q And does this agenda appear to you to be something that
6 would take six months to prepare, if you have six months advance
7 warning?

8 A I think about five minutes.

9 Q Are you familiar with a relationship that Illumina has
10 with a company called Applied Biosystems, or ABI?

11 A Yes, I do.

12 MR. PANTONI: Objection, your Honor, beyond the scope.

13 THE COURT: This is beyond the scope.

14 MS ESPINOSA: Q Well, let me ask you, are you familiar
15 with the concept of selecting codes as part of that ABI
16 relationship?

17 MR. PANTONI: Same objection.

18 THE COURT: Just to speed things up, do you want to
19 reopen?

20 MS ESPINOSA: Q During your cross-examination and
21 direct examination by Mr. Pantoni, he asked you about the 768-
22 decoding experiment?

23 A Correct.

24 Q Do you know if that experiment was also a screening
25 experiment to select codes for the ABI relationship?

26 A I believe it was.

27 Q Can you explain to the jury what selecting codes means?

28 A Yes. I think I did briefly already. What it means is

1 let's say we go through this example that I demonstrated before of
2 having a million of those words, or even let's make it a little
3 simpler, let's say we have five-letter words, and I put all the
4 letters of the alphabet, all 26 letters of the alphabet, and make
5 every combination of those 26 letters. Some are words that mean
6 something and other ones are just jibberish.

7 So to make the same analogy, what you do is you make a large
8 number, you make a population of those, and then you select only
9 the words that actually have a meaning. So in this particular
10 example, for the decoding, the 768, what you want to do? You want
11 to start with a big number and then select that down to 768 really
12 good codes that work.

13 Q And let's go back to Dr. Czarnik's goals with respect
14 to oligo binary decoding. I think it's 227. Do you remember
15 there were two sentences in the goal for oligo binary coding? The
16 second one was to make and decode an array of all 10-mers and
17 verify identities of a representative subset of decoded 10-mers.

18 A That's correct.

19 Q Let's break that down. How would make an array of all
20 10-mers, how difficult would that be?

21 A That would involve really doing just what I described
22 before.

23 Q What would you physically do to take that pool of
24 oligos that you made and make an array?

25 A What you would do you would make each one of those,
26 instead of in solution, you would make each one of those 10-mers,
27 10-letter words, on a bead in the same process that was described
28 by me earlier. So you would put all those on beads, and then you

1 would have a million of them, all million of them in solution.

2 Q I think you said it would take a week or two to
3 actually make that pool?

4 A That's correct.

5 Q How long would it take you to put that on an array?

6 A To put it on an array?

7 Q Physically.

8 A To put some of them on the array, which is really
9 what's being -- it says a subset. To --

10 Q I think it says make and decode an array of all
11 10-mers. So what would you do with that if you wanted to make an
12 array of all 10-mers?

13 A You would put those onto multiple fibers, and so you
14 would spread those out on multiple fibers, and depending on how
15 many little wells and beads you had on each fiber, you could do
16 the map and you'd have to spread them out. But that's a
17 technology that the company has in place, so I would say up to
18 this point of making all those 10-mers, putting them onto the
19 array, all Dr. Czarnik would have had to do would be to go to the
20 appropriate people and they would have done that for him.

21 Q How long would that take?

22 A That would take probably two or three days more than
23 the one or two weeks.

24 Q Then I think you were going on further in that sentence
25 to decode an array of all 10-mers and verify identities of a
26 representative subset of decoded 10-mers. What does that imply to
27 you? I realize this is the first time you are actually reading
28 this.

1 A I'm very familiar with this because this particular
2 project, this is his idea. This is Tony's idea. He came up with
3 this --

4 MR. PANTONI: Objection, move to strike.

5 MS ESPINOSA: Q Dr. Walt, do you know who came up with
6 this idea?

7 A Dr. Czarnik came up with this idea. During the early
8 stages of the company. It was in a phone conversation. It was in
9 the very early stages of the company. We knew that coding and
10 decoding were going to be very critical at this stage to the path
11 of the company. We did not know how we were going to do it. It
12 was before there were any laboratories in the company. And every
13 day or couple of times a week we would get on the phone. Dr.
14 Czarnik called these telephone meetings, and we would have all-
15 afternoon brainstorming sessions to just invent new ideas about
16 how to do this, how to do that. And Dr. Czarnik came up with this
17 pretty interesting idea of binary decoding by using antibodies and
18 other kinds of binding materials. That was in 1998.

19 And in 2000, nobody had worked on this project, even though
20 he was the chief scientific officer of the company. And this was
21 incredible -- it's mind-boggling that somebody who came up with
22 an idea that was of scientific value to a company wouldn't even
23 have some of his own staff members work on this particular project
24 during his time as chief scientific officer.

25 So this was actually a -- an attempt, I assume, on Jay's
26 part to put this technology back on the table and to have somebody
27 who had come up with the idea, who one would think would be
28 excited about working on that idea, this was an extremely fair

1 thing, saying hey, it's your idea, go make it work. And yet step
2 one wasn't even taken. And so it's mind-boggling.

3 To get back to your question, the specific question, what it
4 means is you take some of those beads and you take, for example, 2
5 to the 12th codes, for example, or 2 to the 4th, something, some
6 subset of those, and you make an attempt to decode those. So it's
7 not an experiment to do a million, it's not an experiment to do a
8 thousand, it's simply an experiment to demonstrate the feasibility
9 that in the context of a very complex population, where there's a
10 million present, could you pick out 10 or 20 or 30. That's all it
11 was. It wasn't trying to do 768 or 2000 or anything of that
12 order. It was just to select a representative number out of those
13 one million.

14 Q Dr. Walt, many of the people on our jury are not
15 scientists. Everyone keeps saying "feasibility," "proof of
16 concept." What do those phrases mean?

17 A In any scientific endeavor, you do research. In any
18 research project, you don't know if an experiment is going to
19 work. If you did, it wouldn't be worth doing it. That's why it's
20 called experimentation. And so when you design a feasibility
21 experiment, what you do is you design a relatively simple
22 experiment to demonstrate will that project -- will that
23 experiment work in its simplest manifestation, meaning at the 30-
24 day goal is 2 to the 4th, is that the number? So 16. A very
25 reasonable number to pick. If the 16 doesn't work, then you say
26 hey, we have a problem at 16, we can't go on, we can't go beyond
27 that. If 16 works, then you can say 16 works, now let's see if we
28 can go to 256, 2 to the 8th, and you work at 2 to the 8th. And if

1 that works, you say great, now let's go to the 90-day goal of
2 whatever the number is and see if that works.

3 So these are not etched in stone. They are not fixed for
4 somebody. It's an iterative process. You set some goals, you say
5 here's where I think I can be in a year, but it's all on paper.
6 This is the kind of standard thing that any scientific, anybody
7 that's doing science would do, say where did we think we could be
8 in a year. It's not saying this is where we're going to be, it's
9 just saying here's a reasonable place that we think we can be and
10 here are some milestones we need to achieve along the way, 30, 60,
11 90 days.

12 Q I think you said you are familiar with the notion of
13 setting goals for your students, is that correct?

14 A Yes.

15 Q Does it make sense to arrange them with these time
16 frames in kind of a cumulative fashion, you build on prior
17 experience?

18 MR. PANTONI: Objection, your Honor, relevance.

19 THE COURT: Sustained.

20 MS ESPINOSA: Q Dr. Walt, what would happen if you
21 never even achieved the 30-day goals, "Compose project plan and
22 budget," what would you do if that wasn't achieved? Could you
23 progress any further?

24 MR. PANTONI: Objection, lack of foundation.

25 THE COURT: Sustained.

26 MS ESPINOSA: Q Dr. Walt, are you familiar with where
27 the o-nose technology came from?

28 A Yes, I am.

1 Q Where did it come from?

2 A Came from my laboratory.

3 Q Who is in charge of the o-nose project at Illumina?

4 A Who was in charge?

5 Q Yes, from the inception of the company, when it was
6 formed, which group at Illumina was responsible for pursuing it?

7 A The chemistry group.

8 Q Who headed the chemistry group?

9 A Tony Czarnik.

10 Q I think you also mentioned that you are familiar with
11 the evolution of decoding experiment for Illumina. For the 768
12 decoding experiment, do you know whether or not Illumina was able
13 to successfully decode any of the bead types for that experiment?

14 A Yes, they were.

15 Q Do you recall how many?

16 A I don't recall. It was usually, you know, something
17 like one out of four would work. So I would think that out of
18 4000 that were tested, the expectation was that a thousand, you'd
19 get 500 to a thousand, something like that.

20 Q For the 768 experiments, would you agree that the
21 number 768 referred to the number of bead types that were used in
22 that experiment?

23 A I'm not sure I understand the question.

24 Q I think you said 4000. I'm wondering where did you get
25 the number 4000?

26 A 768, at least in the way it's in the context it's been
27 used, is the number of good codes that were selected from the
28 overall pool.

1 Q Okay. Then I think you may be referring to a different
2 experiment than we've been referring to. I think the record is
3 going to be a little confused on that point. If the 768 decoding
4 experiment was an experiment that was conducted that started from
5 a pool of available 768 bead types --

6 A Yeah. Then the numbers, the numbers would end up being
7 about, I would say, about -- trying to select about 200 of those,
8 cull that down to about 200 good codes.

9 Q So your expectation would be if you started with 768
10 sequences, you would not expect to be able to decode all 768 of
11 those sequences?

12 A If you started from a random pool of 768, that's
13 correct, I would not expect to be able to decode every one.

14 MS ESPINOSA: Let me just confer a moment, your Honor.

15 I think we're done. Thank you, your Honor.

16 THE COURT: Any recross?

17 MR. PANTONI: Very briefly, your Honor.

18 THE COURT: Okay.

19 REXCROSS-EXAMINATION

20 BY MR. PANTONI:

21 Q We've been talking about a proof of concept experiment,
22 experimental feasibility experiment. Is that designed to
23 determine in lay terms whether it makes sense for the company to
24 continue on with further experiments of that nature?

25 A Yes, that's correct. In a proof of concept experiment,
26 it would be to design -- it would be designed to test whether it
27 makes sense to pursue that line further, yes.

28 Q The goals that Dr. Czarnik was given that we've looked

1 at, Exhibit 227, the 30-, 60- and 90-day goals talks about
2 experiments designed to show proof of concept, right?

3 A Concept is on the 60-day, yes, that's correct.

4 Q Second, under 30-day, experimental proof of concept,
5 60-day and the 90-day experimental proof of concept.

6 A It says "feasibility."

7 Q Same thing?

8 A No, not really. Proof of concept really will the thing
9 work. Feasibility is, I would say we're splitting hairs maybe,
10 but taking it beyond that. You've already proved that it works,
11 will it work at a more advanced level.

12 Q The purpose of these experiments would be to decide
13 whether it makes sense to go forward with binary oligo encoding
14 experiments, right?

15 A That's correct.

16 Q Now, who at Illumina has worked on binary oligo
17 encoding after Dr. Czarnik left?

18 A I don't know. There are 200-some people there. I
19 really don't know.

20 Q Who is in charge of this important area of binary oligo
21 encoding today?

22 A It's not on the critical path for the company because
23 it's -- At this stage they've solved their encoding problems. It
24 would be a useful additional capability, but I suspect nobody is
25 working on it at this point.

26 Q If we could take one quick look at the agenda you were
27 asked to look at, the SAB agenda, 116.

28 A I have it in front me.

1 Q I think from Miss Espinosa's questioning you didn't
2 understand the nature of my questioning, so I want to repeat
3 something.

4 A Okay.

5 Q This is the actual agenda for the January 2000 meeting,
6 right?

7 A Uh-huh.

8 Q Correct?

9 A I believe so.

10 Q What I was asking you about, Dr. Walt, is not whether
11 this agenda that we're looking at was revised, rather what I was
12 asking you about is isn't it true that there was a prior agenda
13 before this one that had on it discussion topics relating to
14 experimental problems and scientific problems?

15 A And so my answer is this is the only agenda that I saw.

16 Q Any information one way or another in terms of whether
17 Dr. Czarnik prepared an agenda before this that spoke to
18 experimental problems or scientific challenges?

19 A I have no information one way or another.

20 MR. PANTONI: Nothing further.

21 THE COURT: Anything further?

22 MS KEARNS: No.

23 THE COURT: We'll take our recess. We'll be in recess
24 until tomorrow morning. Please remember the admonition not to
25 form or express any opinions about the case, not to discuss the
26 case among yourselves or with anyone else.

27 We'll be in recess until 9:00 a.m. tomorrow morning. Have a
28 pleasant evening. See you at 9:00 a.m. tomorrow morning.

1 (Proceedings resumed outside the presence of the jury.)

2 THE COURT: I'd like counsel here at 8:45 tomorrow
3 morning in case something comes up. Thank you very much.

4 (Proceedings recessed at 4:20 p.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

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Official Reporter

1 SAN DIEGO, CALIFORNIA, TUESDAY, JUNE 18, 2002; 8:45 A.M.

2 (Proceedings resumed outside the presence of the jury.)

21 (Jurors seated in open court.)

22 THE COURT: Morning, ladies and gentlemen. The record
23 will indicate all the jurors are present, counsel and the parties
24 present.

25 Mr. Pantoni, you want to resume Dr. Czarnik's testimony.

26 MR. PANTONI: Yes, your Honor. We had taken Dr. Walt
27 out of order. I'd like to resume with Dr. Czarnik.

28 THE COURT: Yes.

1 ANTHONY CZARNIK,
2 having been previously duly sworn, resumed the witness stand and
3 testified further as follows:

4 DIRECT EXAMINATION (Continued)

5 BY MR. PANTONI:

6 Q Morning, Dr. Czarnik.

7 A Good morning.

8 Q Please take a look at Exhibit 38. Please identify
9 Exhibit 38 for the record.

10 A Yes. That is a memo that I wrote in response to a
11 meeting I had with John Stuelpnagel in early November of 1998 in
12 which John gave me a list of dates that I had been out of the
13 office and he wanted to know why.

14 Q Are these the list of the dates that Dr. Stuelpnagel
15 provided to you?

16 A Yes.

17 Q You responded by identifying for each and every day
18 where you were and what you were doing?

19 A That's correct.

20 Q What did you do with this document?

21 A I sent it to Dr. Stuelpnagel by e-mail from my home.

22 Q Please, Exhibit 55. Could you identify this document
23 for the record, please.

24 A Yes. This is a list of dates that I knew I was going
25 to be out of the office in 1999 and I gave it to Dr. Stuelpnagel
26 in approximately March.

27 Q These deal with business and professional obligations
28 you had?

1 A Yes.

2 Q Dr. Czarnik, let me ask you some questions about
3 Scientific Advisory Board issues, to which Dr. Walt testified
4 yesterday.

5 What was your role on the Scientific Advisory Board?

6 A Well, I was the chief scientific officer of the
7 company, and I had the internal job of organizing the Scientific
8 Advisory Board meetings, working with Dr. Walt to create an
9 agenda, and after Dr. Walt began the meeting, to lead the
10 discussion.

11 Q When was the first Scientific Advisory Board meeting
12 held?

13 A In January of 1999.

14 Q And did you prepare the agenda for that meeting?

15 A Yes.

16 Q Did you help run that meeting?

17 A Yes.

18 Q Exhibit 46, please.

19 Do you recognize Exhibit 46 as a copy of the an e-mail you
20 received on or about January 29 of 1999?

21 A Yes.

22 Q And you received this from Paul Schimmel?

23 A Yes.

24 Q Who is Paul Schimmel?

25 A He was a professor at Scripps and he's on the
26 Scientific Advisory Board.

27 Q This says this was a nice meeting that you ran for the
28 first SAB meeting?

1 A Yes.

2 Q When was the second SAB meeting?

3 A In June of 1999.

4 Q You also prepared the agenda for that and helped run
5 that meeting?

6 A Yes.

7 Q Prior to when Jay Flatley came on board as the CEO, did
8 anyone ever criticize you, any member of management ever criticize
9 you with respect to the SAB?

10 A There was no criticism. We had regular internal
11 discussion about how to make those meetings as valuable as
12 possible.

13 Q Exhibit 81, please.

14 Scroll down to the bottom, please. Next page.

15 Dr. Czarnik, do you recognize this as an e-mail that you
16 sent to Drs. Stuelpnagel, Chee and Mr. Pytelewski?

17 A Yes.

18 Q On August 17 of 1999?

19 A That's correct.

20 Q And this relates to scheduling the next Scientific
21 Advisory Board meeting?

22 A Yes.

23 Q You say your intent is to winnow down the SAB meetings
24 down to twice a year. If you have any input, please let you know?

25 A Correct.

26 Q Scroll up, please.

27 Is this the e-mail that you received back from Dr.

28 Stuelpnagel that same day, August 17 of 1999?

1 A Yes.

2 Q He's indicating he's bidding to have these SAB meetings
3 held only once a year?

4 A Correct.

5 Q Did you and Dr. Stuelpnagel have any discussions where
6 Dr. Stuelpnagel commented on his view of the importance of SAB
7 meetings?

8 MS KEARNS: Objection, hearsay.

9 THE COURT: Sustained.

10 MR. PANTONI: Q Did Dr. Stuelpnagel tell you that he
11 felt that your work in connection with SAB meetings wasn't very
12 important to the company?

13 MS KEARNS: Objection, hearsay.

14 THE COURT: Overruled.

15 THE WITNESS: Yes, John felt that was not an important
16 activity.

17 MR. PANTONI: Q How do you know that?

18 A He told me directly.

19 Q What did he say?

20 A He said he thought that the SAB meetings were not a
21 useful -- a good use of the company's time or resources, that it
22 was expensive, and that in his view being an SAB member was the
23 cushiest job in start-ups.

24 Q Let's --

25 MS KEARNS: I'll move to strike the comment beginning
26 with "in his view."

27 THE COURT: Overruled.

28 MR. PANTONI: Q Let's move on, sir, to the January

1 2000 SAB meeting to which David Walt testified yesterday.

2 A Yes.

3 Q Were you responsible for preparing the agenda for that
4 meeting?

5 A Yes.

6 Q Did you contact David Walt with respect to what
7 subjects might be addressed at that SAB meeting?

8 A Yes, in early January.

9 Q Exhibit 113, please.

10 Do you recognize the lower portion of this page to be an
11 e-mail that you received from David Walt on January 13 of 2000?

12 A Yes.

13 Q Does this relate to the January 2000 SAB meeting?

14 A Yes.

15 Q Dr. Walt starts out by providing some thoughts. Had
16 you earlier requested input from David Walt?

17 A Yes, in early January I asked David for his advice on
18 how we should run the next meeting.

19 Q This is what he provided to you?

20 A Yes.

21 Q And he indicated that you should use the SAB for
22 problem solving and that you should have brief, highlight-type
23 presentations from key Illumina employees?

24 A Yes.

25 Q Scroll up, please.

26 Then you thank David Walt's for his input, passing on draft
27 of agenda.

28 A Yes.

1 Q Exhibit 114, please.

2 Is this an e-mail you sent out, Dr. Czarnik?

3 A Yes.

4 Q On January 18, 2000?

5 A Correct.

6 Q And a number of people are listed as the people to whom
7 the e-mail was sent. Who are these individuals: Goodnow, Walt,
8 Kauer, Hood, Schimmel, Sejnowski, Still?

9 A Those seven people were the SAB members, Scientific
10 Advisory Board members at that time.

11 Q You sent this e-mail to the entire Scientific Advisory
12 Board?

13 A Yes.

14 Q With a copy to Mark Chee?

15 A Yes.

16 Q Scroll down, please.

17 In this e-mail you state that you plan to spend most of your
18 time at the SAB meeting reviewing experimental challenges in
19 discussions with R and D colleagues.

20 A That's correct.

21 Q Is that your intent at that point in time, to use the
22 SAB meeting to talk about reviewing experimental challenges?

23 A Yes.

24 Q What specific experimental challenges did you have in
25 mind that would be discussed at the SAB meeting?

26 A Challenges is a euphemism for problems, and we had
27 experimental problems in a variety of areas, but the main area in
28 which we were having experimental problems was in decoding.

1 Q Exhibit 115, please.

2 Dr. Czarnik, do you recognize this as an e-mail sent to you
3 by Jay Flatley on January 18, 2000?

4 A Yes.

5 Q Asking whether there's an agenda for the SAB meeting
6 coming up on Friday?

7 A Yes.

8 Q Is this your response to your e-mail responding to Jay
9 Flatley?

10 A Yes, it is.

11 Q Dated January 18, 2000?

12 A Yes.

13 Q You sent copies to John Stuelpnagel and Mark Chee?

14 A Yes.

15 Q You indicate in this e-mail that David Walt and you
16 have been talking about what you want in the meeting, and the
17 consensus is you want to choose R and D people with specific
18 challenges to get feedback from the SAB. Is that right?

19 A Yes.

20 Q Again still thinking at this point in time you would
21 present scientific problems and challenges at the SAB meeting?

22 A That's correct.

23 Q Were you able to discuss scientific challenges and
24 scientific problems at that January, 2000 board meeting?

25 A Ultimately, no.

26 Q Tell the jury what happened.

27 A Within a short period of time after I sent this memo
28 out, John Stuelpnagel and Mark Chee came to my desk and told me

1 that we could not use the SAB meeting for talking about problems
2 the company was having; that we -- John said specifically that we
3 should not be airing our dirty laundry in public like this.

4 Q So what, if anything, did you do with respect to the
5 SAB agenda that you were preparing?

6 A They were emphatic on this point, and ultimately I
7 changed the agenda on short notice.

8 Q For what purpose?

9 A I changed the agenda so we could have a productive day-
10 long meeting, but I changed the agenda in such a way that
11 scientists were no longer going to come in, talk about the
12 problems they were having, and then get the SAB involved in trying
13 to solve those problems.

14 Q Why did you do that?

15 A John and Mark were emphatic on this point, and frankly
16 I was trying to -- I thought we were working as a team at that
17 point and I tried to accommodate what they thought we should be
18 doing at this meeting.

19 Q Had you previously arranged to schedule some of the
20 Illumina scientists to attend the SAB meeting for purposes of
21 discussing experimental problems?

22 A Yes, I had spent most of the day on Monday and Tuesday
23 talking with Illumina scientists, asking them if they would
24 prepare a brief introduction to the problem they were having and
25 then to pose the problem to the Scientific Advisory Board so that
26 the Scientific Advisory Board could give us feedback on how to fix
27 that problem.

28 Q Exhibit 116, please.

1 For the record, Dr. Czarnik, is this the actual agenda that
2 you prepared, the final agenda you prepared for the SAB meeting?

3 A Yes.

4 Q And when did you distribute this agenda to SAB members?

5 A On Thursday evening I dropped it off at the desk at the
6 hotel at which they were staying and asked the person behind the
7 desk to distribute it to the rooms where people were staying.

8 Q When was the first time you received any sort of
9 negative feedback from Illumina with respect to SAB meetings?

10 A It was within a week of this meeting.

11 Q And from whom did you receive negative feedback, in
12 terms of Illumina management?

13 A Well, the first time I heard from anyone that there
14 were concerns about this meeting was from Jay Flatley, who had
15 told me that he had heard from a member of the SAB that was
16 concerned about how the meeting was run.

17 Q After getting this feedback from Jay Flatley, did you
18 do anything, sir, in an effort to try to address any concerns and
19 improve the SAB meetings?

20 A This was the first input Jay had given me on the SAB
21 meeting, and frankly, again at that point I thought that I was a
22 part of the team, so I virtually immediately sent an e-mail to
23 people I know who are heads of other start-up companies and asked
24 them what their experience with their scientific advisory board
25 has been and how do they get it to be a useful meeting.

26 Q Exhibit 132, please.

27 You recognize Exhibit 132?

28 A Yes.

1 Q What is this?

2 A This is the e-mail that I sent out to David after
3 having heard comments from Jay. I copied Jay and John and Mark,
4 and letting them know that I was about to undertake an effort to
5 improve the SAB meeting, including the poll that I had just
6 mentioned.

7 Q Exhibit 141, please.

8 You recognize this e-mail dated February 24, 2000?

9 A Yes, this was the cover e-mail that I used to
10 distribute the results of the poll.

11 Q Distribute to whom?

12 A To Mark Chee, Jay Flatley, John Stuelpnagel and David
13 Walt.

14 Q Were you still the chief scientific officer on February
15 24, 2000?

16 A Yes.

17 Q When were you told you were no longer CSO?

18 A On March the first.

19 MR. PANTONI: Your Honor, if I may confer with Miss
20 Kearns.

21 (Discussion off the record between counsel.)

22 MR. PANTONI: Q If we could move to Exhibit 148,
23 please.

24 Recognize Exhibit 148, Dr. Czarnik?

25 A Yes.

26 Q Recognize this as an e-mail sent to you by Jay Flatley
27 on March 21 of 2000?

28 A Yes.

1 Q You had testified previously about Jay Flatley
2 informing you he wanted to change your compensation, change your
3 salary, change your stock, correct?

4 A Yes.

5 Q This is an e-mail where Jay Flatley forwarded you a
6 change of position agreement, a new contract?

7 A Yes.

8 Q Had you seen the contract prior to March 21, 2000?

9 A No.

10 Q Next page, please.

11 Is this the actual change of position agreement that Jay
12 Flatley had forwarded to you in March of 2000?

13 A Yes.

14 Q This agreement would have reduced your salary?

15 A Yes.

16 Q And it would permitted the company to buy back 167,000
17 shares of your stock at a penny a share?

18 A Yes.

19 Q Did you and Jay Flatley discuss this draft agreement?

20 A Yes, we did.

21 Q What did Jay Flatley say about the draft agreement?

22 MS KEARNS: Objection, hearsay.

23 THE COURT: Sustained.

24 MR. PANTONI: Q Did you agree to sign the draft
25 agreement?

26 A No, I did not.

27 Q Did you tell Jay Flatley you wouldn't sign?

28 A It was hard, but I had to look Jay in the face and tell

1 him I just wouldn't sign this.

2 Q What did Jay Flatley say to you when you told him I
3 won't sign this agreement?

4 MS KEARNS: Objection, hearsay.

5 THE COURT: Sustained.

6 MR. PANTONI: Q Mr. Flatley threaten you in any
7 manner after you told him you wouldn't sign it?

8 MS KEARNS: Objection, argumentative, hearsay.

9 THE COURT: It is leading and suggestive. Sustained.

10 You want to just ask him what he said and I'll
11 determine whether or not it should be stricken.

12 MR. PANTONI: That was my prior question.

13 THE COURT: Yes.

14 MR. PANTONI: Q What did Jay Flatley say to you when
15 you told him you wouldn't sign this change of position agreement?

16 A After I told Jay that I would not sign this document,
17 Jay paused for a moment, he looked at me and said, "You know what
18 that means, don't you?" and I said, "Yes, I know what it means,
19 but I have to be able to look at myself in the mirror."

20 Q Dr. Czarnik, was your salary actually reduced from 185
21 to 165?

22 A Yes.

23 Q Did you have any problem with that?

24 A No.

25 Q Was your stock actually reduced at that point in time
26 where the company bought back 167,000 shares?

27 A No, Jay learned from his attorneys that that was
28 illegal.

1 Q How do you know that?

2 A Jay told me he had learned from his attorneys that it
3 was not legal.

4 Q What was not legal?

5 A That changing my stock without my agreement was illegal
6 in face of the fact that I had a stockholder's agreement that
7 entitled me to that stock.

8 Q Dr. Czarnik, when did Illumina, management of Illumina,
9 first talk about possibly going public?

10 A Well, Mark, John and I did the planning for the company
11 in the summer of 1998, and we were certainly talking about going
12 public as one of the options for the company, you know, regularly
13 during that summer.

14 Q Did you participate during that time frame in those
15 discussions about possibly going public?

16 A Of course, yes.

17 Q This was still predisclosure of your depression?

18 A Yes.

19 Q Now, after Jay Flatley came on board as the new CEO and
20 president, were you included in any of the strategic planning
21 sessions for the initial public offering, preparations and
22 planning for going public?

23 A Not in any of the planning.

24 Q Any of the strategic planning?

25 A Not in any of the strategic planning.

26 Q Were you invited to any of the meetings between
27 Illumina senior management and the company's lawyers dealing with
28 the IPO?

1 A None at all.

2 Q Were you invited to meetings involving the underwriters
3 who were dealing with the initial public offering?

4 A I was invited to make presentations on the optical nose
5 to what I believe were analysts who came through the company
6 learning about Illumina.

7 Q Anything else?

8 A No.

9 Q Did you help in any way, shape or form with respect --
10 strike that.

11 Were you asked to help with respect to the drafting of the
12 S1 registration statement that Illumina was filing in connection
13 with the S1, in connection with the IPO?

14 A No. And I had asked specifically to be involved, that
15 I wanted to be involved in writing that document.

16 Q Were you asked to be involved in any way in preparing
17 for the roadshow that the company was going to put on in
18 connection with going public?

19 A No, I was at no time asked to prepare the roadshow or
20 to help in the preparation of the roadshow presentation.

21 Q Were you invited to any meetings where roadshow
22 preparation was discussed?

23 A No, I was not.

24 Q Were you asked for any input with respect to any of the
25 slides that were going to be shown on the roadshow?

26 A No. Even though people who had been reporting to me
27 were invited to those meetings.

28 Q Were you invited to any of the rehearsal sessions that

1 may have been held at Illumina where the roadshow presentation was
2 practiced?

3 A No, it was very uncomfortable to me, but I was not
4 invited to those practice presentations.

5 MS KEARNS: Move to strike everything after the word
6 "No."

7 THE COURT: Motion to strike granted. The jury
8 admonished to disregard.

9 MR. PANTONI: Q Were you invited to any of the
10 rehearsal sessions where the roadshow presentation was practiced?

11 MS KEARNS: Asked and answered.

12 THE COURT: Sustained.

13 MR. PANTONI: Q Were you asked to go on the roadshow
14 and help with the roadshow presentation?

15 A No, I was not.

16 Q Were you invited to sit in on and observe any of the
17 actual roadshow presentations?

18 A No, I was not.

19 Q What decoding experiments were being conducted at
20 Illumina during the time of the roadshow?

21 MS KEARNS: Objection, foundation.

22 THE COURT: Sustained.

23 MR. PANTONI: Q In the course of your job duties as
24 a research fellow, Dr. Czarnik, did you come to learn what
25 experiments were being conducted during the course of the
26 roadshow?

27 A Yes.

28 Q What decoding experiments were being conducted during

1 the roadshow?

2 MS KEARNS: Objection, foundation.

3 THE COURT: Sustained.

4 MR. PANTONI: Q What did you come to learn, Dr.

5 Czarnik, in the course of your job duties at Illumina with respect

6 to what was going on in the way of decoding?

7 A The majority of the scientific and technical staff at

8 the company were involved in an experiment called the 768 decode

9 experiment.

10 Q Did you sit in on any meetings where the 768 decode

11 experiment was discussed?

12 A Yes.

13 Q What was the first decoding experiment conducted at

14 Illumina?

15 A The first decoding experiment at Illumina was called

16 the 16 bead type decode experiment.

17 Q And you were still chief science officer when that

18 experiment was conducted?

19 A Yes.

20 Q Over what period was the first decode experiment, the

21 16 bead code conducted?

22 A From late October of 1998 until about February of 1999.

23 Q Dr. Czarnik, were you involved in the planning and

24 preparation for the 16 bead decoding experiment?

25 A Yes, I was.

26 Q And what role did you play with respect to the planning

27 and preparation for that experiment?

28 A I led the discussion with the company's scientific and

1 technical staff on what the approaches were, what method we wanted
2 to begin using, and how we were going to prioritize the
3 experiments we did.

4 Q Would you take a look in your binder, please. I'm not
5 going to yet show this on the screen. Take a look at 371 in your
6 binder.

7 A Mr. Pantoni, could you hand me my glasses, please.

8 Q Dr. Czarnik --

9 MS KEARNS: Your Honor, much as I know the Court
10 doesn't wish to do sidebars, there are some specific problems with
11 this exhibit and --

12 THE COURT: You can object. It's not being displayed
13 to the jury. Then if I need a sidebar, we can do it.

14 MR. PANTONI: Q Can you identify Exhibit 371?

15 A Yes. You can't see the exhibit yet. This is a
16 photograph of the white board that was used in mid-October of
17 1998, and it shows the discussion that I led on how we were going
18 to do the 16 bead type decode experiment.

19 Q When you say a white board, what do you mean?

20 A Instead of using a chalk and a chalk board, most people
21 these days have a white board and then Magic Marker, or markers,
22 erasable markers, and that's what this is.

23 Q Who took this photograph?

24 A I took it.

25 Q What's depicted on the photograph?

26 A What's depicted is my notes in leading this discussion
27 about the ways that we could potentially do the 16 bead decode
28 experiment, what was going to be required in each step in order to

1 do that experiment, and finally as a group how we prioritized
2 which of those we do first.

3 Q Who was present at this discussion you led in October
4 of 1998?

5 A The entire scientific and technical --

6 Q Did you take this photograph on the day you made the
7 presentation?

8 A Just after the presentation, yes.

9 MR. PANTONI: Move to admit Exhibit 371.

10 MS KEARNS: We have an objection to admission and
11 publication of the exhibit, your Honor.

12 THE COURT: What's the objection? What are the
13 grounds? What's the legal grounds for the objection?

14 MS KEARNS: Well, we have an objection to the
15 authenticity of the document. I've been provided with not a very
16 clear copy, but there's nothing on it that would -- We have an
17 issue with the authenticity and genuineness of the document.

18 THE COURT: Isn't it hearsay?

19 MS KEARNS: And it's hearsay.

20 MR. PANTONI: It's essentially a business record. It's
21 a documentation --

22 THE COURT: You haven't laid a foundation as a business
23 record, Counsel. There's nothing at all on the record about the
24 foundation.

25 MR. PANTONI: Q what was your purpose in taking the
26 photograph?

27 A I took a photograph of the white board simply because
28 it was a faster way of documenting that discussion than to have

1 transcribed it by hand.

2 Q Did you do so for purposes of supervising the
3 experiment?

4 A I did that after the discussion was over. I and
5 potentially the members of the research team would remember what
6 we had discussed and how we had prioritized experiments.

7 Q Did you maintain this on your computer at work?

8 A No, I didn't.

9 Q What did you do with it?

10 A It actually stayed on the camera at work.

11 Q When did you develop it?

12 A This was a digital picture, so it was possible to view
13 it on computer at anytime.

14 Q Did you view it from time to time during the course of
15 your work?

16 A Yes, I did.

17 Q For what purpose?

18 A For the purpose of reminding me how we had strategized
19 and in what sequence we were going to carry out experiments.

20 MR. PANTONI: Your Honor, I again seek to have 371
21 admitted into evidence.

22 MS KEARNS: And again we object. There's nothing on
23 the document itself, given the copy I have, that corroborates the
24 plaintiff's contention that this is a digital photograph taken in
25 October of 1998. From our view, this is something that could have
26 been created two weeks ago and photographed digitally. We've not
27 been provided with the digital disk. We've simply been provided a
28 photocopy of a white board.

1 And again I think having never seen this before, given the
2 fact that Illumina does not maintain business records of white
3 boards in the manner Dr. Czarnik has just testified he allegedly
4 created the white board and photographed it, we do have a problem
5 with admission of it.

6 MR. PANTONI: I think it goes to credibility of the
7 witness.

8 THE COURT: The objection is sustained.

9 MR. PANTONI: On what basis, for the record, Judge,
10 hearsay?

11 THE COURT: Hearsay, and I think it doesn't qualify
12 under the business record exception. So it's hearsay. Sustained.

13 MR. PANTONI: Q In any event, Dr. Czarnik, you were
14 involved in the planning and preparation for the 16 bead decoding
15 experiment?

16 A I led that planning, yes.

17 Q What was the next decoding experiment that was
18 conducted at Illumina?

19 A After we completed the 16 bead code -- bead type
20 decode experiment, the company moved to a 128 bead type decode
21 experiment.

22 Q And can you explain to the jury what those numbers mean
23 when you are talking about a 16 bead experiment or a 128 bead
24 experiment?

25 A Yes. On the end of one of these fibers, you can fit a
26 lot of little beads. At the beginning of the company we could fit
27 a thousand beads. By the time that I was fired, we could fit
28 50,000 beads. So the same area of the fiber, but you could get a

1 lot more beads, so the beads got a lot smaller.

2 Even though there were at the end 50,000 beads, they weren't
3 all different. In fact, many of the beads were the same in terms
4 of what kind of DNA was on them. So there might be 50,000 beads,
5 but say only 10 different kinds of beads, or in the case of the 16
6 bead code experiment, there were 16 kinds of beads, and in the
7 case of the 128 decode experiment there were 128 different kinds
8 of beads. It just means there were many copies of each of those
9 128 types of beads.

10 Q Was the -- Strike that.

11 Over what period was the 128 bead experiment conducted?

12 A We worked on that experiment from about February of
13 1999 until about late November of 1999, and there was some work
14 that went on beyond that date.

15 Q So you are saying for most of the year of 1999, you
16 were working on the 128 bead experiment?

17 A Yes.

18 Q And were you the chief science officer during that
19 period?

20 A Yes.

21 Q Did you express any concerns, Dr. Czarnik, with respect
22 to the way in which the 128 decode experiment was conducted?

23 A Yes.

24 MS KEARNS: Objection, hearsay.

25 THE COURT: Sustained.

26 MR. PANTONI: Q Did you raise to Illumina
27 management, senior management, any concerns that you had with
28 respect to the validity, scientific soundness of the 128 bead

1 experiment?

2 MS KEARNS: Same objection. Hearsay.

3 THE COURT: Isn't this something in the nature of a
4 prior consistent statement? There's going to be a dispute as to
5 when these concerns were raised.

6 MR. PANTONI: Absolutely, yes. I'm trying to establish
7 that Dr. Czarnik began to blow the whistle early on

8 THE COURT: Yes. I don't think it's also offered for
9 the truth. It's also offered to show just the notice of something
10 like that.

11 MR. PANTONI: To show he complained.

12 THE COURT: But I think there's going to be a dispute
13 about when the concern arose. I think this would also be his --
14 it could be construed as a prior consistent statement.

15 MS KEARNS: I think this also goes to the issue we
16 addressed sometime ago in chambers, which is expression of general
17 concerns doesn't constitute whistleblowing. We had a discussion
18 about --

19 THE COURT: Let me see you at sidebar with the
20 reporter.

21 (Proceedings at sidebar.)

22 (Proceedings resumed in open court.)

23 THE COURT: Ladies and gentlemen, we'll take our
24 morning recess at this time. We'll be in recess until 10:15. I
25 should have recessed before. Is everybody back? No. So we'll
26 recess until 10:15.

27 Remember the admonition not to form or express any opinions
28 about the case or discuss the case.

1 You want a longer recess than that? You want a normal 15-
2 minute recess?

3 We'll be in recess until 10:15. 10:15.

4 (Recess.)

5 THE COURT: You may continue your examination,
6 Mr. Pantoni.

7 We're missing a juror.

8 The record will indicate all the jurors are present. You
9 may continue your examination, Mr. Pantoni.

10 MR. PANTONI: Thank you, your Honor.

11 Q Dr. Czarnik, we had been talking about the 128 decoding
12 experiment.

13 A Yes.

14 Q This experiment you say took approximately a year or so
15 to be conducted?

16 A Yes.

17 Q Dr. Czarnik, at any point while the 128 bead experiment
18 was being conducted, did you raise any concerns about the dyes
19 that were being used in the decoding experiments?

20 A Yes.

21 Q And what concerns did you raise back in 1999 relating
22 to the -- specifically to the dyes?

23 A I raised concerns that perhaps the dyes that we were
24 buying weren't labeled correctly.

25 Q Did Illumina at that point in time do any quality
26 control to check that what was in the vial of dyes that were being
27 used was actually what was said on the label?

28 A No, it did not.

1 Q And what, if anything, did you advocate with respect to
2 that issue?

3 MS KEARNS: Objection, hearsay.

4 THE COURT: Sustained.

5 MR. PANTONI: Q What did you feel the company was
6 doing wrong -- strike that.

7 What did you articulate to be what the company was doing
8 wrong with respect to its use of dyes?

9 MS KEARNS: Objection.

10 MR. PANTONI: Q In the 128 decode experiment?

11 THE COURT: Sustained.

12 MS KEARNS: Objection, hearsay.

13 MR. PANTONI: Q To whom did you raise concerns about
14 dyes relating to the 128 experiment?

15 A I raised concerns to the scientific staff, to Mark
16 Chee, to John Stuelpnagel, and then when Jay became the CEO, to
17 Jay Flatley.

18 Q Over what period, Dr. Czarnik, inclusive, were you
19 raising concerns about dyes in connection with the 128 bead
20 experiment?

21 A From approximately March of 1999 until December of
22 1999.

23 Q And you were chief science officer during that entire
24 period?

25 A Yes.

26 Q What response, if any, did you get from senior
27 management when you raised concerns about dyes in relation to the
28 128 bead decoding experiment?

1 MS KEARNS: Objection, hearsay.

2 THE COURT: Sounds like it would be hearsay.

3 MR. PANTONI: It's an admission.

4 THE COURT: Okay. Well, subject to motion to strike.

5 MR. PANTONI: Q Did you seek approval from senior
6 management to be able to do what you said you wanted to do, that
7 is check that the dye was actually -- the dye that was in the
8 vials was actually what was labeled?

9 MS KEARNS: Leading.

10 THE COURT: Sustained.

11 MR. PANTONI: Q What did you tell senior management
12 should be done on the dye issue relating to the 128 decode
13 experiment?

14 MS KEARNS: Objection, hearsay.

15 THE COURT: It's leading, sustained.

16 MR. PANTONI: I'm sorry?

17 THE COURT: It's leading.

18 MR. PANTONI: Q What did you say to senior
19 management?

20 MS KEARNS: Objection, hearsay.

21 MR. PANTONI: On that issue.

22 THE COURT: It may be hearsay. Subject to motion to
23 strike, he may answer.

24 THE WITNESS: I said we should make sure that the dyes
25 are correct before we use them.

26 THE COURT: Is there a motion to strike?

27 MS KEARNS: Motion to strike.

28 THE COURT: Self-serving hearsay. Sustained.

1 MR. PANTONI: Again for the record, Judge, I think it
2 relates directly to the issue of whistleblowing.

3 THE COURT: Also lack of foundation -- This has to do
4 with the dye, so I think in light of what our chambers conference
5 was it passes that hurdle, but I think it's lack of foundation,
6 too. It's supposed to elicit a conversation. To whom, when. Lay
7 a foundation, to whom was the statement made, when was it made,
8 who else was present. So lack of foundation.

9 MR. PANTONI: Q You said you discussed the dye issue
10 with, among others, John Stuelpnagel?

11 A Yes.

12 Q In relation to the to the 128 decode experiment?

13 A Yes.

14 Q And what concerns, if any, did you raise directly to
15 Dr. Stuelpnagel when he was acting president of the company that
16 related to dyes and the 128 --

17 THE COURT: I think you ought to lay a foundation as to
18 when this conversation took place, who else was present.

19 MR. PANTONI: Q How many such conversations did you
20 have, Dr. Czarnik, with Dr. Stuelpnagel, relating to dyes in
21 connection with the 128 decode experiment?

22 A I had three to four conversations with him.

23 Q Can you distinguish those precisely in your mind or are
24 they a series of discussions? How do you recall?

25 A I recall two of them very distinctly.

26 Q When was the first that you recall distinctly?

27 A The first was in late March of 1999.

28 Q Who was present?

1 A I was there, Mark Chee was there, John Stuelpnagel was
2 there, Rich Pytelewski was there.

3 Q And what, if anything, did you say on the subject of
4 dyes at that meeting?

5 A I said there are many reasons why it's very important
6 for us to make sure the dye is correct before we use it.

7 Q And what reasons did you offer?

8 A I offered the fact that while the dye itself wasn't
9 expensive, the reactions we were going to be using them in were
10 very expensive. Secondly, the decoding experiment that we were
11 doing was at the limit of what our machine could measure, and if
12 the dye was wrong, then we could be misinterpreting the results
13 from the experiments.

14 Q And you said that at this meeting with Dr.
15 Stuelpnagel, Chee and Mr. Pytelewski?

16 A Yes.

17 Q What response did you get to your concerns from John
18 Stuelpnagel at this meeting?

19 A The response at that meeting that I received was from
20 Mark Chee.

21 Q Okay. What response did you receive from Mark Chee?

22 A Mark said that testing the reagents, testing the dyes
23 as one of the reagents, would take too long and it would slow down
24 our progress, so we should not do it.

25 Q How long would it take to do a quality control test on
26 a dye, make sure it was on the -- what was on the label was in the
27 bottle?

28 A The quick experiment would take about five minutes.

1 The long experiment would involve sending a sample to an analysis
2 lab and we'd have the results back the next day.

3 Q Were you ever given permission to do quality control
4 tests on dyes in connection with decoding?

5 A No.

6 Q You say you recall a second discussion regarding dyes
7 when the 128 experiment was being conducted and Dr. Stuelpnagel
8 was there?

9 A Yes.

10 Q When was that discussion?

11 A That was in about early September of 1999.

12 Q Who was present during that discussion?

13 A Again all four members of the senior management team
14 were present.

15 Q Again by name?

16 A John Stuelpnagel, Mark Chee, Rich Pytelewski and
17 myself.

18 Q What did you say at this meeting on the subject of
19 dyes?

20 A I said that because the results of decoding we were
21 getting were so variable, we had to check the dyes to make sure
22 that they were what was said on the vial and that they were of
23 high purity.

24 Q What response, if any, was offered by any of the other
25 members of senior management to your concern?

26 A At that meeting John said specifically that we are not
27 going to slow down the progress of the company by doing those kind
28 of controlled experiments.

1 Q Did he say why?

2 MS KEARNS: Objection, hearsay.

3 THE COURT: Overruled, subject to motion to strike.

4 THE WITNESS: He said because it might slow down the
5 rate of progress for generating results.

6 MR. PANTONI: Q Did you have any discussions with
7 Jay Flatley about the use of dyes in decoding experiments after
8 Mr. Flatley came on board as the new CEO?

9 A Yes.

10 Q Do you have any specific discussions in mind?

11 A I remember best a discussion we had in mid-November of
12 1999.

13 Q Who was present at that discussion?

14 A It was me and Jay.

15 Q Where did that discussion take place?

16 A At my desk.

17 Q What was the context, what was the purpose of the
18 discussion?

19 A Jay was new as the CEO, and I thought it was very
20 important for him to know what I felt were the limitations of our
21 current decoding method, and I wanted him to be brought up to
22 speed because he was going to have to make decisions on both
23 business development and how to deploy resources.

24 Q And what did you say to Mr. Flatley on that occasion
25 with respect to dyes being used in decoding experiments?

26 A I told Jay that the results that we were getting from
27 decoding experiments were so variable that the people sitting
28 around me said they were useless and we had to check the dyes to

1 see if they were correct.

2 Q Did you explain to Mr. Flatley what would be involved
3 in checking the dyes to be sure they are correct?

4 A Not in detail, but I told him it would be fast.

5 Q Did Mr. Flatley respond at that time when you raised
6 concerns about not checking the dyes?

7 A No. Jay didn't respond to those comments.

8 Q Now, when did the first 768 decode experiment begin?

9 A The planning for it began in November of 1999.

10 Q When did the actual experiments start?

11 A There was a lot of preparation for that experiment
12 necessary, and the decoding part of that experiment really began
13 in April of 1999.

14 Q And lasted how long?

15 A Until approximately the middle of May of 1999.

16 Q What were the results of the first 768 decode
17 experiment?

18 MS KEARNS: Objection, foundation.

19 THE COURT: Sustained.

20 MR. PANTONI: Q Did you participate in discussions
21 involving scientists who were working on the 768 decode
22 experiment?

23 A Yes, I did.

24 Q How often did you participate in these discussions?

25 A Literally every day.

26 Q Where did those discussions take place?

27 A They took place where my desk was, which was in the
28 room at which the majority of the scientists and engineers sat.

1 Q What was your position at that time?

2 A At exactly what time?

3 Q When you were having these regular discussions about
4 the 768 decode experiment?

5 A At one point I was chief scientific officer and then at
6 another point I was research fellow.

7 Q In the course of your job duties, did you come to learn
8 what the results were of the first 768 decode experiment?

9 A Yes.

10 Q What were those results?

11 MS KEARNS: Objection, hearsay. The witness didn't
12 conduct any of the decoding experiments, so any knowledge is based
13 upon what others --

14 THE COURT: Did you supervise or have any role in the
15 conducting experiments?

16 THE WITNESS: I had a role in analyzing the data to
17 determine whether it was []⁶⁸ quality data or not.

18 THE COURT: Overruled.

19 MR. PANTONI: Q What were the results of the first
20 768 decode experiment?

21 A That there were no conclusions that could be drawn.

22 Q Was there a second set, second 768 decode experiment
23 that began while you were still with Illumina?

24 A Yes.

25 Q When did that experiment begin?

26 A In approximately May of 2000.

27 Q Was that experiment still ongoing at the time you were
28 fired or had it been completed?

⁶⁸ Original transcript read, "a".

1 A The second attempt at the 768 decode experiment had
2 reached the point where the head of that project drew conclusions
3 in about the middle of July, 2000.

4 MS KEARNS: Your Honor, I'll object to further
5 questioning about the results of the second 768 because Dr.
6 Czarnik said it occurred in May of 2000. It's already been
7 established he was a research fellow.

8 MR. PANTONI: I haven't got to the results yet.

9 THE COURT: Okay. Overruled at this time.

10 MR. PANTONI: Q Could you please take a take a look
11 at Exhibit 239. Actually the e-mail begins on another page.
12 Scroll down.

13 Dr. Czarnik, do you recognize this as an e-mail you received
14 from Mark Chee on June 12th? I'm sorry, an e-mail you sent to
15 Mark Chee on June 12th, 2000?

16 A Yes.

17 Q What was Mark Chee's position at the time?

18 A Mark was the vice president of genomics.

19 Q What was your position at the time?

20 A Research fellow.

21 Q You sent this e-mail to Mark Chee on about June 12 of
22 2000?

23 A Yes.

24 Q Exhibit 249, please.

25 Recognize Exhibit 249 as a copy of an e-mail you sent on
26 June 20th, 2000?

27 A Yes.

28 Q Was this during the period of time in which the 768

1 decode experiment was being conducted?

2 A The second attempt.

3 Q You sent this -- Tell the jury who you sent this to,
4 the names and what positions those people held.

5 A I sent this to Steve Barnard, who was an assistant
6 director of the chemistry group, to Chanfeng Zhao, this was a
7 senior scientist in the chemistry group, to Diping Che, who was an
8 optical engineer and was involved in the laser and the imaging
9 system for analyzing decoding experiments, and to David Barker,
10 who was the chief scientific officer at the time.

11 Q There is a reminder about a dye meeting at 2 o'clock
12 that day?

13 A Yes.

14 Q What was the purpose of that meeting, sir?

15 A The purpose of that meeting was to evaluate
16 scientifically and technically whether there was a problem with
17 the dyes that we were using for the decoding experiment.

18 Q Who attended that meeting?

19 A The individuals who I asked to attend all attended.

20 Q Including David Barker, the chief science officer?

21 A That's correct.

22 Q At that meeting were any issues raised with regard to
23 quality control and dyes?

24 A Yes.

25 Q What if anything did you say on that subject at that
26 point?

27 A I said that the poor results that we were obtaining in
28 decoding thus far might be due to a poor choice of dyes or it

1 might be due to impure dyes and that we at a minimum needed to
2 check the quality of the dyes we were using.

3 Q What does that mean, check the quality?

4 A It means to make sure that what we bought, the material
5 that is actually in the vial, is the same as the label says on the
6 vial.

7 Q Now, Dr. Czarnik, at some point did it come to your
8 attention that there was a specific problem relating to
9 mislabeling of dyes?

10 A Yes.

11 Q Relating to the 768 decode experiment?

12 A Yes.

13 Q How did it come to your attention that some of the dye
14 had been mislabeled?

15 A A research assistant who was working on the decode
16 experiment came to me and asked for my help in getting a credit
17 from the manufacturer of one of the dyes.

18 Q If you could look please at Exhibit 275.

19 Do you recognize Exhibit 275?

20 A Yes.

21 Q What is this document, sir?

22 A This is a letter from the company that manufactured the
23 dye saying that while they had shipped more than 800,000 vials of
24 dyes to different people during the company's career, they had
25 managed to mislabel one of the dyes that they had sold to our
26 company.

27 Q What are these products mentioned in the first line of
28 this letter?

1 A They are the names of dyes.

2 Q How many dyes are referenced in this letter, how many
3 different types of dyes?

4 A I believe it's one product.

5 Q What is TMR-X?

6 A TMR is an acronym for the name of the product,
7 tetramethylrhodamine, and the X is a shorthand way of saying that
8 it's made in a way that makes it easy to attach to the DNA.

9 Q Dr. Czarnik, you have any particular background or
10 expertise that specifically relates to using dyes in chemical and
11 biological experiments?

12 A I have been doing work on the synthesis and use of
13 fluorescent dyes for my entire scientific career, 25 years. It's
14 so a part of my career that when I bought an engagement ring for
15 my wife --

16 MS KEARNS: I'm sorry for interrupting the witness, but
17 I don't think the engagement ring for the wife has anything to do
18 with his experience with fluorescence. Move to strike after the
19 word "25 years."

20 MR. PANTONI: He could explain in lay terms how
21 significant of an area this is.

22 MS KEARNS: Objection, relevance.

23 THE COURT: I'll let him complete his answer, subject
24 to motion to strike.

25 THE WITNESS: When my wife and I were selecting
26 diamonds for our engagement, there was one dye -- one diamond that
27 was labeled as having a defect, and this was a defect that made
28 the diamond glow under a black light, it was fluorescent, so that

1 was the diamond that we bought.

2 MR. PANTONI: Q What specific experience or
3 background or expertise do you have, explain to the jury, that
4 bears directly on using dyes for these types of scientific
5 experiments?

6 A In graduate school my project was on making dyes and in
7 making DNA that had fluorescent dyes on them. So most of my
8 graduate career was based on that area. My training was in
9 organic chemistry, and it sensitized me to the fact that what you
10 buy from a vendor isn't always what it says on the bottle and it's
11 important to check that those are correct.

12 When I moved from graduate school to my postgraduate work, I
13 worked on fluorescent methods for looking at enzyme reactions, and
14 then when I moved to Ohio State University as a professor, I spent
15 almost half of my research on synthesizing new fluorescent dyes
16 that were sensors for other molecules.

17 Q Do you have any work experience that directly relates
18 to the use of dyes in scientific experiments other than what
19 you've testified to?

20 A Yes.

21 Q What is that?

22 A When I left the university, I moved to Parke-Davis
23 Pharmaceutical Company, and my group developed methods using
24 fluorescent dyes to search for new drugs. After that I moved to
25 IRORI, a start-up company. They hired me in large part because of
26 my experience in fluorescence, to create new ways of combining
27 combinatorial chemistry and fluorescence, ways of searching for
28 drugs.

1 And certainly I was hired at Illumina in large part because
2 I am an expert in the use of fluorescent dyes.

3 Q What about in your current employment?

4 A My current employment is at Sensors for Medicine and
5 Science, and the technology is completely based on the use of
6 fluorescence and fluorescent dyes for measuring things like oxygen
7 and glucose

8 Q Now, can you explain to the jury in simple terms as you
9 can how the dyes were actually used in decoding experiments at
10 Illumina?

11 A In order to do -- Once you've assembled the beads into
12 this fiber optic, you know how many beads are there, but you can't
13 tell just by looking at the bead what kind of DNA is on it. And
14 that array only becomes useful for that type of experiment if you
15 can create a map that says on this bead is this type of DNA and on
16 this bead is a different type of DNA and on this bead is a
17 different type of DNA. And to do that for most of the beads, the
18 way that we create that map is by putting fluorescent dyes on a
19 different DNA. This is a kind of DNA that can bind to the DNA
20 that's on the bead. And after we've made that fluorescently-
21 labeled DNA, we essentially put that whole bead array into a
22 solution, we let the fluorescently-labeled DNA in solution stick
23 onto the right beads, and then we look under a kind of microscope
24 and we look to see what color is on each bead.

25 The way that we've designed the experiment is that the color
26 that is on a given bead tells us a piece of information about what
27 kind of DNA is on that bead. We then complete that series of
28 experiments over and over until we've gotten enough information

1 about these colors that we can then step back and say okay, now we
2 can say that this is the kind of DNA that's on that particular
3 bead.

4 Q Dr. Czarnik, this letter from -- You say Molecular
5 Probes is the vendor who sold the dye to Illumina?

6 A Yes, that's correct.

7 Q This is dated July 24, 2000?

8 A That's correct.

9 Q This is the -- Was the roadshow ongoing at that point
10 in time?

11 A Yes.

12 Q And approximately when in relation to this date of July
13 24, 2000, approximately when did you find out that there had been
14 mislabeling of the dye?

15 A It had been about two days before the date of this
16 letter.

17 Q So on or about July 22 of 2000?

18 A Yes.

19 Q How did you come to learn for the first time about the
20 mislabeling issue?

21 A Well, Monica, who was the research assistant that this
22 letter was written to, and said that we had received mislabeled
23 dye and she wanted to know if I could help her get a credit
24 because they had sent us a bad --

25 Q What's Monica's last name?

26 A I'm afraid I've forgotten.

27 Q Let's look, please, at Exhibit 276.

28 Do you recognize the bottom e-mail, the e-mail you sent on

1 or about July 26, 2000, to Diping Che?

2 A Yes.

3 Q Who is Diping Che?

4 A Diping Che is an optical engineer who works at Illumina
5 and was intimately involved in the decoding experiments.

6 Q What was your purpose in sending this e-mail to Dr.
7 Chee?

8 A Well, I had come to learn that the results of the 768
9 decode experiment, this second sampling, second attempt, were very
10 poor, and Diping was the person who knew the instrument that we
11 would use to measure the colors. He's the guy who would sort of
12 first know whether the colors were different than what were
13 expected. I wrote him to ask[, 'Does it look like this experiment is
14 bad because the dyes were actually bad or one of the dyes was bad']⁶⁹.

15 Q Is this the response you received from Dr. Chee?

16 A Yes.

17 Q Same day, July 26, 2000?

18 A Yes.

19 Q Dr. Czarnik, did you ever form a belief that the
20 results from the 768 decode experiment had been sent to the
21 roadshow team?

22 A Yes.

23 Q And can you tell the jury why you formed a belief that
24 the results from that 768 decode experiment had actually been sent
25 to the roadshow team?

26 A At Illumina we called the 768 decode experiment the
27 ["Roadshow Experiment"]⁷⁰. It was done specifically so that the team on
28 the roadshow would be able to say we can decode a lot of beads,

⁶⁹ Quotation marks added. This sentence does not make sense as transcribed.

⁷⁰ Quotation marks and capitalization added.

1 and that's because if Illumina couldn't decode a lot of beads,
2 this aspect of the technology wouldn't be valuable. So when the
3 experiment was completed, it was certainly my understanding,
4 expectation, that these results would be sent to the roadshow team
5 as soon as possible. In fact, the hope had been to give the
6 results to them before the roadshow began.

7 Q How do you know that had been the hope?

8 A I knew that from sitting in on scientific meetings
9 where Mark Chee said we want to get this done before the roadshow
10 team leaves. That's one example.

11 Q Did you participate in any discussions with senior
12 management about the importance to the company of completing the
13 768 decode experiment before the roadshow began?

14 A I had participated in the discussion with David Barker
15 about the importance of getting this done before the roadshow
16 began.

17 Q What did Dr. Barker say to you?

18 A Simply that it would be extremely valuable for the
19 company if they were able to have these results before
20 presentations were made to investors.

21 Q Let's take a look at Exhibit 269, please.

22 MS KEARNS: 261, Counsel?

23 MR. PANTONI: 269.

24 Q Exhibit 269 is a copy of an e-mail, July 13, 2000, from
25 Mark Chee. Had the roadshow begun by July 13, 2000?

26 A Yes.

27 Q This e-mail is sent to Jay Flatley, David Barker, John
28 Stuelpnagel, Timothy Kish, is that correct?

1 A That's correct.

2 Q And copies to Miss Espinosa and Mr. Kain?

3 A That's correct.

4 Q Were you ever copied on this particular e-mail?

5 A No

6 Q At the time did you know this e-mail, this specific
7 e-mail had been sent?

8 MS KEARNS: Objection, relevance

9 THE COURT: Sustained.

10 MR. PANTONI: Q Had you been involved in discussions
11 involving Mark Chee about his intention, if any, to send the
12 results of the 768 decode experiment to the roadshow team?

13 A Mark had voiced the intention to give the roadshow team
14 these results as soon as they were available.

15 Q If we could move to the next page, please, and the page
16 after that, the actual attachment.

17 We're going to have to use the board for this one.

18 THE COURT: What's the exhibit you are going to show to
19 the jury?

20 MR. PANTONI: It's part of 269, the attachment to the
21 e-mail.

22 Q This is a document with Bates stamp label Illumina
23 1560.

24 Now, Dr. Czarnik, did you form the belief that the
25 mislabeling of the dyes in connection with the 768 decode
26 experiment in anyway called into question the results of that
27 experiment?

28 A Yes.

1 Q Can you explain to the jury why you believe that the
2 mislabeling of the dye in anyway compromised the 768 decode
3 experiment?

4 A There are two general reasons and several specific.
5 Let me go with the general ones first. I had concerns with the
6 quality of our data from the 128 decode experiment --

7 MS KEARNS: Objection, move to strike.

8 THE COURT: Motion to strike granted. The jury to
9 disregard the answer. It is stricken.

10 THE WITNESS: The results from --

11 THE COURT: Can you explain --

12 MR. PANTONI: I think it goes to state of mind, Judge.

13 THE COURT: Have you explained the previous rulings of
14 the Court to the witness?

15 MR. PANTONI: I have. Not in this context.

16 THE COURT: There's to be no mention of any generalized
17 criticisms you have about the research methodology. Testimony has
18 been confined to the dye issue.

19 MR. PANTONI: Q Will you explain to the jury why you
20 thought that the mislabeling of the dye was a problem in the 768.

21 A The mislabeling of the dye was a problem because
22 decoding requires that we be able to tell what color a bead is at
23 each stage of decoding, and it is the dye that gives the color to
24 the bead. We were working at the limit of how small of a bead we
25 could be observing, and it was essential that we not be hampered
26 by things we could control, such as whether the dye was right,
27 because we were already hampered by working at the limit of what
28 the machine could measure.

1 Q Now, assuming, and I believe we'll be able to prove
2 this up through other evidence, but assuming that this document on
3 this board is the PowerPoint slide that was sent by Mark Chee to
4 the roadshow team during the roadshow, could you come down,
5 please, and describe for the jury in what sense you believe this
6 slide would be misleading because of the mislabeling issue.

7 THE WITNESS: May I do that?

8 THE COURT: Yes.

9 THE WITNESS: The decoding essentially requires a
10 series of pictures, and this is an overlay of several pictures,
11 that tells us what color each bead is. It's the series of those
12 colors that tells us what DNA is on that bead.

13 The first thing you'll note is that while the experiment had
14 been done using three colors of dye, there are more than three
15 colors in this picture.

16 MR. PANTONI: Q Let me interrupt. What colors were
17 used, to your knowledge, in the 768 decode experiment?

18 A The colors of the dyes were red, green and blue.

19 So as you look at these, and this is a blowup of a
20 particularly good region, you'll see the colors red and green and
21 blue. But you also see yellow, you see white, you see purple, you
22 see colors other than the three colors of the dyes that were used.
23 And if the three dyes were right, and if this experiment had
24 worked well, we should have observed three colors.

25 Secondly, you'll note that the size of the spots varies
26 tremendously. So some of these spots are large, meaning that
27 there was very bright color on that bead. Some of the sizes are
28 mid-size, some of them are small, and some of them are so dim that

1 you don't know whether there's a color there or not. So the
2 variation of the color on this slide is indicative of an
3 experiment that -- for which there is a problem.

4 Can I talk about the analysis of the results from using the
5 dyes at this point?

6 MR. PANTONI: Q Well, do you know whether the
7 mislabeling of the dye issue affected the way the data was
8 analyzed?

9 A Yes.

10 Q Will you explain that, please.

11 A The way that the colors from these experiments were
12 analyzed was by having a computer collect all of these colors and
13 brightnesses, and then after having all of that sitting in front
14 of you deciding which beads to say were good and which beads were
15 bad based on what it is you wanted to see. So the beads that were
16 chosen to say[, 'This is a bead whose data I'm going to use']⁷¹ was based
17 on beads that gave the results that the lead scientist wanted to
18 see. Other beads that didn't give the results that were desired,
19 the data from those beads was simply thrown away.

20 Q By the way, are you familiar with this basic graphic
21 way of depicting decoding? Have you seen these type slides in
22 earlier experiments?

23 A Many times.

24 Q Okay. Thank you, Doctor.

25 Could we please take a look at Exhibit 265.

26 Exhibit 265 is a copy of an e-mail dated July 8, 2000, from
27 Jay Flatley to "All of us." You testified earlier "all of us"
28 meant the entire company.

⁷¹ Quotation marks added.

1 A Yes.

2 Q Did you receive a copy of this e-mail from Mr. Flatley?

3 A Yes.

4 Q And this e-mail indicates that while Jay Flatley and
5 others were gone on the roadshow, Mark Chee will be in charge of
6 the company?

7 A That's correct.

8 Q So, Dr. Czarnik, what, if anything, did you do after
9 learning that one of the dyes used in the 768 decode experiment
10 had been mislabeled?

11 A Well, when I first learned of the mislabeling, within
12 20 minutes I found Mark Chee, who was on site --

13 Q Why Mark Chee?

14 A Because Mark was the head of the company, he was the
15 head of the decode experiment, and he had the information with
16 which to contact the roadshow team immediately.

17 Q Did you speak to Mark Chee about this?

18 A Yes.

19 Q Tell the jury, please, what you said to Mark Chee.

20 A First I asked Mark if he was aware of the mislabeled
21 dye, and he said that yes, he was aware of it. I said this could
22 really mess up the decode experiment, the results. It was
23 essential that Mark contact the roadshow team as soon as possible
24 to make sure that they no longer used that data in the roadshow,
25 because if they did use that data, it might be construed as a
26 defraud of investors.

27 Q Is that what you said to Mark Chee or what you were
28 thinking?

1 A No, that's what I said to Mark.

2 Q What specifically did you ask Mark Chee to do?

3 A I didn't so much ask Mark as I emphatically insisted
4 that he call the roadshow team and make sure they were aware of
5 this problem so that they didn't use the data any further.

6 Q Did you specifically use the word "fraud"?

7 A Yes.

8 Q What response, if any, did Mark Chee give to you?

9 A Mark had told me he was aware of the reagent problem,
10 and then after I made those comments to him, Mark simply looked
11 back at me and really didn't give a verbal response.

12 Q Approximately when was it, Dr. Czarnik, that you had
13 this discussion with Mark Chee?

14 A It would have been -- It was very shortly after I
15 learned of the results. It was a day or two before -- a day or
16 two before the letter was dated for the -- from Molecular Probes.

17 Q We saw earlier the letter was dated July 24, 2000.

18 A Right.

19 Q So with that in mind, can you tell the jury
20 approximately when it was that you had this discussion with Mark
21 Chee?

22 A It may have been July 21st, it may have been July 22nd.

23 Q Somewhere in that time frame?

24 A Right.

25 Q Do you know, Dr. Czarnik, one way or another whether
26 this slide was actually used on the roadshow, the one that Mark
27 Chee sent to the roadshow team?

28 A The experiment was done for the roadshow, but I never

1 attended any of the roadshow sessions, and so I wasn't physically
2 there to know if it was used.

3 Q Do you recall the date on which Illumina went public,
4 when the IPO was?

5 A On July 28.

6 Q 2000?

7 A Yes.

8 Q Exhibit 278, please.

9 You recognize Exhibit 278?

10 A Yes.

11 Q What is Exhibit 278?

12 A This is the first page of what is called the [Prospectus]⁷²
13 for this initial public offering. It is the booklet that is given
14 to potential investors, if they ask for it, to describe what the
15 company is about, what it does, what its prospects are.

16 Q We had talked earlier in your testimony about whether
17 you were or you were not listed as a founder in various documents.
18 Do you recall that?

19 A Yes.

20 Q Including the S1 registration statement?

21 A Correct.

22 Q In this prospectus, sir, are you listed as a founder of
23 the company?

24 A Yes.

25 Q Were you invited to go to New York City in connection
26 with any commemoration of Illumina's IPO?

27 A No.

28 Q Any sort of celebration or event held at Illumina,

⁷² Original transcript read, "prospectus".

1 physically at the Illumina property?

2 A Yes.

3 Q In connection with the IPO?

4 A Yes.

5 Q How did that come about?

6 A I realized after Mark left to join the group in New
7 York, I realized that while there had been a party planned for
8 that night, basically welcoming home our victorious roadshow team,
9 that nothing had been planned at the company for the moment when
10 the stock began trading. And the management team just hadn't
11 thought about the employees, what they might do -- excuse me.
12 There was nothing, there were no plans made to celebrate the
13 moment at which the stock began trading.

14 So the evening before, my wife suggested that we should
15 really have champagne because it's a big moment for a company. So
16 the two of us went out, bought a couple of cases of champagne,
17 brought it into the company that night, left it in the cold room
18 so the champagne would be cold, and the moment at which the
19 trading of the stock began, we were able to pop corks and have
20 champagne flowing, and it was really nice.

21 Q Now, after the IPO, I take it the roadshow team
22 returned back to Illumina?

23 A Yes, late on the night of the 28th.

24 Q After Mr. Flatley returned to Illumina, did you resume
25 your weekly meeting with Jay Flatley?

26 A Yes.

27 Q Exhibit 285, please.

28 Do you recognize this as an e-mail you sent to Jay Flatley

1 on August 1 of 2000?

2 A Yes.

3 Q This was a few days after the roadshow --

4 A Yes.

5 Q -- completed. And a few days after the IPO?

6 A Yes.

7 Q And in your e-mail you request an earlier time for your
8 scheduled meeting?

9 A Yes.

10 Q This is Jay Flatley's response to you, that he
11 preferred to hold the meeting at 6 p.m.?

12 A That's correct.

13 Q Exhibit 262, please.

14 By the way, why were you requesting an earlier time for your
15 meeting?

16 A Since April of 1999, I have had a stress headache that
17 feels like a vise every afternoon, and meeting with Jay at 6
18 o'clock under these circumstances while this headache was going on
19 was difficult, and so I simply had hoped to be meeting with Jay in
20 the morning rather than in the evening.

21 Q In fact you noted that in the e-mail that you had sent
22 to Mr. Flatley?

23 A Yes, that's right.

24 Q Let's move to 262, please.

25 Is this an e-mail you sent to Deborah Flamino on July 5?

26 A Yes, it is.

27 Q Asking a series of questions?

28 A Yes.

1 Q Who -- strike that. What was Deborah Flamino's
2 position at this time?

3 A She was head of human resources at Illumina.

4 Q Scroll up, please.

5 This is Miss Flamino's response to you?

6 A That's correct.

7 Q Next page, please. Scroll down to the bottom.

8 That's a repeat of the same message you had sent to Miss
9 Flamino in early July?

10 A And had copied Jay on.

11 Q Scroll up, please.

12 Is this Jay Flatley's response to you?

13 A Yes.

14 Q Sent on August 1 of 2000?

15 A That's correct.

16 Q Did you get any response from Jay Flatley in the three
17 or four weeks in between these two e-mails?

18 A Not on the questions raised in this e-mail.

19 Q By the way, Mr. Flatley's e-mail refers to a
20 performance program. Is that right?

21 A Yes.

22 Q Had you heard that term from Jay Flatley prior to
23 August 1 of 2000?

24 A Not in the context of my employment, no.

25 Q When Mr. Flatley gave you the initial 30-, 60-, 90-day
26 goals and the year goals, did he tell you you were on a
27 performance program?

28 A No.

1 Q Or performance plan?

2 A No.

3 Q Exhibit 283, please.

4 Do you recognize Exhibit 283?

5 A Yes.

6 Q This is a copy of a memo from Jay Flatley dated August
7 1 of 2000 to you and copy to your personnel file?

8 A That's correct.

9 Q Regarding review of progress on 30-day goals due June
10 19 of 2000?

11 A Yes.

12 Q Is this August 1st of 2000 the first written feedback
13 you got from Jay Flatley on your goals?

14 A Yes.

15 Q Scroll down, please.

16 You note in the text that Mr. Flatley says that he received
17 your work plan on July 11?

18 A That's what it says.

19 Q That was your plan about how you go about meeting your
20 goals?

21 A Exactly.

22 Q And Mr. Flatley says, "I owe you feedback on this
23 plan." Hadn't Mr. Flatley given you any feedback previously on
24 your work plan?

25 A None.

26 Q Exhibit 291, please.

27 Is this a copy of a memo you received about a week later, on
28 August 8 of 2000?

1 A Yes.

2 Q From Mr. Flatley with a copy to your personnel file?

3 A That's correct.

4 Q A week later Mr. Flatley is reviewing your progress
5 toward the 60-day goals?

6 A That's correct.

7 Q Exhibit 294, please.

8 What is this document, sir, Exhibit 294?

9 A This is the memo that I placed in my personnel file to
10 rebut the comments that Jay had made.

11 Q This was specifically in response to the first memo
12 that Jay Flatley gave you reviewing your 30-day goals?

13 A Yes.

14 Q Who did you send this memo to?

15 A If I remember, I actually sent this to my personnel
16 file and copied Jay.

17 Q How do you send something to your personnel file?

18 A That's a good question.

19 Q Thanks. Maybe my first one.

20 How did you do that?

21 A That's a real question?

22 Q That's a real question.

23 A I gave the memo to Deborah Flamino with a note asking
24 her to put it in my personnel file and then gave Jay a copy.

25 Q Exhibit 303, please.

26 Can you tell us what Exhibit 303 is, sir?

27 A Yep. This is the memo that I wrote in response to
28 Jay's comments of August 8th, and this one I sent to Jay and

1 copied my personnel file.

2 Q This is in response to his memo dealing with your
3 progress toward 60-day goal?

4 A Right.

5 Q Now, Dr. Czarnik, at any point in time while you were
6 having these weekly meetings with Jay Flatley, did you ask to have
7 a witness present?

8 A Yes.

9 Q Did you ask for that in writing -- strike that. Did
10 you ask Jay Flatley orally or in writing?

11 A I asked Jay in writing.

12 Q What essentially, tell the jury essentially what you
13 were asking for?

14 A I asked Jay if I could have one of my co-workers
15 present in my meetings with him. That was it.

16 Q What was your purpose in wanting a witness?

17 A I felt if I had a co-worker with me in the room that
18 Jay would be more civil in the discussions that we were having.

19 Q Had Jay Flatley been uncivil?

20 A Yes.

21 Q Can you describe for the jury how he was generally
22 behaving in these weekly meetings?

23 A Jay was demeaning. At one point I had shown Jay the
24 results of work I'd done and he said, "Looks like that took you
25 about one day. What did you do all the rest of the days?" I just
26 wanted someone in there with me to make Jay behave in a better
27 way.

28 Q What response did you get from Jay Flatley to your

1 request to have a witness of your choosing in the meeting?

2 A Jay said that if I wanted a witness, he would supply a
3 witness, but it would be a witness of his choosing and it would be
4 someone from either HR or from the senior management team.

5 Q Do you recall at some point Mr. Flatley suggested maybe
6 some neutral facilitator from outside the company?

7 A Yes, he did in one of the memos he placed in my
8 personnel file.

9 Q Were you ever allowed to have a witness of your own
10 choosing at the weekly meetings?

11 A No. Jay specifically said no, forbade it.

12 Q Please take a look at Exhibit 299.

13 You recognize this document, Dr. Czarnik?

14 A Yes, I do.

15 Q Is this an e-mail you sent to Jay Flatley on or about
16 August 11 of 2000?

17 A Yes, I did.

18 Q And you reference the Ar-K laser. Is that the
19 argon-krypton laser?

20 A As it's commonly known, yes.

21 Q This was the piece of equipment that you had indicated
22 earlier you thought would help you achieve your goals?

23 A That I needed in order to carry out the experiments.

24 Q Had the argon-krypton laser arrived at Illumina at this
25 point?

26 A No, it was going to arrive the next week.

27 Q Who is the Diping reference to?

28 A Diping Che, the optical engineer who really had the

1 most experience in terms of setting up lasers and optical systems.

2 Q Did you work with Diping Che to schedule experiments in
3 this area?

4 A Yes, I had been working with Diping ever since his
5 arrival at Illumina, strategizing in solving problems on the
6 equipment, and I arranged to [have him]⁷³ help us run the first
7 experiments on this new piece of equipment.

8 Q Exhibit 309, please.

9 Exhibit 309[. Is]⁷⁴ this a copy of an e-mail you sent to Jay
10 Flatley on August 17, 2000?

11 A Yes.

12 Q So in terms of timing, this was, what, approximately
13 two weeks or so before you were fired?

14 A Yes.

15 Q What was your purpose in sending this e-mail?

16 A To let Jay know that there had been a lot of research
17 accomplished, to let him know the exact status on the two
18 experimental projects I was working on, and to frankly let him
19 know that it was looking very encouraging, that I was really
20 optimistic about the experiments.

21 Q Your e-mail states you were able to work with Diping
22 using the argon-krypton laser system. Is that right?

23 A That's correct.

24 Q When did you start using that argon-krypton laser that
25 you needed?

26 A It would have been early this week, the week of the
27 August 17th.

28 Q So two to three weeks before you were fired?

⁷³ Original transcript read, "him to".

⁷⁴ Original transcript read, ", is".

1 A Yes.

2 Q If we could skip to Exhibit 272. I'm sorry, 315.

3 Is this a copy of an e-mail that you sent to David Walt on
4 August 25, 2000?

5 A Yes, it is.

6 Q We heard Dr. Walt testify yesterday. He at this point
7 in time was a director, major shareholder and chair of the
8 Scientific Advisory Board?

9 A Yes, that's correct.

10 Q What was your purpose in sending this e-mail to Dr.
11 Walt on August 25, 2000?

12 A Based on the experiments that the scientists were
13 proposing at Illumina, it seemed to me that the concerns that I
14 had been raising about variability -- excuse me, concerns that I
15 had been raising weren't being addressed, weren't even being
16 heard. David was a friend. I still consider David a friend. He
17 was literally the highest scientific position at the company, and
18 I thought it was essential for him to know that the problems of
19 decoding were not being addressed at Illumina.

20 Q In the second paragraph you make reference to what you
21 thought was Jay's pronouncement at the April board meeting?

22 A Yes.

23 Q Again the source of your information on what Jay said
24 at the April board meeting came from who?

25 A From David.

26 Q Did you ever get any response from David Walt to this
27 e-mail?

28 A No. I didn't receive any response. That was a sad

1 day.

2 Q Let move on to Exhibit 272.

3 Can you identify what this exhibit is, Dr. Czarnik?

4 A This is my lab notebook from Illumina.

5 Q Over what period did you use this lab notebook?

6 A During the summer of 2000.

7 Q While you were working toward your --

8 A Right.

9 Q If we could scroll through this for your benefit.

10 Q What generally did you include in your lab notebook?

11 A I included a description of the experiment I was going
12 to do, description of the reagents I was using for doing the
13 experiment, where the reagent came from, how the experiment was
14 done, and then in most cases the results of that experiment.

15 Q All right. Did you ever discuss your lab notebook with
16 Jay Flatley?

17 A Yes, I did.

18 Q Do you recall when that happened?

19 A Near the end of August, during my weekly meeting with
20 Jay, he asked me how progress was going, and I said progress was
21 going very well, and I was really enthusiastic about the results
22 that were coming out.

23 Jay didn't seem to want to hear about that. He just wanted
24 to see my lab notebook. So I went back to my desk, got my lab
25 notebook, brought it back, and Jay spent about five minutes paging
26 through it.

27 Q Did Jay Flatley make any comments with respect to your
28 lab notebook?

1 A Well, this was the meeting where Jay said, "What did
2 you do the other 89 days?"

3 Q Was this meeting you are describing, was that the last
4 weekly meeting you had with Jay Flatley before you were fired?

5 A No, it was the second to last.

6 Q When was the last meeting you had with Jay Flatley
7 before your termination?

8 A It was the meeting at which I was terminated.

9 Q Okay. So the meeting you just described was the last
10 you had before the termination meeting?

11 A Yes.

12 Q Do you recall anything else discussed at that meeting
13 in late August, 2000, your last weekly meeting with Jay Flatley
14 before your termination?

15 A Jay had paged through the lab notebook and hadn't made
16 any comments about what was in the notebook except for saying this
17 business about, you know, what did you do the other 89 days, and
18 he said, "I want you to give me every scrap of paper that you've
19 worked on, any graphs, any analyses, any calculations, I want you
20 to give me everything that you've worked on, and give it to me."

21 Q Exhibit 320, please.

22 Is this an e-mail that you sent to Jay Flatley on August 30,
23 2000?

24 A Yes.

25 Q And there's an attachment?

26 A Yes.

27 Q What is the attachment?

28 A The entire company was in the process of doing self-

1 evaluations. A lot of companies have this, where annually
2 managers will tell their employees how they've been doing, and the
3 first step in a lot of these is for the employee to say this is
4 what I've accomplished, this is why I think I've done well, these
5 are things that have been problems, this is why I think I deserve
6 a big raise, basically. And Deborah Flamino had just a day or two
7 before this sent out a reminder for the whole company that this
8 was due and they should be sending it to their advisor
9 immediately, and I wanted to get mine in.

10 Q What was your purpose in forwarding this on to Jay
11 Flatley on August 30th?

12 A Well, actually I sent this to Jay simply because he was
13 my supervisor and you sent it to your supervisor and a copy to HR.

14 Q Your e-mail says, "Here's the material you requested."

15 A I'm sorry?

16 Q What request, if any, did Jay make?

17 A Jay asked me for all this material, and I asked Jay if
18 what he meant was like a performance evaluation, and Jay said yes,
19 it would be part of a performance self-evaluation. So I wrote out
20 my performance self-evaluation and sent it, and that's what this
21 is. That's what that note refers to.

22 Q Scroll through the rest of the exhibit. Is this the
23 actual performance, the self-performance appraisal that was
24 attached to your e-mail?

25 A Yes.

26 Q And Dr. Czarnik, does this describe the activities that
27 you were engaged in during your 30-, 60-, 90-day goal period?

28 A Yes.

1 Q What is this section?

2 A This is a standard heading of the performance self-
3 evaluation that says what do you think are your major
4 accomplishments during the period of evaluation.

5 Q The review period is beginning May 17?

6 A That's right.

7 Q You got your new goals from Jay Flatley on May 19?

8 A That's correct.

9 Q Now, Dr. Czarnik, did you attend a meeting of the
10 entire Illumina staff that was conducted by Jay Flatley on
11 September 1, 2000, a few days before your termination?

12 A It was an all-company meeting.

13 Q Where was the meeting held?

14 A It was held in a conference room on the third floor of
15 the building that Illumina was occupying.

16 Q And did Jay Flatley make any statements at that all-
17 company meeting that related to the 768 decoding experiment?

18 MS KEARNS: Objection, hearsay.

19 THE COURT: Sustained.

20 MR. PANTONI: Q Did Jay Flatley make any statement
21 at that all-company meeting to indicate that he was aware of the
22 problems relating to the 768 decoding experiment?

23 MS KEARNS: Objection, leading, hearsay.

24 THE COURT: You can just answer that yes or no.

25 THE WITNESS: Would the you please repeat that.

26 THE COURT: Did he make any statement he was aware of
27 the 768 decoding experiment?

28 THE WITNESS: He made statements that he knew decoding

1 was a big problem.

2 MR. PANTONI: Q What did Jay Flatley say at this
3 all-company meeting on that subject?

4 MS KEARNS: Same objection.

5 THE COURT: Overruled.

6 THE WITNESS: Jay said that solving the problems of
7 decoding was the biggest issue facing Illumina, and that it was a
8 4 on a scale of 1 to 3.

9 THE COURT: Is that really consistent with the previous
10 response, that's a problem with decoding?

11 MS KEARNS: No. Motion to strike.

12 THE COURT: Motion to strike granted.

13 MR. PANTONI: The testimony was it was the biggest
14 problem facing the company.

15 MS KEARNS: This doesn't have to do with a dye issue,
16 your Honor.

17 THE COURT: Can I have the last response read back.

18 (Record read by the court reporter.)

19 THE COURT: I don't think that's an admission, so the
20 motion to strike is granted.

21 MS KEARNS: Instruction to the jury, please?

22 THE COURT: I think it's sufficient.

23 MR. PANTONI: Q Look at Exhibit 332, please.

24 Do you recognize this document as an e-mail you sent to Mark
25 Chee on September 5, 2000?

26 A Yes.

27 Q Your e-mail is actually at the bottom here, correct?

28 A Yes.

1 Q You are stating to Mark Chee, "Jay was out of town when
2 we learned the roadshow decode experiment was flawed. We're now
3 aware of the problem. When did you let him know?"

4 A Right.

5 Q What was your state of mind, Dr. Czarnik, in terms of
6 why you were asking these questions?

7 A Jay had made the statement at a company meeting that
8 decoding was the biggest problem facing the company to be solved,
9 and I was actually very happy at that moment because --

10 MS KEARNS: Your Honor, I'm going to move the first
11 portion of the witness' answer --

12 THE COURT: Motion to strike is granted.

13 MR. PANTONI: May I be heard on that issue, please?

14 THE COURT: Let's have a sidebar on that issue.

15 (Proceedings at sidebar.)

14 (Proceedings resumed in open court.)

15 THE COURT: We're going to take our noon recess at this
16 time. We'll be in recess until 1:15. Please remember the
17 admonition not to form or express any opinions about the case, not
18 to discuss the case among yourselves or with anyone else. We'll
19 be in recess until 1:15.

20 (Proceedings resumed outside the presence of the jury.)

1 SAN DIEGO, CALIFORNIA, TUESDAY, JUNE 18, 2002; 1:20 P.M.

2 THE COURT: Record will indicate all the jurors are
3 present, counsel and parties present.

4 Can we display that last exhibit.

5 THE COURT: Ladies and gentlemen of the jury, in
6 connection with this exhibit here, which is, what is it?

7 MS KEARNS: 332.

8 THE COURT: 332, I'm going to give you what's known as
9 a limiting instruction. That means you can consider the exhibit
10 only for some purpose but not for other purposes.

11 For instance, in this case, as you may already know, there's
12 an issue of whether or not this conversation between Dr. Czarnik
13 and Dr. Chee actually took place in the evidence on or about July
14 21st or 22nd. That's the conversation regarding, allegedly
15 regarding, failure to disclose the problem with the experiment at
16 or about the time of the roadshow. So in considering this Exhibit
17 332, the only purpose that you can consider the statements is, one
18 by Dr. Chee and one by Dr. Czarnik, is just to prove that the
19 statements were made, but not to prove the truth of the matter
20 asserted.

21 In other words, for example, Dr. Czarnik's statement alludes
22 to the fact this conversation took place. Dr. Chee's statement
23 says it didn't take place. You can't consider this evidence to
24 prove whether or not the conversation took place. You can only
25 consider it to show that what was said was said, but not -- you
26 can't consider it for the truth of whether or not the
27 conversations took place.

28 So that limiting instruction applies to this entire exhibit.

1 Similarly, we're going to allow Dr. Czarnik to testify about
2 statements that he says were made by Mr. Flatley at the meeting of
3 all employees of the company about -- that has to do with the
4 subject of decoding experiments. That statement is not to be
5 admitted -- that evidence is only admitted, it's going to be
6 received, for the sole purpose as it shows what Dr. Czarnik's
7 state of mind was but not for any other purpose.

8 In other words, not to be -- it's not offered to prove that
9 the statement was made, but Dr. Czarnik will testify about how it
10 affected his state of mind.

11 So you can only consider it as evidence of his state of mind
12 but not for the proof of the matter that the statement was made.

13 You want to proceed then, Mr. Pantoni?

14 MR. PANTONI: Yes. Thank you, your Honor.

15 DIRECT EXAMINATION (Continued)

16 BY MR. PANTONI:

17 Q Dr. Czarnik, looking again at Exhibit 332, which is
18 displayed, your e-mail to Mark Chee of September 5, 2000.

19 A Yes.

20 Q You sent it to Mark Chee on that date?

21 A Yes.

22 Q And this is the response you received from Mark Chee?

23 A It appears to be the response. I didn't get it at
24 Illumina.

25 Q Where did you get it?

26 A I saw it among documents that were produced.

27 Q Now, in your e-mail to Mark Chee, you ask Mark whether
28 Jay is now aware of the problem, right?

1 A Right.

2 Q What was your state of mind in terms of why you were
3 asking Mark Chee that question on September 5, 2000?

4 A On the all-company meeting on September 1st, Jay had
5 said that we were going to work on decoding because it was the
6 biggest -- it was a big problem for the company. He at that
7 meeting assigned a team of people who were going to be addressing
8 the decoding problem. That team was headed by Steve Barnard and
9 included two or three other technical people in the company. So
10 at that meeting I actually felt quite good that we were going to
11 address this problem.

12 Then on the 5th -- that was over Labor Day weekend, so the
13 1st was a Friday and the 5th was a Tuesday, coming back from Labor
14 Day weekend -- I had actually spent sometime that weekend thinking
15 about decoding and coming up with potential solutions, and early
16 in the afternoon I talked with Steve Barnard about his role as
17 heading up the decoding team. I wanted --

18 MS KEARNS: We may be heading into hearsay statement.

19 THE COURT: This is a narrative at this point. So why
20 don't you ask another question.

21 MR. PANTONI: I'd be offering this just for state of
22 mind purposes, not for the truth of the matter asserted.

23 THE COURT: Okay.

24 MR. PANTONI: Q You mentioned a decoding team that
25 Jay Flatley had implemented at about this time?

26 A Announced it on September 1st.

27 Q Were you made a part of that decoding team?

28 A No.

1 Q I believe you said you had a conversation with Steve
2 Barnard on September 5 of 2000?

3 A Yes.

4 Q And was Steve Barnard on that decoding team?

5 A Yes, he was the head of that team.

6 Q Now, did Steve Barnard say anything to you on September
7 5 which in any way caused you to send this e-mail to Mark Chee
8 dated September 5?

9 A Yes.

10 Q What did Steve Barnard say to you on that date?

11 A I had asked Steve how he was going to go about working
12 on the decoding problem, and Steve told me that in his
13 conversations with Jay, who had appointed him to the head of that
14 group, Jay seemed to believe that the 768 decode --

15 THE COURT: Hold on for a second. That seems like
16 inadmissible opinion. It's getting into inadmissible opinion.
17 It's hearsay. It's one witness saying what other witness said.

18 MS KEARNS: "Seemed." It's one witness -- Dr. Czarnik
19 saying that Dr. Barnard said to him that it seemed to Barnard.

20 THE COURT: Yes, his conclusion, which is
21 objectionable.

22 MR. PANTONI: May I continue? Have the witness,
23 rather, continue with that discussion without alluding to --

24 THE COURT: Just frame a question that will elicit the
25 information in a way that's proper.

26 MR. PANTONI: Q I simply want to know what, if
27 anything, did Steve Barnard say to you with respect to the 768
28 decode experiment.

1 THE COURT: That's going to get us into the same
2 problem we were just in, isn't it?

3 MS KEARNS: Yes.

4 MR. PANTONI: That caused you to send this e-mail?
5 Again I don't offer it for the truth of the matter asserted.

6 THE COURT: Its limited purpose is for the state of
7 mind of the witness. Try to avoid saying anything about his
8 opinion about someone else's state of mind.

9 THE WITNESS: Okay. Steve was going -- was going to
10 begin working on the decoding as if the 768 decode experiment had
11 worked fine.

12 MR. PANTONI: Q Did Steve -- Again pursuant to the
13 judge's instructions, don't tell me what Steve may have
14 speculated. Did Steve Barnard make any statement to you about the
15 768 decode experiment which made you send this e-mail to Mark
16 Chee, this e-mail dated September 5?

17 A Yes.

18 Q What did he say?

19 A Steve said he was to begin working on decoding, picking
20 up where the previous team had left off, picking up based on the
21 results that they had obtained.

22 Q So your testimony is based on what you heard at the
23 all-company meeting and what Steve Barnard told you, you sent this
24 e-mail to Mark Chee?

25 A Yes.

26 Q Let's look at Exhibit 327.

27 It's actually page 3 of 327. Is this a copy of a September
28 5, 2000 e-mail you sent to Jay Flatley?

1 A Yes.

2 Q On that date?

3 A Yes.

4 Q What was your purpose in sending this e-mail, Dr.

5 Czarnik?

6 A Jay had asked me for some specific materials, results
7 of my experiments, so the main purpose was to let him know that I
8 had placed the things he was asking for in his mailbox.

9 Q When did he make that request?

10 A About five days earlier.

11 Q You sent it to Jay Flatley about 5 o'clock in the
12 evening?

13 A It would have been six days earlier, excuse me.

14 Q You sent this e-mail to Jay Flatley 5 o'clock that
15 evening?

16 A Yes.

17 Q Did you receive a response?

18 A Again, I didn't see this response, but this is what
19 appeared in discovery.

20 Q His response September 5, 2000?

21 A Yes.

22 Q You didn't see that that day?

23 A No.

24 Q What date was your employment with Illumina terminated?

25 A On September 5th, 2000.

26 Q How were you informed your employment was terminated?

27 A At a meeting that occurred in Jay Flatley's office.

28 Present were -- Well, at a meeting at Jay Flatley's office.

1 Q Who was at the meeting?

2 A Jay Flatley, Deborah Flamino, and me.

3 Q What time was the meeting, do you recall?

4 A It began at 6 o'clock.

5 Q And who opened the meeting?

6 A Jay opened the meeting.

7 Q What did Jay say at this meeting?

8 A Jay started by asking me if I had done anymore
9 experiments since he had reviewed my lab book the previous week.

10 Q What was your response?

11 A Yes, I had.

12 Q By the way, had you given any of the information with
13 respect to those experiments to Jay Flatley?

14 A I had put the stack of experimental results that Jay
15 asked for in his mailbox an hour earlier.

16 Q All right. And after inquiring about whether you had
17 done anymore experiments or anymore results, what, if anything,
18 did Jay Flatley say at the termination meeting?

19 A Jay told me that he was going to terminate my
20 employment.

21 Q Did he say why?

22 A He said it was because I hadn't achieved my goals.

23 Q At this termination meeting, Dr. Czarnik, didn't Jay
24 Flatley make any reference to dyes or reagents?

25 A Yes.

26 Q Tell the jury, please, what Jay Flatley said to you on
27 that subject at the termination meeting.

28 A Jay said -- Jay looked at me and said, "I understand

1 you've been making some strong statements about decoding. If you
2 tell anyone outside of the company about the reagent problem, the
3 company will go after you with everything it has."

4 Q Did you respond to that?

5 A No. It was pretty shocking.

6 Q How long was the termination meeting?

7 A A total of about 15 minutes.

8 Q At the termination meeting, did Jay Flatley make an
9 offer to you of any sort of severance?

10 A Yes, Jay offered that if we would just settle the
11 complaint that I had about the company, he would offer me three
12 months worth of stock.

13 Q Did he mention anything about salary?

14 A No. I'm sorry, I take that back, he did. Jay said
15 that he was going to pay the --

16 MS KEARNS: I'll object, this will be a hearsay
17 statement.

18 MR. PANTONI: Q In terms of -- Withdraw the
19 question.

20 Q In terms of making a severance proposal, did he offer
21 you salary in addition to stock?

22 A No.

23 Q Did Jay Flatley tell you anything about what he
24 perceived to be the value of the severance offer he was making?

25 MS KEARNS: Objection, hearsay, relevance.

26 THE COURT: Are these settlement discussions?

27 MR. PANTONI: We've had plenty of testimony.

28 THE COURT: I know. I think I'm going to need an offer

1 of proof outside the presence of the jury.

2 (Proceedings at sidebar.)

22 (Proceedings resumed in open court.)

23 THE COURT: Ladies and gentlemen, all the testimony you
24 heard so far about the September 5th conversation is stricken.
25 We're going to start all over with a clean slate, and Mr. Pantoni
26 is going to be allowed --

27 MR. PANTONI: The entire conversation? There were many
28 subjects.

1 THE COURT: Just as relates to possible settlement of
2 the case. Those considerations are stricken.

3 MR. PANTONI: I don't need to revisit what he said about
4 the reasons or decoding.

5 THE COURT: All that is still in. And now about the
6 settlement discussions, that Mr. Pantoni is going to ask a few
7 very targeted questions to elicit information that will be
8 admissible.

9 MR. PANTONI: Q Dr. Czarnik, at the termination
10 meeting on September 5, 2000, the meeting in which Jay Flatley
11 informed you that you were fired, without telling us the terms of
12 any proposal made by Dr. Flatley, Mr. Flatley, rather, did Mr.
13 Flatley make you a severance proposal at the termination meeting?

14 THE COURT: You can probably answer these questions yes
15 or no.

16 THE WITNESS: Yes.

17 MR. PANTONI: Q This was at the same meeting in
18 which he fired you?

19 A Yes.

20 Q Did you accept Mr. Flatley's offer of severance that he
21 made at the termination?

22 A No.

23 Q You say the termination meeting took about 15 minutes?

24 A Yes.

25 Q And what happened after the meeting?

26 A I was escorted to the garage by Deborah Flamino.

27 Q If we could please take a look at Exhibit 339.

28 Do you recognize Exhibit 339?

1 A Yes.

2 Q Is this a letter that you received dated September 12,
3 2000?

4 A Yes.

5 Q From Illumina?

6 A Yes.

7 Q Scroll up, please.

8 And the letter is from Connie Brick, Illumina's director of
9 finance?

10 A Correct.

11 Q This was a letter by which Illumina repurchased shares
12 of stock that you had owned in the company?

13 A That's correct.

14 Q Is it accurate that as of this date, prior to the offer
15 -- strike that. Prior to the repurchase, you owned a total of
16 425,000 shares?

17 MS KEARNS: Objection, calls for a legal conclusion.

18 THE COURT: You are just asking how many shares he
19 owned? I think it's permissible for the owner to give an opinion
20 in that regard. Overruled.

21 THE WITNESS: Yes, that's the amount.

22 MR. PANTONI: Q And you did have a contract with
23 Illumina whereby the company could repurchase certain shares in
24 the event that your employment terminated, right?

25 A Yes.

26 Q Is it true that at least your understanding was that as
27 time went on, as you continued to work with the company, the
28 company would lose its right to repurchase a certain number of

1 those shares every month?

2 A Yes.

3 Q The company included a check for \$4516.67 in this
4 letter?

5 A Yes.

6 Q And it was to repurchase 226,667 shares at a penny a
7 share and 25,000 shares at nine cents a share?

8 A That's correct.

9 Q What was the market value of the shares that were
10 repurchased by Illumina on September, 2000, based on the price at
11 which the stock was trading publicly?

12 MS KEARNS: Objection, foundation, relevance, 352.

13 THE COURT: Are we going to have expert testimony later
14 on on the value of the shares?

15 MS KEARNS: We will, your Honor.

16 THE COURT: I think under 352, there's so many possible
17 qualifiers, I think the experts are better suited.

18 MR. PANTONI: I don't think there's any dispute about
19 what the value was, Judge. We dealt with this in limine. We
20 could all do the math.

21 THE COURT: Just the market value?

22 MR. PANTONI: Yes, that's all.

23 THE COURT: You are not asking about the effect of any
24 restrictions?

25 MR. PANTONI: No.

26 THE COURT: The market value, he can answer that if he
27 knows. What Illumina, what they would have been listed at in the
28 paper if you looked it up in the financial pages.

1 MR. PANTONI: Exactly.

2 MS KEARNS: Foundational objection stands.

3 THE COURT: Overruled. If you know. Do you know?

4 THE WITNESS: Yes, I do know. On the date of that
5 letter, the shares that were repurchased were worth a little over
6 \$10 million.

7 MR. PANTONI: Q Did you ever cash that check for
8 4516.67?

9 A Objection, relevance.

10 THE COURT: Sustained.

11 MR. PANTONI: Goes to emotional distress, which we're
12 going to get into.

13 MS KEARNS: Same objection.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: No, I never cashed that check.

16 MR. PANTONI: Q Dr. Czarnik, did the events you
17 described in this trial, including the termination of your
18 employment, did it affect you emotionally?

19 A Yes.

20 Q Can you describe to the jury the impact that the events
21 that you've testified to had on you emotionally?

22 A It would be hard to exaggerate it. I was powerfully
23 betrayed and felt a powerful feeling of betrayal. Having founded
24 this company, having been involved with people from the very
25 beginning, I was extraordinarily hurt, and maybe most of all very
26 disillusioned with this whole process. I was lucky enough to have
27 been a founder of a company that was successful and then got
28 booted from it, and that was extraordinarily difficult to accept.

1 Also I felt very saddened by the injustice of having been
2 doing what was in my opinion an excellent job moving the company's
3 science forward and coming to the realization that that wasn't
4 valued. So I felt very disillusioned by that.

5 It's hard to get this out of my mind. I can't get it out of
6 my mind. One of the reasons for this trial is to help me lose the
7 emotional part that's associated with the extraordinary injustice
8 of it. And it's taken a toll on my marriage, which I don't need
9 to elaborate on. Just an extraordinarily painful incident, and
10 one that I wasn't simply going to say was okay, I was never hurt,
11 in an open forum like this.

12 Q Do you have any physical manifestations of emotional
13 distress?

14 A Well, I'm somewhat tougher for the experience, but have
15 continuing mid-afternoon headaches, since April of 1999, and
16 routinely have difficulty falling asleep. I began on sleep
17 medication in April of '99 and have been continuing them since.
18 So those are the two major physical changes.

19 Q I want to back up and ask you a question about a
20 document I should have asked you toward the beginning but didn't.
21 This is Exhibit 33. There are a series of documents in Exhibit
22 33. Can you describe for the jury generally what these documents
23 are. What is an invention disclosure form?

24 A It's a standard form that companies use when an
25 employee of the company comes up with an idea that's probably new
26 and likely to be valuable. The employee writes that idea up and
27 in enough detail so what's called someone trained in the art could
28 reproduce it or understand it. Make sure all the people who

1 contributed to that idea are listed as inventors, and that
2 document is signed by the inventors, it's signed by at least two
3 people who aren't inventors, and then it's submitted to the
4 company for holding. And it turns out in the U.S. it's the person
5 who invented something first rather than the person who filed with
6 the patent office first, so these are important and the dates are
7 important.

8 Q And can you get the binder out in front of you.

9 A What's the number again, please?

10 Q 33.

11 Just for the record, does Exhibit 33 -- What is in Exhibit
12 33 generally?

13 A Exhibits 33 contains a copy of each of the invention
14 disclosures on which I was either the only inventor or one of the
15 co-inventors.

16 Q You submitted those in the normal course of business at
17 Illumina?

18 A Yes.

19 Q I think I asked you to count how many invention
20 disclosure forms there are in that exhibit. Do you know how many
21 there are?

22 A Yes, I do.

23 Q How many?

24 A There are 32.

25 Q One last exhibit. Dr. Czarnik, you recognize Exhibit
26 343?

27 A Yes, I do.

28 Q What is this document, sir?

1 A It's a photograph of Illumina employees that is
2 intended to represent the second-year people who are at Illumina
3 at the end of the second year.

4 Q How did you obtain this photograph, or your copy of the
5 photograph?

6 A Well, while I was employed at Illumina we took the
7 picture the first time, so the employees were gathered and a
8 photographer took the photo of all the employees at the company at
9 the end of the second year.

10 Q Let me interrupt a second. When was that first photo
11 taken?

12 A It was taken in August of 2000.

13 Q Early, mid, late, do you recall?

14 A I really don't recall.

15 Q Sometime in the month before your termination?

16 A Yes.

17 Q And were you in that group photo?

18 A Yes, I was.

19 Q And did you order a copy of it?

20 A I paid for a copy of it, yes.

21 Q And what did you receive back from the company?

22 A What I received was this picture, which was taken after
23 I had been fired, and in this version of the picture I'm not in
24 it.

25 Q How long after your termination did you receive a copy
26 of this group photo where you are not in it?

27 A A couple of weeks after I'd been fired.

28 Q Sometime in September of 2000?

1 A Yes.

2 MR. PANTONI: Nothing further, Judge, at this time.

3 THE COURT: Okay. Thank you.

4 MS KEARNS: Yes, your Honor.

5 CROSS-EXAMINATION

6 BY MISS KEARNS:

7 Q Good afternoon, Dr. Czarnik.

8 A Good afternoon.

9 Q You understand that all of the testimony you've given
10 here before this jury during the course of this trial has been
11 under oath, correct?

12 A Yes, ma'am.

13 Q You are sworn to tell the truth?

14 A Yes.

15 Q You understand that the testimony you've given is under
16 penalty of perjury, correct?

17 A Yes, ma'am.

18 Q Now, I took your deposition over the course of six days
19 last summer, did I not?

20 A I remember.

21 Q And you took the same oath during each and every
22 session of that deposition, correct?

23 A Yes.

24 Q And you understood back in the summer of 2001 that the
25 testimony you were giving me in deposition was also under a
26 penalty of perjury?

27 MR. PANTONI: Argumentative at this point, Judge.

28 MS KEARNS: Q Also under the same penalty of perjury.

1 MR. PANTONI: Objection, there's been no indication
2 there's been anything inconsistent.

3 THE COURT: Customarily, although it's not about trial
4 testimony, generally I think when an attorney is trying to explain
5 to the jury what a deposition is, they -- it's admissible for the
6 purpose of understanding the deposition testimony is just as
7 serious as the testimony given in court. So the objection is --

8 MR. PANTONI: I understand.

9 THE WITNESS: I did understand that I was under oath
10 during the depositions.

11 MS KEARNS: Q Right. And you remember during the
12 summer of 2001 when I examined you over the course of six days, I
13 asked you a number of questions bearing on the very same events
14 that you've discussed during this trial, correct?

15 A Yes.

16 Q Let me first ask you to direct your attention to
17 Exhibit 339, which has already been published to the jury and
18 shown to you, and this is the repurchase letter dated September 12
19 in which the company was repurchasing 226,667 shares of stock that
20 you had purchased at a penny a share, correct?

21 A Yes, ma'am.

22 Q So you would agree with me that Illumina was purchasing
23 back those shares at the very same price that you paid for them,
24 correct?

25 A Yes.

26 Q And this letter also indicates a repurchase of 25,000
27 shares of common stock at a purchase price of nine cents a share?
28 I apologize for my caffeine hands with this shaky pointer. Would

1 you agree with the 25,000 shares that were repurchased, the nine
2 cents per share price does reflect the price you paid for them?

3 A Yes.

4 Q So you were getting back the same amount of money that
5 you paid for the shares that were ultimately repurchased?

6 A Yes.

7 Q Now, you testified, when being asked about this
8 repurchase document, you were asked whether you owned 425,000
9 shares at the time of this letter, and you made some reference,
10 Dr. Czarnik, to being under a contract with the company for the
11 repurchase, correct?

12 A I'm afraid I don't recall the question or my answer.

13 Q The one that your counsel asked about 20 minutes ago.

14 A Would you just ask it again because I don't want to
15 answer a question I don't understand.

16 Q Certainly. Would you agree with me that you had, at
17 the time you purchased the shares, some of which were repurchased
18 here, you signed an agreement with the company that specifically
19 said in the event I am gone from Illumina, the company has a
20 contractual right to repurchase certain shares?

21 A Yes.

22 Q So the repurchase in this letter was made pursuant to
23 that agreement that you'd previously signed with the company?

24 A Yes.

25 Q Now, you were asked the fair market value of the shares
26 which were repurchased pursuant to this September 12 letter, and I
27 believe your testimony was based upon your knowledge of the fair
28 market value price that day, you think that the repurchased shares

1 were worth about \$10 million, correct?

2 A Yes.

3 Q But now the company didn't repurchase all of the shares
4 that you held, did it?

5 A No.

6 Q You kept a number of shares, correct?

7 A Yes.

8 Q You kept those shares as to which you had, I'm using
9 this term somewhat loosely, but you kept shares in which you had
10 acquired vested rights, correct?

11 A Yes.

12 Q And isn't it true that the fair market value of the
13 shares you kept was worth about \$9 million on September 12, 2000?

14 MR. PANTONI: Objection, relevance.

15 THE COURT: Overruled.

16 THE WITNESS: I would have to do the math. It was
17 close, if not that number.

18 MS KEARNS: Q Close to \$9 million?

19 A It sounds right.

20 Q Thank you.

21 Now, Dr. Czarnik, let's back up a moment. I asked you about
22 the deposition, and the judge's comment is causing me to just ask
23 a very preliminary question. Isn't it true that the deposition
24 process is a question-and-answer session in which I was asking you
25 questions and then you would give me your answers under oath,
26 correct?

27 A Correct.

28 Q And we had a court reporter present, very similar to

1 Mr. Stewart who is here with us today, correct?

2 A Correct.

3 Q And there was a written transcript, a booklet,
4 generated from each session of that deposition, correct?

5 A Correct.

6 Q And you were given an opportunity to review the written
7 transcript of each of the days of deposition which we engaged in,
8 correct?

9 A Yes.

10 Q And I'll represent to you that your counsel provided me
11 with a written communication in which he advised that you had
12 reviewed all six volumes of your deposition transcript and that
13 you had no changes.

14 Let me ask you this: Is that an accurate statement, first,
15 did you in fact review all six transcripts?

16 MR. PANTONI: Move to strike the preface, Judge. I
17 don't mind the question, but I do mind the preface.

18 THE COURT: The preface --

19 MS KEARNS: I think the preface is necessary to
20 understand why I'm even asking these questions.

21 THE COURT: Strike the preface for now. Just ask the
22 questions.

23 MS KEARNS: Q Dr. Czarnik, did you in fact at some
24 point review each of the transcripts from all six days of your
25 deposition?

26 A I read all of the transcripts, yes.

27 Q And did you at anytime make any written corrections to
28 any of your answers in those deposition transcripts?

1 A No, I didn't see anything substantive that needed to be
2 changed.

3 Q Okay. So you are comfortable standing by the
4 deposition testimony which you gave to me last summer?

5 MR. PANTONI: Objection, there's no foundation, Judge,
6 about specific testimony.

7 MS KEARNS: Q As you sit here today, there is nothing
8 that you remember seeing in your deposition transcripts which you
9 think was erroneous and which you neglected to correct?

10 MR. PANTONI: Same objection.

11 THE COURT: Overruled.

12 THE WITNESS: I read through all the depositions. If
13 there had been any major changes that I noticed, I would have sent
14 them to Mr. Pantoni.

15 MS KEARNS: Q Thank you.

16 And you would agree with me, Dr. Czarnik, the deposition
17 sessions which you and I had over many days last summer, those
18 days were closer in time to the events which occurred at Illumina
19 than today?

20 A Yes.

21 Q About a year closer in time to the actual event,
22 correct?

23 A Yes.

24 Q And isn't it true, Dr. Czarnik, that very early in your
25 deposition, you told me that your memory is impaired from dealing
26 with depression, correct?

27 A I think the question was is there any reason why your
28 memory might not be perfect, and I answered that difficulties with

1 memory can occur with depression.

2 Q So you believe your answer was in the abstract, that it
3 can occur, but you weren't necessarily saying it had occurred with
4 you?

5 A Yes, I did not say it had occurred with me.

6 Q Let me read into the record, I'm looking at Volume
7 1 --

8 THE COURT: Just for the future, Counsel, rather than
9 characterizing what he said in his deposition, ask a question
10 about the subject matter, and then if you feel it is inconsistent,
11 then give the reference to Mr. Pantoni, and by that time he would
12 have located the volumes.

13 I have a set. Did somebody give me your set?

14 MR. PANTONI: That is the set I had, Judge.

15 THE COURT: Do I have your set? Maybe you'll have to
16 look over Miss Kearns' shoulder.

17 MR. PANTONI: You don't want me looking over your
18 shoulder?

19 THE COURT: What is it, page what?

20 MS KEARNS: Page -- Volume 1, your Honor, page 9, line
21 19.

22 THE COURT: How do you want to do this? I just asked
23 for a set to save time in case there was objection, but you want
24 to have this set and hand it to me if there's an objection?

25 MR. PANTONI: We may have it on the computer, Judge.
26 We're trying to find it.

27 THE COURT: Page 9.

28 MS KEARNS: Page 9, line 19:

1 "QUESTION: Can you think --" This is my
2 question to you, Dr. Czarnik:

3 "QUESTION: Can you think of any reason that
4 your memory of past events relating to your employment with
5 Illumina would be impaired?

6 "ANSWER: My memory is impaired by dealing
7 with depression. My memory is not as good as it was 15
8 years ago."

9 That was your testimony on your deposition date,
10 correct?

11 A If you are reading it from the deposition, then yes.

12 Q Thank you.

13 And you also told me -- And isn't it true, Dr. Czarnik,
14 that you believe you have a generalized memory impairment due to
15 dealing with depression?

16 A Yes, that's true.

17 Q And you so testified in your deposition on July 10,
18 2001?

19 A I don't have the deposition in front of me, but if you
20 read it accurately, yes.

21 Q Now, you were first diagnosed with clinical depression
22 over 10 years ago, correct?

23 A Just 10 years ago -- Yes, ten years ago this year.

24 Q That was during the period of time that you were a
25 professor at Ohio State University?

26 A In 1992.

27 Q And that was during the time that you were a professor
28 at Ohio State?

1 A I was a professor at Ohio State in 1992.

2 Q And you are not suggesting that any of the events which
3 you claim happened at Illumina actually were the initial cause of
4 your depression, are you?

5 A No.

6 Q You testified, I believe, on direct for the first time
7 Wednesday of last week, and isn't it true, Dr. Czarnik, that your
8 depression, though it's occurred over a 10-year period, has
9 generally been well controlled with medicines during that 10-year
10 period?

11 A Yes.

12 Q You say that your breakdown in April of 1999, while at
13 Illumina, was a direct result of having made a change in your
14 medications a few months earlier, is that correct?

15 A Yes.

16 Q Prior to April of 1999, had you suffered any other
17 major depressive episodes?

18 A Yes.

19 Q How many times?

20 MR. PANTONI: Objection, relevance, 352.

21 THE COURT: Overruled. Claim for emotional distress
22 damages, among other things.

23 THE WITNESS: I believe it's twice.

24 MS KEARNS: Q And just generally were both of those
25 other major depressive episodes -- strike that.

26 Did both of those major depressive episodes occur during the
27 time you were a professor at Ohio State University?

28 A Did both of them?

1 Q Yes.

2 A No.

3 Q Did one of them?

4 A Yes.

5 Q And then the second one occurred when you were working
6 where?

7 A I believe at Parke-Davis Pharmaceutical Company.

8 Q Now, the first major depressive episode that you
9 suffered while a professor at OSU, when did that occur?

10 A In 1992.

11 Q And is it your contention -- strike that.

12 You are not suggesting to us that that first major
13 depressive episode was caused by any particular job duty or
14 activity, are you?

15 A Would you repeat the question.

16 Q Sure. I'll make it more plain. Are you suggesting in
17 any way that your first major depressive episode was caused or
18 precipitated by preparing a grant application?

19 A No.

20 Q And in fact in deposition you told me that you were
21 first diagnosed with depression in 1992 but had been -- had
22 suffered from it for years, correct?

23 A I don't remember if that's what I testified, but I in
24 fact had dealt with depression for several years before it was
25 diagnosed.

26 Q And the first major depressive episode then which
27 occurred while you were a professor was not caused by writing a
28 grant application?

1 A No, it wasn't.

2 Q And the second major depressive episode which you just
3 testified occurred while you think you were at Parke-Davis, that
4 one wasn't caused by writing a grant application, was it?

5 A No, it wasn't.

6 Q In fact, Dr. Czarnik, you testified that while at Ohio
7 State University, your duties encompassed not only teaching
8 chemistry but also running a research group, correct?

9 A Yes.

10 Q And isn't it true that in order to fund a research
11 group and to pay the salaries of the scientists who were working
12 on your scientific projects, it was necessary to get funding
13 through these grant applications?

14 A That's correct.

15 Q And you testified last week, did you not, that the
16 grant process became much more competitive than it had been when
17 you began in academia?

18 A Yes, that's correct.

19 Q And in trial last week didn't you say -- I think you
20 said something to the effect that initially you liked grant
21 writing and you said it was something like raising a family,
22 correct?

23 A No. What I remember saying is simply that it was an
24 experience to just write something, send it off and have money
25 come back.

26 Q Okay. And isn't it true, though, that while you were
27 in academia, you found grant writing unpleasant?

28 A Certainly near the end, yes.

1 Q And you testified that over the course of your academic
2 career, you had written approximately 40 grant applications,
3 correct?

4 A Yes.

5 Q What was your estimated success rate? In other words,
6 what proportion of those 40 grant applications were funded?

7 MR. PANTONI: Objection, relevance.

8 THE COURT: Is why is it relevant?

9 MS KEARNS: I'll move on.

10 THE COURT: Okay.

11 MS KEARNS: Q So writing grant applications is
12 something which you had done numerous times before you came to
13 Illumina, correct?

14 A That's correct.

15 Q And it's not an activity that had triggered depressive
16 episode in the past, correct?

17 A No.

18 Q And in fact you are not contending that writing the
19 grant application at Illumina triggered your depressive episode,
20 are you?

21 A No, I'm not.

22 Q You are saying it was the change in medication that
23 triggered the depression?

24 A Yes.

25 Q After your April 19, 1999 breakdown at Illumina, you
26 began [treatment]⁷⁵ with a local psychiatrist by the name of Dr. [Allan]⁷⁶
27 Mallinger, correct?

28 A Yes.

⁷⁵ Original transcript read, "treating".

⁷⁶ Original transcript read, "Allen".

1 Q And you trusted and respected Dr. Mallinger then?

2 A I came to trust and respect him, yes.

3 Q Do you still trust and respect him today?

4 A Yes.

5 Q Did you tell Dr. Mallinger in late April, 1999, that
6 while you were a professor at OSU you came to hate grant writing?

7 A I may well have said that.

8 Q Did you tell Dr. [Allan]⁷⁶ Mallinger while you were a
9 professor at on OSU you had trouble getting money from grants and
10 you became despondent over that?

11 MR. PANTONI: Objection, relevance.

12 THE WITNESS: I don't know if I told him that.

13 MS KEARNS: Q Dr. Czarnik, I am having put up on the
14 board a document which has been marked in the case as Exhibit
15 195-3, and if we could scroll to the top just so we can have the
16 witness identify what this is.

17 What is this document, Dr. Czarnik?

18 A This is a page from a document that I had prepared in
19 preparation for the talk I had with Jay Flatley. I was preparing
20 to explain to Jay why my contribution to Illumina had been
21 substantial, why the big change in compensation wasn't warranted.
22 I had initially over that time expected that I was going to
23 complain about my treatment by John Stuelpnagel, and just before
24 the meeting I changed my mind and I did not complain about my
25 treatment by John Stuelpnagel.

26 Q So let me ask you to set a time frame. This exhibit,
27 Exhibit 195-3, this is a document you prepared and authored,
28 correct?

1 A Yes.

2 Q And you say that you prepared this in preparation for a
3 meeting or a discussion with Jay Flatley that centered around the
4 proposed reduction in your stock and salary, correct?

5 A Yes.

6 Q So that would have been in the spring of 2000, right?

7 A Yes.

8 Q And in fact just to circle back on one point that you
9 made, I think earlier today, maybe before the lunch break, you
10 said that the proposed change in your compensation as a result of
11 your assumption of the position of research fellow, there were two
12 proposed changes. One was a reduction in salary itself from
13 \$185,000 a year to 165,000, correct?

14 A Yes.

15 Q That change actually was implemented, right?

16 A Yes.

17 Q You testified this morning that you actually did not
18 have a problem with that change, correct?

19 A That's correct.

20 Q The other proposed change was a reduction in the amount
21 of stock in which you would vest over time, correct?

22 A That's correct.

23 Q You testified this morning that that change was not
24 implemented, correct?

25 A That's correct.

26 Q And that's because you refused or declined to sign the
27 agreement which would have been required in order to effect that
28 change?

1 A I refused.

2 Q Okay. And so this Exhibit 195-3, which you prepared in
3 anticipation of a discussion with Dr. Flatley about these
4 compensation issues, did you give this document to Mr. Flatley?

5 A No.

6 Q You created this, though, on your work computer at
7 Illumina?

8 A Yes.

9 Q If we could scroll down to the mea culpas. Now mea
10 culpa, I don't know Latin, but I presume you do, Dr. Czarnik. Mea
11 culpas are admissions, or how would you describe that, what did
12 you mean?

13 A They are things that are -- I acknowledge that.

14 Q Okay. You acknowledge that.

15 Now, with respect to grant applications which appear towards
16 the bottom, grant applications, "I detest them and wrote them
17 hesitantly." That was your language, correct?

18 A Yes.

19 Q How many grant applications did you write while at
20 Illumina?

21 A Five.

22 Q And you were telling Mr. Flatley or agreeing that you
23 detest doing grant applications, correct?

24 A Yes.

25 Q Focusing on the trips, you were telling Mr. Flatley
26 that you took more non-Illumina trips than either JRS, that's John
27 Stuelpnagel?

28 A Yes.

1 Q Or MC, Mark Chee?

2 A Yes.

3 Q And patents, isn't it true that one of the
4 responsibilities which was to be yours as chief scientific officer
5 when you began at Illumina was to put together the company's
6 intellectual property portfolio, correct?

7 A No.

8 Q Why do you say no?

9 A Because my responsibility was to participate in the
10 creation of intellectual property.

11 Q Didn't you understand that the documentation and patent
12 application process to protect the company's intellectual property
13 was a responsibility which was going to be primarily yours?

14 A No.

15 Q Do you see this language, "Early on I was asked to take
16 responsibility for patents. I could not do a good job on this
17 given my low experience with patents and even lower experience
18 with DNA applications. I resisted the request. JRS took on this
19 task --" "took this task on and has done an excellent job." You
20 see that?

21 A Yes.

22 Q So this document that you were asked to take on
23 responsibility for patents, but that given the fact that you had
24 low experience with patents, you resisted the request?

25 A That request was made in approximately September of
26 1998.

27 Q Very early on in your employment?

28 A Shortly after we moved to the new facility.

1 Q And isn't it true that your offer letter, which I'll
2 put up in awhile, but isn't it true your offer letter had as one
3 of your responsibilities participating in the creation of a sound
4 intellectual property portfolio?

5 A Yes.

6 Q Now, in earlier testimony, Dr. Czarnik, on direct you
7 testified for the jury that you are -- Let me actually -- let me
8 finish up with this one exhibit. Strike the previous portion of
9 the sentence.

10 The next mea culpa mentioned is "Poor response times." You
11 were admitting to Jay Flatley that in some instances you had poor
12 response times, correct?

13 A Yes.

14 Q You admitted that you missed deadlines due to both time
15 and to imperfect organization, correct?

16 A That was before Jay arrived, but yes.

17 Q So these mea culpas relate not only to your behavior or
18 performance after Jay Flatley arrived, but also your performance
19 prior to his arrival?

20 A Actually these describe to the best of my recollection
21 only things that occurred before Jay arrived.

22 Q Okay. Now let me focus on this, "Crashing in April
23 '98." In fact wasn't your breakdown in April of '99?

24 A Yes, I get the year wrong sometimes.

25 Q So this is incorrect. It's an error.

26 A It's an error.

27 Q Now, you say that the crash occurred after six months
28 of constant competitiveness between JRS and AWC. So you are

1 suggesting in this sentence that your crash in April of '99
2 occurred after six months of a competitive relationship between
3 you and John Stuelpnagel?

4 A I don't know if I would describe it as a competitive
5 relationship, but in that setting, we were certainly competing for
6 how the company should be run.

7 Q What's this QD patent application? What does that
8 refer to?

9 A QD is an abbreviation for Quantum Dot.

10 Q "I shouldn't have taken this on. I was medically
11 unable to." Is this QD patent application something you should
12 have been doing around the April 1999 time frame?

13 A Yes.

14 Q Was there a deadline or due date for it?

15 A No.

16 Q It's just something that slipped through the cracks?

17 A It's something I should have focused on if I could have
18 focused on writing.

19 Q Dr. Czarnik, you indicated certainly as of April 6,
20 1999, when you spoke with John Stuelpnagel and Mark Chee, as of
21 that date, you say that you were having trouble writing creatively
22 and couldn't complete the grant application, correct?

23 A Yes, ma'am.

24 Q Through what date, Dr. Czarnik, were you unable to
25 write creatively?

26 A Through April 8th of 1999.

27 Q So your inability to write creatively only lasted about
28 two days?

1 A Well, during that period of time, my ability to write
2 creatively was dependent on my self-medication.

3 Q Okay. The Dexedrine to which you referred?

4 A Yes.

5 Q But I guess my question is this: If you became able to
6 write creatively as of April 8 because you had self-medicated with
7 Dexedrine, did that effect continue beyond April 8th?

8 A I self-medicated with Dexedrine until I achieved the
9 completion of that [NIST]⁷⁷ ATP grant, and after that I was very
10 cautious not to use it because of the risk of addiction.

11 Q I think you testified that the ATP grant was submitted
12 April 14, 1999?

13 A That's what I recall, yes.

14 Q So are you saying that you self-medicated with
15 Dexedrine basically from April 8, 1999 through the 14th?

16 A No. No, I self-medicated for two days in the beginning
17 of that period and for two days at the end of that period.

18 THE COURT: We're going to have to take a break at this
19 time.

20 MS KEARNS: This would be a good time.

21 THE COURT: We'll take our afternoon recess at this
22 time. We'll be in recess until 10 minutes before 3. Please
23 remember not to form or express any opinion about the case, don't
24 discuss the case. We'll be in recess until 10 minutes before 3.
25 10 minutes before 3.

26 (Recess.)

27 THE COURT: Record indicate jurors are present, counsel
28 and parties.

⁷⁷ Original transcript read, "missed".

1 You may continue your cross-examination.

2 MS KEARNS: Thank you, your Honor.

3 Q So, Dr. Czarnik, with respect to this exhibit that we
4 were looking at, this document that you created for use in your
5 meeting with Jay Flatley, you already testified you didn't give to
6 Jay Flatley?

7 A In fact, I don't think we covered these items.

8 Q That was going to be my next question, did you discuss
9 the items mentioned in this exhibit during your meeting with Jay
10 Flatley?

11 A I don't think I did.

12 Q Let's take the exhibit down, please.

13 Dr. Czarnik, in your direct examination you testified that
14 you are the author of about 120 papers, give or take, correct?

15 A Yes.

16 Q And did you actually personally conduct all the
17 experiments that are described in those papers?

18 A No.

19 Q Many of them would have been done by graduate students
20 under your direction?

21 A Yes.

22 Q And on some of the papers are you listed as an author
23 because you were the experimenter or the [student's]⁷⁸ advisor?

24 A You are never an author just because you are advisor.
25 You are an author because you contributed to the conclusions that
26 were drawn in the paper.

27 Q You didn't necessarily do the experiments?

28 A In fact, doing the experiment is insufficient to be an

⁷⁸ Original transcript read, "student".

1 author.

2 Q And do you know how many of those 120 papers or so that
3 you've written were peer-reviewed journals?

4 A I'm sorry, I don't know.

5 Q So, for example, some of the articles which were put up
6 during your direct examination, some of those articles appeared in
7 magazines or publications which are not reviewed by other
8 scientists, correct?

9 A That's correct.

10 Q And yet something like Science or Nature, are those
11 peer-reviewed journals?

12 A Yes.

13 Q So some of your articles were in fact in peer-reviewed
14 journals and others were not, correct?

15 A Correct.

16 Q You testified on direct that you hold about eight
17 patents, correct?

18 A I don't recall what I said. That number sounds right.

19 Q Okay. Do you hold any patents with respect to any
20 technology that was actually being used at Illumina while you were
21 there?

22 A Could you repeat it, please.

23 Q Sure. Do you hold any patents that cover any
24 technology that was actually being used in practice at Illumina
25 during your time there?

26 A I don't know if the Illumina decoding patent has issued
27 yet. If it has issued, the answer is yes.

28 Q Are you the only inventor on the Illumina decoding

1 patent?

2 A No.

3 Q Who else is on that patent?

4 A My recollection is that John Stuelpnagel, Mark Chee,
5 David Walt and myself are the inventors.

6 Q Setting aside a decoding patent, you are not aware of
7 any other patent that you hold which covers technology that was in
8 actual use at Illumina?

9 A I can't think of any, but it depends on what's issued
10 over the last month.

11 Q Do you hold any patents with respect to any, apart from
12 the decoding patent which you mentioned, do you hold any other
13 patent which covers technology which is being used at Illumina
14 today?

15 A I don't know the answer to that question. It depends
16 on what's issued. I know there are a lot of patents that are
17 currently being prosecuted and for which I've signed off as
18 inventor.

19 Q Now, in earlier testimony you indicated that you
20 obtained certain records relating to the company's SEC filing from
21 the Securities Exchange Commission's website, correct?

22 A Yes.

23 Q Do you know whether there is a similar website for the
24 U.S. Patent Office?

25 A There is.

26 Q Have you ever visited that website?

27 A Yes.

28 Q Have you ever visited that website and checked on what

1 patents you are listed as holding?

2 A At some point in my career, yes.

3 Q Do you have any idea how many patents Mark Chee holds?

4 A No.

5 Q Any sense of whether it's more or fewer than yours?

6 A No sense.

7 Q Now, in direct testimony you talked to us a little bit
8 about the time when you were employed at Parke-Davis, correct?

9 A I don't remember.

10 Q Okay. Do you remember using the term in your direct
11 examination "I was doing blue-sky research"?

12 A Yes, I remember that.

13 Q Does that refresh your recollection?

14 A Yes.

15 Q And isn't it true that blue-sky research is, for a
16 scientist, it means working on whatever projects you find
17 interesting and challenging?

18 A In a company context it means the intersection of that
19 with things that might be useful to the company.

20 Q Okay. So there's some -- It's not just whatever
21 strikes your fancy, it's whatever strikes your fancy and which
22 might be of use to the company?

23 A Yes.

24 Q And that's what you were doing at Parke-Davis?

25 A Yes.

26 Q Isn't it true that at Parke-Davis, -- Let me strike
27 that.

28 You went to Parke-Davis after leaving academia, right?

1 A Yes.

2 Q And in part you left academia because it was getting
3 harder and harder to get grant funding to support your research
4 there, correct?

5 A Correct.

6 Q At Parke-Davis your research was fully funded by the
7 company, right?

8 A Yes.

9 Q So there was no need for you to write grant
10 applications, correct?

11 A Correct.

12 Q No need to seek money from outside the company, right?

13 A That's correct.

14 Q In terms of funding to support the research, it was a
15 low pressure position, correct?

16 A Yes.

17 Q And you didn't have to seek money from venture
18 capitalist while you were at Parke-Davis.

19 A No.

20 Q And on direct isn't it true you testified that you left
21 Parke-Davis because it was becoming, and I think I'm quoting
22 correctly, it was becoming more difficult to support your group
23 politically, correct?

24 A Yes.

25 Q And what that meant is you said that the group that
26 seemed to be in authority or power was a group that wanted to push
27 and have things done immediately, right?

28 A I don't remember if that's what I testified.

1 Q Well, let me ask you, when you say that it was becoming
2 more difficult to support your group politically at Parke-Davis,
3 what did you mean by that?

4 A I meant that the people who were in authority at the
5 company were less supportive of this kind of blue-sky research.

6 Q And in direct when you said they wanted to push and
7 have things done immediately, what were you referring to there?

8 A This kind of blue-sky research occasionally delivers
9 something valuable immediately. Normally it takes longer. And
10 -- I'm sorry, I've lost my train of thought. Would you ask the
11 question again.

12 Q Sure. Let me follow up with an absolutely different
13 question. Are you saying that blue-sky research -- Which is what
14 you were doing at Parke-Davis, correct?

15 A Yes.

16 Q And it's what you wanted to do, right?

17 A I enjoyed it.

18 Q Okay. Are you saying that blue-sky research is
19 something that really can't be managed to a time line or to
20 deadlines?

21 A Well, that's a broad statement, but it is less possible
22 to set deadlines for that kind of research than for say an
23 engineering problem.

24 Q And was there a group in authority that was sort of
25 pushing to have the researchers focus on things where you could
26 get results quickly?

27 A The group that was in authority was less tolerant of
28 research that required longer to accomplish.

1 Q So the group that was in authority was sort of exerting
2 some time pressure on the researchers?

3 A No, it was resource pressure. People would leave the
4 group and the position wouldn't be refilled.

5 Q Okay. And you weren't -- You didn't consider yourself
6 to be in that group that was in authority, correct?

7 A I was one of the group that was in authority, but I
8 wasn't the authority in the group.

9 Q And you weren't in the group that you said was making
10 it difficult to support your research?

11 A Well, that would have been my boss and my boss's boss.

12 Q So that wouldn't have been you?

13 A Wouldn't have been me.

14 Q Now, at the time that you were having discussions about
15 the possible formation of the company which later became Illumina,
16 you were then employed at a company called IRORI, correct?

17 A Yes.

18 Q And you didn't have to do any grant writing at IRORI,
19 did you?

20 A No.

21 Q And you I think testified that IRORI had in fact begun
22 as a start-up, is that right?

23 A Yes.

24 Q And approximately how many employees did IRORI have
25 when you joined that company?

26 A My best recollection is approximately 10.

27 Q And you I think testified you became aboard at IRORI as
28 a director initially?

1 A As a senior director.

2 Q Senior director. You didn't participate in the
3 development of IRORI's business plan, did you?

4 A No.

5 Q Your first experience in being a participant in a
6 company that truly was from the ground up was Illumina, correct?

7 A I was involved in trying to spin a company out of
8 Parke-Davis that wasn't done successfully, but the first
9 successful experience, yes.

10 Q Did you write a business plan for the spin-out at
11 Parke-Davis?

12 A I participated in writing the business plan but I
13 didn't have primary responsibility.

14 Q What do you mean by participated?

15 A What I mean is that I didn't have primary
16 responsibility for the business plan, but there were areas that I
17 could contribute to and so I did.

18 Q Are you saying you drafted any portions of that
19 business plan or you reviewed the drafts of others?

20 A I think both.

21 Q Do you remember specifically?

22 A No, I'd have to say I don't remember specifically.

23 Q Thank you.

24 Now, isn't it true that your first experience with being in
25 a company that went public while you were in the company was
26 Illumina?

27 A Yes.

28 Q On Wednesday -- Now, in your direct testimony you were

1 talking a little bit about the negotiations that you were having
2 with Larry Bock and John Stuelpnagel about this potential new
3 company, right?

4 A Yes.

5 Q And you said in your direct testimony that you liked
6 where you were, and that was IRORI, correct?

7 A I was at IRORI, yes.

8 Q And so the testimony from your direct on June 12 was,
9 "I liked where I was, and if they didn't want to offer me the
10 position that would move me, I'd stay." Do you remember that
11 testimony?

12 A I believe I do remember that testimony.

13 Q Okay. And didn't you tell John Stuelpnagel at a later
14 time that you were glad that the Illumina offer came along because
15 you knew you had to leave IRORI?

16 A I don't believe I told that to John.

17 Q Do you deny that you told that to John?

18 A I just don't have any recollection of telling that to
19 John.

20 Q Let me see if I can perhaps refresh your recollection.
21 If I tell you -- Do you remember telling John Stuelpnagel that
22 you were glad the offer came along because you knew you had to
23 leave IRORI because you were being excluded from --

24 MR. PANTONI: Objection, your Honor.

25 MS KEARNS: Q Excluded from meetings?

26 THE COURT: Sustained. I thought that was subject of
27 an in limine.

28 MR. PANTONI: It was, in fact.

1 MS KEARNS: Q Do you remember saying anything to Dr.
2 Stuelpnagel about a belief that you --

3 MR. PANTONI: Objection, your Honor.

4 THE COURT: Sustained. Don't go into this, Counsel,
5 unless we take it up outside the presence of the jury at some
6 time.

7 MR. PANTONI: I request that you instruct the jury to
8 disregard the question.

9 THE COURT: The asking of a question to which there is
10 no answer isn't evidence.

11 MS KEARNS: Q Now, Dr. Czarnik, with respect to your
12 first contacts by the company that later became Illumina, you were
13 first contacted by either John Stuelpnagel or Larry Bock to have a
14 meeting to discuss and review David Walt's technology, correct?

15 A Correct.

16 Q That's the breakfast meeting you testified about?

17 A At Milton's.

18 Q In Del Mar?

19 A Yes.

20 Q And isn't it true that at the time of this initial
21 breakfast meeting, there was a discussion of the technology and
22 whether it was good technology, correct?

23 A Yes.

24 Q And isn't it true that at this stage there was the
25 issue was whether or not -- it still had not been determined
26 whether a company was or was not going to be founded around this
27 technology, is that true?

28 A Yes.

1 Q Do you have any information about the number of other
2 scientists that John Stuelpnagel and Larry Bock may have spoken
3 with to elicit opinions about the technology?

4 A No, no information.

5 Q So you don't know whether they did or didn't, and if
6 they did, you don't know who, basically?

7 A I only know that they spoke with Clark Still, who was
8 -- who they knew from a prior relationship.

9 Q So it would be fair to say that yours was not the only
10 outside opinion that they sought concerning the technology and
11 whether to form a company?

12 A I know of one other person who they talked with.

13 Q I'm going to ask that you put Exhibit 21, which is the
14 solicitation of an offer.

15 Dr. Czarnik, you have an exhibit binder I think at the
16 witness chair. If you prefer to just look on the screen, that's
17 fine.

18 A Okay.

19 Q This is Exhibit 21. Now, isn't it true, Dr. Czarnik,
20 you were actually the first, between you and Illumina, you were
21 the first one to put out in writing any proposal concerning the
22 terms under which you'd work?

23 A In writing, yes.

24 Q That is Exhibit 21, your solicitation letter, correct?

25 A I don't know if it's a solicitation letter, but I wrote
26 this letter.

27 Q You wrote it on -- I'm going to try to be steady here.
28 You wrote it or on about April 3rd, 1998?

1 A Yes.

2 Q And you have requested in particular that you be
3 considered for the founder and CSO position, correct?

4 A No, at that time I was being considered for the
5 position and I said I'm happy I am being considered for it.

6 Q Okay. Now, you didn't have any prior experience as a
7 CSO at this point, correct?

8 A Correct.

9 Q At the time you wrote this letter you were a vice
10 president at IRORI, true?

11 A Yes.

12 Q And you were expecting or desiring a step up in
13 position, right?

14 A Yes.

15 Q But you didn't have any particular reason that you
16 thought you should get a step up in position other than the fact
17 that you wanted one, right?

18 A I am not sure how to answer that question. I was
19 certainly interested in having a step up in position, yes, and I
20 expressed that interest, yes.

21 Q But you didn't have any particular other reason other
22 than wanting to advance that you were expecting a step up?

23 A No. There's one other reason. If you change companies
24 without a step up in position, sometimes people will look at that
25 and say um, there's some reason he changed without a step up in
26 position.

27 Q Has that every happened to you?

28 MR. PANTONI: Objection, relevance, 352.

1 MS KEARNS: I think the witness opened the door.

2 THE COURT: Sustained.

3 MS KEARNS: Q Your position at IRORI as senior director
4 and then subsequently vice president was primarily a scientific
5 position, correct?

6 A At IRORI, yes.

7 Q And you understood that coming to Illumina as CSO, if
8 in fact you did, would involve significant business duties,
9 correct?

10 A That it would involve business duties, yes.

11 Q And you knew there were aspects of a CSO position that
12 you had no prior experience with, right?

13 A Well, I didn't have experience going on a roadshow and
14 I expected to do that as a CSO, so there's at least one thing.

15 Q Can you think of any other responsibilities at the CSO
16 position that you knew would be part of that job and which you'd
17 never done before, other than going on a roadshow?

18 A Working on an S1 filing, I hadn't done that. Was
19 looking forward to it. Those are the only two that come to mind.

20 Q How about selecting among potential applications for a
21 brand new technology?

22 A Certainly did that at IRORI.

23 Q You did that at IRORI?

24 A Yes.

25 Q Let me just read in some deposition testimony. Volume
26 1, page 70, line 4.

27 Dr. Czarnik, you just told me that at IRORI you did select
28 among potential applications for brand new technology.

1 A Evaluated among.

2 Q Potential applications for a brand new technology.

3 A Yes.

4 Q In deposition on July 10, my question to you was:

5 "Can you describe for me generally some of the
6 responsibilities that you knew you'd be taking on if you
7 became a CSO and which you did not yet have experience in?"

8 "ANSWER: Selecting among potential
9 applications for a brand new technology."

10 Have you any reason to dispute that I misread your
11 deposition testimony?

12 A If I had my deposition in front of me it would be
13 easier to answer that question.

14 MS KEARNS: May I approach, your Honor?

15 THE COURT: I could just show it to him.

16 MS KEARNS: Page 70, line 4 and the following answer.

17 THE COURT: Do you have a copy of the deposition now?

18 MR. PANTONI: A rough one on the computer. Enough to
19 follow along, Judge.

20 MS KEARNS: Sometimes the old-fashioned standby is the
21 most reliable.

22 MR. PANTONI: I agree.

23 MS KEARNS: Q Dr. Czarnik, having read your deposition
24 transcript, I have read, correctly read aloud my question and your
25 answer, didn't I?

26 A Yes.

27 Q Thank you.

28 Now, prior to coming to Illumina, you just testified a

1 moment ago that you may have done some drafting and may have done
2 some review of a business plan when there was a proposed spin-out
3 at Parke-Davis, correct?

4 A Yes.

5 Q But you had never had a substantial involvement in the
6 preparation of a start-up's business plan prior to Illumina,
7 correct?

8 A Yes, that's correct.

9 Q And you'd never done any of the business planning for a
10 company leading up to an initial public offering, correct?

11 A Correct.

12 Q Now, you understood when you were negotiating to join
13 Illumina that -- or the company that later became Illumina, that
14 it had a very limited amount of money, right?

15 A When I was negotiating, the company had no money. The
16 company I think got its first batch of money after I joined.

17 Q You are saying after June 15th, 1998?

18 A No, after I had signed my original offer letter.

19 Q Okay. Well, in any event, at the point in time when
20 you are negotiating, you understood that the company either had no
21 money or was on the verge of getting what we called seed money,
22 correct?

23 A Yes.

24 Q And did you understand that the amount of seed money
25 that started up Illumina was \$750,000?

26 A Yes.

27 Q Did you understand that \$750,000 would keep the company
28 running for a relatively short period of time?

1 A Yes.

2 Q A matter of months, correct?

3 A A matter of months.

4 Q A matter of about five and a half to six months

5 maximum, correct?

6 A That would have depended on whether we had taken

7 salaries or not.

8 Q Well, you took a salary the entire time that you worked

9 for Illumina, correct?

10 A Yes.

11 Q Now, on Wednesday when we were talking about the

12 negotiations between you, John Stuelpnagel and Larry Bock about

13 joining Illumina, I believe you told us that you did what was

14 standard in the executive world, you asked for a lot for yourself

15 when negotiating, do you remember that?

16 A I remember saying it was standard in some world, but I

17 don't remember which world.

18 Q Okay. In which worlds do you believe it to be standard

19 in, standard meaning the practice of negotiating, asking for a

20 lot?

21 MR. PANTONI: I'll object, your Honor, it's irrelevant

22 and lacks foundation.

23 THE COURT: Sustained. It's too broad.

24 MS KEARNS: Q Did you take into account in making your

25 proposal for your compensation package, did you take into account

26 the fact that you were negotiating with a start-up company that

27 either had no money or had -- was just about to receive its seed

28 money?

1 MR. PANTONI: I'm going to object. This is irrelevant.
2 The facts are the parties reached an agreement. This is not
3 relevant.

4 MS KEARNS: I think that the negotiations relating to
5 the compensation at the beginning of this individual's employment
6 with Illumina is relevant to show the differing mindsets of the
7 various founders who were in the company, and I won't dwell on it,
8 it's not going to be a protracted area of examination.

9 THE COURT: Calls for state of mind.

10 MR. PANTONI: Absolutely.

11 THE COURT: It's sustained under 352 of the Evidence
12 Code.

13 MS KEARNS: Okay. Your Honor, may I inquire about the
14 content of the proposal letter?

15 THE COURT: Is it relevant to anything?

16 MS KEARNS: I think it is.

17 MR. PANTONI: My view is he made a proposal on some
18 terms, there was some negotiation, there was an agreement reached,
19 and that his employment started. It's really all that's relevant.
20 What he asked for is not -- bears on no issue in the case.

21 MS KEARNS: I think it does. I think it bears on state
22 of mind and differences in philosophical approach, because there's
23 been an argument that there were differences in how to run the
24 company. I think that this has direct bearing on that issue.

25 MR. PANTONI: I couldn't even --

26 THE COURT: I'll sustain the objection at this point.
27 You can take it up outside the presence of the jury at some point
28 later, if you wish.

1 MS KEARNS: All right.

2 Q Let's go down --

3 Actually there is one issue which, in this letter which I'd
4 like to address, your Honor, if we could.

5 THE COURT: I haven't ruled on the whole letter, just
6 that particular area. At this particular time I won't allow you
7 to do it. I haven't read the whole letter. There may be other
8 things.

9 MS KEARNS: It's this portion, your Honor (indicating).

10 THE COURT: Why is that relevant?

11 MS KEARNS: Well, I'd like to bring it in for
12 impeachment purposes.

13 MR. PANTONI: It's not an issue relevant to the case.

14 THE COURT: I know it was referred to sometime earlier
15 in the case.

16 MS KEARNS: I think the door has been opened and it
17 will directly bear upon this witness' credibility.

18 THE COURT: Why don't you go ahead and, instead of
19 imagining what you might ask, actually ask a question.

20 MS KEARNS: Q Dr. Czarnik, in your letter which we
21 marked as Exhibit 21, you were proposing that the company pay
22 \$15,000 a year in salary to your wife Rebecca, correct?

23 A Yes.

24 Q At the time you were the editor -- you were and are, I
25 take it, today the editor of the Journal of Combinatorial
26 Chemistry, yes?

27 A Yes.

28 Q And your wife assists you as editorial assistant,

1 right?

2 A Yes.

3 Q Your work for the journal was not part of your job
4 responsibilities for Illumina, correct? It wasn't something
5 Illumina was asking you to do, you'd already agreed to do this
6 before. At the time you wrote this letter, you weren't an
7 Illumina employee, correct?

8 A Correct.

9 Q You were already the editor of that journal, correct?

10 A Yes.

11 Q Your wife was already assisting you on that journal,
12 correct?

13 A Correct.

14 Q You made a proposal that Illumina pay \$15,000 salary to
15 your wife to help you on this journal, correct?

16 A Yes.

17 Q And in this letter you say, "This represents a one-
18 third company contribution to REC's salary." Do you see that?

19 A Yes.

20 Q So you were representing that your wife's salary for
21 her editorial assistance was about \$45,000 a year, correct?

22 A Yes.

23 Q You were proposing Illumina pay one-third of that,
24 correct?

25 A Yes.

26 Q You state, "It is a one-third contribution and a
27 continuation of the circumstance under which REC's compensation
28 exists today." Do you see that language?

1 A I see it.

2 Q Okay. You wrote it, correct, this is your letter?

3 A This is my letter.

4 Q And so you wrote that that arrangement was a
5 continuation of the circumstance under which your wife's
6 compensation existed as of the date of that letter, right?

7 A I apparently did write that.

8 Q That wasn't true, was it?

9 MR. PANTONI: Objection, your Honor, irrelevant.

10 MS KEARNS: It goes to impeachment and credibility,
11 your Honor, not on an issue relevant to the case. I haven't heard
12 his answer.

13 THE COURT: How does that impeach his previous
14 testimony?

15 MS KEARNS: Because this is a written communication
16 from this litigant to the company making a representation about a
17 continuation of the circumstance under which the compensation --

18 THE COURT: I understand what you are saying. Does
19 this have some consequences as far as a wrongful termination case
20 is concerned?

21 MS KEARNS: No, I think it just bears on this witness'
22 credibility and honesty.

23 THE COURT: The objection is sustained. I'll take it
24 up outside the presence of the jury.

25 MS KEARNS: Q Let's put up Exhibit 22, please. Dr.
26 Czarnik, Exhibit 22 is the April 6, 1998 offer letter from -- the
27 original offer letter, correct, from what later became Illumina?

28 A It was on April 6th.

1 Q Right. And isn't it true that this was the first offer
2 letter sent to you from the company that would later become
3 Illumina, correct?

4 A Yes.

5 Q If you could scroll to the bottom of the letter.
6 Bottom of the second page of the letter. Last page.

7 Dr. Czarnik, looking at page 4 of the offer, the initial
8 offer letter where it says, "Start date, mutually agreeable time
9 and contingent upon successful completion of the Tufts University
10 company licensing agreement." You see that?

11 A Yes.

12 Q So isn't it true that at the time you got this initial
13 offer letter, there was still work to be done to obtain the
14 licensing rights to the technology from Tufts, correct?

15 A Yes.

16 Q And isn't it true that you did not -- you didn't sign
17 this offer letter, correct? Let's go to the final page. This
18 April 5, 1998 offer letter is unsigned by you, correct?

19 A Yes, this is unsigned by me.

20 Q Isn't that because, Dr. Czarnik, within a very short
21 period of time you got a second offer letter after the licensing
22 contingency had been taken care of?

23 A A month later, yes.

24 Q Okay. Let's put up that exhibit, which I believe is
25 24.

26 Let's go to the signature page of the May 6, 1998 offer
27 letter. So this is the final page of Exhibit 24. Is this the
28 offer letter which you did sign, Dr. Czarnik?

1 A I did [sign]⁷⁹ the previous offer letter.

2 Q Okay. I don't have a signed copy of it, but in any
3 event, this letter that we have on the screen right now, the one
4 that you signed on May 7, 1998, [it]⁸⁰ superseded the previous
5 letter?

6 A Yes.

7 Q Isn't it true at the time you signed this document, you
8 understood that the licensing rights to the technology had been
9 obtained?

10 A Yes.

11 Q Now, you didn't, at the time you signed this on May 7,
12 1998, you were still an employee of IRORI, correct?

13 A Yes.

14 Q And what is the last day that you actually worked for
15 IRORI?

16 A I'm afraid I don't remember the last date.

17 Q Okay. Let me see if I can refresh your recollection in
18 any way. Isn't it true that the first day -- Well, let me ask
19 you this. Was there any period of time in which you were both an
20 employee of Illumina and an employee of IRORI?

21 A There was no time at which I was a paid employee of
22 both companies.

23 Q Okay. And isn't it true that your first day at work at
24 Illumina was June 15, 1998?

25 A I believe that's correct.

26 Q Now, although you signed the offer letter on May 7,
27 1998, then, you didn't actually show up and start working at
28 Illumina until June 15th, correct?

⁷⁹ Original transcript read, "design".

⁸⁰ Original transcript read, "it's".

1 A I was showing up at Illumina on a regular basis, but I
2 didn't begin to be paid until the 15th.

3 Q And you weren't on the books as an employee until that
4 date?

5 A I didn't keep the books.

6 Q So you understood from your offer letter that you were
7 receiving initially a grant of the right to purchase up to 400,000
8 shares of stock, correct?

9 A Yes.

10 Q At a penny a share?

11 A Yes.

12 Q And so that would have been \$4000, right?

13 A Yes.

14 Q And did you purchase that stock?

15 A Yes.

16 Q And did you understand that although you purchased all
17 400,000 shares at the beginning, that the company was going to
18 have these repurchase rights that would expire over time?

19 A The repurchase option is in the -- I think it's part
20 of this letter.

21 Q It is. Let's go ahead and put up the page that has
22 some discussion about the stock purchase and the repurchase
23 option.

24 So under the section that says "Equity," you were given a
25 right to purchase 400,000 shares at a penny a share, and you did
26 so, correct?

27 A Yes.

28 Q This language that says, "The shares are subject to

1 standard vesting over a five-year period with 20 percent of the
2 shares vesting after one year." Do you see that?

3 A Yes.

4 Q So did you understand that if you left the company
5 within the first year of employment, before your first
6 anniversary, all 400,000 shares could be repurchased back?

7 A Yes.

8 Q Then once you hit your one-year anniversary, 20 percent
9 of the shares would be released from the repurchase, correct?

10 A Yes.

11 Q And so what that means is on your one-year anniversary,
12 20 percent, or 80,000 shares, became no longer subject to the
13 repurchase right, correct?

14 A Yes.

15 Q And then after you cleared your one-year anniversary,
16 thereafter 1/60th per month for the remaining 48 months would
17 vest, and so did you understand that after you cleared your one-
18 year anniversary, the remaining 320,000 shares would be released
19 to you incrementally on a month-to-month basis for the next 48
20 months?

21 A The repurchase agreement would retire on that basis.

22 Q Right, the repurchase rights would lapse.

23 Isn't it true if you just do the math and take 320,000
24 shares remaining at your one-year anniversary, divide it by 48
25 months, what that meant is each month you were acquiring 6666.67
26 shares that were then released from the repurchase obligation?

27 A Yes.

28 Q And you understood upon receiving this offer letter

1 that in order to have all 400,000 shares free and clear with no
2 repurchase rights was going to require that you be there for five
3 years, a five-year period?

4 A Well, I certainly understood I was going to be there
5 for five years.

6 Q Well, that wasn't my question.

7 A Sorry. Would you ask it again, please.

8 Q My question was did you understand that in order to
9 hold all 400,000 shares free and clear, you would need to be there
10 for five years?

11 A Yes, the repurchase would end after five years.

12 Q Okay. And there's nothing else in this offer letter
13 that actually says you would be there for five years, correct?

14 A I don't remember the whole letter, but there certainly
15 is no guarantee in there of employment for five years.

16 Q Now, on Wednesday of last week when you testified, you
17 say the stock that was offered to you by Illumina was particularly
18 important to you because you said in a larger company you could be
19 confident that you'd be employed for a long time. Do you remember
20 making that statement?

21 A I don't remember making it, no.

22 Q Isn't it true that the employment at IRORI that you
23 came from to come to Illumina was employment at will?

24 MR. PANTONI: Your Honor, objection, relevance. We
25 discussed this during jury instructions. At will employment has
26 no bearing on this case whatsoever.

27 MS KEARNS: We discussed it with respect to this
28 plaintiff's employment at Illumina. I'm trying to establish with

1 respect to the testimony given last week whether there's any basis
2 for the statement that he came from employment where he'd be
3 employed "for a long time."

4 THE COURT: Overruled.

5 MS KEARNS: Q So isn't it true, Dr. Czarnik, that the
6 employment that you came to Illumina from, IRORI, was an
7 employment that could be terminated by either you or by that
8 company at any time?

9 A Yes.

10 Q And in your offer letter you -- I don't know that we
11 need to put the page up, but you were -- You ultimately
12 negotiated to the point of receiving an annual salary of \$185,000,
13 correct?

14 A Yes.

15 Q And isn't it true that that was a higher salary than
16 was paying -- than was being paid to Mark Chee?

17 A At the time I didn't know what either of the other
18 guys' salaries were.

19 Q At the time Dr. Stuelpnagel wasn't even an employee of
20 the company, correct?

21 A Correct.

22 Q He was being paid by CW Group?

23 A Correct.

24 Q At the time you joined, did you have any information
25 about the amount of money that was being paid to Dr. Mark Chee?

26 A No.

27 Q Did you later come to have that information?

28 A Yes.

1 Q And in fact after John Stuelpnagel joined the company
2 and became an Illumina employee, you later came to have
3 information about how much he got paid also, correct?

4 A Yes.

5 Q And in fact when you learned how much Drs. Stuelpnagel
6 and Chee were being paid, you realized or learned that you were
7 being paid more than either one of them, correct?

8 A Yes.

9 Q And didn't you at some point suggest that you wanted to
10 speak to the board and to equalize the salaries?

11 A I wanted to more equalize the salaries. I don't
12 remember if I asked to speak with the board. But I did ask to
13 speak with Larry Bock.

14 Q Now let's --

15 Going back to the salary differential issue, did you at some
16 point volunteer to take a cut in your salary?

17 A I don't think I volunteered for Jay to cut my salary,
18 but he did cut it --

19 Q I guess before Jay Flatley came on board, did you
20 volunteer to John and Mark to cut your salary or was it a proposal
21 that their salaries be increased?

22 A I don't remember the proposal. The goal was to more
23 equalize salaries.

24 Q Now, focusing again on this offer letter, there is a
25 statement here at the bottom, "You will receive a one-time signing
26 bonus of \$10,000, payable pro rata throughout the first year." So
27 you were paid a signing bonus of \$10,000 split out over 12 months,
28 correct?

1 A No, I actually received a \$10,000 bonus in about
2 November of 1998.

3 Q Payable in a lump sum?

4 A Yes.

5 Q Isn't it true that you had negotiated or asked for a
6 much higher amount?

7 MR. PANTONI: Objection, your Honor, relevance.

8 THE COURT: Sustained.

9 MS KEARNS: Q Do you have any knowledge whether Dr.
10 Chee received any signing bonus?

11 MR. PANTONI: Same objection.

12 THE COURT: Sustained.

13 MS KEARNS: Q Why did you ask for a signing bonus?

14 MR. PANTONI: Same objection.

15 THE COURT: Sustained.

16 MS KEARNS: Q Let's focus on --

17 THE CLERK: Excuse me, Counsel, what exhibit is this
18 again?

19 MS KEARNS 24.

20 THE CLERK: Thank you.

21 MS KEARNS: Q Now, Dr. Czarnik, earlier in the case
22 during your direct we heard some testimony about situations in
23 which you say that your founder role was not acknowledged. You
24 remember that testimony?

25 A Absolutely.

26 Q So you absolutely do remember giving that testimony?

27 A Sorry, I absolutely remember that at times my founder
28 role was not acknowledged.

1 Q Okay. Now, let me ask you this. There is this clause
2 in your offer letter where it says, "Recognition of CW Group's
3 founding role." Do you see that?

4 A Yes.

5 Q It says, "You agree that." To whom did you understand
6 the word "you" to refer to, "You agree that"?

7 A You are asking me to define "you"?

8 Q Yes, I'm -- Didn't that term, "You agree that in
9 future press releases," wasn't that term referring to you, Dr.
10 Czarnik?

11 A This letter was from John Stuelpnagel to me, so the
12 "you" is me.

13 Q So the "you" is Dr. Czarnik. And doesn't this clause
14 say that you, Dr. Czarnik, "agree that in future press releases
15 and public disclosures, CW Group's role in founding and supporting
16 the company will be acknowledged"? You see that?

17 MR. PANTONI: Objection, the document says what it says,
18 and there's more to that sentence, obviously.

19 THE COURT: You left off the last few words.

20 MS KEARNS: Right. "As is your founding role."

21 Q You see that?

22 A I can see it.

23 Q Let me ask you this: Isn't it true that you were
24 agreeing by signing this offer letter that you had an obligation
25 to recognize CW Group's founding role in any future press releases
26 and public disclosures?

27 MR. PANTONI: Same objection, your Honor, contract says
28 what it says.

1 THE COURT: Speaks for itself. Sustained.

2 MS KEARNS: Q Did you have any belief that CW Group had
3 an obligation to recognize your founding role in press releases
4 and public disclosures?

5 MR. PANTONI: Same objection, Judge.

6 MS KEARNS: Your Honor, this goes to the --

7 MR. PANTONI: It's in black and white.

8 MS KEARNS: Yes, and counsel has examined his own
9 client by repeating portions of documents, but my point is this:
10 There's a contention that someone breached a contractual
11 obligation to the plaintiff. I'm trying to understand what his
12 reading of this document is.

13 MR. PANTONI: Just so we're clear again, there's no
14 claim of breach of contract here. This claim is about
15 discrimination, retaliation, whistleblowing and the damages that
16 flow from it.

17 MS KEARNS: And counsel -- or your Honor, I would say
18 in direct examination Dr. Czarnik said that Jay Flatley failed to
19 attribute to him his founder role, and he said, and I'm
20 quoting, --

21 THE COURT: Also he said it caused him emotional
22 distress.

23 MS KEARNS: He also said it was right in my contract,
24 and I think this was the document he's referring to. I think the
25 door is opened and I'm entitled to inquire about it.

26 MR. PANTONI: It is right in his contract, your Honor,
27 that's my point. Our claim was the failure to recognize him was
28 discriminatory and retaliatory.

1 MS KEARNS: I think I'm entitled to understand why it
2 is that Dr. Czarnik thinks that the company has --

3 THE COURT: Since he claims emotional distress as a
4 result, there's some subjective component, it's not just
5 objectively what the contract says, so I'll let her question about
6 this.

7 MS KEARNS: Q Focusing on this clause in your offer
8 letter, my first question to you is did you believe that CW Group
9 has an obligation to recognize your founding role in any press
10 release or public disclosure it made?

11 A This letter came from Illumina, not from CW Group.

12 Q Actually let's go to the letterhead. Let's go to the
13 first page. Let's check each page of the letter.

14 Would you agree with me page one of this letter comes from
15 CW Group?

16 A The letterhead is from CW Group.

17 Q Second page CW Group letterhead?

18 A Yes.

19 Q Third page CW Group.

20 A On all pages it says CW Group and Illumina, Inc.

21 Q So going back to the clause about recognition of CW
22 Group's founding role, my question to you is did you believe that
23 by this letter -- recognizing it's on CW Group letterhead but
24 relates to your joining a company called Illumina, that's clear,
25 did you believe that CW Group had any obligation to acknowledge
26 your founding role in press releases and public disclosures?

27 A I must admit when I received this letter, I only
28 focused on the fact it was coming from John Stuelpnagel, acting

1 president of Illumina.

2 Q And so your answer is?

3 A I don't think I even considered it, I'm sorry.

4 Q Okay. Did you believe that this particular clause
5 which talks about recognizing CW's founding role, did you believe
6 that that clause obligated Illumina to recognize your founder role
7 in press releases and public disclosures?

8 MR. PANTONI: I request the witness be permitted to see
9 the first page of the document as well.

10 MS KEARNS: Sure.

11 Q Dr. Czarnik, I think this is exhibit, if you need the
12 binder, I think it's Exhibit 24.

13 A I'm sorry, number 24?

14 Q 24.

15 MR. PANTONI: Your Honor, could we have the first page
16 displayed while he's looking at the first page.

17 MS KEARNS: I think this is actually something more
18 appropriate for redirect, but I'll indulge counsel at this point.

19 MR. PANTONI: Thank you. I'll try to reciprocate.

20 MS KEARNS: Q Looking at the first page of Exhibit 24,
21 Dr. Czarnik, you see this relates to Illumina Inc. and it talks
22 about terms for you joining Illumina, Inc. the company. You see
23 that?

24 A Yes.

25 Q Let's go back to the language about acknowledgement of
26 CW's founding role. You see that that says, "In future press
27 releases, CW's role in founding and supporting the company,"
28 meaning its role in supporting and founding Illumina, "will be

1 acknowledged, as is your founding role." You see that?

2 A Yes.

3 Q Did you believe that this particular language obligated
4 Illumina, the company, to acknowledge your founding role in all of
5 its press releases and public disclosures?

6 A At least to me the language is very clear that Illumina
7 is required to acknowledge both my founding role and CW Group's
8 founding role.

9 Q Where does it say that Illumina is obligated to
10 recognize CW Group's founding role? I'm wondering what language
11 you are focusing on that relates to the company's obligation to
12 acknowledge anyone's founding role.

13 A It's on the next page.

14 Q Okay. Let's go to page 5. Are you referring to the
15 fact that it was signed by John Stuelpnagel as acting president of
16 Illumina?

17 A I'm referring to the fact that this letter is a
18 commitment from the acting president of Illumina.

19 Q And so my question going back, if you would, to the
20 clause itself, I'm trying to understand what language in the
21 clause about recognizing founder status, what language you see
22 there that you believe obligated Illumina the company to
23 acknowledge anyone's founder role, whether it's yours or CW
24 Group's?

25 MR. PANTONI: Again I'll reiterate my objection. The
26 contract is clear, it's black and white, and by its terms it sets
27 forth an agreement between these two parties. His
28 interpretation --

1 THE COURT: How does the letter answer this last
2 question? The question is where does it say in here founding role
3 has to be him?

4 THE WITNESS: It says, "CW Group's role will be
5 acknowledged, as is your founding role." To me it couldn't be
6 clearer.

7 MS KEARNS: Q That's the language upon which you base
8 your conclusion?

9 A Well, I draw my conclusion from the whole paragraph,
10 but that part of it is what I think speaks to it the most
11 strongly.

12 Q And did you interpret this clause in any way to impose
13 any obligation upon any of the other individual founders to
14 acknowledge your founder role? So in other words, Mark Chee was a
15 founder, correct?

16 A Yes.

17 Q Do you believe that Mark Chee had any obligation
18 arising from this letter to acknowledge your founder role?

19 MR. PANTONI: Same objection, your Honor.

20 THE COURT: At this point I would sustain the objection
21 under 352 of the Evidence Code.

22 MS KEARNS: Q Have you ever written any paper or
23 article, Dr. Czarnik, in which you identified yourself as a
24 founder of Illumina and neglected to list all the other founders?

25 A I know I was careful to list the other founders. I
26 don't recall if that happened.

27 Q So you attempted to be careful, but you don't know
28 whether you were fully successful?

1 A I think that's accurate.

2 Q Now, in joining Illumina, sir, did you contribute any
3 capital contribution to the company other than purchasing your
4 restricted stock?

5 MR. PANTONI: Objection, relevance.

6 THE COURT: Sustained.

7 MS KEARNS: Q Did you bring any intellectual property
8 to the company?

9 MR. PANTONI: Same objection.

10 THE COURT: Sustained.

11 MS KEARNS: Q Now, Dr. Czarnik, in April of 1998, when
12 you -- In April of 1998, you were employed at IRORI, correct?

13 A Yes.

14 Q And even on May 7, 1998, when you signed your offer
15 letter committing to join Illumina, you were still an IRORI
16 employee, correct?

17 A Yes.

18 Q Do you have any reason to -- You saw an exhibit that
19 your counsel used, and I can't remember the exhibit number
20 offhand, but it was the slide from the H and Q conference which
21 stated John Stuelpnagel and John Chee founded Illumina in 1998.
22 You recall that?

23 A Yes.

24 Q Do you have any reason to disagree that Drs.
25 Stuelpnagel and Chee were in fact working on Illumina in April of
26 1998?

27 A We all three were working on Illumina in April of 1998.

28 Q So your answer to my question would be no, correct?

1 A Do I have any reason to believe they would not have
2 been working?

3 Q Do you have any reason to dispute my contention that
4 John Stuelpnagel and Mark Chee were working on Illumina in April,
5 1998?

6 A I'm sorry, do I have any direct evidence they weren't
7 working in the company?

8 Q That wasn't my question. I just asked if you had any
9 reason to dispute that statement, John Stuelpnagel and Mark Chee
10 were working in Illumina -- They were both working in Illumina?

11 A You have no reason to dispute that?

12 A No.

13 Q And what contributions in particular, if any, did you
14 make to Illumina in April of 1998?

15 A In April of 1998, well, for example I drafted the first
16 company logo.

17 Q What else? And let me ask you, that company logo, with
18 what name, Illumina?

19 A Illumina.

20 Q Anything else?

21 A I know I had a meeting with a potential business
22 development partner named Siemens, and I had that meeting with
23 corporate representatives of Siemens, with John Stuelpnagel and
24 Larry Bock in attendance.

25 A I met with David Walt and discussed the company.

26 A To my recollection, the three of us met to -- Well, I don't
27 know if Mark was there that whole time. The main things that we
28 did were to choose the company name, so I was involved in that

1 selection process. My candidate lost, but I had a vote. The main
2 thing we did was to choose a company name and to get it registered
3 on the Internet.

4 Q Now, Dr. Czarnik, you did testify, and your counsel's
5 time line suggested, that your start date or employment date at
6 Illumina was June 11, 1998. I will represent to you that all of
7 your employment documents appear to have been signed June 15,
8 1998. This may be an innocent error, and that's what I'm trying
9 to clear up here. To that end, let me ask you this: Were you in
10 Hawaii at a conference on June 11th, 1998?

11 A I believe I was in Hawaii at a conference on that date.

12 Q So would you now agree with me with that refreshing of
13 your recollection that your start date at Illumina was June 15,
14 1998, the date that all of your employment documents are signed?

15 A No.

16 Q Are you still contending that your employment date was
17 June 11?

18 A I'm contending that as of June 11th, I was with
19 Illumina. The talk that I gave at the conference in Hawaii was
20 about Illumina. I do believe I worked for a week without pay
21 until I came back from Hawaii.

22 Q Doesn't that contradict the testimony you gave me just
23 awhile ago in which I asked whether you ever -- You said how long
24 seed money would last depended on whether we worked with or
25 without salary, and I think you told me you always worked with
26 salary.

27 A You may be right.

28 Q Now, do you remember signing various employment related

1 documents on the first day you actually showed up to work at
2 Illumina's facilities?

3 A I remember signing them. I don't remember the date.

4 Q And your employee number, Dr. Czarnik, was employee
5 number 2, correct?

6 A Yes.

7 Q So you weren't Illumina's first employee, were you?

8 A I was the first person to commit to the company.

9 Q When you say you were the first person to commit to the
10 company, what do you mean by that?

11 A I mean I was the first person to say I am going to work
12 at Illumina.

13 Q How did you say that? To whom did you say that or how
14 did you communicate that?

15 A I signed the offer letters.

16 Q The one that we just have been looking at?

17 A On April 6, 1998.

18 THE COURT: Can I confer with counsel about scheduling.
19 I'll talk to you more later, but preliminarily in the back hall.

20 (Discussion off the record.)

21 THE COURT: As to the question about dress, you can
22 wear whatever you want, within the limits of decency. We've been
23 conferring about this almost the whole time we were back there.

24 The other thing is in an effort to try again, as I told you
25 at the beginning of the case we try to arrange it so when we are
26 here we're working on the case. There's a number of things, we
27 always have things to take up outside of your presence, but we'll
28 make a little adjustment tomorrow. We already know some things

1 that are going to come up that need to take place outside your
2 presence. Instead of coming in at 9 tomorrow, 9:30. The
3 attorneys will get here much earlier than that.

4 We'll take our evening recess at this time. We'll be in
5 recess until 9:30 tomorrow morning. Please remember the
6 admonition not to form or express any opinions about the case, not
7 to discuss the case among yourselves or with anyone else. We'll
8 be in recess until 9:30. Have a pleasant evening.

9 (Proceedings resumed outside the presence of the jury.)

10 THE COURT: You want to talk off the record about the
11 overall scheduling or you want that on the record?

12 MR. PANTONI: I think we can do that off the record.

13 (Discussion off the record.)

14 (Proceedings recessed at 4:10 p.m.)

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1 SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 19, 2002; 8:45 A.M.

2 (Proceedings resumed outside the presence of the jury.)

3 (Jurors seated in open court.)

4 THE COURT: Morning, ladies and gentlemen. Record will
5 indicate all the jurors are present, all appropriately attired;
6 counsel are present.

7 When we left off you were cross-examining Dr. Czarnik.

8 MS KEARNS: Yes.

9 MR. PANTONI: Your Honor, I should note for the record
10 Michael Czarnik, who was at counsel table for the trial, has flown
11 back home. His wife is expecting a baby any day. Hopefully he'll
12 return later on in the trial.

13 THE COURT: Thank you.

14 ANTHONY CZARNIK,

15 having previously duly sworn, resumed the witness stand and
16 testified further as follows:

17 CROSS-EXAMINATION (Continued)

18 BY MISS KEARNS:

19 Q Morning, Dr. Czarnik.

20 A Good morning.

21 Q Now, when we broke for the day yesterday, I had been
22 asking you about your contention that you were Illumina's first
23 employee. Do you remember that?

24 A I remember the questioning.

25 Q And you told us that you based your belief that you
26 were Illumina's first employee upon the fact that you were the
27 first person to commit to coming to work for Illumina, is that
28 correct?

1 A In fact I had signed two offer letters by the time Mark
2 had signed one.

3 Q Now, Exhibit 24, let's put that up.

4 MR. PANTONI: I'll object to the line of questioning on
5 the grounds that I'm not sure it matters if Dr. Czarnik was the
6 first or the second employee. Either way he was one of the first.

7 MS KEARNS: Well, there's been a great deal made of the
8 first employee status in opening, in plaintiff's direct. I
9 imagine this will take probably two or three questions, your
10 Honor.

11 THE COURT: Because the subject has already been
12 discussed in your case, I think I have to allow it. I agree with
13 you, but I still have to allow it.

14 MS KEARNS: Q Dr. Czarnik, this was the May 6, 1998
15 offer letter, and you signed that offer letter, correct?

16 A Correct.

17 Q Now, you also received an earlier offer letter in
18 April, 1998, true?

19 A Correct.

20 Q And that offer letter referred to Sensa Technologies
21 because the company had not yet been named, correct?

22 A Correct.

23 Q Would you put up the first page of the April offer
24 letter.

25 This is Exhibit 22. This is the April 6, 1998 offer letter.
26 Could you scroll down to the bottom of that page. You see the
27 Bates labeling number in the lower right hand corner, C0001?

28 A Yes.

1 Q This is a document which you produced in this
2 litigation, correct?

3 A Yes.

4 Q Let's look at the second page of the exhibit. Third
5 page of the exhibit. Final page.

6 This is the final page of the April 6, 1998 offer letter,
7 Exhibit 22. This was not signed by you, is it, Dr. Czarnik?

8 A No, this copy is not.

9 Q Scroll down to the bottom of the page. And this is
10 again part of the same exhibit which you produced in this
11 litigation, correct?

12 A That's correct.

13 Q You've never produced to us a signed copy of the April
14 6, 1998 offer letter, have you?

15 A That's because the signed copy was retained by Dr.
16 Stuelpnagel.

17 Q How do you know that?

18 A Because I was there.

19 Q Where were you?

20 A At CW Group offices.

21 Q And it's your contention that you delivered it to him?

22 A I signed it in his presence and gave it to him.

23 Q Did you get a copy?

24 A No. This was my copy to show what was in the letter.

25 Q So you never asked for a copy with your
26 countersignature on it?

27 A No.

28 Q And so it's your testimony that as of today, you do not

1 have a signed original of the April 6, 1998 offer letter?

2 A This was the document that I received to memorialize
3 that agreement.

4 Q Did anybody else see you sign this April 6 offer
5 letter?

6 A I think Larry Bock probably was there.

7 Q Do you know that he was or are you just speculating?

8 A I believe that Larry was there. I'm not speculating.

9 Q On your direct exam you stated that you traveled alone
10 to the Boston area to recruit Drs. Barnard Dickenson and Steve
11 Auger, correct?

12 A I don't recall if that's what I testified, but I did do
13 that.

14 Q Now, if Todd Dickenson had already signed an offer
15 letter, then you wouldn't have been recruiting him, would you?

16 A I guess only to the extent that he could leave at
17 anytime.

18 Q What do you mean?

19 A Well, I mean for one thing I don't know when Todd
20 signed his letter so I don't know if that statement is true.

21 Q Do you know the date of your visit to Boston to meet
22 with the scientists?

23 A It was somewhere between -- It was somewhere in either
24 April or May of 1998.

25 Q And that's as specific as you can get?

26 A Yes.

27 Q You say that you recruited Dr. Steve Barnard, right?

28 A Well, I certainly -- I didn't personally -- I wasn't

1 the only person involved in recruiting him, but I did -- was
2 involved in recruiting him.

3 Q You were not the person who identified Dr. Steve
4 Barnard as a possible addition to Illumina?

5 A No, that was David Walt.

6 Q And were you in Boston for the purpose of giving a
7 talk?

8 A I don't recall.

9 Q Do you recall a discussion with John Stuelpnagel in
10 which there was a discussion about the fact that you were going to
11 be in Boston anyway and that it would make sense for you to meet
12 with these three scientists while you were there?

13 A I'm sorry, that wouldn't be beyond the realm of
14 possibility, but I don't remember if I was at a meeting or not
15 then.

16 Q And you took Dr. Barnard out to dinner while you were
17 in Boston?

18 A Yes.

19 Q And that dinner cost about \$200?

20 A I don't remember what the dinner cost.

21 Q This was at a time you say, April or May of 1998, this
22 is at a time when Illumina was still existing on seed money, if it
23 had any money at all, correct?

24 A Certainly we were existing on a relatively low amount
25 of money at that point, but what I don't know is whether or not
26 that was at a time when I was paying personally for Illumina
27 expenses or not.

28 Q You don't recall submitting the receipt for

1 reimbursement?

2 A Well, at one point, at some point I would have, but
3 there was a period of about five months where I put all Illumina
4 expenses on my personal credit card. I don't remember if I did
5 that in the case of this dinner or not.

6 Q But you were eventually reimbursed for those charges,
7 correct?

8 A After the first financing of eight and a half million
9 dollars, yes.

10 Q Now, the offer letter, Exhibit 24, let's put that up
11 with respect to the severance provision.

12 MR. PANTONI: Your Honor, I'm going to object to
13 questioning on the subject matter.

14 THE COURT: Of the offer letter?

15 MR. PANTONI: Of this particular subject matter. If we
16 could approach.

17 MS KEARNS: No, it will be a very brief examination,
18 and it goes to economic damages.

19 MR. PANTONI: It doesn't, Judge.

20 THE COURT: Okay. You want to be on the record or not?

21 MR. PANTONI: I do.

22 THE COURT: Okay.

23 (Proceedings at sidebar.)

15 (Proceedings resumed in open court.)

16 THE COURT: I believe you reached a stipulation?

17 MR. PANTONI: Yes, your Honor. I'll make it clear that
18 in this case, Dr. Czarnik is not seeking lost salary as part of
19 his economic damages. His economic damages deal with allegations
20 that he lost value of stock.

21 THE COURT: So stipulated?

22 MS KEARNS: Yes, your Honor.

23 THE COURT: Ladies and gentlemen of the jury, if the
24 attorneys stipulate to any fact, it's to be regarded as
25 conclusively proved. So Dr. Czarnik is not seeking lost wages as
26 part of his damages in this case.

27 MS KEARNS: Q Dr. Czarnik, when you joined Illumina,
28 your initial expectation was you were coming to the company and

1 that you would be working on combinatorial libraries, right?

2 A I did believe that was going to be an area that we
3 would be working in, yes.

4 Q At the time that you joined Illumina, did you also
5 understand that a possible application for the technology was
6 going to be in the genomics area?

7 A Yes.

8 Q Now, you had no personal knowledge of genomics, isn't
9 that true?

10 A I had personal knowledge of DNA and the synthesis of
11 DNA and synthesis of probes, but it is use of those items in
12 genomics studies I did not have personal knowledge in.

13 Q Let's put up Exhibit 195, please.

14 This is the document which we looked at yesterday, the
15 document that you had prepared in preparation for a discussion
16 with Jay Flatley relating to changes in compensation, right?

17 A This was the document that management took off my hard
18 drive after I was fired.

19 MS KEARNS: Move to strike the answer.

20 THE COURT: Motion to strike is granted. The jury is
21 admonished to disregard the answer.

22 MS KEARNS: Q Dr. Czarnik, this is a document you
23 prepared, correct?

24 A This is a document that I prepared but did not show.

25 Q And you prepared it on your work computer at Illumina,
26 correct?

27 A That's correct.

28 Q You prepared it on Illumina's company property?

1 A I certainly don't deny it's Illumina's computer.

2 Q And in this document, which you authored, you wrote,
3 "AWC had no knowledge of genomics." Do you see that?

4 A Yes.

5 Q And that those were your words, nobody provided that
6 language to you?

7 A No. I think it's consistent with the question I
8 answered as well.

9 Q Now, your personal desire with respect to Illumina was
10 for the company to focus on a different application other than
11 genomics, correct?

12 A No.

13 MS KEARNS: This is the deposition taken July 10,
14 Volume 1, page 106, line 14:

15 "QUESTION: When you say you made a conscious
16 decision not to promote your own personal interests, what do
17 you mean by that? What were the personal interests that you
18 might have liked to promote?

19 "ANSWER: I would liked --" I think there's a
20 typo in the transcript -- "I would liked for us to have
21 worked in the area of high throughput screening.

22 "QUESTION: Is this -- is high throughput
23 screening an application?

24 "ANSWER: Yes."

25 MR. PANTONI: I don't believe that's inconsistent with
26 his testimony.

27 THE COURT: I don't either, but I think that pretty
28 much the defense may read without any limitation from the

1 plaintiff's deposition.

2 MS KEARNS: Q So, Dr. Czarnik, consensus was reached,
3 even though you had this interest in high throughput screening,
4 consensus was reached in the summer of 1998 that the company was
5 initially going to focus its efforts in the genomics application,
6 correct?

7 A Yes. And for the record, genomics is one type of high
8 throughput screening.

9 Q And given the decision to focus on genomics as the
10 first step application, it placed molecular biology at the top of
11 the research chain, true?

12 A Yes.

13 Q And with a genomics application, chemistry was going to
14 be responsible for producing certain tools, the arrays, which
15 would then be used by the molecular biologists to do decoding
16 experiments, is that correct?

17 A Yes.

18 Q So to some degree, molecular biology was dependent on
19 the work that chemistry needed to do, true?

20 A Yes.

21 Q And chemistry had a responsibility to produce its
22 product in order for molecular biology to proceed with its work?

23 A Yes, and did.

24 Q Dr. Czarnik, were you at all resentful over the fact
25 that the genomics application was chosen as Illumina's first
26 focus?

27 A No.

28 Q Now, on direct you testified that before your

1 disclosure of depression, you had been involved in every aspect of
2 early fundraising, correct?

3 A I can only say every aspect that I was aware of.

4 Q Now, on direct you said that the company -- on direct
5 on June 12th, I'll try to be specific, so it was last week, you
6 said that the company's first financing closed in November of
7 1998?

8 A Correct.

9 Q In fact the November, 1998 financing, the one that you
10 referred to as the company's first financing, was actually the
11 company's Series B financing, correct?

12 A Well, we actually used a different terminology than
13 that internally. I can explain it for you if you'd like.

14 Q Actually I'd like you to answer my question. Was the
15 November, 1998 financing the company's Series B financing?

16 A No, we referred to it as our Series A.

17 Q Did anyone refer to it as your Series B?

18 A I don't know the answer to that.

19 Q Isn't it true that the Series A financing closed
20 shortly before you joined Illumina in June of 1998?

21 A We referred to that as the seed round and we referred
22 to the November '98 financing as a Series A, for arcane venture
23 capitalist reasons that I never quite understood.

24 Q We may come back to that.

25 Now, Dr. Czarnik, prior to your disclosure of depression in
26 April of 1999, you never met -- you were never involved with
27 meetings with a company called [Tredegar]⁸¹ Investments for the
28 purpose of trying to raise money for Illumina, were you?

⁸¹ Original transcript read, "Trediger".

1 A No, I was.

2 Q And how do you say you were involved?

3 A I'm blanking on the fellow's name, but he was working
4 for [Tredegar]⁸¹, and [Tredegar]⁸¹ is a venture capital wing of an oil or
5 machinery company located in the south, and he was actually very
6 helpful to Illumina in helping us to get our price for that first
7 major financing.

8 Q You still haven't explained to me how you participated.
9 That's what I'd like to hear.

10 A I was physically in the meeting with John, Mark, myself
11 and this fellow whose name I've forgotten.

12 Q Where did this meeting take place?

13 A At CW Group. He came to visit us there.

14 Q When did this meeting occur?

15 A It would have been in approximately -- approximately
16 August of 1998.

17 Q You did not travel to Domain Associates in Princeton,
18 New Jersey, prior to April, 1999, for the purpose of seeking
19 funding for Illumina, did you?

20 A No, I did not.

21 Q So that's a fundraising or a fundraising activity prior
22 to your disclosure of depression in which you were not involved,
23 correct?

24 A I was involved in the planning for that meeting but I
25 didn't go, I didn't go on the trip.

26 Q You were involved in talking about the meeting but you
27 didn't actually make the visit to Domain?

28 A If I recall, I had a conflict that prevented me from

1 attending.

2 Q You didn't attend?

3 A Yes, ma'am.

4 Q You never met with Brentwood Ventures prior to your
5 disclosure of disability for the purpose of fundraising, did you?

6 A No, I wasn't even aware that meeting took place.

7 Q Do you have any reason to disbelieve that such a
8 meeting took place before April of 1999?

9 A Only that you are not here to help me. I mean I have
10 no way of knowing whether or not that took place, and if it didn't
11 take place, no, I don't know whether you would bring it up or not.

12 Q Yeah, I certainly wouldn't be trying to trick you. I
13 wouldn't suggest to you that something happened that didn't
14 happen.

15 I guess my point then is if I suggest to you that there was
16 a meeting with Brentwood Ventures that occurred before April of
17 1999, and given your statement that you were aware of but did not
18 actually participate in the meeting with Domain in Princeton,
19 wouldn't you agree with me that there were some fundraising
20 activities that occurred before your disclosure in which you were
21 not present or involved?

22 A Well, based on the two examples you've given, one I
23 didn't participate and wasn't aware of, and the second I
24 participated in preparation for the meeting with Domain but didn't
25 participate in the meeting with Domain.

26 Q As to the Brentwood Ventures meeting, you say you had
27 not been aware of it. In fact, is today the first you've ever
28 heard there was a meeting with Brentwood Ventures?

1 A What I can say is I have no recollection of having
2 heard of Brentwood Ventures previously. If it were to show up in
3 a board packet as a business development activity, it might be
4 there, but certainly I have no recollection of it as of today.

5 Q And so assuming -- and I will represent to you, I
6 wouldn't say to you that this meeting occurred if it didn't occur,
7 so if this was a meeting with Brentwood Ventures that occurred
8 prior to April of 1999, and you didn't know about it, and weren't
9 in the loop on it, you would not be contending that you were shut
10 out from that activity because of your depression, right?

11 A No, I would not be.

12 Q Because nobody at the company knew during that time
13 that you suffered from depression?

14 A I agree with that.

15 Q Let's focus a little bit on the days in which Illumina
16 was operating out of space in CW Group's offices in Cardiff. This
17 was essentially the summer of 1998, correct?

18 A And the couple of months before summer. Sort of from
19 April until August of 1998.

20 Q All right. Do you remember the people who were on site
21 in this office space during the April through summertime frame of
22 1998?

23 A Yes.

24 Q Can you identify them for us?

25 A The three Illumina people were John Stuelpnagel, Mark
26 Chee, and myself. Larry Bock had an office in that facility but
27 Larry was there quite infrequently, and Marsha Bakko was Larry's
28 secretary, administrative assistant, and she was there on a part

1 time basis.

2 Q Do you recollect that before the company moved out of
3 that space and into its own facilities on Towne Centre Drive that
4 there were other people who joined Illumina before the move?

5 A Yes.

6 Q And who were they?

7 A Steve Auger was present with us in that space. He
8 joined us near the end of the summer. Steve Barnard was in that
9 space. He joined us near the end of the summer. Todd Dickenson
10 had joined us but he hadn't finished his thesis yet, so he had
11 moved to San Diego and was living in his apartment working on
12 finishing his thesis.

13 Q Not spending time at Illumina?

14 A I don't remember Todd spending any time in the Cardiff
15 space.

16 Q Would you agree with me that you had no scientific
17 vision for the company when you started in June of 1998?

18 A I had no preconceived vision of what the company should
19 be working on before joining it.

20 Q Well, just the statement I just made, no scientific
21 vision for the company, would you agree with that statement?

22 MR. PANTONI: Asked and answered.

23 THE COURT: Cross-examination. Overruled.

24 THE WITNESS: I don't know that I can answer that
25 question. I did not have a preconceived notion of what the
26 company should be working on when I joined it.

27 MS KEARNS: Q Okay. I'm going to read from your
28 deposition transcript, July 10, Volume 1, page 91, line 13:

1 "QUESTION: At the commencement of your
2 employment with Illumina, did you have, as CSO, did you have
3 an overall scientific vision for the company?

4 "ANSWER: As of May 7, I did not have an
5 overall scientific vision.

6 "QUESTION: How about as of June, 1998, when
7 you actually came on board and became an employee, became
8 CSO?

9 "ANSWER: No, at that time I did not have an
10 overall vision."

11 Dr. Czarnik, one of the most significant activities
12 that was occurring during the summer of 1998 was the development
13 of company's business plan, correct?

14 A Yes, it was very significant.

15 Q And the business plan document itself is something
16 which describes the company, describes the technology, describes
17 essentially what the company hopes to achieve, correct?

18 A Yes.

19 Q And you didn't prepare anything in writing for the
20 business plan that detailed the scientific vision for the
21 chemistry department, did you?

22 I'll withdraw the question. It's a little confusing and
23 maybe I need to lay some foundation and put it in context.

24 Dr. Czarnik, when you began your employment at Illumina, you
25 were chief scientific officer?

26 A Yes.

27 Q You were also responsible for running and leading the
28 chemistry group, true?

1 A Yes.

2 Q And in connection with writing the company's business
3 plan, during the summer of 1998, you didn't prepare anything in
4 writing that detailed a scientific vision for the chemistry group
5 per se, did you?

6 A Well, I wouldn't agree with that statement. It's too
7 broad. I can expound on it if you'd like.

8 Q No, I'm just going to read from your deposition, July
9 10, Volume 1, page 109, line 11:

10 "QUESTION: Did you ever prepare anything, did
11 you prepare for inclusion in the business plan of Illumina
12 anything that specifically touched upon the vision for the
13 chemistry department?

14 "ANSWER: No.

15 "QUESTION: Do you know whether or not Dr.
16 Chee prepared something for inclusion in the business plan
17 that specifically related to his vision for the molecular
18 biology department?

19 "ANSWER: I think the answer would be yes."

20 As you sit here today, do you in fact remember that Mark
21 Chee did prepare a submission for the business plan detailing the
22 scientific vision for molecular biology?

23 A Mark did prepare a section on really what the company
24 was going to be focusing on, which was the genomics application.

25 Q Are you changing your deposition testimony in any way?

26 MR. PANTONI: Objection, argumentative. It's completely
27 consistent with what he just said.

28 THE COURT: Overruled. He can answer that.

1 THE WITNESS: I don't think I'm changing my deposition
2 testimony.

3 MS KEARNS: Q Isn't it true that you didn't produce any
4 written work product for inclusion in the business plan until John
5 Stuelpnagel specifically assigned you a couple of sections to
6 prepare?

7 A That's nonsense.

8 Q What did you prepare or what did you produce -- Let me
9 back up.

10 Isn't it true that at some point during the summer of 1998,
11 John Stuelpnagel did assign you a couple of sections to prepare
12 for the business plan?

13 A It is true that the three of us agreed how we were to
14 divvy up the job of writing up the business plan, and I wrote
15 those sections that I agreed that I would write.

16 Q So Dr. Czarnik, would you disagree with the
17 characterization that others, like John and Mark, were writing and
18 producing written work product for the business plan at a time
19 when you were not doing so?

20 A I would definitely disagree with that.

21 Q You understood that the company was moving to
22 facilities with laboratory space effective in September, 1998?

23 A I was part of the reason we went there.

24 Q And you didn't provide Dr. Stuelpnagel, who was then
25 acting CEO, with any kind of written research and development plan
26 prior to the move, did you?

27 A Well, the company focus was on genomics. It was the
28 area that Mark was most attuned with. We were effectively in a

1 role supporting genomics. So if the --

2 The answer is did we write a document as to how we were
3 going to support genomics? You know, I think we probably did not
4 write a specific document, but we were actually doing a lot of
5 what's called development, which is not really all that difficult
6 to plan for.

7 Q Dr. Czarnik, you were heading up the chemistry group,
8 right?

9 A Yes.

10 Q But you were also the chief scientific officer
11 responsible for the overall research and development program of
12 the entire company, isn't that true?

13 A No.

14 Q Weren't you the chief scientific officer?

15 A Yes, I was.

16 Q But you deny that you were responsible for the overall
17 scientific research and development program?

18 A I was responsible for the quality of the outcome of the
19 scientific work.

20 Q Well, I'm not suggesting that you actually directed
21 experiments or performed experiments in molecular biology, but if
22 there was one person in the company at the time who was the head
23 of research, who would that have been?

24 A We did not have one person who was the head of
25 research. Mark and I had equal roles in research at Illumina.

26 Q So you are saying that you didn't provide Dr.
27 Stuelpnagel with a written research and development plan even for
28 the chemistry group alone because chemistry was in a support role

1 with molecular biology?

2 A That's the reality, that we were providing things for
3 molecular biology.

4 Q Yes, but I'm saying is it the fact that chemistry was
5 in a support role, is that the reason that you didn't prepare a
6 written research and development plan for the chemistry
7 activities?

8 A My best recollection is that we never had a request or
9 intent to write a chemistry research plan. We needed it for
10 genomics because that was where the really high-end research was
11 going to be done.

12 Q That actually segues very nicely into my next question.

13 A I'm happy to do it for you.

14 Q You don't remember John Stuelpnagel asking you on more
15 than one occasion to provide him with a written research and
16 development plan for chemistry?

17 A No.

18 Q You don't remember him asking you for that in writing
19 via e-mail?

20 A No, I don't remember him writing it to me by e-mail.

21 Q Okay.

22 Now, on your direct examination, you said that when Illumina
23 moved to the Towne Centre space, you moved in and the lab space
24 was empty with no equipment whatsoever, right?

25 A Only with hoods for doing chemistry.

26 Q Did you do anything prior to the move to identify the
27 equipment that you would need and to get it on order?

28 A I would say all of us except John, who was at Cardiff,

1 was involved in that process.

2 Q My question wasn't about all of us, my question is what
3 you did.

4 A You are asking did I --

5 Q Yes, what if anything did you do to, as the chief
6 scientific officer of the company, what did you do before the move
7 to identify the equipment that you would need and to get it
8 ordered so that it would arrive in a timely fashion?

9 A One of the main things that I did was to compare the
10 cost of putting hoods into the first floor with renting the second
11 floor, and at that time we hadn't made a decision whether the
12 chemistry moving to the first floor, the second floor. The first
13 floor was cheaper but it didn't have hoods. So I went to a
14 company called Biostruct here in town that installs hoods, got
15 them to price out what it would cost out to put in the hoods, and
16 compared the price of putting in hoods downstairs with having
17 hoods upstairs, and we made a decision to go upstairs. So that
18 was one of the things I was involved in then.

19 Q Wasn't there equipment and supplies that you were going
20 to need in order to be able to do the chemistry experiments, do
21 the bead chemistry work?

22 A Yes, of course.

23 Q And you didn't do anything in it before moving into the
24 space to get these materials ordered or in place, did you?

25 A No, that's incorrect.

26 Q How so?

27 A By that point, on board were Steve Auger -- Steve
28 Auger, Steve Barnard, and Mark and I and Steve and Steve were all

1 involved in identifying equipment that was needed and then putting
2 in orders.

3 Q When did you put the orders out?

4 A I don't remember if the orders actually would have gone
5 in in August or September. There was a constant tension between
6 having the equipment that we needed and spending the money that we
7 didn't yet have.

8 Q So it's possible that those orders didn't go in until
9 after the move had already occurred, correct?

10 A Yes.

11 Q Let's put up -- Well, Dr. Czarnik, asking you about
12 the preparation of a submission for the business plan describing
13 the overall direction of the research activities, you indicated
14 that although you were chief scientific officer, you say that
15 there was no head of research and that you did not have overall
16 responsibility for the entire research and development program?

17 A I've been clear on this from the beginning of my
18 depositions. We decided at the very beginning of the company that
19 neither Mark nor I would report to each other and we would have
20 equal standing in the company. I did assume as chief scientific
21 officer responsibility to make sure that the results that we
22 reported were accurate and repeatable.

23 Q So results, not necessarily activities?

24 A Yes.

25 Q Let's put up Exhibit 24. May 6, 1998 offer letter.

26 Let's take a look at this portion of it: "Chief scientific
27 officer is a position of both technical and strategic leadership,
28 having primary responsibility for the overall research and

1 development activities of the company." Do you see that, Dr.
2 Czarnik?

3 A Yes.

4 Q Does that change your testimony in any way?

5 A In no way.

6 Q Okay. Thank you.

7 Now, on direct examination you were asked whether or not you
8 ever had a discussion while still in the Cardiff space with John
9 Stuelpnagel and Mark Chee about your performance or about your
10 work ethic. You remember that questioning on direct?

11 A Yes.

12 Q Are you denying that you had an off-site
13 walking-around-Cardiff conversation with John Stuelpnagel and Mark
14 Chee in or about August of 1998?

15 A No, we often were out of the building walking together.

16 Q Do you deny that they asked you to take a walk for the
17 purpose of having a private conversation outside the office?

18 A Yes, I don't have any recollection of that.

19 Q Do you deny that there was a discussion between the
20 three of you, John Stuelpnagel, Mark Chee and yourself, while in
21 Cardiff, in which they expressed to you their concerns about your
22 level of engagement, your work ethic and the number of hours you
23 seemed to be putting in?

24 MR. PANTONI: That's compound, Judge.

25 MS KEARNS: I'll break it down.

26 Q Do you deny having a conversation with John Stuelpnagel
27 and John Chee in Cardiff in the summer of 1998 in which they
28 expressed to you that they were concerned about your level of

1 commitment?

2 A Yes. We didn't talk about my level of commitment.

3 Q Never discussed in the summer of 1998?

4 A No, it was not discussed.

5 Q Are you certain?

6 A To the best of my recollection today, yes, we didn't
7 have a discussion on that topic.

8 Q Okay.

9 Did you have a discussion with John Stuelpnagel and Mark
10 Chee in the summer of 1998 in which your work ethic was discussed?

11 A We had a discussion on the way to lunch one day in
12 which John expressed concern that I was away from the office on
13 multiple days, and I told John I had these preexisting meetings
14 that I had told him about and that I had made commitments and I
15 was going to keep them, and at that point I believe I told him
16 that, you know, I'd make every effort not to be out as often as I
17 was that summer. But that was the extent of the conversation.

18 Q Who was present during that conversation?

19 A I don't remember if it was all three of us or John and
20 I.

21 Q Do you -- So do you deny that there was a discussion
22 between you, Mark Chee and John Stuelpnagel in the summer of 1998
23 in which they were telling you that they were concerned that you
24 didn't seem to be as committed or as serious about Illumina as
25 they were?

26 A The only discussion I recall is a discussion about the
27 days that I was off site. I don't know if what you are saying or
28 what they are saying came off of that discussion, but we did have

1 that discussion, where John said I'm concerned about the number of
2 days you are off site.

3 Q Now, during this time frame, the summer of 1998, you
4 have said on direct that you, John and Mark were all working
5 roughly the same hours, is that right?

6 A I don't recall specifically what I said. It certainly
7 is my sense that we were working the same hours, except for the
8 days that I was off site.

9 Q Didn't you testify on direct that you all worked the
10 same hours and that at the end of the day, 6:30 or 7:00 p.m., John
11 Stuelpnagel would call it a day and say, "Let's all go home, we're
12 done"?

13 A On the days that I was there, that's when we ended the
14 day was when John said we're done for today.

15 Q So it's your testimony that John Stuelpnagel was the
16 one calling it a day for all, for the three of you, on the days
17 you were there?

18 MR. PANTONI: Again, Judge, we're talking about the
19 summer of 1998.

20 MS KEARNS: Summer of 1998.

21 THE WITNESS: To the best of my recollection, yes.
22 John was leading the discussions that summer.

23 MS KEARNS: Q And this is a time frame, summer of 1998,
24 that you've previously testified that you worked very hard,
25 correct?

26 A Yes. We had a great summer that summer.

27 Q Now, the move to Towne Centre Drive took place in
28 September of 1998, right?

1 A September, yes.

2 Q And at the time of the move, how was morale?

3 A Good, very good.

4 Q You've stated in your direct examination that in
5 November of 1998, John Stuelpnagel was upset with the rate of
6 progress of the company's research, is that right?

7 A Upset is an understatement.

8 Q And you claim that the discussion that he had with you
9 in November of 1998 related to the company's failure to make more
10 progress, correct?

11 A Well, the discussion was on the company's failure to
12 make progress. The only thing I remember outside of that is some
13 comment that John had made about whether the chemists respected me
14 or not.

15 Q But in your direct examination in this trial, you've
16 denied absolutely that the November 1998 meeting was a discussion
17 about your performance, right?

18 A It was not a discussion of my performance, although
19 where this comment about the chemists not having respect for me
20 came from, I don't know.

21 Q Now, you agree that there was, in fact from your direct
22 testimony, there was a discussion between you and John Stuelpnagel
23 that occurred in November of 1998, right?

24 A Well, we had many discussions in November.

25 Q But you in particular, you remember a certain
26 discussion that took place between you and John in November of
27 1998?

28 A I remember the scolding, yes.

1 Q So we'll refer to it as the scolding meeting. So the
2 scolding you say was a scolding about research not having attained
3 its goals rapidly enough?

4 A Yes, that's correct.

5 Q And you deny that the scolding was directed at you
6 individually for not working hard enough or not being engaged
7 enough?

8 A In that meeting, John did not talk to me about specific
9 instances in which he thought that I had made failures in our
10 reaching these goals. John talked about his frustration, his
11 anger with not hitting the goals, not being able to tell the board
12 we'd hit our goals, and John certainly gave me the sense that I
13 was part of the reason that we didn't hit our goals. John had a
14 way of giving everybody a sense that they were the reason for our
15 problem.

16 Q Well, actually in direct didn't you testify that John
17 Stuelpnagel said that all three of you were responsible, you, Mark
18 and himself?

19 A Sorry, could you read back that testimony?

20 Q That was testimony that you gave just last week. You
21 don't remember it?

22 A Well, you are going to hold me accountable for exact
23 words, and I think I should probably hear them.

24 Q I'll pull the transcript during the break and we'll
25 come back to this. But it's your position, it appears to be your
26 position now, Dr. Czarnik, that in this scolding meeting, John
27 Stuelpnagel was suggesting that you were part of the reason that
28 the research goals hadn't been met and it does not appear that you

1 are saying he accepted any responsibility?

2 A No, I'm not saying that. John certainly accepted
3 responsibility.

4 Q Now, are you saying, are you telling us, that the only
5 comment that was really specifically directed at you as an
6 individual that was made during this conversation was a comment by
7 John Stuelpnagel that the chemists didn't respect you?

8 A That certainly is the only comment I can remember from
9 that discussion that seemed to be something directed at me
10 personally.

11 Q Now, you referred to this -- So during this trial
12 you've referred to this meeting, November, 1998 meeting, as a
13 scolding, correct?

14 A Yes.

15 Q And you are saying it was a scolding relating to the
16 company not attaining research goals rather than a scolding of you
17 as an individual performer?

18 A Yes.

19 Q I'd like to read from your deposition testimony, Volume
20 4, September 21, 2001. So Volume 4, page 507, line 9:

21 "QUESTION: More pointedly, let me ask you
22 this: Didn't John Stuelpnagel have discussions with you in
23 which he expressed disappointment or dissatisfaction in your
24 individual performance, and didn't those occur prior to
25 April of 1999?

26 "ANSWER: My best recollection is that in
27 November of '98, John had a meeting with Mark individually
28 and then had a meeting with me individually, and I don't

1 know precisely -- I don't know at all what was described in
2 Mark's meeting, but in my meeting it was a -- Would you like
3 me to elaborate?

4 "QUESTION: Let me ask you this: Is this a
5 meeting with John which you have characterized in writing as
6 a scolding?

7 "ANSWER: No, that meeting wasn't a scolding.

8 "QUESTION: Is there some other meeting that
9 comes to mind which you characterized as a scolding?

10 "ANSWER: I actually don't recall using the
11 term 'scolding'."

12 Now, Dr. Czarnik, on your direct examination you told
13 us that John Stuelpnagel met with you first, discussed his
14 frustration over research goals not being met, and then met
15 immediately thereafter with Mark Chee, correct?

16 A Yes.

17 Q That was your direct testimony.

18 A Yes.

19 Q But in your deposition you testified that he met first
20 with Mark, then with you, correct? The passage I just read.

21 A Yes.

22 Q And in trial you've acknowledged and have characterized
23 this meeting as a scolding, correct?

24 A Yes.

25 Q In deposition you said that meeting wasn't a scolding
26 and that you didn't recall using the term "scolding" at all,
27 correct?

28 MR. PANTONI: Objection, your Honor, there must be 50

1 references in the 1000-page deposition transcript, if Miss Kearns
2 shows the document, where he did refer to it as a scolding, and
3 she knows that.

4 THE COURT: If you have any objection, state the legal
5 grounds.

6 MR. PANTONI: Intentionally mischaracterizing the
7 deposition transcript.

8 THE COURT: Overruled.
9 You'll have an opportunity to rehabilitate him.

10 MR. PANTONI: I appreciate that.

11 MS KEARNS: Q Dr. Czarnik, during this November, 1998
12 scolding meeting, isn't it true that you remember John Stuelpnagel
13 having a legal pad with him during that meeting?

14 A Yes.

15 Q And you testified in your deposition that although you
16 couldn't read the notes very clearly because they were upside
17 down, you remember that those notes had something like pros and
18 cons and that they related specifically to you, correct?

19 A I remember that they had pros and cons. I remember
20 having the sense that he had prepared those notes in preparation
21 for a talk with me. I remember having that sense.

22 Q Okay. So your testimony now is that you remember that
23 the legal pad had categories like pros and cons, but you don't
24 necessarily believe that they related to you specifically?

25 A I'm sorry, I don't have a recollection right now that
26 they were referring specifically to me.

27 Q Let me read from your deposition transcript, Volume 4,
28 page 513, line 11:

1 "QUESTION: Do you remember John in that
2 discussion discussing with you the contributions that you
3 had made?

4 "ANSWER: The answer is this was a strange
5 discussion, because John had on his pad of paper in my full
6 view comments about things like things I had done that he
7 thought was good, things that he thought wasn't good, sort
8 of listed pros and cons. And what he had on the pad never
9 came up in discussion. So he had sets of things that it
10 looked like he was preparing to discuss, but he didn't
11 discuss them. Instead we had just this sort of rambling
12 diatribe about dissatisfaction."

13 So in your deposition taken a year ago, closer in time
14 to the events that happened at Illumina, you did recall that the
15 notes on John Stuelpnagel's pad related specifically to things you
16 had done well and things he felt you hadn't done well, correct?

17 A Yes, I don't think there's any inconsistency. I
18 remember seeing a row of pros, I remember seeing a row of cons.
19 John was in there to have a discussion with me, and my assumption
20 is that they were rows of pros and cons about me.

21 Q You just testified moments ago that it was a list of
22 pros and cons and that you did not have a recollection of them
23 being about you?

24 A I made an assumption about what they are. I didn't see
25 any of the individual items.

26 Q Are you changing the testimony that you gave a few
27 moments ago?

28 A I don't think I'm changing my testimony, and I also

1 wouldn't have used the word "was" and "wasn't" in that sentence.

2 It should have been "were" and "weren't."

3 Q I didn't transcribe the deposition, as you know.

4 A Sometimes the transcription is imperfect.

5 Q You had a chance to review these transcripts, did you
6 not?

7 A Yes, but --

8 Q You didn't make these changes?

9 A I certainly didn't make every change that could have
10 been made in transcripts, as good as they generally are.

11 Q You didn't make any changes, did you?

12 A I didn't make any changes to the transcripts.

13 Q So you also said that in your deposition passage that I
14 just read, you say that John Stuelpnagel did not discuss any of
15 these pros and cons points with you?

16 A That's correct.

17 Q And you said in your direct exam, in your answer just a
18 moment ago, that during this same scolding meeting, Dr.
19 Stuelpnagel told you that people at Illumina didn't respect you,
20 correct?

21 A He made some reference to that the chemists didn't
22 respect me.

23 Q I want to read from your deposition transcript, Volume
24 4, page 515, line 6:

25 "QUESTION: Do you remember John giving you
26 any specific examples of unfulfilled expectations, things he
27 had expected you to do and which you hadn't delivered on?

28 "ANSWER: John did seem to think that he had a

1 -- that I didn't have the respect of the people who were
2 working at Illumina, and I thought maybe he wasn't in
3 control of his senses, because I had enormous respect from
4 the people working at Illumina."

5 MR. PANTONI: Could you finish the answer, please. I
6 think it's appropriate to --

7 MS KEARNS: "Honestly, I just took it as -- as a
8 comment of someone who was frustrated and under a lot of pressure,
9 and I just expected that was going to get better as the bead
10 assembly or bead manufacture process was getting closer to
11 reality."

12 Q So in deposition, when we discussed this comment, you
13 didn't narrow it to a statement about chemists, right?

14 A I guess I didn't.

15 Q Let's put up Exhibit 38. We've seen this exhibit
16 before during your direct. This is your handwritten note on the
17 document, Dr. Czarnik?

18 A Yes.

19 Q It says, "In November '98, John asked me for the
20 reasons I was out of town on these dates. This was my response."
21 You see that?

22 A Yes.

23 Q And on direct examination, you told us that you
24 prepared Exhibit 38 in response to the scolding meeting that you
25 had with John Stuelpnagel, correct?

26 MR. PANTONI: Objection, your Honor, that's not the
27 testimony. Mischaracterizes the testimony.

28 THE COURT: Well, I think the witness can answer. He

1 can say that. He can disagree with it, with her characterization.

2 MR. PANTONI: Well, I'll object, it mischaracterizes the
3 testimony.

4 MS KEARNS: Q Did you prepare this document -- Well,
5 didn't you prepare this document in response to the November, 1998
6 meeting that we've been talking about that you had with Dr.
7 Stuelpnagel?

8 A As I mentioned, I had many meetings with Dr.
9 Stuelpnagel in November of 1998, and we did not discuss my being
10 out of town on those dates at the meeting that you and I have just
11 been discussing over the last 10 minutes. That was a previous
12 meeting.

13 Q The scolding meeting. You are saying you did not
14 discuss your absences during the scolding meeting?

15 A That's correct.

16 Q Is it your testimony now, is it your testimony right
17 now, that you did not say in direct examination that you prepared
18 Exhibit 38 in direct response to the scolding meeting?

19 A The fact is that the list of dates that you see on the
20 overhead was given to me by John at a meeting prior to the meeting
21 we're now calling the scolding meeting, and so this was not
22 written in response to something said to me at the scolding
23 meeting.

24 Q That wasn't the question I asked you.

25 A I thought it was. I'm sorry.

26 Q No. The question I asked you was whether you told us
27 in direct examination that you prepared Exhibit 38 in response to
28 the November, 1998 meeting that we have been referring to as the

1 scolding meeting.

2 MR. PANTONI: I'm going to object that it's
3 argumentative and irrelevant.

4 MS KEARNS: It's not irrelevant.

5 MR. PANTONI: It's irrelevant in the sense that this is
6 not a test as to who said what exactly when.

7 THE COURT: I think there's a problem a lot of times
8 with asking about what was said on direct exam. You are more --
9 Are you testing his recollection of exactly what he said on direct
10 exam? I think it's better to concentrate on the truth of whatever
11 his position is. I think calling on him to recall exactly, or any
12 other witness, to recall exactly what they testified to sometimes
13 gets just confusing. It's a test of his recollection about his
14 previous testimony? It is difficult to recall exactly what one
15 testified to, days and days of examination.

16 MS KEARNS: Yes, but I guess, your Honor, my point is I
17 believe the witness did testify that this document was created in
18 response to the scolding meeting, and that would corroborate our
19 position that meeting was in fact a performance discussion.

20 MR. PANTONI: Your Honor, I think it's argumentative
21 and improper. That's why we have court reporters.

22 THE COURT: Do you have a transcript of that testimony,
23 Counsel?

24 MS KEARNS: I have one day's transcript. I'm not sure
25 whether it's in that day or not. We've been ordering dailies.

26 MR. PANTONI: The fact of the matter is whether he
27 recalls exactly what he said last week is not relevant. It's what
28 happened is relevant.

1 THE COURT: The objection is sustained.

2 MS KEARNS: Q So Dr. Czarnik, you are telling us that
3 this document, Exhibit 38, was prepared in response to some other
4 November, 1998 meeting?

5 A Yes.

6 Q Dr. Czarnik, isn't it true that you first consulted
7 with any attorney about issues relating to your employment at
8 Illumina sometime in the first quarter of 1999?

9 A It was the first quarter of 2000.

10 Q So you are saying you didn't consult with an attorney
11 about issues relating to your employment in the first quarter of
12 1999?

13 A No, first quarter of 2000.

14 Q I'm going to read from your deposition transcript, page
15 16, Volume 1, page 17, line 15:

16 "QUESTION: So my first question is I would
17 assume, and correct me if I'm wrong, but I would assume the
18 first discussions you had with any attorney concerning
19 issues relating to your employment at Illumina were held
20 with your brother Michael, is that correct?

21 "ANSWER: That is correct.

22 "QUESTION: When do you believe you first
23 began consulting with Michael in his capacity as an attorney
24 as opposed to simply sharing with him as your brother?

25 "ANSWER: I think it would be approximately
26 first quarter of 1999."

27 That's the testimony you gave in your deposition, sir,
28 correct?

1 A I don't know if that testimony I gave. It's the first
2 quarter of 2000.

3 Q I'm focusing on the testimony that you gave when I
4 deposed you a year ago under oath and you told me under oath that
5 the first point in time that you consulted with any attorney
6 regarding employment issues at Illumina was in the first quarter
7 of 1999, correct? That's what you said?

8 A I believe I said first quarter of 2000 because that's
9 when it happened.

10 MS KEARNS: Your Honor, may the witness be shown his
11 transcript.

12 MR. PANTONI: I'll stipulate that the transcript says
13 first quarter of 1999.

14 THE WITNESS: I see it. It's the first quarter of
15 2000, but this does say first quarter of 1999.

16 MS KEARNS: Q So you are saying that you misspoke when
17 I deposed you?

18 A I don't know if I misspoke or if it was a transcription
19 error, I don't know.

20 Q Well, you had an opportunity to review and in fact have
21 testified that you did review all six volumes of volumes of your
22 deposition transcript, is that correct?

23 A All 1200 pages.

24 Q And you did not make a single change to any of your
25 deposition testimony, isn't that true?

26 A Yes.

27 Q Isn't it true that your deposition length is 932 pages,
28 not 1200?

1 A Sorry, I thought --

2 MR. PANTONI: I'm not sure it matters, Judge. I can
3 stipulate for the record how long the transcript was.

4 MS KEARNS: It's 932.

5 MR. PANTONI: 932 pages. Without exhibits.

6 THE COURT: Stipulation is accepted. You accept the
7 stipulation, Counsel?

8 MS KEARNS: Yes.

9 MR. PANTONI: Without exhibits.

10 MS KEARNS: Q So Dr. --

11 A I blame my brother. He told me 1200 pages.

12 Q You didn't make any changes or corrections to any portion
13 of your deposition, including this section in which we were
14 discussing the date on which you first consulted with an attorney?

15 A Yes, that's correct.

16 Q Isn't it true that you in fact did consult with your
17 brother in his capacity as an attorney in the first quarter of
18 1999 because you received a performance scolding?

19 MR. PANTONI: Objection, attorney-client privilege.

20 THE COURT: Hold on for a second.

21 MS KEARNS: I'll ask a different question.

22 THE COURT: Okay.

23 MS KEARNS: Q Isn't it true that performance
24 discussions that had been had with you by John Stuelpnagel in 1998
25 are what led you to have a consult with an attorney in the first
26 quarter of 1999?

27 MR. PANTONI: Same objection, Judge. By the way, he's
28 testified now three or four times it was first quarter of 2000.

1 MS KEARNS: He also testified under oath a year ago
2 that it was first quarter of 1999.

3 MR. PANTONI: I don't think it's appropriate to get
4 into the subject matter.

5 MS KEARNS: I'm not inquiring into the communications
6 between --

7 THE COURT: I think it does get to that. The objection
8 is sustained.

9 We have to take a break around this time. We'll be in
10 recess until 11 o'clock. Please remember the admonition not to
11 form or express any opinions about the case, not to discuss the
12 case. We'll be in recess until 11:00 a.m. 11:00 a.m.

13 (Proceedings resumed outside the presence of the jury.)

14 THE COURT: The jurors have left. Did you want to
15 discuss something?

16 MR. PANTONI: One matter, Judge.

17 I don't think it's appropriate for the questioning to
18 continue to be, "Isn't it true that you testified at deposition X"
19 before the subject matter is even broached, or, "Isn't it true you
20 testified at trial to X" before the subject is even broached. I
21 think it's argumentative. I think testing his recollection of his
22 testimony is not an issue that's relevant to the case. I
23 understand she can use the transcript deposition appropriately,
24 either to impeach or read it into evidence, but simply broaching
25 the subject for the first time --

26 THE COURT: I always felt, I made a comment already
27 once before but it hasn't been adhered to, but I generally don't
28 like you to try to characterize what his testimony at deposition

1 is. Rather I would prefer you ask him a question, and then if you
2 think that his answer is inconsistent, and again you have pretty
3 wide latitude because you can read whatever you want to read and
4 later on Mr. Pantoni can argue it's not consistent, then you can
5 read his deposition testimony. I think when you get into here's a
6 lengthy deposition, 900, I guess --

7 MR. PANTONI: 932 to be exact.

8 THE COURT: To require him to characterize that
9 testimony just interjects a lot of levels of uncertainty.

10 Get to what his position is right now. If you think it's
11 inconsistent with the depo, read the depo.

12 Also, even as far as trying to characterize his trial
13 testimony, I think that since it's difficult to recall, for anyone
14 to recall exactly what they testified to at trial, that that
15 interjects something that's confusing and time consuming, and if
16 you think it's clear after -- There may be some exceptions to
17 that, something diametrically opposed, but I don't think you
18 should initially try to get him to characterize what his testimony
19 was.

20 MS KEARNS: Okay.

21 THE COURT: Hopefully you'll have transcripts so you
22 can read from the transcripts. It will save time.

23 MR. PANTONI: At some point today I'm going to request
24 about five minutes with you to talk about scheduling, but I need
25 to talk to Miss Kearns first.

26 THE COURT: Okay. You want to return at five of 11?

27 MR. PANTONI: Sure.

28 THE COURT: Okay.

1 (Recess.)

2 THE COURT: Record indicate all the jurors are present,
3 counsel, parties.

4 You may continue your cross-examination.

5 MS KEARNS: Thank you, your Honor.

6 Q I'd like to put up on the screen --

7 Dr. Czarnik, one of the topics that you testified to on your
8 direct examination related to the company photograph that was
9 taken of Illumina, and you said that there was a first photograph
10 taken in which you were in the picture, right?

11 A Literally and figuratively.

12 Q Do you remember when that photograph was taken?

13 A It was taken at some point in the months before I was
14 fired.

15 Q And you said on direct that you then were mailed the
16 photograph from the vendor or the photographer?

17 A No, from Deborah Flamino.

18 Q Okay. And that photograph was a photograph in which
19 you were not in the picture, right?

20 A Yes.

21 Q Dr. Czarnik, in the photograph that you got in which
22 you did not appear -- Let me just ask you this first. Is it your
23 position that Illumina had a second all-employee picture taken in
24 order to eliminate you from the picture?

25 A I can't testify as to what Illumina, why Illumina did
26 what it did. I can only tell you that I was in the first picture
27 and I was not -- I was not in the second picture.

28 Q Let me ask you to take a look at the second picture,

1 which your counsel introduced as Exhibit 343.

2 Your Honor, may I hand the witness the photograph?

3 THE COURT: Yes.

4 MS KEARNS: Q Dr. Czarnik, here is Exhibit 343. This
5 is the photograph that you say you received from Deborah Flamino
6 and in which you are not in the photograph, correct?

7 A Yes.

8 Q Take a look at the picture, if you would. Do you see
9 Mark Chee in the photograph?

10 A Never looked for Mark Chee in this photograph.

11 Q Well, could you look now.

12 A May I have my glasses.

13 I don't see Mark Chee in this picture.

14 Q And Mark Chee is also a founder of Illumina, correct?

15 A Yes.

16 Q Were you aware that the first photograph taken which
17 occurred before your termination didn't turn out due to a lighting
18 problem that the photographer had?

19 A Oh, please. That's nonsense.

20 Q Well, you say it's nonsense. Did you ever see any of
21 the proofs or print from the first photo shoot?

22 A No. I sure didn't.

23 Q Do you have any information about the circumstances
24 that led to a second photo shoot?

25 A The information I have is that I'm not in this picture.
26 I was in town. Illumina could easily have contacted me so I could
27 come and be taken as a part of this group.

28 MS KEARNS: Move to strike the answer as nonresponsive

1 to my question.

2 THE COURT: Motion to strike is granted.

3 MS KEARNS: Q My question is do you have any
4 information as to why a second photograph was taken?

5 A As I said, I don't know from someone telling me what
6 Illumina's motive was in taking the second picture.

7 Q And you don't know what circumstances may have
8 necessitated the taking of the second picture?

9 A I know the first picture was taken by a professional
10 photographer.

11 Q And you've testified you didn't see the proofs and you
12 didn't see the photographs that resulted from that photo shoot?

13 A That's correct.

14 Q And you don't see Mark Chee in the second photograph
15 either, right?

16 A Right.

17 Q Now, you've testified in the trial that morale was good
18 when you moved into the new facilities, right?

19 A Yes, ma'am.

20 Q At what point did it become bad?

21 A In approximately December of 1998.

22 Q Isn't it true that in late November, 1998, morale was
23 quite good because the company had just closed its financing,
24 raising about \$9 million?

25 A I know we were happy to have finished the financing,
26 yes.

27 Q Wouldn't you agree that morale was good in November of
28 1998?

1 A My recollection isn't fine enough to differentiate
2 between right after the financing and in December. Sometime
3 during the period of the end of the year morale began to decline.

4 Q On direct you said that several chemists told you in
5 the December time frame that they were considering leaving
6 Illumina.

7 A I don't believe I said that under direct. I said that
8 in the time frame where morale was falling, I think it was in
9 January, February of '99, several chemists told me they were
10 thinking of leaving.

11 Q If I'm mistaken on the timing, I apologize. Who are
12 the several chemists who told you they were thinking of leaving
13 Illumina?

14 A Todd Dickenson, Steve Barnard, and Steve Auger was the
15 engineer who told me he was thinking of leaving.

16 Q And you believe that these three individuals expressed
17 thoughts of leaving Illumina when?

18 A In approximately January or February of 1999.

19 Q To what do you attribute the lowering of morale?

20 A I attribute of lowering of morale to John Stuelpnagel
21 being very frustrated with not meeting the goals that we had set
22 forth in the business plan and that he began to micromanage the
23 process of setting time lines.

24 Q Isn't it true that you generally don't like working
25 with time lines?

26 A No, that's not true.

27 Q Did you ever tell John Stuelpnagel that science can't
28 be managed to time lines?

1 A I don't think I ever told that to John. I certainly --
2 Some aspect of research are very difficult to manage to time
3 lines.

4 Q Now, at this point in time when you say that morale
5 worsened in late 1998, isn't it true that at the time Dr.
6 Stuelpnagel was the acting CEO and president?

7 A Yes.

8 Q And you understood, did you not, that he had the
9 ultimate responsibility for the company's success or failure at
10 that point in time?

11 A Yes.

12 Q Isn't it true that in the fall of 1998, company
13 milestones were set by the entire senior management team,
14 including you?

15 A Yes.

16 Q So these were -- The company milestones that were
17 agreed upon in the fall of 1998 were collectively agreed upon,
18 they weren't assigned or handed down by John Stuelpnagel?

19 A That's correct.

20 Q You talked on direct a little bit about stretch goals
21 and stupid goals in December of 1998. These stretch goals and
22 stupid goals that you referred to, these are goals that had been
23 set by the entire senior management team, including yourself,
24 right?

25 A No, not always.

26 Q What goals -- Well, I understood your testimony to be
27 that at this point in time, the goals were being set by the entire
28 senior management team.

1 A Prior to that time, yes, but beginning around that
2 time, no.

3 Q So what goals were implemented in or about December of
4 1998 [in]⁸² which you had no involvement in setting?

5 A Oh, I didn't say I had no involvement in setting [some goals]⁸³. I
6 said that what I thought was the case didn't carry the day.

7 Q I don't understand your answer.

8 A I had a vote but I didn't have a veto.

9 Q So in other words, these stretch goals and stupid goals
10 were set by the senior management team but you are saying you had
11 a dissenting vote?

12 A Yes.

13 Q Have you ever said that until April of 1999, you
14 participated completely and fully in all decisions of the company?

15 MR. PANTONI: Objection, lacks foundation.

16 THE COURT: Sustained.

17 THE WITNESS: I don't know if I'd ever stated that.

18 MS KEARNS: Q You don't --

19 MR. PANTONI: The objection was sustained.

20 THE WITNESS: I'm sorry.

21 MR. PANTONI: That means you don't answer.

22 MS KEARNS: Q Now, Dr. Czarnik, you told us in this
23 trial that you are a person who doesn't like to hold others
24 accountable for failing, right?

25 A I said that where? Here?

26 Q Yes. You don't remember that?

27 MR. PANTONI: Objection,

28 THE COURT: Sustained.

⁸² Original transcript did not include the word "in".

⁸³ Original transcript did not include the phrase "some goals".

1 THE WITNESS: I don't think I said that.

2 MR. PANTONI: It's sustained. I'm sorry, Dr. Czarnik.
3 Sustained means you don't answer the question.

4 MS KEARNS: Q So Dr. Czarnik, let me ask you this:
5 Would you describe yourself as a person who does not like to hold
6 anyone accountable for failing?

7 A I'm a person who always shares failure if someone under
8 my management fails.

9 Q Well, that wasn't my question. My question was would
10 you describe yourself as someone who does not like to hold anyone
11 accountable for failure?

12 A No, I wouldn't describe myself that way.

13 Q And you don't believe you've described yourself that
14 way in this trial?

15 MR. PANTONI: Objection.

16 THE COURT: I'll overrule that objection. You may
17 answer.

18 THE WITNESS: You know, who likes to tell people that
19 they failed?

20 THE COURT: The question is did he testify to that. Do
21 you recall?

22 THE WITNESS: I don't recall.

23 MS KEARNS: Q How is it, Dr. Czarnik, that you
24 claim John Stuelpnagel actively discouraged communication between
25 the scientific groups?

26 A I had attempted to organize meetings between
27 engineering and chemistry and molecular biology beginning in about
28 this period of November of 1999, when John was beginning to get

1 very frustrated with our not setting goals, and I believed and
2 still believe to achieve goals the three groups had to be talking
3 together, and John specifically said meetings are
4 counterproductive, we don't need anymore meetings.

5 Q You said November, 1999. Isn't that at a point in time
6 when Jay Flatley was already on board as the CEO?

7 A I got the year wrong. It's November of 1998.

8 Q So you are saying that you tried to facilitate meetings
9 among the three scientific groups and John told you we have too
10 many meetings, we're not going to have anymore meetings?

11 A No, he didn't say that, he said meetings were
12 counterproductive and we don't need anymore meetings.

13 Q What sort of meetings were you producing?

14 A Meetings by which the scientific and technical staff
15 talked with each other about goals, why they weren't being met,
16 and the best ways to strategize to achieve them.

17 Q Didn't you already at this time have a regular
18 Wednesday morning science meeting among all the scientists?

19 A I don't recall. We began that meeting sometime in the
20 first quarter -- sorry, the fourth quarter of '98, and I don't
21 remember when.

22 Q Okay. So you'll agree with me that by the fourth
23 quarter -- sometime in the fourth quarter of '98, you were having
24 regular weekly scientific meetings that pulled together the
25 scientists from all the disciplines?

26 A That's my recollection.

27 Q And when is it that you were suggesting to John
28 Stuelpnagel that you needed to have meetings of the various

1 scientists?

2 A Beginning in approximately the beginning of November,
3 1998.

4 Q So if you agree with me that you were having
5 interdisciplinary scientific meetings by the end -- by the end of
6 the fourth quarter of 1998, right?

7 A My best recollection is that by the end of [fourth]⁸⁴
8 quarter we were having weekly meetings.

9 Q So by the end of fourth quarter, 1998, which would be
10 by December 31, 1998, you were having weekly meetings?

11 A Yes.

12 Q And your testimony is that you were suggesting meetings
13 but getting shot down in November, 1998?

14 A I was suggesting meetings, yes.

15 Q So it sounds, Dr. Czarnik, as though the period of time
16 in which you made a suggestion and it wasn't listened to lasted no
17 more than a month?

18 A No, that's incorrect.

19 Q Well, isn't it true that by the end of 1998, weekly
20 interdisciplinary scientific meetings were occurring?

21 A Yes.

22 Q Just a side note, Dr. Czarnik. When we were talking
23 about your alleged emotional distress, you were asked how you've
24 been treated for your depression, and you articulated for us that
25 you've taken medication for years and you've also had
26 psychotherapy as well, correct?

27 A That is the truth.

28 Q And you told us that there was only one period of time

⁸⁴ Original transcript read, "forth".

1 in which talk therapy or psychotherapy was necessary, and that was
2 in the April, 1999 time frame, right?

3 A I don't know if that's what I told you, but that is the
4 truth.

5 Q But isn't it true that since moving east to start your
6 new employment, you have engaged in talk therapy with a
7 psychiatrist?

8 A I did for a period of a month or two.

9 Q So April, 1999 wasn't the only time that you engaged in
10 psychotherapy?

11 A No, that's incorrect, it began in April of '99 and it
12 ended approximately eight months ago.

13 Q Well, with a different therapist, correct?

14 A Yes.

15 Q So you are contending that the April 1999 psychotherapy
16 is part of a continuum that includes your therapist back in
17 Maryland?

18 A Of course.

19 Q Now let's talk about the NIST grant. You told us that
20 it was decided in November of 1998, decided as a team, you would
21 prepare the NIST grant, correct?

22 A Correct.

23 Q So this is not something that was unilaterally handed
24 down to you by John Stuelpnagel?

25 A No.

26 Q This is something that as a team you agreed you would
27 take responsibility for?

28 A Yes.

1 Q And you previously testified the due date on the NIST
2 grant application was April 15, 1999?

3 A Yes.

4 Q Convenient day to remember.

5 A Tax day.

6 Q Isn't it true that the NIST grant for which Illumina
7 was applying, if successful, would have resulted in an infusion of
8 \$2 million over a three-year period?

9 A Yes, that's correct.

10 Q And if successful, that grant would have been the
11 largest sum of money sought by Illumina in a grant application to
12 date, right?

13 A Yes.

14 Q And if granted, it would have been a very significant
15 grant?

16 A Yes.

17 Q In January of 1999, did you attend a seminar
18 specifically geared toward preparation of this particular grant?

19 A Yes.

20 Q That was a one-day seminar in San Francisco?

21 A Yes.

22 Q And isn't it true that this NIST grant was going to be
23 the very first step, first grant application you worked on on
24 behalf of Illumina?

25 A I don't think that's correct. Steve Barnard and I
26 submitted a grant in approximately August of 1998.

27 Q Did you write any portion of that August, 1998 grant
28 application?

1 A No, that application Steve wrote while he was living on
2 the east coast, and then I had a chance to edit it before we
3 submitted it.

4 Q So I guess maybe put another way, isn't it true this
5 NIST grant was going to be the first grant application in which
6 you did the initial drafting and writing of the grant application?

7 A Yes. At Illumina.

8 Q Right. We've already heard about the numerous grant
9 applications you did at other places.

10 Isn't it true that by November of '98, when it was agreed as
11 a group that you would do the NIST grant, Mark Chee had already
12 written and submitted several grant applications on behalf of
13 Illumina?

14 A Yes.

15 Q Let's put up Exhibit 58.

16 You can either look on the screen, Dr. Czarnik, or in your
17 exhibit binders. This is Exhibit 58. Do you recognize this as an
18 e-mail sent by you from your home e-mail address to John Chee,
19 John Stuelpnagel, Rich Pytelewski, [Michal]⁴¹ Lebl, Chanfeng Zhao,
20 Steve Barnard and Todd Dickenson?

21 A Yes.

22 Q What are you communicating in this e-mail?

23 A Do you want me to summarize what it says?

24 Q Yes.

25 A I am letting other members of senior management know
26 that I'm going to be working at home on the grant, first draft,
27 and then on Tuesday I would be asking Steve, Todd and Chanfeng to
28 help me for a day in creating figures and references and that sort

1 of thing. And then on Wednesday I asked Mark for proofreading and
2 Thursday it would go out on Friday.

3 Q And the second portion of the e-mail you were
4 communicating that the following week, in other words after you
5 had completed the NIST grant application, you were going to be
6 focusing on a number of other projects that were backlogged,
7 correct?

8 A Correct.

9 Q If we scroll down and just take a look at the nature of
10 these activities that you were backlogged on, for example Journal
11 of Combinatorial Chemistry, Solid-Phase Organic Syntheses, ACS
12 Division of Organic Chemistry, Combinatorial Chemistry Gordon
13 Research Conference, write an invited article, these were all
14 things that were not specific job duties of yours at Illumina,
15 correct?

16 I don't know what you mean by specific job duties. These
17 were all professional obligations on which I was working, and in
18 every case I was identified as working at Illumina, so Illumina
19 was identified with something interesting that was happening

20 Q These are all professional organizations or journals
21 you were involved in, and while it's true that any article you'd
22 submit that related to Illumina would mention Illumina and
23 identify you as being affiliated with it, my question, Dr.
24 Czarnik, really was acting as the editor of the Journal of
25 Combinatorial Chemistry, that was not part of your job description
26 as CSO of Illumina, was it?

27 A No.

28 Q Acting as a founding editor of the Solid-Phase Organic

1 Syntheses series, that was not something that was part of your job
2 description as CSO, at Illumina, was it?

3 A No, it was not.

4 Q Similarly, being on the executive committee of the ACS
5 Division of Organic Chemistry, serving in that capacity was not
6 something that was one of your -- part of your job description as
7 CSO at Illumina, was it?

8 A No.

9 Q Same thing for the Combinatorial Chemistry Gordon
10 Research Conference, planning or organizing -- planning that
11 conference was not something that led to your duties at Illumina?

12 A That lead to the [cover of]⁸⁵ Science, but it's not in my
13 job letter.

14 Q It's not in your job letter?

15 A It was not what was listed in my job letter as things I
16 needed to do.

17 Q Writing an invited article on the future of CC for the
18 millennium issue of Chemistry in Britain, that also is not
19 something that was part of your job description as CSO at
20 Illumina?

21 A That's correct.

22 Q And you were proposing that you basically reserve the
23 entire following work week, the week of April 11, except for
24 attending a board meeting, to focus on these activities?

25 A I proposed it but didn't do it.

26 Q Let's put up Exhibit 59.

27 This is, Dr. Czarnik, do you recognize this as an e-mail
28 that you sent on Monday, April 5th, to your subordinates in the

⁸⁵ Original transcript read, "copy on".

1 chemistry department?

2 A Yes, I do.

3 Q And you were basically giving them a heads-up that you
4 needed to pull them into service to work on the NIST grant the
5 following day?

6 A Yes.

7 Q So you had assistance from your subordinates in
8 preparing the NIST grant application, correct?

9 A Let me see what actually came out. Chanfeng wasn't
10 able to find anything on that topic. Steve was able to give me
11 some figures. And I think Todd was able to give me an existing
12 figure of the imaging system.

13 Q So would your answer be yes, you had assistance in
14 connection with the NIST grant application?

15 A I had assistance to the extent that these people sent
16 me existing figures that I could incorporate into the grant.

17 Q And which you did incorporate into the grant?

18 A And which I did.

19 Q Let's go back to the previous exhibit. I think it was
20 58. This is the e-mail that you sent to John, Mark and Rich and
21 copied to others that we just looked at. In the first portion
22 here, you are talking about working on the NIST grant, right?

23 A Yes.

24 Q And you are saying you are going to work at home, et
25 cetera. You state that on Wednesday you would be asking Mark for
26 proofreading of the science section and John for proofreading of
27 the business plan section "(Guaranteed to be pathetic in the first
28 draft.)" Why did you feel your first draft of the business

1 section for the grant application was guaranteed to be pathetic?

2 A Because I had not written myself a business plan like
3 that before and had not gone to business school.

4 Q But you say you had been very involved in the
5 preparation of the company's business plan during the summer of
6 summer of 1998, right?

7 A Yes, that's true.

8 Q So didn't you feel that your experience in working on
9 the company's business plan from the summer of 1998 would have any
10 carryover or any assistive effect when you had to write a business
11 plan section for a grant application?

12 A I certainly had hoped I would learn from that
13 experience.

14 Q When is it, sir, that you actually began working on the
15 grant application, and by working, I mean putting thoughts into
16 written form?

17 A It would have been on Saturday, and I'm not -- If I
18 could see the date, I can tell you the date. If I could see the
19 date on the top of the e-mail. It would be on looks like
20 Saturday, April 3rd.

21 Q So you would have begun actually committing thoughts to
22 paper on Saturday, April 3rd, and you knew that the deadline for
23 the grant was April 15, correct?

24 A Yes.

25 Q Now, Dr. Czarnik, you testified on direct that in late
26 1998 you had a change in your depression medication as a result of
27 some sexual side effects?

28 A In September of '98.

1 Q Did you make the change in your medication unilaterally
2 or was it upon a doctor's advice?

3 MR. PANTONI: Objection, relevance and privacy.

4 THE COURT: Pardon?

5 MR. PANTONI: Relevance and privacy.

6 THE COURT: Sustained.

7 MS KEARNS: Q You testified that you had a change in
8 medications and that as a result of that change the new medication
9 was not controlling your depression like your old medication had,
10 correct?

11 A I don't know what I testified, but that is the case.

12 Q And by March of 1999, you were experiencing symptoms of
13 depression?

14 A That is correct.

15 Q And you recognized that you were experiencing symptoms
16 of depression?

17 A Yes.

18 Q Why didn't you at that point in time go and see a
19 doctor and say this regimen isn't working for me, I need to get
20 back on my old medication?

21 MR. PANTONI: Same objections.

22 THE WITNESS: I'd like to answer it.

23 MR. PANTONI: Withdraw the objection.

24 THE WITNESS: The answer is I did.

25 MS KEARNS: Q Okay. And when did you actually begin a
26 switch in medications or a transition to medication?

27 A I think it was in either February or March. It would
28 have been in March of '99.

1 Q So certainly you are saying by the time you had your
2 discussion with Mark Chee in March of 1999, you'd begun
3 transitioning back to your original medication?

4 A Yes.

5 Q And you say you sought out Mark Chee because you needed
6 a reality check on how you were performing?

7 A Yes.

8 Q You didn't tell Mark Chee in this discussion that you
9 had depression, right?

10 A That's correct.

11 Q You simply told him that you weren't feeling well?

12 A That's correct.

13 Q And in this discussion you suggested that you step down
14 as CSO of the company, right?

15 A I offered that if Mark wanted to be CSO and he thought
16 it would be better for the company at this stage, that I would
17 step down.

18 Q Now let's focus on April 6, 1999. This is the meeting
19 that you've previously testified to in which you told John
20 Stuelpnagel and Mark Chee you weren't going to be able to complete
21 the NIST grant application, correct?

22 A Correct.

23 Q And at this point in time when you had the meeting, you
24 had been only able to write a couple of sentences?

25 A I think two pages, something like that.

26 Q You'd had the responsibility or the task since November
27 of 1998?

28 A Yes, I had.

1 Q You knew that the news you were going to deliver would
2 not be well received?

3 A I didn't know how it was going to be received, but I
4 had to tell them no matter how it was going to be received.

5 Q You would agree, would you not, that your disclosure
6 that you were not going -- not going to be able to complete the
7 grant was a legitimate source of frustration for John Stuelpnagel?

8 A For John Stuelpnagel, yes.

9 Q And your inability to complete the grant would have led
10 to either a missed opportunity on the company's part or it would
11 have created additional work for someone else, right?

12 A Yes.

13 Q And what you told John Stuelpnagel and Mark Chee was
14 that you couldn't complete the grant given how you were feeling,
15 right?

16 A Yes.

17 Q You didn't mention depression?

18 A That's correct.

19 Q You didn't mention inability to concentrate?

20 A That's correct.

21 Q You didn't mention inability to write creatively?

22 A No.

23 Q And at this point in time you were in a deep depression
24 but people at work would have been unaware, correct?

25 A Yes.

26 Q So you are not suggesting that there was anything about
27 your outward appearance prior to April 6 which should have caused
28 anyone to suspect that something was wrong?

1 A I'm not sure I would make that statement.

2 Q Isn't it true that this meeting, this April 6 meeting,
3 is the only occasion throughout your employment with Illumina on
4 which you claim John Stuelpnagel was abusive to you?

5 MR. PANTONI: Vague and ambiguous.

6 THE COURT: Do you understand the question?

7 THE WITNESS: Yes, I understand it.

8 THE COURT: Overruled.

9 THE WITNESS: No, this was not the only occasion that
10 he was cruel and abusive.

11 MS KEARNS: Q What is it that John Stuelpnagel did
12 during this meeting on April 6 that you claim was cruel and
13 abusive?

14 A When I began to tell John and Mark that I was not going
15 to be able to complete the grant, I was in a deep state of
16 depression but I was doing my very best to stay in the closet. I
17 knew that I had to tell them, so I went in --

18 Q I'm sorry for interrupting you, Dr. Czarnik, but what I
19 asked you was for you to describe to me what John Stuelpnagel did
20 or stated that you think was cruel and abusive.

21 MR. PANTONI: If he needs to set the context to explain
22 it, I think he should be able to do that.

23 MS KEARNS: We already heard on direct the context
24 about the meeting. I'm just asking what is it in John
25 Stuelpnagel's conduct --

26 THE COURT: It's cross-examination. The witness should
27 respond to the question. So the objection is overruled. Please
28 respond to the question. Do you have the question in mind?

1 THE WITNESS: Yes.

2 THE COURT: Okay.

3 THE WITNESS: After I broke down and was crying in the
4 chair, instead of showing any form of compassion or at minimum
5 holding back on his anger, John let his anger out full blast,
6 yelled at me, asked me what am I able to do, what can I do, and
7 then when Mark Chee tried to interject in what I know at the time
8 would have been a sympathetic, moderating way, John stopped him
9 and continued his attack on me.

10 MS KEARNS: Q How did he continue his attack on you?

11 A John told me he felt that if that was the way I felt,
12 then I should leave the company.

13 Q That if that was the way you felt, you should leave the
14 company?

15 A Yes.

16 Q I believe your testimony on direct was that he
17 supposedly said to you if the job is too hard for you, you should
18 leave the company. Does that change your recollection at all?

19 A No.

20 Q Now, isn't it true, Dr. Czarnik, that the statement
21 made by John Stuelpnagel, "What can you do," was made before you
22 broke down in tears?

23 A No.

24 Q You are certain of that?

25 A Yes.

26 Q Isn't it true that the meeting commenced with you
27 saying that you weren't going to be able to complete the grant
28 application and then it was followed by John Stuelpnagel telling

1 you how you had let the company down, he was disappointed, he was
2 frustrated, and would you agree with that characterization?

3 A Would you please characterize it again.

4 Q Sure. That you articulated or you said that you were
5 not going to be able to complete the grant application, and that
6 you offered no explanation at that point; that John Stuelpnagel
7 then told you that he was disappointed, that you were letting the
8 company down, and that he asked you at that point well, what can
9 you do, and that thereafter, you began crying?

10 A I began crying in the middle of my sentence, explaining
11 that I wasn't going to be able to finish the grant. And John said
12 all of those things while I was sitting there broke down.

13 Q So it's your contention that you broke down crying
14 before John Stuelpnagel uttered a word?

15 A That is my -- That is what happened.

16 Q Now, in your deposition you told me that you felt that
17 John concluded from this meeting that you were weak?

18 A Yes.

19 MR. PANTONI: Your Honor, I'm going to object to the
20 form of this question.

21 THE COURT: Sustained.

22 MS KEARNS: Q Did Dr. Stuelpnagel call you weak during
23 this meeting?

24 A No, John is too smart for that.

25 Q Did Dr. Stuelpnagel ever call you weak?

26 A He's too smart for that, no.

27 Q Did Dr. Stuelpnagel ever call you incompetent at
28 anytime during your employment with Illumina?

1 A Did he use the word "incompetent"? No.

2 Q So after this meeting took place in Dr. Stuelpnagel's
3 office, you say you went home and went to bed, correct?

4 A First I went to my desk where I had a short meeting
5 with Rich Pytelewski, and then I went home and went to bed.

6 Q That evening you sent e-mail to John Stuelpnagel and
7 Mark Chee?

8 A Yes.

9 Q Let's put Exhibit 60 up.

10 Dr. Czarnik, do you recognize Exhibit 60 as the e-mail which
11 you sent from your home address to Mark Chee and John Stuelpnagel
12 on the evening of April 6?

13 A Yes.

14 Q And in this e-mail, you are communicating to John and
15 Mark that at least for the moment you'd lost confidence that you
16 could deliver on anything, correct?

17 A That's correct.

18 Q And you also were advising them that you had
19 substantially lost your ability to think clearly, right?

20 A Yes.

21 Q And this e-mail which you wrote on April 6, 1999, you
22 wrote during the same period of time that you were unable to write
23 the grant application, correct?

24 A Yes.

25 Q Now, we didn't hear about it in your direct testimony,
26 but isn't it true that on the very next morning, the morning of
27 April 7, John Stuelpnagel called you at home to check up on you
28 and see how you were doing?

1 A Yes.

2 Q And isn't it true that during that phone conversation
3 on April 7, John Stuelpnagel sounded sympathetic?

4 A He did sound sympathetic.

5 Q And he initiated the call, correct?

6 A That's correct.

7 Q And isn't it true that during that call, Dr.
8 Stuelpnagel told you to take whatever time you needed to take care
9 of yourself and get better?

10 A Yes.

11 Q Now, during this day, Wednesday, April 7, when you were
12 off of work, I think you testified that you spent most of the day
13 in bed. You did leave the house to run one errand, correct?

14 A Yes.

15 Q That was having your car serviced, right?

16 A Yes.

17 Q And later that evening, Wednesday evening, April 7th,
18 you had your conversation with your brother, Tam, right?

19 A Yes.

20 Q And as a result of that conversation on Wednesday
21 night, Thursday morning, you got up and you self-medicated with
22 Dexedrine, right?

23 A Yes.

24 Q And Dexedrine had not been prescribed to you, correct?

25 A That's correct.

26 Q You understand that it is a prescription drug?

27 A Yes.

28 Q And you say that the effect it had upon you was

1 unbelievable, correct?

2 A Yes.

3 Q Now, on April 8, 1999, which is the morning that you
4 took Dexedrine, you returned to work, correct?

5 A Yes.

6 Q And this is the date on which you had that meeting with
7 John Stuelpnagel and Rich Pytelewski, correct?

8 A Yes.

9 Q This meeting, April 8, 1999, is the first occasion on
10 which you actually disclosed to anyone at Illumina that you had
11 depression?

12 A Yes.

13 Q Didn't you tell John Stuelpnagel to brief Mark Chee on
14 your disclosure?

15 A I believe I did tell that to John.

16 Q And is it your testimony that you also had a direct
17 communication with Mark Chee on that topic?

18 A Yes.

19 Q And you resumed your work on the grant?

20 A Yes.

21 Q And you actually finished it?

22 A Yes.

23 Q Was any portion of the grant application culled from
24 any prior written work, like the company's business plan?

25 A Yes, substantial part of the grant is two parts. It's
26 a scientific part and then a business plan part, and a substantial
27 part of the business plan part came from Illumina's business plan.

28 Q Now, you've testified that after the April 6 [breakdown]⁸⁶

⁸⁶ Original transcript read, "breakdwon".

1 meeting, John Stuelpnagel stopped talking to you until the end of
2 May, right?

3 A No, he talked with me on April 7th. I talked with him
4 on April 8th. I would have talked with him briefly to get his
5 signature for the grant. But at that point from then until the
6 end of May, I don't recall any substantive communication. I
7 remember him avoiding me.

8 Q Well, you've testified that he just stopped talking to
9 you until that breakthrough discussion on May 29. Is that
10 correct?

11 A I don't know if that's what I testified to, but that's
12 the case.

13 Q Let's look at your deposition transcript, page 361,
14 that's in Volume 3. 361, line 17:

15 "QUESTION: So it doesn't appear that you are
16 saying that John literally stopped talking to you, that
17 there was complete silence for a period of two months,
18 correct?

19 "ANSWER: There was not complete silence for a
20 period of two months.

21 "QUESTION: What would you say, that it was
22 reduced communication?

23 "ANSWER: Yes."

24 A Is there a question?

25 Q No. There isn't.

26 Dr. Czarnik, you would agree with me, would you not, that
27 during this two-month period in which there was reduced
28 communication, Dr. Stuelpnagel was also communicating with you

1 through other forms of communication such as e-mail, correct?

2 A Correct.

3 Q In addition to talking with you?

4 A I don't remember any instances of talking, but I can't
5 say unequivocally there were none.

6 Q You testified in deposition in the passage I just read
7 that there was not complete silence during that two-month period?

8 A If I was to have testified there was complete silence,
9 and then there was a record of a single conversation, then my
10 deposition would have been wrong. So I can't testify that there
11 wasn't a single instance of communication between John and I.

12 Q In fact, during the period of time between April 6 and
13 end of May, you and John actually made some business calls on
14 prospects together, didn't you?

15 A I don't recall.

16 Q I'll come back to this.

17 So let's now focus on business development. You say that
18 prior to April, 1999, you were meaningfully involved in all
19 business development activities, is that right?

20 A All that I was aware of, yes?

21 All that I were. Were or was?

22 Q So let me focus on the period prior to April of 1999
23 and some business development activities. Are you aware that in
24 September of 1998, a meeting was held with a company called Serion
25 in Boston.

26 A I was aware of it through the process of discovery, but
27 I wasn't aware of it at that time.

28 Q And through the process of discovery in this case,

1 you've learned that there was such a meeting and that only John
2 Stuelpnagel and Mark Chee went to that company, correct?

3 A I didn't learn that that was the case, but that is
4 what's in the document.

5 Q Now, isn't it true that in September -- on September
6 28, 1998, a visit was made to Venrock, a venture capitalist in
7 Palo Alto, California?

8 A I can't confirm the date, but the approximate date is
9 correct.

10 Q Do you remember going on that visit?

11 A Yes.

12 Q Who else went?

13 A John and Mark.

14 Q Now, we talked a little bit this morning about a visit
15 before your disclosure to Domain in Princeton, New Jersey.

16 A Yes.

17 Q And remind me, did you say you were or were not aware
18 of that visit?

19 A I was aware of it and I was involved in the planning
20 for that meeting but I did not attend.

21 Q You did not attend. Who did attend?

22 A John and Mark, to the best of my knowledge.

23 Q Still in October of 1998, before your disclosure of
24 depression, there was a meeting with Venrock, but this meeting
25 occurred in New York City. Do you remember that meeting?

26 A What is the date again, please?

27 Q Sure. October 12, 1998.

28 A Yes.

1 Q And you attended that meeting, correct?

2 A Yes.

3 Q With John and Mark?

4 A Yes.

5 Q Do you recall that on October 16, 1998, again before
6 your disclosure of depression, the company called upon Monsanto in
7 Des Moines, Iowa?

8 A I'm aware of it, yes.

9 Q You didn't go on that visit, did you?

10 A I was involved in the preparation, but I did not go.

11 Q The persons who went were John Stuelpnagel, Mark Chee
12 and Rich Pytelewski?

13 A Based on what I've learned in discovery, yes.

14 Q Are you aware that on November 17th, 1998, still before
15 your disclosure of depression, there was a presentation made at
16 the Human Genetic Variation Conference in Boston, Massachusetts?

17 A I'm aware there was a conference. I believe Mark went
18 and gave a presentation there.

19 Q Do you have any information one way or another whether
20 John Stuelpnagel also went?

21 A In discovery it's listed that John went there as well.

22 Q Let's focus now on the January, 1999 time frame,
23 business development activities. Are you aware that on January 7,
24 1999, Illumina met in Palo Alto, California, with a company called
25 Incyte, I-n-c-y-t-e?

26 A Yes.

27 Q And you didn't go to that meeting, did you?

28 A I was involved in the preparation but I didn't go.

1 Q John and Mark went, correct?

2 A Correct.

3 Q And are you aware that on January 13th, 1999, still
4 before your disclosure, there was a Hambrecht --

5 A H and Q.

6 Q H and Q conference in San Francisco?

7 A Yes.

8 Q And did you go to that?

9 A No.

10 Q John is the only one who went to that?

11 A Yes.

12 Q Are you aware that on January 15th, 1999, before your
13 disclosure, Illumina met with Amgen in Thousand Oaks, California?

14 A Yes.

15 Q And isn't it true that John Stuelpnagel is the only
16 person who attended that meeting?

17 A Yes.

18 Q And are you aware that on January 26, 1999, Illumina
19 met with a company called Celera, C-e-l-e-r-a?

20 A Yes.

21 Q That meeting took place in Rockville, Maryland?

22 A Yes.

23 Q Isn't it true that John Stuelpnagel is the only person
24 from Illumina who went to that meeting?

25 A Yes.

26 Q Let's focus now on the March time frame. March of
27 1999. Still before your disclosure of depression. Isn't it true,
28 sir, that on March 3rd of 1999, there was a Trigenum conference

1 held at the law firm of Flehr Hohbach in San Francisco?

2 A Yes.

3 Q And isn't it true that John Stuelpnagel and Mark Chee
4 were the two people from Illumina who attended that conference?

5 A Yes.

6 Q Are you aware, sir, on March 14th, 1999, there was a
7 discussion had between Illumina and a company called
8 Pyrosequencing in Stockholm, Sweden?

9 A Yes.

10 Q Isn't it true John and Mark were the only two persons
11 from Illumina who met with that company on that occasion?

12 A We made the connection with Pyrosequencing because of
13 me and John and Mark went to Stockholm to meet with them.

14 MS KEARNS: I'm going to move to strike the entire
15 answer as being non-responsive to my question.

16 THE COURT: Granted.

17 MS KEARNS: Q I'll try to make my questions a little
18 more clear, Dr. Czarnik.

19 A They are clear, they are just incomplete.

20 Q I'm talking about meeting that occurred March 14, '99,
21 in Stockholm, Sweden, with a company called Pyrosequencing. John
22 and -- You were aware of that, correct?

23 A I helped arrange it.

24 Q Okay. And John and Mark were the only two persons from
25 Illumina who actually attended that meeting, correct?

26 A That's correct.

27 Q Let's focus now on the April time frame, which occurred
28 after your disclosure. Actually I'm going -- I think I'll break

1 now.

2 THE COURT: Okay.

3 We'll take our noon recess at this time. We'll be in recess
4 until 1:15. Please remember the admonition not to form or express
5 any opinions about the case, not to discuss the case among
6 yourselves or with anyone else. We'll be in recess until 1:15.
7 1:15.

8 (Proceedings resumed outside the presence of the jury.)

9 THE COURT: Counsel, could you return at one o'clock.
10 One o'clock.

11 MS KEARNS: Okay.

12 MR. PANTONI: Thank you, Judge.

13 (Lunch recess taken at 12:00 p.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

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Reported By: Peter C. Stewart, CSR No. 3184
Official

1 SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 19, 2002; 1:15 P.M.

2 (Proceedings resumed outside the presence of jury,
3 reported but not transcribed herein.)

4 ANTHONY CZARNIK,

5 having been previously duly sworn, resumed the witness stand and
6 testified further as follows:

7 CROSS-EXAMINATION (Continued)

8 BY MISS KEARNS:

9 Q Now, Dr. Czarnik, you told us that the only business
10 development activity that you were invited to participate in after
11 your disclosure of disability was various meetings related to the
12 o-nose technology, is that correct?

13 A I don't remember what I testified. Do you want to ask
14 me that question?

15 Q Is it your position that the only business activity you
16 were asked to participate in post-disclosure was meetings related
17 to the o-nose project?

18 A That's the only area in which I can recall being
19 involved in business activities

20 Q Is it your position the o-nose project was not an
21 important project for Illumina?

22 A It's a project that had a very low priority in terms of
23 what the company was going to be working on.

24 Q Do you recall there being a meeting at Illumina with
25 Dow representatives in December of 1999?

26 A Yes.

27 Q Isn't it true that you were substantially late for this
28 meeting?

1 A No.

2 Q Do you remember an occasion in, during your employment
3 at Illumina, in which there was a business meeting and in which
4 you were asleep in bed at home and were wakened by a phone call
5 from someone at Illumina inquiring where you were for the meeting?

6 A Yes, that occurred once in December of 1999.

7 Q And with whom was the meeting occurring?

8 A With Don Young from Chevron.

9 Q Don Young?

10 A (Witness nodding head.)

11 Q And isn't it true that the time of that meeting was
12 10:00 in the morning?

13 A My recollection is the time of the meeting was 9:00 in
14 the morning.

15 Q Whatever time the meeting commenced, is it accurate
16 that you were awakened by a phone call while in bed at home and
17 told that the meeting was underway?

18 A My recollection is, isn't certain as to whether I was
19 awakened by that call or whether I had just woken up and took the
20 call, but it's one or the other.

21 Q Who placed that call to you?

22 A I think it was Carmela Haskell.

23 Q Jay Flatley's assistant?

24 A Yes.

25 Q Do you recall traveling with Todd Dickenson to make a
26 presentation at Dow?

27 A Yes.

28 Q When did that occur?

1 A It occurred somewhere between November of 1999 and
2 December of 1999.

3 Q Very late 1999?

4 A Yes.

5 Q And where did you and Dr. Dickenson travel to for this
6 meeting?

7 A To Dow Chemical Company in Midland, Michigan.

8 Q And did you take the same flight out?

9 A Yes.

10 Q Did you sit next to one another?

11 A Yes, we did.

12 Q Did you discuss the presentation that was going to be
13 made at Dow?

14 A Yes.

15 Q What presentation were you going to be making at Dow?

16 A We were going to be talking about the optical nose
17 project.

18 Q Previously referred to as the o-nose?

19 A Yes.

20 Q Isn't it true that during this meeting with Dow in
21 Midland, Michigan, you called upon Todd Dickenson to make the
22 presentation literally on the spot while you were in the meeting
23 with the Dow representatives?

24 A Yes.

25 Q You had not discussed with Todd Dickenson during the
26 plane trip back to Michigan the concept of having him make the
27 presentation, did you?

28 A No.

1 Q You didn't discuss with Todd Dickenson at anytime the
2 day of the meeting up until you were in the meeting that you would
3 be requesting him to make the presentation, correct?

4 A That's correct.

5 Q And in fact isn't it true that you put Todd Dickenson
6 on the spot in the meeting in front of the Dow representatives and
7 said in essence, "Todd, you make the presentation"?

8 A Yes.

9 Q And isn't it true that you then gave him overheads or
10 slides for use in the presentation?

11 A I gave him the set of overheads that we were going to
12 use for the presentation, yes.

13 Q Isn't it true that the reason you gave Todd Dickenson
14 for your request that he pick up this presentation and do it on
15 the spot was that your throat hurt and you didn't feel like
16 talking?

17 A No.

18 Q You deny that's what you told Todd Dickenson?

19 A Well, I have no recollection of saying that to Todd.

20 Q Do you recall giving him any kind of explanation for
21 why it was that you were calling upon him at the last minute to do
22 this presentation?

23 A My recollection is that this was an area in which Todd
24 knew it very well, Todd was [chomping]⁸⁷ at the bit in order to be
25 engaged in more advanced level things, and told him I wanted to
26 give him an opportunity to see what he could do.

27 Q Isn't it true, Dr. Czarnik, that after -- So is it
28 your testimony now that you offered Todd the opportunity to do the

⁸⁷ Original transcript read, "champing".

1 presentation and that he accepted, is that what you are saying?

2 A I don't think I offered it to Todd. I think I asked
3 Todd to give it.

4 Q But in your mind, you thought of it as giving him the
5 opportunity?

6 A In my mind?

7 Q Did you say to him, "Todd, I'd like to give you the
8 opportunity to present"?

9 A No, my recollection of it is something to the effect I
10 said, "Todd, you can do this as well as I can. Why don't you do
11 it."

12 Q Isn't it true that after this presentation, Dr.
13 Dickenson expressed to you great displeasure at having been put on
14 the spot and having been called upon to make this presentation on
15 virtually no notice?

16 A Todd and I had a discussion. I don't recollect it as
17 being great displeasure.

18 Q Do you remember Dr. Dickenson saying to you, "Don't you
19 ever do that to me again"?

20 A No, I don't remember that.

21 Q Do you deny that he said it?

22 A I don't have any recollection of him saying that.

23 Q Dr. Czarnik, what was the purpose for the meeting with
24 Dow to which we've just been referring?

25 A The purpose was to -- My recollection of the purpose
26 -- Of the presentation or of the visit?

27 Q The purpose of the visit.

28 A There were -- There was a twofold purpose of the

1 visit. One was for us to give a presentation to the new head of
2 venture investing at Dow at that time, and for us to work with
3 scientists at Dow who had responsibility -- who had interest, not
4 responsibility, but who had interest in finding new ways to sense
5 chemicals in tank cars.

6 Q At the time of this meeting with Dow, at which you
7 asked Todd Dickenson to give the presentation, was there already
8 any collaboration agreement in place between Dow and Illumina?

9 A Dow had made a venture investment, but they were not
10 supporting research at Illumina.

11 Q I'm sorry, I didn't hear the last part of your answer.

12 A They were not supporting research at Illumina.

13 Q Isn't it true one of the purposes of this visit was to
14 try to convince this new head of the venture arm to make further
15 investment and to support the research arm of the Illumina?

16 A I don't remember that as being a purpose of the visit.

17 Q Which company, I may have asked this, and if I did I
18 apologize, but which company is it that there was a meeting
19 scheduled at Illumina for which you were late because you were at
20 home?

21 A With Chevron.

22 Q Okay.

23 Who is Richard Fuentes?

24 A I think Richard Fuentes is -- He may have been this
25 new head of venture investing at Dow.

26 Q Did you have a scheduled meeting in the May, 2000 time
27 frame with Richard Fuentes?

28 A I don't recall a meeting with Richard in May, 2000.

1 Q Do you recall missing a scheduled meeting with Richard
2 Fuentes in May, 2000?

3 A I don't remember. The event itself, it happened, so I
4 certainly don't remember missing it.

5 Q I can understand you may not remember actually meeting
6 with an individual, but do you remember a situation in which you
7 were supposed to meet with Richard Fuentes and forgot?

8 A No.

9 Q And as a result did not meet with him?

10 A I don't recall any such event.

11 MS KEARNS: I need to confer with counsel for just a
12 moment.

13 THE COURT: Okay.

14 (Discussion off the record between counsel.)

15 MS KEARNS: Q Dr. Czarnik, we heard testimony in the
16 case to date about a company called ABI, correct?

17 A Yes.

18 Q And ABI was also previously known as PE Biosciences,
19 correct?

20 A Correct.

21 Q So ABI and PE Biosciences are the same company for
22 purposes of this case?

23 A For the purposes of the case, yes.

24 Q And you testified on direct you had given a talk to --
25 a speech at UCSD in April of 1999, right?

26 A Yes.

27 Q And at that conference or that talk, Michael Albin from
28 ABI was present, correct?

1 A Correct.

2 Q And you detailed a dinner discussion that you had with
3 him following the seminar, correct?

4 A Correct.

5 Q And you say that you gave him John Stuelpnagel's card
6 for follow-up?

7 A I think I gave him John's name for follow-up.

8 Q Okay.

9 Now, you testified on direct that you didn't learn about the
10 ABI collaboration until the contract between Illumina and ABI was
11 actually being drafted, right?

12 A I didn't learn there was an agreement until we had a
13 contract draft in place.

14 Q Now, during 1998 and into 1999, until Jay Flatley
15 arrived, John Stuelpnagel was the acting CEO, correct?

16 A Correct.

17 Q Now, throughout your employment with Illumina, you were
18 never a member of the board of directors, were you?

19 A No.

20 Q Mark Chee wasn't a member of the board of directors
21 either, was he?

22 A No.

23 Q And Rich Pytelewski wasn't a member of the board of
24 directors?

25 A No.

26 Q But John Stuelpnagel was, correct?

27 A Yes.

28 Q And during the period of time that John Stuelpnagel was

1 acting CEO, isn't it true that when he was in charge of running
2 the board of directors meetings, he routinely invited and included
3 all of his members at senior management?

4 A Yes.

5 Q And so during John Stuelpnagel's tenure as acting CEO,
6 you, Mark Chee and Mr. Pytelewski were included and invited to
7 board of directors meetings?

8 A Yes.

9 Q I would presume that since none of the three of you
10 were actually directors, you didn't cast votes at these meetings?

11 A No, we didn't.

12 Q But you were physically present and allowed to sit in
13 on these meetings, correct?

14 A Yes.

15 Q And I would assume that from time to time each of the
16 three of you actually participated verbally and spoke up in these
17 meetings?

18 A From rare time to time.

19 Q Wouldn't it be fairly common in these board of
20 directors meetings for John Stuelpnagel perhaps to call upon you
21 to give a report to the board of directors about research
22 activities?

23 A Yes, we were each asked to give a report about
24 activities under our jurisdiction or area of responsibility.

25 Q And although you weren't actual members of the board of
26 directors, you were participating or attending at least the
27 meetings, correct?

28 A Yes.

1 Q And that is true from 1998 up until about October of
2 1999, correct?

3 A Yes.

4 Q And isn't it true that before every board of directors
5 meeting, there would be what's commonly referred to as the board
6 packet?

7 A Yes.

8 Q And it's a set of written materials, correct?

9 A Yes.

10 Q Typically with an agenda and some attachments?

11 A Yes.

12 Q And you were provided with a copy of the board packets
13 at these meetings, correct?

14 A To the best of my recollection, yes.

15 Q Now, you say that you didn't know about -- You didn't
16 know that a deal had been struck between ABI and Illumina until
17 the contract was already in the drafting stages?

18 A Correct.

19 Q When was that, sir?

20 A I believe that would have been in late August of 1999.
21 That's my best recollection.

22 Q Now, isn't it true that the collaboration with ABI is
23 mentioned in the February, 1999 board packet?

24 A I'm afraid I don't know.

25 Q Any reason to dispute that statement?

26 A I don't have any reason to even comment on it.

27 Q Isn't it true that the ABI collaboration with Illumina
28 is also specifically referenced in the April, 1999 board packet?

1 A Same answer.

2 Q You don't know?

3 A I don't know.

4 Q Well, by the time you gave your talk at UCSD in April
5 of 1999, isn't it true that you knew that Illumina was in
6 discussions and in negotiations with ABI?

7 A What I knew was that we had talked as a threesome,
8 Mark, John and I, about what a good partner ABI would make and why
9 we should be targeting them for potential business development.

10 Q I'll ask my question again. At the time you gave your
11 talk at UCSD in April of 1999, didn't you know that there was this
12 collaboration with ABI in negotiation? In other words, not that
13 it was just internally discussed that ABI would be a good partner
14 to have, but by April of 1999, you knew that Illumina was actually
15 in negotiations with ABI?

16 A To the best of my recollection, we were not in
17 negotiations with ABI at that point.

18 Q So your answer would be no?

19 A If you'd ask it again, please, so I'm sure I'm
20 answering it right.

21 Q You don't remember knowing in April of 1999 -- You
22 don't have any recollection of having a belief in April of 1999
23 that the company was already in negotiations with ABI?

24 A I believe we were not in negotiations with them at that
25 point.

26 Q Now, isn't it true that you are familiar with the terms
27 of the ABI deal that were eventually struck, correct?

28 A I'm familiar with the milestones. I'm familiar with

1 some of the terms. I don't know if I'm familiar with all of the
2 terms.

3 Q Okay. Isn't it true that during the drafting stages
4 when ABI and Illumina were trying to put together a contract
5 embodying their agreement, isn't it true that Dr. Stuelpnagel sent
6 you copies of those drafts and asked for your review and
7 commentary?

8 A Yes.

9 Q And he did that with Mark Chee as well?

10 A I don't know.

11 Q Do you know whether he included Mr. Pytelewski in that
12 effort?

13 A I don't know.

14 Q But you know he did with you?

15 A Yes.

16 Q And so isn't it true, Dr. Czarnik, that ABI was seeking
17 to obtain from Illumina bead arrays that would be used by ABI for
18 a genotyping application?

19 A Yes.

20 Q And your expertise did not lie in the area of genomics
21 or genotyping, correct?

22 A Providing bead arrays.

23 Q But not -- so your -- If you had to characterize,
24 then, your expertise lay in the area of doing the chemistry
25 necessary to build or create the bead arrays and then the bead
26 arrays would be provided to ABI for a genotyping application?

27 A My responsibility was to provide the bead arrays.

28 Q Isn't it true John Stuelpnagel and Mark Chee were the

1 two individuals who did the negotiating of the ABI contract on
2 behalf of Illumina?

3 A Yes.

4 Q And although your input was sought with respect to
5 drafts of the contract and so forth, you didn't personally do any
6 of the negotiating?

7 A I asked to be involved but wasn't involved.

8 Q So you actually didn't do any of the negotiating,
9 correct?

10 A That's correct.

11 Q Now, I take it from your last answer it's your
12 contention that you were prevented or denied the opportunity to
13 participate in the ABI deal?

14 A I don't know motivations. I simply know what I asked.

15 Q Okay. You asked and what was -- To whom did you
16 direct this request?

17 A To John Stuelpnagel.

18 Q What did he say?

19 A John said nothing to that question.

20 Q So just total lack of response?

21 A Yes.

22 Q Dr. Czarnik, to the best of your knowledge, Richard
23 Pytelewski wasn't involved in negotiating the ABI deal, was he?

24 A Not best of my knowledge, no.

25 Q Do you have any knowledge one way or another whether
26 Mr. Pytelewski made a request to be involved in negotiating?

27 A I don't know.

28 Q Do you think it's a reasonable conclusion to say that

1 when a company is negotiating with another company, at some point
2 there may need to be a limit on the number of people involved in
3 the negotiations?

4 A In general, certainly.

5 Q Would you agree that it may make sense when a company
6 is negotiating with another company, that it may make sense to
7 have the persons who are most knowledgeable about the subject
8 matter of the negotiation to be the negotiators?

9 A Sometimes it's most knowledgeable, sometimes it is most
10 responsible, sometimes it's greatest authority. It can vary.

11 Q So you testified in direct that you did not receive a
12 100,000 share stock purchase grant in connection with the ABI
13 deal, correct?

14 A That is correct.

15 Q You are saying that Mark Chee and John Stuelpnagel did
16 receive 100,000 shares or they received the opportunity to
17 purchase a hundred thousand shares as a result of their
18 involvement in the ABI deal?

19 A I don't honestly know if it was a grant or it was --
20 or the right to purchase.

21 Q Isn't it true that both you and Richard Pytelewski, who
22 did not negotiate the deal, were both given 25,000 share grants
23 contingent upon the achievement of certain milestones in the ABI
24 contract?

25 A Yes, we were permitted to buy 25,000 shares at nine
26 cents a share.

27 Q In fact those are the 25,000 shares that were
28 repurchased by the company at exactly that same price, nine cents

1 a share, correct?

2 A Yes.

3 Q Now, Dr. Czarnik, you testified on direct about having
4 had a discussion with John Stuelpnagel on a Saturday. Do you
5 remember that testimony generally?

6 A Yes.

7 Q You said on direct that this discussion took place on
8 Saturday, May 29. Do you have --

9 MR. PANTONI: I'm going to object to that. He said it
10 was last Saturday in May. He didn't give a specific date.

11 THE COURT: Sustained.

12 MS KEARNS: Q You told us that there had been -- that
13 this was the first discussion you and John Stuelpnagel had since
14 your breakdown, correct?

15 A I remember it as the first back and forth discussion
16 that we had.

17 Q But before the lunch break, you acknowledged that there
18 had been some verbal communication between you and John
19 Stuelpnagel between April 6 and the end of May, correct?

20 A I'm sure there was some.

21 Q Now, you may remember me asking you about this meeting
22 in your deposition last summer. Do you remember that?

23 A No, I don't remember it.

24 Q If I were to suggest to you that this discussion took
25 place between you and John Stuelpnagel on a Saturday at the end of
26 April, would you have any reason to disagree?

27 A Yes, my recollection it was at the end of May.

28 Q Going to look at your deposition, page 368. 368 is in

1 Volume 3. Actually 367, line 20:

2 "QUESTION: Did you ever express any concern
3 to John Stuelpnagel about this apparent reduction in
4 frequency of communication between the two of you?

5 "ANSWER: Yes.

6 "QUESTION: When did you do that?

7 "ANSWER: One Saturday I was working in the
8 office and John was at work as well, and he sat and
9 initiated a discussion.

10 "QUESTION: Approximately when did this occur?

11 "ANSWER: Approximately June of 1999."

12 Now, before the lunch break, Dr. Czarnik, I was asking you
13 about various financing, and I was asking you about the financing
14 in which Illumina raised roughly \$9 million.

15 A Yes.

16 Q I asked you whether that wasn't Illumina's Series B
17 financing. Do you remember that?

18 A Yes, I remember that.

19 Q And you told me that that was the one that was referred
20 to as Series A or seed money?

21 A I don't think that's what I said.

22 MR. PANTONI: That mischaracterizes the testimony.

23 MS KEARNS: Q When did Illumina's Series -- I'm sorry,
24 I think -- Just let's correct it and get a clean record.

25 I think you told me that the round which I called Series A,
26 which closed in June of 1998, you say it was referred to as the
27 seed money round, is that correct?

28 A The seed round. That's at least how we referred to it

1 internally.

2 Q I was wrong. And then I asked you whether the round
3 that closed in November, 1998, was known as the Series B round,
4 and you said no, that was referred to as the Series A round.

5 A We referred to it as the first major round. My
6 recollection is that it was also referred to as the Series A
7 round.

8 Q Do you have -- Are you aware that the complaint that
9 you filed in this case refers to that round, the November, 1998
10 round, as the Series B round?

11 MR. PANTONI: Your Honor, I'm going to object on the
12 grounds of relevance.

13 THE COURT: Why is this important? Is it important if
14 it's called Series A or B? We know it happened, we know how much
15 was raised. I think it's irrelevant.

16 MS KEARNS: I think the relevance is to show this
17 witness' lack of familiarity with the financing rounds,
18 particularly given the fact he is making it an issue of his non-
19 participation in the IPO and the S1 drafting.

20 MR. PANTONI: I wrote the complaint, Judge.

21 THE COURT: We can take judicial notice of the
22 complaint. Is it a verified complaint?

23 MR. PANTONI: No. Maybe I got it wrong.

24 MS KEARNS: Q Now, Dr. Czarnik, you say that -- Well,
25 there was a round of financing, whether you want to call it a
26 Series A or Series B, but there was an A round of financing that
27 closed in late 1998, November, 1998, when John Stuelpnagel was
28 acting CEO, correct?

1 A Correct.

2 Q You told us on direct that you participated in the
3 various activities leading up to that financing, right?

4 A Except for -- The answer is yes.

5 Q Yeah. I'm not saying you participated in each and
6 every meeting or each and every discussion, but you are saying you
7 substantially participated.

8 A Yes.

9 Q In the activities leading up to the closing of that
10 financing, correct?

11 A Yes.

12 Q Doesn't it prove there was another financing, which I
13 would be inclined to call the Series C, but since we have this
14 divergence on naming I'll just say isn't it true there was another
15 financing that closed in November of 1999, after Jay Flatley was
16 on board?

17 A Yes.

18 Q And it's your contention that you were excluded from
19 participation in connection with that round of financing?

20 A It's my contention that I wasn't asked to participate
21 in that round as I had in previous rounds, the previous round.

22 Q Do you have any belief as to the reason or reasons you
23 were not asked to participate in connection with the round that
24 closed in November of 1999?

25 A Well, my belief is that I wasn't involved in a lot of
26 things that happened in the last half of 1999. I just take that
27 as one of those.

28 Q Pardon me?

1 A I was not involved in a lot of company activities in
2 the last half of 1999, and that was one them.

3 Q And is it your belief that you were not asked to
4 participate in connection with this financing, this November, 1999
5 financing? Strike that.

6 Is it your belief that the company's failure to ask you to
7 participate in connection with the November, 1999 financing had
8 something to do with your disclosure of depression earlier that
9 year?

10 A I don't know what their motivation was for not
11 including me.

12 Q Now, you said that you did participate in connection
13 with the various activities that led up to the preceding
14 financing, the one that closed in November of '98, correct?

15 A Correct.

16 Q What sort of activities were you involved in in
17 connection with that financing?

18 A Beginning in June of 1998, we created a list of what
19 things the company should accomplish before we could ask for money
20 at a higher stock value, and we, as a group, set out to fulfill
21 that list. And then as we were fulfilling that list, John had
22 identified venture firms that he was -- had experience with in his
23 previous role as associate for Larry Bock, and John set up the
24 meetings for those presentations, and then Mark, John and I went
25 to give presentations at Venrock and at -- I'm blanking on the
26 name of it, -- and there were two of the major presentations that
27 I was involved with in that round.

28 Q Let's talk for a moment about Venrock. You testified

1 in direct that Venrock is the venture arm of a Rockefeller family
2 trust or something, is that accurate?

3 A That's about what I understand as well.

4 Q And isn't it true that there had been some meetings
5 with Venrock, Venrock representatives, in Palo Alto or in Silicon
6 Valley?

7 A Yes.

8 Q Did you go to those meetings?

9 A I definitely went to a meeting in Palo Alto. I just
10 don't remember if that was the Venrock meeting or another meeting
11 on Sand Hill Road.

12 Q Or this other venture company that's on Sand Hill Road?

13 A There are a lot there, but I just -- I think it was
14 Venrock in Palo Alto.

15 Q And --

16 A No, that was Sam [Colella's]⁸⁸ company. It wasn't Sam
17 [Colella's]⁸⁸ company. I'm getting them mixed up.

18 Q Let me just back up. Isn't it true that the reason you
19 and John and Mark were meeting with Venrock was to try to convince
20 them to invest money in Illumina?

21 A Yes.

22 Q And isn't it true that in October of 1998, there was a
23 meeting in New York City with Venrock representatives back there?

24 A Yes.

25 Q And before this New York City visit, isn't it true that
26 you, Dr. Stuelpnagel and Dr. Chee had already met with some of the
27 Venrock associates in their Palo Alto office?

28 A I think that's correct.

⁸⁸ Original transcript read, "Kalella's".

1 Q And isn't it true that in connection with the New York
2 meeting, which was a follow-on meeting, Dr. Stuelpnagel told you
3 and Dr. Chee that it was going to be a more formal meeting than
4 the one held in Palo Alto and that all three of you needed to wear
5 business suits?

6 A Well, I remember him saying it was going to be more
7 formal and that we needed to wear suits.

8 Q And in fact when you gathered that morning in New York
9 City for the meeting, to go to the meeting, you realized that you
10 were attired much more casually than Drs. Stuelpnagel and Chee,
11 correct?

12 A Well, I was not wearing a black suit as they were.

13 Q You testified in deposition -- Well, isn't it true
14 that you were wearing a blazer and light-colored or white pants?

15 A I was wearing blue sports coat. I think they were
16 probably khaki pants, a shirt and tie.

17 Q And isn't it true that this meeting with Venrock took
18 place in its offices in an office tower in New York City?

19 A In Rockefeller Center.

20 A And isn't it true that you called for a break in the
21 meeting with the Venrock representatives?

22 A I asked if we could have sometime to discuss an offer
23 that they had made.

24 Q But the way the request was phrased, Dr. Czarnik, isn't
25 it true that you weren't saying can we have a couple of weeks, you
26 were asking the Venrock people to step out of the room for a
27 minute?

28 A Yes, that's correct.

1 Q And isn't it true that while the Venrock -- And you
2 were there for the purpose of discussing or trying to convince
3 Venrock to put money into Illumina, right?

4 A Yes.

5 Q Essentially the Illumina folks were going with their
6 hats in their hand saying essentially, "Fund us"?

7 A We were giving them the opportunity to invest in a good
8 company.

9 Q And isn't it true that after you called for a break in
10 order to discuss the offer that Venrock had put on the table, you
11 then took a flat paper doll and took a photograph of the paper
12 doll with the Empire State Building in the background?

13 A It's accurate but incomplete.

14 Q I'm sure your counsel will redirect you.

15 You testified in deposition you did this because your niece
16 had a school project to photograph the doll, Flat Stanley, in a
17 variety of settings?

18 A Yes. We had photographed Flat Stanley in a variety of
19 settings, and from that view we could see the Empire State
20 Building and the World Trade Center in the background.

21 Q You had a break, called a break in this meeting so you
22 could photograph Flat Stanley for your niece?

23 A Wrong.

24 Q Now let's go back to the Saturday discussion that you
25 had with Dr. Stuelpnagel, whether it was in April, May or even
26 June, according to your deposition. Who initiated the discussion?

27 A John did.

28 Q And on direct you said that he testified -- that he

1 told you -- he suggested to you that you set aside your
2 differences?

3 A Yes.

4 Q Isn't it true, Dr. Czarnik, that this Saturday talk
5 that occurred either in April, May or June of 1999 was actually a
6 discussion in which Dr. Stuelpnagel expressed to you concerns
7 about your performance and your commitment?

8 A No, ma'am.

9 Q Are you certain of that?

10 A I'm absolutely certain.

11 Q Now, one of the other points you mentioned, Dr.
12 Czarnik, is that you stated on direct that after Jay Flatley came
13 on board, he created certain working groups, and that there was a
14 working group to address decoding with Steve Barnard at the helm
15 of that group, right?

16 A That occurred on September 1, 2000. It was announced
17 on September 1, 2000.

18 Q So that would be after Jay Flatley was on board as CEO?

19 A Yes.

20 Q And on your direct testimony you were asked whether you
21 were part of that group, part of that decoding group, and you said
22 you were not, correct?

23 A Yes.

24 Q And Mr. Pantoni asked you whether you were given the
25 role of leading up any group and you said you were not, correct?

26 A Correct.

27 Q And I think you were also asked whether you were a
28 member, assigned to any particular working group, and you said you

1 were not, correct?

2 A I only remember the decoding working group having been
3 assigned on September 1st.

4 Q Let's put up Exhibit 64.

5 Dr. Czarnik, do you recognize this document?

6 A Yes.

7 Q And if I scroll down, you see the Bates stamp number
8 C0883?

9 A Yes.

10 Q This indicates that this is a document that was
11 produced by you to Illumina in this litigation, correct?

12 A Yes.

13 Q This is a document that you created?

14 A Yes.

15 Q And let's blow it up a little more.

16 Its title is "Illumina R&D Working Groups and Topics,
17 Version 29 April 99." Do you see that?

18 A Yes.

19 Q So is this a document that you created or revised on or
20 about April 29th, 1999?

21 A Yes.

22 Q And in this document, Dr. Czarnik, isn't it true that
23 you are proposing by way of this document, you are proposing that
24 working groups be developed?

25 A I'm not proposing it. By this point I had talked with
26 all the managers and all the scientists and we had come to an
27 agreement that we would do it. So this was a report on what we
28 had all agreed to.

1 Q Okay. In fact you say we're going to experiment with
2 working groups at Illumina, correct?

3 A Yes.

4 Q And your proposal -- Well, your statement then here is
5 you are creating eight different working groups, correct?

6 A Yes.

7 Q As to the decoding or optical bead encoding group, you
8 were proposing that Steve Barnard be the task person, correct, the
9 point person?

10 A The point person for that group.

11 Q And other members of that group would be Chanfeng and
12 Steve Auger?

13 A Yes.

14 Q So with respect to these working groups, would you
15 agree with me, Dr. Czarnik, the working groups as detailed in your
16 memorandum, of April 29th, 1999, first of all these were
17 interdisciplinary groups?

18 A Correct.

19 Q They involved, if you look at any given team, they may
20 have involved people from chemistry, may have involved people from
21 molecular biology, may have involved engineers, right?

22 A That was exactly the point of my creating this.

23 Q And in creating this, you don't propose or you don't
24 list yourself as being the head or point person of any of the
25 working groups, correct?

26 A Correct.

27 Q And in fact you don't list yourself as being a member
28 of any of those working groups either, correct?

1 A There's no member of senior management who is on that
2 list.

3 Q Including yourself?

4 A Including myself.

5 Q Now, Dr. Czarnik, one of the statements that you made
6 on your direct is that after Jay Flatley came on board, he wasn't
7 in your view using you as the CSO, is that right?

8 A Yes.

9 Q And you told us that Jay did not try to sit down and
10 talk with you and learn about your role other than a 15-minute
11 talk that he had with you and with each of the other members of
12 the team, correct?

13 A In the early days, at some point we eventually gave
14 presentations on research that was going on in chemistry.

15 Q How is it you have this recollection that the meeting
16 was only 15-minutes long?

17 A Jay had a 15-minute long meeting with everyone in the
18 company.

19 Q Did you time the meeting in any fashion?

20 A No, the schedule was set up for 15 minutes per person.

21 MS KEARNS: I'd like to put up what we'll have the clerk
22 mark Exhibit 383. It's a one-page document including --
23 reflecting e-mail communications on September 23, 1999. Your
24 Honor, shall I deliver this to the clerk at this time?

25 THE COURT: You can mark it later on. Is this a copy
26 for the Court?

27 MS KEARNS: Q Dr. Czarnik, take a look at what we have
28 up on the screen. It's Exhibit 383. These are e-mails dated

1 September 23, 1999. The one in the middle, right, is a message
2 from Jay Flatley to -- dated Thursday, September 23, 1999, and
3 it's being sent to Mr. Pytelewski, to you, to [Michal]⁴¹ Lebl, to
4 Mark Chee, with copy to John Stuelpnagel. You see that?

5 A Yes.

6 Q This e-mail appears to be a meeting schedule, in fact
7 the subject says, "Individual Meetings," that Jay Flatley was
8 trying to set up with you, Rich, [Michal]⁴¹ and Mark. Do you see
9 that?

10 A Yes.

11 Q And would you agree with me that this schedule seems to
12 be organized in 45-minute increments rather than 15 minute
13 increments?

14 A Yes.

15 Q Let me show you -- So, Dr. Czarnik, with respect to
16 this proposed meeting schedule, with 45-minute time increments,
17 did you in fact have a 45-minute meeting with Jay Flatley or are
18 you suggesting that he shortened the meeting and only gave you 15
19 minutes?

20 A I don't recollect having had this meeting.

21 Q You just don't remember?

22 A No.

23 Q And at the bottom it says, "Jay would like to reserve
24 some individual meeting times for Friday morning." This is the
25 message from John Stuelpnagel to you, Mark, Rich and [Michal]⁴¹ Lebl,
26 sent to you to Thursday. It's forwarding Jay's message in which
27 these are proposed meeting times for Friday, which would have been
28 September 24th. You just don't have any recollection of having

1 such a meeting with Jay Flatley on September 24th?

2 A I don't.

3 Q Let's put up what is next in order. I believe it's
4 Exhibit 384. Dr. Czarnik, do you recognize this as an e-mail
5 dated September 27th, Monday, sent by you to John Stuelpnagel,
6 copy to Rich Pytelewski and Mark Chee?

7 A I don't remember the e-mail, but I can read what's on
8 it, who it's to.

9 Q You recognize it being an e-mail from you to John
10 Stuelpnagel?

11 A No, I don't remember the e-mail.

12 Q You are not -- You have no reason to believe this is a
13 fabricated document, do you?

14 A Are you asking me what I think the company is capable
15 of?

16 Q No, that wasn't my question at all, Dr. Czarnik. You
17 are saying you don't remember the e-mail, and I just want to make
18 sure that there are a number of things that you haven't been able
19 to remember. I'm just asking you whether you are taking the
20 position that this isn't a genuine e-mail taken off your hard
21 drive, because your counsel and I had a stipulation concerning
22 authenticity of documents.

23 MR. PANTONI: If I have a problem of authenticity, I'll
24 make the objection.

25 THE COURT: You are representing to the witness this
26 came off his hard drive?

27 MR. PANTONI: I have no idea.

28 THE COURT: I'm asking defense counsel.

1 MS KEARNS: I believe it did.

2 Q Dr. Czarnik, could you read the sentence -- Could you
3 just read your message to John Stuelpnagel, and this is the e-mail
4 which appears to have been sent Monday, September 27, 1999, from
5 you to John Stuelpnagel. I understand that you claim not to
6 remember this e-mail, but can you please read for me the content
7 of the message?

8 A I'll read to you the line that's written on the board.
9 "John, let's get Jay involved. Based on my 45 minutes with him on
10 Friday, he seems to have a lot of connections in the engineering
11 world."

12 Q And signed Tony?

13 A Tony.

14 MS KEARNS: Your Honor, counsel says we usually break
15 at 2:30. I'm fine with that.

16 THE COURT: Okay. We'll take our evening recess at
17 this time. We'll be in recess until 2:45. Please remember the
18 admonition not to form or express any opinions about the case, not
19 to discuss the case among yourselves or with anyone else. We'll
20 be in recess until 2:45. 2:45.

21 (Recess.)

22 THE COURT: Record indicate all the jurors are
23 present, counsel, parties present.

24 You may continue your cross-examination.

25 MS KEARNS: Thank you, your Honor.

26 Q Let's put up Exhibit 85, please.

27 Let's go down to the bottom, which is the original message.
28 Then blow it up, please.

1 Dr. Czarnik, this is Exhibit 85, which has previously been
2 used, I believe, during your direct examination. This is an
3 e-mail which you sent to Jay Flatley on Friday, September 24,
4 correct?

5 A Correct.

6 Q It says, "Jay, one area I had intended to address this
7 morning is my standard weekly work schedule." Does this reference
8 in this e-mail in any way refresh your recollection as to whether
9 you had a 45-minute meeting with Jay Flatley on Friday, September
10 24th?

11 A It suggests I had a morning meeting with him, but I
12 couldn't testify to the length.

13 Q And the prior e-mail that we had up on the board before
14 the break in which you talked about your 45 minutes with Jay, that
15 didn't refresh your recollection as to the length of the meeting?

16 A No.

17 Q Now, as of September 24th, 1999, Jay Flatley wasn't
18 actually on board at Illumina yet, was he?

19 A He was on site but not on board.

20 Q Okay. And so isn't it true that Jay Flatley did meet
21 with you for some duration in September of 1999 before he was
22 actually on board as CEO?

23 A Yes.

24 Q And in this e-mail you are telling Jay that you are --
25 about your typical hours, and then you say that you like to take
26 an hour during mid-afternoon to swim, "it's reinvigorating."
27 Right?

28 A Yes.

1 Q You didn't tell Jay Flatley in this e-mail that you
2 liked to take three hours mid-afternoon to go swimming, did you?

3 A No.

4 Q Scroll up to the response, please.

5 This is Jay's response sent to you September 26th, a couple
6 of days later, and he states that he got this as he was leaving
7 Friday, hence the delayed response. He makes a statement about
8 your work schedule, have no problem as you've described it, but
9 stating that, "All of us need to be sufficiently available that
10 subordinates and peers feel that we are pulling our share of the
11 load."

12 This question posed by Jay Flatley, "Have you had any prior
13 input from John on this that has you concerned," do you see that
14 language?

15 A Yes.

16 Q Had you had some prior input from John Stuelpnagel
17 about your weekly schedule or your swimming that had you -- that
18 prompted you to send this e-mail to Jay Flatley before he began as
19 CEO of Illumina?

20 A So the question is have I -- had I had any feedback
21 from John?

22 Q Essentially I'm putting the same back to you that
23 Mr. Flatley asked you. Had you received some prior input from
24 John Stuelpnagel that had you concerned about your schedule?

25 A The input I'd had from John was that in the first
26 summer I had missed days that I wasn't on site. In terms of
27 hours, I had not had a previous feedback from John about hours.
28 We had set company hours, as I think it was 8 to 6. And so the

1 answer is no, I don't recollect having had any input from John
2 that had me concerned.

3 Q When, sir, in time did you begin your practice of
4 taking a mid-afternoon swim?

5 A The beginning of September of that year.

6 Q The beginning of September of 1999?

7 A Yes.

8 Q So during Dr. Stuelpnagel's tenure as acting CEO for
9 virtually all of it, you were not taking these swims, correct?

10 A Correct.

11 Q So swimming wouldn't have been an issue between you and
12 Dr. Stuelpnagel, correct, because save one month of his
13 [leadership]⁸⁹, you weren't taking a mid-afternoon swim?

14 A Correct.

15 Q Now I'd like to focus for a moment, Dr. Czarnik, on the
16 lunch that you talked about having had with Jay Flatley in
17 October, 1999, right after he came -- shortly after he came on
18 board as CEO, as he was formally in place as CEO. During this
19 lunch you told us on direct that you made a comment to Jay Flatley
20 in which you said you can be kind of cynical at times?

21 A Yes.

22 Q What prompted you to make that kind of a statement to
23 Mr. Flatley?

24 A This was the first occasion that Jay and I had had to
25 talk with each other in terms of our management styles, our
26 leadership styles, our concerns, and I thought it would be helpful
27 for Jay to know that my response to some situations could be
28 cynicism.

⁸⁹ Original transcript read, "readership".

1 Q And his response to your statement was what?

2 A Jay's response was, "Are you sure it isn't more than
3 that?"

4 Q And what interpretation or conclusion, if any, did you
5 draw from Mr. Flatley's response?

6 A I drew the conclusion that Jay was -- Jay had
7 information about me that I hadn't offered and that he was hoping
8 to get me to offer it in response to his question.

9 Q Are you saying that you concluded that Jay Flatley knew
10 that you suffered from depression?

11 A Are you asking me what I thought?

12 Q Yes.

13 A Yes, at that time I thought that Jay was aware of my
14 fight with depression.

15 Q The reason you concluded or the reason you believed Jay
16 Flatley knew about your depression was because of his response,
17 "Are you sure it's not more than that"?

18 A No, it was somewhat more than that.

19 Q What else contributed to your conclusion in October of
20 1999 that Jay Flatley knew that you had a history of depression?

21 A My response to that question was this isn't something
22 that I wanted to talk about right now, and Jay didn't push me on
23 the issue.

24 Q Well, --

25 A And then --

26 Q I'm sorry, I need to stop you just so I get a clear
27 record, Dr. Czarnik.

28 MR. PANTONI: I prefer he be allowed to finish answering

1 the question that was asked, and that's, "What else caused you to
2 believe it?"

3 MS KEARNS: I'll certainly allow the witness to give a
4 complete response, but let me ask you this first, Dr. Czarnik.

5 Q If I misunderstood you, I'm happy to be corrected, but
6 I thought you told me that by the point when Jay Flatley said are
7 you sure it's not more than that, you concluded that he knew?

8 A We had an approximately three-sentence exchange, and by
9 the end of that exchange, in my mind I felt that he knew.

10 Q Okay. So when he said, "Are you sure it's not more
11 than that," that question alone did not cause you to conclude that
12 he knew anything about your disability?

13 A I don't remember how I responded immediately after he
14 said that. I remember thinking about it after the exchange.

15 Q Okay. Then what else transpired in the exchange?

16 A Let's see. I said, "I can sometimes be cynical," and
17 then Jay said, "Well, how will I know when you are feeling
18 cynical?" and I said, "After so many years of dealing with it, I
19 can measure myself pretty well and I'll simply let you know."

20 Q So can you explain -- Is that the entire exchange?

21 A Yes.

22 Q What was it about that exchange that caused you to
23 conclude -- And you've recounted to us to the best of your
24 recollection what you said and what Mr. Flatley said in that
25 exchange?

26 A Yes.

27 Q Can you explain to me what it is about that exchange
28 that caused you to conclude that Jay Flatley had any information

1 about your disability?

2 A It was simply the way that I read the words and the
3 situation and the face and not following up on statements, and it
4 was simply my general conclusion from the exchange.

5 Q Now, in your direct examination, Dr. Czarnik, you said
6 that you denied being involved in discussions about who the new
7 CEO should be, right?

8 A What I recall is that I wasn't involved in the earliest
9 stages of Mr. Flatley's consideration as a CEO.

10 Q But certainly by the point in time that he was meeting
11 with people for purposes of being evaluated as a possible new CEO,
12 you were involved in that process, right?

13 A I was involved in the meeting at which Jay came to
14 Illumina and met with the junior management team.

15 Q In fact you gave your feedback about Mr. Flatley to
16 John Stuelpnagel?

17 A Yes.

18 Q And did Dr. Chee and Mr. Pytelewski do the same?

19 A I don't know.

20 Q Didn't do it in your presence, at least?

21 A Right.

22 Q I'd like to focus now on the dinner that you had with
23 Mr. Flatley at [Daley's]¹³ on February 7th, 2000. Who initiated this
24 dinner? Who proposed it?

25 A Give me a moment to remember, please.

26 Jay proposed it.

27 Q And in setting up the dinner meeting, did Mr. Flatley
28 tell you what the purpose of the dinner would be?

1 A No.

2 Q Just said he'd like to go to dinner with you?

3 A A bit more than that. I had been -- Well, I didn't
4 know what the purpose of the dinner meeting was going to be.

5 Q And during this dinner meeting at [Daley's]¹³, isn't it
6 true that Mr. Flatley discussed with you some of the feedback he
7 had received from Dr. Walt concerning your performance at the
8 January SAB meeting?

9 A Yes.

10 Q Did Mr. Flatley tell you that David Walt had told him
11 at least he felt you were disengaged and disorganized?

12 A I believe that Jay had told me that previously, and it
13 came up again at dinner.

14 Q Now, during this dinner meeting, isn't it true that you
15 and Mr. Flatley began talking about the fact that the company was
16 looking to go public?

17 A Yes, I believe that topic came up.

18 Q And apart from this dinner, isn't it true, Dr. Czarnik,
19 that originally it was anticipated that the company's IPO was
20 going to occur earlier than the summer of 2000?

21 A I don't know.

22 Q Do you ever remember hearing while at Illumina that the
23 company was gearing up for and trying to have its IPO happen in
24 May of 2000?

25 A I don't recall that.

26 Q Before I continue with the [Daley's]¹³ dinner, I want to
27 try to keep a chronological order, even though I'm not doing the
28 best job of it. Let me ask you to focus on February 1, 2000.

1 This precedes your [Daley's]¹³ dinner by about a week. You told us on
2 direct that on that date you and David Walt went to breakfast?

3 A Yes.

4 Q And you told us that David Walt asked you whether you
5 were still interested in Illumina, right?

6 A Yes.

7 Q And your response, you told us in court that you were
8 flabbergasted by the question?

9 A Yes.

10 Q Why?

11 A Up until that point, I didn't have any reason to think
12 that David would even question that.

13 Q Did you have any belief as to the reasons why David
14 Walt was asking you whether you were still interested in the
15 company?

16 A Did I have a belief why he was asking me?

17 Q Well, let me ask you this. Let me withdraw the
18 previous question.

19 Did David Walt tell you why he was asking you whether you
20 were still interested in Illumina?

21 A I asked David why he was asking me that question.

22 Q And what did he say?

23 A And he said -- Essentially what he said was that he was
24 asking that question of his own volition. He didn't use the word
25 "volition," but he was the one who was -- who wanted to ask me.
26 It wasn't a message coming through from somebody else.

27 Q Were you worried that it was coming to you through
28 David Walt but was really being -- the question was really being

1 put out there by someone else?

2 A I think most people would be concerned about that, and
3 I was.

4 Q Okay. So you are saying that when David Walt asked you
5 -- David Walt was at the Scientific Advisory Board meeting of
6 January, 2000, correct?

7 A Correct.

8 Q He was there for the entire meeting, to the best of
9 your recollection?

10 A Yes.

11 Q And you are saying that when David Walt asked you
12 whether you were still interested in Illumina, you thought that
13 perhaps he was asking that question of you at the request of
14 someone else. In other words, that someone else put him up to it?

15 A Well, as I've testified, I still consider myself
16 David's friend, and certainly at that point he considered me a
17 friend as well. I'd known David from between 10 and 15 years, and
18 I felt very strongly that David would not be asking me a question
19 like that based on one meeting that we'd had. And frankly I still
20 don't believe it.

21 Q Didn't Dr. Walt tell you during this breakfast meeting
22 that he felt you had behaved in a way that was disengaged,
23 disinterested during the January 2000 SAB meeting?

24 A No.

25 Q If there were a characterization on the part of Dr.
26 Walt that he talked to you about his concerns about -- So let me
27 ask you this: Are you denying that Dr. Walt expressed any
28 concerns to you about your performance at the January 2000 SAB

1 meeting?

2 A What I remember of that conversation is that David --
3 We were having a breakfast and David was uncomfortable, and we
4 were sitting at a table together and David was trying to ask me
5 something but he was having trouble working up the nerve, and I
6 said, "David, just whatever it is, just ask me, just ask me and
7 we'll deal with it."

8 A And David said, "Well," and he had a hard time working his
9 way up to it, he said, "Are you still interested in Illumina?"

10 Q Dr. Czarnik, I am going to stop you there. Thank you
11 very much for setting the stage for the question, but actually my
12 question had been whether in this breakfast meeting Dr. Walt
13 expressed to you any criticisms or concerns about your performance
14 at the January 2000 SAB meeting. So could you answer that
15 question, please?

16 A To the best of my recollection, David did not raise any
17 concerns. Jay told me later that David had raised concerns to
18 him.

19 Q But it's your contention that David Walt never raised
20 any concerns directly with you about your performance at that SAB
21 meeting?

22 A No, David did send me an e-mail in which he raised
23 concerns about how the SAB meeting had gone, but that wasn't at
24 this breakfast.

25 Q Did that e-mail precede this breakfast? What was the
26 date of the e-mail, if you remember?

27 A I don't recall.

28 Q If Dr. Walt characterized your January -- So if Dr.

1 Walt testified that he did express to you concerns about your
2 performance at the January SAB meeting during this particular
3 breakfast, you would say he's being untruthful?

4 MR. PANTONI: Object, mischaracterizes Dr. Walt's
5 testimony. He's already testified.

6 THE COURT: Sustained.

7 MS KEARNS: Q Now, Dr. Czarnik, you did acknowledge
8 when I began, in fact I think it might have been the first line of
9 questioning in your cross-examination, you personally have a
10 memory that is impaired by your depression, correct?

11 A Yes.

12 Q Do you think it's possible you are just failing to
13 remember some of the things that were discussed during this
14 breakfast meeting with David Walt?

15 A No, I remember that breakfast pretty clearly and
16 David's discomfort in even broaching the question.

17 Q Do you consider Dr. Walt a timid person?

18 A No. No, I don't.

19 Q So again trying to stay chronological, but actually
20 going backward a little bit, on direct you talked about mid-
21 January 2000. You said that it was clear by that point that
22 Mr. Flatley was not using you as a CSO. Correct?

23 A Yes.

24 Q So I want to focus on the conversation that you had
25 with Mr. Flatley in mid-January, 2000, in which you talked to Jay
26 Flatley about the concept of stepping down as CSO.

27 A Yes.

28 Q Where did that occur?

1 A It occurred in a small conference room, in a conference
2 room at Illumina.

3 Q Who else was present?

4 A It was just Jay and I.

5 Q And who initiated the discussion or the meeting?

6 A I did.

7 Q And what did you say?

8 A I told Jay that it was -- it would be reasonable that
9 at this point that he would be considering looking to bring on his
10 own chief scientific officer, and that if he was, that I wouldn't
11 resist him in doing that, that I would step back to become vice
12 president of chemistry, and that I felt that was an appropriate
13 thing as John had stepped back from CEO to become vice president
14 of business development.

15 Q Can you explain for us, Dr. Czarnik, -- Now, you just
16 said you told Jay Flatley it would be reasonable for him to want
17 to bring in his own CSO.

18 A Yes.

19 Q Why would that be reasonable?

20 A Because very often when a new chief executive officer
21 comes into an organization, he or she wants to bring in their
22 immediate team. Sometimes it's people they know, but it's always
23 of people who owe their job to him or her.

24 Q Well, so when you say it's always people who owe their
25 job to him or her, are you suggesting that a CEO who brings in a
26 new CSO is necessarily bringing that person in because they'll
27 have somebody who owes them?

28 A Is your question always? No. It's not always.

1 Q That could be one motivation, right?

2 A Yes.

3 Q Isn't it true, Dr. Czarnik, that another possible
4 motivation for bringing in a different CSO is that the new CSO has
5 a better skill set?

6 A Yes, that is a possible motivation.

7 Q And isn't another possible motivation for bringing in a
8 different CSO the fact that -- Couldn't another motivation be
9 that the CEO has worked in the past with this CSO and knows him or
10 her to be a strong performer?

11 A Yes, that is a possible motivation.

12 Q That could be another motivation.

13 But in your own words, you felt that it would be -- If Jay
14 Flatley in fact had formed the impression that he wanted to bring
15 in a CSO of his own choosing, you were acknowledging that there
16 could be any number of reasonable bases for him to do that?

17 A I'm acknowledging today that there are a number of
18 reasonable bases upon which he would want to do that.

19 Q And when you talked to Jay Flatley in the January 2,
20 mid-January, 2000, you told him that if he wanted to bring in his
21 own CSO, you understood and that would be reasonable?

22 A I think I said it would be -- I may well have said it
23 would be reasonable for him to want to bring in his own CSO.

24 Q So having been through a number of the potential
25 reasonable rationales for bringing in a different CSO, would you
26 agree that -- Well, you say you told Jay Flatley that it would be
27 reasonable for him to want to bring in his own CSO.

28 A Yes.

1 Q Why did you think in this particular case it was
2 reasonable for Jay Flatley to want to bring in his own CSO?

3 A Well, the reason that Jay told me at this meeting was
4 that he understood that Mark and I disagreed on the approach to
5 science and that it would be good to have someone that each of us
6 would report to to sort of mediate these disagreements.

7 Q Did that sound reasonable to you?

8 A Yes.

9 Q And in fact the CSO who did come on board, David
10 Barker, you understand that David Barker had worked with Jay
11 Flatley in the past?

12 A Yes.

13 Q Did you understand that David Barker had worked with
14 Jay Flatley in a company before it went public and then together
15 they took the company public?

16 A Yes.

17 Q And that company was Molecular Dynamics?

18 A Correct.

19 Q And so in mid-January of 2000, when you told Jay
20 Flatley that it would be reasonable for him to want to choose his
21 own CSO, and that if he elected to do so you would step down and
22 become VP of chemistry, what was his response?

23 A His response was that indeed it was a topic that he was
24 thinking about at that time, and that he thought that the
25 motivations that John and I had shown for stepping back were
26 admirable.

27 Q Now, this brings me to another point. You said that
28 -- Actually this relates to the [Daley's]¹³ dinner, but you said in

1 your direct that you wanted to follow the same path that John
2 Stuelpnagel had taken, which was not only to step down, but to be
3 the lead person in identifying his successor.

4 A Yes.

5 Q And you stated in your direct examination that John
6 Stuelpnagel was given a stock bonus by the board of directors for
7 his selflessness in stepping down and working hard to find a
8 replacement. You did not use the word "selflessness," but you
9 said on direct that John Stuelpnagel was given a reward in the
10 form of stock for stepping down and taking an active role in
11 finding his replacement, right?

12 A Yes.

13 Q So is the reason that you wanted to be involved in
14 finding the new CSO because you, too, wanted a stock award?

15 A No.

16 Q Then why is it that you wanted to be involved in
17 selecting, identifying and/or selecting a new CSO?

18 A Because I wanted Jay to understand that I was just as
19 committed to this company as John was.

20 Q Did you feel competitiveness with John Stuelpnagel?

21 A The competitiveness that I felt with John had more to
22 do with what was the best style to get things done. Did I feel
23 competitiveness with John regarding amount of money or stock? No.
24 I didn't feel that at all. But I certainly felt that there was a
25 competition of ideas as to how we should best get things
26 accomplished at the company.

27 Q So you wanted to be actively involved in the search for
28 a new CSO as a means of showing Jay Flatley that you were as

1 committed to the company as was John Stuelpnagel?

2 A I think primarily Jay, but also the board.

3 Q But didn't you also say that it was reasonable for Jay
4 Flatley to want to choose his own CSO?

5 A It was reasonable for Jay to want to bring in his own
6 CSO, yes.

7 Q And so if Jay Flatley was going to bring in his own
8 CSO, wouldn't that suggest that he might have people in mind
9 already and that he might not need your assistance in identifying
10 a candidate?

11 A That's one possibility. But it certainly isn't the
12 only possibility.

13 Q Are you saying or suggesting in [any way]⁹⁰ that Jay Flatley
14 owed it to you to give you the opportunity to propose a candidate
15 if in fact he had somebody in mind that fit the bill?

16 A What Jay owed me was, to be fair, and --

17 Q I'm -- Please answer the question.

18 MR. PANTONI: Your Honor, this is the third or fourth
19 time she's interrupting his answer.

20 THE COURT: I can't tell if it was responsive or not.
21 Do you think you are responding to the question?

22 THE WITNESS: She asked me if I thought Jay owed me
23 something.

24 MS KEARNS: Q No, I asked if Jay owed you something in
25 particular, and in case it wasn't clear in the previous question,
26 I'll rephrase it.

27 Is it your position that Jay Flatley was obligated in any
28 way to give you the chance to propose candidates if he already had

⁹⁰ Original transcript read, "anyway".

1 somebody in mind to succeed you?

2 A No, Jay was not obligated to me to allow me to do that.

3 Q So at your [Daley's]¹³ dinner on February 7th, 2000, how
4 did the topic of your stepping down as CSO come up during this
5 dinner? I understand it had come up in mid-January, but how did
6 it come up during the [Daley's]¹³ dinner?

7 A During the course of our discussion, Jay reminded me of
8 the talk we'd had in mid-January and he asked me if my offer was
9 still on the table.

10 Q What did you say?

11 A I said yes.

12 Q And during this discussion, during the [Daley's]¹³ dinner,
13 isn't it true that Mr. Flatley asked you whether you would be
14 willing to step down if it did not involve taking a management
15 role?

16 A Yes.

17 Q And you -- Isn't it true you indicated that you would
18 be willing to step down into a non-management position?

19 A Yes.

20 Q And in fact the position that you eventually assumed,
21 research fellow, isn't it true that it was you who proposed this
22 very position?

23 A We were searching together for a name, and I thought of
24 what position I was familiar with in the pharmaceutical industry
25 that was same level as VP but on the scientific track, and that's
26 called research fellow.

27 Q So you did or you didn't propose the position?

28 A I did. I did propose the name, and I think Jay liked

1 it.

2 Q And in fact isn't it true that this is a, as you
3 testified on direct, it's a high-level scientific position,
4 correct?

5 A Yes.

6 Q And in fact isn't that the position that you originally
7 proposed for [Michal]⁴¹ Lebl when he joined the company?

8 A I don't recall. I don't recall.

9 Q Let's put number 136.

10 Dr. Czarnik, looking at Exhibit 136, you've seen this before
11 on your direct. This was your e-mail to Jay Flatley on February
12 28th in which you are telling Jay that if he's looking outside the
13 company, externally, for a new CSO, you wanted to volunteer to
14 take the lead in the search. Do you see that?

15 A Yes.

16 Q And on your direct you already explained what you meant
17 by the "symmetry makes sense," and that was a reference to the
18 fact that John Stuelpnagel had identified his successor?

19 A Yes.

20 Q And Mr. Flatley responded and told you, "I would like
21 to discuss -- speak with you about this when I return to the
22 office on Wednesday." Do you see that?

23 A Yes.

24 Q Now, at this point did you have any knowledge one way
25 or another whether Jay Flatley had already had in mind a successor
26 candidate?

27 A No, I actually interpreted this message to mean that
28 Jay was going to ask me to take the lead in searching for the CSO.

1 Q So you interpreted his response, you just said you
2 interpreted his response that he was going to take you up on your
3 offer?

4 A I thought that that was a good possibility, yes.

5 Q Well, there's nothing in his response that says he was
6 taking you up on the offer, right?

7 A Right.

8 Q So there was -- In your view, there was a good
9 possibility he'd take you up on it, correct?

10 A Yes.

11 Q But there was also a possibility he wouldn't, right?

12 A Right.

13 Q And wouldn't you agree with me that the verbiage "I'd
14 like to speak about this when I return" doesn't give away one way
15 or another what his mindset was?

16 A Right.

17 Q And when is it that you -- This e-mail exchange was
18 Monday, February 28. When is it that you next discussed the topic
19 of the CSO search -- I should say when is it you next
20 communicated with Jay Flatley on the topic of the CSO search?

21 A It was Wednesday, March the 1st.

22 Q And was that communication had via e-mail, telephone or
23 in person?

24 A In person.

25 Q Where?

26 A In Jay's office.

27 Q And what happened?

28 A Jay told me that he was going to take me up on my

1 offer; that as of that day, I was research fellow; that the new
2 CSO would be coming to visit us the following day; that he wanted
3 me to prepare the schedule for the new CSO; that in my new
4 position, my salary would be cut by a certain amount and my stock
5 would be cut by a certain amount.

6 Q So today you are telling us that in this discussion on
7 Wednesday, March 1st, 2000, you are saying that in this single
8 discussion with Jay Flatley on that date, he communicated to you
9 the following point: He was taking you up on your offer to step
10 down, he'd already selected a new CSO, that person would be
11 arriving the following day for meetings, he wanted you to set up
12 the schedule, and in this same discussion you are saying that he
13 communicated to you that there would be a reduction in your salary
14 and a reduction in stock?

15 A Yes.

16 Q Do you have in mind your direct testimony on this point
17 on June 12th?

18 MR. PANTONI: Objection.

19 THE COURT: I think you can answer that yes or no.

20 THE WITNESS: No.

21 MS KEARNS: Q Let's put up Exhibit 144. Actually 143.

22 Dr. Czarnik, this is Exhibit 143. It's an e-mail sent
23 originally -- e-mail sent from you to Jay Flatley, March 2nd. The
24 subject is "The morning after." I think you testified on direct
25 that that was a reference to meaning that this was the morning
26 after you had been told that you would no longer be CSO, correct?

27 A Yes.

28 Q You say, "Jay, most of what we discussed yesterday

1 seems fine, but the stock offer is demonstrably incorrect based
2 just on good accounting practice."

3 Now, I think earlier in my cross I established with you, Dr.
4 Czarnik, you didn't have a problem with the fact that your salary
5 was being reduced with your new position, right?

6 A I think we've stipulated to that.

7 Q Okay. So you did have an issue, though, with the
8 proposed reduction in your stock?

9 A Yes.

10 Q And we've already established that your stock in fact
11 was never reduced?

12 A Over my -- Over my strong objections, yes.

13 Q So what did you mean here when you said, "The stock
14 offer is demonstrably incorrect based just on good accounting
15 practice"? What were you -- What were you referring to?

16 A The vesting schedule, the new stock agreement that Jay
17 was proposing for me, was much less than a founder vice president
18 at Illumina received, and I wanted to point out to him that what
19 he was proposing was just much less than what was already in place
20 for another equally placed individual.

21 Q Mark Chee?

22 A Yes.

23 Q Well, what does that have to do with good accounting
24 practice? I guess what I'm asking you to do is explain to me what
25 you meant by good accounting practice?

26 A Well, on the day that I discussed this with Jay, I had
27 brought in a hand-drawn figure where I sort of showed what my
28 stock level vesting had been, what a new scientist had, and then

1 where the new proposal put me, and how much lower it was than
2 where it should be, and I was referring to the fact that I thought
3 that on a simple graph one could show that he had chosen the
4 number wrong.

5 Q What does that have to do with accounting practices?

6 A That's simply the term that I used to describe what I
7 just described.

8 Q Let see Exhibit 144.

9 THE CLERK: I'm sorry, 44?

10 MS KEARNS: 144.

11 THE CLERK: Thank you.

12 MS KEARNS: Q Dr. Czarnik, we also looked at this
13 exhibit on your direct. This is Friday, March 3rd. You are
14 communicating with Jay Flatley, you are asking for a discussion at
15 3 o'clock. Jay is responding that he has a -- that there's a
16 company meeting at 3:00, and proposes that you meet after the
17 meeting. Do you see that?

18 A Yes.

19 Q Did you in fact meet with Mr. Flatley after this
20 meeting on -- after the 3 o'clock meeting on March 3rd?

21 A We met. I believe it was then.

22 Q And in your direct testimony in connection with this
23 exhibit, this is 144, in connection with this exhibit on direct,
24 you testified that by the time of this e-mail exchange, there was
25 no doubt that it could not -- there was no doubt that there
26 hadn't been a clean slate. Do you remember that testimony?

27 A There was no doubt in my mind.

28 Q What is it -- Is there something about this e-mail

1 itself that causes you to conclude that there could not have been
2 a clean slate vis-a-vis you and Jay Flatley?

3 A No, not this e-mail.

4 Q Now, you also testified on direct in connection with
5 this exhibit that by this date you concluded that Jay Flatley had
6 made a decision to replace you. My question to you --

7 MR. PANTONI: I'll object. I'm sorry. I'll object, it
8 mischaracterizes his testimony.

9 MS KEARNS: It's a direct quote, Counsel.

10 MR. PANTONI: Object.

11 THE COURT: Do you agree with her characterization?

12 MS KEARNS: I'm actually going to ask a clarifying
13 question.

14 THE COURT: Go ahead and ask the question and then you
15 can object.

16 MS KEARNS: Q when you testified on direct that you had
17 concluded by March 3rd that Jay had made the decision to replace
18 you, did you mean that he made the decision to replace you as CSO
19 or did you mean that he had made the decision to eliminate you
20 from the company?

21 MR. PANTONI: Same objection.

22 THE COURT: Overruled.

23 THE WITNESS: I don't remember that statement, but on
24 March 1st Jay had told me that I was being replaced as CSO.

25 MS KEARNS: Q So I'm just trying to understand what you
26 meant when you said that you had concluded that Jay made the
27 decision to replace you.

28 THE COURT: Let's ascertain if that's what his

1 recollection is of his testimony.

2 MS KEARNS: Q At what point in time, Dr. Czarnik, did
3 you []⁹¹ form a conclusion or a belief that Jay
4 Flatley wanted to remove you from the company entirely?

5 A Yes.

6 Q On what date did you form that conclusion?

7 A On April 27th.

8 Q And what is it -- What caused you on April 27th to
9 reach that conclusion?

10 A David Walt told me that at the board of directors
11 meeting Jay had told the board he was going to give me goals that
12 I couldn't meet.

13 Q Is April 27 the day of the board meeting?

14 A No, that was April 25.

15 Q So you are saying that on April 27, David Walt
16 communicated to you the content of something supposedly said at a
17 board meeting two days earlier, and that's when you formed the
18 conclusion that Jay Flatley wanted to move you out of the company?

19 A Yes.

20 Q Let's have Exhibit 149, please.

21 So, Dr. Czarnik, this is Exhibit 149. We've seen this on
22 direct previously. This is an e-mail that you wrote on March 8,
23 2000, and sent out to everyone at Illumina.

24 A Which I wrote, Jay approved, and I sent.

25 Q Did Jay contribute any verbiage to this e-mail or did
26 you compose it and he simply approved it?

27 A I composed it and Jay approved it.

28 Q So all of the language in the e-mail is your own?

⁹¹ Original transcript read, "at some point in time".

1 A Yes.

2 Q The statement here that you write -- Sorry everyone
3 about the caffeine hands. "Jay and I agree my interests and
4 frankly abilities lie on the science side." Preceding that it
5 said, "The options for me were VP or research fellow. These are
6 positions of similar responsibility, the former on the management
7 track and the latter on the scientific track. Jay and I agreed
8 that my interests and frankly abilities lie on the science side."
9 Do you see that language?

10 A Yes.

11 Q And that was language which you drafted and chose to
12 include in your e-mail to everyone in the company, correct?

13 A That's correct.

14 Q And in fact wasn't it a true statement, Dr. Czarnik,
15 that your strengths, that your interests and your abilities, lay
16 primarily on the scientific side rather than the management side?

17 A Well, I had -- I don't think that that's true. I
18 think I'm a good scientific manager, and frankly I included that
19 in this e-mail as a way of making the transition easier for the
20 scientists in the chemistry group.

21 Q How did that statement make the transition easier for
22 the scientist?

23 A Because we knew that they were going to be upset that I
24 was being replaced, and in fact they were upset.

25 Q How do you know they were upset?

26 A They told me they were upset.

27 Q Did you solicit from them statement of being upset? In
28 other words, did you go to your -- did you go to the scientists

1 who had been your subordinates and say anything like, "Don't you
2 wish I was still the CSO?" "Aren't you upset I'm being replaced
3 at as CSO?" Did you solicit that type of comment?

4 A No. I'd like to tell you what I did do.

5 Q I'll come back to that if I need to go further with
6 that. I'm asking specifically if you solicited those comments
7 from them.

8 A No.

9 Q After you left Illumina, at a going-away party for you,
10 at Chanfeng Zhao's house, isn't it true you solicited from former
11 subordinates comments by saying, "Don't you think Illumina would
12 be better off if I were still there"?

13 A My recollection of that party is that I solicited that
14 comment from Bob Kain, not from my subordinates.

15 Q So you solicited that comment from an Illumina employee
16 but not somebody who previously reported to you?

17 A Correct.

18 Q Now, Dr. Czarnik, you talked a little bit about the
19 process that the company underwent when it was going public, and
20 you talked a little bit in your direct about the S1 filing. You
21 say that you had expressed an interest and a desire to be involved
22 in the drafting of the S1, correct?

23 A Correct.

24 Q Now, by the time that the S1 was being prepared, you
25 were a research fellow, correct?

26 A Based on Jay's statement of March 1st, yes. Based on
27 my -- the personnel record that was submitted in April, no. That
28 change occurred on March 20th based on the change in position.

1 Q You understood as of March 1, 2000 that you were not
2 going to be the CSO on a going-forward basis, correct?

3 A Yes.

4 Q And you understood that David Barker would be the CSO
5 on a going-forward basis, right?

6 A Yes.

7 Q And so the fact that the company was gearing up to go
8 public was well known, correct, within the company?

9 A Yes.

10 Q And you understood that when the IPO actually happened,
11 you would not be the CSO by that point?

12 A Yes.

13 Q And you understood that the person who was CSO would be
14 -- would likely be one of the persons to go on the roadshow?

15 A At that point I don't think that topic had come up.

16 Q Okay.

17 So you were requesting the opportunity to participate in the
18 drafting of the S1 registration statement, right?

19 A Yes. That was one of the things I was looking forward
20 to when I joined as CSO.

21 Q When you joined?

22 A Illumina as CSO.

23 Q As -- as CSO.

24 A When I joined back in early '98.

25 Q But you understood that things have changed since you
26 joined Illumina and that you were either not CSO any longer or you
27 would soon be stepping down?

28 A Yes.

1 Q And you had no prior experience in drafting an S1,
2 correct?

3 A Correct.

4 Q You'd never done it before?

5 A Everyone has a first time. I was looking forward to
6 this as my first time.

7 Q And you understood that David Barker, who would be
8 coming on board as CSO for Illumina, had been with Molecular
9 Dynamics in an executive management role at the time that company
10 went public, correct?

11 A That was his first time.

12 Q Well, whether it was his first time or not, by the time
13 he came to Illumina, you understood that David Barker had been
14 through the IPO process once already?

15 A Yes.

16 Q And you understood that it was David Barker who was
17 going to be the CSO of Illumina at the time of its IPO?

18 A Yes.

19 Q Let's take a look at Exhibit 169.

20 Sorry, Judge, I thought I had the right exhibit.

21 Now, Dr. Czarnik, we established earlier that during the
22 time that John Stuelpnagel was acting CSO, he included his senior
23 management team in board of directors meetings even though you,
24 Rich Pytelewski and Mark Chee were not directors, correct?

25 A Yes.

26 Q After Jay Flatley came on board, were you, Mark Chee
27 and Rich Pytelewski included in board of directors meetings as
28 regular attendees?

1 A While we were senior management, yes.

2 Q Well, let me ask have you explain that to me. You
3 ceased to be senior management after you stepped down as CSO,
4 correct?

5 A After I received my new position, yes.

6 Q And that occurred in either March or April of 2000?

7 A I knew it as of March the 1st.

8 Q So are you telling me that from October of 1999 when
9 Jay Flatley came on board and was CEO, that you were a regular
10 attendee at the board of directors meetings from October, 1999 up
11 until March of 2000?

12 A Well, February 1st was the last board meeting that I
13 attended, and I did attend that meeting and the others in that
14 time frame, typically the first half.

15 Q Okay.

16 Well, let me ask you this. Was there any difference in your
17 participation in board of directors meetings under Jay Flatley as
18 compared with your level of participation in those meetings during
19 the time that John Stuelpnagel was acting CSO?

20 A Yes, while John was CEO, I participate in the whole
21 board meeting and when Jay was CEO I participated in about half
22 the board meeting.

23 Q Isn't that statement also true with respect to Mark
24 Chee and Rich Pytelewski?

25 A Yes.

26 Q So to the extent your involvement in the -- To the
27 extent your involvement in the board of directors meetings was
28 shortened or reduced under Jay Flatley, the same treatment was

1 given to you, to Mark Chee and to Rich Pytelewski, correct?

2 A Yes.

3 Q None of the three of you were in fact members of the
4 board of directors?

5 A That's correct.

6 Q During the time that John Stuelpnagel was the acting
7 CSO and you attended board meetings in their entirety, you
8 testified earlier on direct that you were given -- you were privy
9 to the board packets that were handed out at those meetings,
10 correct?

11 A I believe that I was received the board packets, yes.

12 Q You remember seeing them, correct?

13 A I certainly --

14 Q I'm not saying you can remember exact content of each
15 board packet today.

16 A Yes.

17 Q Under Jay Flatley's leadership, when you, Mark Chee and
18 Rich Pytelewski attended portions of the board meetings, were you
19 given board packets?

20 A No.

21 Q But the same treatment was given to all three of you,
22 correct?

23 A Correct.

24 Q Now, on your direct examination there was some
25 discussion of the first occasion on which you and David Barker met
26 one another. Do you remember that testimony?

27 A Yes.

28 Q You said that you were at Illumina, somebody came to

1 the door and was trying to get in, and you open the door and
2 brought that person in and escorted him to Jay's office, correct?

3 A Correct.

4 Q And it turns out that this individual was David Barker,
5 right?

6 A Yes.

7 Q What was the date of this first meeting between you and
8 David Barker?

9 A I can only place it in January or February of 2000.

10 Q Were you aware that representatives of Illumina made
11 one or more presentations at Amersham Pharmacia to discuss a
12 possible collaboration?

13 A I remember that I brought in the first person from
14 Amersham to Illumina, made the first business contact. Then John
15 and Mark went to Amersham to visit them, and I don't think
16 anything came of that visit, and then afterwards I don't recollect
17 whether -- Well, if Amersham was defined as Molecular Probes,
18 then yes -- Molecular Dynamics, excuse me, was part of Amersham
19 at that time, so I knew they had gone to Molecular Dynamics.

20 Q Too many Moleculars in this case, right?

21 Well, I guess the point I'm making is you do know that at
22 some point prior to your first meeting with David Barker, John
23 Stuelpnagel and Mark Chee had traveled to Amersham Pharmacia for
24 some purpose. You knew they went there?

25 A I knew they went to Molecular Dynamics and Molecular
26 Dynamics was part of Amersham, so yes.

27 Q And on the date which you think is either January or
28 February of 2000, when you happened to meet David Barker, you

1 didn't have any information about why it is he was visiting Jay
2 Flatley, did you?

3 A No.

4 Q You still don't have such information as you sit here
5 today, do you?

6 A About why he was visiting Jay?

7 Q Yes.

8 A No.

9 Q Was this encounter with David Barker something that
10 occurred before Jay Flatley told you that that he would accept
11 your offer to step down as CSO?

12 A I really don't know.

13 Q Dr. Czarnik, we're going to put up what's previously
14 been marked as Exhibit 142. This is an e-mail dated March 2nd,
15 2000, from you to Jay Flatley.

16 A Yes.

17 Q And in the final paragraph you say, "The board must
18 have gotten quite a one-sided view of me over the past year."

19 Why did you say that? Why did you write that?

20 A Because at that point when I began to realize that this
21 large, punitively large change in my stock options, had been made,
22 that that kind of thing would only happen with board approval, and
23 somebody would have had to have made a case to the board for that
24 to happen.

25 Q Well, who do you think made the case to the board for
26 that to happen?

27 MR. PANTONI: I'll object, it calls for speculation.

28 THE COURT: Sustained.

1 MS KEARNS: Q Well, let's just review what had occurred
2 by March 2nd. By March 2nd you had offered to step down as CSO so
3 that Jay Flatley could hire or bring on board a CSO of his own
4 choosing, correct?

5 A Yes.

6 Q And Jay Flatley had communicated to you on March 1, in
7 fact, that he was taking you up on your offer, right?

8 A Yes.

9 Q And you say today that he communicated to you in that
10 same meeting that he would be reducing your salary and reducing
11 your stock.

12 A Yes.

13 MR. PANTONI: The question is argumentative when she
14 says "you say today."

15 THE COURT: It is. That's true.

16 MR. PANTONI: Like inconsistent with something else he's
17 saying.

18 MS KEARNS: Well, the record will reflect whether it
19 is.

20 THE COURT: It could be viewed as argumentative.

21 MS KEARNS: Q So are you telling us, Dr. Czarnik, that
22 the basis for your statement, "The board must have gotten quite a
23 one-sided view of me over the past year," that statement is based
24 upon the fact that you were told your stock would be reduced and
25 your assumption that there must have been board discussion and
26 board decision on that point?

27 A Well, the board has approval, final approval, on all
28 stock grants, so the board would have to have been involved in

1 this decision.

2 Q Right. I guess -- And maybe it's just a real fine
3 point I'm trying to draw out of you, but --

4 A I'm not going to help you.

5 Q Did you consider that Jay Flatley as a board member and
6 as CEO of the company may have simply told the board Tony is
7 stepping down into a non-management role, I'd like to reduce his
8 stock vesting?

9 MR. PANTONI: Object, that calls for speculation

10 THE COURT: Sustained.

11 MS KEARNS: Q Well, is there anything more beyond what
12 you've already testified to that caused you to conclude that the
13 board had gotten a one-sided view of you over the last year?

14 A No. The reason that I've given is sufficient to have
15 drawn that conclusion.

16 MS KEARNS: Well, I'm going to move to strike after the
17 answer "No."

18 THE COURT: Motion granted.

19 MS KEARNS: Q Dr. Czarnik, whether you think it's
20 sufficient or not, my question was whether there was any other
21 basis for your statement, "The board must have gotten quite a one-
22 sided view of me," and your answer to that was no?

23 A My answer to that was -- Well, let me tell you -- My
24 answer to that question is that -- I'm going to end up saying the
25 same thing.

26 Q Don't say the same thing. Let me withdraw the question
27 and ask a new one.

28 A Okay.

1 Q Just clarifying, you've now told us all of the reasons
2 that supported your statement in this e-mail, "The board must have
3 gotten a one-sided view of me"?

4 A No, I've only told you the reason that catalyzes the
5 rest of my thinking, of my conclusions.

6 Q I guess we'll pick up with it tomorrow.

7 THE COURT: Could I see counsel a moment regarding
8 scheduling in the hallway.

9 (Discussion off the record.)

10 THE COURT: Ladies and gentlemen, we'll take our
11 evening recess at this time. We're going to be in recess as far
12 as the jury is concerned until 9:15 tomorrow morning. 9:15.
13 Please be here promptly at that time. We'll start at 9:15.

14 Please remember the admonition, do not form or express any
15 opinions about the case, do not discuss the case amongst
16 yourselves or with anyone else. We'll resume with the jury at
17 9:15 tomorrow morning. Have a pleasant evening. See you at 9:15.

18 (Proceedings resumed outside the presence of the jury.)

19 THE COURT: I have not received your brief,
20 Mr. Pantoni.

21 MR. PANTONI: I've been requested to ask for an
22 extension of time. The issue won't come up until Mr. Flatley
23 testifies, which won't be until -- certainly not before next
24 week, probably middle of next week. I'd request if I could have
25 the weekend.

26 THE COURT: It would be really helpful if I could have
27 it before. How about Friday at noon so I'd have a chance to read
28 it. Friday at noon.

1 MR. PANTONI: I will do my very best to deliver it by
2 Friday at noon. I am a solo and I'll be in court most of the
3 time.

4 THE COURT: Okay.

5 I'd like you here at 8:45. I'd like you to think of any
6 issues that you think might come up tomorrow. 8:45.

7 MR. PANTONI: Thank you, your Honor.

8 THE COURT: Thank you.

9 (Proceedings recessed at 4:05 p.m.)

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1 SAN DIEGO, CALIFORNIA, THURSDAY, JUNE 20, 2002; 8:55 A.M.

13 (Jury seated in open court.)

14 THE COURT: Morning, ladies and gentlemen. The record
15 indicate all the jurors are present, counsel are present and
16 parties.

17 We're going to be calling -- We're interrupting the
18 testimony of Dr. Czarnik at this time to call another witness.

19 MR. PANTONI: Yes, we are, your Honor.

20 THE COURT: Okay. Who is that?

21 MR. PANTONI: John Stuelpnagel.

22 THE COURT: Very well.

23 JOHN STUELPNAGEL,

24 called as a witness by the Plaintiff, having been first duly
25 sworn, was examined and testified as follows:

26 THE CLERK: Would you please state your full name and
27 spell your last name for the record.

28 THE WITNESS: I'll do that. Full name is John Robert

1 Stuelpnagel. I'll spell the last name, S-t-u-e-l-p-n-a-g-e-l.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. PANTONI:

5 Q Good morning, Dr. Stuelpnagel. Could you state your
6 present employment, please?

7 A I'm employed at Illumina, Incorporated.

8 Q What is your current position with Illumina?

9 A I'm -- Current position is senior vice president of
10 operations.

11 Q How long have you been employed by Illumina?

12 A I've been employed by Illumina since September 1st,
13 1998.

14 Q And you've been employed continuously from September
15 1st, 1998 through the present?

16 A Yes.

17 Q Are you a director of the company, a member of the
18 board of directors?

19 A Yes.

20 Q And how long have you been a board member?

21 A Since the inception of the company, May of -- actually
22 April of 1998.

23 Q Continuously through and including the present?

24 A Yes.

25 Q Are you presently an officer of Illumina?

26 A Yes.

27 Q And when did you first become an officer of Illumina?

28 A I became an officer of Illumina on the incorporation

1 date, April, 1998.

2 Q Have you been an officer of Illumina continuously from
3 April of 1998 to the present?

4 A Yes.

5 Q In terms of your personal background, Dr. Stuelpnagel,
6 what is your age?

7 A 44.

8 Q Your marital status?

9 A I'm single, thank you.

10 Q Have you ever been married?

11 A No, I've never been married.

12 Q Any children?

13 A No children.

14 Q In terms of your educational background, do you have
15 any formal education or training in chemistry?

16 A Yes.

17 Q Where did you obtain formal education or training in
18 chemistry?

19 A I obtained a bachelors of science degree in
20 biochemistry in 1979 from the University of California at Davis.

21 Q And what about biology, any formal training or
22 education in biology?

23 A Yes, both during that degree program and also in my
24 subsequent degree program, which was a Doctorate of Veterinary
25 Medicine, which I was given in 1983 from the School of Veterinary
26 Medicine at the University of California at Davis.

27 Q And we've been referring to you as Dr. Stuelpnagel.
28 The only reason we call you doctor is you are a veterinarian, is

1 that correct?

2 A Sure, yes.

3 Q You are not a medical doctor or Ph.D?

4 A No, just a veterinarian.

5 Q And how long did you work as a veterinarian?

6 A From the time I graduated until I left practice in
7 1995, so 12 years.

8 Q And that was as -- in private practice?

9 A Private practice.

10 Q And after your work as a veterinarian, you went into
11 the venture capital field?

12 A Not directly. I entered a masters of business
13 administration program in the fall of 1995. During the -- it's a
14 two-year program, and during the summer -- in the summer of 1996,
15 I became engaged in venture capital and continued with that
16 employment through my second year and onward until I joined
17 Illumina.

18 Q Put up Exhibit 360, please.

19 Dr. Stuelpnagel, do you recognize Exhibit 360 as a copy of
20 your resume?

21 A Yes, specifically this was a request by our HR
22 department to have a resume on file approximately in the summer of
23 2000. I had been delinquent for several months, got nasty e-mails
24 from our HR department, and finally threw this together in a very
25 short period of time. So it was not used for my employment at
26 Illumina, nor has it been used in solicitation of any employment.

27 Q But you prepared this resume yourself?

28 A That's right.

1 Q And is all the information in your resume true and
2 accurate, to the best of your knowledge?

3 A To the best of my knowledge.

4 Q Let's move to the next page, please.

5 In terms of your education, do you have an MBA from UCLA?

6 A That's correct, Anderson School at UCLA.

7 Q You were top what percent of your class?

8 A That was award, I believe, it was the Carter Fellowship
9 given to the top two percent of the graduating class in 1996.

10 Q Top two percent?

11 A That's correct.

12 Q Okay.

13 A In fact, that was the definition of the award.

14 Q I see.

15 Now, your work as a consultant for Keystone Biomedical,
16 Inc., that was your first engagement after you were a
17 veterinarian, your first business venture?

18 A No. In fact, while I was a veterinarian I was engaged
19 in a number of start-up activities before that. So prior to that.

20 Q This was the first thing you did professionally after
21 you were a veterinarian?

22 A Professionally after I was a veterinarian. If you
23 discount things I did while I was a veterinarian.

24 Q I'm not discounting them, I'm talking about afterwards.

25 A Yes.

26 Q So you worked for, what, about a year as a consultant
27 for Keystone Biomedical, Inc.?

28 A That's right.

1 Q Then you were an intern at a venture capital firm,
2 InnoCal?

3 A Yes. In the first portion of my MBA degree, I was
4 honored to receive a venture fellowship. It was a very
5 prestigious honor that the school enabled a small number of the
6 classmates to receive, and part of that fellowship was an attempt
7 by the school to place you into venture capital during your
8 internship years between your first and second years.

9 Not everybody got placed in venture capital. Depended
10 whether there was a good match. But they helped with the
11 introductions.

12 In my case, I was very, very fortunate to have been placed
13 with two venture capital firms. During the first portion of the
14 summer I was with a firm called InnoCal, and during the second
15 portion of the summer I was with a venture firm called Avalon/
16 Catalyst. It was in the process of some of the activities coming
17 under the Catalyst name and some of the activities being done
18 under the Avalon name.

19 Q In the interests of time, I'd ask you to try to focus
20 on my question and try to limit your answer to what I ask you. In
21 this case I said the next thing you did, you worked as an intern
22 at InnoCal?

23 A That's correct.

24 Q In the summer of 1996?

25 A Yes.

26 Q What was your next professional activity after that?

27 A As I just mentioned I was then engaged with Avalon/
28 Catalyst in venture capital.

1 Q In an employment capacity or some other capacity?

2 A Both of those were employment capacities. It was
3 anticipated that would be a six-week internship, but my boss,
4 Mr. Larry Bock, liked the work I was doing and actually encouraged
5 me to drop out of my MBA program so I would become full-time
6 employed. In other words, not return and finish my degree.
7 Instead I worked out a relationship where I only had to go to
8 school one day a week. While I missed a lot of classes, frankly,
9 but worked for Larry from Tuesday to Sunday of that week during
10 that year.

11 Q How long did you work there?

12 A As it says there, the summer of 1996 until my first
13 full-time employment with Illumina. Although there was a name
14 change. That's where it gets a little tricky, in that in the 1996
15 time frame, there was another venture capital firm that we often
16 worked with called CW Group that acquired our offices. I still
17 had the same boss, the same responsibilities. We just became part
18 of a larger company called CW Group.

19 Q You just described on your resume your time with
20 Catalyst Partners, Avalon Ventures and your association with CW
21 Group.

22 A Correct.

23 Q Was your employment at Illumina the first time you
24 worked as an employee for a technology company?

25 A Yes.

26 Q Was your employment at Illumina the first time that you
27 had scientists reporting to you?

28 A Yes.

1 Q Was your employment at Illumina the first time you had
2 any type of employee reporting to you other than a secretary or
3 administrative assistant?

4 A Actually I'd like to restate that earlier question.
5 You said my employment, employee at Illumina was the first time,
6 but as I've defined my employment at Illumina, it started in
7 September. In fact, I was the acting president and CEO of
8 Illumina starting in April of 1998, and from the period of April,
9 1998 until I became a full-time employee, everybody reported to
10 me. I had total responsibility, including the reporting with Dr.
11 Czarnik and Dr. Chee. So I guess the answer is I did have people
12 reporting to me prior to that.

13 Q I meant to include that.

14 A I'm trying to be exact, sir.

15 Q Okay.

16 So let me ask you this: Was the work and services and your
17 affiliation with Illumina -- strike that.

18 Was your activity in connection with the enterprise that
19 became Illumina, was that the first time that you had any
20 scientists reporting to you?

21 A I believe so.

22 Q Was Illumina, including the enterprise that eventually
23 became Illumina, was that the first time you had any employees
24 reporting to you other than perhaps an administrative assistant or
25 a secretary?

26 A No. I had numerous aides and technicians and other
27 activities with respect to my veterinary career, and with respect
28 to the entrepreneurial start-ups I was involved with.

1 Q How did you become involved in the business that
2 eventually became Illumina?

3 A My activity at the venture firm was to start new
4 companies. That was my role there. And I found this technology
5 at Tufts University. Dr. David Walt was a professor of chemistry
6 there. I had received a notice from --

7 THE COURT: Dr. Czarnik, could you push that back
8 closer. I'm getting a strong glare off the projector.

9 Thank you.

10 THE WITNESS: I'm sorry, could you repeat the question.

11 MR. PANTONI: Q You were talking about how you became
12 involved in the enterprise that became Illumina.

13 A Thank you. So I had received an executive summary of
14 this technology from the agent that was representing Tufts
15 University, somebody that I had become acquainted with when he was
16 at Harvard, and I thought this was very interesting, and Larry
17 Bock and I went to see Dr. Walt as a consequence of this memo plus
18 some additional information that he had received about this
19 technology through a connection that he had, Dr. Clark Still.

20 Q Are you a founder of Illumina, Dr. Stuelpnagel?

21 A I realize that this has become an emotional issue in
22 this trial, but there is no legal definition of founder. I have
23 referred to myself as well as others as a founder of Illumina.

24 Q You consider yourself to be a founder of Illumina?

25 A Yes, under a number of different definitions.

26 Q You consider Mark Chee to be a founder of Illumina?

27 A Yes, under a number of different definitions.

28 Q Do you consider Tony Czarnik to be a founder of

1 Illumina?

2 A In almost all circumstances I have regarded Tony
3 Czarnik as a founder of Illumina, but there are definitions of a
4 founder that would exclude Tony Czarnik.

5 Q Yes or no, do you consider Tony Czarnik to be a
6 founder?

7 A I believe I answered that, sir.

8 Q I'm asking again.

9 A Yes.

10 Q In fact, you recruited Tony Czarnik to come to
11 Illumina, true?

12 A I was part of a team that made the decision to offer
13 him an offer letter.

14 Q You recruited Tony Czarnik, right?

15 A I wouldn't use the word recruited. We engaged Dr.
16 Czarnik in discussions about employment opportunities. It wasn't
17 me that did the recruiting, it was a team that did the recruiting.

18 Q Were you part of a team, Dr. Stuelpnagel, that
19 recruited Tony Czarnik?

20 A Yes.

21 Q Who else was on the team that recruited Tony Czarnik?

22 A So in the initial stages I always -- Actually
23 throughout the history of Illumina, I always strove for a
24 consensus agreement. So the people that had the opinions that
25 weighed in on the eventual offering of employment to Dr. Czarnik
26 were Dr. David Walt, Mr. Larry Bock, Dr. Mark Chee, as well as me.

27 Q Those are the people you referred to as being part of
28 the team?

1 A Yes.

2 Q Who identified Tony Czarnik as a candidate for a senior
3 position at Illumina?

4 A Dr. David Walt.

5 Q Did Dr. Walt recommend Tony Czarnik?

6 A He recommended that we talk to Dr. Czarnik.

7 Q Did Dr. Walt eventually recommend that you hire Tony
8 Czarnik?

9 A We had a conversation. There were reservations that
10 David expressed, but the end of the day we decided to go ahead and
11 offer Dr. Czarnik employment.

12 Q That was a consensus decision among you, Dr. Walt,
13 Larry Bock and Mark Chee?

14 A Correct.

15 Q Were you impressed with Dr. Czarnik's background and
16 experience at the time you hired him?

17 A There were elements that seemed to be impressive and
18 suitable for Illumina.

19 Q In fact, in evaluating Dr. Czarnik's background and
20 experience, you thought it was a good idea to hire him, right?

21 A I agreed with the consensus opinion, yes.

22 Q You thought it was a good idea?

23 A Yes.

24 Q You wouldn't have hired him unless you thought it was a
25 good idea?

26 A That's right. But the information I had at the time, I
27 thought it was a good idea to hire Dr. Czarnik.

28 Q The information included the fact Dr. Czarnik had been

1 a professor and spent considerable time in academia?

2 A Yes.

3 Q The information you had included the fact that he had
4 never served as a chief science officer before, true?

5 A Correct.

6 Q In fact, you had never served as a president of any
7 company before, had you?

8 A It's not correct.

9 Q When were you a president?

10 A There was a small water company called Santa Barbara
11 Artesian Water Company that I founded with someone who was a
12 client of mine in the veterinary business. He wanted me to help
13 him, and I had the title of president at that point.

14 Q The title. Did you have any real job duties?

15 A Yes, I did, sir. We actually started the company and I
16 had numerous employees reporting to me.

17 Q This was at a time that you had your veterinary
18 practice?

19 A I actually took a sabbatical for about six months to
20 pursue this activity.

21 Q So this presidency, prior presidency, had been about
22 six months in duration?

23 A Yes.

24 Q And then the only other experience you had in terms of
25 running a company was your experience at Illumina?

26 A Yes.

27 Q Mark Chee was hired as a vice president, is that right?

28 A Correct.

1 1 Q Had Mark Chee ever held a title of vice president
2 before?

3 A No.

4 Q If we could move to Exhibit 24, please. Actually 22.
5 My mistake.

6 Do you recognize Exhibit 22 as an offer letter to Tony
7 Czarnik dated April 6 of 1998?

8 A Yes.

9 Q This is an offer to join a company at that time it was
10 known as Sensa Technologies, Inc.?

11 A That's correct.

12 Q Was that the first name that was being considered for
13 the enterprise that eventually became Illumina?

14 A Up to that point we had referred to it as Newco. This
15 was a tentative name. Eventually it became Illumina.

16 Q Dr. Stuelpnagel, you signed this offer letter?

17 A Yes, I did.

18 Q This offer was made back in April of 1998?

19 A Yes.

20 Q That's when the company was first founded, April of
21 '98?

22 A Yes. Technically there was no company when we made
23 this offer. In fact, I believe there's some contingencies in the
24 offer letter that we got the license from Tufts, otherwise the
25 offer letter disappeared. Technically the company was founded the
26 end of April, about April 26 or 28th.

27 Q This copy is not signed by Dr. Czarnik. Do you know
28 one way or another whether Dr. Czarnik ever signed this offer

1 letter?

2 A Yes, he never signed this offer letter.

3 Q You are sure of that?

4 A Positive.

5 Q Exhibit 24, please.

6 Do you recognize this as an offer letter dated May 6 of
7 1998?

8 A Yes, I do.

9 Q And this is an offer letter that you sent to Tony
10 Czarnik with respect to a company that was now called Illumina,
11 Inc.?

12 A Correct.

13 Q Did you understand that this offer letter would set
14 forth the principal terms of Dr. Czarnik's employment with
15 Illumina, Inc.?

16 A Yes.

17 Q Page 4, please.

18 Is that your signature, Dr. Stuelpnagel?

19 A Yes.

20 Q No dispute Dr. Czarnik signed this offer?

21 A No dispute with me.

22 Q There's a provision in the offer letter with respect to
23 equity, is that right?

24 A Correct.

25 Q You'd agree that equity, stock compensation, is an
26 important part of compensation for senior managers in start-ups,
27 wouldn't you?

28 A In fact it's much more egalitarian than that. We had

1 equity as part of the compensation package for all employees at
2 Illumina.

3 Q You'd agree that significant equity given to senior
4 managers founding the company is an important element of the
5 compensation package?

6 A Yes.

7 Q In fact, sir, that's why you got into the start-up
8 world to begin with, right, for possible equity?

9 A No.

10 Q It's not? It's not one of the reasons why?

11 A Absolutely not. What drove me, maybe I should give you
12 a little background here, is I was reasonably -- I think you
13 could say I was very successful as a veterinarian, enjoyed that
14 immensely, but I had a desire, a desire to really build something,
15 to really impact people's lives in a positive way, create jobs. I
16 really had this tremendous entrepreneurial fever. That's what got
17 me into this industry.

18 In fact, when I was awarded the venture fellow, colleagues
19 of mine were surprised. They said why would you want to get into
20 venture capital? I said I needed to learn how to raise money to
21 build companies.

22 Q Equity is one of the reasons you were involved in
23 start-ups, true?

24 A It was part of my compensation involved with start-ups,
25 yes.

26 Q It's one of the reasons you were involved, to get
27 equity?

28 A One of the reasons, but it was not the driving reason,

1 as you suggested before.

2 Q When you signed Dr. Czarnik's offer letter, you were
3 aware it contained this provision with respect to acknowledging
4 Dr. Czarnik's founding role?

5 A Yes.

6 Could you repeat that question? I may have answered too
7 quickly anticipating what you'd asked.

8 Q Okay. When you signed Dr. Czarnik's offer letter, you
9 were aware that the offer letter contained a provision with
10 respect to acknowledging Dr. Czarnik's founding role?

11 A Absolutely not. That's not what that states. It
12 states Dr. Czarnik has to recognize CW's. This was a clause put
13 it in by my boss, Mr. Larry Bock, because in the past he had been
14 ignored as a founder even though he really did start companies
15 with history, so he wanted to make sure Dr. Czarnik referred to
16 his founding role and that of CW Group's.

17 Q Who was the "your," where it says "your founding --"

18 A I believe if you look through this entire agreement
19 that it becomes pretty obvious, like "your employment," it was
20 obviously referring to Dr. Czarnik, "you agree" is Dr. Czarnik.
21 "You" in the context of this offer letter is Dr. Czarnik.

22 Q So where it says "your founding role," that's a
23 reference to Dr. Czarnik?

24 A Absolutely. That's plain English.

25 Q I agree.

26 A Thank you.

27 Q A simpler question. We'll let the jury interpret this.
28 You were aware of this provision when you signed Dr. Czarnik's

1 offer letter, weren't you?

2 A Yes.

3 Q It's also plain English this agreement is between
4 Illumina and Dr. Czarnik, isn't it?

5 A Yes. Actually I correct that. Actually there was --
6 It was more than that. Even though I signed it with "Acting
7 President of Illumina," I was also signing it on behalf of CW
8 Group. CW was obligated in this offer letter to make sure that if
9 this company didn't get funded, it would pay Dr. Czarnik his
10 salary. So there was actually a three-way obligation. So I was
11 signing it not only on behalf of Illumina, but also on behalf of
12 CW Group.

13 Q In plain English, you didn't agree this offer letter
14 sets forth Illumina's obligations as well as Dr. Czarnik's
15 obligations?

16 A As well as CW's obligations.

17 Q All three?

18 A All three.

19 Q First page.

20 The "regarding" line says, Illumina, Inc., right?

21 A Absolutely. The header says "CW Group."

22 Q I understand. We talked a little bit in Dr. Czarnik's
23 cross-examination about the fact this is on CW letterhead.

24 A Good.

25 Q I want to get back to the plain English. The terms are
26 for him to join Illumina, Inc. True?

27 A The terms are for his employment at Illumina, Inc. and
28 it involves obligations by Dr. Czarnik, CW Group, Illumina, Inc.

1 Q Sir, again, in the interests of time, if you could
2 answer my questions. If your counsel wants to ask different
3 questions, she will.

4 This agreement sets forth the terms on which Dr. Czarnik was
5 joining Illumina, Inc.?

6 A Yes.

7 Q Signature block, please.

8 You were signing as acting president of Illumina, Inc.?

9 A Yes.

10 Q Thank you.

11 Dr. Stuelpnagel, do you believe there's a certain prestige
12 associated with being recognized as a founder of a company?

13 A I think that some people regard it as prestigious.

14 Q Do you regard it as prestigious?

15 A No.

16 Q Do you agree with me it could enhance one's reputation
17 to be recognized as a founder of a company?

18 A Because some people believe it's prestigious, I would
19 agree.

20 Q In fact, it could enhance one's reputation, true?

21 A Yes.

22 Q Isn't it true it's particularly important to be
23 recognized as a founder of a start-up if the company is a success
24 and goes public?

25 A Obviously the more successful the company, the more
26 prestigious it is to be part of the founding team.

27 Q You've gone to some lengths to recognize yourself as a
28 founder of Illumina, haven't you?

1 A I very rarely refer to myself as founder, but I have
2 been referred to as a founder.

3 Q Every time you speak of Illumina, you speak of yourself
4 as a founder?

5 A Absolutely not.

6 Q In publications you've referred to yourself as a
7 founder, haven't you?

8 A In a legal document, the S1, where I was required to
9 list myself as part of the senior management team, I was listed as
10 a founder.

11 Q Let's get back to the resume, please, Exhibit 360.
12 You decided on your resume, sir, to indicate that you
13 founded Illumina?

14 A That's right. So that's not referring to myself as a
15 founder.

16 Q It was significant enough that you included it on your
17 resume, sir?

18 A That I founded Illumina, yes.

19 Q Are you saying it's not important to you to be
20 recognized as a founder of the corporation?

21 A I'm rather ambivalent to it because I realize how
22 divisive that term has become.

23 Q When you first joined Illumina, who were the member of
24 Illumina's senior management?

25 A Just me.

26 Q When you first became an employee of Illumina, who were
27 the members of senior management?

28 A Dr. Tony Czarnik, Dr. Mark Chee and me.

1 Q What were your respective positions when you first
2 became an employee?

3 A I was the acting president and CEO, the acting chief
4 financial officer, and the vice president of business development.

5 Q So you were in charge of running the company?

6 A I accept responsibility for running the company.

7 Q What were Mark Chee's and Tony Czarnik's positions
8 initially?

9 A I believe Tony Czarnik was chief scientific officer and
10 Mark Chee was vice president of genomics.

11 Q Both Dr. Chee and Dr. Czarnik reported directly to you,
12 is that right?

13 A Yes.

14 Q Dr. Chee didn't report to Dr. Czarnik, did he?

15 A No.

16 Q Ever?

17 A Ever.

18 Q During the initial stages of the company, you three
19 held meetings to engage in strategic planning, right?

20 A Yes.

21 Q And all three of you participated, you, Dr. Chee and
22 Dr. Czarnik?

23 A There were many meetings. Not all three of us
24 participated in all the meetings, but some of the meetings all
25 three of us participated.

26 Q Generally speaking, over the course of the summer of
27 1998, all three of you, Dr. Chee, Dr. Czarnik and yourself,
28 participated in the series of meetings to discuss strategic

1 planning for the company?

2 A All three of us participated in some of the meetings
3 for that function.

4 Q In these meetings you talked about setting the vision
5 for the company, right?

6 A Among other things.

7 Q Those other things included which business applications
8 to pursue?

9 A That would be part of the strategic planning.

10 Q How to raise money?

11 A Absolutely.

12 Q And how best to exploit the company's intellectual
13 property?

14 A Exploit has a negative connotation, but in the context
15 of trying to gain benefit from the intellectual property, yes.

16 Q How best to commercialize the intellectual property?

17 A Better.

18 Q And you discussed which projects and which areas of
19 scientific research the company should embark?

20 A Yes.

21 Q And all three of you participated at various times in
22 discussions on all those topics?

23 A All of us participated in the meetings. Not all of us
24 participated to the strategic vision.

25 Q You claim that Tony Czarnik did not?

26 A His contributions were minimal.

27 Q Company strategy from the very beginning was to try to
28 go public, is that right?

1 A No.

2 Q One of the goals of the company was to go public?

3 A The goals in a venture-backed company is to plan for
4 what's termed for the investors, the venture capitalists, an exit
5 strategy. That's an opportunity for them in the future to sell
6 their stock they've invested in. Exit strategies, in the parlance
7 of venture capital, could be acquisition by another company, an
8 IPO, some other liquidity event.

9 Q Is it accurate that in the early stages of the company,
10 during your strategic management sessions, you talked about the
11 goal of the company being able to go public?

12 A I talked about the goal of the company -- Sure, since
13 that was one of the exit strategies, absolutely.

14 Q In fact, that's in your business plan, isn't it?

15 A I haven't read the business plan since 1998, but I'll
16 take your word for it.

17 Q I'm asking you.

18 A I don't know.

19 Q Who wrote the business plan?

20 A Primarily me and Dr. Chee, with about three pages out
21 of 80 or four pages out of 80 contributed by Dr. Czarnik.

22 Q How early did you as a management team start talking
23 about a goal?

24 A Right away. If you start a venture-backed company, you
25 need to start talking about exit strategies. Otherwise investors
26 aren't going to invest in Illumina. So right away.

27 Q By exit strategy, you mean a way for investors to get
28 money back for their investment?

1 A That's correct, as I explained.

2 Q The exit strategy you discussed as a way for the
3 investors to get money back for their investment was possibly to
4 go public?

5 A That and other exit strategies, including acquisition.

6 Q When was it decided that the company in fact would in
7 earnest start planning for an IPO, start planning to go public?

8 A I believe it was February of 2000, after a series of
9 meetings that Jay Flatley and I had with investment bankers.

10 Q So prior to February of 2000 it was a goal, as of
11 February of 2000 you started planning in earnest for that
12 possibility?

13 A Well, again you keep emphasizing goal. It's not in my
14 definition of a goal. I'd be happy to define what I think a goal,
15 a real quality goal is. It was an objective of the company. And
16 there is a difference between goals and objectives that I'd be
17 happy to explain if you'd like me to.

18 Q Let me read some of your deposition testimony, Dr.
19 Stuelpnagel. You recall having your deposition taken in this
20 case?

21 A Yes.

22 Q I'll read from the deposition testimony at page 85.

23 MS KEARNS: 85?

24 MR. PANTONI: Right. Beginning at line 19:

25 "QUESTION: Is it accurate to say that, at
26 least in the early stages of a company, during your
27 strategic management sessions, that you talked about the
28 goal of the company being to go public?

1 "ANSWER: I do believe we talked about that as
2 a goal for the company, a milestone for the company, and it
3 may even be included in the business plan."

4 Q Do you recall that testimony?

5 A Yes. And so today I didn't contradict that at all.
6 I'm just having a narrower definition, a more precise definition
7 of goal, a more exact definition of how I use that term regularly.

8 Q Thank you.

9 So using your narrow definition of goal, it was a narrow
10 defined goal of the company to possibly go public from the very
11 early stages of the company?

12 A It can't be a goal unless you have a time in which you
13 anticipate going public, and that's not possible because of market
14 conditions. We all have experienced up and down market
15 conditions. It has to be the right market conditions to
16 successfully go public. So you can't predict and set that as a
17 goal. You could set it as an objective, but a goal should be time
18 dated.

19 Q You talked about it as a milestone, didn't you?

20 A Milestone, yes.

21 Q You talked about going public as a milestone, you
22 talked about that in the company's plan?

23 A Yes.

24 Q In terms of your initial discussions about business
25 strategy, which business applications to focus on, the consensus
26 of senior management was to focus on genotyping, is that right?

27 A The majority decision was to focus on genotyping. I
28 guess you could call it a consensus at the end.

1 Q It was a consensus among whom?

2 A Dr. Mark Chee, Dr. Tony Czarnik and me.

3 Q It was the senior management's consensus that you would
4 first focus on genotyping, and if and when you made sufficient
5 progress on genotyping, then you would look to other business
6 applications?

7 A No. In fact, there was a prioritization for genomics
8 or genotyping, but in the plan it was contemplated that other
9 activities at a lesser resourced scale would in fact occur in
10 parallel. We later, in February of 1999, scaled that back, and
11 those include things like the o-nose, which we deemphasized, as
12 well as high throughput screening, which we deemphasized because
13 we had no made substantial progress those goals.

14 Q Nor had you made substantial progress on genotyping?

15 A That's not true, sir. One month after being at the
16 company with one scientist, a very talented scientist named Dr.
17 Kevin Gunderson, he successfully almost by himself decoded and
18 genotyped and showed the feasibility that this was going to be
19 something that was a very, very doable project at Illumina.

20 Q When did you decide to deemphasize the o-nose?

21 A I believe there was a strategic management meeting in
22 February of 1999 in which we wrote down all of our projects. In
23 fact, I have notes about this that I think you reviewed. The team
24 included Mr. Rich Pytelewski, who has now joined the senior
25 management team, Dr. Mark Chee, Dr. Tony Czarnik and me, and in
26 that context, we decided how to prioritize our resources so that
27 we could focus as a company.

28 MR. PANTONI: I'm sorry, could I have the court

1 reporter read the question back?

2 (Record read by the reporter.)

3 MR. PANTONI: Q Sir, the question was when did you
4 decide to deemphasize the o-nose?

5 A I believe we formally did that in a senior management
6 meeting, February of 1999, and the emphasis was on -- the
7 deemphasis of that because we had a contractual obligation to
8 Tufts University to do research on the --

9 THE COURT: February of '99 is your answer?

10 THE WITNESS: Yes.

11 MR. PANTONI: Thank you.

12 Q When you hired Tony Czarnik, you knew he had a number
13 of preexisting scheduled commitments?

14 A Yes.

15 Q And you hired him, you discussed he was going to have
16 to meet these commitments even if he came to work at Illumina?

17 A Yes.

18 Q In fact, he submitted a list of those preexisting
19 commitments to you before he even joined the company?

20 A Yes.

21 Q You did that on at least two occasions prior to joining
22 Illumina?

23 A I only recall one.

24 Q Do you recall that in a letter that he wrote to you to
25 discuss the terms of employment, at the bottom he included a list
26 of dates?

27 A That's the one I recall.

28 Q Do you recall also on separate piece of paper prior to

1 joining Illumina he gave you an update?

2 A I don't recall that.

3 Q You don't deny it, you just don't recall?

4 A Don't recall.

5 Q Was there any timekeeping system at Illumina to record
6 hours worked by the senior managers?

7 A No.

8 Q Is there any system whereby you had a security card to
9 gain entry to the building that would have recorded times?

10 A No.

11 Q Is there any way that you have to estimate the number
12 of absences on the part of Dr. Czarnik in the summer of 1998?

13 A Just my recollection.

14 Q Can you give me an estimate of the number?

15 A Are you talking about full days or are you talking
16 about partial days?

17 Q Talking about days where Dr. Czarnik was absent.

18 A Are those full days?

19 Q Yes.

20 A From his employment start date of June 15th through
21 when we moved to our laboratory facilities in San Diego, September
22 1st, I would estimate that that ranged from 10 to 15 days.

23 Q And how many of those days related to prescheduled,
24 preexisting commitments?

25 A Probably seven to ten.

26 Q Who signed your offer letter, Dr. Stuelpnagel, when you
27 became an employee of Illumina in September of 1998?

28 A Dr. Czarnik did.

1 Q Dr. Czarnik signed your offer letter to join the
2 company?

3 A Yes.

4 Q Are you claiming that you had a counseling session with
5 Dr. Czarnik before, at some point before he signed your offer
6 letter to join the company?

7 A In August of 1998, I had a counseling session. I was
8 joined in that counseling session with Dr. Mark Chee, and a
9 specific objective of that counseling session was to alter Dr.
10 Czarnik's performance positively.

11 Q You thought he was out of the office too much?

12 A There were a number of things that we discussed. In
13 fact, I can go into great detail about that meeting, if you'd
14 like. One of which was his absences not only on days off but the
15 failure to even spend the full working day at Illumina on most
16 days.

17 Q You claim this happened in August of 1998, before you
18 were an employee?

19 A While I was the acting president and CEO and had
20 responsibility for Dr. Czarnik and Dr. Chee.

21 Q Then you claim that after that counseling session
22 occurred, Dr. Czarnik signed an offer letter so that you could
23 become an employee?

24 A I have no knowledge of that.

25 Q No knowledge of the timing?

26 A I have no knowledge of when Dr. Czarnik signed my offer
27 letter. I'm sure you have documentation. I do recall with
28 absolute clarity is that in Cardiff, in August of 1998, Dr.

1 Czarnik had a performance counseling session where he was joined
2 by Dr. Chee and me in a private walk in Cardiff so that we could
3 -- could do that in a private setting and other employees of
4 Illumina would not be aware of our discussion.

5 Q It was after that you claimed Dr. Czarnik signed an
6 offer letter?

7 A No, Counselor. I said before I don't know when Dr.
8 Czarnik signed my offer letter. I don't remember.

9 Q Where is that offer letter?

10 A I'm sure I could produce it if you'd like. It's never
11 been requested by you before.

12 Q It has been requested, but I don't want to argue about
13 it.

14 A I can look for it. It should be in my personnel
15 folder.

16 Q When did you join the company as an employee?

17 A As an employee I joined I believe September 1st, 1998.

18 Q What date was your -- Was this so-called counseling
19 session in August?

20 A I can't remember an exact date. It was five years or
21 four years ago, and it was in August of 1998.

22 Q Do you recall if it was beginning, middle, end?

23 A I don't recall if it was beginning, middle or end. I
24 have a very strong feeling that it was after the first board
25 meeting, which was approximately the middle of the month, and it
26 was prior to our move to the Towne Centre address on September
27 1st.

28 Q When was your first major crisis at Illumina?

1 MS KEARNS: Objection, vague, what is meant by
2 "crisis."

3 THE COURT: Sustained.

4 MR. PANTONI: Q We talked about a first major crisis
5 during your deposition, didn't we?

6 A Yes, you were referring to my handwritten notes in I
7 believe January of 1999.

8 Q I'm not asking you about your note. Let me just ask
9 you about the first major crisis that you recall in your
10 presidency. When did that occur?

11 A January, 1999.

12 Q And your first major crisis as acting president of
13 Illumina was the fact that Illumina was not meeting its company
14 milestones?

15 A That's right. We had developed a research timeline and
16 goals collectively. Those were presented to the board in August,
17 October, December. Another board meeting was coming up in
18 February, and looking at what our commitments were and where we
19 were, it was clear that our progress was not what we had expected
20 it to be.

21 Q In fact, you weren't even close to meet those goals,
22 were you?

23 A I'd have to go back and look whether we were close or
24 not close, but I was convinced that we were going to have to talk
25 to our board at that point in time about our overly optimistic
26 expectations earlier in the summer and into the fall.

27 Q And a situation with the company not meeting its
28 company milestones was significant enough that you thought it was

1 your first major crisis as acting president?

2 A These are notes that I made to myself. Perhaps they
3 are a little melodramatic, and they were in the context of trying
4 to understand what our alternatives were in terms of prioritizing
5 our research and moving the progress of the company forward.

6 Q Let me ask the question again. The situation with the
7 company not meeting its milestones was significant enough that you
8 thought it was your first major crisis as acting president?

9 A In my personal notes to myself I called it our first
10 major crisis.

11 Q Forget the notes. I'm asking you whether you thought
12 as acting president this was your first major crisis?

13 A As a company, yes.

14 Q This was your first major crisis as acting president of
15 that company?

16 A There were lots of issues that we deal with on a daily
17 basis, but this is the first time that I remember characterizing
18 anything as a crisis.

19 Q As a major crisis?

20 A Fine, Counselor, however you want to characterize it.

21 Q I'm asking if you characterized it in that way, sir.

22 A The only reason I even remember this is because I was
23 able to go through my handwritten notes to remember that this was
24 what we talked about in a strategic planning session and in
25 preparation for a board meeting.

26 Q You, sir, as acting president of Illumina, you take
27 personal responsibility for this first major crisis?

28 A Yes.

1 Q At the same time, sir, when the first major crisis
2 occurred with respect to the company not meeting its milestones,
3 there was discontent among the staff, wasn't there?

4 A I don't know that to be true.

5 Q You don't recall if the staff was discontented?

6 A No, I don't.

7 Q You don't recall if there was finger pointing going on?

8 A I don't recall that.

9 Q You do recall that Steve Auger resigned, don't you?

10 A Resigned June 15th, 1999.

11 Q Why did Steve Auger resign?

12 MS KEARNS: Objection, calls for speculation.

13 MR. PANTONI: Let me -- I'll withdraw the question.

14 Q Do you know why Steve Auger resigned?

15 A Yes.

16 Q Why did he resign?

17 A Steve Auger resigned, as he told me -- I should say
18 what I know is what he told me in an exit interview. What he told
19 me in his exit interview was that he didn't have respect for
20 Mr. Rich Pytelewski, his senior manager.

21 Q I thought he resigned because he had a problem with
22 Mark Chee.

23 A He also said he had a problem with Mark Chee.

24 Q You forgot about that in your prior answer?

25 A No, I think the primary reason he resigned was Mr. Rich
26 Pytelewski.

27 Q What were -- Did you speak to Mark Chee and counseling
28 him over any issue with respect to Steve Auger?

1 MS KEARNS: Objection, relevance, collateral.

2 MR. PANTONI: Differential treatment, Judge.

3 THE COURT: Overruled.

4 MR. PANTONI: Q You say you counseled Tony Czarnik
5 about some matters?

6 A About his performance, yes.

7 Q When Steve Auger resigned in part because of problems
8 with Mark Chee, did you any in any way counsel Mark Chee?

9 A I believe --

10 MS KEARNS: Same objections.

11 THE WITNESS: That --

12 THE COURT: Hold on for a second.

13 Overruled. You may answer.

14 THE WITNESS: I believe I regarded the exit interview
15 that I had with Steve Auger as private and confidential. I did
16 try to work with both Rich and Mark to improved the relationships
17 at Illumina.

18 MR. PANTONI: Q So did you counsel Mark Chee?

19 A Mark Chee and I -- I never counseled Mark Chee
20 specifically about his interactions with Steve Auger, to the best
21 of my recollection.

22 Q As a result of Steve Auger resigning -- First of all,
23 you thought that was a significant loss to Illumina, didn't you?

24 A I was very disappointed and took it personally. Steve
25 had left Massachusetts to move all the way to San Diego, moved his
26 wife out here, and I felt that it was a terrible shame that the
27 company and he weren't the right fit, and I accepted
28 responsibility and I thought it was painful for me personally for

1 that reason.

2 Q In fact, you were so concerned about this issue that
3 you decided to engage in a series of interviews with the Illumina
4 staff to look into this issue?

5 A Not to look into this issue, because that was a done
6 issue. The purpose of that was really to ask what things were
7 issues at Illumina and try to understand how we could improve
8 communication and conditions so that people felt better about
9 their employment at Illumina.

10 Q And Steve Auger's resignation was a catalyst for you to
11 do that?

12 A That's what I recollect.

13 Q You personally interviewed a number of Illumina
14 employees and asked them questions about morale and working
15 environment and those sorts of things?

16 A Yes.

17 Q Who did you interview?

18 A Probably have an abbreviated list, but I know I
19 interviewed Dr. Chanfeng Zhao, Mr. Barnard, Mr. Jim Bierle.

20 Q And what type of questions did you ask in these
21 interviews?

22 A I asked them how they felt relative to the goals,
23 whether they were set appropriately, whether the expectations of
24 the -- of Illumina were appropriately matched with what we were
25 trying to do. I talked to them about what they valued in the
26 culture, what they thought could be improved, how we could run
27 things better.

28 Q Isn't it true, sir, in the course of these interviews,

1 no one, not a single person, expressed any concerns whatsoever
2 with respect to Tony Czarnik?

3 A That's correct. But I'll add that they didn't --
4 These are junior employees and they didn't criticize any of the
5 senior managers.

6 Q Isn't it true, sir, that about this time that you were
7 conducting these interviews, you formed the state of mind that
8 Tony Czarnik was personally liked by the staff?

9 A I still feel that.

10 Q And Tony Czarnik was professionally admired by the
11 staff?

12 A I don't think I agree there.

13 Q At the time you thought he was professionally admired,
14 didn't you?

15 A That's correct. I had no other information at the time
16 about whether he was professionally admired by the company.

17 Q When was the point in time, sir, your state of mind was
18 that Dr. Czarnik was professionally admired by the scientists?

19 A No one ever told me that they professionally admired
20 Dr. Czarnik.

21 Q The question was when did you have that state of mind?

22 A I didn't have that state of mind because nobody told me
23 that.

24 Q You never formed the impression or state of mind that
25 Dr. Czarnik was professionally admired, is that your testimony?

26 A I never formed the state of mind that Dr. Czarnik was
27 professionally admired by other employees at Illumina.

28 Q Do you agree that Dr. Czarnik helped to improve

1 communication?

2 A Yes.

3 Q At Illumina. Do you agree that Dr. Czarnik helped to
4 enhance the comradery among the scientific staff?

5 A I think that's fair.

6 Q Those things that a good leader does, in your mind?

7 A Among other things, yes.

8 Q Let's take a look please at Exhibit 32.

9 Judge, do we normally break at 10:30?

10 THE COURT: We started a little later this morning.
11 Also if you feel some point is convenient point to break or you
12 need a couple of minutes to organize some exhibits, then we could
13 break at this time.

14 MR. PANTONI: This would be an absolutely perfect time.

15 THE COURT: We'll take our morning recess at this time.
16 We'll be in recess until 10:35. Please remember the admonition
17 not to form or express any opinions about the case, not to discuss
18 the case. We'll be in recess until 10:35. 10:35.

19 (Recess.)

20 THE COURT: The record will indicate all the jurors are
21 present, counsel and the parties present.

22 You may continue your examination.

23 MR. PANTONI: Thank you, your Honor.

24 Q Dr. Stuelpnagel, going back to your first major crisis
25 as acting president, you believe at that point in time your
26 managers were not working very well as a team, isn't that right?

27 A I think that was perhaps -- Yes, I think that's one of
28 the issues.

1 Q You take responsibility for that, right?

2 A I take responsibility for anything that happened at
3 Illumina during my tenure as acting president and CEO of the
4 company.

5 Q You said earlier the first major crisis involved the
6 company not meeting the initial milestones for the company. Isn't
7 that what you and Dr. Czarnik talked about in November of 1998?

8 A No.

9 Q The subject didn't come up?

10 A No. What we talked about was his performance.

11 Q Your testimony is there were no issues relating to what
12 became your first major crisis that were discussed in November of
13 1998?

14 A No. In fact, November of 1998 was a real high point
15 for the company.

16 Q Were you on track to meet goals?

17 A Yes.

18 Q So from -- strike that.

19 When in November of 1998 did you speak with Tony Czarnik
20 about allegedly about performance?

21 A Again I don't have real good single date resolution,
22 but it was in November of 1998.

23 Q Do you recall when in the month?

24 A I wish I could help you there, sir.

25 Q So your testimony is that you were on track in November
26 of 1998. It was a good time for the company with respect to its
27 progress toward goals, and that by January of the next year it had
28 reached the point that it was a crisis?

1 MS KEARNS: Objection, argumentative.

2 THE COURT: Overruled.

3 THE WITNESS: Would you repeat the question.

4 MR. PANTONI: Q Sure. Could I have the court
5 reporter read it?

6 THE COURT: Please.

7 (Record read by the reporter.)

8 THE WITNESS: Yes.

9 MR. PANTONI: Q What happened between November of
10 1998 when things were great and you were on track, in fact ahead
11 of -- Did you say you were ahead of goals?

12 A I don't think I used the word "ahead."

13 Q Let me ask you, were you on track or ahead?

14 A I remember there was some significant milestones that
15 were accomplished in November. This was the proof of feasibility
16 for decoding and the genotyping that Kevin Gunderson had done.
17 These were important milestones. We had gotten fibers to work and
18 imaging system up and running. So I think the company was doing
19 pretty well in November of '98.

20 Q What goals were you so far behind in in January of 1999
21 that you viewed it as a crisis?

22 A So we had committed in our first product to make an
23 array matrix. What that is is our technology makes arrays. We
24 were going to put multiple arrays into one matrix. The early
25 success that we had in November of '98 was with respect to doing
26 single array experiments, but there was us trying to scale up that
27 to a matrix as well as scale up the decoding, scale up the
28 chemistry, the oligo attachment to the beads, things like that,

1 that were not making as much progress.

2 Q So when you talked to Tony Czarnik in November of 1998,
3 were you on track toward that goal or ahead of pace?

4 A As I recall, those were not deliverables for November
5 of '98, the best of my recollection.

6 Q So that goal were you on track?

7 A Yes, because going from a single fiber to multiple
8 fibers was a natural step, it was a progress. You do one thing
9 and then you do 16 things. We had done the one thing well. Now
10 we were trying to scale that up and do things in a bigger way.

11 Q So at that point in November of 1998 when you spoke to
12 Tony Czarnik, were you on track where you want it to be or a
13 little ahead of schedule, a little behind schedule?

14 A To the best of my recollection, we had accomplished the
15 major milestones, particularly the molecular biology milestones in
16 the company. There was some issues. I won't say there everything
17 was going perfectly. Like for instance --

18 Q Sir, I'll ask the question.

19 You said things were great in November of 1998.

20 A I said there were things that we were doing extremely
21 well and that was a high point for the company. One of the things
22 that we did in November of '98 was we finalized the financing that
23 brought in \$8.8 million to allow us to expand and continue as a
24 company.

25 Q Talking about goals just a few minutes ago, I believe
26 you said things were great in 1998?

27 A That was one of the very, very important goals, because
28 if we didn't do that, we would have been out of business in

1 January of '99.

2 Q So what happened between November of 1998 when things
3 were great to eight weeks later where there's a crisis?

4 A I can give you a couple of examples, one of which I
5 already have done, which is this expansion of the technology from
6 a single array to multiple arrays all in a matrix.

7 Another example I mentioned that Dr. Gunderson was a very
8 clever scientist. He actually worked around the chemistry issues
9 in the company so we could accomplish those, but it wasn't the
10 long term solution that we required. We actually needed to have
11 chemistry attachment of oligos to beads, and this was something,
12 for instance, that hadn't been worked out.

13 Q So how long did it take approximately to go from things
14 being great to being in crisis?

15 A Again, maybe I am over-melodramatic in my definition,
16 but it was -- I was going to have to get up in front of the
17 people who evaluate the entire senior team and tell them we were
18 not meeting the expectations that we set. To me, because I'm a
19 very responsible individual, because I try to accomplish the
20 things I commit to and commit the company to, I thought that that
21 was significant enough to talk with my senior managers about that.

22 Q Let me ask the question again, please, sir. How long
23 did it take, approximately, to go from things being great to
24 things being crisis?

25 A Again, I don't want to be classified as great, because,
26 maybe I accidentally said that word, what I said is we were doing
27 well in November of '98, and we subsequently started to see that
28 the goals in front of us were not going to be achieved as quickly

1 as we thought they were going to be achieved. So by January I
2 thought it was significant enough that I was going to, in the
3 February board meeting, talk to my board of directors, so I began
4 talking to my senior managers.

5 Q I'll try one more time. I'll use "well" instead of
6 "great." How long did it take to go from a situation you
7 described as being well to a situation you described as being a
8 crisis, how long?

9 A Approximately two months, November to January.

10 Q Dr. Stuelpnagel, you know David Walt?

11 A Very well, thank you.

12 Q He's one of the founders of the company?

13 A Absolutely.

14 Q He's a board member?

15 A Absolutely.

16 Q You are aware David Walt has already testified in this
17 case?

18 A I understand that.

19 Q Do you agree with David Walt that in the early stages
20 of the company, summer of 1998, that Dr. Czarnik demonstrated a
21 passion and a commitment to Illumina?

22 MS ESPINOSA: I'll object to the question to the extent
23 that it may mischaracterize --

24 THE COURT: Sustained. It's the same thing, Counsel.
25 Characterizing what somebody else testified.

26 MR. PANTONI: Q Do you agree, sir, that Tony Czarnik
27 demonstrated a passion and a commitment to Illumina during the
28 summer of 1998?

1 A No.

2 Q Do you disagree with that vehemently?

3 A I had --

4 MS KEARNS: Objection.

5 THE WITNESS: I had inside information Tony wasn't
6 demonstrating that to me.

7 MR. PANTONI: Q Let me ask you about scientific
8 advisory boards. Dr. Walt was the chair of the Scientific
9 Advisory Board?

10 A Yes.

11 Q Is he still the chair?

12 A Yes.

13 Q Had you ever attended a Scientific Advisory Board
14 meeting before Illumina?

15 A No.

16 Q How many Scientific Advisory Board meetings were held
17 during the time that you were acting president?

18 A Two.

19 Q The approximate date of those two meetings?

20 A January of 1999 and June of 1999.

21 Q And you never counseled Tony Czarnik with respect to
22 any alleged deficiencies relating to either of those?

23 A That's not correct.

24 Q When did you counsel Tony Czarnik about SAB meetings?

25 A I counseled him advance of the January 1999 meeting
26 because the preparation that I was seeing was not adequate. And
27 then subsequently, after the January, 1999 meeting, I counseled
28 him again.

1 Q The only criticism you had regarding the first SAB
2 meeting was that Dr. Czarnik didn't send out pre-read materials to
3 the board, is that right?

4 A No, that's not correct.

5 Q What did you talk to Dr. Czarnik about with respect to
6 the first SAB meeting?

7 A Which counseling session?

8 Q You spoke to Dr. Czarnik -- Is your testimony you spoke
9 to Dr. Czarnik on more than one occasion about the first SAB
10 meeting?

11 A Yes, I spoke to him about his inadequacies for that
12 meeting prior to the meeting and following the meeting.

13 Q What did you say prior to the meeting?

14 A Prior to the meeting I told him that I was not seeing
15 the type of preparation in advance of that meeting that I
16 expected, and I told him that he should model this preparation
17 after how I prepare board packets and board meetings, because he
18 had observed those, he had received all the board packages, he
19 understood how those meetings were done. There's an agenda,
20 there's pre-read materials, there's questions and problems and
21 things like this that are going to be solved by the board.

22 Q What did you say to him after the meeting?

23 A After the meeting I was again disappointed because he
24 didn't send out any pre-read materials. I don't believe he sent
25 out an agenda. He created an environment at the board meeting
26 that wasn't conducive to exchange between the board members. It
27 was simply some lectures that employees gave about Illumina's
28 technology. So there was no value received back to Illumina as a

1 consequence of the Scientific Advisory Board. We just educated
2 them about our technology, but they didn't help us with any of the
3 issues or problems.

4 Q This was all your first crack at running an SAB
5 meeting?

6 A I didn't run the SAB meeting.

7 Q This is Illumina's first SAB meeting?

8 A Yes.

9 Q It's the first SAB meeting you ever attended?

10 A That's correct.

11 Q What about Dr. Czarnik?

12 A I don't know if this was the first one he ever
13 attended. I think he said on the SAB for Sensors for Medicine.
14 In fact I know he was on the SAB because he resigned that position
15 to become employed at Illumina. So I would anticipate, being a
16 board -- member of the Scientific Advisory Board of Sensors for
17 Medicine, he might have attended board meetings prior.

18 Q Now, with respect to the second SAB meeting, which was
19 in June of 1999?

20 A Yes.

21 Q You didn't get any negative feedback from any members
22 of the SAB as to that meeting, isn't that right?

23 A I don't recall any direct feed -- I'm trying to think,
24 sir. I just don't remember.

25 Q Do you recall any negative feedback whatsoever from SAB
26 members relating to the June 19 --

27 A Like I said, I just don't remember.

28 Q You really don't think that SAB meetings have much

1 value, do you, sir?

2 A I didn't think the SAB meeting as Tony Czarnik ran them
3 had much value.

4 Q Generally thinking, independent of Tony Czarnik, you
5 thought SAB meetings were a waste of time, isn't that right?

6 A I was echoing the opinion of my former boss, Mr. Larry
7 Bock, who had expressed that to me.

8 Q And the opinion that you echoed was that SAB meetings
9 are a waste of time?

10 A No, I said Larry Bock thought the SAB meetings were a
11 waste of time. Since I'd only been to one SAB meeting, it would
12 be inappropriate for me to draw a conclusion.

13 Q You said[, "I echoed his opinion?"]⁹²

14 A I said Larry Bock thinks that SAB meetings are a waste
15 of time.

16 Q Did you ever get involved in planning for SAB meetings?

17 A Minimally.

18 Q In fact you didn't even attend regularly the SAB
19 meetings, did you?

20 A That's not correct. The first meeting I believe I was
21 there a hundred percent of the time. The meetings go for about a
22 whole day. 9:00 in the morning until like 4:00 in the afternoon.
23 I believe I was there -- pretty sure I was there the whole time
24 that first meeting.

25 The second meeting, unfortunately I had other commitments
26 and activities, so I was there I guess 50 percent of the time for
27 the second meeting.

28 Q And after that -- strike that.

⁹² Quotation marks added.

1 The January 1999 meeting, the first SAB meeting after Jay
2 Flatley became CEO, you weren't there?

3 A Jay Flatley didn't become CEO in January of --

4 Q I misspoke, January of 2000.

5 A I don't think I attended that SAB meeting. If I did,
6 it was for a short time.

7 Q You weren't there at all?

8 A No, I didn't testify that.

9 Q I'm asking you again, sir.

10 A I'm trying to answer. I think I might have been there
11 for a short period of time, but I know I wasn't there for the
12 majority of that meeting.

13 Q You told Tony Czarnik that you felt that the SAB
14 meetings should be held less frequently, didn't you?

15 A I was open to any suggestion. Mostly I was wanting to
16 make sure if we were going to go to the expense of having an SAB
17 meeting that it create value.

18 Q Let me ask the question again, please. Isn't it true
19 you told Tony Czarnik you wanted SAB meetings held less
20 frequently?

21 A No.

22 Q Didn't you advocate SAB meetings should be held less
23 frequently?

24 A I believe there was a discussion the SAB had requested
25 quarterly meetings and I suggested annual meetings.

26 Q You were on pace to have them scheduled twice a year,
27 right, that was the initial decision?

28 A I don't recollect that that was set in stone, but I

1 wouldn't disagree either.

2 Q That was the consensus, you would use SAB meetings --
3 strike that. You would hold SAB meetings twice a year?

4 A To the best of my recollection, that was the target.

5 Q In fact that has been what Illumina has pursued in
6 terms of its schedule for SAB meetings, basically twice per year?

7 A No, we've had them either twice a year or once a year.

8 Q Let's take a look at Exhibit 81, please.

9 A Is there a way I can get a printed copy? I can't read
10 that. My eyes aren't that good.

11 Q We'll blow it up. That might help. Also there are
12 binders.

13 A How do I find the exhibit, sir?

14 Q There are numbered tabs.

15 MR. PANTONI: May I approach, Judge?

16 THE COURT: Yes.

17 THE WITNESS: Sorry. I'm new to this game.

18 Again, I apologize, what number am I looking for here?

19 MR. PANTONI: Q 81.

20 Do you recognize exhibit 81, Dr. Stuelpnagel?

21 A I'm tell you in a minute. I'm still reading.

22 Q Okay.

23 A I believe it's an e-mail exchanged between Tony and I.

24 Q Okay. The first e-mail is an e-mail from Tony Czarnik
25 to you, Mark Chee, Rich Pytelewski dated August 17 of 1999, is
26 that right?

27 A Yes.

28 Q In this e-mail Dr. Czarnik says that his intent is to

1 winnow down the SAB meetings to twice a year. "If you have input,
2 let me know."

3 A That's what it says, yes.

4 Q And you put in a bid for having meetings held only once
5 a year?

6 A Yes, I think what I did was advocate it might be better
7 to have smaller groups more frequently rather than the specific
8 expertise of a group of SAB members might be more applicable to
9 solving an Illumina problem.

10 Q In terms of timing, you were throwing in a bid for
11 let's do it once a year?

12 A For the entire SAB I was advocating for more frequent
13 meetings with a subsection of the SAB.

14 Q Now let's talk about the third SAB meeting, which would
15 have been the first after Jay Flatley came on board as CEO. This
16 would have been in January of 2000. Correct?

17 A Correct.

18 Q You saw the agenda for that meeting, did you not?

19 A I don't remember. Maybe I saw it in an e-mail the day
20 of the meeting. I don't remember having any input to the agenda.
21 I was not guiding the scientific direction of the company at that
22 point.

23 Q In terms of the content of that agenda, you had no
24 problems with the content, did you?

25 A I don't recall what the agenda is. If you'd like to
26 show it to me, I'd be happy to comment on it.

27 Q You don't recall reviewing it and having no problems
28 with the content?

1 MS KEARNS: Objection, argumentative.

2 THE WITNESS: I don't recall that, sir. I don't think
3 it was in my scope of responsibility at that time. I had stepped
4 back from being the president and CEO. I was no longer president
5 and CEO, I was just involved with business development.

6 MR. PANTONI: Q Let me fast forward to -- Let me
7 move to April of 1999. You recall that Tony Czarnik had an
8 assignment at that point, among other assignments, to do a grant
9 application?

10 A Yes.

11 Q What was that grant application?

12 A In approximately December of 1998, it could have been
13 November of 1998, I asked him to apply for a NIST ATP grant, and
14 the due date I believe was about mid-April of 1999.

15 Q How long do you think it takes to draft a grant
16 application, do you have any idea?

17 A I only have experience from having witnessed others at
18 Illumina draft grant applications and they would typically take
19 anywhere from a week to a month, depending on the size of the
20 grant.

21 Q Do you recall an incident in April of 1996 -- I'm
22 sorry, do you recall an incident on April 6 of 1999, an incident
23 where Tony broke down in your office?

24 A Yes.

25 Q Isn't it true on that occasion Dr. Czarnik came into
26 your office and told you he could no longer work on this grant?

27 A I think he said that he was not going to submit the
28 grant.

1 Q Isn't it correct that Dr. Czarnik started to cry?

2 A Yes.

3 Q Isn't it correct that you became angry at what you had
4 heard Dr. Czarnik say?

5 A I became very frustrated.

6 Q You were frustrated.

7 A Yes.

8 Q Were you angry?

9 A That's a fine line between frustration and anger, but
10 mostly I felt frustration.

11 Q Did you feel any anger?

12 A Again, I think we're playing with semantics. If you
13 want to call very frustrated slightly angry, okay.

14 Q I don't want to call it anything. I want to find out
15 from you.

16 A I'm trying to explain my feelings. I was very, very
17 frustrated that after six months and one week before the grant was
18 to be submitted, Dr. Czarnik said he wasn't going to be submitting
19 the grant.

20 Q Do you believe, sir, you became angry?

21 MS KEARNS: Objection, your Honor, the question has
22 been asked and answered to the best of the witness' ability.

23 THE COURT: Anything you haven't already said, Dr.
24 Stuelpnagel?

25 THE WITNESS: No

26 THE COURT: It's cumulative. Sustained.

27 MR. PANTONI: Q Did you raise your voice to Dr.
28 Czarnik?

1 A I don't recall raising my voice.

2 Q You spoke in the same conversational tone you are now?

3 A Probably how you and I are at, very direct to each
4 other.

5 Q The level of your voice?

6 A About that.

7 Q About what you are using now?

8 A Maybe a little bit more.

9 Q You deny that you were yelling?

10 A I did not yell at him. In fact, when I get frustrated
11 and stuff, I typically lower my voice.

12 Q You assumed, based on what you observed in this
13 meeting, Dr. Stuelpnagel, that Tony Czarnik had suffered a nervous
14 breakdown, isn't that right?

15 A With the information that I had at the time, which was
16 just the observation of the meeting, yes.

17 Q Your conclusion was he suffered a nervous breakdown,
18 based on what you observed?

19 A I'm not a trained psychologist or psychiatrist, but I
20 would characterize it as that. That was my impression that he was
21 having a nervous breakdown.

22 Q At any point in time when Dr. Czarnik was in your
23 office and crying -- And about how long did that last, by the way?

24 A It's hard to put an exact time to it. I'm thinking the
25 meeting was 15 minutes.

26 Q Was Dr. Czarnik crying for most of those 15 minutes?

27 A No.

28 Q How long was he crying?

1 A Probably the last couple of minutes.

2 Q Last two minutes?

3 A Two, five minutes, something like that.

4 Q Your testimony is it wasn't until the very -- near the
5 very end of the meeting that Dr. Czarnik started to cry?

6 A Yes.

7 Q At any point during this meeting, including the last
8 few minutes or so when you say he was crying, did you ever ask Dr.
9 Czarnik what was wrong?

10 A He was in such an emotional state towards the end, when
11 I realized that something was wrong with him, when I interpreted
12 something was wrong with him emotionally, he was not in a state
13 where you were going to have a rational conversation about what
14 was bothering him. And I think everybody in the room, at least I
15 did, felt uncomfortable with him crying. So it wasn't really the
16 context of asking him what was wrong with him.

17 Q What did you ask him? "What's wrong; what's going on?"

18 A I assumed, he once told me grant writing, the word he
19 used was "loathed" or "detested," and so I assumed that the stress
20 of writing the grant had caused him to have this emotional
21 breakdown. So I was making an assumption. It turned out to be a
22 wrong assumption, but that's the information I had at the time.

23 Q You never asked him basically what's wrong?

24 A No. I assumed.

25 Q Now, is it your testimony, Dr. Stuelpnagel, that you
26 were completely professional and compassionate and considerate
27 throughout this entire meeting?

28 A The meeting had quite a difference from start to finish

1 in terms of how we were interacting. At first I was questioning
2 about why he wasn't going to submit the grant and how much he had
3 done towards submitting the grant, and when he said nothing, then
4 I started asking him about, well, was there anything anybody else
5 could do to get this done, and when he said no, then I said, well,
6 do you realize that this was an important goal, this was important
7 objective for the company, could have substantially increased our
8 cash, allowed us to explore areas of research that we couldn't
9 afford to do otherwise, and that he had let us down, he let me
10 down personally, let the company down, let every employee down.
11 About that time he started crying.

12 Q Let me interrupt you. At that point what you just
13 described, you delivered it in a calm, professional manner which
14 you just talked to the jury?

15 A Undoubtedly I was more stern than that. But I
16 certainly wasn't yelling at him.

17 Q Then he started to cry?

18 A Yes.

19 Q And then what did you say?

20 A I changed from being very stern and upset to thinking
21 whoa, here I've got an important person of the company breaking
22 down and crying. He's our chief scientific officer and having a
23 nervous breakdown. So I backed up, thinking that okay, I
24 shouldn't have been so stern, I was a little rough on the guy. I
25 started saying Tony, yes, this was important to the company, but
26 the company will get through this, that we will survive. We were
27 successful in raising eight and a half million dollars. Take a
28 deep breath, settle down, it will be okay.

1 Q Do you recall anything else discussed in this meeting?

2 A Yes. Tony brought up the idea that maybe he should
3 leave Illumina or step down as CSO or whatever I thought was
4 appropriate, and I thought what was appropriate was not to make
5 any decisions in this kind of framework. Here we've got a grown
6 man crying in my office. I thought he was having a nervous
7 breakdown.

8 I was sympathetic, and last thing I wanted to do was make
9 decisions about the long-term involvement of Tony Czarnik at
10 Illumina. So I kept saying, "Tony, don't worry, we're not going
11 to make any decisions. The most important thing is for you to get
12 better. You can't help Illumina in this state."

13 And he kept saying, "I want to help Illumina, I want to help
14 Illumina, but if leaving is what I need to do, I'll do that."

15 I said, "Tony, don't worry about it, just take sometime off,
16 take as much time as you need, and then we'll talk about where we
17 need to go next."

18 Q So you never suggested he leave the company, that's
19 your testimony?

20 A Not at that moment.

21 Q Now, then Tony Czarnik left your office and it was just
22 you and Mark Chee?

23 A That's correct.

24 Q And to your understanding, Dr. Czarnik went home?

25 A Yes.

26 Q So then did you and Mark Chee talk about what had just
27 happened, this incident where your chief science officer had
28 suffered an apparent nervous breakdown in your office?

1 A I remember having a short conversation. I think it's
2 fair to characterize Mark as not necessarily comfortable with
3 these kind of emotional discussions or displays, and so I don't
4 think --

5 MR. PANTONI: I'll object and move to strike, Judge, as
6 to his characterization.

7 THE WITNESS: Sorry.

8 MR. PANTONI: Of whether Mark was comfortable.

9 THE WITNESS: So I don't think we had a long
10 conversation, is the short answer. I think we had a few words and
11 then we went back to work.

12 MR. PANTONI: Q You had what you called a
13 superficial discussion?

14 A Superficial implies the value. There was no value in
15 the conversation, but I think it was a short conversation with
16 Mark Chee.

17 Q You discussed the situation at a superficial level, is
18 that right?

19 A Okay. Yes. However you want to characterize it.

20 Q I'll read your testimony into the record. At page 185,
21 beginning on line 21:

22 "QUESTION: So you had a brief conversation
23 with Dr. Chee on April 6, 1999, after Dr. Czarnik left your
24 office?

25 "ANSWER: Again, I can't testify to the date
26 or when the conversation occurred. I have a vague
27 recollection we would have talked about it at least on a
28 superficial level.

1 "QUESTION: Can't recall anything beyond a
2 discussion on a superficial level?

3 "ANSWER: No."

4 How long did you and Mark Chee discuss what just happened in
5 your presence with Dr. Czarnik?

6 A Again, a very short conversation.

7 Q Define that for me, sir.

8 A My guess is it was less than five minutes.

9 Q What did you discuss in those five minutes?

10 A Again, just a vague recollection that whoa, that was
11 kind of unusual, and yeah, he's pretty upset. Too bad we didn't
12 get the grant done. That took about five minutes.

13 Q You recall a business trip that you took with Mark Chee
14 shortly after -- strike that.

15 Did you see Tony Czarnik any more that day, April 6, 1999,
16 after he left?

17 A No.

18 Q Then the next day you received an e-mail from Tony
19 Czarnik?

20 A Technically I received the e-mail the night before, but
21 I personally didn't open the e-mail until the morning when I came
22 in.

23 Q Let's put that on the screen, please. It's Exhibit 60.

24 MS KEARNS: 60.

25 MR. PANTONI: Q Do you recall receiving this e-mail
26 from Tony Czarnik dated April 6 of 1999?

27 A Yes.

28 Q You saw it the next day, April 7, 1999?

1 A Yes.

2 Q When you received this e-mail, did you do anything with
3 respect to reviewing the company's personnel policies and
4 procedures relating to this matter?

5 A No.

6 Q Did Illumina have an employee handbook or policy and
7 procedure manual?

8 A It's a very --

9 Q At that point in time?

10 A It's a very good question. What I'm having a hard time
11 reconciling is when we put that into place. It was sometime in
12 1999. My best guess is that it was more like June or so of 1999.
13 But again, I apologize, I don't have a good recollection of that
14 exact date.

15 Q Did Illumina have a leave of absence policy in place in
16 April of 1999?

17 A We had a PTO policy. I believe we put it in in the
18 fall of 1998, where employees earned up to four weeks of paid time
19 off, and they could use that however they wanted to, for vacation,
20 sickness. We didn't have a separate sick vacation. This was all
21 encompassed in the PTO.

22 Q Did you prepare a special -- strike that. Did you
23 prepare a leave of absence policy in about April of 1999?

24 A I don't remember, but at some point I helped prepare
25 one. Deborah Flamino was the one that was taking the lead on the
26 HR handbook.

27 Q All right. So did you speak with Tony Czarnik then
28 that day he was at home, April 7 of 1999?

1 A Yes.

2 Q You called him at home and you told him what he needed
3 to do was take care of himself?

4 A No, -- I mean that was part of the conversation. What
5 I started with the conversation is, "How are you feeling, Tony?
6 Are you feeling any better? Sounds like this is something that's
7 much longer acting than I expected." So when I saw this e-mail, I
8 was actually surprised.

9 Q The gist of what you told him is stay home and take
10 care of yourself?

11 A Mostly what I did was tried to talk to him and make
12 sure that he was feeling better, tried to comfort him. I thought
13 I was compassionate. He doesn't regard it as such. And I told
14 him, I reiterated not to think about the grant, because I think in
15 that conversation he said, "Well, I'm feeling better, I think I
16 can take on the grant now," and we're only a week from the
17 deadline, and this date the last thing I wanted to do was put more
18 stress on the guy.

19 I said, "Absolutely not, Tony, don't work on the grant, just
20 take care of yourself," and that's the context.

21 Q In fact, you believe you were compassionate the day
22 before when he broke down in your office?

23 A After he started crying, I believe I was compassionate.

24 Q Do you recall the next day, April 8, 1999, Dr. Czarnik
25 returned to work?

26 A Yes.

27 Q And did he seem to be in good spirits?

28 A Yes.

1 Q And on April 8, 1999, he met with you and Rich
2 Pytelewski?

3 A Yes.

4 Q Where did that meeting take place?

5 A Again in my office.

6 Q On April 8, 1999, Dr. Czarnik disclosed to you that he
7 had been suffering from depression?

8 A Yes.

9 Q And that he had been suffering from depression for many
10 years?

11 A Yes.

12 Q And he told you that he was being treated for his
13 depression, right?

14 A Yes.

15 Q And that he was taking medication, antidepressant
16 medication?

17 A Yes.

18 Q And Dr. Czarnik went back to work that day, to the best
19 of your knowledge?

20 A Yes.

21 Q After that meeting you had a discussion with Mark Chee?

22 A Yes. I think I did.

23 Q Dr. Czarnik had asked you to please pass on the
24 information he gave you to Dr. Chee?

25 A That's my recollection.

26 Q You did that?

27 A I believe I did.

28 Q So then as of that date, April 8, 1999, yourself, Mark

1 Chee and Rich Pytelewski all have knowledge of Dr. Czarnik's
2 depression?

3 A I just want to make sure you said April 8, 1999. I
4 thought maybe I heard the wrong date.

5 Q That's what I meant to say. As of April 8, 1999,
6 yourself, Dr. Chee and Mr. Pytelewski had knowledge of Dr.
7 Czarnik's depression?

8 A Correct.

9 Q Now, Dr. Czarnik did complete the grant application,
10 did he not?

11 A Yes.

12 Q And the grant application was submitted on time?

13 A Yes.

14 Q And you had no problems with the quality of the grant
15 application that was submitted?

16 A No.

17 Q In terms of the quality, it was at least satisfactory,
18 is that right?

19 A Yeah. I'm not a grant reviewer. Those are done by
20 scientist level people. But from my perspective I was impressed
21 he was able to pull it together that quickly.

22 Q Do you recall a business meeting that you had at
23 Bristol-Myers Squibb shortly after you learned of Dr. Czarnik's
24 depression?

25 A Yes.

26 Q That took place on April 11, 1999?

27 A Yes. I'm pretty sure it was around that time period.

28 Q And you and Mark Chee talked about what had happened in

1 your office on April 6 when you were on this business trip on
2 April 11, is that right?

3 A In more depth, yes.

4 Q In the hotel room?

5 A It wasn't in the hotel room. To be precise, it was --
6 We walked around the hallway getting some exercise because we had
7 just had a long flight to New Jersey.

8 Q You and Dr. Chee discussed getting a new CEO?

9 A I don't think --

10 Q I'm sorry, a new chief science office, CSO.

11 A Yes, Mark told me that in March, a few weeks earlier.
12 Tony had approached him and asked that Mark take the position of
13 CSO and Tony step down, and so Mark and I talked about whether
14 that was appropriate or not.

15 Q You were concerned, Dr. Stuelpnagel, were you not, that
16 Dr. Czarnik might break down again?

17 A No.

18 Q No concern about that at all?

19 A No.

20 Q CSO had just broken down in your office, crying, a few
21 days ago. You are saying you had no concern whatsoever that that
22 might happen again?

23 A No, because he had -- at least he told me he had a
24 perfect reason for that. He had changed his medication for
25 personal reasons, adverse reaction reasons, approximately December
26 of 1998. The medication didn't work. He was now going back to
27 his original medication which had controlled his depression for a
28 number of years prior to that, so I assumed that with the new

1 medication he'd be fully functional and not break down.

2 Q You were concerned Dr. Czarnik had broken down over a
3 seemingly simple task of writing a grant application, isn't that
4 true?

5 MS KEARNS: Objection, argumentative.

6 THE COURT: Sustained.

7 MR. PANTONI: Q You viewed the grant application as
8 a relatively simple task, didn't you?

9 A I don't think I'd characterize grant application as a
10 simple task.

11 Q Were you concerned over the fact it appeared to you
12 that Dr. Czarnik had broken down over the grant application
13 process?

14 A No, because as I gained more information in the April
15 8th meeting, I came to the conclusion the grant had nothing to do
16 with that. It was further confirmed by his ability to get the
17 grant in.

18 Q As of April 11, 1999, he hadn't submitted the grant
19 application, had he?

20 A I'd have to go back and -- We're within days of the
21 meeting, and submitting the grant, so I'd have to go back and
22 actually confirm that, but I knew he was back working on it.

23 Q Focusing on April 11, 1999, when you and Mark Chee are
24 talking about this issue, weren't you concerned that the stress of
25 the job might be too much for Dr. Czarnik?

26 A I don't recall that specifically came up. I think we
27 instead talked about whether he was the right person for the job
28 and could fulfill or grow into the role of chief scientific

1 officer.

2 Q In your own mind, sir, were you concerned the stress of
3 the job might be too much for Dr. Czarnik?

4 A I guess I'm worried the stress of the job is too much
5 for me at times. So maybe that came across, sure.

6 Q In light of the fact that he had broken down crying in
7 your office on April 6, 1999, weren't you particularly concerned
8 that the stress of this job might be too much for Dr. Czarnik?

9 A No, because he had the logical reason. It was change
10 in medication. He was back to his original medication.

11 Q You and Mark Chee discussed Tony Czarnik's mental
12 health in April of 1999, didn't you?

13 A I'm sure that topic of depression came up because Mark
14 and I had that short conversation following the April 8th meeting,
15 and to the best of my recollection we didn't talk about it again,
16 so this was an opportunity to I guess refresh our minds with
17 respect to that, too.

18 Q Didn't you and Mark Chee on April 11, 1999, discuss
19 that Illumina could be at significant risk if you kept Dr. Czarnik
20 in the chief science officer position?

21 A No. Not to the best of my recollection.

22 Q You decided not to look for a new chief science
23 officer, right?

24 A That's correct.

25 Q You never even began a search while you were acting
26 president for a new CSO, did you?

27 A That's correct.

28 Q Dr. Stuelpnagel, was there a period of time after Dr.

1 Czarnik disclosed his depression to you that you avoided talking
2 with Dr. Czarnik?

3 A Absolutely not.

4 Q Did you find what had happened in your office on April
5 6 to be in any way embarrassing?

6 A No.

7 Q Were you any way -- Did you feel -- Strike that.

8 Was it awkward for you to interact with Dr. Czarnik in the
9 immediate aftermath of the April 6 breakdown?

10 A No.

11 Q Did you ever bring it up again?

12 A We talked about it a couple of weeks later on a
13 Saturday, I think it was late April, where we talked about that
14 and other issues. It was another counseling session because I
15 talked to him about where I thought he was failing. It was a time
16 period where we could have a nice rational conversation about what
17 we needed to do collectively to move forward.

18 Q How long after the breakdown do you say you counseled
19 him again about performance problems?

20 A How long after? The best of my recollection, it was a
21 couple of weeks, on a Saturday afternoon.

22 Q So you say a couple of weeks after the breakdown you
23 had a meeting with Dr. Czarnik and you counseled him about
24 performance?

25 A We talked about a number of things, including his
26 performance.

27 Q This was only two weeks or so after this incident
28 occurred, approximately?

1 A I'm saying a couple of weeks because I don't know
2 whether it was two, three. I guess it could have stretched to
3 four. To the best of my recollection, it occurred late April.

4 Q Is it your testimony that there was no change at all in
5 the way you two interacted at work after Dr. Czarnik broke down in
6 your office and later disclosed depression to you?

7 A Correct.

8 Q After Dr. Czarnik disclosed his depression, did you get
9 him involved in any business development activities relating
10 specifically to genotyping?

11 A No, because he wasn't involved with those before
12 either.

13 Q To your knowledge, was Dr. Czarnik involved in any
14 business development activity relating to genotyping after April
15 of 1999?

16 A Not to the best of my knowledge, although from an
17 information point of view, we showed him term sheets and things
18 like that about the deals that we were in, and so in that context
19 I guess he contributed in a small way, but not materially.

20 Q Was he involved at all in meeting with potential
21 business partners in the area of genotyping after April of 1999?

22 A To the best of my knowledge, no.

23 Q And genotyping was the principal application that
24 Illumina was pursuing, right?

25 A It was the first principal is a fair characterization.

26 Q Let me ask you a few questions about Illumina's
27 collaboration with [ABI]⁹³. Formerly called what?

28 A Maybe I should just go through all the names that may

⁹³ Original transcript read, "API".

1 have been used for this particular company. Its formal name at
2 the time that we were negotiating with them with PE Biosystems.
3 Prior to that they were called [Perkin-Elmer]⁹⁴, so might have been
4 the context of somebody might have written out of historical
5 reasons. Now they are called Applied Biosystems, and it's
6 abbreviated ABI or AB.

7 Q So for simplicity can I refer to it as ABI? You'll
8 understand what I'm talking about.

9 A Absolutely.

10 Q You understand that ABI first became interested in
11 Illumina because of a talk given by Tony Czarnik?

12 A No.

13 Q You recall that Tony Czarnik gave a talk at which a
14 principal of ABI was in attendance?

15 A I think there was such a talk that Tony told me about
16 afterwards.

17 Q Who from ABI was at that talk?

18 A I think Tony said it was Mike Hunkapillar.

19 Q What was his position with ABI?

20 A He's the president

21 Q You were involved in negotiations for the ABI deal?

22 A Yes.

23 Q You decided who would work on that project?

24 A Yes.

25 Q You decided that you and Mark Chee would be the persons
26 who negotiated that deal?

27 A Yes, it was a natural outcome of our initial meeting in
28 February of 1999 and Mark's expertise in genomics.

⁹⁴ Original transcript read, "Perk and Elmer".

1 Q Did you ever ask Tony Czarnik to get involved in the
2 ABI deal before closing?

3 A Yes. In fact I sent him term sheets, contracts, we met
4 strategically to discuss these things. Unfortunately, Tony didn't
5 have a lot to offer.

6 Q These were personal meetings in Illumina?

7 A Some were in person, some were transferring files by
8 the intranet asking for comments.

9 Q Did he provide comment and they weren't satisfactory?

10 A To the best of my knowledge, he didn't provide any
11 material comments.

12 Q What was Illumina going to provide to ABI in connection
13 with this collaboration, generally speaking?

14 A An agreement -- You call it the field. In the field of
15 this agreement was the use of this array matrix I described before
16 with the Applied Biosystems chemistry for genotyping, a chemistry
17 we had been working on at Illumina.

18 Q Illumina was going to provide the array matrix?

19 A Yes.

20 Q Did Dr. Czarnik have any expertise in that area?

21 A There were, the array matrix, manufacturing array
22 matrix, is an interdisciplinary activity that involves chemistry,
23 molecular biology, informatics, engineering. All these
24 disciplines.

25 Q When did the ABI deal close?

26 A I believe it was around the first week. I think it's
27 November 5th, of 1999.

28 Q And Dr. Stuelpnagel, you made recommendations to boards

1 of directors about who should get stock bonuses on that deal,
2 right?

3 A No.

4 Q Who made recommendations?

5 A Answering precisely your question, the compensation
6 committee is the organization that decides senior management
7 compensation at Illumina.

8 Q Compensation committee?

9 A Compensation committee.

10 Q Who is on the compensation committee?

11 A My old boss, Larry Bock, and Bob or Robert Nelson.

12 Q Have you ever been on the compensation committee?

13 A No.

14 Q Did senior management make recommendations to the
15 compensation committee?

16 A We were discussing compensation in the fall of 1999. I
17 had a previous conversation with them in June of '99, mostly in
18 the context of getting approved the compensation program that I
19 wanted to provide to the existing employees in the summer of '99.
20 The compensation committee decided not to use my recommendation
21 for senior management, but did use my recommendation for stock
22 options and raises for the employees in the summer of '99. They
23 said that they would revisit senior management upon the execution
24 of certain milestones.

25 Q What recommendations did you make to the compensation
26 committee about a stock grant on the ABI deal?

27 A I recommended that Mark Chee and me receive a hundred
28 thousand shares. The opportunity to purchase a hundred thousand

1 shares of Illumina stock.

2 Q And that's ultimately what happened, your
3 recommendations were finalized?

4 A Yes.

5 Q Did you recommend that Tony Czarnik get any stock grant
6 in connection with the closing the ABI deal?

7 A No.

8 Q Is it correct, sir, that the Illumina/ABI collaboration
9 is the most important business collaboration that Illumina
10 currently has?

11 A I think that's a true statement.

12 Q Dr. Stuelpnagel, did you ever give Tony Czarnik any
13 sort of a counseling memo?

14 A All the counseling sessions were oral.

15 Q Did you ever give him anything in writing that
16 documented any alleged concerns you have about his performance?

17 MS KEARNS: Objection, just asked and answered.

18 THE COURT: Overruled.

19 THE WITNESS: No.

20 MR. PANTONI: Q Did you ever -- We've heard you
21 talk about your concerns about his performance, Tony Czarnik's
22 performance. Did you ever discuss any alleged performance
23 problems on the part of Tony Czarnik with the board of directors?

24 MS KEARNS: Objection, hearsay.

25 THE COURT: This would be in the nature of an
26 admission?

27 MR. PANTONI: The fact he didn't do so.

28 THE COURT: That he did not. Failure to do so.

1 MR. PANTONI: Let me withdraw the question.

2 Q Isn't it correct, sir, that you never reported any
3 alleged performance problems on the part of Tony Czarnik to the
4 Illumina board of directors?

5 A No, that's not true.

6 Q When did you first report any allege performance
7 problems to the Illumina board?

8 A During the discussion around senior management
9 compensation, and I think it was in the September time frame of
10 1999. We're getting close to signing the ABI deal. We talked
11 about who was contributing at Illumina, and I told the
12 compensation committee, which consisted of two of the board
13 members, Larry Bock and Bob Nelson, that both Rich Pytelewski and
14 Tony Czarnik were not contributing at the same level that Mark and
15 I were.

16 Q Was there ever a discussion to your knowledge about
17 alleged performance problems on the part of Tony Czarnik at a
18 meeting of Illumina's board of directors while you were acting
19 president of the company?

20 A No.

21 Q You mentioned Rich Pytelewski. Was his employment
22 terminated by Illumina?

23 A Yes.

24 Q When was Rich Pytelewski's employment terminated by
25 Illumina?

26 A It's a little bit of a complicated situation, so I'm
27 trying to remember. I believe he was terminated in March of 2000,
28 but remained for approximately three months as a consultant, and

1 we did not disclose to the other employees his change in status,
2 we kept that private during that consulting period.

3 Q So the decision to terminate Rich Pytelewski's
4 employment was made in March of 2000?

5 A I believe there were earlier discussions between Jay
6 Flatley, our CEO, and Rich Pytelewski around the winding down of
7 his employment and the nature of that, and it might have occurred
8 before March. I just don't remember.

9 Q But at least as of March of 2000, the company had
10 decided to terminate Rich Pytelewski's employment and communicated
11 that to him?

12 A Yes, with the caveat that the March date is to the best
13 of my recollection.

14 Q Is it fair to say that it happened within a month or
15 so, within a month of -- strike that.

16 Is it fair to say the decision to terminate Rich
17 Pytelewski's employment occurred within a month of March of 2000?

18 A I think so.

19 Q Now speaking of Mr. Flatley, were you the person who
20 identified Jay Flatley as a candidate to be the new CEO?

21 A No.

22 Q Who did that?

23 A Dr. Mark Chee, in May of 1999, told me that Mr. Flatley
24 was winding down his relationship with his previous company,
25 Molecular Dynamics, which had been acquired by Amersham, and would
26 be potentially available and perhaps a nice fit.

27 Q Did you take a lead in terms of, from Illumina's point
28 of view, in trying to approve Jay Flatley?

1 A Yes.

2 Q Were you the person who was involved in negotiating
3 with Jay Flatley over the terms of his employment?

4 A No.

5 Q Who did that?

6 A Bob Nelson, board member.

7 Q What was your role, sir, with respect to recruiting Jay
8 Flatley?

9 A We went to Molecular Dynamics, it's up in Sunnyvale,
10 and presented our technology. It was really a potential partner
11 for the same type of thing that we were doing with Applied
12 Biosystems. I didn't want to be in a position where I only had
13 one person interested in our technology. So we went there to --
14 Mark Chee and I went there to talk to him about potential
15 collaborations, and then in a very brief, like one-minute
16 conversation, I mentioned to Jay that I was just the acting
17 president and CEO, and I understood that he might be available and
18 looking for new opportunities, and if he were, I'd love to have a
19 conversation apart from the one we were having there.

20 Q Did you have a series of discussions over time with Jay
21 Flatley about possibly coming on board?

22 A Yes.

23 Q Did you ever receive a stock bonus simply for the
24 hiring of Jay Flatley?

25 A Yes, it was contingent upon the hiring of Jay Flatley.

26 Q Take a look again at Exhibit 360. That's your resume,
27 Dr. Stuelpnagel?

28 A Okay.

1 Q You included as an element of your experience the fact
2 you had identified and recruited the permanent president and CEO.
3 Is that in reference to Jay Flatley?

4 A Yes.

5 Q You hadn't really identified him?

6 A I was being very precise in my conversation here as
7 identifying the first person who brought him up as a possibility,
8 but in terms of identifying him for the board and for the
9 management team, I certainly did.

10 Q You thought that your role in identifying and
11 recruiting your successor was significant enough professionally to
12 include on your resume?

13 A I'll tell you, it's one of the best decisions I ever
14 made.

15 Q Your involvement in your role in doing that, finding
16 and recruiting your successor, is important enough professionally
17 that you included it on your resume?

18 A Yes, because first of all it helped to correlate my
19 current position at Illumina, but most importantly, this was
20 something that just isn't done. Typically when somebody gets to
21 be the president and CEO of a company, you have to pry them out,
22 and the fact that I actually volunteered to step down, initiated
23 the discussions to step down with my board of directors, was
24 extremely unusual. In fact, one of the board members told me he
25 had never seen this in his history of venture capital, which was
26 something like 15-year tenure. So I think it was an important
27 milestone for the company, an important milestone for me.

28 Q Wasn't that the plan from day one, that you would only

1 be in an acting capacity and a new CEO would be hired?

2 A Like I said, it's typical that somebody gets into this
3 role, and trying to extricate them from that role is often
4 difficult, and for me it wasn't. It was -- I was looking out to
5 do what absolutely was the best thing for the company. Jay has
6 terrific experience in this industry. Knew how to build a strong
7 team and lead a strong organization.

8 Q My question is simply that was the plan from day one,
9 that you would be an acting president and you would someday hire a
10 new person to replace?

11 A The company would someday hire a replacement. It
12 wasn't anticipated I would hire my own replacement.

13 Q Did you take any initiative in getting involved in
14 doing that?

15 A I'm sorry?

16 Q Did you take the initiative in insuring that you were
17 the person that would be involved in actively recruiting and
18 hiring a new CEO?

19 A It was real opportunistic. There were a couple of
20 candidates, Eric Gordon, who Larry Bock identified, and I flew up
21 to a meeting in San Francisco to meet with Eric and other board
22 members. There was another person, Nick Savage, of MSI in San
23 Diego, that had been recently acquired. Larry Bock identified
24 that person as a potential candidate.

25 So it was really trying to find the best candidate, and
26 whoever found him, that was great.

27 Q Now, when Jay Flatley first came on board as the new
28 CEO, did you brief him on the senior management team that he was

1 inheriting?

2 A No.

3 Q You didn't sit down with him and tell him anything
4 about the background and experience of the people he was going to
5 take over supervising?

6 A Absolutely not.

7 Q Did you give him the strengths and weaknesses of the
8 management team he was inheriting?

9 A No, sir.

10 Q Did you give Jay Flatley any background whatsoever on
11 the new management team that he was about to take over
12 supervising?

13 A No.

14 MS KEARNS: Objection, your Honor, it's cumulative. I
15 think this is the fourth iteration of the question.

16 MR. PANTONI: Q Did you -- Strike that.

17 When is the first time, sir, that you discussed Tony
18 Czarnik's performance with Jay Flatley?

19 A To the best of my recollection, it was January of 2000,
20 after his, Tony's performance, at the Scientific Advisory Board
21 meeting.

22 Q So that we're clear then, Jay Flatley started at
23 Illumina on what date, approximately?

24 A The middle of October, 1999.

25 Q So at any point between October of 1999 and January of
26 2000, did you have any discussion with Jay Flatley about Tony
27 Czarnik's performance?

28 A To the best of my recollection, no.

1 Q You are aware that the new chief science officer who
2 replaced Dr. Czarnik is a man named David Barker?

3 A Yes.

4 Q Isn't it true that Jay Flatley asked you for your input
5 on whether the company should hire David Barker as CSO?

6 A Yes.

7 Q Do you have any knowledge whether Jay Flatley sought
8 the input of Tony Czarnik with respect to whether David Barker
9 should hire the CSO?

10 A I think he did.

11 Q How do you know that?

12 A Try to recollect whether Jay told me about a
13 conversation he had with Tony about the appropriateness of David
14 Barker, but I think that's where it came from.

15 Q So you believe Jay Flatley told you that he had
16 discussed the appropriateness of hiring David Barker with Tony
17 Czarnik?

18 A I believe he did.

19 Q Let's take a look at Exhibit 32, please.

20 Do you recognize Exhibit 32?

21 A I recognize it as one of the drafts of our business
22 plan from the summer of 1998.

23 Q In handwriting up there it says "Business Plan, Non-
24 Confidential." Did Illumina have a confidential and a non-
25 confidential version of the business plan?

26 A The original version was we considered to be
27 confidential, meaning we didn't want it spread widely in the
28 scientific community, so we redacted some portions of it,

1 shortened it, took out things that perhaps were more sensitive,
2 and made a non-confidential version, which was only circulated, I
3 believe, to one or two of our members of our Scientific Advisory
4 Board.

5 Q Okay. Who drafted the executive summary portion of the
6 business plan?

7 A I drafted this version of the executive summary.

8 Q If we can look at page 2, please.

9 Is this a continuation of the executive summary that you
10 drafted?

11 A I believe it is.

12 Q This is paragraph that you drafted saying Illumina has
13 assembled a world class management team?

14 A Yes, I wrote that.

15 Q And did you write the description of Dr. Czarnik?

16 A Probably, yes. You know, when I say that, Dr. Czarnik
17 tried to write the first draft of the executive summary. It was
18 assigned to him, and when it came back inappropriate, I rewrote
19 it. I don't know how much, if that's possible, that sentence
20 could have come from his first draft.

21 Q But ultimately this was the version that you either
22 prepared or --

23 A Yeah.

24 Q And you called Dr. Czarnik a founder?

25 A Yes.

26 Q In the business plan.

27 Do you agree he is an internationally recognized expert in
28 combinatorial chemistry and analytical chemistry, solid phase

1 synthesis, coding, fluorescence and chemosensors?

2 A Probably a little bit of an overstatement. Well, no, I
3 think that's probably fair.

4 Q Move to page 5, please.

5 This is a continuation of a business plan describing some of
6 the background of the company?

7 A Yes.

8 Q Did you write this section?

9 A I believe I wrote this section.

10 Q You refer to the fact that in June Illumina recruited
11 its two key scientific founders, Czarnik and Chee, correct?

12 A Yes.

13 Q So that's the second time at least in this business
14 plan you refer to Dr. Czarnik as a founder?

15 A Yes.

16 Q Skip over to page 42, please.

17 This is a description of the management team and the
18 organization of the management team?

19 A Yes.

20 Q And again you describe Dr. Czarnik as being a founder
21 and internationally recognized expert?

22 A Yes.

23 Q Did you circulate this business plan to companies with
24 whom you were talking to about potential business collaborations?

25 A No, I don't think I did.

26 Q Did you use this for purposes of trying to raise money?

27 A Yes.

28 Q Exhibit 111, please.

1 The business plan we just discussed, Dr. Stuelpnagel, you
2 say was drafted sometime in 1998, right?

3 A Yes.

4 Q Do you recall attending a conference sponsored by
5 Hambrecht & Quist January 10 of 2000?

6 A Yes.

7 Q You were present at that conference, true?

8 A I believe I was.

9 Q Jay Flatley gave a presentation at that conference?

10 A Yes.

11 Q Next page, please.

12 Jay Flatley showed this slide at the H&Q conference, right?

13 A Yes.

14 Q You were there when he showed this slide that in April
15 of '98 this company was founded by you and Mark Chee?

16 A Yes.

17 Q When you saw that slide, did you bring it to
18 Mr. Flatley's attention and tell him it was erroneous?

19 A I had a conversation about how it wasn't inclusive of
20 everybody, so absent on this line is Larry Bock, David Walt, Tony
21 Czarnik, and Jay said well, for this audience, you are the two
22 that would be most recognizable.

23 Q Did you use this same slide in a presentation you gave
24 later that year?

25 A Yes. That was an accident. It was misfortune on my
26 part. I borrowed the slides. I believe it was the same month,
27 might have been the following month, but Jay had a nice template
28 and nice slides built from the H&Q conference, so I borrowed those

1 slides for a presentation I gave.

2 Q It was an accident?

3 A The fact that this hadn't been changed.

4 Q This was a presentation that you made to a company
5 called Caliper Technologies, is that right?

6 A Yes.

7 Q Exhibit 128, please.

8 Do you recognize this as an e-mail you sent to Tony Czarnik
9 on February 8 of 2000?

10 A Yes.

11 Q Just a few weeks after the H&Q conference?

12 A Yes.

13 Q And you invited him to this presentation you were going
14 to give to Caliper Technologies?

15 A Yes, I did.

16 Q It had been a long time since you had invited Dr.
17 Czarnik to a presentation that you gave to a business partner?

18 A That's not correct.

19 Q When is the most recent time before this that you
20 invited Dr. Czarnik to a presentation you gave?

21 A We were having two active business development
22 discussions with the Dow Chemical Company and Chevron
23 Petrochemical, and Dr. Czarnik was the lead scientist helping me
24 with those discussions.

25 Q Did you show slides at those meetings?

26 A I'm sure we did.

27 Q Did you show slides of who founded the company?

28 A No, because this slide didn't exist.

1 Q Did you show any slides about who founded the company?

2 A I think I didn't. I'm not sure. I don't know all the
3 slides I showed.

4 Q At this Caliper Technologies presentation, you showed
5 Jay Flatley's slide that listed yourself and Mark Chee as the only
6 founders?

7 A It doesn't say only founders. It says founded by or
8 whatever it says. We can go back to the exhibit. But I don't
9 want to mischaracterize the slide.

10 Q You showed this slide to Jay Flatley and showed at the
11 H&Q?

12 A Yes.

13 Q You said it was an accident, it shouldn't have been?

14 A Yes. I was embarrassed, actually, because Tony was in
15 the audience, and I said why did I do this, I should have had
16 Tony's name there. Should have been David Walt's name there,
17 Larry Bock's name there. Because Caliper was founded by Larry.
18 That was stupid, too. There were a lot of things not right about
19 that slide.

20 Q Dr. Czarnik complained to you about that slide, didn't
21 he?

22 A He complained I think it was to me, yes.

23 Q Let's look at Exhibit 131. You recognize this as an
24 e-mail Dr. Czarnik sent to you on February 18, 2000, complaining
25 about that slide?

26 A Yes.

27 Q Did you ever respond to him?

28 A Actually I went to Jay because Jay had played the slide

1 and I wanted to make sure Jay was comfortable with changing it
2 back, and I was kind of apologetic. I went to my boss, said boss,
3 I screwed up.

4 Q You agree with Jay Flatley's comment that this was an
5 error, it should be fixed, and Dr. Czarnik should be reflected as
6 a founder?

7 A Yes.

8 Q Let me ask a few questions about Dr. Czarnik's research
9 fellow position. Were you involved at all in the decision to make
10 Dr. Czarnik a research fellow?

11 A No.

12 Q Would you agree, sir, that Dr. Czarnik's
13 responsibilities as a research fellow were purely scientific?

14 A I wasn't -- It wasn't my decision to make what his
15 responsibilities were. That was between him and the CEO.

16 Q Would you agree his responsibilities ended up being
17 purely scientific?

18 A I'm trying to think through his goals. I believe most
19 of those goals were scientific in nature.

20 Q Are you aware of the fact Dr. Czarnik was first asked
21 to report to, as research fellow, David Barker, the chief
22 scientific officer?

23 A I vaguely remember that, yes.

24 Q And do you vaguely remember the fact that Dr. Czarnik's
25 reporting relationship was later changed to report directly to Jay
26 Flatley rather than to report to the chief science officer?

27 A The vague part is that it was changed, because I
28 vaguely remember it was first David, so changing it could be vague

1 also. But I do know that the reporting relationship ended up
2 where Jay Flatley was guiding Dr. Czarnik.

3 Q Did you ever suggest any job responsibilities be taken
4 away from Dr. Czarnik after he became research fellow?

5 A No, other than I helped try to cut down the number of
6 goals and make them goals, that they were specific, measurable,
7 mandated.

8 Q Other than your role in discussing Dr. Czarnik's
9 specific written goals, putting that aside, did you ever recommend
10 that any job responsibilities be taken away from Dr. Czarnik?

11 A Again I think that was the decision that Jay made
12 because he was the boss.

13 Q Does Illumina have a patent review committee?

14 A At the time it didn't. Now it does.

15 Q Let's take a look at Exhibit 204, please.

16 You recognize this at the bottom --

17 A Sorry, there's lot of books back here. 204?

18 Q 204. The bottom. Do you recognize this as an e-mail
19 sent by Tony Czarnik on May 1 of 2000 to yourself, among other
20 people?

21 A Yes.

22 Q This deals with the patent review committee and the
23 organization of the patent review committee, correct?

24 A A committee that didn't exist yet.

25 Q It's involving organizing that committee?

26 A Yes.

27 Q Do you disagree with this comment that David Barker
28 asked Dr. Czarnik to organize the patent review committee?

1 MS KEARNS: Objection, foundation.

2 THE COURT: Sustained.

3 MR. PANTONI: Q Do you have any reason to dispute
4 that fact?

5 A I have no knowledge one way or the other.

6 Q Did you ever go to Dr. Barker when you received this
7 e-mail or in any way discuss this issue with Dr. Barker?

8 A Yes, I do remember talking to Dr. Barker about this.

9 Q Did that confirm Dr. Barker had asked Dr. Czarnik to
10 organize the patent review committee?

11 A No, what I expressed is my concern with Tony leading
12 it. I didn't feel he was competent based upon his previous
13 activities with intellectual property in the company.

14 Q Scroll down, please. In fact you responded to this
15 e-mail by saying that you prefer that Nicky, that's Nicky
16 Espinosa, and yourself take the lead on this item?

17 A Yes. So I was in charge of the IP by default. I
18 assumed that responsibility when Tony decided he didn't want to be
19 part of that in the summer of 1998, despite having asked for him.
20 Nicky Espinosa was a partner at Brobeck and specialized in patent
21 law. She was leaving her practice there to join us as vice
22 president of intellectual property, so it seemed to make sense
23 since Nicky would be joining us shortly that she should work with
24 me to organize a committee to make sure the transition was done.

25 Q What were Dr. Czarnik's duties and responsibilities as
26 you understood them on May 1st, 2000?

27 A I'm not sure I understood his responsibilities. I
28 don't know if they've been communicated to me at that point.

1 Q You didn't know what his role was, what specific tasks
2 he was working on?

3 A The only thing that -- At some point, I don't know
4 whether it was before May 1st or after May 1st, there was some
5 agreed upon goals that he would -- that would focus his direction
6 over the next several months. On May 1st I'm not sure whether
7 those goals had been finalized with Jay.

8 Q I believe that the record has indicated and will
9 indicate that he thought he got his new goals, Dr. Czarnik got his
10 new goals on May 19th of 2000.

11 A Okay.

12 Q So assuming that's correct, do you know what his duties
13 and responsibilities were on May 1st of 2000, when you sent him
14 this e-mail?

15 A No.

16 MR. PANTONI: Could this be a good time to take --

17 THE COURT: Could I see you counsel regarding the
18 schedule for this afternoon.

19 (Discussion off the record.)

20 THE COURT: We'll take our noon recess, ladies and
21 gentlemen. We'll be in recess until one o'clock today. One
22 o'clock. Is that a big problem for anybody? We gave it a lot of
23 thought. One o'clock.

24 Please remember the admonition not to form or express any
25 opinions about the case, not to discuss the case among yourselves
26 or with anyone else. We'll be in recess until 1:00 p.m. 1:00
27 p.m.

28 (Proceedings resumed outside the presence of the jury.)

26 (Lunch recess taken 12:10 p.m.)

27 --o0o--

28

1 SAN DIEGO, CALIFORNIA, THURSDAY, JUNE 20, 2002; 1:00 P.M.

2 THE COURT: The record will indicate all the jurors are
3 present, counsel and parties present.

4 You may continue your examination, Mr. Pantoni.

5 DIRECT EXAMINATION (Continued)

6 BY MR. PANTONI:

7 Q Dr. Stuelpnagel, I'd like to show you the final goals
8 assigned by Jay Flatley to Tony Czarnik, Exhibit 227. I just have
9 a few questions about this document, Dr. Stuelpnagel.

10 First of all, did you participate in meetings with Jay
11 Flatley that resulted in the generation of this set of goals?

12 A The best of my recollection it was just one meeting.

13 Q Who attended that one meeting?

14 A Jay, Dr. Mark Chee, Dr. David Barker.

15 Q And yourself?

16 A Yes, I'm sorry.

17 Q So the four of you got together in the same room to
18 talk about the subject of assigning goals to Tony Czarnik?

19 A Yes.

20 Q The second goal that deals with binary oligo encoding,
21 it has a series of goals, 30-day goal, 60-day, 90-day and year
22 goals. Whose idea was it, sir, to have a goal that dealt with
23 this subject, binary oligo encoding?

24 A I think it was Dr. Mark Chee's suggestion.

25 Q Is it possible it was your suggestion?

26 A I don't think so.

27 Q You believe it was Dr. Chee?

28 A Yes.

1 Q Had Illumina done any work at all in the area of binary
2 oligo encoding before May of 2000?

3 A No.

4 Q As of May of 2000 when these goals were assigned, how
5 many different bead types or how many different codes could
6 Illumina actually decode as of that date?

7 A In the hundreds, I believe.

8 Q Less than 500, is that fair to say?

9 A I think that's correct. And I should correct that. I
10 want to make sure I answer precisely. You asked how many have
11 they decoded. But certainly we've shown feasibility and proof of
12 concept for much larger numbers.

13 Q As of this date you could actually decode 500 or fewer,
14 correct?

15 A That's right.

16 Q And by means of feasibility and proof of concept, how
17 many had you shown?

18 A Over 2000.

19 Q 2000.

20 A Yes.

21 Q And that's from the beginning of the company's history
22 up through and including May of 2000?

23 A Yeah, I think that key feasibility experiment was done
24 by Dr. Kevin Gunderson within the first few months of us having
25 lab space in 1998.

26 Q You told us before, Dr. Stuelpnagel, that some point
27 Tony Czarnik told you he either, using your words, loathed or
28 detested grant writing?

1 A Yes. In the November -- I think it was in the
2 November counseling session where I had a list of things that I
3 went over with him, I went over grant writing, because I was very
4 disappointed he had not even tried to write grants. At that time
5 at least two or three other scientists have contributed multiple
6 grants --

7 Q Let me interrupt a second. Please ask you just limit
8 your answer to my question so I can try to keep this thing moving.

9 Did Tony Czarnik tell you in that meeting that he loathed or
10 he detested grant writing?

11 A I believe he did say that.

12 Q You knew that or you believed that as of November,
13 1998, that Dr. Czarnik loathed or detested grant writing?

14 A Yes.

15 Q Whose idea, sir, was it to add to the goals that were
16 assigned to Dr. Czarnik the goal of submitting a grant
17 application?

18 A I'm not for sure certain. It might have been my
19 suggestion.

20 Q Dr. Stuelpnagel, did you attend a board of directors
21 meeting where Jay Flatley told the board that Tony Czarnik
22 probably was not going to be able to meet his goals?

23 A I don't think those were Jay's words, no.

24 Q Do you recall a board meeting when this subject came
25 up, don't you?

26 A I recall the meeting where one of the board members,
27 and I think it was the June 2000 board meeting, one of the -- Jay
28 had said he had given Tony Czarnik these goals, and the board

1 member said, "Well, do you think he's going to meet them?" and Jay
2 said, based upon his previous inability to meet any goals and
3 really contribute to the company, he doubted it. I don't think he
4 ever said -- I don't think he ever said Dr. Czarnik was going to
5 meet these goals.

6 Q That was the May or the June board meeting?

7 A I'm pretty sure it was the June board meeting.

8 Q A few weeks after Dr. Czarnik was assigned these goals?

9 A Yeah, I think the June board meeting was toward the
10 middle to end of June, so approximately a month perhaps, and maybe
11 we'd even got through the first 30-day period at that point.

12 Q So approximately a month after the goals were assigned,
13 Jay Flatley is talking at a board meeting in response to a board
14 member's question about whether Dr. Czarnik would meet the goals?

15 A Yes.

16 Q Are you saying that Mr. Flatley offered an explanation
17 as to why he thought Tony Czarnik wouldn't meet the goals?

18 A The best of my recollection, yes.

19 Q Let me read some of your deposition testimony on this
20 subject. Beginning at page 327. You initially thought it may
21 have been the April board meeting. Later in your testimony you
22 had said it may have been the June board meeting, but your
23 testimony was as follows, beginning at line 19 of 327:

24 "QUESTION: What else --"

25 MS KEARNS: I'm sorry, your Honor, I object. I don't
26 think the passage that's proposed to be read is in conflict with
27 the testimony just given by the witness.

28 MR. PANTONI: He's a party, Judge.

1 THE COURT: Is he a party?

2 MS KEARNS: Is Dr. Stuelpnagel a party?

3 MR. PANTONI: Not individually, but he's an officer,
4 director of the corporation.

5 THE COURT: Is it inconsistent?

6 MR. PANTONI: It's inconsistent in the sense he said
7 that Mr. Flatley didn't say why.

8 MS KEARNS: No, that's not the testimony, Counsel. In
9 the deposition it said did he say why, and frankly you got an
10 answer that wasn't responsive to your question and you didn't
11 follow up.

12 MR. PANTONI: He's an officer and director of the
13 company, Judge. I just want to read in a short --

14 THE COURT: You agree he's, in essence, for these
15 purposes, a party?

16 MS KEARNS: Sure.

17 THE COURT: I think he can read without limitation.

18 MS KEARNS: Okay.

19 THE COURT: Doesn't imply that -- Go ahead.

20 MR. PANTONI: Q The testimony was, line 19 of 327:

21 "QUESTION: What else do you recall being said
22 by Jay Flatley regarding Tony Czarnik at this meeting?

23 "ANSWER: He was asked a question whether he
24 would meet his goals.

25 "QUESTION: Who asked that question?

26 "ANSWER: I can't remember.

27 "QUESTION: One of the board members?

28 "ANSWER: Yes.

1 "QUESTION: What did Mr. Flatley say?

2 "ANSWER: That he didn't think he probably
3 would."

4 "QUESTION: Did he say why?

5 "ANSWER: I don't think there was a follow-up
6 question."

7 Is that how it happened?

8 A I'm confused by what you just read me.

9 Q Maybe I should read it more slow?

10 A Perhaps. Thank you.

11 Q "QUESTION: What did Mr. Flatley say?

12 "ANSWER: That he didn't think he probably
13 would."

14 A I guess I wasn't very literate the way I spoke in
15 deposition. It was the end of the day and we were doing this for
16 like four days at that point. I think that that statement is
17 basically incoherent on my part. I apologize to the jury and the
18 Court.

19 Q In any event, your testimony today is that at this
20 board meeting Mr. Flatley did, in answering a board member's
21 question, say he meant that Dr. Czarnik probably would not meet
22 the goals?

23 A That's the best of my recollection, yes.

24 Q When did it come to your attention that Dr. Czarnik had
25 made a claim of discrimination on the basis of disability?

26 A Approximately --

27 MS KEARNS: Just going to object on vagueness just in
28 terms of what is meant by a claim of discrimination insofar

1 there's a formal charge.

2 THE COURT: Sustained.

3 MR. PANTONI: Q Any sort of claim, formal or
4 informal. When did it first come to your attention that Dr.
5 Czarnik was contending that he had been discriminated against on
6 account of his depression?

7 A He made some reference to discrimination to Jay in the
8 midst of a severance negotiation.

9 Q When did it come to your attention?

10 A I'm sorry, April, 2000, I think.

11 Q And at some point did you learn he had filed a formal
12 charge of discrimination with the state?

13 A Yes.

14 Q Who is Deborah Flamino?

15 A Deborah Flamino is a employee of Illumina.

16 Q What is her job title?

17 A I believe her title is HR or human resource manager.

18 Q Was that her title at the time that Dr. Czarnik to your
19 knowledge first contended discrimination on the basis of
20 disability?

21 A I'm pretty sure it was, yes.

22 Q Did Deborah Flamino ever investigate Tony Czarnik's
23 allegations of discrimination?

24 A To the best of my knowledge, she did not. I'm not sure
25 when she became aware of it, either.

26 Q To your knowledge, did anyone affiliated with the
27 company investigate Dr. Czarnik's claims of discrimination?

28 A The best way to answer that is there was an attorney

1 that was affiliated with the company that did investigate, at
2 least investigated me, with respect to that.

3 Q Anyone internal, anyone within the company conduct an
4 investigation?

5 A No.

6 Q With respect to Illumina's roadshow in connection with
7 the IPO, you participated in that roadshow presentation, didn't
8 you, a series of roadshow presentations?

9 A Yes.

10 Q Were you one of the presenters or were you there to
11 answer questions?

12 A I was there primarily to answer questions.

13 Q Were there rehearsals done of the roadshow before you
14 took it out on the road?

15 A Yes.

16 Q Were they done at Illumina?

17 A I don't think so.

18 Q Were there any rehearsals done at Illumina?

19 A Oh, I think maybe there might have been, yes, I'm
20 sorry.

21 Q Some people were invited to attend those rehearsals, is
22 that right?

23 A Again I'm just trying to put this together. It's a
24 very busy time. I don't know whether there was an open invitation
25 or whether it was just a select number of people that were
26 invited.

27 Q You are familiar with an experiment called the 768
28 decoding experiment?

1 A Yes.

2 Q It's true, sir, isn't it, that you wanted that
3 experiment, the 768 decoding experiment, to be done by the time of
4 the roadshow?

5 A No. That was certainly the target, but it didn't have
6 a bearing on the roadshow.

7 Q Did you want the experiment done before the roadshow?

8 A Anybody who knows me always would know I'd want any
9 experiment to be done as quickly as possible so we could continue
10 to move the science forward. So in that context, yes.

11 Q There was some urgency to this experiment in the sense
12 that you wanted to have the data so that you could possibly, if
13 necessary, use it on the roadshow, true?

14 A There was the normal progression of science that this
15 experiment be done. It just increased the coding, decoding, and I
16 guess by chance, if anybody asked a question about it, it's great
17 to have data. If we didn't have data, it wouldn't stop us from
18 going on the roadshow.

19 Q That's not what I asked. You wanted the 768 decoding
20 experiment to be completed for the roadshow so you could have data
21 from that experiment to possibly use on the roadshow?

22 A No, we wanted the 768 decoding experiment to be
23 completed because it advanced the scientific progress of the
24 company. We wanted that done as quickly as possible.

25 Q Isn't it true that you wanted data from that experiment
26 for use on the roadshow because if someone asked a question on the
27 roadshow, how many bead types have you actually decoded, you could
28 say a larger number had been actually decoded?

1 A That wasn't the reason why we needed to do the
2 experiment, but that would be an outcome of the experiment.

3 Q Isn't that what you wanted, you wanted to have that
4 data, be able to answer a question on the roadshow if it were
5 asked regarding how many bead types have you decoded?

6 A Again, I think that was a consequence and a favorable
7 expectation if the experiment got done, but that wasn't the reason
8 we did the experiment.

9 Q Let me read some deposition testimony beginning at page
10 378.

11 MS KEARNS: 328?

12 MR. PANTONI: 378, beginning on line 25:

13 "QUESTION: Why did you want the 768 decode
14 experiment to be done prior to the roadshow?

15 "ANSWER: Because then if someone asked the
16 question how many bead types have you actually decoded we
17 could say a larger number of the several hundred than had
18 been done previously."

19 Is that accurate testimony?

20 A Yes, and it doesn't reflect why we wanted the
21 experiment to be done.

22 Q And in fact some results from the 768 decoding
23 experiment were sent to you while you were on the roadshow?

24 A Yes.

25 Q And who sent you that information?

26 A Dr. Mark Chee.

27 Q In what form did he send you results from the 768
28 decode?

1 A It was an e-mail PowerPoint file.

2 Q I'm going to show you a blowup from a slide we have
3 that has been marked as Exhibit 259 with Illumina Bates 11560. Is
4 that a copy of the PowerPoint slide that Mark Chee sent to you
5 while you were on the roadshow?

6 A Looks like it.

7 Q Kevin Gunderson was the lead scientist on the 768
8 decode experiment, is that true?

9 A I don't have that knowledge. R&D didn't report to me
10 at that time.

11 Q Do you know, who, who the lead scientist was on the 768
12 decode experiment?

13 A No, I don't, not with any certainty.

14 Q Let me ask you a few questions about the termination of
15 Dr. Czarnik's employment. Were you consulted with respect to
16 whether Dr. Czarnik should be fired?

17 A Several days before his term -- Trying to remember.
18 I'm sorry. I think at some point Jay, right before his
19 termination, said he was ready to terminate Dr. Czarnik for lack
20 of progress toward his goals.

21 Q My question was whether you were ever consulted for any
22 input with respect to whether to terminate.

23 A I think I did not have any input.

24 Q Is it fair to say that you were involved with respect
25 to the termination decision?

26 A No, that was the president and CEO's decision.

27 Q Were you involved, though, in the entire process of
28 monitoring Dr. Czarnik's performance against his goals?

1 A No.

2 MS KEARNS: I'm going to object, vague in terms of what
3 is meant by "involved."

4 THE COURT: He's already answered the question.

5 MR. PANTONI: Q Were you involved at all in managing
6 Dr. Czarnik with respect to performance against his goals?

7 A No.

8 Q Were you involved at all in discussions with Jay
9 Flatley with respect to Dr. Czarnik's progress toward goals?

10 A The only type of conversation we'd had was occasionally
11 Jay would update me about Dr. Czarnik's progress.

12 Q Just for your information?

13 A Yes.

14 Q Did he participate actively in discussing whether Dr.
15 Czarnik was performing, is that your testimony?

16 A I believe that's correct.

17 Q When -- Strike that.

18 When did Jay Flatley tell you he intended to fire Tony
19 Czarnik?

20 A So what's difficult with trying to answer that is that
21 I knew for several days that we were leading up to Dr. Czarnik's
22 termination, so the actual date that he said I'm going to fire
23 Tony today, I don't remember whether that was the day of, day
24 before, two days before, five days before, but I had known for
25 several days leading up for that that Dr. Czarnik was going to be
26 terminated in the very near future.

27 Q When did you learn that Jay Flatley was going to fire
28 Dr. Czarnik?

1 A To the best of my recollection, it was either the day
2 before or that day was the precise day that he was going to fire
3 Dr. Czarnik.

4 Q Dr. Czarnik was fired on Tuesday, September 5, 2000.
5 Day before was Labor Day.

6 A Okay.

7 Q Does that refresh your recollection or help on that
8 issue?

9 A It could have been the working day before that on the
10 Friday.

11 Q Let me read your deposition testimony, see if that
12 refreshes your recollection. On page 407, line 10:

13 "QUESTION: When did Jay Flatley tell you that
14 he intended to fire Tony Czarnik?

15 "ANSWER: I believe the day that he fired
16 him."

17 Is that the day you learned?

18 A Again, I knew he was going to be fired, but the actual
19 termination date, as I testified, it was either that day or the
20 day before.

21 Q When did Jay Flatley talk to you about the possibility
22 of firing Tony Czarnik?

23 A I don't recall. What I recall is a series of updates
24 from Jay about Tony's failure to make any progress, and the best
25 of my recollection, those discussions happened in August, and the
26 certainty that he was moving towards terminating Dr. Czarnik
27 increased over that month's period of time.

28 Q So your discussions with Jay Flatley about his

1 perception that Dr. Czarnik wasn't meeting goals began sometime in
2 August of 2000?

3 A To the best of my recollection.

4 Q So within a month of his actual termination?

5 A Yes. That's as accurate as I can be.

6 Q Had you had any discussions with Jay Flatley back in
7 May of 2000 when he assigned the goals to Tony Czarnik about
8 whether he intended to terminate or fire Tony Czarnik?

9 A No, but this was considered a performance plan that we
10 put routinely employees on, and therefore poor performing
11 employees, you hope they can meet their goals and be a more
12 satisfactory employee, but in many cases at Illumina they don't
13 meet their performance plan and they are eventually terminated.

14 Q Let me ask you a clearer question. Didn't Jay Flatley
15 tell you back in May of 2000, which was the month he assigned the
16 goals to Dr. Czarnik, that he was going to fire Tony Czarnik?

17 A I don't think he did.

18 Q Are you unsure?

19 A I'm giving you my best recollection.

20 Q He may have, he may not have?

21 A I don't think he did.

22 Q If I could ask you to take a look, please, at Exhibit
23 259.

24 Do you recognize Exhibit 259? We have only one sheet of it
25 displayed on the screen. You've got that exhibit in front of you,
26 Dr. Stuelpnagel?

27 A Yes.

28 Q What is Exhibit 259?

1 A They were some milestones for people to monitor
2 Illumina's progress.

3 Q Exhibit 259 is a series of PowerPoint slides. I'm
4 sorry, the exact one you had up there. It's a series of
5 PowerPoint slides that, although I haven't gone through these
6 specifically, look to be the set that was used for the roadshow
7 presentations.

8 MS KEARNS: Your Honor, I guess to the extent there's a
9 line of questioning relating to the roadshow per se, it might be
10 relevant, but general questions about company milestones I don't
11 think have any bearing on individual performance goals in this
12 case. Objection, relevance.

13 MR. PANTONI: I do, your Honor. I can say it in open
14 court or --

15 THE COURT: Maybe I can get an offer of proof outside
16 presence of the jury.

17 (Proceedings at sidebar.)

18 THE COURT: Go ahead.

19 MR. PANTONI: I intend to show that the company wasn't
20 meeting company goals. Certain individuals weren't meeting their
21 individual goals. It's the essence of discrimination is to show
22 that similarly situated people, similar situations are not treated
23 the same. Dr. Czarnik was --

24 THE COURT: The company is not a person.

25 MR. PANTONI: No, but the people who run the company are
26 responsible for those goals. So I want -- No? Confusing?

27 MS KEARNS: Well, it has no relevance on the issue of
28 an individual who is given personal goals and whether he or she is

1 performing against those goals. The fact that the company may not
2 have raised as much money as it was seeking to raise, may not have
3 entered into as many collaborations as it projected it would, has
4 no bearing on whether, A, Dr. Czarnik was performing, and, B,
5 whether he was fired for not attaining goals. And even if there
6 were another person who was on a performance plan and didn't meet
7 goals, or who had goals and didn't meet them, it is not
8 appropriate to say well, here's -- I mean you are entitled,
9 Counsel, to say was every person who didn't meet goals fired. I
10 think that's a fair question, and the answer to that is clearly
11 no.

12 MR. PANTONI: The essence of discrimination --

13 THE COURT: What about the company not meeting its
14 goals? That seems collateral.

15 MS KEARNS: It's absolutely collateral.

16 MR. PANTONI: This whole case is about goals and whether
17 the goals were a pretext to fire.

18 THE COURT: You don't fire the company for not meeting
19 its goals.

20 MR. PANTONI: But the managers who were responsible for
21 meeting goals --

22 THE COURT: I'm not going to allow the company not
23 meeting its goals. I think that's collateral, time consuming,
24 confusing. I'm getting the feeling we're never going to get this
25 case done.

26 MR. PANTONI: This took about five questions of
27 deposition. It lasted 30 seconds: "Did you meet that goal? No."

28 THE COURT: As far as the company goes, I'm not going

1 to allow it. What else -- The company doesn't get fired. You
2 can't compare the treatment of the company to the individual.

3 MR. PANTONI: I believe it's appropriate the decision-
4 maker, Jay Flatley, was responsible for those goals, failed
5 miserably against his goals, and he uses goals as a pretext to
6 fire another senior manager. I think that's the essence of what
7 discrimination is. Different people are held to different
8 standards. Dr. Czarnik is the only person held to that high of a
9 standard and was fired for not meeting goals.

10 Jay Flatley didn't meet his goals. His goals are the
11 company goals. Other senior managers didn't meet their goals and
12 they are all employed there. That's the essence of
13 discrimination. Compare people in similarly situated situations.
14 The fact is every other similarly situated person on the senior
15 management team didn't meet their goals, they are still employed.

16 MS KEARNS: I believe the testimony on direct
17 examination from Dr. Czarnik was in the termination meeting he was
18 told he was being fired for failing to make progress toward his
19 goals. There's a difference between -- And whether he said it or
20 not, certainly the testimony of Mr. Flatley is going to be that
21 Dr. Czarnik was fired not only for not meeting the goals but for
22 failing to make even a good faith effort to do so.

23 THE COURT: What is the offer of proof as to these
24 company goals?

25 MR. PANTONI: I'm going to ask him who is responsible
26 for it.

27 THE COURT: What are the goals?

28 MR. PANTONI: They are just a series of milestones, some

1 financial, some technical.

2 MS KEARNS: They are irrelevant. Mr. Pantoni has shown
3 his hand by saying essentially he wants to say unless the company
4 met each and every one of the goals it set for itself, unless it
5 cleared every hurdle it hoped to jump over, then Dr. --

6 THE COURT: He's saying Flatley was treated differently
7 than Czarnik, is that what you are saying?

8 MR. PANTONI: All the senior managers had goals.
9 Flatley's goals were the company's goals.

10 THE COURT: The company did not meet its goals.

11 MR. PANTONI: Company did not meet its goals,
12 individuals did not meet their goals. Czarnik allegedly didn't
13 meet his goals, he's fired. That's how you show pretext.

14 I have to add one thing. Mr. Flatley testified at his
15 deposition, I don't know what he's going to testify at trial, he
16 testified at his deposition that he told Czarnik he was fired for
17 not meeting goals, not failing to --

18 THE COURT: The objection is overruled. I'm afraid
19 I'll have to allow this.

20 MS KEARNS: May I be heard?

21 THE COURT: I'm afraid the case is never going to get
22 over with. We'll be here in the middle of July.

23 MR. PANTONI: I'll be done with this area of
24 examination --

25 THE COURT: You said before lunch it was going to take
26 half an hour to 45 minutes.

27 MR. PANTONI: I appreciate that. I intended that,
28 Judge, in good faith. I think to some degree it was my fault,

1 some degree I wasn't getting simple answers to simple questions.

2 MS KEARNS: I need to make a comment for the record.
3 I'd request your Honor reconsider overruling the objection,
4 because I think if Plaintiff is allowed to put on evidence of
5 company goals and the company not meeting its goals, then I
6 think --

7 THE COURT: Does this mean Flatley or the company? The
8 company is different. Is it Flatley not meeting his goals?

9 MS ESPINOSA: Those are company goals.

10 MS KEARNS: Those are company goals he's talking about.

11 MR. PANTONI: He's responsible for it.

12 MS KEARNS: We would be required to then rebut the
13 inference that's going to be --

14 THE COURT: What goals did the company not meet?

15 MR. PANTONI: I don't have them in front of me. They
16 are financial and technical. Raising money, meeting certain
17 technical milestones.

18 THE COURT: Then again I don't think that's really
19 analogous to an individual's goals, then.

20 MR. PANTONI: They are essentially Flatley's goals. No
21 one assigns Flatley his goals.

22 MS KEARNS: Then they aren't Flatley's goals, they are
23 company goals. He is the person ultimately responsible --

24 THE COURT: It's different.

25 MS KEARNS: They aren't his individual goals.

26 MR. PANTONI: Can we redo this when we have Flatley on
27 the stand? Flatley was running the company.

28 THE COURT: I don't think this is about the company not

1 meeting its goals, it's about individuals not meeting their goals,
2 if there's [disparate]⁹⁵ treatment among individuals. These company
3 goals, they are raising money and what else?

4 MS KEARNS: Collaborations and many of these things.

5 MR. PANTONI: Technical goals.

6 MS KEARNS: Some of them --

7 THE COURT: Also what strikes me, these are things
8 without -- really beyond the control of any individual.

9 MR. PANTONI: That's partly what Dr. Czarnik said in his
10 testimony. That --

11 THE COURT: He's saying his goals are unreasonable, but
12 that's something that's easy to ascertain. To try to compare that
13 with the company's goals involving collaborations and raising
14 capital I think it's a little different.

15 I will sustain the objection under 352 of the Evidence Code.

16 MR. PANTONI: May I make one final comment just for the
17 record? To the extent that your Honor revisits the issue as to
18 whether the individual goals of any other persons may be
19 introduced by Plaintiff, then I would say that it's going to
20 require us to rebut that evidence --

21 THE COURT: What evidence is that? Is there evidence
22 of something about some other people? Aside from Flatley and
23 these company goals, is there some other evidence of other people?

24 MR. PANTONI: I believe so.

25 MS KEARNS: If he wants to put in evidence that John
26 Stuelpnagel didn't meet one of his goals and didn't get fired,
27 then I think we're going to have to trot out a parade of people to
28 say I met my goals, I wasn't fired, or other people who say I was

⁹⁵ Original transcript read, "dispirit".

1 fired and I think I met all of my goals. We'd have to call upon
2 terminated employees who will say well, I did meet my goals but I
3 was still fired.

4 MR. PANTONI: I don't understand that.

5 THE COURT: All I'm going to say at this time, I'm not
6 going to allow the company goals because I think they are not
7 comparable to individual's goals.

8 MR. PANTONI: And I think, to make my record, there's no
9 dispute those goals weren't met. I could have this covered in two
10 minutes.

11 MS KEARNS: It's still collateral and I think it's
12 prejudicial because it will -- getting that evidence in will
13 enable you --

14 THE COURT: It seems if you carry this to its logical
15 extreme, we could spend a year determining who met their goals,
16 what goals were they, were they met, were these people fired,

17 MR. PANTONI: I certainly don't intend to do that.

18 THE COURT: I just think we've got to draw the line
19 somewhere. Certainly talking about the company trying to raise
20 capital or meet broad technical goals, these aren't to me
21 comparable to some goal you tell an individual he's got to get
22 this particular thing done, make progress, get it done. I don't
23 think it's analogous.

24 I'll sustain the objection under 352.

25 (Proceedings resumed in open court.)

26 THE COURT: You may continue your examination.

27 MR. PANTONI: Thank you, your Honor.

28 Q Dr. Stuelpnagel, during the roadshow there were some

1 questions asked about decoding, is that right?

2 A Out of the approximate 70 meetings, there might have
3 been two in which there were any questions about decoding.

4 Q Is it correct that, Dr. Stuelpnagel, that on the
5 roadshow, during the roadshow presentations, the company
6 represented that decoding works?

7 A Represented it correctly.

8 Q Is it correct that the company --

9 A Yes.

10 Q Represented to investors on the roadshow that the
11 decoding actual worked?

12 A And it does.

13 Q Is the answer yes?

14 A Yes.

15 Q How many shares of Illumina stock do you own, sir?

16 A Accumulated through purchases as employee, 720,000.

17 Q You currently own 720,000 shares?

18 A I believe that's accurate.

19 Q What about at the time of the IPO, when the company
20 went public, how many shares did you own then?

21 A Most of those.

22 Q Over 700,000?

23 A I believe so, yes. There's some that I've acquired
24 since in employee sponsored stock purchase program.

25 Q Do you have any plans to leave Illumina?

26 A No.

27 MR. PANTONI: Nothing further.

28 THE COURT: Thank you.

1 Cross-examination, or actually Mr. Pantoni examined under
2 776, that was cross-examination. Are you also going to call Dr.
3 Stuelpnagel as your own witness as well as you are going to
4 examine --

5 MS KEARNS: I'll be doing a complete examination at
6 this time.

7 THE COURT: Okay.

8 CROSS-EXAMINATION

9 BY MISS KEARNS:

10 Q Good afternoon, Dr. Stuelpnagel.

11 A Hi.

12 Q As the judge has indicated, I'm going to be basically
13 doing what's cross-examination based upon the questioning of
14 Mr. Pantoni, and given scheduling issues for you, I'm also going
15 to cover in my examination of you things which I would have
16 covered had I called you independently.

17 A Thank you.

18 Q So to some degree I'm going to start at the beginning.
19 Can you -- You indicated to us that your title today is senior
20 vice president of operations.

21 A Yes.

22 Q Can you tell the jury what your job duties or what your
23 job responsibilities are in that position?

24 A Yes. I have responsibility for overseeing all of the
25 research and development departments, including chemistry,
26 molecular biology, engineering, informatics, including the
27 manufacturing of our organization, services, intellectual
28 property, and business development. I think that's it.

1 Q Sounds like plenty.

2 A It's a lot to do, yes.

3 Q Can you describe -- We've heard quite a bit discussed
4 about the fact that Illumina was a start-up company when you
5 founded it. Can you describe for us the characteristics of a
6 start-up company based upon your experience in working in the
7 venture capital area?

8 A It's an intense and a curious environment, where
9 survival is far from certain. Most start-ups fail. So to really
10 be successful, you have to have total commitment, you have to work
11 incredibly hard, you have to have a little bit of luck, and some
12 good technology and some good people behind you, and contributions
13 from as many people as you can.

14 Q Now, you've had an opportunity based upon your
15 employment with CW Group and before that Avalon Ventures to
16 observe various compensation schemes that are used in start-ups,
17 correct?

18 A Yes.

19 Q And you remember Mr. Pantoni asking you about equity as
20 a component of compensation?

21 A Yes.

22 Q Although you haven't been here, we've had some
23 testimony from Dr. Czarnik about the vesting schedule that related
24 to the restricted shares he was allowed to purchase at the outset.
25 Can you describe for us why does a company -- why did Illumina in
26 this case have the restricted shares vest over time?

27 MR. PANTONI: I'm going to object, your Honor, on the
28 grounds of relevancy, 352.

1 THE COURT: Overruled.

2 THE WITNESS: Vesting is a normal function of stock
3 that's either allowed to be purchased by an employer or options
4 that could later be purchased by employees. It's part of the
5 compensation program. So you earn that stock by staying and
6 working hard for the company. It's intended to increase your
7 motivation so you are aligning your interests with those of the
8 rest the investors. A large portion of your compensation is due
9 to the success of the company, and certainly that's in everybody's
10 issue.

11 But specifically it vests over a period of time to retain
12 you as an employee and to continue to motivate you to work hard as
13 an employee. If you leave for whatever reason, termination,
14 voluntary departure, or fraud, whatever, criminal activity, it
15 doesn't matter, the stock stops vesting and whatever portion you
16 had not vested to that point returns to the company. You didn't
17 earn it so you are not going to get it.

18 MR. PANTONI: I'll object and move to strike that
19 latter portion.

20 THE COURT: Which portion?

21 MR. PANTONI: The notion if he's fired for any reason.
22 This whole case is about illegal firing.

23 THE COURT: It's all subject to later determination of
24 a jury or court.

25 MR. PANTONI: Right.

26 THE COURT: But I think that's understood.

27 MR. PANTONI: Okay.

28 MS KEARNS: Q Dr. Stuelpnagel, at the time that you

1 were putting together Illumina and identifying candidates for the
2 senior scientific positions, you identified both Dr. Czarnik and
3 Mark Chee in conjunction with Larry Bock, correct?

4 A Yes.

5 Q Do you have -- You are aware that Dr. Czarnik came to
6 Illumina from a company called IRORI, correct?

7 A Yes.

8 Q Do you have any information about the degree of job
9 security, if any, that Dr. Czarnik had at that prior employment?

10 A Yes.

11 MR. PANTONI: Objection.

12 THE COURT: What's the basis of your knowledge?

13 THE WITNESS: Conversation that I had with Dr. Czarnik
14 directly.

15 MS KEARNS: And as to which the door has been opened.

16 Q What did Dr. Czarnik say to you in your conversation
17 with him about the degree of job security he had at IRORI?

18 THE COURT: It might come within the exception to the
19 hearsay. What is the relevance? Do you want to say that outside
20 the presence of the jury?

21 MS KEARNS: Probably so. I'm sure counsel would.

22 THE COURT: You want the court reporter?

23 MS KEARNS: No, we don't need a reporter.

24 THE COURT: Okay.

25 (Discussion off the record outside the presence of the
26 jury.)

27 THE COURT: Don't discuss the case during the recess.

28 We'll be in recess until five after 2:00.

1 (Proceedings resumed outside the presence of the jury.)

2 THE COURT: Why don't you go ahead and ask your
3 question. This is a hearing outside the presence of the jury.
4 Ask the question you were going to ask.

5 MS KEARNS: Okay.

6 Q Dr. Stuelpnagel, did you ever have a conversation with
7 Dr. Czarnik about his -- Let me start that.

8 Did you ever have a conversation with Dr. Czarnik in which
9 he discussed with you his job security or his --

10 THE COURT: Did you ever have any discussion with Dr.
11 Czarnik where he discussed whether or not he was happy at his
12 previous employment?

13 THE WITNESS: No. What happened is we went outside
14 Cardiff, there's a UPS drop box where we put next-day delivery,
15 and Tony and I stepped out to do that --

16 THE COURT: When was this conversation?

17 THE WITNESS: Summer of 1988 while we were at Cardiff.
18 Right outside the building was this drop box. Tony started to
19 tell me about his problems he was having at IRORI and he was
20 really glad the Illumina opportunity came along because he was
21 starting to look for jobs, he knew he had to leave IRORI, and more
22 specifically, he said that IRORI started to have meetings where he
23 was excluded and meetings where -- which were done behind closed
24 doors, and he assumed that this meant that people were meeting
25 without him, and he felt insecure in his job as a consequence of
26 that.

27 MR. PANTONI: Of course, Judge, Dr. Czarnik would deny
28 that if that were put into issue somehow.

1 THE COURT: Yes. Here's the thing, though, just
2 looking at this, I'm looking at what has testified to, "I liked
3 where I was," impeachment; "I knew I had to leave." "I knew I had
4 to leave," that impeaches that, "I like where I was."

5 MR. PANTONI: I think my point is I still think that if
6 anything should come in, we shouldn't get into this notion of
7 these closed-door meetings, allegedly, because this was a subject
8 of a motion in limine, and we'd have to have a mini-trial on
9 whether those meetings occurred, whether they were legitimate.
10 The inference -- No matter how cautionary --

11 THE COURT: What does it mean? If they didn't want to
12 offer me the position that would move me, I'd stay?

13 MS KEARNS: Let me respond to that, it is the second
14 statement that is also impeached by the --

15 THE COURT: Who is the "they"?

16 MS KEARNS: "They" meaning Illumina. This was in the
17 context of a discussion questioning Dr. Czarnik about his
18 negotiations with Illumina and the fact he was insisting upon
19 having the CSO title, and his answer there was in response to
20 questions about the negotiations, and he said, "I liked where I
21 was, and if they," and by they he was referring to Illumina, "if
22 they didn't make me the offer that would move me, I'd stay." And
23 that statement -- it essentially is saying if they gave me --
24 unless Illumina gave me a good enough offer, I liked where I was
25 and I would stay at IRORI. His comments to Dr. Stuelpnagel made
26 it very clear that he wasn't going to be staying at IRORI. It's
27 direct impeachment.

28 THE COURT: "I knew I had to leave," that's direct

1 impeachment.

2 MS KEARNS: Also it's impeachment of the comment "I'd
3 stay." He's told --

4 THE COURT: What about the closed-door meetings?

5 MR. PANTONI: That's where I think it deals with
6 unfairly with character and it's collateral, and all the factors
7 under 352 suggest that that shouldn't come in.

8 MS KEARNS: Your Honor, let me make my record here by
9 saying first of all, the Plaintiff himself was in your Honor's
10 chambers when you said the stuff about prior employment and prior
11 problems and employment isn't going to come in unless the
12 Plaintiff opens the door. Dr. Czarnik was sitting right there.
13 He indeed did open the door by volunteering that comment. And for
14 Dr. Stuelpnagel to simply testify well, he told me he wasn't happy
15 at IRORI, only allowing Dr. Stuelpnagel to do that is going to
16 make it look to the jury like he's just fabricating something.
17 But having an explanation and a context in which the conversation
18 took place is very important to the jury's believing the statement
19 when offered by Dr. Stuelpnagel.

20 THE COURT: Actually the question, the problem
21 Mr. Pantoni, is this: Really it is very unclear. I made it very
22 clear, I even gave an example. I said this was out because, I
23 gave a number of reasons, unless he opens the door, if he says
24 something like nothing like this has ever happened to me before.

25 MR. PANTONI: That's the example you used, "Nothing
26 like this has of happened before."

27 THE COURT: That would open the door. Here he says I
28 am -- He testifies in court I like where I was. Unless Illumina

1 made me a very good offer, I wouldn't leave. But in fact he said
2 he knew he had to leave because he was uncomfortable there, they
3 were having meeting behind closed doors about him, and I can't
4 read my own writing. What did he say after that?

5 THE WITNESS: Decisions being made in which he wasn't
6 asked to participate, meeting where he wasn't asked to
7 participate.

8 THE COURT: He felt insecure at his job.

9 THE WITNESS: Yes, and particularly bothered by the
10 closed-door meetings because he didn't know what was going on.

11 THE COURT: In other words, since Dr. Czarnik opened
12 the door, why should we hinder what is clearly impeaching evidence
13 of his testimony that he was happy?

14 MR. PANTONI: For the same reasons I articulated in the
15 motion to begin with.

16 THE COURT: I understand that. But it changes it,
17 though. It's kept out and then he tries to use it as a sword
18 instead of a shield.

19 MR. PANTONI: He didn't in the sense -- he didn't
20 say --

21 THE COURT: He tried to create the impression to the
22 jury that he was completely happy there, he had to be lured away
23 to Illumina, and if you believe, and I understand he'll deny this,
24 but if you believe, I have to assume for purposes of the testimony
25 that Dr. Stuelpnagel is correct in his testimony, but further what
26 I'll do is, I'll give a limiting instruction to say that's the
27 only -- that may be considered only for the purpose of impeaching
28 his testimony, only as it relates to his credibility. May not be

1 considered for the truth of the matter about whatever the
2 situation was on the other job, if you request a limiting
3 instruction, which I assume you do.

4 MR. PANTONI: That's a safe assumption.

5 THE COURT: So when the jury comes back -- How much
6 more time are you going to take on your examination?

7 MS KEARNS: I probably will go to the end of our court
8 day today, but I expect to be done.

9 THE COURT: I'd like to finish, but there may be some
10 more cross-examination based on new matter you bring up.

11 MS KEARNS: Okay. I'll do my level best.

12 THE COURT: I'd like to get this over with today. What
13 I'll tell the jury in response to the question are we on time,
14 it's too soon to tell. We're kind of pushing toward -- Well,
15 maybe I won't even say that. It's too soon to tell.

16 MS KEARNS: Is there any possibility that if we are
17 running over that we extend the court day, or not?

18 THE COURT: Well, the problem, my problem is that I
19 have 500 other cases, and this was the time I use to read my law
20 and motion on the other cases, and so there is a good hour or so I
21 spend after this.

22 MS KEARNS: Sort of like our office.

23 THE COURT: That's a problem.

24 Do you think it will do any good to give them some
25 reassurance if we start bumping up against 4th of July we will
26 probably create sometime around the 4th, extra time for them
27 around the 4th of July?

28 MR. PANTONI: I still think --

1 MS KEARNS: Yeah.

2 MR. PANTONI: I think we're going to do it.

3 THE COURT: I was going to ask you, too, I was going to
4 ask you to actually sit down together and work out a schedule. In
5 fact I could even tell the jury we're trying to schedule
6 everything out definitively.

7 MS KEARNS: In advance.

8 THE COURT: By Monday, to work out a schedule that will
9 be complete, day by day, who the witness are, and that includes
10 not only the Plaintiff's case, but the defense case as well.

11 MR. PANTONI: I think we both should and will. This
12 applies to me as well as Miss Kearns. When we're doing cross or
13 redirect, not rehash the same thing that's covered.

14 THE COURT: I think lots of these things, I think they
15 are kind of cumulative. This stuff about the -- whether or not
16 Dr. Czarnik was recognized as a founder, it's all -- it's in the
17 documents. They say what they say. I don't think that's the most
18 important issue in the case. I understand it's an issue. But I
19 think you have to start trying to prioritize. Realize there are
20 some limits, and we can't lose the jury, or in worst case have a
21 mistrial because we lose too many jurors.

22 MR. PANTONI: I do have that in mind.

23 THE COURT: Okay. So we'll reconvene at five after
24 2:00.

25 (Recess.)

26 THE COURT: The record will indicate all the jurors are
27 present, counsel and parties present.

28 You may continue your examination, Miss Kearns.

1 MS KEARNS: Thank you, your Honor.

2 Q Dr. Stuelpnagel, at or about the time -- Well, did you
3 ever have a conversation with Dr. Czarnik in which he shared any
4 information with you about his employment at IRORI, which was the
5 company he was with when he was hired for Illumina?

6 A Yes, in the summer of 1998, while we were still working
7 out at Cardiff, Dr. Czarnik and I had a meeting. The meeting
8 happened to be by the UPS drop box where we did next-day drops for
9 express mail. And he told me that it was very good that the
10 Illumina opportunity had come along because he knew he had to
11 leave IRORI, so the timing was perfect for him.

12 Q Did he say anything to you, did he elaborate on why it
13 is he had to leave IRORI?

14 A Yes, he said that the senior managers were starting to
15 have meetings where he wasn't invited to attend. He didn't feel
16 that his opinion was as highly valued, and perhaps most
17 particularly he was worried because there was meetings where doors
18 were closed.

19 Q Did he tell you anything else to explain why he had to
20 leave IRORI?

21 A That's pretty much all. I think that's it.

22 THE COURT: As to this, you are requesting a limiting
23 instruction? As to this entire line of questioning, since the
24 recess, the following limiting instruction applies:

25 This testimony is limited only to the -- as it may bear upon
26 the credibility of the testimony of Dr. Czarnik. It's for that
27 purpose only.

28 MR. PANTONI: Not for the truth of the matter.

1 THE COURT: It's not to prove that these things that
2 are alluded to by the witness actually took place, but it's only
3 offered to the extent it is inconsistent with the previous
4 testimony of Dr. Czarnik.

5 MS KEARNS: Q Now, Dr. Stuelpnagel, in the summer of
6 1998, Illumina was being operated out of CW space in Cardiff?

7 A Yes.

8 Q During this period of time, in this morning's
9 questioning by Mr. Pantoni, Mr. Pantoni asked you a question in
10 which he referenced David Walt, and I understand that you weren't
11 here when David Walt testified the other day so you don't know
12 what it is David Walt said. But he asked you whether you would
13 agree with the comment that he attributed to David Walt that Tony
14 Czarnik showed a passion and enthusiasm in the summer of 1998. Do
15 you remember that question to you by Mr. Pantoni?

16 A Yes.

17 Q Let me ask you, first of all, during the summer of
18 1998, did you have an opportunity to observe Dr. Czarnik's work
19 ethic day-by-day, week-by-week?

20 A Yes. In fact, to the best of my recollection, I had
21 the only keys to the office, and so the only time others could be
22 in the office at CW Group, people from Illumina, would be when I
23 was there.

24 Q And during the summer of 1998, did David Walt have the
25 ability to or opportunity to observe Dr. Czarnik's work ethic
26 day-by-day, week-by-week?

27 A No, Dr. Walt was in Boston, Boston area.

28 Q And so what were your observations of Dr. Czarnik's

1 work ethic while Illumina was working out of the space in Cardiff?

2 A Incredibly poor. He typically would arrive kind of
3 mid-morning and then be around for lunch, maybe hang around for
4 another hour or two, and then be gone for a couple of hours, and
5 sometimes he would come back, or not, during the late afternoon.
6 So typically he was there anywhere from four to say six hours, and
7 maybe there was a couple of days where he was there for a full
8 day's worth of work.

9 Q What kind of hours were you putting in during this
10 period of time, summer of 1998?

11 A I typically got to work around 7:00 in the morning and
12 I typically left 6:00 to 7:00 at night.

13 Q What sort of hours was Mark Chee putting in?

14 A Mark would typically arrive about 8:00 and he and I
15 would leave about the same time. Sometimes he'd leave a little
16 bit earlier.

17 Q And Steve Barnard, did he join during the summer of
18 1998?

19 A Yes, he did. He had approximately the same hours as
20 Dr. Chee.

21 Q And Dr. Auger, an engineer, did he join during the
22 summer of 1998?

23 A Yes, he did.

24 Q What sort of hours did he keep?

25 A Approximately the same hours as Dr. Chee and Dr.
26 Barnard.

27 Q Did Dr. Czarnik spend less time at the facilities than
28 any other person affiliated with Illumina during the summer of

1 1998?

2 A Any other person that was working at Illumina full
3 time.

4 Q So like Dr. Todd Dickinson was a consultant, Dr. David
5 Walt was providing consulting, but anybody that was considered to
6 be full time, whether they were listed on the payroll or not?

7 A Absolutely.

8 Q During the summer of 1998, did any person comment to
9 you -- Let me ask you this: Were you displeased with the amount
10 of time that Dr. Czarnik was spending?

11 A Yes. And it was one of the issues that we brought up
12 in that counseling session of August of 1998.

13 Q Did anybody else comment to you upon Dr. Czarnik's work
14 ethic during the summer of 1998?

15 A Yes. Our administrative --

16 MR. PANTONI: Objection, hearsay.

17 THE COURT: Sustained.

18 MS KEARNS: Q Without getting into the content of any
19 communication, can you identify the person or persons who
20 commented upon Dr. Czarnik's work ethic?

21 MR. PANTONI: Same objection.

22 THE COURT: Sustained.

23 MS KEARNS: Q Did you have any other concerns regarding
24 Dr. Czarnik's performance that arose during the summer of 1998
25 beyond the number of hours that he was on site?

26 A The most blatant and quantifiable was this business
27 plan. It was the critical function deliverable for the summer of
28 1998, and consisted of 10 or 12 different sections. I outlined

1 the whole project for Mark and for Tony, and at the end of the
2 day, Tony contributed about four pages to an 80-page document, and
3 that was only after I had to assign him specific sections, like a
4 fourth grader.

5 Q And with respect to the preparation of this business
6 plan, you say, Dr. Stuelpnagel, there were approximately 12
7 different sections that comprised the plan?

8 A Yes.

9 Q Did you have any meetings between -- among you, Dr.
10 Stuelpnagel, Dr. Chee and Dr. Czarnik, concerning the preparation
11 of the business plan?

12 A Absolutely. As I mentioned, I'd outlined all of those
13 sections and gave Mark and Tony a copy of that outline and said
14 what we need to do is pick sections and start working on it.
15 Let's communicate with each other and tell each other which
16 section you are working on, let's bring them together, and then
17 we'll put it together as a full business plan.

18 Q When did this process begin?

19 A It began almost immediately, in June of 1998, and
20 continued until the first week of August, 1998.

21 Q And during this period of time, you indicated in your
22 testimony just moments ago that at some point in time you had to
23 assign sections to Dr. Czarnik, is that correct?

24 A That's right. In July, most of the sections had either
25 been written or Mark or I had committed to writing them, and Dr.
26 Czarnik had contributed nothing. So I had a meeting with Dr.
27 Czarnik in my office and said Tony, we need to have you make a
28 contribution here. So what we made was the executive summary, an

1 industry summary, and then there was two small sections within the
2 business plan, one to do with high throughput drug screening and
3 the other to do with binary encoding, both of those being areas
4 which Tony had some expertise. I said you are responsible for
5 doing these.

6 Q So is it accurate then to say that from the time you
7 began working on this in early June up until sometime in July when
8 you assigned sections to Dr. Czarnik, you didn't see any output or
9 any written contribution from him?

10 A There was nothing.

11 Q And that's what prompted you to assign him some
12 sections?

13 A Yes.

14 Q Did he object to the sections that you gave him?

15 A No. I think he kind of smiled sheepishly and accepted
16 the assignment. He realized he hadn't done any work on this
17 important project.

18 Q Did he in fact provide you with drafts of the sections
19 which you ultimately assigned to him in July?

20 A Yes.

21 Q Did you give him a time frame within which you were
22 requesting his draft?

23 A I don't remember, but, you know, I think they were
24 delivered within a week or two.

25 Q In terms of the timing, --

26 A Actually I remember now I was disappointed particularly
27 with the executive summary section, because all the other pieces
28 that were done, and we were still waiting for the executive

1 summary, and Tony hadn't delivered it. And so I said Tony, just
2 read the business plan and pick out sections and make the
3 executive summary. You wanted the executive summary, you've
4 written the plan, now make a summary of it.

5 To my surprise, he delivered that by literally cutting and
6 pasting exact sentences from the business plan into the executive
7 summary.

8 Q So when you said to him take -- read the business plan
9 and take bits and pieces, I take it you didn't mean it literally?

10 A No, absolutely. I expected him to understand what
11 anybody would understand with a summary, you take the information
12 and you condense it, you write it so that it flows naturally, not
13 disjointed sentences from page 23, for example, and page 41.

14 Q Did you, in essence, did you expect him to review the
15 business plan and to, for lack of a better word, to summarize it?

16 A Yes.

17 MR. PANTONI: I'll object, it's leading, Judge.

18 THE COURT: It is, and it's getting cumulative.

19 MS KEARNS: Q So apart from the -- So you received
20 these drafts from Dr. Czarnik of the sections you articulated for
21 the business plan. Did you have to revise any of those sections?

22 A I completely rewrote the executive summary because it
23 was so poorly done by Dr. Czarnik.

24 Q Did you make any revisions to the other sections?

25 A I think we all made minor revisions and edits, but I
26 don't think I made wholesale changes like I had to do for the
27 executive summary.

28 Q All right.

1 Apart from the number of hours he was spending at Illumina
2 and apart from his lack of contribution to the business plan, were
3 there any other performance concerns that you developed concerning
4 Dr. Czarnik's performance during the summer of 1998?

5 A Yes. With respect to strategic planning, trying to
6 figure out what we really were going to do in this company, Dr.
7 Czarnik didn't contribute nearly at the level of Dr. Chee or
8 myself. In fact, he advocated for areas of development that were
9 unsupportable based on the amount of information that we had in
10 the technology and what was feasible. So he was suggesting, for
11 instance, very high risk opportunities where fundamental
12 inventions had not yet been made versus Dr. Chee's position to
13 follow genomics, where the fundamental knowledge of making oligos,
14 putting them on beads and doing hybridizations was well
15 understood, and Dr. Chee had already come up with prior to his
16 employment the fundamental expansion of this technology, the basic
17 oligo decoding strategy.

18 Q We heard testimony from other witness about the close
19 working conditions during these days at Cardiff. Did you have a
20 formal meeting time scheduled for the team during that period?

21 A No, it was more opportunistic. People were there, we
22 got together, we solved problems, and tried to do that real time.
23 There were no formal dates in terms of meeting times.

24 Q Are there any particular issues or -- issues that were
25 addressed or meetings that were held that were significant in your
26 view and in which Dr. Czarnik did not participate?

27 A Yes, there was a key one, and that was really the
28 development of our product, this array matrix that took arrays to

1 a whole different level. That was beginning of an invention I had
2 when I was out running one day, on a weekend, and I started
3 thinking about this. I brought that concept back to the group in
4 an afternoon meeting, and I believe it was on a Monday. Present
5 in the room was Mr. Steve Auger and Dr. Mark Chee, and in that
6 period of time, we had the fundamental invention of our first
7 product, the product that we're pursuing today, the product that
8 really differentiated us as a company. Dr. Czarnik wasn't there
9 for that afternoon meeting.

10 Q Now, I understand from your testimony that you were
11 concerned with the number of hours Dr. Czarnik was keeping. Was
12 it simply a matter of you wanted for him to keep the same hours?

13 A No. In fact I think I testified that Dr. Chee and
14 others were actually working a little bit less, and that's
15 probably understandable. I tend to be a little bulldog about
16 those kinds of things.

17 Q On his direct testimony, Dr. Czarnik talked about the
18 summer of 1998 and his direct testimony was that you all worked
19 about the same number of hours and that at the end of each day,
20 which was 6:30 or 7:00 p.m., work would wrap up because you would
21 tell everyone okay, let's call it a day, we're done for the day,
22 or words to that effect. Is that accurate?

23 A That's absurd. Anybody that knows me would never
24 voluntarily ask people to stop working. We were under a lot of
25 pressure. A lot of effort was required to get this company going,
26 and I was working very hard and so was everybody else. But we had
27 hours where people terminated their employment at various times
28 during the evening and just left as they concluded whatever tasks

1 they were working on.

2 Q With the Court's permission, I would want to approach
3 the witness and just ask him to identify this piece, since we've
4 heard so much about bead arrays, I wanted to have him identify it
5 and then we'll have it available for the jury.

6 THE COURT: Okay.

7 MS KEARNS: Q Dr. Stuelpnagel, can you please take a
8 look at this will item, safely enclosed in plastic, and describe
9 what it is for the jury so that when they are able to handle it
10 and look at it they'll have some description of what this thing
11 is.

12 A So this is the array matrix. Each one of these sticks
13 are actually a fiber optic bundle with 50,000 individual fibers on
14 them. What's spectacular about Walt's invention is each fiber
15 becomes an individual detector or [sensor]⁹⁶.

16 What we did, we assembled these to match the wells in a
17 microtiter plate. That's the way samples are prepared in large
18 scale experimentation. This contribution was the product that we
19 developed that afternoon meeting.

20 MS KEARNS: And, your Honor, would you like for me to
21 have the witness -- allow the jury to pass it at this point or
22 later?

23 THE COURT: Later.

24 MS KEARNS: Okay.

25 Just for the record, this array matrix has been identified
26 on our exhibit list as Exhibit 13.

27 THE COURT: Very well.

28 MS KEARNS: Q So Dr. Stuelpnagel, during the summer of

⁹⁶ Original transcript read, "censor".

1 1998, did you develop concerns or dissatisfaction with the work
2 performance of any other person who was dedicating full-time
3 effort to Illumina?

4 A Nobody other than Dr. Czarnik.

5 Q Let talk then about the August, 1998 walking
6 discussion. Who was present?

7 A Dr. Mark Chee and me.

8 Q Who initiated the discussion?

9 A Dr. Chee and I talked beforehand about his observation,
10 my observation about the lack of productivity and lack of effort
11 from Dr. Czarnik, and we concluded that what we wanted to do is
12 talk to and confront Dr. Czarnik about these issues, man-to-man,
13 and we wanted to do that in the context where other employees
14 wouldn't be prejudiced about that discussion.

15 It's a very small office, four offices, and as a
16 consequence, Dr. Chee and Dr. -- and myself took Dr. Czarnik
17 outside the office. And if anybody knows Cardiff, what we did was
18 walked up and down the railroad track area. There's a little
19 walking path there.

20 And we specifically addressed these issues with Dr. Czarnik
21 about his productivity, his lack of effort, his poor performance
22 on the business plan, and his failure with respect to intellectual
23 property, the protection of our core ideas, lack of focus on the
24 product development.

25 And most importantly, which was most important to me, all
26 those were historical, but looking forward, we were on the verge
27 of moving into our new facility September 1, and what I saw was no
28 planning on his part in preparation for that. Our costs of being

1 in business were going to escalate dramatically when we moved to
2 these new facilities. We were going to have about \$16,000 a month
3 in rent payments. I saw no preparation so that we could order the
4 supplies ahead of time, so we knew what kinds of experiments we
5 were going to do right away when we got there. It's as if we had
6 wasted that first two and a half months to get ready to do the
7 experiments.

8 Q What sort of preparation were you expecting to see?

9 A Specifically a research and development plan.
10 Something that outlined what he wanted to do, what experiments,
11 how he's going to prioritize experiments so that we could advance
12 the core technology at Illumina as quickly as possible.

13 Q Did you ask him, did you ever ask him before this
14 counseling discussion in August -- Strike that.

15 Prior to the counseling session in August, had you asked Dr.
16 Czarnik to provide you with a research and development plan?

17 A Yes, I had told him I was expecting a research and
18 development plan.

19 Q And did you expect a research and development plan for
20 the entire R&D effort? In other words, molecular biochemistry or
21 just chemistry?

22 A Dr. Chee had already done this for the things under his
23 responsibility. He did it in a form that was remarkable. He did
24 it in the form of grant applications. Not only did I have an
25 opportunity to review them, but milestones were well laid out, the
26 intellectual thought behind it was extremely well developed. We
27 knew precisely what experiments we were going to do at what time,
28 and he was going to subject this experimental plan to third party

1 review, his experts, his peers, that would decide whether to fund
2 this type of research or not.

3 Q Okay. So you are telling us that Dr. Chee in fact had
4 provided you with a written plan in the form of grant applications
5 showing the research projects that were going to be conducted
6 under his supervision?

7 A That's right.

8 Q You could ask for the same thing from Dr. Czarnik?

9 A I didn't need it in the form of a grant application,
10 what I needed was a plan, some thought and some intellectual power
11 behind how to prioritize what activities we were going to start
12 doing September 1st.

13 Q And you didn't get that?

14 A No.

15 Q So during this -- You also said that one of the
16 concerns that you also had developed by this point was had a
17 concern over Dr. Czarnik's failure to make progress with respect
18 to IP or intellectual property. What is it you were expecting him
19 to do?

20 A Right away I'd asked Dr. Czarnik to take the lead with
21 respect to intellectual property. Again, protecting our ideas
22 and also making sure that we didn't try to do things that others
23 had already protected. He just failed miserably in this role. So
24 I picked it up myself and managed the company's IP from that point
25 forward until Ms Nicky Espinosa joined the company.

26 Q Trying to keep your answer short, what do you mean,
27 what activities are involved in protecting a company's IP?

28 A Systems and processes. So the systems were to set up

1 procedures where people could document their inventions, and I
2 asked specifically for him to do that. In fact, I spelled it out.
3 He never put in an invention disclosure log, I did that. I asked
4 him to get scientific notebooks, something that's routine in every
5 scientific lab where scientists would document their thoughts as
6 they have them. He didn't do that. We even moved to our new
7 laboratory facilities. We still didn't have these notebooks.

8 Finally Dr. Barnard stepped up and took the task after I
9 found out where precisely to go buy these things. For me it was a
10 five or ten minute phone call, and I gave it off to Steve and he
11 had it done in a very short period of time. So these are not big
12 activities.

13 What was more critical, though, besides setting up the right
14 systems, was actually understanding what our IP was, how it
15 differentiates from others, what's patentable, what's not, how to
16 plan our research strategy so we didn't infringe on anybody's
17 intellectual property. All those things are what I expect from a
18 chief scientific officer.

19 Q Did you know one way or another whether Dr. Czarnik had
20 any prior experience dealing with identifying and controlling an
21 IP portfolio?

22 A I had no knowledge one way or another. It was part of
23 his offer letter. He didn't bring it up as an issue where he
24 didn't feel confident, so I thought he did have competency there.

25 Q Because he didn't do these any of these things, you
26 said you took on those tasks yourself?

27 A That's right.

28 Q Did you have any prior experience in managing and

1 protecting an IP portfolio?

2 A In fact at that point I probably had less experience.
3 Dr. Czarnik at least had patents issued so he knew about the
4 process. In my case, at that point I had not had any patents
5 issue of any inventions that I had made.

6 Q You basically had to learn this on the fly?

7 A Yes. Fortunately if you apply yourself with good
8 resources, you can get a lot of things done. I had good help with
9 outside counsel.

10 Q And this IP portfolio identification and protection
11 issue, this is only one of the many duties that you were focusing
12 on that summer?

13 A Yes. I was writing the majority of the business plan,
14 although Mark did help. He probably contributed 30-plus percent.
15 I was finding all the financing, I was continuing with my
16 recruiting of key scientific members of the staff, and I was
17 setting up all of the infrastructure of running a company. Things
18 that you don't think about, payroll, benefits, all of the other
19 things necessary to really make this a real company.

20 Q Now, focusing back again then on the Cardiff walking
21 counseling session, you've identified a number of concerns that
22 you developed about Dr. Czarnik's performance during the summer.
23 You talked about your discussions with Mark Chee. As the two of
24 you walked with Dr. Czarnik, what did you communicate to him, what
25 did you say?

26 A Exactly what I spelled out: The business plan
27 failures, strategic planning failures, failures to really even
28 make an effort. I can understand people not being capable, but

1 what I can't understand is start-up environment, not even trying.
2 That's what I was trying to influence Dr. Czarnik about.

3 And surprisingly he was very passive during the whole
4 meeting. Didn't really give us a whole lot of feedback, and at
5 the end he said that this environment was a difficult environment
6 for him, partly because the commute was harder to Rancho Bernardo
7 to Cardiff than to Torrey Pines, and partly because he was waiting
8 to have laboratories to really do experiments. So he said, it's
9 almost a quote, "Don't worry, when we get to our lab facilities, I
10 will be there."

11 Q Did Mark Chee say anything during this walking
12 counseling?

13 A He had some input, but I led the discussions.

14 Q Did you consider terminating Dr. Czarnik's employment
15 at this point in time, August of 1998?

16 A No, I didn't. We'd only been together for a few weeks,
17 and I took him at his word, that when we got to a different
18 environment, he was going to be a more productive employee.

19 Q There was some testimony given during Dr. Czarnik's
20 direct examination, and he testified that he signed your offer
21 letter.

22 A Yes.

23 Q Did Dr. Czarnik in any way recruit you to Illumina?

24 A Maybe I'll tell you how that all happened.

25 Q Well, no, just tell me whether he recruited you to
26 Illumina.

27 A Both he and Dr. Chee came into my office one day and
28 said, "John, have you ever considered leaving the venture firm and

1 staying permanently at Illumina?"

2 Q Okay. But okay. So maybe there was some ambiguity in
3 my use of the word "recruit."

4 You were aware of the Illumina technology and the Illumina
5 opportunity well before Mark Chee and Tony Czarnik came into your
6 office and laid the question whether you might come on board as an
7 Illumina employee?

8 A I'd been working on this since November '97.

9 Q Why is it that Dr. Czarnik signed your offer letter?

10 A Well, I was the acting president, CEO. I was an
11 officer of the company. I couldn't sign my own letter. The offer
12 letter in fact was negotiated between the venture people,
13 specifically a board member named Sam Collela, and me, and when we
14 got to terms, I drafted it, wrote the whole offer letter, Sam
15 approved it, and we gave it to Dr. Czarnik to sign because he was
16 the officer, the next officer in the company.

17 Q So Dr. Czarnik didn't engage in any negotiations with
18 you on your employment terms?

19 A All Dr. Czarnik did was sign the offer letter I printed
20 out and had approved for the board.

21 Q Now, you moved to the new facilities in September of
22 1998, correct?

23 A Yes.

24 Q There was laboratory space there?

25 A Yes.

26 Q To the best of your knowledge, had Dr. Czarnik done
27 anything to order equipment, machines or supplies for experiments?

28 A No.

1 Q So you moved in in, what, the lab space was --

2 A Pretty much empty.

3 Q Except for hoods?

4 A We had to scramble, I'll give Tony credit for this, he
5 scrambled and got me a printer so I could have a printer. But
6 this was the lack of preparation that was standard at that point
7 in time.

8 Some of the other scientists, Mr. Steve Auger and Steve
9 Barnard, and certainly Dr. Chee, were buying some critical
10 components, so other elements were coming along appropriately.

11 Q Was your expectation back in the summer of 1998, was it
12 then your expectation that when you moved into the new space,
13 you'd hit the ground running and begin performing experiments
14 almost immediately?

15 A It's unrealistic that everything arrives on day one.
16 What you wanted to see was a plan and a schedule and an ordering
17 process so those things could arrive in timely manner.

18 Q And by the time you actually moved in, was there any
19 written plan from Dr. Czarnik?

20 A No.

21 Q Now, what were your observations concerning Dr.
22 Czarnik's work ethic after the move to the new facility that had
23 laboratory space?

24 A It was marginally better. He wasn't gone for all
25 afternoon. He'd come in typically a little bit later, like 9
26 o'clock, and he'd be there until 5:00. Some days he was there
27 until 6:00. But it certainly wasn't at the same level of
28 commitment as other [employees]⁹⁷. He was still the least working

⁹⁷ Original transcript read, "employee".

1 employee at Illumina.

2 Q He was the highest compensated employee at Illumina?

3 A Correct.

4 Q During this time, let's say September 1st, 1998, when
5 you moved into the new space, how many employees total in the
6 company?

7 A Mark, Tony, John, Steve, Todd, Steve. Six.

8 Q Now, during the months of September, October and
9 leading up to a discussion that occurred in November, let me ask
10 it this way: Did any of the -- Did any of the concerns that
11 you'd formed in August or articulated in August, did -- fumbling
12 here. Let me withdraw all of that.

13 You articulated for us concerns you had formed during the
14 summer of '98 and talked to Dr. Czarnik about in August.

15 A Yes.

16 Q Did any of those improve significantly after the move
17 to the new facility?

18 A No.

19 Q Did you develop any new performance concerns after the
20 move to the new facility?

21 A I did become concerned because he tended to divide the
22 organization between molecular biology and chemistry rather than
23 trying to unite the organization. So that would have been a new
24 concern.

25 Q What did he do to divide those two scientific groups?

26 A It was kind of subtle and manipulative. He would make
27 the chemists feel like they were second class citizens, and other
28 people were making them second class citizens because they weren't

1 the glory boys, they weren't developing the application, rather
2 than take responsibility and say hey, they were chemistry
3 applications we could work on and try to meet some feasibility
4 experiments.

5 Q Actually that brings me to another point then,
6 something that Mr. Pantoni has already touched upon with you.
7 It's true, isn't it, that during the summer of 1998, when you were
8 still in Cardiff, the consensus was eventually reached that the
9 first application that was going to be commercially pursued would
10 be the genomics application?

11 A It was prioritized, but the expectation was that we
12 would continue to do research in the immuno- -- the binary
13 encoding, the Tony Czarnik invention that later became a goal of
14 his, as well as research into high throughput screening
15 feasibility and the o-nose. Those were chemistry, primarily,
16 applications.

17 Q You are saying although genomics was prioritized
18 higher, the intention was that these other application areas be
19 pursued?

20 A Yes.

21 Q Why would-- Let me ask you this. Under Dr. Czarnik's
22 direction as CSO, were these additional research areas pursued?

23 A Not in a material way. Not in a way that would justify
24 more resources, because he didn't design the experiments that show
25 basic feasibility. We did continue some R&D activity on the
26 o-nose as was required in our Tufts license agreements, and that
27 was primarily conducted by Dr. Todd Dickinson.

28 Q Let me touch upon that because it's been alluded to.

1 Dr. Walt developed the technology?

2 A Yes.

3 Q Dr. David Walt actually had signed away the rights to
4 his technology to Tufts University, his employer, correct?

5 A Yes.

6 Q And so in order for Illumina to acquire that
7 technology, Illumina had to negotiate with Tufts University, is
8 that right?

9 A Yes.

10 Q And you were the person involved in doing those
11 negotiations on behalf of Illumina?

12 A Yes.

13 Q As a condition of that licensing agreement between
14 Illumina and Tufts, Tufts insisted that you had to continue
15 conducting research on the o-nose application?

16 A Yes.

17 Q Now, while you were acting CEO and president, did you
18 hold regular management meetings with your senior managers?

19 A No, again there was not that many people that you'd
20 have to have regular meetings. You just walked down the hall and
21 talked to people or said let's talk at such and such a time about
22 this issue.

23 Q In the very early days, in September of '98, there were
24 only six people in the company, right?

25 A That's right.

26 Q And Rich Pytelewski came on board in November, November
27 of '98?

28 A Yes.

1 Q After Mr. Pytelewski came on board, did you find any --
2 did you hold regular management meetings?

3 A No, that didn't occur until Mr. Flatley started them
4 right after he arrived.

5 Q Were you interpreting my comment[, 'regular management
6 meetings']⁹⁸ to mean like a regular weekly scheduled meeting at a set
7 time?

8 A Yes.

9 Q You are not suggesting that you didn't meet with or
10 didn't talk to your senior managers?

11 A No. We had, I guess, those are regular -- We had
12 frequent meetings amongst all of us.

13 Q But they weren't necessarily prescheduled?

14 A Some were prescheduled, but they weren't on a routine
15 basis, like they weren't done every Monday at 1:30 in the
16 afternoon.

17 Q Now, what contributions, if any, at a strategic level
18 do you recall Dr. Czarnik made?

19 A I cannot think of any strategic contributions that Dr.
20 Czarnik made to the company.

21 Q Did he make any contributions to Illumina?

22 A Fairly, I think he did.

23 Q What are they?

24 A He's a very likeable person. Very social person. I
25 think he helped a little bit with the culture. So he helped with
26 communication with the scientists. He popped popcorn for them,
27 held boat races for them, and while these activities were kind of
28 frivolous, they did help support the culture.

⁹⁸ Quotation marks added.

1 Q What did you -- Now, Dr. Czarnik and his role as chief
2 scientific officer was responsible for leading and directing the
3 overall research activities of the company, isn't that true?

4 A That was the intent of a chief scientific officer, but
5 Dr. Czarnik never met that goal. Right from the beginning he
6 insisted on this title as chief scientific officer, and this was
7 really a concession in the negotiations on my part, and the
8 documentable evidence for that is the fact that Dr. Mark Chee
9 reported to me. We set this up because we knew that Dr. Czarnik
10 had never been the CSO before, he didn't have experience in
11 genomics, and he didn't even have interdisciplinary experience.
12 His experience was primarily confined to chemistry, and rightly
13 so.

14 So the goal, the intention, and I confirmed this with Dr.
15 Chee prior to Dr. Chee signing his offer letter, was that the hope
16 with Dr. Czarnik would demonstrate he could handle full scientific
17 responsibility of the company. He never did, so the reporting
18 relationship was never changed.

19 Q Let me ask you this: There were initially two
20 scientific arms of the company, right, chemistry and molecular
21 biology?

22 A That's not fair. There's chemistry, molecular biology,
23 chemistry, informatics all work together to build this product.

24 Q I guess maybe my point was that the very beginning, the
25 very inception, there were only chemists and molecular biologists
26 and engineers?

27 A Steve Auger was an engineer.

28 Q Did you ever observe Dr. Czarnik doing anything to

1 educate himself about the research or the concepts that were going
2 on in any of the other scientific groups?

3 A Shockingly, no. To the best of my knowledge, he never
4 even read Mark's grant applications.

5 Q And grant applications weren't -- The grant
6 applications that Mark Chee had submitted weren't just for the
7 molecular biology arm of the Illumina, they were for Illumina the
8 company, correct?

9 A Yes. In fact, they drafted out more than just
10 molecular biology. Most of the application itself was about the
11 specifics of genotyping, gene expression and to some extent
12 proteomics.

13 Q Now, at the time that you moved into the new facilities
14 with lab space, did Illumina have an idea or a concept that was
15 ready to become a product, ready for manufacturing?

16 A No. That was the whole point. It was going to take
17 years to develop a product like this.

18 Q And did Dr. Czarnik -- Were there any conflicts
19 between Dr. Czarnik and anyone else on the management team about
20 the speed with which we were pursuing commercialization of a
21 product?

22 A No, I think everybody bought into the time lines and
23 the milestones, and then everybody was disappointed when we set
24 them too aggressively.

25 Q We heard testimony about the fact that the company was
26 started up with seed money, and I think that Dr. Czarnik agreed
27 with me the seed money the company had was going to make it last
28 for about six months. Would you agree with that?

1 A Yes.

2 Q Did Dr. Czarnik, to your observation, did Dr. Czarnik
3 seem to be managing his group and his responsibilities in a manner
4 consistent with the limited funding of the company?

5 A There were instances that bothered me. One particular
6 one was a recruiting dinner between he and Dr. Steve Barnard where
7 I had to reimburse him for over \$200 for dinner for two people.

8 Q What were your observations and impressions of Dr.
9 Czarnik's management style vis-a-vis the people who reported to
10 him?

11 A Management is a funny thing. Not so funny, but there's
12 a spectrum of manager styles, from a very direct to a very laissez
13 faire, hands-off style. Current management strategy is really
14 situational management, knowing that you have different tasks and
15 different people, you should manage those activities and those
16 people according to whatever style is most appropriate for that
17 situation.

18 Dr. Czarnik had one style, and that was completely hands off
19 management style.

20 Q Let me jump ahead then to the November of 1998 time
21 frame. What was your overall assessment of Dr. Czarnik's -- What
22 was your overall assessment of Dr. Czarnik's performance during
23 the months of September, October, November, 1998? In other words,
24 after the move to the new facility.

25 A I continued to be disappointed. His hours had only
26 marginally improved. He had not delivered on the R&D plan. I
27 didn't see a logical process to the experiments that were being
28 done. And so we had a meeting. We had a meeting in which I

1 prepared handwritten notes ahead of time because I realized I
2 didn't get through to him in August. He hadn't changed his
3 behavior. So I went ahead and meticulously developed three pages
4 of notes that I used as an outline for my private conversation
5 with Dr. Czarnik.

6 We talked about and tried to be very fair. The positive
7 things that he had contributed to the company, where he had
8 disappointed me and the company, and most importantly, what was
9 going to happen if he continued to act in the way he did.

10 And I remember there was three precise things that I
11 predicted in November of 1998 if Dr. Czarnik didn't change his
12 behavior. The first was that he was going to be marginalized, the
13 second was he was going to have less respect, and the third is
14 he's going to have less responsibility.

15 Q I'd like the witness to open your exhibit book and take
16 a look at what we've marked as Exhibit 23. I'd like to publish
17 this to the jury on the screen.

18 MR. PANTONI: Object to that on the grounds we talked
19 about earlier.

20 MS KEARNS: I'm not offering to admit it but I'm
21 offering to put it up.

22 THE COURT: What was the state of this at the time of
23 the trial readiness conference? Was there an objection to this?

24 MS KEARNS: No.

25 MR. PANTONI: It was made this morning, we discussed it.

26 THE COURT: I'm going to sustain the objection. Maybe
27 when we get to that point, when there's some excerpt on this you
28 want to refer to, refer to line-by-line in testimony in any way.

1 MS KEARNS: Q Dr. Stuelpnagel, referring to Exhibit 23.

2 A Yes.

3 Q Can you please read your notes -- Now let me again
4 confirm, when did you prepare these written notes?

5 A These -- What I did, I always worked on an 8
6 and-a-half by 11 note pad that was bound, and I would write notes
7 chronologically, and I literally kept stacks of notes. What these
8 are is portions from those stacks of notes all kept together
9 chronologically.

10 Q And so when is it that you prepared these notes? You
11 say the meeting that you had with Dr. Czarnik occurred in November
12 of 1998.

13 A That's correct. And in fact there are notes that are
14 the outline that I prepared in advance of that meeting, and those
15 are marked Exhibit 21, 54 through 21, 56.

16 Q Actually the exhibit numbers may have changed since
17 then?

18 A 23, 30 through 23, 32? Are those the right numbers
19 now?

20 Q They are.

21 Your Honor, may I approach the witness with his original
22 notes?

23 THE COURT: Yes.

24 MS KEARNS: Q Dr. Stuelpnagel, what is this note pad
25 I've just handed to you?

26 A These are the notes that I prepared in advance of that
27 November '98 counseling session that I had with Dr. Tony Czarnik.

28 Q Prepared these note specifically as an outline for the

1 discussion that you planned to have with Dr. Czarnik?

2 A Absolutely.

3 Q You created them before you actually had the
4 conversation with him?

5 A Yes.

6 Q Can you please check the Court Exhibit 23 against the
7 original note pad, the pages in the original note pad which are
8 tabbed, and tell me whether the court exhibit is a true and
9 correct copy of your original handwritten notes?

10 A It is.

11 Q Can you please read line by line what your notes say?

12 A I will.

13 MR. PANTONI: It's hearsay, your Honor.

14 THE COURT: Sustained.

15 MS KEARNS: Q Dr. Stuelpnagel, can you tell me the
16 general categories of topics that you intended to discuss with Dr.
17 Czarnik?

18 A Yes. There were general categories were examples of
19 contributions that Dr. Czarnik made, examples of unfulfilled
20 expectations, the first category of which was lack of leadership,
21 the other specific failures. Then there was the time away from
22 Illumina, the issue of commitment to Illumina's success, and he
23 realized we all depended on him, we all needed him and everybody
24 else for our survival. And there was some themes that I was going
25 to try to weave into the discussion: science, business,
26 motivation. And then the consequences, which I already discussed,
27 that he become marginalized, less respected, and have less
28 responsibility if he didn't alter his performance and his

1 behavior.

2 Q Now, recognizing that I did testify with some
3 specificity even before I showed you the notes about what you
4 talked to Dr. Czarnik about in November of 1998, do you remember
5 what some of the contributions or positive things that Dr. Czarnik
6 had done were?

7 A He had made a couple of paper inventions. They
8 included the idea of binary decoding, which later became a goal to
9 have him show feasibility. Another paper invention called in-bead
10 screening, which there's never been any further experimentation to
11 prove whether it's going to work. He identified an important
12 employee, [Michal]⁴¹ Lebl. He helped set corporate culture. He did
13 the one portion of the benefit program around the 401-K. He had
14 the rollover issue for his own 401-K, so he wanted to be sure that
15 got instituted quickly.

16 In terms of unfulfilled expectations, he didn't show
17 leadership in chemistry. On the coding issue, when we talked
18 about oligo or binary, he didn't show leadership on in-bead
19 screening, not on the o-nose, not on high throughput synthesis.
20 And there's specific failures, much of which I've already
21 testified to, things like strategic planning, business planning,
22 grant writing, preparation for meetings, et cetera, including here
23 a notation that I didn't think he was preparing well for the SAB
24 meeting that hadn't even happened yet. We're nearly two months
25 away from the first meeting and I wasn't seeing the type of
26 activity that I expected him to be showing in preparation for that
27 SAB meeting.

28 Q Dr. Stuelpnagel, could you please take a look at the

1 original note pad and tell me whether there are any notes in that
2 pad immediately preceding or after these notes which were related
3 to your November, 1998 meeting with Dr. Czarnik. Are there any
4 notes in that pad reflecting thoughts or bullet points that you
5 intended to discuss in a meeting with Mark Chee relating to his
6 performance?

7 A No.

8 Q And looking in that same notebook, are there any notes
9 that you have in that notebook relating to any conversation that
10 you purportedly had with Dr. Czarnik in November of 1998 about the
11 company not meeting its goals?

12 A No, these are all specific around Dr. Czarnik and
13 there's no notes about the company not making its goals or
14 milestones.

15 Q And if you had had such a conversation, say if you had
16 such meetings with Drs. Czarnik and Chee, would those have been
17 the types of conversations that you would have documented in these
18 note pads?

19 MR. PANTONI: Calls for speculation, lacks foundation.

20 THE COURT: Maybe you can establish custom and
21 practice.

22 MS KEARNS: Q What were the circumstances under which
23 you would create these handwritten notes on letter-size note pads?

24 A When I'm preparing for significant meetings, I often
25 make notes to myself so I can make sure I cover all the subjects
26 that I want to cover and make sure that the meeting is as
27 productive as possible. So if I was going to have the same kind
28 of meeting with Dr. Mark Chee that I had had with Dr. Czarnik in

1 November, 1998, there would be notes here.

2 Q Now, you are not representing to us that you covered
3 each and every bullet point in those notes with Dr. Czarnik in
4 your meeting, were you?

5 A No, it wasn't that kind of discussion where I said
6 Tony, you failed A, B, C, D and E. It was a conversation, but I
7 used this as a template, an outline so I could be clear in my
8 communication with him so there would be no misunderstandings.

9 Q If you had had conversations with Dr. Chee and Czarnik
10 in November of 1998, in which you were telling them that the
11 company wasn't meeting its scientific goals and expressing great
12 concern over that, would you -- would that have been a
13 circumstance significant enough for you to have put in your
14 notebooks?

15 A Absolutely.

16 Q And you don't see any such notes there?

17 A No, I don't.

18 Q You have retained the originals, or actually I may have
19 them in my office, but you have kept the originals of all of these
20 note pads, correct?

21 A Yes, to the best of my knowledge, yes. Up until about
22 the fourth quarter of 2000. So in around the December time frame
23 I changed my habit, where from there forward I ripped out and
24 filed things going forward. But up until the period which we're
25 covering here in the trial, that was exactly my pattern.

26 Q So let's talk now about the November, 1998 counseling
27 meeting. You have outlined what you discussed with Dr. Czarnik,
28 right?

1 A Yes.

2 Q What was his response?

3 A He said, "Well, I'll get a research plan to you, I'll,
4 you know, --" He didn't really have whole lot of response,
5 unfortunately.

6 Q Are you saying by this point in time, November of 1998,
7 he still hadn't provided you with a written research plan?

8 A That's correct.

9 Q What was his demeanor like?

10 A I don't really recall. I think it was pretty
11 nonchalant. I don't think he really believed that he had failed
12 like I perceived him to be failing.

13 Q Did you put Dr. Czarnik on any sort of performance
14 management plan at this point in time?

15 A I made the specific request to have a written R&D plan,
16 and either in this meeting or shortly after this meeting is when I
17 assigned him that NIST ATP grant. I wanted tangible things he
18 could deliver to me.

19 Q There were -- There was a question by Mr. Pantoni on
20 his direct examination of you in which he asked you whether Dr.
21 Czarnik hadn't told you at some earlier point he either loathed or
22 detested grant writing. Do you remember that?

23 A Yeah, and now that you've said that, I think it was
24 actually in this November meeting. So we did talk about grants or
25 his failure to identify and write grants, and I think in that,
26 this precise meeting, he said he loathed and detested grant
27 writing.

28 Q Let me ask you generally, are there some aspects of

1 your job that you dislike?

2 A Oh, yeah, we all have things about our job we don't
3 like, but for the good of the company, we do them. That's the
4 expectation here with respect to grant writing. Grants were an
5 important vehicle for funding our development.

6 Q And isn't it true that grant writing is something that
7 would be expected of any senior scientist in the company,
8 including the chief scientific officer?

9 A Yes, particularly at that point where money was
10 incredibly scarce.

11 Q So when you assigned the task of writing the NIST grant
12 to Dr. Czarnik, you knew it was a task that he didn't particularly
13 want to do, right?

14 A We all do things we don't want to do.

15 Q Did he object?

16 A No.

17 Q Did he say I so detest grant writing that I really
18 don't want to do it?

19 A No. In fact, my impression was that he absolutely
20 accepted that it was his responsibility, it was his time to
21 contribute in this way.

22 Q What was the significance of this NIST grant, if it had
23 been approved?

24 A Two things. One is it would allow us to expand our
25 scientific breadth into new areas of applications, ones that
26 related specifically towards Dr. Tony Czarnik's expertise, that
27 around high throughput drug screening. And the other is pure
28 financial one. It would help us leverage the money that we had

1 gotten from the venture capitalists, money that comes at a
2 tremendous cost to the company, and move forward to the science
3 without having to seek additional funding quickly. And the third
4 one is credibility. When you have grants reviewed by outside
5 third parties, investors respect that. Outside third parties have
6 looked at these R&D plans, they've said these are acceptable,
7 we're going to give you government money. We think it's good
8 enough for the government to give you money for based upon these
9 plans. So there's an outside validation of what you are doing
10 technologically.

11 Q Okay.

12 Would the amount of funding for this NIST grant, \$2 million,
13 have been a significant infusion for the company?

14 A Yes, we only raised \$8.5 million approximately from the
15 venture capital community, so this was significant.

16 Q Let me focus upon the division of labor among the
17 management team. Who on the management team was responsible for
18 identifying potential collaborators for the company?

19 A We all shared that responsibility, because we all had
20 contacts, or hoped we had good contacts outside the company, and
21 that would allow us to make introductions for Illumina.

22 Q Did Dr. Czarnik ever identify or recommend any
23 potential collaborators for Illumina to get involved with?

24 A Just one, to the best of my recollection, and that's a
25 company called Parke-Davis. It's a company he used to work for,
26 and he allowed or made arrangements for us to talk to somebody by
27 telephone at Parke-Davis during the summer of 1998. To the best
28 of my knowledge, that's the only contact or contribution that Dr.

1 Czarnik made from a contacts point of view for business
2 development.

3 Q Let's focus for a moment, then, on business
4 development. Let me ask you to just limit your answer to the
5 period of time from the beginning of the company up until April 6,
6 1999, when Dr. Czarnik had his breakdown. Up until that point,
7 before the breakdown, were there business development meetings
8 which Dr. Czarnik was not involved in?

9 A Yes.

10 Q Were there business development meetings during that
11 same time which Mark Chee was not involved in?

12 A I believe so.

13 Q During that same period of time, was it routine --
14 well, was it common for Illumina to make a business development
15 presentation that did not include each and every member of senior
16 management?

17 A Absolutely.

18 Q What criteria did you use in determining who would go
19 to the business development meetings or presentations?

20 A The number one criteria is what application were we
21 going to be discussing with the partner. If it's a genomics
22 application, Dr. Mark Chee is absolutely world famous in this
23 area. He brings just incredible credibility in genomics. Having
24 him there to answer the scientific questions was incredibly
25 valuable. So most of but not all of the genomics business
26 development meetings included Dr. Mark Chee.

27 Very few included Dr. Czarnik. He had no expertise in
28 genomics, and he contributed not at all to the few meetings that

1 he attended.

2 The other criteria was how much it was going to cost the
3 company. If we had to fly across the country to meet with
4 somebody and the airline ticket was going to be \$2000 because we
5 were doing it the last minute, we may have considerations about
6 how we're going to spend our money, and do we want to spend that
7 \$2000, so we tended to trim down the group as a consequence of
8 that.

9 On the other hand, chemistry business development business
10 applications always involved Dr. Czarnik.

11 Q Who were some of the chemistry business development
12 partners or potential collaborators with whom Illumina met?

13 A The Dow Chemical Company and later Chevron, although
14 Chevron happened, I believe, after the April '99 period.

15 Q So is it your testimony that before April of 1999,
16 there were business development meetings particularly in the
17 genomics area that did not include Dr. Czarnik?

18 A Routinely.

19 Q And it's also your testimony that business development
20 meetings that involved a chemical or chemistry application did
21 involve Dr. Czarnik?

22 A Yes.

23 Q And in fact the Chevron discussions resulted in a
24 collaboration agreement, correct?

25 A Yes.

26 Q Dr. Stuelpnagel, we had some testimony during your
27 direct about a company known as ABI, PE biosciences, Perk and
28 Elmer. There was one more. But in any event, you are familiar

1 with this company, right?

2 A Yes.

3 Q And Illumina entered into a deal or a contract with
4 ABI, right?

5 A Right.

6 Q Who identified ABI as a potential collaborator?

7 A I think the first time ABI became aware of us was in
8 November of 1998 as a result of a presentation that Dr. Mark Chee
9 gave in the Boston area. Subsequently to that, I went to ABI's
10 sister company, called Celera, in January of 1999, and presented
11 our technology, which overlapped very nicely with Applied
12 Biosystems, and the investigator there, Dr. Emily Windean, had
13 previously been employed by Applied Biosystems and worked very
14 closely with Applied Biosystems. Shortly after that meeting with
15 Celera, Applied Biosystems contacted us and we arranged our first
16 meeting in mid-February, 1999.

17 Q And were you involved, throughout the relationship
18 between Illumina and ABI, were you involved in negotiating,
19 documenting the business deal?

20 A Yes.

21 Q Did anyone, any person affiliated with ABI, ever say
22 anything suggesting that seeing a talk given by Tony Czarnik was
23 the reason or was one of the reasons that ABI became interested in
24 Illumina?

25 A No. The only conversation of that nature was a private
26 conversation that I had with Mike [Hunkapillar]⁹⁹ that I later related
27 to Tony Czarnik in approximately the April or May time frame where
28 Mike Huckapiller said it's great to see this technology, I'd seen

⁹⁹ Original transcript read, "Huckapiller".

1 it once before at a presentation that Dr. Czarnik had given.

2 Q Did he make any kind of qualitative assessment of the
3 presentation he'd seen given by Dr. Czarnik?

4 A I don't recall that he did. And he wasn't the one
5 responsible for initiating the contact. It was -- We got
6 elevated to his level when the discussions got very serious, but
7 more junior people identified Illumina and began the discussions.

8 Q Now, who participated in negotiating the terms of the
9 ABI deal on Illumina's side?

10 A Dr. Mark Chee and me.

11 Q And what sort of effort or time commitment was involved
12 in working out the ABI deal?

13 A Enormous would be the word I would use. It was a lot
14 of work.

15 Q Over what -- Maybe to give us a context. When did you
16 start working on pursuing ABI? How long did it take until a deal
17 was in place?

18 A We started in February of 1999. We executed the deal
19 in November of 1999, so approximately nine months, ten months, and
20 in particular it intensified over the spring and summer and fall.

21 Q Who was responsible for closing the deal with ABI on
22 behalf of Illumina?

23 A I held that responsibility, primarily.

24 Q What contributions, if any, did Dr. Czarnik make in
25 negotiating the ABI deal?

26 A No material contributions.

27 Q What contributions, if any, did Dr. Czarnik make in
28 documenting the ABI deal?

1 A No material contributions.

2 Q And what contributions, if any, did Dr. Czarnik make in
3 closing the deal?

4 A No contributions.

5 Q None whatsoever?

6 A Pretty much put that one as none whatsoever.

7 Q Did Dr. Czarnik ever come to you and say that he wanted
8 to have greater involvement with this ABI deal?

9 A I don't think so. I don't remember that.

10 Q If he had made such a request, would you have honored
11 it, and if not, why not?

12 A You wouldn't have done that, because you have a team.
13 Once you get started with a process, chemistry, personal
14 chemistry, matters a lot. These deals get done based upon your
15 relationships you develop. The last thing you want to do is in
16 the middle of a negotiation bring a third party into it and alter
17 that chemistry.

18 Q Do you believe that there's anything about Dr.
19 Czarnik's training, experience or background that would have added
20 value to bringing him into the deal once underway?

21 A None whatsoever. The key contribution there was Dr.
22 Mark Chee, whose technical expertise was well known by Applied
23 Biosystems and well respected.

24 Q Now, isn't it -- Is it accurate that part of what
25 Illumina agreed to do for ABI was to deliver to ABI a number of
26 the these arrays?

27 A Yes.

28 Q And isn't it true that in order to create these arrays,

1 there is work done at Illumina by a number of groups that pull
2 together to make this product?

3 A The entire company, for the most part, is focused on
4 making these arrays.

5 Q And some of what goes into making the arrays involves
6 chemistry, correct?

7 A That's correct.

8 Q And some of what goes into the arrays involves
9 engineering?

10 A Correct.

11 Q But ABI was purchasing or was contracting to have
12 Illumina produce these arrays for a specific use, is that correct?

13 A That's right.

14 Q What was the use or intended use for which ABI was
15 contracting to have Illumina make these arrays?

16 A Genotyping, which is a genomics application.

17 Q Okay. Now let's jump forward to the April, 1999 time
18 frame. Before I discuss that meeting, let me ask you a couple of
19 preliminary questions, Dr. Stuelpnagel.

20 You are aware that Dr. Czarnik is claiming in this lawsuit
21 that you froze him out and treated him differently after April,
22 1999, when you learned that he suffered from depression?

23 A I'd even go further. He says because I knew he
24 suffered from depression, this [was]¹⁰⁰ the result. Those are
25 absolutely false statements.

26 Q Dr. Stuelpnagel, do you have any personal acquaintances
27 or family members that suffer from depression?

28 MR. PANTONI: Objection, your Honor, we dealt with

¹⁰⁰ Original transcript read, "as".

1 this --

2 THE COURT: This is subject to limiting instructions?

3 MS KEARNS: No, it's different, your Honor.

4 THE COURT: Let's take a 10-minute recess at this time.

5 We'll be in recess until 20 minutes after 3:00. Please remember
6 the admonition not to form or express any opinions about the case,
7 not to discuss the case. We'll be in recess until 3:20. 3:20.

8 (Proceedings resumed outside the presence of the jury.)

9 THE COURT: What is your offer of proof?

10 MS KEARNS: The motion in limine --

11 THE COURT: What is your offer of proof.

12 MS KEARNS: My offer of proof is that the very people
13 who are accused of discriminating against and ostracizing Dr.
14 Czarnik because they'd learned he had depression are people who
15 have close family and friend who suffer from the same condition,
16 that they do not have a discriminatory bias. It goes to bias and
17 motivation. Whereas the motion in limine was one brought by the
18 Plaintiff to prevent us from disclosing medical information about
19 his daughter, about his brother, and that's fine.

20 THE COURT: Privacy.

21 MS KEARNS: We're not going to have these witnesses
22 identified --

23 THE COURT: You say there's a contention by the
24 Plaintiff, for example, that Dr. Stuelpnagel is prejudiced against
25 people who have depression?

26 MS KEARNS: That he discriminated against Dr. Czarnik
27 because he has depression. I think the fact Dr. Stuelpnagel has a
28 family member, and we won't require him to identify the person by

1 name, but has a family member who suffers from the same condition,
2 I think is probative, is probative as to the issue of whether or
3 not he is biased against and discriminates against people with
4 this condition.

5 MR. PANTONI: I think it's collateral. There's no way
6 for me to test the veracity of any of this, of any of his
7 testimony. The motion in limine was actually to exclude all third
8 party medical information.

9 THE COURT: That's because you were invoking privacy.
10 He's willing to waive. You can cross-examine.

11 MR. PANTONI: [It's]¹⁰¹ someone else's privacy.

12 MS KEARNS: Furthermore, your Honor, with respect to
13 Dr. Stuelpnagel personally, this is particularly relevant because
14 there is going to be testimony about a conversation that Dr.
15 Stuelpnagel had with Tony Czarnik in which he made this -- made
16 certain disclosures about his experience with depression to Tony
17 Czarnik.

18 THE COURT: In connection with?

19 MS KEARNS: It happened in the Saturday meeting which
20 we believe occurred at the end of April and which Dr. Czarnik
21 thinks happened at the end of May or possibly June or possibly
22 April.

23 THE COURT: What happened this this meeting?

24 MS KEARNS: Dr. Stuelpnagel was talking with Tony
25 Czarnik. It was another counseling meeting. But with respect to
26 the depression issue, Dr. Stuelpnagel shared with Dr. Czarnik that
27 he believed that he had a family member who had suffered from
28 signs of depression, and even made a statement to Dr. Czarnik that

¹⁰¹ Original transcript read, "Its".

1 he himself, Dr. Stuelpnagel, believes that at times he may have
2 had, I won't say -- Dr. Czarnik called it [hypodepression]¹⁰². Dr.
3 Stuelpnagel never used that word, but said some of the mild signs
4 of depression.

5 THE COURT: I think it's relevant.

6 MS KEARNS: I do, too.

7 THE COURT: And it's different than somebody, than Dr.
8 Czarnik trying to invoke the privacy interests of his own family.

9 MR. PANTONI: Technically it's not Dr. Stuelpnagel's
10 privacy interest.

11 MS KEARNS: I'm happy to have him limit his -- limit
12 his testimony by saying a member of my immediate family and not
13 say what the familial relationship is.

14 THE COURT: I'll overrule the objection. Reconvene in
15 five minutes.

16 (Recess.)

17 THE COURT: Record will indicate all the jurors are
18 present, counsel and parties present.

19 You may continue your examination.

20 MS KEARNS: Q Dr. Stuelpnagel, do you have any family
21 members or close acquaintances who either have been diagnosed with
22 depression or take anti-depressants?

23 A Yes.

24 Q Can you elaborate upon that?

25 A In fact, this is what's so insulting about this whole
26 claim, is that in the April meeting with Dr. Czarnik,
27 approximately two weeks after he disclosed depression, I talked to
28 him about members of my immediate family that suffered from

¹⁰² Original transcript read, "hyperdepression".

1 depression, were treated with anti-depressant. I also have
2 colleagues I work with, professional colleagues I work with at
3 Illumina nearly every day, who also suffer from depression.

4 Q Thank you.

5 So I'm not going to replot each and every event that we've
6 talked about or that Mr. Pantoni asked you about, particularly
7 because the judge has made it very clear that we, both Mr. Pantoni
8 and I, need to do a better job about moving the case along, and
9 we're both going to try to do that.

10 MR. PANTONI: Hold your applause, please.

11 MS KEARNS: Q Focusing on the April time frame just to
12 summarize, this was when the breakdown occurred, and a couple of
13 days later, you learned from Mr. Czarnik he suffered from
14 depression, right?

15 A April 8th I learned for the first time Dr. Czarnik
16 suffered from depression.

17 Q Did you treat Dr. Czarnik any differently than you had
18 before as a result of learning that he suffered from depression?

19 A Not whatsoever.

20 Q Did you feel he was weak or incompetent after -- as a
21 result of learning that he suffered from depression?

22 A No.

23 Q Did you conclude that you needed to rid Illumina of him
24 as a result of learning that he suffered from depression?

25 A Absolutely not.

26 Q And in fact you have people that you work with in a
27 professional capacity that suffer from the same condition?

28 A Yes.

1 Q You haven't chosen to disassociate from those persons?

2 A No.

3 Q Is there any particular activity, business activity,
4 that you prevented Dr. Czarnik from engaging in as a result of
5 learning that he had depression?

6 A No.

7 Q Did you feel uncomfortable being around Dr. Czarnik as
8 a result of learning that he had depression?

9 A Absolutely not.

10 Q Now, Jay Flatley came on board in October of 1998,
11 correct?

12 A Correct.

13 Q When Mr. Flatley joined the company, or even before,
14 did you give Mr. Flatley a briefing or rundown of your impressions
15 of the other senior managers at Illumina?

16 A No.

17 Q Why not?

18 A A number of reasons. One is I was taking a unique
19 step, I was taking a step backward, and now I was a colleague
20 rather than the boss of the other senior managers. So it would
21 seem inappropriate for me to go to Jay and say this person is
22 strong, this person is weak, when we're now all on the same exact
23 level.

24 The other is I wanted to be fair, and that is whatever
25 prejudices I may have developed from performance-based issues that
26 I had with my senior managers, I didn't want to transfer those to
27 Jay. New boss, clean plate, professional, experienced senior
28 manager. He would be able to draw his own conclusions. And

1 mostly I really did hope under new leadership that Dr. Czarnik's
2 performance would improve.

3 Q Did you feel, for lack of a better word, did you feel
4 any way like Dr. Czarnik's lack of performance under your
5 leadership reflected negatively upon you?

6 A I tried everything. I was fortunate to have family
7 members that run businesses, and run very large businesses, and I
8 had talked to them almost all the time and ask them how can I
9 motivate this guy, what can I do to get more productivity from
10 him. I tried different things. You know, casual walking
11 conversation, a very directed counseling session. Nothing helped.

12 I was inept in getting Dr. Czarnik to perform satisfactorily
13 at Illumina, and I was the acting president, CEO of the company,
14 and I accept my responsibility for not getting him to perform
15 better.

16 Q So what is the first point in time at which you had any
17 discussion with Jay Flatley about your impressions of Dr.
18 Czarnik's performance?

19 A I believe that was in January of 19 -- I'm sorry,
20 January of 2000, when Jay approached me and talked to me about
21 what my impressions were regarding Dr. Czarnik's performance.

22 Q And was there some event or occurrence that seemed to
23 precipitate this discussion?

24 A We testified to that earlier, and that was the
25 Scientific Advisory Board meeting, where Dr. Czarnik performed
26 very poorly.

27 Q You attended? Did you attend that meeting?

28 A No, I think I attended for a very short period of time.

1 I knew all the scientific advisory board members. I recruited and
2 identified most of them, so I had personal relationships, but I
3 had other things that were pressing on my time.

4 Q Do you recall what portion of that January SAB, January
5 2000 SAB meeting you attended?

6 A No, I don't. It would probably have been the first
7 part or last part and maybe lunch, because those are more social
8 times.

9 Q When Dr. Flatley approached you to talk about Tony
10 Czarnik, after the January 2000 SAB meeting, what did you tell
11 him?

12 A Told him I --

13 MR. PANTONI: Objection, hearsay.

14 THE COURT: It is hearsay. Does it come within an
15 exception of the hearsay rule?

16 MS KEARNS: I'll ask another question.

17 Q What was the general topic of discussion, the general
18 topic of discussion that you and Mr. Flatley had?

19 MR. PANTONI: Same objection.

20 MS KEARNS: Q Did you express any negative impressions?

21 A I confided in Jay --

22 MR. PANTONI: Objection, hearsay.

23 THE COURT: This is really a denial of some allegations
24 made by the other side at this point, or what is this? What are
25 you getting to?

26 MS KEARNS: It's testimony about the first occasion on
27 which there was any discussion about Tony Czarnik's performance.

28 I'll just move on.

1 MR. PANTONI: It's hearsay, Judge. He said the timing
2 is January of 2000.

3 MS KEARNS: Q The first time you discussed with
4 Mr. Flatley any impressions of Tony Czarnik's performance was in
5 January, 2000?

6 A Yes.

7 Q Had you by that point, January 2000, had any discussion
8 with Mr. Flatley about the fact that you knew that Tony Czarnik
9 suffered from depression?

10 A I never talked to Mr. Flatley about Tony Czarnik's
11 depression up until Tony brought it up as an issue in April of
12 2000.

13 Q Now, you are aware, are you not, Dr. Stuelpnagel, that
14 at some point Dr. Czarnik stepped down as CSO?

15 A Yes, I understand -- Well, I knew Jay was meeting with
16 him that evening to talk about him stepping down, and afterward
17 the next morning Jay told me he didn't get through the meeting
18 before Tony volunteered to step down, which was a pleasant
19 surprise for Jay.

20 Q At this point in time when you are aware Jay Flatley
21 was going to have a discussion with Dr. Czarnik, had Jay Flatley
22 suggested in any way up to that point this time that he wanted
23 Tony Czarnik to leave the company entirely?

24 A No. In fact, he thought because Tony was well liked by
25 the scientists, it was valuable to try to get Tony to stay.

26 Q And do you have any information one way or another
27 whether Dr. Czarnik had ever offered to step down as CSO before
28 the early 2000 time frame?

1 A I've testified to those. One was in late March time
2 frame when he asked Dr. Mark Chee whether he should step down and
3 have Dr. Mark Chee assume the role of CSO. The other is in the
4 April 6 meeting, which I thought he was having a breakdown and he
5 volunteered to leave the company or volunteered to leave his
6 position as CSO, whatever was best for Illumina.

7 Q So the offer to step down as CSO made to Jay Flatley on
8 September 7th during a dinner meeting would have been the third
9 occasion on which Dr. Czarnik offered to step down as CSO?

10 A Yes.

11 Q And with respect to Dr. Czarnik's new position of
12 research fellow, did you have any input in the decision to reduce
13 his salary?

14 A No.

15 Q Now, do you recall seeing an e-mail from Tony Czarnik
16 announcing to the company that he had elected to take the position
17 of research fellow?

18 A Yes.

19 Q We've seen that, I won't put it up, it's already in the
20 record. At some point, Dr. Stuelpnagel, did you come to learn
21 that Tony Czarnik had resigned?

22 A Yes, I understand that shortly after he sent out that
23 e-mail, he went to Jay and said I don't want to even be in the
24 company anymore, I want for quit, but I want you to pay me all my
25 stock that I haven't earned yet.

26 Q Is that a direct quote or paraphrased?

27 A No, that's paraphrased.

28 MR. PANTONI: I'll object that's hearsay, ask it be

1 stricken from the record.

2 THE COURT: Granted.

3 MS KEARNS: Q Do you remember when it is that you came
4 to have an understanding that Tony Czarnik had resigned?

5 MR. PANTONI: It's all based on hearsay.

6 MS KEARNS: The initial question wasn't objected to.

7 THE COURT: What is significant about when this witness
8 learned the Plaintiff had resigned?

9 MR. PANTONI: By the way, it's hotly contested as to
10 whether he resigned, just so we're clear on that.

11 MS KEARNS: Timing and to the context of the various
12 communications that were going on in the March, April time frame.

13 MR. PANTONI: Even according to Mr. Flatley, who claims
14 there was a resignation, Dr. Stuelpnagel wasn't present. It's all
15 hearsay.

16 THE COURT: Just trying to establish the time, is that
17 it?

18 MS KEARNS: Yes.

19 THE COURT: Why don't you just --

20 MS KEARNS: Also another conversation that corroborates
21 that this occurred.

22 THE COURT: Just rephrase the question, ask when he
23 learned that Plaintiff was leaving the company and --

24 MS KEARNS: Q This communication which you have
25 referred to, is it something that you came to learn in passing or
26 did Mr. Flatley make a special point of seeking you out to make
27 the communication?

28 A Mr. Flatley, in the best of my memory, March of 2000

1 came to me immediately and said Tony just volunteered to resign.
2 He wants to negotiate a severance package.

3 Q Were you involved at all in the negotiation with Tony
4 Czarnik of a severance package?

5 A Only peripherally. I was part of the board and I knew
6 the severance negotiations were going on. The decisions were made
7 by Mr. Flatley.

8 Q Were you also aware at this time that Mr. Pytelewski,
9 an underperforming senior manager, had been asked to leave the
10 company?

11 A Yes.

12 Q Were you aware that a severance offer had been made to
13 him?

14 A Yes, and I believe that that severance offer was in
15 consideration of an additional three months of consulting work
16 that Mr. Pytelewski was going to provide to the company after his
17 termination.

18 Q Now, over the course of a period of time, March,
19 perhaps into April, of 2000, there were various communications
20 between Mr. Flatley and Dr. Czarnik on the topic of a severance
21 package. You indicated, Dr. Stuelpnagel, that you are today and
22 always have been a board member of Illumina, correct?

23 A Yes.

24 Q So did you attend all the board meetings?

25 A Yes.

26 Q And was there discussion held at the board level about
27 the severance that would be offered to Tony Czarnik or that would
28 be provided to him?

1 A Yes.

2 Q And did those negotiations eventually reach an impasse?

3 A Yes.

4 Q Are you aware that in early April, 2000, Dr. Czarnik
5 sent an e-mail to Jay Flatley in which he asserted that he had
6 been discriminated against?

7 A Yes.

8 Q How did you come to know that?

9 A Jay asked me about this.

10 Q And did Jay ask you what he meant?

11 A He was just confused because he had made the decision
12 to reduce Dr. Czarnik's position from chief scientific officer to
13 research fellow without any knowledge of any past discrimination,
14 so he was confused why this allegation would be made, so he asked
15 me, and I said[, 'Well, there's never been any discrimination against
16 Dr. Czarnik, but I can think, I know what he's plotting here, that
17 he's plotting to make a claim about discrimination based upon the
18 fact that he told me he suffered from depression about a year
19 earlier.']*¹⁰³

20 MR. PANTONI: Object, your Honor, it's hearsay, lacks
21 foundation, and it's inadmissible opinion testimony.

22 THE COURT: Sustained.

23 MR. PANTONI: Ask that it be stricken from the record.

24 THE COURT: It's stricken. Jury admonished to
25 disregard it.

26 MS KEARNS: Q The time Mr. Flatley came to you and
27 communicated to you Tony Czarnik was claiming discrimination,
28 isn't it true that the severance negotiations had been ongoing for

¹⁰³ Original transcript did not include punctuation marks.

1 over a month?

2 A That's right. This was just a blatant blackmail
3 attempt.

4 MR. PANTONI: Same objection.

5 THE COURT: Don't volunteer your opinions, please, Dr.
6 Stuelpnagel. I'm sure your counsel might want to argue that at
7 the end of the case, but it's not proper for you to testify to
8 that.

9 Motion to strike is granted. The jury is admonished to
10 disregard the testimony.

11 MS KEARNS: Q Dr. Stuelpnagel, after the severance
12 negotiations reached an impasse, there's been testimony about the
13 development of certain goals of Tony Czarnik's?

14 A Yes.

15 Q One of the questions which Mr. Pantoni put to you
16 during his examination of you was whether there had been any work
17 done in the company to date on binary oligo encoding. Do you
18 remember that?

19 A Yes.

20 Q In assigning goals to individuals, Dr. Stuelpnagel, do
21 you routinely assign goals which have been partially met or
22 partially performed by others?

23 A Not routinely.

24 Q Would you normally try to get people to strive to do
25 something new?

26 A Yes. And what's really important here is that this was
27 a goal that absolutely had all the foundation built from the core
28 technology that we're developing at Illumina. We were following

1 oligo-based decoding, and converting it to binary oligo decoding
2 was a natural progression. All the chemistry for attaching oligos
3 had been worked out. All of the fluorescent interactions, binding
4 interactions, all been worked out. We can synthesize oligos
5 easily. So all the resources that Dr. Czarnik at hand made this a
6 much more reasonable goal than the one he proposed himself, an
7 antibody antigen mechanism.

8 Q Mr. Pantoni asked you about a resume which he put up on
9 the board and you testified about it, and in that resume you
10 referred to yourself as a founder.

11 A Yes.

12 Q Is that your standard working resume?

13 A I don't have a working resume. I had the good fortune
14 to have been employed in the summer of 1999 by Avalon and
15 continued in that relationship as they were acquired by CW Group,
16 continued in that relationship as I started Illumina, or helped
17 start Illumina, and then continued at Illumina. So for six years,
18 five years, I've never applied for a job.

19 Q And your creation of the resume which we saw, is that
20 something which you initiated and did on your own initiative or
21 were you specifically asked to prepare it?

22 A No, our human resources department was collecting
23 current resumes from every employee. I'd been negligent in
24 getting that to them. I had been busy. I didn't want to take the
25 time to write it up. Very quickly on a Saturday afternoon I threw
26 this thing together, shot it to them, and they now have something
27 on record for me.

28 Q Now, Dr. Stuelpnagel, were you -- You've testified

1 already about a board of directors meeting in which you believe in
2 June of 2000 Jay Flatley was asked whether Tony Czarnik was going
3 to meet the goals that had been assigned to him.

4 A Yes.

5 Q Remember your testimony on that?

6 You've attended every board of directors meeting, correct?

7 A Correct.

8 Q Has there ever been a board of directors meeting in
9 which Jay Flatley, so this certainly narrows the time frame, any
10 board of directors meeting after Jay Flatley joined the company in
11 which he suggested or said to the board that Tony Czarnik didn't
12 know it yet but he would be given goals that he couldn't attain,
13 or words to that effect?

14 A Absolutely not.

15 Q Now, you participated in being part of the roadshow
16 team, correct?

17 A Correct.

18 Q And with respect to that process, Dr. Stuelpnagel, were
19 there any representations made to investors on the roadshow about
20 the actual number of beads that Illumina was decoding?

21 A None.

22 Q Were there any questions on that topic?

23 A No.

24 Q Were there any representations made there's an
25 experiment that was being conducted throughout much of year 2000,
26 768 decoding experiment?

27 A Yes.

28 Q Is that true?

1 A Yes.

2 Q Did you ever refer to that experiment as the "roadshow
3 experiment"?

4 A Never.

5 Q Are you aware of any person other than Tony Czarnik who
6 has referred to that experiment as the "roadshow experiment"?

7 A No.

8 Q And you testified this morning that the 768 decoding
9 experiment was merely a continuation of prior decoding experiment
10 series, is that correct?

11 A That's correct.

12 Q We've done a 16 bead decoding experiment?

13 A Yes.

14 Q Then a 128 decoding bead experiment?

15 A Yes.

16 Q And then the 768?

17 A I think there might have been a 256 between that.

18 Q Okay.

19 And during this roadshow, apart from a general description
20 of decoding and a statement that decoding works, was there any
21 scientific data presented regarding decoding?

22 A No.

23 Q Now, with respect to the alleged whistleblower claim,
24 did Dr. Czarnik ever, during or after the roadshow, approach you
25 and express concern about the content of anything that might have
26 been said to investors on the roadshow?

27 A No.

28 Q Did Dr. Czarnik during the roadshow or at any point

1 thereafter express to you any concern about the fact that the
2 roadshow team had received data from the 768 experiment while on
3 the roadshow?

4 A Never.

5 Q Do you have any reason to believe that Dr. Czarnik
6 approached any other person who was on the roadshow with such
7 concerns?

8 MR. PANTONI: Object, that calls for speculation.

9 MS KEARNS: Q Do you have any information?

10 A Mark Chee joined the roadshow on the very last day, and
11 I've seen an e-mail that Dr. Czarnik had sent to Dr. Mark Chee.

12 Q That e-mail was sent to Mark Chee on September 5, the
13 date on which Dr. Czarnik was terminated, correct?

14 A Correct.

15 Q Now, Dr. Stuelpnagel, you have a background in
16 biochemistry, you have training in biology and chemistry, correct?

17 A Correct.

18 Q So do you understand scientifically the design of the
19 768 bead decoding experiment?

20 A I wouldn't qualify myself as an expert, but I think I
21 have a pretty good understanding of the experiment, yes.

22 Q We will be hearing from other witnesses in more detail
23 about that experiment, but let me ask you, based upon your
24 knowledge of chemistry, biochemistry, et cetera, molecular
25 biology, and knowing that there was mislabeling of some of the dye
26 vials that were used in that experiment, based upon that
27 knowledge, do you think that the scientific results of the 768
28 decode experiment were useless?

1 MR. PANTONI: I'll object on basis of lack of
2 foundation. There's no evidence -- In fact, I believe Dr.
3 Stuelpnagel never worked on these experiments.

4 THE COURT: You understand what the mechanism is?

5 THE WITNESS: Absolutely.

6 THE COURT: Objection overruled.

7 THE WITNESS: I think the --

8 MS KEARNS: Q The question is based upon your
9 understanding of the experimental design and knowing, it's
10 undisputed in this case, knowing that a few of the dye vials were
11 mislabeled, did that mean that the results were useless and
12 couldn't be interpreted?

13 A Absolutely not. In fact, the conclusions are
14 absolutely perfectly legitimate. The labeling mistake did not
15 impact the conclusions, and the fact that we routinely in
16 manufacturing build arrays that have over 1500 different beads
17 that have to be decoded on every array is proof that that
18 experiment was completely valid.

19 Q Now, Dr. Stuelpnagel, Mr. Pantoni asked you how many
20 shares of Illumina stock you hold. Do you remember that?

21 A Yes.

22 Q How much capital, how much of your own personal money,
23 have you invested in Illumina today?

24 A I think it's in excess of \$150,000.

25 Q And how much money have you made on the sale of any
26 Illumina stock?

27 A I have not sold a single share of Illumina stock, so
28 zero.

1 Q And if you were to use the amount invested by you and
2 look at the value of that stock as of today, have you lost or
3 gained money?

4 A I've got paper gains.

5 Q Okay. But you haven't actually sold a single share of
6 stock?

7 A I haven't realized any gains, so I'm out cash
8 considerably.

9 Q Now, understanding that you may have some paper gains,
10 whether those hold or not will depend upon what the market does,
11 right?

12 A That's correct.

13 Q Have you significantly -- Have you in any way
14 significantly altered your lifestyle in terms of cars, houses,
15 anything of that nature?

16 MR. PANTONI: Objection.

17 THE COURT: Sustained.

18 MS KEARNS: Nothing further, subject of course to the
19 redirect.

20 MR. PANTONI: Does this mean I have 12 minutes, Judge,
21 give or take?

22 THE COURT: Give or take.

23 MS KEARNS: You only wanted 10.

24 THE COURT: As long as we leave enough time for her
25 redirect.

26 REDIRECT EXAMINATION

27 BY MR. PANTONI:

28 Q Dr. Stuelpnagel, I took some notes here when you were

1 testifying about your view of Dr. Czarnik's performance. Among
2 many other things, you said that his work ethic was incredibly
3 poor, he failed miserably in his job duties, his work on the
4 business plan was a blatant failure, contributing nothing to the
5 company. He had complete lack of focus, absolutely no planning
6 or --

7 MS KEARNS: I'm going to object to the --

8 MR. PANTONI: Q -- and he's not even trying.

9 MS KEARNS: I'm going to object to the question to the
10 extent that it's culling responses to a number of questions and
11 suggesting that this was a narrative.

12 THE COURT: Overruled.

13 MR. PANTONI: Q Given your testimony, it's a fact,
14 sir, that notwithstanding what you thought of or claimed you
15 thought of Dr. Czarnik, he failed miserably, incredibly poor
16 performer, contributed nothing, you never gave him a single
17 written warning memo, is that true?

18 A Not a written warning.

19 Q You never discussed these, this incredibly poor
20 performance, at a meeting of Illumina's board of directors, true?

21 A No, as I testified, I talked to the compensation
22 committee that was responsible for senior management performance.

23 Q You never brought the fact -- strike. You never
24 brought his alleged incredibly poor performance and his miserable
25 failings and the fact he contributed nothing, you never discussed
26 that at a board of directors meeting?

27 A That's correct.

28 Q And in fact you never even began to search for a new

1 CSO during the time you were acting president, true?

2 A It's correct.

3 Q Miss Kearns asked you about your notes. If you could
4 open to Exhibit 23, please, page 39, 23-39.

5 A I'm sorry, 29?

6 Q 23- --

7 THE COURT: Exhibit 23-39.

8 THE WITNESS: 39.

9 THE COURT: 23-39. Bates 2163.

10 MR. PANTONI: Q These are notes you took with
11 respect to your first --

12 MS KEARNS: Counsel, can you give me just a moment. I
13 only have the first portion of the exhibit.

14 Okay I've got it. Thank you.

15 MR. PANTONI: Q This page, Exhibit 23 at page 39,
16 this deals with your first major crisis as acting president,
17 correct?

18 A Yes.

19 Q What is the approximate date these notes?

20 A Approximately January of 1999.

21 Q January of 1999?

22 A That's what I testified.

23 Q So this would have been after the two counseling
24 sessions you claim you had with Dr. Czarnik?

25 A Yes. In fact, you referred to these in your direct,
26 sir.

27 Q Isn't it true, sir, that as of January, 1999, you were
28 confident that you had hired good research and development

1 managers?

2 A I was not confident of that. I wanted to make sure
3 that they were successful.

4 Q Didn't you write in your notes that you were confident
5 you hired good research and development managers?

6 A Again this is a stream of consciousness, and there's a
7 number of suggestions on what I could do to help in the R&D
8 progress, and one of the suggestions was that I would become more
9 involved in the R&D management, and in that context, I could help
10 coordinate between the department managers and acquire more
11 resources, but I wrote the cons, and the cons that I essentially
12 didn't have more bandwidth to give to the company, that there are
13 good R&D managers there, and I personally did not have the right
14 expertise to lead the R&D organization at that time.

15 Q Maybe you are not looking at what I'm looking at.

16 May I approach, Judge?

17 THE COURT: Sure.

18 MR. PANTONI: Q See that line?

19 A Yes. So I read those.

20 Q What have you written on that line, sir?

21 A "Confident that I've hired good R&D managers."

22 Q Confident you hired good R&D managers. That included
23 Dr. Czarnik?

24 A Yes.

25 Q That was January of 1999?

26 A Yes.

27 Q What is the last time you claim you counseled Tony
28 Czarnik about alleged performance problems?

1 A It would have been that Saturday meeting in April of
2 1999.

3 Q The last time?

4 A Yes.

5 Q Timing is important in this case. You didn't counsel
6 him in May, June, July, August, September or October of 1999
7 before Mr. Flatley became CEO?

8 A That's correct.

9 Q Dr. Czarnik testified about a February 7, 2000 dinner
10 meeting he had with Jay Flatley. As of that date, February 7,
11 2000, had you told Jay Flatley Tony Czarnik suffered from
12 depression?

13 A No.

14 Q Do you have any reason to believe that Jay Flatley
15 would have known as of February 7, 2000, that Tony Czarnik
16 suffered from depression?

17 A No. In fact the contrary. Based upon the e-mail he
18 got from Tony two months later where he had no clue what sort of
19 mental or health issues Tony was talking about in that e-mail.

20 Q Who at the company as of February 7, 2000, when this
21 dinner meeting happened, who at the company knew that Tony Czarnik
22 had depression, to your knowledge?

23 A To my knowledge, the only people who knew were Dr.
24 Mark Chee, Dr. Rich Pytelewski and me.

25 Q But not Jay Flatley?

26 A Not Jay Flatley.

27 Q Now, Miss Kearns asked you about severance negotiations
28 that took place between the company and Tony Czarnik, right?

1 A Yes.

2 Q And you say that those severance negotiations were
3 because Tony Czarnik had allegedly resigned?

4 A Yes.

5 Q Do you have any understanding why Jay Flatley would
6 have offered Tony Czarnik a severance package the day after he
7 fired him?

8 A I have no knowledge about what he may or may not have
9 offered. I can speculate that it was to avoid the expense of a
10 trial such as this, that they are very expensive with respect to
11 hiring attorneys and such.

12 Q Clearly the severance offer made to Tony Czarnik on the
13 day of filing had nothing to do with an alleged resignation, you'd
14 agree with that?

15 A At that point I would agree it would nothing to do with
16 a resignation. Tony withdrew his resignation after he had not
17 succeeded in his request not to have all his stock vest.

18 Q When do you understand Tony withdraw his resignation?

19 A I have no date that I understand that, but the fact he
20 continued his employment at Illumina and that he resumed or
21 initiated his position as research fellow to me was a logical
22 conclusion that he was no longer thinking about resigning.

23 Q When did you conclude Tony Czarnik had withdrawn any
24 alleged resignation, approximately?

25 MS KEARNS: Objection, relevance.

26 THE COURT: Sustained.

27 MR. PANTONI: Q Well, severance negotiations
28 continued after the so-called withdrawal of the resignation,

1 didn't it?

2 MS KEARNS: Yes, but, your Honor, this witness
3 testified he wasn't the one negotiating.

4 MR. PANTONI: She asked him about this, Judge.

5 THE COURT: I think it would all be based on hearsay
6 since he wasn't involved in the negotiations.

7 MR. PANTONI: I'll ask Mr. Flatley.

8 Q Who's working on binary oligo encoding today?

9 A That's being done by scientist named Gali Stromberg.
10 I'm sorry, Dr. Gali -- I can't remember Gali's last name.

11 Q This is an important area to the company?

12 A Yes.

13 Q Critical?

14 A Yes.

15 Q What's her last name?

16 A Again I'm not recalling her last name. Her name is
17 Gali. She's a scientist from Israel. She does great work.

18 Q And who does Gali, last name unknown, report to?

19 A I believe she reports to Dr. Chanfeng Zhao.

20 Q You testified that Illumina conducted a 16 bead
21 experiment, decoding experiment?

22 A Yes.

23 Q And a 128 bead experiment?

24 A Yes.

25 Q You think maybe a 256?

26 A Yes.

27 Q And a 768?

28 A Yes.

1 Q Did Illumina ever conduct a 4096 bead experiment?

2 A I don't recall. Don't know. I think there might have
3 been feasibility experiments that showed that reaching 4000 was
4 done by Illumina. I don't think we did an experiment to decode
5 4000 beads. So again it's the difference between proof of
6 principle and feasibility versus actually decoding 4000 beads.

7 Q You say the mislabeling the dyes -- strike that. Did
8 the mislabeling of the dyes in your opinion have no effect
9 whatsoever on the results of the 768 decode experiment?

10 A It did not affect the conclusions that one could draw
11 from that experiment.

12 Q Kevin Gunderson is the person who conducted that
13 experiment, isn't he?

14 A He was among a team. This was a team project. It
15 involved the people both from the chemistry department and from
16 the molecular biology department.

17 Q Did you read Kevin Gunderson's report about the 768
18 bead experiment?

19 A I don't think I did.

20 Q You never did? Even up through today's date you have
21 not seen it?

22 A No.

23 Q Would it surprise you if he said the results were
24 somewhat compromised because of the mislabeling issue?

25 A That certainly could be. Kevin is a great scientist.
26 The fact that results are compromised doesn't lead one to reach
27 the conclusion that the conclusion was wrong or the conclusion was
28 incorrect.

1 Q How about the conclusions were at least compromised or
2 questionable?

3 A Absolutely not.

4 Q Have you read Dr. Gunderson's deposition testimony?

5 A No, I have not.

6 MR. PANTONI: Well, it being 4:01 --

7 THE COURT: Do you have anymore questions? I don't
8 want to --

9 MR. PANTONI: I'm finished. Thank you, Judge.

10 MS KEARNS: I have nothing further.

11 THE COURT: Okay. Gee that's too bad.

12 The question was asked by Miss Mack if we're on schedule or
13 not.

14 JUROR MACK: Yes, I was curious if it would go beyond
15 July 4th.

16 THE COURT: What I'm going to ask the attorneys to do
17 over the weekend is give us a day-by-day who the witnesses are
18 going to be each day. It really is hard to tell because generally
19 in civil trials they start, it seems, oftentimes the main
20 witnesses testify first and their testimony is very time
21 consuming. As it goes on, things pick up a little bit. So I
22 can't say for sure. If we get close to the 4th of July, I think
23 we'll consider taking days off around the 4th of July so as not to
24 interfere with plans people have made.

25 JUROR: I have an important doctor's appointment that
26 is critical to me.

27 THE COURT: What day?

28 JUROR: Second. So I can change it.

1 THE COURT: Yes.

2 JUROR: If you are going to get to a point you are
3 going to take days off, I want to know.

4 THE COURT: I think it's -- Bring it up next week. Do
5 you want to change it now?

6 JUROR: I don't know. Should I?

7 THE COURT: I think it's -- I think it's a good bet.
8 We can't say. If you are deliberating on July 3rd, maybe we'd
9 allow that. Does anybody have plans on July 3rd right now?

10 MS KEARNS: Counsel does.

11 ALTERNATE JUROR 2: That's a Monday, right?

12 THE COURT: July 3rd is Wednesday.

13 JUROR: The only problem I have is my company only will
14 take care of me for 30 working days.

15 THE COURT: We're not --

16 JUROR: No.

17 THE COURT: We're talking 12 -- Our estimate, as a
18 matter of fact, was really for 12 days and we're now on our sixth
19 day, I think. So we're not going -- 30 days, no. Can't happen.

20 JUROR: Please, please understand, I'm not challenging
21 you --

22 THE COURT: We're not going to go 30 days.

23 JUROR: I thought you originally said 14 to 16 days. I
24 could be wrong.

25 THE COURT: I think I said probably. Didn't we say
26 done by July 4th, is what we said?

27 JUROR: I thought you did say that. Now she's talking
28 about the 7th and you are --

1 THE COURT: The second.

2 JUROR: I misunderstood.

3 THE COURT: Also I have a conflict on July 1st. I'm
4 trying to work that out. Why don't we talk about this more next
5 week. If we're going to go over July 4th, I think it's probably
6 likely we probably won't, if we're not going to be done, I would
7 think unless everybody wants to be in session on July 3rd, if
8 somebody has plans, we may not be in session on July 3rd. The 5th
9 is a Friday, so unless, we wouldn't be -- The court will be open
10 but we won't be in session.

11 JUROR: 5th if we were in deliberation, would you have
12 us in?

13 THE COURT: If somebody had a problem like previously
14 scheduled family thing on the 5th, I probably wouldn't force it.

15 The other thing, too, if it's one person with a problem and
16 we're at the very end of the case, we have an alternate, we might
17 bring one of the alternates in. We're doing really well so far,
18 we've only lost one juror. As it get closer, try to minimize the
19 hardships on everybody. We really are trying to work hard to try
20 to keep this schedule, and by asking the attorneys to list all
21 their witnesses, day by day, I think by next week we'll have a
22 better idea.

23 So we'll take our recess at this time. We'll be in recess
24 until 9:00 a.m. Monday morning. Please remember the admonition
25 not to form or express any opinion about the case, not to discuss
26 the case. We'll be in recess until 9:00 a.m. Monday morning.
27 Have a pleasant weekend.

28 (Proceedings resumed outside the presence of the jury.)

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(Proceedings recessed at 4:10 p.m.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

Reporter's Transcript of Proceedings
Volume 5
San Diego, California
June 21, 24, 25, 2002

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Official

1 SAN DIEGO, CALIFORNIA, FRIDAY, JUNE 21, 2002; 1:35 P.M.

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(Proceedings recessed at 2:00 p.m.)

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1 SAN DIEGO, CALIFORNIA, MONDAY, JUNE 24, 2002; 9:35 A.M.

2 THE COURT: Morning, ladies and gentlemen.

3 I apologize to you for the delay. The delay had nothing to
4 do with this case. Essentially in two other -- I told you I have
5 about 550 other cases, and on two of those cases some crises arose
6 over the weekend, they had to see them immediately, and I had to
7 deal with it. I apologize. I don't like to keep you waiting.

8 The attorneys and I met together on Friday and we, as I told
9 you, in every case there are matters that we have to take up
10 outside your presence, and we got those things accomplished. And
11 then also the attorneys spent a great deal of time and they came
12 up with a proposed trial schedule to cover -- we're already a
13 half-hour behind the schedule, but that's my fault -- to come up
14 with a comprehensive schedule. They both say they are going to
15 stick to the schedule. So they have certain number of hours
16 allotted for each witness and they'll stick to the schedule. It's
17 very tight. It gets the case completed on Wednesday, July 3rd.

18 The only real question is we'll decide if we want to start
19 deliberations that day, and if we want to have deliberations on
20 Friday after July 4th, and that will be up to you, I think,
21 because although I have the impression some of you already have
22 plans for that day, but -- So probably we'll stick to this
23 schedule and you may end up coming back the weekend after the July
24 4th, the Monday after the July 4th weekend, to do your
25 deliberations, the way it looks to me.

26 Does anybody have plans for July 5th at this time?

27 So probably we'll not -- And then we'll have to decide if
28 we want to begin deliberations before or I might save -- let you

1 go, if we stick to this schedule, we'll be letting you go a little
2 early on July 3rd, which is a Wednesday, and then telling you to
3 come back Monday, July 7th to begin deliberations.

4 So who is the next witness? Are we going to resume the
5 testimony of Dr. Czarnik at this time?

6 MR. PANTONI: We're going to resume cross-examination.

7 THE COURT: Okay.

8 Dr. Czarnik, you are still under oath.

9 ANTHONY CZARNIK,
10 having been previously duly sworn, resumed the witness stand and
11 testified further as follows:

12 CROSS-EXAMINATION (Continued)

13 BY MISS KEARNS:

14 Q Good morning, Dr. Czarnik.

15 A Good morning, ma'am.

16 Q Now, on your direct testimony you told us that in
17 connection with the ABI deal, Illumina agreed to deliver to ABI
18 these arrays. Is that correct?

19 A Yes.

20 Q And isn't it true that all of the scientific branches
21 of the company contributed to the development of the array?

22 A Yes.

23 Q So chemistry contributed, right?

24 A Yes.

25 Q And molecular biology contributed?

26 A Yes.

27 Q And engineering as well?

28 A Yes.

1 Q Isn't it true that you understood at the time that the
2 application for which ABI was going to use this array was a
3 genotyping application?

4 A Their initial interest was in the genotyping
5 application.

6 Q Well, their initial interest is what was covered by the
7 deal that was struck by Illumina and ABI, correct?

8 A Yes.

9 Q Let's put up Exhibit 21. Dr. Czarnik, this Exhibit 21
10 is an exhibit we've previously seen. It is your letter to Dr.
11 Stuelpnagel expressing an interest in coming to work for Illumina
12 and indicating the terms upon which you would be willing to go
13 work for Illumina. Is that right?

14 A Yes.

15 Q And did you make -- So this was one of the early
16 written communications between you and Dr. John Stuelpnagel
17 relating to the terms under which you were willing to come to
18 Illumina, correct?

19 A Yes.

20 Q Directing your attention to this portion in which you
21 were talking about a salary for your wife, did you make any
22 misrepresentations or false statements in this letter?

23 A No.

24 Q What about this statement, where it says you're
25 proposing that the company pay a portion of a salary to your wife
26 for her editorial assistance, and you say in this letter that,
27 "This represents a one-third company contribution and a
28 continuation of the circumstance under which REC's compensation

1 exists today." Do you see that?

2 A Yes.

3 Q That was not an accurate statement, was it?

4 A It was an accurate statement.

5 Q Isn't it true, Dr. Czarnik, that at the time you wrote
6 this solicitation letter, which was April 3rd, you were employed
7 by IRORI?

8 A Yes.

9 Q And isn't it true that IRORI never paid your wife any
10 salary?

11 A Yes, that's true.

12 Q Well, then how can you reconcile, Dr. Czarnik, your
13 statement that a one-third company contribution and two-thirds ACS
14 contribution was what was then in place at the time you wrote this
15 letter?

16 A At that time two-thirds of Becky's salary was being
17 paid by the ACS, so that was \$30,000 a year, and that's all that
18 statement says, that Becky was receiving \$30,000 a year from the
19 ACS.

20 Q Well, no, doesn't this statement say more than that.
21 Doesn't this say that this represents a one-third company
22 contribution, two-thirds of which is provided by the ACS, and the
23 proposed arrangement is a continuation of the circumstance under
24 which REC's compensation exists today?

25 A I see that, but it doesn't imply what I think you are
26 trying to imply. I mean the Company, with a capital C there, was
27 referring to Illumina, and certainly Illumina wasn't making a one-
28 third contribution to Becky's salary.

1 Q Okay. So what you are telling us is that this
2 modifier, "a continuation of the circumstance under which REC's
3 compensation exists today," you are telling us that that language
4 only applies to the two-thirds which was being provided by the
5 ACS?

6 A No, what I meant to imply is that a third of Becky's
7 salary could be paid by a second source, two-thirds by the ACS,
8 and at that time the one-third was essentially Becky just wasn't
9 receiving it.

10 Q But wouldn't you agree with me that this letter could
11 easily be read to suggest that you were telling John Stuelpnagel
12 that the current arrangement, the circumstances under which REC's
13 compensation exists today, involved a one-third payment by your
14 company and two-thirds by ACS?

15 A I suppose it might be read that way.

16 Q In fact didn't you put that language in the letter
17 knowing that Becky was not receiving any money from IRORI, merely
18 in an effort to try to negotiate hard and to get Illumina to pay
19 part of her salary?

20 A I certainly had hoped Illumina would pay a part of her
21 salary. In academic settings the secretaries of editors are
22 supplemented by the academic institution. So I was certain we
23 would have that same relationship with Illumina.

24 Q Dr. Czarnik, you weren't under a misimpression in
25 coming to Illumina you were joining an academic institution, were
26 you?

27 A No, I've done my time in academics.

28 Q You understood Illumina was an industrial company and

1 not an academic university?

2 A I'm a founder. I realized that.

3 Q Now let's focus for a moment on the lunch that you
4 believed that you initiated with Jay Flatley either in October,
5 1999 or November of 1999. On direct you said that you had
6 scheduled this lunch with Mr. Flatley because he had come on board
7 and he had not even tried to sit down and meet with you, correct?

8 A Well, for the three weeks that Jay was there, we had
9 had no substantial discussions as I would have expected for a CEO.

10 Q And isn't it true that Jay Flatley had a 45-minute
11 substantial discussion with you even before he started -- even
12 before he was formally on board at Illumina?

13 A If the e-mail is accurate, then it looks like we did
14 have a 45-minute discussion.

15 Q And if you remember that e-mail from last week, it
16 appears he had similar 45-minute meetings with the other senior
17 managers as well, correct?

18 A Yes.

19 Q Now, it is during this particular lunch in which you
20 have attributed some statement to Jay Flatley which caused you to
21 conclude right then and there that he had some information about
22 your disability, right?

23 A Yes.

24 Q Now, isn't it true that during this lunch on your
25 direct you said that what you told Jay Flatley was that you could
26 be cynical at times but that you were able to control it?

27 A Yes.

28 Q And what is it that Mr. Flatley said in response?

1 A Jay's response was, "Are you sure it isn't more than
2 that?"

3 Q And from that question, from that question posed by
4 Mr. Flatley, you concluded from his words that he knew that you
5 had a medical condition?

6 A That in addition to the follow-up statement, which was,
7 you know, "How will I know when you are feeling that way?"

8 Q The term "depression" wasn't used by either of you
9 during this conversation?

10 A That's correct.

11 Q The term "medical condition" wasn't used by either of
12 you during this discussion?

13 A That's correct.

14 Q Is it your contention that most people would interpret
15 the words cynical to mean depressed or afflicted with a medical
16 condition?

17 MR. PANTONI: Objection, calls for speculation.

18 THE COURT: Overruled.

19 THE WITNESS: Well, that statement coupled with my
20 follow-up, which was this isn't something that I really want to
21 discuss right now, and then also after having had a lot of
22 experience with this, I've learned to gauge myself. I think that
23 you would at least be on heightened alert that this person was
24 aware of some aspect of your medical condition that you'd hoped
25 they wouldn't be.

26 Q So have you now testified both in your direct and just
27 this moment, have you now testified to everything it is that Jay
28 Flatley did or said during this lunch meeting that caused you to

1 reach the conclusion that he had some information about your
2 medical condition?

3 A Yes.

4 Q Now, you have no reason -- In fact, you understand that
5 Jay Flatley is not a medical doctor, correct?

6 A Yes.

7 Q And you understand that Jay Flatley is not a trained
8 psychiatrist or psychologist, correct?

9 A Yes.

10 Q And nonetheless it's your contention that you think
11 that from the conversation you recounted to us, he clearly in your
12 mind knew that you had a medical condition?

13 A Clearly, meaning high likelihood, and I certainly left
14 that conversation feeling that Jay wanted to have a discussion
15 with me about my medical condition, but since I had cut it off, we
16 weren't going to have that discussion.

17 Q Well, when you say we had cut it off, you cut it off,
18 right?

19 A Yes, I did cut it off.

20 Q Why didn't you interpret his question to mean that he
21 was inquiring how will I know when you are -- when you are in a
22 cynical frame of mind? I'm just trying to explore why you didn't
23 adopt that interpretation of his statement.

24 A Well, when Jay made the statement, "Are you sure it
25 isn't more than that," frankly that was sufficient for me to
26 understand that he knew it was more than that.

27 Q And what is your -- What is your definition or your
28 understanding of the meaning of the word "cynical"?

1 A It means you don't always take things at face value,
2 that sometimes things happen for reasons other people don't really
3 want you to understand, and a cynical person will recognize that
4 and recognize that they are not being told the whole story.

5 Q And you felt that by using the word ['cynical']¹⁰⁴ with
6 Mr. Flatley, you were tipping your hand that you had depression?

7 A No, it was not at all my intent to tip my hand I had
8 depression. I simply wanted Jay to be aware that it was possible
9 for my mood to swing, so that if he did notice a mood swing, he
10 wouldn't be concerned about it. I wasn't -- I was in no way
11 trying to telegraph to Jay that I had depression.

12 Q Why didn't you say from time to time I have mood swings
13 but I've learned to control them?

14 A Frankly I think being cynical is more socially
15 acceptable than having mood swings.

16 Q And so you will agree with me, will you not, that
17 cynical does have a meaning which is different from depressed?

18 A Yes.

19 Q Do you consider yourself to be a cynical person?

20 A I'd say under my definition, sometimes I can be
21 cynical.

22 Q Let me move now to the February, 2000 breakfast that
23 you had with David Walt. This is a breakfast which he initiated?

24 A Yes.

25 Q And during this breakfast, he asked you whether you
26 were still interested in Illumina, correct?

27 A Correct.

28 Q Did he express any concerns or worries about your

¹⁰⁴ Original transcript did not contain punctuation marks.

1 preparation of or your conduct of the SAB meeting which had just
2 occurred?

3 A No, David did not.

4 Q Not at all?

5 A Not at all.

6 Q Now, isn't it true, Dr. Czarnik, that the Illumina SAB
7 was not your first experience with a Scientific Advisory Board?

8 A To my recollection, it was my first experience with a
9 Scientific Advisory Board.

10 Q So you seem to be having trouble recalling. Let me see
11 if I can refresh your memory.

12 Isn't it true that at the time you were negotiating to join
13 Illumina, you were a member of the Scientific Advisory Board of
14 Sensors in Medicine, which is in fact today your current employer?

15 A Yes, that's correct.

16 Q And in fact as a condition of joining Illumina,
17 Illumina said you would need to step down from Sensors' SAB
18 because of potential conflict of interest?

19 A Yes, that's correct. I was on the SAB at Sensors,
20 although we never met.

21 Q But strictly in response to my question then, you had
22 been on an SAB before you joined Illumina?

23 A Yes.

24 Q Now, during your direct examination in connection with
25 discussion about the January 2000 SAB meeting, there had been some
26 discussion about the timing and the content of the agenda which
27 you prepared. Do you remember that?

28 A Yes.

1 Q And on your direct examination you testified that you
2 had prepared an agenda for this January meeting, correct?

3 A Yes.

4 Q And that you shared it with John and Mark?

5 A Yes.

6 Q And that they basically told you to change it?

7 A Yes.

8 Q Let's put 115 up.

9 So on direct when you were talking to us about your
10 preparation of an agenda, you testified that Drs. Chee and
11 Stuelpnagel were emphatic [that]¹⁰⁵ you not have as an agenda item[,
12 'Discussion of technical problems?']¹⁰⁶

13 A Yes.

14 Q At this point in time, Dr. Czarnik, January of 2000,
15 you were still the chief scientific officer, weren't you?

16 A Yes.

17 Q You didn't report to John Stuelpnagel, correct?

18 A No.

19 Q And you didn't report to Mark Chee either, did you?

20 A No.

21 Q In fact you reported to Jay Flatley?

22 A Yes.

23 Q And you didn't share your initial draft of the agenda
24 with Jay Flatley, did you?

25 A No, I didn't.

26 Q And let's blow this up one more time if we can.

27 On Tuesday, January 18, Jay Flatley was e-mailing you and
28 asking whether you had an agenda for the SAB meeting, which was

¹⁰⁵ Original transcript did not contain the word 'that' at this location.

¹⁰⁶ Original transcript did not contain punctuation marks.

1 three days later, correct?

2 A Yes.

3 Q And your response -- So that same evening you tell
4 Mr. Flatley[, 'Not yet,']¹⁰⁷ that you did not have an agenda yet, and you
5 go on to discuss what you were intending. "Much of the meeting
6 will be people at Illumina setting up their problem, posing it,
7 being present to hear the discussion," et cetera. You see that
8 language?

9 A Yes.

10 Q Mr. Flatley never came to you and discouraged you from
11 including on your agenda the content of this e-mail, did he?

12 A No, he didn't.

13 Q And so you had by Tuesday, January 18th, you had told
14 Jay Flatley, although you haven't produced an agenda, you'd
15 summarized for him part of what you intended to include in the
16 agenda, right?

17 A Yes.

18 Q He didn't object to it?

19 A No, he didn't.

20 Q And you delivered an agenda to him two nights later,
21 Thursday night, the night before the SAB, correct?

22 A Correct.

23 Q And you did not include in that agenda the content that
24 you wanted to include about having R&D people talk about -- R&D
25 people talk about their specific problems?

26 A That's correct.

27 Q Is it your testimony that the reason you didn't include
28 that topic is because John Stuelpnagel and Mark Chee had expressed

¹⁰⁷ Original transcript did not contain punctuation marks.

1 disagreement with it?

2 A Yes.

3 Q And this is notwithstanding the fact that you reported
4 to Jay Flatley and it was Jay Flatley to whom you owed the agenda?

5 A Yes.

6 Q Dr. Czarnik, let me now focus for a moment on the
7 [Daley's]¹³ dinner, February 7, 2000. You told Jay Flatley during
8 this dinner that your offer to step down as CSO was still good,
9 correct?

10 A Yes.

11 Q And upon questioning by Mr. Flatley, you said that it
12 wasn't critical to you that you remain in a management role,
13 right?

14 A Correct.

15 Q Now, you told Dr. Flatley that you wanted to
16 participate or even take the lead in identifying a new CSO,
17 correct?

18 A Yes.

19 Q And will you agree with me, though, that Jay Flatley
20 was under no obligation to allow you to do so?

21 A Yeah, Jay had no formal obligation to allow me to do
22 that.

23 Q So if he wanted to choose his own CSO without your
24 input at all, that was within his right to do?

25 A Yes.

26 Q Do you think David Barker is qualified to be Illumina's
27 CSO?

28 A Based on what I know of David from interacting with him

1 for a couple of months, yes.

2 Q Well, and in connection with David Barker's joining
3 Illumina, you had an opportunity to see his CV and so forth,
4 correct?

5 A Yes.

6 Q You've seen it in the course of this litigation as
7 well?

8 A Yes.

9 Q So apart from interacting with him for just a couple of
10 months, you also do have some information about his scientific
11 training and background?

12 A Actually I hadn't seen David's CV until this
13 litigation.

14 Q But you now have information about his training and
15 background?

16 A Yes.

17 Q Do you respect David Barker scientifically?

18 A Yes. David doesn't push the right way to do
19 experiments in the same way that I tend to push it, but I think
20 that David is a fair guy who knows the area and he respects
21 scientists.

22 Q Now, were you -- One of the issues that you've made
23 out in this case is you do seem to have some resentment over not
24 having been involved in selecting the new CSO. Is that accurate?

25 A I really wish I had been allowed to be involved in the
26 selection, that's true.

27 Q Isn't that because you wanted to get a bonus for
28 finding your replacement?

1 A No.

2 Q Isn't that what you meant when you say you wanted to
3 follow in John Stuelpnagel's shoes?

4 A No, I just wanted to be valued.

5 Q Well, how do you believe that John Stuelpnagel's
6 finding his replacement was valued and how was that value
7 manifested?

8 A As John mentioned in his testimony, in this world of
9 start-ups, it's very common for the initial founder, the CEO,
10 would be involved with the company for two years or three years,
11 and then once the company needs to start commercializing
12 something, for the venture group to come in and say[, 'You are not
13 the right guy to be CEO any longer, we need a new person']¹⁰⁸. In a
14 large percentage of the cases there's a big fight and the board
15 has to physically remove the original guy.

16 So when John offered to step back, it was something that was
17 valued by the board, but they didn't have to go through this
18 standard fight.

19 Q Well, you, too, had offered to step back, so there's a
20 parallel there, both you and John Stuelpnagel both voluntarily
21 stepped down from your positions, right?

22 A Yes.

23 Q So don't you think that the board valued that on your
24 part?

25 A Apparently not.

26 Q Because you didn't get a bonus, right?

27 A Because my stock was cut so much.

28 Q Well, the stock had something to do -- Your stock

¹⁰⁸ Quotation marks added.

1 actually wasn't cut while you were at Illumina, correct?

2 A You are right, ultimately, because it was illegal for
3 them to do it without my permission.

4 Q Well, Dr. Czarnik, just so that there's no confusion on
5 the jury's part, you say because my stock was cut so much. Isn't
6 it true that Jay Flatley told you he intended to reduce the amount
7 of stock in which you would vest because you were taking a lower
8 -- well, a lower level position than CSO and because you would no
9 longer have any managerial duties. He told you he intended to,
10 correct?

11 A Jay told me he intended to, yes.

12 Q And he then in fact -- I think you testified, that you
13 were in the room, had a conversation with counsel, not me, but a
14 prior law firm, in which he was told that the stock vesting could
15 be changed only if you agreed to it, right?

16 A I wasn't in the room when that conversation occurred,
17 but I learned of the conversation later.

18 Q Okay. And Jay Flatley did present you with a change in
19 position agreement and asked you to sign it, correct? He asked
20 you to sign it?

21 A Yeah, a bit like Simon LeGree asked Nell to vacate her
22 house.

23 Q You declined to sign it?

24 A Yes, I did.

25 Q Your stock?

26 A Yes, I did.

27 Q And your stock was never reduced while you were at
28 Illumina?

1 A No, it was not.

2 Q Okay.

3 Now, I think from your direct testimony it seems to be your
4 position that it was March 1st, 2000, when Jay Flatley told you he
5 was taking you up on your offer to step down as CSO, correct?

6 A Yes.

7 Q And at sometime shortly after that you became aware
8 that the company and its outside lawyers were preparing the S1
9 registration statement for the IPO, correct?

10 A Yes.

11 Q And you say that you asked to participate?

12 A Yes.

13 Q Now, you didn't have any prior experience in drafting
14 or preparing an S1, did you?

15 A No.

16 Q It's the drafting and preparation of an S1 for the most
17 part is not a scientific activity, correct?

18 A It involves an important description of the company's
19 science technology, so there's a lot of it that isn't scientific
20 but there's a very important part that is.

21 Q And you had never before been involved in drafting a
22 description of any company's scientific activities for use in an
23 S1?

24 A That's correct.

25 Q Now, did you understand at the time that Jay Flatley
26 had taken a company public before and had experience in the S1
27 drafting process?

28 A Yes.

1 Q And did you understand that David Barker also had that
2 same experience?

3 A Yes.

4 Q And did you understand that on a going-forward basis,
5 David Barker was going to be the company's CSO?

6 A Yes.

7 Q Now, you took issue with not being included in an early
8 draft in the section that is entitled "Executive Management and
9 Directors," right?

10 A Yes.

11 Q Now, at the time you were not a director, true, you've
12 never been a director?

13 A I've never been a director with the board.

14 Q And as of March 1st, whether it was documented in your
15 personnel file yet or not, but as of March 1st, you had been told
16 that you would be stepping down from an executive management role
17 and would be becoming a research fellow, correct?

18 A Yes, Jay did tell me that on March 1st.

19 Q So you had no reason to believe that on a going-
20 forward basis you would be a member of executive management?

21 A I was not a member of executive management.

22 Q So you are saying actually as of the date Jay
23 communicated to you, you no longer considered yourself part of
24 executive management?

25 A As of that date I wasn't a part of management.

26 Q And the research fellow position itself is not a
27 management position, right?

28 A Generally yes, and as it was used at Illumina, yes.

1 Q I believe you told us on direct that you insisted and
2 you were eventually included in the final version of the S1 in
3 that same section, correct?

4 A Yes.

5 Q And that's even though you weren't a member of
6 executive management, right?

7 A Yes.

8 Q And you weren't a director, correct?

9 A Yes.

10 Q And you insisted upon being included there even though
11 you filled neither of those roles because you wanted the public
12 recognition, correct?

13 A I insisted on being recognized as a founder. I
14 actually had suggested that a good place to put it might be in the
15 SAB section. It didn't really matter to me where it occurred, but
16 it was important to me it did occur, that I was listed as a
17 founder.

18 Q Were you, as of the point in time when you were no
19 longer CSO, were you a member of the SAB?

20 A No, that was a part of the negotiations that we had had
21 that I might join the SAB.

22 Q So in a document which you understood was going to be
23 filed with the SEC, you were proposing that they represent you to
24 be a member of the SAB even though that was not accurate at the
25 time?

26 A What I was proposing, that I be made a member of the
27 SAB and then added to the document.

28 Q Do you have any knowledge or training in the content of

1 an S1 registration statement?

2 A I certainly have knowledge of the science and technical
3 parts of the S1 that was filed.

4 Q But do you know one way or another who dictates the
5 content that must be included in an S1? In other words, do you
6 know for a fact whether Illumina decides what information goes in
7 or whether the SEC dictates the information that must be included?

8 A I think the SEC dictates the content based on the laws
9 of 1933 and 1934.

10 Q Now, isn't it true that as a consequence of your
11 insistence that you be listed in the S1, this meant that your
12 Illumina stock was locked up for a longer period than it would
13 have been had you not been listed?

14 A If that's true, I didn't know it until you took my
15 deposition.

16 Q So you don't remember having discussions with John
17 Stuelpnagel in which he described to you the consequence of being
18 listed in the S1?

19 A On my honor, we did not have that discussion.

20 Q Okay. Another statement you made during direct is that
21 you weren't invited to be on the trading floor of NASDAQ on the
22 date of the IPO. Is that correct?

23 A I believe I made that statement.

24 Q That statement is incorrect, right? Well, I guess it's
25 a correct statement you weren't invited to be on the trading floor
26 of the NASDAQ, but in fact you now know today that the Illumina
27 roadshow team was not on the floor of NASDAQ on the opening day,
28 correct?

1 A I've subsequently learned they weren't on the trading
2 floor. During the time of the roadshow, the -- there was some
3 thought that there was going to be an interview with Jay on the
4 floor of NASDAQ on the opening day, so we were actually quite
5 excited about that back at the company. Apparently that didn't
6 come through.

7 Q Because you had some information that there might be an
8 interview with Jay Flatley on the floor of NASDAQ, you assumed
9 that the team would be on the floor of NASDAQ, correct?

10 A Well, that was a pretty reasonable assumption, I think.

11 Q Well, whether you think it was reasonable or not, you
12 made the assumption, correct?

13 A Yes.

14 Q And you subsequently learned that the team actually was
15 on the trading floor at Goldman Sachs Investment Brokerage rather
16 than at NASDAQ, correct?

17 A That's what I've been told, yes.

18 Q So your direct testimony about people being on the
19 floor of NASDAQ was a little imprecise, correct?

20 A It was apparently incorrect.

21 Q Now, another area I'd like to discuss with you, Dr.
22 Czarnik, very briefly, you testified toward the end of your direct
23 examination your marriage has been affected by your dispute with
24 Illumina, correct?

25 A Yes.

26 Q Isn't it true your intimate relationship with your wife
27 has been impaired or affected for roughly the last 10 years?

28 MR. PANTONI: I'm going to object. We are not making

1 any sort of loss of consortium claim or seeking any damages
2 relating to any alleged loss of consortium.

3 MS KEARNS: Well --

4 THE COURT: There was a claim made in his testimony
5 that doesn't necessarily relate to damages, just he testified to
6 that.

7 THE WITNESS: I don't mind answering this question.
8 It's an unfortunate side effect of virtually all the anti-
9 depressant medications of loss of libido, and in part for that
10 reason I tried to take myself off of it a couple of times and each
11 time has crashed. So I get to make this choice between being
12 depressed or intimate with my wife. I made the decision not to be
13 depressed, or my wife and I made it together.

14 MS KEARNS: Q My point is this impairment in your
15 intimate relationship is something which first of all existed long
16 before you came to Illumina, correct?

17 A Bob Dole calls it "erectile dysfunction."

18 Q If you want me to go there, I'll just say your
19 impotence issue preexisted coming to Illumina. You are not saying
20 Illumina caused the sexual problems?

21 A No.

22 Q It's the medication?

23 A It's the medication.

24 Q And you'd been on the medication since roughly 1992?

25 A Yes.

26 Q So your testimony on direct when you said your marriage
27 has been harmed by the events that occurred at Illumina, you said
28 that, right?

1 A Yes.

2 Q But in deposition you said that you wouldn't be taking
3 that position, isn't that true?

4 MR. PANTONI: I take the positions in the case and I
5 said then as I said now, we are not seeking -- there's no loss of
6 consortium claim here.

7 THE COURT: I think you ought to not characterize
8 what's in the deposition, and you made a particular page reference
9 and --

10 MS KEARNS: I'll just read from the deposition.

11 THE COURT: Give counsel a chance to object if he wants
12 to.

13 MS KEARNS: Because there was a statement that certain
14 things would not be claimed and I think the plaintiff has made a
15 claim.

16 THE COURT: I'll sustain the objection to that. I
17 think in that -- It's confusing as to what that means. So I'll
18 sustain the objection under 352.

19 MS KEARNS: Your Honor, I think it's -- If we can see
20 your Honor, I think --

21 THE COURT: What page and line are we talking about?

22 MS KEARNS: We are talking about page 927, line 24
23 through 928; 928, 11.

24 THE COURT: 924 is the page?

25 MS KEARNS: No, 927, line 24.

26 THE COURT: What volume is that?

27 MS KEARNS: It's the last volume, Volume 6.

28 THE COURT: I don't know if I have that volume.

1 Do you have an objection to that, Counsel?

2 MR. PANTONI: I do, Judge.

3 MS KEARNS: Your Honor, I would say the deposition
4 passage, which I'm happy to approach and let you take a look at --

5 THE COURT: Yes.

6 MS KEARNS: Your Honor, I'm offering it not to dwell on
7 the intimacy issue, but there was a statement on direct by the
8 plaintiff that he wasn't sure his marriage was going to survive
9 this, and there's testimony on that issue in the passage.

10 MR. PANTONI: Again, your Honor, we're not making that
11 claim.

12 MS KEARNS: This goes to more than loss of consortium.

13 THE COURT: Theoretically can't she read from a
14 deposition of the plaintiff without --

15 MR. PANTONI: Not if it's irrelevant to the case,
16 but --

17 MS KEARNS: I think it's relevant because on direct the
18 plaintiff testified my marriage has been harmed, I'm not sure it's
19 going to survive this.

20 MR. PANTONI: He didn't say that on direct. He did not
21 say that on direct.

22 THE COURT: Objection is overruled.

23 MS KEARNS: Q Reading from your deposition, Dr.
24 Czarnik, taken September 25, 2001:

25 "QUESTION: Just so that I'm clear, it was my
26 understanding that your not making any -- you are not
27 making a contention that any issues in your marriage are
28 attributable solely to what happened at Illumina, correct?

1 "ANSWER: Correct.

2 "QUESTION: And you've agreed with me that
3 your sexual problems in your marriage predated the April,
4 1999 meeting?

5 "ANSWER: That's correct.

6 "QUESTION: And I just want to make sure that
7 you are not going to be contending at trial if your marriage
8 has split up by then, by that point, that it was all due to
9 what happened at Illumina.

10 "ANSWER: Even if that's the case, I'm not
11 going to contend it."

12 MR. PANTONI: I'll reiterate, Judge, that I'm not
13 going to contend it either.

14 THE WITNESS: In fact I was chastised because I don't
15 get to make contentions.

16 MS KEARNS: Q Let's move to another topic. Let's
17 talk about decoding. Isn't it true in connection with the
18 decoding experiments that were being done at Illumina while you
19 were there, chemistry had the responsibility or the task of
20 delivering to molecular biology an array of beads which had DNA
21 oligos attached to the beads?

22 A That was one -- That was our major responsibility.

23 Q And then the actual decoding of the DNA that was on the
24 beads was something that was done primarily by molecular biology?

25 A There's an additional step. What you said is correct,
26 the decoding was typically done by molecular biology, but the
27 synthesis of the decoder oligos changed with time. Originally the
28 company bought them, then chemistry made them, and then beginning

1 in January of 2000, molecular biology took responsibility for
2 that.

3 Q Okay. Now, you would agree with me that there is a
4 difference between an experiment where the objective is to prove
5 proof of principle or proof of concept and an experiment which is
6 intended to definitively decode a certain number of beads,
7 correct?

8 A Gosh, that's a hard question.

9 Q Well, let me ask a new question then.

10 In your deposition, we went through at some length the
11 decoding experiments, and you and I talked at some length about
12 the concept of an experiment whose objective is feasibility or
13 proof of principle, and I understood from your testimony that
14 proof of principle or feasibility means can we do an experiment
15 and draw reasonable conclusions that at this level of complexity
16 it works. It may not work perfectly, but that at this level of
17 complexity it is working.

18 A Yeah, the intent of a proof of concept experiment is
19 typically to say should we be investing money in this further.
20 Let's do an experiment that's close to the one we want to do
21 ultimately. If it works, then we'll put the money into it. If it
22 doesn't work, we'll rethink it.

23 Q But you would agree with me, wouldn't you, that a proof
24 of principle or proof of concept or feasibility experiment doesn't
25 have to work perfectly in order to draw a conclusion that it
26 merits further research?

27 A Yes, that's correct.

28 Q Or further repetition of the experiment?

1 A That's correct.

2 Q Now, you did not personally conduct any of the work in
3 the decoding experiments, did you?

4 A No, I've been relieved of that as of January, 2000.

5 Q Well, we've heard testimony about some prior decoding
6 experiments. There was a series of 16-bead experiments?

7 A Yes.

8 Q Did you personally do any of the experiments that were
9 part of the 16-bead decode series?

10 A If you mean with my own hands, no.

11 Q Yeah, I do.

12 A No.

13 Q Did you personally do any of the experiments that were
14 part of the series known as the 128-decode series?

15 A No.

16 Q And you did not personally -- Did you personally
17 conduct any of the experiments that formed part of the 768 decode
18 series?

19 A As a member of management, we typically were not
20 working in the lab.

21 Q Okay. And if -- I don't know whether there was or
22 not, but if there was a series of 256, you wouldn't have
23 personally done any of those experiments either, correct?

24 A There wasn't, and I didn't.

25 Q Okay.

26 Now, one of the steps in the experiment is bead assembly,
27 correct?

28 A Yes.

1 Q Bead assembly is the seating of the beads into the
2 wells, right?

3 A Yes.

4 Q And last week we had our exhibit, and so at the end of
5 each fiber optic fiber, there's a little hole or a little pit, and
6 into each one of those pits ideally you will have a bead, correct?

7 A It's a lot like a Chinese checker board with the
8 marbles, except the whole thing is much, much smaller.

9 Q Yes, much, much smaller.

10 And there are at least a couple -- In your deposition we
11 were talking about bead assembly, and you acknowledged to me there
12 were at least a couple of different methods by which you could get
13 the beads to seat and attach in the wells, correct?

14 A Yes.

15 Q And you admitted in deposition that you didn't know
16 which one of those methods was used in the 768-decode experiment.

17 MR. PANTONI: Objection, form of the question, Judge.

18 THE COURT: Sustained.

19 MS KEARNS: Q You don't know what form or what method
20 of bead assembly was used in the 768-decode experiment, do you?

21 A I don't know.

22 Q And isn't it true that there is a potential step that
23 can be done in these decode experiments called a stringency wash?

24 A Yes.

25 Q And in lay terms, isn't it true that stringency wash is
26 an extra step to make sure that you've washed away the
27 complementary oligos?

28 A Ones that don't bind tightly, yes.

1 Q And you don't know one way or another whether a
2 stringency wash was used in the 768-decode experiments?

3 A That's correct.

4 Q And you would agree with me, would you not, that in
5 order to call the 768-decode experiment a success, it was not
6 required that we actually decode each and every one of the 768
7 bead types?

8 A That's correct.

9 Q Now, you said that the flaw in the 768-decode
10 experiment was this mislabeled dye, right?

11 A Well, the flaw was in the methodology. The dye just
12 brought to the surface that the methodology was flawed.

13 Q The methodology meaning the dye wasn't tested before
14 using it?

15 A No, that the decode was so bad that even if a bad dye
16 the scientists didn't notice it.

17 Q Well, wouldn't you agree that if the dye was tested
18 before using it to make sure it is what the label says it is, that
19 that would have allowed -- that would have enabled the
20 experimenters to determine the dye was what it purported to be?

21 A Yes.

22 Q And in your deposition, or on your direct exam, I'm
23 sorry, you said you had been advocating for testing, quality
24 control testing of dyes beginning with the earliest decoding
25 experiment, right?

26 A Yes.

27 Q And the earliest decoding experiments like the 16-bead
28 experiment and the 128-bead experiment, those occurred while you

1 were chief scientific officer, right?

2 A Yes.

3 Q And you told us on direct that the tests to quality
4 control or quality check the dyes would take either five minutes
5 for a quick and dirty or one day for a more comprehensive test,
6 right?

7 A Yes.

8 Q And isn't it true, Dr. Czarnik, that as CSO, chief
9 scientific officer of the company, you had the tools, materials
10 and instrumentalities necessary to do these quality check tests?

11 A Yes.

12 Q And isn't it true that as chief scientific officer you
13 didn't have any limit on your spending authority?

14 A No, I did have a limit, a \$10,000 limit.

15 Q Are you suggesting that these tests would have cost
16 \$10,000?

17 A No, not at all.

18 Q They would have been quite inexpensive, right?

19 A Yes.

20 Q You had all the tools and materials available to you to
21 do these tests, right?

22 A Yes.

23 Q And you didn't do them, did you?

24 A I didn't personally do them, no.

25 Q You didn't direct that they be done?

26 A I tried to direct Mark to do it, but Mark can be very
27 stubborn.

28 Q You were a chief scientific officer who had supervisory

1 control over a number of people on your team, correct?

2 A Yes.

3 Q And you didn't ask any of your scientists like Steve
4 Barnard or Todd Dickinson or Chanfeng Zhao, you didn't say to any
5 of them, hey, I'd like you to spend five minutes and quality check
6 this dye, did you?

7 A No, they weren't using the dye.

8 Q Well, would they have been competent to test the dye
9 had you instructed them to do so?

10 A Yes.

11 Q And you didn't ask any of the people who were on your
12 team to conduct this five-minute quality control test of the dyes,
13 correct?

14 A No.

15 Q Let's see Exhibit 249.

16 MS KEARNS: On suggestion of counsel, we'd suggest we
17 take a short morning break.

18 THE COURT: We'll take our morning recess at this time.
19 We'll be in recess until 10:45. Please remember the admonition
20 not to form or express any opinion about the case, not to discuss
21 the case. We'll be in recess until 10:45. 10:45.

22 (Proceedings resumed outside the presence of the jury.)

23 THE COURT: Theoretically you have 40 minutes left.

24 MS KEARNS: I'll bring it in within that.

25 THE COURT: Then was there something you wanted to take
26 up?

27 MR. PANTONI: Right at this point?

28 THE COURT: Yes.

1 MR. PANTONI: No.

2 THE COURT: Great.

3 (Recess.)

4 THE COURT: The record will indicate all the jurors
5 present, counsel and the parties present.

6 You may continue your cross-examination.

7 MS KEARNS: Thank you, your Honor.

8 Q Dr. Czarnik, I'd like to now focus on the concerns that
9 you claimed to have raised concerning the 768-decoding experiment.
10 Now, you told us that you believed that the 768-decode experiment
11 was being done specifically to generate data for the roadshow?

12 A That was one of the main purposes of doing that
13 experiment.

14 Q And in deposition you testified that it was common
15 knowledge among the scientists that --

16 MR. PANTONI: Object to the form the question.

17 MS KEARNS: Q That the experiment was being done to
18 generate data --

19 THE COURT: Sustained.

20 MS KEARNS: Q Did you believe that it was common
21 knowledge among the scientists that the 768-decode experiment was
22 done to generate data for the roadshow?

23 A Yes.

24 Q In fact were you the person who was telling scientists
25 that the 768-decode experiment was meant to generate data for the
26 roadshow?

27 A Absolutely not.

28 Q But you are saying this was clearly common knowledge

1 among the scientists?

2 A We referred to it as the roadshow experiment.

3 Q When you say "we," can you identify any of the other
4 people who referred to this experiment as the roadshow experiment?

5 A The people who I remember were Steve Barnard and Jim
6 Bierle, but those are specific recollections, but this was
7 absolutely common parlance.

8 Q Okay. But you have specific recollections of Steve
9 Barnard and Jim Bierle referring to the 768 experiment as the
10 roadshow experiment?

11 A Yes.

12 Q What do you remember Steve Barnard saying? What
13 conversation do you recall in which Steve Barnard called it the
14 roadshow experiment?

15 A It was a discussion in which we were talking about how
16 hard it was going to be to do 768 decodes. I'm afraid I don't
17 remember where we were standing or what time of day.

18 Q Do you recall when it was?

19 A Just a general sense. It was in the sort of April to
20 May timeframe of 2000.

21 Q And what verbiage did Steve Barnard use in which he
22 called the experiment the roadshow experiment?

23 A Well, it was something as simple as, "Doing what we
24 need to do for the roadshow experiment is going to be very
25 difficult."

26 Q Are you aware of any written document that refers to
27 this 768-decoding experiment as the roadshow experiment?

28 A Just one e-mail between Mark Chee and I.

1 Q In which you categorized it as the roadshow experiment?

2 A And then Mark said he understood what I meant by that.

3 Q Is that your "Code Blew" e-mail?

4 A Yes.

5 Q We'll take a look at that momentarily. What do you
6 remember Jim Bierle saying during which he referred to the 768
7 experiment as the roadshow experiment?

8 A Again something as simple as, you know, "The whole
9 decoding team is spending all of their time right now working on
10 the roadshow experiment."

11 Q Do you remember when that conversation took place?

12 A That was probably in June of 2000.

13 Q Why are you able to distinguish that conversation as
14 having occurred later than the one that -- the one that you had
15 with Steve Barnard?

16 A Because the one I had with Jim Bierle occurred after
17 the first attempt failed.

18 Q Now, you believed at the time that the data was
19 actually shown during the roadshow presentations?

20 A I certainly have a belief that it was. It was created
21 for use on the roadshow.

22 Q Are you saying that even today you have a belief that
23 it was?

24 A I believe it was created for use on the roadshow. I
25 can't tell you whether it was or not.

26 Q Okay. Just so that we've got some clarity. My
27 question is whether or not you have a belief that data from the
28 768 experiment was actually shown on the roadshow?

1 A The only data I have to the contrary is what John and
2 Jay have testified to, and to the extent that I have concerns with
3 their credibility on this issue, then I'm concerned that it may
4 well have been.

5 Q Okay. Let me ask you this: Do you have any
6 information that would corroborate or support the idea that data
7 regarding the 768 experiment was shown on the roadshow?

8 A No, that would have required going out and questioning
9 potential investors who were at these shows, and frankly I haven't
10 wanted to do that to the company.

11 Q Well, once we were in litigation after you sued the
12 company --

13 A Yes.

14 Q -- you understood that there's this discovery process,
15 correct?

16 A Yes.

17 Q And so you -- It's an accurate statement that in the
18 discovery process, neither you nor your counsel talked to any of
19 the investors who heard the roadshow presentations, correct?

20 MR. PANTONI: I'll object to the extent it may violate
21 the attorney-client privilege.

22 MS KEARNS: I'm not asking for any communications, I'm
23 asking whether to his knowledge --

24 MR. PANTONI: And work product, Judge. I'll object to
25 the whole line of questioning on the grounds of relevance. As I
26 said in my opening, we're not going to be able to present evidence
27 in this trial it was actually used. The --

28 THE COURT: I think the question is objectionable. You

1 might be able to rephrase the question.

2 MS KEARNS: Q Dr. Czarnik, you state that the only
3 evidence that you have that data wasn't shown on the roadshow is
4 the testimony of Jay Flatley and John Stuelpnagel, and you made a
5 gratuitous comment questioning their credibility or veracity. Do
6 you have any information that supports a belief that data was
7 actually shown on the roadshow relating to the 768 decode
8 experiment?

9 MR. PANTONI: Object to the form of the question. It's
10 argumentative as phrased.

11 THE COURT: Overruled.

12 THE WITNESS: As I said, getting that data would have
13 required interviewing investors and I didn't want to do that to
14 the company.

15 MS KEARNS: Q That's not my question. My question
16 is whether you have any information, not how you would go about
17 getting it, do you have any information that supports a contention
18 that data from the 768 was actually shown or discussed on the
19 roadshow?

20 A No.

21 Q Thank you.

22 Now, you weren't on the roadshow, correct?

23 A That's correct.

24 Q And during the roadshow, it was late in the roadshow,
25 but it was toward the end of July that you learned from Monica
26 Milewski that there was this problem with some of the dye that had
27 been used, correct?

28 A Yes.

1 Q And you didn't telephone any of the people who were on
2 the roadshow to express any concern about the use of this data,
3 did you?

4 A No, I didn't have the schedule or phone number.

5 Q You knew that Jay Flatley had an executive assistant by
6 the name of Carmela Haskell, didn't you?

7 A Yes.

8 Q You didn't go to Carmela Haskell and say I need to get
9 in touch with Jay, may I have the number, correct, you didn't do
10 that?

11 A I didn't talk with Carmela, no.

12 Q And you knew that Carmela would have the roadshow
13 schedule and would be able to track down Jay Flatley if need be?

14 A I knew that Mark had that schedule and Mark was the
15 head of the company on site. He was the right person to give this
16 information to, not Carmela.

17 Q Well, you didn't go to Mark Chee and ask him for the
18 schedule, did you?

19 A No. It was appropriate for Mark to call Jay and to
20 tell him about this.

21 Q Dr. Czarnik --

22 I'm going to move to strike the "it was appropriate"
23 comment.

24 THE COURT: Motion to strike granted; jury to
25 disregard.

26 MS KEARNS: Q I'm just asking what you did, more
27 pointedly what you didn't do. You didn't ask anyone at the
28 company for the roadshow schedule, correct?

1 A That's correct.

2 Q You didn't ask anyone at the company to give you the
3 phone number where the roadshow team could be reached, correct?

4 A That's correct.

5 Q You didn't e-mail anyone on the roadshow expressing any
6 concern about the data from the 768-decode experiment, correct?

7 A That's correct.

8 Q And in fact you were sending e-mail on other topics
9 during the roadshow to people who were on the roadshow, correct?

10 A To Jay, yes.

11 Q Let's put up Exhibit 268.

12 So let's go down to the bottom of the document. So Dr.
13 Czarnik, by July 12, 2000, the roadshow was underway, correct?

14 A Yes.

15 Q And Jay and John and David Barker and Tim Kish, they
16 were all out of the office on the roadshow, correct?

17 A Yes.

18 Q On this date, July 12, you were sending to Jay by
19 e-mail the binary coding work plan, correct?

20 A Yes.

21 Q And so you were, at least on this topic, you were at
22 least communicating with Jay while he was on the roadshow via
23 e-mail, correct?

24 A I was trying, but Jay didn't respond to this e-mail.

25 Q Okay. Well, let's scroll down. Jay's assistant,
26 Carmela, responded very quickly, correct? This message right
27 here. The next day, or July 13th?

28 A I need to see the date on the one at the bottom,

1 please.

2 Q It's July 12.

3 A No, my e-mail to Jay. So the next day, yes.

4 Q July 12th. So by the next day, you got a response from
5 Carmela Haskell saying, "Tony, due to the size of the e-mail, Jay
6 said he will not be able to open it up and respond until he's
7 home." Do you see that?

8 A Yeah, Jay could have sent that to me directly. I don't
9 know why he didn't.

10 Q No. But wouldn't you agree with me that the content of
11 Carmela's message to you basically told you that Jay had seen your
12 e-mail but due to the size of the attachment he wasn't going to be
13 able to open it up and look at it until he was back?

14 MR. PANTONI: Object, calls for speculation.

15 THE WITNESS: It says Jay said he will not be able to
16 open it. It appears Jay contacted Carmela.

17 MS KEARNS: Q After seeing your e-mail?

18 MR. PANTONI: Calls for speculation.

19 THE WITNESS: Could we see the bottom one again. I'm
20 not sure if I saw it.

21 Yes, I didn't cc Carmela. So I assume he did see it.
22 Either that or I don't know if Carmela was checking Jay's e-mails.
23 I don't know.

24 MS KEARNS: Q But the verbiage of the response says
25 "Jay said."

26 A Yep.

27 Q And so you didn't e-mail Jay Flatley, Mark Chee, --
28 You didn't e-mail any of the people who were on the roadshow about

1 your purported concerns about the 768-decode experiment?

2 A That's correct.

3 Q Now, on your direct examination, you say that within
4 moments of learning about the dye problem, you went and addressed
5 your concerns to Mark Chee verbally, correct?

6 A Yes.

7 Q And on your direct exam you stated that you asked Mark
8 if he was aware that some of the dye had been mislabeled and he
9 said yes?

10 A Yes.

11 Q And on your direct examination you also testified that
12 you specifically told Mark Chee that it was essential that he
13 contact the roadshow team and tell them not to use the data
14 because it could amount to fraud on the investors, is that
15 correct?

16 A That's what I told Mark.

17 Q Okay. And you stated on direct that you specifically
18 remember mentioning the concern to Mark about showing the data to
19 investors?

20 A Yes.

21 Q Now, you remember we discussed this topic when I
22 deposed you last summer, correct?

23 A Yes.

24 Q And I asked you in that deposition to tell me what you
25 told Mark Chee after learning about the dye problem, correct?

26 A Yes.

27 Q Going to read from your deposition beginning at page
28 190, which is in Volume 2. 190, line 21:

1 "QUESTION: Did this give you concern when you
2 learned that this reagent had been mislabeled by the
3 supplier?

4 "ANSWER: Yes.

5 "QUESTION: What did you do? You say it was
6 common knowledge at Illumina among the scientific staff by
7 the time you heard it?

8 "ANSWER: Yes.

9 "QUESTION: What if anything did you do to
10 communicate this to any of the executive management?

11 "ANSWER: Before I started trying to get a
12 refund, I confirmed with Mark he was aware of the problem.

13 "QUESTION: How did you confirm that?

14 "ANSWER: Verbally.

15 "QUESTION: Was anyone else present when you
16 did so?

17 "ANSWER: No, the answer is no, no one else
18 was present. And I urged Mark to tell Jay.

19 "QUESTION: What was Mark's response?

20 "ANSWER: I think there was no verbal
21 response."

22 And then again at page 225, 225 line 8, through 227, 6:

23 "QUESTION: At what point in time did you
24 express concerns about the experimental results of the 768-
25 bead experiment?

26 "ANSWER: To the best of my recollection, I
27 talked with Mark within two days of my having been
28 informed."

1 Then there's a break, we go off the record. Back on,
2 the witness volunteers:

3 "My answer to your question was specifically about when
4 did I inform the company of my concerns regarding the
5 mislabeling with the bad reagent. As I testified this
6 morning, I had been raising concerns in the company
7 literally for months about general methodology that was
8 being used for decoding and I had serious concerns whether
9 the conclusion from those experiments could be supported."

10 I'm going to actually jump down to 226, line 10:

11 "QUESTION: Your learning of this bad reagent,
12 as you previously testified, came about when Monica showed
13 you the letter that the company had gotten from the supplier
14 advising it of the mislabeling?

15 "ANSWER: Yes.

16 "QUESTION: And within two days of Monica
17 showing you this letter from the supplier relating to the
18 mislabeling, you informed the company of your concerns in
19 what fashion, verbally, e-mail, written letter?

20 "ANSWER: Verbally

21 "QUESTION: To whom did you direct those
22 concerns?

23 "ANSWER: To Mark."

24 Down to line 24: "What do you remember saying to Mark?

25 "ANSWER: I remember saying to Mark did you
26 know that the reagent was bad, and Mark said yes. I said
27 you have to contact Jay and let him -- tell him that the
28 experiment is flawed.

1 "QUESTION: Did Mark make any response to
2 that?

3 "ANSWER: No."

4 Dr. Czarnik, during your deposition, when I questioned you
5 about this conversation that you were having with Mark Chee about
6 the mislabeled dye, you didn't mention anything about having
7 expressed concerns about fraud on investors, did you?

8 MR. PANTONI: I'll object that the question is
9 argumentative as framed. Just read a section of the testimony
10 where she interrupted his answer and she knows she never came back
11 to this subject again. It's argumentative as phrased. She never
12 asked him about the completion of the discussion.

13 THE COURT: Unless that is called for by a question, I
14 think the objection should be sustained.

15 MS KEARNS: Okay. I'll ask a different question.

16 Q Dr. Czarnik, I deposed you not for full days but I
17 deposed you over the course of six days last summer, correct?

18 A Yes.

19 Q At no point during any of those six days did you
20 testify under oath that you had made a comment expressing concern
21 about fraud on investors?

22 MR. PANTONI: Same objection, it's argumentative. He's
23 here to answer her question. She never asked him that question.
24 She never came back to it. It's argumentative.

25 THE COURT: Absent showing the Court some question that
26 would necessarily call for that in a response, the objection is
27 sustained.

28 MS KEARNS: Q At no point during those six days of

1 deposition did you volunteer such a statement, did you?

2 MR. PANTONI: Objection, argumentative as phrased.

3 THE COURT: Sustained.

4 MS KEARNS: Q Your e-mail to Mark Chee, let's put that
5 up, the "Code Blew" e-mail. Blow it up, please. This is Exhibit
6 332.

7 A By the way, you also mischaracterized my deposition in
8 another way.

9 Q I'm sure your counsel can take that up on your redirect.

10 In this e-mail sent September 5, 1:00 in the afternoon, you
11 state, "Mark, Jay was out when we learned that the 'roadshow'
12 decode experiment was flawed. Is he now aware of the problem?
13 When did you let him know?"

14 Dr. Czarnik, first of all, you see that you put roadshow in
15 quotes?

16 A Not quotes, but they are the thing that's a little bit
17 less than a quote.

18 Q And the response from Mark Chee says if the roadshow
19 decode experiment, as you call it, was flawed, that's a big
20 surprise to me."

21 What is it about Mark's response -- You said earlier that
22 you sent Mark Chee an e-mail in which you characterized the
23 experiment as the roadshow experiment and that he agreed with you.
24 What is it about his response here that causes you to believe that
25 he's agreeing with your characterization?

26 A Simply he knew what experiment I was talking about.

27 Q Okay. But you will agree that the content of this
28 makes it clear that he's not adopting your -- the name that

1 you've attached to it?

2 A No, he doesn't say that. He just says he assumes that
3 I'm referring to the 768 experiment.

4 Q Right. You see in the parenthetical, "Roadshow decode
5 experiment, as you call it." You see that?

6 A Yes.

7 Q You don't say anything in your message about fraud on
8 investors, do you?

9 A No.

10 Q You never said anything about fraud on investors in
11 written form until you filed your complaint in this lawsuit,
12 correct?

13 A In written form, I think that's correct.

14 Q Now, after the team returned from the roadshow, you
15 didn't approach any of the people who had been on the roadshow to
16 express your concerns about the 768 decode results, did you?

17 A What I did was to ask Jay if he had any problem with my
18 getting a refund for the bad reagent. He was, you know, aware of
19 the bad reagent. So we didn't discuss it any further.

20 Q Well, you drew a distinction between -- in fact it was
21 in connection with this very e-mail in your deposition. You told
22 -- You just testified that you had a discussion with Jay in which
23 you said that you wanted to try to obtain a refund for the bad dye
24 because the reagents was bad, correct?

25 A Yes.

26 Q You also testified in your deposition when I asked you
27 why you were asking -- Let me strike that.

28 In this e-mail you are asking Mark Chee whether Jay Flatley

1 knows that, whether he is aware of the problem, when did you let
2 him know?

3 A Yes.

4 Q And in deposition you drew a distinction between
5 Mr. Flatley knowing a reagent was bad and Mr. Flatley having a
6 conclusion that an experiment was flawed.

7 MR. PANTONI: Object to the form of the question, Judge.

8 THE COURT: Do you understand the question?

9 THE WITNESS: Yeah, I do.

10 THE COURT: You may answer.

11 THE WITNESS: Yes, they are not the same thing.

12 MS KEARNS: Q So the only communication that you had
13 with Mr. Flatley was on the topic of the fact that the reagent was
14 mislabeled. You didn't have a discussion with Mr. Flatley in
15 which you said, "Jay, I think that because the reagent was
16 mislabeled, the experimental results are flawed."

17 A Certainly when Jay came back from the roadshow, the
18 discussion that I had centered on the reagent.

19 Q Right. So let me just ask you a new question. Have
20 you ever at anytime had a conversation with Jay Flatley in which
21 you stated in so many words because the reagent was mislabeled,
22 the experiment is flawed?

23 A I believe that that was in an e-mail that was sent to
24 Jay on the same day.

25 Q The day that you were fired?

26 A Yes.

27 Q But shortly after the roadshow, let's set aside
28 September 5th, but after the team returned from the roadshow at

1 the very end of July, you didn't approach any of the people who
2 had been on the roadshow and expressed to them a concern that
3 investors might have been misled during the roadshow?

4 A No, at that point I wasn't concerned about it because
5 Mark had contacted the roadshow, or at least I thought he had
6 contacted the roadshow.

7 Q Well, my question was simply what you did. Not why,
8 not the rationale or the basis for your actions or inactions, just
9 what you did.

10 MR. PANTONI: Argumentative.

11 MS KEARNS: Q So you did not approach any of the
12 roadshow participants to express concerns, correct?

13 A No.

14 Q Now, I want to go back over a couple of different
15 areas. You have characterized Dr. Stuelpnagel's behavior toward
16 you on April 6 as the worst moment of your entire life. Is that
17 accurate?

18 A I don't remember if I said that.

19 Q I'm going to read from Volume 6, page 909.

20 THE COURT: What page?

21 MS KEARNS: 909.

22 THE COURT: Volume 6?

23 MS KEARNS: Volume 6.

24 Q I'll read the question even though the statement
25 doesn't have to do with the question. But question at line 17,
26 question on page 908:

27 "QUESTION: So you were born with a tendency
28 or a predisposition to depression?

1 "ANSWER: Yeah. And up until the point that I
2 started to experience it, I had a very good career and
3 enjoyed life. After I started to experience it, life became
4 harder to enjoy and work was harder to accomplish as
5 easily, but with time you learn that the choices you have
6 are either learn to deal with it and function or give up and
7 not function. And that's what I did, I function. And when
8 I have days when it's a problem, I deal with it either
9 because -- either by just dealing with it or occasionally
10 taking a day off and getting better. And I've been
11 experiencing this disability for the last ten years, and
12 I've had ups and downs.

13 "I've actually had a hell of a good career in the last
14 ten years, in many respects better than the first ten
15 years of my career. The experience of the -- the
16 experience of being verbally attacked and humiliated in
17 John's office was the single most difficult moment of my
18 life to date. You asked me at one point if I was angry
19 at John, and I'm still so angry at John I can't even -- I
20 can just barely begin to describe it.

21 "He -- the way the guy behaved toward me was inhuman
22 and took me from having had a bad depressive episode to
23 being laid up. I've described to a number of people, a
24 number of my docs, that it felt that day as though something
25 broke in my head that is still broken. I wish I didn't have
26 to describe that, because as somebody who is a scientist and
27 dedicated to quantitative measure, you can't measure
28 quantitatively what I'm feeling. I can't -- it's not like

1 describing pain on an index or a broken bone, but what I
2 experienced that day in John's office as a result of his
3 action was the single most intense moment of pain I ever
4 experienced in my life, and frankly, of all the different
5 reasons that I've been holding steady to bring this suit,
6 that moment of barbarism is the reason I'm still here and
7 looking you in the face and want to pursue this thing."

8 MR. PANTONI: There's a couple more sentences if you
9 want to be complete.

10 MS KEARNS: I think I ended.

11 THE COURT: It goes on.

12 MS KEARNS: Okay.

13 Q "I was hurt and humiliated. My response to it
14 was to be honest and explain what I was dealing with and the
15 response I got to that admission was to be cut out of the
16 company that I helped to found. And I was angry every
17 single day that I worked from Illumina."

18 Now, Dr. Czarnik, let me focus back on another
19 occasion, May 18. Let's have Exhibit 222, please. This is the
20 date on which you visited the DFEH and filed your administrative
21 charge, correct?

22 A Yes.

23 Q Isn't it true you already had a scheduled meeting to
24 meet with Jay Flatley and discuss goals?

25 A I had a meeting with Jay. I didn't know what we were
26 going to be discussing.

27 Q So you're denying that you understood that that meeting
28 was for the purpose of giving you your goals?

1 A Yes, I had no pre-information about that.

2 Q Okay. So focusing on -- Let's scroll down.

3 I need the one where he says he's going to be late.

4 Probably immediately precedes this one.

5 I'll come back to this once we have the exhibit.

6 Now, isn't it true, Dr. Czarnik, that you were given goals
7 on May 19th, correct?

8 A Yes.

9 Q And isn't it true that it took you three months before
10 you ever told Jay Flatley that you thought the goals were
11 unreasonable?

12 A No. The day after I informed Jay that we didn't have
13 the right tools for the new goal.

14 Q My question was didn't it take you three months before
15 you told Jay Flatley that you thought the goals were unreasonable?

16 A No, I told him the next day. We didn't have the
17 equipment needed to do that experiment.

18 Q Okay. I'm going to read from your deposition, page 8
19 18, line 22:

20 "QUESTION: Did you ever tell Jay that you
21 felt the goals were unreasonable?

22 "ANSWER: No.

23 "QUESTION: Is that true as to all the goals?

24 "ANSWER: Yes. Excuse me, you said did I ever
25 tell Jay?

26 "QUESTION: Yes.

27 "ANSWER: And I have to modify that. I did
28 not tell him at this meeting that they were unreasonable.

1 At a later point, I believe in August, I pointed out to him
2 that they were unreasonable."

3 MR. PANTONI: I'm -- I'm sorry.

4 MS KEARNS: "QUESTION: And that's after you were
5 already being advised you weren't meeting these goals,
6 correct?

7 "ANSWER: Yes, that's correct."

8 MR. PANTONI: I'll object to the line of questioning is
9 argumentative.

10 MS KEARNS: It's direct impeachment, your Honor.

11 MR. PANTONI: If I could state my objection. In that,
12 as Miss Kearns knows, subsequent to the depositions we've had tons
13 of e-mails, it's intentionally misleading and argumentative.

14 THE COURT: It's what he testified to in his
15 deposition, so the objection is overruled.

16 MS KEARNS: Q Now let's focus on Exhibit 222. This is
17 an e-mail from you to Jay Flatley dated May 17, and you are
18 advising Jay Flatley that you are going the following day to the
19 DFEH, correct?

20 A Yes.

21 Q And you reference a scheduled meeting that is the next
22 day, correct?

23 A Yes.

24 Q And you state, "At our meeting I'd like to discuss your
25 thoughts on the research fellow job description I wrote for David,
26 my goals and an update on my work." That was your language,
27 correct?

28 A Yes.

1 Q Now let's go to the next portion of the same exhibit.

2 In fact, your meeting did run over, correct?

3 A Yes.

4 Q And so you didn't make it back to Illumina that day,
5 right?

6 A I think I made it back, but it was something like 6
7 o'clock or 6:30.

8 Q You and Jay Flatley did not meet that day, correct?

9 A That's correct.

10 Q Now, you got a message from Jay Flatley saying since
11 you couldn't make our meeting, he asks for some information, and
12 you responded on Friday and you represented to Jay Flatley that
13 your appoint did run over, right?

14 A Yes.

15 Q And you state in this e-mail there were no public
16 phones or water fountains in the building. Correct?

17 A I state that. That was my understanding at the day I
18 wrote it.

19 Q In fact that was not accurate, is that true?

20 A I learned the next time I went back to the DFEH that
21 there were phones there.

22 Q Did you carry a cell phone at the time, Dr. Czarnik?

23 A No.

24 Q You didn't have a cell phone assigned to you by
25 Illumina?

26 A No.

27 Q So isn't it accurate to say that this representation,
28 when you say there were no public phones, you made that statement

1 as a means of explaining to Jay Flatley why you hadn't phoned him,
2 right?

3 A Yes.

4 Q And in fact you didn't make any search for a public
5 phone, did you?

6 A I didn't make a search, because when you go to the DFEH
7 to make a complaint, you are put together in a room where they
8 show you videotapes on what the complaint process is, et cetera,
9 and they said don't leave the room.

10 Q And in fact let me read from your deposition on that
11 very point. Page 803, line 15.

12 So you understood while you were at the DFEH that Jay
13 Flatley was back at Illumina, and if you could make it by the 4
14 o'clock meeting, he was planning to meet with you?

15 A And I told him the day before that if it ran over then
16 I would miss it.

17 Q Line 15 of page 803:

18 "QUESTION: As you were running late at DFEH,
19 did you make any attempt to find a public phone?

20 "ANSWER: No, I did not.

21 "QUESTION: Why not?

22 "ANSWER: Because we were told not to leave
23 the room unless we had to use the bathroom.

24 "QUESTION: And is that the only reason that
25 you didn't try to find a phone to call Jay and let him know
26 you'd be late?

27 "ANSWER: Well, they were very specific about
28 not leaving, and so I simply followed their instructions.

1 "QUESTION: Well, they told you you could
2 leave the room to leave the bathroom --" I think it was
3 mistransposed -- "to use the bathroom, correct?"

4 "ANSWER: Yes.

5 "QUESTION: Did you consider leaving the room
6 ostensibly to use the bathroom in order to place a short
7 phone call to let Jay know you were delayed?"

8 "ANSWER: That wouldn't be honest."

9 A That's exactly what happened.

10 Q Dr. Czarnik, isn't it true that during the time that
11 you were working under your individual goals, the work plan which
12 you sent to Jay Flatley via e-mail while he was on the roadshow
13 was late?

14 A Um, yeah, the final work plan was later than what I'd
15 expected, yes, and what Jay expected.

16 Q In fact you were given your goals May 19th, correct?

17 A Yes.

18 Q You assumed that the goals didn't begin until June 1st,
19 right?

20 A Yes, that's correct.

21 Q And that's because you had some vacation scheduled at
22 the end of May?

23 A Yes.

24 Q But you didn't confirm that with Jay Flatley in any
25 way, did you?

26 A No.

27 Q You didn't talk to him about when the goals begin?

28 A No.

1 Q You just assumed that they wouldn't start until you had
2 finished your vacation, correct?

3 A I assumed Jay wouldn't start my goals until I was back
4 from vacation.

5 Q How long was your vacation in May of 2000?

6 A I think it was a week.

7 Q So between the time you got the goals and returned from
8 vacation, there was roughly two-week period there, so you felt
9 that the goals wouldn't start until you got back from vacation?

10 A It's a week and a half.

11 Q But you didn't confirm that with Jay Flatley, correct?

12 A No.

13 Q But if the goals began June 1st, which is what you had
14 in your mind, wouldn't your 30-day goals have been due then July
15 1st?

16 A Yes.

17 Q And you didn't send Jay Flatley a written work plan
18 relating to the experiments on July 1st, did you?

19 A No, Jay was on vacation by then.

20 Q Isn't it true that you, among others at Illumina,
21 received an e-mail from Jay explaining that during the first week
22 of July when he was on vacation he would be working out of his
23 home?

24 A It may be. I'm sorry, I don't remember.

25 Q Do you have any reason to dispute that Jay Flatley
26 communicated to everyone in Illumina that he would be on vacation
27 but working out of his home and accessible?

28 A No, I just don't have any recollection of that.

1 Q In fact you didn't have a work plan ready to send to
2 him on July 1st, did you?

3 A I put the majority of the work plan in his box on June
4 30th.

5 Q You did not send him the final work plan until July
6 12th, correct?

7 A That's correct.

8 Q Isn't it true that by June -- by early June of 2000,
9 while you were working on these goals, actually while you were
10 still in -- by either party's count in the first month of the
11 goals, isn't it true that during the first month of being under
12 the goals, you were already working with a headhunter seeking a
13 different employment position?

14 A It's true I was talking with a headhunter about a
15 position in Boston, yes.

16 Q With a company called U.S. Genomics?

17 A Yes.

18 Q And isn't it true that in preparing the experimental
19 work plans which were goals assigned to you, you agreed with me
20 that you would normally in doing a work plan include things like
21 risks, contingencies, things that can come up that can either
22 cause a project to be delayed or cost more, correct?

23 A Yes, that's often included as part of a work plan.

24 Q Didn't you tell me -- Well, isn't it true that you
25 didn't include discussion of those points in your work plan for
26 your goals because you said you knew you wouldn't be there to
27 finish them?

28 A I don't recall what I said. The fact is both I did

1 know I wasn't going to be there to finish them and the things that
2 caused delays, like reagents getting shipped late not arriving on
3 time, were things that I couldn't have known when I wrote the work
4 plan.

5 Q Let me have the --

6 THE WITNESS: Tony, why don't you put it up for her if
7 she needs it.

8 MS KEARNS: Your Honor, may I approach the witness with
9 these lab notebooks?

10 THE COURT: Yes.

11 MS KEARNS: Q Dr. Czarnik, I've just handed you the
12 originals of three lab notebooks which were assigned to you during
13 your employment at Illumina. I think you've had a chance to
14 examine these before. Isn't it true that two of the three lab
15 notebooks before you are absolutely empty?

16 A Yes, that's true.

17 Q And --

18 A I would like to add that I actually don't remember why
19 I had two. One is numbered 6 and one is 8, but I had checked out
20 one in the beginning, when I was chief scientific officer, and I
21 didn't actually do any experiments with my own hands as chief
22 scientific officer. So that's why these are empty.

23 Q Well, let me ask you to look at the book in which there
24 is writing.

25 A Yes.

26 Q And this is the lab notebook that was assigned to you
27 on July 21st, 2000?

28 A Yes.

1 Q It's been marked as Exhibit 272. Isn't it true, Dr.
2 Czarnik, that this lab notebook, Exhibit 272, reflects the work
3 that you did from July 21st, 2000 through your date of
4 termination?

5 A Yes.

6 Q And can you thumb through the lab notebook and tell me
7 how many pages of writing you generated in that period, July 21
8 through September 5?

9 A 10 pages with some pages covering multiple days.

10 Q And those 10 pages reflect the work you did from the
11 period of July 21 through September 5th, 2000?

12 A They are the comments that I made in response to work
13 that I did.

14 Q Well, if you had done experiments, they would have been
15 reflected in the lab notebook, correct?

16 A Except for trivial experiments that are required
17 sometimes to get to the point where you can do an interesting
18 experiment.

19 Q If you had done any interesting experiment, they would
20 have been reflected in the lab notebook?

21 A That hurt.

22 Q For example, if you had done -- One of your goals was
23 to demonstrate proof of principle or feasibility of binary oligo
24 encoding at a certain level. If you had actually done that
25 experiment, you would have written it in your lab notebook, right?

26 A Yes.

27 Q And one of your goals was to -- Well, I guess a later
28 goal was to do the same proof of principle or proof of concept

1 experiment but at a higher level of complexity, and if you had
2 done that experiment, it would have been in the lab notebook?

3 A Yes.

4 Q Did you understand, Dr. -- Now the binary oligo
5 encoding goal, this was an idea or an invention of yours, right?

6 A Yes.

7 Q And did you understand that in doing -- We've heard
8 from your counsel the fact that at that point in time no one in
9 the company had done any work on binary oligo encoding, is that
10 correct?

11 A Yes.

12 Q Isn't it true that to do the binary oligo encoding
13 experiment, you would have been able to use some of the building
14 blocks or technology that had been developed in connection with
15 the existing scientific work?

16 A Well, we would have needed to develop new beads. They
17 weren't in existence. But some of the DNA, for example, was
18 available.

19 Q And you would have perhaps been able to use the same
20 sort of attachment chemistry to attach the oligos to the beads?

21 A Yes.

22 Q And the same kind of attachment chemistry to attach the
23 beads to the wells?

24 A Yes.

25 Q So you needed to develop different beads?

26 A Yes.

27 Q But you will agree with me that in order to do the
28 binary oligo encoding, there were a number of steps that would

1 have been required in that experiment that had already been done
2 at Illumina?

3 A Yes.

4 THE COURT: Based on your estimate, Counsel, you are
5 out of time.

6 MS KEARNS: Okay. I think I'm done.

7 MR. PANTONI: Your Honor, we agreed that I would do not
8 only recross but rebuttal, one fell swoop, when I return to Dr.
9 Czarnik at the end of the case.

10 THE COURT: So he's done for today?

11 MR. PANTONI: Yes.

12 THE COURT: Thank you very much.

13 MR. PANTONI: Next on our list was to use a videotaped
14 excerpt of a witness. It's going to run considerably past 12:00,
15 so perhaps we could play part of it, break for lunch and play the
16 rest of it.

17 THE COURT: Yes.

18 MR. PANTONI: This is the videotaped deposition of
19 Richard Pytelewski.

20 THE COURT: It need not be reported by the reporter
21 because you will provide a copy of the --

22 MS KEARNS: Yes, we have the written transcript.

23 MR. PANTONI: Right.

24 THE COURT: Is that agreeable, Counsel?

25 MR. PANTONI: That's fine.

26 THE COURT: Okay.

27 (Videotaped deposition of Richard Pytelewski played;
28 not reported.)

1 THE COURT: Is this a good place to stop?

2 MR. PANTONI: Let's play the next excerpt because it's
3 related.

4 (Videotape resumed; not reported.)

5 THE COURT: Can I see counsel for a moment in the
6 hallway regarding scheduling.

7 (Discussion off the record.)

1 SAN DIEGO, CALIFORNIA, MONDAY, JUNE 24, 2002; 1:00 P.M.

2 (Videotape deposition of Richard Pytelewski resumed;
3 not reported.)

4 THE COURT: Who will be the next witness?

5 MS ESPINOSA: Your Honor, due to scheduling
6 difficulties, we'd like to call Bob Nelson at this time.

7 THE COURT: Okay.

8 This is a defense witness called out of order?

9 MS ESPINOSA: Yes, your Honor.

10 ROBERT NELSON,
11 called as a witness by the Defendant, having been first duly
12 sworn, was examined and testified as follows:

13 THE CLERK: Would you please state your full name and
14 spell your last name for the record.

15 THE WITNESS: Robert T. Nelson, Taylor Nelson,
16 N-e-l-s-o-n.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION

19 BY MS ESPINOSA:

20 Q Good afternoon, Mr. Nelson.

21 Could you tell us your current employment, please?

22 A Managing director at Arch Venture Partners.

23 Q And could you previously summarize your educational
24 background?

25 A I have a BS in biology and economics from the
26 University of Puget Sound and MMPA from University of Chicago.

27 Q What is Arch Venture Partners?

28 A An early stage venture capital firm that basically

1 hangs out at universities and helps professors commercialize their
2 ideas, that when they have revolutionary insight, we help them to
3 create companies around what they do on a nationwide basis.

4 Q And do you have a particular focus or concentration in
5 terms of the types of companies that you work with?

6 A I do. Mostly biotechnology, health care, investments.

7 Q Can you give us examples of the kind of companies you
8 worked with?

9 A We helped to start the company that's been in the news
10 a lot lately that makes the bionic eye and allows blind people to
11 see, and we started the first breast cancer detection system for
12 using computers to detect breast cancer.

13 Q How long have you been in the venture capital field?

14 A 16 years.

15 Q What's your affiliation with Illumina Incorporated?

16 A I'm on the board of directors.

17 Q And have you been on the board of directors since the
18 company was formed?

19 A Yes, since its inception.

20 Q Are you still currently on the board?

21 A Yes.

22 Q Was Arch Venture Partners a seed investor in Illumina?

23 A We invested in the seed round and then all the
24 subsequent rounds prior to the IPO.

25 Q And has Illumina -- I'm sorry, has Arch Venture sold
26 any of its stock in Illumina?

27 A No.

28 Q And besides the stock owned by your firm, do you

1 personally own, have you purchased, any Illumina stock?

2 A Yes, I purchased stock in the IPO and then in February
3 of this year.

4 Q Have you sold any of those shares?

5 A No.

6 Q Okay. Generally speaking, can you describe for the
7 Court what the role of a board of directors is?

8 A From my perspective, it's to represent the shareholders
9 and kind of be the alter ego management, kind of the company, and
10 from a 40,000 foot level, hiring and firing the CEO and being the
11 general kind of ultimate authority on big issues, not small
12 issues.

13 Q Okay. So not the day-to-day operations of the company?

14 A No.

15 Q Do you also serve on committee that's part of the board
16 of directors?

17 A Compensation committee.

18 Q Can you describe for the jury what a compensation
19 committee does?

20 A Compensation committee in my view is really in charge
21 of reviewing the executives' compensation and also general
22 compensation philosophy of the corporation.

23 Q Prior to working with Illumina, had you ever heard of
24 the Plaintiff in this lawsuit, Dr. Czarnik?

25 A No.

26 Q Did you meet Dr. Czarnik in connection with your role
27 on the board of directors of Illumina?

28 A Yes.

1 Q Were you able to observe and assess Dr. Czarnik as the
2 chief scientific officer of Illumina?

3 A Yes.

4 Q How were you able to do that?

5 A I encountered Dr. Czarnik early in the process outside
6 of board meetings in terms of initial investors' meetings, and
7 over time probably bimonthly basis within the context of board
8 meetings, and then sometimes during the day outside, before and
9 after board meetings.

10 Q So at board meetings did you see the senior managers
11 give presentations to the board?

12 A Yes.

13 Q That would include Dr. Czarnik?

14 A Yes.

15 Q Did you develop generally over time an impression of
16 the relative contributions made to Illumina by the various members
17 of the senior management team?

18 MR. PANTONI: Objection, lacks foundation.

19 THE COURT: As to what?

20 MR. PANTONI: That there's -- He's a board member who
21 sees Dr. Czarnik twice a year. So I would object there's no
22 foundation.

23 MS ESPINOSA: I think that mischaracterizes the
24 witness' testimony.

25 Q How often were board meetings held at the beginning of
26 the company?

27 A Every two months.

28 Q So every six -- six times a year you had an

1 opportunity to observe --

2 A At least.

3 Q Okay.

4 So during that first year of Illumina's existence, did you
5 have an opportunity to develop an impression of the relative
6 contributions made by the various members of the senior management
7 team?

8 A Yes, that's part of my role as a board member but also
9 as an investor.

10 Q And having watched Dr. Czarnik give presentations and
11 having sort of a board level awareness of the company's progress,
12 what was your observations of Dr. Czarnik as the chief scientific
13 officer?

14 A I think Tony, I guess the way I would say it, he peaked
15 early. We came in with a lot of great promise, but relative to
16 the contributions of John Chee and John Stuelpnagel and eventually
17 Jay, but Mark and John drove the company, continued to drive the
18 company, and made it what it was.

19 Q Are you aware of any scientific contributions made by
20 Dr. Czarnik as the chief scientific officer?

21 A Not that -- I'm not aware of those.

22 Q And to your knowledge, did Dr. Czarnik play any role in
23 the company's rounds of financing?

24 A Financings were driven by Mark, John, Larry Bock. In
25 the early stages when Larry was there, Larry would drive it with
26 John. Then it slowly transitioned to be Mark and John, and then
27 when Jay was there, really it became Jay and John.

28 Q So over time John played a continuous role in the

1 financing?

2 A Yes, John, in the early days, John and Larry were the
3 primary interface kind of a team. In later days it would be more
4 of -- I always have this innate confidence in Mark as the kind of
5 scientific visionary, and then John as kind of the operations guy,
6 and that's kind of what you are investing in. It's really
7 investing the people more than the -- more than every little
8 detail of the science happening every day. At least my judgment,
9 when I invest.

10 Q Are you aware that Dr. Czarnik was trying to raise
11 awareness of Illumina through publications, magazines and
12 newspaper articles?

13 A Yes.

14 Q And as a board member did you view that as a
15 significant contribution?

16 A I think it's a piece of what companies do is to try to
17 publicized what they did. I really felt that was driven mostly by
18 David Walt's invention, which was getting the PR. David was the
19 guy who invented this technology and is world-famous scientist in
20 this area, and I think Tony was helpful in getting that out. But
21 in terms of the net contribution to the success of the company,
22 it's a side thing. It's nice to get PR, but it's not a got-to-
23 have.

24 Q So it's not crucial to the progress of the company?

25 A Not central.

26 Q Let's go to the year 2000 now. By the time you get to
27 April of 2000, there's a board meeting held April 24th, 2000. So
28 would you say that you had a sense that certain members of the

1 management team were really pulling their weight more than others?

2 A I think, as I stated before, it's my very strong
3 opinion having watched this company from its inception that Mark
4 and John were as good as it gets in a start-up. They were the
5 people that drove this company from the very beginning, and Tony's
6 performance was just never, you know, was diverging over time.
7 Mark and John were getting better and Tony was being heard from
8 less.

9 Q Before you came in the courtroom we were watching a
10 videotaped deposition of Rich Pytelewski. Where would you say he
11 fit into the hierarchy of things?

12 A I think Rich maybe in a different way, it was clearly
13 driven by Mark and John, and what you see in start-ups, you know,
14 it is such a pressure cooker, you have to be good to really make
15 it work, and we see this all the time in start-ups, where
16 basically over time some people begin not to contribute, they try
17 or they don't try, whatever reason, and then it's driven by a
18 couple of folks. And I think Mark and John, you know, Larry set
19 this company up, Mark and John made the company, and Jay and Mark
20 and John are kind of continuing, what I think.

21 Q Did Dr. Stuelpnagel ever tell you he thought
22 Mr. Pytelewski or Dr. Czarnik were underperforming?

23 A I made those judgments on my own. I really -- John
24 was actually quite protective of people at the company, and I
25 think continues to remain really protective of some. It was
26 fairly obvious over time just watching -- I don't know, I get --
27 my job is to get an innate sense how an organization is
28 functioning. So any kind of organization, whether a school board

1 or a company, you kind of know who the performers are over time,
2 especially if you are observing it over a long period of time. My
3 job is not to get into every detail, it's to observe over a long
4 period of time and try to make judgments about who is performing
5 and who is not performing.

6 Q By the way, did you attend all the board meetings at
7 Illumina?

8 A I believe so. I don't recall, but I believe so.

9 Q Okay.

10 Now, Illumina closed a round of financing in November of
11 '98. There was a board meeting in the following month, December
12 of '98. Did Dr. Stuelpnagel report to the board at the December
13 1998 board meeting anything about the company having some kind of
14 crisis?

15 A I don't recall specific dates, but I don't recall any
16 crises. There are always milestones that aren't met in start-ups.
17 I've been involved in probably 30 start-ups. You don't meet
18 milestones, you meet them, and when you are financing them, you
19 kind of expect that there's going to be some slippage and then
20 kind of make it up later.

21 But Illumina was always kind of a fast riser in my book, and
22 I wasn't very worried about it.

23 Q How about February 1999 board meeting, do you recall if
24 Dr. Stuelpnagel reported to the board at that meeting that there
25 were any problems in meeting company milestones?

26 A I don't recall.

27 Q Let's go to the compensation committee role that you
28 play. How does the compensation committee try to motivate the

1 members of the senior management team?

2 A Usually through stock options. Sometimes through cash
3 bonuses. The general idea is to provide a carrot to people if
4 they perform, to try to motivate them. Kind of general
5 performance and then specific performance through milestones. If
6 you do this, you get something.

7 Then I'm always a firm believer in kind of surprise bonuses,
8 surprise milestones. If people really perform, they get that
9 extra thing, and that's always kind of the most appreciated type
10 of incentive.

11 Q What happens if you set a milestone goal for a person
12 and they are no longer at the company when that milestone is
13 achieved?

14 A They don't get it.

15 Q Now, do you recall in October of 1999 that the
16 compensation committee gave out a series of milestone stock grants
17 to senior managers?

18 A Yes.

19 Q Do you recall they were hinged to a deal with a company
20 called Applied Biosystems or ABI?

21 A Yes, that's correct.

22 Q Do you recall what was awarded to the senior management
23 team?

24 A I don't recall the specific amounts, but I think there
25 were bonuses given to Mark and John specifically of some amount of
26 shares, or at least milestone -- We created a milestone pool to
27 basically say if you get the ABI deal, you get rewarded.

28 Q Why was that so important for the company?

1 A That was a critical deal for the company. We were a
2 company that hadn't been -- We needed kind of a stamp of
3 validation by somebody, a big corporate partner with significant
4 resources, that says we believe in your technology, basically, and
5 we're going to help you financially and get out into the world and
6 hopefully change the course of the way they are found.

7 Q You heard earlier testimony Dr. Chee and Dr.
8 Stuelpnagel each received a hundred thousand shares closing the
9 ABI deal?

10 A Right.

11 Q Why did the compensation committee give those shares
12 only to Mark and John?

13 A They were the ones, they were the key individuals
14 responsible for the deal.

15 Q What activity did they participate in that made them
16 worthy of those shares?

17 A Mark is kind of the guy that creates innate confidence
18 in the technology, the smartest guy you'll ever meet. You take
19 him out and people are willing to partner with him because they
20 believe he's going to get it done. And John is the guy that
21 actually gets it done, and makes sure that kind of all the ducks
22 are pointed in the right direction and then goes and lands the
23 deal. Because there's a big difference between kind of thinking
24 you are going to get a deal and getting it, and John was the guy
25 that got it.

26 Q Do you recall discussing with Larry Bock and John
27 Stuelpnagel the issue of giving these milestone grants to various
28 senior managers?

1 A Yes.

2 Q Do you recall that some stock was also given based on a
3 milestone of achieving certain number of genotypes on a single
4 array to Dr. Czarnik, Dr. Chee and Mr. Pytelewski?

5 A Yes.

6 Q Why were those grants given to those three people?

7 A I think John felt it was important that those guys get
8 something. Actually I was an advocate of nothing.

9 Q You advocated not giving them any shares?

10 A Yeah. And John kind of convinced me that for purposes
11 of just not making everybody angry in the organization, it
12 appeared that there needed to be some kind of milestone set out
13 that was achievable, and a technical milestone like that, other
14 than the ABI milestone, seemed like a reasonable thing. If that
15 milestone was achieved, that would be good for the company. So it
16 fell within the kind of reasonableness.

17 Q So would it be fair to say Dr. Stuelpnagel went to bat
18 for the other guys on the team?

19 A Absolutely.

20 Q Let's talk about Jay Flatley. Did you help recruit
21 Mr. Flatley to Illumina?

22 A Yes.

23 Q Did you negotiate with him about his position with
24 Illumina?

25 A Yes, I negotiated his employment agreement.

26 Q And through the process of recruiting Mr. Flatley, did
27 you or anybody else on the board tell Mr. Flatley about any
28 performance-related problems with Dr. Czarnik or Mr. Pytelewski?

1 A No.

2 Q Mr. Flatley met with various board members as part of
3 this approval process, correct?

4 A Yes.

5 Q Did anyone on the board inform Mr. Flatley that Dr.
6 Czarnik or Mr. Pytelewski had performance problems, as far as you
7 knew?

8 A Not that I'm aware of.

9 Q So to the best of your knowledge, based on the board's
10 activities in recruiting Mr. Flatley, would you say Mr. Flatley
11 joined Illumina with a clean slate as far as his impressions of
12 Dr. Czarnik and his past performance?

13 A Yes, absolutely. It's the kind of thing I'm not going
14 to share my concerns unless they are absolutely huge kind of fraud
15 or some other thing. I think the CEO needs to come in and make
16 his or her own decisions about their own team, and I might -- I'm
17 not the one to make that decision at that point. If they were to
18 come ask me later, I would tell them.

19 Q If you had been asked for your impressions by
20 Mr. Flatley after he was recruited --

21 MR. PANTONI: Calls for speculation.

22 THE COURT: Sustained.

23 MS ESPINOSA: Q Did you or anyone else on the board
24 know at the time that Mr. Flatley arrived at Illumina that Dr.
25 Czarnik suffers from clinical depression?

26 A No.

27 Q Let's also go back to another compensation committee
28 award that was given to Dr. Stuelpnagel. He was given 25,000

1 shares for stepping down as the acting president and CEO. Why did
2 the comp committee do that?

3 A I think I have this idea that they call the
4 testosterone award, because I've never and still have never in my
5 career, I doubt I will ever see again, somebody who has the total
6 support of the board to be CEO come in one day and -- come in one
7 day and say I found a better person. John has had my respect ever
8 since that day, because -- and I still don't know why he did it.
9 He believed it was better for the corporation to put his own job
10 on the line, essentially, and say I found the best CEO we're ever
11 going to get. So we gave him an extra bonus of stock just for
12 being a good guy, basically.

13 Q If someone is being replaced because they are not
14 performing well in a position, would it be appropriate for the
15 comp committee to give them a stock grant just because they helped
16 recruit their successor?

17 A No, no. This was an exceptional thing.

18 Q Is it unique to the CEO position, your reaction to
19 this?

20 A I think you can't say that broadly. Any amazing thing
21 that would happen, I would consider something like that, but it
22 would have to be pretty big deal to go out of your way to give
23 somebody that kind of stock.

24 Q Let's jump ahead now a few months to April, 2000. Do
25 you recall in April, 2000, Larry Bock contacting you about a
26 communication he had had with Dr. Czarnik?

27 A Yes.

28 Q What do you recall him telling you?

1 A I don't recall kind of specifics. I recall that Larry
2 and Tony had spoken or there was some interaction going on between
3 -- some communication going on between Larry and Tony, and I don't
4 recall who initiated that, but there was some kind of interaction
5 going on between Larry and Tony talking about demands that Tony
6 was making at the time.

7 Q Okay. So you know that the general subject matter of
8 their communications had to do with some sort of severance
9 negotiations for Dr. Czarnik?

10 A Yes.

11 Q And did you in fact attend a board meeting held at
12 Illumina on April 24, 2000?

13 A Yes.

14 Q Did Mr. Flatley say anything about Dr. Czarnik at that
15 board meeting?

16 A I don't recall.

17 Q Do you recall that the topic of severance negotiations
18 came up at the end of that board meeting?

19 A Yes. Around this time there was a series of calls and
20 discussions regarding severance agreement with Tony, and I was
21 party to some of those conversations with Larry, Tony, and I don't
22 know who else, but others.

23 Q So the board was aware that Dr. Czarnik was trying to
24 negotiate a separation package from Illumina?

25 A Yes.

26 Q Was there any discussion about goals that were going to
27 be assigned to Dr. Czarnik as a research fellow?

28 A I think at some point, I don't know when, but at some

1 point there was a discussion of goals at the board meeting.

2 Q What was said about those goals?

3 A I think either me or others brought up to Jay and Jay
4 kind of was already ahead of us on that to make sure that if any
5 goals were assigned to Tony that they were fair. And actually
6 what's interesting about this whole process is that Jay
7 continually, through this whole company, it seems that Jay and
8 John were ahead of the curve in terms of thinking about fairness.
9 You know, even ahead of the board. Thinking about fairness to
10 Tony and in terms of making goals that were realistic and looking
11 for him to succeed and not fail.

12 Q So they were trying to incent him to be successful?

13 A They were always trying to incent him, and I would say
14 that there was those on the board, including myself, that might
15 not have been as charitable.

16 Q Did you ever hear Mr. Flatley say anything to the
17 effect that although Dr. Czarnik doesn't know it yet, I'm going to
18 assign him goals that he cannot possibly achieve?

19 A That's absolutely not true. Exactly the opposite.

20 Q So it was the opposite of the way you perceived
21 Mr. Flatley's approach?

22 A He was always working to make achievable, reasonable
23 things to help Tony succeed if he could, and anything to the
24 contrary to that is absolutely not true.

25 Q And again, by the time of this board meeting, had you
26 ever heard Dr. Czarnik suffers from clinical depression?

27 A Which board meeting?

28 Q April of 2000.

1 A I don't believe so. Somewhere around that time I heard
2 that for the first time. I don't recall when.

3 Q Did you ever hear anything to the effect that
4 Mr. Flatley had reported to the board that Dr. Czarnik has
5 depression but that he, Mr. Flatley, did not believe Dr. Czarnik?

6 A No.

7 Q Do you recall what the board did about helping to
8 negotiate with Dr. Czarnik on the severance package? Was there
9 any resolution to that?

10 A There was a set of discussions that were going on.
11 Tony was making certain demands that were unreasonable, in my
12 opinion, and I think we appointed David Walt, or there was some
13 discussion about having David, who knew Tony the best, to talk to
14 Tony and try to figure out some kind of resolution, because we had
15 an IPO coming up and I think we all felt that we were being held
16 up at that point prior to the IPO, under duress, because when we
17 were going public, you have to have everything clean. And these
18 things have this -- have an interesting timing. Right before the
19 biggest thing that ever happens, somebody comes and says I want
20 this, I want this. So we just wanted to get it over with.

21 Q So did the board agree that Dr. Walt should make a
22 certain offer to Dr. Czarnik?

23 A Yes.

24 Q And what happened with that?

25 A I believe they had a conversation and they didn't come
26 to an agreement.

27 Q So now let's go ahead a couple more months to June of
28 2000. Did you attend a board meeting of Illumina on June 26th,

1 2000?

2 A I believe I attended.

3 Q At that board meeting did Mr. Flatley report anything
4 further about activities with Dr. Czarnik?

5 A I'm not sure of the specific time. At some point Tony
6 filed a complaint.

7 Q The complaint was filed in the May time frame, let me
8 represent to you, in late May. The next morning would have been
9 the June 26th.

10 A Yes.

11 Q So what did Jay say?

12 MR. PANTONI: Objection, hearsay.

13 THE COURT: It is hearsay unless it comes in as one of
14 the exceptions.

15 MS ESPINOSA: Q At this board meeting did you learn
16 for the first time Dr. Czarnik was alleging discrimination against
17 Illumina?

18 A Either at that board meeting or in a call I usually do
19 with Jay before the board meeting. Usually I call Jay maybe a
20 couple of days before a board meeting and say, "Jay, is there
21 anything I need to know about what's going to happen at the board
22 meeting?" to make sure there aren't surprises. It's likely that's
23 when I learned it, a couple of days before.

24 Q At the board meeting itself, did Mr. Flatley discuss
25 Dr. Czarnik's performance issues?

26 MR. PANTONI: Objection, hearsay.

27 THE WITNESS: I don't think --

28 THE COURT: You can answer yes or no.

1 THE WITNESS: Yes.

2 MS ESPINOSA: Q Was the topic of Dr. Czarnik's
3 performance goals as a research fellow discussed with the board?

4 A Yes.

5 Q And what was said about the --

6 MR. PANTONI: Hearsay.

7 THE COURT: Sustained.

8 MS ESPINOSA: Q Did the board -- At the board meeting
9 was there any decision made about what to do with respect to Dr.
10 Czarnik?

11 A I think we discussed with Jay this concept that I
12 already talked about of making sure that Tony's goals were fair,
13 and Jay took the initiative and pointed out that he was out to
14 have Tony succeed, not fail.

15 Q Did you ever see Dr. Czarnik's research fellow goals?

16 A No.

17 Q To your knowledge, did the board of directors ever
18 discuss the specific goals assigned to Dr. Czarnik?

19 A No. We usually would not get into that level of
20 detail. With the CEO like Jay, I think we basically delegate to
21 him. He's going to -- If there's some specific thing we need to
22 deal with, he's going to bring it up to us. If it's a general
23 concept, we're going to trust Jay to go get it done.

24 MS ESPINOSA: No further questions. Thank you.

25 THE COURT: Cross-examination.

26 MR. PANTONI: Thanks, your Honor. I just have a few
27 questions.

28 CROSS-EXAMINATION

1 BY MR. PANTONI:

2 Q Mr. Nelson, wasn't it the original understanding that
3 John Stuelpnagel would be only an acting president, acting CEO,
4 and from day one it was understood he would be bringing on a
5 successor?

6 A The original understanding was he was acting CEO,
7 although over time support grew for John to be permanent CEO if he
8 wanted the job, and there was support at the time when he brought
9 on Jay that he would be the guy to take us public.

10 Q Is it your testimony that Dr. Stuelpnagel never brought
11 a major crisis to the board's attention in late '98 or early '99?

12 A Major crisis. My definition of a major crisis?

13 Q In terms of Dr. Stuelpnagel reporting that he thought
14 there was a major crisis under his leadership.

15 A I don't recall a major crisis.

16 Q Never?

17 A I don't recall a major crisis. I recall a whole lot of
18 minor crises, which is pretty much standard for any start-up.
19 Depends who you are talking to how they define major or minor.

20 Q Okay. You testified on direct that with respect to Dr.
21 Czarnik that over time he was heard from less and less. What did
22 you mean by that?

23 A I felt over time, it was a polite way of saying that
24 not that he was heard from less and less literally, but it was a
25 polite way of saying my judgment of his performance declined over
26 time.

27 Q The board meetings were held every other month, six
28 board meetings a year?

1 A Usually, I don't know exact, usually when we start a
2 company like this, we'll do board meetings either every six weeks
3 to two and a half months, so it depends on the calendar, but
4 often.

5 Q Real quick with respect to the ABI deal and the stock
6 grants that were awarded with respect to ABI. Senior management
7 made recommendations to the compensation committee, correct?

8 A Usually.

9 Q In this specific case, senior management made
10 recommendations with respect to stock grants on the ABI deal?

11 A Yes.

12 Q And John Stuelpnagel made those recommendations?

13 A Yes.

14 Q Now, with respect to the 25,000 stock grant that Dr.
15 Czarnik got, you say that was tied to a technical milestone?

16 A That Dr. Czarnik got or Dr. Stuelpnagel?

17 Q Dr. Czarnik.

18 A I believe that was tied to a technical milestone of
19 genotyping, or something like that.

20 Q Do you know when the company actually, if at all, hit
21 that milestone that was tied to Dr. Czarnik's --

22 A I don't recall.

23 Q With respect to severance and the discussions about a
24 severance package, you mentioned that Dr. Czarnik was making
25 certain demands on the company?

26 A Yes.

27 Q And flip side of that is the company was making certain
28 offers of severance to Dr. Czarnik, true?

1 A Yes.

2 Q What was the highest offer that you recall the board
3 authorizing in terms of severance package to be given to Dr.
4 Czarnik?

5 MS ESPINOSA: Objection, relevance, your Honor.
6 Settlement negotiations.

7 MR. PANTONI: There's already been plenty of testimony
8 on this.

9 THE COURT: Overruled.

10 THE WITNESS: I don't recall. I think there was, you
11 know, during this time there was somewhere -- there's a lot of
12 discussion going on, so somewhere between six months or nine
13 months or something like that. I don't know. My own views were
14 quite different. I kind of, as I told you, I felt like we were
15 being blackmailed at the time, so I preferred zero. The more it
16 appeared like that, and then eventually we had to go public, so we
17 needed to settle.

18 Q So the blackmail that you've described, that was
19 because the company was going to go public, that's your
20 perception?

21 A Because of the suspicious timing of this, yes.

22 Q Pre-public offer, pre-IPO?

23 A Right.

24 Q And that's why you think severance offers were made to
25 Dr. Czarnik, because the company was about to go public, is that
26 your testimony?

27 A I think that more generous severance offers than
28 normally would have been made to Dr. Czarnik were made because the

1 company felt vulnerable and needed to get this behind them and
2 felt that it would be harmful to them.

3 Q Because this was pre-IPO, before the company went
4 public?

5 A Because he was holding us up.

6 Q Talking about timing, sir, you are saying problem of
7 the hold up was because this was pre-IPO?

8 A Because it was a disclosure item in the IPO, pre-IPO
9 documents.

10 Q Your concern was this was happening before the IPO?

11 A Yes, and I think --

12 Q Yes?

13 A Yes.

14 Q Now, were you aware, sir, that Jay Flatley made an
15 offer of severance to Tony Czarnik on September 5, 2000, the day
16 he fired him?

17 A I'm not aware of that, but wouldn't surprise me if that
18 were to be the case.

19 Q That was after the IPO, correct?

20 A Yes.

21 Q Isn't it true that the highest severance package that
22 the board approved for Dr. Czarnik was nine full months of salary
23 and nine full months of stock vesting?

24 A It could have been.

25 Q Miss Espinosa asked you about ownership of shares. I
26 don't recall if she asked you how many shares.

27 A I own 9,000 shares personally.

28 Q What about your venture capital firm?

1 A My venture capital firm owns 3.6 million shares, and
2 -- 3.6 or 3.7 million shares.

3 Q Today, 3.6 or 3.7 million shares?

4 A Yes. Proudly.

5 Q Do you know what the stock price is today?

6 A I don't know.

7 Q You haven't checked?

8 A I try not to check it every day. It's a bad economy.

9 Q Last time you checked what was it?

10 A 6 or 7.

11 Q Per share?

12 A Yes.

13 Q Do you know when the goals were assigned to Dr.

14 Czarnik?

15 A I don't know exactly when. I think somewhere in May or
16 June.

17 Q I'll represent to you it was in May. May 19th, 2000,
18 to be exact. Does that sound about right?

19 A Sounds right.

20 Q So is it your testimony that as far as you know, Jay
21 Flatley would have had no reason to want to fire Tony Czarnik on
22 May 19, 2000?

23 A No, I think Jay actually -- I think Jay and John were
24 quite open and sympathetic to Tony at the time. I would have been
25 less --

26 Q We're talking about Jay. Let's stick to Jay. Do you
27 have any reason to believe on May 19, 2000, when Jay Flatley gave
28 Dr. Czarnik his goals, that he wanted to fire him as of that day?

1 A Say again.

2 Q Do you have any reason to believe that as of May 19,
3 2000, which is the day Jay Flatley gave Tony Czarnik his goals,
4 that he wanted to fire him as of that day?

5 A No.

6 MR. PANTONI: Nothing further.

7 THE COURT: Any redirect?

8 MS ESPINOSA: No.

9 THE COURT: Thank you very much. You may step down.

10 We'll take our afternoon recess at this time. We'll be in
11 recess until 20 minutes before 3:00. Please remember the
12 admonition not to form or express any opinions about the case, not
13 to discuss the case. We'll be in recess until 20 minutes before
14 3:00.

15 (Proceedings resumed outside the presence of the jury.)

16 THE COURT: We're all set for the next witness?

17 MS KEARNS: We are. I believe so.

18 THE COURT: This is a defense witness?

19 MS KEARNS: A defense witness being called by the
20 Plaintiff under 776, and then we'll do our full examination at the
21 same time.

22 THE COURT: Okay.

23 MS ESPINOSA: Are you impressed?

24 THE COURT: I'm really impressed. You are sticking
25 right to the schedule. It's like clock work.

26 (Recess.)

27 THE COURT: Record indicate all the jurors present,
28 counsel and parties present.

1 Call your next witness, please.

2 MR. PANTONI: Thank you, your Honor. David Barker.

3 DAVID BARKER,

4 called as a witness by the Plaintiff, having been first duly

5 sworn, was examined and testified as follows:

6 THE CLERK: Would you please state your full name and
7 spell your last name for the record.

8 THE WITNESS: David L. Barker, B-a-r-k-e-r.

9 THE CLERK: Thank you.

10 DIRECT EXAMINATION

11 BY MR. PANTONI:

12 Q Good afternoon, Dr. Barker.

13 A Good afternoon, Mr. Pantoni.

14 Q Would you state your present employment, please?

15 A I'm currently vice president and chief scientific
16 officer at Illumina, Incorporated.

17 Q And have you held those two positions the entire time
18 you've been with Illumina?

19 A Yes.

20 Q Prior to joining Illumina, sir, is it correct that you
21 were employed by a company called Molecular Dynamics at some point
22 before you came to Illumina?

23 A Yes, I was.

24 Q At Molecular Dynamics you worked with Jay Flatley?

25 A Yes, I did.

26 Q Did you report to Jay Flatley the entire time you were
27 at Molecular Dynamics?

28 A Essentially the entire time, yes.

1 Q And how long of a period was that?

2 A 11 years.

3 Q Were you ever a chief science officer before you got
4 that job at Illumina?

5 A I was the chief science advisor at Amersham
6 Pharmaceutical, a biotech. It was the equivalent position. This
7 was the company that acquired Molecular Dynamics.

8 Q Was Illumina the first time you held the title of chief
9 scientific officer?

10 A Yes.

11 Q Do you recall the date on which you were first
12 contacted about the CSO position at Illumina?

13 A Yes, I believe it was February 4th of the year 2000.

14 Q And that first contact was by Jay Flatley, is that
15 correct?

16 A Yes, that's right.

17 Q And after that initial contact there were a series of
18 discussions and negotiations with respect to you becoming CSO at
19 Illumina, is that right?

20 A Yes.

21 Q And Jay Flatley used stock or equity as an inducement
22 or incentive for you to join the company, is that right?

23 A Well, he offered me a position, which was an attractive
24 position, and involved responsibility as chief scientific officer.
25 It also involved a salary and stock.

26 Q Isn't it correct in an effort to try to talk you into
27 joining Illumina, that Mr. Flatley specifically used stock and
28 talked about the financial upside of stock as an incentive for you

1 to join the company?

2 A Yes, of course that's the incentive for joining a
3 start-up company where there's a great deal of risk.

4 Q And in terms of the potential financial upside that Jay
5 Flatley discussed with you, what did he talk to you about in terms
6 of the potential dollar price per share that Illumina had?

7 A Well, in our discussion, of course, we all know in a
8 risky venture like this the actual price that a stock will reach
9 can't be predicted in advance. But in our discussion we
10 calculated how much the stock would be worth if say the price were
11 \$10 a share or \$20 a share, that sort of thing.

12 Q Or \$30 a share?

13 A Or \$30 a share. And in my own mind I thought what if
14 it's \$50 a share.

15 Q Did the math pretty quickly?

16 A Sure.

17 Q What was your starting salary at Illumina as CSO?

18 A \$200,000 a year.

19 Q In terms of interviews for the position of CSO, you
20 interviewed with Jay Flatley, correct?

21 A Yes.

22 Q And John Stuelpnagel?

23 A Yes.

24 Q And Mark Chee?

25 A Yes.

26 Q When did those interviews take place?

27 A It was the decision had to be made kind of quickly
28 because part of the reason for Jay asking me to join was to help

1 with the initial public offering process, and that was expected to
2 occur fairly quickly. As it turned out, it didn't occur as
3 quickly as we thought it would.

4 But as a result, there was a period of about a month, a
5 month of February, in which I visited Illumina and then arranged
6 to come back to give a seminar, which is traditional in any
7 employment opportunity like that, give a seminar and have
8 interviews with other members of the company. I'd already met
9 John and Mark before because of business relationships where they
10 had come to visit Molecular Dynamics, so I'd known them a little
11 bit. Talked with them further on these meetings. Maybe there
12 were at least two visits in that month.

13 Q The month of February?

14 A February and early March.

15 Q Of 2000?

16 A Yes.

17 Q Do you recall, Dr. Barker, that on your first day on
18 the job that you helped write the S1 registration statement?

19 A I think officially it was even before I was an official
20 employee of Illumina. I helped -- This was going on up in the
21 San Francisco area, and really started in a consulting role
22 helping to write the IPO document, yes.

23 Q Do you recall if the first real work you did for
24 Illumina was helping to write the S1 registration statement?

25 A That's not quite correct. First thing I did was I
26 attended the all-hands meeting, which was the organization meeting
27 of all the people involved in doing the IPO. And that was in
28 advance of beginning to write the S1 document.

1 Q So the all-hands meeting was a meeting of people
2 specifically who were going to be working on the S1 and the IPO?

3 A Yes. The bankers and lawyers and so on helping with
4 that, as well as other people at the company who were giving
5 seminars to inform the people who would be working on the IPO, of
6 all of the scientific, technical and business information about
7 the company that would be important to the IPO.

8 Q When was that first meeting, that all-hands meeting?

9 A That was on March 6th, I believe.

10 Q Let's take a look at Exhibit 162.

11 Dr. Barker, have you seen these e-mails before?

12 A I think you may have shown them to me during my
13 deposition.

14 Q Do you recall there being an issue in terms of what
15 your actual start date was, the official start date at Illumina?

16 A I don't recall that it was an issue particularly, no.

17 Q Was there an issue with respect to timing your start
18 date so you could take advantage of any sort of stock deal at
19 Illumina?

20 A Well, I wasn't actually aware of what the concerns were
21 about stock price and so on, I presume you are referring to. I
22 think for, as the e-mail suggests, for stock purposes, it says it
23 was good that I could get the vesting started as of March 6 and be
24 allowed to buy restrictive stock options.

25 Q Your official start date, is it correct it was March
26 16th as your date of employment?

27 A Yes.

28 Q And on March 15 of 2000 you were a consultant to

1 Illumina, is that correct?

2 A I assume so.

3 Q Is that your understanding?

4 A That's my understanding.

5 Q When you came on board as the new chief science
6 officer, did you then take over responsibilities for the
7 Scientific Advisory Board?

8 A Yes, I did.

9 Q And when did you take over responsibility for the
10 Scientific Advisory Board? Would that have been as of March of
11 2000?

12 A It was part of the duties of the chief scientific
13 officer, so yes.

14 Q How long did it take you, sir, before you held the
15 first meeting of the Scientific Advisory Board after you came on
16 board?

17 A I don't remember precisely. Possibly you can refresh
18 my memory. Maybe January of the following year.

19 Q Did you have any meeting of the Scientific Advisory
20 Board at all during the year 2000?

21 A I don't believe so. I think that was a busy time, we
22 were doing the IPO and so on.

23 Q David Walt also testified in this case, and he said
24 that part of the reason for any delay in scheduling an SAB meeting
25 was that you were still trying to get up to speed on the science.
26 Would you agree with that?

27 A There was a lot of work to do to get fully acquainted
28 with the new company, yes.

1 Q In fact, when you hit the ground in March of 2000, when
2 you first joined Illumina, you were not intimately familiar with
3 the company's science, were you?

4 A Not intimately, although I was familiar with the
5 company in advance. As I mentioned, John had been and Mark had
6 been to give presentations at Molecular Dynamics previously.

7 Q How many presentations had they made before you
8 started?

9 A I visited also Illumina once on behalf of Amersham, so
10 I probably heard a total of three presentations.

11 Q Prior to --

12 A On the company's technology.

13 Q You were taking over for Tony Czarnik as CSO. Would
14 you tell the jury your view in terms of how cooperative or
15 uncooperative Dr. Czarnik was in terms of turning the reins over
16 to you?

17 A I thought it was important that I try to establish a
18 good relationship with Tony, and I thought he was quite helpful
19 and cooperative with me in giving me advice on what the chemistry
20 department was doing. And I should mention that in addition to
21 having responsibility for overall scientific matters at Illumina,
22 I was also specifically supervising the chemistry department. And
23 Tony had been doing that before, and I asked him to help me get up
24 to speed on the different things the chemistry department was
25 doing, and he was cooperative in helping me do that.

26 Q So he did that to your satisfaction?

27 A Early on, yes, he did.

28 Q Did he ever, did Tony Czarnik ever do anything to

1 interfere with or to undermine you as the company's new CSO?

2 A Not to my knowledge.

3 Q Early on after you came on board as CSO, you noticed
4 that there was a conflict between molecular biology and chemistry,
5 is that right?

6 A Yes, that's right.

7 Q Mark Chee blamed Tony Czarnik for that?

8 A No, not specifically, at least not to me. I just
9 noticed it from the way people interacted.

10 Q Didn't Mark Chee suggest to you Tony Czarnik was
11 responsible for the alleged conflict between the two groups?

12 A I don't believe I ever had that conversation with Mark,
13 no.

14 Q Dr. Barker, I need to read to you from some of your
15 deposition testimony. See if it might refresh your recollection.

16 A Fine.

17 Q Beginning on page 44, line 16. Your testimony was:

18 "QUESTION: Did anyone ever blame Dr. Czarnik
19 for having caused or contributed to the conflict between the
20 two groups?

21 "ANSWER: Yes, there was a feeling that he
22 contributed to this conflict.

23 "QUESTION: Who had that feeling -- strike
24 that. Who expressed that feeling to you?

25 "ANSWER: Well, let's see. The -- Mark.
26 Mark suggested that. And then the other side of the
27 chemistry group, people thought Mark had contributed to that
28 as well."

1 The Mark is Mark Chee?

2 A Yes. It's possible when I asked him about the conflict
3 as I saw it arising that, or saw it existed, that he could have
4 held that Tony was somewhat responsible for that. It wasn't my
5 purpose, though, to try to blame anyone.

6 Q Did you, sir, ever see, observe anything on the part of
7 Dr. Czarnik that you thought contributed to the conflict between
8 the two groups?

9 A I can't say specifically that I observed such a thing.
10 The residue was there of the conflict. I was just trying to solve
11 it.

12 Q You recall testifying at deposition that you never
13 observed anything that Tony Czarnik did or said that contributed
14 to a conflict?

15 A If you say so. I don't remember.

16 Q Can you give me the approximate date, Dr. Barker, that
17 you found out that Dr. Czarnik was claiming discrimination?

18 A I don't remember the exact date, but I believe he filed
19 a complaint in April sometime.

20 Q And did anyone affiliated with Illumina ever interview
21 you in connection with the investigation into the complaint of
22 discrimination?

23 A Sorry, did anyone interview me to --

24 Q To ascertain the facts and circumstances, any facts and
25 circumstances that you may be aware of?

26 A Formally for that purpose, no, I don't believe so.

27 Q Now, when you first came on board, was Dr. Czarnik
28 reporting directly to you?

1 A Yes.

2 Q Was he research fellow by that point?

3 A That was his new title is research fellow.

4 Q So how long of a period of time was it that Dr. Czarnik
5 reported to you when he was research fellow and you were CSO?

6 A From the time I started, which we've established was
7 middle of March, until the first week in May, I believe.

8 Q So a few weeks?

9 A About six weeks.

10 Q Did you have time during that six week period to assess
11 or evaluate Dr. Czarnik's performance as the research fellow?

12 A Well, not really. He was in the process of having --
13 deciding what his goals were and we were mainly focusing on
14 getting me up to speed in the chemistry department, so I wouldn't
15 say that I had a chance to evaluate his performance very greatly.
16 I don't recall that he did much as research fellow during that
17 period.

18 Q And then Jay Flatley changed the reporting relationship
19 so that Dr. Czarnik would report to him, correct?

20 A That's correct.

21 Q Now, mentioned goals for Dr. Czarnik. Let's take a
22 look, please, at Exhibit 163. Do you recognize this document, Dr.
23 Barker?

24 A I brought the wrong glasses. I brought reading
25 glasses.

26 Q There's a binder behind you.

27 A That's okay.

28 Q Do you recognize this as a draft of goals?

1 A Yes.

2 Q You discussed this draft with Tony Czarnik, is that
3 right?

4 A I believe this was a draft that Tony prepared of
5 potential goals for himself as research fellow.

6 Q You discussed this with Dr. Czarnik, is that right?

7 A Yes.

8 Q Some of the handwriting on this document is your
9 handwriting, correct?

10 A I see two notes that are likely to be my handwriting.

11 Q This one here under the 30-day goal column?

12 A Yes.

13 Q And this one at the bottom under the project column, is
14 that right?

15 A Yes. I can't read that one very well.

16 Q I'm not sure I can read your writing. "Recruit for two
17 open chemistry --"

18 A Yes, great.

19 Q Do you recall the approximate time frame when you met
20 with Dr. Czarnik to discuss this draft?

21 A This would have likely have been in mid-April sometime.
22 Something like that. Possibly a little earlier.

23 Q And you and Dr. Czarnik and Jay Flatley then got
24 together and the three of you discussed Tony Czarnik's goals,
25 isn't that right?

26 A That's likely, yeah.

27 Q This was still time when you were Tony Czarnik's
28 immediate supervisor?

1 A If it was before the time he was transferred to Jay,
2 yes.

3 Q This meeting involving the three of you, you, Tony
4 Czarnik and Jay Flatley, this would have still been at a time when
5 you were his boss, correct?

6 A That's likely true, yes. I don't specifically remember
7 the timing of such a meeting.

8 Q Let's take a look at Exhibit 208, please.

9 Q There's been some testimony, sir, that Dr. Czarnik's
10 reporting relationship was changed from you to Jay Flatley on or
11 about May 4th, 2000. Does that date sound about right?

12 A Yes.

13 Q And you do believe that prior to that date that you,
14 David Barker, and Jay Flatley, Tony Czarnik, discussed goals for
15 Dr. Czarnik, correct?

16 A Yes.

17 Q Next page.

18 This is a set of goals that you discussed at that meeting,
19 the meeting prior to May 4, 2000, correct?

20 A This was, yeah, this was the initial modification that
21 I made to the draft that Tony had submitted.

22 Q This is the one that you and Jay Flatley, Tony Czarnik
23 got together to discuss prior to May 4, is that right?

24 A This is the one that -- I don't remember the
25 discussion you are talking about with Jay, tell you the truth. So
26 I'm assuming it existed, if Tony's e-mail was correct there. I do
27 remember that I crossed out the patent review committee on the
28 original draft of Tony's goals.

1 Q You are referring to the marked outline?

2 A Right. Because we were going to hire a new patent
3 attorney for the company. That would be her responsibility.

4 Q Now, Dr. Barker, do you recall these goals, the ones
5 we're looking at on the screen, that these were revised, and they
6 were revised because of an acceleration in the dispute between Dr.
7 Czarnik and Illumina?

8 A Revised by?

9 Q Revised by Jay Flatley.

10 A Well, I don't know that that was -- I don't think
11 that's a correct characterization of why they were revised.

12 Q Do you recall testifying about this subject at
13 deposition?

14 A You can remind me if you'd like.

15 Q Were you aware at the time that there was some sort of
16 dispute going on?

17 A By this time Tony had filed a complaint.

18 Q Don't you recall, sir, these goals were revised at
19 least in part because there had been an acceleration in that
20 dispute?

21 A My sense of why the goals were revised were so that
22 they could be measurable and doable. This being important in a
23 case if there's any possibility of a dispute with an employee,
24 it's important the goals be measurable and doable. And that's my
25 opinion as to what the main reason for revising the goals was.

26 Q Terms of the process for revising the goals, is it
27 correct that you and Jay Flatley and John Stuelpnagel and Mark
28 Chee, all four of you got together in a conference room to talk

1 about revising Tony Czarnik's goals?

2 A That's correct.

3 Q Had you set goals for any other employee at Illumina as
4 of that point?

5 A Had I at that time?

6 Q Yes.

7 A No.

8 Q Were you responsible for setting Mark Chee's goals?

9 A I was responsible for supervising Mark Chee and in
10 carrying out goals which had been set for him in the molecular
11 biology department earlier in the year. We had not in the six
12 weeks since I joined changed those goals.

13 Q Did Mark Chee report to you?

14 A Yes.

15 Q Was that the case the entire time after you joined
16 Illumina, that Mark Chee reported directly to you the entire time?

17 A Yes.

18 Q Have you set goals for Mark Chee at any point after you
19 joined?

20 A Yes, we set goals each year. In the case of Mark Chee,
21 since he's one of the senior members of the company, his goals are
22 for the department that he supervises, and as a result those were
23 agreed, not just by myself, but by the senior staff in general.

24 Q Who would have set Mark Chee's, maybe you know, maybe
25 you don't, who set his 2000 goals?

26 A I wasn't involved in that.

27 Q Let's take a look please at Exhibit 227. Do you
28 recognize this document, Dr. Barker?

1 A Yes.

2 Q These are the final goals that were assigned to Tony
3 Czarnik in May of 2000, is that correct?

4 A That's correct.

5 Q This first goal relating to immunocoding, do you recall
6 that prior to this point in time, prior to May 19 of 2000, that
7 Dr. Czarnik had suggested to you that perhaps an expert consultant
8 be retained to assist in the area of immunocoding technology?

9 A I'm sorry, what was the timing of the suggestion?

10 Q Some point prior to when Dr. Czarnik got these goals.

11 A I think that's likely. This was one of the goals that
12 Tony had proposed on the previous set, and one of the ones that we
13 retained on the three out of the long list that he proposed. And
14 he I think suggested that a consultant be called in to help with
15 this project.

16 Q Let's take a look at Exhibit 190. We'll come back to
17 this in a minute.

18 Do you recognize this as an April 21, 2000 e-mail that Tony
19 Czarnik sent to you?

20 A Yes.

21 Q This was at a time that you still were Tony Czarnik's
22 immediate supervisor?

23 A Yes.

24 Q And this immunocoding project, that is the first line
25 of the goals that we had just looked at, correct?

26 A Yes.

27 Q And he is suggesting bringing in an antibody expert to
28 help with the immunocoding, somebody called Gary David, correct?

1 A Yes.

2 Q And as of April 21, 2000, while you still were his
3 supervisor, you thought that sounded fine and you'd be happy to
4 join in the brainstorming, correct?

5 A The request is to interview a potential consultant, and
6 I said fine, yes, and I did join in the brainstorming.

7 Q Let's look at Exhibit 192, please.

8 Do you recognize this as an e-mail that Tony Czarnik
9 forwarded on to you?

10 A Yes.

11 Q Again this was on April 26 of 2000, so this would have
12 been when you still were Dr. Czarnik's immediate supervisor?

13 A Yes, that's right.

14 Q He's telling you that you are on with this consultant,
15 Gary David, correct?

16 A Right.

17 Q Did you folks meet with Gary David?

18 A Yes.

19 Q When did that meeting take place?

20 A I'm not certain, but I assume it was Monday morning.

21 Q Let's look at Exhibit 213, please.

22 You recognize this as an e-mail that you sent to Tony
23 Czarnik on May 4, 2000?

24 A Yes.

25 Q This was the evening after you had learned that Jay
26 Flatley was going to take over supervising Tony Czarnik, is that
27 right?

28 A This is, right, May 4th.

1 Q And the bottom line of this e-mail you are suggesting
2 that it does not make any sense to retain this consultant, is that
3 correct?

4 A I thought this was, you know, I thought what he offered
5 was something that Tony can certainly do himself.

6 Q Do you know whether Dr. Czarnik ever got any assistance
7 of any kind with respect to that first line of goals, the
8 immunocoding project?

9 A Any assistance?

10 Q Of any sort, either from --

11 A Besides this consultation with Gary David?

12 Q Including but not limited to this consultation.

13 A Not that I know of.

14 Q Jump back to 227, please, specifically the second line,
15 this project called binary oligo encoding. Whose idea was it to
16 add that to the list of goals?

17 A This came out of the joint discussion that you
18 mentioned between Jay, Mark, John and myself.

19 Q Who specifically suggested adding that?

20 A I can't remember specifically. It was a project that
21 was known to be important to the company and something that Mark
22 particularly wanted to do. It could have been Mark, could have
23 been John.

24 Q Do you know, sir, whether the company had done any work
25 in the area of binary oligo encoding before May of 2000?

26 A I don't believe so. This was considered easier to do,
27 though, than the antibody encoding, so that was one reason it was
28 added as a doable goal.

1 Q We've had some testimony about what these various
2 numbers mean in terms of the number of codes that are being
3 referenced here. For example, the 90-day goal that deals with 2
4 to the 12th power goals. That's a number that's more than 4000,
5 is that correct?

6 A 4096, I believe.

7 Q And as of this date, sir, May 19 of 2000, how many
8 specific bead types had Illumina been able to decode as of that
9 date?

10 A Above 200. Couple hundred bead types. Of course the
11 advantage of this method was it was much easier to do large
12 numbers.

13 MR. PANTONI: Move to strike the remainder of the answer
14 as nonresponsive.

15 THE COURT: Granted.

16 MR. PANTONI: Q How many had been decoded as of this
17 day?

18 A I think it was 252, something like that.

19 Q 257?

20 A Yes.

21 Q As of this same date, May 19 of 2000, isn't it correct,
22 sir, the 768 decoding experiment had not been successful yet?

23 A The experiment? That hadn't been done yet, hadn't been
24 successful.

25 Q There had been a 768 decode experiment before that
26 date?

27 A I'm not sure. I wasn't in charge of decoding at that
28 time.

1 Q Did you have any information on that point as chief
2 science officer of the company in terms of whether the 768 decode
3 experiment had been successful yet as of May of 2000?

4 A Can't recall specifically at this date.

5 Q Let's talk about the year goal for binary oligo
6 encoding. You remember talking about that at your deposition?

7 A Yes.

8 Q This goal, this year goal for binary oligo encoding,
9 this implied to you, sir, that Dr. Czarnik was being asked to show
10 the feasibility of doing more than one million codes within a
11 year, isn't that correct?

12 A Yes.

13 Q And you think that's pretty tough, don't you?

14 A Yes, that's a challenging and difficult goal, extremely
15 important to the company.

16 Q You felt it would be very difficult for Dr. Czarnik to
17 achieve all of these goals, all three goals, simultaneously within
18 a year, didn't you?

19 A Yes, I thought it would be difficult to do, but I
20 thought if he applied himself he could make good progress.

21 Q In fact you thought the first goal standing alone, just
22 by itself, was an aggressive goal, true?

23 A Yes.

24 Q And second goal standing alone just by itself was an
25 aggressive goal?

26 A Yes, aggressive goal.

27 Q And in combination you thought it would be very hard
28 for Dr. Czarnik to achieve all these goals in one year, correct?

1 A Yes. That way it would be in alignment that goals that
2 everybody in the company has. We have very aggressive goals.

3 Q Is it correct, sir, that Jay Flatley expressed the
4 opinion it was unlikely that Tony Czarnik would meet these goals?

5 A He may have said that, based upon his understanding or
6 his knowledge of Tony's previous work.

7 Q Isn't it correct that Jay Flatley said it was unlikely
8 Dr. Czarnik would meet these goals?

9 A Given his work ethic and previous work he'd done, yes.

10 Q Same question as to John Stuelpnagel, he also stated it
11 was very unlikely Dr. Czarnik would meet these goals, correct?

12 A I can't remember that John said anything about it.
13 Could have.

14 Q Mark Chee?

15 A Can't recall for sure. Mark expressed an opinion. We
16 all knew these were aggressive goals.

17 Q Let me ask you a few questions about the roadshow. You
18 were on the roadshow team?

19 A I was.

20 Q Before leaving on the roadshow, you thought it was
21 likely that you would get a lot of questions about decoding, true?

22 A We thought we had to be prepared for questions about
23 decoding because that was the part of the technology that was
24 different from other array technologies.

25 Q You expected a lot of questions on this subject?

26 A Expected some questions.

27 Q I'll read from your deposition testimony, page 139,
28 line 13:

1 "QUESTION: Why did you feel that the 768
2 decode experiments was not ready for public presentation?

3 "ANSWER: Well, I didn't have enough time to
4 review it, and wasn't an issue, turned out not to be an
5 issue, on the roadshow.

6 "QUESTION: Because nobody asked about it?

7 "ANSWER: Nobody was -- Yeah, nobody asked
8 questions or really concerned about decoding, so it turned
9 out not to be an issue. I think there was some thought
10 beforehand that we might be getting a lot of questions on
11 decoding. Turned out there wasn't an issue."

12 Does that refresh your recollection?

13 A I agree with that.

14 Q So before you went on the roadshow, you thought you
15 might be getting a lot of questions about decoding?

16 A Yes.

17 THE COURT: You have about five minutes Counsel.

18 MR. PANTONI: Literally 10 minutes, but who's counting.

19 I'll do my best, Judge.

20 Q When you left on the roadshow, Dr. Barker, you had
21 scientific evidence you could only decode a few hundred beads,
22 right?

23 A We had decoded only a few hundred beads, yes.

24 Q You were optimistic at least that the 768 decode
25 experiment would show you could decode a greater number of beads?

26 A We had experiments planned to decode more beads all the
27 time and work up to 1500 to 2000 bead types, which is what our
28 array held, yes.

1 Q Do you recall getting an e-mail from Mark Chee while
2 you were on the roadshow?

3 A Yes.

4 Q And that e-mail contained a PowerPoint slide, is that
5 right?

6 A Yes.

7 Q Is this the PowerPoint slide that has an Illumina Bates
8 stamp number of ILL1560, and does that look familiar?

9 A Looks familiar. Looks to be such a slide.

10 Q Does [it appear to be]¹⁰⁹ the PowerPoint slide Mark Chee sent
to
11 you on the roadshow?

12 A Yes.

13 Q Your understanding as to why Mark Chee sent you that
14 e-mail, PowerPoint slide, was for possible use on the roadshow,
15 isn't that right?

16 A I think Mark was providing us with the latest
17 information on the progress of decoding and making it available
18 for us should we want to use it on the roadshow. As it turned
19 out, we didn't need to use it, didn't want to use it.

20 Q Turned out you didn't use it, but you understood he was
21 sending it to you for the possible use on the roadshow if you felt
22 that it was appropriate?

23 A I think he was mainly keeping us up to date with the
24 progress of experiments at the company. We never even considered
25 using it.

26 Q You understood Mark Chee sent you that e-mail and this
27 PowerPoint slide in case people asked questions about decoding on
28 the roadshow?

¹⁰⁹ Original transcript read, "if appear".

1 MS KEARNS: I'll object to the extent the question
2 appears to be asking the witness to speculate about Mark Chee's
3 state of mind.

4 THE COURT: Sustained.

5 MR. PANTONI: Q Kevin Gunderson was the principal
6 scientist on the 768 decode experiment, wasn't he?

7 A That's correct.

8 Q At some point, Dr. Barker, you found out that there was
9 a problem with mislabeled dye in connection with this experiment,
10 correct?

11 A Yes.

12 Q You found out from Kevin Gunderson?

13 A It was general discussion about it. Some month or so
14 after the roadshow, yeah. I talked to Tony about it, talked with
15 Kevin about it.

16 Q You concluded -- strike that. This is when you were
17 chief science officer at Illumina you found out about this?

18 A Yes.

19 Q You concluded that because of this mislabeling problem,
20 and at a minimum you would have to do the experiment again, true?

21 A Of course we'd want to repeat the experiment.

22 Q Is it fair to say, Dr. Barker, as a result of this
23 mislabeling, as a scientist you would have at least questioned the
24 reliability of the scientific results from that experiment?

25 A I would want to see the experiment done again, yes,
26 because there was a problem in the materials used. However, it
27 was a useful experiment that showed feasibility of decoding a
28 large number of beads.

1 Q Is it fair to say as a scientist you would at least
2 question the reliability of the results?

3 A Yes.

4 Q You conducted meetings of your scientific staff when
5 you were CSO, is that correct?

6 A Yes.

7 Q You conducted meetings where both Tony Czarnik and Mark
8 Chee were in attendance?

9 A We had weekly research meetings of the all the research
10 staff, and Tony and Mark would be at those meetings.

11 Q Do you recall that during the course of those
12 scientific meetings, Tony Czarnik was advocating that you quality
13 control check your reagents including your dyes, to make sure that
14 the dyes and other reagents were what you thought they were?

15 A I don't specifically remember those admonitions.

16 Q You don't recall Dr. Czarnik talking about this issue
17 at meetings of senior scientists, is that your testimony?

18 A That's correct.

19 Q I'm going to read from your deposition transcript,
20 beginning at page 157, line 3. This is in the context of talking
21 about scientific staff meetings:

22 "QUESTION: Well, what did Dr. Czarnik say in
23 terms of why he felt the company should do more in the way
24 of controlled experiments?

25 "ANSWER: This has to do with sort of this
26 part of the schism between chemistry and molecular biology
27 that existed. The belief on the part of the chemists,
28 including Tony, and maybe perhaps because of him, was that

1 everything should be understood clearly. Every chemical
2 should be QC. So each bead type should be QC. Maybe that's
3 going far, but as much as possible every chemical element
4 you are working with should be understood and verified in
5 some way. Whereas on the other side, Mark was thinking
6 well, we've got so many things to work here, we're trying to
7 deal with 768 bead types, if we wait to QC everything
8 individually, we'll just not make the same amount of
9 progress.

10 "So I'd say there were valid points on both sides and
11 this was more of a disagreement in philosophy that needed to
12 be worked out."

13 Do you recall that type of discussion?

14 A Yes. I don't believe whether you mentioned this took
15 place in a meeting of any kind.

16 Q We're talking about scientific staff meetings you were
17 holding.

18 Do you recall these discussions happening generally?

19 A Yes.

20 Q Do you recall that Tony Czarnik was advocating checking
21 the dyes, quality control checks on the dyes to make sure they
22 were what you thought you had?

23 A I remember that he got more and more interested in
24 this, but I think the statement you read is a good
25 characterization of the situation. There was a sense the chemists
26 have more of a sense we have to understand more precisely, and
27 molecular biologists, we need to work with hundreds and later
28 thousands of things. If we stopped to quality control everything

1 all the time, we'll never get the experiment done.

2 Q You do recall Dr. Czarnik advocating checking the dyes
3 to be sure they were what you really thought they were?

4 A I don't remember him making a big point of that.
5 Certainly if he were real concerned about it, he could have done
6 so.

7 Q You agree with Dr. Czarnik, didn't you, that it was
8 more important to do quality control checks on the reagents?

9 A Yes, as much as possible.

10 Q After Tony Czarnik was fired, was responsibility for
11 decoding taken away from Mark Chee and given to Steve Barnard?

12 A "Taken away" is certainly not the right
13 characterization. It was agreed for the following year, with the
14 feasibility of decoding shown, that the development of decoding
15 should now go on further under Steve Barnard's direction, and
16 Steve reported to me.

17 Q As opposed to continuing under Mark Chee's direction,
18 true?

19 A That's correct, and Mark was in agreement on this. It
20 was part of a joint decision that we made together.

21 Q How many shares of stock do you own, Dr. Barker?

22 A At the present time or --

23 Q Yes.

24 A Let's see. 250,000 shares of stock. Not all of which
25 have vested.

26 Q And do you have any plans to leave Illumina?

27 A No.

28 MR. PANTONI: Nothing further.

1 THE COURT: Thank you.

2 CROSS-EXAMINATION

3 BY MS ESPINOSA:

4 Q Good afternoon. We've referred to you as Dr. Barker.

5 Do you hold a doctor's degree?

6 A Ph.D in biochemistry.

7 Q Prior to coming to Illumina, had you heard of Dr.

8 Czarnik?

9 A I did not know Dr. Czarnik before that time.

10 Q Mr. Pantoni asked you about your experience in

11 Molecular Dynamics. Had you been through the initial public

12 offering process with Molecular Dynamics?

13 A Yes.

14 Q You'd been through the drafting of a prospectus and the

15 roadshow?

16 A I helped the drafting of the prospectus. I didn't go

17 on the roadshow.

18 Q You were performing services for Illumina as a

19 consultant as of March 6th, correct?

20 A That's correct.

21 Q And are you aware that Illumina stock plans

22 specifically allows consultants to vest in stock?

23 A Yes.

24 Q When you joined Illumina and you worked with Dr.

25 Czarnik, did you have an opportunity to make observations about

26 his work ethic?

27 A Well, I did notice that he was used to taking long

28 lunches and even taking the whole department out for long lunches.

1 I noticed this because in the work ethic I was used to at
2 Molecular Dynamics with Jay, these kind of things probably would
3 have been considered inappropriate.

4 Q Why is that?

5 A Well, because to take a couple of hours for lunch is
6 just interrupting the workday too much and doesn't set a good
7 example for good diligent work.

8 Q Did you observe -- Well, we've heard testimony earlier
9 today about lab notebooks. How are lab notebooks assigned to
10 scientists?

11 A Administrative assistant keeps track of the notebooks
12 and issues one to the scientist when the scientist is in need of
13 one.

14 Q So the scientist just has to go and ask for one?

15 A That's correct.

16 Q I think we also heard about the roadshow presentations
17 a bit. After you returned from the roadshow and were back in
18 Illumina's offices, did Dr. Czarnik ever ask you what had happened
19 on the roadshow with respect to the decoding experiment that's in
20 that poster there, the 768 decoding?

21 A I don't believe so.

22 Q Did he ever express any concerns to you about the
23 roadshow experiment had been discussed with potential investors?

24 A No.

25 Q I think I mentioned to Mr. Pantoni that regarding the
26 experiment where there was mislabeled vial, you would question the
27 reliability of the results, correct?

28 A Sure, I don't want to see it repeated.

1 Q So did you see the 768 experiment had been repeated at
2 Illumina?

3 A We've done very many experiments since then with 768
4 and more bead types.

5 Q Looking back at this experiment, do you question the
6 reliability of that experiment?

7 A No, it turned out that it accurately showed the
8 feasibility of the decoding method that we now use in
9 manufacturing.

10 Q We were also talking about goals and whether they were
11 aggressive. In your experience working with Jay Flatley, has he
12 ever aimed low in setting goals?

13 A No.

14 Q And what do you mean by aggressive?

15 A Aggressive means trying to stretch yourself to do as
16 much as possible to further the aims of the company.

17 Q Is that consistent with the culture you are trying
18 promote?

19 A Yes.

20 Q So going back to the 768 mislabeled dye issue, based on
21 that experiment, does it seem reasonable to you to conclude that
22 this experiment is useless from a scientific standpoint?

23 A Certainly not useless, no.

24 Q Does it seem reasonable to conclude that's a flawed
25 experiment in terms of the conclusions and results that are shown?

26 A No, the conclusions turned out to be accurate. A flaw
27 was in some of the materials that went into it, but they didn't
28 completely compromise the experiment, by any means.

1 Q Dr. Czarnik testified earlier he felt strongly the dyes
2 should be QC'd, check to make sure the label is accurate,
3 describes what's in the bottle. He said there's two ways to test
4 that, a five minute dirty test and a more expensive overnight
5 test. Would you agree with that?

6 A There are various levels on which you could determine
7 if the dye labeling was correct, yes.

8 Q As CSO, if you wanted to get back to the five minute
9 quick and dirty test, would you be able to do that?

10 A Yes.

11 Q Do you have the equipment needed to do that?

12 A Yes.

13 Q Would you ask someone else to do it or could you do it
14 yourself?

15 A I could do it myself or I could ask someone else to do
16 it.

17 Q Would it occur to you to ask Mark Chee's permission?

18 A I wouldn't need to ask Mark's permission, no.

19 Q If you wanted to use the overnight test, would it be
20 within your authority as vice president to spend the funds to do
21 that kind of a test?

22 A Certainly.

23 Q Again would you ask Mark Chee?

24 A Wouldn't need to, no.

25 Q I think we've heard a lot of testimony about the
26 decoding technology at Illumina and whether to QC things at
27 different levels. Is it important to distinguish to QC the things
28 you do that Illumina does today at his manufacturing site?

1 A Yes, those are different things. When you are doing
2 research, you have to use lots of materials quickly, and you are
3 not manufacturing a product, which you have to guarantee its
4 success and so on. Of course that's a different level. Once we
5 have things in manufacturing, we now in fact have developed a lot
6 of QC procedures to verify the accuracy of decoding in our
7 manufacturing product.

8 Q Is that the decoding technology that Steve Barnard is
9 now responsible for?

10 A Yes.

11 Q Do you recall why the binary oligo decoding goal was
12 assigned to Dr. Czarnik as a research fellow?

13 A It was considered probably more likely to result in
14 success than the immunocoding goal, and the reason for that was
15 that we felt it could be done with the chemistry that had already
16 been established for attaching oligos to beads.

17 Q So it would be fair to say people reviewing the goals
18 would feel the oligo decoding goal would be an easier one to
19 achieve?

20 A Yes.

21 Q In fact, after Dr. Czarnik failed to achieve that goal,
22 did you reassign that goal to anyone else at Illumina?

23 A Yes.

24 Q Who was that?

25 A That was Gali Steinberg.

26 Q What did she do?

27 A Gali developed a method to attach two different oligo
28 nucleotide tags to the same bead.

1 Q Why is that important?

2 A Sort of like I guess an analogy is the reason people
3 have two names instead of one name. If you have just one name for
4 a person, then if you want to have 10 different individuals
5 uniquely named you need 10 different names. If you have both a
6 first and a last name, of course corresponding to the two oligos
7 on this binary method, then you could actually name a hundred
8 different people because you are going to have 10 first names with
9 each of the 10 last names, so you get 10 times 10 or a hundred
10 different people's names. It's that advantage, that expandability
11 of the number of bead types that we could decode that made this
12 binary method important.

13 Q I think you were cut off, or there was a motion to
14 strike some of your earlier testimony. I think you were trying to
15 explain what are the advantages of binary oligo decoding. I think
16 you said you could more easily achieve higher levels of decoding?

17 A Higher numbers of bead types. That's what I just
18 described, that with two oligos on a bead, the number of beads you
19 can decode is the multiplication of the two different sets of
20 oligos you have. So if you have 10 beads the first name and 10
21 the second name, you can do a hundred bead types. If you have a
22 hundred of each kind, a hundred times a hundred is 10,000 bead
23 types, and you have a thousand in each set, a thousand times a
24 thousand is a million different bead types. So the number of
25 beads you can decode grows exponentially.

26 Q What did Dr. Steinberg do?

27 A She put two, two oligos on one bead to test the
28 feasibility of this method.

1 Q How far in the feasibility experiments did she get?

2 A She got so that I think she did 35 bead types, 35
3 oligos in each of two different sets. So that she showed the
4 feasibility of decoding, I think that comes out to 1275 different
5 bead types, something like that.

6 Q From start to finish, how long did it take her to do
7 that?

8 A She worked with that along with other things over a
9 period of five months.

10 Q Along the course of that work did she learn some new
11 things about bead chemistry that caused her to reassess the
12 chemistry she was using?

13 A Yes. In fact she, in the process of doing that,
14 developed a new type of chemistry so she could separately attach
15 the oligos so that she could control the chemistry. What we found
16 was the oligos didn't react equally to each other, so she had to
17 screen through different oligos to find oligos that would react
18 well and attach approximately the same number to the same bead,
19 and that wasn't a good way to go, so she developed a new method in
20 which she could actually attach the element separately, oligos
21 separately.

22 Q What level of experience does Dr. Steinberg have?

23 A She was a Scientist 1. Just out of a post-doc, post-
24 doctoral fellowship. Two or three years out of her Ph.D.

25 Q Did Illumina consider this project to be significant?

26 A Yes, I think it's very important.

27 Q Why is that?

28 A Because as we mentioned, it allows decoding up to a

1 million different bead types, if we had a thousand, two sets of a
2 thousand.

3 Q With respect to this consultant, Gary David, we saw
4 some e-mails about that. Why was it you didn't feel Dr. Czarnik
5 should use Dr. David's services?

6 A I felt that the main thing that was needed in that was
7 to choose antigen-antibody pairs, things that would bind to each
8 other, and that could be done just as well as looking them up in a
9 catalog as having an expensive consultant come in.

10 Q It was a decision about resources, then?

11 A Resources and not a feeling that he was adding very
12 much.

13 Q So in essence was Dr. Czarnik trying to delegate one of
14 his goals to a consultant?

15 MR. PANTONI: Objection, leading.

16 THE COURT: I guess you could say that

17 THE COURT: Hold on. It is leading. Sustained.

18 MS ESPINOSA: Q We also heard some questions about
19 whether or not Dr. Czarnik had asked for any assistance in
20 achieving his goals. Was there ever a contemplation that he could
21 ask for help as part of his research fellow role?

22 A Yes, I told Tony when he discussed this with me that if
23 he did well in his initial work and established a good program,
24 that it would be reasonable some months down the line to hire
25 [a]¹¹⁰ research assistant to work with him.

26 Q I think the 30-day goal for both the immunocoding
27 project and the binary oligo project had to do with drafting of
28 project plan. Would it be appropriate to put your request for

¹¹⁰ Original transcript did not include the word "a" here.

1 some additional resources in the plan?

2 A Sure.

3 Q Did you ever see such plans from Dr. Czarnik?

4 A No, I didn't.

5 Q Did you ever see Dr. Czarnik in the laboratory working
6 towards this research --

7 A No, I didn't.

8 Q Is it your view that the chief scientific officer is
9 responsible for the overall research and development activities of
10 the company?

11 A Yes.

12 MS ESPINOSA: Can you put up trial Exhibit 24, please.

13 While we're waiting for that, I'll ask a different question.

14 Q Dr. Barker, is it your understanding that if someone at
15 Illumina needs to get a copy of a scientific paper at the UCSD
16 library, would you personally go and get that paper from the
17 library?

18 A We had some student assistant who would go get the
19 papers from the library.

20 Q Here is Exhibit 24. It's Dr. Czarnik's offer letter to
21 join Illumina. Do you have any understanding that Dr. Czarnik's
22 duties as chief scientific officer did not include primary
23 responsibility for the overall research and development activity
24 of the company?

25 MR. PANTONI: Object, there's no foundation. He wasn't
26 around when Dr. Czarnik was there, although we don't dispute it.
27 There's no foundation.

28 THE COURT: Sustained.

1 MS ESPINOSA: Q Would it be appropriate in your role
2 as CSO to say that you were not responsible for the overall
3 primary responsibility for research and development activities but
4 rather to be responsible for the results achieved by the R&D
5 group?

6 A I feel I'm responsible for the overall research and
7 development activities at the company.

8 MS ESPINOSA: A moment, please.
9 Nothing else. Thanks.

10 THE COURT: Any further questions?

11 MR. PANTONI: Just three or four questions, and
12 reasonable follow-up.

13 REDIRECT EXAMINATION

14 BY MR. PANTONI:

15 Q Real quickly, Dr. Barker. You said the 768 experiment
16 turned out to be accurate in the sense that it turned out that you
17 were able to show the feasibility of 768?

18 A Yes.

19 Q But when you first found out about the mislabeling of
20 the dye issue, you didn't know how it was going to turn out when
21 you did the experiment, did you?

22 A I didn't really doubt the results, the feasibility. It
23 was a method that we all believed would work and had shown worked
24 at lower levels.

25 Q It had never worked at a level of 768?

26 A Not at that time.

27 Q So when you -- And you ordered the experiment be
28 conducted again?

1 A No, I didn't order that it be conducted again. It
2 wasn't under my direction at the time.

3 Q But you testified that as a scientist, your immediate
4 reaction was the experiment should be conducted?

5 A Should be repeated, yes.

6 Q And it turned out in your view that when it was
7 repeated that it worked, correct?

8 A Yes.

9 Q You didn't know that, you didn't know at the time that
10 it would work, did you?

11 A Not with absolute certainty, no.

12 Q And again as a scientist, you would at least, when you
13 find out about the mislabeling issue, you would at least question
14 the reliability, true?

15 A Yes.

16 Q You received this slide on the roadshow, would you have
17 used this slide?

18 MS KEARNS: Objection, beyond the scope of the cross.

19 THE COURT: Sustained.

20 MS KEARNS: Also calls for speculation.

21 MR. PANTONI: He said he never used it, Judge.

22 Thank you very much.

23 THE COURT: Anything further?

24 MS ESPINOSA: Another set of questions, your Honor.

25 RE-CROSS EXAMINATION

26 BY MS ESPINOSA:

27 Q You said you were on the roadshow?

28 A Yes.

1 Q Were you there at every presentation?

2 MR. PANTONI: This is clearly beyond what I just did.

3 THE COURT: They may reopen it.

4 MR. PANTONI: Thanks.

5 MS ESPINOSA: Q Did you give any of these
6 presentations?

7 A No, Jay gave all the presentations on the roadshow.

8 Q And did he give pretty much the same presentation every
9 time?

10 A Pretty much exactly the same every time.

11 Q Did you answer questions after his presentation?

12 A Yes.

13 Q How many questions on decoding in general were you
14 asked?

15 A Perhaps one or two.

16 Q On the whole roadshow?

17 A During the whole roadshow.

18 Q How many presentations were there?

19 A I think 50-some presentations.

20 Q And were they any questions specific to the number of
21 bead types that could be decoded at Illumina or were they asked
22 generally what does Illumina do to decode?

23 A We showed an example of decoding 16 bead types and
24 there was a question about understanding that methodology.

25 Q Were those backup slides you presented or was that part
26 of Mr. Flatley's presentation?

27 A You know, was it part of the presentation? It may not
28 have been part of the presentation. It might have been -- We

1 might have used it in answer to some questions about decoding, but
2 it was only once or twice.

3 Q In response to Mr. Pantoni's question whether you
4 anticipated a lot of questions would be asked, after the roadshow
5 were you surprised on how few questions were asked about decoding?

6 A Yes, I was surprised.

7 MS ESPINOSA: Thank you.

8 MR. PANTONI: Now if I may, Judge.

9 REDIRECT EXAMINATION

10 BY MR. PANTONI:

11 Q You were there to answer questions, including questions
12 about decoding?

13 A Yes.

14 Q Showing you again this slide that was attached to Mark
15 Chee's e-mail, Illumina 1560, if you had been asked more questions
16 about this decoding, would you have been comfortable using this
17 slide?

18 MS KEARNS: Objection, calls for speculation.

19 THE COURT: It's a hypothetical question. Sustained.

20 MR. PANTONI: Q You would not have been comfortable
21 using this slide, isn't that correct?

22 MS KEARNS: Objection, same objection. Incomplete
23 hypothetical, calls for speculation

24 THE COURT: He's not been designated as an expert
25 witness, so the objection is sustained.

26 MR. PANTONI: In that case, nothing further.

27 THE COURT: Thank you very much, sir, you may step
28 down.

1 We'll take our evening recess at this time. If today is any
2 indication, I'd say the attorneys' estimates on time are very
3 reliable, so it looks like we'll be right on schedule.

4 We'll reconvene at 9 o'clock tomorrow. I know what my
5 schedule is for tomorrow beginning at 8:15. I'm confident we can
6 start right at 9 o'clock.

7 Please remember not to discuss the case, not form or express
8 any opinions about the case. We'll be in recess until 9:00 a.m.
9 tomorrow morning. Have a pleasant evening. 9:00 a.m. tomorrow
10 morning.

11 (Proceedings resumed outside the presence of the jury.)

12 THE COURT: Any problems you know of for tomorrow?

13 MR. PANTONI: No.

14 THE COURT: Be here at 8:45 just in case something
15 comes up.

16 MR. PANTONI: Thank you.

17 (Proceedings recessed at 3:50 p.m.)

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1 SAN DIEGO, CALIFORNIA, TUESDAY, JUNE 25, 2002; 9:30 A.M.

2 THE COURT: Record will indicate that all the jurors
3 except Mr. Manalang are present. It's now 9:30. We've tried to
4 call Mr. Manalang's house, spoke to his mother. She knows that he
5 left and so I don't understand why he's not here. But, Counsel,
6 would you agree we have to move on at this point, we need to
7 excuse him. If he comes in, ask him to remain, we'll talk to him
8 at the recess. I think we'll have to excuse him at this time and
9 select the name of one of the alternates.

10 THE CLERK: Alternate Number 1.

11 THE COURT: Who is that?

12 THE CLERK: Mr. Smith.

13 THE COURT: Mr. Smith. He gets to move over one seat.
14 What he's been waiting for.

15 Who will be the next witness?

16 MR. PANTONI: Mark Chee.

17 THE COURT: Okay.

18 MARK CHEE,
19 called as a witness by the Plaintiff, having been first duly
20 sworn, was examined and testified as follows:

21 THE CLERK: Would you please state your full name,
22 spell your last name for the record.

23 THE WITNESS: Mark Steven Chee. Last name is C-h-e-e.

24 THE CLERK: Thank you

25 DIRECT EXAMINATION

26 BY MR. PANTONI:

27 Q Good morning, Dr. Chee.

28 A Good morning, Mr. Pantoni.

- 1 Q By whom are you presently employed?
- 2 A I'm employed by Illumina.
- 3 Q What is your present position with Illumina?
- 4 A Research fellow.
- 5 Q Some background information on you, Dr. Chee. First of
6 all, how old, Dr. Chee, sir?
- 7 A I'm 40-years old.
- 8 Q What is your marital status?
- 9 A I'm single.
- 10 Q Have you ever been married, sir?
- 11 A No, I haven't.
- 12 Q Let's take a look, please, at Exhibit 362.
13 Dr. Chee, do you recognize Exhibit 362 as a copy of your
14 resume?
- 15 A Yes, I do.
- 16 Q Does the resume accurately set forth your employment
17 experience?
- 18 A It's a little bit out of date now, but what's on there
19 is accurate, from what I can tell.
- 20 Q So you were employed at Affymetrix from what period of
21 time?
- 22 A I was employed at Affymetrix from about '93 through
23 about '97.
- 24 Q Through July of '97?
- 25 A That's correct.
- 26 Q When did your employment with Illumina begin?
- 27 A That began in June of '98.
- 28 Q What was your first position with Illumina?

1 A Vice president of genomics.

2 Q So were you an officer of the company at that point?

3 A I guess at that stage. I'm not sure if we had officers
4 at that point.

5 Q At some point did you become an officer?

6 A Yes.

7 Q When was that?

8 A I don't recall the exact date.

9 Q Can you give us your best approximation?

10 A Actually I'm not too sure. I was on the research side.
11 I didn't pay too much attention to those, you know, formal
12 business details.

13 Q Can you give us your best estimate of how long into
14 your employment it was that you became an officer?

15 A I'm not sure actually. It may have been earlier, it
16 may have been a bit later. I'm not sure of the formal sort of
17 designation when I became an officer.

18 Q Was it still sometime in 1998?

19 A It may have been. I'm not sure.

20 Q How long did you hold a position of vice president of
21 genomics?

22 A For about four years.

23 Q And then did you, -- Was your next position research
24 fellow?

25 A That's correct.

26 Q When did you go from vice president to research fellow?

27 A Actually very recently. Just on Friday, last week.

28 Q I would say that's recently.

1 Prior to coming to Illumina, had you ever been a vice
2 president before?

3 A No, I hadn't.

4 Q Dr. Chee, do you recall an incident that took place on
5 April 6 of 1999, an incident where Tony Czarnik essentially broke
6 down in John Stuelpnagel's office?

7 A I have some recollection of that incident.

8 Q You were present at that incident, correct?

9 A Yes, I was.

10 Q Do you recall that Dr. Czarnik was in a very emotional
11 state during that meeting?

12 A I do recall him being in an emotional state, yes.

13 Q Do you recall Dr. Czarnik crying at that meeting?

14 A Yes, I do.

15 Q And Dr. Chee, you assumed, based on what you observed,
16 that Dr. Chee -- I'm sorry. Dr. Chee, you observed Dr. Czarnik
17 in John Stuelpnagel's office on that day, April 6, 1999, correct?

18 A I actually don't recall which office it was in. I
19 believe it was in Dr. Stuelpnagel's offices, but it was in one of
20 the offices at Illumina.

21 Q Based on what you observed, Dr. Chee, you assumed that
22 Tony Czarnik had suffered a nervous breakdown, is that correct?

23 A From what I could gather, he was suffering some kind of
24 severe emotional distress. Some type of breakdown.

25 Q Do you recall characterizing it in your deposition as a
26 nervous breakdown?

27 A I recall characterizing it as a breakdown. I don't
28 remember my exact words at the deposition.

1 Q How long did this meeting take place, this meeting on
2 April 6, 1999?

3 A To the best of my recollection, it was a relatively
4 brief meeting.

5 Q Now, I'm sure your counsel will cover your version of
6 what happened specifically on that day so I won't do that at this
7 point.

8 Let me ask you this: Based on what you observed on April 6,
9 1999, did you then have a concern about Dr. Czarnik's health?

10 A I did.

11 Q Isn't it correct that based on what you observed on
12 April 6, 1999, you were also concerned about Dr. Czarnik's ability
13 to continue to function as a chief scientific officer?

14 A Not strictly, no.

15 Q Isn't it true that was one of your concerns, that you
16 were concerned about Dr. Czarnik's ability to continue to function
17 as chief science officer?

18 A Dr. Czarnik, to the best of my recollection, raised
19 that concern himself during the meeting, and so I had never seen
20 him in this state before. I had some concern about his sort of
21 ability to recover from this state. So I guess it would be fair
22 to say I was very concerned about his health, I had some questions
23 based on his statements or what I recollect of his statement as to
24 his ability to continue, and I regarded it as an open question at
25 the time, to be resolved on discussion when he returned.

26 THE COURT: Counsel, can I see you for a minute.

27 (Discussion off the record.)

28 THE COURT: Mr. Manalang, we had to start without you.

1 I've talked to the attorneys. What we're going to do is put you
2 back on as an alternate juror and we're going to have the reporter
3 at some point read back the testimony that you missed.

4 JUROR MANALANG: Okay.

5 THE COURT: So essentially just switch seats with
6 Mr. Smith and you'll become an alternate juror, and we'll read
7 back the testimony, the attorneys have agreed to this, at some
8 convenient time.

9 This is Dr. Chee who is testifying, and most of what he's
10 testified to is kind of preliminary. We're just now beginning --
11 the testimony is just now beginning to cover the incident where
12 Dr. Czarnik broke down.

13 MR. PANTONI: Proceed, your Honor?

14 THE COURT: Yes.

15 MR. PANTONI: Q Dr. Chee, would you agree that based
16 on what you saw on April 6, 1999, that one of your concerns was
17 Dr. Czarnik's ability to continue to function as chief science
18 officer?

19 A In a general sense, I guess you could say yes.

20 Q And you were concerned, weren't you, that the task that
21 to you had apparently led to the breakdown, the task being writing
22 a grant application, you were concerned that this appeared to you
23 to be a relatively minor task that should not have resulted in a
24 breakdown, is that true?

25 A That's correct. The type of task is tedious, it's a
26 nuisance, but not something I would expect at that level to lead
27 to a breakdown.

28 Q And based on what you saw on April 6, 1999, you were

1 concerned, Dr. Chee, about the fate of the company, isn't that
2 true?

3 A Sorry? Say again. I've always been concerned about
4 the fate of the company, I should say.

5 Q Sure. You have a general concern about the fate of the
6 company. Isn't it true that you had a specific concern based on
7 what you saw on April 6, 1999, your concerns relative to Dr.
8 Czarnik, you were concerned about the fate of the company in light
9 of what you had just observed?

10 A I think probably the best way to, for me to answer
11 that, is to say that I had a concern that the senior management
12 team was maybe not fully able to function. So I guess in that way
13 you could say yes, I had a concern about the fate of the company.

14 Q Let me refer to some of your deposition testimony on
15 this point. Beginning on page 70, line 2. Your testimony was as
16 follows:

17 "QUESTION: So then what business concerns did
18 you have as a result of what you observed from Dr. Czarnik?

19 "ANSWER: Well, at the time Illumina was an
20 even smaller company than it is now, and any company at that
21 stage of development is -- is critically dependent on the
22 performance of its people, and it requires an enormous
23 amount of attention and hard work and competency at every
24 level of the job in order to make a small company be
25 successful. It's rather common for small companies to fail
26 and for people to lose their jobs as a result, investors
27 to lose their money.

28 "So my concern was for the fate of the company. It's

1 as if you have a ship and somebody at the helm steering the
2 ship, who has no idea where the shores are, who has no idea
3 where the currents are running, has no idea of which
4 direction they are going. You fear for the safety of the
5 ship."

6 You agree you were fearful for the safety of mothership
7 Illumina based on what you observed on April 6, 1999?

8 A Yes. I think I was speaking to a broader concern
9 there, though, with that analogy about the ship, and that I had a
10 longer term concern going further back as to the ability of Dr.
11 Czarnik to guide the company strategically.

12 Q I was asking you at deposition specifically about your
13 observations on April 6, 1999, true?

14 A That's correct. In context you'll see that I also
15 answered more broadly at the deposition.

16 Q Now, two days later, April 8, 1999, Dr. Czarnik
17 returned to work, correct?

18 A I believe that's correct. To the best of my
19 recollection. I actually wasn't there when he returned.

20 Q At some point a few days after the incident where you
21 thought Dr. Czarnik had suffered some sort of a breakdown, a few
22 days later he came back to work, correct?

23 A That's correct.

24 Q And at that point you learned that Dr. Czarnik suffers
25 from depression?

26 A I believe so, yes. That's correct.

27 Q And a few days after that, April 11, 1999, do you
28 recall being on a business trip with John Stuelpnagel visiting

1 Bristol-Myers Squibb?

2 A Yes. Actually I checked my calendar more recently
3 after the deposition and I did see on my calendar that I was
4 visiting Bristol-Myers Squibb the week afterwards.

5 Q So do you recall meeting with John Stuelpnagel to talk
6 about Tony Czarnik on about April 11 of 1999?

7 A I recall discussing this matter with Dr. Stuelpnagel
8 sometime after the event, and I couldn't say a hundred percent
9 that it was at that Bristol-Myers Squibb meeting, but I think it's
10 very likely, because I looked at my calendar and that would be the
11 meeting that was most likely the one where we talked.

12 Q At this meeting you and Dr. Stuelpnagel discussed
13 replacing Tony Czarnik as chief science officer, is that correct?

14 A Yes, we did. As part of a more general discussion, we
15 discussed whether or not we should contemplate such an action.

16 Q And at this point in time, Dr. Chee, you were concerned
17 that there might be business problems for Illumina if Dr. Czarnik
18 broke down again in a fashion he had previously broken down, isn't
19 that correct?

20 A Actually I wasn't too concerned about that.

21 Q Let me read from your deposition testimony, beginning
22 at page 81, line 20, reads as follows:

23 "QUESTION: Did you and Dr. Stuelpnagel
24 discuss what business problems would be presented to
25 Illumina if Dr. Czarnik broke down again in the fashion that
26 he did previously?

27 "ANSWER: We -- we may well have. I don't
28 recall specifically, but certainly it was -- it was

1 something that was of concern."

2 Refresh your recollection that it was of concern that
3 Dr. Czarnik might break down again?

4 A That's consistent with what I just said. I said I
5 wasn't too concerned. There were other concerns that were greater
6 that I also discussed at the deposition.

7 Q So you were concerned but not too concerned?

8 A I was very concerned overall.

9 Q I'm talking about this particular subject. The
10 subject, let me get it clear, the subject of what business
11 problems would be presented to Illumina if Dr. Czarnik broke down
12 again.

13 A I was not too concerned. That was one of my concerns,
14 but it was relatively minor on the list of my concerns.

15 Q You and Dr. Stuelpnagel discussed whether Tony Czarnik
16 would be able to continue to function as CSO in light of what
17 happened on April 6, is that true?

18 A We discussed actually -- To the best of my
19 recollection, and it's going back a long way so it's rather vague,
20 but we discussed the general question of Dr. Czarnik's
21 performance, not just that particular incident, but going back
22 over his performance record, and whether or not we should consider
23 at that time replacing him.

24 Q You were concerned whether Dr. Czarnik was healthy
25 enough to continue as CSO, isn't that true?

26 A Was concerned about his personal health. I was very
27 concerned about his personal health. I didn't believe anybody
28 should continue in a position that was causing them that much

1 stress in routine sort of job tasks. I was concerned about his
2 ability to guide the company strategically, and that wasn't
3 stemming from that particular incident. That goes back, his track
4 record over a couple of years really. And I was concerned about
5 other factors, such as the morale of the company, the ability of
6 Dr. Czarnik to foster a team spirit between the different sort of
7 functional groups in the company. There are a number of different
8 concerns I had, and these were all raised.

9 Q My question was you were concerned -- strike that.

10 One of your concerns, sir, was whether Czarnik was healthy
11 enough to continue on as CSO, is that true?

12 A Yes, in the context of what I've just answered, that's
13 correct.

14 Q You and Dr. Stuelpnagel discussed if this should be a
15 situation that you should carefully monitor?

16 A That's correct.

17 Q You wanted sometime, didn't you, to see whether this
18 breakdown, this one incident, was an isolated incident or was a
19 pattern or would turn into a pattern, is that true?

20 A I don't recall discussing that specifically.

21 Q You did discuss options what to do with Dr. Czarnik,
22 correct?

23 A We did.

24 Q Let me read from your deposition testimony, beginning
25 on page 87, line 8:

26 "QUESTION: Why was the option of Dr. Czarnik
27 leaving the company rejected?

28 "ANSWER: Again, you know, this is sort of

1 trying to go through reasoning after the fact, long after
2 the fact when you can't remember the details. It makes it
3 hard to answer the question. But, you know, I think we
4 wanted to give Dr. Czarnik every opportunity to -- to be
5 successful, to do, you know, what he was capable to
6 determine for himself what his capabilities were, and it was
7 one incident. I think we wanted to allow time to see, you
8 know, if this would turn into a pattern or if it was really
9 just some isolated incident."

10 Is that your state of mind at the time?

11 A It sounds like it was.

12 Q Let's take a look at Exhibit 227. Do you recognize
13 Exhibit 227 as a set of goals that were assigned to Dr. Czarnik
14 when he was research fellow?

15 A It does look like that.

16 Q And you participated in discussions with respect to
17 setting these goals, is that right?

18 A Yes, I did.

19 Q You were at a meeting with Mr. Flatley, Dr.
20 Stuelpnagel, Dr. Barker and yourself, talked about setting goals
21 for Tony Czarnik?

22 A That's correct.

23 Q Now, on the second line, the second project, binary
24 oligo encoding, -- Let me first ask you what method is being used
25 for decoding as of this point in time, May 19 of 2000.

26 A It was a DNA-based decoding scheme.

27 Q Is that a decoding scheme that you invented?

28 A Yes.

1 Q And that -- Your decoding scheme was the decoding
2 scheme used at Illumina up through and including the date these
3 goals were assigned, May of 2000?

4 A We tried many different things and exploring ways to
5 decode arrays, but the specific invention that I came up with was
6 used right from the beginning and indeed is used in manufacturing
7 today.

8 Q This binary oligo encoding, there had been no prior
9 work or experiments in that area before May of 2000, correct?

10 A Actually I don't think that's strictly correct in that
11 you could say that the binary oligo decoding described here is an
12 extension of the invention that I came up with, and so you could
13 say actually there was a lot of prior work leading up to this.

14 Q Not specifically on binary oligo encoding?

15 A It depends what you call binary oligo decoding. We're
16 getting into technicalities here. But the basic methodology is
17 essentially the same.

18 Q But this is a different methodology, you'd agree with
19 that?

20 A Some details of methodology, some people might call
21 them minor, some people might call them more significant, were
22 different. But actually the overall methodology I'd have to say
23 it was the same. The -- sorry. Let me clarify. The key
24 processing steps were the same.

25 Q Would you agree there were no experiments conducted
26 specifically in the area of binary oligo encoding prior to May of
27 2000?

28 A I wouldn't agree with that. I would say that perhaps

1 no one had tried to do exactly this version of decoding, but a lot
2 of the experiments that were done previously were directly
3 relevant to doing this version of decoding.

4 Q No one is working on binary oligo encoding today, isn't
5 that correct?

6 A Again, I think it depends how you characterize it.
7 Because these are -- Because we're talking here about variant of
8 schemes, depending on how you characterize it, you could say that
9 either no one was working on it or people were doing work that was
10 closely affiliated with it.

11 Q Let's take a look at your sworn deposition testimony on
12 this subject, beginning on page 124, where I was asking you about
13 this project:

14 "QUESTION: So the binary oligo encoding
15 project that Dr. Czarnik was assigned when he was a research
16 fellow, was anyone assigned that project after Dr. Czarnik
17 left the company?

18 "ANSWER: I have no specific recollection on
19 that point.

20 "QUESTION: To your knowledge, is anyone
21 working on that project today?

22 "ANSWER: To my knowledge, nobody is working
23 on that project today.

24 "QUESTION: I better be careful in terms of
25 the use of today. I don't necessarily mean November 30th of
26 2001. I mean at this general point in time, is anyone
27 working on that project?

28 "ANSWER: To the best of my knowledge, at this

1 general point in time, nobody is working on this project."

2 Is that accurate testimony?

3 A Yes. But I think it's important to put it in context,
4 in that we had --

5 Q Counsel can put it in context, sir. Is that accurate
6 testimony?

7 A Well, if you've read it, I guess it is, yes.

8 Q Okay.

9 And, Dr. Chee, to your knowledge, does Illumina have any
10 plans to conduct research in this area of binary oligo encoding?

11 A We may well do in the future, but right now it's not
12 being pursued.

13 Q Not being pursued today?

14 A To the best of my knowledge it's not being pursued
15 today.

16 Q This was an invention of Dr. Czarnik's, binary oligo
17 encoding, correct?

18 A Actually it's a little bit unclear whether it was.
19 This narrow concept to which I testified wasn't being worked on.
20 The very narrow definition of what we were calling binary
21 encoding, that was an invention of Dr. Czarnik's.

22 Q So this project on Dr. Czarnik's goals, Exhibit 227,
23 binary oligo encoding, was that Dr. Czarnik's invention?

24 A It's genuinely hard to answer that, because ideas of
25 this type often have input from various people. I would say a
26 very key part of that was Dr. Czarnik's invention, but other
27 aspects contributed by others.

28 Q You don't think too much of this area of decoding, do

1 you, Dr. Czarnik's invention?

2 A That's completely untrue. I think very highly of it.

3 Q Let me refer again to your deposition testimony. Page
4 301, line 19:

5 "QUESTION: In your opinion, did Dr. Czarnik
6 make any significant contributions to the overall success of
7 the company?

8 "ANSWER: He occupied the position of chief
9 science officer, and it looks funny if you don't have a
10 chief science officer for a small company. I guess you
11 could say if nothing else, he filled a figurehead role.

12 "QUESTION: Anything else in the way of
13 significant contributions that Dr. Czarnik made to the
14 overall success of the company?

15 "ANSWER: Not that I'm recalling. Now, also
16 to be fair, I should say, you know, there was work in the
17 chemistry department that I wasn't always involved in, so
18 it's possible he made minor contributions in the context of
19 the group that I either was not aware of and not recalling
20 at this time.

21 "QUESTION: I'm not talking about the minor
22 contributions, I was asking you about significant
23 contributions.

24 "ANSWER: I do not recall any significant
25 contributions that he's made, and even the contribution of
26 so-called binary oligo decoding is highly debatable in terms
27 of its significance when considered in light of the success
28 of the company. I think it was a nice idea. The truth is

1 we don't use it today."

2 You stand by that testimony?

3 A So --

4 Q You stand by that testimony, sir?

5 A Yes, I do.

6 Q The idea to add the writing of a grant application to
7 the third line of the goals, do you recall whose idea that was?

8 A No, I don't.

9 Q Was that your idea?

10 A I just answered I don't recall.

11 Q You might be able to recall if it was your own idea as
12 opposed to someone else's.

13 A No, I don't recall whose idea it was.

14 Q It might have been yours?

15 A It's possible.

16 Q Let me ask you a few questions about decoding
17 experiments. You are familiar with the 768 decoding experiment?

18 A Yes, I am.

19 Q Is it correct that the decoding experiments, there were
20 a series of decoding experiments, each with increasing levels of
21 complexity?

22 A That's correct.

23 Q And the first decoding experiment was known as the 16
24 bead experiment, is that right?

25 A We didn't actually have formal names for these things,
26 but yes, that was referred to as 16.

27 Q Experiment using 16 different bead types?

28 A Right.

1 Q Over what period was that 16 bead experiment conducted?

2 A Well, these experiments were never conducted just once,
3 they were repeated multiple times, different versions of them were
4 tried. People were trying to optimize things. So there wasn't
5 one 16 bead experiment.

6 Q Over what period were the series of 16 bead experiments
7 conducted?

8 A To the best of my recollection, probably would have
9 been on the order of initial results maybe a few weeks and then
10 maybe continuing for a few months.

11 Q Give me the inclusive time period, if you can recall
12 it, approximately, over which the 16 bead experiments were
13 conducted, from when to when, approximately?

14 A They were one of the first things we worked on when we
15 had lab facilities. So I'd say late '98, probably through to
16 early '99, approximately.

17 Q You started --

18 A Sorry for interrupting. I should say occasionally one
19 goes back and does experiments again to try something new or to
20 reverify something in the future. It's possible that there were
21 additional experiments conducted even much later than that.

22 Q By late '98, you mean shortly after you went into your
23 new laboratory space?

24 A That's correct.

25 Q So that would be September of 1998, approximately?

26 A Very approximately.

27 Q You say they continued through approximately early
28 1999. Can you give me an approximate month?

1 A Actually, no, I can't.

2 Q Was it first quarter '99, second quarter '99?

3 A I'm sort of guessing at this point. Because, you know,
4 we did a lot of experiments. And you are asking me to pin down a
5 particular series. I'm guessing first quarter '99.

6 Q Is that your best recollection at this point in time?

7 A It's more an educated guess than a specific
8 recollection.

9 Q You wouldn't quarrel with the notion that the
10 experiments were conducted from approximately September of '98
11 through first quarter of '99, on 16 bead?

12 A No, I wouldn't quarrel with that.

13 Q Now, the next series of experiments involved 128
14 different bead types, is that correct?

15 A That's correct.

16 Q Can you give me the approximate time frame in which
17 those experiments or series of experiments were done on 128
18 different bead types?

19 A They, to the best of my recollection, would have been,
20 the bulk of them would have been done, I think, in 1999.

21 Q Beginning when the 16 bead ended and continuing through
22 the remainder of '99, approximately?

23 A There was probably some overlap.

24 Q So most of 1999 was devoted to, in terms of decoding,
25 some experiments on 128 different bead types?

26 A A lot of the experiments, decoding experiments in 1999,
27 were around 128 bead types, but by no means was that sort of an
28 exclusive set of decoding experiments going on.

1 Q I'm just trying to set the time frame in which 128 bead
2 experiments were conducted.

3 And a 768 decoding experiment, when did the first 768 decode
4 experiment take place?

5 A Again for the same reasons, I don't recall exactly, but
6 I believe we began working on those experiments in late '99.

7 Q And those experiments continued at least through July
8 of 2000 when the roadshow experiment was conducted?

9 A They continued through probably all the way through
10 2000.

11 Q Before and after the roadshow?

12 A That's right.

13 Q And Kevin Gunderson was the principal scientist who
14 conducted the 768 decoding experiment, true?

15 A You could say that. It was very much a team effort. A
16 number of people were very important to conducting that
17 experiment.

18 Q Not only can I say that, actually several witnesses
19 have already said that.

20 A Yeah.

21 Q I'm asking if you say that. You agree Kevin Gunderson
22 was the principal scientist on the --

23 A Kevin was directly responsible for the 768 experiment.

24 Q Was he also lead scientist on the 16 bead experiment?

25 A He did that almost single-handedly.

26 Q And the 128 bead?

27 A He was the key person in that series of experiments,
28 too.

1 Q The 768 decode experiment that was conducted in the
2 summer of 2000, that involved three different colors of dyes, is
3 that right?

4 A Sorry, could you say again?

5 Q The 768 decode experiment that was conducted in the
6 summer of 2000, that involved using three different colors of
7 dyes, correct?

8 A That's more or less correct. I believe the intention
9 initially was to use four. We decided for a couple of reasons to
10 do it, practicality, to use three.

11 Q So one point it was four, later three; true?

12 A I believe so.

13 Q Let's take a look at Exhibit 257, please.

14 Dr. Chee, do you recognize this as an e-mail that you sent
15 on June 30th of 2000 to Jay Flatley, Barker and Stuelpnagel?

16 A Yes.

17 Q Subject was decoding update?

18 A Yes.

19 Q You say, "Kevin's group will a do a two-color decoding
20 with the 768 Illumina codes next week." Was that a typo or were
21 you actually doing two-color decoding?

22 A Very unlikely to be a typo. We often did preliminary
23 experiments. The beautiful -- One of the beautiful things about
24 decoding is it's very -- --

25 Q You need --

26 THE WITNESS: Am I allowed to answer this?

27 THE COURT: Is it responsive to the question?

28 THE WITNESS: I believe it is.

1 MR. PANTONI: Q Were you doing two-color decoding in
2 summer of 19 -- strike -- in the summer of 2000?

3 THE COURT: Just answer the question.

4 THE WITNESS: So we have the aim of three-color
5 experiments and we did some preliminary experiments, and I think
6 we did a two-color experiment as a preliminary one, yes.

7 MR. PANTONI: Q Are you sure you did two-color
8 experiments?

9 A I am not a hundred percent sure, but we did one-color
10 experiments, we did two-color experiments, we did three-color
11 experiments, we did four-color experiments. We did experiments
12 with mixtures of the colors. We did a lot of different
13 experiments, and I don't recall exactly what was done at any
14 particular time in this series.

15 Q I think I asked a simple question. Are you sure you
16 did two-color decoding in summer of 2000?

17 A I couldn't be 100 percent sure, but if I wrote it
18 there, it's most likely that we did.

19 Q That was going to be done by Kevin Gunderson?

20 A That's right. I should say I didn't directly do these
21 experiments, I oversaw the science to do with this, so the
22 experiments were conducted in the lab by research in the lab,
23 directly supervised by Kevin.

24 Q Now, Dr. Chee, you sent results from the 768 decoding
25 experiment to the roadshow during the roadshow, is that right?

26 A To the best of my recollection, that's correct.

27 Q And you sent it by means of e-mail?

28 A That's right.

1 Q Attaching a PowerPoint slide?

2 A I believe so.

3 Q Would you look at Exhibit 269, please.

4 Do you recognize Exhibit 269 as a copy of an e-mail that you
5 sent to the roadshow team on July 13 of 2000?

6 A Looks like an e-mail from me.

7 Q And you were attaching two PowerPoint slides, is that
8 correct?

9 A You know, I don't recall exactly how many PowerPoint
10 slides, but probably two.

11 Q Let me show you one that we have a blow-up of. It's
12 part of the same exhibit. With Illumina Bates stamp number
13 ILL1560. Was that one of the PowerPoint slides you sent to the
14 roadshow team?

15 A Yes, it was.

16 Q During the pendency of the roadshow, while the roadshow
17 was still going on?

18 A I believe so, yes.

19 Q Now, the whole point of this slide, Dr. Chee, is to
20 show that as a result of the 768 decoding experiment, you were
21 getting different colors to show up upon the beads, correct?

22 A Scientifically speaking, the point of the experiment
23 was to show that it was feasible to decode at a complexity of
24 hundreds of things --

25 Q Let me interrupt a second. I was asking about the
26 point of the slide. The point of the slide is to depict the
27 different colors that show up during decoding?

28 A Yes, it's to illustrate some of the data that we

1 obtained from the decoding experiment.

2 Q And the point of the slide is to show that you could
3 tell the different bead types apart, you could distinguish them
4 from one another due to the color that shows up during the
5 decoding process?

6 A That's correct.

7 Q It's fundamental to the experiment that the colors be
8 distinguishable enough that you can tell them apart, is that
9 right?

10 A That's correct.

11 Q Now, Dr. Chee, you sent this slide containing some
12 results from the 768 decode experiment, you sent this slide to the
13 roadshow team for possible use during the roadshow?

14 A That's correct.

15 Q You thought this slide might be of use to Mr. Flatley
16 and the roadshow team in connection with answering questions about
17 decoding?

18 A I did.

19 Q At some point, Dr. Chee, you became aware of mislabeled
20 dye that was used in this experiment?

21 A That's right.

22 Q If we could put up the Exhibit 275.

23 Do you recognize this exhibit as a copy of a letter sent to
24 Illumina by Molecular Probes?

25 A Yes.

26 Q Molecular Probes was the vendor who had sold you the
27 dyes in question?

28 A That's right.

1 Q And Dr. Chee, you found out about the mislabeling
2 problem a few days before you saw this letter, is that right?

3 A I'm not sure that I did. My recollection on that is a
4 little bit vague as to exactly when we found out. We suspected
5 there might be an issue, I think, a little bit before.

6 Q In fact you knew there was something wrong with the
7 experiment before you learned about the mislabeling issue, right?

8 A No, I didn't I think in the sense that you are asking.
9 I had already looked at the analysis of the experiment and there
10 are a number of things that I wasn't happy with that didn't go
11 quite as expected, but as to the result, the result was as
12 expected.

13 Q You knew there was something wrong with the experiment
14 before you heard about the mislabeling issue?

15 A One of the things we were concerned about in the
16 analysis was that there wasn't as much separation as we would have
17 liked, so I guess in that sense you could say yes.

18 Q Isn't it true that you and Kevin Gunderson knew there
19 was something wrong with the experiment, and when you found out
20 about the mislabeling issue, you both thought well, this is why?

21 A I think that's fair to say. We suspected something
22 didn't work optimally, and when we saw this, we thought yes,
23 that's the reason why.

24 Q And on the point of when you learned about the mislabel
25 problem, I want to read from your deposition testimony, please,
26 Exhibit 185, line 2:

27 "QUESTION: You believe this mislabeling
28 problem came to your attention when you saw the letter from

1 the vendor, right?

2 "ANSWER: That's '00. I think that, you know,
3 it may have been a couple of days previously. We were
4 scratching our heads thinking that there was something that
5 was not quite right. We didn't know what it was, and that
6 letter to the best of my recollection established the
7 cause."

8 Does that refresh your recollection you found out about
9 this a few days before the letter?

10 A That's consistent with what I'm remembering now, yes.

11 Q And then you and Kevin Gunderson talked about the
12 mislabeling problem, is that right?

13 A Yeah, I don't recall specifically what we said, but
14 yes, we discussed it.

15 Q Dr. Chee, you were in charge of the company while Jay
16 Flatley was on the roadshow?

17 A That's right.

18 Q And isn't it true that Tony Czarnik approached you
19 about the mislabeled dye?

20 A You know, I don't recall him doing so.

21 Q No recollection?

22 A No.

23 Q Either way?

24 A That's right. I recall it was discussed, actually it
25 was discussed fairly broadly in the group that was working on
26 this, but I don't recall Tony specifically coming up to me about
27 this mislabeling issue.

28 Q So you have no recollection either way on that point,

1 is that your testimony?

2 A At this point I'm not recalling anything either way,
3 that's right.

4 Q Was responsibility for decoding transferred from you to
5 someone else after Dr. Czarnik was fired?

6 A After -- let's see. At some point, I don't remember
7 exactly when, responsibility was handed off. We established
8 feasibility. I thought very nicely. And we wanted to transition
9 it to more of a manufacturing process, and that's a whole
10 different set of skills and set of things to be done.

11 Q So who took over for decoding?

12 A At some point Steve Barnard took over, with a specific
13 purpose of transitioning it into manufacturing.

14 Q You just don't recall whether that was before or after
15 Dr. Czarnik was fired?

16 A At this time I don't recall exactly when that happened.

17 Q Dr. Chee, was Illumina your first experience working
18 for a company that went public while you were employed there?

19 A No, it wasn't.

20 Q What was your first experience in that, when that
21 happened?

22 A I was employed at Affymetrix when we went public.

23 Q What was your position when you went public at
24 Affymetrix?

25 A I think it was probably senior scientist, but I'm
26 actually not a hundred percent sure.

27 Q Did you work on the Affymetrix roadshow in any way?

28 A No, I didn't.

1 Q Did you work on the Affymetrix S1 registration
2 statement?

3 A No, I didn't.

4 Q So your experience at Illumina was the first experience
5 you had helping to review and edit an S1 registration statement?

6 A Um, I would say yes. I saw drafts of the Affymetrix
7 documents, but I really wasn't participating in creating them.

8 Q So Illumina is the first time you participated in
9 creating an S1?

10 A That's right.

11 Q You were involved in regular meetings where the S1
12 would be reviewed and edited?

13 A I was involved in a number of those meetings. I wasn't
14 involved in all of them.

15 Q Was Dr. Czarnik ever involved in any of those meetings
16 that you attended?

17 A Best of my recollection, no.

18 Q You were not on the roadshow making presentations, were
19 you?

20 A I wasn't on the roadshow making presentations.

21 Q But you were flown from San Diego to New York to
22 witness a roadshow presentation?

23 A I chose to fly to New York to witness -- at the last
24 day of the roadshow.

25 Q And were you present then on the day the company went
26 public, were you present in New York City?

27 A Yes, I was.

28 Q On the floor, trading floor of Goldman Sachs?

1 A Yes, I was.

2 Q Were all the founders there?

3 A Let's see. Depends what you mean by founder, but Jay
4 Flatley, John Stuelpnagel, myself, and I think David Barker were
5 there.

6 Q If we can take a look at Exhibit 332.

7 On this exhibit, Dr. Chee, I wanted to confirm that you
8 received this e-mail from Tony Czarnik on September 5 of 2000 and
9 you responded back with an e-mail to Tony Czarnik on September 5,
10 2000?

11 A Yes.

12 Q When you were -- You said last Friday you went from
13 being a vice president to being a research fellow, correct?

14 A That's right.

15 Q Do you consider that to be a demotion of any sort?

16 A No, I didn't. Actually I initiated that, and I'm very
17 happy to be a research fellow.

18 Q Do you have written goals as a research fellow?

19 A Not yet because I've just made that transition on
20 Friday, but I do expect to in the near future.

21 Q Who are you reporting to as a research fellow?

22 A I report to David Barker.

23 Q Do you have any subordinate reporting to you as a
24 research fellow?

25 A None whatsoever.

26 Q How many shares of stock do you own, Dr. Chee?

27 A In the approximate range of 900,000.

28 Q And that was the same amount you owned at the time of

1 the IPO, is that correct?

2 A Very approximately.

3 Q So has your stock or rate of stock vesting ever been
4 reduced since the time you joined Illumina?

5 A Yes, it has.

6 Q When was that?

7 A When I became a research fellow.

8 Q What was the extent of the reduction of your stock?

9 A Well, the unvested stock, some of it -- Actually it
10 vests at a slower rate, and some options I don't get anymore.

11 Q But in terms of the initial 900,000 that you had at the
12 time of the IPO, you still have those?

13 A Let's see. At the time of the IPO, yes, that's right.
14 But some of them vest at a greatly reduced rate.

15 Q So the vesting schedule changed, but in terms of the
16 number of shares, that didn't change, is that correct?

17 A That's actually -- Some of my stock vesting is tied to
18 goals, and so it depends on whether or not goals are accomplished.
19 But in terms of general arrangement, the vesting slowed down and
20 some options I don't get anymore.

21 Q The vesting slowed down but you still have the same
22 number of shares?

23 A Very approximately, yes.

24 Q What is your current salary, sir?

25 A Let's see. My current salary is, I think it's gone
26 down to about one hundred sixty something thousand.

27 Q Do you work now part time as a research fellow?

28 A I work 50 percent time as a research fellow.

1 Q Your salary is 160,000 per year?

2 A I think a little bit above that. Now --

3 Q What was your salary when you were --

4 A I should say --

5 Q -- vice president?

6 A But let me clarify. It actually for the first three
7 months it's at that level. It decreases pretty rapidly to half of
8 my salary.

9 Q To reflect the fact you are going to be working half
10 time?

11 A That's right. The step down is to reflect that
12 initially I'm expected to be more than half time to help the
13 transition.

14 Q What was your salary when you were vice president?

15 A About a 190,000.

16 Q Do you have any plans to leave Illumina, Dr. Chee?

17 A No, I don't.

18 MR. PANTONI: Nothing further.

19 THE COURT: Okay.

20 Would this be a good time for our recess?

21 We'll take our morning recess at this time. We'll be in
22 recess until 10:45. Mr. Manalang, I'd like you to remain for a
23 couple of minutes. We'll resume at 10:45. Please don't form or
24 express any opinions about the case, don't discuss the case.

25 (Proceedings resumed outside the presence of the jury.)

26 THE COURT: What was the problem this morning? Did you
27 have a cell phone?

28 JUROR MANALANG: No, I didn't.

1 THE COURT: It's important. Actually we're really on a
2 strict schedule right now. Although I don't think it really
3 caused any other than a little delay this morning, but I don't
4 think it's going to throw us off for the whole day. Could you get
5 here at 8:30 tomorrow morning, have the reporter read back the 10
6 minutes or so of testimony that you missed?

7 JUROR MANALANG: Sure.

8 THE COURT: 8:30 tomorrow morning. He said probably 10
9 or 15 minutes.

10 JUROR MANALANG: Sure.

11 THE COURT: Thank you very much.

12 (Mr. Manalang exits the courtroom).

13 THE COURT: Anything I need to discuss with counsel?

14 MS KEARNS: I'm sorry?

15 THE COURT: Anything I need to discuss with you?

16 So we're right on schedule. That was about five minutes
17 less. So you have five minutes for your redirect.

18 MR. PANTONI: I have 10 on my clock. My clock seems to
19 be running slower.

20 (Recess.)

21 THE COURT: Record indicate all the jurors are present,
22 counsel and parties present.

23 You may examine, Miss Espinosa

24 CROSS-EXAMINATION

25 BY MISS ESPINOSA:

26 Q Good morning, Dr. Chee.

27 A Good morning.

28 Q We've heard so much about this mislabeled dye problem.

1 Could you please explain for the jury roughly your analogy there
2 that you'd like to use to explain how that labeling affected your
3 768 decoding experiment in the summer of 2000?

4 A Yes. So can I give just a little background and then
5 show this?

6 Q Sure. Quickly, please.

7 So one of the really nice things about decoding is that it
8 doesn't depend on having exactly the right colors. What it does
9 depend on is being able to tell these colors apart. That's the
10 basic requirement. The other thing to keep in mind that we were
11 inventing new technology. We were doing things that nobody had
12 done before. So we were figuring things out. We were
13 experimenting. What we were trying to do was show it was feasible
14 to decode hundreds of things. That hadn't been done before.

15 So this 768 decoding experiment, what we tried to do was to
16 have three different colors to label our DNA molecules for
17 decoding. This is what we wanted to get. But this freak thing
18 happened where the supplier actually mislabeled the bottle. It
19 happens very, very rarely. Completely unexpected. So we ended up
20 mixing up two colors.

21 Q Let me interrupt you, Dr. Chee. For each of the
22 colors, is it true that you used multiple vials of each type of
23 dye?

24 A That's right. Because we needed to make quite a lot of
25 it. What we bought from the supplier was only in little vials, so
26 we pooled them together into a big lot. So I'll show you what
27 happened in the pooling of one, for one of these colors.

28 Q Just by way of example, I'll show you what's been

1 marked as Court's Exhibit Number 385. It's the empty vial from
2 one of these dyes. It's a brown glass color. I believe the dye
3 comes in a powder form. Are these the type of dyes you had to
4 pool together?

5 A That's right.

6 Q Do you recall how many?

7 A I think we're pooling something like 11 lots. I'm not
8 sure exactly. But it is hard to tell exactly what you've got in
9 there. These are designed to protect them from light, so it's
10 hard to see what you have in the container.

11 So anyway, what was done in the lab effectively was to pool
12 some of the mislabeled bottles with the correctly labeled ones,
13 and I'm going to sort of recreate that in the same proportions we
14 pooled things.

15 We had seven parts of a green dye and four parts of red dye,
16 instead of just green, which is what we had to make.

17 Q The wrong color mixed in happened to be one of the
18 other colors already used in the experiment, correct?

19 A I believe so. Yes.

20 Okay. So mislabeled bottle, we thought it was green but it
21 was mislabeled. Not something we sort of anticipated at all.
22 This is what we ended up with.

23 Now, there is what we wanted to get, but there is what we
24 actually got. Now I said to you previously that decoding works as
25 long as you can tell the colors apart. We could still tell these
26 colors apart. This wasn't what we wanted to get, but it was still
27 sufficiently different from the others that we could tell them
28 apart.

1 And what's more, the analysis of the experiment proved that.
2 This wasn't just my wishful thinking maybe we can tell them apart.
3 The data showed we could tell them apart. So to me this is all a
4 storm in a teacup.

5 There were, you know, a number of things about this
6 experiment that weren't perfect. That's to be expected. There
7 were other things wrong that actually aren't discussed here that
8 actually I was more concerned about than this. This is an easy
9 problem to fix. Once you know the dyes are mislabeled, you can
10 redo this experiment with the correct dyes and it will get even
11 better. But it's not that the experiment didn't work in the first
12 place, it worked fine because you could still tell these apart.

13 Q Okay.

14 By the way, the real experiment, was the distinguishing
15 done, between the colors, done with the human eye or by computer?

16 A It was done by computer.

17 I should say a couple of sort of scientific differences. We
18 were talking about fluorescence. This isn't fluorescence. But
19 the basic principle is exactly the same.

20 Q Let's show you Exhibit 275 again that was just up a few
21 moments ago. This is the -- Had Illumina used Molecular Probes
22 as a vendor in the past?

23 A We have routinely used Molecular Probes as a vendor.

24 Q You view them as a reputable company?

25 A Yes.

26 Q And if you'll focus on the second full paragraph there,
27 can you read the sentence beginning with, "In the past year."

28 A "In the past year, our packaging department has

1 packaged and labeled more than," looks like "800,000 vials of
2 Molecular Probes' product. To my knowledge, this instance marks
3 the only time that customers have ever received a product
4 mislabeled due to a packaging department error."

5 Q So does that in part explain why Kevin Gunderson and
6 the people working under your supervision did not individually QC
7 the bottles of dye?

8 A That does.

9 Q And in fact Dr. Czarnik has testified you had repeated
10 concern that the molecular biologists failed to QC the dyes
11 properly. Do you recall him expressing those concerns?

12 A I don't recall that at all.

13 Q In fact let me show you what we will offer as a
14 rebuttal exhibit, number 386.

15 THE COURT: Has Mr. Pantoni seen this?

16 MR. PANTONI: No.

17 MS ESPINOSA: Just now, your Honor.

18 MR. PANTONI: I don't see how this is rebuttal.

19 MS ESPINOSA: Your Honor, it will come out when I have
20 Dr. Chee testify about the content of the document.

21 Q Can you describe for the jury what this document is?

22 A This is a set of instructions --

23 Q Go ahead.

24 A Can I continue? This is a set of instructions to
25 prepare some documentation for this project. All the procedures
26 that we used and so on.

27 Q Does this have to do with the QC'ing of dyes?

28 A Not directly, no.

1 Q Does this have to do with quality control of reagents?

2 A It does very much have to do with quality control of
3 all reagents in the process.

4 Q Dyes would be one of them?

5 A Dyes would be included.

6 Q What -- Who authored this document?

7 A I did.

8 Q Why did you prepare this document?

9 A I wanted to make sure that people were following
10 careful quality control and other procedures so that we would be
11 doing -- developing processes that could eventually be
12 transferred to manufacturing.

13 Q Who was this document directed to?

14 A This was directed to actually four people who were
15 responsible for various major components of the overall project.

16 Q And who were they?

17 A They were Chanfeng Zhao, Jim Bierle, Steve Barnard and
18 Johnny BenDor.

19 Q Why did you prepare this document for them? Is it a
20 normal document for you to prepare in the normal course of
21 managing a project?

22 A Normally I wouldn't prepare such a document. I did
23 have some concern that not all the procedures were being developed
24 for quality controlling reagents and so on, and I just wanted to
25 make sure that we put things on a more formal basis.

26 Q So in fact then you are testifying that you personally
27 had a concern about the adequate quality control of reagents?

28 A I did.

1 Q Was that brought to your attention by Dr. Czarnik?

2 A No, it wasn't.

3 Q To your knowledge, were those suggestions you made in
4 that document implemented as part of the ABI project?

5 A To some extent, but I had difficulties getting some of
6 these implemented across the whole group.

7 Q Why is that?

8 A I felt it was because the -- some of the individuals
9 in the chemistry group reporting to Dr. Czarnik didn't want to
10 follow my instructions.

11 Q And Dr. Czarnik has testified that there's a quick and
12 dirty method for checking dyes that takes about five minutes. Do
13 you have recall forbidding or discouraging Dr. Czarnik or anyone
14 in his group from conducting such an experiment?

15 A No.

16 Q In fact, would they need your buy-in or authorization?

17 A No, they wouldn't need my permission. I don't
18 micromanage things at that level. Nobody needs my permission to
19 do a five-minute experiment. In fact, I tell the people who work
20 for me directly that if you feel strongly about doing an
21 experiment, even if everybody else disagrees with you, you should
22 go ahead and do it. That's part of the nature of research.

23 Q And also you testified earlier this morning about the
24 different levels of complexity of arrays that have been used at
25 Illumina. I think there was a point that might have confused the
26 jurors. At what point did someone demonstrate the feasibility of
27 16-bead decoding?

28 A That was demonstrated very early on, I think in 1998,

1 Q Do you recall a conference in November of 1998 where
2 you presented a 16 bead --

3 A Yes, I do.

4 Q Who did that experiment?

5 A Kevin Gunderson.

6 Q How much help did he have doing that experiment?

7 A He had very little help. He did almost everything
8 single-handedly. It was actually at that stage very difficult to
9 do these experiments, and he did a truly spectacular job. He
10 didn't do just the decoding. In all this analysis we don't rely
11 on just the decoding itself to know whether or not we've got the
12 right answer. This decoding is just part of the manufacturing
13 process. We then use these arrays to -- for genetic analysis, and
14 Kevin did that part as well. So he couldn't have got the right
15 answer at that stage if the decoding was wrong.

16 Q Mr. Pantoni asked you for periods of time over which
17 experiments were done on 16-bead arrays. So was it your intention
18 to imply to the jurors you were still trying to figure out or
19 optimize 16-bead decoding over that time period?

20 A Absolutely not.

21 Q So what was going on during that time period using 16-
22 bead arrays?

23 A So we were doing genotyping experiments, actually, as
24 much as we could. We wanted to spend not too much time on
25 decoding but actually develop ways of using these arrays. The
26 purpose of doing this is to figure out the causes of human disease
27 and to try and understand them, develop better drugs and so on.
28 So most of the effort in my group was directed at that part of the

1 research, and with the 16-bead arrays, we were figuring out new
2 ways of genetic analysis. Which actually have been extremely
3 successful.

4 Q And did Dr. Gunderson also conduct a feasibility
5 experiment to demonstrate a higher level of complexity of
6 decoding?

7 A He did. And I should say that one of the aims to be
8 successful here is to constantly push the envelope of your
9 technology. If your technology is good, you want to keep making
10 it better. That's no difference from what anybody else does. If
11 I look at Intel, for example, they are always making a smaller,
12 faster, better chip. They don't stop and rest. It's the same for
13 us with decoding. We're at 1500 today. We're not going to stop
14 there. We'll keep pushing that technology to get more
15 information, faster, better, cheaper. That's the nature of a
16 technology company.

17 Q Do you recall Dr. Gunderson actually conducting a mock
18 complexity experiment sometime in --

19 A He did. Very early on we wanted to get some
20 information, even though experiments were difficult to carry out,
21 we wanted to get some information on whether or not we could
22 decode at a complexity of 2000 things, and the reason for that was
23 when we were first sketching out the plans for the company, I came
24 up with some specifications for this array, and one of my
25 specifications was that we should aim to do, read, 2000 different
26 things. And so he did 2000 complexity experiments very early on,
27 and those experiments show that it was feasible.

28 Q We also saw your resume that shows you've got some

1 experience with Affymetrix. At the beginning of the process when
2 you were preparing to the 768 decoding experiment, what was your
3 gut feel about how many bead types you thought you'd be able to
4 decode for that experiment before you even started the experiment?

5 A I felt that it would probably be, this is sort of a gut
6 feel, as you describe it, about 500. And that not everything
7 would decode for various reasons, that not all the reagent would
8 be perfect. We knew that when we synthesize things without
9 checking every single one that some of them might fail. There's
10 some intrinsic properties of DNA that mean not all of them will
11 work. So about 500.

12 Q In fact, after the analysis of the data from this
13 experiment, how many were you able to decode?

14 A It was actually a little a little bit over 500, much to
15 my surprise, and I should say delight. But it wouldn't have
16 mattered to me if it was more, it wouldn't have mattered to me if
17 it was somewhat less.

18 Q Let's put up trial Exhibit 269, please.

19 Would you say you were happy with the results of the 768
20 experiment in the summer of 2000?

21 A I was delighted with the results at that stage, yes.

22 Q Let's scroll into the e-mail there from Mark. The top
23 sentence there. Who did you send this e-mail to? So there's your
24 e-mail, Thursday, July 13th, 2000. Who is the audience that you
25 are sending this to?

26 A Looks like the people on the roadshow at the time would
27 have been the primary audience, Jay Flatley, David Barker, John
28 Stuelpnagel, Tim Kish, and copied to yourself and Bob Kain.

1 Q Would that comprise the entirety of the senior staff of
2 Illumina at that point?

3 A Probably, yes.

4 Q And what's it say in the first full paragraph there?

5 A The one, "There's a lot of detail here, it's provided
6 for those who are interested. Don't feel obliged to wade through
7 all of this. The attached pictures tell most of the story."

8 Q So from that sentence there, was it your intention that
9 the guys on the roadshow use this slide or use this information as
10 part of the roadshow presentations?

11 A The information being the pictures or the --

12 Q Yes, the attachments.

13 A The attachments. Yes, it was offered to them for that
14 purpose if they needed it.

15 Q There wasn't anything imperative about the language
16 there they had to use all of the information in this e-mail and
17 the attachment on the roadshow?

18 A Absolutely not.

19 Q What was your purpose in sending this e-mail besides
20 the possibility that it could be used on the roadshow?

21 A Informational. I was excited about the result and I
22 wanted to convey progress to everybody. I wanted, you know -- and
23 that's something I routinely do. If there's something I regard as
24 useful events, I tell people who I think might be interested. I
25 like to find out about things, too, when they happen.

26 Q Let's put up again 275.

27 Now, you seem to have a rough recollection of learning about
28 the mislabeled dyes either at the time this letter was received or

1 perhaps earlier. Do you recall Dr. Czarnik coming up to you after
2 learning about the mislabeled dye and saying something along the
3 lines of "I told you so, I've been warning you about this QC issue
4 a long time"?

5 A No, I don't recall that.

6 Q Do you recall him saying anything to you about the
7 impact that this mislabeled dye might have on information
8 disclosed on the roadshow?

9 A No, I don't recall that.

10 Q Do you recall at anytime him sending you any kind of
11 e-mail concerning the 768 decoding experiment?

12 A There was the e-mail that was just shown earlier,
13 September 5th.

14 Q On the day he was terminated.

15 A Yes, I guess so.

16 Q Let's put back up 269, please. I'm sorry, 332.

17 So between the time that you received the letter from
18 Molecular Probes in July through September 5th when you received
19 the e-mail from Dr. Czarnik about what he called the roadshow
20 experiment, do you recall having any conversations with Dr.
21 Czarnik concerning his issues with that decoding experiment being
22 used on the roadshow?

23 A No, I don't.

24 Q Okay. So let go back to 247. In the afternoon,
25 Tuesday, September 5th, you receive this e-mail. What's the
26 subject line there?

27 A "Code Blew."

28 Q What did you interpret that to mean?

1 A I wasn't too sure. My interpretation, to the best I'm
2 able to remember, was that he was indicating that somehow we'd
3 blown it, there was a big problem here.

4 Q And he mentions there in sort of apostrophies,
5 "roadshow experiment"?

6 A Yes.

7 Q "Roadshow decode experiment." Had you ever heard
8 anyone refer to the 768 experiment as the "roadshow experiment"?

9 A You know, my recollection is a bit dim on that. I
10 heard about it talked quite a lot now in that context. I'm not
11 sure if I'm remembering someone say it then or later. But by and
12 large, no.

13 Q So let's read your e-mail back to Tony. Could you read
14 that first, can you read back your response.

15 A "Hi Tony. If the roadshow decode experiment, as you
16 call it, was flawed, then that's a big surprise to me. If we're
17 talking about the same experiment, I assume you mean the 768
18 complexity decode feasibility experiment, it worked as designed
19 and provided valuable information on specificity of decoding in a
20 complex sample. I would be happy to explain the experiment in
21 more detail if that would help remove any confusion you might have
22 in your understanding of it."

23 Q So at the time you received this message, were you
24 surprised that Dr. Czarnik was now characterizing the experiment
25 as flawed?

26 A I was. And I just really wasn't sure what he was
27 referring to there. I was trying to figure out what he sort of
28 meant by flawed. I actually would have liked to have a discussion

1 with him and gone over it and sort of figured out what the issue
2 was.

3 Q And had this experiment been discussed internally at
4 Illumina before September 5th?

5 A It had. It had been discussed very publicly at
6 Illumina, at a scientific meeting, where everybody in the company
7 was open to everybody in the company and most of the scientists in
8 the company came to.

9 Q Including Dr. Czarnik?

10 A To the best of my recollection, he was also there when
11 this was discussed, yes.

12 Q Including people that reported to Dr. Czarnik when he
13 was the CSO?

14 A Certainly, yes.

15 Q And do you recall anyone from that group, from Dr.
16 Czarnik's own people, raising concerns about the results of this
17 experiment?

18 A I think there was quite a lot of discussion. I don't
19 recall exactly what was said. There was a lot of discussion about
20 the results. I think there were concerns raised. But mostly in
21 the context of how could we improve the experiment, how could we
22 do better in the next stage. That's completely normal and routine
23 when you are developing new technologies.

24 I think I also have the impression that initially in
25 explaining these results, not everyone understood it, and so there
26 were questions of that type, where it had to be explained, you
27 know, exactly how the results were analyzed and what the
28 interpretation was. But nothing of the -- no concerns about it

1 being fundamentally flawed and that we drew the wrong conclusions.

2 Q Let me switch topics to grant applications. Did you
3 write a grant application for Illumina even before Illumina had
4 obtained the right to the Tufts technology?

5 A I did.

6 Q Did you write a number of grant applications while you
7 were the VP of genomics?

8 A I did.

9 Q Do you anticipate writing grant applications as a
10 research fellow?

11 A I do.

12 Q So would you say that writing grant applications is one
13 of your favorite parts of being a scientist?

14 A It's something I like to do. I actually find it
15 onerous. It's a task. It's a chore to do. But it helps you plan
16 your projects, it helps you answer, figure out exactly how you are
17 doing things, and I think it's actually very good because it goes
18 out to an objective set of scientists who don't know you, who are
19 then judging your work, and if you get funded, it means people
20 think that this is doable, that it's important, it's significant,
21 it's worth doing.

22 So I guess in one way you could say yes, I like writing them
23 even though it's a chore to do.

24 Q But you do them anyway?

25 A I do them anyway.

26 Q Okay. And let's go back to the time period you were at
27 Cardiff, when it was still a very small embryonic company, and
28 would you say the grant applications are a good way of planning

1 research and development?

2 A That's one of the primary reasons I do them, because
3 think it's a very good way to plan your research. If you plan
4 things well, then things tend to go well. If you dive into
5 something without planning it, you can have all kinds of
6 headaches.

7 Q We've heard some testimony about the 1998 time frame
8 and this very important business plan. So would there be an
9 analogy between Illumina's business plan and grant application in
10 terms of R&D aspects of the business plan?

11 A Certainly.

12 Q Do you recall Dr. Czarnik participating in the drafting
13 of the business plan?

14 A Superficially and quite reluctantly.

15 Q Why do you say reluctantly?

16 A To the best that I'm able to recall it, it reached the
17 point where John Stuelpnagel was actually assigning him tasks, you
18 know, sections to write, because he didn't seem to be
19 participating much. He wasn't diving in to help, to volunteer to
20 contribute.

21 Q We heard a little bit about what the work ethic was
22 like back in the early days of Illumina. Would you agree that Dr.
23 Czarnik worked as hard and as long as you and Dr. Stuelpnagel
24 worked at Cardiff?

25 A I wouldn't agree with that.

26 Q How would you characterize his work ethic in those
27 days?

28 A Um, seemed to me to regard it more as a -- It wasn't a

1 very strong work ethic. Usually when you are starting a new
2 company, you are full of enthusiasm, you are working very hard.
3 Much longer than 9 to 5 hours. It's not necessarily healthy, but
4 it's kind of all-consuming, and Dr. Czarnik was more on a 9 to 5
5 schedule.

6 Q Would you say his concerns at the time were directed
7 towards Illumina's incipient business plan? Do you recall what
8 his major concerns were at the time?

9 A No. I don't think he was -- His priority perhaps, I
10 should say, was the business plan.

11 Q What was his priority during that time frame? If you
12 can recall.

13 A I'm not entirely sure, but I can tell you that the
14 kinds of things we talked about in conversation. He liked to talk
15 about cars. He'd often point out cars. A lot of people like
16 that, it's a good hobby, but he seemed to be investing some of his
17 time in buying a new car, for example, things like that, whereas
18 the focus of John and my conversation were more the company
19 itself.

20 Q Do you recall any significant scientific or business
21 contributions that Dr. Czarnik made to the business plan at
22 Cardiff?

23 A Not really. At that time he came up with this idea of
24 what we call binary decoding. It's a bit of confusing term. But
25 nevertheless, there was an idea he came up with that we call
26 binary decoding. It was a very nice idea, and not all nice ideas
27 turn out to be important to a company. They can just stay as nice
28 ideas. This one did. At the time was it important? We wanted to

1 show that we had good concept for decoding, so that's probably
2 about the only one I can put my finger on and say maybe it was
3 significant.

4 Q So today you mentioned Illumina uses your version of
5 oligo decoding, it's part of the manufacturing process. Are you
6 familiar with some work done by Dr. Gali Steinberg using two
7 different sequences on a bead?

8 A Yes, I am.

9 Q Would that be analogous to the goal assigned to Dr.
10 Czarnik?

11 A You could say it was directly relevant to the goal. It
12 was a little different than the goals there, but it was certainly
13 very relevant.

14 Q Okay. And did she -- Do you know where Dr. Gali
15 Steinberg is today?

16 A Actually she's had a baby pretty recently. I'm not
17 sure where she is right now today.

18 Q So she's -- I can represent she's on maternity leave.
19 So do you know whether or not Dr. Barker intends to have her
20 pursue the binary decoding methodology that she was working on
21 when she returns from maternity leave?

22 MR. PANTONI: Objection, calls for speculation and
23 hearsay.

24 THE COURT: Sustained.

25 MS ESPINOSA: Q What is the benefit of this type of
26 binary oligo decoding, the one that was mentioned for Dr.
27 Czarnik's goals?

28 A It actually -- The method that I invented, we can

1 decode a couple thousand things very well. But for some other
2 applications that we're interested in, that we don't do today, it
3 would be nice if we could decode a million things. And this
4 variant of the scheme would actually work well for those very big
5 numbers. So it's something that has, I think, very great
6 potential for the future.

7 Q Do you recall who suggested adding binary oligo
8 encoding as one of Dr. Czarnik's research goals?

9 A I couldn't say for sure, but it possibly could have
10 been myself even.

11 Q And why did you suggest that, if you were the person
12 who suggested it?

13 A If I suggested it -- I remember thinking this would be
14 a nice thing to be working on. It was because it was not in the
15 commercial path of what we were doing, so it was not something
16 that we immediately depended on, but it would have given us new
17 opportunities and new areas, and it built on work that was already
18 done. So it wasn't starting something out from scratch. It was
19 taking a lot of things we already had and using them in a somewhat
20 new way. I thought it would actually be a very nice, elegant,
21 nice piece of scientific work to extend what we were doing.

22 Q Was it your view if Dr. Czarnik applied himself and
23 worked toward that goal it would be of business value to Illumina?

24 A Absolutely.

25 Q How do you compare the binary oligo decoding to the
26 immunocoding goal that was proposed by Dr. Czarnik himself?

27 A I actually preferred the oligo decoding version. I
28 thought it was more practical for a number of reasons.

1 Q So in terms of level of difficulty of getting
2 feasibility shown, which did you think was easier?

3 A You know, the thing about research is these are all
4 sort of judgment calls. Things you thought were easy actually
5 turn out to be hard. Things you thought were hard turn out to be
6 easy. But I'd say -- I'd have to say probably the oligo decoding
7 initially, anyway.

8 Q Now let's go back to Cardiff again in the summer of
9 '98. Do you recall having a discussion with Dr. Czarnik about his
10 performance while you were still at Cardiff?

11 A Yes, I do.

12 Q Can you describe what that meeting was like and what
13 that discussion was like?

14 A Was like?

15 Q Where were you, who was there.

16 A Okay. I think this was a meeting initiated by -- I'm
17 pretty sure initiated by John Stuelpnagel. Had some concerns
18 about Tony's performance. We went off-site. We actually just
19 walked around outside in Cardiff, and --

20 Q Near some railroad tracks?

21 A Yeah. And it was -- To me it was a little bit
22 uncomfortable, actually. This is -- These are the guys who are
23 sort of building this whole company, and we're having to talk
24 about performance at this early stage. It's difficult.

25 But I don't recall exactly what was said, but my overall
26 impression was that Dr. Czarnik really wasn't taking these
27 concerns too seriously. That actually bothered me. He wasn't
28 acknowledging that it was a problem. He was I think saying what

1 are you guys worried about, type of thing.

2 Q Okay. Are you sure this occurred while you were still
3 at Cardiff?

4 A Yes.

5 Q And then --

6 A We spent most of our time inside in a little conference
7 room sitting around a conference table, so this was a meeting, you
8 could call it, where we're actually walking around outside in the
9 bright sunshine. So I think that helps me remember it, actually.

10 Q Why did you go outside to discuss this?

11 A Privacy. You know, again these are the key people in
12 the company, and if you are discussing performance issues, you
13 don't want people, everyone else, to be worried and distracted
14 from their work.

15 Q And to your observation during that meeting, was it
16 pretty clear Dr. Stuelpnagel was concerned about Dr. Czarnik's
17 performance rather than just occasional absences from the office?

18 A He was concerned about his performance.

19 Q I think when Mr. Pantoni was questioning you you
20 started to explain yourself in terms of some of the concerns you
21 had about Dr. Czarnik after his breakdown. So let me ask you,
22 after his breakdown, going forward through the time that he's
23 still employed there, did you ever again, besides that one trip
24 you took to New Jersey where you discussed this with Dr.
25 Stuelpnagel, did you ever again raise a concern about him
26 potentially having a breakdown?

27 A I don't recall ever doing that again.

28 Q Did you ever have a concern that this might happen

1 again at Illumina?

2 A You know, shortly after the breakdown, much to my
3 surprise, the next week, Dr. Czarnik showed up at work and he
4 seemed absolutely fine. More to my surprise, he said there was no
5 way he was going to get this grant application done. He got it
6 done. So everything seemed to be back on an even keel. So, you
7 know, to me the incident was over.

8 Q Prior to April of 1999 when he had this breakdown
9 incident, had Dr. Czarnik ever offered you the position of CSO?

10 A He -- let's see. Prior to the -- Yes, I believe he
11 did, yes. I believe that was prior to the breakdown.

12 Q Can you describe how that happened?

13 A He asked me -- I felt it was more a personal level, to
14 discuss matters with him, and we went for a walk outside the
15 building again, around the block.

16 Q Is this at Cardiff or --

17 A It is at Towne Centre Drive. So I think it was a
18 longer walk. It was a bigger block.

19 So I don't recall all the things we discussed. We talked
20 about a number of things. But it was clear that Dr. Czarnik was
21 not completely comfortable in his role as CSO of the company, and
22 he actually offered that position to me.

23 Q What was your response?

24 A I felt he was having sort of a crisis of confidence,
25 and because he'd come to me for help, you know, I tried to make
26 him feel better about it. I told him that I thought he should be
27 the CSO of the company; that although right now the molecular
28 biology part which I ran was the most important thing for the

1 company, we all had high hopes for the chemistry part under his
2 leadership eventually making a big contribution to the company.
3 So the chemistry part sort of, you know, because it was more
4 immature at that stage under Dr. Czarnik's leadership, I thought
5 having the CSO be a chemist would help encourage that part of the
6 company. I wanted to see a company that was strong in molecular
7 biology and strong in some very exciting chemistry applications
8 that we still haven't developed today.

9 So I should say being offered the CSO position is something
10 that's very attractive. I mean it has more status, has a higher
11 salary, it was certainly a role I could fill. I get called all
12 the time by headhunters wanting me to be CSO of this company or
13 that. I could very easily have stepped into that role. The
14 reason I didn't was because I think partly when someone comes to
15 you for help, you don't want to take their job, you want to help
16 them.

17 Q Let's talk about another incident where he came and
18 showed emotion. Let's go to the breakdown incident. Do you
19 recall that when Dr. Czarnik entered the office, do you remember
20 what his demeanor was like?

21 A At the breakdown incident?

22 Q Breakdown incident when he came into --

23 A To the best that I can recall, he seemed calm, but he
24 seemed, I guess you could say, stressed. I don't recall exactly
25 why, but I had a sense that there was some issue, some problem we
26 had to discuss.

27 Q Do you recall that I think you said this was a very
28 short meeting? Do you recall about when he started to show

1 emotion and broke down crying? Was that immediately or was that
2 some later time in the meeting?

3 A I think it was fairly shortly into the meeting. The
4 way I remember it, and you know this is going back awhile, he
5 pretty matter of factually stated that he wasn't going to be able
6 to complete this grant, and then there was some questioning. Dr.
7 Stuelpnagel and myself were asking him to just sort of fact
8 finding to figure out what the issues were, what was going on.
9 And that phase, to my recollection, he started to sort of lose it,
10 show signs of breaking down.

11 Q During that questioning process, did Dr. Stuelpnagel
12 yell at him, do you recall that?

13 A I'm pretty sure that Dr. Stuelpnagel didn't yell at any
14 point. He's not a yeller.

15 Q Do you recall at any point that Dr. Stuelpnagel tried
16 to stop you from speaking by holding up a finger at you?

17 A I don't recall that. Usually I get my word in anyway.
18 If people try to stop me, I at some point get my word in. So --
19 but I don't recall that.

20 Q Do you recall any point during the breakdown incident
21 where John Stuelpnagel suggested to Dr. Czarnik that he should
22 leave the company?

23 A No. I don't recall Dr. Stuelpnagel making such a
24 suggestion. I recall Dr. Czarnik actually, I think, making such
25 an offer. He's saying he wants to do whatever was needed for the
26 success of the company. I had the impression that he felt bad
27 about this, he felt guilty about this. And he was offering to do
28 -- to step aside and do things like this. We said, you know, in

1 this mental condition, we can't discuss such things. It's not
2 fair to you, it's not good for anyone to -- We said go away, get
3 yourself better, and then let's talk about the future.

4 Q How would you characterize Dr. Stuelpnagel's demeanor
5 after Dr. Czarnik was crying? Was he cruel, abusive in anyway?

6 A No.

7 Q How would you describe his demeanor?

8 A He, to the best that I can remember, he was sympathetic
9 and just I think we ended this meeting fairly shortly after that
10 point. Recommended to Dr. Czarnik that he should go and get
11 himself better, and I was doing the same thing. So his demeanor
12 to my recollection was always calm. I think initially -- He often
13 has quite a stern look on his face when he's dealing with any
14 serious matter, and --

15 Q This is Dr. Stuelpnagel?

16 A Dr. Stuelpnagel. So I think initially he was perhaps
17 looking a bit stern, but certainly nothing more than that.

18 Q By the way, do you attend any of Illumina's scientific
19 advisory meetings?

20 A I do.

21 Q Do you recall what role Dr. Czarnik played in
22 recruiting SAB members?

23 A The best of my recollection, he didn't really recruit
24 any SAB members.

25 Q Did you ever see how he ran SAB meetings?

26 A I did.

27 Q How would you characterize his management of the SAB
28 meetings that he ran?

1 A It was pretty haphazard. SAB members, I should say,
2 are people, eminent scientists, people you pay a lot of money to
3 come and give you advice. You have to pay their transport and
4 everything else. You really want to get the most out of them when
5 you get them in. It's really good to prepare beforehand, to set
6 an agenda, work on the topics you are going to talk about, give
7 them a chance to prepare, and very little of that was done.

8 Q Let's jump ahead now to the year 2000, to about June of
9 2000. We're now -- Illumina was now located at the Towne Centre
10 Drive facilities. Did you have another walk about with Dr.
11 Czarnik initiated about that time frame?

12 A Yes.

13 Q What did you discuss with him during that walk-about?

14 A I don't recall all the things we discussed. Quite a
15 long walk. But I recall just a couple of the things. One, we had
16 a discussion that I regretted, actually, because it was clear from
17 an e-mail afterwards that it sort of created some bad feeling,
18 that I wasn't very happy with the performance or some of the --
19 some of the -- the performance of the chemistry group that was
20 his responsibility at the time when -- back when he was CSO. And
21 I just regret that that ever came up, basically, because it seemed
22 to be a surprise to him.

23 Q This is June of 2000 when he's already a research
24 fellow?

25 A Yes. And the other thing, which actually --

26 Q So he was surprised when you raised those concerns
27 about his chemistry group?

28 A He seemed to be surprised, yes, and he actually

1 expressed that in an e-mail afterwards. So I just closed that
2 topic as quickly as possible.

3 The other was I had heard, and I don't remember exactly from
4 whom, whether it was Jay Flatley or Dr. Stuelpnagel or someone
5 else, that Dr. Czarnik was taking some legal action at that time,
6 and that he was -- I think Dr. Walt was trying to mediate things.
7 And so I was very concerned about this, and I raised it with him,
8 and I recall that initially there was some confusion, because Dr.
9 Czarnik interpreted my asking about legal action as asking about
10 whether or not he was going to sue Illumina, and he said, you
11 know, he was saying no, and I was saying I heard there's legal
12 action.

13 Then we established what we're talking about, that he had in
14 fact retained a lawyer, so on, and I just asked him to think
15 carefully about this, the effect it would have on the morale of
16 the people in the company, particularly people who used to work
17 for him, the way he would be perceived by people who -- some
18 people who regarded him very positively, people who worked for
19 him, and whether this was the wisest course of action overall.

20 And he said something along the lines of, I think trying to
21 reassure me, "Don't worry, I'm not going to sue Illumina. This is
22 just part of negotiation I'm having with Jay," and he said --
23 Then he said something along the lines of, "It's going very well,"
24 and he smiled and he looked very satisfied, and I was a bit
25 disturbed by that. It sounded to me like a very serious matter
26 and he seemed calm and quite happy about it.

27 Q You also mentioned that you own approximately 900,000
28 shares?

1 A About 900,000.

2 Q Were all those shares given to you by the company or
3 did you actually purchase some of those shares?

4 A I purchased a sizable fraction of those shares.

5 Q Can you estimate how much money you spent for those
6 shares you bought?

7 A I think I purchased -- I think I spent probably
8 \$350,000, roughly.

9 Q When did you buy those shares, do you recall?

10 A It was in the Series B round, so '98.

11 Q Have you sold --

12 A Most of them. I also bought some shares at the IPO, I
13 bought some shares in the Series C round.

14 Q So you've invested some money?

15 A Yes, I have.

16 Q Have you sold any of your Illumina stock?

17 A I have not sold a single share of Illumina stock, and
18 that's because I believe in the technology. If you buy shares,
19 you hold onto them, it means you believe in the technology.

20 Q Did I understand your testimony that now as a research
21 fellow your vesting rate is about half of what it was before you
22 became a research fellow?

23 A That's right.

24 Q Did you agree to that in writing?

25 A Yes.

26 Q So what would happen as far as you understand if you
27 were to leave Illumina, what would happen to those shares that
28 have not vested?

1 A They would be repurchased by the company.

2 Q In terms of the research goals that were provided to
3 Dr. Czarnik as a research fellow, in terms of the goals you sent
4 to the scientists who work for you, do you have a philosophy in
5 how you gauge what to prepare as goals for a scientist?

6 MR. PANTONI: Objection, relevance.

7 THE COURT: What's the grounds of the objection?

8 MR. PANTONI: His philosophy in terms of how to give
9 goals to the subordinates is irrelevant.

10 THE COURT: Sustained.

11 MS ESPINOSA: Q With respect to the goals for Dr.
12 Czarnik, the research fellow goals, you said that you might have
13 been a person who suggested the binary oligo encoding goal.

14 A I might have, yes.

15 Q If that's the case, what is your general philosophy in
16 setting goals for a scientist?

17 MR. PANTONI: I'll object, it calls for speculation,
18 it's foundational. He says he doesn't know if it was his idea.

19 MS ESPINOSA: We've heard a lot of testimony about
20 aggressive goals. I want to be sure what that means with this
21 witness, because he did participate in --

22 THE COURT: You can ask him what he recalls about
23 setting those particular goals.

24 MS ESPINOSA: Q Dr. Chee, you did participate in a
25 meeting where Dr. Czarnik's research fellow goals were discussed,
26 right?

27 A Right.

28 Q Can you recall from that meeting, what happened during

1 that meeting, how the goals were set for Dr. Czarnik, especially
2 the binary oligo, because that was something new that was added to
3 his goals?

4 A When you say how the goals were set --

5 Q What was the mindset of the people in that setting
6 setting the goals?

7 MR. PANTONI: Objection, calls for speculation.

8 THE WITNESS: I can tell you what my mindset was.

9 THE COURT: Yes. Overruled. Confine it to your
10 mindset.

11 THE WITNESS: So setting goals is something that I take
12 fairly seriously. It's hard to do. Keeping in mind that this was
13 a research fellow position, it was more on the scientific end of
14 the spectrum, and research fellow is a very senior position. So
15 this is someone now in a position, because of their expertise and
16 position, to do more groundbreaking research that might really
17 open up new possibilities for the company.

18 I sort of applied a philosophy that has always stood me in
19 good stead from my -- When I was a Ph.D student, I was given
20 advice by actually person by the name of Cesar Milstein, who
21 received a Nobel prize for his work on monoclonal antibodies, and
22 some of the companies in San Diego and around the U.S. are based
23 on his work. He invited me to dinner at his college when I was
24 sort of very young and impressionable. He asked me when I was
25 just starting my Ph.D, he asked me about my work, and this is very
26 formal dinner, this is a high table in the college and the master
27 of the college and all kinds of eminent people were there, and he
28 said to me something which I will remember for the rest of my

1 life. He said -- because he said it very pointedly, he said,
2 "When you are choosing goals, when you are choosing things to work
3 on, you should always choose things that are -- that would make a
4 big difference if you are successful at them, and you should
5 choose things at the very limit of your abilities, you should
6 choose things that really test yourself, because if you are
7 successful, you'll make a real difference in the world."

8 So I've applied this to myself and applied this to people
9 around me, that you try and come up with something that, if they
10 succeed at it, it's going to be something they look back and they
11 are really proud of and they've made the world a better place.

12 MS ESPINOSA: Q That was your mind set?

13 A Yes, it was. So those goals are things that weren't
14 directly relevant to the things that we're doing commercially.
15 They were things that, if we were successful, would open up new
16 opportunities for the company and new areas. Instead of decoding
17 2000 things, we could decode a million things. That's a
18 breakthrough.

19 MS ESPINOSA: That's all I have.

20 How much time do I have?

21 THE COURT: You actually have more time. You've gone
22 about 55 minutes.

23 MR. PANTONI: I'm going to need time.

24 THE COURT: We're going to have to finish this witness
25 before lunch. There's probably some recross-examination.

26 MS ESPINOSA: Q Let me ask you one quick question on
27 the stock again. At the time you purchased your Series B stock, I
28 think you mentioned you purchased some of that. Could any of the

1 other senior managers have purchased some of the stock at that
2 time as well?

3 A Yes.

4 Q Could Dr. Czarnik have purchased stock?

5 A Absolutely. In fact I think he was offered that
6 opportunity.

7 Q And did he, to your knowledge?

8 MR. PANTONI: Objection, relevance.

9 THE COURT: Overruled.

10 THE WITNESS: To my knowledge, he didn't.

11 MS ESPINOSA: Thank you, your Honor.

12 THE COURT: Cross-examination

13 REDIRECT EXAMINATION

14 BY MR. PANTONI:

15 Q Dr. Chee, you were asked some questions about doing
16 quality control checks on dyes. Dr. Czarnik had testified there
17 are relatively short tests that can be done to QC or test dyes to
18 make sure they are what they say they are on the label. You were
19 asked couldn't Czarnik have performed those tests if he wanted to.
20 Do you recall that?

21 A I think so.

22 Q Isn't it true that the dyes that were used in decoding
23 experiments were dyes used by molecular biologists under your
24 supervision?

25 A Yes, that's true.

26 Q Chemists in the summer of 2000 were not using dyes,
27 were they?

28 A Actually I don't know. They may have been.

1 Q But the people who were actually using the dyes that
2 should or should not have been quality control checked, they were
3 molecular biologists?

4 A The particular experiment we're talking about where
5 there was a mix-up in the dye lot, those experiments, those dyes
6 were being handled by molecular biologists.

7 Q You used this little demonstration here with these
8 bottles.

9 A Yep.

10 Q Can we call this not quite red set, but can we call
11 this green, red and blue, is that what it's intended to show?

12 A Sure. If you like call them green, red and blue.

13 Q These are the chemicals used in the 768 decode
14 experiment, green, red and blue, is that right?

15 A You are now moving to a scientific footing where these
16 things have fluorescent emission and particular wavelength. I
17 don't recall the exact wavelengths. I really don't think it
18 matters whether those wavelengths were red, green and blue, and
19 I'm not prepared right now to say whether they in fact were red,
20 green and blue.

21 Q They may have and may not?

22 A That's right.

23 Q Let say for purposes of discussion.

24 A For purposes of discussion I'm happy to assume that.

25 Q First of all, the dyes are not visible to the naked eye
26 when they are being used, isn't that correct, the colors of the
27 dyes?

28 A The colors of the dyes themselves, if you make a

1 concentrated solution of the dyes, they are visible. But in this
2 sort of microscopic experiment, no, they are not.

3 Q And when you are doing the decoding to check what color
4 shows up, it's not done with the naked eye, it's done by a
5 computer system?

6 A That's right, it's done with an optical detection
7 system. Like you take a picture with a digital camera. We have a
8 scientific version of that that takes a picture of this through a
9 microscope and then the processing of the data is done by the
10 computer.

11 Q Is it accurate then to know what colors show up that
12 you use filters to only use certain wavelengths?

13 A That's right.

14 Q If you are using green, red and blue dyes, you would
15 use a filter in separate steps, a filter to let through only green
16 wavelength color and then a filter to let in only red wavelength
17 color and a filter to let in only blue wavelength color, right?

18 A So there's different ways of doing this. The filter is
19 one way. That was the method we were using. But not -- But it
20 doesn't have to let in only. Sometimes filters are used that are
21 letting in about a certain wavelength or below a certain
22 wavelength.

23 Q What about the filters used in 768?

24 A Actually at this stage I don't recall what exact
25 filters we were using, but they were generally designed to allow
26 discrimination of those different colors.

27 Q Allow discrimination of red -- I'm sorry, I'm pointing
28 to green and red. Green, red and blue, correct?

1 A Yes, for purposes of discussion, yes.

2 Q What colors do you want to call this?

3 A I don't know. Sort of a murky olive green, I guess.

4 Q There was not a filter used in the 768 experiment to
5 let through murky olive green?

6 A Now we're --

7 Q Yes or no, was there a filter used to look through this
8 murky green color?

9 MS ESPINOSA: Objection, foundation, your Honor.

10 THE COURT: I think he ought to be able to answer the
11 question. Go ahead and answer.

12 THE WITNESS: Yeah, there's no specific filter for
13 that. But actually I should say we need to be careful here.
14 We're getting into a fluorescence is a somewhat different
15 phenomenon. The filters were adequate for analyzing that.

16 Q There wasn't a specific filter?

17 A There wasn't a specific filter for that.

18 Q You told the jury this experiment was a huge success,
19 the 768 decode experiment?

20 A Yes.

21 Q You are not backing off on your testimony, are you, Dr.
22 Chee, when you found out about the mislabeling of the dye, you
23 concluded that the experiment should be redone?

24 A No, I had a whole list of concerns about that
25 experiment.

26 Q I just want to be sure --

27 A When you talk about success, the question is whether
28 you are talking about the feasibility of decoding at that

1 complexity or whether or not the process could be improved. I
2 have all kinds of concerns, and the mixed-up dyes was the least of
3 them, about improving the experiment.

4 Q You are not backing off from your testimony that as a
5 result of learning about the mislabeling of the dye, you concluded
6 you had to redo the experiment?

7 MS ESPINOSA: I'll object to the form of the question.

8 THE COURT: Sustained.

9 MR. PANTONI: Q Take a quick look at Exhibit 269,
10 please.

11 This is the e-mail you sent to the roadshow team, July 13,
12 2000?

13 A Yes.

14 Q You say here, "Based on the results to date I think
15 that once we combine two sets of 768 sequences, we'll have a
16 thousand useful addresses."

17 A Yes.

18 Q Does that intend to mean that once you combine the
19 results from the first 768 decode experiment done the first half
20 of 2000 with the results from the summer of 2000, then you'd have
21 1000 useful addresses?

22 A I don't recall exactly which experiments were, but we
23 have two different sets of sequences that could be used together,
24 yes.

25 Q There had been two 768 decode experiments run by this
26 point?

27 A Yeah, right. At least two.

28 Q And when you are saying once you combine the results,

1 you'd have a thousand useful addresses, you were incorporating
2 both the first and second --

3 MS ESPINOSA: Objection to the extent he's
4 mischaracterizing prior testimony. So I object to the foundation.

5 THE COURT: Overruled. You may answer.

6 THE WITNESS: Yeah. I'm not actually -- I'm not sure
7 that I'm -- I might not be just inferring things. Let's me read
8 this e-mail.

9 So I don't have a specific recollection, as I've testified,
10 to which 768 experiment was done when, and so I don't think I can
11 answer your question because I can't tell from that first sentence
12 I've written there, "based on the results to date." I think that
13 once we combine two sets of 768 sequences, we'll have a thousand
14 useful addresses, approximately, whether I'm talking about -- Oh,
15 okay. Sorry, the next bit it says that. "We have now tested two
16 different sets." Okay, so I can't say that.

17 MR. PANTONI: Q These two sets you tested were
18 basically the first 768 and the second 768?

19 A Most probably.

20 Q You were happy with the results of both those
21 experiments?

22 A Yes.

23 Q You mentioned Gali Steinberg's work. Was the work that
24 she did in the area of -- was it binary?

25 A So we seem to keep running into this issue of what you
26 define as binary. Because I'm familiar with all kinds of nuances
27 with this decoding. If you define it very narrowly, no. If you
28 define it a bit broader, yes.

1 Q And you agree that nobody is working on binary decoding
2 today, right?

3 A So actually it's now a company of about 200 people and
4 I don't monitor closely all the work that's going on, particularly
5 in areas of chemistry, but to my knowledge people aren't working
6 on it today.

7 Q To your knowledge, there are no plans to resume work in
8 this area, correct?

9 A To my knowledge, there's no immediate plans to resume
10 work in this area.

11 Q Miss Espinosa asked you about some events that took
12 place in the summer of '98 at Cardiff and your impression of Dr.
13 Czarnik's work ethic in the summer of 1998.

14 A Yes.

15 Q Dr. Stuelpnagel testified about notes that he made
16 after that, in early 1999, and he read notes that in his writing
17 that said "Confident that I've hired good R&D managers." My
18 question is did you have any discussions with John Stuelpnagel in
19 the first part of 1999 after you moved from Cardiff where he told
20 you he was confident that he's hired good R&D managers?

21 A I don't recall, sorry.

22 Q Now, when you were testifying about the April 6, 1999
23 breakdown meeting, you testified that you told Dr. Czarnik
24 essentially go away, get better, and then let's talk about the
25 future?

26 A Somewhat more sympathetically than that, but yes.

27 Q Let's talk about the second part of that, "Then let's
28 talk about the future." Did you ever have that discussion with

1 Dr. Czarnik when you told him, "Go away, get better, then we'll
2 talk about the future"?

3 A I'm not sure that I did. I don't recall having that
4 discussion. But I wouldn't have expected to. I wasn't Dr.
5 Czarnik's -- So I wouldn't necessarily have been expected to be
6 involved in further discussions on that.

7 Q Did you have any information as to whether Dr.
8 Stuelpnagel ever had such a discussion?

9 A No, I don't recollect hearing about that.

10 Q Following up on the issue of how many shares you own,
11 how many you bought, Miss Espinosa asked you some questions about
12 what you bought. How many shares were you -- did you receive by
13 means of grant at the inception of your employment?

14 A I think it was in the range of a little over half a
15 million shares in total over the whole period of time I've been at
16 Illumina, very roughly.

17 Q Those are shares, approximately, those were the shares
18 you were granted and didn't have to buy?

19 A That's right.

20 Q And do I understand you correctly that even after you
21 became a research fellow, although the rate of vesting changed,
22 the company never attempted to buy back shares that had initially
23 been granted?

24 A Yeah, company never attempted to -- but -- yeah.

25 Q Okay. Who was that Noble Prize winner who gave you
26 some advice on setting goals?

27 A Cesar Milstein gave me advice on, you could say,
28 setting goals, yes.

1 Q He told you to set goals, push people to the very limit
2 of their abilities?

3 A He was giving me that as personal advice, push myself,
4 but I think it was good advice.

5 Q Did he advise you that people who don't meet goals
6 should be fired?

7 A No, he didn't. That was not at all -- It was very
8 friendly dinner conversation we were having. We weren't talking
9 about -- This is an academic setting. We weren't talking about HR
10 matters.

11 Q Are you familiar with in terms of setting goals, an
12 acronym SMART, setting smart goals?

13 A I've heard that term used.

14 Q You've heard that used by John Stuelpnagel?

15 A I think I may well have heard it used by Dr.
16 Stuelpnagel.

17 Q Do you know what the R means, S-m-a-r-t?

18 A No.

19 Q Nothing further.

20 THE COURT: Anything further?

21 MS ESPINOSA: Nothing further, your Honor.

22 THE COURT: Thank you.

23 THE WITNESS: Thank you.

24 THE COURT: We'll take our noon recess at this time.

25 We'll be in recess until one o'clock. Please remember the

26 admonition not to form or express any opinions about the case.

27 We'll be in recess until 1:00 p.m., 1:00 p.m.

28 (Lunch recess taken at 11:55 a.m.)

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1 San Diego, California, Tuesday, June 25, 2002, 1:05 p.m.

2 * * * *

3 (out of the presence of the jury)

26 (in the presence of the jury)

27 THE COURT: The record will reflect all jurors are
28 present, counsel are present. Who is the next witness?

1 MR. PANTONI: Kevin Gunderson.

2 THE COURT: Very well.

3 (witness sworn)

4

5 KEVIN LEE GUNDERSON

6 Plaintiff's witness herein, testified as follows:

7

8 THE CLERK: Thank you, please take the witness stand.

9 Would you please state your full name and spell your last
10 name for the record?

11 THE WITNESS: Yes. My full name is Kevin Lee
12 Gunderson.

13 THE CLERK: Could you spell your last name, please?

14 THE WITNESS: G-U-N-D-E-R-S-O-N.

15 THE CLERK: Thank you.

16

17 DIRECT EXAMINATION

18 BY MR. PANTONI:

19 Q. Good afternoon, Dr. Gunderson.

20 A. Good afternoon.

21 Q. What is your present employment?

22 A. I'm a principal scientist at Illumina.

23 Q. When did you first start working at Illumina?

24 A. It was October, it was October 1st, 1998.

25 Q. Prior to joining Illumina, you were employed by a
26 company called Affymetrix?

27 A. That's right.

28 Q. Who was your boss at Affymetrix?

1 A. Mark Chee, for the first year.

2 Q. And when you joined Illumina in October of 1998,
3 who was your boss then?

4 A. Mark Chee.

5 Q. And how long did Mark Chee continue to be your
6 immediate supervisor at Illumina?

7 A. He was my immediate supervisor up until I think
8 last Friday.

9 Q. Okay. Now, you were the principal scientist with
10 respect to the coding experiment called the 768 decoding
11 experiment?

12 A. I led the decoding effort. It was a collaborative
13 product between chemistry, bio informatics and molecular
14 biology.

15 Q. You are the lead scientist on the decoding
16 efforts?

17 A. On the decoding side.

18 Q. The actual decoding was run under your direction
19 and supervision?

20 A. Yes.

21 Q. Now, the 768 decoding experiments, they were
22 actually two experiments run in the year 2000, is that right?

23 A. Yeah, there were a couple separate experiments
24 that we tried to decode 678 B-types.

25 Q. Both were conducted under your supervision?

26 A. Yes.

27 Q. When did the first 678 decoding experiment begin?

28 A. That was in the Spring of 2000.

1 Q. Do you happen to recall the month?

2 A. It was probably April or May at the latest.

3 Q. Now, this first 678 decoding experiment didn't
4 work, did it?

5 A. No. The intensities were too low to really get
6 good results.

7 Q. The results from the first 768 decoding
8 experiments were so poor that you couldn't get any meaningful
9 data, correct?

10 A. That's correct. And I thought they would be poor.
11 The bead intensities at that time were too low. Chemistry
12 hadn't perfected the immobilization chemistry at that time.

13 Q. Let's take a look at Exhibit 269. This is an
14 email from Mark Chee sent on July 13, 2000. You have seen
15 this earlier in the case, Dr. Gunderson?

16 (marked for id: 269: 7-13-00 Chee email)

17 A. Yes.

18 Q. Mark Chee refers to having, by July of 2000,
19 having tested two different sets of 768 beads. Those were
20 the two 768 decoding experiments, right?

21 A. I'm not sure what he's referring to. I will have
22 to read it again?

23 Q. Referring to this language here, "By July 13 of
24 2000," he states, "we've now tested two different sets of
25 768."

26 A. Yeah. I'm not sure what he's referring to there.

27 Q. Well, the only two sets of 768 bead experiments
28 that you are familiar with by July 13 of 2000 would have been

1 the first experiment that you've already described and then
2 the one that was done in the summer, right?

3 A. Yeah. We tested subsets of the 768 prior to that.
4 We had model 16 that were based on both 768 series that had
5 worked.

6 Q. And the first set of 768, that experiment just
7 didn't work?

8 A. Intensities were too low, on average.

9 Q. You'd agree the experiment didn't work, correct?

10 A. No. There was certainly a -- we knew where
11 improvement needed to be done. And from our side, we went
12 ahead with that improvement.

13 Q. And again, no meaningful data from the first 768
14 experiment?

15 A. Well, all data is meaningful in some sense. It
16 tells you something. I wouldn't say the data wasn't
17 meaningful. It's meaningless in the sense you didn't
18 accomplish what you wanted to accomplish.

19 Q. The results were so poor from that first
20 experiment you couldn't rely on the data, is that correct?

21 A. No.

22 Q. Is it correct or incorrect?

23 A. You couldn't rely on the data. I wouldn't use my
24 data for choosing my sequences in the screen.

25 Q. The second 768, when did it begin?

26 A. The planning for it began in the beginning of June
27 of 2000. It was, the decoding itself was actually conducted
28 in July of 2000. But prior to that, a lot of preparation of

1 reagents was being undertaken.

2 Q. Okay.

3 A. Basically, from the month of June, first week of
4 July or so.

5 Q. Now, how many colors, Dr. Gunderson, were used in
6 the 768 decoding experiment?

7 A. There were actually three colors used. We were
8 planning on using four colors, but in the end we only used
9 three colors.

10 Q. Let's take a look, please at Exhibit 257.

11 (marked for id: 257: 6-30-00 Chee email)

12 Exhibit 257 is a copy of an email from Mark Chee
13 dated June 30 of 2000. It states, "Kevin's group will do a
14 two-color decoding with the 768 codes next week."

15 You never did two color decoding in the Summer of
16 2000, did you?

17 A. No. Mark was under the impression that we might
18 do two-color, and that was our fall back position. We would
19 have done two-color, but we thought three-color would do the
20 same job.

21 Q. You weren't even planning on doing two-color
22 decoding at that point in time, were you?

23 A. No, we discussed it, it was an option.

24 Q. Let me read from your deposition testimony. Do
25 you recall having your deposition taken in this case?

26 A. Yes, I do.

27 Q. You gave sworn testimony in that deposition?

28 A. Yes.

1 Q. I'm going to read why your deposition, at Page 70,
2 where I asked you specifically about this June 30, 2000
3 event. And your testimony was as follows.

4 "Q. Exhibit 1 appears to be an email
5 sent from Mark Chee to Jay Flatley and others,
6 dated June 30, 2000 and Jay Flatley's response on
7 the same date. And in Mark Chee's email it states
8 that, 'Kevin's group will do a two-color decoding
9 with the 768 Illumina codes next week.' Did you,
10 did you do two-color decoding at about that time?

11 "A. No.

12 "Q. Is there any particular reason why you
13 did not?

14 "A. We did three-color.

15 "Q. So is it your belief that that's a typo
16 or that there was a change in plans?

17 "A. I can't speak for Mark. I wasn't
18 planning on doing two-color decoding."

19 So does that refresh your recollection, sir, that
20 you were not planning to do any two-color decoding?

21 A. No. I may have discussed two-color with Mark, we
22 discussed a lot of things, but, you know, I make my own
23 decisions in the end.

24 Q. And you weren't planning on doing two-color
25 decoding, were you?

26 A. No. I made the decision that three colors should
27 work.

28 Q. Now, the three colors that were actually used in

1 the 768 decoding experiment, could you tell us what those
2 colors were?

3 A. Well, I can you the particular dye, but we refer to
4 them as blue, green and red. But those are, you just refer
5 to them, they are spectral colors are roughly those, but --

6 Q. Okay. So for ease of convenience, we will call
7 them blue, green and red?

8 A. Yes.

9 Q. Okay. And when the decoding experiments are done,
10 the beads are actually painted or coated with one-third blue,
11 one-third green and one-third red, is that right?

12 A. Roughly, that's the case. You can see it out
13 among the exhibits there, but, yeah.

14 Q. And I take it it's important in the -- in doing
15 decoding to track the colors that are used to tag individual
16 beads?

17 A. Yeah. That's how we do our decoding, we attach a
18 unique color signature to each bead type, which tells us what
19 that bead is.

20 Q. Okay. Could we please take a look at Exhibit
21 354.

22 (marked for id: 354: 7-12 Gunderson-Chee memo)

23 Exhibit 354 is a copy of a memo from Kevin
24 Gunderson to Mark Chee, dated July 12 of 2001. And this is a
25 memo you wrote, isn't that right?

26 A. That's correct.

27 Q. And this memo concerns the 768 decoding experiment
28 that was conducted in the Summer of 2000?

1 A. That is correct.

2 Q. So you wrote this memo approximately a year after
3 the experiment was conducted?

4 A. Yes.

5 Q. Mark Chee asked you to write this memo, true?

6 A. Yeah, he asked me to write a memo, reviewing the
7 768 experiment from the year, the summer before.

8 Q. Did he say why, did Mark Chee say why he wanted
9 you to write a memo about this experiment about a year after
10 the experiment was conducted?

11 A. No, he didn't say why. I didn't ask him. And I
12 have no idea why it was being written.

13 Q. He's your boss. He tells you to write a memo, you
14 write a memo, right?

15 A. Pretty much.

16 Q. And in the summary section of the memo, I take it
17 you summarize the 768 decoding experiment?

18 A. Yeah.

19 Q. And you wrote in your memo, in the summary
20 section, quote, "The quality and accuracy of the data may
21 have been somewhat compromised by the mix up in a lot of dye
22 from Molecular Probes"?

23 A. That's correct.

24 Q. That's your belief, sir?

25 A. Oh, yes. Yes.

26 Q. Did you report to Dr. Chee, back in the Summer of
27 2000, that the quality and accuracy of the data may have been
28 somewhat compromised by the mix up in the dye lot?

1 A. Yeah, I did discuss that with him.

2 Q. Back in the Summer of 2000?

3 A. That's right.

4 Q. You are aware, sir, that there were some vials of
5 dye used in the 768 decoding experiment that were mislabeled?

6 A. That's correct. There were -- we usually mixed a
7 large number of vials together in order to do a labeling.
8 They were all labeled the same, but what was actually in the
9 bottle was different than what it said on the label.

10 Q. Okay. Which color was missing?

11 A. There were a series of vials that were labeled
12 with the color green and a subset of them actually had red,
13 so-called red dye in them.

14 Q. So the label said green, but there was actually
15 red inside the vials?

16 A. That's right.

17 Q. And the mislabeled dyes were actually used in the
18 experiment, right?

19 A. Correct.

20 Q. Now, Dr. Gunderson, as a scientist, you were
21 concerned when you learned about the mislabeled dye, weren't
22 you?

23 A. Naturally.

24 Q. Because you thought it compromised the data?

25 A. Well, reduced the quality. I knew as soon as I
26 saw the data that the separation wasn't as good as I had
27 expected from some earlier studies, but I didn't know the
28 reason for it at that moment.

1 Q. Is it correct, sir, when you were conducting this
2 experiment you knew something was wrong and then when you
3 found out about the mislabeling that explained what was
4 wrong?

5 A. That's right. I -- looking at the data, I
6 immediately knew that it wasn't of the quality that I had
7 expected.

8 Q. And when you found out about this mislabeling of
9 the dye, you thought that explains it?

10 A. That's right.

11 Q. Now, when you found out about the mislabeling, you
12 questioned in your own mind whether you could have confidence
13 in the accuracy of the data from this experiment, is that
14 right?

15 A. I had confidence. I questioned, you know, what
16 the robustness of the assay would be, whether we could really
17 be confident that the sequences we screened would behave well
18 in a manufacturing setting where this was actually, you know,
19 destined for. So, yeah, I planned further experiments, but
20 it didn't, it didn't -- in fact, I could see the separation
21 visually, so I knew we could still decode, nonetheless,
22 hundreds of bead types.

23 Q. When you found out about the mislabeling, you
24 questioned the accuracy of the data, true?

25 A. Of course. I'm a scientist, I question
26 everything.

27 Q. In fact, sir, you still question whether the data
28 from that experiment was accurate because of the mislabeling,

1 don't you?

2 A. Yes. From those 500 bead types, I actually
3 selected 2 -- 150 bead types confidently, and we went forward
4 with those subsequent to this experiment.

5 Q. But as you sit here today in this courtroom before
6 this jury, you still question in your own mind whether the
7 data from the 768 decoding experiment was accurate?

8 A. On every last bead type, you know, I wouldn't
9 vouch for the accuracy. But for the general gist of the
10 experiment, there was -- my conclusions were completely
11 justified.

12 Q. Let me read some of your deposition testimony on
13 this, on this point, sir.

14 Beginning at Page 87, Line 16:

15 "Q. Did you question whether the
16 mislabeling of the dye might call into question the
17 reliability of the scientific data?

18 "A. I didn't question the overall, you
19 know, conclusions in the experiment, but I
20 questioned, you know, the accuracy and robustness
21 of the data.

22 "Q. In fact, you still question the
23 accuracy of the data due to the reagent problem?

24 "A. Yes."

25 Do you stand by that testimony?

26 A. Yeah. I mean, I wouldn't throw those 517 beads,
27 or whatever they are, into production.

28 Q. After discovering the mix up, the mislabeling of

1 the dye, you immediately stopped using mislabeled dye?

2 A. That's right.

3 Q. And you immediately started planning to redo the
4 experiment, correct?

5 A. We didn't redo the full experiment, we actually
6 changed, changed a number of processes. We actually went
7 back and started reworking our process.

8 Q. But you started -- strike that. When you found
9 out about the mislabeling of the dye, you started planning a
10 new experiment that wouldn't use the mixed-up dye?

11 A. Yeah.

12 Q. Did you talk to Mark Chee about that?

13 A. Yeah. We were in close communication all the
14 time, so most of the things I did I discussed with him.

15 Q. Did you discuss that with him in the Summer of
16 2000, correct?

17 A. Yeah.

18 Q. The dyes that were actually used in that
19 experiment, they were used by molecular biologists, correct?

20 A. They were used by biologists of all sorts and
21 types, went through the biologist tests they were used by
22 chemists.

23 Q. In terms of attaching the dye to the decoding
24 oligos that were used in this experiment?

25 A. Yes.

26 Q. That was done by a molecular biologist named Marc
27 Schneebaum.

28 A. Yeah. We did the attachment.

1 Q. Did anyone check the dye vials to do a quality
2 check before they were used in the 768 experiment to be sure
3 what was inside the vial was what was put on the label?

4 A. No, we didn't check it, we took the manufacturer's
5 word for it. In fact, most scientists still don't check
6 every bottle they get.

7 Q. In retrospect, you believe you would have been
8 checking the dyes?

9 A. If there was that much risk of a mix up, yeah, it
10 would have helped a lot.

11 Q. In retrospect, as you sit here today, you believe
12 you should have been QCing, quality control checking, true?

13 A. Well, in light of what happened, yes.

14 Q. Let's look please at Exhibit 269.

15 Okay. This is the email that we had looked at
16 previously. Scroll down a little. Scroll up to the top.
17 Dr. Chee testified that he forwarded on a Powerpoint, at
18 least one Powerpoint slide, maybe more, to the roadshow team
19 and testified that this blowup I'm about to show was one of
20 the slides that he forwarded to the roadshow team. And
21 again, this is the slide with a Illumina Bates stamp number
22 IL-1560. Let me move it back a little bit. It's not a great
23 view, but can you see it?

24 A. Yes.

25 Q. Okay. Dr. Gunderson, you made this slide, is that
26 right?

27 A. That's correct.

28 Q. Mark Chee asked you to make this slide?

1 A. That's correct.

2 Q. Mark Chee asked you to prepare a slide that he
3 wanted to send to the roadshow team, true?

4 A. That was my understanding.

5 Q. He said he wanted this slide for the roadshow
6 team?

7 A. I believe he was going to send it on, yeah.

8 Q. That's what he told you, didn't he?

9 A. Something to that effect.

10 Q. Do you recall that Mark Chee told you that he
11 wanted to make a slide for the roadshow, sort of a pretty
12 picture slide?

13 A. Yeah, something like this.

14 Q. Is that what he said?

15 A. I -- I -- it's two years ago. I don't remember
16 his exact words, but, yeah, something to that effect.

17 Q. All right. Just for the record, I will read in
18 your testimony, because I believe you did use that phrase at
19 deposition. Page 98, Line 1:

20 "Q. And what did Dr. Chee tell you in terms
21 of why he wanted you to make up a slide?

22 "A. I think he told me he wanted to make a
23 slide for the -- a roadshow, sort of a pretty
24 picture slide."

25 Is that pretty much what he told you?

26 A. Yeah, that's a pretty picture.

27 Q. It's colorful?

28 A. Yeah.

1 Q. Now, the point -- strike that. What you were
2 trying to depict on this slide was to show visually that you
3 could see different colors on beads as a result of the
4 decoding process?

5 A. That's right.

6 Q. And you testified earlier that the three colors
7 you used were blue, green and red?

8 A. That's correct.

9 Q. How many different colors do you see in this
10 pretty picture?

11 A. I see roughly, blue, green, red and there's sort
12 of a greenish yellow, or maybe even a white. And, of course,
13 the black spaces where there are no beads.

14 Q. So you see green, red, blue, yellow, white and
15 black?

16 A. Yeah.

17 Q. And yet there were only three colors used in the
18 experiment?

19 A. Correct.

20 Q. Do you recall, Dr. Gunderson, that you left on a
21 vacation on this very day, July 13, 2000, and Mark Chee sent
22 his email to the roadshow team?

23 A. Yeah, I went on vacation then.

24 Q. Were you aware when you went on vacation that Mark
25 Chee had sent your slide on to the roadshow on that day?

26 A. I was unaware of what he did with it once I sent
27 it to him.

28 Q. Dr. Gunderson, when you left on vacation on this

1 day, July 13 of 2000, you believed that the results were too
2 preliminary as of that date for you to have any confidence in
3 the number of bead types that could be decoded, true?

4 A. Well, at that time, yeah, I didn't know -- I mean,
5 this was part of a, a screening exercise. We wanted to make
6 good sequences, so I was very concerned about the quality and
7 the intensity of the brightness of each sequence, that was a
8 primary concern. So I wanted to make sure the screening
9 exercise was worth our time.

10 Q. When you left on vacation on this day, July 13,
11 2000, you didn't have any confidence in the number of bead
12 types that could be decoded as of that day, true?

13 A. I hadn't had enough time to look at the data, you
14 know.

15 Q. Dr. Gunderson, is it correct that you couldn't
16 draw any conclusions with regard to the number of beads that
17 could be accurately decoded as a result of the 768 decoding
18 experiment.

19 MS. ESPINOSA: Objection.

20 BY MR. PANTONI:

21 Q. The one that was conducted in the Summer of 2000?

22 MS. ESPINOSA: Objection, vague and ambiguous as to
23 what he means by "accurate."

24 THE COURT: Sustained.

25 BY MR. PANTONI:

26 Q. "Accurate" means correctly decoding individual
27 beads, true?

28 A. Accurate, yeah, that's the definition of

1 "accurate," you correctly decode a bead type.

2 Q. You got it right, yes?

3 A. Yes.

4 Q. So is it your sworn testimony, sir, that you could
5 not -- you were the principal scientist, you could not draw
6 any conclusions with respect to the number of bead types that
7 could be accurately decoded as a result of this experiment,
8 the 768 decoding experiment?

9 A. It's not quite true. Looking at the image, I was
10 actually -- I could actually distinguish at least three
11 colors. And that made me confident that the decoding was
12 still working. Although you see when you mix some of the red
13 and the green, you get yellow, and that can be caused by the
14 mixing up in dye. But, nonetheless, red is still
15 distinguishable from the greenish yellow, so I knew that
16 decoding was working at some level.

17 Q. But you couldn't reach any conclusions as to the
18 number of bead types that could be accurately decoded as a
19 result of this experiment, true?

20 A. I didn't actually do -- Bio informatics did the data
21 analysis. They were reaching the conclusions, I wasn't. I
22 just looked at the data, and it looked reasonable in terms of
23 being able to classify three different clusters or colors,
24 if you can visually distinguish these colors by eye. The
25 computer element that was used by informatics can do a better
26 job than that. So there's no doubt that we would get three
27 clusters and decoding would occur.

28 Q. I'm simply asking about your conclusions, if any.

1 There did come a point in time, sir, that you did reach a
2 conclusion about the number of bead types that could be
3 accurately decoded as a result of the 768 decoding
4 experiment, right?

5 A. Bio formatics department reached a conclusion.

6 Q. They didn't reach -- strike that. You didn't
7 reach any conclusions about this until the experiment was
8 redone after the roadshow, true?

9 A. I was careful with my conclusions.

10 Q. So is the answer no? The question is: Isn't it
11 true, sir, that you, Dr. Kevin Gunderson, didn't reach any
12 conclusions about the number of beads that could be
13 accurately decoded as a result of the 768 bead experiment
14 until after the experiment was redone after the roadshow?

15 A. No, bio informatics recorded they had 317 bead
16 types. I will take their word for that. The question about
17 accuracy is mostly reproducibility. You can't really talk
18 about reproducible until you decode that bead type again and
19 again and again to show that most of that bead type is
20 decoding. You might be able to decode a bead type, but only
21 be able to decode the top ten percent of the beads of that
22 particular bead type. And those may be decoded accurately,
23 but you've thrown away 90 percent of the beads that was also
24 unacceptable. Although decoding might have been accurate if
25 you were only decoding a small fraction of the bead types,
26 that was unacceptable. We were concerned with accuracy, the
27 total number of beads, decoding robustness, so forth. With
28 one experiment, I wouldn't be able to draw all those

1 conclusions that it was accurate robust, and we were decoding
2 most of the bead types.

3 Q. I will come back to your question about accuracy
4 in a minute. Let me follow-up on something you said. How
5 many different types of beads in total were used during the
6 768 decoding experiment bead experiment in the summer of
7 two,000?

8 A. In a typical array I think these were 20, 30
9 thousand bead types. We have we had four different arrays
10 with 768 different bead types and looked for concordance
11 among four arrays in terms of decoding.

12 Q. But on one array you had 20 or 30,000 different
13 beads?

14 A. Something on that order.

15 Q. And to get any meaningful results, you had to
16 basically throw away a huge percentage of the beads, right?

17 A. No. Bahram has that data.

18 Q. Who has that data?

19 A. Bahram. He is the one that analyzed the data.

20 Q. Bahram Kermani?

21 A. Correct.

22 Q. You understood that most of the beads were
23 essentially thrown away or ignored in the analysis, don't
24 you?

25 A. No, I don't understand that. I thought most of
26 the beads were analyzed and decoded, at least a good, at
27 least 50, 60 percent of them, at least.

28 Q. Let me come back to your testimony at deposition

1 with respect to conclusions, if any, that you reached about
2 the accuracy of the decoding. I want to read your testimony
3 from your deposition at Page 102, beginning at Line 18. Your
4 testimony was as follows:

5 "Q. But did you personally reach any
6 conclusions as a result of the data generated from
7 the 768 decoding experiment in terms of the
8 specific number of beads that Illumina could
9 decode?"

10 MS. ESPINOSA: I'm sorry, Counsel, are you reading at
11 Line 11?

12 MR. PANTONI: Page 102, Line 18.

13 MS. ESPINOSA: Sorry. Go ahead.

14 BY MR. PANTONI: Begin this passage again.

15 "Q. But did you personally reach any
16 conclusions as a result of the data generated from
17 the 768 decoding experiment in terms of the
18 specific number of bead types that Illumina could
19 decode?

20 "A. When you say the 768 decoding
21 experiment you mean this particular one? Because
22 it was sort of an ongoing experiment. Even after
23 the IPO we performed more experiments.

24 "Q. No, I mean the experiments that were
25 conducted up through and including the time of the
26 IPO?

27 "A. I didn't make any conclusions.

28 "Q. Regarding the number of bead types?

1 "A. Not that could be accurately decoded.

2 "Q. When was it that you first, if at all,
3 reached any conclusions with respect to the number
4 of bead types that could be accurately, that could
5 accurately be decoded as a result of the 768
6 decoding experiments?

7 "A. It was after we performed additional
8 experiments with, you know, new labeled sets.

9 "Q. And when?

10 "A. Well, not new labeled sets, but
11 different pooling that didn't include the
12 mislabeled set. That was done in August.

13 "Q. August of 2000?

14 "A. Yes.

15 "Q. After the IPO?

16 "A. Yes."

17 Q. Do you stand by that testimony, sir?

18 A. Yeah. We performed additional experiments.

19 Q. And you couldn't reach any conclusions about the
20 accuracy of the number of beads until the new experiments
21 were conducted after the IPO?

22 A. We, we -- not the exact accuracy, no. I couldn't
23 vouch for every bead type. I wouldn't throw them into the
24 master pool of 2,000 sequences we were selecting, no, I
25 wasn't ready to do that.

26 Q. In fact, you testified at deposition you couldn't
27 reach any conclusions about the number of bead types that
28 could be accurately decoded until new experiments were done

1 post-IPO?

2 A. I like to see the data repeated. So with one
3 experiment --

4 Q. And your position on that point you think was at
5 least a reasonable position, don't you?

6 A. Yeah.

7 Q. Back to 257, please. 257.

8 My mistake, 354. Sorry.

9 Get the board, please.

10 MR. PANTONI: I'm sorry.

11 JUROR NO. 6: It's the pretty picture.

12 BY MR. PANTONI:

13 Q. This is again the memo that you drafted about the
14 768 decoding experiment, correct?

15 A. That's right.

16 Q. And, again, this is the one where you state that
17 the quality and accuracy of the data may have been
18 compromised by the mix up in the lot of dye from Molecular
19 Probes?

20 A. That's correct.

21 Q. You submitted this memo to Mark Chee, is that
22 right?

23 A. That's correct.

24 Q. Did Mark Chee ever say that he disagreed with
25 anything you put in this memo?

26 A. I don't think we really discussed it after I
27 submitted it to him.

28 Q. Did he ever come back to you and say that he

1 disagreed with any of your conclusions --

2 A. I don't recall.

3 Q. -- made in this memo?

4 A. I don't recall any disagreement.

5 Q. Are you familiar with the term called "proof of
6 concept"?

7 A. Yeah, I've heard the term.

8 Q. You don't think very much of the term, do you?

9 A. "Proof of concept"?

10 Q. Yeah.

11 A. We do proof-of-concept experiments. You have to
12 do them carefully and with creativity.

13 Q. Do you use the term "proof of concept" as a
14 scientist?

15 A. Yeah.

16 Q. You are familiar with the term?

17 A. Yeah, I've heard the term.

18 Q. Do you understand the difference between a
19 proof-of-concept experiment and a different type of
20 experiment?

21 A. And what type of experiment?

22 Q. Well, what -- strike that.

23 You don't agree -- strike that.

24 Do you conduct proof-of-concept experiments?

25 A. Yeah, in -- as I define "proof of concept," yeah.

26 Q. How do you define "proof of concept"?

27 A. Typically a "proof-of-concept" experiment that we
28 do is, especially with regard to arrays, is we want to

1 demonstrate, like, for instance, the decoding of several
2 thousand sequences, but we only have the resources or the
3 reagents to generate, say, several dozen sequences. So you
4 devise an experiment that can mimic the complexity of a large
5 scale experiment yet with fewer reagents, such that you can
6 infer if that small proof-of-concept experiment works, you
7 can infer that you can actually do the much larger
8 experiment, more encompassing experiment, something like
9 that.

10 Q. Well, can you explain to me -- let me read some
11 deposition testimony you gave about proof of concept. I
12 would like you to explain that testimony to us.

13 Beginning at Page 110, Line 25:

14 "Q. If in or about May of 2000, you
15 were assigned a 90-day goal, and that is within 90
16 days of being assigned these goals you were to show
17 experimental feasibility of binary oligo encoding
18 with two to the 12th power in codes, would you have
19 agreed that was a reasonable and attainable goal?"

20 And your answer is: "Two to the 12th, can you tell
21 me what number that is, two to the sixth is --"

22 And I say:

23 "Q. I believe it's over 4,000.

24 "A. Over 4,000 in -- if you had actually
25 showed you could decode 4,000 things in 90 days
26 with 4,000 reagents, that would be very difficult.

27 "Q. In fact, to your knowledge has that
28 ever been done at Illumina?

1 "A. We have never actually decoded 4,000
2 different bead types simultaneously.

3 "Q. Nor have you shown proof of concept
4 that you could do so?

5 "A. I wouldn't say that.

6 "Q. Well, have you shown proof of concept?

7 "A. What do you define as 'proof of
8 concept.'

9 "Q. Well, I thought that was a scientific
10 term you might be familiar with, 'demonstrate.'

11 "A. Either you do it or you don't."

12 What did you mean by that testimony, "either you
13 do it or you don't"?

14 A. That was simply in response to your definition as
15 "demonstrate." That was your definition of "proof of
16 concept."

17 Q. You agree -- strike that. Are you familiar with
18 some work that Gali Steinberg did that relates to decoding
19 or --

20 A. Yeah, I'm somewhat what familiar with it.

21 Q. You are familiar that there was some problems with
22 the results of Galley Steinberg's experiments, aren't you?

23 A. I don't know if you call them problems. She, she
24 showed sort of a basic proof of concept, but there --
25 certainly there were issues with implementing it in our
26 production manufacturing environment.

27 Q. And in fact what Galley Steinberg did at Illumina,
28 that's never been accurately pursued by the company after she

1 finished her experiments, is that right?

2 A. I believe it's still being pursued or going to be
3 pursued. Yeah, there's still interest in it.

4 Q. There's still interest, but it's not being pursued
5 today, is it?

6 A. I think we just haven't had the time to work on
7 that aspect of it.

8 Q. Let me ask you a few questions about Tony
9 Czarnik. She was chief scientific officer when you started
10 with Illumina?

11 A. Correct.

12 Q. How did your job duties cause you to interact with
13 Tony Czarnik at work, if at all?

14 A. Well, we, we would discuss experiments. We would
15 have group meetings, chemistry, molecular biology. And we
16 discussed some planned experiments. And so Tony was leading
17 the chemistry group, so we would have interaction in those
18 types of meetings.

19 Q. From time to time would Dr. Czarnik lead the
20 discussions at those meetings?

21 A. Yeah. I mean, like, we had these Wednesday update
22 meetings where we'd sort of update the company about what
23 we'd been doing the past week. And that, that was passed,
24 the leadership of that meeting was passed among the senior
25 staff, including Tony Czarnik.

26 Q. In addition to being chief scientific officer,
27 Tony Czarnik also headed up chemistry?

28 A. Correct.

1 Q. And you were in molecular biology?

2 A. That's correct.

3 Q. Mr. Gunderson -- Dr. Gunderson, did you ever
4 observe Tony Czarnik or hear him say anything to cause
5 divisiveness, tension between the two groups, molecular
6 biology and chemistry?

7 A. There were always challenges. Tony would always
8 challenge our group on various experiments. Yeah, I mean
9 there was definitely sort of a competition or -- it wasn't
10 the most smoothly running interaction between the two groups.

11 Q. Did Tony Czarnik ever make any negative or
12 derogatory comments about other scientists?

13 A. I don't recall any particular comments at this
14 time.

15 Q. What is your observation of how Dr. Czarnik got
16 along with other scientists at Illumina?

17 A. Well, I think he got along pretty well. He was
18 cordial. I interacted very cordially with him. He sort of
19 provided a lot of hospitality. And, you know, we would have
20 fun together. Made it sort of a fun working environments.

21 Q. And what were your observations on that same
22 subject as to Mark Chee, how did he get along with other
23 scientists?

24 A. Well, Mark Chee gets along -- he's, Mark Chee
25 is -- he's very opinionated and has a strong opinion on
26 subjects. So, by necessity, that would cause more friction
27 and arguments. And he was more serious, of course, very
28 serious, very focused, worked really hard. That was just his

1 nature.

2 Q. Dr. Gunderson, have you ever made any complaints
3 about Mark Chee to human resources?

4 MS. ESPINOSA: Objection. Relevance, your Honor.

5 BY MR. PANTONI:

6 Q. In terms of morale and how he interacted with
7 employees at work.

8 MS. ESPINOSA: 352.

9 THE COURT: Hearsay. Sustained.

10 MR. PANTONI: Can we establish who, if anyone, Judge,
11 may have been responsible for the alleged morale problems?

12 THE COURT: I think I have already made rulings on this
13 and ruled out that type of evidence.

14 BY MR. PANTONI:

15 Q. What is your current job title?

16 A. Principal scientist.

17 Q. What was your job title at the time I took your
18 deposition?

19 A. Associate director.

20 Q. So have you been demoted since the time of your
21 deposition?

22 A. No, I've been promoted.

23 Q. That's a promotion?

24 A. Correct.

25 Q. Did Mark Chee ever talk to you about your
26 deposition testimony you gave in this case?

27 A. No, we didn't really discuss my deposition.

28 Q. Ever?

1 A. I can't recall discussing it.

2 Q. Did you ever tell any scientist at Illumina that
3 Mark Chee was unhappy with your deposition testimony?

4 A. I never --

5 MS. ESPINOSA: Objection. Hearsay, your Honor.

6 THE WITNESS: I didn't know he was unhappy.

7 THE COURT: Hold on. Hold on. Repeat the question.

8 BY MR. PANTONI:

9 Q. Did you ever tell any scientist at Illumina that
10 Mark Chee was unhappy with your deposition testimony in this
11 case?

12 A. No, I didn't. I was unaware that he was unhappy
13 with it.

14 MR. PANTONI: Nothing further at this time, Judge.

15 THE COURT: You may examine.

16

17 CROSS EXAMINATION

18 BY MS. ESPINOSA:

19 Q. Dr. Gunderson, did Dr. Czarnik know that you were
20 working on the 768 decoding experiment?

21 A. Yeah. I mean, it was a collaborative experiment
22 between chemistry and molecular biology. So, yeah, of course
23 he knew.

24 Q. Did Dr. Czarnik ever come to you with any concerns
25 about the way the 768 decoding experiment was being run?

26 A. Not myself personally, he didn't come to me.

27 Q. Let's go back to trial Exhibit 2 -- 269, please.

28 I believe Mr. Pantoni questioned you about this

1 two-color --

2 MS. BISHOP: Do you want to go to the slide?

3 MS. ESPINOSA: Right there is fine.

4 Q. Where it says, "We've now tested two different
5 sets of 768. And with both --" Okay, "showing -- both
6 showing good specificity --" I think the letter S is
7 missing. So I think you said you didn't know what Dr. Chee
8 was referring to in this email message, is that correct?

9 A. I can't. No, at this point I don't know what he
10 was referring.

11 Q. Okay. Well, let's step back a little bit and talk
12 about -- I think you mentioned screening exercises that were
13 at issue with the 768 decoding experiment. What did you mean
14 by "screening"?

15 A. Well, the 768 experiment. One of the purposes,
16 well, original purposes, we were supposed to develop 2,000
17 good sequences for our collaboration with Applied
18 Biosystems. That was established late Fall of 1999, I
19 believe. And our plan was to screen sequences experimentally
20 test them in sets of 768. The reason for that magic number
21 768 is we have a -- an instrument in our lab called an
22 oligator that synthesizes or makes these short snips of DNA
23 in batches of 768. So it was reasonable to screen them in
24 batches of 768. So that's why all experiments were conducted
25 on the 768 size scale.

26 And the goal was to screen various sets of 768
27 until we'd accumulated 2,000 sequences that we called good,
28 that passed various criteria. We wanted them to hybridize

1 really well in -- well, when we sell the product to people,
2 basically.

3 Q. So you are saying you were trying to select out
4 2,000 really good sequences, well-behaved sequences?

5 A. That's right. We generated over 4,000 potential
6 sequences and we wanted to functionally screen them to get
7 down to 2,000 good sequences.

8 Q. I think with Mr. Pantoni questioning you, then you
9 said that the July, the June-July 768 experiment was the
10 second experiment that you had conducted with the set of 768
11 sequences, correct?

12 A. That's right. There was an earlier one, where we
13 didn't get a lot of data from it. That was also done with a
14 different set of sequences that we weren't going to mix with
15 this set. There was some business reasons for going to a
16 different set, completely independent of the first set.

17 Q. Okay. And I think you've also mentioned that the
18 decoding experiments were really a team effort. Let me show
19 you what's one of our demonstrative exhibits. If you could
20 --

21 Now, Dr. Gunderson, have you seen this poster
22 before?

23 A. That's right.

24 Q. And did you help create this poster?

25 A. Yes.

26 Q. And we will put it up on the big screen as well.
27 Maybe if you come down here, you can just point to it.

28 A. Okay.

1 Q. So, can you describe for the jury how the 768
2 decoding experiment was a team effort?

3 A. Yeah. This, poster board depicts the organization
4 of basically our screening experiments. And these 768
5 experiments were going to be done again and again until we
6 had 2,000 good sequences. And sequences were going to be
7 synthesized or created by the oligator. It's called oligo
8 synthesis.

9 These are these little pieces of DNA that we put
10 on beads. And we need these pieces of DNA both for the beads
11 themselves to put on the beads. And then we put their, their
12 cognate sequence into decoding labeling. I was responsible
13 for actually making the decoders, myself and Jim Bierle and
14 Monica Milewski. Having worked for me, we were responsible
15 for making the decoders, pulling them, and then actually the
16 conducting the arrays and hybridization experiment. And
17 engineering was responsible for image processing. And they
18 were under Richard Pytelewski and Bob Kain. They actually
19 made the instrument to read the arrays and then note some of
20 the software to process the images. And data analysis was
21 done by Bahram in bio informatics.

22 The beads for the arrays were made by chemistry,
23 and that was originally headed by Tony Czarnik. And Steve
24 Barnard and Chanfeng Zhao worked under him to make the beads.
25 Basically the beads and decoder come together in the decoding
26 process.

27 Q. I think Mr. Pantoni also questioned you on whether
28 or not you discussed using two colors versus three colors

1 with Mark Chee. I think you said two colors was a fall-back
2 position. Where did you make that up?

3 A. If three colors didn't work and four colors didn't
4 work, we could fall back on two colors. We had been doing
5 two colors since the start of the company, it was easy, it
6 works. So, however, as you want to decode more and more bead
7 types, it requires more and more stages. We used three-color
8 decoding, which required something called seven stages, which
9 maybe we will get to, whereas two-color would require 11
10 stages. It was a lot more effort to use two colors. So
11 that's why we tried to use three colors.

12 Q. So is it fair to say the more colors you used, the
13 fewer steps you have to go through to decode an array?

14 A. Correct.

15 Q. Maybe now is a good time then to talk about -- I
16 believe you said a November 1998, you did a 16-bead decoding
17 experiment, is that correct?

18 A. That's correct. Should I stand there or sit down?

19 Q. Yeah, I think you can go back on the witness
20 stand. Why don't we put up another demonstrative exhibit so
21 we can kind of walk through that to go through the concept of
22 all of the decoding. We will take this down now.

23 Do you have that on the display?

24 MS. BISHOP: Which one do you want?

25 MS. ESPINOSA: It's this.

26 Q. Okay. Is this actually one of your 16-bead
27 decoding experiments?

28 A. That's correct. That's a real experiment.

1 Q. How many colors is this experiment.

2 JUROR NO. 6: It's upside down.

3 THE WITNESS: That's a four-color experiment.

4 MS. BISHOP: It is upside down. Would you read the
5 number on the back, please.

6 MS. ESPINOSA: Trial Exhibit 344-3.

7 (marked for id: 344-3: 16-bead array experiment)

8 Q. Can you see that?

9 A. Yeah.

10 Q. Okay. So can you sort of walk the jurors through
11 how you would decode a 16 bead array?

12 A. Yeah. Maybe I will come down there and make it
13 easier. So, like I had mentioned previously, DNA arrays are
14 made out of DNA. And DNA has its property called
15 hybridization. Two strands of DNA will come together and
16 hybridize.

17 Hibridization is very specific. And a -- the
18 partner of a DNA strand will recognize its specific partner.
19 So, like I say, we attach pieces of DNA to the beads, and
20 then we put its partner in solution and label it. And when
21 we bring those two together, the labeled partner will find
22 its correct bead type.

23 So the way we do decoding is we make an array with
24 16 different bead types. Now, mind you, this array can have
25 thousands of beads, but there's only 16 bead types. So each
26 bead type is represented numerous times.

27 Now, the way we do decoding, originally these --
28 this is black, everything is black, right. They just have a

1 piece of DNA on them, there's no color. However, we make its
2 partner colored by attaching a label to it. And we create
3 what we call a decoding mix. And if you are going to decode
4 16 bead types, with this scheme we have 16 partners, so we
5 have a complete set of partners, each bead type has a partner
6 in the decoding mix. And we color those partners with the
7 particular scheme. That allows us to infer information about
8 the bead types.

9 So, in this example, the first decode mix, we
10 color the first four partners blue, the second four are
11 green, third four yellow, and the last four are red. And
12 then we expose the array to this mix, and it colors the
13 beads.

14 The first four bead types get colored blue because
15 hybridization is very specific and finds its unique partner.
16 The second set gets colored green, third set yellow, and the
17 fourth set red. So after one decode step, we looked at the
18 image. And if it's a red bead, now you've gained some
19 information. Previously, it could be one of 16 beads, but if
20 it's red now it's one of four beads. Now, you still haven't
21 narrowed it down to the exact bead type, so what you do is
22 add a second decode step.

23 Q. Dr. Gunderson, so do you wash off the first set of
24 decoders?

25 A. Yeah, hybridization, or DNA has this property of
26 hybridization. And you can also dehybridize quite readily
27 just by exposing it to heat or alkaline solution, like sodium
28 hydroxide, found in your drain cleaner. That will cause DNA

1 to dehybridize and come apart. That's what we do,
2 dehybridize it, take all the color away, and sort of repaint
3 the beads with a second decoder solution.

4 And in the second solution we have all 16 partners
5 there, but we color them differently. And you can see the
6 way we color them. So, originally, the first four bead types
7 will be colored blue. Now we construct the color such that
8 that blue set is split among the four colors as shown, blue
9 green, yellow, red, and then we split the second set of
10 colors four ways again, and four ways, and four ways.

11 So, in two stages we can ascribe a unique color
12 signature to each bead type. Bead type one should be blue in
13 the first stage, blue in the second stage, and so on. And if
14 we actually look at the images from the two stages, we can
15 look at this bead here, again these are images, so you see
16 the same beads in both images.

17 Q. That's the same array, with two different
18 pictures?

19 A. That's same array, but taken at two different
20 times, one after the first decode hybridization, this one
21 after the second decode hybridization. This bead here is
22 blue in the first, red in the second. That's a unique
23 signature. Blue, red that means it's bead type four. This
24 bead type here is -- you can see it's yellow, and then it's
25 blue and that's bead type nine. You know, this one here is
26 red and then blue. We look up red-blue, you get a unique
27 signature, it's bead type 13. That's basically how we do our
28 decoding.

1 So this is 16 bead types we've decoded over two
2 stages, because we are using four colors. You get a power of
3 four with each stage. With one stage we can decode four bead
4 types, because we have four colors. With two stages we can
5 decode 16 bead types, because we can split it four ways each
6 time. If we have three stages, you get four times four times
7 four, which is 64. Four stages is what, 256. Five stages is
8 1,000-some. And six stages is 4,000-some bead types. So a
9 sixth stage decode would give you six colors, each bead type
10 would have a signature with six colors. So that's basically
11 how we do the decoding.

12 Q. So going back to the Summer of 2000, when you were
13 doing a 768 decoding experiment with three colors --

14 A. That's right.

15 Q. -- you needed more of the different sets of
16 decoder pools, correct, more stages?

17 A. That's right. With three colors, we needed seven
18 stages to assign a unique color signature to each bead type.

19 Q. Okay. I think you did -- you weren't here, but
20 Dr. Chee did a little demonstration there with the dyes. So
21 preparing the decoder pools for the 768 experiment, how many
22 of those small vials of dye did you actually have to go
23 through to properly make all the decoder pools?

24 A. Actually, I have an overhead that shows that, too.

25 Q. How about if we could put up the demonstratives?

26 A. Because we were labeling 768 at a time and
27 Molecular Probes supplied the dye in real small vials. I
28 think I have my example of the vials right here. Basically,

1 we buy these dye vials from the vendor. They are a small
2 vial, and they are dark, so you can't really see into them.
3 We combined 11 of these vials for each labeling reaction. We
4 combine 11 blue vials, 11 green vials, 11 red vials and so
5 on. That's how we did our labeling, made one big master pool
6 of dye and labeled them.

7 Q. Who actually did the labeling chemistry part of
8 the 768 experiment?

9 A. The actual labeling was conducted by Jim Bierle
10 and Monica Milewski.

11 Q. How long did that take?

12 A. The actual labeling part of the experiments took a
13 matter -- I think with all the dyes we used, took a matter of
14 a week. That's labeling, purification and so forth.

15 Q. So will you put those up?

16 MS. BISHOP: Mm-hmm.

17 MS. ESPINOSA: And the next one. Just the ones with
18 the decoder.

19 THE WITNESS: This just shows you denaturation and
20 renaturation, that DNA can come together and come apart.

21 BY MS. ESPINOSA:

22 Q. Kevin, we are just going to jump ahead.

23 A. That's the basic dogma of the cell. Find DNA in
24 the nucleus organized in the chromosomes. That's made out of
25 base pairs, A, T, C, G.

26 Q. Due to the time constraints we have, we are going
27 to have to skip through some of jury slides. Sorry. Let's
28 go to Number 8 of this exhibit.

1 Okay. So what does this 15-8 illustrate?

2 A. This is a basic cartoon illustration of how we
3 generated the master mixes for the dye. So for three colors
4 here we combining 11 of these little amber vials into one
5 tube and then use that to label the oligos.

6 Q. Actually, I don't think the color reproduces well
7 when it's projected but.

8 A. Actually the color is completely obliterated in
9 this projection, so it doesn't illustrate the point that I
10 want.

11 Q. Okay. Let's go to the next one.

12 A. But basically there was three dyes used, a blue,
13 green and red. And it was the green dye that had some vials
14 that were mislabeled. So it was contaminated with some of
15 the incorrect dye.

16 Q. Yes. I think Dr. Chee demonstrated that with the
17 bottles.

18 A. That's right.

19 Q. So what does this illustrate?

20 A. This illustrates the way we actually labeled these
21 oligos. So we got the oligos from the oligo lab, the
22 oligator lab, and they come in 96 wall plates. That's the
23 way the machine synthesizes, or makes these oligos, makes
24 them in these standards, micro-titer parts, with 96 walls,
25 it's industry standard.

26 We will take one plate, this is plate one -- we
27 actually have eight plates. Plate one gets split into three
28 what we call daughter plates. The given oligo just gets

1 distributed among the different plates. The plates are
2 replicants of each other. They contain all the same oligos.
3 And then we just label each plate with a different dye. For
4 plate one we split it into plate one, blue dye in plate one,
5 green die in plate one, red dye. And, of course, before we
6 label them we purify them, because you have to purify them
7 away from some impurities that would inhibit the labeling
8 reaction. After labeling, we also purify them again.

9 We pool the dyes. We pool them into a decoder
10 solution that I illustrated on the 16 decode illustration.
11 So we have to pick the appropriate colors and mix them
12 together in such a way that we assign a unique signature to
13 each bead type when we do a decoder hybridization.

14 Q. And the next slide, dash 10, please. What does
15 this illustrate?

16 A. This illustrates one way in which you may create,
17 like, a stage one decoder pool for just the first plate. So
18 the first plate will decode 786 oligos right there, the
19 partners to 96 bead types on the RNA. You might take the
20 first type of plate one and use it to color the beads blue,
21 and the second third of the plate, shown in the middle there
22 colored green, you combine that with the last of the plate
23 colored red, so you would have blue, green and red. And
24 those 96 beads types, the first third colored blue, second
25 third green, and the last third red. And that's the first 96
26 going into the decode pool. Then you would do a similar
27 treatment for the next seven plates. It would be seven times
28 three, being 21 plates. But --

1 Q. So a lot of work?

2 A. It's a lot of work. There's a lot of labeling.
3 For four colors, you have to label over 3,000 different
4 oligos.

5 Q. So these are the reagents you refer to that you
6 had to prepare in order to actually conduct the actual
7 decoding part of the experiment?

8 A. We had to label these purify them and pool them.

9 Q. So when you saw the letter from Molecular Probes
10 saying some of the dyes were mislabeled is that good news or
11 bad news?

12 A. Well, naturally it's bad news. Just the dye
13 itself in this labeling experiment costs around 6, \$7,000.
14 That didn't include the labor that went into the labeling.
15 So, naturally, I was a little upset that such a mistake would
16 occur.

17 Q. Did Dr. Czarnik actually help you obtain a refund
18 for those dyes?

19 A. Yeah. I believe Dr. Czarnik knew maybe the
20 president of Molecular Probes, so he did obtain a nice refund
21 for us.

22 Q. Did he say anything to you about obtaining a
23 refund?

24 A. Yeah. Yeah. I passed on information to him and
25 he actually wrote the letters to, I forget who is the head of
26 Molecular Probes, but, yeah.

27 Q. And at the time he mentioned getting the refund to
28 you, did he ever express any concern that the data from this

1 experiment might be used to fraudulently induce investors to
2 buy Illumina stock?

3 A. Not at all.

4 Q. Let's go back to exhibit, I believe it was 354.

5 MS. BISHOP: Yeah.

6 BY MS. ESPINOSA:

7 Q. Oh, let me ask you a question about these
8 particular dyes that are used by molecular biologists at
9 Illumina. Are these dyes kept under lock and key in a
10 certain laboratory?

11 A. They are kept in A certain laboratory, but not
12 under lock and key.

13 Q. What if a chemist wanted to test whether or not
14 the dye vials were properly labeled and wanted to conduct a
15 quick five-minute experiment to check if they were properly
16 labeled. Could a chemist ask one of the molecular biologists
17 for the labeling for that?

18 A. Yeah.

19 Q. I mean -- So there's no restriction on who can
20 touch these vials?

21 A. No.

22 Q. Let's go back to 354, to the section that's called
23 "summary." I think Mr. Pantoni had you, had you -- referred
24 you to the first part of that paragraph.

25 MS. BISHOP: Shaky hands, caffeine.

26 BY MS. ESPINOSA:

27 Q. Okay. Let's have you read the last sentence of
28 that paragraph that starts with "Nonetheless"?

1 A. "Nonetheless, enough cluster separation existed
2 between the three different possible bead colors to allow
3 Bahram's decoding algorithms to decode 500 different bead
4 types."

5 Q. In terms of that sentence, did you view the
6 results of the experiment to show that over 500 bead types
7 could be decoded?

8 A. Yeah, they could be decoded.

9 Q. But I believe Mr. Pantoni questioned whether you
10 believed, you concluded that those 500 bead types were
11 accurately decoded. Did you testify that you did not
12 conclude that they were accurately decoded?

13 A. Well, those bead types that were decoded may have
14 been accurately decoded, but I was really concerned about
15 beads dropping out, how bright were the beads. In this end,
16 these were going to go into a product. They had to be
17 screened. They had to be bright. They had to work really
18 well. From this data, I wasn't confident we could trust this
19 screening data to make that selection. I -- yeah.

20 Q. So, in the end, how many of the 500 bead types
21 that were decoded in this experiment were used further in the
22 set of 2,000 bead types?

23 A. We only used 250 we went forward with.

24 Q. Now, did you select those 250?

25 A. Basically, they were selected on ones that decoded
26 and were, were bright. We really looked for brightness and
27 intensity, because that's one of the fundamental things that
28 determines how well they decode. Poor decoding results from

1 poor bead intensities. You know, you can't really tell what
2 color it is because it's so dim. If an assay, if they are
3 dim in decoding, they are going to be dim in an assay, so
4 they wouldn't be all that functional.

5 Q. You are trying to pick the best of the best?

6 A. That's right.

7 Q. Okay. Let's -- in this lawsuit, Dr. Czarnik is
8 contending that he was blowing the whistle on Illumina
9 because of the dye mislabeling error. Did he ever express to
10 you any concern that Illumina's IPO was somehow based on
11 scientifically flawed data?

12 A. None whatsoever. It was -- I didn't hear anything
13 from him until after months later.

14 Q. And, in fact, on the day of the IPO, did Dr.
15 Czarnik seem concerned about any perpetration of fraud on the
16 public?

17 A. No.

18 MR. PANTONI: Object. The question calls for
19 speculation of the witness and there's no foundation.

20 THE COURT: Sustained.

21 BY MS. ESPINOSA:

22 Q. On the day of the IPO, did you see Dr. Czarnik
23 exhibiting any concern that some fraud had been perpetrated
24 on the public? Did you see any manifestation necessary in
25 his behavior that he seemed concerned about fraud based on
26 this experiment?

27 MR. PANTONI: Same objection.

28 THE COURT: I think you could ask him to describe Dr.

1 Czarnik's behavior. But the form of the question is
2 objectionable.

3 BY MS. ESPINOSA:

4 Q. On the day of the IPO, can you describe Mr., Dr.
5 Czarnik's behavior with respect to the IPO?

6 A. Yeah. I mean, Dr. Czarnik sort of led the
7 celebration. He brought in some cases, some champagne,
8 bottles of champagne, popped them open. It was a very
9 celebratory mood, and Dr. Czarnik led the charge in
10 celebrating the IPO.

11 Q. I think Mr. Pantoni questioned you about Dr.
12 Czarnik's professional interactions with you at Illumina. In
13 your view as the CSO, did he seem to have a mastery of the
14 molecular biology aspects of Illumina's business?

15 A. No, Dr. Czarnik really didn't understand molecular
16 biology. So it was difficult for him to contribute in that
17 area.

18 Q. Did he ever ask you about the molecular biology
19 aspects of the 768 decoding experiment?

20 A. No.

21 Q. And having worked with Dr. Chee previously at
22 Affymetrix and having observed Dr. Czarnik at Illumina, how
23 would you characterize the differences in their management
24 styles?

25 A. Oh, Dr. Czarnik is very laid back, easy going,
26 completely hands off, you know. And Mark, in contrast, Mark
27 Chee in contrast is very focused, you know, works hard. He
28 is really, really sort of controls the experiments and wants

1 to see the data all the time.

2 MS. ESPINOSA: Just one second. I have nothing
3 further, your Honor.

4 THE COURT: Mr. Pantoni, questions?

5 MR. PANTONI: Thank you, judge.

6

7 REDIRECT EXAMINATION

8 BY MR. PANTONI:

9 Q. Mark Chee has been your boss the entire time you
10 have been with Illumina, up through last Friday, right?

11 A. That's correct.

12 Q. Do you ever report to Dr. Czarnik directly?

13 A. No.

14 Q. You talked, when Ms. Espinoza examined, you about
15 pooling of dye lots?

16 A. That's right.

17 Q. May I, your Honor?

18 Do you know that the trade name that Molecular
19 Probes, the vendor, used for the blue dye?

20 A. Yeah, it was bodipy 493.

21 Q. So 493 was blue?

22 A. That's what I call blue, yeah.

23 Q. What's the trade name for green?

24 A. Bodipy TMR, it's abbreviated by TMR.

25 Q. TMR, green. And what's the trade name for red?

26 A. It's, I think it was called, it's basically XTR
27 they used.

28 Q. Have you use heard of TM, TRX rather?

1 A. See, basically it's called Texas red.

2 Q. Texas red?

3 A. Texas red. Equivalents, it's bodipy Texas red,
4 and X refers to the linger.

5 Q. These are the trade names used by molecular
6 biology -- I mean Molecular Probes?

7 A. That's right.

8 Q. Okay. And the green, TMR, was the one that was
9 mislabeled?

10 A. A subset of that was mislabeled.

11 Q. Now, which vials were pooled with, which vials
12 were pooled -- when you say pooled, mixed together?

13 A. Well, we had 11, roughly 11 blue vials that were
14 mixed together, all blue; 11 all green; and 11 all red vials.

15 Q. So was there any blue mixed with green or green
16 mixed with red, were there any combinations that were mixed?

17 A. No. Well, you know, other than the mix up.

18 Q. And how did the mix up involve, if it did, two
19 different colors being mixed together?

20 A. We had 11 tubes they were all labeled TMR or
21 green. In actuality I think like four of them contained red,
22 but they were labeled green.

23 Q. All right. So in actuality, TMR was mixed with
24 TRX?

25 A. That's right.

26 Q. Let's take a look at the memo you wrote, please,
27 Exhibit 354. Let me make sure I've got this, Dr. Gunderson.
28 These are the two that you say were mixed because of the

1 mislabeling?

2 A. That's, that's -- that's right.

3 Q. Actually, let's look at the Molecular Probes
4 letter first, which is 275. This is the letter from the
5 vendor telling you which dye lot was mislabeled?

6 A. That's right.

7 Q. And what dye lot was mislabeled?

8 A. It was bodipy TMR.

9 Q. And what particular dye, lot what lot number?

10 A. Oh, 4301-3 or something.

11 Q. I'm sorry, 43?

12 A. 01.

13 Q. 01-3?

14 A. Yeah.

15 Q. That's the mislabeled one?

16 A. Actually, I think it was, maybe it was 650 we used
17 for the white light. It was either -- the second dye was
18 either TXR or 650 that was mixed up with.

19 Q. TMR, that's the green dye that was mislabeled,
20 right?

21 A. Yeah, the green dye was mixed up with the red dye.

22 Q. The one that was mislabeled was TMR, correct?

23 A. That's right.

24 Q. Lot 4301-3?

25 A. Yeah.

26 Q. Okay. Let's take a look at your memo, which is
27 Exhibit 354. This is where you explained what happened in
28 the experiment?

1 A. That's right.

2 Q. Second page, please. Here's where you describe
3 which vials of dye were pooled together, is that right?

4 A. That was for bodipy 493, yeah.

5 Q. 11 vials of die were pooled for the Reaction 9
6 from Lot Number 4302-1 and two vials from Lot Number
7 4371-3, is that right?

8 A. Yeah.

9 Q. Do you see any reference in your memo, Dr.
10 Gunderson, to lot number 4301-3?

11 A. Not in this memo, no. It doesn't really describe
12 the labeling of TMR, TRX or 650 in the memo.

13 Q. So this claim that the -- only a portion of the
14 mislabeled dye was mixed together, that's not addressed
15 anywhere in this summary, anywhere in your memo talking about
16 this experiment?

17 A. No.

18 Q. You didn't address that?

19 A. I addressed it in the beginning of the memo.

20 Q. You didn't talk at all about lot 4301-3?

21 A. Like I said, I didn't talk about bodipy, TMR, TRX,
22 bodipy 650. Those are also pooled.

23 Q. Sure you did, here you are talking about the
24 labeling.

25 A. No, but I didn't go through what lot numbers were
26 used in pooling so forth, or if those were actually written
27 down. I didn't conduct any of these experiments. I didn't
28 do the labeling myself. I do not record those into my

1 notebooks, because they were done by Monica and Jim.

2 Q. Paragraph 4 talks about how the labels were
3 labeled?

4 A. They were labeled 493, TMR, TRX, 650.

5 Q. And you do talk about TMR being mislabeled vials,
6 correct?

7 A. Yeah. Actually I think it was, the red dye that
8 we used for white light data that was analyzed was 650. TRX
9 was what we used for the laser system. So that, I think --

10 Q. Let's focus on TMR, the green, the one that was
11 mislabeled.

12 A. That's right.

13 Q. Okay. You do mention that in Section 4 of your
14 memo?

15 A. Yeah.

16 Q. And this is the section where you are talking
17 about how the decoders were labeled?

18 A. That's right.

19 Q. You do talk about some pooling that took place?

20 A. Uh-huh.

21 Q. And you do talk about Lot Number 4301-1?

22 A. That's right.

23 Q. You do talk about lot 4371-3?

24 A. That's right.

25 Q. There's no reference here to 4301-3?

26 A. No.

27 Q. Okay.

28 A. I probably didn't have that information in front

1 of me when I was writing the memo.

2 Q. You didn't have Molecular Dyes letter that was
3 sent a year before you wrote in memo?

4 A. I actually never received the letter. I was only
5 told about it, I think through Monica. I didn't actually get
6 the letter myself. I think I had to chase down Monica and
7 asked her where the letter was and spent some time hunting
8 for it.

9 Q. Exhibit 269, please. I will be done in just two
10 minutes. Again, Dr. Gunderson, I want to clarify. The two
11 sets of 768, at least the two sets that you are aware of,
12 they involve the first 768 decode experiment and the second?

13 A. That's what I recall at this time.

14 Q. Those are the only two sets you are aware of as of
15 July 13th, correct?

16 A. I think so, yeah. That's what --.

17 Q. All right. And as to the first set, the first
18 experiment, that experiment didn't work, correct?

19 A. Well, it showed good specificity.

20 Q. That experiment didn't work, did it?

21 A. No, I said there's different levels of working.

22 Q. All right. Let me read from your deposition
23 testimony about that.

24 A. It didn't work to the level that I wanted it to
25 work, such that we would generate good oligos for the 2000
26 set, that's what I refer to as working. If it doesn't -- if
27 we don't obtain a lot of oligos to throw into that set of
28 2,000, it doesn't work for that purpose.

1 Q. Let me try to simplify it. Isn't it correct you
2 couldn't get any meaningful data from the first experiment?

3 A. Probably I said that, as best as I recall, as best
4 as I recall.

5 Q. Isn't it correct you couldn't get any meaningful
6 data from the first experiment?

7 A. I wouldn't necessarily say "any."

8 Q. Let me read your deposition testimony, Page 19,
9 beginning Line 8:

10 "Q. I think you said the first 768 decode
11 experiment didn't work, is that right?"

12 A. I said, yeah, correct.

13 Q. Let me just read your deposition testimony, sir.
14 Try again. Page 19 beginning, line 8.

15 "Q. I think you said the first 768 decode
16 experiment didn't work, is that right?"

17 "A. I did.

18 "Q. Why didn't it work?"

19 "A. In my opinion, the oligos did not
20 immobilize very well on the beading.

21 "Q. Were you able, when you ran the first
22 768 decode experiment, to conclude with any sort of
23 scientific confidence that you were able to decode
24 any particular number of beads?"

25 "A. The intensities were much too low on
26 much of the beads. We tested our decoders against
27 our test of monthly 16, indicating that in fact
28 those were good, the decoders were good.

1 "Q. So were you able to draw any
2 supportable scientific conclusions from the first
3 768 decode experiment?

4 "A. The only conclusion I could draw was
5 the immobilization was too poor to give you any
6 meaningful data."

7 Do you stand by that?

8 A. That's right. We didn't include any of those
9 sequences in the set of 2,000.

10 Q. Thank you. As to the second set, the second set
11 of 768 decode data, when you left on vacation July 13, the
12 same date Mark Chee sent that email, you couldn't draw any
13 scientific conclusions from the second experiment, true?

14 A. I could see decoding was working from the
15 clustering, but I didn't know how much I was going to throw
16 into the set of 2000 from the 768.

17 Q. As the lead scientist, as of this date, July 13,
18 2000, you couldn't form any conclusions, could you?

19 A. Oh, I could form some conclusions, but not with
20 regard to which sequences we were going forward with in the
21 screen.

22 Q. Did you have any confidence as to the number of
23 beads that could be decoded with respect to the second set as
24 of July 13, 2000?

25 MS. ESPINOSA: Multiple times, asked and answered.

26 THE WITNESS: I was thinking about vacation, I was not
27 really thinking about the experiments.

28 BY MR. PANTONI:

1 Q. When you left, could you form any scientific
2 conclusions about the number of beads that could be decoded?

3 A. By the time I left, I personally hadn't made any
4 conclusion. I hadn't even seen the data. In fact, it wasn't
5 even forwarded to me. I was going to look at the data when I
6 got back from vacation.

7 MR. PANTONI: Nothing further.

8 MS. ESPINOSA: A few.

9

10 RE CROSS EXAMINATION

11 BY MS. ESPINOSA:

12 Q. Dr. Gunderson, Mr. Pantoni read from your
13 deposition transcript at Page 19. And you said, "In my
14 opinion the oligos did not immobilize very well on the
15 beading."

16 What did you mean by that?

17 A. If the oligos mobilized poorly to the bead, you
18 will get poor signal intensity. As a result, it's hard to
19 decode the bead types. I analyzed a number of bead types
20 earlier showing the mobilization process they were using
21 actually gave a lot worse intensities than a previous method
22 they were using. They didn't test them side by side. We
23 switched to a mobilization process where they synthesized --

24 Q. Let me interrupt. Who are you referring to
25 "they"? Where did you get the beads?

26 A. The chemistry group.

27 Q. Who was running the chemistry group at that time?

28 A. Tony Czarnik.

1 Q. Is it your contention that the first 768 decoding
2 experiment didn't work because the beads didn't work well?

3 A. That's right.

4 Q. And these are the beads that came from Dr.
5 Czarnik's group?

6 A. Correct.

7 MR. PANTONI: One follow up.

8

9

10 FURTHER REDIRECT EXAMINATION

11 BY MR. PANTONI:

12 Q. In July of 2000, Dr. Czarnik wasn't running the
13 chemistry group, was he?

14 A. He may have about -- at that time probably not.

15 Q. You are mistaken about that. He was a research
16 fellow.

17 A. No, he was developing protocols in the Winter of
18 2000 and Fall of 2000 that we were using. The mobilization
19 chemistry was established at that time, in the winter.

20 Q. He became a research fellow in March?

21 A. That's right, but the protocols we used to
22 mobilize were established before them, and the control
23 experiments were never done.

24 MR. PANTONI: Nothing further.

25 MS. ESPINOSA: Nothing further.

26 THE COURT: Thank you very much. Dr. Gunderson, you
27 may step down.

28 THE WITNESS: Thank you.

1 MR. PANTONI: May we approach, Judge?

2 THE COURT: Yes.

3 (off-the-record sidebar conference)

4 THE BAILIFF: Wait, someone is in the bathroom.

5 THE COURT: That's where everybody is else is going.

6 We will take our afternoon recess. We will be in recess

7 until five minutes of 3:00. Please, remember the admonition

8 not to form any opinions about the case or discuss the case.

9 We will be in recess until 2:55, 2:55.

10 (recess)

11 THE COURT: The record will indicate all the jurors are

12 present, counsel are present. We are going to be playing the

13 deposition of Larry Bock?

14 MR. PANTONI: Right.

15 THE COURT: Okay.

16 You timed this, Counsel?

17 MS. ESPINOSA: 55 Minutes, your Honor.

18 THE COURT: Okay.

19 MR. PANTONI: Perfect.

20 (videotape deposition of Larry Bock played,

21 not reported)

22 THE COURT: We will take our evening recess at this

23 time. We will be in recess until 9:00 o'clock. Please,

24 remember the admonition not to form any opinions about the

25 case and not to discuss the case. Hopefully, we can start at

26 9:00 o'clock tomorrow morning.

27 (out of the presence of the jury)

28 THE COURT: Are we going to get into any legal problem

1 tomorrow that you know of?

2 MR. PANTONI: No, your Honor.

3 THE COURT: 8:45 tomorrow morning.

4 MR. PANTONI: We are actually ahead of schedule.

5 THE COURT: That's good.

6 (proceedings adjourned to 6-26-02, 9:00 a.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

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San Diego, California
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1 SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 26, 2002; 9:05 A.M.

2 THE COURT: Morning, ladies and gentlemen.

3 Record will indicate all the jurors are present, counsel,
4 parties present.

5 You ready to call your next witness?

6 MR. PANTONI: Yes, your Honor.

7 THE COURT: Okay.

8 MR. PANTONI: Steve Barnard.

9 THE COURT: Very well.

10 STEVEN BARNARD,

11 called as a witness by the Plaintiff, having been first duly
12 sworn, was examined and testified as follows:

13 THE CLERK: Would you please state your full name and
14 spell your last name for the record.

15 THE WITNESS: Steven Mark Barnard, B-a-r-n-a-r-d.

16 THE CLERK: Thank you

17 DIRECT EXAMINATION

18 BY MR. PANTONI:

19 Q Morning, Dr. Barnard.

20 Who is your present employer?

21 A Illumina.

22 Q And how long have you been employed at Illumina?

23 A Just about four years now.

24 Q You recall the approximate date that your employment
25 began?

26 A It was in August of -- April '98, I believe.

27 Q April of 1998?

28 A Yes.

1 Q What is your present position with Illumina?

2 A Director of array chemistry.

3 Q What was your first position when you joined the
4 company in April of 1998?

5 A When I signed my contract, it was senior scientist
6 position.

7 Q And who did you first report to, who was your boss when
8 you first took over -- strike that -- when you first became
9 employed at Illumina?

10 A Dr. Czarnik.

11 Q You reported directly to Dr. Czarnik?

12 A Yes.

13 Q How long did you hold the position of senior scientist?

14 A It was probably for a year and a half to two years.

15 Q And what was your next position?

16 A Associate director.

17 Q Who was your immediate supervisor when you became --

18 A It was still Dr. Czarnik.

19 Q What was Dr. Czarnik's position during the time that he
20 was your supervisor?

21 A He was the CSO of the company and VP of chemistry.

22 Q Now, did you report directly to Dr. Czarnik from the
23 time you joined Illumina in approximately April of 1998 up until
24 the time that Dr. Czarnik became a research fellow in March of
25 2000?

26 A That's correct.

27 Q And after that, when Dr. Czarnik became a research
28 fellow, who did you report to?

1 A I reported to the new CSO, David Barker.

2 Q So I take it you worked together for a time with Dr.
3 Czarnik at the Cardiff location?

4 A Yes, we did.

5 Q And at Cardiff did you have your own office?

6 A No, there were no private offices. The only person who
7 had a private office is John Stuelpnagel, because he was a member
8 of the CW Group.

9 Q So where was your office or where was your desk at
10 Cardiff?

11 A There is a common -- essentially a meeting room that we
12 used as an office.

13 Q I take it you were there for only a short period of
14 time, a couple of months?

15 A Yes.

16 Q And then you went over to the Towne Centre location,
17 Towne Centre Drive?

18 A That's correct.

19 Q And are you familiar with the room at that location
20 called the big room?

21 A Absolutely.

22 Q And was your office or desk located in the big room?

23 A Absolutely. It had two windows.

24 Q How big was the big room?

25 A Probably twice the size of this room here.

26 Q And approximately how many people warehoused in the
27 room?

28 A As many as we could get in there.

1 Q Could you give me an estimate how many that was?

2 A It depends what time you are talking about the company.
3 At that time we were very few. When we first started the company,
4 we weren't in the big room because we only had a handful of
5 people, we were in a small office. As the company grew to about
6 30 to 60 people, we started populating the big room just because
7 we had to at that time. So it was probably maybe 30 or 40 people
8 in there when the company was about a hundred.

9 Q Each of those people having their own work location?

10 A Absolutely.

11 Q A desk?

12 A Yes, everyone had a desk and space for their chair to
13 move around, basically.

14 Q And Dr. Czarnik, did he also have a desk in the big
15 room?

16 A Tony had two desks, actually.

17 Q Both in the big room?

18 A Yes.

19 Q Right next to each other in proximity or different
20 locations?

21 A No, they were right next to each other.

22 Q Is it fair to say that you interacted with Dr. Czarnik
23 on nearly a daily basis during the time that you reported to him?

24 A Yeah. It was hard not to. The only concept of the big
25 room was to foster communication.

26 Q Do you believe Dr. Czarnik was a good manager during
27 the time you supervised him?

28 A I think he was a good mentor. I don't think Tony had

1 very good management skills, no.

2 Q In what way? Let take good first, get to what you
3 think is the bad. In what way do you think Dr. Czarnik was a good
4 mentor?

5 A Tony is a renowned expert in combinatorial chemistry.
6 His background in organic chemistry, making drugs and things like
7 this, I found him a tremendous scientific resource. We had many
8 scientific discussions about science and the problems we had in
9 the company and stuff. He was a good friend at that time also.

10 Q And what did he do, if anything, in an effort to mentor
11 you as a scientist?

12 A Oh, used to discuss science on chemical terms. That's
13 what our group was. We were the department of chemistry. So we
14 approached life through that outlook.

15 Q Did Dr. Czarnik make himself available to you when you
16 needed such mentoring?

17 A Yes.

18 Q Now, you say you have some issues with his management
19 style?

20 A Absolutely.

21 Q What are those issues?

22 A Well, for a company to succeed, a manager has to be
23 both technically competent and he's got to have some managerial
24 skills also. The company was moving very, very fast at that time.
25 To be efficient, to use money wisely, in doing the right
26 experiments and getting projects off the ground, they have to be
27 very directed. Have to be well organized, planned out. Tony
28 didn't approach the chemistry department that way. He had no

1 strategic plan or vision of where we were going. It was more like
2 an academic group, university group, where basic research was
3 being done.

4 Q Did you ever complain to Dr. Czarnik about that?

5 A No. It really wasn't my position to do that. It would
6 be like calling your boss bad in front of his face. It's not the
7 great way to win approval in the company.

8 Q How long has it been since you worked with Dr. Czarnik?

9 A Well, since he was dismissed from the company, I guess.
10 So when was that?

11 Q Back in September of 2000.

12 A So since then.

13 Q Going on two years?

14 A Two years now.

15 Q And who has been your boss for the last two years?

16 A David Barker.

17 Q He's the current chief scientific officer of Illumina.
18 He's also VP of chemistry.

19 Q Dr. Barnard, did you consider leaving Illumina in
20 1999?

21 A No, I didn't.

22 Q Never even considered leaving?

23 A No. Illumina was like a dream for me. Sort of two
24 huge facets of the technology came out of my Ph.D thesis and was
25 just a beautiful opportunity to see that to fruition, to turn into
26 a product, to essentially move science along in the U.S. and the
27 world. It's a great opportunity.

28 Q You don't recall talking to Dr. Stuelpnagel about

1 concerns you had with the company and the fact you were
2 considering leaving the company?

3 A No. I never had a conversation with John about that.

4 Q You are saying you weren't even thinking about that in
5 your own mind?

6 A No.

7 Q What were your duties in and responsibilities, if any,
8 that related to decoding?

9 A Depends on what time in the company you are talking
10 about.

11 Q Let's talk about the summer of 2000. Prior to the --
12 and including the time of the roadshow.

13 A So at that time I had not taken over the responsibility
14 of decoding at that time. The responsibility of decoding was
15 under Mark Chee, who was the VP of genomics.

16 Q Did you have any responsibilities relating in any way
17 to decoding?

18 A Yes, in the production of the beads. That was
19 supporting Dr. Chanfeng Zhao in production of the beads.

20 Q So you and Chanfeng Zhao worked on the production of
21 the beads which would be sent over to molecular biology?

22 A Correct.

23 Q For decoding purposes?

24 A Yes.

25 Q Do you know, Dr. Barnard, as of May of 2000, Dr.
26 Czarnik was assigned some goals in 2000?

27 A Yes, I was aware of that.

28 Q Do you know how many different codes Illumina could

1 actually decode as of May of 2000?

2 A If that's the same time Kevin Gunderson was doing what
3 was now termed the 768 experiment, we were decoding hundreds of
4 codes at that time.

5 Q A few hundred?

6 A It varied. Depending on the experiment.

7 Q What would be the range?

8 A Anywhere from 200 to 700 codes, probably.

9 Q Did you do any work in terms of analyzing the results
10 of the 768 decoding experiment?

11 A No. The only time I analyzed the results was in a
12 group meeting, but I didn't look at the raw data.

13 Q What group meeting are you referring to?

14 A There's a group meeting when the team working on
15 decoding first presented results, decoding hundreds of things.
16 That was referred to as the 768 experiment. There was quite a
17 long meeting just because the sort of the presentation, people
18 were excited about that level we attained at that time.

19 Q When was that meeting?

20 A I can't recollect.

21 Q No idea at all?

22 A It's been four years.

23 Q So, Dr. Barnard, at some point after Illumina went
24 public, was responsibility for decoding transferred from Mark Chee
25 to you?

26 A Yes.

27 Q When did that happen?

28 A That happened in conjunction with the collaboration we

1 have with Applied Biosystems. It was critical at that time with
2 where we reached a milestone where we had to present publicly to
3 Applied Biosystems the state of decoding, that that state, the
4 goal, was to decode over a thousand things consistently. We had
5 the milestone and the requirements of what we had achieved written
6 down and documented. So there was quite a bit of pressure to
7 reach that goal.

8 Q Goal was actually to decode 2000 beads, right?

9 A No, it wasn't.

10 Q You sure about that?

11 A Absolutely.

12 Q In any event, my question, sir, was when did you take
13 over responsibility for decoding?

14 A It was probably nine months after that, in that time
15 frame.

16 Q That would put it approximately when?

17 A Do we have a calendar, Nicky? That lists these dates.
18 Tony was dismissed when?

19 Q September of 2000.

20 A 2000. So it probably happened in -- probably in that
21 year, 2000, the decoding was transitioning over to me.

22 Q Let's take a look, please, at Exhibit 355.

23 You recognize Exhibit 355?

24 A Yeah. These are the typical goal charts that the
25 company started to use after Jay Flatley came on to the company.

26 Q Does this exhibit set forth the 2001 chemistry group
27 goals?

28 A Yes, it does.

1 Q I've got a blow-up of this I'll use.

2 MS KEARNS: Counsel, is this a blow-up of the same
3 exhibit?

4 MR. PANTONI: Same thing.

5 Q Dr. Barnard, what was Illumina's chemistry department
6 goal in the area of decoding for fourth quarter 2000?

7 MS KEARNS: Your Honor, I think this may have been the
8 subject of a chambers conference.

9 MR. PANTONI: Absolutely not.

10 THE COURT: This has to do with generalized scientific
11 methodology?

12 MS KEARNS: No. We talked about the relevance or
13 irrelevance of goals vis a vis the --

14 MR. PANTONI: This is not a specific issue relating to
15 the subject matter we've been discussing for days. It's the
16 chemistry group goals, not the corporate goals.

17 THE COURT: Better see you outside the presence of the
18 jury.

19 MS KEARNS: Please.

20 (Proceedings at sidebar.)

26 (Proceedings resumed in open court.)

27 THE COURT: You may continue your examination,

28 MR. PANTONI: Q Dr. Barnard, you testified you

1 thought that the 768 decode experiment that you were able -- that
2 Illumina was able to actually decode, give me a range, the upside
3 of that range was approximately 700 codes?

4 A Yes.

5 Q And it was actual decoding?

6 A It's the only kind there is, I think.

7 Q Okay. Now, what was the chemistry department goals --
8 strike that.

9 First of all, this 2001 chemistry goal, Exhibit 355, is
10 dated September 14, 2001. I believe that's the print date. Let
11 me direct your attention to the chemistry group's goal for the
12 fourth quarter of 2000. What was the chemistry group's goal in
13 terms of the number of beads to be decoded during fourth quarter,
14 2000?

15 A So it depends on what project you are talking about,
16 whether it's gene typing or gene expression.

17 Q Where is that set forth in this chart, if at all?

18 A It's implied in line number 8, test decoding method to
19 achieve 2000 and a hundred thousand codes. So as we see, as the
20 year marches on, we scale up. We start at 500 codes, we go to a
21 thousand and we go to 2000. But that's for a specific product
22 we're trying to develop, and that's in relation to the Applied
23 Biosystems collaboration. So that product is called genotyping
24 product.

25 The hundred thousand codes in Q4 was for a research project
26 for gene expression, so a totally different project.

27 Q What was the fourth quarter goal?

28 A The fourth quarter goal of 2000 by this chart is a

1 hundred thousand goals for gene expression, line 8.

2 Q Fourth quarter, 2000?

3 A No, excuse me, it's 500.

4 Q So the goal for fourth quarter 2000 was 500 codes?

5 A Correct.

6 Q And that was after Dr. Czarnik had been fired?

7 A Your point being?

8 Q My point being I would like a yes or no answer.

9 THE COURT: You can ask the witness that. Doesn't the
10 record already show when he was fired?

11 MR. PANTONI: It does. Nothing further.

12 CROSS-EXAMINATION

13 BY MS ESPINOSA:

14 Q Dr. Barnard, you were a student of David Walt's at
15 Tufts University, correct?

16 A Yes, I was.

17 Q You already had some familiarity with Illumina's
18 technology by the time the company was formed?

19 A Absolutely. The original patent, Illumina license,
20 came out of my Ph.D thesis.

21 Q Would you say Dr. Czarnik was the person who identified
22 you as a candidate for Illumina?

23 A No. Actually David Walt did.

24 Q And Mr. Pantoni asked you about your observations of
25 Dr. Czarnik at the Cardiff facilities. Those were pretty close
26 quarters, weren't they?

27 A Absolutely.

28 Q To your observation, did Dr. Czarnik work as hard and

1 as long as Dr. Chee and Stuelpnagel?

2 A No, there is a clear distinction between the work ethic
3 between John Stuelpnagel and Mark Chee and Tony and myself and
4 Steve Auger at the Cardiff office. Tony would roll in about 9:00
5 and leave about 5:00. A lot us were there at 7:30, we worked
6 until about 7:00 at night, some on the weekends. So it was a
7 clear difference in work ethic.

8 Q And would you say that Dr. Stuelpnagel kind of dictated
9 when the workday would end?

10 A No. I mean it was -- We were forming a company and
11 there was a lot to do and we worked until people got tired, which
12 was typically 12-hour day, 14-hour day. It was sort of what
13 people wanted to do. It was a lot to do at that time. At no time
14 did John Stuelpnagel come around to me and say, "Steve you have to
15 put in a 60-hour week." It's why we were there, we wanted to do
16 this. It was a great opportunity.

17 Q And did people come and go as they pleased at Cardiff?
18 Was Dr. Stuelpnagel dictating when you arrived and when you left?

19 A No. People came and go as they have things to do. I
20 just moved out here so I had to go and find an apartment and get
21 set up and all this other stuff. So it was common practice just
22 to come and go as you felt you needed to.

23 Q We've also heard testimony that Illumina moved to new
24 facilities at Towne Centre Drive around September.

25 A Uh-huh.

26 Q Of 1999, I believe.

27 What did you do to prepare for the move to the new building?

28 A The tremendous amount you have to do. You just can't

1 walk into a facility and expect things to be there. We had to
2 organize vendor relationships, to order chemicals and things we
3 needed for the labs. We had to set up accounts, get certification
4 from the banks that we had money in the bank so we could buy stuff
5 from the chemical vendors. So we had that to do.

6 We had to plan out all the things we need to have in the
7 laboratory. It's like setting up a kitchen, really. You need
8 pots and pans and things to bake with. We do the same thing in
9 chemistry. You have to make those lists, make sure those lists
10 coordinated with the experiments you want to do. We had
11 everything -- We had to do everything from buying pencils and
12 wastepaper baskets to paper, to chemicals, planning the
13 experiments, writing plans of what we want to do. Everything from
14 A to Z. So there was tons to do at that time.

15 Q To your observation, in terms of setting up the
16 chemistry facility in the new building, who took care of that?

17 A It was -- I was championing that at that time. There
18 was no distinction at that time if it was chemistry or molecular
19 biology or engineering. There were only a few of us. There was
20 no distinction at that time in the company. It was basically to
21 get the technology that was licensed up and running as fast as
22 possible, and that was the goal.

23 Q Do you recall Dr. Czarnik doing any of the planning or
24 strategic documents to get ready for the move to the new building?

25 A No, I don't recall that at all.

26 Q And then we talked a little about the big room at the
27 new facilities.

28 A Uh-huh.

1 Q Do you recall Dr. Stuelpnagel of trying to do anything
2 to hamper communication between the different groups of
3 scientists?

4 A I thought John thought it would be a good idea that we
5 all be in the big room.

6 Q Do you recall that at some point in time Steve Auger
7 left the company?

8 A Yes.

9 Q Do you recall that John Stuelpnagel interviewed you
10 after Steve Auger left to see what he could do to improve things
11 as Illumina?

12 A I think we had a conversation. I wouldn't call it an
13 interview.

14 Q Do you recall during that discussion suggesting to Dr.
15 Stuelpnagel that there could be further kinds of meetings to
16 foster communication within the company?

17 A Yes, I suggested a venue of communication, the
18 Wednesday noon seminars or seminars where people would present
19 what each group, each group was working on. That way we would
20 know what each group of people would be doing and it would foster
21 communication on that level also.

22 Q Did Dr. Stuelpnagel agree with that suggestion?

23 A Yeah, he encouraged me to start that.

24 Q Did you in fact do that program at Illumina?

25 A Yes.

26 Q So would you say that over his tenure as chief
27 scientific officer, Dr. Czarnik acted as the chief scientific
28 officer in terms of the business development of Illumina's science

1 efforts?

2 MR. PANTONI: Object that there's no foundation for
3 that, Judge.

4 THE COURT: Sustained. You can lay a foundation.

5 MS ESPINOSA: Q Did you have an opportunity to observe
6 Dr. Czarnik's business development efforts on behalf of the
7 chemistry applications of Illumina?

8 A Absolutely. At that time I was fairly senior in the
9 company, and being from the beginning of the company, I was kept
10 informed of all the business development and where the company was
11 going. The company was going in the genomics area. It was clear
12 Dr. Czarnik was not an expert in the genomics area. He was an
13 expert in essentially combinatorial chemistry, which is a drug
14 design based area. So he didn't have the expertise to actually do
15 the development, the business development, and it was clear that
16 Mark Chee, the VP of genomics, and John Stuelpnagel had the
17 connections we needed to develop the genomics aspect of the
18 business at that time.

19 Q As part of the chemistry group, had you hoped that Dr.
20 Czarnik would in fact propose chemical applications for Illumina's
21 technology?

22 A Absolutely. I didn't know why we weren't doing more of
23 it. There were a number of areas we could be developing in the
24 chemistry department. We could be developing assays to identify
25 new drugs. A lot of companies do this. There are companies that
26 are just out there screening new compounds with potential of
27 hitting on a new drug. That would be a beautiful application for
28 our technology. I didn't understand why we weren't doing more of

1 that.

2 Q Did you ever observe any member of senior management
3 being disrespectful to Dr. Czarnik?

4 A No, not disrespectful.

5 Q You saw a healthy scientific debate among the
6 scientists and senior managers?

7 A Yes. It's typical. You have a very strong -- You have
8 a group of people that are very strong minded about ideas and
9 there's going to be debate. Sometimes they get very heated. But
10 that's commonplace in science.

11 Q To your observation, did you perceive Dr. Czarnik as a
12 fighter for the chemistry group?

13 A No. Actually Tony and I talked about that quite a bit.
14 Tony admitted to me or confided in me he was not a fighter, that
15 if I wanted to pursue ideas or if I had disagreement with what was
16 going on I'd have to go that alone.

17 Q He was in essence saying if you want to have a
18 discussion or a debate with molecular biology, you are going to
19 have to do that --

20 MR. PANTONI: Objection, leading.

21 THE COURT: Sustained.

22 MS ESPINOSA: Q So did you feel that you had to
23 advocate positions for the chemistry group on behalf of the
24 chemists?

25 A Yes. People know I'm very vocal about my positions, so
26 that -- I had to stand on my own two feet to do that with the
27 company at that time.

28 Q Did Dr. Czarnik tell you he had voluntarily taken on

1 the position of research fellow?

2 A I remember the day Tony had the meeting with Jay
3 Flatley and Tony came down, we went outside, we had discussion of
4 what went on. During that discussion, Tony told me he accepted a
5 position of research fellow and he was stepping down from CSO, and
6 he thought it was a good idea just because David Barker was an
7 expert at genomics. It seemed like a good idea at that time.

8 Q During that time period did Dr. Czarnik connect his
9 stepping down to research fellow as in any way connected to a
10 concept that he was being discriminated against because of a
11 medical condition?

12 A No, it had to do with his essentially efficiency of
13 representing Illumina in the genomics area.

14 Q In fact at that time did you have the idea that Dr.
15 Czarnik suffered from any kind of medical disability?

16 A No.

17 Q Did you perceive Dr. Czarnik as a procrastinator?

18 A Absolutely. Tony used to admit to it. We used to joke
19 about it.

20 Q Let's put up Trial Exhibit 58, please. Do you recall
21 that Dr. Czarnik was responsible for filing a grant application, a
22 NIST ATP grant application, in April of 1999?

23 A Absolutely. The NIST grant application is a sizable
24 grant, would be a great sense of revenue for the company at that
25 time, so it was important that we be applying for these grants.
26 They are on the order of millions of dollars. There was
27 tremendous interest in getting this grant applied for and actually
28 receiving it.

1 So we talked quite a bit about the importance of the NIST
2 grant and the business development of the company.

3 Q Had you personally had any experience in writing grant
4 applications by this time?

5 A Yeah, I've written two in grad school and I wrote three
6 at Illumina. One of the three at Illumina was funded.

7 Q So in your experience, how much lead time should you
8 allow for preparing a grant application?

9 A So for myself I think you need at least two months to
10 prepare well to write the grant application, have it reviewed by
11 colleagues, get all the diagrams and things like that ready. So
12 I'd say about good two months.

13 Q Let's take a look at this exhibit, Trial Exhibit 58.
14 It's an e-mail from Dr. Czarnik to you, among others. Do you
15 recall him enlisting your help on April 4th, 1999, to prepare the
16 NIST ATP grant application?

17 A Yes, I do.

18 Q And at the time you received this, did you think this
19 was kind of late in the game to be getting started?

20 A Absolutely. It came right before a weekend and I had
21 to come in on the weekend to get these diagrams ready for Tony
22 that -- so he could put them in the grant.

23 Q This one was on a Sunday, it was discussing the
24 following week. So are you referring to the weekend after that
25 where you had to prepare diagrams?

26 A I think I'm trying to remember whether I came in on
27 that Sunday to get the diagrams.

28 Q So do you recall the effort that you and others went

1 through to help Dr. Czarnik get this grant application done on
2 time?

3 A Yeah. I mean we provided support to get the grant out.

4 Q Dr. Czarnik did get it in on time?

5 A Yes, he did, he pulled an all-nighter and got the grant
6 written.

7 Q Did Dr. Czarnik ever draw your attention to the goals
8 he was assigned as research fellow?

9 A Yes, he did. As I understand it, reached by consensus
10 between Jay Flatley, the CEO of the company at the time, and Tony.
11 Tony showed me the goals.

12 Q By this time you weren't reporting to him any longer,
13 correct?

14 A No, I was reporting to David Barker.

15 Q Was there any business reason for him to draw your
16 attention to those goals that you know of?

17 A No.

18 Q Let's put up Trial Exhibit 227, please. Do you know
19 Dr. Gali Steinberg?

20 A Yes, I do.

21 Q She currently out on maternity leave?

22 A Yes, she is.

23 Q Are you familiar with some work she did where she tried
24 to demonstrate the feasibility of attaching two different oligos
25 to beads as a binary decoding system?

26 A Yes. What we're talking about is a chemical method
27 where two pieces of DNA are actually attached to a bead. What
28 that does is simplify the decoding process. There was two big

1 concerns why we wanted to pursue that. First of all, it's a cost
2 reduction for the company. It also allows us to decode many more
3 things very efficiently. So it was very important that we pursue
4 this avenue.

5 Q I think Dr. Barker tried to analogize putting two
6 different oligos on a bead sort of like giving human beings a
7 first name and a last name. Is that a fair analogy?

8 A Yes. It gives you two sets of identifiers.

9 Q So let me draw your attention to Dr. Czarnik's binary
10 oligo encoding goal. Do you believe that Dr. Steinberg -- First
11 of all, did you have any involvement with Dr. Steinberg's
12 experiments with binary encoding?

13 A Yes, we were working on this under the gene expression
14 project which I was supervising. The beads that were made
15 chemically come to my group for analysis. My group does the
16 testing of the beads or the decoding of the beads.

17 Q So when you are referring to "my group," are you
18 referring to the decoding group?

19 A Absolutely.

20 Q So you referred to gene expression. So that's the
21 group where they are trying to decode many greater numbers of bead
22 types, correct?

23 A Yes.

24 Q So take a look at Dr. Czarnik's binary oligo encoding
25 goal. Did Dr. Steinberg actually do any of the things that are
26 listed as Dr. Czarnik's research goals?

27 A Yes, the first two, the goal of 30-day, the initial
28 model system was decoding 16 things. So she produced that very

1 quickly, actually. The next step was to scale that up to a higher
2 complexity of things, to 96, and then up to hundreds of things.
3 So Gali was working on these -- on both of these complexity
4 levels.

5 Q I know Illulmina is a big place now, but do you have
6 any idea whether or not Dr. Steinberg intends to further pursue
7 the binary encoding project?

8 A Absolutely. We have a team based on developing bead
9 chemistry for bead expression. Gali is in that group and I'm
10 leading that group.

11 Q The intent is to decode greater numbers of bead types
12 than the 30-, 60-day goals listed there?

13 A Absolutely.

14 Q What's the ultimate goal?

15 A The ultimate goal is probably around 100,000 to 150,000
16 codes.

17 Q Were you aware that Dr. Czarnik was preparing for a
18 January 2000 SAB meeting?

19 A Yes, I was.

20 Q How did you become aware of that?

21 A It was at the last moment. Typically SAB meetings --
22 Scientific Advisory Board meeting, where we have world-renowned
23 experts come in and review the technology of the company to make
24 sure we're pursuing our science as we should, it's sort of a board
25 that oversee what's going on scientifically.

26 So Tony was responsible for running these meetings.
27 Typically what you do is you create a packet of information
28 summarizing the science that's been done in the company. So this

1 goes out beforehand to the Scientific Advisory Board members so
2 they can preview it and then come in when they visit the company
3 to ask questions and, you know, either to offer suggestions or
4 correct us if they feel we're going to the wrong direction. So
5 it's a very important package that goes out before the board for
6 two reasons. It's very hard to get these people to meet because
7 they are famous people and very, very busy, so we want to make
8 that meeting very, very efficient. It's critical they have the
9 information before.

10 So Tony --

11 Q Were you expecting to be asked to prepare some
12 materials for the SAB meeting?

13 A Yes. Typically what would happen is week before the
14 meeting we'd start preparing the board packet, as we called it.
15 We assemble information, get it printed, sent out two or three
16 days beforehand.

17 Q I know you said Dr. Czarnik was your boss so you are
18 uncomfortable to criticize him. But do you recall commenting to
19 anyone else that Dr. Czarnik wasn't getting ready in time?

20 A Actually I confronted Tony why it was going on so late,
21 because I knew it wouldn't be shipped in time. Tony told me that
22 he was going to wing it at the next meeting. I was basically
23 insulted by that whole comment. To bring 10 or 12 people in that
24 are famous in science and then wing it and try to get information
25 out of them, I thought was a bad thing for Illumina. First of
26 all, it ruins our reputation in the scientific community. It's a
27 waste of our money, also.

28 So I mentioned this to Deborah Flamino also in a

1 conversation we had --

2 MR. PANTONI: Your Honor, I'll move to strike that last
3 bit of hearsay.

4 THE COURT: That he mentioned it to Deborah Flamino?
5 Motion granted.

6 MS ESPINOSA: Q Do you recall after Dr. Czarnik
7 announced he was stepping down to research fellow, do you recall
8 having a sense that he probably wasn't going to be long for
9 Illumina, around at Illumina for much longer?

10 A Yes. In my experience, and that's probably 10 years of
11 real experience, first of all working at a large company,
12 CIBA-GEIGY, a mid-sized company, and now a start-up company,
13 usually when people are taking these positions they are looking at
14 it as exit position from the company.

15 MR. PANTONI: I'll move to strike, lack of foundation,
16 inadmissible.

17 THE COURT: Motion to strike granted.

18 MS ESPINOSA: Q Do you recall commenting that because
19 of Dr. Czarnik's lackadaisical style that Jay Flatley might want
20 to terminate him?

21 MR. PANTONI: Objection, hearsay

22 THE COURT: Sustained.

23 MS ESPINOSA: I don't think I have anything further.
24 Thank you.

25 REDIRECT EXAMINATION

26 BY MR. PANTONI:

27 Q Dr. Barnard, other people have testified in this case
28 that Gali Steinberg's work in this case was something different

1 than this project.

2 A I haven't heard the other testimonies, but I don't
3 think it's different. It's a generic technique we can use to
4 apply to gene type or gene expression.

5 Q When did Gali Steinberg stop working on that
6 experiment?

7 A Well, she's picked it up again and she just stopped it
8 probably a month ago.

9 Q She had done some earlier work?

10 A Absolutely. So she's been working on and off on this
11 technique.

12 Q She hasn't reached this level, has she, 4000?

13 A No, but she has decoded up to hundreds of things. I
14 think most we've decoded is about 700 things.

15 Q You mentioned that you were surprised that you weren't
16 doing any work in the area of developing assays to perhaps
17 discover new drugs.

18 A Absolutely.

19 Q Who is working on that project now?

20 A We have no interest in that right now or no one working
21 on it.

22 Q So you are not surprised now, you are not questioning
23 or scratching your head why aren't we working on this project now?
24 Yes or no.

25 A I thought about areas we could be working on in terms
26 of assays for drug development.

27 Q Thinking about it?

28 A Yeah, I think we're still thinking about it.

1 Q I would like to ask you to take a look at Exhibit 340.
2 I'm sorry, it's in a binder. I don't want to show it on the
3 screen yet.

4 Do you recognize Exhibit 340, Dr. Barnard?

5 A No, I do not.

6 Q Take a look at all the pages.

7 A It appears to be the card we gave Tony when he left.

8 Q Going-away card?

9 A Yes.

10 Q Do you have any writing on that card, Dr. Barnard?

11 A Yes, I do.

12 Q Read to the jury what you wrote in your handwriting on
13 Dr. Czarnik's going-away card.

14 MS KEARNS: Objection, relevance, hearsay.

15 THE COURT: Let me read it. Which one is it?

16 Is it the last sentence that you are particularly interested
17 in?

18 MR. PANTONI: In particular. I think it all should be
19 read, but in particular the last sentence. It's very short.

20 THE COURT: I'm not sure if that is impeaching -- I
21 think she might ask some questions about that subject. I'm not
22 sure if that's inconsistent with what the witness has testified
23 to.

24 I guess you could argue what the implication is.

25 MR. PANTONI: I think so, Judge.

26 THE COURT: You see what sentence I'm talking about?

27 MS KEARNS: 340?

28 THE COURT: It will be faster just to take that up

1 outside the presence of the jury for a few minutes.

2 (Proceedings at sidebar.)

8 (Proceedings resumed in open court.)

9 MR. PANTONI: Q Dr. Barnard, your writing appears on
10 this card, that is right?

11 A Yes, it does.

12 Q Would you please read to the jury what you wrote?

13 A I'm trying to figure out what I wrote. "It's been a
14 wild ride from the first dinner in Boston to hopefully not the
15 last," something in San Diego. "I never had a boss I respected so
16 much. Steven."

17 Q "I've never had a boss I respected so much"?

18 A Until -- Until I had David Barker, yeah.

19 Q Your boss will appreciate your saying that formally on
20 the record.

21 A Is that the point you are trying to get across?

22 THE COURT: He gets to ask the questions.

23 MR. PANTONI: Q I'm trying to get a point across
24 that on the day Dr. Czarnik was fired, you had never had a boss
25 you respected so much, you agree with that, sir? Do you agree
26 with that?

27 A No.

28 Q All right. How many promotions have you received at

1 Illumina?

2 A Three.

3 Q How many shares of stock do you have?

4 A About 80,000.

5 MR. PANTONI: Nothing further, Judge.

6 THE COURT: Thank you.

7 Redirect.

8 RE CROSS-EXAMINATION

9 BY MS ESPINOSA:

10 Q Dr. Barnard, the passage you just read, what's that
11 from, what was the document?

12 A Yeah, it's from a goodbye card to Tony when he left.

13 Q You said that Dr. Czarnik was your friend?

14 A Absolutely.

15 Q Do you like him personally?

16 A I did.

17 Q Do you think what you wrote there contradicts what you
18 said about him previously?

19 A No, I don't think it does. I think you can respect
20 someone but they can be very bad at their job.

21 Q And did you ever express the view or did you hold the
22 view that Dr. Czarnik did have a lackadaisical style?

23 A Absolutely. I wrote an e-mail to Steve Auger --

24 MR. PANTONI: Objection, hearsay, move to strike.

25 THE COURT: Let me think about that.

26 Without telling me the content, that contradicts in your
27 mind what you wrote here? Just answer that yes or no.

28 THE WITNESS: Yes, it does.

1 THE COURT: When was that written?

2 MS ESPINOSA: I can represent it was written in March
3 of 2000, your Honor.

4 THE COURT: What's the date of departure of Dr.
5 Czarnik?

6 MS ESPINOSA: Around the time of his departure from the
7 company, September of 2000.

8 I think I'll have to get an offer of proof outside presence
9 of the jury.

10 MS ESPINOSA: I can get at it a different way with a
11 different question.

12 THE COURT: Okay.

13 MS ESPINOSA: Q So in March of 2000, did you hold the
14 view if Dr. Czarnik continued with his current management style,
15 he would be terminated by Jay Flatley?

16 A It was my opinion that due to Tony's lack of
17 productivity, I was very concerned about his status in the
18 company.

19 Q You were concerned out of a friendship for him?

20 A Absolutely.

21 Q Personal feeling toward him?

22 A Uh-huh.

23 Q And in fact he was terminated in September of 2000,
24 correct?

25 A Yes.

26 MS ESPINOSA: Nothing further, your Honor.

27 MR. PANTONI: Nothing further.

28 THE COURT: Okay. Thank you very much, sir, you may

1 step down.

2 Would this be a good point to take our recess?

3 MR. PANTONI: I think so.

4 THE COURT: We'll our morning recess at this time.

5 We'll be in recess until 10:25. Please remember the admonition

6 not to form or express any opinions about the case, not to discuss

7 the case amongst yourselves, with anyone else. We'll be in recess

8 until 10:25. 10:25.

9 (Proceedings resumed outside the presence of the jury.)

24 (Recess.)

25 THE COURT: Record indicate all the jurors present,

26 counsel and parties.

27 You may call your next witness.

28 MR. PANTONI: Todd Dickinson.

1 TODD DICKINSON,
2 called as a witness by the Plaintiff, having been first duly
3 sworn, was examined and testified as follows:

4 THE CLERK: Would you please state your full name and
5 spell your last name for the record.

6 THE WITNESS: Todd Allan Dickinson. D-i-c-k-i-n-s-o-n.

7 THE CLERK: Thank you.

8 DIRECT EXAMINATION

9 BY MR. PANTONI:

10 Q Morning.

11 A Good morning.

12 Q It Dr. Dickinson?

13 A It is.

14 Q Dr. Dickinson, who are you currently employed by?

15 A Illumina.

16 Q When did you become employed by them?

17 A At the beginning of the company, about four years ago.

18 Q Do you recall approximately what date or what month
19 that was?

20 A Yeah, I signed my contract I believe in April of 1998,
21 and started September 21st of that year.

22 Q So you actually started working September 21 of '98?

23 A Yep.

24 Q Where was the company located at that time?

25 A When I started it had moved to UTC, La Jolla.

26 Q Towne Centre Drive?

27 A Towne Centre Drive.

28 Q What was your first position with Illumina?

1 A Scientist.

2 Q Have you received any promotions or position changes
3 since that point?

4 A Yes, several.

5 Q Can you take us through those, what the new position
6 was and the approximate date that you got your new position?

7 A Sure. Promoted to Scientist 2 about a year and a half
8 after I started, to senior scientist about six months after that,
9 and two months ago to scientific program manager.

10 Q Sorry, your last promotion, scientific?

11 A Program manager.

12 Q When you first started with Illumina, who was your
13 immediate supervisor?

14 A Tony Czarnik.

15 Q Dr. Czarnik held a position of CSO and VP of chemistry
16 at that time?

17 A Yes.

18 Q Did you report directly to Dr. Czarnik the entire time
19 from the beginning of your employment until Dr. Czarnik became
20 research fellow?

21 A Yes.

22 Q In March of 2000.

23 A I believe so, yeah. And then David Barker at that
24 point.

25 Q Has David Barker been your immediate supervisor since
26 that time?

27 A He has. He shares it with Bob Kain, our VP of
28 engineering. I report to both of those individuals.

1 Q During the time Dr. Czarnik was your immediate
2 supervisor, did you interact with him on a daily basis?

3 A Yes.

4 Q Did you both have a desk in what we've been calling the
5 big room at Illumina?

6 A Yes.

7 Q And where was your desk in relationship to Dr.
8 Czarnik's desk?

9 A We changed around, but I think I was on the other end
10 of the room most of the time. I was by the windows and he was at
11 the other end of the room by the doors.

12 Q Do you believe that Dr. Czarnik was a good manager
13 during the time that he supervised you?

14 A On a personal level, yes. Technically, there were
15 areas where he could have done better.

16 Q What do you mean by technically?

17 A Things like planning, kind of vision for what we were
18 doing, technical level wasn't always there, but on a personal
19 level I enjoyed reporting to Tony.

20 Q Same thing Steve Barnard said a few minutes ago.

21 A I don't know.

22 MS KEARNS: Objection, the witness wasn't present.

23 THE COURT: It's not a question. The jury to disregard
24 it.

25 MR. PANTONI: Q Would you describe Dr. Czarnik as a
26 good mentor?

27 A Be more specific. Technically or personally?

28 Q In terms of discussing science with you, giving you

1 ideas and concepts that you might apply to your work?

2 A From a chemistry standpoint, yes. Tony is an excellent
3 chemist and I got a lot of advice from him from a chemistry
4 standpoint when I asked for it.

5 Q You were a chemist?

6 A Yes.

7 Q He was running the chemistry group?

8 A He was VP of chemistry and also our CSO, yes.

9 Q Your duties were limited to chemical?

10 A That's not true.

11 Q What else were you doing as a chemist?

12 A My background is very broad. My Ph.D is in analytical
13 chemistry and fiber optics sensors. I was technology transfer for
14 fiber optics, for things like etching, something a chemistry and
15 also --

16 THE COURT REPORTER: Slow down, please.

17 THE WITNESS: Suffice to say my responsibilities
18 weren't limited to traditional chemistry.

19 MR. PANTONI: Q Obviously you did have some
20 traditional chemistry-related duties and responsibilities?

21 A Some, yes.

22 Q Did you notice any sort of a schism or divisiveness
23 between biology and chemistry?

24 A Yes, that existed.

25 Q And what if anything did you observe Dr. Czarnik do to
26 try to improve communications between the two groups?

27 A Not a whole lot. I don't recall Tony spending a lot of
28 time trying to bridge the gap. What I do remember is him wanting

1 to make sure the chemistry department wasn't limiting staff rather
2 than -- the weakest link. He was saying that often. But not
3 bridging the gap between microbiology and chemistry.

4 Q Do you recall that Dr. Czarnik established a series of
5 meetings involving interdisciplines where scientist from both
6 molecular biology and chemistry would attend and discuss
7 scientific issues?

8 A I don't recall, no.

9 Q Do you recall those meetings happening?

10 A We tried to talk often among biologists and chemists.
11 I was a big advocate of trying to get rid of departments entirely,
12 but I don't remember if Tony --

13 Q Do you remember having regular meetings where scientist
14 from both disciplines, both molecular biology and chemistry, would
15 attend and discuss scientific issues?

16 A Those meetings do not stick out. I remember speaking
17 with chemists most of the time in the early days. Then we of
18 course had a Wednesday morning meeting where everybody would
19 attend those, but those were more just issues in the company and
20 things we had to take care of. We didn't get into the
21 technical --

22 Q Who ran the Wednesday-morning meetings?

23 A I don't remember who ran them in those days, honestly.
24 I do not remember who ran those meetings.

25 Q What subject matters did you discuss generally at the
26 Wednesday meetings?

27 A Well, the Wednesday meeting has changed. It has
28 evolved tremendously over the last four years. When we first

1 started, when there were six of us, we were mostly discussing
2 things like what's catching us up right now, how do we get around
3 it, problem solving. Over the years it's evolved into more
4 presentations, formal presentation of what people are working on.
5 And it's hard to me to remember how that evolution has taken
6 place.

7 Q Dr. Dickinson, did you ever consider leaving Illumina?

8 A Have I ever considered leaving Illumina. No.

9 Q You don't recall at some point in early 1999 there
10 being some sort of major crisis at Illumina and you talked about
11 possibly leaving the company?

12 A I've never questioned my employment at Illumina. Not
13 to my recollection, anyway. Everybody goes through ups and downs,
14 but I really enjoy working at Illumina. I have no question of
15 leaving.

16 Q Do you recall a series of interviews being conducted by
17 John Stuelpnagel in early 1999 to talk about morale issues at
18 work, things of that nature?

19 A Not really, no. I don't recall that.

20 Q Did you do any work in the areas of the optical nose,
21 the o-nose, at Illumina?

22 A Yes.

23 Q What is your graduate thesis on?

24 A The optical nose technology.

25 Q Did you recall ever expressing any frustration over the
26 fact that the company was not raising money to fund the o-nose
27 project?

28 A Probably. The project has struggled from the beginning

1 of the company. I'm trying to get off the ground. It hasn't been
2 the focus of Illumina and it shouldn't be. I always agreed with
3 the focus. Since that was the project I was leading, I was hoping
4 it would receive a little more support.

5 Q Is that still the case today, it's not the focus at
6 Illumina?

7 A It safe to say that's not our focus, yes.

8 Q Although you might have a personal interest in the
9 o-nose, having given your thesis on it, you agree from a business
10 standpoint it doesn't make sense to emphasize the o-nose?

11 A Right now. It's all timing. Right now, as I
12 understand it, the market is for genomics. Since Illumina's
13 technology expands that as well, that's what we chose to focus on.
14 I think that's the right decision.

15 MR. PANTONI: That's all I have. Thank you.

16 CROSS-EXAMINATION

17 BY MISS ESPINOSA:

18 Q Dr. Dickinson, when did you first become acquainted
19 with the technology that was part of Illumina's technology?

20 A I worked on this technology in graduate school, helped
21 develop it from the start.

22 Q Were you a student of David Walt's?

23 A Yes.

24 Q Is it safe to say Dr. Walt is the person who identified
25 you as a potential candidate for Illumina?

26 A Yes.

27 Q And to your knowledge, who do you think was the first
28 person to sign an offer letter with Illumina?

1 A I think I was. Yeah. But you have the dates probably.
2 I think April 24th is when I signed one and I was the first.

3 Q Let me put that up on the screen.

4 THE CLERK: Is that an exhibit, Counsel?

5 MS ESPINOSA: Not yet.

6 MS ESPINOSA: We offer this as trial Exhibit 387.

7 Q Dr. Dickinson, does this look like the offer letter
8 you received for a company that was referred to as Newco, Inc. at
9 the time, dated April 9th, 1998?

10 A Yes, that looks like it.

11 Q Put up the signature page, please.

12 Does this look like your signature indicated dated April 22,
13 1998?

14 A Yes, and that was my birthday, for the record

15 Q By the way, Dr. Dickinson, how old are you?

16 A I'm 31. Thank you. I know, I get that all the time.

17 Q Was Illumina your first employment as a scientist?

18 A Yes.

19 Q Was Dr. Czarnik your first boss as a scientist?

20 A Uh-huh, yes.

21 Q And between April 22, 1998 and September when you
22 actually started working at Illumina's facilities near UTC, what
23 were you doing?

24 A I was finishing my dissertation, actually.

25 Q That was for your doctorate degree?

26 A Right.

27 Q Where did you finish that work? Is that in San Diego?

28 A I finished the last chapter here. So I visited the

1 Cardiff office a couple of times, but I was not employed at the
2 time.

3 Q So when you joined Illumina initially, what were your
4 first responsibilities?

5 A As I was mentioning earlier, technology transfer in a
6 broad sense. Developing the fiber optics that we use today in our
7 products. Working with various companies to do that. Developing
8 the etch process, developing the chemistry associated with that.
9 Doing initial molecular biohybridization. Even beginning to start
10 evaluating alternative substrates for the materials. My
11 responsibilities kind of bridged engineering, biology and
12 chemistry.

13 Q Did you get a lot of guidance in terms of how to manage
14 your work and what kind of things to do next?

15 A No, I pretty much knew what I had to do and did it.
16 That's the way I work.

17 Q Did you enjoy that kind of management style in terms of
18 hands-off management style?

19 A I did. That was fine for me.

20 Q Now, do you recall Dr. Czarnik articulating any
21 scientific vision or plans for the chemical applications for
22 Illumina's technology?

23 A Not in any organized fashion. I wanted to do things
24 with the technology from a chemistry standpoint. High throughput
25 screening, things like that. There was interest there, sure.

26 Q Do you recall him proposing any business plans for
27 those applications?

28 A No.

1 Q Were you involved in drafting the prospectus for
2 Illumina's initial public offering?

3 A I don't think I wrote anything. I helped put together
4 some of the photographs that were used in those documents.

5 Q Let me put up Trial Exhibit 58. It's Illumina 4547
6 through 4548.

7 Actually this is the wrong one but I'll start with this.

8 Q Could you take a look at Exhibit 58, which is up on the
9 screen there. Do you recall in April of 1999 Dr. Czarnik asked
10 for your help in preparing a NIST ATP grant application?

11 A Yeah, yes, I remember that.

12 Q And was it your perception that this was something that
13 had to be done fairly quickly?

14 A Yes.

15 Q Would it be fair to say that Dr. Czarnik had
16 procrastinated in getting started on this application?

17 A Very fair to say that, yes.

18 Q And your experience with working with Dr. Czarnik,
19 would you characterize his style as a little bit of a
20 procrastinator?

21 A Not a little bit, a lot, yeah.

22 Q Did that cause you some inconvenience being enlisted to
23 help with this grant application?

24 A Yes, it did. I think I had to come in on a weekend,
25 which wasn't a huge deal, but I prefer to plan ahead a little more
26 than that.

27 Q Have you personally had experience in drafting grant
28 applications?

1 A Some experience in graduate school. I helped write a
2 few grants with David Walt, but none on my own.

3 Q Based on that limited experience, would you have
4 preferred a little more lead time to get started on this grant
5 application?

6 A Yes.

7 MS ESPINOSA: Let's put up Exhibit 125, please.

8 Q We're putting up on the screen what's marked Exhibit
9 125-2. Dr. Dickinson, can you recognize that photograph?

10 A Sure.

11 Q What is that?

12 A That's the big room, that we called it.

13 Q That's at 9390 Towne Centre?

14 A Yes.

15 Q And about how many people sat in that room over time?

16 A I don't know. It must be 20. We packed a lot of
17 people in there.

18 Q What kind of people sat in there in terms of which
19 functional groups they worked in?

20 A I think they were people from all disciplines. Mostly
21 the scientists. I think some engineers in there, too. I'd have
22 to go through. Kevin -- There was people from different
23 disciplines, scientist mostly. There may have been a couple of
24 research associates there, too.

25 Q So we've heard some testimony that there was this
26 schism between the molecular biology group and the chemistry
27 group, so with everybody sitting in the same room, did that
28 enhance communication between the people in the different groups?

1 A Yeah, I think it helps for us to be in the same room.

2 Q Do you recall Dr. Stuelpnagel ever saying or doing
3 anything to try to hamper communication between the groups?

4 A No.

5 Q Do you recall Dr. Czarnik characterizing anything that
6 Dr. Stuelpnagel did as an attempt to hinder or hamper
7 communications between the molecular biology group and the
8 chemists?

9 A No. My impression was John wasn't hampering
10 communication as well.

11 Q Under Dr. Barker's regime as chief scientific officer,
12 do you believe this schism between the groups has improved at all?

13 A I do, yeah. I don't feel a schism with microbiology at
14 all.

15 Q Let me put up -- Actually let me show Mr. Pantoni an
16 exhibit that's been objected to. It's 4855.

17 THE CLERK: What exhibit is it?

18 MS ESPINOSA: 203. It's not objected to.

19 Q Can we start at the bottom.

20 That's the one that says "Dear Colleagues."

21 Do you recognize this e-mail from John Stuelpnagel to "All
22 Of Us" dated May 1st, 2000?

23 A Yeah, it looks familiar.

24 Q What is it?

25 A This had be announcement of your arrival to the
26 company. The bottom one you are talking about?

27 Q Yes, right there.

28 Then look at the next one here. It's dated the same day,

1 about an hour later, from Dr. Czarnik to "All Of Us." Do you
2 recall seeing this e-mail on or about May 1st, 2000?

3 A Yes.

4 Q What was your reaction when you read that e-mail? By
5 the way, can you read it out loud for the jury?

6 A The whole thing?

7 Q Yes.

8 A Sure. "Before fully passing the baton, everyone at
9 Illumina should know how much effort John has provided for the
10 company on its intellectual property portfolio. When Mark and I
11 joined John to start the company, no one was experienced in the
12 preparation and prosecution of patents. I was loaded with work
13 and simply unable to take on this responsibility. I assume Mark
14 found himself in the same spot. John didn't hesitate to take this
15 on despite having probably the greatest work load. With 40-plus
16 applications now filed, it was a Herculean effort. Thanks John.
17 Nicky, we're glad you're here, Tony."

18 Q Do you recall your reaction to receiving this e-mail?

19 A At some point I became aware that the e-mails Tony was
20 sending about John were not entirely sincere. I don't recall if
21 this was before or after that time.

22 Q Let's go to the next message above that.

23 Is this 4855? There's a different version.

24 MS ESPINOSA: Sorry, your Honor, I think we have a
25 duplicate.

26 Q This was marked as trial Exhibit 203-4. It's the same
27 e-mail string. Do you see your response, Todd Dickinson to Dr.
28 Czarnik, the same day, about a minute after Dr. Czarnik sent that

1 one out?

2 A Yes.

3 Q And your response. What was your response?

4 A My response was, "You are something else."

5 Q What did you mean by that?

6 A I meant at this point in time I realized that Tony was
7 probably not being entirely sincere with this e-mail. It had
8 hidden meanings, complimenting but not really meaning it. That's
9 why I wrote that as being sarcastic.

10 Q What was Dr. Czarnik's response about two minutes
11 later?

12 A "The world is seldom as it appears." Which confirmed
13 my suspicion.

14 Q Then your response to that?

15 A "This makes me rethink all the times you have been kind
16 to me."

17 Q Didn't you testify that you and Dr. Czarnik sat in the
18 big room together?

19 A Yes.

20 Q So you were e-mailing each other across the room?

21 A Probably. 20 feet away.

22 Q Why at this point in time did you feel that Dr. Czarnik
23 was not being sincere about his feelings towards Dr. Stuelpnagel?

24 A Because at this point, May of 2000, I knew what was
25 going on. Generally speaking behind the scenes, Tony was unhappy
26 with John and there was a schism there and I was aware of that.
27 And this e-mail was inconsistent with what I knew Tony's feelings
28 toward John to be, which prompted me to write this.

1 Q How would you characterize his feelings toward John?

2 A That's a tough one. I don't know if I'd use the word
3 "hate," but I think John caused Tony a tremendous amount of
4 stress, but, you know, that's -- those personal feelings, I
5 guess, based on the way Tony was perceiving the situation.

6 Q Did Dr. Czarnik ever connect his feelings with Dr.
7 Stuelpnagel to any perception he had that Dr. Czarnik -- that Dr.
8 -- Let me start over.

9 How did you learn about Dr. Czarnik's feelings towards Dr.
10 Stuelpnagel?

11 A Tony would tell me about this. We'd go on walks and he
12 would tell me about how he was feeling.

13 Q So these are private walks with just the two of you
14 around the outside of the building?

15 A Correct.

16 Q Did Dr. Czarnik ever tell you that he felt Dr.
17 Stuelpnagel was discriminating against him because he suffers from
18 a mental disability?

19 A Toward the very end, I believe Tony mentioned that to
20 me, but it wasn't for awhile. Tony and I had been talking about
21 this for months, and there was no mention of disability or
22 depression, and then when it became public, I think that's when he
23 told me.

24 Q So can you place some time when it was near the very
25 end, is that close to the time he was terminated?

26 A Yeah.

27 Q Prior to that had you ever known that Dr. Czarnik had a
28 mental disability?

1 A No.

2 Q Can you recall any other examples besides the NIST ATP
3 grant where Dr. Czarnik's procrastination affected your personal
4 professional performance?

5 A Well, there was the trip to Dow.

6 Q Was this a trip to visit a company called Dow in
7 Michigan?

8 A Dow Chemical in Midland, Michigan.

9 Q Did the two of you travel together?

10 A We did.

11 Q The same flight?

12 A Yes.

13 Q Did you sit next to one another on that flight?

14 A Yes.

15 Q Did you talk about the upcoming purpose of the meeting
16 during that flight?

17 A We probably did, yeah.

18 Q What was the purpose of the meeting?

19 A As I recall, the purpose was to get Dow Chemical
20 interested in our chemical detection or optical nose technology as
21 well as getting them interested in the company in general, in
22 Illumina. So we were planning -- Tony was planning on giving a
23 talk about not only the optical nose but the genomics, biology
24 aspects, company history, the whole spiel, to get Dow interested.

25 Q Why did you want to get Dow interested in Illumina?

26 A Financial contributions and helping us get -- keep us
27 going, starting to fund the chemical detection program first off,
28 but also potentially other aspects of the company.

1 Q Was it fair it say this was a business development trip
2 for a chemical application?

3 A Mostly, yes.

4 Q And what happened when you got to Dow?

5 A We got into the little board room type area and we sat
6 down with some of the leaders of Dow, high-level people, and came
7 time for us to give the presentation and Tony handed me a stack of
8 transparencies that were out of order and said, "Why don't you
9 give the talk?"

10 Q Was this a surprise to you?

11 A Yes, it was.

12 Q Was it a shock to you?

13 A It was a shock.

14 Q And what did you do?

15 A I laughed. I thought he was joking. He said, "No, I'm
16 serious." So I got up and gave the talk, did my best.

17 Q So did you think you gave your optimal performance?

18 A No, not by a long shot.

19 Q Did Dr. Czarnik explain why he had asked you to do the
20 presentation at the last moment?

21 A Well, when I asked him, when I was joking, said, "You
22 are kidding, right?" he said, "No, my throat is a little dry, why
23 don't you give the talk." That's the explanation he gave me. I
24 talked to him afterwards and was very disappointed, actually very
25 angry, because I like to be prepared for my talks, especially a
26 talk of that magnitude, importance.

27 Q Did you feel you were qualified to present all the
28 slides that were presented during that meeting?

1 A I think I probably am qualified now. At the time there
2 were some things I would have liked to have studied beforehand. I
3 was definitely qualified for the optical nose part, historical
4 Illumina, but we wanted to tell them about genotyping, results
5 there, and I wasn't prepared to talk about that at the time. I
6 could have been had I been given notice.

7 Q Had you been given notice, would you have done more
8 preparation?

9 A Absolutely.

10 Q So did you feel it made a bad impression on Dow on
11 behalf of Illumina?

12 A I did. I was kind of embarrassed. I wanted to give a
13 good impression.

14 Q Recognizing that Dr. Czarnik was your boss, did you say
15 anything to him about your displeasure of being put on the spot?

16 A Certainly not in front of them. Afterward I said,
17 "Please don't ever do that again." I was really upset.

18 Q Did you feel that Dr. Czarnik as chief scientific
19 officer was directing or managing the conduct of all the R&D
20 activity at Illumina?

21 A Not really. Chemistry, yes.

22 Q Do you believe that Dr. Barker today as chief
23 scientific officer does direct and manage the R&D activities of
24 Illumina?

25 A Yes, I do.

26 Q Let me put one more exhibit.

27 Do you recall receiving a copy of a draft of Illumina's
28 prospectus for its IPO?

1 A Yes.

2 Q Do you recall how you received that draft?

3 A I think I first saw a draft from Tony. He sent one to
4 me.

5 Q Do you know why he sent it to you?

6 A Yeah, I think the circumstances around that were we had
7 -- He had mentioned that he was not written in as a founder, and I
8 responded, "Really?" I was surprised to hear that. He said,
9 "Yeah, take a look." He sent me one.

10 Q At the time you received this, was Dr. Czarnik then a
11 research fellow?

12 A I don't remember the timing of that.

13 Q Well --

14 MS ESPINOSA: Your Honor, we'd like to discuss this
15 exhibit out of the presence of the jury.

16 THE COURT: Okay.

17 You want the reporter?

18 MS KEARNS: Not necessary.

19 (Discussion off the record.)

20 MS ESPINOSA: Q You mentioned that you recall Dr.
21 Czarnik sending you a draft of the prospectus. Do you have an
22 understanding why he sent you that draft of the prospectus?

23 MR. PANTONI: Objection, calls for speculation.

24 MS ESPINOSA: Q What was your interpretation of why he
25 sent you that?

26 MR. PANTONI: Same objection.

27 THE COURT: Sustained.

28 MS ESPINOSA: Q As your former boss, after Dr. Czarnik

1 became a research fellow, did he keep you posted on his
2 developments with respect to his disputes with management at
3 Illumina?

4 A Generally speaking, yeah, Tony and I were talking about
5 these things. I don't recall details of those conversations.

6 Q Did you have an opportunity to see his research fellow
7 goals?

8 A Yes.

9 Q Did he characterize those goals to you in anyway?

10 A Well, what he did, he posted them above his desk, and
11 at one point I was walking by, or I don't know if he told me to
12 come over and look at them. The point being look at how
13 outlandish these goals were. I looked at them and they looked
14 tough.

15 Q And your experience, do employees the Illumina
16 participate in the drafting of the goals?

17 A Yes.

18 Q And did Dr. Czarnik explain how those goals had been
19 arrived at to you?

20 A He made it seem as if they had been dictated to him by
21 Jay.

22 Q Do you in fact have any knowledge of how those goals
23 were given to him?

24 A No.

25 Q So you didn't participate in any review of potential
26 goals for Dr. Czarnik as research fellow?

27 A No.

28 Q Did Dr. Czarnik ever give you an expensive gift?

1 A Yes.

2 MR. PANTONI: Objection, relevance.

3 THE COURT: Sustained.

4 MS ESPINOSA: Q Do you know why Dr. Czarnik posted his
5 goals over his desk?

6 A I can imagine to show how hard these goals were, try to
7 -- I don't know. I don't know what his reason was. That's why he
8 posted them. He showed me them to show me how hard they were. I
9 can assume he was doing the same for others.

10 Q Is it typical for people to post their personal goals
11 over their desk?

12 A Not at all.

13 MS ESPINOSA: Nothing further.

14 THE COURT: Redirect.

15 MR. PANTONI: Yes, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. PANTONI:

18 Q If we could take a look please at Exhibit 63.

19 THE CLERK: I'm sorry?

20 MR. PANTONI: 63.

21 THE CLERK: Thank you.

22 MR. PANTONI: Q Dr. Dickinson, do you recall the
23 e-mail by Tony Czarnik in April of 1999?

24 A I don't remember this e-mail, but looks like he sent
25 it.

26 Q Do you recall Dr. Czarnik establishing regular weekday
27 research lunches?

28 A I just don't recall Tony setting those up. He might

1 have.

2 Q Do you recall that regular Wednesday research lunches
3 were held while Dr. Czarnik was CSO?

4 A That's very gray. They might have been. I don't
5 remember if they were being held when Tony was in place. I do
6 remember them in the past year.

7 Q You don't recall either way in terms of when Dr.
8 Czarnik was -- You don't recall either way when the Wednesday
9 lunches were held?

10 A I know we've held them. I don't know how far back we
11 held them. It wasn't in the first couple of years of the company.

12 Q Let's take a look please at Exhibit 65. Do you
13 recognize Exhibit 65, Dr. Dickinson, as an e-mail sent by Tony
14 Czarnik on May 3rd of 1999?

15 A Again, I don't remember this e-mail, but I don't
16 question its validity. I'm sure he sent it.

17 Q Do you recall at about that point in time that Dr.
18 Czarnik established Illumina working groups, various working
19 groups?

20 A I remember there being discussion of working groups,
21 yes.

22 Q Do you recall that they actually were established?

23 A I remember that there was difficulty getting that off
24 the ground and it never really flew.

25 Q Did it get off the ground?

26 A I don't remember.

27 Q Did you head up any of the individual work groups?

28 A Well, my name is next to fibers, so I must have headed

1 that up, but it certainly didn't go anywhere. It was a good
2 concept, but I remember that this failed for some reason or
3 another.

4 Q Do you recall any of the details?

5 A Of why it failed? I would just be speculating, no.

6 Q One last question. Do you recall Dr. Czarnik ever
7 missing a deadline?

8 A It wasn't my job to monitor Tony's deadlines, so I
9 don't know if he missed any or not.

10 Q Okay. I only speak to that because you mentioned
11 procrastination.

12 A He did procrastinate. I do remember him accomplishing
13 things at the very last minute. I don't know if he met all his
14 deadlines or not.

15 Q You don't recall any circumstance where he missed any?

16 A I'd have to think about it. Not offhand.

17 MR. PANTONI: All right. Nothing further.

18 MS ESPINOSA: Your Honor, response to that, I have
19 further questions.

20 I offer trial Exhibit 119, please. This has been objected
21 to, but I offer it as rebuttal.

22 THE COURT: 119?

23 MS ESPINOSA: Yes, your Honor.

24 THE COURT: Is there an objection to this?

25 MR. PANTONI: I have to look at it, Judge.

26 Yes, Judge.

27 THE COURT: I think I'll have to have an offer of proof
28 on this outside the presence of the jury.

1

(Proceedings at sidebar.)

12 (Proceedings resumed in open court.)

13 THE COURT: You are asking to reopen your examination
14 on this point?

15 MS ESPINOSA: Yes, your Honor.

16 THE COURT: Very well.

17 RE CROSS-EXAMINATION

18 BY MS ESPINOSA:

19 Q Dr. Dickinson, was it known amongst the scientists that
20 Dr. Czarnik was a procrastinator?

21 MR. PANTONI: Objection, calls for speculation

22 THE COURT: Sustained.

23 MS ESPINOSA: Q To your recollection, did Dr. Czarnik
24 admit to you that he was a procrastinator?

25 A Yes.

26 Q How did he admit that?

27 A I think I got an e-mail from him that said, "I'm a
28 procrastinator," you know, admitting that he's a procrastinator.

1 I think during this exchange of one of the grant scenarios he was
2 putting it out at the last minute.

3 Q Do you recall Dr. Czarnik asking you for any assistance
4 on some of his work plans to Mr. Flatley?

5 A Could I ask you to repeat that.

6 THE COURT: That's our bailiff's phone. I recognize
7 that familiar ring.

8 MS ESPINOSA: Q I think the question was do you recall
9 Dr. Czarnik asking you for any last minute assistance on a work
10 plan he needed to submit to Jay Flatley?

11 A Yes.

12 Q What did he ask you to do?

13 A He asked me to help him compose a plan for the project
14 I was leading, alternate substrate and optical nose.

15 Q To your recollection, was that also at the last minute?

16 A Yes. Fortunately I had already done them.

17 MS ESPINOSA: Nothing further.

18 THE COURT: Further questions?

19 MR. PANTONI: No, your Honor.

20 THE COURT: Thank you very much, Dr. Dickinson. You
21 may step down, please.

22 Call your next witness, please.

23 MR. PANTONI: May I request a five-minute break?

24 THE COURT: Recess?

25 MR. PANTONI: We were not anticipating being this far
26 ahead of the game.

27 THE COURT: Okay.

28 We're actually ahead of schedule. This is an afternoon

1 witness.

2 We'll take a short recess. We'll be in recess until 11:30.

3 Please remember the admonition not to form or express any opinions

4 about the case, not to discuss the case. We'll be in recess until

5 11:30. 11:30.

6 (Recess.)

7 THE COURT: Call your next witness, please. Record

8 will indicate all the jurors are present, counsel and parties.

9 MR. PANTONI: Bahram Kermani.

10 BAHRAM KERMANI,

11 called as a witness by the Plaintiff, having been first duly

12 sworn, was examined and testified as follows:

13 THE CLERK: Would you please state your full name and

14 spell your last name for the record.

15 THE WITNESS: Bahram Kermani, K-e-r-m-a-n-i.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MR. PANTONI:

19 Q Good morning.

20 A Good morning.

21 Q Is Mr. Kermani or Dr. Kermani?

22 A It's Dr. Kermani.

23 Q I'll call you Doctor.

24 A Sure.

25 Q Dr. Kermani, are you currently employed by Illumina?

26 A Yes, I am.

27 Q And when did you first become employed by Illumina?

28 A January 17, 2000.

1 Q And, sir, what was your first position with the
2 company?

3 A Senior scientist. Bioinformatics.

4 Q Is that the position you still hold today?

5 A I was promoted to staff scientist and bioinformatics.

6 Q When did that happen?

7 A I don't quite recall. Probably more than a year ago.

8 Q What is meant by bioinformatics? What does that group
9 do?

10 A It's the informatics, which is information science in
11 biology.

12 Q What role does bioinformatics play with respect to the
13 decoding process?

14 A Once data is acquired, it comes in the form of data,
15 which is just numbers, and then it's my job to decode based on
16 those numbers. In other words, make sense of the actual code
17 based on the numbers. The numbers that I'm talking about
18 represent entities on the images that it acquires.

19 Q You take the data generated by the molecular biology
20 group and you analyze it?

21 A Not quite. The data goes through an image processing
22 application and it transformed, the intensity is extracted and
23 transformed to columns of text. So text represents a bead
24 location, if you are familiar with the terms, intensities in
25 different stages. So that's input to my algorithms. Take it from
26 there.

27 Q Who does the image imaging process?

28 A The scientists. Term scientist here refers to chemist

1 and biologists, and also mathematics people. They can run this
2 application. There's an application, at the time it was called
3 Fiber Works. So the images would go through Fiber Works and the
4 output of Fiber Works was bead intensities, which was the inputs
5 to my program.

6 Now, Fiber Works is a program and anybody with knowledge of
7 the configuration and how to run it can run it, basically.

8 Q I'll try to keep this as simple as possible.

9 A Sure.

10 Q Most of us I think are not scientists.

11 A Sure.

12 Q With respect to the 768 decoding experiments, you are
13 familiar with those experiments?

14 A To some degree.

15 Q Do you recall that there were two sets of 768 codes
16 that were attempted to be decoded in the year 2000?

17 A I don't recall, but after I got familiar with this
18 case, I did some digging in data and figured out, it appeared to
19 me, there are two different cases because the quality of the
20 results.

21 Q And did you do analysis on both sets of those 768
22 codes?

23 A So my function is generating algorithms, and also
24 implementing algorithms in terms of a program. This program can
25 be run again by anybody in the company. So if you think about it
26 that way, yes, I'm involved because I made the program. But it
27 doesn't necessarily mean I was the one who was involved in get
28 running the data through the program. Although I did do data

1 analysis as well, which means taking the results of the program
2 and trying to convert that into something that makes more sense at
3 a higher level. So I was involved in one of those and some of
4 those I was not involved.

5 Q Were you involved in analyzing the data from the first
6 768 decode experiment the first half of 2000?

7 A I do not recall. But it's -- Usually what would
8 happen as the architect of this program, I would run data through
9 with whatever comes out. If nothing -- if for no other reason it
10 would be for my benefit to tune the algorithms for higher
11 performance. Chances are, yes, I have run it through, but I do
12 not recall specifically.

13 Q Have you ever reviewed the data from the first 768?

14 A From the first? The only clue I found to the first set
15 was a path I had, and I asked the IT to recover that path because
16 it was nonexistent anymore. This was a location on a computer,
17 that because we have a lot of images that grow large in size so we
18 have to archive them. Once we archive, they are out of the
19 computer system. I had to ask the information technology
20 department to recover them, and there was one directly that was
21 recovered, with one file I could associate with, and it appeared
22 to be the file because it had the keyword "768" in it. And the
23 date of that directory was back in May.

24 There was another 768 experiment done in June or July time
25 frame. This particular one I'm talking about, the one in May,
26 from that directory, from looking at that one file, it appeared
27 not to have the quality; not to have any quality.

28 Q So you reviewed the data that you believed to be the

1 data from the first 768 decode experiment, correct?

2 A Only about a month ago or so.

3 Q And in that review you've concluded that the quality,
4 -- that there was no quality to that data?

5 A Based on that one file, just one file. A lot of times
6 I have to mention that you can have data, you have multiple fiber
7 bundles, and your experiment may fail on a certain fiber bundle
8 for one reason or another. One reason could be like -- There are
9 many reasons. It could be the fiber was broken for any reason,
10 for mechanical reasons. So this was just one file, I want to
11 express the importance of that. But yes, based on that one file,
12 it did not have quality.

13 Q Dr. Kevin Gunderson testified the first 768 decode
14 experiment didn't work. Did you see anything that was
15 inconsistent with that?

16 A No, based on that one file, it would be consistent with
17 that testimony.

18 Q Now, did you do the analysis of data for the second 768
19 decode experiment that was run in the summer of 2000?

20 A I did do some analysis. I wouldn't refer to it as the
21 analysis, because once again, everybody else could do an analysis,
22 but I did do some analysis.

23 Q Using your computer program you did some analysis of
24 the 768 decode experiment that was run in the summer of 2000?

25 A The decoding program won't do analysis by itself. It
26 gives you some summary statistics of experiment, but what I refer
27 to as analysis is taking that summary statistics and trying to
28 make sense at a higher level, and that was not done using the

1 program, it was done using other programs.

2 Q Based on what you did in terms of analyzing the data
3 from the second 768 decode experiment, the one that was run in the
4 summer of 2000, did you have any -- did you notice any problems
5 with the data?

6 A Based on the white light experiment, it didn't appear
7 to be significant problem. When we say problem, we're talking
8 about the quality, and quality never be perfect, so as a person in
9 informatics, you should have higher standards. So if anything is
10 below a hundred percent, we would call it not perfect in that
11 sense. But with respect to something realistic you would expect,
12 yes, it did have the quality.

13 Q How many total beads were used on the array for the
14 second 768 decode experiment?

15 MS KEARNS: Objection. I'm just going to object vague,
16 when you say total number of beads. Actual number of physical
17 beads or bead types?

18 MR. PANTONI: Total number of physical beads.

19 THE WITNESS: That's a random process. I can't answer
20 that question exactly. We have a total of approximately 50,000
21 cores, core locations. When we assemble this based on the random
22 process, you may have anywhere from -- any percent up to a hundred
23 percent of those filled, and that becomes your number of beads.

24 MR. PANTONI: Q Can you give us an estimate of how
25 many beads total, not bead types, total beads were on the array
26 that you analyzed for the second 768 experiment?

27 A Probably do have information to get exact numbers, but
28 right now on top of my head, off the top of my head I can only

1 remember perhaps in the vicinity of 20 to 30,000 beads.

2 Q Now, is it correct that in analyzing the data for
3 results that it requires you to essentially throw away or ignore
4 certain numbers of the beads that are on the array?

5 A Certain cores. As I said, because this is a random
6 process, not all the cores are occupied, and when you are
7 analyzing, specifically because you analyze everything, all the
8 core locations, you happen to analyze anti-cores as well. So that
9 will come into analysis, and if you don't take care of them
10 originally, they will contaminate the results. So you have to
11 take those anti-cores.

12 Q You throw away the ones that are empty, you don't
13 consider them?

14 A And that's not a hundred percent accurate again.
15 That's -- You throw away what you believe is anti-core because
16 you cannot know which one is anti-core. You only look at
17 intensities. Based on intensities, you can make a judgment
18 whether it's anti-core or not.

19 Q You also throw away those beads that you are not able
20 to decode, is that right?

21 A At different evolutions of the program we design
22 different ways. So we have ways to filter out data that is
23 inconsistent with the templates you are looking for. Templates
24 are fairly general. So to give you specific results, I don't know
25 if anybody has talked about clustering. When you do clustering,
26 it's fairly -- I'm getting into technical details. Tell me when
27 to stop.

28 Q Stop.

1 A So the answer is yes, we do filtering, we do some
2 degree of filtering to improve the overall performance results.

3 Q In lay terms, if a spot appears to be empty, you throw
4 that away or disregard it?

5 A Correct.

6 Q And if you can't decode that particular bead for
7 whatever reason, you throw it away or ignore it?

8 A That's objective, yes.

9 Q Of the 25,000 or so beads that were on the array that
10 you analyzed, 25,000 cores, how many were thrown away or ignored?

11 A 60,000 cores, and we between 25,000 beads --

12 Q How many of the approximately 25,000 beads did you have
13 to throw away or disregard in order to analyze the data?

14 A Probably for that specific experiment we didn't have to
15 throw away anything. It appeared to be nicely clustered. But
16 since we have one program certain parameters and we apply it
17 across the board to everything we get, because you want to be
18 blindfolded from the data that comes in, and for that reason the
19 filter was on, and when the filter was on, it appeared like it had
20 filtered out about 4000 beads in that area.

21 Q 4000?

22 A Approximately. Again, I have to look at the data
23 exactly.

24 Q Let's take a look please at Exhibit 269.

25 Let me ask you first before I ask you specific questions
26 about this document, Dr. Kermani, on the second 768 experiment,
27 the one done in the summertime of 2000, of the 768 different bead
28 types, how many was Illumina actually able to decode?

1 A Once again we have different criteria for calling
2 something decoded. If you call the criteria minimum of two beads
3 or three beads in that case, it happened to be 517 bead types. In
4 other words, 517 bead types had at least two beads or three beads,
5 I can't recall exactly, at least two beads in every --

6 Q There a more rigorous way to analyze the data involving
7 more bead types, isn't there?

8 A You can change your threshold as you desire. You can
9 change it to a higher threshold. We do that experiment often, and
10 I think if you increase the threshold to 11 or 12, you would end
11 up with 249 or something in that area bead types. So --

12 Q Let me interrupt a second. The lower you set the
13 threshold, the easier it is to say a bead is decoded, true?

14 A Bead type is decoded.

15 Q The higher that you set -- The higher you set the
16 threshold, that would result probably in a lower number of bead
17 types being decoded?

18 A Yes, and that's theoretically expected to be the case.

19 Q The level you thought you should set it at in your
20 judgment was 5, isn't that right?

21 A I think for that particular experiment was 2, I
22 believe. Once again it's up to the user. My program would
23 provide parameters that can be set by the users.

24 Q Who was the user who told you to use 2?

25 A The users don't tell me what to use. The users will
26 use it at their will and get the results.

27 Q Who uses the program and used 2 as the threshold for
28 the 768 decode?

1 A I do not know. Anybody in the company could use the
2 program.

3 Q Did you run the program setting it at a certain
4 threshold?

5 A I believe I ran the program. I do not remember what
6 the specific threshold I put it. But it seems to me that 2 was
7 the correct threshold, because of some of the results, when I look
8 at them, it appears to be histograms saying their tails into areas
9 of 2 or higher.

10 Q 2 is the lowest you could set it?

11 A No, I could set it to zero.

12 Q Would that give any meaningful data if you set it to
13 zero?

14 A Yes. You can have a lot of bead types with one bead
15 because it's not all filtering we do. We do what's called
16 concordance, and that's at the fiber, multiple fiber levels. If
17 you set it to lower threshold, chances are you get more garbage
18 in, but when you look at concordance between different fibers, if
19 that's truly a garbage point, a bad point, it will not appear in
20 all bundles with the same representations. So it would raise a
21 flag and you stop.

22 Q The range at which you could set the threshold is from
23 zero to 12, approximately?

24 A No, it's from zero to infinity.

25 Q In terms of actual use at Illumina, it's set between
26 zero and 12?

27 A Depends on the representations. So if you know how
28 many beads you have, you know an average, obviously you know how

1 many beads per bead type to expect, because you know how many bead
2 types and number of beads, so you divide it. So get the number of
3 expected bead types, and you know theoretically this follows a
4 distribution, so you know what the tails of distribution should
5 be, so you know within 99 percent of whatever confidence interval
6 how many beads you would expect in every bead type. That would
7 give you good value for the lower threshold.

8 Q But this scale, setting this threshold, the lower you
9 set the scale, the more garbage comes in, right?

10 A Potentially. Potentially. It could be as little as
11 zero bad data point entering.

12 Q And 2 was the threshold what was used to analyze the
13 768?

14 A To the degree I recall based on what I observed.

15 Q Let me ask you this. In this e-mail dated July 13 of
16 2000, it's stated that, "Based on the two different sets of 768
17 that were run --"

18 A Okay.

19 Q "Based on the two sets that were run by July, we'll
20 have a thousand useful addresses." That's not true based on your
21 knowledge and information, is it, sir?

22 A As I said, I only remember one set, so it's possible if
23 you had the second set, the second set, the only limitation is a
24 theoretical limitation. I don't know if a thousand is the actual
25 value or it would be higher. Because as I said, to the degree I
26 remember, it was one set that perhaps I performed experiment on
27 and it was threshold of 2 gave 517, that were concordant between
28 three bundles at least.

1 Q In simple terms, the first set of 768 that was run in
2 the beginning of 2000, you've concluded that had no useful data,
3 and the second set that was run developed perhaps 500 or so
4 different bead types, is that right?

5 A So if you only look at what we refer to in the May time
6 frame as the first set, that would be correct. It doesn't quite
7 make sense to me. It appears the experiment that was done in
8 summer, specifically in July time frame, was perhaps two
9 experiments. We often do multiple blocks, so we don't just stop
10 at one block. So if anything would make sense, to be two
11 experiments of that type.

12 Q Because you know the first one resulted in no
13 meaningful data, right?

14 A Yeah, first one definition we made, yes. I don't know
15 the first one there means the first one over here. That's hard to
16 tell.

17 Q Do you agree with this statement, Dr. Kermani, where
18 it's stated in this e-mail that of 768 bead types, 626 were
19 decoded?

20 A So that's not the number I recall, but if you set the
21 threshold maybe to 1, that would be possible.

22 Q You set it to zero and allow more garbage in you might
23 get a higher number, is that true?

24 A Once again, with that quality of data, actually it
25 might be possibly to just run the program, see how much garbage
26 we're getting. The program would -- If something has zero beads
27 in it, it puts in different categories. Zero is obsolete. Is
28 only one bead in a bead type. And, yes, you get more garbage

1 compared to 2, but if the clusters are clean, whatever the number
2 of garbage you get could be zero, you could get nothing.

3 Q You don't agree with this number of 626, do you?

4 A I haven't seen that number, and that means I have not
5 run the experiment using a threshold giving that number to me.

6 MR. PANTONI: Nothing further

7 THE COURT: Thank you.

8 You may examine.

9 CROSS-EXAMINATION

10 BY MS ESPINOSA:

11 Q Dr. Kermani, have you ever seen this e-mail before?
12 Scroll down to the top of it. I don't believe you are listed as
13 one of the recipients.

14 A No. It's not familiar.

15 Q Okay. So do you recall at Illumina referring to sets
16 of beads by the number of bead types in that set generally?

17 A I'm sorry, could you repeat?

18 Q Do you remember referring to bead sets generally by the
19 number of bead types available in that bead set? So for instance,
20 the 768 sets?

21 A Yes, we often do that.

22 Q Do you have any idea who ran the analysis of the arrays
23 that are being referred to in this particular e-mail?

24 A No. As I said, it could be anybody in the company.

25 Q You provide a program that any scientist can run by
26 themselves and do their own analysis?

27 A That's correct.

28 Q So do you have any information about what two different

1 sets of 768 Dr. Chee is referring to in this e-mail?

2 A Absolutely not. The only thing I could guess was one
3 of them was a set that I ran.

4 Q As you said, I think you said you did a concordance
5 across three bundles. Is that sort of like repeating the
6 experiment three times?

7 A Yes.

8 Q Is that done simultaneously?

9 A Yes.

10 Q So based on that analysis that you personally did on
11 that particular 768 set, was it your testimony that about 500 bead
12 types were decoded?

13 A Correct.

14 Q And just so there's a little more clarity in this area,
15 you are saying any scientist running your algorithm can modify the
16 thresholds you set for whatever reasons they want to?

17 A Correct.

18 Q When you refer to garbage, it has kind of a negative
19 connotation. What did you mean by garbage?

20 A Mostly empty cores. As I said, empty cores, if they
21 come to analysis they will get called something, so you don't want
22 to bring them in. Also beads that are not -- maybe they are not
23 showing high intensity.

24 Q So would it be fair to say that you are talking, when
25 you refer to garbage, you are talking about places where there's
26 no bead at all, that's one kind of garbage?

27 A That's one category, yes.

28 Q Another kind of garbage would be a bead that just

1 didn't light up?

2 A That's correct. There are other possibilities
3 theoretically one could imagine, but it's beyond my knowledge of
4 chemistry and biology.

5 Q But with experience that you had with the particular
6 three experiments that you looked at, the three arrays that you
7 analyzed that had 768 bead types, was it your perception looking
8 at the data that that data clustered well and you were able to
9 decode only five over 500 bead types?

10 A Yes.

11 MS ESPINOSA: Thank you.

12 THE COURT: Anything further?

13 MR. PANTONI: Just that one question.

14 REDIRECT EXAMINATION

15 BY MR. PANTONI:

16 Q Dr. Kermani, do you recall there being any sense of
17 urgency at Illumina to complete the 768 decode experiment and get
18 results of that experiment for purposes of the roadshow?

19 A Um, not that I recall. I mean it's always urgency in
20 the science, in the field of science, you want to get the results
21 out as soon as possible. As far as my algorithms are concerned, I
22 always had urgency to get the best program out to the users. As
23 far as design of experiment is concerned, I wasn't the one doing
24 the design of experiments so I wouldn't feel the urgency.

25 Q Did you come to have an understanding that the company
26 was possibly going to use results from the 768 decode experiment
27 on the roadshow?

28 A I do not recall. But it would make sense to me at the

1 time definitely if company has an objective, everything did was
2 towards that objective, and the roadshow was one objective.

3 MR. PANTONI: Nothing else.

4 MS ESPINOSA: Follow up.

5 RE CROSS-EXAMINATION

6 BY MS ESPINOSA:

7 Q Dr. Kermani, do you know one way or another whether
8 any of the data from the 768 decoding experiments that you
9 analyzed was ever presented at Illumina's roadshow?

10 A I definitely don't know because I wasn't at the
11 roadshow present, so I really don't have any --

12 MS ESPINOSA: Thank you.

13 THE COURT: Could I see counsel in the hallway about
14 scheduling.

15 (Discussion off the record.)

16 THE COURT: We'll take our noon recess at this time.
17 We'll be in recess until 1:15. Please remember the admonition not
18 to form or express -- that's your reward for all getting here on
19 time today.

20 Don't form or express any opinions about the case, don't
21 discuss the case. We'll be in recess until 1:15. 1:15.

22 (Proceedings resumed outside the presence of the jury.)

23 THE COURT: The clerk just reminded me tomorrow I have
24 a lunch meeting, judge's meeting, so we'll have to have a little
25 longer lunch tomorrow. You might want to start Mr. Flatley's
26 testimony today. See what you can do to pare it down before this
27 afternoon.

28 (Lunch recess taken at 12:05 p.m.)

1 SAN DIEGO CALIFORNIA, WEDNESDAY, JUNE 26, 2002; 1:15 P.M.

2 THE COURT: Call your next witness, please.

3 MR. PANTONI: Diping Che.

4 DIPING CHE,

5 called as a witness by the Plaintiff, having been first duly

6 sworn, was examined and testified as follows:

7 THE CLERK: Would you please state your full name and

8 spell your whole name for the record, please.

9 THE WITNESS: Diping Che, D-i-p-i-n-g, last name C-h-e.

10 THE CLERK: Thank you.

11 DIRECT EXAMINATION

12 BY MR. PANTONI:

13 Q Good afternoon, Dr. Che.

14 A Good afternoon.

15 Q Are you currently employed by Illumina?

16 A Yes.

17 Q And what is your current position with Illumina?

18 A Associate director in the engineering department.

19 Q When did you first become employed by Illumina?

20 A July 6th.

21 Q Have you held that same position throughout your

22 employment at Illumina?

23 A No.

24 Q Take us through the various positions you've held.

25 A Senior scientist, program manager, and then associate

26 director.

27 Q What was your position in the summer of 2000 during the

28 time of the roadshow?

1 A Senior scientist.

2 Q What were your duties and responsibilities at that
3 time?

4 A I was responsible developing imaging systems.

5 Q Imaging systems?

6 A Yes, that's correct.

7 Q And what are imaging systems used for at Illumina?

8 A The imaging system is used to detect if fluorescent
9 signals come out from fiber optic bundles.

10 Q Fluorescent signals are the signals sent from the
11 fluorescent dyes that are attached --

12 A Fluorescent dyes, that's correct.

13 Q And how does the imaging system that was used by
14 Illumina, how does it detect a signal from a fluorescent dye?

15 A It uses light, light source, to excite fluorescent dye.
16 The dye will go through energy transfer, water process, some of
17 the energy will be remained to return back to the ground state,
18 and the energy will be released as form of light. That light is
19 called fluorescence. We will capture those light from the
20 molecule by objects and detectors.

21 Q Is the actual color of the dye being detected, is that
22 visible with the naked eye?

23 A Depending how much dyes there are. And the case under
24 our experimental conditions, our normal use the dye is generally
25 not visible to the naked eye.

26 Q So it's read through some sort of computer system?

27 A It is computerized, assisting detector.

28 Q Did Dr. Czarnik assist you at all in the development of

1 the imaging system at Illumina?

2 A In a way in his -- Not technically. Not too much
3 technically. Because --

4 Q That's your area?

5 A (Witness nodding head.)

6 Q Right?

7 A That's correct.

8 Q So in what way did Dr. Czarnik assist you with respect
9 to the imaging system?

10 A Managerially. Probably just -- Generally support and
11 as co-worker as well as senior management.

12 Q Is the imaging system that you used for looking at the
13 molecules, is it called a white light system, is that the system
14 you used?

15 A Develop a different imaging systems. Usually is two
16 laser line, two color laser system. Later we had a multi-colored
17 laser, which is argon-krypton laser, multiple laser lines.
18 Different wavelength. And finally it evolved to a white light
19 system which uses a xenon arc lamp.

20 Q You mentioned the argon-krypton laser. Is that right?

21 A Yes, I did.

22 Q When did the argon-krypton laser arrive at Illumina?

23 A I don't recall the specific date. I think is in -- in
24 the year 2000.

25 Q Let's take a look please at Exhibit 297.

26 THE CLERK: I'm sorry, Counsel, what?

27 MR. PANTONI: 297.

28 THE CLERK: Thank you.

1 MR. PANTONI: Q Dr. Che, do you recognize this
2 exhibit as being an e-mail you received from Tony Czarnik on
3 August 10, 2000?

4 A Yes.

5 Q That e-mail states, "Diping, cascade blue filter set
6 has arrived. I would love to work with you to do an experiment on
7 the AR-K laser system. Would you have any time tomorrow? Let me
8 know. Thanks, Tony."

9 You recall receiving this e-mail?

10 A I guess I received this one, yeah.

11 Q And the AR-K laser, that's the argon-krypton laser?

12 A That's correct.

13 Q Is it true, sir, that --

14 A The K should be KR, that should be krypton.

15 Q Better abbreviation would be AR-KR?

16 A That's correct.

17 Q So does that refresh your recollection that the
18 argon-krypton laser arrived somewhere around August 10 of 2000?

19 MS KEARNS: Objection, I think that mischaracterizes
20 the text of the exhibit. It makes reference to a filter set.

21 MR. PANTONI: Q Is it your recollection that the
22 argon-krypton laser arrived at around August 10 of 2000?

23 A Probably a little bit before.

24 Q And what is cascade blue filter set, what is that?

25 A Cascade blue is a dye that absorbs a lower wavelength
26 and emit probably 470, something like that. I don't recall
27 exactly wavelength it emits.

28 Q So that's a filter to let through a certain color?

1 A Yes, that's correct.

2 Q Do you recall that Dr. Czarnik was working on a project
3 relating to binary oligo encoding in about August of 2000?

4 A I'm aware he's doing some experiment. I don't know the
5 plan or the goal of that particular test. In general, I thought
6 Illumina was -- many people is doing dealing with the dyes and
7 trying to find best dyes at the same time.

8 Q Do you recall that Dr. Czarnik was working on an
9 experiment using five colors in about August of 2000?

10 A That's correct.

11 Q And did you and Dr. Czarnik have discussions about
12 whether this particular laser, the argon-krypton laser, would be
13 helpful in doing type of experiments that Dr. Czarnik was
14 conducting at that time?

15 A We had discussions on that.

16 Q And did you agree that the argon-krypton laser would be
17 an important tool to have for Dr. Czarnik to be able to do this
18 five-color decoding?

19 A At that time, yes. There are other ways to do it as
20 well.

21 Q Now, this e-mail that we looked at says that Dr.
22 Czarnik would love to do an experiment on that argon-krypton
23 laser. Did you in fact work with Dr. Czarnik on an experiment
24 using the argon-krypton laser in about that time frame?

25 A Yes.

26 Q That experiment was done in the laboratory at Illumina?

27 A Yes, that's correct.

28 Q And I'll probably regret asking this, but we do need

1 you to try to describe in simple terms what that experiment was.

2 A What we tried to do is to find out the cross-talk
3 between different color channels, and that's basically it.

4 Q You say cross-talk?

5 A Cross-talk between different color channels, or other
6 people call it bleeding through.

7 Q That's when it appeared that two colors were
8 overlapping in terms of what the imaging system was reading?

9 A Yes.

10 Q And this particular laser, the argon-krypton laser, was
11 better at separating colors, is that right?

12 A That's correct.

13 Q And that was important when you are doing a five-color
14 experiment, right?

15 A That's correct.

16 Q And the results of that experiment that you and Dr.
17 Czarnik worked on, can you describe to the jury generally what
18 those results were. Were they promising, were they not so good?
19 How would you characterize them?

20 A It's definitely serves some purpose. It is better than
21 the previous laser system in which we only used the argon ion
22 laser.

23 Q So the results using the argon-krypton laser were
24 better than results using previous imaging systems?

25 A Yes, theoretically can predict that as well.

26 Q Can you estimate for us approximately how long it was
27 before Dr. Czarnik was fired that you and Dr. Czarnik worked on
28 this experiment using the argon-krypton laser?

1 A We probably did the experiment a little bit shortly
2 after this message, and I don't recall when Dr. Czarnik left us.
3 I don't recall exact date. So you can calculate from there.

4 Q So you say you did this experiment sometime in mid-
5 August, 2000?

6 A Something around there.

7 Q Let's take a look at a different exhibit now, Exhibit
8 276. Dr. Che, do you recognize Exhibit 276 as an e-mail exchange
9 between you and Tony Czarnik?

10 A I think that's right.

11 Q So Dr. Czarnik sent you this e-mail on July 26, 2000,
12 asking, do I understand correctly, that the 768 decode experiment
13 was performed with effectively two colors, not three, right?

14 A Yes.

15 Q And then you responded to Dr. Czarnik the same day, is
16 that correct?

17 A Yes.

18 Q This relates to mislabeling of dyes from Molecular
19 Probes, the vendor, right?

20 A Yes.

21 Q Before you learned of the mislabeling of the dyes, how
22 many colors did you believe had been used in the 768 decode
23 experiment?

24 A We assumed or soon discovered had three.

25 Q I'm sorry, you thought there would be three?

26 A I thought before the experiment result come out we
27 thought it's four, but as soon as we analyze the data, we realize
28 it's three

1 Q So you thought they had been using four. You came to
2 learn they were actually using three. Right?

3 A Yes.

4 Q And those three colors we've generally called blue,
5 green and red, would you agree with that?

6 A I don't recall which exactly, which three we used.

7 Q Now, Dr. Czarnik was asking you in this e-mail whether
8 you understood that this experiment really was done with two
9 colors and your response was indicating most likely that is the
10 case?

11 A Yes.

12 Q What led you to believe at that point in time that the
13 experiment most likely had been conducted with only two colors,
14 not three?

15 A Based on the fact that there are too much bleed
16 through. That's one. The second one is we went back to, with
17 respect of those dyes that we used, we concluded the spectral
18 characteristics are fairly among those -- of the three dyes, two
19 of them are very close, so we contacted the vendor and we find a
20 road course for that program.

21 Q You observed that there was a problem with the
22 experiment before you learned about the mislabeling, right?

23 A Can you repeat that question again.

24 Q Sure. Based on what you saw and knew, you believe that
25 there had been a problem with this experiment concerning bleed
26 through of colors before you knew that there had been mislabeling
27 of dyes?

28 A From the experiment data we would conclude there is

1 possibly mislabel. Then later confirmed from the supplier that it
2 is in fact mislabeled.

3 Q Is that the case because when you were looking at the
4 data, it appeared that there were only two colors showing up?

5 A That's correct.

6 Q Who contacted the vendor to ask about the labeling
7 issue?

8 A I don't recall.

9 Q It's important in doing decoding experiments when you
10 use three colors to be able to separate all three colors, is that
11 right?

12 A That's correct.

13 Q It was your job to, using the imaging system, to look
14 at the data and see whether you could see three distinct colors?

15 A That is not exactly my job or function. My job was
16 developing imaging systems, and I was involved with that as a
17 scientist, with that analysis as a scientist, but not responsible
18 for the conclusion about that. I make suggestions and --

19 Q So you were responsible for developing the imaging
20 system to be able to see three separate colors?

21 A That's correct.

22 Q Based on your background and experience, you did some
23 analysis of that data, right?

24 A That's correct.

25 Q But you weren't responsible in terms of your job
26 responsibilities for the accuracy or quality of that?

27 A That's correct.

28 Q Based on what you saw using the imaging system, you

1 could only see basically two colors, not three?

2 A Yeah, due to mistake from the manufacturer.

3 MR. PANTONI: Nothing further.

4 THE COURT: You may examine.

5 CROSS-EXAMINATION

6 BY MISS ESPINOSA:

7 Q Dr. Che, referring to the same e-mail message up there,
8 do you recall in the summer of 2000 there were a series of
9 experiments that are referred to as the 768 experiments?

10 A Yes, there are some experiments.

11 Q So you were just testifying about some data where you
12 say you only saw two colors rather than three?

13 A Only one of the experiment. I think there are several
14 experiment, yes.

15 Q So Dr. Kermani was just in here earlier and he was
16 referring to how he analyzed the data and concluded that there was
17 concordance between three different fibers. Do you know if the
18 data you are referring to in this e-mail message and that you were
19 discussing with Mr. Pantoni pertains to the three bundles that Dr.
20 Kermani analyzed that had concordance?

21 A Because the main different here experiment, this
22 particular one is an issue, but soon afterward, there are other
23 tests, as soon as we realized that's the problem, probably that
24 these mislabel might have been corrected. So they might agree
25 with what Dr. Kermani said.

26 Q Dr. Kermani said he analyzed from data from one of the
27 768 experiments and found concordance among three fibers, whereas
28 he was able to decode 500-something bead types. Do you have any

1 idea whether the data you discussed with Mr. Pantoni is anyway
2 connected to those particular data that Dr. Kermani analyzed?

3 A I don't recall. I don't know.

4 Q Could we go back to Exhibit 297, please.

5 You mention an argon-krypton laser. Why was that piece of
6 equipment purchased for Illumina? Is that specifically for Dr.
7 Czarnik's research fellow goals?

8 A No.

9 Q Why was that ordered?

10 A When I arrived there at Illumina in July, 1999, I
11 examined the existing equipment to find there's some deficiency in
12 terms of existing laser that only had two laser lines, not
13 suitable for multi-color decoding. So research, looked at the web
14 page and found a vendor that has that argon-krypton laser that's
15 usable, so I ordered.

16 Q You ordered these machines?

17 A That's correct.

18 Q Are they fairly expensive?

19 A Very expensive by my standard.

20 Q So did it take awhile after you ordered it for the
21 piece of equipment to arrive?

22 A Yes.

23 Q And you mention that you did some experiments with Dr.
24 Czarnik to measure cross-talk between the dyes. Can you describe
25 exactly what you did with respect to measuring cross-talk between
26 the dyes?

27 A In that particular experiment, I believe we had four
28 different dyes, and we -- I designed this four filter channels to

1 discriminate one from each other among those dyes. And what we
2 did, after the filter arrived and the laser is set up, we put
3 fluorescent dyes under the imaging system and use different color
4 channel filters and measured the cross-talk between them.

5 Q So if I understand you then, what were -- Were you
6 basically just turning on the system and looking at the dye to see
7 if you could see it through the filters?

8 A Yes, we measured it.

9 Q So would it be fair to say what you were doing was
10 basically calibrating the machine to look at particular dyes?

11 A That's correct. Generally for every imaging system,
12 fluorescent imaging system we have developed, we perform this type
13 of test to characterize the imaging systems.

14 Q Were you doing something scientifically new or
15 significant, then, in doing this?

16 A No.

17 Q Do you recall whether or not Dr. Czarnik actually
18 participated in the experiment himself or was he present when you
19 did the experiment?

20 A I personally turned on laser, performed the experiment,
21 and Dr. Czarnik provided the dye. The dyes.

22 Q He provided you with the dyes?

23 A Gave me vial of the dyes.

24 Q You actually did the calibration testing?

25 A That's correct.

26 Q And did Dr. Czarnik present this data at a science
27 meeting at Illumina?

28 A I believe so.

1 Q And did you know ahead of time that he was going to
2 present this data at a science meeting?

3 A I don't think so.

4 Q Were you surprised when in fact he did present this
5 information at a science meeting?

6 MR. PANTONI: Objection, your Honor.

7 THE WITNESS: I --

8 THE COURT: Sustained.

9 MS ESPINOSA: Q Would you have presented this
10 information at a science meeting?

11 MR. PANTONI: Same objection.

12 THE WITNESS: I would not.

13 THE COURT: Overruled.

14 MS ESPINOSA: Q I'm sorry, what was your answer?

15 A I would not.

16 Q Why not?

17 A Based on the insignificance of it.

18 Q Based on the fact it was an insignificant test, you
19 would not have presented this?

20 A That's correct.

21 Q Dr. Che, did Dr. Czarnik ever express to you any
22 unhappiness that he had not been listed as a founder in Illumina's
23 draft prospectus for a initial public offering?

24 A Yes.

25 Q What did he say to you?

26 MR. PANTONI: Objection, hearsay and relevance.

27 THE WITNESS: He --

28 MR. PANTONI: Objection.

1 THE COURT: Does it come within one of the exceptions
2 to the hearsay rule, or is it inconsistent with something that's
3 been testified to that we heard before in this case?

4 MS ESPINOSA: I believe, your Honor, it pertains to a
5 subject that Mr. Pantoni raised in his direct examination of Dr.
6 Czarnik.

7 THE COURT: I'll have to see you in back. You want the
8 court reporter?

9 MS ESPINOSA: No.

10 (Discussion off the record.)

11 MS ESPINOSA: Nothing further, your Honor.

12 THE COURT: Okay. Mr. Pantoni?

13 MR. PANTONI: I didn't know she was finished.

14 REDIRECT EXAMINATION

15 BY MR. PANTONI:

16 Q Dr. Che, that experiment that you said you did, that
17 was a calibration of the argon-krypton laser?

18 A It's a calibration of the whole system, including light
19 source, dye and the detection system.

20 Q That was something that would have been -- that was
21 required in order to be able to use the argon-krypton laser in
22 connection with decoding experiments, right?

23 A Not scientifically required, but it would help, because
24 there are other ways you can do it.

25 Q Let me take a look again very briefly at Exhibit 276.
26 I want to clarify a point I think you testified to on direct but
27 it was raised again on cross.

28 The data that you looked at that appeared to you to show

1 only two colors, not three, you believe that you learned that the
2 reason for that problem was the mislabeling of the dyes?

3 A Yes.

4 MR. PANTONI: Nothing further.

5 THE COURT: Anything further?

6 RE CROSS-EXAMINATION

7 BY MS ESPINOSA:

8 Q Dr. Che, is the argon-krypton laser system used at all
9 at Illumina today?

10 A No.

11 Q Why not?

12 A Because, for one, it's very expensive, and also
13 requires massive amount of water to cool it. It's a very bulky
14 and very hard to multiply, to make more of them. And the spectral
15 performance is not as good as white light.

16 Q Are you familiar with some work that was done by Gali
17 Steinberg where she attached more than one oligo type to beads?

18 MR. PANTONI: Objection, beyond the scope.

19 THE COURT: Seems like it's beyond the scope.

20 MS ESPINOSA: Okay.

21 THE COURT: Anything further, Mr. Pantoni, of this
22 witness?

23 MR. PANTONI: No.

24 THE COURT: Thank you very much, Doctor. You may step
25 down, sir.

26 Call your next witness, please.

27 MR. PANTONI: Calling someone out of order.

28 THE COURT: A witness called by Defendant?

1 MS ESPINOSA: Yes, your Honor, due to scheduling
2 difficulty.

3 CONSTANCE BRICK
4 called as a witness by the Defendant, having been first duly
5 sworn, was examined and testified as follows:

6 THE CLERK: Would you please state your full name and
7 spell your last name for the record.

8 THE WITNESS: Full name is Constance Brick, last name
9 spelled B-r-i-c-k.

10 THE CLERK: Thank you.

11 DIRECT EXAMINATION

12 BY MS ESPINOSA:

13 Q Good afternoon, Miss Brick. Can you tell us what your
14 current employment position is?

15 A Yes, I'm director of finance at Illumina.

16 Q And when did you join Illumina?

17 A In March of 1999.

18 Q You happen to remember what your employee number was?

19 A Yes, I am employee number 16.

20 Q What was your title when you joined the company?

21 A Controller.

22 Q What exactly does a controller do?

23 A I was in charge of all the financial aspects of the
24 company, everything from payroll, making sure bills are paid,
25 administering the stock, closing the books, doing budgeting,
26 making sure capital equipment was tracked. All -- I also did
27 some grant administration.

28 Q So you were involved in the grant application process?

1 A Yes, from the budget standpoint.

2 Q Who did you report to?

3 A Dr. Stuelpnagel. He was acting CEO, and we did not
4 have a CFO at that point, so he had that role.

5 Q Did you meet Dr. Czarnik prior to his working there?

6 A Only in the interview process.

7 Q What is your education and background?

8 A I graduated from UC Santa Barbara with an accounting
9 degree. I worked three and a half years in public accounting for
10 one of the -- they were Big 6 at the time, Ernst & Young. After
11 that I went into private industry, worked for various high tech
12 manufacturing companies for six years, always in a finance role.

13 Q And let me show you what's been marked as a trial
14 exhibit. It's a floor plan. It's the second floor. It's marked
15 as Trial Exhibit 7-3.

16 Can you see that?

17 A Yes.

18 Q From your employee number 16, can I infer that you had
19 about 15 other colleagues at Illumina at the time you joined?

20 A Yes.

21 Q And where did you sit when you first joined Illumina?

22 A Should I walk up and point?

23 Q Yes, point it out.

24 A I sat in this. This is a cubical. I sat right here.

25 Q Where did Dr. Czarnik sit?

26 A When I joined the company, he sat in this office.

27 Q That's a private hard-walled office?

28 A Yes.

1 Q Where is the door to the office?

2 A The door to the office is here, and the opening to my
3 cubical there's no door, was right there.

4 Q Just to be clear, where you sat was a cubical that
5 didn't have walls that go all the way up to the ceiling?

6 A Right. Actually this is drawn a little wrong. The
7 opening was actually here to this cubical. The wall was here and
8 the opening was here.

9 Q How long did you sit there?

10 A Oh, I started in March and I sat there until about
11 November or December of the same year.

12 Q Did Dr. Czarnik continue to sit in that private office
13 during that time period?

14 A Dr. Czarnik moved, I don't remember the exact time, but
15 before I moved, Dr. Czarnik moved into, we called this the big
16 room, and Dr. Czarnik moved to this desk.

17 Q The jurors have heard a little about that. So the big
18 room is where a number of the scientists sat?

19 A Yes.

20 Q Can you point out where the glass windows are, too?
21 They heard about windows.

22 A Windows for the big room?

23 Q To the street.

24 A There's a street here and there's glass windows here
25 and there is a window here, but this is sort of the courtyard in
26 front of the building.

27 Q Can you indicate where Todd Dickinson sat?

28 A Right here.

1 Q Where did Steve Barnard sit?

2 A Steve Barnard sat right here.

3 Q Do you remember where Kevin Gunderson sat?

4 A Right here. I was in there a lot. I know where a lot
5 of them sat, actually.

6 Q Let me ask you about that. In the course of your duty
7 as the controller, did you ever the need to walk around the
8 facilities?

9 A Yes. One thing that I had to do quite often was we had
10 this process you have to get purchase requisitions signed and
11 approved before we could order any supplies or anything from our
12 suppliers, and so I had to go make sure I had the appropriate
13 approval levels on the purchase requisition, so I would have to
14 chase down scientists to get their signatures.

15 Q Where was Illumina's lunchroom at that time?

16 A It was always here, I believe.

17 Q Could you walk through the big room to get to the
18 lunchroom?

19 A Yes, you could. For awhile actually this door was open
20 and you could walk through there. I usually sort of took the
21 shortcut, went through this door, or like this and walked through
22 the big room rather than going all the way around it.

23 Q Would it be fair to say these were pretty close
24 quarters in terms of how people were crammed together?

25 A Oh, yes.

26 Q You can get back to your seat.

27 A Thank you.

28 Q So back in the 1999 time frame after you joined, who

1 were the senior managers of Illumina?

2 A There were four. There was Dr. Stuelpnagel, Dr.
3 Czarnik, Dr. Chee and Mr. Pytelewski.

4 Q Did you interact with all of them?

5 A Yes, quite frequently.

6 Q Did you have any observations of Dr. Czarnik's work
7 ethic in the time frame that you sat at that cubical area?

8 A Yeah, when I was sitting there -- Just in general
9 or --

10 Q Just in general, in comparison to the way you observed
11 others at Illumina.

12 A Dr. Stuelpnagel and Dr. Chee and even Dr. Pytelewski,
13 they seemed to be -- It was a small start-up company, and usually
14 when you are in small start-up company, people are putting in a
15 lot of hours, working really hard, trying to make -- to have the
16 company make it, and Dr. Czarnik seemed to be more about having
17 fun, creating a fun environment to work in rather than a real
18 disciplined environment.

19 Q You are not a scientist by training, are you?

20 A No. And I didn't know much about the scientific
21 industry when I got there. I'd been in high tech previously.

22 Q So as a non-scientist but someone who worked in this
23 very small environment, did you observe any differences in his
24 work habits in terms of his coming and going or work hours?

25 A Yeah. Dr. Czarnik sometimes would be gone for a couple
26 of hours in the middle of the day, sort of not necessarily around
27 lunchtime. I had asked him about it once and he told me he liked
28 to go swimming every day. I believe that was usually in the

1 morning before the lunchtime.

2 And it didn't seem to me that he was there as late at night
3 as a lot of the other VP's.

4 Q Did you ever see any of the other VP's behaving
5 disrespectfully toward Dr. Czarnik?

6 A No.

7 Q Do you recall in about April of 1999 there was a grant
8 application that had to be submitted for Illumina?

9 A Yes, I do.

10 Q Do you recall who was responsible for that grant?

11 A That was Dr. Czarnik was the PI, or principal
12 investigator, on that grant, I believe.

13 Q Were you involved in the grant application preparation
14 process?

15 A Yeah, I was usually involved, only to the extent of
16 helping, either helping with the budget or doing the entire
17 budget, depending on the grant. The grant requires that you name
18 certain scientists on the grant, and you have to put in their
19 salary and fringe things like benefits, how much more their
20 benefits cost, and I was involved in that. I had negotiated all
21 the rates with the National Institute of Health for all of these
22 fringe benefit rates and things like overhead rates and such. So
23 I was involved usually on putting together the budget page.

24 Q Had you previously worked with anyone else on grant
25 applications prior to this April '99 time period?

26 A Yeah, I actually had previously worked with Dr. Chee on
27 at least a couple when I had first come to Illumina.

28 Q Was there a difference in the approach for preparing

1 these grant applications as between Dr. Czarnik in April of 1999
2 versus Dr. Chee in the early examples?

3 A When I first worked with Dr. Chee on it, I was new to
4 the process, I did not have grant administration background. He
5 had planned very far ahead and he worked with me and I had a lot
6 of time to get stuff to him and get everything together.

7 Dr. Czarnik, I remember, he and Steve Barnard were working
8 on this grant together and at the last minute it was like a rush
9 to get it out, you have to get it in to the government by a
10 certain time to have it considered for the next, their next budget
11 round, and it came to me very last minute, "Connie, can you please
12 put this together, we need to get it out." I believe it was
13 FedEx'd that day. So I had to drop everything and work on and
14 help them get some numbers together.

15 Q So would you say that Dr. Czarnik appeared to have been
16 procrastinating --

17 MR. PANTONI: Objection, leading.

18 THE COURT: Sustained.

19 MS ESPINOSA: Q Was it your perception Dr. Czarnik
20 waited too long to start on this project?

21 MR. PANTONI: Objection, lack of foundation.

22 THE COURT: Sustained.

23 MS ESPINOSA: Q Was it an imposition on you for Dr.
24 Czarnik to come to you at such a late time to get this work done?

25 MR. PANTONI: Objection, relevance.

26 THE COURT: Overruled.

27 THE WITNESS: I did have to drop what I was working on,
28 because this was a fairly large grant application, so it meant a

1 good amount of revenue to the company. So of course it was very
2 important, so I had to drop everything else I was working on so I
3 could do that.

4 MS ESPINOSA: Q Over time did you have an impression
5 of Dr. Czarnik's conduct as senior executive at Illumina?

6 MR. PANTONI: Objection, lack of foundation.

7 THE COURT: She can just answer that yes or no.

8 THE WITNESS: I'm sorry, can you ask the question
9 again.

10 MS ESPINOSA: Can we have this read back?

11 THE COURT: The reporter please read back the last
12 question.

13 (Record read by the court reporter.)

14 THE WITNESS: Yes.

15 MS ESPINOSA: Q What was that?

16 MR. PANTONI: Same objection.

17 THE COURT: What aspect? Can you narrow it down a
18 little bit.

19 MS ESPINOSA: Q Did you have the impression Dr.
20 Czarnik was working very hard?

21 MR. PANTONI: Same objection.

22 THE COURT: Overruled.

23 THE WITNESS: Um, comparatively, no, to the other
24 members who are -- who were on the staff.

25 MS ESPINOSA: Q How did you develop that impression?

26 A Just through work habits and observations. Do you want
27 specific examples?

28 Q For instance, did you interact with him on a day-to-day

1 basis?

2 A Oh, yes, absolutely. I had to get signatures for
3 documents. All of the VPs had to sign a lot of documents. Tony
4 was also the second check signer, so any checks over a certain
5 dollar amount required a second signature. So yes, I did interact
6 with him regularly and I had to -- so sometimes to try to find
7 him.

8 Q So the time for those interactions did you develop an
9 impression he just wasn't working as hard as the other senior
10 managers?

11 MR. PANTONI: Same objection.

12 THE COURT: I think that's already been asked and
13 answered.

14 MS ESPINOSA: Q How did you develop that impression?

15 MR. PANTONI: Asked and answered.

16 THE COURT: Overruled. You may answer.

17 THE WITNESS: There were times where I would have to go
18 looking for Dr. Czarnik. Sometimes I would run into him in the
19 break room. There are a lot of people in the break room at
20 various times, in and out. We had sodas and some food there. And
21 there were some times when we had a couple of conversations about
22 non-work-related matters. I can specifically remember talking
23 about the phenomenon of a green flash and what a tangelo, what
24 combination of fruit makes a tangelo. And both of these -- both
25 of these we spent a good deal of time talking about. And an hour
26 or more later I would get an e-mail, along with the other person
27 who was in the conversation with us, would get an e-mail from Dr.
28 Czarnik with a website that explained it, and the impression was

1 that he had spent that time looking on a website during work
2 hours, looking on a website trying to figure out what a green
3 flash, what happened to cause a green flash or what made up a
4 tangelo, when I was working very hard trying to get my job done,
5 and it was a little frustrating.

6 Q Did you express your frustration about this to one?

7 MR. PANTONI: Objection, hearsay.

8 THE COURT: Sustained.

9 MS ESPINOSA: Q What about your position in your later
10 office? I think you indicated you moved from that cubical to a
11 different location?

12 A Yes.

13 Q Can you indicate where you moved to.

14 A I moved to this. It's a walled office with a door.

15 Q Could you see into the big room?

16 A Yes. There was a door right here going into the big
17 room. It was closed. But it did have a window in it at head
18 height. My desk was right here, with my chair, and so if I stood
19 up, and I had file cabinets, so if I stood up I basically had a
20 direct line of sight into the big room.

21 Q Where could you see the big room specifically?

22 A I could generally see all the way down here, and, you
23 know, is sort of where the field of vision would go, like that.

24 Q Where did Dr. Czarnik sit?

25 A Right there.

26 Q So based on the fact that you happened to sit at a
27 location where you could see Dr. Czarnik's desk, did that add to
28 your impression that he wasn't working very hard?

1 A Yes.

2 Q How?

3 A It never seemed -- It never seemed like there was, I
4 don't know, like when you are working really hard a lot of times
5 you have your head down, you are working on documents and you look
6 like you are in deep concentration, and it looked -- it just
7 looked like there was never a lot of, you know, documents on the
8 desk and looked like he was spending -- I had the impression he
9 was spending a lot of time on websites.

10 MR. PANTONI: I'll object and ask that last remark be
11 stricken based on no foundation.

12 THE COURT: Stricken. Lack of foundation. Jury
13 admonished to disregard it.

14 THE WITNESS: Sorry.

15 MS ESPINOSA: Q Could you see Dr. Czarnik's computer
16 monitor from where you sat?

17 A Yes, I could. If I stood up and was over here I could
18 see his computer. It faced this way.

19 Q Is that how you gained an impression he was looking at
20 websites, by standing up and looking?

21 A Yes.

22 Q Be seated.

23 I think you mentioned earlier that because of these
24 observations you felt frustrated. Why did you feel frustrated?

25 A Dr. Czarnik was the highest paid employee and had more
26 stock granted to him than any other employee at Illumina.

27 Q How did you know that?

28 A I tracked -- I did stock administration, which is where

1 you track all the stock grants and insure the vesting of them is
2 accurate, and also I did all the payroll, so I had access to all
3 that information.

4 Q So sorry, I interrupted you. You said it frustrated
5 you. Why did it frustrate you?

6 MR. PANTONI: Objection, relevance.

7 THE COURT: Sustained.

8 MS ESPINOSA: Q Do you recall any incidence in which
9 you felt your interactions with Dr. Czarnik were unprofessional?

10 MR. PANTONI: Objection, relevance.

11 THE COURT: Sustained.

12 MS ESPINOSA: Q Did your impression of Dr. Czarnik's
13 work ethic interact with your work interactions with him?

14 MR. PANTONI: Objection.

15 THE COURT: Sustained.

16 MS KEARNS: Q Were you present in about June of 1999
17 when a company picture was taken of people at Illumina at Towne
18 Centre?

19 A Yes.

20 Q I'll show you the picture.

21 MS ESPINOSA: We're going to offer this as Trial
22 Exhibit 388. It's a rebuttal exhibit. Unfortunately it's the
23 only one we have.

24 Q Do you recognize this as a company photo that was taken
25 in June of 1999?

26 A Yes.

27 Q Are you in it?

28 A Yes, I am. I'm sort of hidden behind Kevin Gunderson

1 in the front. Do you want me to point myself out?

2 Q I'll bring it to you.

3 A I'm right there (witness indicating).

4 Q Do you see Dr. Czarnik in the picture?

5 A Yes, right there.

6 Q Who is he standing next to?

7 A He is standing next to Dr. Stuelpnagel.

8 Q Is this the entirety of Illumina in June of 1999?

9 A Yes. If somebody was sick that day or not there, they
10 may be missing, but pretty much.

11 Q Do you know where this picture hangs in Illumina?

12 A It hangs on a wall sort of outside of our executive
13 board room.

14 Q Dr. Czarnik was clearly pictured in this photograph?

15 A Yes.

16 Q Let put up trial Exhibit 334. -- I'm sorry 343. And
17 I'll represent to you that this was the picture taken in November
18 of 2000. Are you in this photograph as well?

19 A Yes, I am. I'd have to search to find myself again.

20 Q Do you recall why this picture was taken?

21 A Why it was taken?

22 Q Yes.

23 A It was our -- The next year, every year we do a
24 company photo, and this picture was done to represent the staff
25 that had been on at the time of the IPO.

26 Q Is this the first time this picture had been taken of
27 the people that were there during the IPO?

28 A No. The first time had been shortly after our IPO,

1 which happened in late July, so probably sometime in August.

2 Q And what happened to the photograph that was taken in
3 August?

4 A There were actually several photographs, they took
5 several proofs, at which they were given to the company to review
6 to pick out which one we liked best to have blown up, and they had
7 all turned out very terrible, and we had to have the photographer
8 come back and reshoot the photos. A lot of the time -- The sun on
9 people's faces was even worse than it was in this picture and the
10 people were squinting. It was a terrible photo.

11 Q Were you one of the people that reviewed proofs when
12 they came back?

13 A Yes.

14 Q Were these photographs taken by professional
15 photographer?

16 A Yes.

17 Q Okay. So when this picture was retaken, do you have
18 any understanding of why Dr. Chee is not in this photograph?

19 A Yes, actually he was there at one point but he was
20 hungry for breakfast and was running down the street going to get
21 his breakfast, and we were all yelling at him, saying, "Mark,
22 where are you going," and they took the photo without him in
23 there.

24 MR. PANTONI: I'm going to object, your Honor. We know
25 Dr. Chee doesn't eat.

26 THE WITNESS: That's what he told us, anyway.

27 THE COURT: So the jury will be given a limiting
28 instruction it's not offered for the truth of the matter.

1 MS ESPINOSA: Q So in fact when this picture was
2 taken, why was Dr. Czarnik not present, do you know?

3 A Dr. Czarnik had already left the company at that point.

4 Q Now, as director of finance, did you participate in
5 helping put together the documents for the initial public
6 offering?

7 A Yes. Yes, I did all of the financial aspects of the S1
8 filing.

9 Q And as part of that, how do you decide what to put into
10 these documents, what information?

11 A There's Exchange Rule Act of 1933 act and the 1934 act.
12 There's Security Exchange Commission acts. And they are very
13 strict rules about what goes in and what doesn't go in.

14 Q We've heard earlier some testimony about a document
15 that I believe is a summary of officers' and directors'
16 compensation where people are listed by name and salaries are
17 listed.

18 A Yes.

19 Q Who prepared that part of the prospectus?

20 A I prepared that.

21 Q Did you decide who to list in that document?

22 A I put the people in that document who were required to
23 be there under the SEC rules.

24 Q And did you omit Dr. Czarnik on that list?

25 A Yes, at that point Dr. Czarnik was not an officer, so
26 he was not required to be in that table, so I did not put him in.
27 Generally one does not want to be in that table unless they have
28 to be because all your compensation is made public, and so the

1 general thinking is you don't want to be in it if you don't have
2 to be.

3 Q So did anyone at anytime instruct you not to list Dr.
4 Czarnik in the prospectus?

5 A No.

6 THE COURT: Cross-examination.

7 MR. PANTONI: Yes, your Honor.

8 CROSS-EXAMINATION

9 BY MR. PANTONI:

10 Q Let me ask you to look again, please, at Exhibit 7.
11 You say this is the floor plan at Illumina as of March of 1999?

12 A Yes.

13 Q You started with the company in March of 1999?

14 A March 8th.

15 Q Let me try to refresh your recollection. You said this
16 is where Dr. Czarnik sat initially?

17 A His office was there only for a very short period of
18 time when I started.

19 Q In fact didn't he already move to the big room as of
20 January of 1999, before you even started working at Illumina?

21 A No, not to my knowledge. He was there in that room
22 when I was sitting in that cubical. I don't know if he had two
23 desks at that point, but that was still an office, and Dr. Czarnik
24 was in there.

25 Q How short of a time would you say that was a short
26 time?

27 A I would say he was out probably in a month. I mean it
28 was a very short time.

1 Q So most of the time that you were at work while Dr.
2 Czarnik was working there, Dr. Czarnik was in the big room?

3 A Yes. Oh, yes.

4 Q And this is the door to the big room where I'm pointing
5 right now?

6 A That's one of the doors, yes. That was shut later.
7 There was a short bookcase put against it later so I couldn't even
8 get through it.

9 Q Is the door you say you were able to look through?

10 A Yes, there was a window.

11 Q What is indicated, what is here in between the door and
12 Dr. Czarnik's desk?

13 A I think those say "File Cabinets."

14 Q Two file cabinets there?

15 A Uh-huh. Yes, I believe so. I don't recall exactly,
16 but that's what it shows.

17 Q Where was your desk in relationship to your office?

18 A Let me walk up there and I'll show you.

19 Q Okay.

20 A My desk came out a little bit further than the door, so
21 my desk was right here, and I sat with my chair sort of right
22 there.

23 Q If you were sitting at your desk, you couldn't have a
24 straight line of sight to Dr. Czarnik's desk?

25 A No, I had to stand up.

26 Q You had to stand up and walk around and look out the
27 door?

28 A Stand up and walk over about one step.

1 Q How often would you stand up, look around your desk and
2 see what Dr. Czarnik was doing?

3 A I was up and down from my desk quite often. I didn't
4 spend -- Do you want me to stay up here?

5 Q You can go back to there. That's fine.

6 A I didn't spend a lot of time -- I mean I didn't spend
7 a lot of time just sitting at my desk. I was up and down all the
8 time. I had to make a lot of copies in the copier room. So I was
9 always up and down.

10 Q It's true you were out of your office more than you
11 were in your office, your physical office, isn't that fair to
12 stay?

13 A I don't know if you could say I was out of my office
14 more, but I was definitely up. I had file cabinets along that
15 back wall. I was always in those file cabinets. So I don't know
16 if I could say I was out more than I was -- I was probably
17 actually in my office more, but I was up and down a lot.

18 Q And I take it when you left your office, you didn't
19 report to Dr. Czarnik where you were going on any particular
20 occasion?

21 A No, no.

22 Q Same is true for Dr. Czarnik, when he would leave his
23 desk, he wouldn't report to you where he was going?

24 A No.

25 Q And the break room that you said you saw Dr. Czarnik in
26 from time to time, this is in the upper right corner there?

27 A Yes.

28 Q Isn't it true there's a whiteboard in that break room?

1 A Yes.

2 Q Isn't it true from time to time Dr. Czarnik held
3 scientific discussions in that break room using that whiteboard?

4 A Yes.

5 Q Now, you were asked how long you knew Tony Czarnik.
6 Did you say you met him for the first time at Illumina?

7 A In the interview process is the first time I met Dr.
8 Czarnik.

9 Q How long have you known John Stuelpnagel?

10 A I met John Stuelpnagel, I'm actually friend with his
11 sister, and I had met him once prior to interviewing for the
12 position.

13 Q How long have you been friends with Dr. Stuelpnagel's
14 sister?

15 A A long time. I worked with her for years.

16 Q Were you childhood friends?

17 A No. I worked with her at a previous company that I
18 probably was at in maybe '96 time frame, so I've known her for
19 five or six years.

20 Q And how much stock do you hold in Illumina?

21 A Currently?

22 Q Yes.

23 A Including stock, all my stock options, or how much do I
24 physically own at this point?

25 Q The shares you have now.

26 A I physically have? I'm not sure of the exact number.
27 Maybe 25,000.

28 Q What about in terms of stock options?

1 A Some of those are from exercising my stock options. I
2 have somewhere about 50,000 shares of stock options.

3 MR. PANTONI: Nothing further, your Honor.

4 THE COURT: Anything further?

5 MS ESPINOSA: We'd like to make an offer of proof
6 outside of the presence of the jury.

7 THE COURT: Okay.

8 (Proceedings at sidebar.)

1 (Proceedings resumed in open court.)

2 THE COURT: Any further questions at this time?

3 MS ESPINOSA: Yes, your Honor, just one.

4 REDIRECT EXAMINATION

5 BY MS ESPINOSA:

6 Q Miss Brick, you testified when Mr. Pantoni just
7 questioned you that you saw Dr. Czarnik in the break room on
8 occasion working at the whiteboard conducting meetings?

9 A Yes, I have seen him conducting meetings there.

10 Q I think you said earlier you had conversations with him
11 not related to business but in the lunchroom as well?

12 A Yeah, I also saw him in the lunchroom when we were just
13 -- when people were just in there on a break and having
14 conversations. So --

15 Q What else did you see Dr. Czarnik doing in the
16 lunchroom during business hours?

17 A There was one instance where Dr. Czarnik was sound
18 asleep on the couch.

19 MR. PANTONI: Objection, move to strike.

20 MS ESPINOSA: Your Honor, he brought it in by
21 discussing his participation in meetings at the whiteboard. I'm
22 showing other instances she observed him in the lunchroom.

23 MR. PANTONI: Move to strike under 352.

24 THE COURT: Motion to strike is granted.

25 MR. PANTONI: Could you ask the jury to --

26 THE COURT: Jury admonished to disregard the last
27 answer, and the question.

28 MS ESPINOSA: That's it.

1 MR. PANTONI: Nothing further.

2 THE COURT: Thank you very much. You may step down.

3 THE WITNESS: Thank you, your Honor.

4 THE COURT: Ladies and gentlemen, the attorneys are way
5 ahead of schedule.

6 JUROR: I think that's pretty good, because neither one
7 of them are suffering from lockjaw.

8 THE COURT: They are not at a loss for words, but they
9 are ahead of schedule.

10 So we're going to -- I hope this doesn't disappoint you,
11 we're going to have to recess for the day at this time.

12 We're going to resume promptly at 9:00 a.m. tomorrow
13 morning. Please remember the admonition not to form or express
14 any opinions about the case, not to discuss the case among
15 yourselves or with anyone else. We'll be in recess until 9:00
16 a.m. tomorrow morning. Have a pleasant evening. We'll see you at
17 9:00 a.m. tomorrow morning.

18 (Proceedings resumed outside the presence of the jury.)

1 SAN DIEGO, CALIFORNIA, THURSDAY, JUNE 27, 2002; 9:10 A.M.

2 THE COURT: We're missing two jurors. I thought we
3 were just missing one.

4 Mr. Martinez.

5 (Brief interruption).

6 THE COURT: The record will indicate that all the
7 jurors are here except Miss Bergin and Mr. Manaleng.

8 Miss Bergin is very ill. We had to excuse her.
9 Mr. Manaleng is having some health problems. We have to talk to
10 him about this problem. He's on his way in right now. We expect
11 him to be here before 9:30. So we're going to recess until 9:30.

12 We expect also we'll not be in session on Monday morning.
13 We'll be in session for three hours on Monday from 1 to 4. It's
14 likely we're not going to be in session on Wednesday, July 3rd,
15 and Friday July 5th. Since we wouldn't have completed the case,
16 we won't be in session.

17 What we expect is that on Monday, July 7th, the case will be
18 concluded with closing arguments and the jury instructions. Is
19 that correct, Counsel?

20 MS KEARNS: I think it's the 8th.

21 THE COURT: Yes, the 8th.

22 THE COURT: Monday the 8th. So we conclude the
23 argument and the instructions on Monday the 8th, and then as long
24 as it takes to complete your deliberations.

25 JUROR: We're not in on the 5th?

26 THE COURT: Not in on the 5th. Probably not on the 3rd
27 as well. Monday, just the afternoon only.

28 Yes?

1 JUROR: Sir, will we not know until Tuesday whether
2 we're going to be in on the 3rd? When would you know that?

3 THE COURT: Looks like right now, unless there's
4 something surprising that happens, we're not going to be here on
5 the 3rd.

6 I can't tell you with a hundred percent certainty right now.

7 JUROR: Are we going to be here Tuesday?

8 THE COURT: Yes, Tuesday, July 2nd. Monday it's only
9 the afternoon.

10 Actually everything is all scheduled out. We're all set,
11 except we have to resolve this problem with Mr. Manaleng before we
12 can proceed this morning.

13 So we'll be in recess until 9:30.

14 MR. PANTONI: Are we going to seat another juror?

15 THE COURT: I'm going to talk to you about that,
16 Counsel, first. So we'll be in recess until 9:30. Please
17 remember the admonition not to form or express any opinions about
18 the case, not to discuss the case. We'll be in recess until 9:30.

19 (Proceedings resumed outside the presence of the jury.)

20 (Discussion off the record.)

8 (Jury seated in open court.)

9 THE COURT: We have drawn the name of one of the
10 alternates at random, and the lucky alternate is, drum roll,
11 please: Teresa Lucas.

12 Call your next witness, please.

13 MR. PANTONI: Jay Flatley.

14 JAY FLATLEY,

15 called as a witness by the Plaintiff, having been first duly
16 sworn, was examined and testified as follows:

17 THE CLERK: Would you please state your full name and
18 spell your last name for the record.

19 THE WITNESS: Jay Thomas Flatley, F-l-a-t-l-e-y.

20 THE CLERK: Thank you

21 DIRECT EXAMINATION

22 BY MR. PANTONI:

23 Q Good morning, Mr. Flatley.

24 A Good morning.

25 Q Are you presently employed by Illumina?

26 A I am.

27 Q What is your present position, sir?

28 A I'm president, CEO and director.

1 Q So are you the senior-most officer at Illumina?

2 A Yes.

3 Q Have you been president, CEO and a member of the board
4 of directors your entire employment with Illumina?

5 A Yes.

6 Q When did your employment with Illumina begin?

7 A On October 18th, 1999.

8 Q Take a look, please, at Exhibit 361. Mr. Flatley, do
9 you recognize this exhibit as a copy of your resume?

10 A I do.

11 Q And this was your resume through and including your
12 employment with Molecular Dynamics?

13 A That's correct.

14 Q Is this the resume you submitted to Illumina during the
15 time that you were negotiating with Illumina for employment?

16 A I don't recall whether I actually submitted a resume to
17 Illumina or not.

18 Q Molecular Dynamics was your employment immediately
19 before Illumina, is that right?

20 A That's correct, although I was technically an employee
21 of Amersham Pharmacia Biotech.

22 Q Which is an affiliate of --

23 A No, Molecular Dynamics was an affiliate of Amersham.

24 Q Now, were you a founder of Molecular Dynamics?

25 A I was.

26 Q And you included the fact that you were founder on your
27 resume, correct?

28 A That's correct.

1 Q Do you agree, sir, that there's some prestige
2 associated with being a founder of a company?

3 A Marginal.

4 Q Marginal enough for you to include it on your resume?

5 A Yes. Most people who are founders, if they technically
6 were, will include it on a resume.

7 Q Would you agree that there is some additional
8 importance to being recognized as a founder in a situation where
9 the company that you founded has been successful and gone public?

10 A I frankly don't think so. I think the real prestige
11 from a company being successful comes from your participation in
12 that company and how you contribute to making a company
13 successful. A founder title is largely ceremonial.

14 Q Again it was important enough for you to include it as
15 an item of significance on your resume?

16 A Sure.

17 MS KEARNS: Objection, asked and answered.

18 THE COURT: Cumulative. Sustained.

19 MR. PANTONI: Q Mr. Flatley, when you took over at
20 Illumina, what was Tony Czarnik's position?

21 A He was the chief scientific officer.

22 Q At that point was Tony Czarnik a member of Illumina's
23 senior management team?

24 A Yes, he was.

25 Q Now, sir, do you claim that you came on board at
26 Illumina with a completely clean slate as it relates to Tony
27 Czarnik?

28 A If by clean slate you mean I had no preconceptions

1 regarding Tony Czarnik, that's right. I did not know Tony
2 Czarnik, had never heard of Tony Czarnik before I started at
3 Illumina.

4 Q At about the time you joined the company, sir, were you
5 given any type of a briefing --

6 THE COURT: Could you speak more into the microphone.

7 THE WITNESS: Sure.

8 MR. PANTONI: Q At the time you joined Illumina,
9 were you given any type of a briefing with respect to the
10 background and the experience of a senior staff that you were
11 going to be taking over?

12 A Yes, I was.

13 Q Did John Stuelpnagel provide you with any background
14 concerning the skills, experience or abilities of any of the
15 senior staff members?

16 A No.

17 Q Did John Stuelpnagel -- strike that.

18 John Stuelpnagel was a previous acting CEO who you are
19 taking over from?

20 A He was acting CEO, yes.

21 Q You essentially replaced him in that position as a
22 permanent CEO?

23 A Yes.

24 Q And the former acting CEO, John Stuelpnagel, did he
25 give you any background on the job performance of any of the
26 managers that you were inheriting from him?

27 A No.

28 Q Never had a discussion about that?

1 A No.

2 Q Didn't Dr. Stuelpnagel tell you anything about the
3 skills and abilities of the people you were inheriting on his
4 senior management team?

5 A He did not.

6 Q Did you review the personnel files of any members of
7 your senior management team in anticipation of taking over their
8 supervision?

9 A I did not.

10 Q Did you have any preconceived notions or ideas
11 regarding Tony Czarnik at the time you joined Illumina?

12 MS KEARNS: Objection, asked and answered.

13 THE COURT: Overruled.

14 THE WITNESS: I had never heard of Tony Czarnik before
15 I started Illumina.

16 MR. PANTONI: Q My question was whether you had any
17 preconceived notions about it.

18 A If I never heard of him, it would be impossible to have
19 any preconceived notions about him. I didn't even know his name.

20 Q Miss Kearns asked about the circumstances when a new
21 CEO comes on board and wants to bring on his or her own team. You
22 heard that testimony, the questioning, when you were here in the
23 courtroom?

24 A Can you refresh my memory on that again?

25 Q Sure. Miss Kearns asked Dr. Czarnik about
26 circumstances where a new CEO comes on board, and some new CEO's
27 want to bring on their own team. That wasn't the case with you,
28 was it?

1 A That was not the case.

2 Q You didn't have any plans when you joined Illumina that
3 you would want to bring on your own team?

4 A Well, I should say that the management team when I
5 arrived at Illumina consisted of four executives. It was very
6 clear, with the intention we had of growing the company to be
7 large and successful, that I was going to need, to make
8 substantial additions to the senior management team, and that was
9 a charter I have from the board of directors. So it was very
10 clear that one of my obligations was to bring on additional senior
11 managers into the company, and I planned to do that.

12 Q But in terms of replacing people because you wanted
13 your own team, you had no plans to do that, did you?

14 A No.

15 Q Well, at the time you joined Illumina, sir, what were
16 your plans, if any, with respect to making changes in personnel?

17 A At the time I joined Illumina, I didn't know any of the
18 players at Illumina so I had no plans whatsoever. I knew nothing
19 about the people.

20 Q At the time you joined the company, did you have any
21 plans whatsoever with respect to reorganizing or restructuring the
22 management team?

23 A No.

24 Q Did you have any plans at all with respect to Tony
25 Czarnik?

26 A No.

27 Q Did you have any plans at all with respect to the
28 position of chief scientific officer?

1 A No.

2 Q Was it your philosophy, sir, when you first came on
3 board at Illumina, that you would make your own independent
4 evaluation of the members of your senior management team?

5 A That's correct.

6 Q And the evaluation of your senior management team would
7 be based on your own personal observations, true?

8 A Well, I guess I wouldn't say my evaluation had to be
9 exclusively only my observations. If the day after I got there
10 somebody came to me and said we have a criminal in a particular
11 position, I would have listened to them. So no, I won't say I
12 came in with blinders on saying I wouldn't listen to any input,
13 but the day I walked in I had no input.

14 Q Primarily you were going to rely on your own
15 evaluation, what you saw and heard, as opposed to what other
16 people were telling you about your team, is that fair to say?

17 A No, I didn't come in with any preconceived notions how
18 I was going to evaluate people, what methodology I would use to do
19 that. I showed up, I had a team, I didn't know anybody on the
20 team, and I went to work. So I didn't think through what my
21 preconceived notions were with regard to how to evaluate people.

22 Q So when you began your employment on October 18 of
23 1999, you didn't know anything at that point about any alleged
24 performance problems on the part of Dr. Czarnik, is that true?

25 A That's true.

26 Q Is it correct, sir, that you had only one 45-minute
27 discussion with Tony Czarnik in the first few weeks after you came
28 on board at Illumina?

1 A No.

2 Q That's not true?

3 A That's not true.

4 Q How many meetings, sir, did you have with Tony Czarnik
5 say in the first two to three weeks of your employment?

6 A I had many meetings with Tony Czarnik, and Tony
7 Czarnik, frankly, was the only person on my team I was having
8 individual scheduled one-on-ones with because he requested those.
9 The other senior managers I was not having those.

10 We were very small company, about 25 people at the time I
11 joined, and most of our interactions were at our weekly staff
12 meetings I instituted right after I got there and hallway
13 conversations, and after-hours, stand-up-by-the-file-cabinets sort
14 of discussion. So the only meetings I was having on a one-on-one
15 basis were with Tony Czarnik.

16 Q And the lunch you had with Dr. Czarnik in late October
17 of 1999?

18 A Yes.

19 Q How many one-on-one meetings had you had with Dr.
20 Czarnik prior to that lunch?

21 A At least one or two.

22 Q One or two?

23 A Uh-huh.

24 Q One of them would be --

25 A Exclusive of staff meetings where the group gets
26 together.

27 Q Right. I'm talking about individual one-on-one
28 discussions.

1 A That's right.

2 Q Is one of those occasions the 45-minute meeting you
3 had? Miss Kearns showed some e-mails reflecting that you had a
4 series of 45-minute meetings scheduled.

5 A For clarity, we should point out that that 45-minute
6 schedule predated my arrival at Illumina. I didn't begin working
7 at Illumina until the 18th of October. That series of meetings
8 was a program I sent you to try to get myself up to speed in
9 advance of my arrival, and those meetings occurred on September
10 24th. So that meeting would have been in addition to one-on-ones
11 I had with Tony after I arrived on the 18th.

12 Q I see. Okay.

13 So those meetings were sometime in September when you were
14 sort of getting acquainted with the company but hadn't yet
15 officially begun work?

16 A I had only been to Illumina about three times for half
17 a day to maybe a day each before my official start on the 18th of
18 October. These meetings were the 24th of September when I was --
19 After I accepted my offer, I came down, and we scheduled a meeting
20 with the entire company to introduce new CEO to the company, and
21 on that same day I scheduled 45-minute meetings with all the
22 senior managers.

23 Q Let's talk about that lunch with Dr. Czarnik in October
24 of 1999. Do you recall the date of that?

25 A I believe it was about 10 days after I started. So it
26 was probably near the end of the month, end of the month of
27 October.

28 Q And Dr. Czarnik had requested that lunch, is that

1 right?

2 A The very first day I arrived on the job I got an e-mail
3 from Dr. Czarnik requesting a lunch meeting with me.

4 Q That meeting was held approximately 10 days after?

5 A That's right.

6 Q Do you recall the discussion at the end of that lunch
7 or anytime that day, frankly, where Dr. Czarnik told you that he
8 could be cynical at times?

9 A Yes.

10 Q Is that what he said, something to the effect, you
11 know, "I can be cynical at times"?

12 A Yes.

13 Q And you responded, "Are you sure it isn't more than
14 that"?

15 A No, that was not my response.

16 Q What was your response?

17 A I engaged Tony in a discussion about what the word
18 cynical meant and why he considered himself to be a cynic. In my
19 mind the word cynical has a negative connotation. Someone is a
20 naysayer, or someone dismisses information out of hand without
21 thinking it through, and I enjoined him in discussion about the
22 difference between what I considered a cynic and what I considered
23 a skeptic, where a skeptic is someone who might look at
24 information and be thoughtful about it but wasn't inherently
25 negative. Our conversation revolved around that distinction and
26 in fact this turned out that Tony was right, he was a cynic and is
27 a cynic.

28 Q You don't recall any point in that conversation Dr.

1 Czarnik saying something to the effect look, I'm not comfortable
2 talking about this again now?

3 A Could you repeat the question.

4 Q Do you recall at any point during that discussion that
5 Dr. Czarnik said something to the effect, "I'm not comfortable
6 talking about this subject matter right now"?

7 A No.

8 Q Did you and Dr. Czarnik on this same occasion talk
9 about whether it would be necessary for you to hold regular
10 meetings between yourself and Dr. Czarnik?

11 A Tony and I had, as I mention, a couple of one-on-one
12 meetings during my initial start-up phase in the first four weeks.
13 We had had a number of these. And during one or more of those we
14 discussed the idea whether we should have one-on-one meetings, and
15 Tony seemed to like that idea. We discussed it, and we decided to
16 not hold regular one-on-one meetings, because I guess for the most
17 part we were having staff meetings on a regular basis. So we
18 mutually agreed not to have one-on-one meetings.

19 Q Do you recall at about this time of the October lunch,
20 October, 1999, that you talked about whether weekly or -- strike
21 that -- whether regular meetings would be required, and Dr.
22 Czarnik said something to the effect, "I don't need to have
23 regular meetings, but I do need to be sure that if I don't hear
24 from you, I can assume I'm doing a good job"?

25 A Well, we never used the phrase would one-on-one
26 meetings be required, because they are never really required. So
27 we didn't have that conversation in those words. But we did
28 discuss whether it was appropriate to have one-on-one meetings,

1 and my management style is to try to work with the people that
2 work for me in styles that are most comfortable for them. So we
3 had a discussion about whether my working relationship with Tony
4 should include weekly one-on-one meetings or even more frequently.
5 At the end of that discussion, we concluded that we did not need
6 one-on-one meetings, and we left it at that.

7 Q Didn't Dr. Czarnik tell you essentially that unless he
8 heard back from you regarding something negative, he would assume
9 that he was performing adequately?

10 A Dr. Czarnik in those early meetings was already
11 soliciting feedback from me about his performance. I told him,
12 "Tony, I don't know you, I don't know anything about your
13 performance," and we had that discussion a couple of times, and he
14 did come to me as a result of that type of conversation, he said
15 to me, "Well, if I don't hear from you, I will assume I'm doing an
16 excellent job, is that right?" I said yes.

17 Q So you agreed that unless he heard from you, he could
18 assume he was doing an excellent job?

19 A That's correct.

20 Q When did he first hear from you that he was doing
21 something less than an excellent job?

22 A I would say the first time was probably late November,
23 into December. There were a couple of sessions where we had
24 discussions about performance in November, December.

25 Q Late November or December of 1999?

26 A Yes.

27 Q We'll get back to that.

28 When did you first consider replacing Tony Czarnik as chief

1 science officer?

2 A I'd say it's a very difficult question to answer,
3 because my impressions of Tony, you know, grew over time, and my
4 very first impressions of him were in the group interview session
5 we had. If you are asking me whether I concluded I wanted to make
6 the change, I can give you that information, but the word
7 "consider" is tough for me to answer because it was just a process
8 that went on over the course of four or five months.

9 Q Let me refer to your deposition testimony on this
10 point.

11 A Sure.

12 Q It's at beginning at page 117, line 22, your testimony
13 is --

14 MS KEARNS: 117, line 22?

15 MR. PANTONI: My mistake, 116. Sorry.

16 Q Beginning at page 116, line 22:

17 "QUESTION: When did you first consider
18 replacing Tony Czarnik as CSO?

19 "ANSWER: I don't recall a date.

20 "QUESTION: Approximately when?

21 "ANSWER: I would approximate the end of
22 January.

23 "QUESTION: January, 2000?

24 "ANSWER: Yes."

25 Is that a fair approximation, sir, the end of January, 2000,
26 when you first considered replacing Dr. Czarnik?

27 A Again I would say that was the time frame when I was
28 beginning to reach a conclusion about replacing Dr. Czarnik.

1 Q My question to you had been when did you first consider
2 it.

3 A And my response was that consideration -- I mean if you
4 were to plot a graph of my impressions of Tony, they were
5 increasingly negative over the period from when I started with the
6 company, so to pick a date when I would say I was first
7 considering it is difficult. The point that I first began to in
8 my mind reach conclusions that I was going to replace him were
9 roughly in the time frame you cited.

10 Q Are you contradicting your sworn testimony that you
11 first considered replacing Tony Czarnik as CSO in late January of
12 2000?

13 A Not at all. I'm drawing a finer distinction than
14 perhaps I did during the deposition.

15 Q Now, do you recall having a lunch with Larry Bock where
16 you discussed Tony Czarnik?

17 A I recall having lunch with Larry Bock.

18 Q Where you discussed Tony Czarnik?

19 A My recollection on discussing Tony Czarnik is very
20 vague in that meeting. I think it's a possibility. I don't have
21 any specific recollection.

22 Q You were here when we played the videotaped deposition
23 testimony of Larry Bock?

24 A I was.

25 Q And you recall he testified to a lunch meeting that
26 occurred where you talked to him about Tony Czarnik?

27 A He testified to the fact that there was a lunch meeting
28 and that there had been some conversation about Tony in the

1 meeting.

2 Q You don't deny that that took place, do you?

3 A As I stated, my recollection is vague what we would
4 have discussed about Tony at that meeting.

5 Q So you don't recall, but you are not saying that Larry
6 Bock is mistaken?

7 A That's correct.

8 Q And you only had one lunch with Larry Bock where you
9 talked about Tony Czarnik, isn't that right?

10 A The intention that lunch was not to talk about Tony
11 Czarnik.

12 Q I'm not asking you about what the intention was. Isn't
13 it correct you only had one lunch with Larry Bock where you and
14 Larry Bock talked about Tony Czarnik?

15 MS KEARNS: I'll object that the question assumes facts
16 not in evidence. The witness has already testified that he thinks
17 it's possible they discussed Dr. Czarnik but doesn't have a clear
18 recollection of it.

19 THE COURT: Overruled.

20 THE WITNESS: I believe I've only ever had lunch with
21 Larry Bock once.

22 MR. PANTONI: Q For the record, when you had lunch
23 with Larry Bock, he was a board member, right?

24 A That's correct.

25 Q Take a look at Exhibit 96. Do you recognize Exhibit
26 96, Mr. Flatley, as an expense report that you submitted in
27 connection with your employment at Illumina?

28 A I can't read that from here.

1 Q We'll blow it up. If you could look at the binder
2 also. It's Number 96.

3 Do you recognize that, sir, as your signature on this
4 document?

5 A Yes.

6 Q Is there a copy of an expense report that you
7 submitted?

8 A I have no reason to doubt that that's what it is, no.

9 Q And one of the items reflected on this expense report
10 was, "Lunch, Larry Bock," is that right?

11 A Yes.

12 Q Go to the next page, please. Is the second page of
13 Exhibit 96 is a copy of the receipt that you submitted for that
14 lunch with Larry Bock?

15 A Appears to be, yes.

16 Q At the top is that your writing where it says "Lunch,
17 Larry Bock"?

18 A Yes.

19 Q What is the date of this lunch, sir?

20 A November 4th, 1999.

21 Q November 4, 1999. So approximately two weeks after
22 your employment began?

23 A Yes.

24 Q So that November 4, 1999 lunch, again that would have
25 been the only lunch you ever had with Larry Bock?

26 A To the best of my recollection, it is.

27 Q Is one of your board members a person named George
28 Poste?

1 A Yes.

2 Q When did George Poste join the Illumina board of
3 directors?

4 A I believe we elected him -- I believe we elected him
5 at the February meeting, which meant that his first meeting in
6 attendance would have been the April meeting.

7 Q So he was elected at the February 2000 meeting?

8 A Yes, I believe that's right.

9 Q Was George Poste the first new member to the board of
10 directors after you came on board as CEO?

11 A I believe his start on the board of directors was
12 contemporaneous with the change out of Larry Bock with Chuck
13 Hartman, so I believe those both occurred at the April board
14 meeting. So Larry had resigned and was replaced by another member
15 of CW Group.

16 Q Does George Poste have some particular scientific
17 background that you thought might be help helpful to the company?

18 A Yes, he has a lot of scientific background, but he's --
19 he was in a very high management position so he's not -- doesn't
20 do science day to day.

21 Q Did he run a research and development group of
22 pharmaceutical company?

23 A Yes, he did.

24 Q You say he has -- strike that.

25 When did you begin to recruit George Poste to join the board
26 of directors?

27 A I had seen a press release saying that he was leaving
28 his prior company, and shortly after that I scheduled a breakfast

1 meeting with him, and I believe that breakfast meeting might have
2 happened in the September, '99 time frame.

3 Q Who else at Illumina, if anyone, participated in
4 interviewing, meeting and trying to recruit George Poste to the
5 board?

6 A Well, I was really the person that was doing the
7 assessment of George Poste. In the breakfast meeting that we had
8 with George, John and I were on a trip together, so John joined me
9 for breakfast, and the meeting was in Palo Alto, and Mark Chee was
10 up in Palo Alto for some other reason, so he joined us for lunch
11 also.

12 Q You, Mark Chee and John Stuelpnagel meet with George
13 Poste?

14 A We had a breakfast meeting with George Poste, yes.

15 Q Talk about him possibly joining the board of directors?

16 A Yes.

17 Q Did you ever get your chief scientific officer, Tony
18 Czarnik, involved in discussions with George Poste about possibly
19 joining the board?

20 A No. This was not that sort of appointment. The board
21 of directors are brought on board really for global business
22 perspectives, their view of the industry, their view of the
23 competition. Science input was not a factor in our selection of
24 George Poste.

25 Q I think I asked a simple question. Did you ever
26 involve the chief science officer, Tony Czarnik, in any
27 discussions with George Poste about the board seat?

28 A I involved Tony in a discussion about George joining

1 the board. I did not ask Tony to meet with George.

2 Q Let's take a look please at Exhibit 111: You've seen
3 this before, Mr. Flatley? This is the cover page to a slide
4 presentation that you gave at the Hambrecht & Quist Health Care
5 conference on January 10 of 2000, is that right?

6 A That's right.

7 Q Tell the jury what this conference was.

8 A Hambrecht & Quist is an investment banking firm that
9 brings together life science companies, in this conference to
10 present in about 25-minute presentation the technology and
11 strategy of your company.

12 Q And you made that presentation on behalf of Illumina?

13 A I did.

14 Q You used slides?

15 A I did.

16 Q And was John Stuelpnagel present when you gave this
17 presentation?

18 A Yes.

19 Q Did he participate in making the presentation or was he
20 there to observe?

21 A He was there to observe. I prepared the presentation.

22 Q Next page, please.

23 This is one of the slides you showed at the H&Q conference,
24 correct?

25 A Yes.

26 Q Indicating the company was founded by John Stuelpnagel
27 and Mark Chee, is that correct?

28 A Is what correct?

1 Q That you indicated on this slide the company was
2 founded by John Stuelpnagel and Mark Chee.

3 A That's right.

4 Q Now, I'm a little confused. Was this or was this not a
5 mistake or an error on your part?

6 A This was absolutely an error on my part.

7 Q You should have included Tony Czarnik?

8 A On this slide at this presentation I should have
9 include Tony Czarnik.

10 Q How did you come to learn that the company had been
11 founded by John Stuelpnagel and Mark Chee?

12 A As I testified earlier, the concept of a founder is a
13 very loose concept. During my early start-up with the company,
14 the founding group that -- it seemed to me that the people that
15 were founders were John and Mark. And at the time I did this
16 presentation, the best of my recollection I was unaware that Tony
17 had status as a founder. So I didn't include him on the slide
18 until he pointed that out to me.

19 Q Who told you that John Stuelpnagel and/or Mark Chee
20 were founders?

21 A No one told me that specifically.

22 Q You didn't do any investigation or due diligence, ask
23 any questions, look at any documents before you gave this
24 presentation to find out who founded the company?

25 A I didn't consider that necessary, no.

26 Q You had, in the process of doing due diligence on
27 Illumina in deciding whether to join the company in the first
28 place, you read their business plan, didn't you?

1 A Very superficially. When I got the business plan, John
2 told me it was largely out of date, so I believe I scanned the
3 business plan, but I certainly didn't read it cover to cover.

4 Q This was the only business plan in place at Illumina,
5 the one John Stuelpnagel gave you, right?

6 A Yes.

7 Q You were taking over as the new CEO of the company at
8 that point, true?

9 A True.

10 Q Your testimony is that you only gave a superficial scan
11 of the company's business plan?

12 A The acting CEO at that time told me the data in the
13 business plan was largely out of date. For that reason my scan of
14 the business plan was relatively superficial.

15 Q Aren't you aware the business plan was used in
16 connection with the Series B financing?

17 A The business plan was written in the summer of 1998,
18 and so the concept of that business plan had evolved significantly
19 by the fall of 1999.

20 Q You are aware now that Dr. Czarnik is listed as a
21 founder in that business plan, aren't you?

22 A Yes, I am.

23 Q You didn't see that when you were doing your
24 superficial review?

25 A If I did, I didn't recall it.

26 Q By the way, when John Stuelpnagel, who was at the H&Q
27 conference, did he point out he had made an error on this slide?

28 A No. The first time I knew there was an error here is

1 when I received an e-mail from Tony.

2 Q John Stuelpnagel never pointed out your error?

3 A No.

4 Q And this again the timing of this was when you gave
5 this presentation was January of 2000?

6 A That's correct.

7 Q Also in January of 2000, isn't it correct that you took
8 away some important job responsibilities from Tony Czarnik?

9 A I don't recall taking away any job responsibilities
10 from Tony other than the routine reassignments that we look at
11 every week in our senior staff meeting.

12 Q You took away from Dr. Czarnik the responsibility for
13 making the decoding oligos, isn't that right?

14 A It's possible that that happened. When you said I took
15 away, I would absolutely characterize it differently, if in fact
16 that did happen. In staff meetings we are constantly reviewing
17 projects and priorities and who is working on what. We had center
18 bandwidth. And it's possible Tony took on something different and
19 we moved that to another person. But I have no specific
20 recollection of the circumstances.

21 Q You were Tony Czarnik's boss at that point, January of
22 2000, right?

23 A Yes.

24 Q You he reported directly to you?

25 A Yes.

26 Q Mark Chee reported directly to you?

27 A Yes.

28 Q Isn't it true that in January of 2000, I won't use take

1 away, isn't it true in January of 2000, the responsibility for
2 making decoding oligos was transferred from Tony Czarnik to Mark
3 Chee?

4 A That's possible. I mean there could have been five
5 other transfers as well. I don't remember exactly which projects
6 were moving in what direction.

7 Q Let's talk about the Oligator. The Oligator is a
8 significant thing that Illumina has at its disposal, true?

9 A Yeah.

10 Q Probably could have used a better word?

11 A Better word than "thing," yes. It's a great
12 technology.

13 Q The Oligator is a great technology. It's in fact
14 something you mentioned specifically at the roadshow that we will
15 talk about?

16 A That's true.

17 Q And are you aware that Tony Czarnik was responsible for
18 bringing [Michal]⁴¹ Lebl, the person who invented that technology, to
19 Illumina?

20 A I wouldn't characterize it that way.

21 Q How would you characterize it, sir?

22 A To my understanding, Tony introduced [Michal]⁴¹ Lebl to
23 the company, but John Stuelpnagel was responsible for bringing
24 [Michal]⁴¹ Lebl into the company.

25 Q [Michal]⁴¹ Lebl reported to Tony Czarnik when he I think
26 was chief science officer, isn't that right?

27 A That's right.

28 Q So Tony Czarnik was responsible for supervising [Michal]⁴¹

1 Lebl and the activities related to the Oligator, true?

2 A Yes.

3 Q And isn't it true that in January of 2000, you took
4 that responsibility away from Tony Czarnik?

5 A I believe that transition occurred when Tony stepped
6 down from CEO to research fellow.

7 Q Are you sure or are you unsure of the timing of that?

8 A That's my best recollection.

9 Q So if Dr. Czarnik were to say, in fact I think he did
10 say, it was in January of 2000 you took away responsibility for
11 the Oligator and [Michal]⁴¹ Lebl, would you deny that?

12 A I wouldn't deny it, but I would say it's unlikely.

13 Q Let me show you what we've marked Exhibit 178.

14 Actually I have a blow-up of it.

15 Exhibit 178 is a copy of a document relating to Tony
16 Czarnik's goals in January of 2000, is that correct, sir?

17 A Yes, it looks like that's what this is, yes.

18 Q And you included this document, this chart, reflecting
19 Dr. Czarnik's goals and his progress toward goals, you included
20 that in a board packet you submitted to Illumina's board of
21 directors, is that right?

22 A We often put goal status in the board packets, so we
23 probably did.

24 Q This would have been for the board meeting in January
25 of 2000?

26 A I believe the board meeting was in February of 2000.

27 Q I'm sorry, February of 2000.

28 You are familiar that these color codings indicate the

1 status of the various projects, true?

2 A Would you like me to describe what the colors mean?

3 Q Yes. Generally you are familiar with these, with this
4 color scheme? Can you tell us what green means?

5 A Yes, green means that the person filling out the form
6 anticipates that they will achieve the goal that shows green. If
7 it's yellow, it means that there's some potential problem that's
8 been identified in achieving that goal. If it's red, it means
9 that it's unlikely they are going to meet it or they are going to
10 miss the date.

11 Q And if it's white, that means it's already been
12 completed?

13 A Yes.

14 Q Did you get any comments or questions from any of the
15 board members when you submitted this as part of the board packet?

16 A We don't review those in the board meetings.

17 Q You included in the board packet but don't discuss it,
18 is that what you are saying?

19 A That's right. It could potentially come up in the
20 discussion that that particular individual had on their report to
21 the board on their department, so it's possible that any of the
22 VP's could throw that slide up in the board meeting and talk about
23 it in context of their department report, but we don't go through
24 a section of the board meeting where we say let's look at all the
25 goals and compare things.

26 Q Bottom line, do you recall any questions or discussion
27 about Tony Czarnik's goals and his progress toward goals at the
28 February, 2000 board meeting?

1 A We had just set those goals, so there was no really
2 meaningful information on that chart, because all -- You know,
3 virtually everybody's goals are green when you first set them
4 because you are just defining what the goal is, and of course
5 immediately after that you believe -- you still believe you can
6 make most of them.

7 Q Let me request the court reporter read the question
8 back. I'd like you to answer this question.

9 THE COURT: You claim it's not responsive?

10 MR. PANTONI: I do, Judge.

11 THE COURT: Do you object to that?

12 MS KEARNS: I think it was responsive.

13 THE COURT: Let's hear it.

14 (Record read by the court reporter.)

15 THE COURT: You may answer.

16 You want to reask the question?

17 MR. PANTONI: Sure.

18 Q Was there any discussion at the February 2000 board
19 meeting with respect to Exhibit 178, Dr. Czarnik's goals and his
20 progress toward those?

21 A I don't recall any specific discussion.

22 Q Do you recall a dinner meeting with Tony Czarnik that
23 took place on February 7, 2000 at a restaurant called [Daley's]¹³?

24 A Yes.

25 Q Now, you specifically asked Tony Czarnik about his
26 depression at this lunch, didn't you?

27 A First off, this was a dinner, not a lunch.

28 Q Thanks. Let me ask a clear question. Isn't it true,

1 sir, that this dinner meeting on February 7, 2000, that you
2 specifically asked Tony Czarnik about his depression?

3 A I didn't know Tony Czarnik had depression at that time.

4 Q So you deny making any reference to depression?

5 A Yes.

6 Q Did you make any comments or did you ask any questions
7 related in any way to mental health?

8 A No.

9 Q Did you ask Tony Czarnik if you thought his depression
10 was caused by work?

11 A I already testified that I didn't know Tony Czarnik had
12 depression, so such a question would have been impossible.

13 Q You do recall asking Tony Czarnik at this dinner
14 whether he was willing to give up his CSO title?

15 A Yes.

16 Q And you asked Tony Czarnik whether it was critical to
17 him that he keep a management position with the company?

18 A The way the conversation went, Tony in effect early on
19 when I was at Illumina put out a standing offer to step down as
20 CSO, so I didn't directly ask him will you step down as CSO, he
21 had kind of had that as a standing offer.

22 So we discussed his stepping down from CSO, and yes, I did
23 ask him if having a management component in whatever position we
24 defined after that was of importance to him.

25 Q You essentially asked him was his offer to step down
26 still on the table?

27 A In effect.

28 Q And isn't it true that Dr. Czarnik told you that he

1 would accept a non-management role if it were an important high
2 level position with the company?

3 A No. That's not how the conversation went.

4 Q Isn't it true that Dr. Czarnik told you he was still
5 very excited about the company at that point in time?

6 A Yes.

7 Q And isn't it true he told you he still wanted very much
8 to contribute to the company at that point in time?

9 A Yes.

10 Q And at that point in time, February 7 of 2000, you told
11 Tony Czarnik you thought he still could be a valuable contributor
12 to Illumina, true?

13 A I may have said that. I certainly hoped he could.

14 Q Was there any discussion, sir, at this point about any
15 changes or reductions to Dr. Czarnik's compensation?

16 A No.

17 Q At this dinner, February 7, 2000, Dr. Czarnik
18 specifically requested that he be asked to participate and help in
19 the search for any new CSO, true?

20 A I believe he did bring it up at that dinner, yes.

21 Q This wasn't the first time he had brought it up, was
22 it, that he wanted to be involved in any search for a new CSO?

23 A Well, I guess it's possible he would have said that
24 prior to that dinner meeting, but we really hadn't discussed him
25 specifically stepping down from the CSO position until that
26 dinner, so I would be surprised, but it's possible.

27 Q What did you say to Dr. Czarnik on February 7 of 1999
28 when he asked to be included in helping to find a new CSO?

1 A I told him I would involve him in the process.

2 Q Did you tell him that three days earlier you had
3 already spoken to David Barker about a position at Illumina?

4 A I did not.

5 Q Approximately three weeks later on March 1st, 2000, you
6 told Tony Czarnik he was no longer CSO, is that right?

7 A That's correct.

8 Q And on that same day you told Tony Czarnik the new CSO
9 was David Barker?

10 A No.

11 Q Did you mention David Barker?

12 A Yes.

13 Q What did he say?

14 A I told him that David Barker was scheduled to come in
15 for interviews on the next day. I asked him to coordinate those
16 interviews, would he set up a seminar, coordinate the schedule of
17 David Barker beginning with the following day.

18 Q When did David Barker start working as a consultant or
19 an employee?

20 A His first day as a consultant was our all-hands
21 meeting, which was in -- I would estimate that to be the second
22 week of March, and that was a half a day consulting assignment
23 where we introduced him to our investment bankers. His full time
24 start was some seven to maybe ten days after that, he began
25 helping with the drafting of the S1.

26 Q Didn't you start David Barker as a consultant on March
27 6 of 2000?

28 A Whatever the day of the organization meeting was was

1 the day he started as a consultant.

2 Q Now, on March 1st, 2000, when you told Tony Czarnik he
3 was no longer CSO, on that same day you told him that there were
4 going to be changes to his compensation, is that right?

5 A In the same meeting, yes.

6 Q And you had decided unilaterally to reduce Dr.
7 Czarnik's compensation, right?

8 A That's correct.

9 Q And you were reducing both his salary and his stock, is
10 that right?

11 A That's right.

12 Q And in terms of reducing Tony Czarnik's stock, you
13 weren't talking about just changing the vesting rate, the rate at
14 which the shares vest, you were talking about actually buying back
15 significant numbers of shares from Dr. Czarnik, weren't you?

16 A That's really a semantics issue. We were in effect
17 saying that from this point forward you would be eligible to vest
18 a smaller number in total than you had been previously eligible to
19 vest, and you could characterize that in multiple different ways.

20 Q Perhaps we'll look at the agreement that you asked Dr.
21 Czarnik to sign, but isn't it true that you were telling him that
22 the company was going to immediately buy back a significant number
23 of shares at a penny a share?

24 A Those were shares that he had not vested in, so we were
25 buying back shares that were unvested shares.

26 Q Shares he might acquire in the future if he continued
27 to be employed?

28 A Shares he would earn a right to keep if he continued

1 employment with Illumina.

2 Q If he didn't quit or wasn't fired?

3 A That's correct.

4 Q Now, your reasoning for deciding that the company was
5 going to buy back some shares, reasoning was the fact that Dr.
6 Czarnik was taking on a new position of research fellow, is that
7 right?

8 A There were several components in my decision. That was
9 one of them.

10 Q Let me read your deposition testimony. Page 132, line
11 11, and this is your sworn deposition testimony:

12 "QUESTION: And what was your reason for
13 reducing Dr. Czarnik's stock?

14 "ANSWER: Because that level of stock was
15 consistent with his new role in the company as a research
16 fellow."

17 Is Mark Chee the only other research fellow that's ever
18 been employed at Illumina?

19 A To my knowledge, yes.

20 Q Let's take a look please at Exhibit 148.

21 Mr. Flatley, this is an e-mail you sent to Tony Czarnik on
22 March 21 of 2000, is that right?

23 A Yes.

24 Q Forwarding on a change of position agreement, correct?

25 A Correct.

26 Q Next page, please.

27 This is the actual change of position agreement you were
28 asking Dr. Czarnik to sign?

1 A Yes.

2 Q And in Paragraph 3 this agreement would provide that
3 "Dr. Czarnik agrees that the company shall repurchase 167,000
4 shares of his common stock at a price of a penny a share." Is
5 that right?

6 A Exactly the price he paid for that stock, yes.

7 Q Tony Czarnik refused to sign this agreement, is that
8 right?

9 A He did.

10 Q And your lawyers, your company lawyers, told you that
11 it would be illegal to change Dr. Czarnik's stock unless he signed
12 such an agreement?

13 MS KEARNS: Objection, argumentative.

14 THE COURT: Overruled.

15 THE WITNESS: Lawyers never used the word "illegal."

16 MR. PANTONI: Q They told you you couldn't legally
17 do it?

18 A What my lawyers told me was a reduction in this stock
19 needed to be mutual between the employee and the company, and so
20 we drafted an agreement to memorialize such an agreement between
21 Dr. Czarnik and the company.

22 Q And your state of mind, sir, was if your lawyers told
23 you it was legally permissible, you would have reduced Tony
24 Czarnik's stock at that point in time without his consent?

25 MS KEARNS: Objection, calls for speculation, assumes
26 facts not in evidence.

27 THE COURT: Sustained.

28 MR. PANTONI: Goes to state of mind, Judge.

1 THE COURT: It's a hypothetically question to a non-
2 expert witness. Sustained.

3 MS KEARNS: Also for the record I'd like to make the
4 record that the communications to which Mr. Flatley just testified
5 were not held with current counsel and therefore do not constitute
6 a waiver of any attorney-client privilege between my law firm and
7 Mr. Flatley and Illumina.

8 MR. PANTONI: This would be a good time for a morning
9 break, if it's all right.

10 THE COURT: We'll take our morning recess at this time.
11 We'll be in recess until 10:45. Please remember the admonition
12 not to form or express any opinions about the case, not to discuss
13 the case. We'll be in recess until 10:45.

14 (Proceedings resumed outside the presence of the jury.)

15 THE COURT: Is there something you wanted to discuss?

16 MR. PANTONI: No, I just thought it would be a good time
17 for the break.

18 THE COURT: Okay.

19 MR. PANTONI: I have about 50 minutes gone on my clock,
20 Judge.

21 THE COURT: Okay.

22 (Recess.)

23 THE COURT: The record will indicate all the jurors
24 present, counsel and parties present.

25 You may continue your examination, Mr. Pantoni.

26 MR. PANTONI: Thank you, your Honor.

27 Q I'd like to take a look at Exhibit 164.

28 Mr. Flatley, the top e-mail, you recognize this as an e-mail

1 that you received from Tony Czarnik on April 3, 2000?

2 A Yes.

3 Q And toward the bottom here Dr. Czarnik claims, "Every
4 aspect of my original contract has been reduced in a manner I
5 consider discriminatory and punitive." Correct?

6 A That's correct reading, yes.

7 Q And you say that you didn't know yet at this point in
8 time he was talking about discrimination on the basis of medical
9 condition, is that right?

10 A That's right.

11 Q Let's take a look at another e-mail, please, 173.

12 You recognize Exhibit 173, Mr. Flatley, a copy of an e-mail
13 you received from Tony Czarnik on April 5 of 2000?

14 A Yes.

15 Q Now, at the last paragraph Dr. Czarnik makes specific
16 reference to discrimination based on my medical condition. So at
17 least by this date, April 5 of 2000, you knew that Dr. Czarnik was
18 making some sort of a claim that he was discriminated on the basis
19 of medical condition, is that right?

20 A Um, well, yes, it was very clear that he had a medical
21 condition from this and he thought the change of compensation was
22 discriminatory.

23 Q So as of April 5, you knew that the discrimination he
24 was talking about was in his mind medical condition
25 discrimination?

26 A Yes.

27 Q Let's take a look at 185, please.

28 At the bottom of this page do you recognize this as an April

1 18, 2000 e-mail that you sent to Tony Czarnik?

2 A Yes.

3 Q And in that e-mail you tell Dr. Czarnik, "Any issues
4 you have had with John are history and are not in my mind at all
5 related to our current discussions." Right?

6 A That's correct a correct reading, yes.

7 Q Do you recognize the e-mail on top of that to be e-mail
8 from Tony Czarnik to you, the same day, April 18, 2000, responding
9 to your e-mail?

10 A Yes.

11 Q This e-mail Dr. Czarnik points out to you that he
12 believes that the discrimination that he experienced was before
13 you arrived and after you arrived, correct?

14 A Yes.

15 Q And you received this back in April, on April 18, 2000,
16 right?

17 A Yes.

18 Q At this point in time, Mr. Flatley, did you know
19 specifically what Dr. Czarnik was referring to in terms of what
20 happened before you arrived?

21 A Well, I'm not sure exactly when I pieced that all
22 together. I began having some discussions with John about what
23 had predated my arrival, and that covered the year and a half's
24 worth of time, so I'm not sure what pieces I had at any given
25 time. But I was beginning to collect pieces of information.

26 Q You never asked Tony Czarnik what he was referring to
27 as discrimination before you arrived, did you?

28 A I did not.

1 Q Exhibit 222, please.

2 THE CLERK: I'm sorry, 222?

3 MR. PANTONI: 222.

4 Q We've seen this e-mail before. I want to confirm that
5 you received this. Did you receive a copy of this -- strike that.
6 Did you receive this May 22 -- May 19, 2000?

7 MS ESPINOSA: May 17.

8 MR. PANTONI: Q I better let you do the reading.

9 A Is there a question there?

10 Q I want to make it clear on the record. Exhibit 222 is
11 an e-mail dated May 17 of 2000 from Tony Czarnik to you. You did
12 in fact receive this e-mail, did you not?

13 A I assume I did, yeah.

14 Q And you knew that on this date that Tony Czarnik was
15 going down to the California Department of Fair Employment and
16 Housing for an interview, right?

17 A Right.

18 Q And you knew that Dr. Czarnik was going to the
19 Department of Fair Employment and Housing to talk about
20 discrimination, right?

21 A All I knew is that he was going down there for an
22 interview.

23 Q You didn't know that it had to do with alleged
24 discrimination?

25 A That would be an inference on my part, so I didn't know
26 anything about it. I had no experience with the DFEH. I didn't
27 know anything about what his intent was. If you piece together
28 some prior e-mails, someone might infer that, but I didn't know

1 anything about this.

2 Q And Exhibit 231, please. Exhibit 231 is a copy of a
3 May 22, 2000 letter from the Department of Fair Employment and
4 Housing to you, Jay Flatley. You did receive this letter, did you
5 not, that the DFEH?

6 A Yes.

7 Q And this letter enclosed a copy of Dr. Czarnik's actual
8 complaint of discrimination against Illumina, right?

9 A Yes.

10 Q Now I want to show a portion of Exhibit 304. You can
11 look in your binder first, Mr. Flatley, and tell us what Exhibit
12 304 is.

13 A This is a letter delivered to Mr. Jose Moreno at the
14 Department of Fair Employment and Housing that was prepared by our
15 attorneys in response to the allegations that Dr. Czarnik had
16 submitted.

17 Q This was prepared by Jennifer Kearns, your attorney?

18 A That's correct.

19 Q And do you understand this to be submitted to the
20 Department of Fair Employment and Housing as Illumina's response
21 to Dr. Czarnik's complaint of discrimination?

22 A Yes.

23 Q And this is a segment that we have up on the screen
24 here from page 15 of Illumina's response to the DFEH, and it
25 reads, "Illumina notes that Dr. Czarnik did not follow its
26 internal complaint procedures. He did not voice a complaint of
27 discrimination or harassment orally or in writing to the human
28 resources department but instead proceeded directly to file with

1 the Department, perhaps advising co-workers days beforehand that
2 he was planning to do so. Dr. Czarnik never lodged any internal
3 complaint in a manner which would have afforded Illumina the
4 chance to address his concerns outside the administrative forum."

5 That's not a true statement, is it?

6 A Dr. Czarnik never to my knowledge filed a complaint
7 with our human resources department.

8 Q But he told you he felt he was discriminated against,
9 didn't he?

10 A He sent me an e-mail saying that he had been
11 discriminated in his change of compensation.

12 Q He sent you several e-mails, we just looked at them,
13 dealing with discrimination, before he filed this actual charge
14 with the DFEH, correct?

15 A That's correct.

16 Q Do you agree with this statement, "Dr. Czarnik never
17 lodged any internal complaint in a manner which would have
18 afforded Illumina the chance to address his concerns outside the
19 administrative forum"?

20 A The context of this is that Dr. Czarnik had resigned
21 his position. We were in severance negotiations --

22 Q Let me stop and you move to strike. I want to know
23 whether you --

24 Move to strike that. I want to know whether he agrees with
25 this statement.

26 THE COURT: Can you answer that question? You may
27 answer the question, do you agree with that statement.

28 MR. PANTONI: Q The last sentence, which reads, "Dr.

1 Czarnik never lodged any internal complaint in a manner that would
2 have afforded Illumina the chance to address his concerns outside
3 the administrative forum."

4 THE COURT: You don't have to confine your answer to
5 yes or no. You can explain your answer.

6 THE WITNESS: To me it's parsing words, the definition
7 of the word "complaint." To me a complaint is a process. We had
8 a procedure in the company for filing complaints on
9 discrimination, where what Dr. Czarnik did was not something that
10 followed company procedures. It was an e-mail directly to me
11 related to a change in compensation that I instituted with regards
12 to Dr. Czarnik.

13 Q We looked at an e-mail that said part of what he was
14 complaining about was what Dr. Stuelpnagel did before you arrived.

15 MS KEARNS: Objection, argumentative.

16 THE COURT: Sustained.

17 MR. PANTONI: Q Isn't it true, sir, you understood
18 that Dr. Czarnik was also complaining about things that happened
19 to him while John Stuelpnagel was his supervisor?

20 A Yes, by this time I did understand that.

21 Q Now, with respect to this response, you understood that
22 was being sent to a government agency, the California Department
23 of Fair Employment and Housing, didn't you?

24 A Yes.

25 Q And you reviewed and approved this response before it
26 was sent to the Department of Fair Employment and Housing?

27 A I reviewed the response, but the principal input to
28 this was not from me.

1 Q Did you review and approve the letter before it was
2 sent out?

3 A Yes, I did.

4 Q And you provided input into the content of the letter,
5 is that right?

6 A I provided some input.

7 Q And you theorized it to be sent on to Department of
8 Fair Employment and Housing, is that right?

9 A Is that a different question than the prior one?

10 Q Yes.

11 A How is it different?

12 Q Did you authorize Miss Kearns to send this response on
13 behalf of Illumina to the Department of Fair Employment and
14 Housing?

15 A I believe I answered that I did.

16 Q Now, Mr. Flatley, do you recall a series of -- Take
17 this off.

18 Do you recall a series of severance negotiations regarding a
19 possible severance package for Tony Czarnik?

20 A Yes.

21 MS KEARNS: Objection, vague as to time.

22 THE COURT: Well, he may lay a foundation.

23 MR. PANTONI: Q Over what period did you have
24 discussions with Dr. Czarnik with respect to a possible severance
25 package?

26 A It began in about the third week of March of 2000 and
27 it went up to and included his termination.

28 Q At some point, Mr. Flatley, before you assigned your

1 goals, the 30-, 60-, 90-day goals to Dr. Czarnik, did you and Dr.
2 Czarnik reach an impasse in your severance negotiations?

3 A Let me first point out those were not my goals, those
4 were Tony's goals. We did reach a point where we were still apart
5 and had not converged on an agreement, yes.

6 Q Did there reach a point you felt there had been an
7 impasse in negotiations?

8 A I think that's fair to say.

9 Q Approximately when was that, sir?

10 A That would have been in the early part of May.

11 Q At some point before you assigned Dr. Czarnik his 30-,
12 60-, 90-day goals, is that right?

13 A Before we revised his goals to the final set, yes.

14 Q Before you actually assigned them to him?

15 A Well, Dr. Czarnik had been working as a research fellow
16 since March 1st, and so there were goals that had already been
17 discussed to some extent prior to that, and I had expected between
18 March 1st and the beginning part of May that Dr. Czarnik was doing
19 something productive related to his goals. It was unclear that
20 that was the case. In fact, in retrospect there was nothing
21 productive going on, but by that time of early May, his ultimate
22 final set of goals had not been assigned.

23 Q The ultimate final set of goals was assigned on May 19,
24 2000, is that right?

25 A That's right.

26 Q And you reached an impasse in negotiations prior to
27 May, 2000, is that right?

28 A I think that's fair to say.

1 Q Now, in terms of what you offered to Dr. Czarnik in the
2 way of severance, at one point you offered Dr. Czarnik a package
3 of six months salary and six months stock vesting, is that right?

4 A That's right.

5 Q Do you recall that some point David Walt from the board
6 got involved in a severance negotiations?

7 A Yes.

8 Q And Dr. Walt offered Tony Czarnik nine months salary,
9 nine months stock vesting, is that your understanding?

10 A David Walt offered that as a representative of the
11 board of directors.

12 Q On behalf of Illumina?

13 A Yes.

14 Q Do you recall a point in time where David Walt told you
15 that he had reached consensus with Tony Czarnik with respect to a
16 package that would include nine months stock vesting if Dr.
17 Czarnik could sit on the scientific advisory board and get
18 additional stock vesting?

19 A No, there's no such consensus. David Walt told me that
20 discussion had occurred during the meeting, but there was never
21 any consensus on that.

22 Q Let's talk about the research fellow position. That's
23 the position that Dr. Czarnik assumed after CSO. Right?

24 A Right.

25 Q And the research fellow position at that point in time
26 was a newly created position at Illumina, is that right?

27 A That's right.

28 Q And when Dr. Czarnik took over as research fellow,

1 there were no written goals in place at that time, correct, for
2 that position?

3 A That's correct.

4 Q Would you agree, Mr. Flatley, that Dr. Czarnik's duties
5 and responsibilities as a research fellow were primarily
6 scientific in nature?

7 A Yes.

8 Q Would you agree that his responsibilities as a research
9 fellow were quite different from the responsibilities he had as
10 chief science officer?

11 A Yes. Although I would clarify that the goals that Tony
12 originally submitted had lots of other responsibilities on them
13 that were not primarily scientific. Those were ultimately deleted
14 from the goals, so the early proposal on the goals included
15 non-scientific responsibilities like organizing intern programs
16 and things like that. The ultimate goals were primarily
17 scientific.

18 Q In terms of discussing the position in your view of the
19 position, rather than specific goals, let's focus on your
20 understanding of the position, you understood that the position of
21 research fellow involved duties and responsibilities that were
22 quite different from duties and responsibilities of the scientific
23 officer, is that right?

24 A Yes.

25 Q And as research fellow, did Dr. Czarnik have any
26 further management responsibilities?

27 A No.

28 Q Did he have any employees that he was supposed to

1 supervise?

2 A No.

3 Q Did he have no responsibility relating in any way to
4 the Scientific Advisory Board, SAB?

5 A No direct responsibilities, no.

6 Q Did Dr. Czarnik as research fellow have any
7 responsibilities in the area of business development?

8 A No.

9 Q Or financial planning?

10 A Financial planning to the extent that his goals
11 required an analysis of budgets, costs, things of that nature.
12 That type of financial planning was definitely still part of his
13 responsibility.

14 Q But not corporate-level financial planning?

15 A Well, he didn't have that responsibility as CSO either.

16 Q Now, after Dr. Czarnik became a research fellow, he
17 reported initially to your chief scientific officer, David Barker,
18 is that right?

19 A That's right.

20 Q That was your decision to have Dr. Czarnik as research
21 fellow report to the chief science officer, right?

22 A Yes.

23 Q And is it true that you initially had Dr. Czarnik
24 report to Dr. Barker because Tony Czarnik's job responsibilities
25 were primarily scientific?

26 A David Barker, yeah, he was the new CSO coming into the
27 company. We expected Tony to be working on scientific projects,
28 and initially it made sense to have him reporting to David as a

1 result.

2 Q Did you have any formal training, Mr. Flatley, in
3 chemistry, molecular biology or any other branch of science?

4 A By formal do you mean if I have a Ph.D, I do not.

5 Q Do you have any degrees in any of those areas?

6 A Not specifically those areas, no.

7 Q You would agree you certainly have less scientific
8 background and experience than David Barker?

9 A Yes.

10 Q How long did Tony Czarnik report as research fellow to
11 the chief science officer, David Barker?

12 A My guess is it would have been about six weeks,
13 something of that nature.

14 Q And after six weeks of having Tony Czarnik report to
15 David Barker, you changed the reporting relationship, right?

16 A Right.

17 Q You did that on May 4, 2000, is that right?

18 A That's approximately the time frame.

19 Q Let's take a look at Exhibit 214.

20 Is Exhibit 214 a copy of an e-mail you sent to everyone at
21 the company on May 4, 2000?

22 A Looks like that, yes.

23 Q So you'd agree that the effective date of the transfer
24 of Tony Czarnik's reporting relationship from Dr. Barker to
25 yourself was May 4, 2000?

26 A Yes.

27 Q At this time, May 4, 2000, did you have any other
28 scientists who reported directly to you?

1 A Yes.

2 Q Who was that?

3 A David Barker reported to me, [Michal]⁴¹ Lebl reported to
4 me at this time, Mark Chee had reported to me, but with David
5 coming on, I reassigned Mark to report to David. So I supervised
6 Mark Chee's activities since I joined the company in October.
7 John Stuelpnagel has some science training as well, so some people
8 would call him a scientist, some might not.

9 Q Mark Chee in May of 2000 was reporting to David Barker?

10 A When David Barker came on board, Mark Chee started
11 reporting to David.

12 Q When Tony Czarnik was a research fellow did you ask him
13 to attend meetings of your senior staff?

14 A No.

15 A You held meetings of your senior staff, didn't you?

16 A Yes.

17 Q How regularly did you hold those meetings?

18 A Every week.

19 Q Why did you not invite Tony Czarnik to the regular
20 weekly staff meetings that you held?

21 A Because his position wasn't one that was related to the
22 types of topics we discuss at our senior staff meetings. There
23 were many people that reported to me that didn't attend my senior
24 staff meeting. It was really the vice presidents who ran
25 departments that reported, that attended those senior staff
26 meetings.

27 Q As research fellow, did you consider Dr. Czarnik to
28 continue to be a member of your senior management team?

1 A No.

2 Q Did he continue to participate in strategic planning
3 for the company?

4 A No.

5 Q Now, on the same day that you changed Dr. Czarnik's
6 reporting relationship, you gave him a counseling memo, isn't that
7 right?

8 A I believe that's right.

9 Q Let's look at Exhibit 206, please.

10 Is this a copy of the counseling memo you gave Tony Czarnik
11 on May 4 of 2000?

12 A Yes.

13 Q Mr. Flatley, to your knowledge is there anything
14 negative in Dr. Czarnik's personnel file -- strike that.

15 Was there any counseling memo to your knowledge in Dr.
16 Czarnik's personnel file before you gave him this May 4, 2000
17 memo?

18 MS KEARNS: Objection, lacks foundation.

19 THE COURT: Sustained.

20 MR. PANTONI: Q Do you know either way, sir, whether
21 there was anything negative in Dr. Czarnik's personnel file prior
22 to May 4th, 2000?

23 MS KEARNS: Same objection.

24 THE COURT: Overruled.

25 THE WITNESS: The counseling sessions with Tony had
26 been largely verbal up to this point, so this may have been the
27 first time that there was documented criticism of his performance
28 in a written form.

1 MR. PANTONI: Q Are you aware, sir, of anything
2 documenting any alleged performance problems on the part of Tony
3 Czarnik before May 4, 2000?

4 A Sure. There's lots of notes and things like that of
5 that nature. Tremendous compilation of notes and background about
6 Tony's performance that never wound up in his personnel file.

7 Q Was there anything to your knowledge given to Dr.
8 Czarnik alleging poor performance prior to May 4, 2000?

9 A There was great feedback given to him verbally.

10 Q Anything in writing, to your knowledge?

11 A No.

12 Q Now, in the second paragraph of your May 4, 2000 memo,
13 you state that you had been informed over the last few months by
14 two individuals that Dr. Czarnik had an historical pattern of
15 leaving the facility for extended periods when John Stuelpnagel or
16 yourself were absent. Was one of those persons, one of the two
17 individuals who informed you of that, Deborah Flamino?

18 A Yes.

19 Q Are you sure of that?

20 A To the best of my recollection, yes.

21 Q And who was the second individual?

22 A I believe it might have been Connie Brick, but there
23 might have been others as well.

24 Q Where was -- Strike that.

25 Where did you have these this discussion with Deborah
26 Flamino where she told you about this alleged historical pattern?

27 A This was a very well-known pattern of Dr. Czarnik prior
28 to this. It was not a meeting where she disclosed that to me.

1 Over many, many months people had told me about Dr. Czarnik's
2 leaving the facility, being gone for extended periods of time,
3 particularly during the time of the -- that the other senior
4 managers were traveling.

5 Q I'm asking with respect to Deborah Flamino. Are you
6 saying she told you about this historical pattern of leaving the
7 facility, that she, Deborah Flamino, told you that on more than
8 one occasion?

9 A I believe that's the case, yes.

10 Q Now, Dr. Czarnik asked you for some specifics with
11 respect to this claim that he had been historically absent from
12 the facility. He asked you for some date, for some further
13 detail, didn't he?

14 A I believe there's a response memo to this memo where
15 Tony asked for information.

16 Q Did you ever provide Dr. Czarnik with any specifics?

17 A I provided him a response to his e-mail, yes.

18 Q Did you ever provide him with any specifics in terms of
19 the alleged times that he was absent from the facility?

20 A I provided him a general response regarding that issue,
21 not a specific one.

22 Q Provide any dates or times?

23 A No.

24 Q Let's talk about the written goals that were assigned
25 to Dr. Czarnik as research fellow. Were you aware that Dr.
26 Czarnik and David Barker were discussing a set of written goals
27 for Tony Czarnik as research fellow while Dr. Barker was still his
28 supervisor?

1 A I was aware that Tony had submitted a draft set of
2 goals to David Barker.

3 Q My question, sir, were you aware that Dr. Barker and
4 Tony Czarnik had had some discussions about a written set of
5 goals?

6 A I believe they had had one or two discussions about the
7 goals.

8 Q And in fact at some point David Barker, Tony Czarnik
9 and you met to talk about written goals while Dr. Barker was still
10 Tony Czarnik's supervisor, is that right?

11 A I don't have any recollection of that meeting. None at
12 all.

13 Q Let's look, please, at Exhibit 227. Is Exhibit 227 a
14 copy of the final goals that you assigned to Tony Czarnik as
15 research fellow?

16 A Yes.

17 Q And is that your writing at the top of the document
18 where it says, "Tony's file"?

19 A Yes.

20 Q Is that your writing at the bottom where it says,
21 "5-19, discussed and given to Tony at meeting, 11"?

22 A Yes.

23 Q So did you in fact give these written goals to Tony
24 Czarnik on May 19 of 2000?

25 A Yes, I did.

26 Q And you recognize that this is the next day after Tony
27 Czarnik had visited the California Department of Fair Employment
28 and Housing?

1 A 5-19 would be the next day, yes.

2 Q Is it correct, sir, that you and John Stuelpnagel and
3 Mark Chee and David Barker, all four of you met together in a
4 conference room at Illumina to discuss the set of goals that would
5 be assigned to Tony Czarnik?

6 A I'm not at all certain where we met. I had
7 interactions with all three of them in the formation of the goals,
8 yes.

9 Q You do recall at least one meeting at Illumina where
10 the four of you were present at the same time, yourself, Dr.
11 Stuelpnagel, Dr. Chee and Dr. Barker, to talk about assigning
12 goals to Tony Czarnik, is that right?

13 A I don't remember a meeting necessarily where all four
14 of us were together at once. These evolved over some period that
15 had begun in early March, so when it was clear that Tony was --
16 He had resigned at the end of March, and when we had reached an
17 impasse on the negotiations, we needed to get the goals in place.
18 We had had multiple meetings between us establishing what those
19 goals should be and what was appropriate.

20 Q Mr. Flatley, when you gave these goals to Tony Czarnik
21 on May 19 of 2000, you knew he wasn't going to be able to meet
22 these goals, isn't that right?

23 A That's not right.

24 Q You had already formed the intention to terminate Dr.
25 Czarnik's employment as of May 19, 2000, isn't that true?

26 A Not at all. I had that impression, I would have fired
27 him right then.

28 Q You knew you were going to end up firing him at some

1 point after you gave him the goals, didn't you?

2 A My objective was to do everything I possibly could to
3 make Tony a productive member of Illumina. I had absolutely no
4 intention of firing him if he was a productive member of the
5 Illumina team.

6 Q Looking at these specific goals on Exhibit 227, the
7 second goal dealing with binary oligo encoding, Illumina had never
8 worked on this area before May of 2000, isn't that right?

9 A We had never done any experiments in this area. We
10 intellectually talked about this concept.

11 Q You were asking Dr. Czarnik to do experiments in the
12 area of binary oligo encoding, right?

13 A Right.

14 Q The company had never done that before, correct?

15 A If we had done it before, we wouldn't need to set a
16 goal to do it again.

17 Q You hadn't even started any experiments in the area of
18 binary oligo encoding?

19 A No. That's why it was such a great opportunity.

20 Q The method for decoding that was being used at Illumina
21 at that point in time had been the method invented by Mark Chee,
22 right?

23 A We'd explored multiple methods of decoding. There were
24 lots of different theories how to do it. Most effectively the
25 method that was being used regularly in manufacturing at this
26 point was the method that Mark Chee had invented, but there were
27 lots of different methods proposed.

28 Q As you understand it, the 16-bead experiment decoding

1 experiment was done using Mark Chee's method of decoding, is that
2 right?

3 A That's right.

4 Q And the 128-bead experiment had been done using Mark
5 Chee's method of decoding, is that right?

6 A Yes.

7 Q The 768 decoding experiment was done using Mark Chee's
8 method, right?

9 A Correct.

10 Q You are still using Mark Chee's method to do decoding
11 today?

12 A It's one method. We're using -- We're working on more
13 than one.

14 Q Mark Chee's method is the method you are using
15 certainly for purposes of manufacturing?

16 A That's correct.

17 Q As of the date you gave Dr. Czarnik these goals, May 19
18 of 2000, how many different bead types could Illumina actually
19 decode at that point in time?

20 A What do you mean by "actually"?

21 Q That you were able to do it on a repeatable,
22 verifiable, regular basis.

23 A We were in the several hundred range in terms of
24 numbers of codes.

25 Q 200 or so?

26 A Varied from experiment to experiment. We would have
27 some that would be 50 or a hundred, others which might be 300. So
28 we were doing lots of experiments on decoding at this time.

1 Q Is it fair to say the range was between 2 to 300?

2 A I think so.

3 Q Now, is it correct, sir, that on the third line of
4 these goals that somebody suggested that a goal of submitting a
5 grant application be added to Dr. Czarnik's goals?

6 A Yeah, I think that's fair to say.

7 Q We had seen the prior drafts before. I don't think I
8 need to put them up. You are aware the prior drafts of goals that
9 were discussed with David Barker for this particular project did
10 not mention a grant application, right?

11 A I'm aware of that now. At the time that wasn't a major
12 issue, so --

13 Q Who suggested adding on to goal number 3 a goal to
14 write a grant application?

15 A I'm not sure.

16 Q At this point in time, May of 2000, did you know that
17 Dr. Czarnik had suffered a breakdown at a time that he was writing
18 a grant application?

19 A Yes, but I also knew the breakdown was unrelated to the
20 grant application.

21 Q I'm sorry, did you know as of May of 2000 that Dr.
22 Czarnik had previously suffered a breakdown when he was writing a
23 grant application?

24 A I did and I knew it was unrelated to the grant
25 application.

26 Q By the way, on a subject of the grant application that
27 Dr. Czarnik was working on in April of 1999, did John Stuelpnagel
28 tell you that Tony Czarnik did not complete that grant application

1 and did not submit it on time?

2 A No, I don't recall him telling me that at all.

3 Q Let me read from your deposition testimony, at page 82,
4 beginning on line 9:

5 "QUESTION: Did Dr. Stuelpnagel tell you
6 essentially that, you know, Tony Czarnik had dropped the
7 ball on this grant application that he was working on at the
8 time?

9 "ANSWER: He told me that Tony had not
10 completed the grant application on schedule.

11 "QUESTION: Did he tell you he was upset about
12 that, he, Dr. Stuelpnagel, was upset about Dr. Czarnik's not
13 delivering the grant application at that time?

14 "ANSWER: He told me that he was disappointed
15 that Tony hadn't delivered per his commitment, yes."

16 You know now, sir, Dr. Czarnik did complete the grant
17 application and it was submitted on time, don't you?

18 A I'd be delighted to clarify my testimony on that if
19 you'd like me to.

20 Q Go ahead.

21 A So at the time of the deposition I didn't know exactly
22 what the dates were that it was due, that it had to be mailed, all
23 of those pieces of information. In my deposition, you asked me
24 did I know whether the grant was ever finished and I testified
25 that I was unaware whether it had even gotten finished at that
26 point in time. So when you asked me did John -- what did John
27 Stuelpnagel tell me about whether he finished it on time, because
28 there was this big event surrounding that grant, my assumption was

1 the grant was due right at that point in time when this big event
2 occurred, which has turned out not to be the case, it was due some
3 weeks later, and Tony finished the grant. So that was information
4 I didn't at my deposition.

5 Q So did Dr. Stuelpnagel tell you that Tony Czarnik had
6 not completed the grant application on schedule and he was
7 disappointed about that?

8 A I just testified that I don't recollect that John told
9 me that, but my assumption was the grant was due at the time this
10 event occurred during my deposition, and I've learned subsequently
11 the grant was not due during the day of the breakdown, it was due
12 some weeks later.

13 Q Look at Exhibit 263, please.

14 Did you receive this e-mail, Mr. Flatley, from Tony Czarnik
15 on or about July 10, 2000?

16 A By this time we had begun the roadshow, so my e-mail
17 was highly sporadic during the roadshow. I couldn't testify which
18 date I actually saw this or read it.

19 Q At some point you did see it?

20 A Yes.

21 Q And in this e-mail Dr. Czarnik states, "The primary
22 issue for us to discuss now is how our reporting relationship can
23 go forward following my learning that you told the board in April
24 that I would not be successful in achieving my goals." Did you
25 ever respond to this e-mail?

26 A No, it was an outright lie so I had no reason to
27 respond to it.

28 Q Just ignored it?

1 A I ignored it.

2 Q Could you tell the jury what an S1 registration
3 statement is?

4 A Sure. When a company intends to go public, they have
5 to file a series of documents with the SEC to do that. The first
6 one that you file is called a registration statement. Is called
7 an S1 document. It's a fairly lengthy document that describes the
8 company, the financials of the company, background, history,
9 things of that nature. And you do a series of these filings up
10 until you go public.

11 You start typically with an S1 that then gets reviewed by
12 the SEC. They comment back, you review it, and there's this
13 iterative process back and forth that winds up with a final
14 document, called a red herring, that you go to the roadshow with
15 to hand to the investors. The S1 is the first one, and there are
16 lots of iterations.

17 Q Were you the person with primary responsibility for the
18 S1 statement on the Illumina team?

19 A I'm not exactly sure what you mean by primary. There
20 were lots of people contributing to the document. If you are
21 asking who wrote most of the words, who had final authority for
22 the document, it was who had final authority, I did.

23 Q And you personally reviewed and commented on each draft
24 of the S1, isn't that right?

25 A That's probably not the case. There are many, many
26 iterations and drafts back and forth between the lawyers. I mean
27 hundreds of these. And so no, I can't say I read every one and
28 commented on every one.

1 Q Most of them, is that fair to say?

2 A I would say actually not most of them. There are many,
3 many iterations that I probably never even saw.

4 Q Would you agree that the drafting of the S1
5 registration statement was the most important project going on at
6 Illumina that the from a business standpoint?

7 A Boy, that's hard to say. It was clearly important, but
8 we have the ABI project going at the same time, which from a
9 business perspective was very important. If our IPO had gotten
10 delayed nine months and the market was good, then that timing of
11 the S1 submission could have been irrelevant. So that still is
12 speculative on how important it was.

13 Q Would you agree it was one of the most important
14 projects coming on line?

15 A Sure, it commanded lots of our attention.

16 Q In terms of who was involved in the process of
17 reviewing and commenting on the S1 registration statement from
18 Illumina's point of view, that would include yourself, right?

19 A Yes.

20 Q And John Stuelpnagel?

21 A Yes.

22 Q And Mark Chee?

23 A Mark Chee was selectively involved.

24 Q Did Tony Czarnik request that he be allowed to
25 participate in the review and editing of the S1?

26 A I don't know about editing, but Tony asked to see it
27 and we gave him copies early on of the S1 drafts.

28 Q Why was Dr. Czarnik not included in any of the meetings

1 where S1 drafts were reviewed and discussed?

2 A Because there was no need to include Dr. Czarnik. We
3 needed to have lots of people at Illumina doing real work, and the
4 S1 had no scientific content, so there was no reason to bring Dr.
5 Czarnik into the meetings.

6 Q The S1 had no scientific content?

7 A No. It's a business document. The goal of an S1
8 drafting is to remove scientific content, not to put it in.

9 Q Why was David Barker included in reviewing and
10 commenting on the drafts of the S1?

11 A Couple of reasons. One, that David had direct
12 experience writing an S1 previously and knew what it took and how
13 it interacted with the lawyers on drafting an S1. So he was
14 directly experienced in this. Since he'd worked for me before, I
15 knew he was an outstanding writer, one the best I'd ever seen.
16 And thirdly, I was planning to take David Barker on the roadshow
17 with me, so having intimate knowledge of the content of the S1,
18 helping to generate, would be very valuable as part of the
19 roadshow exercise.

20 Q Mark Chee had never had any prior experience reviewing
21 and commenting on S1's, did he?

22 A No.

23 Q Mark Chee wasn't going to go on the roadshow, was he?

24 A No. That's why I didn't involve him directly in the
25 project.

26 Q But Mark Chee was involved in reviewing to some degree
27 and commenting on the S1?

28 A Mark got some copies of the S1, but he was very

1 selectively involved on particular topics that Mark had expertise
2 in.

3 Q Let's take a look at Exhibit 153.

4 Do you recognize Exhibits 153 as a draft of a section of the
5 S1?

6 A Yes. I don't know which draft it was, but looks like a
7 draft.

8 Q It indicates at the top this is a description of the
9 directors and executives officers as of March 15th, 2000.

10 A That's correct.

11 Q And at least on this draft Dr. Czarnik was included,
12 correct?

13 A Correct.

14 Q Was Dr. Czarnik a director or executive officer as of
15 March 15, 2000?

16 A No, he was not.

17 Q Why was he included in this chart?

18 A Well, you'll have to settle the context for me in terms
19 of whether this was -- which draft it was. There were literally
20 probably hundreds of versions of this. I can't comment
21 specifically on this one until I knew where it was in a time
22 sequence.

23 Q We know at least it was sometime after David Barker
24 joined the company, correct?

25 A David joined right at the time we were starting the
26 process.

27 Q So this draft is sometime after David Barker came on
28 board as chief scientific officer, correct?

1 A Yes, that would be correct.

2 Q So that means that when this draft was prepared, if
3 David Barker was chief scientific officer, then Tony Czarnik was
4 research fellow, right?

5 A Yeah. It depends again on the timing, because David
6 Barker officially -- What was his official start date? I'd have
7 to look back to see exactly what his first paycheck was as an
8 employee. He had consulted in the beginning around March 6, so it
9 could be that as of the time we did this, we knew he was going to
10 be joining but he hadn't actually. So again, it depends on the
11 timing.

12 Q Looking at Dr. Czarnik's name on this draft S1, he is
13 specifically called a research fellow, right?

14 A Right.

15 Q So if he was a research fellow and not a director or
16 executive officer, why was he included in this chart?

17 A Well, if this is the final version, as an example, Dr.
18 Czarnik requested that he be included in the list.

19 Q This is a version, if we scroll down to John
20 Stuelpnagel's description, this is a version where John
21 Stuelpnagel is described as founding Illumina, Mark Chee described
22 as founding Illumina. The next page. Tony Czarnik described as
23 helped found Illumina.

24 Do you know why his role was distinguished from Dr.
25 Stuelpnagel and Dr. Chee's role?

26 A Well, like I said, there were many, many versions of
27 this, and this could have been drafted by Brian Roberts, who we
28 asked to help us, from one of the venture capital firms, and Tony

1 had a position of research fellow as of the first, so it's
2 possible Brian wrote that language in an attempt to distinguish
3 him from who was an executive officer, who wasn't. If Connie did
4 that, it could have been for some other reason. I don't know who
5 generated this draft.

6 Q Let's take a look please at Exhibit 223. If you could
7 look in your binder, too, sir, that might be helpful.

8 A 223.

9 Q 223.

10 Looking at the cover page, do you recognize this as a fax
11 that you received on or about May 18 of 2000?

12 A I was on the distribution list for this fax, yes, if it
13 was a fax. It looks like it was a fax.

14 Q So does it appear to be a fax that you received at some
15 point in time?

16 A Yes.

17 Q Let's move to the 12th page of this exhibit. There are
18 numbers in the lower right hand corner.

19 Do you recognize this as a mark-up of a draft of the S1
20 registration statement?

21 A By do I recognize it, yes. I'm not sure I ever saw
22 this, but I recognize it now as a draft, yes.

23 Q And if we could move, please, to Exhibit 29. I'm
24 sorry, page 29, in the lower right hand corner.

25 By the way, you don't deny receiving this? It was produced
26 by your counsel in this case. You are saying you don't recall?

27 A I don't recall.

28 Q Look at the Bates stamp number.

1 A Produced by our counsel, you mean produced in
2 connection with the litigation, not in connection with the IPO?

3 Q I'm sorry, this was a document produced by your counsel
4 in connection with this lawsuit?

5 A I assume that's the case, yeah.

6 Q You don't deny receiving it, you just say you don't
7 recall specifically, is that right?

8 A What I'm saying is that there were -- I mean these
9 faxes were going back and forth between the attorneys of the
10 underwriters, literally 10 or 20 a day, and it's very unlikely I
11 even looked at this document, and literally these were not things
12 I was reviewing at this level. These were details between the
13 lawyers.

14 Q Between which lawyers?

15 A Between our lawyers and -- Between Sullivan &
16 Campbell, attorneys for the underwriters, and our lawyers.

17 Q Your lawyers being Illumina lawyers?

18 A Illumina's lawyers connected with the IPO, yes.

19 Q Next page, page 30 of the exhibit.

20 So at least this point in time, May of 2000, it appears Dr.
21 Czarnik was included as being one of the company's founders, is
22 that right?

23 A Yes, it looks that way.

24 Q You don't quarrel with that, you agree Dr. Czarnik is
25 one of Illumina's founders, don't you?

26 A Yes.

27 Q If we could scroll through the rest of the pages, 31
28 through the end, 43. This is just a mark-up of the S1

1 registration statement?

2 A Yes, a mark-up by the attorneys of the underwriters.

3 Q Let me ask you some questions about the Illumina
4 roadshow. First of all, you went on a vacation, I think you said
5 it was a working vacation, but a vacation the week before the
6 roadshow?

7 A It's exactly the same vacation I've scheduled for next
8 week. July 4th has always been a one-week vacation for me, yes.

9 Q So over what period were you on this particular
10 vacation in 2000?

11 A It was whatever the week was that included the 4th of
12 July. So in that year, that was I think literally the first
13 calendar week of July, plus or minus a day.

14 Q And when did the roadshow actually begin?

15 A We flew to New York on either Sunday -- I believe
16 probably Sunday, the end of that week, and we began working
17 intensely with the underwriters to pull all the final pieces
18 together to begin the roadshow. I think our first roadshow
19 presentation was Wednesday of that following week.

20 Q Do you recall the date?

21 A I would guess it's around the 10th maybe, 10th, 11th.

22 Q And how long did the roadshow continue? When was the
23 last presentation?

24 A Last presentation was on July 28th.

25 Q The purpose of a roadshow, Mr. Flatley, is to solicit
26 investment in the initial public offering, is that right?

27 A That's right.

28 Q Convince people to sell -- strike that. Convince

1 people to buy stock in connection with the IPO, is that correct?

2 A That's right.

3 Q Now, you used -- strike that. You were one of the
4 presenters on the roadshow?

5 A I was the primary presenter.

6 Q And you used PowerPoint slide as part of your
7 presentation?

8 A Yes.

9 Q Let's take a look, please, at Exhibit 269.

10 We've seen this exhibit before also. This is an e-mail from
11 Mark Chee to yourself and other members of the Illumina roadshow
12 team dated July 13, 2000. Correct?

13 A Yes.

14 Q You received this e-mail some point while you still
15 were on the roadshow, right?

16 A Well, this was actually routed to our entire senior
17 staff at that time, so it wasn't just the roadshow team. And this
18 probably came into my e-mail box while I was on the roadshow, and
19 the way my e-mail is set up, I can view the first through lines of
20 an e-mail without downloading the whole thing, so it may be I
21 didn't see all of this and I either deleted it or forwarded it on.

22 Q The people that the e-mail was addressed to, yourself,
23 Dr. Barker, Dr. Stuelpnagel, and Tim Kish, the four of you were
24 the roadshow team, is that right?

25 A We were the Illumina representatives on the roadshow
26 team. It was a large entourage of others.

27 Q In terms of who was there from Illumina, those are the
28 four people from Illumina who are on the roadshow, right?

1 A Yes.

2 Q You and Tim Kish made presentations, and Dr. Barker and
3 Dr. Stuelpnagel were on the roadshow to answer questions, is that
4 correct?

5 A To answer questions in addition to Tim and myself, so
6 it wasn't we present the answer, it was, you know, additional --
7 they could answer questions.

8 Q Now, you had asked Mark Chee to keep you informed of
9 the status of the 768 decoding experiment while you were on the
10 roadshow, didn't you?

11 A I wouldn't characterize it that way. I asked Mark Chee
12 to keep me informed of the status of all kinds of experiments we
13 were doing.

14 Q Did you ask Mark Chee to keep you advised of the status
15 of the 768 decode experiment while you were on the roadshow?

16 A I may have. Mark sends me e-mails all the time about
17 the status of our experiments, and I would have loved to keep up
18 to date on this and other things in the company.

19 Q Mr. Flatley, at some point you learned about a problem
20 with the mislabeling of a dye that was used in connection with the
21 768 decode experiment, is that right?

22 A I did, yes.

23 Q Do you agree, sir, that this mislabeled dye probably
24 resulted in some invalid data from the 768 decode experiment?

25 MS KEARNS: Objection, calls for speculation.

26 THE COURT: Sustained, lack of personal knowledge.

27 MR. PANTONI: He's the highest ranking officer at
28 Illumina.

1 Q You talked with Mark Chee about this experiment from
2 time to time, didn't you?

3 A While I was on the roadshow?

4 Q No. Just from time to time, you've had discussions
5 with Mark Chee about the 768 decode experiment, have you?

6 A What do you mean by time to time?

7 Q Anytime.

8 A If I did, they were very cursory.

9 Q The only discussions you have had with Mark Chee about
10 the 768 decode experiment were discussions you described as
11 cursory, is that right?

12 A Let me be very clear here. We used the term the 768
13 experiment in this litigation. We had all sorts of experiments
14 going on. We had other ones that were 768 experiments. We talked
15 about all kinds of experiments. The 768 experiment happened to be
16 one that occurred during this time frame, and so I've talked to
17 Mark about lots of experiments, this one and others. I never sat
18 down with Mark and had a meeting about this experiment.

19 Q Pretty picture.

20 Let talk about this 768 decode experiment. The one
21 reflected in the PowerPoint slide that Mark Chee sent to the
22 roadshow team with Illumina Bates stamp 1560. Did you ever talk
23 to Mark Chee about that experiment?

24 A Maybe. I don't have a specific recollection of talking
25 to him about it. I read this e-mail when I got back. I don't
26 know if we had a conversation directly about this at all.

27 Q Did you have a conversation with David Barker, the
28 chief scientific officer, about this experiment?

1 A It's very difficult to distinguish any conversation
2 about this experiment versus lots of others that were going on.
3 We did have, when I got back, some quick conversations about the
4 fact that there had been mislabeled dye and we were going to try
5 to recover the funds for the dye, but I just don't recall
6 specifically having any particular discussion about this
7 experiment.

8 Q Let's me try to refresh your recollection. I'm going
9 to read from your deposition testimony, beginning at page 483,
10 line 20: This is dealing with a discussion with David Barker:

11 MS KEARNS: Hold on, Counsel. Just a moment.

12 Okay.

13 MR. PANTONI: Q Page 43, line 20:

14 "QUESTION: Did Dr. Barker express the view
15 that any of the data that was obtained from that experiment
16 might be compromised as a result of the mislabeled reagent?

17 "ANSWER: Again, I think that's a
18 mischaracterization of any conversation I had with David
19 about it. I mean if a reagent was mislabeled, that part of
20 the experiment, we needed to fix that problem and repeat
21 it."

22 Skipping down to 84, line 10:

23 "QUESTION: Did Dr. Barker express the view
24 that results obtained from using the mislabeled reagent
25 might be compromised?

26 "ANSWER: We never used the word 'might be
27 compromised.'

28 "QUESTION: Without using the words, did he

1 ever express that view to you?

2 "ANSWER: The view we had was if a label, if a
3 component is mislabeled, then the data from that label
4 doesn't work, and so you fix it and move on.

5 "QUESTION: What do you mean the data from the
6 label doesn't work?

7 "ANSWER: That if you think you have one dye
8 on some material, what you really have is another dye, that
9 part of the experiment where you are reading that dye is
10 invalid data, so you fix the problem and do it again.

11 "QUESTION: So did you direct Dr. Barker to
12 fix the problem and do it again?

13 "ANSWER: I had no need to direct David Barker
14 to do that.

15 "QUESTION: Is that what Dr. Barker told you
16 he was going to do?

17 "ANSWER: Not in so many words.

18 "QUESTION: So you just assumed that Dr.
19 Barker, being a competent scientist, would do that?

20 "ANSWER: Dr. Barker didn't even need to
21 direct anybody to do that. We had very competent scientists
22 at all levels of the organization, and it was obvious to
23 everybody that we needed to fix the problem and repeat the
24 experiment."

25 Was it obvious to you, sir, you needed to fix this
26 problem with the mislabeled reagent and redo the experiment?

27 A Of course.

28 Q Did you do that, did you redo the 768 decoding

1 experiment after the roadshow?

2 A I don't know if we precisely designed the next
3 experiment to mimic this precise one. We probably, since we'd had
4 such good results and decoded 5 to 600 bead types, we probably
5 took the next step and changed several variables. So we didn't
6 need to do this exact experiment again. We moved on to the next
7 series.

8 Q You and Dr. Barker talked about fixing the problem and
9 repeating the experiment, correct?

10 A Well, you are reading literally there. By repeating
11 the experiment, we do the next experiment, and so the next
12 experiment could have been maybe we chose a thousand, maybe we
13 said that was pretty good so let's move to a thousand. I don't
14 know what the next exact one was they did. But in any case, what
15 we would want to do, obviously, is to take a bad dye, take it out
16 of the system and put good dye in and do whatever the next
17 experiment was, and that's what we were talking about.

18 Q During the roadshow presentations, the actual
19 presentations, isn't it true that you made a representation to
20 investors that you expected that Illumina's's first product would
21 have over 2000 different bead types?

22 A No. It's not the way it was characterized.

23 Q Did you represent to investors that you expected your
24 product to be able to decode something in the range of 2000
25 different bead types?

26 A Yeah, our target was to be in the neighborhood of 2000.
27 We told people we would be up to 2000 in the initial product
28 launch.

1 Q You made representations to investors that your first
2 product, that you expected it to range of about 2000 beads, right?

3 A The number of beads we put in a product depends what
4 the product is. So it could be anywhere up to 2000, but somewhere
5 in that range is what our target was.

6 Q I'm asking you specifically what you represented to
7 investors on the roadshow. Did you represent to investors that
8 you expected the first product to contain in the range of about
9 2000 beads?

10 A So let me be very specific how we do the presentation.
11 We didn't talk about Illumina products in the roadshow
12 specifically, we talked about a product that ABI was going to
13 launch that used a piece of Illumina's technology. When we
14 described the technology, we talked about these fiber bundles,
15 talked about how many overall fibers we had, and on that fiber we
16 expected in the first product to have a certain level of
17 redundancy and we therefore have about 2000 unique bead types in
18 that range at about 25 times redundancy. How many we actually
19 deploy would depend specifically on the type of product you want
20 to launch, which was undefined at that time.

21 Q Let me read again from your deposition testimony on the
22 subject of what representations you made on the roadshow. Page
23 462, line 4:

24 "QUESTION: What if anything did you say with
25 respect to the number of bead types that you anticipated
26 that Illumina might be able to decode in the future?

27 "ANSWER: We expected that it would be in the
28 range of 2000 per fiber bundle.

1 "QUESTION: And what scientific experiments
2 were you relying on in making that representation?

3 "ANSWER: We were relying on the fact we had
4 demonstrated that the decoding process worked with a smaller
5 set of beads.

6 "QUESTION: And would the experiment you were
7 relying on in making that representation have included a 768
8 decode experiment conducted under the direction of Kevin
9 Gunderson?

10 "ANSWER: Our representation to investors was
11 that our arrays in our first product we expected to contain
12 in the range of about 2000 beads, and the fact that that was
13 our product target included everything I knew about
14 everything we had done."

15 Moving on to page 464, line 13:

16 "QUESTION: Was your belief that you would be
17 able to at some point decode 2000 different bead types, was
18 that based at least in part on the experiments that Kevin
19 Gunderson was running using 768 different bead types?

20 "ANSWER: Wasn't directly coupled to that, but
21 it was in part based on that experiment and every other one
22 we had ever done."

23 Did you ever talk to Kevin Gunderson about whether he
24 felt that any results from the 768 decode experiment were
25 compromised or faulty?

26 A I don't believe I ever had a direct conversation with
27 Kevin about the experiment.

28 Q What was the date of the initial -- when Illumina went

1 public?

2 A July 28, 2000.

3 Q Take a look please at Exhibit 287.

4 Mr. Flatley, is this an e-mail you sent to the entire
5 company on August 2 of 2000?

6 A Yes.

7 Q This is after the IPO and when you returned back to
8 Illumina?

9 A Correct.

10 Q So how much money was raised in the Illumina initial
11 public offering?

12 A Well, if you include what's called the green shoe here,
13 which is a second piece of the offering that's optional, and you
14 subtract expenses, the total was about 103 million net.

15 Q \$103 million net?

16 A Net of expenses. About half of which we've burned
17 through to date.

18 Q What was the original strike price for the IPO?

19 A What's your definition of strike price?

20 Q What was the initial price at which persons could
21 invest in the IPO?

22 A The question is ambiguous because it depends a little
23 bit on who you are talking about and the public or people that
24 were buying in friend of the family. Those prices are different.

25 Q What was the opening price the day that Illumina went
26 public on the stock market?

27 A The final offering price was \$16 a share, meaning the
28 investors on the roadshow paid \$16 a share to get the stock. The

1 first public trade that was done was at a somewhat higher price
2 than that. I don't recall what the exact price was.

3 Q When did you begin discussions of what the offering
4 price would be, over what period were those discussions?

5 A Probably began in January 2000. Probably start to get
6 a little bit of specificity around the February 2000 time frame.
7 We had to select underwriters first, and as part of that
8 discussion with underwriters, you talk about what the potential
9 value of the company might be.

10 Q Let me back up in time a little bit. You claimed a
11 couple of times in the course of your testimony that Dr. Czarnik
12 at some point resigned his employment with Illumina.

13 A Definitely, absolutely.

14 Q When is it you claim Dr. Czarnik resigned?

15 A It was late in March, around 22nd or 23rd of March.

16 Q You are saying this wasn't an offer to give up a job
17 title or change duties, this was a flat-out resignation?

18 A No question about that.

19 Q "I quit"?

20 A Yep.

21 Q You did understand, sir, that if Dr. Czarnik was simply
22 resigning that he was walking away from hundreds of thousands of
23 shares of stock?

24 A Sure. He could join another start-up and get another
25 few hundred thousand shares of stock at another start-up. That's
26 not something he was giving up permanently. He would give up
27 Illumina's and get the new one.

28 Q Did you inform Deborah Flamino of Dr. Czarnik's alleged

1 resignation?

2 A I informed John Stuelpnagel. I'm not positive I
3 informed Deborah about that. In retrospect, I should have. If I
4 didn't, I guess I had an excess of discretion there, perhaps.

5 Q Let's me read from your deposition testimony on this
6 point.

7 A Sure.

8 Q Beginning at page 431; line 8. We were looking at a
9 particular exhibit dated April 17 when I asked this question:

10 "QUESTION: Well, let's say as of April 17,
11 2000, which is the date of Exhibit 47, as of that date, just
12 give me the list of names of persons you had already
13 informed of Dr. Czarnik's purported resignation?

14 "ANSWER: I'd informed John Stuelpnagel, Mark
15 Chee, David Barker, I believe Deborah Flamino. At that
16 point that was probably everyone.

17 "QUESTION: Why did you inform Deborah Flamino
18 that Tony Czarnik had purportedly resigned?

19 "ANSWER: Because Deborah Flamino was our HR
20 supervisor.

21 "QUESTION: Did you expect her to take some
22 action in response to you informing her that Dr. Czarnik had
23 resigned?

24 "ANSWER: She would need to be poised to have
25 a reaction to process an employee leaving the company, and
26 so I alerted her, as I would with anyone resigning from the
27 company, that we had a person departing, and when that
28 happens, there's exit interviews, there's paperwork to

1 process, and Deb needed to be knowledgeable about that
2 possibility.

3 "QUESTION: All right. So you told her to get
4 ready to do that, is that right?

5 "ANSWER: I did not say that to her, no.

6 "QUESTION: Well, did you take -- tell her to
7 take any particular action?

8 "ANSWER: No.

9 "QUESTION: This was her information only, is
10 that right?

11 "ANSWER: I did not need to tell Deb what to
12 do when an employee resigns. She knew what to do.

13 "QUESTION: What was Deborah Flamino's
14 reaction when you told her that Dr. Czarnik had resigned?

15 "ANSWER: She was surprised."

16 Do you recall what Miss Flamino said, if anything, in
17 expressing her surprise when you allegedly told her about the
18 resignation?

19 A No, I don't. I mean as I testified, I don't recall
20 directly telling Deb about this. I thought I had told her about
21 it. It could be what I did tell Deb we were in severance
22 discussions with Tony, and I may not have used the word "resign"
23 with her, I'm not sure.

24 Q Your testimony was that you told her because she needed
25 to get ready for the resignation, prepare paperwork, get ready for
26 exit interviews. Is that why you talked to her?

27 A That's why I would have talked to her, sure.

28 Q Did you actually do anything, sir, to process or act

1 upon this so-called resignation?

2 A Yes.

3 Q What did you do?

4 A When Tony came in and resigned, I asked him what were
5 the specifics surrounding his resignation in terms of his
6 transition plan, did he have a transition plan for the projects, a
7 time frame. He said he didn't, that the situation was intolerable
8 for him and he needed to leave. So I asked him to go away to
9 think about that overnight and come back the next day and give me
10 the specifics surrounding his departure, and when he did that is
11 when we first heard that he wanted to leave instantly and take all
12 his stock with him.

13 So we entered into a discussion and a debate back and forth
14 about what an appropriate package might be for Tony as a result of
15 that resignation.

16 Q Did you have process any paperwork in connection with
17 the purported resignation?

18 A There was no paperwork to process. We never got to
19 that point. We were in severance negotiations, as we've
20 discussed, that reached an impasse

21 Q Let's take a look at Exhibit 168, please.

22 You are familiar with this form, the change of status form
23 at Illumina?

24 A Yes.

25 Q And is that your signature on the change of status
26 form?

27 A Yes.

28 Q And in this form you were transferring Dr. Czarnik from

1 CSO to the position of research fellow?

2 A That's correct.

3 Q That's right?

4 A Uh-huh.

5 Q Is this the only paperwork that was submitted with
6 respect to Dr. Czarnik's employment status in the spring of 2000,
7 to your knowledge?

8 A The only -- Can you read back the question, please?

9 Q Is this the only paperwork that was submitted with
10 respect to Dr. Czarnik's employment status in the spring of 2000
11 in terms of human resources paperwork?

12 A In terms of compensation changes, yes. There were the
13 warning memos and things we talked about that you could say had to
14 do with his employment status, but this and the agreement that we
15 had drafted are the documents that relate to the change of his
16 compensation.

17 Q There never was any change of status form to reflect a
18 resignation, was there?

19 A You would never have one until you reached an agreement
20 on a resignation, on a status of how you are going to do it.

21 Q You claim on some point Dr. Czarnik withdrew his
22 resignation?

23 A In effect, yes. We reached an impasse on the
24 negotiations, as I've testified, and Dr. Czarnik in an e-mail said
25 he wanted to continue to work with Illumina because we had not
26 reached an agreement, he wanted to take all the stock. I was
27 unwilling to let him do that, so he wrote an e-mail that said
28 basically he wanted to continue working.

1 Q Could we take a quick look at one more exhibit. I know
2 we're at the lunch break, but it's the same subject.

3 Exhibit 334.

4 Come back to this after lunch, Mr. Flatley, but this is the
5 termination memo that you gave Dr. Czarnik, is that right?

6 A That's right.

7 Q Dated September 5 of 2000. Is that right?

8 A That's right.

9 Q And by the way, did your attorney, Miss Kearns, draft
10 this letter?

11 A Miss Kearns probably helped me draft this letter.

12 Q And we'll get back to other portions of this letter
13 later, but I want to ask you about this sentence. "You stated
14 your intention to resign from Illumina earlier this year and
15 subsequently changed your mind and withdrew your resignation."
16 When do you claim Dr. Czarnik changed his mind and withdrew his
17 resignation, what approximate date?

18 A I had to go back and look at the e-mail trail there,
19 but it was basically at the time we reached an impasse around the
20 negotiation, we were about to start the roadshow. Tony said my
21 offer is off the table, basically the day before the roadshow
22 started, I hope this doesn't hurt your IPO, doesn't damage the
23 IPO, and I want to continue to work, and so it was roughly in that
24 time frame.

25 MR. PANTONI: This would be an appropriate time.

26 THE COURT: We'll take our noon recess at this time.
27 We'll be in recess until one o'clock. Please remember the
28 admonition not to form or express opinion about the case, not to

1 discuss the case. We'll be in recess until 1:00 p.m. 1:00 p.m.

2 (Proceedings resumed outside the presence of the jury.)

3 THE COURT: You have about 20 minutes left.

4 MR. PANTONI: I'm not going to make it in 20 minutes,
5 but it's pretty close.

6 THE COURT: We have to finish this today.

7 MS KEARNS: I can't hear you.

8 THE COURT: We have to finish this today.

9 MS KEARNS: I know. So I'm concerned about Mr. Pantoni
10 going over. We worked very hard to map out these time schedules.

11 MR. PANTONI: In good conscious, the first examination
12 under the new schedule Miss Kearns ran about 15 minutes over, very
13 first one. Other than that we've been on track. I may run a few
14 minutes over, but not materially.

15 THE COURT: Okay. You have 20 minutes left. You agree
16 with that, if we stick to the schedule?

17 MR. PANTONI: Come up a little shorter than that, but
18 it's real close.

19 THE COURT: Okay.

20 MR. PANTONI: I had 25 minutes.

21 THE COURT: Okay. Try to finish at least within half
22 an hour.

23 MR. PANTONI: Okay.

24 (Lunch recess taken at 12:10 p.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

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Official

1 SAN DIEGO, CALIFORNIA, THURSDAY, JUNE 27, 2002; 1:00 P.M.

2 THE COURT: The record will indicate all the jurors are
3 present, counsel are present.

4 You may continue your examination, Mr. Pantoni.

5 MR. PANTONI: Thank you, your Honor.

6 JAY FLATLEY,

7 having been previously duly sworn, resumed the witness stand and
8 testified further as follows:

9 DIRECT EXAMINATION (Continued)

10 BY MR. PANTONI:

11 Q Mr. Flatley, I'm going to follow up on your testimony
12 that when you showed the slide at the H&Q presentation in January
13 of 2000, showing only John Stuelpnagel and Mark Chee as founders,
14 your testimony that that was just an error or an oversight, do you
15 recall giving a public presentation at a conference called the
16 Health Winds Tailwinds Conference of 2001?

17 A Healthwinds Tailwinds? I think it's called the
18 Tailwinds Conference.

19 Q What was the Tailwinds Conference?

20 A A financial conference put on by an investment banking
21 firm.

22 Q You made a presentation there regarding Illumina?

23 A I did.

24 Q Let me show you what we've marked Exhibit 4, which is a
25 transcript from your talk that day. We have an audio
26 transcription of it, but I believe your counsel will stipulate
27 this is an accurate transcription.

28 MS KEARNS: Yes, and this is, as indicated, it's an

1 excerpt, it's not the entire text.

2 MR. PANTONI: Right.

3 Q So your counsel stipulated this is accurate, and at the
4 Tailwinds 2001 conference -- By the way, when was that held?

5 A I'd be guessing other than to say it was 2001.

6 Q In this talk you indicated that, "The founders of the
7 company were Dr. John Stuelpnagel from CW Group and Dr. Mark Chee,
8 who came from Affymetrix." Is that right?

9 A That's right.

10 Q Let take a look at Exhibit 356. Do you recognize this,
11 Mr. Flatley?

12 A Only because I saw it this morning.

13 Q Did you give an interview to a publication called the
14 Wall Street Transcript?

15 A I think I've done that on a couple occasions, yes.

16 Q Where you talk about Illumina?

17 A Yes.

18 Q And did you indicate that John Stuelpnagel and Mark
19 Chee founded Illumina?

20 A Yes, on both these occasions, this is after Dr. Czarnik
21 had left the company and certainly was under no obligation to add
22 Dr. Czarnik to this list after he left the company.

23 Q Now, Mr. Flatley, with respect to the termination of
24 Dr. Czarnik's employment, first of all, was it you, sir, who made
25 the decision to terminate Dr. Czarnik's employment?

26 A Yes, it was.

27 Q And Dr. Czarnik was reporting directly to you at that
28 time, right?

1 A That's correct.

2 Q So is it fair to say you were the only person who would
3 have been authorized to make a decision to fire Tony Czarnik in
4 2000?

5 A I think that's fair to say, yes.

6 Q When did you first consider terminating Tony Czarnik's
7 employment?

8 A I'd say --

9 MS KEARNS: Objection, I think this was asked and
10 answered this morning.

11 MR. PANTONI: This morning I asked when he first
12 considered replacing him as chief science officer.

13 MS KEARNS: I'm sorry.

14 MR. PANTONI: Q When did you first consider
15 terminating Tony Czarnik's employment?

16 A I say I decided on August 29th, 2000. With regard to
17 the word "consider," it's challenging to figure out exactly when I
18 first started considering it, but I decided on August 29th.

19 Q August 29th, 2000. Correct?

20 A That's correct.

21 Q Let me show you what has been marked as Exhibit 333.

22 I also have a blow-up of this. Exhibit 333 are notes that
23 you made, Mr. Flatley, correct?

24 A Yes.

25 Q All this writing on the document is yours, correct?

26 A Yes, it is.

27 Q Is it true, sir, these notes reflect a conversation
28 that you had with your attorney, Jennifer Kearns?

1 A They reflect the comments that my attorney made to me
2 in a phone conversation.

3 Q And the purpose of this phone conversation was for you
4 and Miss Kearns to discuss what you would say to Dr. Czarnik when
5 you fired him, is that right?

6 A It was intended to be talking points for a termination
7 discussion.

8 Q Points that she was suggesting that you say to Dr.
9 Czarnik when you fire him?

10 A What I refer to as talking points for such a
11 conversation.

12 Q Let me read your deposition testimony on this for
13 clarity. At page 512, beginning at line 18:

14 "QUESTION: When did you prepare the notes in
15 anticipation of the termination meeting?

16 "ANSWER: The notes were generated based on a
17 conversation I had with counsel where our counsel walked
18 through the sequence of things that we should -- that I
19 should discuss during the termination meeting."

20 That's the purpose of those notes, right?

21 A Yes.

22 Q Now, you actually met with Dr. Czarnik on September 5
23 of 2000 for the purpose of terminating his employment, is that
24 right?

25 A That's right.

26 Q Did any opinions that Dr. Czarnik expressed with regard
27 to decoding enter into your decision to terminate his employment?

28 A No.

1 Q Could you read the first line of your note, please,
2 Exhibit 333, in terms of the notes that you and Miss Kearns
3 discussed as to what you should say to Dr. Czarnik.

4 A "I understand you have expressed some strong opinions
5 in the last few days about the state of decoding."

6 Q Did you in fact understand that Dr. Czarnik had
7 expressed some strong opinions in the last few days about the
8 state of decoding?

9 A I got an e-mail from Dr. Czarnik just before the
10 termination meeting where he expressed to me his concern about
11 data that we had gathered and disseminated publicly.

12 Q So these notes, in terms of what Miss Kearns suggested
13 you actually say to Dr. Czarnik when you fired him, did you make
14 the first point, did you make that statement that's on the first
15 line?

16 A I didn't, no.

17 Q You did or did not?

18 A I did not.

19 Q What about the second point, "I want to remind you of
20 your continuing obligation to hold all information about our
21 technology confidential. If you do not, the company will pursue
22 all its remedies." Did you make that statement?

23 A I did, and it was a set, it included the first point,
24 so I really made the second point only.

25 Q You made the second point on these notes, you actually
26 said that?

27 A Not verbatim.

28 Q Something to that effect?

1 A Yes.

2 Q The notes go on to say, "As I stated, we will intend to
3 honor the severance terms of your employment agreement; however, I
4 am prepared to offer you a comparable settlement offer of three
5 months salary and 20,000 shares." Did you say that to Dr.
6 Czarnik?

7 A I think it says "compromise settlement."

8 Q I'm sorry, I misread it: So would you read your words.

9 A "As I stated, we'll intend to honor the severance terms
10 of your employment agreement; however, I'm prepared to offer you a
11 compromise settlement offer of three months salary and 20,000
12 shares."

13 Q Did you make those statements to Dr. Czarnik at the
14 termination meeting?

15 A Again, not literally.

16 Q But you made a statement to that effect?

17 A Made that offer to Dr. Czarnik, yes.

18 Q And the bottom portion of your notes, you've indicated
19 three choices, 1, 2, 3?

20 A That's correct.

21 Q What do those choices refer to?

22 A Those are choices as to how he might select to exit the
23 company. We gave him three different options there.

24 Q Did you make statements to that effect to Dr. Czarnik?

25 A Again not literally, but yes.

26 Q Statement to that effect?

27 A Yes.

28 Q So if I understand you correctly, you made -- you say

1 you made statement to the effect of every single thing on these
2 notes except for the first line. Is that true?

3 A That's true.

4 Q And decoding had nothing to do with the termination?

5 A Decoding was irrelevant to me and irrelevant to the
6 termination.

7 Q When you met with Dr. Czarnik for the purpose of
8 terminating his employment, you told him that you were terminating
9 his employment because he failed to meet his goals, is that
10 correct?

11 A In large measure it was failure to meet the goals, and
12 of course the fact he made no effort to meet the goals.

13 Q The reason you gave him was failure to meet goals?

14 A Which includes making an effort to meet them, yes.

15 Q You didn't say that, did you?

16 A I don't recall what I said specifically.

17 Q Let me read your deposition testimony, see if this
18 refreshes your recollection. On page 510, beginning at line 8:

19 "QUESTION: What reason, if any, did you give
20 to Dr. Czarnik in the termination meeting for terminating
21 his employment?

22 "ANSWER: Because he had had specific
23 objectives that I had given him that were intended to
24 demonstrate his ability to provide capable, competent
25 contributions to the company, and he had failed to meet
26 those objectives.

27 "QUESTION: And those specific objectives are
28 the written goals you gave him on May 19, 2000, is that

1 right?

2 "ANSWER: That's right.

3 "QUESTION: Did you give any other reasons for
4 the termination to Dr. Czarnik when you met with him?

5 "ANSWER: No."

6 So it's true, sir, you told him he was fired for failing to
7 meet his goals, correct?

8 A I'm not sure exactly what I told him verbally. We did
9 have a memo that went along with this that stated that failure to
10 meet the goals, which was all-inclusive of goals and working on
11 the goals, was the reason he was being terminated.

12 Q You don't contradict your deposition testimony I just
13 read, do you?

14 A I don't think it's contradicting in anyway, no.

15 Q I read what you said and you told me what you said,
16 correct?

17 A Repeat that again.

18 Q I asked you at your deposition what you said to Dr.
19 Czarnik and you told me to the best of your recollection what you
20 actually said.

21 A I told you in concept what I said. I was never
22 intending that to be reflective of my precise words to him.

23 Q You gave me all the reasons for the termination,
24 correct?

25 A There's more deposition testimony on reasons.

26 Q Let me read the deposition testimony again, page 510,
27 line 19, after what I just said, I asked you:

28 "QUESTION: Did you give any other reasons for

1 the termination to Dr. Czarnik when you met with him?

2 "ANSWER: No."

3 Then on page 511 --

4 MS KEARNS: Counsel, I think you mean to put it in
5 context, you need to continue reading a follow-up question, "Did
6 you have any other reasons for terminating Dr. Czarnik's
7 employment."

8 MR. PANTONI: Q I asked specifically what reasons you
9 communicated to Dr. Czarnik. The reasons you communicated were
10 failure to meet goals, true?

11 A Are you asking me what was my deposition, what was in
12 the memo, or what did I say in the meeting? Can you clarify that
13 for me?

14 Q When you met with Mr. Czarnik on September 5 you told
15 him he was fired for failure to meet goals?

16 A I handed up a memo and had him read the memo. The memo
17 said that.

18 Q Have you reviewed Deborah Flamino's deposition
19 testimony about this same conversation?

20 A No, I have not.

21 Q Deborah Flamino was present during this conversation,
22 was she not?

23 A She was.

24 Q At some point, sir, did you also decide to terminate
25 the employment of Rich Pytelewski?

26 A Yes, I did.

27 Q When did you make the decision to terminate Rich
28 Pytelewski's employment?

1 A I believe it was in the February time frame of 2000. I
2 don't recall that exactly.

3 Q And when did you communicate that to Rich Pytelewski,
4 your decision to terminate his employment?

5 A We reached mutual agreement in about that time frame.

6 Q And when did Rich Pytelewski actually leave the
7 employment of Illumina?

8 A It was in May 2000, I believe.

9 Q And again, sir, are you the person who made the
10 decision to terminate Rich Pytelewski's employment?

11 A Yes, I am.

12 Q How many shares of stock of Illumina do you own,
13 Mr. Flatley?

14 A Approximately 970,000.

15 Q 970,000. Is that what you said?

16 A That's what I said.

17 Q When do you become fully vested in those shares?

18 A In all of them, probably seven years from now.

19 Q What about the shares you got when you initially joined
20 the company, when do you become vested in those shares?

21 A It's indeterminate because some of them are performance
22 based. Depending how the company performs, could be 10 years from
23 now.

24 Q How many shares are you vested in right now?

25 A I believe it's about half of those.

26 Q So roughly a half a million shares?

27 A No, it's less than that. I think it's about 450,000.

28 Q Do you have any plans to leave Illumina before you

1 become fully vested?

2 A No.

3 MR. PANTONI: I'll save whatever time I have left,
4 Judge.

5 THE COURT: Which is none.

6 We'll give you a little additional time.

7 CROSS-EXAMINATION

8 BY MISS KEARNS:

9 Q Good afternoon, Mr. Flatley.

10 A Good afternoon, Miss Kearns.

11 Q Rather than do things chronologically, perhaps go in
12 reverse order.

13 Let me just start with a few of the last items that
14 Mr. Pantoni asked you about. Mr. Flatley, you testified that you
15 are the name holder of about 970,000 shares of Illumina stock,
16 correct?

17 A That's correct.

18 Q What was your personal monetary investment? In other
19 words, how much did you pay for those shares of stock?

20 MR. PANTONI: Objection, relevance.

21 THE COURT: Overruled.

22 THE WITNESS: I've paid \$175,000 to buy those shares.

23 MS KEARNS: Q And like any shares, the ultimate value
24 of those shares is dependent on what the market does, right?

25 A What the market does, whether the company makes it.

26 Q Now, Mr. Flatley, Mr. Pantoni was asking you about the
27 termination meeting, and he asked you about what you communicated
28 to Dr. Czarnik about the reasons for the termination. You

1 remember that?

2 A Yes.

3 Q Regardless of what was exactly communicated to Dr.
4 Czarnik verbally, you indicated that you also in that same meeting
5 handed him a termination memo?

6 A That's correct.

7 Q Can we have that exhibit put up, please.

8 THE CLERK: What exhibit is this, Counsel?

9 MS KEARNS: 334.

10 Q Is this the termination memo to which you are
11 referring?

12 A Yes, it is.

13 Q Mr. Flatley, you were asked about in deposition, you
14 were asked about reasons, and I sense from your testimony under
15 Mr. Pantoni's questioning that there were some additional reasons
16 that played into your decision to terminate which you wanted to
17 talk about.

18 A Yes. We can phrase all this under the general category
19 of did he meet these objectives, but when you assign someone
20 objectives, and even at Illumina we all sign objectives that are
21 aggressive, and there's been a lot of testimony about that. So my
22 measurement of Tony Czarnik's performance against his objectives
23 included what did he actually achieve and what level of effort did
24 he put into making those objectives.

25 And in many cases in science, you have an objective, you
26 work on the beginning part of that objective and you realize maybe
27 it's an absolutely impossible one in terms of some law of physics,
28 so you change it or replace it with some other objective.

1 So one thing that's incredibly important is how much effort
2 is somebody making to try to achieve their objectives, and that
3 was a very serious factor in my decision to terminate Dr. Czarnik.

4 Q So would you agree with me that what you communicated
5 to Tony Czarnik in the termination meeting about the reasons for
6 the termination was split between what you said out loud and what
7 was in the memo that you handed to him during that meeting?

8 A That's correct.

9 MR. PANTONI: Objection, leading.

10 THE COURT: Sustained.

11 MS KEARNS: Q Can you read for me --

12 MR. PANTONI: Can I have that stricken from the record,
13 please.

14 THE COURT: Just in the interests of saving time, I'm
15 sure she could ask a non-leading question.

16 MS KEARNS: I'll ask a new one.

17 Q You provided this Exhibit 334 to Tony Czarnik in real
18 time in the termination meeting?

19 A Yes.

20 Q Can you please read for me what you communicated to Dr.
21 Czarnik next to last sentence in the first paragraph.

22 A "I provided you with 30-day, 60-day, 90-day and 12-
23 month goals and have met with you on nearly a weekly basis since
24 the meeting which you and I had on May 19th, 2000. Since that
25 time, your progress toward the goals has been insufficient. Many
26 of your 30-day goals have still not been met."

27 Q And the 30-day goals to which you are referring on the
28 date that you have the termination meeting, you were past the 90-

1 day one, correct?

2 A Yes, we were at about a hundred days at that point.

3 Q Thank you.

4 Now let me ask you, Mr. Flatley, we took a look, Mr. Pantoni
5 put up the blow-up of your handwritten notes reflecting a
6 conversation which you and I had, correct?

7 A Correct.

8 Q Can you explain to the jury why, if I suggested to you
9 that you make that first statement about decoding, why you
10 ultimately did not do so?

11 A Yes. We had talked about the company's intellectual
12 property, and the second statement on that talking point
13 documented to do with the fact that Dr. Czarnik has signed a
14 proprietary information agreement with the company and the fact
15 that we expected Dr. Czarnik to live by the terms of that
16 agreement. In other words, we didn't want him talking about our
17 confidential information outside the walls of Illumina.

18 And in the discussion with him, I reaffirmed his obligation
19 to live by that confidentiality agreement, and anything having to
20 do with decoding was included and embodied in that statement
21 already, so I didn't feel any need to specifically call out
22 decoding, because there are a lot of other confidential issues Dr.
23 Czarnik was aware of.

24 Q All right.

25 Let me jump back now very briefly. Mr. Pantoni didn't give
26 -- didn't ask you any question about your own educational
27 background or work history. Can I ask you to summarize in very
28 short form your educational background, beginning with college.

1 A Sure. I graduated in 1975 from a program that was
2 cooperative program between Claremont McKenna College and Stanford
3 University. After five years of this preorganized program I
4 graduated with a bachelors degree in economics, bachelors degree
5 in industrial engineering and masters degree in industrial
6 engineering.

7 Then went to work for Spectra Physics in the analytical
8 instrumentation industry. I held positions in engineering and
9 manufacturing for them. Engineering and manufacturing.

10 I then worked for three years for Manning Technologies,
11 where I was executive vice president, reported to the owner and
12 CEO of that company.

13 I went on to work for Plexis Computers, which was another
14 start-up company, so this is my second start-up company. There I
15 held positions of vice president manufacturing, another period
16 vice president of engineering, and vice president of strategic
17 planning.

18 I left that company in 1987 to found another start-up called
19 Molecular Dynamics. I started in an operations vice president
20 role there, became president and CEO in 1994, took the company
21 public in 1993, and eventually sold that company in 1998 to a
22 company called Amersham Pharmacia Biotech. I was under contract
23 with Amersham for one year to do the integration of Molecular
24 Dynamics with Amersham, and that one-year contract was expired in
25 September of 1999, and then I joined Illumina in October of 1999.

26 Q And jumping back to your educational period of time,
27 did you receive any academics honors or awards?

28 A I did. I was Summa Cum Laude and Phi Beta Kappa, which

1 are honor societies. I also won the Frederick Terman Engineering
2 Award at Stanford, which is the top two students in each of the
3 different engineering departments in the University.

4 Q Are you married?

5 A I am.

6 Q Do you have any children?

7 A I have three and expecting another one in October.

8 Q So from your recitation of your work history, before
9 joining Illumina, then, you had been -- you had had executive
10 managerial experience before?

11 A A substantial executive experience, yes.

12 Q You'd also been with a number of start-up companies
13 before joining Illumina, correct?

14 A Illumina is my fourth start-up company.

15 Q Mr. Pantoni asked you about your joining and in fact
16 founding a company called Molecular Dynamics?

17 A That's right.

18 Q That company went public, true?

19 A It did.

20 Q At the time that that company went public, were all of
21 the founders still on board with the company?

22 A No, there were three founders in total and only two of
23 us were with the company at that point. I should also mention
24 that company was in the life science industry, so it was directly
25 related to the type technology that Illumina is involved in.

26 Q Now, during your early days at Illumina, you've already
27 testified that your actual start date was October 18, 1999,
28 correct?

1 A That's correct.

2 Q At the time were you living in San Diego on a permanent
3 residency basis?

4 A No, Molecular Dynamics was in the San Francisco Bay
5 Area and I'd lived there since I graduated in college in '75, so
6 my residence was in the Bay Area.

7 Q How is it you were working at Illumina while you still
8 lived in the Bay Area?

9 A That was really the only issue with me joining
10 Illumina, that it wasn't close to home. So I commuted to Illumina
11 for about a year and a half, and went back and forth twice a week
12 to the Bay Area.

13 Q So you commuted back and forth from the Bay Area to San
14 Diego twice a week?

15 A That's right. And my wife was still working in the Bay
16 Area.

17 Q Approximately, including commuting, approximately how
18 many hours a week were you working?

19 A Including commuting?

20 Q Yes.

21 A Whoa. Probably 70 or 80.

22 Q Did you do Illumina work while you were commuting on
23 the plane?

24 A Yes.

25 Q Let's put up Exhibit 85. Let's blow it up, please.

26 Move it up and I think blow it up a little further.

27 This is from Exhibit 85. Mr. Flatley, do you recognize this
28 as an e-mail sent by Dr. Czarnik to you on Friday, September 24th?

1 A Yes, I do.

2 Q Do you remember receiving this e-mail?

3 A Yes.

4 Q Why is it memorable?

5 A Well, I was at the company, as I mentioned earlier, for
6 only about three days before I actually started on October 18th,
7 and this was one of the days I came to Illumina to be introduced
8 to the company, and I met with all the senior managers before
9 actually starting, and this is an e-mail I received just as I was
10 about to leave to fly back to the Bay Area. It struck me very
11 funny that I receive an e-mail from Tony about work hours actually
12 before I even started my employment with Illumina. So it just
13 struck me as very odd.

14 Q And in this message he's basically telling you that he
15 needs or he's wanting to take the time out during the business day
16 to go swimming, is that right?

17 A That's right.

18 Q Did you ever receive any kind of communication of this
19 nature from any of the other senior managers before you began
20 working at Illumina?

21 A Not before and not after.

22 Q Let's go back to the full exhibit, please.

23 Let's highlight Jay's response. Let me ask you,
24 Mr. Flatley, do you recognize this as your response to the e-mail
25 that you had received from Dr. Czarnik about his desire to swim
26 during the business day?

27 A Yes, I do.

28 Q And let me -- What were you trying to communicate to

1 him about work scheduling?

2 A My general point here was that I don't require people
3 to be in the office any specific time during the day. I require,
4 number one, that they perform very well, that they are in the
5 office during normal core hours, but that I grant them a little
6 flexibility on those hours if they have special circumstances.

7 Q And the question that you put to Dr. Czarnik was, "Have
8 you had any prior input from John on this that has you concerned?"
9 Correct?

10 A That's right.

11 Q Did you ever receive any response to that question from
12 Dr. Czarnik?

13 A Never heard anything back on that.

14 Q Now let's jump ahead to the time, point in time when
15 you've actually come on board at Illumina, and you testified on
16 examination by Mr. Pantoni when he called you as a witness in his
17 case that on a number of occasions Dr. Czarnik said in effect
18 unless I hear back from you to the contrary, I'm going to assume
19 I'm doing an excellent job. Do you remember that?

20 A That's right.

21 Q Did this strike you as unusual?

22 MR. PANTONI: Objection, relevance.

23 THE COURT: Overruled.

24 THE WITNESS: Struck me as very unusual. We had these
25 conversations a number of times in the first few weeks, and very
26 quickly I was getting a perception of an employee who was highly
27 insecure about his job. In fact he sent me an e-mail my very
28 first day on the job already wanting to schedule a lunch to talk

1 about things like this.

2 So I found it, particularly for somebody in a senior
3 executive position, to be highly odd in my mind.

4 MS KEARNS: Q That brings me to an interesting
5 point. You have sat through every day of trial thus far, correct?

6 A Correct.

7 Q And in fact you'll be unable to do that during the two
8 days we're in session next week, right?

9 A Right.

10 Q But you were here during the entirety of Dr. Czarnik's
11 testimony, correct?

12 A Correct.

13 Q You heard Dr. Czarnik testify in his direct that you
14 had been at the company for a few weeks and you didn't seem to be
15 conferring with him as a CSO and that's what prompted him to
16 invite you to lunch, correct?

17 A Correct.

18 Q In fact, it was your very first day on the job that he
19 asked you to lunch?

20 A Yes, that's right, and I was not there prior other than
21 to a few specific occasions for very specific reasons.

22 Q Now, you also testified, Mr. Flatley, that sometime
23 much earlier than the [Daley's]¹³ dinner meeting in February, 2000,
24 you testified on examination by Mr. Pantoni that Tony Czarnik had
25 made a standing offer to step down as CSO if and when you deemed
26 it appropriate?

27 A That's right.

28 Q Did you set the context? Tell us when those, when that

1 discussion or when that topic was first raised.

2 A Sure. I don't remember the exact date of that, but we
3 had multiple one-on-one meetings, including this initial lunch we
4 had during the first four weeks of my employment there, and during
5 those meetings we talked about all sorts of different things that
6 Tony was interested in, about the technology, about the company,
7 about his role, about his hours, things of that nature. And
8 during one of those meetings he basically told me that he had put
9 in place a standing offer to step down as CSO and that he realized
10 the company was focused on genomics, that is not his area of
11 expertise, and that was an open offer on his part, and very noble
12 of him to take that position.

13 Q So did he present it that he had made this standing
14 offer even before you arrived at Illumina?

15 A Yes, that was the context of how he described it.

16 Q And did you confer with anyone else that that was true?

17 MR. PANTONI: Objection, hearsay.

18 THE COURT: Sustained.

19 MS KEARNS: Q Now, upon -- what was your -- You said
20 you felt it was noble gesture at that time, whatever point in time
21 Dr. Czarnik first communicated to you that he was willing to step
22 down as CSO at anytime. Did you have any intention at that moment
23 of taking him up on his offer?

24 A No, I had no reason to think anything about that.

25 Q And was it your understanding in your early days at
26 Illumina that as CSO, Tony Czarnik was responsible for the overall
27 leadership of the research and development program?

28 A Exactly.

1 Q Did you, in all of the time that Dr. Czarnik was CSO up
2 until his change to research fellow, did you see him do anything
3 to lead the entire research program?

4 A Not at all. Tony never functioned as a CSO in this
5 company. I didn't know that when I arrived there, but didn't take
6 long for me to realize that Tony was not acting or functioning in
7 a CSO role at Illumina.

8 Q Let's talk about say the end of the first month of your
9 employment, which would have been late November, 1999. Did you
10 hold a strategic off-site meeting with your senior managers?

11 A I did. That was around the 22nd of November, I
12 believe.

13 Q Where did that meeting take place?

14 A I rented an apartment close by the office, and that
15 apartment had a downstairs conference room, so I rented out that
16 conference room for a day and had all my senior management team
17 come over for a full-day strategic meeting.

18 Q I think the jury knows the senior management team, but
19 could you identify the persons who attended that meeting?

20 A Tony, John Stuelpnagel, Mark Chee, Rich Pytelewski, and
21 [Michal]⁴¹ Lebl was also included in many of the management meetings
22 and I believe he was at that meeting as well, as well as myself,
23 of course.

24 Q I'll ask you to keep your voice up, please.

25 A Pull this a little closer?

26 Q Yes.

27 What was the purpose of this meeting?

28 A The purpose of the meeting was to do strategic planning

1 for the company. One thing I realized when I got there pretty
2 quickly the company was engaged in a very large number of
3 projects, we probably had 20 different projects underway, and the
4 projects were kind of fragmented between different groups and
5 different people working on multiple projects. So I wanted to
6 have a meeting where we reviewed all of those, reviewed the
7 relative priority, staffing levels on each, business potential of
8 each of those, and begin to formulate for the company how we were
9 going to get products on the market, what those products might
10 look like, who was going to have responsibility for delivering on
11 those objectives.

12 Q Did you prepare any form of agenda or schedule before
13 the meeting?

14 A Of course. We had a full agenda. We had done a
15 significant amount of work to prepare for that meeting, schedules
16 backing up all the projects, and those were all input to the
17 meeting.

18 Q Let put up Exhibit 100. In broad form, do you
19 recognize this document, Mr. Flatley, as the agenda for the
20 strategic on-site meeting?

21 A Yes.

22 Q And did you provide this agenda to the meeting
23 participants in advance of the meeting?

24 A Yes.

25 Q Are you able to estimate how far in advance?

26 A We certainly began discussing it probably two weeks
27 before the meeting. We probably confirmed the final version some
28 number of days before that. But the assignments of who was to

1 work on what were given at least a week in advance.

2 Q At least a week in advance, the people who are
3 identified as discussion leaders had advance notice of which topic
4 or topics they would be responsible for leading the discussion
5 about?

6 A That's correct.

7 Q And what topic did you assign for Tony Czarnik to lead
8 the discussion on?

9 A We called this an early access program. This is a
10 particular strategy of getting products to market where you let
11 certain customers have access to your technology earlier than the
12 general group of customers. Because you gave this early access,
13 you get premium price. It's a way of getting technology that
14 isn't fully developed into the market early and in a profitable
15 way.

16 Q What were your expectations in terms of the level of
17 preparation that was to be done by each discussion leader
18 concerning his topic or topics?

19 A I would have expected them to do some prior research to
20 make sure at a minimum they understood what everybody else on the
21 staff knew about that particular topic, that they might consult
22 with people outside the company, that they might hold some sub-
23 meetings to talk with other people in the company about that, and
24 to come prepared with a small presentation. I wasn't looking for
25 a 50-page presentation here, but content related to that topic
26 that represented the company's best thinking on that issue at that
27 point.

28 Q What level -- Were you satisfied with the level of

1 preparation done by Tony Czarnik with respect to the topic he was
2 given?

3 A Not at all.

4 Q Did he prepare any written materials?

5 A Nothing that I recall.

6 Q Did he prepare any PowerPoint slides or blow-ups?

7 A Nothing that I recall.

8 Q Did he lead the discussion?

9 A He led the discussion in the sense that I said okay,
10 Tony, it's now yours, and he took it from there, but that was
11 really just asking questions and trying to be a facilitator, not a
12 leader of topic itself.

13 Q Did he make any concrete contributions or suggestions
14 during the discussion on his topic?

15 A Nothing whatsoever.

16 Q Did Dr. Czarnik make significant contributions or
17 suggestions in connection with any of the other discussions?

18 A Well, he probably did on some of the other topics, but
19 he didn't necessarily come prepared with any materials on those
20 other topics.

21 In general, what I came away from this meeting with a sense
22 was that Dr. Czarnik had no strategic vision, that he was a
23 tactical person, that he couldn't integrate broadly the company's
24 strategy and develop strategic views how to get that technology to
25 market, what customers to go after, how to price it, position it
26 in the marketplace. During this meeting he was silent because he
27 had no input on those topics.

28 Q What was the level of preparation that appeared to have

1 been engaged in by the other presenters, the other discussion
2 leaders?

3 MR. PANTONI: Objection, relevance.

4 THE COURT: Sustained.

5 MS KEARNS: Q Did other decision-leaders provide
6 written materials?

7 MR. PANTONI: Same objection.

8 THE COURT: Sustained.

9 MS KEARNS: Q Was it your impression that in leading
10 his discussion, Dr. Czarnik was essentially winging it?

11 A Yes.

12 Q Did you at some point express to him your
13 dissatisfaction with his contributions at this meeting?

14 A I did.

15 Q When did that happen?

16 A Over the next few weeks, I talked to Tony about this
17 meeting, and in addition to his contribution, he was also late for
18 the meeting, so he didn't get there when the meeting was supposed
19 to start.

20 Q And he was late to the strategic meeting?

21 A Yes, he was. It was only three blocks from the office.

22 Q When you talked to Dr. Czarnik about your
23 dissatisfactions concerning his performance and his lack of
24 contribution at this strategic meeting, in that verbal counseling
25 session did you address any other performance concerns or was that
26 discussion limited only to a discussion of this strategic meeting?

27 A That discussion was probably in the context of a number
28 of other subjects. Some -- I don't recall any other specific

1 counseling at that meeting, but it would have been wrapped into
2 other discussions on other topics.

3 Q Do you distinctly remember that at some point after
4 November 22 you did communicate to Dr. Czarnik verbally that you
5 were unhappy with his level of preparation and contribution during
6 this strategic off-site?

7 A Yes.

8 Q Any question in your mind whether you did that?

9 A No, none whatsoever.

10 Q Why didn't you document that discussion and put it in
11 his personnel file?

12 A Well, this was the first kind of tangible performance
13 issue that I had had with regard to Tony. The other things were
14 very soft, things about the insecurity of his job and things of
15 that nature, and his work hour request. So this was really the
16 first tangible indication, so I didn't feel a need to put a formal
17 warning in a file. That's a fairly serious step when you get to a
18 formal warning.

19 Q Were you hoping that the verbal counseling would be
20 sufficient to get him to contribute more and prepare better?

21 A I was. I thought and hoped at this point that really
22 all it was was that he didn't understand my expectations and that
23 maybe somehow John was a much more lax than I was and didn't have
24 high expectations, and I was just new with the company so I didn't
25 know how John had run it before I got there. So I thought once I
26 communicated what my expectations were to Tony, he'd immediately
27 be able to step up and deliver to my expectation.

28 Q Let's jump ahead a little bit in time but still

1 probably during calendar year 1999. Did you ever have an occasion
2 in which you received any kind of client or collaborator complaint
3 about Tony Czarnik's performance?

4 A Yes.

5 MR. PANTONI: Objection, hearsay.

6 MS KEARNS: Goes to Mr. Flatley's state of mind and the
7 reasons that played into the termination decision ultimately.

8 THE COURT: It will be limited to his state of mind and
9 not offered for the truth of the matter.

10 MS KEARNS: Q Did you receive any customer complaints,
11 or I should say collaborator complaint about Dr. Czarnik's
12 performance?

13 A Yes, I had a very direct one. Tony was responsible for
14 our collaboration with Chevron, and there was a meeting scheduled
15 on site at Illumina with representatives from Chevron, meet with
16 our scientists at Illumina to discuss the status of the project.
17 And the head officer of that collaboration, after a series of
18 morning meetings, put in a request through my assistant to have a
19 personal one-on-one meeting with me that afternoon.

20 In that meeting we kind of discussed the collaboration in
21 general, but very specifically he told me he was very disappointed
22 with the leadership that Dr. Czarnik had provided on the Chevron
23 collaboration.

24 Q What was, to your understanding, what was Dr. Czarnik's
25 role vis-a-vis the Chevron collaboration?

26 A He was the lead person for Illumina on the Chevron
27 collaboration.

28 Q And did this Chevron representative indicate to you the

1 nature of the disappointment or dissatisfaction?

2 A Yes, there were a couple of things. One is that there
3 was a work plan that was supposed to have been provided to Chevron
4 from Illumina, and that he said that that responsibility had been
5 going on for six months and Tony had not delivered anything
6 tangible against that requirement. And in addition, he was
7 disappointed at the pace of the project.

8 Q Did you subsequently personally -- Did you personally
9 review the content of the work plan that Tony Czarnik provided to
10 Chevron?

11 A I did. And when I looked at that work plan, I was very
12 disappointed as well, so I could see the customer's reasons for
13 complaining about the work plan.

14 Q Why were you disappointed with the content of the work
15 plan?

16 A Because it was incredibly superficial. It had a few
17 pages of work tasks that were not creative at all. Anybody could
18 have listed those. And this really began to -- for me to
19 understand how Tony approached these kinds of assignments, and
20 what he would do is create a very superficial outline and then
21 route it to everyone else in the company to get comments and
22 feedback, and often he didn't get any because it would require the
23 other people to actually create the original content. Instead of
24 offering input and feedback on the content that was there, there
25 generally was no content. So people would have to author things
26 originally.

27 So this Chevron plan just like that. It was a sketchy
28 outline, no content, no milestones, no budgets, and it didn't have

1 the kind of things the customer was looking for, which was in fact
2 the most important dimension of a plan like this, is what the
3 customer wants.

4 Q You said that it was -- you came to learn that it was
5 the standard procedure for Dr. Czarnik to create an outline and
6 then send it out, in your words, to everybody in the company for
7 feedback. You mean literally he sent it to every person in the
8 company?

9 A No, the people that were associated with the project.

10 Q Okay. So he sent it out to everybody on the team?

11 A On the team, yes.

12 Q Let's now jump ahead to the January 2000 time frame.
13 We've heard testimony that there was a Scientific Advisory Board
14 meeting in January, 2000, correct?

15 A Correct.

16 Q This is the first one which you had attended since
17 joining Illumina?

18 A The first one that had been held since I joined.

19 Q What level -- Dr. Czarnik, as CSO, was responsible for
20 organizing and planning this meeting?

21 A Yes.

22 Q What level of preparation or what degree of preparation
23 was expecting from Dr. Czarnik in advance of this SAB meeting?

24 A I was expecting him to bring up at one of our weekly
25 staff meetings a discussion of what was going to happen at the
26 upcoming SAB, to solicit input from people on what the agenda
27 topic and organization's dimensions of that meeting might be, to
28 put together any social interactions with the SAB, whether it was

1 going to be a breakfast or a dinner, and then to gather the
2 appropriate set of inputs from people in the company and publish
3 those out to the SAB in advance so people flying in from around
4 the world, in fact we had somebody from Australia that was flying
5 in, to have a chance to think about these problems and
6 opportunities and be well prepared for the meeting.

7 Q Let's put up Exhibit 115.

8 Mr. Flatley, is this Exhibit 115 an e-mail. The bottom
9 part, this portion, is this an e-mail sent to you, from you to
10 Tony Czarnik on January 18 at 2:05 in the afternoon?

11 A Yes, meeting was Friday and I was beginning to get
12 alarmed by the fact there had been no discussion or agenda about
13 the meeting on Friday.

14 Q And so on Tuesday you were wondering -- So is it
15 accurate to say that at the time you sent this e-mail, you had not
16 been provided with any agenda either in draft or final form?

17 A That's correct.

18 Q Dr. Czarnik responded to you about four hours later?

19 A Yes.

20 Q And he indicated that there was not an agenda yet,
21 correct?

22 A That's correct.

23 Q And did Dr. Czarnik, in this first portion of his
24 response he said that much of the meeting will be people at
25 Illumina setting up their problem, posing it, then being present
26 to hear the discussion? Do you see that?

27 A I do.

28 Q When you read that, did you have any concern with the

1 concept of scientists from Illumina presenting problems to the
2 SAB, posing their problems, and then remaining to hear the
3 discussion about the problems?

4 A In fact that's the purpose of an SAB. You want to
5 present what your scientific challenges are to the SAB, get
6 outside input, direction, third-hand observations from the SAB.

7 Q Now, I notice that on the communication from you to
8 Tony Czarnik which you are asking him whether there's an agenda
9 you copied John Stuelpnagel and Mark Chee. Why is that?

10 A Because I wanted to know whether somehow I was being
11 left out of the loop on this and maybe I was the only one that
12 hadn't gotten it, so I wanted there to be a general awareness we
13 didn't have an agenda and also give John an opportunity, if he had
14 set some other standard for this meeting, for him to let me know
15 that.

16 Q Did you ever instruct Dr. Czarnik at anytime before
17 this SAB meeting to obtain the approval of Dr. Stuelpnagel and/or
18 Chee on the agenda?

19 A No.

20 Q Did you ask Tony Czarnik to prepare the agenda and
21 submit it to you?

22 A Well, I expected him to submit it to me. In this
23 e-mail I was directly asking him to submit it to me.

24 Q Did you ever direct, I just want to make sure there was
25 no confusion on Dr. Czarnik's part, did you ever instruct him to
26 submit the proposed agenda to John or Mark for advance review
27 before giving it to you?

28 A No.

1 Q Did you ever tell Dr. Czarnik to submit the agenda to
2 Dr. Stuelpnagel and Chee in lieu of to you?

3 A No.

4 Q You've testified that you didn't have any problem with
5 including on the agenda a discussion period for technical
6 problems?

7 A None at all.

8 Q So let's focus then on the conduct of the January SAB
9 meeting. As of Tuesday evening, Dr. Czarnik was telling you there
10 wasn't an agenda yet. Did you ultimately receive an agenda before
11 the start of the SAB meeting?

12 A Before Tuesday and the start of the meeting on Friday,
13 I asked Dr. Czarnik verbally on a couple more occasions what the
14 status of this was, because my alarm was going up that we had no
15 preparation. The first agenda I ever saw was between 9 and 10
16 o'clock, I was still in the office, on Thursday night, just before
17 the SAB was to start that next Friday morning. He came in and
18 asked me, "Here's the agenda, what do you think?"

19 Q So you were being given the agenda to review for the
20 first time at 9 or 10 o'clock the night before the meeting?

21 A That's right.

22 Q Did you have any changes to the agenda at that time?

23 A It was too late to make any changes to the agenda. The
24 SAB members were going to have it -- I asked him, "How are you
25 going to get this to the members?"

26 He said, "I was going to slide it under the door of their
27 hotel rooms." So maybe someone would be able to look at it over
28 breakfast, but that was the extent of the possible review. So it

1 wasn't even worth commenting on at that point.

2 Q Did Dr. Czarnik provide to you this Thursday night any
3 reading materials or articles that were going to be provided to
4 the SAB members?

5 A No, there was no package whatsoever, only an agenda.

6 Q Were you present at the start of the SAB meeting?

7 A Yes, I was.

8 Q Who kicked off the SAB meeting?

9 A Tony kicked it off.

10 Q Do you remember any of his opening remarks?

11 A I do distinctly.

12 Q What did he say?

13 A He stood up and introduced me as the new CEO of the
14 company, gave a couple of introductory remarks to the SAB members,
15 and then Tony promptly apologized for fact we didn't have an
16 agenda, and said, "This must be a remanent of my academic
17 training," and basically dismissed out of hand the fact that we
18 didn't have an agenda for the meeting.

19 Q Were you disappointed with Dr. Czarnik's level of
20 preparation for the meeting?

21 A I would say I was more than disappointed. I found it
22 personally embarrassing. This is my first SAB meeting as CEO and
23 I thought we had begun this very poorly, and I was embarrassed for
24 the company and for Tony.

25 Q Did any member of the SAB meeting ever communicate to
26 you any dissatisfaction with the way that meeting was run?

27 A Yes.

28 MR. PANTONI: Objection, hearsay.

1 THE COURT: Sustained.

2 MS KEARNS: Q Do you know one way or another whether
3 Dr. David Walt ever had -- ever sought to have breakfast with
4 Tony Czarnik shortly after this SAB meeting?

5 MR. PANTONI: Calls for hearsay.

6 THE COURT: I think he can answer yes or no.

7 THE WITNESS: Yes.

8 MS KEARNS: Q Do you know one way or another who
9 initiated the breakfast meeting?

10 A I do, yes.

11 Q Who was that?

12 MR. PANTONI: Calls for hearsay.

13 THE COURT: I think it is going to be hearsay. Unless
14 there's some --

15 MS KEARNS: I think it's not being offered for the
16 truth of the matter. I mean to the extent that I want to bring in
17 what Dr. Walt reported about that breakfast meeting, it's not for
18 the truth of the matter. It goes, though, to show the impressions
19 that Jay Flatley formed and his state of mind, and Mr. Pantoni has
20 certainly explored the reasons and the timing of the decision to
21 appoint a new CSO, and this is directly relevant.

22 THE COURT: It will be received for state of mind only,
23 not for the truth of the matter.

24 MS KEARNS: Q So Mr. Flatley, again focusing on --
25 You've heard the statement I made to the Court, so we want to
26 focus on your state of mind, but what did you learn from David
27 Walt about the -- what did David Walt say to you about the SAB
28 meeting and what sort of state of mind did that create in you?

1 A I obviously came away from the SAB meeting very
2 disappointed personally, and David told me in a phone conversation
3 that he was also extremely disappointed in the meeting. He went
4 through a series of specifics of where he thought the meeting was
5 poorly prepared or in some cases irrelevant, commented
6 specifically on the fact there was no agenda, and wrapped up with
7 his impressions of Tony's performance, that he was performing a
8 ceremonial role in the company, disengaged, not motivated and
9 didn't seem to be excited or interested in staying with Illumina.

10 Q And what sort of state of mind did that create for you,
11 in you?

12 A Well, it created a terrific degree of uncertainty about
13 Tony's status in the company for me at that point. David
14 corroborated essentially or validated my views of what had
15 happened at the SAB meeting. David Walt was not only a member of
16 the SAB, but also a member of the board of directors and inventor
17 of this technology, and here he was telling me our CSO was
18 disengaged and performing a ceremonial role in the company. So I
19 that that very seriously. I began thinking at that point that I
20 had a potential serious problem on my hands, and I needed to begin
21 thinking about what I was going to do about that.

22 Q And was there some discussion between you and David
23 Walt at this point in time about the concept of him having
24 breakfast with Tony Czarnik?

25 A Yes, David proposed that to me because David had been
26 long-time friends with Tony and thought that over a breakfast
27 meeting that he may be able to talk to Tony about these issues and
28 understand more clearly what, if anything, was behind them.

1 Q Did you think that was a good idea?

2 A I thought it was a great idea. So David went ahead and
3 scheduled that.

4 Q And did you make any -- Did you make any
5 memorialization of your conversation with David Walt?

6 A I did.

7 Q I'm obviously looking for that memorialization, but
8 I'll come back to that later in our examination perhaps after a
9 short break.

10 So did you have an understanding that the breakfast meeting
11 between Dr. Walt and Dr. Czarnik did occur?

12 A Yes, it did.

13 Q Again same question, what did Dr. Walt tell you about
14 that breakfast and what did that -- what kind of state of mind in
15 you did that information create?

16 MR. PANTONI: Objection, hearsay.

17 MS KEARNS: Again it's --

18 THE COURT: Limited to state of mind, not for the
19 truth, not to be considered by the jury to prove the truth of what
20 was said, but just evidence of how it affected Mr. Flatley's state
21 of mind regarding the defendant.

22 THE WITNESS: So David reported back to me they had
23 indeed had the breakfast. David had talked to Tony about the SAB
24 meeting and his general level of disengagement with the company,
25 and Tony had proceeded to more or less rationalize away each of
26 those specific concerns.

27 In fact I got back from Tony a report about that meeting as
28 well e-mail form where he went by point-by-point and rationalized

1 had each of those concerns about the SAB meeting.

2 So I came away thinking from this not only do I have someone
3 who has a performance problem in the company, but he's not self-
4 aware at all about the fact that he did. So he didn't stand up
5 and say okay, tell me what I did wrong, how I can make it better,
6 how can I change and make this -- accept responsibility for the
7 things I did incorrectly. He basically rationalizes, I wasn't
8 disengaged. He went on and on about that.

9 MS KEARNS: Q Let's put up Exhibit 124.

10 Mr. Flatley you said moments ago you had gotten e-mail
11 feedback from Tony Czarnik on the breakfast with David Walt,
12 correct?

13 A Correct.

14 Q Do you recognize this portion, a portion of this
15 document to be Tony Czarnik's e-mail to you regarding the
16 breakfast?

17 A Yes.

18 Q And in this statement Dr. Czarnik says to you that
19 during the breakfast with David Walt several misconceptions
20 regarding the SAB meeting were addressed. Right?

21 A Right.

22 Q Did you view Dr. Czarnik's use of the word
23 "misconceptions" to reflect the fact that he wasn't hearing the
24 feedback that was being given to him by David Walt?

25 A Exactly.

26 MR. PANTONI: Calls for speculation.

27 MS KEARNS: I asked for Mr. Flatley's interpretation.

28 Q Mr. Flatley, you testified then that as a result of the

1 report you got back from David Walt concerning Tony Czarnik's
2 response to these criticisms, you formed a state of mind where you
3 were very concerned that you had a senior manager who not only had
4 a performance problem but didn't recognize that he did.

5 MR. PANTONI: Objection, leading

6 THE COURT: Sustained.

7 MS KEARNS: He already testified to that.

8 Q Would you say that after receiving the feedback -- Let
9 me strike that.

10 After receiving the feedback from David Walt concerning the
11 breakfast he'd had with Tony Czarnik, were you more concerned,
12 less concerned or holding the same degree of concern you'd had
13 about Tony Czarnik's ability to function as CSO in the company?

14 A My concern had been increasing all along. After this
15 it was acute, I would say. It was a very serious concern about
16 him holding that role. And in fact functionally he was not
17 actually performing the role at this point in time.

18 MS KEARNS: Let me show to counsel, this was marked as
19 a deposition exhibit.

20 Your Honor, I have Mr. Flatley's handwritten notes
21 reflecting his initial phone call -- Excuse me. Let me make my
22 statement. I'm not going to read them in yet.

23 MR. PANTONI: I think we can do this at the next break.

24 THE COURT: You want to take it up right now, take a
25 break --

26 MS KEARNS: I'd rather keep going and come back to it
27 if need be.

28 THE COURT: Okay.

1 MS KEARNS: Q So after getting feedback from David Walt
2 concerning his breakfast with Tony Czarnik and Dr. Czarnik's
3 rationalization concerning the SAB, what did you decide to do in
4 response to what you had learned?

5 A I decided to schedule a dinner meeting with Tony that
6 we could verbally discuss these issues one-on-one and talk to him
7 about the future of his role at Illumina. It had been indicated
8 to me through David he was disengaged. I wanted to understand
9 that and talk about what I thought was going to need to happen.

10 Q And one issue that was raised in Mr. Pantoni's
11 examination of you is that you have this dinner meeting with Dr.
12 Czarnik at [Daley's]¹³ on February 7th, 19 -- February 7th, 2000,
13 correct?

14 A That's correct.

15 Q And he asked you whether you told Dr. Czarnik at that
16 dinner meeting that you had already spoken with David Barker about
17 the possibility of Dr. Barker joining Illumina, do you remember
18 that?

19 A Yes.

20 Q First let me ask you, is it accurate you in fact had
21 spoken with Dr. Barker about the possibility of his joining
22 Illumina?

23 A Yes, I have.

24 Q That conversation occurred before the [Daley's]¹³ dinner?

25 A Correct.

26 Q Why didn't you tell Tony Czarnik in that dinner meeting
27 that you'd already had a communication with David Barker?

28 A Well, I didn't feel a need to tell him about that

1 communication. My discussion with David only related to whether
2 David was a potential candidate for a CSO at Illumina. When I
3 called him, I didn't know whether he had any interest in
4 potentially joining Illumina, but after I'd seen this e-mail from
5 Tony, in my mind I needed to begin to explore what my
6 possibilities were in terms of finding a replacement CSO.

7 The context is we were marching by this time toward a public
8 filing for an IPO and I needed a management team in place that
9 could lead a public company, so I needed to have somebody in a CSO
10 role who could be very effective both internally and external to
11 the company.

12 Q So let's now let me ask you this. By the point in time
13 at which you had the dinner meeting at [Daley's]¹³, had you reached
14 the conclusion that you did need a different CSO?

15 A Yes, I had.

16 Q What were the reasons that you concluded Illumina
17 needed a different CSO other than Dr. Czarnik?

18 A There were multiple reasons. One, it was very clear
19 Tony was not functioning as a CSO in the company. He didn't have
20 the strategic -- knowledge of core applications, and frankly he
21 admitted that part of it, he didn't understand -- He had had the
22 standing offer to step down as CSO, and of course by this time I
23 had very serious specific performance problems with Tony's ability
24 to deliver in any area, so it was a combination of not performing,
25 not functioning that role, and not having the academic training to
26 be the CSO that we needed as public company.

27 Q And you mention the fact that you were hoping to have
28 an IPO. Did the fact that the company was heading toward an IPO

1 play into your conclusion that you needed a different CSO?

2 A Well, I needed to really put together an entire
3 management team. This was all happening very quickly because the
4 markets during this time period were very, very good for public
5 offerings, so the board was very interested in me trying to get a
6 public offering done. So not only did I need to get the financing
7 in place, but I needed additional people into the management team
8 to flush out a complete organization that would be presentable and
9 allows us to do a very positive IPO. So filling the CSO role was
10 one of those positions.

11 Q Now, in fact, Mr. Flatley, you say the markets were
12 very hot at the time and the board was very interested in pushing
13 forward with an IPO?

14 A Yes.

15 Q In fact, the company's IPO actually occurred July 28,
16 2000, correct?

17 A Correct.

18 Q Was that the original anticipated IPO date?

19 A No, it wasn't.

20 Q What was the anticipated, original anticipated IPO
21 date?

22 A Well, the objective was to get it done as fast as
23 humanly possible, so we spent the entire month of March preparing
24 this registration statement, and typically what happens is that
25 you prepare that statement, you submit it to the SEC, you receive
26 comment back, revise it, and you typically are able to start a
27 roadshow about 30 days after you file the initial S1, which would
28 have put our roadshow, initial target for our roadshow right at

1 the beginning of May.

2 Q And in fact the decision was made not to go forward
3 with the IPO in May, correct?

4 A That's correct.

5 Q To defer it until what ended up being late July?

6 A That's correct.

7 Q And in fact, had the company completed its IPO as
8 originally anticipated in May, that would have occurred before the
9 round of experiments that Kevin Gunderson was doing during the
10 summer of 2000, correct?

11 MR. PANTONI: Objection, leading.

12 THE COURT: It's kind of ponderous, isn't it?

13 MR. PANTONI: It's already been leading for a long time.

14 MS KEARNS: I'll ask it another way.

15 Q Had the 768 decode experiments which were done by Kevin
16 Gunderson been completed as of May, 2000?

17 A No.

18 Q Now, you testified that you did have a particular
19 potential candidate for new CSO in mind, and that was David
20 Barker?

21 A That's right.

22 Q Why did you have David Barker in mind?

23 A David Barker had worked for me at Molecular Dynamics
24 for quite sometime, 10 or 11 years maybe, so I knew that he was
25 very effective in that role. He had direct knowledge of our
26 applications. He had been in the micro business before. He had
27 IPO experience. He drafted an S1 with me the prior time around,
28 so he was ideally suited to join if he was interested.

1 Q Now, a point I'd like to bring up from Mr. Pantoni's
2 examination of David Barker is isn't it true when David Barker
3 worked with you at Molecular Dynamics, he never held the title
4 chief scientific officer?

5 A That's correct, he didn't.

6 Q And all of the years that you were with Molecular
7 Dynamics, was there a chief scientific officer?

8 A No, we didn't ever have a position like that. We
9 called it something different.

10 Q What was David Barker's title, if you recall?

11 A We called it VP of advanced research or advanced
12 development, something like that.

13 Q In the years in which David Barker served in that role,
14 did he serve as the top level scientific VP?

15 A Yes, he did.

16 Q There was no other scientific position higher than that
17 one?

18 A No. Top of the heap.

19 Q In that position he's responsible for directing the
20 overall scientific activity of that company?

21 A Yes.

22 Q Having been in executive management in a number of
23 companies, Mr. Flatley, is it the case that it's up to the company
24 to decide what titles it's going to have? In other words, what
25 positions it's going to have within it?

26 A You mean how many of those positions are filled, how
27 they are combined?

28 Q Whether you have a chief scientific officer or whether

1 you call it something else.

2 A Yes. Different companies call them different things.
3 If you are more biotech oriented, CSO is more typical. Molecular
4 Dynamics had a lot of instrumentation, so the advance research
5 role, including not only the chemistry part of that but a lot of
6 the engineering, building instrumentation, so we chose a different
7 title because of the orientation of the company.

8 Q Let's jump ahead to the [Daley's]¹³ dinner. You'd already
9 had a discussion with David Barker on February 4th, correct?

10 A Correct.

11 Q And he indicated to you that he would have some
12 interest in joining Illumina?

13 A That's right.

14 Q So what was your purpose, what was your intended
15 purpose -- strike that.

16 What was your intended content of discussion when you
17 arrived at [Daley's]¹³ for the dinner with Dr. Czarnik?

18 A As I stated earlier, Dr. Czarnik had volunteered to
19 step down from the CSO role and I was certainly prepared to take
20 him up on that and make a change. However, I was much more
21 concerned about the situation than that, in fact, because I think
22 Tony's, when he offered up the CSO role, he thought what he would
23 then step back to is VP of chemistry. My assessment of him as a
24 manager at that point was so low I did not believe any
25 management position was suitable for Tony. So my goal was to try
26 to move him into some other position in the company.

27 So that dinner meeting was intended to be a direct
28 performance counseling session with Tony where I tell him about

1 all the things that I was concerned about, and explore what
2 options we had for Tony in the company. My goal was to get that
3 to be something that was in a non-management role.

4 Q So how do you start the discussion?

5 A We started talking, a little small talk after we
6 ordered. We started talking about what was going on in the
7 company and the IPO process was moving along, and then we talked
8 about the CSO role, and he reiterated his willingness to step down
9 from that CSO role, particularly in light the fact we were about
10 to start officially in the IPO process.

11 Then I asked him well, how important is a position that has
12 management content to you, and I was trying to explore the working
13 space I had here to try to deal with Tony as to whether that was
14 an important component to him or not. He said that it wasn't
15 significant and that really he loved working at Illumina, he
16 wanted to continue to work at Illumina, that he'd do whatever he
17 could to make it successful, and that he was willing to take a
18 non-management role if required.

19 Q Who proposed the research fellow position, you or Dr.
20 Czarnik?

21 A Tony did.

22 Q And did he propose in this meeting any specific job
23 responsibilities or duties?

24 A No, we didn't get down to that level in this meeting.

25 Q Mr. Pantoni asked you whether Illumina had an existing
26 position for research fellow at the time, correct?

27 A Correct.

28 Q And you didn't?

1 A We did not.

2 Q Did you agree to create this position specifically to
3 enable Dr. Czarnik to continue with Illumina?

4 A We did. We didn't do that at that dinner meeting, but
5 subsequently when we made the change, yes, we created a new
6 position for Tony.

7 Q Now, if Dr. Czarnik was not performing well as CSO, why
8 is it that you were willing to create a research fellow position
9 for him?

10 A Well, Tony came well credentialed in the field, and he
11 had -- a lot of the scientists in the company liked Tony a lot.
12 In fact, I liked Tony a lot. So we were searching for a way to
13 keep Tony in the company.

14 It was my belief, at least at that point, that he could make
15 individual contributions to the company that were significant. He
16 had couple of inventions. And my hope was we could put him into a
17 role where he could be very productive and continue on with
18 Illumina forever.

19 Q So your primary concerns with his performance at that
20 time related to strategic thinking, buildings business acumen and
21 leadership?

22 MR. PANTONI: Objection, leading.

23 THE COURT: But it just summarizes what he said. We're
24 trying to move things along.

25 MS KEARNS: Overruled or sustained?

26 THE COURT: Overruled.

27 MS KEARNS: Q You can answer.

28 A Those are the areas of my concern.

1 Q And at that time did you have a concern about his
2 ability to contribute on a scientific level?

3 A Not specific. I mean there had been some other kind of
4 peripheral problems with regard to Tony in the company. I had
5 hoped those would not be a factor in an individual contributor
6 role and that he would do well in a pure science spot.

7 Q Now, you've already testified that it was sometime
8 later that you actually communicated to Dr. Czarnik that you would
9 take him up on his offer to step down. Why didn't you accept the
10 offer on the spot during the [Daley's]¹³ dinner?

11 A Well, by that time we knew we were going to start
12 working on the IPO documents at the beginning of March, and to go
13 public you really do need to have a good team in place. So
14 depending upon how fast I was able to get a replacement, we could
15 have made the decision to keep Tony in the CSO role for some
16 amount of time while we did the public offering, if that was
17 required. So what I began to do after the [Daley's]¹³ dinner was to
18 really look carefully to see whether I could come to an agreement
19 with David Barker to join the company.

20 If I was able to have David join the company, then we could
21 move quickly and make it happen before of IPO instead of after.

22 Q By the time of the [Daley's]¹³ dinner, then, David Barker
23 had expressed an interest, correct?

24 A That's right.

25 Q Had you engaged in any negotiations with David Barker
26 by that point?

27 A None at all.

28 Q So is it fair to say that although David Barker

1 expressed interest, you didn't have any guarantee that you'd be
2 able to get him?

3 A Well, in fact it was worse than that. David had -- In
4 fact, I had an agreement as part of my departure with Molecular
5 Dynamics I wouldn't go in to people inside of Molecular Dynamics
6 and hire them away. David at that point was working for Amersham
7 for the CEO, and so it was very clear that if there was any chance
8 of me getting David that I had to negotiate this directly with
9 Amersham, not just with David.

10 So during that subsequent period I actually entered into a
11 discussion with the CEO of Amersham and basically had to get
12 permission to take him from the company. The reason he granted
13 that was David was going to leave anyway. David wasn't enjoying
14 his role there, and the CEO knew that, so he granted me permission
15 to take David away, but that took sometime to get in place.

16 Q You didn't make any firm offer to David Barker until
17 you determined that Amersham would let you take him?

18 A That's right.

19 Q You said, Mr. Flatley, one of your intended topics to
20 discuss during dinner was discussion about Dr. Czarnik's
21 performance issues, correct?

22 A Right.

23 Q Did you have that discussion during this [Daley's]¹³
24 dinner?

25 A Well, I didn't go into all the things that I had
26 originally planned to go into, so we talked a little about the
27 SAB, a little about Chevron. Because Tony basically agreed very
28 quickly to step down to this research fellow position that we

1 began to talk about, most of the other performance issues became
2 irrelevant so I didn't feel a need to dive down into those
3 difficult problems there.

4 Q You were more focusing on moving forward?

5 A Yes. There was a lot going on and I needed to move
6 quickly, and my hope was everything was going to get resolved and
7 we're going to work out fine.

8 Q Was there any discussion whatsoever during this dinner
9 meeting about Dr. Czarnik's history of depression?

10 A No.

11 Q Was there any discussion whatsoever during this dinner
12 meeting about medications?

13 A No, that didn't come up.

14 Q Any discussion during this dinner meeting about an
15 unspecified medical condition?

16 A No.

17 Q Do you have any doubt in your mind about your testimony
18 and your answers to the last three questions?

19 A No, none whatsoever.

20 Q When is it in relation to the [Daley's]¹³ dinner that you
21 finally did communicate to Dr. Czarnik that you'd take him up on
22 his offer and have him step down as CSO?

23 A That meeting occurred on March 1st.

24 Q And in this meeting you told him that you were taking
25 him up on the offer, correct?

26 A That's right.

27 Q Is it in this meeting you also communicated to him that
28 you would be making changes in his compensation?

1 A Yes, I did.

2 Q Now, Mr. Flatley, we've heard testimony from Dr.
3 Czarnik about the change in compensation. Let me ask you, what
4 exactly did you tell him in this meeting about the changes in
5 compensation?

6 A I told him that it was my intention to reduce his
7 salary and to reduce his stock and to do that commensurate with
8 his change to research fellow.

9 Q The proposed change in salary was a reduction from
10 185,000 to 165,000 a year?

11 A That's right.

12 Q A little over a 10 percent reduction?

13 A Yes, that's about right.

14 Q Did Dr. Czarnik express any resistance or opposition to
15 that change during this meeting?

16 A No.

17 Q When you communicated to Dr. Czarnik during March --
18 the meeting on March 1st, 2000 an intention to reduce his stock
19 vesting, did he in that meeting express any opposition to the
20 concept?

21 A No, he did not in that meeting.

22 Q Why did you feel that reductions in salary and stock
23 were called for given the change in position?

24 A Tony was the highest compensated person in the company
25 other than myself, and clearly by that time I had drawn the
26 conclusion his contribution, actual contribution, was distinctly
27 different than that of John and Mark in particular. And one of
28 the responsibilities I have as CEO is to maintain equity among

1 people inside the company. So there were many people who knew
2 what Tony's compensation was in the company, and particularly
3 given the fact that he was stepping down to a lesser management
4 role, I felt an adjustment in compensation was absolutely
5 appropriate to maintain equity with people inside the company and
6 with outside market conditions.

7 Q Now, on direct questioning by Mr. Pantoni, you
8 testified that you consulted with counsel other than me concerning
9 the stock change, correct?

10 A Yes.

11 Q You testified that that counsel told you that it could
12 only be changed by agreement, right?

13 A That's correct.

14 Q Your counsel didn't use the word "illegal," correct?

15 A No, they didn't.

16 Q Or "not legal"?

17 A No.

18 Q So an agreement was presented to Dr. Czarnik which he
19 ultimately declined to sign, right?

20 A Yes.

21 Q As a result, isn't it true his stock vesting was never
22 changed?

23 A It was never changed until termination.

24 Q Well, at that point it just stopped, correct?

25 A The discussion stopped about changing his stock, yes.

26 Q And when Dr. Czarnik declined to sign the change of
27 position agreement, did you say to him, "You know what this means,
28 don't you?"

1 A No, I did not.

2 Q Are you sure?

3 A I'm positive.

4 MS KEARNS: How him am I doing on time, your Honor?

5 THE COURT: I think you've gone about 45 minutes.

6 MR. PANTONI: It's been an hour and five minutes.

7 THE COURT: Hour five minutes. You started at --

8 MR. PANTONI: But who's counting?

9 I stopped at 1:20 on the dot.

10 THE COURT: Was it 1:20? I wrote 1:40. 1:20?

11 So it's an hour five minutes. You want to take a break?

12 MS KEARNS: Is this a good time?

13 MR. PANTONI: Sure.

14 THE COURT: We'll take our afternoon recess at this
15 time.

16 MR. PANTONI: It's always a good time.

17 THE COURT: We'll be in recess until 20 minutes before
18 3:00. Please remember the admonition not to form or express any
19 opinion about the case, not to discuss the case. We'll be in
20 recess until 20 minutes before 3:00.

21 (Recess.)

22 THE COURT: The record will indicate all the jurors are
23 present, counsel and parties present.

24 You may continue your examination, Counsel.

25 MS KEARNS: Thank you, your Honor.

26 Let put up Exhibit 143.

27 Q Mr. Flatley do you recognize this as an e-mail you
28 received from Dr. Czarnik on March 2nd?

1 A Yes, I do.

2 Q This is the day after you communicated to him that he
3 would become a research fellow and his salary and stock were
4 proposed to be reduced?

5 A That's right.

6 Q In this message he says, "Most of what we discussed
7 yesterday seems fine, but the stock offer is demonstrably
8 incorrect based just on good accounting practice. I'll stop by
9 this afternoon to explain why." And you respond, "Okay."
10 Correct?

11 A Correct.

12 Q Now, anytime after you communicated to Dr. Czarnik on
13 March 1st that his salary would be reduced, did he ever complain
14 about that to you?

15 A No.

16 Q And in fact were you here when -- did you personally
17 -- Were you present when Dr. Czarnik said he didn't have an issue
18 with the salary reduction?

19 A Yes, I was.

20 Q Let's go to 144.

21 Do you recognize this as an e-mail communication between you
22 and Dr. Czarnik the next day, March 3rd?

23 A Yes.

24 Q And once again Dr. Czarnik is taking the position that
25 the proposed change in stock compensation is not appropriate or
26 warranted, correct?

27 A Correct.

28 Q He didn't say anything in this e-mail or any other

1 e-mail about the salary change?

2 A Correct.

3 Q Did Dr. Czarnik ever visit you and provide you with
4 accounting practice data that demonstrated why his stock reduction
5 wasn't appropriate?

6 A No.

7 Q Now, just so that we're absolutely clear, is it true
8 that Dr. Czarnik volunteered to step down as CSO?

9 A That's right.

10 Q And Dr. Czarnik proposed taking on the position of
11 research fellow, correct?

12 A Correct.

13 Q I understand that Dr. Czarnik wasn't proposing either
14 of these salary or stock reductions, but he didn't object to the
15 salary reduction, correct?

16 A That's right, he didn't object to the stock reduction
17 in the first meeting either.

18 Q So would you say, Mr. Flatley, you as of the [Daley's]¹³
19 dinner, Dr. Czarnik was agreeing if you chose to accept the offer,
20 he was agreeing to step down to become a research fellow, correct?

21 A Correct.

22 Q And he subsequently indicated that he didn't have any
23 -- In fact in court he indicated he didn't have a problem with the
24 salary reduction issue?

25 A That's correct.

26 Q Let put up Exhibit 231. Let me just say in broad form,
27 do you recognize this as the complaint of discrimination that was
28 received by you at Illumina?

1 A In broad form. It's hard to read from here.

2 Q I guess let's blow-up the top part. It's also in your
3 binder, 231.

4 A Yes.

5 Q So do you recognize this as the complaint of
6 discrimination filed by Tony Czarnik which you ultimately received
7 at Illumina?

8 A Yes, but that's not the same document. There. Yes.

9 Q Let's scroll down to this first paragraph of
10 particulars and blow that up. In this document, Exhibit 231, the
11 DFEH charge, there's a representation by Dr. Czarnik to the DFEH,
12 a governmental agency, that on or about March 14th he was
13 retaliated, "I was again retaliated when demoted to research
14 fellow earning \$165,000 per year." Do you see that?

15 A Yes, I do.

16 Q Is that an accurate characterization of the way by
17 which Dr. Czarnik became a research fellow?

18 A No. In fact, Dr. Czarnik had proposed the change to
19 research fellow.

20 Q He offered to step down, correct?

21 A Correct.

22 Q So he wasn't demoted per se, he was -- his offer to
23 step down was accepted?

24 A I guess I wouldn't say he offered to step down, but as
25 part of our discussions we'd agreed research fellow was the
26 appropriate role and he agreed that was the workable position for
27 him.

28 Q This line, when it talks about retaliation, it's

1 characterizing the change in position to research fellow as a
2 retaliatory action, correct?

3 A Correct.

4 Q Let's scroll down to the signature block. Mr. Flatley,
5 when people file charges with the DFEH they sign them, and they
6 sign them under penalty of perjury. Do you recognize that as Dr.
7 Czarnik's signature?

8 A Yes, it is.

9 Q Thank you.

10 Now, Mr. Pantoni asked you whether Dr. Czarnik offered to or
11 expressed an interest in taking a lead in your search for a new
12 CSO, do you remember that?

13 A Yes, I do.

14 Q Did you do a search for a new CSO?

15 A No, I never conducted a search.

16 Q Why not?

17 A Because I had in mind Dr. David Barker, who I thought
18 was a perfect fit for the position. I knew how well he had
19 performed for me prior, and by the time we brought him in, I knew
20 he was interested in the job so I had no need to do a search, and
21 I was under very tight time deadline to get the CSO position
22 filled.

23 Q Your direct testimony was you told Dr. Czarnik you'd
24 involve him in the process?

25 A Yes, I told him when he asked me about being involved,
26 I said I'd involve him in the process.

27 Q Did you ever tell him you'd involve him in a search?

28 A No, I wasn't planning on doing a search if I could get

1 David Barker on board.

2 Q Let's go to Exhibit 149. Do you recognize this as an
3 e-mail sent by Tony Czarnik to all of us, meaning all of Illumina
4 on March 8, 2000?

5 A Yes.

6 Q And Dr. Czarnik testified on direct that he sent out an
7 e-mail communication about his change of position at your
8 suggestion. That's what he testified to on direct. Is that
9 accurate?

10 A Well, if it was my suggestion. He announced it at the
11 morning R&D meeting, so he stood up and described to people at the
12 R&D meeting the fact he was making this change and what his
13 reasons were for making the change, and then we had agreed it
14 would be appropriate to put out an e-mail because there are people
15 who don't attend that meeting, so everyone would know.

16 Q There's a line in which Dr. Czarnik says, "Jay and I
17 agreed my interests and frankly abilities lie on the science
18 side." Did you insist that Dr. Czarnik include that verbiage, or
19 is that his own wording?

20 A No, he wrote this entire e-mail, I didn't write it.

21 Q Thank you.

22 Now let focus on the resignation. On March 8th Dr. Czarnik
23 communicates to the entire company that he's changing positions
24 and is accepting a position more consistent with his interests and
25 ability, right?

26 A Right.

27 Q You testified already that you believe it was in late
28 March, 2000 that he resigned?

1 A That's right.

2 Q On or about the 22nd or 23rd?

3 A That's correct.

4 Q When did this discussion between you and Dr. Czarnik
5 take place?

6 A What time of day?

7 Q Yes.

8 A I don't actually remember what time of day it was.

9 Q What did Dr. Czarnik say to you, to the best of your
10 recollection?

11 A He came into my office and he said to me that he was
12 resigning his position at Illumina and that he wanted to leave as
13 soon as possible and that the conditions at Illumina were
14 intolerable for him.

15 Q Did he specify what conditions were intolerable?

16 A No.

17 Q What was your response?

18 A I was frankly pretty stunned by this because I thought
19 things had gone pretty well, that I'd orchestrated a pretty smooth
20 transition of Tony into the research fellow role. I thought that
21 would work out well for the company. I was cautiously optimistic
22 that he could contribute in that role, and I was frankly
23 pleasantly surprised he came in and resigned.

24 Q And apart from your attorneys, did you tell anyone else
25 that Dr. Czarnik had resigned?

26 A I told John Stuelpnagel.

27 Q Did he have a reaction?

28 A He was equally surprised. This certainly isn't what

1 either of us had anticipated at that point, and I was frankly
2 still pretty early with the company. I'd only been there about
3 five months or so at that point. And so for me I was really very
4 interested in Tony being successful, and the fact he was now going
5 to be leaving the company, the one hand there were some positive
6 things because there were performance issues. On the other hand,
7 it wasn't necessarily the best thing for me that somebody senior
8 in the company was about to depart in terms of how the board might
9 view me in managing the performance of people and the
10 organization, that I was unable to get Tony to stay and be
11 productive.

12 Q What was the next communication you had with Dr.
13 Czarnik relating to his resignation?

14 A Well, I asked him some more questions during that
15 meeting. I said, "Tony describe your plan to me. What do you
16 want to do, how soon do you want to leave, how are we going to
17 transition the projects, do you want to leave in a week or a month
18 or three months, what's the phase out plan," and it was very clear
19 he hadn't thought that through.

20 He said, "I don't know. Conditions are just intolerable and
21 I need to leave."

22 I said, "Why don't you take a day and come back and talk to
23 me tomorrow about it a little more, put a little more meat on the
24 bones, if you will, how you want to exit the company," and how we
25 can orchestrate that that works for both Illumina and for him.

26 He did come back to me the next day.

27 Q Now, at this meeting, March 22 or 23rd, when Dr.
28 Czarnik resigns, did he say he was thinking of resigning?

1 A No.

2 Q Did he say he was contemplating resigning?

3 A No, he said, "I'm resigning."

4 Q Do you have an explanation for the jury why the
5 termination memo made reference to verbiage that said, "You stated
6 your intention to resign and later withdrew your resignation"?

7 A That memo was drafted in conjunction with my attorneys,
8 so that wasn't intended to reflect exactly the conversation that
9 we had. It was just a general description of what had happened.

10 Q As you sit here today, are you able to pick out
11 sentence by sentence what portion of the letter was your original
12 input and what portion of the letter may have been anyone else's
13 input?

14 A No, it was jointly developed, so I couldn't identify
15 that specifically.

16 Q Now, when Dr. Czarnik returned the following day to
17 discuss the concept of a transition plan, what was the transition
18 plan that he proposed to you?

19 A He said he wanted to leave immediately, and by that he
20 meant literally immediately, and that day, the next day. Right
21 away. And he said he wanted one-year salary, which in Dr.
22 Czarnik's contract there is a one-year salary provision in his
23 contract, so he wanted one year of salary and take all of his
24 stock with him. All the unvested shares he wanted to take with
25 him.

26 Q You mean the shares that would have vested over the
27 next several years?

28 A That's right.

1 Q What was your response to that proposal?

2 A I was very stunned by that proposal, that he would even
3 consider that. I mean equity in start-up companies is something
4 that you get as a privilege and is something that you earn and you
5 earn the right to keep that equity by being in the company and
6 participating in the company's success. So the notion he would
7 somehow leave the company and take all his stock with him was
8 unfathomable to me. It was a stunning proposal. I told him so.

9 Q Mr. Flatley, when you say equity in the company is
10 something that you get that is earned, do you mean it is earned
11 over the period of time during which it vests?

12 A That's right.

13 Q So even though the grant or the right to purchase the
14 full number of shares may have been given on the first date of
15 employment, the actual right to acquire all of those shares is
16 something that is acquired over time, correct?

17 A Yes, that's exactly right. This form of agreement with
18 early employees is it gives them the right to buy it to begin with
19 so that they can get capital gains treatment on the tax side, and
20 that's really why this is done. It's exactly the same as an
21 option that vests over time, except in this case, the company has
22 a right to repurchase. So it's just structured --

23 Q Which goes over time?

24 A The right to repurchase goes away as you vest the
25 shares.

26 Q So in your own mind, did you want, even though Dr.
27 Czarnik was making a proposal that you found unacceptable, did you
28 still want to try to reach some form of resolution with him?

1 A Sure. My objective at that point was to try to come to
2 whatever amicable parting we could and make it something that Tony
3 thought was fair to him on the one hand, but obviously my response
4 to him as CEO is to be fair to the company and our shareholders
5 and other employees in the organization, so I needed to structure
6 something I thought was reasonable, that I could defend to the
7 board of directors.

8 Q Is that why you allowed Dr. Czarnik to continue as an
9 employee as you continued severance negotiations?

10 A Exactly, yes.

11 Q Let me ask us to put up 164, please. Let's blow-up the
12 bottom message, first message.

13 This is Monday, March 27, a message from Tony Czarnik to
14 you, correct?

15 A Yes.

16 Q And he's telling you that he's planning to take
17 vacation that week, but that he'd be available to talk as needed
18 to talk. Correct?

19 A That's right.

20 Q This is about available to talk about what, the
21 severance issues?

22 A Yes, we were in a severance negotiation at this point,
23 so that's what this e-mail refers to.

24 Q Let's go to the next message above your response. Blow
25 that up.

26 Now, actually, I'm sorry, let's go back to the preceding
27 message for a moment.

28 So in Dr. Czarnik's message to you, Mr. Flatley, he states

1 that he's open to negotiating but on the condition that the
2 company makes a good-faith offer. That hasn't happened yet. Do
3 you see that?

4 A Yes.

5 Q Does that mean that at this point in time, Dr. Czarnik
6 is the only one who had been making proposals for what it is he
7 might get?

8 A No, I think we'd had a couple of rounds of discussion
9 by this time, or maybe at least one round of discussion. He
10 opened with a year's worth of salary and all his stock and I come
11 back with a counterproposal to that. I think what he meant there
12 was that it wasn't big enough to be something he considered a
13 good-faith offer.

14 Q Now, in your response, in fact, you reference "my
15 three-month proposal." So does that suggest to you that by this
16 date you in fact had put a three-month proposal on the table?

17 A Yeah, that's exactly what. So what I counter with was
18 three months of salary and three months of stock vesting and he
19 could leave as soon as he wanted to leave and walk away with that.

20 Q Now, this response on your part also says in the first
21 bullet point, "Companies don't usually give any severance for
22 employees who resign their positions." Do you see that?

23 A Yes.

24 Q Why do you include that bullet point?

25 A Well, severance is usually something that's reserved
26 for a situation where employees terminated. If an employee leaves
27 voluntarily, companies don't give severance generally for somebody
28 who decides to leave a job.

1 So what I was trying to do with Tony is to offer him
2 something, he had been with the company for awhile, at the same
3 time I had also come to a severance agreement with Rich
4 Pytelewski, and I wanted to be fair to Tony. So I wanted to enter
5 into a severance discussion that I thought was reasonable.

6 However, I qualified that by saying that companies don't
7 usually offer severance at all to people who will voluntarily
8 leave.

9 Q Would you have included the verbiage about employees
10 who resign if Dr. Czarnik had not resigned?

11 A No.

12 MR. PANTONI: Objection, leading.

13 THE COURT: Sustained. It was leading.

14 MS KEARNS: Q Is there anything about this line,
15 "employees who resign their positions," that is inconsistent with
16 what actually happened with Dr. Czarnik?

17 A No, it's totally consistent.

18 Q Let's go to Exhibit 166-1. Actually 166 -- yeah,
19 166-1.

20 Mr. Flatley is this an e-mail to -- from you to Dr.
21 Czarnik, March 27th?

22 A Yes.

23 Q And you sent this to Dr. Czarnik from the Bay Area?

24 A That's right.

25 Q And you were soliciting additional feedback from Dr.
26 Czarnik and inquiring whether you should communicate by e-mail or
27 whether you should wait until you were back in the office Tuesday
28 the 28th, correct?

1 A Correct.

2 Q And let's have 166-2.

3 On Monday, March 27, the day before, we already saw this
4 message about if the company makes a good faith offer, as of
5 Monday, March 27, you knew that Dr. Czarnik was telling you that
6 he was planning to take some vacation time this week but severance
7 negotiations were important and he'd be available as needed,
8 correct?

9 A Yes.

10 Q Then you learned, you sent -- you learned from some
11 source on March 28th at 9:42 p.m. that Tony Czarnik had submitted
12 a paid time-off request for the entire remainder of the week,
13 right?

14 A Yes, my original response to him to the bottom e-mail
15 was sent at about 10:50 the night of March 27th, so I got back
16 from that same day and then I hadn't heard from him on the
17 following day, so I was trying to track him down.

18 Q So you were making an effort to try to communicate with
19 him during this week, correct?

20 A Right.

21 Q And you then learned that he was going to be out for
22 the rest of the week, correct?

23 A And apparently not checking e-mail because I had sent a
24 direct response to this e-mail immediately.

25 Q And based upon documents you've seen in this
26 litigation, do you have an understanding as to whether or not Dr.
27 Czarnik had a home computer system in his home during the time he
28 was employed by Illumina?

1 A He did, yes.

2 Q Because you've seen various documents that he e-mailed
3 to his home address from Illumina while employed at Illumina,
4 correct?

5 A That's right.

6 Q And so let's go ahead to -- It's Illumina 0529. It is
7 Dr. Czarnik's April 3rd, 2000 e-mail, which I think -- It may be
8 164. Yes, 164.

9 So is it your recollection, Mr. Flatley, that the first
10 response you got back from Tony Czarnik was Monday, even though
11 you were trying to track him down on Tuesday, the first response
12 you got was, to your e-mail back to him, was a week later, Monday,
13 April 3rd?

14 A Yes, that's correct.

15 Q And Dr. Czarnik is saying he just got back to the
16 office from vacation?

17 A Yes.

18 Q Does it appear that -- And he said, "I hoped you would
19 leave me a phone message so I could come in to talk. We could
20 have been working toward an agreement all week." Correct?

21 A Yes, that's right.

22 Q And you had left him e-mail, correct?

23 A Yes.

24 Q And did this -- This response message, "I hope you
25 could leave me a phone message so I could come in to talk," that
26 suggests to you he had been in town that week?

27 A It implies that. I don't know if he was proposing a
28 phone message at home there or his office, but we were typically

1 communicating by e-mail and that's how I sent his message back to
2 him, to his e-mail.

3 Q In his original message if which he told you he was
4 planning to use some vacation time but would be available to talk
5 as needed, did he say anything in that earlier exhibit about the
6 only way you can communicate with me during that week is by
7 telephone?

8 A No.

9 Q Did you have that understanding?

10 A No. In fact, I assumed that e-mail was the appropriate
11 communication mechanism because that's how we'd been doing it all
12 along, before and after this one.

13 Q Now, in this response, April 3rd, from Dr. Czarnik, he
14 states that "Every aspect of my original contract has been reduced
15 in a manner I consider discriminatory and punitive." Do you see
16 that language?

17 A Yes, I do.

18 Q When you read that language upon receiving this e-mail,
19 did you believe that Dr. Czarnik was referring to discrimination
20 in the employment -- in the legal context in terms of employment
21 law?

22 A No, not at all.

23 Q What do you think he meant?

24 A I assumed he meant he used the word "discriminatory"
25 there in context with the salary change to mean unfair and that he
26 was trying to imply that he thought that I had been unfair in
27 changing his employment agreement.

28 Q Now let's go to Exhibit 174. This is on April 5. Now,

1 Mr. Flatley, are you responsible for -- Let me strike that.

2 On or about April 5th, did it come to your attention that
3 Dr. Czarnik had filled out a time card for the preceding week
4 representing that he'd been at work for 40 hours that week?

5 A Yes, the way that works in our company is the
6 supervisor of any employee always approves the time cards for the
7 group of employees that report to him. So I would approve the
8 time cards for anyone who reported to me and reviewed each one
9 every week.

10 Q So when you got a time card for Tony Czarnik
11 representing a full work week the preceding work week, did that
12 raise a red flag for you?

13 A It did.

14 Q Because you knew he'd been on vacation, correct?

15 A For at least a portion of this week.

16 Q You'd been trying to communicate to him about severance
17 and gotten no response?

18 A That's correct.

19 Q You had another response from David Barker in an
20 earlier exhibit that we just saw indicating that Tony had put in a
21 PTO request for the remainder of that week?

22 A For the entire week, I believe, yeah.

23 Q So was it your intention in sending this e-mail simply
24 to get him to fill out an accurate time record of the time he
25 actually worked?

26 A Yes. I say there can you let me know the specifics of
27 this. I was just asking what's the reality of your time last
28 week, because I didn't know.

1 Q Let's go to Exhibit 173. Let's blow-up the top part.
2 Blow-up the whole thing if we can.

3 This is an e-mail which we've previously seen, Exhibit 173.
4 In this e-mail, Dr. Czarnik again uses the words, he says, "I do
5 not agree with your proposed reduction in my compensation and job
6 duties because it's discriminatory." Do you see that?

7 A Yes.

8 Q At any point before receiving this e-mail had Dr.
9 Czarnik ever suggested that he disagreed with his new job duties?

10 A No.

11 Q In fact he was proposing the research fellow position,
12 correct?

13 A He suggested it, yes.

14 Q And in this e-mail, this is the first time that Dr.
15 Czarnik mentioned discrimination based on medical condition,
16 correct?

17 A First time I'd ever seen that, yes.

18 Q When you saw that, did you know what he was talking
19 about?

20 A I had no idea.

21 Q Did you do anything to learn what he might be talking
22 about?

23 A I did. I went to see John Stuelpnagel. John was the
24 head of our HR group, and I asked John what he thought that meant.

25 Q What did he tell you?

26 A John at that point told me for the very first time
27 about the events that had occurred back in April, 1999 and the
28 fact that Tony Czarnik had suffered from depression and was on

1 medication for depression.

2 Q Is the is this the first point -- And when in relation
3 to April 5, the date of this e-mail, do you believe he spoke with
4 Dr. Stuelpnagel?

5 A I wouldn't be surprised if it was that afternoon. It
6 was pretty quick. I don't recall that exactly, but --

7 Q It was that date or -- Was that communication with John
8 Stuelpnagel, the first time that you ever knew that Tony Czarnik
9 had suffered from depression and was on medication for it?

10 A The very first time I ever heard anything about
11 depression.

12 Q Or being on medication?

13 A No, Tony had told me early on that he was on
14 medication, and that had happened in the first month that I was at
15 Illumina.

16 Q Did he ever specify to you the nature of the
17 medication?

18 A Not at all. It was a very casual comment. He said,
19 "I'm on medication and once in awhile I've had a side effect, and
20 if you ever see me acting funny, let me know." That was all.

21 Q Did you form any impressions at that time of what he
22 was taking medication for?

23 A I had no idea what that was about. I thought it could
24 have been a skin condition or a rash. I had no idea.

25 Q Now, Dr. Czarnik is encouraging you to respond with a
26 counterproposal for severance, correct?

27 A That's right.

28 Q And at anytime -- So at no time prior to April 5th,

1 2000, when you are in the middle of severance negotiations, at no
2 time prior to that had Dr. Czarnik ever expressed to you the view
3 that he was being discriminated against based upon a medical
4 condition, is that right?

5 A Prior to this date?

6 Q Right.

7 A Never.

8 Q And on this date do you remember that you were having
9 difficulty reaching an agreement in the severance negotiations?

10 A Yes. We were not converging very quickly at all.

11 Q Let's go to Exhibit 176. Do you recognize this as an
12 -- Have you seen this document before?

13 A Yes, I have.

14 Q You recognize this as an e-mail that was sent by Tony
15 Czarnik on April 6 to you, John Stuelpnagel, with a copy to David
16 Barker?

17 A Yes.

18 Q And in this Dr. Czarnik is saying he might not have the
19 opportunity to carry on with the Chevron project. Do you see
20 that?

21 A Yes.

22 Q Did you understand that to be because he had resigned
23 and would be leaving?

24 A That's what I assumed he meant, yes.

25 Q Let me ask you, Mr. Flatley, about the following date,
26 April 7, 2000. Did you attend a meeting with Dr. Czarnik and his
27 lawyer on that date?

28 A On April 7 I definitely had a meeting with his lawyer.

1 I don't recall whether Dr. Czarnik was present at that meeting or
2 not. We had at least one where Dr. Czarnik was present. It might
3 have been that same meeting.

4 Q And what was the purpose of that meeting?

5 A The purpose was to discuss the severance proposals that
6 were under consideration from both sides.

7 Q The lawyer who represented Dr. Czarnik in that meeting
8 was Mr. Pantoni?

9 A Yes, it was.

10 Q At that point in time had you retained any counsel to
11 assist you with respect to Dr. Czarnik and the issues raised by
12 him?

13 A We had had some discussions about that, but I don't --
14 let's see. I don't recall when we actually hired you.

15 Q May 12.

16 A May 12. So we had not hired you yet.

17 Q And were you represented by counsel in that meeting?

18 A I don't believe we were, no.

19 Q What happened in the meeting?

20 MR. PANTONI: Your Honor, I need to approach on this.

21 THE COURT: I'm sorry?

22 MR. PANTONI: I need to have a discussion about this.

23 THE COURT: With the reporter?

24 MR. PANTONI: Yes.

25 MS KEARNS: Yes.

26 (Proceedings at sidebar.)

2 (Proceedings resumed in open court.)

3 MS KEARNS: Q Mr. Flatley, do you remember having a
4 meeting with Mr. Pantoni asked you on direct whether you remember
5 a meeting with David Barker, Tony Czarnik and yourself involving a
6 discussion of his goals and you indicated you didn't have a
7 recollection of that?

8 A That's right.

9 Q Do you have a recollection of a meeting involving the
10 three of you?

11 A The three being Dr. Barker --

12 Q Czarnik, Flatley.

13 A Yes, we had a meeting on April 17th with the three of
14 us.

15 Q What was the purpose of that meeting?

16 A It was to discuss the severance proposals and what the
17 status of those proposals were. We had made an offer on April
18 7th, and the date of this follow-up meeting was April 17th, and we
19 hadn't heard anything in 10 days, so I was anxious to get some
20 feedback from Tony about whether we were making any progress.

21 Q I'd like to ask you to put up Exhibit 184.

22 MR. PANTONI: There's an objection to this.

23 MS KEARNS: Is there? Take it down.

24 Let me just ask you to refer to Exhibit 184 in your
25 notebook.

26 A Okay.

27 Q Are these your handwritten notes from that April 17th
28 2000 meeting?

1 A Yes, they are.

2 Q And don't read from the notes, but can you summarize,
3 up until the point when there was any lawyer involvement, can you
4 summarize what happened in the meeting between you, David Barker
5 and Tony Czarnik?

6 A Well, we had made this offer to Tony that I had
7 described from April 7th, and so I asked Tony whether he was
8 prepared to accept our offer.

9 Q And your offer was an offer for what?

10 A Was what I call the 6/6 offer, so six months of salary
11 and six months of stock.

12 Q So by this point, April 17th, you doubled the offer you
13 had made earlier in the month?

14 A That's correct.

15 Q Okay.

16 A And I was I guess pessimistic at that point because we
17 hadn't heard anything from Tony in 10 days. It had been radio
18 silence for all that time. So I better stop there I guess.

19 Q At that point there had been 10 days elapsed between
20 the first offer between your offer and this meeting?

21 A That's right.

22 Q And you said that at -- that this point there was some
23 lawyer involvement, is that that Tony Czarnik stepped out,
24 involved a lawyer?

25 A Yes.

26 Q What happened in the next -- between you, Barker and
27 Czarnik?

28 A Tony came back and said he would not accept our offer

1 but that he would talk to his lawyer overnight and come back with
2 a counterproposal, and believed he said he would tell us about
3 that the next day.

4 Q Now let me jump ahead a little bit and ask you a
5 question about this -- these allegations of discrimination based
6 upon medical condition. The first time you ever learned he was
7 making that contention was April 5th, 2000, correct?

8 A April 7th.

9 Q Whatever date exhibit is reflected. It's April 5th,
10 Exhibit 173.

11 A The first time the medical condition.

12 Q The first time the words "medical condition" was used
13 appears to be Exhibit 173?

14 A I'm sorry, April 5th.

15 Q Mr. Flatley, can you explain to the jury why no formal
16 investigation was done once you'd received the e-mail from Tony
17 Czarnik claiming discrimination based upon medical condition?

18 A Well, at this point the context of this discussion was
19 in -- it was all in the context of a severance discussion, so
20 we're going back and forth on severance debates, and this e-mail
21 that had come in just before this one had talked about
22 discrimination and the fact it was related to his change in job
23 duties and his change in compensation. The decision to make those
24 changes was done unilaterally by me, so there was no one else that
25 had made that decision. So frankly there was no one to
26 investigate because I was the person who had made the call with
27 regard to the changes on the job duties and with regard to his
28 changes in compensation.

1 Q Well, at the time you made the decision about changes
2 in job duties, changes in compensation, at the time you made those
3 decisions which he was now claiming to be discriminatory, had you
4 any information about Dr. Czarnik's medical condition at the time
5 you made those decisions?

6 A No, I had none. And additionally by this time we were
7 starting to get lawyers involved on both sides to handle the
8 negotiation between Tony and the company.

9 Q So let me ask you, when you saw Tony Czarnik's April
10 5th e-mail in which he's claiming that these changes were being
11 done on account of his medical condition, you knew, as you just
12 testified, that you were the person who made the decisions, right?

13 A That's right.

14 Q And you knew that you had no information about his
15 medical condition at the time you made the decisions?

16 A I had not.

17 Q So you knew that your decisions could not have been
18 based upon his medical condition?

19 A That's right, and in retrospect, I probably should have
20 conducted an investigation, but at that time the context of the
21 information I had at hand didn't seem like that was appropriate.
22 We were at the point where we were hoping we'd reach a quick
23 agreement on severance and Tony would leave maybe within a day or
24 two days, so we did not launch a formal investigation for that
25 reason.

26 Q Let me ask you this: Did you view, whether rightly or
27 wrongly, did you view Dr. Czarnik's e-mail to you in which he
28 alleges discrimination on account of medical condition as a

1 "complaint of discrimination"?

2 A Well, in retrospect I guess certainly you view it that
3 way, but when it came in in the context of the information I had
4 at that point, I didn't view it as a complaint in a formal way.
5 But certainly in retrospect I would.

6 Q You would do things differently today?

7 A Absolutely.

8 Q And Mr. Flatley, you keep saying in the context in
9 which I got this information. Let me ask you the blunt question.
10 Did you view Tony Czarnik's allegations of discrimination made to
11 you in the context of the severance negotiations to be a genuine
12 complaint of discrimination?

13 A Not at all. I mean I thought that the comments he was
14 making in these e-mails were intending to act as leverage in our
15 negotiations on severance, and that's the really context I viewed
16 them in at that time.

17 Q Did you view them to be veiled threats?

18 A Absolutely.

19 MR. PANTONI: Objection, leading.

20 THE COURT: It is leading. Sustained.

21 MS KEARNS: Q Now, Mr. Flatley, you testified that
22 after the severance negotiations really reached an impasse, you
23 determined that Dr. Czarnik had really not been doing much work
24 during the negotiations, right?

25 A Well, there was virtually no work I'm aware of that
26 occurred between his time of resignation, which was on the 22nd or
27 23rd of March, and the period of early May. So there's a period
28 here of six weeks or so where virtually only thing that was

1 happening was that Tony was talking to lawyers and talking to me
2 about severance. There was no work being accomplished.

3 Q Once you reached the impasse, you determined that you
4 needed to give Dr. Czarnik some specific goals to begin working
5 on, correct?

6 A That's right.

7 Q Who did the first draft of the goals?

8 A Tony did the first draft of the goals and submitted
9 them to Dr. Barker, because at that time he was reporting in to
10 Dr. Barker.

11 Q Did you understand that once -- but on or about May
12 4th, Dr. Czarnik began reporting to you, correct?

13 A That's correct.

14 Q Let's -- I'll hold off on the exhibit.

15 So even though Dr. Czarnik was going to be reporting to you,
16 did you still intend to have his individual goals reviewed and
17 commented upon by David Barker?

18 A Yes. David was -- I mean I was asking David's opinion
19 on the goals so he was involved in helping me set the final goals.

20 Q In setting these goals, did you make an attempt --
21 Well, in setting the goals, did you intend to give Dr. Czarnik
22 goals which were aggressive?

23 A Yes.

24 Q Now, there was one issue that was brought up by
25 Mr. Pantoni, and he said isn't it true that the with respect to
26 the binary oligo encoding goal, no work had ever been done on that
27 goal in the company at the time the goal was assigned, correct?

28 A Yes.

1 Q Had any preliminary work been done in the company which
2 would have completed part of what needed to be done toward that
3 goal?

4 A Yes. In fact, the reason we included that goal is
5 because we judged it to be easier than the one that Tony Czarnik
6 had submitted. So he submitted a proposal to do antibody encoding
7 and enzyme-based -- I'm sorry, decoding and enzyme-based decoding
8 as the two types of decoding. We substituted for enzyme the
9 binary oligo, and the reason that decision was made is because the
10 whole company was focused on trying to get the oligo-based
11 decoding up and running. We had in all all the algorithms to do
12 analysis, the imaging systems, the methodology how you would
13 attach oligos to bead. So the entire infrastructure had been
14 brought up well, well before that to enable us to do oligo
15 encoding, and to do binary oligo encoding was just an incremental
16 step.

17 Q This might be simplifying it a bit much, but you had
18 already developed the technology by which you could attach beads
19 to the wells, single oligos or single types of oligos to the beads
20 and then decode them?

21 MR. PANTONI: Objection, leading.

22 THE COURT: Sustained.

23 MS KEARNS: Q Can you describe for us what had already
24 been accomplished with respect to oligo decoding?

25 MR. PANTONI: Asked and answered an answer ago, Judge,
26 two answers ago.

27 THE COURT: Overruled.

28 THE WITNESS: The company had developed all the core

1 technologies and they were up and running and being used, so we
2 knew how to put oligos on beads, knew how to weld arrays by
3 putting beads in wells, knew how on image those, analyze the
4 image, how to extract, how to do clustering and analyze the
5 resulting data. The entire infrastructure was operational to
6 allow one to do binary oligo encoding, except for the part related
7 to that slight change of doing it in a binary way rather than
8 single.

9 MS KEARNS: Q When you say doing it in a binary way,
10 essentially what you were asking Dr. Czarnik to do which never had
11 been done before was to attach two oligos types to a single bead
12 rather than one?

13 A Two or more. There are multiple ways of doing this
14 binary encoding method. Dr. Czarnik was proposing a method where
15 I would attach five different types of oligos to a bead.

16 Q Were you anticipating he would start just attaching two
17 types to each bead?

18 A Two or three. You could do it in multiple different
19 ways.

20 Q Now let's put up Exhibit 304. Not the entire thing,
21 but just the portion that was included before. I think it's on
22 page 15.

23 So this is the portion of the DFEH response which
24 Mr. Pantoni examined you on?

25 A Yes.

26 Q And you in fact did review and give final approval to
27 my law firm to submit the response on behalf of Illumina, correct?

28 A Correct.

1 Q Now, Mr. Flatley, to the best of your knowledge, were
2 you the only person who provided input or review or approval of
3 this letter?

4 A No, there were multiple people who participated in
5 this. In fact, the person who did most of the input was John
6 Stuelpnagel, because the claims asserted in this had largely to do
7 with these events that occurred back in April, 1999, where I
8 wasn't even involved in the company. So I had no knowledge of
9 most of the facts related to this complaint.

10 Q Mr. Pantoni focused upon this verbiage, "Our position
11 that Dr. Czarnik instead proceeded directly to file with the
12 department, perhaps advising co-workers days before hand that he
13 was planning to do so." At the time that you approved this
14 language, which I wrote, had you conducted a comprehensive review
15 of the company's e-mail servers to ascertain whether or not Dr.
16 Czarnik ever sent e-mails concerning this issue?

17 A No, we hadn't really done a full review of our e-mail
18 system at this point.

19 Q Isn't it true, Mr. Flatley, that the DFEH response
20 document prepared by my law firm is a document of approximately 15
21 single-space pages?

22 A That sounds about right.

23 Q Let's go to just a discussion about the goals. When
24 you -- Actually let me jump back to another topic.

25 There was a board of directors meeting in April, 2000?

26 A Yes.

27 Q Was there any discussion whatsoever about Tony Czarnik
28 in that meeting?

1 A Yes, there was.

2 Q What was said? No, not what was said, what did you
3 say, if anything, about Tony Czarnik?

4 A I discussed the fact that we anticipated Tony was going
5 to be leaving the company, that we were in severance discussions,
6 that we had had a number of back and forth iterations on the
7 subject of severance, and we were trying to reach agreement with
8 him. I told him that the number that I thought was fair and the
9 limit of what I was willing to do was six months of salary and six
10 months of stock, and then we had a board discussion about what was
11 appropriate from there, and that was the time that the board
12 decided to try to have David Walt intervene as an intermediary to
13 try to get this settled and to offer up to nine months and nine
14 months.

15 Q Did you, in this board of directors meeting or any
16 other board of directors meeting, did you say that Tony Czarnik
17 was going to be given goals that he would not be able to a
18 achieve?

19 A I never said that to anyone.

20 Q Did you ever say that individually to any board member?

21 A No.

22 Q Did you ever say either in a group meeting or
23 individually to any director that Tony Czarnik had claimed to have
24 a disability but you didn't believe him?

25 A No.

26 Q Do you disbelieve that Dr. Czarnik has a disability?

27 A I've never had any reason to disbelieve that once I
28 became aware of it.

1 Q During the meeting in which goals were assigned, what
2 date is it that you were intending to assign the goals to Dr.
3 Czarnik?

4 A We were set to assign the goals at our regularly
5 scheduled meeting on May 18th.

6 Q Let me ask you this: We've seen it already, and in the
7 interests of time I'm not going to put up every document we've
8 seen, but this afternoon we've seen or this morning we saw the
9 message from Tony Czarnik advising you on the 17th that he might
10 be late for your meeting on the 18th, correct?

11 A That's correct.

12 Q Actually let's put that one up. That is the 5-17
13 e-mail from Tony Czarnik to Jay Flatley. Exhibit 222.

14 Do you recognize this as an e-mail that you received from
15 Tony Czarnik on May 17?

16 A Yes.

17 Q And he was advising you that he might be late for the
18 meeting, correct?

19 A That's right.

20 Q And he states, "At our meeting I'd like to discuss your
21 thought on the job description I wrote, my goals, and an update on
22 my work." Do you see that?

23 A Yes.

24 Q Was it understood between the two of you that at the
25 meeting on May 17th you would be discussing goals?

26 A The intent was to do that on the meeting of May 18th,
27 the day after this, yes.

28 Q Is it true by the time of the meeting on May 18, the

1 scheduled meeting on May 18 at 4:00 p.m., the goals which were
2 actually delivered to Dr. Czarnik were already prepared?

3 A Yes.

4 Q Were they already in written form?

5 A Yes.

6 Q Had he shown up at the meeting at 4:00 p.m. would you
7 have been prepared to hand him the same document which you ended
8 up delivering to him the following day?

9 A Yes.

10 Q And the only reason you didn't do that is why?

11 A Because he didn't show up for the meeting.

12 Q So you did it the following day?

13 A Right.

14 Q To the extent there's been any implication to this
15 effect, did you deliver your goals, the goals to Dr. Czarnik, on
16 May 19th to retaliate against him for having gone to the DFEH?

17 A Absolutely not.

18 Q Those goals were already prepared?

19 A Yeah, and they'd been discussed numerous times in
20 advance of this.

21 Q When you gave him the goals on May 19th, did he object
22 to any of them at that time?

23 A No.

24 MS KEARNS: My paralegal just handed me a note suggesting,
25 but I need to clear it with the Court, that given the fact we
26 didn't get started promptly at 20 of that if I continue until 4:12
27 p.m., that would give me still within the time limit. I'm
28 wondering if I can count on that.

1 THE COURT: Pardon?

2 MS KEARNS: Because we didn't get started promptly at
3 20 of 3:00, may --

4 THE COURT: I thought you were going to be done at 4:00
5 if we started at 20 of 3:00, so go to 4:05.

6 MS KEARNS: I'll do what I can.

7 Q Mr. Flatley, you at some point received that DFEH chart
8 which we had up on the screen a little while ago?

9 A Yes.

10 Q After you received the charge of discrimination from
11 Tony Czarnik, who was at that point still an employee, correct?

12 A Did you form the impression at that point that you
13 would be firing him?

14 A No.

15 Q Why not?

16 A Because he was on a performance program and we were
17 measuring him versus his goals, the complaint wasn't relevant to
18 what he was doing under his goals.

19 Q Let me ask you to -- Let's talk about the performance
20 management against goals. These were delivered to Dr. Czarnik on
21 May 19th?

22 A That's correct.

23 Q Did he express any confusion or misunderstanding about
24 when these goals were to be begin in effect?

25 A Not until sometime later

26 Q When later?

27 A About two or three weeks later he said, "I didn't
28 really think you meant for me to start these right away because I

1 was taking a vacation two weeks later," so for some reason he
2 assumed they didn't start until after his vacation.

3 Q Now, the -- To your understanding, the goals were in
4 effect immediately, correct?

5 A Immediately, yes.

6 Q The 30-day feedback would have been around June 19th,
7 correct?

8 A That's the day the feedback and his first goals were
9 due, yes.

10 Q Did you get anything from him relating to his first set
11 of goals on or about June 19th?

12 A No.

13 Q When did you finally receive any work product relating
14 to Dr. Czarnik's first set of goals?

15 A The major deliverable for the 30-day goals were these
16 work plans, and the first time that I received those was after I
17 was on the roadshow, which was around July 11th or 12th.

18 Q Now, did Dr. Czarnik at some point -- You've just
19 testified he expressed a belief that the goals actually didn't
20 start for another two weeks or so?

21 A Right.

22 Q In your first weekly meeting with Dr. Czarnik after the
23 assignment of the goals, did he ask you for another set of the
24 goals?

25 A Actually it was a few meetings after that that we got
26 together, and I believe it might have even been the meeting that
27 was targeted for the 30-day review. He came into that meeting, he
28 had no paper, no pencil, no notebook, no copy of the goals. He

1 had nothing in hand. And when I asked him specifically to give
2 meet deliverables for the 30-day goals, he said -- he acted very
3 surprised and said, "Can I get another copy of those?"

4 Q Did that give you the impression he had done nothing
5 toward those goals?

6 A It was worse than that. He hadn't done anything, and
7 it's almost like he didn't remember he had goals.

8 Q And so even by Dr. Czarnik's count, if the goals had
9 not gone into effect until June 1st, would his 30-day deliverables
10 have been due on or about July 1st?

11 A Yes.

12 Q Even though you were on vacation during that week
13 encompassing July 1st, were you doing work?

14 A Yes.

15 Q And if you had received the deliverables relating to
16 30-day goals on or about July 1st, would you have had time to
17 provide any feedback concerning those goals before he left on the
18 roadshow?

19 A I certainly would have had sometime to do that. I
20 might have not have done a totally thorough review, but certainly
21 got some initial feedback to him.

22 Q So you say the first point in time which you received a
23 major deliverable, which was the work plans for relating to the
24 two experimental goals, was while you were on the roadshow?

25 A That's right.

26 Q And isn't it true, Mr. Flatley, that these work plans
27 were documents whereby you were expecting Dr. Czarnik to lay out
28 the design of the experiment, the budget, the time frames, what

1 he'd need to do the experiments? In other words, to explain what
2 he intended to do and how he intended to do it?

3 A Exactly, yes.

4 Q You received those while on the roadshow, correct?

5 A Correct.

6 Q Did you have time to open up and read these documents
7 while you were on the roadshow?

8 A I believe I probably opened the e-mail and did maybe a
9 30-second scan of what was there, but I didn't really have a
10 chance to do it in any detail or provide any feedback.

11 Q In fact, did you forward Dr. Czarnik's e-mail with his
12 work plan attachments to your assistant Carmela?

13 A Yeah, there were some attachments to the work plan that
14 were I think large images, so I didn't even have time to download
15 those. I maybe downloaded some headers, so I ordinarily forwarded
16 them to Carmela. I think I maybe asked for her to print them and
17 forward them off to me by mail, or at least put them in my box. I
18 don't recall what I asked her to do.

19 Q Now, during the period of time that you were on the
20 roadshow -- Actually, let's put up 266 before I go to the
21 roadshow.

22 Do you recognize this as an e-mail sent by you to Tony
23 Czarnik on July 9?

24 A Yes.

25 Q And you indicated that on June 27th he was already more
26 than a week late on delivery of his 30-day goals, correct?

27 A That's right.

28 Q That's using a start date of May 19th, correct?

1 A That's correct.

2 Q Isn't it true that even with a start date of June 1, by
3 Sunday, July 9 -- by Sunday, July 9 you still had not received
4 the 30-day deliverables?

5 A That's correct.

6 Q So he was late even by his own start date measure?

7 A By any standard he was late.

8 Q Now let's focus on the roadshow for a moment. During
9 the month of July, most of the month of July you were on the
10 roadshow?

11 A That's right.

12 Q Do you have a recollection, Mr. Flatley, of how many
13 cities you visited during roadshow?

14 A I think it was something like 17 cities, something like
15 that.

16 Q And you started that roadshow in Frankfurt, Germany?

17 A We made two presentations in New York and jumped on a
18 plane, flew immediately over to Europe, and started right when we
19 got to Europe in Frankfurt, yes.

20 Q As a generalization, how many presentations was the
21 team making each day?

22 A Probably the minimum was five or six and maximum
23 probably 12 in a given day.

24 Q And when I say making presentations, does it mean that
25 anywhere from five to 12 times a day you were making the same
26 pitch or same presentation to various groups?

27 A Yeah, it was exactly the same.

28 Q You had done a roadshow before, correct?

1 A Yes, I had led the roadshow at Molecular Dynamics in
2 1993.

3 Q Did you strive to say the same thing in presentations
4 in each presentation?

5 A Yeah, the goal of a roadshow is to as consistently as
6 possible communicate the company's story, so that's why we had the
7 prospectus to read, and the goal of the management team is to try
8 to communicate verbally using exactly the same materials, the same
9 story, every investor.

10 Q During the roadshow isn't it true you received an
11 e-mail from Mark Chee reporting on the most recent results of the
12 most recent iteration of the 768 decode experiments?

13 A Yes.

14 Q Did you use any of that information on the roadshow?

15 A No, we didn't.

16 Q Did you, before leaving for the roadshow, when you
17 asked Mark Chee to keep you apprised of experimental results in
18 your absence, did you have any intention of using any new
19 experimental results in the roadshow?

20 A No, our roadshow was totally prepared, it was practiced
21 over and over and over. It was absolutely a rote process. I
22 could have done it in my sleep. And we weren't -- The only
23 corrections we would make to the roadshow were things that, you
24 know, we had gotten some direct feedback from the bankers the day
25 before we left.

26 Q Can you explain to the jury -- Let's just say
27 hypothetically you'd gotten some results that were very
28 scientifically exciting and very positive. Can you explain to the

1 jury why you would still not have changed the content of your
2 roadshow presentation in future presentations.

3 MR. PANTONI: Object, that calls for speculation.

4 THE COURT: I think it does. I think it's a
5 hypothetical question.

6 MS KEARNS: Q Let me frame it a different way.

7 Mr. Flatley, is there any kind of scientific information that you
8 think would be appropriate to add into the roadshow presentation
9 midstream?

10 MR. PANTONI: Same objection.

11 THE COURT: Overruled.

12 THE WITNESS: No, there's no material that you really
13 can add to the roadshow while you are on the roadshow because
14 legally you don't want to give investors differential information,
15 so it's not reasonable to tell the first 10 investors something
16 and then tell the last 10 investors something different or add a
17 lot of new content to the roadshow. The goal is to be absolutely,
18 one, consistent and as legally consistent as you possibly can be,
19 because then everybody has exactly the same view of the company
20 and can make an equivalent decision whether to invest in this
21 opportunity.

22 MS KEARNS: Q That's why no matter what the quality of
23 scientific information that might be received on the roadshow, you
24 would keep the presentation the same as it was all the way
25 through?

26 A That's right. This was a very non-technical
27 presentation. The goal of these roadshows, investors are not
28 scientists, they are not people who understand technical material.

1 So the goal both in writing the document and in preparing the
2 roadshow is to get out as much scientific information as you can
3 and make it much more business and very high level so the people
4 can understand the story.

5 Q Let me ask you this: Did you ever specifically direct
6 that the 768 experiment that was -- Now, we've already
7 established there were a number of experiments that involved the
8 attempted decoding of 768 bead types, correct?

9 Actually isn't it true all the experiments through the
10 summer of 2000 were experiments which were geared at demonstrating
11 the feasibility of decoding that many bead types?

12 A The goal of these experiments is to increasingly
13 increase the number of beads. So they were trying to show we
14 could decode large numbers of beads, increasing numbers of beads.
15 Consistently hitting 768 was not the goal, it was to decode as
16 many as you could. If we hit 768, that would have been a miracle.
17 We tried to hit as many as we possibly could out of that to show
18 we could decode a lot of bead types.

19 Q Around Illumina did you ever hear these experiments
20 referred to as "the roadshow experiments"?

21 A Never.

22 Q When was the first time that you ever heard of these
23 experiments referred to as roadshow experiments?

24 A During my deposition with Tony Pantoni.

25 Q And he used that term in a question to you?

26 A Yes.

27 Q Now, you've already testified that you did learn about
28 the dye mislabeling issue?

1 A Yes, correct.

2 Q Did you have a conversation about the mislabeled dye?

3 A Correct.

4 Q Did you have a conversation with Dr. Czarnik about the
5 labeled dye?

6 A Correct. After you came back from the roadshow, he
7 came into my office and wanted to be sure I knew about this. I
8 said -- I don't remember how I found out about it, but it was
9 post-roadshow, and Tony was very interested in trying to recover
10 the money we had spent on these dyes from our vendor. So he asked
11 me can and should I go try to recover this money. I said great,
12 do it. He did, and got the money back.

13 Q Did Dr. Czarnik express to you at that time a concern
14 that misleading data had been shown to investors on the roadshow?

15 A No.

16 Q Separate and apart from that one discussion about the
17 mislabeled dyes, as you sit here today, did Dr. Czarnik ever
18 expression to you he had a concern that investors on the roadshow
19 might have been misled by any information we've heard represented?

20 A He never said that to me.

21 Q Now, during the period of time after you got back from
22 the roadshow, and continuing up in time to the termination meeting
23 on September 5, you were meeting with Dr. Czarnik on virtually a
24 weekly basis, correct?

25 A Correct.

26 Q He never raised this issue about fraud on investors in
27 any meeting with you?

28 A Never.

1 Q Did anybody else communicate to you that he had raised
2 that concern with them?

3 A No.

4 Q Now let's put up Exhibit 283. Let's blow it up.

5 Mr. Flatley, is this a memo to you, from you to Tony
6 Czarnik, with your feedback on his 30-day goals?

7 A Yes, it is.

8 Q And why is it dated August 1st, 2000?

9 A Because I was gone from the office virtually the entire
10 month of July. First on vacation the first week and then on the
11 roadshow. So this was right after I returned.

12 Q And you indicate that the plan on the immunocoding
13 technology issue was received on or about July 11 while you were
14 on the roadshow, correct?

15 A That's correct.

16 Q Now, similarly, the work plan for the binary oligo
17 encoding project was also not received until July 11 while you
18 were on the roadshow, correct?

19 A That's correct.

20 Q You were acknowledging with respect to both you owed
21 him feedback?

22 A That's correct.

23 Q By this date, August 1st, you'd been back in the office
24 from being gone for about a month for all of a couple of days,
25 correct?

26 A Yes, and there was a weekend in between, so July 29th
27 was a Saturday and the 30th was a Sunday.

28 Q Let's go down to the last item, which was Dr. Czarnik's

1 third goal. It was to develop an idea for a grant application and
2 outline grant objectives. On questioning by Mr. Pantoni, there
3 was questioning about whether you knew that Dr. Czarnik had had a
4 breakdown at an earlier point in time when he was working on a
5 grant application, correct?

6 A Correct.

7 Q Mr. Flatley, was the decision to give -- Now, you
8 understood that that breakdown had to do with the change in
9 medication and not the grant application, correct?

10 A That's right.

11 Q You heard Dr. Czarnik's direct testimony that he
12 verified that?

13 A That's right.

14 Q So was the assignment for, in addition to his goals, a
15 grant application work in anyway done to be malicious, hurtful or
16 harmful?

17 A No, just an attempt to try to raise additional funds
18 for the company and something that might be related to a great
19 invention he might come up with as part of this program.

20 Q Did you feel that somebody who was a high level
21 research scientist, that it was a reasonable expectation to ask
22 him to prepare a grant application per quarter?

23 A Yes, absolutely.

24 Q Let's go to Exhibit 291.

25 Mr. Flatley, do you recognize Exhibit 291 as another memo
26 you sent to Tony Czarnik on or about August 8?

27 A Yes, I do.

28 Q This is your feedback for him on his 60-day goals which

1 had been due mid-July, correct?

2 A Correct.

3 Q And even by his standard, if they didn't begin until
4 June 1st, they would have been due August 1st?

5 A That's right.

6 Q And isn't it true that a number of these goals, the 60-
7 day goals, were also not achieved?

8 A Right. In fact, most of the 30-day goals were still
9 not achieved at this point.

10 Q And the experimental 60-day goals, numbers 1 and 2,
11 still were not achieved?

12 A That's right. In fact, by this point it was beginning
13 to become clear there was literally no effort going into making
14 these goals.

15 Q Now, let's go to the second page of this exhibit.

16 On the second page of this memo written August 8, 2000, you
17 say, "In addition to reviewing of 60-day goals, I provided you
18 feedback on your binary optical coding plan."

19 A Yes.

20 Q Verbally in this you communicated your feedback on that
21 work plan that you perceived?

22 A Yes.

23 Q In this e-mail -- In this memo you were clearly
24 advising Dr. Czarnik that you were trying to provide him with
25 support and ongoing feedback, you expressed a concern about the
26 lack of progress, did you not?

27 A I did.

28 Q And you expressed that it was a great concern, right?

1 A Right.

2 Q You wanted to provide him with assistance, and you
3 suggested that if a neutral facilitator would be helpful in the
4 weekly meetings, that was something you were willing to do?

5 A Correct.

6 Q And at the very end here you indicate that a failure to
7 make significant progress toward completing your unfinished 30-,
8 60-day goals and toward your 90-day goals would result in a
9 reevaluation of his continued role at Illumina and could result in
10 termination?

11 A Correct.

12 Q You didn't say a failure to attain all of those goals
13 would result in his termination, did you?

14 A No, I thought we set aggressive goals, and the
15 expectation was not he would finish every one of them and finish
16 them successfully. We expected a tremendous effort and a great
17 experiment. Could be we discovered there was a problem with one
18 of them and we'd take a different direction. The big challenge
19 here there was no experiment. There no experimental results to
20 look at, and Tony was more or less ignoring these goals.

21 Q I guess my real question, Mr. Flatley, is this: By
22 this point in time, August 8th, Dr. Czarnik was already
23 significantly behind in his 30-day goals, right?

24 A Right.

25 Q He was behind in his 60-day goals?

26 A That's right.

27 Q And I guess my question is at this point in time were
28 you looking -- I mean although obtaining and hitting these goals

1 would have been ideal, isn't it true what you were really looking
2 for and what you communicated to him that you were looking for was
3 progress towards these goals?

4 A That's right.

5 Q And if by the 90-day mark Tony Czarnik had made
6 significant progress and effort toward the goals and had not
7 attained them, would you advise --

8 MR. PANTONI: Objection, speculation.

9 THE COURT: Sustained.

10 MS KEARNS: Q What would you have required in order --
11 What were you looking for from Dr. Czarnik in order to turn around
12 the trend that you were seeing by this point?

13 A I would have expected Dr. Czarnik to produce some
14 significant experimental results on both the first two objectives
15 that showed early phase feasibility of those. I would have
16 expected, based on the feedback I gave him on the work plans, to
17 make the work plans something other than a superficial document,
18 which is what they were when they were submitted to me. I would
19 have expected him to conduct some analytical analysis using some
20 modeling to determine the feasibility of some of the things that
21 we were trying to do, and had shown some significant effort toward
22 achieving these objectives.

23 Q When did you reach the decision to terminate Dr.
24 Czarnik's employment?

25 A August 29th.

26 Q Was there any specific event or incident that prompted
27 you to reach that conclusion?

28 A Yes, it was our review, I think this was about a

1 hundred days into this, a review meeting with Tony, asked him for
2 experimental results. He couldn't show me any. The progress was
3 -- There was no progress. It was unbelievable to me.

4 I asked him to go get his laboratory notebook to show me
5 what he had put in his lab notebook. Through a hundred days of
6 work, there were six pages of entries in his lab notebook. To
7 document that, I actually initialed and witnessed his notebook on
8 those six pages. And then I asked him to produce for me any other
9 supporting material that he had that was evidence of his work
10 toward his goals, any analytical work he had done on Excel, any
11 experimental results, any quality control data on reagents.
12 Anything else he had that could show to me he was actually doing
13 any work.

14 Q Did he ever provide you with any of those materials?

15 A The afternoon of September 5th, the day I terminated
16 him, a small package arrived in my box that were quality control
17 traces from outside vendors.

18 Q That was it?

19 A There were a few other small documents in there, but by
20 that time we were past the point of no return.

21 Q In fact at some point early, early, in fact on or about
22 August 30th, after you had requested that Dr. Czarnik provide you
23 with any additional evidence that he'd been doing work, what is it
24 that he provided you on that date?

25 A He gave me what we call a self-assessment, which is
26 part of our performance appraisal process. We ask employees to do
27 a self-assessment, what they think about what they've done. And
28 so in response to my request for hard information about the

1 experiments and data, I got his own review of himself.

2 Q And in self-review, did he rank him as performing quite
3 well?

4 A Oh, yeah.

5 Q So on September 5th, 2000, you had the termination
6 meeting with Dr. Czarnik and Deborah Flamino present?

7 A That's correct.

8 Q In that termination meeting, I think we've been through
9 it, but do you deny making a statement to Dr. Czarnik about his
10 expressing concerns about decoding?

11 A Yes, I never had to say that.

12 Q But you did tell him broadly he needed to keep all
13 public information about the company confidential?

14 A I reminded him of his obligation under his
15 non-disclosure agreement with the company and that it was
16 absolutely his responsibility to make sure he maintained all
17 information about the company as confidential.

18 Q What was Dr. Czarnik's demeanor like during this
19 termination meeting?

20 A Relatively passive. I think he expected it and was not
21 a surprise to him.

22 Q Thank you.

23 I would have things further, but given the time constraint
24 we've agreed to, I'll have to end at this point.

25 THE COURT: Mr. Pantoni? Theoretically you've used up
26 all your time.

27 MR. PANTONI: I'm awfully tired and I know the jury is
28 awfully tired, too. I've got a few questions. I've got it on one

1 sheet of paper. Try to do it in five minutes or so.

2 MS KEARNS: Okay.

3 MR. PANTONI: Or so.

4 THE COURT: Or so.

5 REDIRECT EXAMINATION

6 BY MR. PANTONI:

7 Q I appreciate everyone trying to hang in there.

8 Few questions real quickly, Mr. Flatley, about your
9 commuting. You said at first when started at Illumina you
10 commuted two times a week from San Diego to the Bay Area?

11 A That's right.

12 Q How long did you do that?

13 A It was roughly through the summer of 2001.

14 Q So how many days a week were you at Illumina?

15 A I was at Illumina every day. Five days a week. Not
16 the weekend generally.

17 Q One point I want to make absolutely clear, because I
18 think we may have lost sight of this, the position you fired Dr.
19 Czarnik from was research fellow, not chief science officer,
20 right?

21 A That's right.

22 Q I made notes of some of the concerns you said you had
23 about Dr. Czarnik when he was a chief science officer. I want to
24 make sure he didn't have any of those responsibilities when he was
25 a research fellow. You mentioned first strategic planning meeting
26 on November 22, 1999. He had no involvement in strategic planning
27 as a research fellow, right?

28 A He did not.

1 Q You mentioned being concerned about his work on a
2 Chevron collaboration. He had no responsibilities as a research
3 fellow to work on business collaborations, is that true?

4 A No, he did have responsibility for the Chevron
5 collaboration for some period after he was research fellow. Once
6 the final goals were in place, as of May 19th, he no longer at
7 that point forward had responsibility for Chevron, but prior to
8 the 19th and after being put in the research fellow role he still
9 retained that responsibility.

10 Q During his goal period, no responsibilities for any
11 business collaboration, Chevron or otherwise?

12 A That's right.

13 Q You also mentioned a concern about an SAB meeting when
14 he was research fellow. He had no responsibilities connected with
15 the SAB, is that right?

16 A After he became research fellow? That's right.

17 Q And in fact, Mr. Flatley, isn't it true that any
18 alleged shortcomings or deficiencies that you think Dr. Czarnik
19 had as CSO did not enter into your evaluation of how he did as
20 research fellow?

21 A Anything he did at CSO?

22 Q Isn't it correct that any alleged shortcomings or
23 deficiencies you believe Dr. Czarnik had as a chief science
24 officer did not enter into your evaluation of his performance as a
25 research fellow?

26 A I don't think I'd say that.

27 Q Let me read your deposition testimony.

28 A Read it all.

1 Q Page 360, line 14:

2 "QUESTION: Now, Mr. Flatley, you testified to
3 some shortcomings or deficiencies that you believe Dr.
4 Czarnik had as a chief scientific officer at Illumina, and
5 my question is after you put Dr. Czarnik on a performance
6 plan when he was a research fellow, did Dr. Czarnik's
7 purported shortcomings as CSO enter into your evaluation of
8 his performance as research fellow?

9 "ANSWER: No."

10 Do you stand by that?

11 A Well, if you read that very carefully, what it says, it
12 asks about the deficiencies we talked about in the deposition.
13 The question relates to those deficiencies in the deposition. My
14 answer is absolutely accurate with regard to those deficiencies
15 that we talked about in the deposition. It's not accurate with
16 regard to anything that he did as CSO or any responsibilities he
17 had as an employee of Illumina during that time.

18 Q Let me ask you this: Did you consider events which
19 allegedly occurred before you arrived at Illumina, did you
20 consider those in deciding whether to fire Dr. Czarnik?

21 A What I testified to in my deposition and will restate
22 here is that it was very difficult for me to totally disregard
23 anything that had happened prior to his time as research fellow
24 from consideration. So in some way, some part, perhaps, some of
25 his deficiencies and problems prior enter into my decision.
26 However, the bulk of the decision was related to the fact that he
27 didn't achieve the goals and made no effort to achieve the goals.

28 Q This is an important point so let me read two, three

1 questions I asked you at your deposition, beginning at page 361,
2 line 25:

3 MS KEARNS: Bear with me a moment, Counsel. 361.

4 MR. PANTONI: Right.

5 MS KEARNS: I have it.

6 MR. PANTONI: Q 361, line 25:

7 "QUESTION: And did you consider events which
8 allegedly occurred even prior to your arrival at Illumina?

9 "ANSWER: No.

10 "QUESTION: In deciding whether to terminate
11 him?

12 "ANSWER: No.

13 "QUESTION: So is it accurate to say that in
14 making your decision to terminate Dr. Czarnik's employment,
15 you considered only events and behaviors and performance
16 that occurred after you arrived on board?

17 "ANSWER: That's correct."

18 A That's absolutely correct.

19 Q My final question is with respect to Exhibit 333.

20 Again these are notes that you and Miss Kearns talked about in a
21 telephone conversation to prepare for speaking with Dr. Czarnik
22 about his termination, correct?

23 A Yes.

24 Q Things you and Miss Kearns discussed that you should
25 say to Dr. Czarnik when you fired him, correct?

26 A These are notes that Miss Kearns read to me over the
27 phone. It wasn't a discussion or interaction.

28 Q It looks to me, sir, you tell me if I'm correct, but it

1 looks to me there was some wordsmithing done on the first
2 sentence. There was some changes or revisions to that text. It's
3 not written in one solid line. Am I correct with that?

4 A Yeah.

5 Q These words were selected very, very carefully between
6 you and Miss Kearns?

7 A No, not at all. This was a phone conversation that was
8 happening in real time.

9 Q You initially wrote, "I understand you've expressed
10 some opinions," and you inserted "strong opinions," and "in the
11 last few days." Is that right?

12 A Yeah.

13 Q And you had these notes with you during the termination
14 meeting, didn't you?

15 A They were in my office, but I was not reading them.

16 Q And your testimony is, despite having worked with Miss
17 Kearns on this language, and wordsmithed it, you said nothing
18 about what's on that first line?

19 A First off, I didn't -- I wouldn't say I wordsmithed
20 this in anyway, and I did not say what's on the first sentence.

21 Q You said everything else but the first sentence?

22 A I didn't say the other things either. I conceptually
23 communicated the rest of the material in this. I did not read.

24 MR. PANTONI: Thank you, Mr. Flatley.

25 MS KEARNS: In indulgence of Mr. Pantoni's one question
26 running to about 20 --

27 THE COURT: You don't have to editorialize, just get on
28 with it.

1 RE-CROSS-EXAMINATION

2 BY MS KEARNS:

3 Q Mr. Flatley, do you have your deposition transcript
4 available to you?

5 A I don't know.

6 THE COURT: I have copy of it here.

7 MS KEARNS: I'd like you to turn back to the last page
8 Mr. Pantoni read from on the very important point, page 361.
9 Mr. Pantoni read beginning at page 361, line 25, and continuing on
10 to page 362. I'd like to read the immediately preceding passage:11 "QUESTION: Well, did you consider any events
12 or behaviors or performance deficiencies that occurred
13 before Dr. Czarnik was a research fellow when you decided to
14 terminate his employment, or did you limit your analysis to
15 how he performed and how he behaved and how he conducted
16 himself after he became a research fellow?17 "ANSWER: My ultimate decision to terminate
18 him was an aggregate of all information that I had at my
19 disposal at the time I made that decision."

20 Was that your answer during the deposition?

21 A Exactly.

22 Q There was a follow-up question by Mr. Pantoni:

23 "QUESTION: Including things that happened
24 when he was or purportedly happened when he was chief
25 scientific officer?"26 And the reported answer is: "Certainly those were
27 events that I knew about and were considered in aggregate."

28 Was that your answer?

1 A Yes.

2 Q Next question: "Considered in connection with your
3 decision to terminate?

4 Reported answer: "Yes."

5 Was that your answer?

6 A Yes, it is it.

7 Q Do you recall Mr. Pantoni engaging in any questioning
8 to clarify or clear up what might appear to be an inconsistency in
9 this line of deposition questioning?

10 A No.

11 Q Thank you.

12 FURTHER REDIRECT EXAMINATION

13 BY MR. PANTONI:

14 Q While you have the deposition transcript open, I didn't
15 misread it, did I?

16 A You didn't read it at all.

17 Q Let me read it again.

18 MS KEARNS: No, the portion that you --

19 MR. PANTONI: Portion that I read.

20 THE COURT: It's already in the record, Mr. Pantoni.

21 MR. PANTONI: I want to be sure.

22 THE COURT: He said it was accurate when you read it.

23 She just read an additional part that came before the part you
24 read. So the record is clear, so you can argue it later on. No
25 sense having him -- He's already acknowledged what you read is
26 correct.

27 MR. PANTONI: Okay.

28 THE COURT: Anything further?

1 MR. PANTONI: No.

2 THE COURT: Okay.

3 We'll take our recess at this time. It's Thursday. We're
4 not going to be in session until one o'clock on Monday afternoon.
5 The plan is Monday afternoon from 1:00 to 4:00. Tuesday all day.
6 Wednesday, probably no, we're probably off, absent something very
7 unforeseen, and then to return Monday, July 8th for closing
8 arguments and jury instructions and begin deliberations.

9 Please remember the admonition. Take care of yourselves,
10 too. We're down to one alternate.

11 Remember the admonition, don't form or express any opinions
12 about the case, don't discuss the case among yourselves or with
13 anyone else.

14 We'll be in recess until 1:00 p.m. on Monday, July 1st. See
15 you at that time. 1:00 p.m.

16 (Proceedings resumed outside the presence of the jury.)

1 SAN DIEGO, CALIFORNIA, MONDAY, JULY 1, 2002; 12:45 P.M.

2 (Proceedings resumed outside the presence of the jury.)

10 (Jurors seated in open court.)

11 THE COURT: Record indicate all the jurors are present,
12 counsel and parties present.

13 Welcome back, ladies and gentlemen. I hope you had a nice
14 weekend.

15 Who is going to be calling the next witness?

16 MS KEARNS: The Plaintiff will, but the witness has
17 just gone to the restroom, apparently.

18 THE COURT: Okay.

19 MR. PANTONI: I'll wait to call her.

20 THE COURT: You want to call her first?

21 MS KEARNS: Our assistant has gone to hurry her along.

22 (Brief interruption).

23 MR. PANTONI: Call Deborah Flamino.

24 DEBORAH FLAMINO,
25 called as a witness by the Plaintiff, having been first duly
26 sworn, was examined and testified as follows:

27 THE CLERK: Please state your full name for the record
28 and spell your last name.

1 THE WITNESS: Deborah Flamino, F-l-a-m-i-n-o.

2 THE CLERK: Thank you

3 DIRECT EXAMINATION

4 BY MR. PANTONI:

5 Q Are you currently employed by Illumina?

6 A Yes, I am.

7 Q What is your current position with Illumina?

8 A HR manager.

9 THE COURT: Can everybody hear?

10 MR. PANTONI: Q You say HR manager, you mean human
11 resources manager?

12 A Yes.

13 Q And when did your employment with Illumina begin?

14 A December 16th, 1998.

15 Q You've been employed continuously from that date,
16 ma'am?

17 A Yes.

18 Q Now, when you first were hired, who was your immediate
19 supervisor?

20 A John Stuelpnagel.

21 Q Was Dr. Stuelpnagel the person who hired you?

22 A Yes, he was.

23 Q You took over some human resources responsibilities
24 from your first day of employment, right?

25 A Yes, that's correct. It was one of my essential
26 functions.

27 Q When did you receive the position of human resources
28 manager?

1 A March, 2000, I believe.

2 Q I'm sorry?

3 A March of 2000.

4 Q And after that point, after you were human resources
5 manager, were your duties and responsibilities exclusively in the
6 area of human resources?

7 A No.

8 Q Primarily?

9 A Yes, correct.

10 Q After you became human resources manager, were you the
11 highest ranking person in human resources in the company during
12 the time that Dr. Czarnik was employed there?

13 A No, John always assumed the title of VP of HR.

14 Q Let me refer to some of your deposition testimony in
15 this case. By the way, did you have a chance to review your
16 deposition transcript?

17 A A little bit, yes.

18 Q You made one change to the transcript, is that right?

19 A I don't know.

20 Q I'll represent I got a letter from Illumina's law firm,
21 Brobek, Phleger & Harrison, indicating you made one change on --

22 A I know what you mean. Go ahead.

23 Q Do you recall making one change to the transcript?

24 A Was it a misspelling?

25 Q Regardless of what it is, you do recall reviewing the
26 transcript and making one change, right?

27 A Yes.

28 Q Your deposition testimony at page 56, line 6:

1 "QUESTION: Now, after you became human
2 resources manager at Illumina, were you the highest ranking
3 person in human resources at the company?

4 "ANSWER: For awhile, Tony was working --
5 While Tony was employed?

6 "QUESTION: Yes.

7 "ANSWER: Yes."

8 So in the human resources department, you were the highest
9 ranking person, is that right?

10 A But again, John was always my boss.

11 Q Okay. Were you the person primarily responsible for
12 creating the employee handbook at Illumina?

13 A Yes.

14 Q Now, Miss Flamino, during the time that you were human
15 resources manager and Dr. Czarnik worked at Illumina, what was the
16 company policy with respect to discrimination?

17 A Zero tolerance.

18 Q What do you mean zero tolerance?

19 A So that we did not and would not allow for any kind of
20 discrimination.

21 Q What was the company policy, ma'am, with respect to
22 responding to allegations of discrimination?

23 A Immediate and swift. You do an investigation.

24 Q Company policy was to do an investigation?

25 A Correct.

26 Q The investigation would be immediate and swift?

27 A Correct.

28 Q And thorough?

1 A Hopefully.

2 Q And who was responsible for conducting investigations
3 into allegations of discrimination at Illumina?

4 A With regard to I think persons other than senior
5 management, it would have been myself.

6 Q Let me read your question on this subject. Page 56,
7 line 20:

8 "QUESTION: And what was Illumina's policy
9 with respect to responding to allegations of discrimination?

10 "ANSWER: If we knew about it, it would be
11 immediately investigated.

12 "QUESTION: And who was responsible for
13 conducting such investigations?

14 "ANSWER: Myself."

15 A Yes.

16 Q You stand by that testimony?

17 A Yes.

18 Q Miss Flamino, when did you first learn that Dr. Czarnik
19 was contending he had been discriminated against?

20 A Not until the papers were served to Illumina.

21 Q Papers being this lawsuit?

22 A Correct, and that was after Tony was terminated.

23 Q So did you learn anything about allegations of
24 discrimination on the part of Dr. Czarnik while he still was
25 employed at Illumina?

26 A No.

27 Q You didn't hear about it earlier from Jay Flatley?

28 MS KEARNS: Objection, asked and answered.

1 THE COURT: It's cross-examination. Overruled. You
2 may answer.

3 THE WITNESS: No.

4 MR. PANTONI: Q Did you see any of the e-mails that
5 Dr. Czarnik may have sent in the April, May, 2000 time frame that
6 dealt with discrimination?

7 A No.

8 Q During the time that Jay Flatley was having his weekly
9 meetings with Dr. Czarnik, did he ever inform you that Dr. Czarnik
10 had contended he had been discriminated against?

11 A No.

12 Q Were you informed that Dr. Czarnik had gone to the
13 Department of Fair Employment and Housing and filed a formal
14 charge of discrimination with the State?

15 A No. Did I know about that, is that what you are
16 asking?

17 Q Were you informed about that?

18 A No.

19 Q Miss Flamino, what is the company policy with respect
20 to what supervisor should do if he or she learns that an employee
21 is alleging discrimination?

22 MS KEARNS: Objection, vague as to time. Today or
23 then?

24 MR. PANTONI: Then.

25 Q During the time you were human resources manager and
26 Dr. Czarnik worked at the company, what was the company policy
27 with respect to what a supervisor should do if he or she learns
28 that an employee is alleging discrimination?

1 A To inform HR and then again HR would do an
2 investigation.

3 Q Immediately?

4 A Yes.

5 Q Let's take a look please at Exhibit 206.

6 Exhibit 206 is a copy of a memo we've seen before, a May 4,
7 2000 memo from Jay Flatley to Tony Czarnik. Miss Flamino, were
8 you present when this counseling memo was given to Dr. Czarnik?

9 A I don't remember if I was present when it was handed to
10 Tony.

11 Q Mr. Flatley's memo indicates that you were in fact in
12 attendance at a meeting that day.

13 A Right.

14 Q Do you recall a meeting where the subject matter of
15 this memo was discussed?

16 A Yes.

17 Q Do you have any information, ma'am, to the effect that
18 there was anything in Dr. Czarnik's personnel file indicating any
19 sort of negative performance in his personnel file prior to May 4
20 of 2000?

21 MS KEARNS: Objection, foundation.

22 THE COURT: Sustained.

23 MR. PANTONI: Q And you were the human resources
24 manager as of May of 2000, correct?

25 A Correct.

26 Q And were the personnel files kept under your general
27 supervision?

28 A Actually they were kept in John Stuelpnagel's office.

1 Q Did you have access to the personnel files?

2 A Yes.

3 Q From time to time in the course of your duty did you
4 review personnel files?

5 A I would audit them.

6 Q What do mean you would audit them?

7 A At one point to make sure that all the paperwork was
8 correct and proper, where you go through all the employees' files.

9 Q All right. Now, ma'am, do you have any information to
10 the effect that there was anything in Dr. Czarnik's personnel file
11 prior to May 4 of 2000 indicating negative performance?

12 A I don't remember.

13 Q Now, ma'am, when Jay Flatley testified about this memo,
14 I asked him who the two individuals were that gave him information
15 about Dr. Czarnik's alleged historical pattern of leaving the
16 facility, and Jay Flatley said one of the persons who gave him
17 that information was you. Is that correct, ma'am, did you give
18 this information to Jay Flatley?

19 A Yes, I'm sure on occasion I mentioned that Tony's
20 hours.

21 Q You are sure you are one the persons who gave Jay
22 Flatley information reflected in this counseling memo, is that
23 your testimony?

24 A I know I have in the past mentioned to Jay about Tony's
25 hours, but I do not know for sure if I am one of the two persons
26 that Jay is citing in that memo.

27 Q Did you tell Jay Flatley that Tony Czarnik had an
28 historical pattern of leaving the facility for extended periods?

1 A Yes.

2 Q When John or Jay were absent?

3 A Yes.

4 Q Let me read your deposition testimony on this subject,
5 beginning on page 68, where I was examining you about this very
6 same memo:

7 "QUESTION: By the way, the memo in the second
8 paragraph states that Mr. Flatley had been informed by two
9 individuals of certain things. Are you one of the two
10 individuals who informed Mr. Flatley?

11 "ANSWER: Not to my knowledge.

12 "QUESTION: Well, as of May 4, 2000, had you
13 had any conversations with Jay Flatley regarding any
14 performance problems on the part of Tony Czarnik?

15 "ANSWER: Specifically with Jay Flatley, is
16 that what you asked me?

17 "QUESTION: I think I did.

18 "ANSWER: Okay. Not to my knowledge.

19 "QUESTION: As of that date, had you spoken to
20 Dr. -- Mr. Flatley, had you spoken to Mr. Flatley
21 regarding Tony Czarnik's absences from the office?

22 "ANSWER: To Jay Flatley, no.

23 "QUESTION: Or what you perceive to be his
24 lack of work effort?

25 "ANSWER: Not to Jay Flatley."

26 Then on page 70, line 23:

27 "QUESTION: But your testimony still is you
28 did not speak to Jay Flatley about this before?

1 "ANSWER: No.

2 "QUESTION: Before this memo, is that right?

3 "ANSWER: Correct."

4 You didn't change that deposition testimony when you
5 reviewed your deposition, did you, ma'am?

6 A No.

7 Q Let's take a look at Exhibit 106, please.

8 Exhibit 106, Miss Flamino, are these handwritten notes that
9 you made?

10 A Yes, that's my writing.

11 Q Are these your notes of the meeting on May 4 of 2000?

12 A I believe so. Dates are mixed up in my head, so could
13 you give me a second?

14 Q Sure.

15 A I'm sorry, I'm kind of nervous because I've never done
16 this before.

17 I'm trying to remember if the May 4th -- Could you put the
18 May 4th memo up again? They seem they are two different meetings.

19 Q Exhibit 206.

20 A Yes, this was talking about Tony's attendance and
21 taking shot at John Stuelpnagel.

22 Q This memo?

23 A Yes.

24 Q Let's go back to 106.

25 Exhibit 106 are your notes from the same meeting?

26 A I believe so, but I don't -- the top part about --
27 that's why I was confused.

28 Q I was going to ask you about that. This meeting

1 started with respect Jay Flatley ended up talking to Dr. Czarnik
2 about performance. This meeting started with Jay Flatley
3 referencing a severance offer that David Walt had made on behalf
4 of the company, isn't that true?

5 A I don't know if he referenced it as David Walt making
6 that offer of 9/9, but there was an offer for 9/9.

7 Q 9/9 being 9 months of salary and 9 months of stock
8 vesting?

9 A Correct, from my understanding.

10 Q Isn't the David being referenced here David Walt?

11 A Yes.

12 Q So did Mr. Flatley then ask Tony Czarnik whether he was
13 willing to accept the offer of 9 months salary and 9 months
14 severance?

15 A Correct, that's what the notes say.

16 Q And Dr. Czarnik said no?

17 A Correct. That's what the notes say.

18 Q In fact that's what happened at this meeting?

19 A Yes.

20 Q So then after that happened, Jay Flatley told Tony
21 Czarnik he was no longer reporting to David, in this case it's
22 David Barker?

23 A Correct.

24 Q And that he was going to be reporting to Jay instead?

25 A Correct.

26 Q Did Jay say why he would be reporting directly to Jay?

27 A I don't remember.

28 Q Do you remember anything being discussed on that topic

1 other than the fact he was no longer reporting to David Barker,
2 instead would be reporting to Jay Flatley?

3 A That's all I remember.

4 Q What was the discussion on May 4 about, May 4, 2000,
5 about goals?

6 A I believe that Jay asked Tony to look over the goals
7 and that they'd meet and go over them in some detail.

8 Q And what goals were in place as far as you understand
9 as of May 4, 2000?

10 A I didn't see them, so I'm assuming 30, the 30, 60, 90.

11 Q Let's take a look at an e-mail that you sent five days
12 later on May 9 of 2000. It's Exhibit 218. Miss Flamino, at the
13 bottom of this exhibit do you recognize this as an e-mail you sent
14 to Tony Czarnik on May 9 of 2000?

15 A Yes.

16 Q So this was five days after the May 4 of 2000 meeting
17 where he got his counseling, right?

18 A Yes.

19 Q Actually skip to the next page first, please.
20 Recognize this as an e-mail you received from Dr. Czarnik on May 9
21 of 2000?

22 A Yes.

23 Q And Dr. Czarnik was asking you whether there was
24 anything unfavorable in his personnel file?

25 A Correct.

26 Q And then go back to the response, please. You
27 indicated in your e-mail you did check Dr. Czarnik's file and the
28 only note in there is the one from Jay?

1 A Yes.

2 Q That's the May 4, 2000 memo we just looked at?

3 A Correct.

4 Q In this e-mail you say, "I know this is wrong of me to
5 ask and I understand your issue of having to face yourself in the
6 mirror, but is not 12 months almost as good --" I'm sorry, "is
7 not nine months almost as good as 12 when you do not have to fight
8 anyone or anything? Think of the to-do you will be saving."

9 You sent that message to Dr. Czarnik?

10 A Yes.

11 Q You knew, ma'am, did you not, that as of early May of
12 2000, Jay Flatley was considering terminating Tony Czarnik's
13 employment, isn't that true?

14 A I didn't know if Jay was going to terminate Tony
15 because it depended upon his performance.

16 Q You knew as of early May of 2000 Jay Flatley was
17 considering terminating Dr. Czarnik's employment, didn't you?

18 A I knew that Tony had an opportunity to no longer work
19 at Illumina because there was an offer on the table of 9/9 and he
20 wanted 12/12.

21 Q The question is, I'll repeat my question, isn't it true
22 that you knew that as of early May of 2000, before Dr. Czarnik got
23 his final goals, you knew that Jay Flatley was considering firing
24 Tony Czarnik?

25 A I did not know that Jay Flatley was considering firing
26 Tony at that point.

27 Q Let me read from your deposition testimony, ma'am.

28 Page 80 line 9:

1 "QUESTION: When did you first come to learn
2 that Jay Flatley was considering terminating Tony Czarnik's
3 employment?

4 "ANSWER: Probably the beginning of May."
5 That's when you knew, ma'am, isn't it?

6 A See, the difference that needs to be pointed out here
7 is that I didn't know if he was going to terminate him or whether
8 or not Tony was leaving the company.

9 MR. PANTONI: Judge, I may I ask the court reporter to
10 read back the question and answer I read previous to reading the
11 deposition testimony?

12 THE COURT: Okay.

13 (Record read by the court reporter.)

14 MR. PANTONI: Q Let me read back your deposition
15 testimony.

16 "When did you first come to learn that Jay Flatley was
17 considering terminating Tony Czarnik's employment?

18 "ANSWER: Probably the beginning of May."

19 A I think there's a difference between terminating and
20 firing. That's what I'm trying to get at. You can terminate
21 someone's employment, but that's because they -- they've
22 terminated themselves, but it's still considered a termination.

23 Q I see. What fight did you think Tony Czarnik might be
24 able to avoid? You referenced a fight in your e-mail.

25 A It's the fight that Tony told me about. He said he was
26 going to fight it. That was the whole thing, something about
27 facing himself in the mirror and he was going to fight it to get
28 12/12.

1 Q And then you tell Dr. Czarnik, "Think of the to-do you
2 will be saving yourself."

3 "Think of the to-do you would be saving yourself," you were
4 talking about working on the goals Jay Flatley was going to be
5 assigning him?

6 A Not at all. It was the to-do in reference to the
7 difference between 9/9 and 12/12.

8 Q In this next e-mail on top of your -- This is an e-mail
9 you received from Dr. Czarnik on the same day, May 9 of 2000, is
10 that right?

11 A Yes.

12 Q And Dr. Czarnik said he'd love to talk to you about
13 this issue, right?

14 A Yes.

15 Q Scroll up to the top e-mail, please.

16 At the top, ma'am, is this an e-mail you sent on that same
17 day, May 9 of 2000, to Jay Flatley and John Stuelpnagel?

18 A Yes, I forwarded it onto them.

19 Q This is your writing, these are --

20 A Yes.

21 Q This is what you wrote and sent to Jay Flatley and John
22 Stuelpnagel?

23 A Correct.

24 Q You're questioning whether your use of the word "fight"
25 was the wrong verbiage?

26 A Yes.

27 Q You indicate that you will not go on a walk and talk
28 with Dr. Czarnik until you hear back from them, correct?

1 A Correct.

2 Q And the reason you didn't want to go on this walk until
3 you heard back was you do not want to jeopardize the company in
4 general and John in particular?

5 A Correct.

6 Q And the John you were concerned about possibly
7 jeopardizing was John Stuelpnagel?

8 A Correct.

9 Q Did you ever go on that walk and talk with Tony
10 Czarnik?

11 A Not to my knowledge.

12 Q Miss Flamino, did you ever hear from Jay Flatley at any
13 point in time that Dr. Czarnik had allegedly resigned his
14 employment with Illumina?

15 A I don't think so.

16 Q Did you ever hear from any source whatsoever that Dr.
17 Czarnik had resigned from Illumina?

18 A Not to my knowledge.

19 Q Did Jay Flatley ever give you the heads-up that you
20 might have to be preparing some paperwork or doing anything in
21 order to process a so-called resignation?

22 A Not a resignation, no.

23 Q In fact, ma'am, as a human resources manager, were you
24 even consulted with respect to the decision to make Dr. Czarnik a
25 research fellow?

26 A No.

27 Q Were you even consulted with respect to the decision to
28 lower Dr. Czarnik's stock after he was made a research fellow?

1 A No.

2 Q Were you even consulted with respect to giving Dr.
3 Czarnik 30-, 60- and 90-day goals?

4 A No.

5 Q Were you involved, ma'am, in any discussions regarding
6 Dr. Czarnik's progress toward his 30-, 60- and 90-day goals?

7 A No.

8 Q Were you even consulted in your capacity as human
9 resources manager with respect to the decision to terminate Dr.
10 Czarnik's employment?

11 A No.

12 Q Did you attend the termination meeting?

13 A Yes, I did.

14 Q Who asked you to attend?

15 A Jay Flatley.

16 Q Did he say why he wanted you there?

17 A Yes, he wanted me there.

18 Q Did he say why?

19 MS KEARNS: Objection, hearsay.

20 THE COURT: Sustained.

21 MR. PANTONI: Q Did you make any notes of the
22 termination meeting?

23 A I don't think I did.

24 Q Is there any particular reason you didn't make any
25 notes at the termination meeting?

26 A I don't usually make notes at a termination meeting.

27 Q You made notes of the counseling meeting on May 4,
28 2000?

1 A I was asked to.

2 Q Were you told not to make notes of discrimination?

3 A No.

4 Q Your normal practice as human resources manager is that
5 you do not make notes at a termination meeting?

6 A No, we do an exit interview, though.

7 Q Now, ma'am, the reasons that Tony Czarnik was given by
8 Jay Flatley at the termination meeting were that Dr. Czarnik was
9 not meeting his goals, is that right?

10 A Correct.

11 THE COURT: You've exceeded your time, Counsel.

12 MR. PANTONI: I think I've got two minutes, but I can't
13 quarrel with the judge and I've only got two minutes left.

14 THE COURT: Fine.

15 MR. PANTONI: Q Put up Exhibit 333, please.

16 Miss Flamino, Jay Flatley testified that Exhibit 333 are
17 notes that he made in anticipation of the termination meeting.
18 Let me ask you a few questions about what was discussed or what
19 wasn't discussed at the termination meeting.

20 At the termination meeting, did Jay Flatley make any
21 reference to decoding?

22 A Not to my knowledge, no.

23 Q Did Jay Flatley make any reference to obligations under
24 the -- to hold information about technology confidential?

25 A Yes, I think he reminded him of his confidentiality
26 agreement.

27 Q Did Jay Flatley at this termination meeting tell Dr.
28 Czarnik that if he didn't do that the company would pursue all its

1 remedies?

2 A I don't remember that.

3 Q You do remember him talking about keeping confidential
4 information confidential?

5 A Correct.

6 Q And at the termination meeting, this was after -- At
7 the termination meeting, did Mr. Flatley make a severance offer to
8 Dr. Czarnik?

9 A I don't remember.

10 Q Did he offer Dr. Czarnik three months salary and three
11 months stock vesting?

12 A I don't remember.

13 Q Let me try to refresh your memory by reading from your
14 deposition testimony.

15 A Okay.

16 Q At page 145, line 15:

17 "QUESTION: Miss Flamino, at the termination
18 meeting, did Jay Flatley offer Tony Czarnik severance?

19 "ANSWER: I think he did. One more time."

20 Skipping down to line 24:

21 "QUESTION: It was an offer that included both
22 severance and stock vesting, right?

23 "ANSWER: Correct."

24 And at page 146, line 4:

25 "QUESTION: What did Dr. Czarnik say with
26 respect to Jay Flatley's offer of severance?

27 "ANSWER: Disagreed.

28 "QUESTION: He declined it?

1 "ANSWER: Correct."

2 Jay Flatley did make a severance offer at the meeting,
3 didn't he?

4 A I would go with my deposition. I'm sorry, I'm a little
5 nervous.

6 Q Okay.

7 And he also at the termination meeting, Jay Flatley also
8 talked about the three choices that Dr. Czarnik had for removing
9 his personal belongings, true?

10 A Yes.

11 MR. PANTONI: Nothing further. Thank you.

12 THE COURT: Thank you.

13 You may examine.

14 MS KEARNS: Thank you.

15 CROSS-EXAMINATION

16 BY MISS KEARNS:

17 Q Good afternoon, Miss Flamino.

18 A Hi.

19 Q You've made a reference several times to being a little
20 bit nervous. Is that because of the case or because you've had a
21 prior negative experience in a courtroom?

22 A The only time I was in court was when I got a divorce
23 at 22.

24 Q That wasn't a positive experience.

25 A No.

26 Q Let me backtrack a little bit on some of the items that
27 Mr. Pantoni examined you on.

28 When you said in deposition -- Now, isn't it true, Miss

1 Flamino, your deposition was taken back in November of 2001?

2 A Yes.

3 Q So your deposition was taken much closer in time to the
4 events than today, correct?

5 A Correct.

6 Q Do you feel that your nervousness about testifying is
7 affecting in anyway your ability to recall things real quickly?

8 A Yes.

9 Q When you said that you had been promoted to HR manager
10 in or about March of 2000, and Mr. Pantoni asked you if you were
11 the highest ranking HR person, isn't it true that at that point in
12 time you were the only person --

13 MR. PANTONI: Objection, leading.

14 MS KEARNS: Q In March of 2000, were you the only
15 person at Illumina who held a title which included the words
16 "human resources"?

17 A Correct.

18 Q Is that what you meant by saying you were the highest
19 ranking human resources person?

20 A Correct.

21 Q When you said John Stuelpnagel assumed the title of VP
22 of HR, did you mean literally he held the title or simply he
23 performed the functions?

24 MR. PANTONI: Objection, leading.

25 THE COURT: Sustained.

26 MS KEARNS: Q To the best of your knowledge, did John
27 Stuelpnagel ever formally hold the title vice president of human
28 resources?

1 A No.

2 Q With respect to one of the passages read from your
3 deposition, Mr. Pantoni read some of your testimony on page 69,
4 and this related to whether or not you had had any conversations
5 with Jay Flatley concerning performance problems or Tony Czarnik's
6 absences from the office. Do you remember Mr. Pantoni reading
7 that in?

8 A Yes.

9 Q Let me read the very next series of questions that were
10 asked by Mr. Pantoni at deposition but which he did not read here
11 in court.

12 MR. PANTONI: I'll object to her using the deposition
13 transcript in this fashion. This is her witness.

14 THE COURT: Pardon?

15 MR. PANTONI: This is her witness.

16 THE COURT: She's been impeached, so I think now she
17 can be rehabilitated, if that's possible.

18 MS KEARNS: Q Page 69, actually let me just -- I'll
19 back up with Mr. Pantoni's passages at 68, line 19:

20 "QUESTION: Well, as of May 4, 2000, had you
21 had any conversations with Jay Flatley regarding any
22 performance problems on the part of Tony Czarnik?

23 "ANSWER: Specifically with Jay Flatley, is
24 that what you asked me?

25 "QUESTION: I think I did.

26 "ANSWER: Okay. Not to my knowledge."

27 Page 69, line 1:

28 "As of this date, had you spoken to Dr. Flatley

1 regarding Tony Czarnik's absences from the office?

2 "ANSWER: To Jay Flatley, no.

3 "QUESTION: Or what you perceived to be his
4 lack of work ethic?

5 "ANSWER: Not to Jay Flatley."

6 Now, the questions that weren't read here: Who had you had
7 discussions with as of that day?

8 MR. PANTONI: Your Honor, this isn't rehabilitating. I
9 was asking her specifically about Flatley's testimony that she
10 spoke to him about. He said she did, she said she didn't. It's
11 the only section, the only purpose I read that for. Conversations
12 with other people is not rehabilitating.

13 MS KEARNS: I'll do it without reading the deposition
14 testimony.

15 Q With respect to -- Let's put up the exhibit which was
16 being used during this examination. It's Exhibit 206. Miss
17 Flamino, you testified on Mr. Pantoni's examination that you were
18 not sure whether you were one of the people that he was referring
19 to in this memo that said two individuals informed him that Tony
20 Czarnik had a historical pattern of leaving the facility, right?

21 A Correct.

22 Q Had you expressed those concerns about Tony Czarnik's
23 pattern of leaving the facility to anyone other than Jay Flatley?

24 MR. PANTONI: Objection, hearsay.

25 THE COURT: What portion of it again are you referring
26 to?

27 MS KEARNS: Mr. Pantoni on his examination highlighted
28 this, I've been performed by two individuals that you have a

1 historical pattern of leaving the facility. Miss Flamino
2 testified that she does not know whether she is one of the
3 individuals who was being referred to in this memo by Mr. Flatley.
4 Then in reading --

5 THE COURT: I think you can ask her about this.

6 MS KEARNS: Okay.

7 Q So you don't know whether Mr. Flatley was referring to
8 you here?

9 A Correct.

10 Q But had you expressed your concerns about Dr. Czarnik's
11 pattern of leaving the facility for long periods to anyone else?

12 A Yes.

13 Q To whom had you expressed those concerns?

14 A To John Stuelpnagel.

15 Q Do you have --

16 A And other people, too.

17 Q Do you have any knowledge one way or another whether
18 John Stuelpnagel communicated those concerns, your concerns, to
19 Jay Flatley?

20 A I don't know that.

21 Q Now let's go to the fact that there were some severance
22 discussions ongoing at least as of early May. Correct, and you
23 were aware of those?

24 A Yes.

25 Q Did you have any knowledge one way or another why Tony
26 Czarnik and Jay Flatley were discussing severance?

27 A No, I did not.

28 Q Did you have any information as to whether Dr. Czarnik

1 had resigned?

2 A No, I did not.

3 Q Did you have any information as to whether or not Jay
4 Flatley had decided to terminate him at that point?

5 A No.

6 Q All you knew they were discussing severance?

7 A Correct.

8 Q Now, Mr. Pantoni asked you about your knowledge of the
9 Illumina policy regarding discrimination during the time that Dr.
10 Czarnik was employed, and your testimony on Mr. Pantoni's
11 examination was if we knew about it, it would be immediately
12 investigated?

13 A Correct.

14 Q And did you know at anytime while Tony Czarnik was with
15 Illumina that he was claiming to have been discriminated against
16 in anyway?

17 A No, I did not.

18 Q Now, in part of the direct examination you mentioned
19 that from time to time you audited personnel files.

20 A Correct.

21 Q Did you audit Tony Czarnik's personnel file at anytime?

22 A Yes, I did. One Sunday I was in doing the -- a
23 complete audit of all the employee records, so I had -- Actually
24 I was in John's office at the time and I had the files spread out
25 and audit sheets. I was going through them, and it was a Sunday
26 afternoon, and Tony did show up at that point and he asked me what
27 I was doing, and I told him I was doing an audit of the employee
28 files, and Tony got very, very concerned at that time and very

1 nervous and was very flustered that I was in the files and in
2 particular I was into his file, and enough so that he asked me for
3 his file, which I gave it to him, and then he went away with it
4 and came back, and I thought it was strange because his reaction
5 was so strong. I showed him my audit list and everything that I
6 was doing and pointed it out to him.

7 Q So you confirmed with him the reason you were reviewing
8 his file?

9 A Correct.

10 Q Were you reviewing other files?

11 A I did all employee files. It was a big job. Took me
12 all Sunday afternoon.

13 Q Now, Miss Flamino, Mr. Pantoni didn't ask you about
14 your educational background or work history background. I'd like
15 you to summarize it very quickly for the jury so they can have a
16 sense of who you are and what you've done before joining Illumina.

17 A Yes. I have a BS in criminal justice, and so I worked
18 with neglected and abused children for the County of San Diego for
19 six years as a lead worker there.

20 Then also I have a masters in philosophy, and I taught
21 philosophy and religion at the university -- college level for 15
22 years.

23 I've done some traveling, and then I worked in the office
24 environment for a couple of years prior to joining Illumina.

25 Q And you joined Illumina December of '98?

26 A Yes.

27 Q What was your employee number?

28 A Number 9.

1 Q So it was still a small company?

2 A Very small.

3 Q So when you joined Illumina, the company had already
4 moved to its first address on Towne Centre Drive?

5 A Correct.

6 Q Did you have an opportunity to personally observe Dr.
7 Czarnik's work ethic?

8 A Oh, yes.

9 Q What did you observe?

10 A Well, from the very beginning, Tony had a different
11 work ethic, or maybe I would say no work ethic. It seemed that
12 from the very beginning he alienated himself, or I should say the
13 chemistry department, against like molecular biology and
14 administration.

15 He would try to -- His actions I thought were very
16 divisive, because with our company, and it's a biotech, you have
17 all these sciences coming together so you have to work as a team,
18 as a group, and Tony was always saying that chemistry, I can say
19 this, was like the red-headed stepchild of the company, and he
20 felt that he was not treated fairly. Whether really --

21 Q Let me stop you there. He said he felt he and
22 chemistry weren't being treated fairly. When do you remember him
23 first expressing that view?

24 A From the very beginning of my employment. So I would
25 say into January.

26 Q Of 1999?

27 A Correct.

28 Q What did you -- In terms of your personal -- Again

1 focusing on personal observation, how did you see Dr. Czarnik
2 spending his days when he was at Illumina?

3 A He sat in the office -- Well, my cubical was the
4 doorway to his office for the first couple of months, three months
5 that I worked there before he moved into the big room. Do they
6 know what the big room is?

7 Q They do.

8 A And he would come in late. I didn't hear him engaged
9 in any scientific conversations. There weren't meetings going on
10 in his office. The only time -- The one of the times I did hear
11 him talking on the phone he was actually ordering or trying to
12 order jewelry for his wife. If anything, you'd hear him talking,
13 like he was at a computer screen going "Sweet" or coughing and
14 grumbling or grunting.

15 When he moved into the big room, his computer screen was
16 very obvious, and he'd have like Travelocity up.

17 You don't have to be a rocket scientist to know when
18 somebody is working or not working. If you saw my desk and
19 everybody else's desk, we had piles of work. I mean I had piles
20 on the floor. It's the proverbial start-up. Tony's desk was
21 pretty much clear all the time. If he e-mailed anybody or asked
22 us to do anything work-wise, it was always especially when John
23 and Mark were out of town, he'd come in about 10:30 and e-mail
24 everybody to take us, take the whole company out to lunch at
25 Jasmine, which would be for a couple of hours, and he'd pay for
26 it, and he would be very divisive at these times, saying things
27 like well, if he ran the company it would be a much more fun place
28 to work. He would take this opportunity to make cracks about how

1 John was cheap, I'd like to say frugal, and that how Mark was just
2 running the show.

3 Q How early do you remember him expressing these views?

4 A Again, in January.

5 Q So as of January, he was expressing to you and others?

6 A Correct.

7 Q That he felt that John and Mark were running the show?

8 A Right.

9 Q And he was critical of the way in which they were
10 allegedly doing so?

11 A Oh, absolutely. Absolutely. And the other thing about
12 Tony's work ethic, or lack of it, is that what he wanted to do for
13 the company was to be like a good-will ambassador, and I'm
14 thinking this guy is in la-la land. We need a chief scientific
15 officer, we need a VP of chemistry. We need somebody bringing our
16 intellectual property through the steps of research and
17 development. He needs to be developing the chemistry department.
18 He needs to be setting up things and to get you going.

19 Q What sort things do you remember him doing that seemed
20 to you to evidence his desire to be a good-will ambassador?

21 A Again the lunches, where he'd take us all to Jasmine
22 for dim sum. He would e-mail people because he bought a couple of
23 boats, we had a reflecting pond in between our two buildings,
24 about this deep, so he bought a couple of motor boats, so he'd
25 e-mail everybody at 5 o'clock to go down and take a break and
26 they'd run the boats around the lake.

27 In the earlier days, too, we would break for popcorn about 6
28 o'clock every day and everybody would debrief.

1 He would always be there for that.

2 Q Let me touch upon a couple of other topics. I'm
3 limited in time. Did you -- Were you personally present when Dr.
4 Czarnik made a comment to other Illumina employees suggesting that
5 John Stuelpnagel had been indicted?

6 A Yes.

7 Q Tell us what happened.

8 A I'm not sure if you are familiar with an on-line
9 subscription called "Bio World," which is like six, seven page
10 magazine you get daily, and it's just news on biotech industries.
11 In April, I think it was April, I don't have the date in my head,
12 I'm sorry, I'm not very good with dates sometimes, we made the
13 cover of Bio World.

14 It was, you know, because that was my job, to download this,
15 so I see Illumina on the front page. So I immediately printed it
16 out and I ran into the big room and I said, you know, I just
17 shouted out at the door, "Hey, everybody, we're on the cover of
18 Bio World," and you could feel the excitement rising, but then
19 Tony stood up and popped off, "What, has John been indicted?"
20 Like the whole room just went dead silent, and it was horrible, it
21 was terrible. I went and told John Stuelpnagel immediately what
22 happened. I was crushed.

23 Q So when you went in, did you feel that it was a high
24 point, a good news moment?

25 A Oh, I was ecstatic. I couldn't contain myself. I
26 blurted it right out in the middle of the room.

27 Q Dr. Czarnik described this in his direct testimony as a
28 joke. Did anyone in that room laugh?

1 A No. It went dead silence.

2 Q Did Tony Czarnik laugh at his own joke?

3 A I believe so.

4 Q And you then reported to John Stuelpnagel that this had
5 occurred?

6 A Correct.

7 Q Now, another claim that Dr. Czarnik has made is that he
8 was cut out of key business activities and decisions after he had
9 made some disclosure of his history of depression. Did he ever do
10 or saying anything -- Let me ask you, to your own personal
11 observation, apart from Tony Czarnik's own suppositions that John
12 and Mark were running the company from beginning in January of
13 '99, to your own observations did you actually see him being cut
14 out or left out?

15 A No.

16 Q Of business activity and decisions?

17 A No.

18 Q Did he ever do anything that corroborated his belief
19 that he was being cut out?

20 A He thought he was being cut out, and --

21 Q How do you know that?

22 A Well, where my cube is sitting, and it used to be
23 Tony's office, that turned into a conference room.

24 Q After he moved to the big room?

25 A Right, after he moved to the big room. So I was
26 sitting typing and I could feel somebody behind me, so I turned
27 around, I had to turn around that way, I turned around and looked,
28 and Tony has his ear to the conference room door, and I'm looking

1 at him and he said to me, "Doesn't it drive you nuts not to be in
2 there?" and I said -- Can I say "hell" in court?

3 Q You just have.

4 A I said, "Hell, no, I got enough on my plate," you know.
5 And he just had his ear -- It was very unsettling. We kind of
6 walked away after that.

7 Q Sort of weird?

8 A Very weird. Very strange.

9 Q Now, you testified on direct by Mr. Pantoni that you
10 first became aware that Dr. Czarnik claimed to be discriminated
11 against on the basis of depression only after the lawsuit was
12 filed.

13 A Yes, the only time I knew Tony was claiming
14 discrimination was after we received the lawsuit.

15 Q Now, without divulging anyone's names, were you aware
16 of any circumstance in which there was another Illumina employee
17 who suffered from mental illness and who was --

18 A Yes.

19 Q Don't mention his name in court. Let me ask you this,
20 did you personally do anything to try to keep this person at
21 Illumina?

22 A Absolutely. We all did. Myself.

23 Q Who else did?

24 A John, and Mark, as far as I know.

25 Q John Stuelpnagel?

26 A Absolutely. And we were trying to work it out so that
27 he would not leave.

28 Q And this is somebody who you all believed to suffer

1 from depression?

2 A Yes.

3 Q And in fact did Dr. Czarnik also make some efforts with
4 this individual?

5 A I've been informed of that, yes.

6 Q But you don't have any first-hand knowledge that he
7 did?

8 A No.

9 Q Miss Flamino, you indicated that you did not learn
10 about Tony Czarnik's allegations of discrimination until the
11 lawsuit was filed, correct?

12 A Correct.

13 Q If you had known during his employment, would you have
14 investigated it?

15 MR. PANTONI: Calls for speculation.

16 THE WITNESS: Absolutely --

17 THE COURT: Hold on. Sustained.

18 MS KEARNS: Q I'll move on then.

19 You worked with Tony Czarnik from -- together from the time
20 you joined in December of '98 until he was terminated in September
21 of 2000, correct?

22 A Correct.

23 Q Did you have a number of opportunities to interact with
24 and speak with Tony Czarnik?

25 A Yes, absolutely. As that e-mail showed, he'd asked me
26 to go for walks, he'd take me to lunch periodically, and he would
27 do that I believe for confidential reasons. So he had ample
28 opportunity to tell me, and he wasn't quiet about things.

1 Q So your own experience, if Tony Czarnik had a concern
2 or a complaint, did he hesitate to voice them to you?

3 MR. PANTONI: Objection, calls for speculation.

4 MS KEARNS: This is asking what happened.

5 THE COURT: Overruled.

6 MS KEARNS: Q Did he hesitate to voice this complaints
7 and concerns to you?

8 A No.

9 Q Now, there have been testimony earlier in the case
10 about Dr. Czarnik being in the break room at times during the day,
11 and on examination by Mr. Pantoni there was a suggestion that Dr.
12 Czarnik was holding scientific meetings in the break room using a
13 whiteboard to talk about science. Did you ever see him doing
14 that?

15 A No. I know he used the break room to -- He would have
16 -- They sign their lab book, so sign your lab --

17 Q Witnessing?

18 A Yes.

19 Q But do you remember seeing him lecturing or using a
20 whiteboard to explain scientific concepts?

21 A Ever?

22 Q To the best of your recollection.

23 A Yeah, I would think once or twice in all that time.

24 Q Did you ever see him doing anything else in the break
25 room that was inconsistent with work?

26 A Yes, he was sleeping on the couch one afternoon.

27 Q And are you able to estimate -- Did you simply walk in
28 and see him sleeping and leave, or was he there for an extended

1 period?

2 A It was an extended period of time, because one person
3 saw him and then they came and got me, so then I went in and
4 looked at him, and his shoes were off and everything, and he was
5 just sleeping on the couch, kind of almost snoring, and this is
6 the break room, so it's the middle of our company, and enough so
7 that I think there ended up four admin people in there.

8 Connie Brick and I went back and got my camera, because I'm
9 kind of like the company photographer, too, at that point, and I
10 came back in and took a picture. I might have even taken two
11 because I thought the flash would wake him up, but it never did.
12 We kind of giggled and left.

13 Q He still didn't wake up?

14 A No.

15 Q Now, you mentioned photographer, which brings up
16 another issue. There was some testimony in another witness'
17 presentation about a company-wide picture that was taken, and Dr.
18 Czarnik said that when he received the photograph it was a later
19 taken photograph that excluded him. Let me ask you, do you
20 remember is it -- strike that. Is it accurate that there were two
21 pictures taken of the employees of Illumina for 1999?

22 A Absolutely. It was our IPO picture.

23 Q Why is it that?

24 MS ESPINOSA: 2000.

25 MS KEARNS: Q Oh, 2000?

26 A Yes, IPO picture.

27 Q Why is it a second picture was taken?

28 A Because the first ones were horrible, and I gave the

1 photographer a second chance to take a better picture.

2 Q What was horrible about them? First, did you
3 personally observe the pictures taken in the first session?

4 A Yes.

5 Q What was wrong with them?

6 A She took them across the pond, so we were really tiny
7 and the light was bad. So we went to take more closeup pictures.

8 Q And who is it that sent Dr. -- Now, Dr. Czarnik says
9 he had ordered a copy of this picture?

10 A Yes, I had his money still on my desk.

11 Q How much money?

12 A I think it was \$10.

13 Q And you sent him a copy of the second photo?

14 A If it wasn't me it was Claudia. But we did send him
15 that, because I had his money. I didn't even think about it. I
16 was just trying to follow through and to -- with what Tony had
17 requested.

18 Q Did you intend in anyway by sending that picture to him
19 to hurt his feelings?

20 A Absolutely not. In fact, I didn't even realize what I
21 had -- that he wasn't -- he was in the first picture and wasn't
22 in the second picture until it was brought up an issue in court.
23 So, no, not at all.

24 Q Now, Miss Flamino, there was some testimony about Dr.
25 Czarnik on his own initiative holding these new hire orientation
26 meetings.

27 A Yes.

28 Q Did you ever personally attend any of those?

1 A Yes, I attended the second one. The reason was that by
2 this time -- Well, pretty early on, but especially by that time
3 that he started holding these, I didn't trust Tony. I knew he
4 didn't have Illumina's interest in his heart. So I attended the
5 second one, and in sitting there, I realized what Tony was doing
6 was putting on Tony Czarnik's Illumina show, and enough so that he
7 even said to all these new persons that he personally hired John
8 Stuelpnagel.

9 Q Was that an accurate statement or was it a
10 misrepresentation?

11 MR. PANTONI: Objection, lacks foundation.

12 THE COURT: Sustained.

13 MS KEARNS: Q Do you know whether Czarnik hired John
14 Stuelpnagel?

15 MR. PANTONI: Same objection.

16 THE COURT: I think you can answer that yes or no.

17 MR. PANTONI: She started in 1999, Judge.

18 THE COURT: I know. Based on your own personal
19 knowledge.

20 THE WITNESS: Based on my own personal knowledge, I
21 know that Tony Czarnik did not hire John Stuelpnagel.

22 MS KEARNS: Q You heard him make a representation to
23 new hires that he had done so?

24 A Correct. Correct. And when these new hires would ask
25 Tony questions about the company and about the technology, Tony
26 couldn't even hear those questions. He would -- He had such an
27 agenda that he would just go back and answer some other question
28 about him.

1 MR. PANTONI: Object and move to strike. Speculation.

2 THE COURT: Sustained.

3 MS KEARNS: Q Did Dr. Czarnik in the orientation
4 meeting that you personally attended, did any of the attendees ask
5 Dr. Czarnik any scientific questions?

6 A Yes, they did.

7 Q Did he answer those questions?

8 A No, he did not.

9 Q And what did he do instead of answering those
10 questions?

11 A He would just talk about himself.

12 Q Finally, Miss Flamino, you were asked about the
13 termination meeting and the reasons given by Jay Flatley, by Jay
14 Flatley verbally during that meeting, and you testified he told
15 Tony Czarnik he was not meeting his goals, correct?

16 A Correct.

17 Q Isn't it true that Jay Flatley, whether you were
18 present when he gave it or not -- You saw Exhibit 334. Let's put
19 it up again briefly.

20 Miss Flamino, this is the termination memorandum from Jay
21 Flatley to Tony Czarnik. You've seen this document before?

22 A Yes, I've seen it before.

23 Q And do you see that it states, that it talks about the
24 assignment of goals and it states, "Since that time, your progress
25 towards the goals has been insufficient"?

26 A Correct.

27 Q Do you know whether Jay Flatley mentioned progress
28 towards goals when he was verbalizing Dr. Czarnik in that meeting

1 or do you just not remember?

2 A I believe "progress" was used.

3 Q In this termination meeting, what was Dr. Czarnik's
4 demeanor like?

5 A Well, Tony and I met at the door going into Jay's
6 office, and he was very, very flippant. Like stepped aside so I
7 could walk in. And he goes, "Oh, it's such a pleasure always to
8 see you, Deborah," and very, very flippant. It was like a big
9 joke to him.

10 Jay was very -- His demeanor was very, very professional,
11 very directed to the point, and to me it's the first time I ever
12 sat in any termination with a senior management was involved, and
13 I was so impressed with how Jay handled it. It only took perhaps
14 10 minutes with all the whole thing.

15 Q At any time during this termination meeting, did Jay
16 Flatley threaten Tony Czarnik in any way?

17 A No, his voice never went above the level of mine right
18 now.

19 Q Aside from volume of voice, did he ever say anything
20 that in words alone was threatening to Tony Czarnik?

21 A Not at all. Not at all.

22 Q My time is up so I'm going to have to stop.

23 MR. PANTONI: Just a few minutes, Judge.

24 REDIRECT EXAMINATION

25 BY MR. PANTONI:

26 Q While we still have this up, Exhibit 334, you didn't
27 help draft this termination memo, did you?

28 A No.

1 Q You understand this was written by Jay Flatley and
2 Jennifer Kearns?

3 A I did not know that.

4 Q Looking again at 333, Jay Flatley's notes. Ma'am, are
5 you sure that Jay Flatley didn't tell Dr. Czarnik that if he
6 violates confidentiality, the company will pursue all its
7 remedies?

8 A I know he reminded him about the confidentiality
9 agreement, but I don't know, you know, if he made that entire
10 statement. But I do remember about the confidentiality.

11 Q You just don't remember either way?

12 A Correct.

13 Q A real quick look again at Exhibit 206. Miss Kearns
14 followed up on this. You are sure that you are not the person who
15 actually informed Jay Flatley of this information?

16 MS KEARNS: Asked and answered on direct.

17 MR. PANTONI: Q Is that right?

18 THE COURT: Overruled.

19 THE WITNESS: Again, I don't know if -- who Jay is
20 referring to in that memo, those two people.

21 MR. PANTONI: Q I'm just saying you are sure it's
22 not you, you did not inform Jay Flatley about this information,
23 did you?

24 A Of the information in that memo, I don't know if Jay is
25 referring to me. That's the best I can answer you. I don't
26 understand how you are asking me.

27 Q Let me ask it again. It wasn't you, you were not the
28 person, who directly provided this information to Jay Flatley?

1 A Oh, who directly provided it. I don't remember.

2 Q You provided it to John Stuelpnagel?

3 A I know I spoke to John in the past about Tony's hours.

4 Q All right. And Miss Kearns asked you, and actually I
5 asked you, several times now, that you didn't investigate the
6 claim of discrimination because you didn't know about it until
7 after the firing, right?

8 A Absolutely.

9 Q If I understood you correctly, if Jay Flatley were
10 following company policy, and if Jay Flatley learned about
11 discrimination, he was supposed to report it to you so that you
12 could conduct an investigation?

13 A Not necessarily, because again of the level of which
14 Tony Czarnik was in the company. Because this was a senior
15 management, and I was not privy, nor did I ever expect to be,
16 brought into those discussions, such as him becoming a research
17 associate.

18 Q Company policy, as you testified earlier, was that if
19 the supervisor learned about discrimination, they were supposed to
20 report it to you, that's general policy?

21 A Right. That's a supervisor. That's not president and
22 CEO.

23 Q There's an exception for president and CEO at Illumina?

24 A I'm not saying that, but I would not expect for senior
25 management to involve myself in that.

26 Q Even when senior management is the person being accused
27 of discrimination?

28 A I would not expect at my level to be involved.

1 Q Who should have been involved from your perspective
2 internally within the company if Dr. Czarnik accuses the president
3 of discrimination, who should investigate?

4 MS KEARNS: I'll object that the question assumes facts
5 not in evidence, that being that the investigation would
6 necessarily be done by someone within the company.

7 THE COURT: Overruled.

8 MR. PANTONI: Q Ma'am, on the company policy, who
9 should investigate situations where the company president is
10 involved with alleged discrimination?

11 A For myself, I would elect outside counsel at that
12 point. I would have an outside investigator.

13 Q You never had that opportunity because you never were
14 told about it?

15 A I never knew that Tony was claiming discrimination, and
16 he had ample opportunity to tell me that.

17 Q One quick question about you mention that Dr. Czarnik
18 seemed to be about fun. You mention boat races as one example.

19 A Correct.

20 Q Did you ever seen the Illumina website?

21 A Have I ever seen what?

22 Q Illumina's website.

23 A Yes.

24 Q Illumina.Com?

25 A Yes.

26 Q There's a section in Illumina, in the website, about,
27 "We are all about fun at Illumina," something to that effect,
28 isn't there?

1 A I believe so.

2 Q In fact, on your website for a period of time you were
3 touting the boat races as something positive about the company,
4 weren't you?

5 A Yes, but that's not all CSO should be doing.

6 Q I didn't say that. I'm asking you in terms of
7 criticizing Dr. Czarnik. This was something you put on the
8 website and you touted as something positive about the company,
9 true?

10 A That it was on the website?

11 Q Yes.

12 A I believe so, yes.

13 Q And specifically boat races were mentioned on the
14 website at one point?

15 A I'm agreeing with you because I don't remember that the
16 boat races were on the website.

17 Q Boat races aren't on there anymore, are they?

18 A I have no idea.

19 Q Somebody took them off, reference to the boat races off
20 the Illumina website?

21 A We don't do boat races anymore anyway.

22 Q Nothing further. Thank you.

23 MS KEARNS: Just one quick follow-up.

24 RE-CROSS-EXAMINATION

25 BY MS KEARNS:

26 Q Miss Flamino, just so there's no confusion about your
27 criticisms of Dr. Czarnik, did you feel that Dr. Czarnik's
28 activity like boat races and popcorn and lunches were in and of

1 themselves bad things to do?

2 A Not at all.

3 Q Why were you critical then of his performance?

4 A Because he wasn't being a CSO, or a vice president of
5 chemistry. He was just being a good -- He wanted to be a good-
6 time Charlie. He wanted to, you know, be a cheerleader, a good-
7 will ambassador, and that isn't what we needed in order to bring
8 Illumina to fruition.

9 Q Would it be accurate to say you wouldn't have had a
10 problem with him doing these fun social events if he was
11 contributing to a scientific --

12 A Absolutely.

13 MR. PANTONI: Leading and no foundation.

14 THE COURT: Sustained.

15 THE WITNESS: Absolutely.

16 MS KEARNS: Okay. Nothing further.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. PANTONI:

19 Q Ma'am, you didn't attend a single meeting of Illumina
20 scientists since you've been with the company, have you?

21 A A single meeting of any scientific discussion?

22 Q You don't sit in on a session of the company's
23 experiments and technology and things of that nature, do you?

24 MS KEARNS: Objection, it's two different questions,
25 Counsel. Whether she ever did or whether she routinely did.

26 THE WITNESS: Which one?

27 MR. PANTONI: Q Do you -- Strike that.

28 Do you sit in on meetings of the scientific staff at

1 Illumina?

2 A Regularly?

3 Q Yes.

4 A No.

5 Q Did you do that when Dr. Czarnik was CSO?

6 A No, not really.

7 MR. PANTONI: Thank you.

8 THE COURT: Anything further.

9 MS KEARNS: Nothing further.

10 THE COURT: Thank you very much. You may step down.

11 THE WITNESS: Thank you.

12 THE COURT: Ready to call a next witness?

13 MR. PANTONI: Do you want us to do that and then take --

14 THE COURT: Does that lead to any discussions?

15 MR. PANTONI: I don't think so.

16 THE COURT: We should move on.

17 We'll take a break. Let's break for 13 minutes, until 20 of
18 3:00. Please remember the admonition not to form or express any
19 opinions about the case, not to discuss the case. We'll be in
20 recess until 2:40. 2:40.

21 (Recess.)

22 THE COURT: Record will indicate all the jurors are
23 present, counsel are present, parties.

24 Call your next witness, please.

25 MR. PANTONI: Jonathan BenDor

26 JONATHAN BEN DOR,

27 called as a witness by the Plaintiff, having been first duly
28 sworn, was examined and testified as follows:

1 THE CLERK: Please state your full name for the record
2 and spell your last name.

3 THE WITNESS: Jonathan BenDor, B-e-n-D-o-r.

4 THE CLERK: Thank you.

5 DIRECT EXAMINATION

6 BY MR. PANTONI:

7 Q Good afternoon, Mr. BenDor.

8 A Good afternoon.

9 Q Are you presently employed by Illumina?

10 A No.

11 Q Who is your present employer?

12 A Axiom Biotechnology. You want a business card?

13 Q I don't need the business card. Thank you.

14 Had you previously been employed by Illumina?

15 A I have. From January of '99 through March of 2001.

16 Q If you could tell us briefly what positions you held
17 with Illumina?

18 A My former title was senior scientist. Initially I had
19 responsibilities for software development and for system
20 administration.

21 Q What software were you responsible for developing?

22 A The initial challenges was imaging processing software.
23 Essentially program programmed to make sense out of what images
24 were captured by the camera.

25 As far as I recall, prior to my joining the company, the
26 company had contracted some outside facility and they didn't get
27 results that they wanted, and I joined, within six months the
28 results were satisfactory, at least visibility-wise they told me

1 and many others that the job can be done.

2 Q When you say imaging, capturing what the camera showed,
3 is that relating in any way to decoding?

4 A Yeah, I had to design the code and debug it, document
5 it, and algorithms. That's the method for doing things. We
6 started from scratch.

7 Q I'm trying to get you to explain if you can how what
8 you were doing related to the process of decoding.

9 A Oh. Essentially the process of decoding would require
10 that for every position on the fiber bundle we would know whether
11 it's occupied or not occupied by a bead, and if it was occupied by
12 a bead, whether the bead fluoresced or didn't fluoresce with each
13 image. If you only had one image, it would be a matter of
14 basically detecting contrast, finding out essentially which parts
15 of the image are bright and which ones are dim, and thereby you
16 could kind of determine the bright part would be a fluorescent
17 bead and the dim part would either be absent bead or
18 non-fluorescent bead.

19 Q What about if you were using more than one color in the
20 process of using fluorescence?

21 A If you have more than one color, you have to take
22 multiple images, and that would mean that the particular location
23 you could either have a fluorescent bead in one color or another
24 color. So the absence of fluorescence would not mean there was
25 not a bead there, it will just mean it didn't fluoresce in that
26 color.

27 The problem of doing multiple colors would imply you'd have
28 to do a registration, basically looking at the same terrain, so to

1 speak, but because of the way the images were acquired, there was
2 always some shift and minor rotation

3 If you think of it as an aerial photograph of an area, you
4 are not taking it from a balloon which is stationary but from a
5 flying airplane, and the image would therefore reflect or indicate
6 some -- there will be some issues of translation, movement from
7 image to image, and the program would also then do a registration,
8 finding some landmarks and two images to say I can now correlate
9 them because I know this particular landmark is also at this place
10 in this image and that place in that image. That would allow the
11 translation if you have two of them you can also locate.

12 Q There was a lot of information for me.

13 A Basically the information is image registration.

14 Q You are trying to, in an experiment where more than one
15 color was used, you are trying to determine what color lights up
16 in a particular spot or particular bead?

17 A Yes. What bead lights up at a particular spot, and
18 what color.

19 Q We'll come back to that in just a minute.

20 When you worked at Illumina, Mr. BenDor, did you work in
21 what we've been calling the big room?

22 A Yes, it was a very big room, and when we moved in, it
23 was full of tables and no heads. Soon after I joined, we started
24 occupying the room. I happened to occupy a small corner of the
25 room. Just happened to be a little den, but it still was open to
26 the entire room, except for a small part where there was a
27 bookcase. Initially there were I believe about seven people in
28 there, 30 desks and seven people.

1 Q How about at the time you left?

2 A At the time I left, it felt like there were 70 people
3 in there. It was very, very -- Well, not very, very, it wasn't a
4 sweatshop, but it was more crowded than comfortable for me.

5 Q Was Dr. Czarnik also located in the big room?

6 A Yes, he moved in, I can't remember exact date, but few
7 weeks after this gradual movement into this big room, he moved in
8 and he occupied -- initially occupied two desks, I guess,
9 befitting his VP position. Most people only had one desk. I was
10 surprised he didn't get the corner window desk, which is normally
11 a status symbol.

12 Q Mr. BenDor, is it fair to say that when you both were
13 working in the big room that you would interact with Dr. Czarnik
14 on virtually a daily basis?

15 A I guess I would see him on a daily basis. Interact?
16 Several times a week. I could not say a daily basis, but several
17 times a week. Sometimes very informally, though. We had this
18 tradition, if you want, of popcorn at 5:00, 5:30 in the afternoon,
19 and just to keep people motivated, if you want.

20 Q What about in terms of business discussions and
21 business --

22 A There were a few business discussions. Many of them
23 were informal. Because I did not -- Well, it was the nature of
24 the company, 20, 25 people, most things were done in a very
25 informal manner. You didn't need to set up and schedule an
26 appointment a week in advance with somebody. You just walked up
27 to the desk and say do you have a few minutes? If so, let's talk.
28 Otherwise we can do it at another time. That was the nature of

1 the interaction.

2 Q What was your observation during the time you worked
3 with Dr. Czarnik at Illumina in terms of his work ethic and the
4 amount of hours he worked?

5 A I'd say that if I worked a lot, I don't think he worked
6 less than me. I did not track him, okay. I did not check every
7 day when he came in and when he left. But as far as I could tell,
8 he was there most of the time. The times he wasn't there, I
9 remember he was in some conference. Just happen to remember the
10 times I asked where is he because I want to talk to him and he's
11 in some conference. I just assumed those conferences had to do
12 with what the company's business is, because I wouldn't think he
13 just would take off without letting anybody know.

14 In terms of what he did when he was at Illumina, well, I
15 didn't stand behind his shoulder to see what he's doing on the
16 monitor. From what I could tell from the way he interacted with
17 his people, and I worked with his people, with Chanfeng and Jian-
18 Bing, and what's his name, tall guy, Dickinson. What's his first
19 name?

20 Q Todd.

21 A Todd. Yeah. Steve Barnard. I worked with all those
22 people. From what I could tell, they were pretty pleased with
23 working with him. He definitely was giving them guidance,
24 especially Chanfeng, I know there were several times when she had
25 confide to me the fact she discussed professional scientific
26 issues with Tony and he had input and whatever.

27 One particular thing that comes to mind was we could do --
28 how many washes we could do. If you take multiple issues, you

1 have to do a strip and a wash. There was issue how many of those
2 things we can do. Actually it pertains to how many colors we
3 should be using. If you only use one color, you have to do more
4 washes. I don't want to get into the reason for that, but you
5 have to do more washes. There was concern that we are limited by
6 how many washes we can do because we lose beads every time, and
7 other reasons. I remember that particular issue was researched by
8 Chanfeng and Tony's suggestions, which I thought was very nice.

9 Q Mr. BenDor, did you ever observe Dr. Czarnik do
10 anything or say anything that caused any divisiveness or tension
11 among the staff?

12 A Actually on the contrary. From my perspective, Tony
13 gave the company a warm, home-like feeling. It's easy for a
14 company with -- the start-up stage, to become, I won't say a
15 sweatshop, but could become like a boot camp. Especially if you
16 have a good drill sergeant or whatever, it could become that way.
17 It takes the fun away out of working.

18 From my perspective, and this is purely personal, I did not
19 interview Tony before I started working there, I only met him
20 after I started working there, and so all the time that I was
21 there, both in formal meetings and informal meetings, my sense was
22 that people like Tony and, what's the name, Deborah, gave the
23 company a warm feeling, like people you'd like to be around, even
24 if all they do is make things feel good.

25 So in terms of I never saw him instill divisiveness or
26 anything like that, no, I would say that sometime I wish he was my
27 boss, even though I also had a good boss, sometimes I wish he was
28 my boss.

1 Q Let me shift gears a little bit and ask you about
2 Illumina's roadshow. Are you aware that at some point while you
3 were employed there Illumina conducted a roadshow in connection
4 with its initial public offering?

5 A It was impossible not to be aware of that, company
6 going public.

7 Q I have to ask some of these basic questions.

8 A Yes, I was aware of it.

9 Q Okay. Do you recall meeting, Mr. BenDor, at which Jay
10 Flatley spoke about what he wanted to say on the roadshow about
11 the number of beads that Illumina could decode?

12 A What I remember in connection with a meeting such as
13 that was that there was an experiment, I don't know exactly how
14 many beads, I don't want to identify, somebody mentioned 768,
15 something, it was in the hundreds, basically to be able to show we
16 can decode, that we determine on each fiber exactly the locations
17 of 768 different bead types, each of which would be the multiple
18 locations. And the claim that was going to be made to the
19 investors was that we shall or we will be able to do 2000 beads.

20 I was among the skeptics in engineering regarding that
21 particular number. I felt that we did not have sufficient data to
22 support making such a claim. I was willing to go with the
23 estimate we will be able to do a thousand.

24 So there was a meeting in which, I don't know exactly what
25 caused it, whether it was a memo or whatever, there was an issue
26 whether we should say 1000 or 2000, and in that meeting Jay
27 Flatley basically said that we have to say 2000 or else, and I
28 don't recall the exact date of that meeting, but I went away from

1 it with feel -- By the way, his position prevailed --

2 MS KEARNS: I'm sorry to interrupt, but it seems like
3 this continuation is nonresponsive to the question.

4 THE COURT: It's a narrative at this point. Sustained.

5 MR. PANTONI: Q At this meeting, what if anything
6 was Jay Flatley told in terms of whether the company had
7 scientific data to support what he wanted to say on the issue?

8 A There were some people that said we have enough to
9 support it. Mark Chee I think was only one. Engineering side was
10 me, I think it was Bob Kain, too, it was more ambiguous. I mean
11 we were tasked with decoding 2000. I felt, and I wasn't the only
12 one who felt that way, that we lacked data to make that claim.

13 Q Did you express that?

14 A Oh, yes, that was expressed.

15 Q What if anything did Jay Flatley say with respect to
16 whether he needed data or wanted data to support what he wanted to
17 say on the roadshow?

18 A I don't recall anything to that effect.

19 Q Let's take a look please at Exhibit 269. Can you see
20 that from where you are sitting?

21 A Yes, I can.

22 Q This we've already seen in the trial. It's an e-mail
23 that Mark Chee sent on July 13, 2000, to the members of the
24 roadshow team and some others.

25 A The roadshow was already in progress?

26 MS KEARNS: I'll object to examination of this witness
27 with this document until a sufficient foundation has been laid.

28 MR. PANTONI: I want to ask about some statements made

1 in the e-mail.

2 THE COURT: This is this document been admitted into
3 evidence?

4 MR. PANTONI: It has.

5 MS KEARNS: I think things have been identified. I'm
6 not sure anything has been admitted yet.

7 THE CLERK: It has.

8 MR. PANTONI: Q So Mr. BenDor, in any event, this
9 has been discussed and admitted into evidence previously. I want
10 to ask you a about a few statements made in Mark Chee's e-mail, in
11 particular, this statement here, where Dr. Chee is summarizing the
12 result. Dr. Chee wrote, "With Johnny's help, the white light
13 images were registered yesterday, and we have initial analysis of
14 the 768 decoding on the white light system. The results are
15 excellent."

16 Would you agree, sir, that the results that you looked at in
17 connection with this 768 decoding experiment are excellent?

18 MS KEARNS: Objection. Foundation

19 THE COURT: Sustained.

20 MR. PANTONI: Q Did you do this work, Mr. BenDor?

21 A I did participate in the effort to register the images.

22 Q Did you use the white light system as described here?

23 A The images were acquired, I believe, on a white light
24 system.

25 Q Did you review and analyze those images?

26 A I participated in the -- Yeah, in running the program
27 and getting the data.

28 MS KEARNS: So again foundation. It's not clear from

1 the testimony thus far whether Mr. BenDor examined all of the
2 results.

3 THE COURT: Did you have personal knowledge of -- They
4 are talking about an experiment of white light images in that
5 paragraph, is that right?

6 THE WITNESS: It's a light white camera as opposed to a
7 color, and the images were acquired with that kind of camera.

8 THE COURT: Do you have personal knowledge of that
9 experiment?

10 THE WITNESS: The images were given to me --

11 THE COURT: Did you witness that or do you know of your
12 own knowledge, not based on something somebody told you about it,
13 but your own knowledge, did you witness that experiment?

14 THE WITNESS: No, I wasn't in the darkroom when they
15 took the images, definitely not.

16 MR. PANTONI: Q But you reviewed the images taken
17 from the white lights system on this experiment?

18 A It was consistent with other white light images that
19 were registered.

20 MS KEARNS: My objection again is foundational. As we
21 know, there are several different images that were generated.
22 It's not clear whether this witness examined all of those images
23 or only a subset of the images.

24 THE COURT: Did you exam all the images?

25 THE WITNESS: Yes, the way it was done you didn't do
26 them individually, one-by-one, because that was too laborious.
27 You ran -- took a program that says the whole directory, you
28 didn't have to do them one by one, so assuming the guys who

1 captured those images put them where they are supposed to, all of
2 the images, they were all registered. We did not do it manually
3 one by one. It was too laborious.

4 MR. PANTONI: Q Given that, Mr. BenDor, would you
5 agree that the results that you looked at in connection with this
6 experiment were excellent?

7 A There's a word missing there. The word is the
8 registration results were excellent. The decoding results, I
9 don't know enough about it. For that you need to know what was on
10 the boundaries. You have to know to do an experiment to determine
11 independently what's on the boundary.

12 Q Did you undertake to do that personally?

13 A No. It wasn't my domain of responsibility.

14 Q Did you examine the separation that was exhibited on
15 the images in connection with this experiment?

16 A I am not clear as to what the word separation implies
17 in this particular image. I think I can make a conjecture what it
18 means, but I'm not sure.

19 Q We don't want you to do that. Are you familiar with
20 the concept of clustering?

21 A Yes.

22 Q What is clustering?

23 A Clustering is trying to determine, -- What we do when
24 we look in the night sky and see the Milky Way. You see all these
25 white spots, whatever, and if you are fuzzy a little bit you can
26 see kind of a cloud and say that's the Milky Way. Whereas if you
27 focus on each one individually, it's just a white dot.

28 So clustering is making clouds out of spacially-related

1 particles. That can be applied in a mathematical model to just
2 about any variable that you could plot. For example, on an X/Y
3 grid. You could plot students' heights versus temperature in the
4 summer and do some clustering with that.

5 Q What does clustering mean in the context of a
6 three-color decoding experiment?

7 A It would mean that beads of a kind would show up as
8 individual blobs in a 2-D, 3-D or N-D graph, depending upon what
9 attribute of the bead you are looking at.

10 Q Did you or did you not, in connection with the work
11 that you did on the white light imaging system, did you examine
12 whether the clustering showed good separation among the colors?

13 A The clustering was done by software developed by
14 somebody else. His last name is Bahram, something like that, at
15 Illumina. There was another group of people developing software
16 under the direction of Mark Chee. And basically they -- If
17 engineering was to generate the images and do the registration,
18 the rest of -- the decoding was essentially taken to be the
19 territory of Mark Chee.

20 MR. PANTONI: Nothing further.

21 THE COURT: Cross-examination.

22 CROSS-EXAMINATION

23 BY MISS ESPINOSA:

24 Q Good afternoon, Mr. BenDor.

25 A Hello, Nicky.

26 Q You didn't attend any of the Jay Flatley's
27 presentations on the Illumina roadshow, did you?

28 A Only the one he did company-wide.

1 Q Are you saying that during the company-wide
2 presentation, you said he said he had to --

3 A No. No. There was a separate meeting, small, called
4 quite urgently on some day, I don't remember what day it was. It
5 was late afternoon, where the issue of validity of the statement
6 that we can decode or we shall decode 2000 bead types was an issue
7 that I believe caused Jay to call the meeting.

8 Q So this was before the roadshow began?

9 A Probably before the roadshow, but I can't tell you how
10 far before the roadshow.

11 Q You did not attend any of the -- Outside of Illumina,
12 you did not attend any of the roadshow presentations?

13 A Absolutely not.

14 Q You have no basis for saying what was actually said on
15 the roadshow presentations?

16 A That's correct. That's correct.

17 Q Okay. Are you familiar with the agreement between
18 Illumina and Applied Biosystems, one of its partners?

19 A There was an agreement with multiple stages, one of
20 which was to do a 768 decode at a particular time with particular
21 accuracy, and all kind of things like that, yes. There was
22 several -- Yes, I am familiar with it. I don't remember the
23 exact data, but I am familiar with it.

24 Q Are you familiar with the product that Illumina was to
25 provide to the agreement with Applied Biosystems and how many bead
26 types that that array was supposed to contain?

27 A I believe it was 768. I'm wrong?

28 Q You are familiar --

1 A I'm wrong.

2 Q Are you familiar with a goal, for the record, that was
3 to be sold through Applied Biosystems?

4 A No.

5 Q So you would have no way of knowing whether one of the
6 goals was to sell an array that contained 2000 bead types?

7 A No, I don't remember seeing a document. I know 2000
8 was a number that we at engineering where required to support.

9 Q Let's go back to Exhibit 269 here. You didn't receive
10 a copy of this e-mail, did you?

11 A Unfortunately not.

12 Q Were you saying earlier with Mr. Pantoni that there was
13 a word missing with respect to results, where it says, "With
14 Johnny's help," the last sentence there, "the results are
15 excellent"?

16 A What I'm saying to make that statement correct, the
17 word "registration results are excellent."

18 Q Okay.

19 A Not that decoding results are excellent as would be
20 implied from that statement.

21 Q So are you familiar with the registration results from
22 an experiment that was conducted so that you would have seen the
23 white light images on July 12th, 2000?

24 A I believe that Mark Chee wrote that based on fact, that
25 images were registered properly.

26 Q So are you disputing that the decoding results are
27 excellent?

28 A That's correct, I'm disputing the fact that you could

1 get perfect registration, but decoding would be useless or at
2 least inaccurate.

3 Q So are you testifying that you saw excellent
4 registration in the images?

5 A I saw, yeah, yes. I believe that that -- I don't
6 recall exactly looking at all the results, but the way the program
7 ran, it would give indication of whether registration is good or
8 not good.

9 Q I believe Mr. Pantoni asked you if you personally
10 conducted any part of the decoding analyses, and I thought your
11 answer was no.

12 A No, I did not. Decoding is part of the clustering.

13 Q Are you disputing that the clustering experiment that's
14 being discussed here did not show good decoding results?

15 A I would say that I'm skeptical. From what I know, from
16 other images I'd seen at the time, I would be skeptical.

17 Q Did you see the results presented by Bahram Kermani?

18 A It was presented in strip charts, yes, in company
19 meetings.

20 Q Are you sure it's this experiment?

21 A No, I can't be sure.

22 Q Are you sure there are sets of 768 sequences analyzed
23 at Illumina at the time you reached the date of July 13, 2000?

24 A Yeah, probably was more than one 768 experiment going
25 on.

26 Q You don't have any idea what's being referred to in
27 this particular e-mail?

28 A I probably don't. I do have an idea, but I don't know

1 if it's one that -- Yeah, right, I don't know which one he's
2 talking about here, that's correct.

3 Q Do you consider Dr. Czarnik a friend?

4 A I'd like him to be a friend, but I didn't befriend him
5 personally. My interaction with him at Illumina was not as a
6 personal friend.

7 Q Did you feel yourself aligned with him in terms of
8 expressing certain points of view that the two of you held in
9 common while you were employed at Illumina?

10 A Point of view I had had nothing to do with his point of
11 view. But six months after joining Illumina, after from my point
12 of view establishing that the job, image job, can be done, I had
13 focused my attention on the fact that even though we would do the
14 image analysis correctly, the decoding had several flaws in the
15 way the company was going about it, and I at that time approached
16 my boss, Rich Pytelewski, and was able to convince him that
17 engineering has to take hold, take responsibility for that part of
18 the task. He told me he talked to Tony afterwards, and I had
19 several meetings with Tony and Steve Barnard and Chenfang and
20 whatever where I outlined what I thought had to be done. That was
21 the end of my interaction. I wasn't personal friend. If our
22 opinions were in alignment in that respect, good, but that wasn't
23 the reason I befriended him.

24 Q Do you recall Dr. Czarnik ever expressing any concerns
25 that the data from the particular 768 experiment that's being
26 referred to in this e-mail was being overstated?

27 A He didn't say that to me.

28 Q Did he ever say to you anything about a concern that

1 some of the data from decoding experiments at Illumina might be
2 used to perform -- to perpetrate a fraud to the investing public
3 during the IPO?

4 A He didn't say that to me.

5 Q Were you aware Dr. Czarnik had received a performance
6 counseling session from other senior managers prior to July 2000?

7 A Performance what?

8 Q Performance counselings.

9 A What is that?

10 Q Did you ever -- Were you aware the senior managers had
11 expressed to Dr. Czarnik they were unhappy with his performance at
12 Illumina?

13 MR. PANTONI: Object.

14 THE COURT: Prior to?

15 MS ESPINOSA: Prior to July, 2000.

16 MR. PANTONI: Lacks --

17 THE COURT: Is that a preliminary question?

18 MS ESPINOSA: I'm just asking his awareness.

19 THE COURT: I don't think this is relevant with this
20 witness.

21 MS ESPINOSA: Q Are you aware of any concerns Dr.
22 Czarnik raised with respect to the methodology applied to the
23 decoding experiment that's referred to in this e-mail?

24 A He didn't raise them with me because I was usually the
25 one that was most vociferous about these things. It would be
26 redundant for him to tell me these things, so the answer is no.

27 Q So when you were raising your vociferous concerns, was
28 that with respect to the imaging aspect of the decoding?

1 A Not particularly. It was regarding the sequence --
2 regarding our methodology. Instead of going to decode 768 at
3 once, I wanted to start with one, one color only, make sure that
4 works well. Then go to two beads with one color and three beads,
5 eight beads, whatever, with one color. When we get 64 beads or
6 whatever, a good number with one color, then it's time to try two
7 colors. We know there are problems by just going to two colors,
8 let's alone three and four, whatever.

9 I wanted to proceed in this area in a very methodological,
10 cautious manner. My position was overruled by Mark Chee. I tried
11 to solicit, not directly, support from chemistry and some people
12 in biology who would all support me when I had face-to-face
13 meeting with them, but as soon as they were involved in other
14 meetings where Mark Chee presided, basically they chose to stay
15 mute.

16 Q So are you disputing that any of the genotyping
17 experiments that were conducted on the arrays that were decoded
18 using this methodology were inaccurate?

19 A They were susceptible to many errors, many of which we
20 had no idea how largely they affected the results at that time.

21 Q Do you have any training in molecular biology?

22 A You don't need. For this you don't need to know.

23 Q Is it your position that the genotyping methods that
24 would apply to these arrays that were decoded using this
25 technology were somehow flawed because of the decoding
26 methodology?

27 A Yes. That's my position. In fact, there were cases
28 where when I started working on this with Steve Barnard, we could

1 show, and we did, that many results didn't make sense. It would
2 show, but only had one bead type on it, would show up as if it had
3 two bead types. We knew there was only one bead type because
4 that's what we put on it, but the same bundle would show up as if
5 it had to bead types, and three colors, it would have four bead
6 types.

7 Q So you have an understanding of what caused more than
8 one bead type to light up in those experiments?

9 A Yes, you don't have to be rocket scientist for that.
10 There's some basic elements. For example, if you had several
11 beads in a little circle with an empty spot inside, because of
12 what's called scattering, whatever, it would look if those five
13 beads would fluoresce. A spot in the middle that is vacant would
14 also fluoresce, appear to be fluorescing, would become bright.

15 Q Let's get away from the hypothetical. Did you see any
16 data with respect to the 768 experiment that's been referred to in
17 this experiment that showed any of these problems?

18 A I don't recall that because I was not -- I'll answer
19 very frankly. If it was more than one color, I had no interest in
20 it.

21 Q Okay. So you had no interest in multi-color images?

22 A I had no interest in listening to results from
23 clustering and decoding if they were done in multi-colored images,
24 that's correct.

25 Q Why did you come to leave Illumina?

26 A I was fired.

27 MS ESPINOSA: No further questions, your Honor.

28 MR. PANTONI: Nothing further, your Honor.

1 THE COURT: Thank you very much. You may step down.

2 Call your next witness, please.

3 MR. PANTONI: Jian-Bing Fan.

4 JIAN-BING FAN,

5 called as a witness by the Plaintiff, having been first duly

6 sworn, was examined and testified as follows:

7 THE CLERK: Please state your full name for the record

8 and spell your last name.

9 THE WITNESS: My last name Fan, F-a-n.

10 THE CLERK: Your first name?

11 A J-i-a-n, B-i-n-g.

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY MR. PANTONI:

15 Q Is it Dr. Fan?

16 A Yes.

17 Q Dr. Fan, good afternoon. Are you currently employed

18 by Illumina?

19 A Yes.

20 Q And over what period have you been employed by

21 Illumina?

22 A Well, I start working for Illumina for about a little

23 bit over three years now.

24 Q Do you recall approximately when you joined the

25 company?

26 A Yeah, actually I joined the company June 21st, 1999, if

27 my memory is right.

28 Q And you've worked there continuously from that date

1 until now?

2 A Yes.

3 Q What is your current position with the company?

4 A My current position is director of genetic analysis.

5 Q What was your position when you started with the
6 company?

7 A It was senior scientist.

8 Q In what group?

9 A The molecular biology group.

10 Q And are you still in the molecular biology group?

11 A Yes.

12 Q So you've been in molecular biology the entire time
13 you've worked at Illumina?

14 A Yes.

15 Q Dr. Fan, did you have any duties and responsibilities
16 that related to the 768 decoding experiment?

17 A Well, that was not my responsibility. Actually my
18 group was not working on that project.

19 Q So did you do any work at all on that project?

20 A We were just working on very, very side project. We're
21 trying to explore another way to do the decoding. So it's a
22 totally independent -- I mean what we call decoding approach, but
23 it's just some kind of testing.

24 Q Are you familiar with something called the target-down
25 program?

26 A Yes.

27 Q Can you describe for us please what the target-down
28 program is or was?

1 A Yeah. Okay. It may take a little bit of time. So
2 there's two ways to look, you know, the genetical in-patient, for
3 example. So most of the people, we have some kind of standard
4 test probe you put on the array and you take a patient's --
5 hybridize to what testing test probe and then test which probe
6 show up or not show up and to test. Then based on their pattern,
7 you test what's the variation in the patient's sample.

8 But the step --

9 Q Let me interrupt a second. You just described
10 genotyping?

11 A Yes. It can be genotyping, it can be anything. It can
12 be gene expression and it can be anything. When I say probe, it
13 can be any probe. So anything you can say constitutes some kind
14 of biosensor, just to tell you what's in the patient's sample.

15 Q Genotyping is one type?

16 A Yes. We can still stick it -- stick to the genotyping.
17 So the top-down, which is instead put some kind of standard probe
18 on the array, you just take the patient's sample, of course not
19 the whole patient sample, specific part of it, of patient sample,
20 and then you mobilize them and put them on the array. And then
21 you use some kind of standard probe to interrogate what was in the
22 patient sample. We call the top-down because you have the patient
23 sample on the array first.

24 Q In the target-down program, you put actual human DNA on
25 beads?

26 A Yes.

27 Q And as part of the human DNA, not the whole Let's say
28 only particular interest in, say, the breast cancer gene from the

1 patient, but we just look at this particular one, or you want to
2 look at 10 genes, you put 10 genes on the array, but it's really a
3 human DNA in the target-down program?

4 A What you do, you take the human DNA, you preamplify
5 them. Otherwise you won't be able to see them. You amplify the
6 DNA, and then after enrich the particular targeted DNA, you put
7 them on the array, yes.

8 Q But the starting point is human DNA?

9 A Yes.

10 Q And with the genotyping application?

11 A Yeah.

12 Q It's not real human DNA that's put on the bead, is that
13 correct?

14 A No. As I said, for the genotyping, it's also you have
15 to amplify the patient's DNA somehow and also hybridize. It's
16 also from the human, from the patient's sample.

17 Q When did you work on the target-down program?

18 A Well, I cannot remember as clear as my employee date,
19 but I would say roughly either end of 1999 or beginning of the
20 2000.

21 Q And how long did you work on the target-down program?

22 A Well, I have one technician, she has been spending
23 maybe part of her time. I don't know what exact. Maybe 10
24 percent or 20 or 30 percent on that for maybe a few -- a few
25 months.

26 Q Okay. A few months beginning either the end of '99 or
27 the beginning of 2000?

28 A Right.

1 Q So two to three months, that a fair estimate?

2 A Yes.

3 Q Now, other than those two to three months, did anyone
4 else work on the target-down program?

5 A Well, later on, as I say, we were, when we first
6 started, we were looking -- you know, different way to do the
7 genotyping. So we have, like I said, described to have the
8 specific probe put on the array and then take hybrid one way,
9 another way, and then later on a different way, and find the first
10 array may be better. At least you can look at many, many, sample
11 very fast.

12 Q I'm just trying to pin down if I can the timing on
13 which people worked on the target-down program. Was it just those
14 two to three months that you mentioned?

15 A If I remember, yes. If my memory is right, I think
16 it's about a few months.

17 Q Okay.

18 So by first quarter 2000, the target-down program, nobody
19 was working on it anymore?

20 MS KEARNS: I'll object at this point in terms of lack
21 of foundation and relevance of this side project to the issues.

22 MR. PANTONI: I'll bring it in context.

23 THE COURT: Subject to motion to strike.

24 MS KEARNS: Move to strike.

25 THE COURT: Let's hear if you can tie it in.

26 MR. PANTONI: I will.

27 Q So is it fair to say that after the first quarter of
28 2000, no one was working on the target-down program?

1 A Well, as I said, we put this in a side project. We
2 didn't put a lot of effort on it.

3 Q And work stopped in about first quarter of 2000, is
4 that your best recollection?

5 A I have to check my notebook and my technician's
6 notebook.

7 Q As you sit here today, is that your best recollection?

8 A As I said, it's along that time. What I can say is you
9 can find out if we can the notebook, what I have, and my
10 technician has and we can look at them.

11 Q We don't have the notebooks now. Based on your
12 recollection first quarter 2000?

13 A I would say that is the -- I mean my best guess. And
14 as you know, there's some experiment we did almost three years ago
15 and I cannot exactly remember what day I start and when I stop.

16 Q Okay.

17 THE COURT: I think a guess is not good enough if
18 that's important to establishing a time.

19 MR. PANTONI: Q Is that your best estimate, sir,
20 target-down program, you worked on it for approximately two to
21 three months, somewhere late '99, early 2000?

22 A I probably say like early 2000 probably will be more
23 close to what I think it could be correct.

24 MS KEARNS: Your Honor, I'm going to object to the
25 entire line of questioning and move to strike it all. Insofar as
26 I don't think it's, the side project, is relevant to the issues in
27 this case.

28 MR. PANTONI: Let me move to an exhibit.

1 THE COURT: I don't think it's been established at this
2 point it's relevant. Up to this point.

3 MR. PANTONI: Q Let me ask one more question before
4 we look at the exhibit. Was the target-down program discontinued
5 because of some technical difficulties?

6 A Not just technical difficulties. We have only limited,
7 you know, resource, and at certain time we have to make a decision
8 like which platform work better, and, you know, at least immediate
9 impact. So, for example, when I got the direct hybridization,
10 when we find kind of like, you know, make maximum use of our
11 current platform, and then we decide at that time we are not to
12 pursue and put all my effort on that --

13 Q All right.

14 A We may come back to it eventually. And actually if you
15 look what I said before, my technician, that was still one of her
16 goals, even though I'm not sure how much time she spend on that.

17 Q Okay.

18 Let take a look at Exhibit 234. This is an e-mail from Jay
19 Flatley to Tony Czarnik dated June 5 of 2000. It does reference
20 -- it references you and the target-down program. Can you see
21 that?

22 A Yes.

23 Q And you are in charge of the target-down program, is
24 that correct?

25 A My group was working on that, yeah.

26 Q Was anything that Illumina did in the area of binary
27 oligo encoding, was that ever used by your group in connection
28 with the target-down program?

1 MS KEARNS: Objection, foundation.

2 THE COURT: Foundation as to what? His knowledge?

3 MS KEARNS: Knowledge of the binary decoding.

4 MR. PANTONI: That's what I'm trying to establish.

5 Q Did anything that the company may have done in the area
6 of binary oligo encoding, did you ever use that in connection with
7 the target-down program?

8 A Yes. Target-down required decoding as well.

9 Q Required what type of decoding?

10 A Any decoding.

11 Q Anything specific -- Are you familiar with binary
12 oligo decoding?

13 A I'm not sure exactly what, you know, what you mean by
14 that term. Since this is my first time here. If you can explain
15 to me what you mean.

16 Q That may take sometime. We've had some testimony on
17 that.

18 Did you ever use any results generated by a scientist name
19 Gali Steinberg in connection with the target-down program?

20 A No.

21 MR. PANTONI: Nothing further.

22 THE COURT: Any questions?

23 MS ESPINOSA: Nothing further, your Honor.

24 THE COURT: Thank you very much, sir, you may step
25 down.

26 Call your next witness, please.

27 MR. PANTONI: Chanfeng Zhao

28 THE COURT: Could I see counsel without the reporter for

1 a moment as the witness is being brought in. Go ahead and bring
2 her in.

3 (Discussion off the record.)

4 CHANFENG ZHAO,

5 called as a witness by the Plaintiff, having been first duly
6 sworn, was examined and testified as follows:

7 THE CLERK: Please state your full name for the record
8 and spell your last name.

9 THE WITNESS: C-h-a Z-h-a-o

10 THE COURT: The witness was sworn?

11 THE CLERK: Yes, she has, your Honor.

12 Excuse me, is that your first or last name?

13 THE WITNESS: Last name. Z-h-a-o. Z as in Zebra.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MR. PANTONI:

17 Q Dr. Zhao, are you presently employed by Illumina?

18 A Yes.

19 Q And how long have you been employed by Illumina?

20 A I joined Illumina February, 1999, so it's about three
21 and a half years.

22 Q When you first joined Illumina, who was your boss?

23 A Dr. Czarnik was my boss.

24 Q Was Dr. Czarnik your boss from February of '99 until he
25 stepped down as chief scientific officer?

26 A Yes.

27 Q What was your position at that time?

28 A I started at scientist position and then promoted to

1 senior scientist position. So I was a senior scientist.

2 Q In the chemistry department?

3 A In the chemistry department.

4 Q Was your office in the work area that we've been
5 calling the big room?

6 A Yes.

7 Q That's where your desk was?

8 A Uh-huh.

9 Q Dr. Czarnik was also located there?

10 A Yes.

11 Q Is it fair to say, ma'am, you interacted with Dr.
12 Czarnik on nearly a daily basis when he was your boss?

13 A Yes, I would say so.

14 Q Do you believe Dr. Czarnik was a good manager during
15 the time he supervised you?

16 A He is a good boss to me.

17 Q Was he a good mentor to you when you worked for him?

18 A Yes, he was always available for advice, yes.

19 Q Did he provide direction to you as a scientist in his
20 group?

21 A Yes.

22 Q Based on your observations of Dr. Czarnik, Miss Zhao,
23 would you say he was a hard worker?

24 A Um, everyone is hard work worker at Illumina, yes.

25 Q Including Dr. Czarnik?

26 A Yes.

27 Q To your knowledge, Dr. Zhao, did Dr. Czarnik ever do
28 anything to cause dissension or tension between the two groups,

1 between chemistry and molecular biology?

2 A I don't recall.

3 Q Dr. Zhao, did you have any duties or responsibilities
4 that related to decoding when you worked at Illumina?

5 A I was responsible for making beads.

6 Q That were used in decoding?

7 A Yes.

8 Q Do you know a scientist named Gali Steinberg?

9 A Yes.

10 Q What group was she in?

11 A She is in my group.

12 Q In chemistry group?

13 A Yes.

14 Q Let take a look at Exhibit 227. Dr. Zhao, these have
15 been identified as some goals that were assigned to Tony Czarnik
16 when he was research fellow. On the second project is an area
17 called binary oligo encoding. Are you generally familiar with
18 that concept?

19 A Yes.

20 Q Do you know whether Gali Steinberg ever worked on
21 experiments on this project, binary oligo encoding?

22 A Yeah.

23 Q What do you know about that?

24 A Well, do you have a specific question?

25 Q Do you know whether she did experiments in the area of
26 binary oligo encoding?

27 A Okay. So she developed the chemistry which allowed to
28 attach two DNA's on one bead, which allowed to encoding many, many

1 thousands and thousands bead types.

2 Q Do you know whether the project she worked on was the
3 same or different than the project assigned to Dr. Czarnik?

4 A I don't know. I don't know if it's exactly the same.

5 Q Well, did you work with Dr. Czarnik at all on his work
6 plan in connection with this project, binary oligo encoding?

7 A I believe this is after -- after Dr. Czarnik become
8 research fellow.

9 Q Do you know of any problems with the results of Dr.
10 Gali Steinberg's experiments?

11 MS KEARNS: Objection, vague.

12 THE COURT: Sustained.

13 THE WITNESS: There's no problem --

14 THE COURT: Hold on. Don't answer. Objection
15 sustained.

16 MR. PANTONI: Q Did you actually do the experiments
17 with her, ma'am?

18 A Yes. I was her direct supervisor.

19 Q How many different bead types was she able to decode
20 when she did her experiments?

21 MS KEARNS: I'll objection, vague. Actual decoding
22 versus --

23 THE COURT: Proof of concept principle.

24 THE COURT: Do you know the difference between proof of
25 concept principle, can you relate that to this question?

26 THE WITNESS: She didn't make thousand bead types.
27 Actually more thousand bead types. I believe proof concept prove
28 principles down.

1 MR. PANTONI: Q I'm sorry?

2 A Yeah, proof principle, prove-down how done.

3 Q How many actual bead types was she able to --

4 A So each bead type, each bead type she made has QC by
5 fax machine and which is our standard QC at the moment. So if the
6 bead passed QC, we believe that's the -- that the bead can be
7 decoded. And she did make over thousand bead types, but to prove
8 concept we only decode 96.

9 Q 96?

10 A Yes.

11 Q Is she back at work yet, ma'am?

12 A No, she recently had baby.

13 MR. PANTONI: Nothing further. Thank you, ma'am.

14 THE COURT: Thank you.

15 MS ESPINOSA: Nothing further.

16 THE COURT: No further questions. Thank you very much,
17 Doctor, you may step down.

18 Does that exhaust our witnesses for today?

19 MR. PANTONI: It does.

20 THE COURT: Okay.

21 So to go over the schedule, we're done for today. Then we
22 have a full day of testimony tomorrow. I can see from my calendar
23 that we can start right at 9 o'clock. I start at 8:15 with these
24 others. I'll have you come in at 9:15 tomorrow.

25 So we'll do the full day of testimony tomorrow and then the
26 next day of court will be Monday, July 8. That's the day counsel
27 will give their closing arguments, I'll give the instructions and
28 you'll begin your deliberations.

1 So we'll be in recess until 9:15 tomorrow morning. Please
2 remember the admonition not to form or express any opinions about
3 the case, not to discuss the case among yourselves or with anyone
4 else. We'll be in recess until 9:15. 9:15.

5 (Proceedings resumed outside the presence of the jury.)

22 (Proceedings recessed at 3:40 p.m.)

23 --o0o--

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
 Plaintiff,)
)
 vs.) No. GIC763972
)
 ILLUMINA, INC., a corporation; and)
 DOES 1 through 20, inclusive,)
)
 Defendants.)
 _____)

Reporter's Transcript of Proceedings
Volume 8
San Diego, California
July 2, 8, 2002

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Reported By: Peter C. Stewart, CSR No. 3184
Official

1 SAN DIEGO, CALIFORNIA, TUESDAY, JULY 2, 2002; 9:05 A.M.

2 (Proceedings resumed outside the presence of the jury.)

18 (Jurors seated in open court.)

19 THE COURT: Morning, ladies and gentlemen.

20 Record indicate all the jurors are present, and I think
21 we're ready to call the next witness, is that right?

22 MS ESPINOSA: We call Diping Che.

23 THE COURT: Very well. Dr. Che has previously been
24 sworn as a witness. Is that correct?

25 DIPING CHE,
26 called as a witness by the Defendant, having been previously duly
27 sworn, was examined and as follows:

28 THE COURT: You are still under oath, Dr. Che.

DIRECT EXAMINATION

1

2 BY MISS ESPINOSA:

3 Q Good morning, Dr. Che.

4 A Good morning.

5 Q Just so we make sure the jury wasn't confused by your
6 prior testimony, did you have any involvement in the decoding
7 experiment at Illumina involving sets of 768 sequences?

8 A No.

9 Q So as a member of the engineering group, what was your
10 responsibility?11 A My responsibility was to only to develop the imaging
12 systems.13 Q So I understood from your prior testimony you were
14 checking the dyes that were sent to Illumina by Molecular Probes.
15 How did you come to test those dyes?

16 A I was trying to test one of the imaging systems.

17 Q Did Dr. Czarnik suggest you do these tests?

18 A No.

19 Q How did you obtain the samples of dyes?

20 A I got samples from molecular biology group and Mr. Jim
21 Bierle, I believe.

22 Q You just asked for them?

23 A Yes.

24 Q Which dyes did you get?

25 A I think it's three dyes.

26 Q And what exactly did you do with those dyes?

27 A I measured the cross-talk and then also spectral
28 characteristics of those dyes.

1 Q And did you see any kind of error in the labeling of
2 any of those dyes?

3 A Yes, appears from the spectrum appears one of the
4 labels was wrong.

5 Q Could you put up 276, please.

6 So this is your e-mail response to Dr. Czarnik on July 26.
7 Does this relate to the dyes that you tested?

8 A I believe so.

9 Q So when you looked at the three vials of dyes, you were
10 trying to look at three different colors?

11 A Yes.

12 Q Instead you only saw two different colors?

13 A That's correct.

14 Q When you received this e-mail from Dr. Czarnik, you
15 responded, "Most likely that is the case." Did you know exactly
16 what Jim Bierle had done in the 768 decoding experiment?

17 A Not at all.

18 Q You weren't aware of mixed four labels of the
19 mislabeled dye with seven labels of the correctly labeled dye?

20 MR. PANTONI: Assumes fact not in evidence.

21 THE COURT: Sustained.

22 MS ESPINOSA: Q You have no idea?

23 MR. PANTONI: Ask the jury to disregard.

24 THE COURT: Motion to strike granted.

25 THE WITNESS: No idea.

26 MS ESPINOSA: Q In fact, you had no idea what Jim
27 Bierle had done in his experiment, is that correct?

28 A That's correct.

1 Q So why did you respond then, "Most likely that is the
2 case"? Were you speculating?

3 A To the most part, yes, speculating.

4 Q So were you taking a guess that Jim Bierle had only
5 used two colors instead of three?

6 A That's correct.

7 Q Did Dr. Czarnik follow-up with you in anyway after he
8 received your response to this e-mail?

9 A No.

10 Q To your knowledge, did he talk to any of the other
11 scientist that actually were involved in the 768 experiment?

12 A I'm not aware of that.

13 Q And did Dr. Czarnik ever come to you and express any
14 concern that because of this mislabeled dye there might be some
15 problem with Illumina discussing this experiment on its roadshow?

16 A Not at all.

17 Q Could we put up 249, please.

18 Do you recall receiving this e-mail from Dr. Czarnik on June
19 20th, 2000?

20 A I probably received that.

21 Q By this time Dr. Czarnik was a research fellow. Do you
22 remember whether or not at this meeting Dr. Czarnik raised any
23 concerns about checking dyes to make sure they are properly
24 labeled?

25 A No.

26 Q What was this meeting about?

27 A I think at that time we have been searching for the
28 best dyes for our image systems.

1 Q Where it's referring to dye choices, was he asking the
2 group to analyze which types of multiple dyes might be best for
3 his purposes?

4 A I believe it's related to some of research.

5 Q Okay. Nothing further. Thank you.

6 THE COURT: Cross-examination

7 CROSS-EXAMINATION

8 BY MR. PANTONI:

9 Q Hello again, Dr. Che.

10 A Hi.

11 Q You are not retracting any of the testimony you gave to
12 this jury in the previous session, are you?

13 A No.

14 Q Do you recall you've already told the jury that not
15 only did you work on imaging systems, but you looked at the data?

16 A Yes, I believe the data -- Data is the data I
17 personally collect myself, and basically the observation that I
18 resolved with the system I developed.

19 Q And based on your observation of the data, it looked to
20 you like there were only two dyes?

21 A Yes, with those dyes.

22 MR. PANTONI: Nothing further.

23 THE COURT: Anything further?

24 MS ESPINOSA: One follow-up.

25 REDIRECT EXAMINATION

26 BY MS ESPINOSA:

27 Q Diping, what was the data that you were looking at?
28 Was it decoding data?

1 A Not at all. It is just pure dye from the vial.

2 Q So you were just doing a quick check on the dyes?

3 A That's correct.

4 MS ESPINOSA: Thank you.

5 MR. PANTONI: Nothing further

6 THE COURT: Thank you very much. You may step down.

7 Call your next witness, please.

8 MS ESPINOSA: We call Dr. Mark Chee.

9 THE COURT: Very well.

10 MARK CHEE,

11 called as a witness by the Defendant, having been previously duly
12 sworn, resumed the witness stand and testified further as follows:

13 THE COURT: You are still under oath, Dr. Chee.

14 THE WITNESS: I assume I am, yes.

15 THE COURT: You are still under oath, sir.

16 THE WITNESS: Yes, I am.

17 DIRECT EXAMINATION

18 BY MS. ESPINOSA:

19 Q Good morning, Dr. Chee.

20 A Good morning, Nicky.

21 Q I put up Exhibit 269-1, please.

22 Could you highlight the paragraph with the parenthetical
23 clause. It's about, "We've now tested."

24 Dr. Chee, you were questioned earlier about this e-mail by
25 Mr. Pantoni.

26 JUROR: We can't see it.

27 MS ESPINOSA: Q Dr. Chee, let me draw your attention
28 to the parenthetical clause there which says, "We've now tested

1 two different sets of 768 with both showing good specificity." I
2 believe when Mr. Pantoni questioned you, you were unable to recall
3 what experiments particularly were referring to. Have you now had
4 a chance to refresh your recollection?

5 A Yes, I have.

6 Q How did you do that?

7 A I went through lab notebooks of a number of our
8 scientist. Jim Bierle, Kevin Gunderson, Bahram Kermani.

9 Q Are those the original notebooks there?

10 A They are.

11 Q In that clause where you say two different sets of 768,
12 does that mean there were two different sets of 768 DNA sequences
13 that were being tested at Illumina?

14 A That's correct.

15 Q Can you explain what those two were?

16 A There was an initial set that we referred to as the
17 Bahrani sequence. That's after a scientist who published a paper
18 using these sequences. That was the initial set that we worked
19 on.

20 Subsequently, actually not for scientific but for business
21 reasons, to do with intellectual property, namely we came up with
22 another set of sequences. They were designed by Kevin Gunderson,
23 and we referred to them by Kevin's name for them which was the
24 Illumina codes.

25 Q So in this e-mail when you are referring to testing two
26 different sets with both showing good specificity, were you any
27 way referring to an earlier experiment which Dr. Gunderson
28 testified about that failed?

1 A No, I wasn't.

2 Q So were there other experiments that were conducted
3 with the Behrani sequences that did show good specificity?

4 A Yes, there were. As I testified previously, there was
5 a whole series of experiments that we did in this stage looking at
6 768 complexity, and the very initial point in the series failed,
7 but subsequently there were successful experiments.

8 Q Okay. So in this e-mail then is it accurate to say
9 that your memory was refreshed after looking at these lab
10 notebooks, and in fact there were two good sets of 768 that showed
11 good specificity?

12 A That's correct.

13 Q Let put up -- Did you want to show the jury how you
14 refreshed your recollection on that earlier Behrani experiment?
15 Do you have any figures you can refer to to illustrate that?

16 A I can go through very briefly. Actually when I went
17 through this, there was really a nice set of high quality
18 experiments that was done, both in preparing the reagents and in
19 carrying out the experiments and in troubleshooting the very
20 initial experiment that didn't work, and going on to get good
21 data. There's no time to go through that here, but I can just
22 show perhaps a figure from Dr. Kermani's notebook that really just
23 summarizes the result.

24 Q Is that lab notebook number 68?

25 A That's right.

26 Q Is it page -- Does it look like this?

27 A Yes, page 82.

28 Q I'm going to put it on the ELMO for the jurors.

1 MR. PANTONI: I would object to this. I've never seen
2 it before. We've had no opportunity to examine any of these
3 notebooks despite discovery requests. I object to it.

4 MS ESPINOSA: These were not responsive to any of his
5 discovery requests.

6 MR. PANTONI: Absolutely they were.

7 THE COURT: Why don't you show it to him now. How many
8 exhibits are you seeking to use here?

9 THE WITNESS: I think I can probably summarize this
10 with just two pages, one or two pages from the lab books.

11 MS ESPINOSA: Q Which ones do you want to use?

12 A Well, in referring to this earlier Behrani set, perhaps
13 just page 82.

14 Q Is that the one I showed you?

15 A That's the one. And --

16 Q Is that the one with the date June 2nd on the bottom?

17 A That's the one.

18 MR. PANTONI: Same objection, your Honor.

19 THE COURT: Have you had a chance to see it?

20 MR. PANTONI: Yes, I've had a chance to see it. I have
21 no idea what it means.

22 THE COURT: Is this rebuttal testimony?

23 MS ESPINOSA: Yes, your Honor, just the support that
24 there were actually two sets of 768 that showed good specificity.
25 This was the first one, not the failed experiment.

26 THE COURT: What testimony does this rebut?

27 MS ESPINOSA: He was questioning Kevin Gunderson
28 whether there were two good sets of specificity and he had no idea

1 because Kevin Gunderson didn't do this experiment.

2 MR. PANTONI: Several witnesses have said no.

3 THE COURT: Okay. The objection is overruled. You can
4 have these displayed.

5 MS ESPINOSA: Q Could you describe why that shows good
6 specificity?

7 A And I think I can explain it fairly simply.

8 Let me just try and explain the overall interpretation. If
9 you would just look at any one of those rows, just pick one, it
10 actually represents 8 sets of 96. And a specific result should
11 show a black bar in only one of those 8 sets of 96. So what was
12 happening was that we were testing a set of 96 beads against all
13 768 decoders. So there was a chance to get a lot of wrong answers
14 and only 96 chances to get the right answer.

15 And again, without going into all the details, those black
16 bars are in the right places for that -- so indicating that we
17 were getting a right answer.

18 MS ESPINOSA: Q That shows good specificity?

19 A Shows very good specificity. An analogy I can use to
20 just give you some idea of the odds of getting this result by
21 chance is it's like buying lottery ticket and you've got to pick
22 one right number, that's not so hard to do. You have, I don't
23 know, 6 chances out of 40 something, I guess. This is 96 chances
24 out of 768. But then you have to pick a second right number and
25 then you have to pick another right number, and you have to keep
26 going on and doing this, and the odds of doing this correctly for
27 so many right numbers here are just astronomical. So that shows
28 good specificity.

1 The numbers on the left just actually reflect the bars that
2 the picture on the right, and they just show the number of beads
3 in each of those categories.

4 The end result I can summarize for you is that about 400 out
5 of 768 were decoded correctly.

6 Q Okay.

7 So this was the Behrani set of 768, correct?

8 A That was the Behrani set of 768.

9 Q Okay. So that explains your first set that showed good
10 specificity.

11 Now, in the e-mail --

12 A And I believe, sorry. That my initial e-mail,
13 maybe --

14 Q Could you put up 269-1 one again, please. Go ahead.

15 A This -- It's possible that Mr. Pantoni's questioning
16 confused Dr. Gunderson and perhaps others, because my e-mail I
17 think also is not entirely clear. That's not surprising. This
18 e-mail is taken out of context a couple of years later and people
19 don't recollect everything that was said around it.

20 Q And in fact you didn't send this e-mail to Dr.
21 Gunderson?

22 A No, I didn't send it to Dr. Gunderson. I think he may
23 have been misinterpreting and thinking there were 500 good
24 sequences --

25 MR. PANTONI: I'm going to object and move to strike on
26 the basis of foundation and calls for speculation.

27 THE COURT: Sustained. Motion to strike granted. Jury
28 admonished to disregard.

1 MS ESPINOSA: Q Let's move to the other experiment
2 you've heard about a lot in this pretty picture. So was there
3 ever any doubt in your mind that the pretty picture showed good
4 specificity?

5 A None whatsoever. And I'd be happy to just explain this
6 picture a bit better.

7 Q Have you used this picture in scientific presentations?

8 A Yes, I have. I think it's a wonderful picture that
9 shows very intuitively that decoding works well and has worked
10 well in this experiment.

11 What I'd like to do, if I could, is just show one more --

12 Q 269-3. We'll put up the --

13 A That's the one I meant to show.

14 Q Is there any doubt in your mind this experiment used
15 three colors and not two?

16 A There's no doubt whatsoever in my mind this used three
17 colors. You can see.

18 Q 269-3, please.

19 The next page, 4.

20 So this was the other page of the PowerPoint attachments you
21 sent to the team on the roadshow?

22 A That's right.

23 Q And these are the clustering diagrams that relate to
24 this experiment?

25 A That's correct.

26 Q And these are the Gunderson Illuma code 768?

27 A This is the Gunderson Illuma code 768.

28 Q What does that cluster diagram show?

1 A Perhaps I can point it out here.

2 Q They can't see the PowerPoint up there. I'll put it
3 down to the floor if you want to use it.

4 A Is it okay if I go over there and point?

5 Q Sure.

6 A So that's end result of a sort of a computational
7 analysis to figure out what the codes were. This is just a visual
8 representation of the data. So in a scientific experiment, you
9 should be able to relate the end result to the data that you see.
10 If you can do that, it's probably right.

11 A There's three different colors here. Now, they are not --
12 they are not perfectly sort of all red or all blue or all green,
13 but they are close enough that I think you can see three different
14 categories. So the cluster down at the bottom, I've looked at Dr.
15 Kermani's lab book, and I'm not a hundred percent sure is this
16 exactly the same way the cluster --

17 Q Dr. Gunderson, you mean?

18 A Dr. Kermani's. The cluster at the bottom right that's
19 colored blue there, that corresponds to the blue beads here.

20 Q So this blue cluster here correlates to the blue beads
21 in the picture?

22 A Right. So that's one color. The red beads here
23 correspond to the green cluster over there.

24 Q You can have any color you want?

25 A You can assign any color you like. So this is another
26 cluster. And then the third one, that yellow one at the top,
27 which actually is not as well separated from the other two as it
28 should be, as we wanted it to be, that corresponds to the color

1 made by the mixed-up dyes. And that corresponds to beads that are
2 yellowish green here. You can see that some -- It's somewhat an
3 artifact of the imaging process as well. Some are yellow and some
4 are more green, but they are not red and they are not blue. They
5 are that third category.

6 Q So that's why these two clusters are closer together
7 then?

8 A Right. So when you are looking at this, this was the
9 point of making this slide. It's so that you didn't need all the
10 mathematical background to interpret the result. The point of
11 this was to show people that you could clearly distinguish three
12 separate categories of bead.

13 Now, there are occasional beads that just don't fall into
14 any category. There's a couple of white beads. I don't know what
15 those are. I don't think anybody knows what those are. That's
16 normal. That's one of the strengths of the decoding approach.
17 That is that we always get a few beads that don't fall into any
18 category. We now know those are funny beads. We throw those
19 away. So what we wind up with are really good beads. And that's
20 been proven by our genotyping experiments, which is the purpose of
21 all this decoding, that show we get really good genotyping.

22 So there are indeed three colors in this experiment. One of
23 them slightly mixed up, but nevertheless distinct from the other
24 two.

25 Q So to your recollection, in July of 2000, when this
26 whole issue of the mislabeled dyes came up, did Dr. Czarnik ever
27 ask you these questions about the experiment?

28 A To my recollection, he did not.

1 Q Did he ask Dr. Kermani -- Did he call a meeting of the
2 scientists involved in the experiment to investigate the impact of
3 the mislabeled dye on the experiment?

4 A Not that I'm aware of.

5 Q So going back to your e-mail to the senior staff, do
6 you now have a recollection that in any way you overstated or
7 exaggerated the status of decoding at Illumina at that time?

8 A I did not overstate or exaggerate the status of
9 decoding. In fact, the other experiment supports it further.
10 There was an implication there was an experiment done hastily and
11 all these conclusions were drawn on one experiment. That's not
12 the case. If I had the time, I could go through and lay out whole
13 series of 73 careful experiments leading up to this, all the way
14 from 16 to 168 to the initial Behrani net. The initial Behrani
15 set we tested lots of different things, and so we had a very firm
16 foundation before we came to that last 768 that we're talking
17 about here.

18 And keep in mind that we're now using different sets of
19 sequences. We actually used different labeling methods, we used a
20 couple of different analysis techniques, and all of these worked.
21 So that says it's very robust.

22 Q We also heard some prior testimony that Dr. Czarnik
23 described himself as a cynic. In your experience, did Dr. Czarnik
24 ever tell you that any of these scientific experiments or tasks
25 were impossible?

26 A He sometimes referred to tasks as being impossible.

27 Q Can you recall an example?

28 MR. PANTONI: Objection, relevance.

1 THE COURT: Sustained.

2 MS ESPINOSA: Q By the way, did Jim Bierle actually
3 test the mislabeled dyes to see if there was a mix-up in the dyes?

4 MR. PANTONI: Objection, lack of foundation, hearsay.

5 THE COURT: Sustained. Lack of foundation.

6 MS ESPINOSA: Q Could you refer to Mr. Bierle's lab
7 notebook in front of you there. It's lab notebook number 75.

8 MR. PANTONI: Object on the basis of hearsay, Judge.

9 MS ESPINOSA: Page 73.

10 THE COURT: Can you lay a foundation as a business
11 record?

12 MS ESPINOSA: Q Are these lab notebooks that are
13 ordinarily kept in the course of Illumina's business?

14 A Yes.

15 Q Did you supervise Jim Bierle as part of the molecular
16 group?

17 A I did. Kevin Gunderson supervised him directly, but I
18 was overall responsible for him.

19 Q And do you have any knowledge as to whether or not Dr.
20 Bierle, Mr. Bierle, checked the dyes that were used in the 768
21 decoding experiment?

22 A He did check the dyes.

23 Q And Dr. Czarnik testified earlier that there are these
24 five-minute tests you can do to check whether a dye is properly
25 labeled or not in its bottle or not. Is that the kind of test Jim
26 Bierle conducted?

27 A That's correct.

28 MR. PANTONI: Same objection.

1 THE COURT: Can you establish the source of his
2 information on that?

3 MS ESPINOSA: Q Is the source of your information the
4 laboratory notebook that I just referred you to?

5 A Yes.

6 Q Okay. What does that laboratory notebook page
7 illustrate?

8 A That Jim Bierle performed a simple spectroscopic
9 analysis of the dyes when they were attached to the oligos. This
10 was done immediately after we analyzed the decoding results, and
11 we thought that the separation might not be as -- was not as good
12 as it should have been, and the analysis clearly shows there are
13 two dyes mixed together.

14 Q We heard earlier testimony from Dr. Czarnik that he
15 advocated doing these tests to you in particular but that you were
16 stubborn and didn't allow him to do this experiment. Did you in
17 any way prevent Jim Bierle from doing this experiment?

18 A No, I didn't.

19 Q As a matter of fact, at the time it happened, did you
20 know he had done it?

21 A No, I didn't. In fact, no, I don't micromanage
22 research, and a five-minute experiment like this can be done by
23 anybody at anytime, and it was done by Jim Bierle in my group, so
24 I don't see how I would have any way of preventing anybody else
25 from doing such an experiment.

26 Q Thank you, Dr. Chee.

27 THE COURT: Cross-examination.

28 CROSS-EXAMINATION

1 BY MR. PANTONI:

2 Q We already spent several hours with you so I won't, to
3 everyone's pleasure, go over your prior testimony.

4 So you say Jim Bierle checked the dyes but he missed the dye
5 had been mislabeled?

6 A No, I said that he checked them after we suspected that
7 something was wrong, and the analysis clearly showed that the two
8 dyes had been mixed together.

9 Q He didn't check it before the experiment was conducted?

10 A He actually, going back to the earlier Behrani
11 experiments, did those checks, and since we were using more lots
12 of dye from the same supplier, he had no reason to do those checks
13 again prior to the Illuma code experiment. But I can't say a
14 hundred percent whether he checked those dyes before he mixed them
15 together.

16 Q You are speaking of Jim Bierle?

17 A That's correct.

18 Q Who do you believe is the person who actually mixed the
19 dyes together?

20 A As I said, I didn't supervise or carry out work
21 directly in the lab myself. I'm pretty sure it was either Jim
22 Bierle or Monica Milewski.

23 Q Based on your review of the lab notebooks and your
24 reflection on this after you'd already testified, do you know who
25 actually mixed the dyes or allegedly mixed the dyes?

26 A No, I don't. I can't say a hundred percent sure with a
27 hundred percent certainty, but I'm pretty sure it was one of the
28 two people I referred to.

1 Q Okay. You still agree, sir, that Kevin Gunderson was
2 the lead scientist on the 768 series of experiments?

3 A Yes, he was.

4 MR. PANTONI: Nothing further.

5 THE COURT: Anything further?

6 MS ESPINOSA: No, your Honor.

7 THE COURT: Thank you very much. You may step down.

8 THE WITNESS: Thank you.

9 THE COURT: Call your next witness, please.

10 MS KEARNS: We'll be calling Dr. Allan Mallinger.

11 ALLAN MALLINGER,

12 called as a witness by the Defendant, having been first duly
13 sworn, was examined and testified as follows:

14 THE CLERK: Would you please state your full name and
15 spell your last name for the record.

16 THE WITNESS: Allan Edward Mallinger,
17 M-a-l-l-i-n-g-e-r.

18 THE CLERK: Thank you

19 DIRECT EXAMINATION

20 BY MISS KEARNS:

21 Q Good morning, Dr. Mallinger.

22 Do you know the Plaintiff in this action, Dr. Tony Czarnik?

23 A Yes.

24 Q And is Dr. Czarnik an individual who has been a patient
25 of yours in the past?

26 A Yes.

27 Q Have you had a chance to review your treatment notes of
28 the sessions that you held with Dr. Czarnik?

1 A I just glanced over them last night.

2 Q All right. Let me ask you little bit about your
3 background. You are a medical doctor?

4 A Yes.

5 Q You are a psychiatrist?

6 A Yes.

7 Q And do you have a particular area of specialty within
8 psychiatry?

9 A No. Outpatient psychiatry. Adult outpatient.

10 Q Okay.

11 During the course of your treatment of Dr. Czarnik, did you
12 make notes of what occurred in each of your treatment sessions?

13 A Yes.

14 Q Is that your common practice in individual therapy
15 sessions?

16 A Yes.

17 Q And in creating these handwritten notes, did you create
18 them at the same time, in other words during the session with the
19 patient?

20 A Yes.

21 Q I'm going to ask you to take a look, there are some
22 binders behind you, or at your feet, there should be some black
23 binders, exhibit binders. If you could turn to the Exhibit 365.

24 A It would be the last one.

25 Q Yes.

26 I'm going to ask you to thumb through -- These have been
27 Bates stamped in the bottom right hand corner, and for reasons
28 that relate to a ruling made by the judge concerning hearsay

1 documentation, as I mentioned on the phone last night, I'm going
2 to actually have to have you read from your notes rather than
3 putting them up or submitting them in hard copy to the jury.

4 So we've established then, take a look at the Exhibit 365
5 and confirm whether these appear to be a true and correct copy of
6 your own handwritten notes.

7 A They do.

8 Q If I could ask you to go to page -- This is Exhibit
9 365, page 365-7. I'm sorry, I got ahead of myself. 365-2.
10 Second page of the exhibit.

11 A Okay.

12 Q And my first question to you is is April 23rd, 1999,
13 the first date on which you saw Tony Czarnik?

14 A Yes.

15 Q And would it be accurate to say, Dr. Mallinger, that
16 any statement you wrote in your handwritten notes which you
17 attribute to the patient is something that the patient in fact
18 said to you during that session?

19 A Yes, or a paraphrase.

20 Q Okay. You wouldn't attribute a statement or a
21 paraphrase to statement to a patient if he or she didn't say it,
22 would you?

23 A That's correct.

24 Q Let me ask you to go to -- I'm trying to find your
25 handwritten note that coincides. Bear with me a moment. I'm
26 sorry.

27 It's page 365-3. Basically middle of the page, middle of
28 that paragraph that begins, "In the '97 episode." I'd like you to

1 read that sentence to the jury.

2 A "In the '97 episode, I was thinking of self-
3 improvement. Lipo- --"

4 Q I'm sorry, let me ask you to go down to the next
5 paragraph that begins with the words "got involved."

6 A "Got involved in this start-up company back in June."
7 Continue?

8 Q Yes, please.

9 A "Best opportunity I'm likely to have in my lifetime."

10 Q Continue.

11 A "One of three people, one of them is like in your book,
12 too perfect, and as I'm unable to meet -- as -- I've been unable
13 to meet his expectations, he's always angry with me."

14 Q Let me stop you there. Do you have a book that you've
15 written concerning a certain type of personality?

16 A Yes.

17 Q And is that book a book entitled, "Too Perfect"?

18 A Yes.

19 Q So is this reference indicating that Dr. Czarnik was
20 telling you that one of the people in his company was like the
21 personality profile described in your book?

22 A That's correct.

23 Q Let next go to 365-4, bottom of the page, and really
24 towards the last three or four lines there's an indication that
25 says "IMP," which I assume you mean "impression"?

26 A Correct.

27 Q I'd like you to read from there through the plan
28 section.

1 A Okay. "Impression: Major depression. Plan: Add
2 bupropion to the fluoxetine. Come back ASAP. Slow increase to
3 100 milligrams TID of bupropion," and then there's a "100" and
4 then there's a pound sign and a "90," which is -- which means 100
5 milligrams, 90 pills.

6 Q Okay.

7 So does this reflect that you were going -- that when it
8 says, "Plan: Add bupropion to the fluoxetine," does that suggest,
9 Dr. Mallinger, that at the time Tony Czarnik visited you he was
10 taking fluoxetine and you were going to add bupropion as an
11 additional medication?

12 A Correct.

13 Q Let's go to page 365-7, very top entree, and I'd like
14 for you to begin reading -- actually if you could read the entire
15 first full paragraph, and this is again something reflecting what
16 Tony Czarnik told you on May 7, '99. Is that correct?

17 A Correct.

18 Q Okay, please read the passage.

19 A "What's becoming apparent to me is I'm terrified of my
20 boss. Mind racing, shaky, pain in my head. The three of us
21 started the company together, but he is the acting president. I
22 am powerfully motivated to stay with this company, so I have to
23 come to grips with dealing with him."

24 Q If you can then skip the next paragraph and read the
25 paragraph that begins with the word "mood."

26 A "Mood (at 40 of 100) at home in the evening I feel low
27 and down. Last weekend I flew to Washington and was with six
28 brothers and that was great."

1 Q Then continue.

2 A "John, what comes to mind Aryan, tall, unbelievably
3 well built, good looking, athletic, disciplined, non-emotive, sole
4 purpose to increase the price of stock."

5 Continue?

6 Q Yes.

7 A "For the last six months or so you be happy with my
8 performance. His self-worth totally tied up in the success of
9 this company. He is very frugal. Unmarried."

10 Q Let's stop there. So does this reflect that on May 7,
11 1999, Dr. Czarnik reported to you that for the last six months or
12 so John had been unhappy with his performance?

13 A Can you take me back to where that was.

14 Q Sure. It's beginning at 365-8 and it's kind of the
15 second paragraph where it says, "And for the last six months or
16 so."

17 A Yes, that's what it indicates.

18 Q So he was reporting that John had been unhappy with his
19 performance for about six months?

20 A Yes.

21 Q Let's now jump ahead to page 365-14, and I'd like you
22 to read beginning at the very top, which begins with, "20
23 milligrams," and continue -- If you could read that entire page.

24 A All right. "20 milligrams fluoxetine a.m. and p.m.
25 100 milligrams bupropion TID," meaning three times a day.
26 "Getting a bit better each week. Not really getting any pleasure
27 out of anything. And the interesting thing is that my mood seems
28 to deteriorate as the day progresses and the pressure in my

1 forehead correlated with this. A sort of headache. This goes
2 back several months before the bupropion. Normally I would
3 respond to meds by now, but this time it feels as if this last
4 episode had caused (something to change in my brain)."

5 Q Let me stop you there for a moment. So on May -- So
6 the date on which you began adding bupropion to Dr. Czarnik's
7 medical regimen was the first visit, correct?

8 A Correct.

9 Q This was April 23rd.

10 A Correct.

11 Q But on May 24th, about one month later, he reported to
12 you that he had a headache and that the headache went back several
13 months before the addition of the bupropion?

14 A Correct.

15 Q So essentially Dr. Czarnik was saying we added
16 bupropion about a month ago but I've had this headache that
17 preceded the bupropion for several months?

18 A Correct.

19 Q Let's continue reading the passage, which I think
20 begins, "Patient on his own."

21 A "Patient on his own. Has gone up to 20 milligrams of
22 zolpidem. I am very concerned about this. Patient tells that he
23 has had to write a grant. Feels his crash has correlated with the
24 period leading up to this grant. So started Dexedrine, which
25 literally took me from despair in my head to a point where I could
26 work creatively. So for the sake of experiment, I tried this
27 every three weeks or so to see if it has the same effect, and it
28 does. It did yesterday. Able to think, able to be creative, not

1 afraid to take leadership."

2 Q Let me stop you there.

3 Let's go to the next page, 365-15. If you could read the
4 third paragraph.

5 A "We go over options. For now we'll increase the
6 bupropion to 400 milligrams per day and will do it with long
7 acting. Discuss with patient. Patient tells of John suggesting
8 we 'beat someone up' (chew them out). Patient doesn't do this and
9 will not. John is concerned about this. And about patient
10 apparently being gone from the site more than anyone else."

11 Q Let me stop you there. Given the fact that Dr. Czarnik
12 was complaining about a headache, it appears that you went ahead
13 and increased the bupropion, correct?

14 A Yes.

15 Q And is that because Dr. -- He reported that the
16 headache had been present even before he was taking any bupropion?

17 A What is your question again?

18 Q Well, we've previously established Dr. Czarnik told you
19 in the preceding session that he told you -- or he told you this
20 session he had had a headache that plagued him, but that headache
21 had begun several months before starting the bupropion.

22 A Correct.

23 Q Did that cause you to conclude that the headache was
24 most likely not related to the bupropion?

25 A Correct.

26 Q Since it existed before?

27 A Yes.

28 Q So for that reason you felt comfortable increasing the

1 bupropion?

2 A Yes.

3 Q Okay. Now let's go to notes of your session on June 1,
4 1999, and let's go ahead and read in the medical -- the meds
5 section at the very top of page 365-16.

6 A "Bupropion SR 200 milligrams BID." That means twice a
7 day. "Fluoxetine 20 milligram, Ambien, 10 Ambien. Doing better.
8 Slowly improving. Been using only one Ambien 10 milligrams a
9 night and that seems to be working okay. I don't spend quite as
10 much time thinking about that guy, thinking about how much of my
11 capacity is spent thinking about failure and negative thoughts,
12 and it's about 90 percent"

13 Q Stop there. So was Dr. Czarnik reporting to you on
14 June 1st, 1999, that he didn't spend as much time thinking about
15 someone he was referring to as "that guy"?

16 A Yes.

17 Q Did you understand him to be referring to John, his
18 boss?

19 A Yes.

20 Q And he was also reporting to you that about 90 percent
21 of his capacity was spent thinking about failure and negative
22 thoughts?

23 A Yes.

24 Q Let's jump down, page 365-17, the second paragraph.
25 Actually first paragraph, three lines down, if you could
26 begin reading there.

27 A "Well," that one starts with "well"?

28 Q No, "What would."

1 A "What would I do next. Well, I've taken a fair amount
2 of pleasure with the moves I've made. I spend a lot of time
3 thinking about John. Becky has been very supportive, but there
4 isn't much more she can do for me. So she sets up the weekend
5 with my -- she set up the weekend with my brothers, and that
6 helped a lot. She says I've proven John -- I've given John way
7 too much power over me, and she's right in that I'm not going to
8 fight his way. So I don't do things -- So I don't do things the
9 way I think they should be done."

10 Q Please continue.

11 A I asked, "Do you see a solution?" His reply was,
12 "Well, life has gotten much better at work, though I still spend a
13 lot of time at work controlling an urge to run, to leave and get
14 in my car. 2:03 p.m. For example, I'd start to become consumed
15 by a general sense that a fear of foreboding or sense that I will
16 fail. It involves John often. A fantasy of being called into his
17 office, the door closed, and getting laid into. Being looked at
18 and told the effort and the product of my effort are not
19 sufficient. And this actually happened in November. He spent a
20 half -- a half-hour discussing how things went -- how things
21 weren't progressing as he'd like them to. Without saying it, a
22 clear implication I was at fault. It feels to me I have a good
23 ability to see what others are thinking, and John does, too. And
24 it can be used in self-serving ways. I tried to prime patient for
25 cognitive intervention. The biggest anxiety you have is losing
26 the job?"

27 Q Is that your question?

28 A That's my question. His response: "No, it's not doing

1 a good job. The money is important, and I feel that in two years
2 we'll be bought. I hate the notion I'll be bounced out of this
3 company because I can't focus. At one period of my life I was
4 extremely able to focus."

5 Q Let me stop you here. On this treatment session date,
6 June 1st, 1999, Dr. Czarnik told you that he had this negative
7 fantasy of being called into John's office and being told that the
8 effort and the product of his effort were insufficient, correct?

9 A Correct.

10 Q And he then reported to you that this actually happened
11 to him in November, correct?

12 A Correct.

13 Q And he says that John spent about half an hour
14 discussing how things weren't progressing as he'd like them to and
15 implying that Dr. Czarnik was at fault, correct?

16 A Correct.

17 Q Also Dr. Czarnik told you on the same date that the
18 money was important and that he was anticipating that the company
19 might be bought within two years, correct?

20 A Correct.

21 Q Now let's jump ahead to, if I can find it, 365-19. I'm
22 sorry, 365-20. If you just read, this is again a continuation of
23 the June 1st, 1999 counseling session, therapy session. If you
24 can just read the entirety of page 365-20.

25 A "John's first choice would be for patient to work hard
26 and successfully hard and successfully perform and the board also.
27 He has done some great things for the company. For example, --"
28 I can't read that.

1 Q Okay.

2 A So on this same date -- Excuse me, Science Magazine --

3 Q Okay. On the same date Dr. Czarnik was reporting to
4 you that John's first choice would be for Dr. Czarnik to work hard
5 and to be successful?

6 A Correct.

7 Q Now let's jump ahead to page 365-21. Are these your
8 note from the therapy session of June 11, 1999?

9 A Yes.

10 Q So during this window of time, Dr. Mallinger, you were
11 seeing Dr. Czarnik virtually weekly, correct?

12 A Yes.

13 Q Let me ask you to read beginning the very top paragraph
14 on page 365-21.

15 A "Doing well. I think I'm about -- I'm at about 80
16 percent. I sleep well. I wake up early. A lot better than 10
17 percent. I feel good. I'm able to work well. I get along well
18 with everyone at work. Reminds me that I'd assigned him to
19 cloister worry time."

20 Q What does that mean?

21 A I asked him to -- It's a behavioral therapy tactic. I
22 asked him to try to set aside specific time during the day to
23 worry, ruminate, and then when he's working --

24 Q Not do it otherwise?

25 A Yes.

26 Q Continue with that passage.

27 A "I do have some shakiness, trembly, and I can taste in
28 my mouth that I'm on a medicine. And my libido is good, which is

1 extremely good. I'm not high."

2 Q Let me have you continue with that passage.

3 "Interactions."

4 A "Interactions with John. (Okay this week.) I asked him
5 what do you do for enjoyment? Not much. Been responding to a lot
6 of professional --"

7 Q "Papers"?

8 A I don't know.

9 Q Okay.

10 A "Obligations." Believe it or not, "obligations."

11 "Tells of how he hates grant writing and what an awful time
12 he had in April writing one."

13 Q I'll ask you to stop there. If you could go down --
14 go to the next page, 365-22, toward the end of the page, if you
15 could begin reading the passage when it says "Journal of
16 Combinatorial Chemistry."

17 A The passage that ends with that?

18 Q Beginning with that.

19 A Okay. "Journal of Combinatorial Chemistry was
20 approached to see if I'd like to be an editor of a new journal. I
21 said yes."

22 Q Continue on to the next page.

23 A "The chemistry group he leads is support for the
24 biology group, who is at the cutting edge."

25 Q So let me stop you there. On this date Dr. Czarnik was
26 basically telling you that the group that he headed up, chemistry,
27 was in a support function to the biology group, which was cutting
28 edge?

1 A Apparently so.

2 Q Let's go -- Let's continue the very next. "Patient
3 tells."

4 A "Patient tells of noticing at times that he clenches
5 his teeth, that is that is what is causing the afternoon head
6 pain. We talk about SSRI's and teeth clenching."

7 Q Let me stop you there for a moment. On this date, June
8 11, Dr. Czarnik tells you he notices he's clenching his teeth and
9 he told you he thought the teeth clenching is what was causing his
10 headache?

11 A Correct.

12 Q And you say, "We talk about SSRI's and teeth
13 clenching." Is it the case that SSRI's can as a side effect
14 causing teeth clenching in patients who take them?

15 A They can.

16 Q And they are a class of antidepressant drugs?

17 A Correct.

18 Q Dr. Czarnik was in fact on SSRI's, correct?

19 A Yes.

20 Q Among others.

21 A Yes.

22 Q Okay. Let's go down to page 365-25. Are these your
23 handwritten notes from the therapy session dated June 24, '99?

24 A Yes.

25 Q And can you begin reading at the very top of this page?

26 A Yes. "I met 90 percent. My wife wants me to ask why I
27 have a dual need to be a star and to be liked. In the world I've
28 been in since '93, success means having authority over others, and

1 the majority of those people believe it's wrong to interact with
2 your charges as if they were peers, and I don't think I could
3 interact with any other human in any other way."

4 Q Let me stop you there for a moment. So is Dr. Czarnik
5 reporting to you he didn't think he could interact with his
6 subordinates in any way other than as though they were his peers?

7 A Yes.

8 Q Continue reading the passage, please.

9 A "We explore his need to be liked, his need to avoid
10 being critical of people. Patient actually has no complaint about
11 any aspect of his personality. Actually takes pride in his
12 characteristics."

13 Q Let me stop you there. Let's go to the next page,
14 365-26, and are these your treatment notes of the therapy session
15 held on July 2nd, 1999?

16 A Yes.

17 Q Okay. Let's begin at the very top.

18 A "(Check out Tony C's insurance.)" Apparently he had a
19 question and that was a response.

20 Q Okay.

21 A "Doing very well. Wonder if you think I can experiment
22 with the lowest maintenance dose I can, because it would be
23 terrible if the evidence -- if the medicine didn't work for me
24 anymore. The headache is much lessened. Patient takes 150
25 milligrams twice a day of bupropion and 40 milligrams of
26 fluoxetine. Will decrease fluoxetine to 20, after 40, 20, 40.
27 The ability to enjoy activity is a great yardstick for me. That
28 is turned around in a wonderful way. We talk about group."

1 Q Let's stop there.

2 A Sure.

3 Q Then so on this date, July 2nd, 1999, Dr. Czarnik was
4 reporting to you both that the afternoon headache was greatly
5 lessened, correct?

6 A Yes.

7 Q And he was also reporting that his ability to enjoy
8 activities had returned in a wonderful way?

9 A Correct.

10 Q Let's go to the last paragraph at the bottom that says,
11 "Thinking about lately."

12 A My question: "Thinking about lately. His response.
13 My work life is significantly better. One of our first hires
14 resigned. He felt he'd been mistreated and the work setting was
15 not enjoyable to him. So he left and gave up the potential of a
16 lot of money. Tells of John's sincerely asking patient's opinions
17 about any people feeling beat up there. Also that he values what
18 patient brings in. So patient feels more valued now by John for
19 what he brings to the company."

20 Q Let me stop there. July 2nd, 1999, Dr. Czarnik is
21 telling you that he was -- his opinions were being solicited by
22 John relating to employee morale. Well, his opinions were being
23 solicited by John about something?

24 A Yes.

25 Q And he was also reporting to you that John seemed to
26 value what Dr. Czarnik brought to the company?

27 A Yes.

28 Q And that he felt more valued by John than he had in the

1 past?

2 A Yes.

3 Q Let's go to treatment notes from the July 23rd session,
4 and these appear at page 365-33. If you can begin reading from
5 the top of the page.

6 A "A bit discouraged in that my normal state a happy,
7 good mood, et cetera, so I never got all the way back to my normal
8 mood, and that's a little discouraging. When I'm depressed, what
9 I experience is inability to read technical material, inability to
10 follow a suggestion in which we're talking about strategy.
11 Patient and I review his meds. Will increase fluoxetine from 20,
12 40, 20, 40 to 40 milligrams per day. Continue with 150 milligrams
13 twice a day of bupropion.

14 "I think there's a good chance that the work setting I'm in
15 has a major effect on my mood. I don't feel I'm pulling my share
16 of the load. Evaluations this week. I hate that. And also a
17 grant I wrote in April didn't get funded, but it didn't blow me
18 away."

19 Q Continue, please.

20 A "What do you experience when you face writing an
21 evaluation of someone? Well, for most people if you are going to
22 mentor someone, you do have to tell them the things that aren't
23 quite perfect, et cetera. I probably spend an inordinate amount
24 of time writing these things. Why? Because I want to be clear
25 and exact. I don't think others feel empathy the way I do. They
26 can't because they would act the way I do."

27 Q Let me stop you there. So on this date, July 23rd, Dr.
28 Czarnik is telling you in the first paragraph that when he is in a

1 depressive state, he has difficulty reading technical material and
2 difficulty following strategic discussions, correct?

3 A Yes.

4 Q And in the next paragraph on July 23rd, '99, he
5 reported to you that he didn't feel he was pulling his share of
6 the load at work, correct?

7 A Correct.

8 Q And then in the third paragraph, it seems, Dr.
9 Mallinger, you were doing some follow-up questioning of him
10 regarding why the he hated doing evaluations, correct?

11 A Correct.

12 Q And he was basically saying that he doesn't think that
13 other people feel empathy the way he does, I guess toward his
14 subordinates?

15 A Correct.

16 Q And that if others felt the way he did, they would act
17 the way he did. That's what his opinion was?

18 A Correct.

19 Q Okay. Let me ask you to go to the notes of your
20 session dated July 30th, 1999. Those begin at page 365-35, and if
21 you can begin with the first -- just the first paragraph,
22 beginning, "Feeling better."

23 A "Feeling better. Not sure if it's because of the 40
24 milligrams of fluoxetine or that performance reviews are over."

25 Q Okay. Then if we can, let's go to -- down to the
26 bottom where it says number 2, and begin reading there.

27 A "John, things are going well in general. But I'm
28 priming myself should the old situation arise. Patient sort of

1 roleplays what he'd like to say if John puts him down. Tells of
2 his concern that criticism won't be constructive for him, that it
3 will be angry. Patient associates it with his mother's anger. My
4 mother had the ability to flip from apparently calm to screaming.
5 At the kids or at my dad. And you wouldn't necessarily know what
6 she was so mad about or over minor things."

7 Q Let's stop there. So let's go to the next page,
8 365-36. You are already there. And let's go to the top of
9 365-37. Again this is still a continuation of therapy notes from
10 July 30th, 1999.

11 A "So he would be very scared of anger or disapproval in
12 someone with authority as a reflex. He was scanned for this. Try
13 to stay on the good side."

14 Q Let me stop you there for a moment. Are you saying
15 that Dr. Czarnik was reporting to you that he felt scared or
16 apprehensive of being -- having someone who was in a position of
17 authority express anger or disapproval toward him?

18 A Could you just point out --

19 Q Sure it's 365-37 at the very top. So he would be
20 very --

21 A Okay. I'm not saying that he said that. That could
22 have been my thoughts, I don't know.

23 Q Okay. So if it was your thoughts, it was your
24 impression that he was afraid of engendering anger or disapproval
25 from someone in a position of authority?

26 A Yes.

27 Q Now let's go to the very last paragraph on that page,
28 "We go over."

1 A "We go over the adaptive position of being smart,
2 capable, leaving little room for criticism. And if he is doing
3 his best and not -- and it's not working," and I have an arrow,
4 "anxiety," "that that might engender anxiety."

5 Q Is this your comment or something he told you?

6 A Mine.

7 Q So you are saying that to your observation, if Dr.
8 Czarnik was doing his best but his best wasn't good enough, it
9 created anxiety?

10 A If his -- I didn't say not good enough. If it wasn't
11 working.

12 Q Okay.

13 A Yes.

14 Q Now let's go to the next page, 365-38. Are these your
15 treatment notes of a therapy session dated 8-20-99?

16 A Yes.

17 Q If you can read the entire page.

18 A "I'm doing well. Essentially doing a good job of
19 handling the pressure of life without really enjoying life a lot.
20 My question: Is this typical for you? No, this is untypical for
21 me. I really think it's a chemical thing. I would like to
22 fine-tune the medicine. Takes 40 milligrams of fluoxetine, 300
23 milligrams bupropion per day, 10 milligrams zolpidem," that's
24 Ambien," HS. What have you been thinking about this week?
25 Thinking about a realization. I realize I respond inordinately to
26 authority figures who are upset with me. Afraid of them. I
27 easily interact with people who disagree with my position, but the
28 -- of that disagreement when someone is trying to hurt me --"

1 That's an unfinished sentence.

2 Q This is a statement Dr. Czarnik made to you, a self-
3 realization, correct?

4 A Yes.

5 Q He's reporting that he realizes about himself that he
6 responds inordinately with authority figures who are upset with
7 him?

8 A Correct.

9 Q Okay. Let's go to the next entry that says, "We've
10 reviewed his adaptive modes."

11 A "We review his adaptive modes. With John I still feel
12 some anxiety," in parens, meaning I was paraphrasing. "Probably
13 that's the dominant emotion I feel right now. Much more than I
14 feel joy."

15 My question was: "And the cost, the cost of this? Oh,
16 sure, much too much of my mind is taken up with this affect. My
17 mental energy, concentration. The dominant thing I think about
18 every day."

19 Q So in this session was Dr. Czarnik telling you that the
20 dominant thing he thought about every day was still this issue
21 with John and having anxiety in his presence?

22 A I'm not sure it was John and feeling anxiety in his
23 presence or whether he feels anxiety more than he feels joy.

24 Q Okay.

25 Now let's jump ahead to the next page, 365-40. Are these
26 your handwritten notes commemorating a therapy session on August
27 27, 1999?

28 A Yes.

1 Q If you could begin reading from the top.

2 A I've been doing pretty well. Better than last time.
3 With the increased bupropion to 400 milligrams from 300. My boss
4 has improved dramatically. He doesn't constantly have this look
5 on his face that nothing is moving fast enough. And I'll smack
6 the first guy who," unfinished sentence.

7 "The general sense of hostility is less. Patient feels he
8 will need no further individual meetings until September 23rd."

9 Q Let me stop you there. So on August 27th, 1999, Dr.
10 Czarnik was reporting that he was doing real well, that his boss
11 had improved dramatically, is that correct?

12 A Correct.

13 Q Let's jump down to next page, 365-41. Three lines down
14 that begin with the word "If." Let me ask you to read the content
15 that begins, "If I were to characterize."

16 Let me ask you first, are these Dr. Czarnik's words or
17 paraphrasing of his words?

18 A Yes.

19 Q Could you please read the passage.

20 A "If I were to characterize what appeals to me most,
21 it's mostly female versus male. I don't like to compete, I like
22 to nurture. I get no pleasure out of competition or winning in a
23 competition. I think about it when I think about the
24 personalities of the two other guys who started the company. I
25 can see it's just something I lack."

26 Q Let's stop there. So on this date, August 27th, Dr.
27 Czarnik is also reporting to you he doesn't feel the need to have
28 any further individual sessions at least until September, correct?

1 A Correct.

2 Q Do you have treatment notes in your exhibit binder, Dr.
3 Mallinger, from a session on July 7, 2000, or do your notes end at
4 that point?

5 A My notes end right here.

6 Q For some reason the exhibit binders are listing the
7 last few pages of notes. If I may show them to counsel and then
8 show them to the witness.

9 THE COURT: Very well.

10 MS KEARNS: Q Dr. Mallinger, I don't know why the last
11 session of notes didn't make it into the exhibit binders, but
12 let's me ask you to take a look at your notes from July 7, 2000
13 and ask you to read the passage beginning with the word work.

14 A "Work."

15 Q Again this is July 7, 2000.

16 A Correct. "Work. This isn't an easy thing for me to
17 walk away from. I'm widely viewed as a founder in the field in
18 which I'm working. This is widely viewed as my company. A lot of
19 ego perks, et cetera. I'm on a vesting schedule, so that every
20 month a number of shares of my stock vest, and that goes for
21 another three years. When you sign up, you buy all five years of
22 stock. For me that's 500,000 shares. So if I leave before that,
23 I have to sell back all the shares short of that. I vested two
24 years already. It will be worth \$10 million. Still it's hard for
25 me to walk away from this increasing number. And there are lots
26 of people I like there.".

27 Q Thank you, Dr. Mallinger.

28 Have you now reported to me accurately what you personally

1 wrote during these treatment therapy sessions with Dr. Czarnik?

2 A Yes.

3 Q And you've accurately indicated that any statement to
4 which you attributed to Dr. Czarnik or which you paraphrase and
5 attributed to Dr. Czarnik were in fact things he told you in these
6 sessions?

7 A Yes.

8 Q Do you have any reason as you sit here today to believe
9 that Dr. Czarnik was being untruthful with you in these sessions?

10 A No.

11 Q Thank you. Nothing further at this point.

12 MR. PANTONI: Do you want to take the morning break at
13 this point?

14 THE COURT: Sure.

15 MR. PANTONI: And I need to call a witness with respect
16 to --

17 THE COURT: We'll take our recess at this time. We'll
18 be in recess until 10 minutes before 11:00. Please remember the
19 admonition not to form or express any opinions about the case, not
20 to discuss the case. We'll be in recess until 10 minutes before
21 11:00.

22 (Recess.)

23 THE COURT: Record will indicate all the jurors are
24 present, counsel are present.

25 You are asking to reopen your direct examination?

26 MS KEARNS: Yes, I am, your Honor.

27 THE COURT: You object at this point, Counsel?

28 MR. PANTONI: No, your Honor.

1 THE COURT: Go ahead.

2 MS KEARNS: Q Dr. Mallinger, I spoke too soon. I need
3 to ask you a few more questions.

4 Isn't it true that in addition to the individual therapy
5 sessions you had with Dr. Czarnik, at some point this time he also
6 began participating in a group therapy group led by you?

7 A Yes.

8 Q And did you make notes of what was said by the various
9 participants in the group sessions?

10 A Yes.

11 Q And to protect the privacy of persons in the group
12 other than Tony Czarnik, did you provide my office, specifically
13 Helen Bishop, with an audio tape in which you quoted only the
14 portions of group sessions that related to statements made by Tony
15 Czarnik?

16 A Yes.

17 Q And so let me ask you, as you sit here right now, if I
18 were to ask you about specific group sessions and what was said by
19 Tony Czarnik in those group sessions, would you be able to recall
20 that without refreshing your recollection?

21 A No.

22 Q Let me show you the transcription of your audio tape
23 that was prepared by Helen Bishop and let me ask you to take a
24 look at it. I'm only going to focus on a couple of the entries.
25 Without reading out loud the content of the notes at this point,
26 let me ask you to --

27 THE COURT: I think do this by the book. I think first
28 of all you ought to ask him if he has a recollection about some

1 given subject, and then if he doesn't, you can ask him to have him
2 read the portion and ask him if that refreshes his recollection.

3 MS KEARNS: Q Do you have a recollection of Dr. Czarnik
4 talking in group about the fact that there was a presentation in
5 which he was not identified as a founder?

6 A No.

7 Q Do you have a recollection of Dr. Czarnik talking in
8 group about being well connected with subordinates and believing
9 that that was a reason that management wanted him out of the
10 company?

11 A No.

12 Q Let me ask you to refer to entry 40 on the
13 transcription of your audio tape and ask you whether this
14 refreshes your recollection?

15 A Well, I can read it just as you can, but --

16 THE COURT: Doctor, we're really interested in whether
17 or not this really does refresh your recollection. In other
18 words, if having read this, does it refresh your recollection?

19 THE WITNESS: No.

20 MS KEARNS: Q Let me ask a about a different topic. Do
21 you have -- Do you remember any group session in which Tony
22 Czarnik talked about having been demoted or put into a different
23 position?

24 A No, I don't.

25 Q Do you remember a group session in which Tony Czarnik
26 talked about having been demoted and wanting to undermine the
27 company through guerrilla tactics?

28 MR. PANTONI: Argumentative

1 THE COURT: Overruled. It's just preliminary question.

2 THE WITNESS: Could you ask me again, please.

3 MS KEARNS: Q Do you remember Dr. Czarnik ever saying
4 in the group what he wanted to do was to undermine his company
5 through the use of guerrilla tactics?

6 A No, I don't remember that.

7 Q Could you please take a look at entry number 41 and
8 tell me whether that refreshes your recollection as to whether Dr.
9 Czarnik made those statements in group.

10 A No, it does not.

11 Q Do you remember any group session in which Dr. Czarnik
12 talked about being in a good legal position and talking about
13 feeling that he had leverage against the company?

14 A I have a vague memory of something like that, but
15 that's about it.

16 Q Let me ask you to take a look at entry number 43, which
17 is on page 5. Does this entry dated March 30th, 2000, refresh
18 your recollection about any discussions Tony Czarnik may have had
19 in group about being in a good legal position and feeling that he
20 had leverage?

21 A Actually, no.

22 Q And let me ask you whether you remember Tony Czarnik
23 discussing in group in August of 2000 the concept that he was
24 going to make it difficult for the company to fire him?

25 A No, I really don't.

26 Q Let me ask you to take a look at entry 49, which
27 appears on page 6. Does this entry refresh your recollection as
28 to whether Tony Czarnik told the group on August 31st, 2000, that

1 he was going to make it difficult for the company to fire him?

2 A Which entry number?

3 Q Number 49.

4 A Again it doesn't refresh my memory.

5 Q Now, Dr. Mallinger, you did provide us with an audio
6 tape of all the things Tony Czarnik said in group, correct?

7 A Yes.

8 Q The fact that these notes or these transcriptions of
9 your audio tape don't refresh your recollection, that doesn't mean
10 the tapes weren't made, does it?

11 MR. PANTONI: Argumentative, lacks foundation.

12 THE COURT: Sustained.

13 MS KEARNS: Q Do you have any -- You've indicated that
14 these notes don't necessarily refresh your recollection about what
15 happened in group, correct?

16 A Correct.

17 Q In addition to seeing many individual patients, you
18 also have run several groups?

19 A Correct.

20 Q And so the fact that the notes don't refresh your
21 recollection, does that cause you to conclude --

22 MR. PANTONI: Same objections, Judge.

23 MS KEARNS: Q Do you conclude that the statements
24 weren't made or simply that you can't recollect?

25 THE COURT: Actually it's irrelevant because there's no
26 evidence these statements were made. So the objection is
27 sustained.

28 MS KEARNS: Q If I were to ask you to recount any

1 comment or statement that Dr. Czarnik made during group, are you
2 able to recall it?

3 A No.

4 MR. PANTONI: Same objection.

5 THE COURT: Overruled.

6 MS KEARNS: Q And yet you do recall that he did
7 participate in group, correct?

8 A Oh, yes.

9 Q He did make statements in group?

10 A Yes.

11 Q Thank you.

12 MR. PANTONI: Judge, I request that you inform the jury
13 that Miss Kearns' questioning with respect to the group notes are
14 not evidence in the case.

15 THE COURT: If a question is asked at anytime during
16 the trial and the answer is no, then the question itself is not
17 evidence. It can only be considered as evidence in light of the
18 answer. So basically if somebody asks somebody if they recall
19 something and they suggest do you recall that something happened,
20 the question suggests that might have happened and the answer is
21 no, I don't recall, then there's no evidence that that happened.

22 MR. PANTONI: Thank you.

23 CROSS-EXAMINATION.

24 BY MR. PANTONI:

25 Q Dr. Mallinger, you've been talking about Dr. Czarnik's
26 treatment for depression. Can you explain what depression is?

27 A Depression is I would call it a syndrome or illness
28 characterized by certain symptoms, including such things as a low

1 mood, often sleep is affected, appetite is affected, low energy.
2 Sometimes poor concentration. Sometimes sadness. Anxiety is
3 often a symptom. Some people get feelings of hopelessness,
4 suicidal thoughts. There are different degrees of depression,
5 some more severe and some less severe.

6 Q What about low self-esteem, is that a common symptom?

7 A Yes, low self-esteem, deprecating thoughts, loss of
8 self-confidence.

9 Q Okay. I'm only going to ask you about one of the
10 entries that Miss Kearns asked you about. That's the one on page
11 365-18.

12 A Got it.

13 Q This is the third paragraph of your notes. Do you have
14 those notes in front of you?

15 A Yes.

16 Q These are your notes with respect to Dr. Czarnik
17 telling you what actually happened in November, 1998. Correct?

18 A Correct.

19 Q In terms of what Dr. Czarnik said, what actually
20 happened, what if anything did he tell you John Stuelpnagel
21 actually discussed with him?

22 A Actually discussed with him?

23 Q Yes.

24 A Can I just read from my notes?

25 Q If that's helpful.

26 A "He spent one-half hour discussing how things weren't
27 progressing as he'd like them to, without saying it a clear
28 implication I was at fault. It feels if --"

1 Q That's it.

2 A Okay.

3 Q So Dr. Czarnik reported to you that what John
4 Stuelpnagel actually discussed was how things weren't progressing
5 as John would like them to, and without saying it, he, Dr.
6 Czarnik, drew an implication that he was at fault?

7 A Correct.

8 Q Now, Dr. Mallinger, did you believe that Dr. Czarnik
9 was honest with you at all times during your sessions?

10 A Yes.

11 Q Did you ever feel that Dr. Czarnik said things in an
12 effort to present himself in some particular light or in anyway to
13 manipulate you?

14 MS KEARNS: Objection, calls for speculation.

15 THE COURT: I think it's the kind of question that a
16 psychiatrist can answer. Overruled.

17 THE WITNESS: No, I felt he was honest. I don't feel
18 he tried to manipulate my opinion of him.

19 MR. PANTONI: Q Is whether a patient is being honest
20 with you, is that something that you typically need to assess in
21 treating a patient?

22 A No. I don't know how I would assess that.

23 Q You don't care either way?

24 A I care, but you can't -- It's not something that I
25 could possibly know.

26 Q How many patients do you treat at any given particular
27 time on average?

28 A Could you be more specific?

1 Q Now, on average, what is your patient load, people you
2 treat and counsel?

3 A Counsel.

4 Q Yes.

5 A Okay. For people in therapy, well I have three groups.
6 That would be, I would estimate, maybe 30 people a week in
7 therapy, including groups. Maybe more, 35.

8 Q Can you describe for us generally, Dr. Mallinger, what
9 you were trying to learn from Dr. Czarnik, what information you
10 were trying to obtain from him in your counseling sessions?

11 A His feelings, his mood, whether he felt that he was
12 progressing in the areas that he wanted to, whether his life was
13 becoming more fulfilling. A lot of it centered on his symptoms,
14 at least a certain amount centered on his symptoms. Are you more
15 depressed today, less depressed, is this helping, is that helping.
16 His feelings and relationships with people.

17 Q Are you talking about personal relationships or
18 business relationships?

19 A All kind of relationships.

20 Q Were you interested in how he was reacting to his
21 medications?

22 A Yes.

23 Q Did you ask him about that virtually every session?

24 A Just about.

25 Q Dr. Mallinger, would you describe for the jury your
26 custom and practice in terms of taking notes at your counseling
27 sessions?

28 A I was afraid you were going to ask me that, because a

1 lot of it is just based on how I feel during that given meeting,
2 if I feel like writing more or whether I'm involved in an
3 interaction with a client actively at the time. Sometimes it's
4 because he's -- he or she is saying something that I think I might
5 want to look at later or might want to relate to something that
6 happened earlier in the course of things and trying to understand
7 a certain dynamic. Sometimes it depends on the client. Some
8 clients you kind of lose touch with them a little bit if you write
9 too much.

10 So there are a lot of vary -- a lot of variables affecting
11 how often I write or how many notes I take.

12 Q Do you attempt to take down in your notes everything a
13 patient says to you in session?

14 A No.

15 Q If something appears in your notes, does it necessarily
16 mean that you viewed it as important?

17 A No, not necessarily.

18 Q If something is not in your notes, does that mean that
19 the patient didn't say it to you?

20 A No.

21 MR. PANTONI: Nothing further.

22 THE COURT: Anything further?

23 MS KEARNS: Just one question.

24 REDIRECT EXAMINATION

25 BY MS KEARNS:

26 Q Dr. Mallinger, if something is reflected in your notes,
27 although your note may sometimes be more complete or less
28 complete, if there is a statement attributed to the patient that

1 is in the notes, that means the patient said it, correct?

2 A Correct.

3 Q Thank you.

4 MR. PANTONI: Nothing further

5 THE COURT: Thank you very much, sir, you may step
6 down.

7 THE WITNESS: Thank you.

8 THE COURT: Call your next witness, please.

9 MR. PANTONI: Brian Brinig.

10 BRIAN BRINIG,

11 called as a witness by the Plaintiff, having been first duly
12 sworn, was examined and testified as follows:

13 THE CLERK: Would you please state your full name and
14 spell your last name for the record.

15 THE WITNESS: Brian P. Brinig, B-r-i-n-i-g.

16 THE CLERK: Thank you.

17 MR. PANTONI: Your Honor, do you have the binder with
18 Exhibit 380?

19 THE COURT: 380? Yes. Except I don't know that 380 is
20 in this binder. I was just handed a copy of 380 itself.

21 DIRECT EXAMINATION

22 BY MR. PANTONI:

23 Q Good morning, Mr. Brinig.

24 A Good morning.

25 Q Mr. Brinig, what is the general area that you are going
26 to be testifying about today?

27 A I'm going to testify about the value of the stock that
28 was lost by Dr. Czarnik as a result of his termination from

1 Illumina.

2 Q And what is your business or occupation, sir?

3 A I'm a Certified Public Accountant and I specialize in
4 business valuation and economic damages analysis.

5 Q Do you have any credentials that qualify you to testify
6 on the subject of economic damages?

7 A Yes, as I mentioned, I'm a Certified Public Accountant.
8 I was licensed in California in 1977. I'm a senior member of the
9 American Society of Appraisers, with a designation as Business
10 Enterprise Valuation Specialist. I'm the past president of the
11 Financial Analyst Society of San Diego, and within my professional
12 area I'm a member of the American Institute of CPA's, the
13 California Society of CPA's, and I probably should say I'm, within
14 the California Society of CPA's, I'm the past state chairman of
15 the Business Valuation Committee, and I'm the past San Diego
16 chairman of the CPA's Litigation Services Committee. Litigation
17 services is what CPA's call the kind of work I do.

18 I suppose in summary, Mr. Pantoni, those are my, I guess,
19 credentials, if you will, to testify about economic damages.

20 Q Could you give us a brief summary of your educational
21 background.

22 A Sure, very briefly. After college I was employed by
23 Price Waterhouse in Atlanta, Georgia. Then I was employed by
24 Arthur Young & Company. Those are both international CPA firms.
25 I guess until a couple of months ago that was sort of a badge, a
26 feather in my cap, but the last couple of months I don't know.

27 So I was employed by the national CPA firms. Then I went to
28 graduate school at University of San Diego. After that I had two

1 different jobs in business appraisal, and in 1983 I formed my
2 present firm, Brinig & Company, Incorporated, and for the last 19
3 years I have done this kind of work, which is business valuation
4 and economic damages.

5 And I should also mention I'm also an adjunct professor of
6 finance and accounting at the University of San Diego School of
7 Law, and I've been teaching there for about five or six years now.

8 So that's my employment summary in a nutshell.

9 Q Okay.

10 Your Honor, I would move to qualify Mr. Brinig as an expert
11 to testify regarding economic damage in this case.

12 THE COURT: Any objection?

13 MS KEARNS: No objection. In fact I thought we
14 stipulated beforehand that both economics experts are experts in
15 the field.

16 MR. PANTONI: Okay.

17 Q Mr. Brinig, who retained you in this matter?

18 A I was retained by your offices to do the economic
19 analysis.

20 Q And what was your specific assignment in this case?

21 A I was asked to look at the stock, that is I'm sure you
22 all have been hearing about, I was asked to look at the stock that
23 Dr. Czarnik owned at the time of his termination and to determine
24 its value for purposes of this matter.

25 Q And can you tell us how you are being paid for this
26 engagement?

27 A I bill my time hourly. Like in this and every other
28 engagement, I bill my time at \$275 an hour and bill associates'

1 time in my office at lesser rates. If gross revenue equalled net
2 revenue, I would be better off, but there are some expenses
3 attached to that.

4 Q Can you describe for us, generally speaking, what you
5 did in order to accomplish your assignment?

6 A I asked for and received documents. For instance, I
7 got the stock purchase agreement relating to what I'll call the
8 co-founder shares, the block of 400,000 shares. I got the stock
9 purchase agreement relating to the block of 25,000 shares. I
10 received and read the lockup agreement, the insider trading
11 compliance agreement, which is an agreement at Illumina. I got
12 the report of Dr. Ward, who I understand is the Defendant's expert
13 on this subject. The prospectus for Illumina. And I guess those
14 are outside documents that I got. And then I also did research on
15 the stock prices of Illumina since the time of Dr. Czarnik's
16 termination up to the present time.

17 So those are the documents I got, and the outside research
18 that I did in my analysis.

19 Q Mr. Brinig, have you prepared summary of your opinions
20 and conclusions in this case?

21 A Yes, I have I think it's an eight-page packet of
22 schedules that I prepared in this matter, and then the summary
23 page I've had blown-up on a chart.

24 Q Is that what we have marked as Exhibit 380?

25 A Yes, it is.

26 Q I'll set it on the ELMO.

27 A That's my summary chart, yes.

28 Q Actually I have a blow-up here. You'll use this as

1 well. Get it in front of the jury.

2 So this first page of Exhibit 380 is your conclusion page?

3 A Yes, economic loss conclusions under two scenarios.

4 Q Could you describe for us generally what Scenario 1 is.

5 A Yes. I've made these calculations in two different
6 scenarios, and Scenario 1, what I've done is calculated the loss
7 on an ongoing basis based on the trading prices of the stock since
8 the date of termination. So Scenario 1 is what I would call an
9 ongoing basis.

10 Q And briefly what is Scenario 2?

11 A In Scenario 2 what I've done is I put -- I'm standing
12 in a point in time in Scenario 2, and in Scenario 2 I'm standing
13 on the day of termination, which is September 5, 2000, and I'm
14 standing at that point in time without knowing anything in the
15 future and I'm valuing the stock based on its trading prices at
16 that point in time without having -- without moving forward in
17 time and being able to look back. I'm standing on that day.

18 So what's standing at a point in time is Scenario 2, and
19 Scenario 1 is more on an ongoing basis.

20 Q Okay.

21 We can see that for each scenario you treat three different
22 shares?

23 A Blocks.

24 Q Blocks of shares. You described for us generally what
25 the three different blocks of shares are that you analyzed?

26 A Sure. There are three different blocks of stock that
27 are in question in this matter. The first block is what I'll call
28 the co-founder stock, and you can see on the chart it's 226,000

1 shares. I'll just quickly tell you originally there were 400,000
2 shares in this block, which was the co-founder stock that Dr.
3 Czarnik got at the beginning, and at the time of termination, he
4 completely owned 173,000 of those shares, and by completely owned,
5 I mean the repurchase right had lapsed on 173,000 of them. So, as
6 you see on my chart, we're only talking about the 226,000 in that
7 block that the repurchase right hadn't lapsed on. That's the
8 226,000 block which part of the 400,000 co-founder shares.

9 The second block is a 25,000-share block, which relates to a
10 grant that had to do with what I'm calling a milestone for some
11 kind of genotyping, some scientific stuff that these smart people
12 understand, I don't. I just know it's a milestone that the
13 company achieved at a particular point in time. That's the
14 25,000.

15 And then the third block, the 100,000 shares, relates to --
16 it's a block that I'm calling relates to this ABI company
17 collaboration agreement that occurred at a particular point in
18 time. So that's the third block of stock.

19 In total, I am dealing with three blocks of stock in both
20 scenarios.

21 Q Okay. I'm going to move this up here, get it out of
22 our way for the time being.

23 If we could take a look at your schedule 1.2A.

24 A That's the second page of my little package, that is
25 Exhibit 380.

26 Q Sorry for the dizziness here.

27 Can you tell us generally what you have done on this
28 particular schedule. What does this schedule reflect?

1 A Sure. And I promise, Mr. Pantoni, this is the only one
2 I'll go through in elaborate detail, and the elaborate detail
3 won't even be that much. What I'll fast-forward and tell you is I
4 basically have done the same analysis for each of the three
5 blocks.

6 I suppose it would be helpful if I briefly explained one of
7 the analyses to you in summary detail and then I'm going to be
8 able to tell you the second block and third block I did the same
9 way.

10 Q Which block does this relate to?

11 A This relate to the first block, the 226,000 remaining,
12 we can call it the original co-founder stock, which was originally
13 400,000, and there were 226,000 of it left on the date of
14 termination.

15 What you have in the chart in front of you is the scenario,
16 one analysis which you can see written at the top of the chart,
17 and you didn't point out when we looked at the conclusions, but in
18 each case I'm dealing with the past loss and the future loss. The
19 past loss being the stock that was lost from now back to the time
20 of termination in the past, and the future loss, which we're not
21 talking about yet, is where we sit today, the stock that would be
22 yet to be released. So as I sit today, we've got past loss and
23 future loss. This is the analysis of the past loss on the 226,000
24 shares.

25 Q What was the date you did this evaluation to
26 distinguish between the past and the future?

27 A It's as of last Friday, June 28th.

28 Q And you say this schedule, Schedule D1.2A deals with

1 past loss of the 226,000 share block?

2 A Correct. I approached it this way. In my Scenario 1,
3 where I told you this was evaluating the stock on an ongoing
4 basis, here's the concept. The concept is at the date of
5 termination back here, we're here today, at the date of
6 termination, Dr. Czarnik had 226,000 shares for which the right to
7 repurchase was not yet released. Number 1.

8 Number 2, we know by looking, or I know by looking at the
9 stock agreement that every month 6666 shares were released from
10 the right to repurchase.

11 So in concept, if there were no other factors, and there are
12 two, which I'll tell you about in a minute, if there were no other
13 factors, what I'm doing in this analysis is simply taking the
14 price of the stock at every month on the 15th of the month when
15 6666 shares are released, and again subject to a qualification
16 that I'll deal with in a minute, on this ongoing basis what I
17 would simply do is every month on the 15th of the month I would
18 look at the stock price in the newspaper or on the Internet and I
19 would value the stock at that price and I would say there's
20 666,000 shares that just became freely tradeable at, let's just
21 say, \$10 a share, so that would be 66,666 at that point in time.

22 In the simplest world on Scenario 1 in an ongoing basis
23 that's what I would do.

24 Q When you say every month 6666 shares were released,
25 that's what's reflected in this column of your summary?

26 A Correct. That's the release from the repurchase right
27 or the time at which that number of shares had no restriction on
28 them whatsoever on this point, it had no restriction as far as the

1 company's right to repurchase them.

2 Q Why is there no market price listed for the first few
3 share blocks of 6666?

4 A Well, I mentioned nothing is perfectly simple. In a
5 perfect world, I would just take the stock price on the 15th of
6 each month. There are two things in this situation that affect my
7 ability to just take the stock price every month and why I didn't.
8 The first thing that effects his ability to sell the stock is
9 what's called a lockup restriction. A lockup restriction is the
10 following thing: It is a requirement that prohibits the owners,
11 the inside owners of this stock, from selling it for six months
12 from the date of the initial public offering. So there was a
13 lockup restriction on this stock that prohibited the sale of the
14 stock until about January 22nd or 23rd of year 2001.

15 Q Talking about six months after the IPO?

16 A That's correct.

17 Q Did you consider the effect of the lockup, the
18 six-month lockup, in Scenario 1?

19 A Yes. And you'll see, for instance, I'm going to put a
20 little -- The answer is yes. You'll see there's no market price
21 in any of those dates before January of '01 or even February of
22 '01. So I did consider the lockup restriction and I allowed no
23 selling or no market price to exist because he couldn't have sold
24 the stock during the lockup period.

25 Q When did you assume, if you did, that Dr. Czarnik could
26 sell stock?

27 A The second little hiccup, Mr. Pantoni, is what's called
28 the trading window. This is the last stick-up. The trading

1 window is a hiccup. That's a time period where certain employees
2 who are considered to be insiders, certain employees are allowed
3 to sell their stock in particular trading windows. They are not
4 allowed to sell their stock outside the trading window.

5 The reason this exists is to make sure there isn't any
6 accusation of insider trading in a company like this where
7 theoretically somebody could know something and they could call
8 their broker and sell some stock. So the company has an agreement
9 with its employees that says you will only sell stock during a
10 trading window. So that's the only time that Dr. Czarnik could
11 sell the stock.

12 So that's the second sort of qualification that keeps me
13 from just taking the stock price every month when the shares were
14 released, I could only sell them during the trading window. It
15 just happens, Mr. Pantoni, if you will, with your little laser
16 thing, mark the lockup period, which ends in late January of '01.
17 So I have nothing before the lockup period in terms of a market
18 price, but I'll tell you even if the lockup period didn't apply,
19 the trading window still applied.

20 So we go all the way down to the first line, where I show
21 the average price from April 30 to 5-31. That's the first trading
22 window. That's the first time that he could have sold any of the
23 stock that would have been released prior to it.

24 So what you see on my schedule is I summarize or add up all
25 the prior releases into the trading window period, and there's
26 53,333 shares. And then moving to the right, what I do now, we're
27 in a trading window, I take the average price during the 30-day
28 trading window, which was \$9.63, and I value all the stock that's

1 been released prior to that point this time at \$513,000.

2 So to quickly summarize, I'd like to do it every month. In
3 other words, he gets the stock, he could theoretically call his
4 broker, but he can't because the trading window isn't there. So I
5 add up all the past stock, value it at the average trading window
6 price, and that becomes the value of the stock received up to that
7 trading window.

8 Q Real quickly then, what's this little single block of
9 6666 shares that you reference there?

10 A There's always another little complication. He gets
11 stock on the 15th of every month. The first trading window is
12 April 30th to May 31. So come May 15, he gets released another
13 6600 shares. It's in the middle of the trading window.

14 What I do with that little odd lot is I value that at the
15 average price for the last half of the trading window because that
16 stock happened in the middle of the trading window. Then I move
17 down and continue this same process because there are three
18 trading windows that have happened in the past that I'm aware of,
19 and every time moving down the chart I take the stock that's been
20 released from the last trading window to now, and you can see June
21 15th and July 15th, because the next trading window is in the
22 August 10 to August 31 period.

23 And then without being too repetitive I simply repeat the
24 process. I take the 13,000 shares that have been released since
25 last time at the average price during the trading window, moving
26 over to the right, and I value it. All the way from the date of
27 termination until now, moving down to the very bottom of the
28 chart, Mr. Pantoni, with all of that, the stock, all of the stock

1 from the 226,000 block that has been released in the past, valued
2 during the trading windows, is a \$1,112,000, at the average market
3 price during the trading window. And that becomes my past loss,
4 which is on the first sheet, for the 226,000 share block, past,
5 \$1,102,188. And that's the simple analysis on the past loss in
6 Scenario 1, which I call the ongoing basis, where I can keep
7 changing the stock price because I used this ongoing benefit of
8 hindsight to know what the stock price changed to.

9 Q All right.

10 Let's take a quick look at one of your analyses for the
11 future. You described you also did an analysis for future losses.

12 A Yes.

13 Q This is Schedule D1.4, correct?

14 A Correct.

15 Q Can you tell us, essentially walk us through your
16 analysis of the future loss for the 226,000 share block.

17 A Okay. Let me just orient you, if I may, for one
18 second. Remember on this block, which we're calling the 226,000
19 block, at the rate of termination, there were, going back in time,
20 there were 226,000 shares that hadn't been released. In the past,
21 from now back to the date of termination, of those shares, 146,000
22 of them have been released in the past. As we sit today, if you
23 were sitting today in the employment, there would still be 80,000
24 shares that exist today for which the restriction has not been
25 removed. So that's the context in which we come to the future
26 analysis.

27 So we have a person who is sitting today with 80,000 shares
28 of stock, he has complete ownership in the shares in terms of

1 their voting rights, their ability to receive dividends are paid.
2 They happen not to have been paid in this company, but he
3 completely owns the stock except for one thing. He is prohibited
4 from selling the stock until somebody else's right to repurchase
5 it is removed. We also know the right to repurchase removed 6000
6 shares per month.

7 So put yourself in that setting in order to understand how
8 I've done the future analysis. You own the stock, you completely
9 own it today, we know what the price today is in the free market,
10 but you can't sell it yet.

11 Q Now, I notice that in this future loss analysis you
12 priced all of the shares at 6.72 per share.

13 A Well, for starters, yes.

14 Q Why did you start with that price?

15 A That's today's fair market value of the stock, or
16 Friday's, if you could call your broker and say I want to sell
17 80,000 shares of stock. So you are sitting, you own the stock
18 completely, but there's one restriction, you cannot sell it. And
19 in finance, and in valuation, when you have the restriction that
20 you can't sell it, it's called a lack of marketability discount.
21 You completely own it except for one thing, you cannot sell it
22 until some period of time lapses. And that is a lack of
23 marketability discount.

24 Q Tell us how you considered the lack of marketability,
25 the fact he couldn't sell these shares until they were released
26 from the repurchase restriction, how did you consider that in
27 making your assessment of what those shares are worth?

28 A In finance and valuation and stock valuation there is

1 the concept of lack of marketability discount. There are a number
2 of studies that indicate what kinds of discounts the market places
3 on a lack of marketability restriction or a marketability
4 restriction, and the studies follow two tracks. One is valuing
5 what is called restricted stock or letter stock, meaning in many
6 publicly traded companies there will be freely traded stock that
7 you can open the newspaper and see what the true fair market value
8 per share is, which for Illumina is 6.72, and then at the same
9 time there are certain shareholders who own restricted stock who
10 may do private transactions that are reported in the restricted
11 stock. There are studies of the discount differential between the
12 freely traded and the restricted stock, and that's one series of
13 studies that exist.

14 I must tell you the studies aren't perfect. They expend a
15 large period of time. There are a lot of them. But when you look
16 at the studies in total, the mid-point of the discounts of lack of
17 marketability for these kinds of stock is about, I think it's 32.8
18 percent, or right around 33 percent.

19 The other type of study, by the way, is a study of companies
20 that go public and an analysis of their stock before they go
21 public and after in close proximity so you can see the variation.
22 Those studies exist. I've looked at them.

23 Looking at the totality the studies, keeping in mind they
24 are not precise, they are thought perfectly comparable, I looked
25 at the fact that these shares are restricted from being sold, not
26 in total, for in total June of '03, but on a decreasing basis
27 until June of '03.

28 Looking at that, I used approximately the mid-point of the

1 average of the marketability studies of 33 percent, and I
2 concluded that looking at the stock that he holds today, we know
3 the value of it, we don't know if it's going to go up or down in
4 the future. The best estimate of value today is to look at the
5 fair market value minus a discount for lack of marketability,
6 which I used 33 percent discount, and therefore valued the shares.

7 Q Again how did you come up with that 33 percent as the
8 discount rate to apply?

9 A Looking at all the studies of the marketability
10 discounts that exist, and there are 10 or 12 of them, Mr. Pantoni,
11 I, and considering that the lengths of time for this restriction
12 is about a year and three months on a decreasing basis, and it's a
13 little different in the other two blocks, but it's not an
14 extremely long time, I used the mid-point of the various studies,
15 which is about 33 percent, and that's what I used for my lack of
16 marketability.

17 Basically I took the shares he holds today, the current fair
18 market value, reduced it by 33 percent, and used that as the best
19 estimate of value for the stock that he would have owned today
20 that have yet been subject to the marketability -- or the
21 repurchase restriction. And that amount for the block of the
22 226,000 shares is \$480,256.

23 Q Is that number your opinion as to the total future loss
24 for this block of shares? Is that depicted on your summary?

25 A It's the present value of the loss of shares that have
26 yet to be released, and I have it under the category of future
27 value, 480,000. So with respect to the 226,000 block, in the past
28 a million-one, and in the future 480,000.

1 Q All right. Now, Mr. Brinig, I take it from your prior
2 testimony you conducted similar analyses for the other two blocks
3 of stock in this case?

4 A Exactly the same analysis. Past and future, limited to
5 the trading windows, valuing the stock during the trading windows
6 in the past, and in the future looking at the remaining stock that
7 would exist today and using the same marketability discount
8 analysis for both the 25,000 share block and the hundred thousand
9 share block, and that's all summarized on my chart, and the
10 schedules I have in the packet.

11 Q Keep them in the packet for this point.

12 A Sounds great to me.

13 Q Let's shift over to Scenario 2.

14 THE COURT: Just to guide you, Mr. Pantoni, your direct
15 time is exhausted, I think.

16 MR. PANTONI: 45 minutes?

17 THE COURT: Half-hour.

18 MR. PANTONI: We estimated 45 minutes, Judge.

19 THE COURT: You did? You are right. The hour was not
20 evenly divided.

21 MR. PANTONI: Q If you could remind us again what
22 you are looking at in your Scenario 2?

23 A In Scenario 2, we're standing at a point in time,
24 Scenario 1 was looking at things in an ongoing basis. Scenario 2
25 is standing at a point in time, and the point in time that we're
26 standing in Scenario 2 is not today, it is the date of termination
27 of Dr. Czarnik from Illumina on September 5th, 2000. We're
28 standing at that point in time and we don't know anything else,

1 Mr. Pantoni.

2 Q Why do you think it's appropriate to value the shares
3 standing in the point of time of the date of termination? Why do
4 you think that's an appropriate way to measure damages?

5 A A couple of minutes ago I told you in Scenario 1 we
6 know about some stuff in the past, but now we sit today, and if
7 Dr. Czarnik were sitting here today, he would still have some
8 number of shares. We know the market price today, we don't know
9 if it's going to go up or down, but we have to value those shares
10 as we sit today.

11 In you switching gears on Scenario 2, if you go back to the
12 date of termination and you put yourself on that date and if you
13 just sit there and say to yourself I don't know if this stuff is
14 going to go up or it's going to go down, the question is what is
15 the value of this stuff on this day with everything that we know
16 in time on this day, and in finance and valuation, that is. I'm
17 not saying legally it's the right answer, but that's an accepted
18 way to look at something.

19 We have the value of a building on a given day. Three weeks
20 later maybe an earthquake destroys the building. But on a certain
21 day, you can't know an earthquake is going to happen, or the value
22 is going to increase 50 times. You can stand on a day and best
23 estimate the value of something, and that's what I'm doing in
24 Scenario 2.

25 Q Can you walk us through how you estimated the value of
26 the lost shares as of the date of termination?

27 A With the background that you now have, it's very
28 simple. At the date of termination on September 5 of 2000, we

1 know the fair market value of the shares as freely traded. It was
2 \$45.38 a share.

3 Q How do you know that?

4 A That's by simply looking at the high/low stock price on
5 that day, taking the average of it reported, information on the
6 Internet, that was the stock price. Just like calling your
7 broker. We know that fact.

8 So put yourself on that day, Mr. Pantoni. You own 226,000
9 shares. 25,000 shares and 100,000 shares. Today, hypothetically,
10 or on September 5th of 2000. If you could sell that stock, you
11 could call your broker and say I want to execute a trade at
12 today's market value, and it would happen at 45.38.

13 But you can't do it. There's only one thing keeping you
14 from doing it, a restriction, a contractual provision or an SEC
15 provision or a legal provision that keeps you from exercising one
16 incidence of ownership, and that's the ability to sell.

17 Q How did you take into account, then, the fact that Dr.
18 Czarnik couldn't sell these shares on the date of termination?

19 A That concept is a marketability discount.

20 Q Same thing you talked about before?

21 A Same thing, but at this point in time I used a -- the
22 high end of the range of marketability discount, 50 percent. The
23 reason that I used that is if you go back to September of 2000,
24 the restriction extends longer into the future than the one I used
25 in the future analysis in Scenario 1 where I'm sitting here today
26 and I have shorter in the future. So in September of 2000, the
27 restriction extends for quite a long period of time. Again, it
28 decreases every month, but it still extends for quite a long

1 period of time.

2 Q What percentage rate did you apply for the
3 marketability discount in this Scenario 2?

4 A 50 percent marketability discount. Again, I'm going
5 to tell you there's no way you can calculate and come up with the
6 number 50 percent. I look at the studies. 50 percent is at the
7 high end of the range, not the highest, but the high end of the
8 range of marketability discounts. When I'm doing it back at the
9 time in 2000, I look at a fairly lengthy period for those
10 restrictions to be completely off. I say that's the high end of
11 the range of marketability discounts. I use 50 percent.

12 Q One final question on this Scenario 2. Haven't you
13 ignored the fact we know now today the stock is worth
14 significantly less than \$45 a share? You know it's roughly
15 trading at 6.72 a share.

16 A Have we ignored it? I would say no, we haven't ignored
17 it, in the sense that we looked at the stock on that day and we
18 valued it with the significant discounts in it because you can't
19 sell it, but I guess I would say it this way: If I damage your
20 car, if I steal your car, it's a \$10,000 car and I steal it three
21 months ago, we don't know if your car -- we know the Blue Book
22 value of your car on that day. We don't know if two months after
23 I destroy your car if "60 Minutes" is going to do a study on your
24 kind of car that is going to cause the value to go down, or your
25 car is going to be become some priceless relic and everybody wants
26 and cause the price to go up. We're standing on that day and we
27 value the car on that day.

28 So something, the earthquake could happen that destroys it

1 two months later, I don't know that on that day, or something
2 could happen that causes it to go up. I don't know that. All I
3 can do when I stand at a point in time is use everything I know at
4 that moment in time, and one of the things I know in this case is
5 that the stock is restricted from being sold. How can I factor
6 that? I can use a marketability discount to reduce its value
7 significantly from the freely traded value, apply that, that's the
8 value, and that's the value on that day.

9 Two years later we might look back and say gosh, it became
10 worth \$50 million, geez, we were wrong, or it became worth a
11 dollar ten cents, we were wrong. We can only know what we knew
12 on that day, and that's the theory of Scenario 2.

13 Q Looking back again at your conclusion sheet, if you
14 could tell the jury, please, what your opinion is as to total
15 damages, economics damages incurred by Dr. Czarnik under Scenario
16 1, and same question as to Scenario 2?

17 A When I add up in Scenario 1, which is on the ongoing
18 basis, when I add up the three blocks of stock in the past, make a
19 small subtraction for some purchase price that they've had to pay,
20 but I add up the value of the stock in the past on an ongoing
21 basis and the value that he would own now, the total economic loss
22 under Scenario 1 is \$2,423,000. Under Scenario 2, where I stand
23 in time back to the date of termination when the stock price was
24 \$45 a share, the total value of his loss if valued at that point
25 in time is \$7,965,000. Those are my opinions.

26 Q Thank you, sir.

27 Nothing further.

28 THE COURT: Thank you very much, Mr. Pantoni. You are

1 well under your time estimate.

2 Cross-examination.

3 MS KEARNS: Yes, your Honor.

4 CROSS-EXAMINATION

5 BY MISS KEARNS:

6 Q Good morning, Mr. Brinig.

7 A Good morning, Miss Kearns.

8 Q So let's go ahead and put back up the first page of
9 Mr. Brinig's summary sheet. That would be page 1 of Exhibit 3A.

10 Mr. Brinig, let me ask you a couple -- about some of the
11 assumptions that you've made in devising these two scenarios.

12 First of all, let me ask you a preliminary question. Do you
13 remember me taking your deposition in March of this year?

14 A Yes.

15 Q And at that time isn't it true that you had created
16 three different scenarios, correct?

17 A Correct.

18 Q Isn't it true at that time none of your scenarios took
19 into account trading windows?

20 A Correct.

21 Q So that is work that you've done subsequently,
22 presumably after learning from me in that position that there were
23 trading windows?

24 A Yes, I didn't have information on the trading windows
25 at the time of my deposition so I just valued it every month.

26 Q So Mr. Pantoni had not provided you information about
27 trading windows when he asked you to do your initial analysis?

28 A Correct.

1 Q Now let's focus on some of the assumptions about these
2 share blocks. This 25,000 share block you've already testified
3 you understood to be a milestone share grant, correct?

4 A Correct.

5 Q You don't and didn't have any information as to whether
6 Dr. Czarnik was actually entitled to that share block, correct?

7 A No, that wouldn't be my area. I just value it.

8 Q You are simply told assume he was entitled to these
9 25,000 shares?

10 A Or value the 25,000 shares. Somebody else can
11 determine whether he's entitled to them, yes.

12 Q The same thing is true for the 100,000 share block?

13 A Correct.

14 Q That was a share block that Dr. Czarnik and/or his
15 counsel told you he should have gotten in connection with a
16 business deal, correct?

17 A I understand that's the argument, yes.

18 Q But you don't have any information suggesting one way
19 or another whether Dr. Czarnik really should have received that
20 hundred thousand share block?

21 A Correct.

22 Q And so during -- In your analysis, all of these, both
23 of the two scenarios which we're now looking at assume, do they
24 not, that Dr. Czarnik would have remained employed through the
25 entire vesting period, if you will, with respect to all of these
26 share blocks?

27 A Yes, that's true.

28 Q And you don't have any information one way or another

1 whether Dr. Czarnik was performing well at Illumina?

2 A Correct.

3 Q You simply were told assume he would remain employed
4 until he vested in all of these share blocks?

5 A Yes.

6 Q And you didn't have any information provided to you
7 about whether individuals who have not been performing well have
8 been allowed to remain employed throughout their vesting periods
9 at Illumina, correct?

10 A Don't have any information.

11 Q Now, one question I have for you, you are aware, are
12 you not, that after leaving Illumina, after being terminated from
13 Illumina, Dr. Czarnik became reemployed?

14 A I am aware of that.

15 Q Are you aware that in connection with that new
16 employment, Dr. Czarnik was allowed to purchase shares of stock in
17 his new company?

18 A I'm not specifically aware of that.

19 Q Did Mr. Pantoni in anyway ask you to take into account
20 in calculating economic damages the value of the new shares that
21 Dr. Czarnik has acquired from his new employer and which he would
22 not have acquired had he not left Illumina?

23 A If they have any value. No, I haven't looked at them
24 at all.

25 Q When you say if they have any value, have you been
26 asked by Mr. Pantoni to do any assessment of the value of the new
27 shares with the new company held by Dr. Czarnik?

28 A No.

1 Q Now, with respect to Dr. Czarnik's shares, both of your
2 Scenario 1, which is actual share price after lockup and trading
3 windows, that scenario assumes, Mr. Brinig, that as the shares
4 were released in the repurchase restriction, that scenario assumes
5 that each month as shares were released, Dr. Czarnik would have
6 sold those shares at the prices available within the trading
7 windows, correct?

8 A Actually no, it doesn't assume that. First of all, it
9 is limited to the trading window that happens after that. It
10 values them at that price, Miss Kearns. But it's like using my
11 example with Mr. Pantoni, if I destroy your \$10,000 car and the
12 Blue Book price in February is \$10,000, whether or not you were
13 going to sell your car in February when I destroyed it, and I
14 don't mean that to have any larger meaning, it's still worth
15 \$10,000. So by valuing it in those trading windows at that
16 economic value, it doesn't absolutely assume that he physically
17 would have sold them.

18 I see how you could interpret it that way, but it's like
19 valuing your car in February at the Blue Book price. I wasn't
20 assuming you were going to sell it but the value in February is
21 \$10,000.

22 Q Were you provided with any information about whether
23 Dr. Czarnik has sold any of his shares of Illumina stock?

24 A Not specifically. I might know that -- I might have
25 been minimally had something mentioned to me about some children's
26 trusts or something, but I don't know specifically if he sold any
27 stock.

28 Q Of the 400,000 block that Dr. Czarnik purchased at the

1 outset of his employment, 226,000 left to be released?

2 A Correct.

3 Q I'm just doing the math off the top of my head. It
4 would suggest as of the date of termination, he already owned some
5 173,000 shares?

6 A Correct.

7 Q When I say own, I mean 173,000 shares which had been
8 released from the repurchase obligation?

9 A Correct.

10 Q Do you have any information as to whether or not Dr.
11 Czarnik sold any of those 173,000 shares?

12 A No, I've never looked at it or considered it.

13 Q Let's put up Exhibit 183. Let's blow-up the second
14 paragraph.

15 Mr. Brinig, this is it is second paragraph of Exhibit 183,
16 which is the Illumina lockup agreement which you agree that you
17 have reviewed and considered in connection with your analysis,
18 correct?

19 A Yes.

20 Q And in fact this lockup, have you seen other lockup
21 agreements before doing this analysis?

22 A In other cases?

23 Q Yes.

24 A I don't think so.

25 Q So this may have been the first lockup agreement you've
26 ever evaluated?

27 A Possibly, yes.

28 Q And --

1 A I wouldn't say I've evaluated it. I knew that it said
2 it couldn't sell during this period so I evaluated it to that
3 extent.

4 Q Would you agree with me this lockup agreement in
5 particular prohibits the undersigned from actually selling shares,
6 correct?

7 A Seems to, yes.

8 Q This is for a period of 180 days after the final
9 prospectus in connection with the IPO, correct?

10 A Correct.

11 Q But this lockup agreement also prohibits the
12 undersigned from contracting to sell or pledging any stock,
13 correct?

14 A Okay, sure. I'm aware of that.

15 Q Let's go back I guess to the ELMO. So Mr. Brinig, with
16 respect to Scenario 1, then, you've already testified about the
17 assumptions you made concerning Dr. Czarnik's eligibility for this
18 number of shares, correct?

19 A I --

20 Q You made certain assumptions based on what counsel told
21 you?

22 A Yes, I'm sorry. I accept that, yes.

23 Q And you calculated, you calculate the value of these
24 shares based on, as was shown in the next slide, a marketability
25 discount, correct?

26 A With respect to the past loss in Scenario 1, I don't
27 use a marketability discount.

28 Q Let me go to that slide in a minute. Focus for a

1 minute on one of your statements. You said with respect to the
2 shares that are shown as future loss --

3 A Yes.

4 Q You say these were shares which were completely owned
5 save for one incident of ownership, and that was the ability to
6 sell, correct?

7 A Correct.

8 Q And you also sold us that with respect to the
9 marketability discount studies, you said that they are not
10 perfect, they span a long period of time?

11 A They do.

12 Q What is the earliest marketability study upon which you
13 based your opinions in this case?

14 A The earliest one of the 10 or 12 is back in the '60's
15 to '70's.

16 Q And what is the latest one?

17 A Latest one goes into the '90's. I can't give you an
18 end date, but it does go into the '94, '95.

19 Q So these studies at best are roughly 10-years old?

20 A Yes, that's fair.

21 Q If not older?

22 A Yes, that's fair.

23 Q Were these marketability discount studies based on an
24 identical set of circumstances? In other words, were the
25 marketability studies which examined an appropriate marketability
26 discount for the restricted shares of individual -- restricted
27 shares held by individuals who were at the time of the
28 marketability discount locked up not only from selling but from

1 contracting to sell?

2 A I'm sure they are not. It's not possible to find a
3 study of a similar situation to what exists here. It's simply not
4 possible to find. I am definitely making analogies to these
5 studies for purposes of valuation. There's no question about
6 that.

7 Q So there is no study that's directly on point?

8 A Absolutely not.

9 Q And in fact the universe of marketability studies which
10 you have relied upon is roughly 10 to 12 studies over the course
11 of?

12 A 30 years.

13 Q 30-some years.

14 A Yes, that's correct.

15 Q None of which were directly comparable to the situation
16 here?

17 A I can't imagine a study that would be comparable to the
18 unique facts of this case.

19 Q Now, with respect to -- Let's go now to page 2 of this
20 exhibit.

21 THE COURT: You have about two minutes left.

22 MS KEARNS: Okay.

23 Q Second page of Exhibit 380.

24 I'm sorry, go back to the first page.

25 Now let me focus then for a moment on both scenarios. It is
26 actually you say the second scenario only, Scenario 2, the actual
27 share price date of termination that utilizes a marketability
28 discount?

1 A Scenario 2 uses a 50 percent marketability discount on
2 all of the shares. Scenario 1 uses a 33 percent marketability
3 discount on the future shares only.

4 Q Okay. So with respect to this calculation in Scenario
5 1, the 771,000 roughly in future loss, and with respect to the
6 entire damages in Scenario 2, those both are based upon the
7 assumption that one can select a discounted number and say that
8 because the shares were not marketable on certain dates, I'm going
9 to apply a certain discount, and then take the results and use
10 that number?

11 A Yes, you are going to apply a certain discount to the
12 current fair market value, exactly what you say, apply a discount,
13 and the resulting discounted number is an estimate of the economic
14 value of the thing that you own or didn't get.

15 Q And you'll agree with me there are many other ways that
16 one could estimate the value of these shares. This is just one
17 method which you've chosen, correct?

18 A On this point? As we sit today? Many other ways?

19 Q Are there -- Okay, let me retract "many." Are there
20 other methods that you could have used to estimate the value?

21 A I can never say no, there aren't to that, but I can't
22 think of another one that would approach the question more
23 intelligently, subject to you might argue that I should use a
24 different discount, but I can't think of a conceptual other way to
25 value those shares as we either sit today looking forward, or if
26 you force them to sit on the date of termination. I can't say
27 there aren't other ways, but I can't think of one that makes sense
28 to me.

1 Q You don't think it makes sense to use any method that
2 doesn't assign a somewhat arbitrary marketability discount?

3 A Or judgemental marketability discount. I cannot.

4 Q Thank you. Nothing further.

5 THE COURT: Mr. Pantoni.

6 MR. PANTONI: Very brief.

7 REDIRECT EXAMINATION

8 BY MR. PANTONI:

9 Q I want to clarify one thing, Mr. Brinig. As to this
10 block of shares, the 226,000 share block, did you understand that
11 Dr. Czarnik actually had a certificate reflecting ownership in
12 those shares before he was terminated?

13 A Yes.

14 Q Same question as to the 25,000 share block.

15 A He did have a certificate evidencing ownership of the
16 shares.

17 Q On that block, the 25,000 share block, real quickly,
18 when did you assume, if you did, when did you assume the milestone
19 was met?

20 A I think the date says no later than November 4th of
21 2001. I used November 1st of 2001 to have the releases start, so
22 three days different from the latest date of the milestone.

23 MR. PANTONI: I want to read into the record a response
24 to an interrogatory on this point. I believe Miss Kearns is
25 willing to agree the milestone was reached no later than November
26 4th, 2001.

27 MS KEARNS: Yes, so stipulated.

28 MR. PANTONI: Nothing further.

1 MS KEARNS: One final question.

2 RE-CROSS-EXAMINATION

3 BY MS KEARNS:

4 Q With respect to the share certificates which were held
5 by Dr. Czarnik and apparently provided to you by Mr. Pantoni,
6 there was nothing in any of those share certificates evidencing
7 ownership that suggested that the lockup agreement was not in
8 effect, was there?

9 A I would certainly, without having it in front of me,
10 Miss Kearns, I would certainly agree with that. If you state that
11 to me, I don't have it memorized, but I accept that.

12 Q And in working into your analysis this marketability
13 discount, you've now worked in or considered any discounting
14 whatsoever to take into account the fact that Dr. Czarnik is
15 reemployed and has new stock, is that correct?

16 A That is correct.

17 MS KEARNS: Thank you.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. PANTONI:

20 Q One last question. Scenario 1 you did consider the
21 lockup period, did you not?

22 A Yes.

23 MR. PANTONI: Nothing further.

24 THE COURT: Thank you very much, Mr. Brinig.

25 We'll take our afternoon recess at this time. We'll be in
26 recess until 1:15. Please remember the admonition not to form or
27 express any opinions about the case, not to discuss the case.
28 We'll be in recess until 1:15. 1:15.

1 (Proceedings resumed outside the presence of the jury.)

2 THE COURT: Any legal problems you know about for this
3 afternoon?

4 MS KEARNS: I don't think so.

5 THE COURT: You want to return -- Seems like there
6 always is something that comes up. One o'clock.

7 MR. PANTONI: I think we always answer truthfully. We
8 don't anticipate.

9 THE COURT: You think of something. One o'clock.

10 (Lunch recess taken at 12:10 p.m.)

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1 SAN DIEGO, CALIFORNIA, TUESDAY, JULY 2, 2002; 1:05 P.M.

2 (Proceedings resumed outside the presence of the jury.)

9 (Jurors seated in open court.)

10 THE COURT: Record will indicate all the jurors are
11 present, counsel are present, parties.

12 Who is to be the next witness?

13 MS KEARNS: Dr. Michael Ward called by Illumina.

14 THE COURT: Very well.

15 MICHAEL WARD,
16 called as a witness by the Defendant, having been first duly
17 sworn, was examined and testified as follows.

18 THE COURT: State your full name, please, spelling your
19 last name.

20 THE WITNESS: Michael P. Ward, W-a-r-d.

21 DIRECT EXAMINATION

22 BY MS KEARNS:

23 Q Good afternoon, Dr. Ward.

24 A Good afternoon.

25 Q Can you tell the jury by whom you were retained as an
26 expert in this case?

27 A I was retained by counsel for Illumina.

28 Q That would be me?

1 A Right.

2 Q And what is it that you were asked to do in connection
3 with performing any economic analysis?

4 A Well, I was asked to consider the potential economic
5 damages that may have been experienced by Dr. Czarnik as a result
6 of his departure from Illumina.

7 Q And can you tell the jury briefly about your
8 educational and work background that qualifies you to give
9 testimony and to do an analysis on the potential economic loss?

10 A Well, I have a bachelors degree in economics from
11 University of California at Santa Barbara. I have a masters and a
12 Ph.D in economics from the University of Chicago.

13 You want me to describe career?

14 Q Briefly.

15 A I taught for two years at University of California at
16 Santa Barbara. I taught for five years at UCLA. I was senior
17 economist at the Rand Corporation for four years. And since 1984,
18 I've been in private practice.

19 Q Now, again same offer that Mr. Pantoni made, I offer to
20 have Dr. Ward acknowledged as an expert in his field.

21 MR. PANTONI: No objection.

22 THE COURT: Very well.

23 MS KEARNS: Q Dr. Ward, did you receive last Friday
24 Mr. Brian Brinig's most recent iteration of his damages analysis?

25 A I did.

26 Q Let go ahead and put up Exhibit 380, page 1.

27 Dr. Ward, do you remember being provided by me with the
28 earlier analysis involving three scenarios done by Mr. Brinig in

1 March of this year?

2 A Yes, I've seen that.

3 Q And do you recollect whether he took into account in
4 any of his original scenarios the concept of trading windows?

5 A No, at that time he did not.

6 Q Did you read his deposition?

7 A Yes.

8 Q And in fact did it appear from the deposition -- Do
9 you recollect from reading the deposition that trading windows was
10 first mentioned by me during that deposition?

11 A Yes, he was aware of them but had not dealt with it.

12 Q So Mr. Brinig testified this morning, and his --
13 You've reviewed the packets of materials that came with this first
14 page of the exhibit?

15 A Right.

16 Q One of the issues that I'd like for you to address is
17 whether Mr. Brinig's scenarios are appropriate in the use of a
18 marketability discount. What he testified this morning is that in
19 Scenario 1, for the value of future shares, he used a
20 marketability discount of 33 percent, then testified that in
21 Scenario 2, overall using the date of termination value, he used a
22 marketability discount of 50 percent.

23 A Right.

24 Q Why or -- Is that appropriate, and if not, why not?

25 A Okay. It's not appropriate in this case because the
26 shares that we're talking about had not been released. In other
27 words, they were not in full possession of Dr. Czarnik. There is
28 a restricted, so-called restricted stock purchase agreement that

1 Dr. Czarnik signed at the point where he received the rights to
2 restricted stock of 400,000 shares, the major share purchase.
3 That agreement has a series of paragraphs in them, all of which
4 are aimed to restrict Dr. Czarnik's ability to sell those shares
5 to anyone. In fact, it's explicit in the agreement that the
6 shares are actually kept in escrow, they are not kept by Dr.
7 Czarnik, they are not kept by the company except through its
8 agent, its escrow agent.

9 Q Let me stop you there and ask a follow-up question.
10 Would you agree or disagree with Mr. Brinig's testimony this
11 morning that the shares were, in his words, completely owned,
12 complete ownership by Dr. Czarnik save the right to sell?

13 A Well --

14 Q Do you think the term "complete ownership" is
15 misleading?

16 A The term "complete ownership" is misleading in light of
17 all the restrictions that are in this agreement.

18 Q Now, you mention that there was a restricted stock
19 purchase agreement. In fact, if we focus on the three blocks of
20 stock that Mr. Brinig testified to, there is a block that relates
21 to the initial 400,000, which on the date of termination there was
22 227,000 shares not yet released?

23 A Right.

24 Q There was a 25,000 share block which was a milestone
25 grant?

26 A Yes.

27 Q And then Mr. Brinig has include in his analysis a
28 100,000 share block based upon counsel's representation that

1 although Dr. Czarnik didn't get that grant, he should have gotten
2 that grant.

3 A I understand that.

4 Q Let me ask you this: With respect to the restricted
5 stock purchase agreement concerning the 400,000 shares initially
6 purchased, that is Exhibit 29, Dr. Ward, you have at your feet I
7 think a set of binders. If you could thumb to Exhibit 29. If we
8 can put that up on the ELMO.

9 A I have it.

10 Q You said that this agreement actually says that the
11 shares were not held by Dr. Czarnik but rather were held in escrow
12 until they were released?

13 A Right. There is a paragraph.

14 Q Which paragraph?

15 A 5. Second page. Paragraph 5 where it says
16 "Restrictions on transfer." Restrictions on transfer says,
17 "Except for the escrow described in Section 6 or the transfer of
18 the shares to the company or its assignees as contemplated by this
19 agreement, none of the shares or any beneficial interest therein
20 shall be transferred, encumbered or otherwise disposed of in any
21 way until the release of such shares from the company's repurchase
22 option."

23 What that means is a certain hurdle has to be overcome,
24 which is a release of the shares into Dr. Czarnik's possession.

25 Q Until that time, until the shares were actually
26 released, the shares were actually held in escrow, correct?

27 A Right.

28 Q Let me ask you this. Is the concept of the shares

1 being held in escrow until they were released, is that concept in
2 anyway inconsistent with the idea that Tony Czarnik got a paper
3 share certificate evidencing the shares?

4 A He had the right to vote, he had the right to receive
5 any dividends, but he did not have the right to dispose of them.
6 They were not in his possession to dispose of. Moreover, there's
7 actually a clause -- Well, I don't know how you want to show
8 this.

9 Q If you can tell me which paragraph.

10 A If you look at paragraph 6D. 6D says that, "When the
11 repurchase option has been exercised or expires unexercised or a
12 portion of the shares has been released from such repurchase
13 option upon purchaser's request, the escrow holder shall promptly
14 cause a new certificate to be issued for such released shares and
15 shall deliver such certificate to the purchaser." That's the
16 shares that might be sold, not the ones prior to release.

17 There's another section here. Let's look at all of 8. It's
18 on the next page, 4. Down at the bottom.

19 The share certificates that are issued have this legend on
20 them. Now, part B says, "The shares represented by this
21 certificate may be transferred only in accordance with the terms
22 of an agreement between the company and the shareholder, a copy of
23 which is on file with the secretary of the company." In other
24 words, you couldn't sell this thing because it says right there
25 that you can't sell it. So it's useless at this point, prior to
26 release.

27 Q And in fact so the process would be, Dr. Ward, that
28 once the shares, until the shares are released from the repurchase

1 option held by the company, they could not -- they couldn't be
2 sold and Dr. Czarnik didn't even have the right to contract to
3 sell them in the future at that moment in time?

4 A Correct.

5 Q Once they were released from the repurchase option,
6 what would happen is they would be released from this escrow, a
7 new share certificate would be issued which presumably would lift
8 the restriction on the ability to sell?

9 A Correct.

10 Q And did you personally examine the share certificate
11 that was issued to Dr. Czarnik in connection with the 400,000
12 share block?

13 A I don't remember.

14 Q Okay. Let's put up 28, please.

15 Have you seen this document before?

16 A I think it's -- I think it's in the packet of material
17 that was sent to me.

18 Q I can't even read it blown up at this point.
19 Restricted stock purchase agreement is the operative agreement
20 that relates to this 400,000 share block, correct?

21 A The end release portion, right.

22 Q And there was an a virtually identical agreement which
23 was executed by Dr. Czarnik in connection with his purchase -- in
24 connection with the 25,000 share milestone grant, right?

25 A That's right.

26 Q Let's put up Exhibit 93. Apart from the number of
27 shares and the price per share that was paid by Dr. Czarnik, you
28 have examined Exhibit 93 previously?

1 A Yes.

2 Q And is it the same exhibit for those particulars?

3 A I believe so.

4 Q Now let's go back. So you explained the reason Mr.
5 Brinig's analysis was inaccurate by using a marketability discount
6 or a lack of marketability discount is because Dr. Czarnik in fact
7 did not have complete ownership of these shares. He had voting
8 rights, he had dividend rights, if any, but they were held in
9 escrow and he didn't have the right to sell or even to contract to
10 sell these, correct?

11 A That's right.

12 Q Are there any other flaws that you saw in Mr. Brinig's
13 most recent calculations?

14 A Well, to complete the point, the analysis of Scenario 2
15 in Dr. Brinig's calculations uses the discount factor that comes
16 from a series of studies.

17 Q Tell us a little about those studies.

18 A All of those studies compare the price of a share sold
19 when the share was restricted in terms of your ability to sell.
20 In other words, you couldn't sell it in the open market. You
21 could only sell it under certain circumstances. But it was yours
22 to sell.

23 What happens, they actually collected data because of people
24 who exchange shares, if you or I exchange shares under those
25 circumstances, you have to report it to the Securities Exchange
26 Commission, so there's data generated in that case and you can
27 figure out what market price was compared to the price sold of a
28 restricted share.

1 The important point is all those shares were actually sold
2 in those studies. Those were shares that could be sold from one
3 person to the next.

4 Q And were sold?

5 A And were sold. That's why we have the numbers that we
6 can use to compute this discount. In the case of the Illumina
7 shares that had not yet been released, those shares could not be
8 sold under any circumstances. So they are not even comparable to
9 the ones that are in the studies that Dr. Brinig is relying on.

10 Q And actually for the record it's Mr. Brinig.

11 A Mr. Brinig.

12 Q So let me ask you to listen to this characterization.
13 Are you telling me, Dr. Ward, that you are personally familiar
14 with these marketability discount studies upon which Mr. Brinig
15 relied?

16 A We're both reading the same books and looking at the
17 same studies.

18 Q Are you telling me these marketability discount studies
19 which Mr. Brinig relied upon are studies in which somebody had
20 shares and they didn't have the right to sell them to anyone in
21 the world they wanted to, but they did have the right to sell to
22 someone?

23 A Right. In other words, they may have been locked up,
24 they may not have been able to sell them for six months or nine
25 months or whatever the situation was, so they could only sell it
26 in a private transaction, but they could sell it.

27 Q And in this case, given the terms of the restricted
28 stock purchase agreement and the lockup agreement that Dr. Czarnik

1 signed, it is the case, is it not, that he absolutely didn't have
2 the right to sell any of the unreleased shares?

3 A Right. There's paragraph after paragraph in this stock
4 repurchase agreement that is directed specifically to keeping the
5 individuals who had these shares from selling them.

6 Q And in fact isn't the language in the lockup agreement
7 further that he was restricted not only from selling, but from
8 even contracting or agreeing to sell?

9 A Well, there's -- See if I can find the language.

10 Q Here's the lockup agreement.

11 A The lockup, right.

12 Q You've seen this document before?

13 A Yes.

14 Q It's Exhibit 183. In this lockup agreement, let's go
15 to the next page if we can. This is Dr. Czarnik's lockup
16 agreement with Illumina, Inc. Let's go to the signature page.

17 This was -- You've seen this document before?

18 A Yes.

19 Q Signed by Tony Czarnik?

20 A Yes.

21 Q Let's go to the first page.

22 Blow up the second paragraph, please.

23 Just consistent with what you've seen in both of the
24 restricted stock purchase agreements, the lockup agreement signed
25 by Dr. Czarnik also provided that until 180 days after the date of
26 the final prospectus, he agreed that he would not offer, sell,
27 contract to sell, pledge or grant any option to purchase, correct?

28 A Right.

1 Q And does that mean in lay terms that until 180 days
2 after the IPO, he couldn't do -- he couldn't take any step during
3 that window to sell or even arrange to sell in the future?

4 A Right. It also forbids any secondary sale, like
5 through a short sale or option or any other kind of derivative
6 instrument to try to unload the shares.

7 Q Do you have any other specific criticisms of the
8 analysis performed just last Friday by Brian Brinig?

9 A Well, I think we've talked about Scenario 2. I don't
10 think that's a reasonable scenario. In addition to the things
11 that we talked about, what it would essentially do is give Dr.
12 Czarnik value that no other agent or owner of any share of
13 Illumina was able to exercise. He would get more than anybody
14 else just by virtue of this valuation, which makes no sense at
15 all.

16 Q So Scenario 2 says let's use the value of the stock on
17 September 5, 2000, let's multiply it out, then let's discount it,
18 let's give Dr. Czarnik roughly \$8 million, correct?

19 A Right.

20 Q In fact, on September 5th that was still within 180
21 days of the company's IPO, correct?

22 A Right.

23 Q So no senior officer or no person who signed a similar
24 agreement could have taken advantage of that high market price on
25 that date?

26 A Or 50 percent of the market price.

27 Q Right.

28 A They had to wait until -- until the lockup period was

1 ended.

2 Q This scenario doesn't take into account the lockup
3 period at all?

4 A No.

5 Q Now, having analyzed the work done by Mr. Brinig,
6 neither of his scenarios takes into account the likelihood that
7 Dr. Czarnik would in fact remain employed through vesting of the
8 share blocks, correct?

9 A Well, it assumes that he would remain employed,
10 certainly.

11 Q And what about this Scenario 1, is this a reasonable
12 scenario?

13 A Well, as so far as it goes. If you assume that Dr.
14 Czarnik would have been around working for Illumina under the
15 terms of all those agreements indefinitely, then that's an
16 accurate number.

17 Q And again even Scenario 1 uses for future loss which
18 comprises \$771,000, that still uses this marketability discount,
19 correct?

20 A Right. It also assumes that he would get the hundred
21 thousand share block. I don't have any opinion one way or another
22 about that. But if you assume that he would have gotten the
23 block, and if you assume he would have worked there continuously
24 or indefinitely, then that's a measure of the economic -- the
25 value -- a measure the economic value of those shares.

26 I should add that it's not a complete picture of economic
27 loss because it doesn't attempt a valuation of options that Dr.
28 Czarnik has with his current employer, about which we know

1 nothing. Although he has rights to certain shares, we don't know
2 what their value is. So he can't have his cake and eat it too, so
3 to speak. He has some options with his new employer, unknown
4 value. This value we can determine. So the difference between
5 them, which would be a measure, a true measure of loss, we can't
6 really figure out.

7 Q So in other words, you are saying although Dr. Czarnik
8 is claiming to have lost certain value in Illumina shares by
9 virtue of his being fired, he also, as a result of that same
10 event, got the opportunity to purchase shares in a new start-up?

11 A Correct.

12 Q And unless we know the value of those shares, you are
13 saying the value of those shares should be offset by, deducted
14 from, any loss he claims as a result of loss of Illumina shares?

15 A Right. You can't have both. You can't have a
16 continuous career at Illumina and also have these options in his
17 new company.

18 Q Now let me shift gears for a moment. I asked you to
19 prepare an, without acknowledging that Illumina owes anything, did
20 I ask you to prepare an alternative analysis of economic damage?

21 A Yes.

22 Q Let me get the easel and I will put it up. This is
23 Exhibit 377-4.

24 Do you have the copy of that, Dr. Ward? It should be in
25 your exhibit binders. 377, page 4.

26 Dr. Ward, you might want to just come down here in front of
27 the jury and I will lend you my trusty laser pointer, and if you
28 can explain to the jury what you did in this analysis. Again this

1 is an alternative estimate of --

2 Let me also ask you, you don't have any opinion and you
3 don't make any suggestion as to whether or not Dr. Czarnik is
4 entitled to recover anything, correct?

5 A Correct.

6 Q In fact, any analysis of economic loss is dependent
7 upon a finding first that the company is liable to him in some
8 way?

9 A That's correct.

10 Q And you haven't been asked to render an opinion on
11 that?

12 A That's right.

13 Q So this analysis is sort of I asked you to prepare this
14 in the event that there was a finding of liability?

15 A Right.

16 Q So can you explain to the jury what you did here.

17 A Well, the key assumption is I'm assuming that Dr.
18 Czarnik would have remained employed at Illumina for other six
19 months. That's the assumption that you asked me to make. So all
20 the numbers in these -- And I should preface this by saying that
21 Mr. Brinig and I have absolutely no disagreement about this
22 calculation. His numbers are exactly the same as mine. The only
23 difference is the dates are different. I'm going out six months,
24 he's going out much longer than six months. But what I've
25 calculated here is just listing the first block of numbers all the
26 critical dates and grant numbers and so forth.

27 This is the grant date, grant amount, the option price is a
28 penny. Dr. Czarnik paid \$4000 initially for that 400,000 share.

1 The number of the initial release date of the shares was in June
2 of '99. And thereafter 666,000 shares were released monthly.

3 Now, going down here, what I'm going to calculate is the
4 value of those shares had he remained another six months. So
5 that's six times 6666 shares. So turns out to be 40,000 shares
6 it's going to be at the end. He would have been able to sell
7 those initially at the end of the lockout period, 1-23-2001.
8 However, there is an additional trading window would have
9 restricted his ability to share on the open market.

10 Q Let me stop you there and ask you, even though the
11 lockup may have expired, there was an initial restriction in place
12 called the trading window?

13 A Right. And the trading window which we talked about
14 earlier went for almost a month, from the last day of April until
15 last day of May, 2001. And during that period, the average price
16 of a share of Illumina was 9.62.

17 Now, what I've done here in this block of numbers is just to
18 calculate the value of the shares that had been released to Dr.
19 Czarnik. These are shares that he had.

20 Q That he actually had the ability to trade in?

21 A Actually had the ability to trade in during the trading
22 window if he desired. I don't know what he did. But there were
23 226,000 shares. He, had he -- I'm sorry, had he sold those at
24 the average price of \$9.63 after subtracting off the amount he had
25 to pay for them, he would have netted 1.6 million. \$1,669,197.
26 After taking off what he paid for them, it drops by couple
27 thousand dollars, \$1,667,462. So that's what his shares were
28 worth, released shares were worth.

1 Now, he had other shares. That's what we've been talking
2 about. The other shares, had he remained employed for an
3 additional six months, he would have accumulate at a rate of 6666
4 shares a month. If we go out to the end of the six-month period
5 instead of having that original number of -- instead of having
6 the original number of shares released, he would have had an
7 additional block of shares. The additional block of shares would
8 have netted him release prior to his employment of 213,000 shares,
9 for grand total of \$2 million.

10 So had he worked another six months, he would have gotten a
11 little over 2 million. He actually got 1.6 million. The
12 difference, 394,800, is the value of those additional 20,000
13 shares.

14 Q The six-month figure, that's an assumption, correct?

15 A Right.

16 Q And it's an assumption that I unilaterally told you to
17 work with, correct?

18 A Right.

19 Q And in fact you don't know whether Dr. Czarnik would
20 have remained employed for even six more months, correct?

21 A Right.

22 Q But I asked you to work with that number for purposes
23 of developing an alternate analysis of potential economic loss?

24 A That's right.

25 Q And even this number, 384,000 number, does not take
26 into account or does not offset the value of the new shares that
27 Dr. Czarnik holds with this new company, correct?

28 A Correct.

1 MS KEARNS: Nothing further at this time.

2 THE COURT: Cross-examination.

3 MR. PANTONI: Yes, your Honor.

4 CROSS-EXAMINATION

5 BY MR. PANTONI:

6 Q Dr. Ward, you would agree, would you not, that any
7 damage analysis or damage calculation only comes into play if the
8 jury finds that Dr. Czarnik was wrongfully terminated?

9 A I assume so.

10 Q You are an expert economist.

11 A Right.

12 Q You've dealt with these issues before. Isn't it
13 correct that in cases such as these, alleged wrongful termination
14 damages are only relevant if the termination itself was wrongful?

15 A If there's some liability found. I don't know whether
16 that's the only liability issue here or not.

17 Q So in this case if the jury were to find that Dr.
18 Czarnik was wrongfully terminated, and if the jury were to find
19 that Dr. Czarnik would still be employed today but for that
20 wrongful termination, then you agree with Brian Brinig's number in
21 Scenario 1?

22 A Well, except for this issue of the hundred thousand
23 shares about which I don't know anything.

24 Q There's a separate issue as to whether he should have
25 been given that hundred thousand shares?

26 A That's my understanding.

27 Q If there's liability on that issue, then you agree that
28 Mr. Brinig's conclusion as to Scenario 1 is the correct number?

1 A There's nothing wrong with the mathematics under the
2 assumptions that he made.

3 Q So the only difference you would have with Mr. Brinig
4 as to Scenario 1 is whether you should assume Dr. Czarnik would
5 only be employed for another six months or whether you should
6 assume that Dr. Czarnik would still be employed but for the
7 alleged wrongful termination?

8 MS KEARNS: I think that mischaracterizes.

9 MR. PANTONI: Q Is that correct?

10 MS KEARNS: I think that mischaracterizes the
11 testimony.

12 THE COURT: I think it's cross-examination. The
13 witness can answer that.

14 THE WITNESS: Well, assuming that he would have been
15 employed indefinitely, then that's -- and assuming that the
16 100,000 share block was due him, -- Let me think if there's
17 something else.

18 There's a discount for marketability that occurs in the
19 future for his future, and I guess I would have the same problem
20 with that number as I have with the other problems with restricted
21 stock. So as far as the past loss goes, assuming Dr. Czarnik
22 worked up to today, I don't have any problem with that number
23 aside from the 100,000 share issue.

24 Q Okay. And that's the 1,652,000?

25 A Right. The future has the same issue of valuing
26 restricted shares.

27 Q How would you go about valuing the future shares?

28 A I don't know, because there's no market for these

1 things.

2 Q You don't have any way to value it, is that what you
3 are saying?

4 A I don't. What I can say is that the discount number
5 that Mr. Brinig used is too low, it should be higher than that.
6 But I don't know by how much.

7 Q I was going to ask you that. What was the appropriate
8 percentage?

9 A I don't know. It's like saying -- If you don't have
10 data to analyze it, then you really can't say anything about it.

11 Q But they are shares in a publicly traded company, are
12 they not?

13 A But they are not publicly tradable as far as he's
14 concerned.

15 Q I understand, but they are shares in a public company?

16 A Correct.

17 Q So they have some significant value, wouldn't you
18 agree?

19 A They have value, but he has to work there, supply his
20 effort, do all the things that he needs to do in his position to
21 earn those shares. He hasn't earned them yet.

22 Q Comes back to my mind this is relevant only if a jury
23 finds he was wrongfully terminated in the first place.

24 A And he would not have been terminated at any point
25 between the time he was terminated and today.

26 Q And you picked six months simply because Miss Kearns
27 told you six months?

28 A Correct.

1 Q You have no opinion whether six months is reasonable or
2 not reasonable?

3 A I do not.

4 Q Did you take into account, Dr. Ward, that no senior
5 managers of Illumina have left the company since the company has
6 gone public?

7 A I haven't -- I don't know. I don't know anything
8 about that.

9 Q I asked every one of the senior managers who testified
10 at this trial whether they had any plans to leave Illumina.
11 Everyone answered no. Would you take that into account at all in
12 doing your analysis?

13 MS KEARNS: Objection, foundation.

14 THE COURT: Foundation as to?

15 MS KEARNS: He was asking whether this witness took
16 into account testimony given by senior managers in this trial.
17 This witness was not present during any of that testimony.

18 MR. PANTONI: Q Did you take into account, Dr.
19 Ward, whether any of Illumina's senior managers left or intended
20 to leave the company since it's gone public?

21 A I haven't taken into account anything regarding any
22 senior managers.

23 Q You mentioned with respect to Dr. Czarnik's options at
24 his current employer. You understand that that's a private
25 company, do you not?

26 A Correct.

27 Q You understand that there's no market whatsoever for --

28 A It's just like Illumina was before it went public.

1 Q As far as you know, it's worth a penny a share?

2 A Same deal.

3 Q Do you have any way to put any value whatsoever on
4 options that Dr. Czarnik has in his current employment that relate
5 to a private company?

6 A No. I mean let me answer this way. I don't have the
7 information to do that. In theory, you could try to value
8 closely-held company and determine the value of a share in that
9 closely-held company, but I don't have the information to do that.

10 Q Even in a situation where there's no market whatsoever
11 for the shares?

12 A It gets to be a problem, but people do it.

13 Q But you are not able to do it?

14 A No.

15 Q Now, Mr. Brinig told the jury that in Scenario 1 he did
16 take into account the lockup, and you think that was appropriate
17 to do so, don't you?

18 A Yes.

19 Q He also told the jury he took into account the trading
20 windows, and you think it was appropriate to do so?

21 A Yes.

22 Q Do you recall I asked you some questions at your
23 deposition about Mr. Brinig's analysis and you told me Mr. Brinig
24 adds and subtracts with the best of them?

25 A He does.

26 Q Adding and subtracting is a pretty fundamental part of
27 getting expert economic analysis, isn't it?

28 A Yes.

1 Q Looking at your summary -- Would you mind sliding down
2 here.

3 A Sure.

4 Q What did you calculate to be the number of shares Dr.
5 Czarnik had free and clear when he left Illumina's employment?

6 A Shares released prior to 173,000.

7 Q 173,000 shares. If he had worked six months, only six
8 months under your assumption, he would have earned how many more
9 shares that would not have been subject?

10 A I think it's not subject to repurchase.

11 Q What's this, shares purchasable by Illumina at
12 employment end?

13 A Had he gone another six months, he would have had,
14 instead of repurchasing 226, they would have only been able to
15 purchase 186. So the difference is the gain that he has over
16 that.

17 Q Let's take a look, please, at the first page of your
18 report, Exhibit 377. This is a narrative report that you wrote?

19 A Right.

20 Q In this report where you say as of that date, and that
21 that date being the end of the six-month period, third line on the
22 second page?

23 A Right.

24 Q Is that the date you are referring to?

25 A Right.

26 Q So as of a date that was six months after his
27 termination, you state that a total of 186,000 shares would have
28 been released to Dr. Czarnik. That's not correct, is it?

1 A No, that should say repurchased by the company.

2 Q What is the actual number of shares that would have
3 been released as of that date?

4 A 213,333.

5 Q So it's just an error?

6 A The words are wrong.

7 Q Did you write this report?

8 A Yes.

9 Q Looking at the last paragraph, what is the reference to
10 May 4, 2001?

11 A It should be six months after he was terminated. Is
12 that right? He was terminated September 4th.

13 Q What's the significance of May 4?

14 A That's six months later.

15 Q Not by my calendar.

16 A No, it isn't. That's wrong. Six months should be
17 March 4th.

18 Q Now for Scenario 2, your dispute with Mr. Brinig
19 whether a marketability discount should be applied at all?

20 A Well, it's not clear that there is any market to which
21 a discount should be applied. It's kind of what I'm saying.
22 There's no number out there this would be appropriate.

23 Q So the bottom line that you are taking here is that he
24 should not have applied any marketability discount at all in
25 Scenario 2?

26 A We don't know what it is, but it's certainly the
27 numbers that are in that study.

28 Q That's your only dispute with Scenario 2?

1 A That it doesn't make any sense, yeah.

2 Q Do you know whether any other Illumina senior managers
3 were fired during the lockup period after the IPO?

4 A I don't.

5 Q You mention that under the terms of Dr. Czarnik's
6 agreement, every time your purchase rights lapse, a new
7 certificate should have been issued?

8 A If they were released and -- Well, there's another
9 condition, I think he has to ask for it, but the escrow officer
10 would reissue shares.

11 Q Do you know if that's how it worked, if the new
12 certificates were issued to Illumina employees every month when
13 they vested into additional shares?

14 A I don't think that's what it says. They could, if my
15 reading of it is -- If you asked for it, you could have it that
16 way.

17 MR. PANTONI: Nothing further. Thank you, Dr. Ward.

18 MS KEARNS: Just a few items, Dr. Ward.

19 REDIRECT EXAMINATION

20 BY MS KEARNS:

21 Q Let's go back to -- At or about the time of your
22 deposition I asked you to prepare a written narrative report for
23 purposes of providing it to Mr. Pantoni at your deposition,
24 correct?

25 A Right.

26 Q So let's take a look at those pages. Let's blow this
27 up. So it is first thing that Mr. Pantoni focused upon is this
28 ending March 4th. In fact, I'll represent to you, Dr. Ward, that

1 the termination date was actually March -- was actually September
2 5, 2000. I may have at or about the time of your deposition given
3 you a date that was off by a day.

4 But in any event, this statement here, the share value he
5 lost due to his employment ending on September 4, 2000, rather
6 than May 4, 2001, did you mean March 4, 2001?

7 A Right.

8 Q Is that a typo?

9 A Yes.

10 Q And this total number, total of it says as of that
11 date, that date meaning a date six months after termination,
12 correct?

13 A Right.

14 Q When you write a total of 186,667 shares would have
15 been released to Dr. Czarnik as of the original purchase of
16 400,000 shares, did you mean this paragraph to say a total of
17 186,667 plus 40,000 additional shares?

18 A No, the 186 is the number that would have been
19 repurchased.

20 Q Okay.

21 A Leaving --

22 Q Repurchased, not released?

23 A Leaving 40,000 shares. 40,000 is the relevant number.

24 Q Okay.

25 So to understand some of the testimony that Mr. Pantoni
26 brought out, he said you dealt with these issues before, in other
27 words economic damages calculation in a termination case, correct?

28 A Sure.

1 Q In fact, isn't it true, even if it's somewhat remote in
2 time, you have worked as a retained expert not only for me but
3 you've also worked with Tony Pantoni?

4 A Yes.

5 Q So we've both retained you as an expert at various
6 points in time?

7 A Right.

8 Q And to the extent there might have been any suggestion
9 to the jury that I asked you to calculate your alternative damages
10 because there is liability, isn't it true, Dr. Ward, that at least
11 in prior cases you've worked on with me, I've always asked you to
12 provide an alternative damages analysis even in cases in which we
13 got defense verdicts?

14 MR. PANTONI: Objection, relevance

15 THE COURT: Sustained.

16 MS KEARNS: Q Did I ask you inspect preparing --

17 Asking you to prepare an alternative damages analysis, I did
18 not suggest to you in any way there was liability, did I?

19 A No. No.

20 Q Now, with respect to the issue about whether other
21 senior managers left Illumina or were fired from Illumina, you
22 have no information on that issue, correct?

23 A Right.

24 Q And when Mr. Pantoni was asking you whether -- Let's
25 put back up Mr. Brinig's scenario. When Mr. Pantoni asked you
26 with respect to Brinig's Scenario 1, you were saying that some of
27 his assumptions are ones which you have not made, and that is, A,
28 that he would have remained -- with respect to the past, which is

1 past through today, one assumption encompassed within this number
2 is that Dr. Czarnik would have remained employed at least through
3 today?

4 A Right.

5 Q And that is an assumption that you've not made?

6 A Correct.

7 Q Another assumption is that Dr. Czarnik would have in
8 fact been given this hundred-thousand-share block, correct?

9 A Right.

10 Q That's an assumption you haven't made?

11 A Correct.

12 Q And an assumption made with respect to the future
13 damages elements of Scenario 1 is again an assumption that he
14 would remain employed through the end of the vesting period with
15 respect to all three blocks?

16 A Correct.

17 Q That he would have been in fact granted the hundred-
18 thousand block?

19 A Right.

20 Q And a big assumption underlying this element of the
21 damages is that applying a marketability discount is appropriate,
22 correct?

23 A Right.

24 Q And as you testified earlier, the marketability
25 discount studies that do exist are studies that were done based
26 upon actual sales of stock which were restricted in some way but
27 not completely restricted?

28 A Correct.

1 Q In our case, Dr. Czarnik's ability to sell or even to
2 contract to sell his unreleased shares was in fact completely
3 restricted?

4 MR. PANTONI: Cumulative.

5 THE WITNESS: That's my understanding.

6 THE COURT: It is.

7 MS KEARNS: Q And you have the same issue with respect
8 to Scenario 2 in its entirety, correct?

9 A Right.

10 MS KEARNS: Thank you.

11 RE-CROSS-EXAMINATION

12 BY MR. PANTONI:

13 Q I wasn't going to ask you this, but I have to since
14 Miss Kearns did.

15 How long ago has it been since we worked together?

16 A A while.

17 Q Do you recall the last time we worked together I was
18 actually with Brobeck, Phleger & Harrison?

19 A No, you were on your own when you hired me, and you
20 tried to hire me once before.

21 Q I must have had a good reason for not.

22 Let me ask you one question. What percentage of your work
23 in employment cases, Dr. Ward, is on behalf of the employer, on
24 behalf of the company?

25 A In terms of employment cases, it's approximately 80
26 percent.

27 Q 80 percent?

28 A Right. Okay.

1 MS KEARNS: Nothing further.

2 THE COURT: Thank you very much. You may step down.

3 MR. PANTONI: May I have five minutes, Judge? I'll
4 still finish well on time. We have one more witness

5 THE COURT: Yes. You want to take the afternoon break?

6 MR. PANTONI: That would be appropriate.

7 THE COURT: We'll take our afternoon recess at this
8 time. We'll be in recess until 20 minutes after 2:00. Please
9 remember the admonition not to form or express any opinion about
10 the case, not to discuss the case. We'll be in recess until 2:20.

11 (Proceedings outside the presence of the jury.)

12 THE COURT: Any issues that are going to be coming up?

13 MS KEARNS: I don't think so.

14 MR. PANTONI: Not until they come up.

15 THE COURT: Okay.

16 (Recess.)

17 THE COURT: Record will indicate all the jurors are
18 present, counsel are present.

19 Have we now completed all the evidence in the defense case?

20 MS KEARNS: We have.

21 THE COURT: We've really completed all the evidence in
22 Plaintiff's case except for the testimony of Dr. Czarnik.

23 MR. PANTONI: Except for the redirect and then rebuttal.

24 THE COURT: Okay. Very good.

25 This is redirect of Dr. Czarnik.

26 MR. PANTONI: Redirect/rebuttal.

27 THE COURT: Okay.

28 You may resume the stand at this time, Dr. Czarnik. You are

1 still under oath at this time, sir.

2 ANTHONY CZARNIK,

3 having been previously duly sworn, resumed the witness stand and
4 testified further as follows:

5 DIRECT EXAMINATION

6 BY MR. PANTONI:

7 Q Well, Dr. Czarnik, as much as the jury probably wants
8 me to ask you to refute every single solitary bit of evidence
9 that's been put on so far in the case, I'm going to resist the
10 urge.

11 A Thanks.

12 Q Try to keep the big picture.

13 Let me start with some questions about IRORI, the employer
14 you had before you came to work at Illumina.

15 A Right.

16 Q Did you ever tell John Stuelpnagel that you were glad
17 Illumina made you an offer because you were looking to leave
18 IRORI?

19 A No.

20 Q Were you looking to leave IRORI?

21 A No.

22 Q Have you ever made a claim of discrimination before
23 your claim against Illumina?

24 A No --

25 THE COURT: Counsel, I just need to take a call. It
26 will take me about a minute

27 (Brief interruption.)

28 THE COURT: Go ahead.

1 MR. PANTONI: Thank you, your Honor.

2 Q Dr. Czarnik, I was asking you whether you had ever
3 before made a claim of discrimination before your claim against
4 Illumina.

5 A Yeah. I'm glad I had the extra time because I had to
6 really think hard about that one.

7 MS KEARNS: I'm going to object, asked and answered,
8 and the answer was no.

9 MR. PANTONI: That was the question pending.

10 MS KEARNS: There was an answer recorded.

11 THE COURT: You think it was already asked earlier in
12 his deposition?

13 MS KEARNS: Right before your Honor went off the bench
14 to take the call.

15 THE COURT: That's okay then. I maybe just want --
16 I'll overrule the objection.

17 MR. PANTONI: Q So the answer is no?

18 A The answer is no. This was something that I spent a
19 lot of time thinking about, did a lot of sole searching before
20 raising this complaint, for a variety of reasons, a lot of them
21 having to do with the fact that I've got a visible career, this
22 was a very hard thing for me to decide to go to the likes of
23 bringing a formal complaint, and, you know, you don't know what
24 the process is like until you've been through it. But frankly,
25 I'm very glad that we do have such a process, because otherwise I
26 would have had no way to redress this.

27 No, I have not made such a complaint before.

28 MS KEARNS: I'm sorry, excuse me, move to strike the

1 narrative after the words "No, I haven't filed."

2 THE COURT: Aside from, "No, I've never made such a
3 complaint before," the rest of the answer is nonresponsive. It
4 will be stricken. The jury admonished to disregard it.

5 MR. PANTONI: Q Let me ask you this. Mr. Flatley
6 speculated that he thought you had made the complaint against
7 Illumina as some sort of negotiating tactic. Did you, sir, make
8 the complaint as some sort of negotiating tactic?

9 A It is patently absurd. It makes me angry for him to
10 suggest such a thing. This was a very big deal, and in no way
11 would I have raised this kind of complaint as a part of some
12 negotiating tactic.

13 Q There was some testimony, Dr. Czarnik, about an alleged
14 discussion in August of 1998, a walk around Cardiff that Dr.
15 Stuelpnagel and Dr. Chee testified about. Did you ever have a
16 walk around Cardiff that was in any way, shape or form a
17 counseling session?

18 A We had a great summer the summer in Cardiff. We often
19 walked around town discussing the company, going to lunch. I
20 remember a discussion in which John was concerned that I was out
21 of the office more days than he expected. I told him to refer to
22 this list of dates that I had given him before I joined the
23 company. That ended it. There was no more discussion about any
24 other concerns that he had with me. And so the answer is no, it's
25 silly to think I would have signed his offer letter if we had had
26 such a conversation.

27 Q And with respect to the November, 1998 discussion with
28 John Stuelpnagel, any doubt in your mind that Dr. Stuelpnagel did

1 not talk to you about personal performance issues?

2 A On what date again, please?

3 Q November of '98.

4 A In that discussion of November of 1998 John expressed
5 to me frustration that the company wasn't meeting the milestone
6 that we had set out in the summer. Great frustration. It was
7 palpable frustration. But did John ever counsel me that you
8 didn't do this, you didn't do that, you didn't do that?
9 Absolutely not. The only thing that came out of that meeting was
10 that John wanted us to have a research and development plan that
11 Mark and I wrote jointly, and as soon as my meeting was over,
12 Mark's meeting was over, we began writing that research and
13 development plan jointly.

14 Q Now, Dr. Czarnik, you've heard testimony about your
15 work ethic and the work hours. Let me ask you this question: Did
16 you work hard when you were at Illumina?

17 A Absolutely. I worked hard.

18 Q Did anyone at Illumina ever accuse you of not working
19 hard prior to this lawsuit?

20 A No. It's shocking to hear this. So much stuff coming
21 out after the fact. But this was the first I'm hearing about not
22 working hard. It is true that I didn't hang around work until 10
23 o'clock or 11 o'clock at night. I got my work done, typically
24 into the early evening. When my work for the day was done, then I
25 went home to spend time with my family.

26 Q Did Dr. Stuelpnagel ever counsel you about allegedly
27 not working hard at Illumina?

28 A No.

1 Q Did Jay Flatley ever counsel you about that?

2 A No.

3 Q In terms of work hours, Dr. Czarnik, did Illumina have
4 any sort of a system that you are aware of to keep track of when
5 employees entered the building?

6 A Yes, at Illumina we had a system in place where you
7 have to show your ID card in order to get into or get out of the
8 building, and it keeps track of who goes in at what time, who
9 leaves at what time. We actually used it at one point to find
10 someone who had stolen some computers from us in the beginning of
11 the company.

12 If Illumina had wanted to quantitate my work hours, this
13 would have been trivial to get those records and bring them into
14 the case. Illumina did not do that. I think the reason speaks
15 for itself.

16 Q When you say the card was shown, do you mean physically
17 shown to somebody?

18 A No, there was a magnetic reader where, in order to get
19 into the building, you have to put your card up to the magnetic
20 reader and then the door unlocks and you can walk in. It keeps
21 track of whose card it is and what time it is.

22 Q Now, with respect to the business plan that I believe
23 Dr. Stuelpnagel testified about, what was your involvement
24 concerning the preparation of the Illumina business plan?

25 A Mark, John and I started this company starting in April
26 of 1998. We began meeting regularly June of 1998. We talked
27 about what we should be doing in June, July. By the end of July,
28 we had decided that we wanted to write the business plan before

1 the first board meeting. So John did set out the list of topics,
2 a kind of outline we should have in the business plan, and we did
3 sign up for different parts. John signed up for parts, Mark
4 signed up for parts, I signed up for parts. Each of us wrote our
5 parts, we put them together, we edited the business plan, and
6 that's what we turned over to the board.

7 Q Let me ask you about the grant application you were
8 working on in April of 1999. This was the application you were
9 working on when you had what we've been calling the breakdown?

10 A That's right.

11 Q Did you wait too long to start on that grant
12 application?

13 A No. I had gone to the meeting to hear about -- The
14 deadline was April 15. I had gone to a meeting in San Francisco
15 in January to hear about what things the granting agency was
16 interested in. I actually made a trip out to the government
17 agency sometime in February or March in order to talk with the
18 director one-on-one about what the agency was interested in. I
19 had set for myself a starting write date of April 1st. That gave
20 me a little over two weeks to write the grant, which in my
21 experience was plenty of time to write a grant.

22 Q Some witnesses were asked questions about whether they
23 assisted you in connection with this grant application. Let me
24 ask you this: Did you get any assistance at all in writing any
25 portion of that April, 1999 grant application?

26 A No. I wrote that grant. I did ask Steve, Todd and
27 Chanfeng each for figures that they had created for some other
28 purpose that I could use in the grant rather than creating it from

1 scratch. But the grant, the scientific part of the grant, I wrote
2 myself. The part of the grant that had to do with sort of the
3 capitalization or the leveraging of the technology into a market
4 is from the business plan.

5 Q When you say you asked for help with some figures, what
6 do you mean by figures?

7 A They are literally drawings. These are things where we
8 had a drawing of the imaging system, fairly technical drawing. It
9 existed already, and it would have been a waste of my time to try
10 to recreate that. There were a couple of such drawings like that
11 that, after I asked my guys for them, were sent to me via e-mail
12 and I used them

13 Q Other than the April, 1999 breakdown which we've had
14 testimony on, did you have any other breakdowns at Illumina at any
15 other point?

16 A No. You know I'm not proud of the fact that I had this
17 breakdown, but I'm also not ashamed of the fact that I did. It
18 occurred in a small room with a couple of other senior people. It
19 was due to an illness. I knew I needed to get better. I got
20 better. I came back. Period, the end. No more breakdowns. So
21 the answer is no, there were no other breakdowns.

22 Q No breakdowns in front of senior managers?

23 A No.

24 Q No breakdowns in front of customers?

25 A No.

26 Q Or colleagues?

27 A Absolutely not.

28 Q Mr. Flatley testified to what he thought was your

1 standing offer to step down as chief science officer. How many
2 times did you actually offer to step down as chief science
3 officer?

4 A I offered to step down as chief scientific officer
5 twice.

6 Q When was the first occasion?

7 A It was about a week before I had the breakdown in
8 John's office. It was during the walk around the block that I had
9 with Mark Chee. I asked Mark if he felt the company would be
10 better off with him being the chief scientific officer and he said
11 no. And so I offered it once then, the answer that came back was
12 no, I was reassured, and dropped it.

13 Q When you say it was within a week of the breakdown, a
14 week before or week after?

15 A About a week before.

16 Q When was the second time that you made an offer to step
17 down?

18 A The second time was in the middle of January of 2000.
19 Jay Flatley had been on board for about two and a half months at
20 that point. Jay had not been using me as a chief scientific
21 officer. One of the things I would have expected is for Jay to
22 sit down and say here's what I expect of my chief scientific
23 officer, something as simple as that. That never happened.

24 So by the middle of January, I wanted Jay to know that if he
25 felt for whatever reason he needed to bring in his own chief
26 scientific officer, I wouldn't fight him on it. I wanted what was
27 best for the company. I would step back, just as John had stepped
28 back, and he could bring in his own person.

1 Q There's been some testimony about activities that you
2 were involved with before your disclosure as compared to activity
3 you were involved in after your disclosure of depression. Were
4 you involved, Dr. Czarnik, in every single business meeting the
5 company had with all of its business collaborators before the
6 breakdown?

7 A No.

8 Q Were you excluded from every single business meeting
9 that the company had after your disclosure?

10 A No.

11 Q Can you describe for the jury generally what the
12 difference was in types of business you were asked to be involved
13 with before as compared to after?

14 A The only person who was involved in every single
15 business development activity was John Stuelpnagel. John had the
16 role of vice president of business, and literally whoever had a
17 referral, be it me or Rich Pytelewski or Mark Chee, would make
18 that referral to John because he was the central focus through
19 which all of the business development was occurring.

20 Up until April we had been working as a team on what we had
21 decided at the end of the summer. That is, we had opportunities
22 in this area called genomics. We had this opportunity in this
23 area called the optical nose. We had opportunities in this area
24 called high throughput screening. But we couldn't work on all of
25 them. We have to work on one, you have to do it well, when you
26 are a start-up company. We chose that the company would focus on
27 genomics.

28 So through April, we focused on genomics. That is what we

1 worked on. All of us worked on genomics. After April we went
2 through, as I've described, about a two-month period where John
3 and I literally didn't talk except on very rare occasions. When
4 we did begin talking again, I was magically now working on the
5 optical nose and not working on genomics. The transition was very
6 obvious. I had been involved in virtually all of the discussions
7 before April, and afterwards I was cut out of what the company was
8 working on.

9 Q Genomics?

10 A Genomics.

11 Q You heard Dr. Mallinger testify this morning, did you
12 not?

13 A Yes, I did.

14 Q In fact Dr. Mallinger was your treating psychiatrist
15 for a period of time?

16 A He was. I owe a great debt to Al Mallinger. He's a
17 very gentle man. He's a man who is trained in an area to help
18 people who have problems --

19 MS KEARNS: Move to strike.

20 THE COURT: Non-responsive. Motion to strike granted.
21 Jury to disregard everything but the answer to the question, which
22 was about the first sentence after the question was asked.

23 MR. PANTONI: Q Dr. Czarnik, did you from time to
24 time talk to Dr. Mallinger and tell him that things were better
25 with John Stuelpnagel?

26 A Yes, I certainly did.

27 Q And can you explain to the jury why you did it, when
28 you did it and why you did it?

1 A Yeah, I began telling Al Mallinger that things were
2 better between John Stuelpnagel and me in early June of 1999. The
3 reason things were better was that after a very cruel pummeling in
4 the beginning of April, having not talked through April and May,
5 the last Saturday in May John stopped by and we talked, and we
6 talked for the first time for two months. So literally the first
7 session I had with Al after that discussion with John, I said
8 things are going better with John, and they were going better. I
9 wasn't getting pummeled and I was talking with him. That was
10 definitely better.

11 Q Did that continue until the time Jay Flatley became
12 CEO, that relationship?

13 A And roughly at that level. John didn't pummel me after
14 the date that I disclosed my depression, and we did occasionally
15 talk. So that really more or less continued until Jay Flatley
16 joined.

17 Q Were you seeking legal advice from Dr. Mallinger?

18 A No, not at all.

19 Q Seeking career advice from Dr. Mallinger?

20 A Absolutely not.

21 Q Seeking business advice from Dr. Mallinger?

22 A No, I wasn't.

23 Q Why were you seeing Dr. Mallinger?

24 A I was seeing Dr. Mallinger because I have an illness.
25 I had an episode in which I was having a hard time dealing with
26 the symptoms. I talked with Al because I wanted his help in
27 getting through that episode, getting back onto, you know, a place
28 where symptoms are controlled. He helped me to do that. I'm

1 grateful for that. That's why I worked with him.

2 Q Dr. Czarnik, can you explain to the jury in connection
3 with this ABI deal and the 100,000 stock grant why you believe you
4 should have been included in that deal?

5 A Yes, I will. From August of 1998, we were a company
6 focused on genomics. ABI was one of the likely partners for us in
7 the genomics application. We all three talked about who to
8 identify as a potential partner and what was the best way for us
9 to approach them, and ABI was one of those companies. We
10 strategized on who at ABI would be good contacts, the best ways to
11 make those contacts.

12 I was fortunate in that I had been asked to give talks at
13 meetings where both the VP of new business development would be
14 attending and where the president of the company would be
15 attending. We agreed I should give those talks. I gave them.
16 ABI became interested. Began discussions with Illumina. Those
17 discussions actually occurred after April, and I didn't know they
18 were occurring until a couple of months later.

19 But ultimately the agreement that we had with ABI was to
20 provide them with these array of arrays that you've heard of,
21 these flat forms that have a block and have fibers and have beads,
22 and on the beads there's DNA. And my group was responsible for
23 the fibers and for the beads and for the DNA that was on the
24 beads. My group was to be responsible for how well the beads
25 stayed in the fiber, and that was one of the targets of the ABI
26 collaboration. My group was to be responsible for how
27 consistently the DNA was on the beads, and that was a part the ABI
28 collaboration.

1 The majority of the elements in the ABI collaboration were
2 things that my group was to deliver. So I was involved not only
3 in the planning for this collaboration and in doing things so that
4 the collaboration took place, but in being responsible for the
5 things that we were going to need to deliver. I was intimately
6 involved in creating this collaboration and in bringing it to
7 fruition.

8 Q Nevertheless, were you involved at all in actual
9 negotiations with ABI over the terms of the deal?

10 A No, the negotiations with ABI over the terms of this
11 deal occurred after the -- my disclosure of depression.

12 Q You recall that Miss Kearns asked you about a lunch
13 that you had with Jay Flatley in October of 1999?

14 A Yes.

15 Q Asked you many questions about what you said about
16 being cynical and what Jay Flatley's response to that was. You
17 recall that?

18 A Yes, I do recall that.

19 Q She suggested that perhaps you were reading too much
20 into that discussion. Do you recall that?

21 A I recall the question.

22 Q She didn't ask you about what if anything Jay Flatley
23 said in the February 2000 dinner. Any doubt in your mind as of
24 February 7, 2000, when you were having dinner with Jay Flatley,
25 that he knew about your depression?

26 A No.

27 Q Why do you say that?

28 A No doubt whatsoever. Jay asked me during that dinner

1 conversation if I felt that my depression was at all caused by
2 things that happened at work, and I remember thinking very clearly
3 that this guy is concerned about an employment action. I mean
4 he's getting information in preparation for what he thinks I might
5 do in terms of an employment action.

6 Q Let's --

7 MS KEARNS: I'll move to strike the witness' comment
8 about his speculation concerning Mr. Flatley's state of mind. He
9 was asked what Mr. Flatley said to him.

10 THE COURT: I don't think the witness is qualified to
11 read minds. The motion to strike is granted.

12 MS KEARNS: Move to strike.

13 THE COURT: Granted.

14 MR. PANTONI: Q What did Mr. Flatley say to you at
15 this dinner that caused you to believe he knew about your
16 depression?

17 A Jay asked me if I felt that my depression had been
18 caused -- not depression, but my episode had been caused by things
19 that happened at work. I told him that the best research to date
20 shows that depression is a combination of brain chemistry and
21 environmental effects, and that really it was impossible to
22 separate them out.

23 Q Mr. Flatley also in his testimony questioned what you
24 were doing, what your activities were after David Barker came on
25 board as chief science officer and before he became your
26 supervisor. Do you recall that?

27 A Yes.

28 Q It was approximately a six-week period you worked under

1 David Barker's supervision?

2 A Yes, that's right.

3 Q Can you tell the jury very briefly the types of
4 activities you were actually engaged in during that period of
5 time?

6 A Well, in January of 2000, we had identified that there
7 were six open positions in the chemistry group, so we were going
8 to grow the chemistry group from I think from --

9 MS KEARNS: Excuse me, I'm sorry, Dr. Czarnik, for
10 interrupting, but I believe the question was to describe the
11 actual work that he performed under David Barker's supervision,
12 and David Barker didn't join until March, so I don't know why
13 we're talking about January.

14 MR. PANTONI: If you allow him to finish his answer.

15 MS KEARNS: It seems nonresponsive to the question
16 asked.

17 MR. PANTONI: I'll stipulate you are not a mind reader
18 either, so we can let him finish and see if he gets to the point.

19 THE COURT: Counsel, just could you restate the
20 question and allow Dr. Czarnik to answer.

21 MR. PANTONI: Q Describe for the jury what
22 activities you were engaged in during that approximately six-week
23 period in which you were under David Barker's supervision?

24 A One of the visits in which I was spending a lot of time
25 was a recruitment of chemists to fill six positions we had
26 identified several months previously. And in order to fill those
27 positions, I was doing a lot of sorting through resumes, calling
28 potential candidates, calling references of those potential

1 candidates. So I spent a lot of that time continuing the work on
2 recruiting that I had been doing before David Barker arrived.

3 At least for some period of time under David the plan was
4 that I would be submitting a work plan to Chevron. In fact that
5 was one of my goals. So I was working on that work plan to submit
6 to Chevron.

7 A very large part of my activities during that time were in
8 transitioning the projects that I had been overseeing from me to
9 David Barker. I spent a lot of time talking with David when he
10 was in town about what we had been doing, why we had been doing
11 it, putting the work of the chemistry group into perspective, and
12 getting documents to him and bringing him up to speed on what the
13 chemistry group was all about at Illumina.

14 Q I think you may have testified to this on direct but I
15 want to be absolutely sure, on this question of your alleged
16 resignation. Did you ever resign your employment with Illumina?

17 A I never, ever resigned my employment at Illumina,
18 period.

19 Q Let's move on to Exhibit 222, which has been shown
20 before. Miss Kearns asked you some questions about it. This was
21 the e-mail you sent to Jay Flatley on May 15, 2000, the day before
22 you were going to the California Department of Fair Employment and
23 Housing.

24 A Yes.

25 Q Miss Kearns asked you or pointed out, rather, that
26 e-mail indicates that among other things you would like to talk to
27 Jay about your goals. Correct?

28 A Yes.

1 Q What did you want to talk to Jay Flatley about on the
2 subject of goals as of May 17 of 2000?

3 A We had goals, and I was working on my projects as
4 listed in my goals, or at least on the aspects of them that I
5 could. So I wanted to talk with Jay about the research fellow job
6 description that I had written but he hadn't commented on, talk to
7 him about the goals that he, David and I had come to agreement on,
8 and the work that I had been doing toward achieving those goals to
9 date.

10 Q These goals you wanted to talk about were the ones you
11 and David Barker and Jay had previously agreed to?

12 A Yes.

13 Q I'm not very proficient with this, but we'll give it a
14 shot.

15 By now I think we all know these are the final goals Jay
16 Flatley gave you on May 19, 2000?

17 A That's right.

18 Q Dr. Czarnik, did you work to try to meet these goals?

19 A I absolutely worked to try to achieve these goals to
20 the best of my ability.

21 Q With respect to the first product -- rather the first
22 project relating to immunocoding, can you tell the jury what
23 progress, if any, you made on that project?

24 A I spent a lot of time researching what were going to be
25 the best reagents to use for this project. It's not a one-day
26 activity. My old advisor used to say you can spend a day in the
27 library or a month in the lab. So you spend time before you work
28 in the lab researching what you are going to be doing so that the

1 time in the lab is well spent.

2 I identified the reagents that we were going to need for
3 this experiment, I wrote the plan for, the research plan, for
4 doing the project, purchased the reagents. They came in. I put
5 the first set of reagents on beads. I did the first set of
6 experiments to see if we could do coding in this way, Not all the
7 things I expected to work worked, but one of them worked, and it
8 worked very well, and so this was really the first time anybody
9 had shown that you could use -- you could use antibodies for
10 doing coding at Illumina. I was the first person to demonstrate
11 that.

12 Q Now, with respect to the second project, binary oligo
13 encoding, Dr. Chee and perhaps others testified that this type of
14 encoding was really just an extension of the method of decoding
15 that had been done at Illumina, Mark Chee's method, is that the
16 case, sir?

17 A It's not at all the case.

18 Q Can you explain that to the jury, please.

19 A The method of coding that Mark invented, which is a
20 good invention, is based on having one kind of DNA per bead, and
21 as it turns out it was very important for us to use that kind of
22 coding initially because there was so little light coming off of
23 each bead that we needed every little bit of DNA on a bead that we
24 could get in order to get enough light.

25 My project on binary optical coding was to put not one kind
26 of DNA on a bead but up to five or six kinds of DNA on a bead.
27 That was the binary optical coding invention that I wrote in the
28 summer of 1998. A way of putting five different types of coding

1 DNA on a bead so we could do decoding with five colors.

2 That approach had the advantage that decoding could be a lot
3 faster. With the current method of decoding it takes, the last I
4 heard here, was seven steps, seven stages of decoding, and that
5 actually at the time was the slow process to making these arrays
6 was the decoding. My method had the potential of doing it in two
7 steps, so two instead of seven. It had the potential and still
8 has the potential to be a huge advantage in the rate at which
9 these things are decoded, but it requires having on the order of
10 five kinds of decoding DNA on the bead. It requires that
11 therefore you be able to see very small amounts of light on the
12 bead, and that's what this whole program was geared at, was in
13 getting multiple kinds of DNA on the bead and learning how to see
14 that very small types of -- small amounts of DNA.

15 Q Was the imaging system that was used to see the DNA
16 using Mark's method, was that sufficient to be able to do this
17 type of coding?

18 A The imaging system we had in place, the camera that
19 took pictures, it's basically a camera on a microscope. That
20 imaging system, it was just barely good enough to do decoding with
21 Mark's method. It wasn't even close to good enough for doing
22 decoding using the method I had proposed and I was working on.

23 Q Is that why you needed what we've described before as
24 the argon-krypton laser to do that?

25 A Absolutely. It's basically a way of getting a lot more
26 light in so that more light comes out. And if more light comes
27 out, then you've got a chance to see it.

28 Q In that experiment that Diping Che testified about, was

1 that a significant experiment?

2 A Yes. I'm just going to have to differ with Diping on
3 this, and try not to speculate on his -- why he made the statement
4 he did. It was a significant experiment because for the first
5 time we had shown that you could see five different colors using
6 this machine in a way that you were confident that they were
7 there. The system that we had been using at Illumina was
8 incapable of showing in a, really, way you've got real confidence
9 in what colors are on the bead. The laser system showed that with
10 very, very high confidence. It was a very encouraging result.

11 Q How far before your termination date did the
12 argon-krypton laser arrive?

13 A Approximately three weeks.

14 Q Now, Dr. Czarnik, you were present when David Barker
15 testified about work that Gali Steinberg did, were you not?

16 A Yes.

17 Q Now, assuming that Gali Steinberg did the work as
18 described by Dr. Barker in this courtroom, was that the same
19 project or a different project than you were assigned?

20 MS KEARNS: Objection, foundation.

21 THE COURT: Sustained.

22 MR. PANTONI: I'm asking him to rely simply on what the
23 chief scientific officer testified to as to that work.

24 Q Assuming that's true, assuming Dr. Barker accurately
25 testified to Gali Steinberg's experiments, can you tell us whether
26 that's the same or different experiment than from the one you were
27 assigned and were working on?

28 A Assuming what David described is the experiment that

1 was done, that experiment was very different than the project that
2 I was working on. Essentially they put two types of DNA on a
3 bead. We had done that already. We had already shown you could
4 put two types of DNA on a bead. I had told that to Jay. There
5 was nothing novel in putting two types of DNA on a bead. The
6 thing that was potentially novel was getting four or five or six
7 types of DNA on a bead and being able to see the light off of that
8 bead.

9 So doing the experiment that David Barker described would
10 not have been an advance toward achieving what my goal was, which
11 was to see very large numbers of bead types.

12 Q Moving down to the third goal, third project relating
13 to the company's intellectual property portfolio and submission of
14 a grant application.

15 A Yes.

16 Q Did you make progress on that project, on that line of
17 the goals?

18 A I accomplished all of those goals through the 90-day
19 goals, submitted the grant application on time. I don't know
20 whether it was funded or not because I was terminated before I
21 found out.

22 Q So this particular grant application listed as a 60-day
23 goal, you submitted that and submitted that on time?

24 A Yes, I did.

25 Q By the way, Jay Flatley testify at some point you asked
26 him for another copy of your goals?

27 A Yes, I did.

28 Q Did you in fact ask him for another copy of your goals?

1 A Yes, I asked him in a very -- It was a very simple
2 request. I'm shocked such a big deal is being made of it.

3 Q Can you explain to the jury why you made that request?

4 A I was in a meeting with Jay. My goals, written goals,
5 had been on my desk. I came into work one day and they weren't on
6 my desk. So I asked Jay for another copy of my goals, and I got
7 them. I taped them on the wall just above my desk, and they
8 didn't disappear again.

9 Q In fact, did Steve Barnard see those goals taped above
10 your desk?

11 A Yes, Steve did.

12 Q Did he talk to you about that?

13 A Yes, he did.

14 Q What did Steve Barnard say about the goals?

15 A Steve laughed, and Steve said that the goals had been
16 clearly written to be not achievable.

17 Q This is Exhibit 309, Dr. Czarnik. It's dated August 17
18 of 2000.

19 A Yes.

20 Q Did you send this on to Jay Flatley?

21 A Yes. I might suggest to increase the size by one.

22 Q What was your purpose in sending this e-mail?

23 A This was a status report on where I was on the two
24 experimental goals. I wrote this to Jay right at the -- just --
25 Without going into details, I wanted to give him a status report
26 as of August 17.

27 Q This was a few weeks before you were fired?

28 A Yes.

1 Q Does the first paragraph deal with the first goal that
2 we looked at, immunocoding goal?

3 A Yes.

4 Q The second paragraph concerns the second goal, binary
5 oligo encoding goal?

6 A Yes.

7 Q And you let Jay Flatley know you were able then to work
8 with Diping Che on the argon-krypton laser system?

9 A Absolutely. Diping was the optical engineer in the
10 company. This was the first time we were using the laser that he
11 had set up. It made perfect sense for he and I to do this first
12 time together.

13 Q Did you get a response to this from Mr. Flatley?

14 A No, no response.

15 Q Do you recall Mr. Flatley testifying about the fact
16 that you gave him your self-review at some point in time?

17 A Yes.

18 Q Self-evaluation.

19 A Yes.

20 Q This is Exhibit 320.

21 A Yes.

22 Q This is in fact your self-evaluation you sent on to
23 Mr. Flatley?

24 A Yes.

25 Q You remember Mr. Flatley saying something to the effect
26 this isn't what he was looking for?

27 A Yes.

28 Q Can you explain to the jury why you submitted your

1 self-evaluation form to Mr. Flatley?

2 A There are two reasons. One is the company was going
3 through performance evaluation at this time. Just a few days
4 before this, Deborah Flamino sent an e-mail to everyone in the
5 company saying please remember to get your performance self-
6 evaluations in. So one of the reasons I wrote it is because we
7 had all been asked to write it and submit it.

8 The second reason was that after Jay looked through my
9 notebook, he then asked me for other pages of information that I
10 might have relating to the work that I'd done. I said, "Jay, you
11 mean like a performance evaluation?" and he said, "Yes, that would
12 be part of a performance evaluation." So I wrote my performance
13 evaluation and I sent it to Jay.

14 MS KEARNS: Which exhibit is this?

15 MR. PANTONI: 320.

16 Q What does this section of your evaluation deal with?
17 We can see seven numbered items on this page.

18 A Yeah, a part of self-performance self-evaluation almost
19 always is, at least in this setting, is a list of things you think
20 you've done that have been significant. So this is the first
21 seven things of the list that I had done during the three-
22 month period that I thought was significant.

23 Q This is essentially the period in which you were
24 working on the goals that Jay Flatley had assigned you, correct?

25 A Yes.

26 Q And without going into detail, can you tell us just by
27 number which of these numbers on this first sheet of the seven
28 items, which of them relate to progress that you were making

1 toward your goals?

2 A Toward my experimental goals or just goals?

3 Q Toward any of the goals you were assigned, projects you
4 were assigned by Jay Flatley.

5 A All seven of these are related to work on the goals.

6 Q Moving to the next page, you see items 8 through 19?

7 A Yep.

8 Q Which of those relate to progress or work that you were
9 doing on the goals that Jay Flatley assigned?

10 A 8, 9, 10, 11, 12, 13, 15, 19.

11 Q And the others that you skipped were helpful to
12 Illumina but was not specifically on your goals?

13 A Exactly.

14 Q And item 20?

15 A The same, just helpful to Illumina but not specifically
16 part of my goals.

17 Q You heard Mr. Flatley testify about your last weekly
18 meeting with him before you were fired, a meeting that took place
19 on August 29 of 2000?

20 A Yes.

21 Q Did Mr. Flatley at that meeting ask you for everything
22 you had, anything more you had relating to the work you had done?

23 A Yes, Jay asked me for whatever I had relating to the
24 work I had done.

25 Q By that point in time had you already submitted to Jay
26 Flatley your self-evaluation which listed several items you were
27 working on?

28 A Yeah. In fact Jay had asked me for this material and I

1 think it was the next day that I sent him the performance
2 evaluation, and Jay actually came running out looking for me and
3 said, "This isn't what I asked for," and he said what he wanted
4 was tables, graphs, handwritten notes, literally everything I had
5 done that was related to the work that I had done.

6 Q So what, if anything, did you provide to Jay Flatley
7 after that point?

8 A I got all of those items together, it's about 50 pages,
9 and put it in Jay's mailbox on the afternoon of September 5th.

10 Q On the afternoon you were fired?

11 A Yep.

12 Q Dr. Czarnik, I want to ask you some questions about
13 that in-court demonstration that Mark Chee -- We don't have the
14 bottles there. We still have the bottles? Can you use those,
15 please.

16 You remember that demonstration by Dr. Chee conducted in the
17 courtroom, do you not?

18 A Yes, I do.

19 Q First question as to this, Dr. Czarnik, when you talked
20 to Mark Chee and told him what you did about the flawed reagent,
21 contacting the roadshow team, et cetera, did you believe at that
22 point that two colors or three colors were being used in the 768
23 decode experiment?

24 A At that point, based on what I had gathered from the
25 scientists who did the experiment, from Diping Che, who had
26 analyzed the results of what the imaging system was showing, and
27 seeing the letter from Molecular Probes, I believed that there
28 were two dyes used in that experiment, not three. And frankly I

1 had learned nothing to the contrary until the beginning of these
2 proceedings.

3 Q This is Exhibit 276. Believing there were only two
4 dyes used in this experiment, were you relying in part on this
5 e-mail received from Diping Che dated July 26, 2000?

6 A Yes, because what Diping would have been reporting was
7 not something based just on the letter from Molecular Probes but
8 based on his analysis of what the experiment was showing.

9 Q You in fact asked him was the experiment used with two
10 colors?

11 A Yep.

12 Q At any point in time before you were fired did anybody
13 tell you that in fact not two colors were used but actually three?

14 A No.

15 Q Now, going back to Mark Chee's demonstration in court,
16 if you were to assume that in fact some of the mislabeled dye was
17 mixed with some of the properly labeled dye to come up with what
18 Dr. Chee described as this murky-looking color, would that have
19 alleviated your concerns with respect to the reliability of the
20 experiment?

21 A Even if I had known, and honestly today I still don't
22 know if good and bad reagents were mixed, I don't know, even if
23 that's what had happened, it wouldn't have changed my concern
24 about the experiment.

25 The way this experiment is done is, as I mentioned, with a
26 camera on a microscope, and there are filters. So all you have to
27 do is imagine having a piece of green glass. If you have green
28 glass --

1 MS KEARNS: I'm sorry for interrupting, but I think I'm
2 going to object on foundational basis. I think the witness has
3 earlier testified he didn't do any of the 768 decode experiments,
4 so I think there's a lack of foundation to testify to how the
5 experiment is done.

6 THE COURT: Isn't this in the nature of expert
7 testimony?

8 MR. PANTONI: It's the nature of why he was concerned,
9 why his belief was reasonable that the mislabeling caused a
10 problem, whether or not the dyes were mixed.

11 MS KEARNS: And the --

12 MR. PANTONI: It's an issue in the case, whether his
13 belief was reasonable or not reasonable.

14 MS KEARNS: But the witness was purporting to testify
15 how the experiment is done, and he's already testified that he
16 didn't do any of them, so he's not competent to offer testimony on
17 how the experiment is done.

18 MR. PANTONI: He was chief science officer for a long
19 time when other decoding experiments were run. He knows how and
20 has testified he knows how decoding experiments are run. I want
21 him to respond to what Dr. Chee did in the courtroom, and Dr. --

22 THE COURT: You knew how the experiments were run?

23 THE WITNESS: I absolutely knew how decoding was run.

24 THE COURT: Do you know how the experiments were run?

25 MS KEARNS: In fact, your Honor, earlier examination I
26 asked questions about the specific experiment in question, the 768
27 decode experiment done during the summer of 2000, and I asked very
28 pointed questions about the methodologies used in these

1 experiments, and his response was he didn't know, he didn't do
2 these experiments.

3 So to the extent he's purporting to offer testimony on how
4 this particular experiment was done, he just has no foundation
5 upon which to offer testimony on that issue and it would be an
6 inadmissible opinion.

7 MR. PANTONI: Other details relating to this one
8 experiment. I'm just talking about dyes. He's testified he
9 planned the initial 16-bead experiment.

10 MS KEARNS: We're not --

11 MR. PANTONI: He's an expert in fluorescent tags. I
12 wanted to explain to the jury why that demonstration made no sense
13 given his knowledge and background and experience, both before
14 joining Illumina and while CSO at Illumina.

15 MS KEARNS: We are not talking about a 16-bead
16 experiment done in Illumina's very early days. We're not talking
17 about a 128-bead experiment. We're talking about one in a series
18 of the 768 decode experiments done in the summer of 2000 when Dr.
19 Czarnik was no longer CSO and about which he has testified he has
20 no personal knowledge of the conduct of that experiment.

21 THE COURT: Is he just going to opine something about
22 the dye, what Dr. Chee testified about the --

23 MR. PANTONI: From his knowledge and experience why it
24 doesn't make any sense that Dr. Chee's demonstration doesn't mean
25 the experiment can be relied upon as Dr. Chee testified.

26 THE COURT: Does he know what the experiment was?

27 MR. PANTONI: They can't have it both ways. They talked
28 about these are series of experiments, they are 16-bead

1 experiments, they were ever-increasing complexity. He designed
2 the 16-bead experiment. He was involved as CSO with the 128-bead
3 experiment, and this experiment is the same --

4 THE COURT: The 768 experiment?

5 MR. PANTONI: Dr. Chee did his demonstration talking
6 about mislabeling the 768. The use of vials in connection with
7 decoding is exactly the same.

8 THE COURT: Does Dr. Czarnik know how the 768 --

9 MS KEARNS: I want to repeat testimony given just
10 moments ago by Dr. Czarnik, and I believe I am quoting correctly,
11 based upon what he gathered, he believed the two dyes were used,
12 but he said this afternoon, "Although I've learned nothing to the
13 contrary until the trial." He doesn't know, he doesn't have
14 percipient, first-hand knowledge how this particular experiment
15 was conducted.

16 THE COURT: I think I started asking him that and he
17 was hesitating. Do you know how the 768 experiment was done?

18 MR. PANTONI: I'm talking about use of dyes in
19 connection with that experiment. That piece.

20 MS KEARNS: And that piece of it he testified he didn't
21 know.

22 THE COURT: Do you know how the dyes were used in the
23 768 experiment?

24 THE WITNESS: I know how dyes are used in decoding in
25 the 16, 128, 768 bead experiments. I know how dyes are used in
26 those experiments.

27 THE COURT: Okay. Objection overruled.

28 MR. PANTONI: Q This better be good.

1 Based on what you know about how dyes are used in the
2 decoding experiments, assuming, that as Dr. Chee demonstrated,
3 some mislabeled dye was mixed with properly labeled dye, would
4 that have alleviated in any way your concerns about the 768 decode
5 experiment?

6 A No, absolutely not.

7 Q Explain to the jury why not.

8 A First I had been expressing concerns about --

9 MS KEARNS: Your Honor, I think we're going in an area
10 of an earlier ruling, general --

11 THE COURT: General scientific?

12 MS KEARNS: Right.

13 THE COURT: The testimony is not allowed about any
14 criticisms or feelings that Dr. Czarnik may have had about the
15 general science.

16 MR. PANTONI: Q Talk about this murky color, please.

17 A All of the decoding experiments using the imaging
18 systems at Illumina were done with a camera on a microscope and a
19 filter. If you put a piece of green glass in front of your face,
20 you would see the green light coming out of this bottle. It would
21 look bright to you. This would not look bright to you because
22 there's not green coming out of it, and this would not look bright
23 to you because there's not green coming out of it. So the same
24 thing with the camera. Just like a colored filter on a camera.
25 If you put a blue filter on it, you see things that are blue
26 brightly. So in a three-color decode experiment there were three
27 types of filters used. One you see things brightly are green, the
28 second you see things brightly that are red, third, you see things

1 brightly that are blue. There was no filter for puke green.

2 Q Let me ask you take a look please at Exhibit 315.

3 Again you recall this was an e-mail you sent to David Walt a week
4 or so before your termination, August 25, 2000?

5 A Yes.

6 Q Correct?

7 A Yep.

8 Q You recall this was the e-mail that David Walt said he
9 read the first paragraph but stopped reading when he got to the
10 second paragraph?

11 A Yes, I remember that.

12 Q Can you tell the jury why you sent this e-mail to David
13 Walt in particular?

14 A David Walt was on the Scientific Advisory Board of the
15 journal. In about August of 2000 I sent David an e-mail along
16 with other board members about a meeting of the journal board.
17 David wrote back and said sorry, I can't make the meeting.

18 At the time that I received his e-mail, my experience was
19 that people who should have been paying attention to the concerns
20 I was raising about dyes weren't listening and weren't responding.
21 David was the founder of the company, is the founder of the
22 company, he's on the board of directors, he's the head of the
23 Scientific Advisory Board. I considered David a friend, certainly
24 considered him a friend then. He had to know, he had to know from
25 somebody, that the way the science regarding dyes was being used
26 was wrong and that the conclusions were wrong. So I sent him this
27 e-mail so at least he would know that.

28 Q Dr. Czarnik, you recognize this as notes that Jay

1 Flatley testified about?

2 A Yes.

3 Q Is this any doubt in your mind, sir, that at your
4 termination meeting, Jay Flatley made a reference to decoding?

5 A No doubt whatsoever.

6 Q Any doubt that Jay Flatley made a reference to the
7 reagent problem?

8 A Absolutely no doubt whatsoever.

9 Q Last subject I want to ask you about, Dr. Czarnik. You
10 recall Miss Kearns asking you whether at your going-away party you
11 solicited comments from Illumina scientists who were at that
12 going-away party. You recall she asked you that?

13 A I remember the question in general terms.

14 Q Did you in fact solicit comments from Illumina
15 scientists who attended that going-away party?

16 A No.

17 Q Did you in fact get written comments from Illumina
18 scientists who attended the going-away party?

19 A Yes.

20 MR. PANTONI: Your Honor, I'd like to introduce the
21 going-away card, Exhibit 340.

22 MS KEARNS: Same objections as previously raised
23 yourself. Collateral.

24 MR. PANTONI: She specifically --

25 MS KEARNS: 352.

26 MR. PANTONI: She of course specifically asked Dr.
27 Czarnik if he solicited comments at this very party.

28 THE COURT: The going-away card isn't really comment,

1 is it? I don't see what the tying-in is.

2 MR. PANTONI: She suggested he solicited these comments.
3 I want to show the jury he got a lot of positive comments in
4 writing.

5 THE COURT: These are hearsay. I sustain the objection
6 as I did before under 352 of the Evidence Code. I don't think
7 it's pertinent to whether or not he solicited. I think you get
8 nice things said on going-away cards whether you solicit them or
9 not.

10 MR. PANTONI: Nothing further.

11 THE COURT: Cross-examination.

12 MS KEARNS: Yes, your Honor.

13 CROSS-EXAMINATION

14 BY MISS KEARNS:

15 Q Let's return to the last point, Dr. Czarnik. You said
16 you remember my general question on direct about whether you
17 solicited comments from Illumina scientists as to whether the
18 company would be better off with you there. I take it from your
19 answer here today in which you said no, by that I take it you mean
20 you don't consider Bob Kain to be an Illumina scientist?

21 A Bob is an engineer.

22 Q You did solicit such a comment from Bob Kain?

23 A I asked Bob if he didn't think Illumina would be better
24 off if I were still there.

25 Q That's exactly the question I asked you on
26 cross-examination, correct?

27 A I don't remember.

28 Q Today at least you are acknowledging that you did in

1 fact ask Bob Kain wouldn't Illumina be better off with me?

2 A That's a simple fact.

3 Q Now, in this redirect examination you have said that
4 bringing this lawsuit was a very big deal and you denied that you
5 would do so just -- you denied that you raised a discrimination
6 claim merely as a negotiating tactic, correct?

7 A I would not, did not, raise it as a negotiating tactic.

8 Q That's what you told Mr. Pantoni within the last 45
9 minutes, correct?

10 A Yes.

11 Q Isn't it true that you told your therapist, Dr.
12 Mallinger, that the potential of bringing a lawsuit against the
13 company was a big deal?

14 A I'm sorry, I don't remember that.

15 Q Okay. Do you remember telling Dr. Mallinger that you
16 wanted to obtain leverage against the company?

17 A I'm sorry, I don't remember that.

18 Q And let me ask you this: Do you remember telling Dr.
19 Mallinger in a group therapy setting that you wanted to use
20 guerrilla tactics to undermine Illumina?

21 A I can't imagine saying that.

22 Q So I take it your testimony is you don't recall that
23 either?

24 A And I can't imagine saying it.

25 Q You gave testimony, now this is very interesting, you
26 gave testimony on your redirect about the use of ID cards to enter
27 the Illumina building, do you remember that?

28 A Yes.

1 Q It is your suggestion here in court that if Illumina
2 really wanted to demonstrate the number of hours you were at work,
3 it could have produced records, correct, you said that?

4 A Yes, I did.

5 Q And you said that that is because the card registers
6 not only the identity of the person entering the building but also
7 the time at which the individual left the building?

8 A Yes.

9 Q But the reader, Dr. Czarnik, does not record the time
10 you leave the building. You don't need to use the card to exit
11 the building, do you?

12 A My recollection is you did.

13 Q You are sure about that?

14 A Best of my recollection.

15 Q To coin some of your earlier words, are you absolutely
16 certain, no doubt about it, that that card reader recorded the
17 time that somebody left the building?

18 MR. PANTONI: Argumentative.

19 THE COURT: It is argumentative. I sustained the
20 objection.

21 MS KEARNS: Q Are you sure? Have you ever seen with
22 your own eyes any record log that shows the departure times
23 recorded of Illumina employees?

24 A No, I haven't seen with my own eyes any logs.

25 Q Okay. Has anyone ever told you that the card readers
26 keep track of the time that people leave the building? Has anyone
27 ever said that?

28 A Has anyone ever told me? I worked there for a year and

1 a half.

2 Q That isn't my question. You've admitted you've never
3 seen any records documenting times that people leave, correct?

4 A I have seen no records whatsoever.

5 Q And I'm asking you whether anyone affiliated with the
6 company ever told you that a card reader recorded the time you
7 left?

8 A No, I don't think so.

9 Q And in fact wouldn't you agree with me that if the card
10 reader only recorded the time of your entry into the building but
11 if no recording was made of the time you left, those recordings of
12 your entry times alone would be irrelevant, they wouldn't show how
13 long you were in the facility?

14 A No, I don't agree with the statement. If all it did
15 was record the time you arrived, it would tell you the time you
16 arrived.

17 Q But it couldn't tell you how long you remained?

18 A Given your set-up, yes, that's correct.

19 Q Now, Dr. Czarnik, you talked about the summer of 1998
20 and the preparation of the business plan. Remember?

21 A Yes.

22 Q And isn't it true that throughout your employment at
23 Illumina, you from time to time would send work documents that you
24 may have prepared at Illumina to your home address,
25 Czarnik@SanDiegoRoadRunner.com?

26 A When we were at Towne Centre Drive, yes, but not during
27 the summer.

28 Q Did you retain any copies of the draft sections of the

1 business plan which you claim to have produced?

2 A Yes.

3 Q And you have disputed I think in this litigation the
4 amount of contribution that you made to the business plan,
5 correct?

6 A Well, the number that John has used in answer to this
7 question are between two and four, and whether -- and it's more
8 than four, so none of those were correct.

9 Q Now, at no time during your examination did we see
10 evidence or documents showing what you believe your actual
11 contribution to have been?

12 A I think that neither of the attorneys showed that, yes.

13 Q Now, with respect to business activities before and
14 after your disclosure of depression, let me first ask you a very
15 general question. You said that John was, John Stuelpnagel, was
16 sort of the gatekeeper of business development opportunities
17 because he was the VP of business development, and you said that
18 anytime you or Mark or Rich Pytelewski got an opportunity, it
19 needed to be referred to John and John would follow-up?

20 A We had all agreed on that.

21 Q Can you identify for me any business development
22 referral that came to you and that ultimately resulted in a
23 business relationship between Illumina and some company?

24 MR. PANTONI: Objection, relevance.

25 THE WITNESS: Well, I had the --

26 MR. PANTONI: I had objection, relevance.

27 MS KEARNS: May I make an offer of proof, your Honor?

28 I think it's relevant to prove to the extent Dr. Czarnik claims he

1 was excluded from business development activities on account of a
2 disclosure of depression, there may be alternative explanations.

3 MR. PANTONI: They've taken the position in the case he
4 wasn't excluded. You can't argue he wasn't excluded and offer an
5 explanation as to why he was excluded. It's one or the other.

6 THE COURT: The objection is overruled.

7 MS KEARNS: Q Can you identify for me any business
8 development referral which came to you and which resulted in an
9 actual business relationship with another company?

10 A Well, Jay Flatley came from Amersham and the first
11 contact with Amersham was through me.

12 Q Are you trying to take responsibility for bringing Jay
13 Flatley to the company as CEO?

14 A I'm trying to answer your question.

15 Q Okay. Maybe I need to further define "business
16 relationship."

17 Did you bring -- Were there any referrals that came to you
18 that resulted in a contract, collaboration between Illumina and
19 another company?

20 A As I've testified --

21 Q Actually let me follow-up on your answer once I've
22 gotten a yes or no answer. If I define business relationship,
23 sir, as something that resulted in a contract, a collaboration,
24 similar to, for example, the ABI deal, the Chevron deal, about
25 which we've heard a lot, did you bring anything like that to
26 Illumina?

27 A As I've testified previously, the presentation that I
28 gave at which Mike Albin was present and the dinner I spoke about

1 the company with Mike Albin that evening was a factor in bringing
2 ABI to Illumina.

3 Q How do you know that? How do you know it was a factor?

4 A I know that from asking Mike Albin a year later.

5 Q Isn't it true, Dr. Czarnik, that Dr. Stuelpnagel had
6 already had contact with ABI or that Dr. Chee had already had
7 contact with ABI before the first seminar at which you spoke with
8 an ABI person in attendance?

9 A Mark gave a conference in November of 1998 which I had
10 been invited to give, and I passed it to Mark. Mark gave that
11 talk, and based on the material that's been presented here,
12 someone from ABI apparently was in the audience. I don't know any
13 of the specifics about that.

14 Q Are you now saying that the conference at which Mark
15 Chee spoke was an opportunity that initially came your way and you
16 passed it off to Mark Chee?

17 A That is the fact.

18 Q Okay.

19 Now let me ask you this: You say that after your disclosure
20 of depression, you were, in your words, cut out of genomics
21 business development activities, right?

22 A Yes.

23 Q Isn't it true there were genomics-related business
24 activities that occurred prior to April of 1999 which you were not
25 involved?

26 A Yes.

27 Q And those would include discussions with Bristol-Myers
28 Squibb?

1 A Yes.

2 Q Those would include discussions with Cereon?

3 A Yes.

4 Q Those would include discussions with Monsanto?

5 A No, I was involved with Monsanto.

6 Q Those would include discussions with Celera?

7 A Yes.

8 Q Third Wave Technologies?

9 A Yes.

10 Q Those would include discussions with Pyrosequencing?

11 A Pyrosequencing came to Illumina through me as the first
12 contact.

13 Q Even though the discussions were involved before your
14 disclosure, you were not involved after the first contact?

15 A I hosted Mustafa's visit to Illumina. He wrote to me,
16 asked if he could visit. I hosted his visit. All that came
17 pre-April.

18 Q But these others that I've talked about where you
19 haven't added qualifiers, like Bristol-Myers Squibb, Cereon,
20 Celera, Third Wave, all these are genetics-related discussions
21 that happened before your disclosure and which you were not
22 involved?

23 A Yes, that's correct.

24 Q In fact, among that is also Smith Kline Beechum,
25 correct?

26 A I wasn't involved with discussions with Smith Kline
27 Beechum.

28 Q And Smith Kline Beechum involved genomics discussions?

1 A I believe so.

2 Q Those occurred before your disclosure of depression?

3 A Yes.

4 Q Now, you also said that -- Actually, Dr. Czarnik, it's
5 clear that there were a number of genomics-related business
6 discussions that occurred prior to your disclosure and in which
7 you were not involved, true?

8 A Yes.

9 Q And then you stated that after you were cut out of
10 genomics discussions after your disclosure, which we've already
11 established you've not been fully involved in before your
12 disclosure, you said you were magically now on the optical nose
13 project. Right? Those are your words, magically?

14 MR. PANTONI: Magically only on the o-nose.

15 MS KEARNS: Q Isn't it true that you had already been
16 assigned to the optical nose project from its very start?

17 A No, we worked on the optical nose, what little there
18 was, prior to April of '99, we did it as a threesome.

19 Q Isn't it --

20 A The three of us.

21 Q You say as a threesome. You were one of the persons
22 assigned to the optical nose project from the beginning, correct?

23 A We were all for one and one for all.

24 Q I'm not asking about all of us, I'm asking about you,
25 Dr. Tony Czarnik. You were involved in the optical nose project
26 from its inception regardless of the amount of work being done on
27 it, correct?

28 A In the Illumina time frame, yes.

1 Q In addition, you understood, did you not, that pursuing
2 the optical nose project was a contractual requirement of the
3 licensing agreement between Illumina and Tufts University,
4 correct?

5 A No, I don't think I did know that.

6 Q Did you come to know that?

7 A During this trial, yes.

8 Q Now, Dr. Czarnik, do you feel that you have been in
9 anyway melodramatic in your description of the events that
10 happened to you at Illumina?

11 MR. PANTONI: Objection, argumentative.

12 MS KEARNS: Q Do you feel -- Withdraw that and ask a
13 different question.

14 Do you feel that you've exaggerated for effect?

15 MR. PANTONI: Objection, argumentative and no
16 foundation.

17 THE COURT: I think it's very broad, too.

18 MS KEARNS: Q Let me reference part of your earlier
19 testimony. You said that you had been pummeled by John
20 Stuelpnagel during the April 6, 1999 meeting, correct?

21 A Yes, I have.

22 Q You don't mean literally that he physically attacked
23 you with his fist, do you?

24 MR. PANTONI: Can I object that that's absurd?

25 THE COURT: That's what pummeled means.

26 MS KEARNS: That is what pummeled means.

27 THE COURT: If you take it literally.

28 MR. PANTONI: Withdraw the objection.

1 MS KEARNS: Q You were using a term that has a
2 different literal meaning to describe how you felt, correct?

3 A To be honest, to me you could be physically or verbally
4 pummeled.

5 Q Let's put up Exhibit 307.

6 Is this an e-mail string dated August 16 and August 17
7 between you and David Barker?

8 A Yes.

9 Q And you in the bottom message, which is the original
10 message, you are asking Dr. Barker to respond to some questions
11 relating to your relationship with Jay, correct?

12 A Yes.

13 Q And you didn't get a response, right?

14 A That's correct.

15 Q In fact, by this date you no longer reported to David
16 Barker, correct?

17 A That's correct.

18 Q And your response on August 17 back to David Barker
19 was, "Lack of response heard loud and clear." And you then tell
20 him that you are not holding him, David Barker, responsible for
21 the gang rape you'd experienced for the last 16 months. Correct?

22 A Yes, I absolutely said that.

23 Q At that point in time isn't it true that 16 months was
24 virtually your entire employment with Illumina?

25 A No.

26 Q Okay. How long had you been employed by Illumina by
27 this date, August 17?

28 A For 26 months.

1 Q So you were saying that for the last 16 months you felt
2 that you had been gang raped?

3 A Yes.

4 Q That's what you were communicating?

5 A Yes.

6 Q You don't mean, since we've just discussed the use of
7 the term that has different literal meanings, you weren't
8 suggesting that you had literally been gang raped?

9 MR. PANTONI: Argumentative at this point.

10 THE COURT: I think that's pushing things, yes.

11 MS KEARNS: Q Let me move on. With respect to the
12 negotiations -- Let me not go to the negotiations.

13 You say, Dr. Czarnik, that you believe that you were not
14 provided with a bonus in connection with ABI and you'd take issue
15 with that because a part of the work that went into developing the
16 product to be delivered to ABI was work that was done in your
17 work, chemistry, correct?

18 A That's one of the reasons, yes.

19 Q Isn't it true that there was also work that had to be
20 done by the engineering department under the leadership of Richard
21 Pytelewski that was also necessary to produce this product to
22 deliver to ABI?

23 A Yes.

24 Q And you are not contending, are you, that
25 Mr. Pytelewski was illegally discriminated against by not
26 receiving a bonus for ABI, are you?

27 A I have enough with my own complaints.

28 Q You are not -- Have you ever entertained the idea that

1 Richard Pytelewski was being discriminated against on an illegal
2 basis by not receiving a bonus for ABI?

3 MR. PANTONI: Objection.

4 THE COURT: What's the ground?

5 MR. PANTONI: Relevance. And lack of foundation.

6 MS KEARNS: Q Let me lay a foundation. You are aware
7 that Mr. Pytelewski's group also contributed to the same product?

8 A Yes.

9 Q You are aware Mr. Pytelewski also did not get a bonus
10 in connection with the closing of the ABI deal, correct?

11 A Yes.

12 Q You are aware the only two persons from Illumina who
13 were actually involved in the active negotiation with ABI and who
14 closed the deal were John Stuelpnagel and Mark Chee, correct?

15 A In the act of negotiations, that's correct.

16 Q That was my question.

17 A Your question was active negotiations and closed the
18 deal.

19 Q The person who closed the deal was John Stuelpnagel?

20 A I actually couldn't speak to that because I wasn't
21 involved.

22 Q You didn't close the deal?

23 A No.

24 Q And isn't it true that Mr. Pytelewski was also a senior
25 manager at the same time you were?

26 A Yes.

27 Q Now, in some of your testimony about the ABI
28 relationship, you said, "All three of us worked on the ABI deal."

1 Is there any reason in particular that you referred to three
2 rather than the four, which would have included Rich Pytelewski?

3 A Yes, Mark, John and I spoke regularly about business
4 development, business strategy.

5 Q Well, isn't it true that the ABI talks started in or
6 about February of 1999?

7 A You mean the presentation that I gave?

8 Q No, I'm talking about the negotiations with ABI.

9 A They started about the time that I gave my talk that
10 Mike Albin was at.

11 Q In fact didn't they occur before the talk that you
12 gave?

13 A To the best of my recollection, no.

14 Q Isn't it true that Richard Pytelewski did participate
15 in the talks, the internal Illumina talks about the ABI deal?

16 A I think some yes and some no.

17 Q Let's put up Exhibit 49 -- Let me ask you first, what
18 was the date of your talk which you believe contributed to ABI
19 coming to the table and negotiating with Illumina?

20 A It was in February of 1999. I don't remember the date.

21 Q And do you have any reason to dispute that Illumina had
22 already had a meeting with ABI by February 19th, 1999?

23 A I don't have reason to dispute it.

24 Q Now, there seemed to be some suggestion in the
25 examination on your goals that your -- You say that you had been
26 working on your goals that you say you, David Barker and Jay
27 Flatley agreed to, right?

28 A I had been working on some of those goals, yes.

1 Q Those are the goals that you originally proposed, in
2 other words the one that had roughly eight categories?

3 A Yes.

4 Q Let's -- you were asked -- Let's put up the ultimate
5 goals document, 227, I believe.

6 And as Miss Bishop is getting that up, let me ask you this:
7 There had been a lot of questioning by Mr. Pantoni about the fact
8 that no experimental work had been done on the two experimental
9 goals, do you remember that?

10 MR. PANTONI: Beyond the scope. This wasn't covered.

11 MS KEARNS: Q With respect to the work that you did
12 concerning the experimental goals, isn't it true, Dr. Czarnik,
13 that you received these goals on or about May 19th?

14 A On May 19th.

15 Q On May 19th, okay. And isn't it true that it is normal
16 protocol at Illumina when one is actually doing experiments that
17 you put the results of that work into a laboratory notebook?

18 A If you are doing something that's novel and needs to be
19 recorded, yes.

20 Q And certainly if you had been doing an experiment to
21 demonstrate, for example, to demonstrate ability to encode or to
22 show experimental proof of concept, those are things you would put
23 in a lab notebook, correct?

24 A Parts of it you would and parts of it you wouldn't.

25 Q Certainly you would have some commemoration of that in
26 a lab notebook?

27 A Yes.

28 Q Isn't it true that even though you received the goals

1 on May 19th of 2000, you didn't even ask for and check out a lab
2 notebook until July 21st, 2000, 60 days, more than 60 days into
3 the goals?

4 A I did get some lab notebook on July.

5 Q I believe July 21st?

6 A Sounds right.

7 Q Now, the invention or the proposed project of binary
8 oligo encoding, that's something you already testified you
9 developed or you thought of, correct?

10 A Yes.

11 Q You did so in 1998, right?

12 A Yes.

13 Q And you didn't do any work on that invention or idea
14 until it was assigned to you as a research fellow goal in 2000,
15 correct?

16 A Absolutely correct.

17 Q And that's during the time that you were chief
18 scientific officer, right?

19 A Yes.

20 Q Now, you also said with respect to Gali Steinberg's
21 work, you certainly don't have independent knowledge of what Gali
22 Steinberg did, correct?

23 A The only knowledge I have is what was testified to
24 during this proceedings.

25 Q You haven't looked at her lab notebook, correct?

26 A No, I have not.

27 Q And you say that if Gali Steinberg had done the work as
28 described in trial by David Barker, and I think you created some

1 question as to whether or not that was an accurate portrayal by
2 Dr. Barker of what was done --

3 MR. PANTONI: Argumentative.

4 MS KEARNS: Q Did you mean to create any suggestion
5 that the work of Gali Steinberg as described by David Barker was
6 inaccurate?

7 A I know from personal experience that many times what
8 Illumina has said is not what was.

9 Q Okay. Let me ask you this. Were you aware during the
10 pendency of this litigation that your counsel in fact did set a
11 deposition date to take the deposition under oath of Gali
12 Steinberg?

13 MR. PANTONI: Hold on. Irrelevant, argumentative.

14 THE COURT: Sustained.

15 MS KEARNS: Q Are you aware that a deposition was set
16 of Gali Steinberg and taken off calendar?

17 MR. PANTONI: Same objection.

18 THE COURT: Sustained.

19 MS KEARNS: Q Let's go to Exhibit 322.

20 I guess it's 320. Enter the attachment.

21 This is the self-evaluation. Let's go scroll down to item
22 -- the page that had those accomplishments, numbered
23 accomplishments. Let's scroll down to accomplishment 16, 17, 18.

24 You listed in your self-evaluation as one of your
25 accomplishments during the review period recording your work in a
26 laboratory notebook, right?

27 A Yes.

28 Q You also recorded as an accomplishment collecting

1 information for Jay on a new Boston-based genomics company, U.S.
2 Genomics. You see that?

3 A Yes.

4 Q Isn't it true your contacts with U.S. Genomics were
5 related to your job search for a position with U.S. Genomics?

6 A I did not have an ongoing job search.

7 Q I didn't ask if it was ongoing. Didn't you engage in
8 discussions with a headhunter regarding a potential position for
9 you at U.S. Genomics?

10 A Did a headhunter contact me about that position? Yes.

11 Q Did you communicate to Jay Flatley in an e-mail you may
12 receive a call from the president of U.S. Genomics and suggesting
13 I don't care what you say, but in fact -- Let's find that e-mail,
14 put it up. I'll come back to it.

15 Now, with respect to the 768 decode experiment that was done
16 during the summer of 19-- of 2000, did you go and talk to,
17 directly, to any of the scientists who actually did the decoding
18 work and talk to them about the dye issue? And these people I'm
19 including are Jim Bierle, Kevin Gunderson, Monica Milewski, Bahram
20 Kermani.

21 A I talked with Bahram, I talked with Monica, I talked
22 with Jim Bierle.

23 Q Did you talk -- Okay. When you talked to Monica, it
24 was relating to the fact that the dye was mislabeled, correct?

25 A And her interest in getting a credit, yes.

26 Q Let me ask you, in your discussion with Monica
27 Milewski, did you ask her whether the mislabeled dye was used by
28 itself or whether it was mixed with other dye?

1 A No, frankly it never occurred to me it would have been
2 mixed with other dye.

3 Q In fact it didn't occur to you because you didn't know
4 the mechanics of the dye used in these decoding experiments, and
5 by that I mean, Dr. Czarnik, you didn't know how many vials were
6 used in an experimental run, correct?

7 A Did I know how many vials were used?

8 Q Yes.

9 A No, I didn't know how many test tubes were used either.

10 Q That's right, you didn't know the details of the
11 experiment.

12 A I didn't know how many spatulas they used.

13 Q Well, there's a lot you didn't know then.

14 A There's a lot of that kind of stuff I didn't know.

15 Q Did you ask Jim Bierle any questions about whether the
16 mislabeled dye was used on its own or in conjunction with another
17 dye?

18 A No.

19 Q You didn't ask that question of anyone and you
20 testified that you only just learned about that in connection with
21 this lawsuit, correct?

22 A Yes.

23 Q Now, you understood, did you not, that Kevin Gunderson
24 was the scientist heading up the 768 decode experiment in
25 question, correct?

26 A Yes.

27 Q And you were personally present during the deposition
28 of Dr. Gunderson, were you not?

1 A Yes. Excuse me, yes, I was.

2 Q Isn't it true, Dr. Czarnik, that during the depositions
3 that you have attended in this case you have frequently passed
4 notes to your counselor suggested questions?

5 MR. PANTONI: Objection.

6 MS KEARNS: Q You've participated indirectly in the
7 questioning process?

8 MR. PANTONI: Irrelevant.

9 THE COURT: Sustained.

10 MS KEARNS: Q Now, Dr. Czarnik, is it your contention
11 that Illumina's current status of decoding is based upon wrong
12 results and wrong science?

13 MR. PANTONI: Your Honor, you wouldn't let -- I'll
14 object that it's irrelevant, given your prior rulings.

15 THE COURT: Is this getting into his general concerns
16 about science?

17 MS KEARNS: No.

18 THE COURT: Is it particularized with his problems with
19 the 768 decoding experiment?

20 MS KEARNS: I'll make the particulars.

21 Q Despite the concerns you are now raising, your
22 purported concerns about the integrity, worth, validity of the 768
23 decode experiment that was done during the summer, the fact of the
24 matter is as to the Illumina shares of stock in which you were
25 fully vested, you have sold very few if any of those shares to
26 date, correct?

27 A That's not correct.

28 Q How many shares have you sold?

1 A At this point I've sold almost all of it.

2 Q Was that -- That wasn't the case at the time of your
3 deposition, correct?

4 A No.

5 Q And I think what may be a final area of inquiry, --
6 Let's go back, if we may. We need to address this and then I have
7 one more question.

8 THE COURT: You want to address something with the
9 Court?

10 MS KEARNS: Yes, please.

11 THE COURT: You want the reporter?

12 MS KEARNS: No.

13 (Discussion off the record.)

14 MS KEARNS: Q Now, Dr. Czarnik, you offered testimony
15 today that Steve -- You testified about losing -- not losing,
16 your goals being on top of your desk and suddenly the next day
17 they were gone, so you asked for another copy and taped them above
18 your desk so they wouldn't disappear again, right?

19 A Yes.

20 Q Isn't it true you made a point of drawing other
21 scientists' attention to your goals once they were posted above
22 your desk?

23 A No.

24 Q And so if other scientists testified that you drew
25 their attention to your goals, you would disagree?

26 A I think I did draw Steve Barnard's attention to my
27 goals.

28 Q So just a moment ago you said no, you didn't draw them,

1 now you are saying you may have done so with Steve Barnard?

2 MR. PANTONI: Argumentative.

3 THE COURT: Sustained.

4 MS KEARNS: Q Anyone else you may have drawn, whose
5 attention you may have drawn to your goals?

6 A No.

7 Q Okay. Now, when Mr. Pantoni questioned you today, he
8 asked you what Steve Barnard said, and you said that he laughed
9 and told you that the goals seemed designed to make you fail.
10 That was your testimony?

11 A Yes.

12 Q That's what Steve Barnard actually said to you?

13 A I don't know word-for-word, but I'm paraphrasing what
14 Steve said.

15 Q Let me read from your deposition testimony when I
16 questioned you on this very same topic. Page 823 in Volume 6.

17 Looking at the portion of your deposition Volume 6, page
18 823, I asked you in deposition:

19 "QUESTION: Did you ever ask any of the
20 scientists to whom you showed these goals what they thought
21 of the goals?

22 "ANSWER: I believe I did.

23 "QUESTION: Who do you believe you spoke with
24 on that topic?

25 "ANSWER: I think I spoke with Steve Barnard
26 one day.

27 "QUESTION: What do you remember him saying?

28 "ANSWER: I remember him laughing at the goals

1 and then he didn't say anything else."

2 Dr. Czarnik, you wouldn't have a different recollection
3 because you've got something at stake in this litigation, would
4 you?

5 MR. PANTONI: Argumentative

6 THE COURT: Sustained.

7 MS KEARNS: Q You reviewed all of the volumes of your
8 deposition, correct?

9 MR. PANTONI: Asked and answered.

10 THE COURT: Overruled.

11 THE WITNESS: I read them, yes.

12 MS KEARNS: Q And you made no corrections to any
13 portion of the deposition, correct?

14 A Correct.

15 Q Let's put up Exhibit 49-5. Let's blow this up, the
16 bottom portion.

17 Actually let's go to 49-4.

18 THE COURT: How much more do you have, Counsel?

19 MS KEARNS: Just a couple of minutes.

20 Q Dr. Czarnik, do you recognize this as a board of
21 directors packet from April of 1999?

22 A Yes.

23 Q And at that time when John Stuelpnagel was acting CEO,
24 you were still attending every board meeting?

25 A Correct.

26 A Yes.

27 Q Let's go to the next page of this document. Let's
28 enlarge this bottom portion.

1 Is it your recollection, Dr. Czarnik, that as of April of
2 1999, business development and the status of business development
3 discussions was one of the topics that was discussed at board
4 meetings?

5 A Yes.

6 Q Do you see here in this document an entry for PE
7 Applied Bio?

8 A Yes.

9 Q That's what we've known or referred to as ABI?

10 A Yes.

11 Q Let's scroll up to see the whole part. It says
12 "Business Development." Let's enlarge that first line. So for
13 each company listed in the business development, there is a column
14 for the last meeting had with the company, correct?

15 A Yes.

16 Q An entry for the last contact had with the company, an
17 entry for the next meeting scheduled with the company, and a brief
18 description of what that company's interest was with respect to
19 Illumina, correct?

20 A Yes.

21 Q Now let's scroll down this focus on the entry from this
22 April, 1999 board of directors meeting packet for PE Applied Bio.
23 So this is showing, Dr. Czarnik, the last meeting actually held
24 with PE ABI for business development discussion was February 19,
25 1999, correct?

26 A Yes.

27 Q And the last contact with ABI of any form occurred on
28 April 6, 1999, just ten days before the board meeting, right?

1 A Yes.

2 Q And it also shows that the next meeting scheduled with
3 ABI was April 19, 1999, correct?

4 A Yes.

5 Q And isn't it true, Dr. Czarnik, that the talk that you
6 gave that you believe was in some way related to ABI coming to the
7 table was actually given in the month of April, 1999?

8 A No, it was in February of 1999.

9 Q Now, where is the -- Where did you allegedly give a
10 conference in February of 1999?

11 A The meeting we're referring to is at UCSD.

12 Q And do you have any documentation showing that that
13 meeting occurred in February of 1999?

14 A Not on me.

15 Q Well, to the best of your knowledge, have you ever
16 produced any in this litigation?

17 A I don't remember. I've produced hundreds of pages of
18 things.

19 Q But you will agree from this chart that certainly by
20 February 19, 1999, Illumina had already actually met with ABI for
21 the purpose of discussing business development cooperation?

22 A That's what this chart says.

23 Q You have no reason to disagree with the accuracy of
24 this chart, do you?

25 A No.

26 MS KEARNS: Nothing further at this point.

27 THE COURT: Anything further?

28 MR. PANTONI: I think I have one question.

1 REDIRECT EXAMINATION

2 BY MR. PANTONI:

3 Q Miss Kearns asked you how did you come to learn that
4 ABI became interested in Illumina because of the talk you gave in
5 February of 1999. You said because you talked with Mike Albin
6 about it. What did Mike Albin tell you?

7 A This meeting at UCSD is an annual meeting of the
8 industrial advisory board at UCSD chemistry. I'm a member of it.
9 Mike Albin is a member of it. We attend these meetings every
10 year. And so one year Mike heard my talk. We talked about it at
11 dinner. The next year we're at the same meeting. I asked Mike if
12 -- how he had become interested in Illumina. He told me it was
13 because of the talk he heard me give at UCSD.

14 If John Stuelpnagel had done as much as to pick up the
15 telephone and call and ask Mike Albin, you would know that.

16 Q Who is Mike Albin?

17 A He's the vice president for new business development at
18 ABI.

19 MR. PANTONI: Nothing further, Judge

20 THE COURT: Anything further?

21 RECROSS-EXAMINATION

22 BY MS KEARNS:

23 Q Let's put up 49-3.

24 MR. PANTONI: It's beyond the scope at this point.

25 MS KEARNS: No, it's not.

26 THE COURT: Back to what?

27 MS KEARNS: Q Back to 49-3. Let's go to the entry for
28 ABI, which is marketing relationships, right here. This was also

1 from the same April -- This is from the February 16th, 1999 board
2 packet, Exhibit 49.

3 As of the February board packet for the meeting which
4 occurred February 16, there's an -- And during that time, February
5 '99, you were attending board meetings, correct?

6 A Yes.

7 Q You were receiving the board packets?

8 A Yes.

9 Q Business development was discussed at each such
10 meetings?

11 A Yes.

12 Q As the February board packet, Applied Bio is already
13 listed showing that with respect to last meeting column, "None."
14 Last contact, February 1, 1999. Next meeting scheduled, February
15 19, 1999. Correct?

16 A Yes, that's what it says.

17 Q You have no reason to dispute the accuracy of those
18 entries?

19 A No.

20 MS KEARNS: Nothing further.

21 MR. PANTONI: As much as it pains me, I'm going to have
22 to let Miss Kearns have the last word on this. No further
23 questions.

24 THE COURT: Thank you, Dr. Czarnik.

25 Any further rebuttal evidence on behalf of the Plaintiff?

26 MR. PANTONI: Subject to the review of the documents we
27 discussed, no.

28 THE COURT: Surrebuttal evidence?

1 MS KEARNS: Not unless it's engendered by rebuttal
2 evidence brought on by Plaintiff.

3 THE COURT: Ladies and gentlemen, we've now completed
4 all the evidence in the case, barring some last-minute
5 development. So you are to return on Monday, July 8. At that
6 time closing argument. The attorneys, they've been very good
7 about sticking to this schedule. They say they are going to argue
8 an hour and a quarter apiece. That includes rebuttal, too, right?

9 MS KEARNS: Yes.

10 MR. PANTONI: That's the whole shooting match.

11 THE COURT: That means they should complete their
12 argument in the morning, we'll give you jury instructions and
13 you'll be deliberating by the afternoon.

14 Please remember, don't form or express any opinions about
15 the case, don't do any kind of investigation, don't look at any
16 websites that have been mentioned, anything like that. Believe
17 me, it happens, despite admonitions given by the court. Please
18 don't do any of that. Just forget about the case until you come
19 back

20 Have a pleasant 4th of July. 9:00 a.m. Monday. Have a
21 pleasant holiday weekend. We'll see you at that time.

22 (Proceedings resumed outside the presence of the jury.)

20 (Proceedings recessed at 4:25 p.m.)

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1 SAN DIEGO, CALIFORNIA, MONDAY, JULY 8, 2002; 8:50 A.M.

2 (Proceedings resumed outside presence of the jury.)

6 (Jurors seated in open court.)

7 THE COURT: Morning, ladies gentlemen. The record will
8 indicate all the jurors are present, counsel and the parties
9 present.

10 We're about to begin our closing arguments. Remember during
11 the course of the entire trial, including the argument phase, that
12 the statements of the attorneys are not evidence. As far as the
13 closing arguments are concerned, that's their opportunity to
14 summarize for you what they believe the evidence has shown.

15 So without any further interruption, we'll begin as is
16 customary with the Plaintiff's opening argument. Mr. Pantoni.

17 MR. PANTONI: Closing statement.

18 THE COURT: Closing statement.

19 THE COURT: Okay.

20 MR. PANTONI: Ladies and gentlemen, this is the first
21 opportunity I've had to talk to you directly in about three weeks.
22 Because of the rules, of course, we couldn't communicate except
23 for hellos and that sort of thing for the last three weeks. This
24 is my first and last opportunity to talk to you about what I
25 thought the evidence showed in this case.

26 Let me first start off my thanking you all personally on my
27 behalf, and on behalf of my client, Tony Czarnik, for your
28 attention during this trial. This lengthy trial. I know there

1 were portions I'm sure were tedious, portions were tedious to me,
2 but I appreciate you paying attention, hanging in there, and I
3 appreciate the service that you are rendering in this case. So I
4 thank you on my behalf and on behalf of my client.

5 I'm going to begin my remarks by talking about the end of
6 the story, with the termination of Dr. Czarnik's employment. I
7 want to make two points right up front because I think it will
8 bear on the remainder of the evidence. Two things I want to point
9 out about the termination. First of all, the position that Dr.
10 Czarnik was terminated from. This was his research fellow
11 position. When you are deliberating, you want you to bear that in
12 mind. He was terminated from his position as research fellow, not
13 chief science officer. The research fellow position was a
14 completely different position than the chief science officer
15 position he held at the beginning of his employment.

16 Secondly, I want to focus on the reasons why Dr. Czarnik was
17 terminated from his research fellow position. We heard a lot in
18 this case about work ethic, work hours, and those sorts of things.
19 I want to refocus your attention back on the reasons that were
20 given to Dr. Czarnik for his termination as research fellow.
21 Those reasons that he was given were failure to meet the written
22 goals that we looked at. The 30-, 60-, 90-day and year goals.
23 Those were the reasons for the termination. And again, he was
24 terminated from his position as research fellow.

25 The goals are really key in this case, and I'm going spend a
26 good deal of my time, we did in the trial, and I'm going to be
27 spending some of my time today talking about those goals. The
28 issue for you is going to be are those goals reasonable as

1 Illumina contends or are those goals unreasonable and were they a
2 set-up as an excuse to fire Dr. Czarnik. That's a key issue in
3 the case.

4 Let me spend a couple of minutes talking about the issue of
5 work ethic and work hours. The defense spent a lot of time on
6 that issue in this trial. You'll recall a number of witnesses
7 said Tony Czarnik doesn't have the same work ethic as John and
8 Mark. Tony Czarnik doesn't work the same number of hours as John
9 and Mark. I want to remind you that this so-called problem
10 concerning Dr. Czarnik's work ethic, that allegedly arose in the
11 summer of 1998, that was two years and three months before he was
12 fired for allegedly not meeting his goals.

13 Again, this so-called problem arose back in '98 and '99, and
14 yet there's not a single memo, there's not a single letter,
15 there's nothing in Dr. Czarnik's personnel file, nothing that was
16 given to Dr. Czarnik that substantiates that there were any
17 performance problems in this point in time.

18 You remember when John Stuelpnagel talked about Dr. Czarnik
19 back in the summer of 1998 and subsequently. He used terms like
20 "Dr. Czarnik was failing miserably," that "He was an incredibly
21 poor performer," that, "He was contributing absolutely nothing to
22 the company." I'm sure you recall that testimony. We submit that
23 if that were true, if that were really true, if Dr. Czarnik was a
24 miserable failure who was contributing nothing to the company,
25 wouldn't you have expected John Stuelpnagel to at least begin to
26 look for a new CSO? He told you he never even began looking for a
27 new CSO. If he was a miserable failure, if he was contributing
28 nothing, don't you think John Stuelpnagel would have mentioned it

1 at a board of directors meeting? He was having these meetings
2 every two months, yet he told you he never raised this so-called
3 problem even once to the board of directors.

4 If he was failing miserably as Dr. Stuelpnagel indicated,
5 wouldn't you expect that there would be something, some note, some
6 reference in Dr. Czarnik's file to this problem? And yet as you
7 know, there's nothing. There's nothing until two years later, and
8 only after Dr. Czarnik complained about discrimination. You don't
9 see any counseling memo, any warning memo, any documentation about
10 an alleged performance problem, nothing until after he complained
11 about discrimination.

12 On the other hand, what we do have, what you did hear in
13 terms of Dr. Stuelpnagel's testimony, was when he read from his
14 handwritten notes. You will recall these are notes he made about
15 his first major crisis as acting president. He read from those
16 notes. Those notes were taken in January of 1999. And his notes
17 say, and I'm quoting here, "Confident I've hired the right R&D
18 managers." He told you that included Dr. Czarnik. So despite
19 anything you may have heard from Dr. Stuelpnagel in this trial,
20 his own handwritten notes corroborate as of January of 1999, Dr.
21 Stuelpnagel was confident he's hired the right guy in Dr. Czarnik.

22 So, ladies and gentlemen, even though Illumina spent a lot
23 of time on this issue talking about things like who took longer
24 lunches, I submit that you shouldn't be distracted by that
25 testimony. You should focus on the real issues in the case. The
26 issues are discrimination, retaliation and whistleblowing.

27 Now, with respect to discrimination, I told you when I
28 opened the case in my opening statement that we are not claiming

1 in this lawsuit that Dr. Czarnik was involved in everything, in a
2 hundred percent of the activities, before he disclosed his
3 depression. We're not saying he attended every single solitary
4 meeting, he was involved in every single business deal. Nor are
5 we saying that after the disclosure he was excluded from
6 everything. He didn't have anything he was assigned to after
7 disclosure of depression. What I did say we would prove, and what
8 I believe we did prove, is that after the breakdown, Dr. Czarnik
9 was excluded from meaningful and important activity relating to
10 the company. He was given some job duties. He continued to have
11 some job duties. But he was excluded from meaningful and
12 important things that were going on at the company. The most
13 important things going on at the company.

14 I've prepared a PowerPoint slide to try to summarize some of
15 the things that Dr. Czarnik was excluded from after he disclosed
16 his depression. These are exclusions while John Stuelpnagel was
17 still the acting president.

18 First point is after the disclosure, Dr. Czarnik had no
19 further involvement in genomics. He was only involved in the
20 application called the o-nose. You heard at trial that genomics
21 is the key business application for Illumina. It's the focus of
22 the entire company. They made a decision to focus on genomics.
23 Before the depression was disclosed, Dr. Czarnik was involved in
24 genomics business activities.

25 After the disclosure, no involvement in genomics. He was
26 relegated to the o-nose, which you heard from several witnesses
27 was a low priority item at Illumina compared to genomics.

28 Next, exclude from the ABI negotiations and the stock grant.

1 You heard that this deal with ABI, collaboration with ABI, was the
2 single most important business collaboration that Illumina had.
3 At the time it still is the single most important business
4 collaboration. The ABI deal.

5 Even though we heard ABI became interested in Illumina
6 because of Dr. Czarnik, even though the product that was going to
7 be delivered to ABI was something that Dr. Czarnik was familiar
8 with and had responsibility for, called the array of arrays,
9 despite that, Dr. Stuelpnagel decided that he and Mark Chee would
10 be the persons who worked on the ABI deal, and that he and Mark
11 Chee would be the persons who got the stock grant.

12 Next, please.

13 Opinions on scientific matters not solicited or respected.
14 This concerns these ad hoc business strategy meetings that there's
15 been some testimony on. These were meetings that were held on an
16 as-needed basis. Dr. Czarnik explained to you before he disclosed
17 depression he was actively involved, his opinions were solicited,
18 he interacted with his co-founders. After disclosure he was
19 there, he was physically at meetings, but he wasn't asked for his
20 opinions. His opinions weren't respected when they were offered.

21 Next, please.

22 Dr. Czarnik was not involved in the Series C financing.
23 Financing is obviously a major activity for senior managers. You
24 remember there was talk about the Series B financing. That was
25 before the breakdown. Dr. Czarnik was involved in the Series B
26 financing. He was involved with the strategy meetings, he was
27 involved in discussions with venture capital firms, he was
28 intimately involved in the Series B financing, yet the next round

1 of financing, which occurred after disclosure of depression, Dr.
2 Czarnik was not asked to be involved in any way, shape or form.

3 Next, please.

4 Not involved in the recruitment of the Chief Executive
5 Officer. Again this would have been one of the most key
6 activities going on at a senior management level, to be
7 identifying who the new boss is, who the new CEO is. Turned out
8 to be Jay Flatley, as we know. Dr. Czarnik was excluded from
9 recruiting, interviewing, strategizing with respect to who would
10 be the new Chief Executive Officer of the company.

11 Now, again, ladies and gentlemen, these items are major,
12 important things that Dr. Czarnik was excluded from. These are
13 fundamental to what a senior manager at a company like Illumina
14 would do. Dr. Czarnik was excluded after he disclosed his
15 depression.

16 Let me speak to you about the issue of Jay Flatley's clean
17 slate. You recall I made a point about this in opening, very
18 careful to ask Mr. Flatley repeatedly whether when he came on
19 board at Illumina, when he started as the new CEO of the company,
20 did he start with a clean slate or did he have preconceived
21 notions about Dr. Czarnik. Now, remember Jay Flatley was brand
22 new to the company. He was taking over for John Stuelpnagel.
23 He's taking over a management team that John Stuelpnagel had been
24 managing for more than a year. He didn't know these people that
25 he was taking over, his new management team. Jay Flatley tells
26 you that he heard nothing in the way of background. He was given
27 nothing in the way of a briefing on any members of his management
28 team, including Dr. Czarnik. I'm not sure if that makes sense to

1 you that the new CEO taking over a brand new management team to
2 have no discussions with the prior guy who is running the show for
3 more than a year. That's what Mr. Flatley claims. No briefing,
4 no discussion, no background about Dr. Czarnik.

5 Now, bear in mind that only six months earlier, before Jay
6 Flatley started, Dr. Czarnik suffered the breakdown. John
7 Stuelpnagel had actually discussed replacing Tony Czarnik as CSO.
8 It only happened a few months before Mr. Flatley arrived as the
9 new CEO, yet Illumina claims John Stuelpnagel didn't breathe a
10 word about this to Jay Flatley.

11 Ladies and gentlemen, if Jay Flatley really had a clean
12 slate, if he was starting from ground zero with respect to Dr.
13 Czarnik, then how does he explain that lunch that he had with
14 Larry Bock? Remember Larry Bock was the board member who showed
15 his videotaped deposition. Larry Bock testified that at this
16 lunch that he had with Jay Flatley, Jay Flatley told him there
17 were performance problems with Tony Czarnik and he was considering
18 making changes. That's what Larry Bock testified to. So the date
19 of that lunch is extremely important.

20 We showed you during trial Exhibit 96, which is Jay
21 Flatley's receipt for this lunch. He only had one lunch with
22 Larry Bock. This lunch that he had with Larry Bock occurred
23 November 4, 1999. That was only two weeks after Jay Flatley came
24 on board at Illumina. Jay Flatley started at Illumina October
25 18th. Two weeks later, he has a lunch with a board member and he
26 tells the board member two weeks into the job there are
27 performance problems with Dr. Czarnik and I'm considering making
28 changes.

1 Now, did you hear any evidence with respect to anything that
2 happened in the first two weeks of Jay Flatley's employment that
3 would have caused him to meet with a board member and tell a board
4 member there's performance problems with Czarnik, I'm considering
5 making changes? What happened during those two weeks that so
6 alarmed Jay Flatley that he would raise this issue with a board
7 member?

8 Nothing happened during those two weeks. Even according to
9 Mr. Flatley, there were no performance problems at all in that
10 two-week period. So why would Jay Flatley be having lunch with a
11 board member two weeks into the job and telling him he's
12 considering making changes? Because he didn't start with a clean
13 slate. No way. It's impossible, given this lunch.

14 Now, this practice of excluding Dr. Czarnik from important
15 and meaningful business activities continued after Jay Flatley
16 came on board. We prepared a slide to address the ways in which
17 Jay Flatley excluded Tony Czarnik.

18 First point. Jay Flatley never consulted Tony Czarnik for a
19 briefing on the company science and experiments. Remember, Jay
20 Flatley is brand new to the company. He doesn't know the
21 company's science. Who is the chief science officer at that point
22 in time? Dr. Czarnik. Yet Jay Flatley never even bothered to
23 meet with Dr. Czarnik to get a briefing on the company's science
24 or the experiments it was conducting.

25 Next, please.

26 Dr. Czarnik wasn't involved in recruiting a new board member
27 who arrived shortly after Jay Flatley. This was an individual
28 named George Poste. You heard in trial that Mr. Poste had

1 specific scientific background. That's why they wanted him on the
2 board of directors. Jay Flatley got Mark Chee and John
3 Stuelpnagel involved in interviewing George Poste. Didn't get Dr.
4 Czarnik involved at all in the recruitment of this new board
5 member.

6 Next, please.

7 Not given appropriate recognition as founder. If you
8 remember anything from this trial, I'm sure you'll remember that
9 point. We saw examples, numerous examples of Jay Flatley not
10 recognizing Dr. Czarnik as a founder of the company. The first
11 being that slide he showed at the presentation in January of 1999.
12 Slide says company founded by John Stuelpnagel and Mark Chee.
13 Where did he get that information? Somebody had to tell Jay
14 Flatley who the founders were.

15 Now, you recall Jay Flatley said this was just an error or
16 an oversight, but ladies and gentlemen, we showed you that this
17 so-called error was repeated again and again by Jay Flatley.

18 Next, please.

19 Key scientific job responsibilities taken away. Again, this
20 happened in January of 2000, just a few months after Jay Flatley
21 came on board. Jay Flatley took away at least two important job
22 responsibilities from Dr. Czarnik. They both happened to relate
23 to decoding. They were taken away from Dr. Czarnik and assigned
24 to other people in January of 2000.

25 Next, please. Not involved in recruitment of the new chief
26 scientific officer.

27 Again, you recall Dr. Czarnik wasn't asked to be involved in
28 recruiting the new CSO even though he specifically on at least two

1 occasions asked can I please be involved in this activity. He was
2 excluded.

3 Next, please. Then there was the attempt to significantly
4 reduce Dr. Czarnik's stock when he became research fellow.

5 Let me say at this point that it's clear from the evidence
6 that Dr. Czarnik volunteered to step down as chief science
7 officer. We're not hiding from that fact. It turns out he wasn't
8 being used as a real chief science officer for months, but he did
9 volunteer to step down. Jay Flatley accepted that offer. We
10 accept that.

11 What was discriminatory at this point in time was Jay
12 Flatley's attempt to slash Dr. Czarnik's stock. You may recall
13 that Dr. Czarnik -- rather that Jay Flatley tried to buy back
14 167,000 shares, which was about 60 percent of Dr. Czarnik's
15 remaining stock. Tried to buy it back when he made Dr. Czarnik a
16 research fellow. He wasn't able to buy it back only because Dr.
17 Czarnik refused to sign that new employment contract.

18 What's interesting is the reason Jay Flatley said that he
19 was trying to cut Dr. Czarnik's stock was that he was taking a
20 lesser position. He was going from chief science officer to
21 research fellow, so he thought a cut in the stock would be
22 appropriate. Yet we heard when Mark Chee testified that very
23 recently Mark Chee also took a similar change in his job duty. He
24 went from being a VP. He became a research fellow. Dr. Chee told
25 you that the company didn't attempt to buy back one single share
26 of stock when he became a research fellow. Clearly treated
27 differently. Dr. Czarnik, Jay Flatley tried to buy back 167,000
28 shares when he became research fellow. Mark Chee, zero shares.

1 Next, please.

2 Dr. Czarnik was not involved in the drafting of the S1
3 registration statement. He was not involved in the planning for
4 the initial public offering. Clearly these two activities were
5 important. They were among the most important things that were
6 going on at the company. They may be the most important things
7 that ever will go on at Illumina, and Dr. Czarnik was excluded
8 from these activities.

9 So I just tried to summarize for you some of the major ways
10 in which Dr. Czarnik was excluded both by John Stuelpnagel and by
11 Jay Flatley. This takes us up to the point in time where Dr.
12 Czarnik became a research fellow.

13 Now I'd like you to focus on what was the situation when Dr.
14 Czarnik became a research fellow. That point in time is really
15 important to this case. What was the situation. He was taken out
16 of chief science officer and he was put into a brand new position,
17 research fellow. He was reporting to David Barker. You recall
18 that? And that made sense. Dr. Czarnik's job duties were purely
19 scientific. It made sense he'd report to who? Chief science
20 officer. And he had worked out a set of written goals with his
21 new boss, David Barker.

22 That was a situation when Dr. Czarnik first became a
23 research fellow. So what changed? You have to examine what
24 changed from the point in time Dr. Czarnik was made research
25 fellow to the point in time he was given goals and ultimately
26 fired. There weren't at that point in time any performance
27 issues, even according to the defense.

28 What was Dr. Czarnik doing when he first became research

1 fellow? Testimony was he was helping David Barker with the
2 transition to becoming the new CSO. Dr. Barker testified that Dr.
3 Czarnik was helpful in that process, that he was cooperative, that
4 he was professional. So even according to the defense, there were
5 no performance issues after Tony Czarnik became research fellow
6 and when David Barker was still his boss.

7 So what changed? What changed between the time that Tony
8 Czarnik was a research fellow reporting to Barker until the time
9 that Jay Flatley said no, I'm taking over as your supervisor?
10 Ladies and gentlemen, the only thing that changed in that time
11 frame is that Dr. Czarnik began to complain about discrimination.
12 That's what happened in April of 2000. Dr. Czarnik was made
13 research fellow in March. In April he starts complaining about
14 discrimination, and in May Jay Flatley takes over as his new
15 supervisor and assigns him new goals.

16 We showed you three e-mails in April of 2000, three separate
17 e-mails where Dr. Czarnik complained about discrimination. All
18 these e-mails were sent in April.

19 Now, what was Illumina's response to Dr. Czarnik's complaint
20 of discrimination? What did they do to respond to his complaint?
21 I can tell you what they didn't do. We know that they didn't
22 conduct any investigation into the complaint. You'll find out
23 when Judge Prager reads you instructions, when he instructs you on
24 the law, you'll learn that the law requires employers to
25 investigate complaints of discrimination. The law requires the
26 companies do immediate and prompt investigations into complaints
27 of discrimination. That didn't happen here. They didn't follow
28 the law. They didn't even follow their own company policy on this

1 point.

2 You'll recall Deborah Flamino, the human resources manager.
3 She testified that company policy is if a supervisor learns about
4 discrimination, what's the supervisor supposed to do under company
5 policy? Supervisor is supposed to report it to human resources,
6 and human resources is supposed to conduct an immediate and prompt
7 and thorough investigation. In this case, Jay Flatley completely
8 ignored that company policy.

9 So instead of investigating, what did he do? In May of
10 2000, he did three things. He gave Dr. Czarnik a counseling memo
11 on May 4. First counseling memo he ever got. He reassigned Dr.
12 Czarnik's reporting relationship. You are no longer reporting to
13 David Barker, you are reporting to me now. And third, he changed
14 the goals that Dr. Czarnik had worked on with David Barker, and he
15 put Dr. Czarnik on what he called a performance plan. But again,
16 there were no performance issues as research fellow. Why would
17 Jay Flatley, shortly after Dr. Czarnik complains about
18 discrimination, put on him a performance plan as research fellow.
19 There were no performance issues at that point in time.

20 You'll hear also when Judge Prager instructs you on the law
21 that timing is important. Timing is critical in these cases. So
22 bear in mind that all these things I just mentioned, the first
23 counseling memo, the change in reporting relationship, the redoing
24 of the goals and putting him on a performance plan, those all
25 happened shortly after Dr. Czarnik complained about
26 discrimination.

27 Let's take a look at the goals, please. Exhibit 227.

28 You know by now these are the actual written goals that were

1 assigned to Dr. Czarnik. Again because of Illumina's relying on
2 his, Dr. Czarnik's, alleged failure to meet these goals, these
3 goals are critical to your determination of this action.

4 Now, you recall that when Jay Flatley testified he was
5 adamant, absolutely adamant that when he assigned these goals on
6 May 19, he hadn't yet decided to fire Dr. Czarnik. Remember when
7 he said that? He hadn't yet decided. He was hopeful Dr. Czarnik
8 would be able to meet these goals. I'll come back to this point
9 later on in this presentation because I don't believe that that's
10 the case.

11 I believe the evidence, ladies and gentlemen, will show
12 these goals were unreasonable, unattainable and were designed to
13 set Dr. Czarnik up for failure. In particular, the second goal,
14 the goal we've spent sometime on during the trial, binary oligo
15 encoding. I prepared a chart that I think helps graphically
16 demonstrate how unreasonable this goal was.

17 This chart depicts what Illumina did as a company. This is
18 the section in blue. I'll show you in a minute what the company
19 was asking Dr. Czarnik to achieve with respect to binary oligo
20 encoding. You remember that the entire company was devoted toward
21 decoding efforts. You heard plenty of testimony about that.
22 Decoding was key to Illumina's technology, key to Illumina's
23 success, and Illumina was using Mark Chee's method of decoding.

24 We've shown here what the company was able to accomplish in
25 terms of their decoding experiments. Remember these decoding
26 experiments, the 16-bead experiment, the 128-bead experiment, the
27 768-bead experiment. These were a series of experiments that were
28 worked on by many scientists. This is the combined effort of all

1 the company's scientists working together as a team, working on
2 this issue of decoding. You heard that the results were that the
3 company spent about six months, bottom line on this chart, depicts
4 the months that were spent on this activity. This axis is to show
5 the number of beads that were involved in these feasibility
6 experiments. The entire company working together as a team,
7 numerous scientist, six months working on the 16-bead experiment.
8 Then you heard testimony that they took approximately nine months
9 to work on the 128-bead experiment, from months 6 to 15. Then
10 finally for most of the year 2000, the company, many scientists
11 working together, were working on the 768-bead experiment. That
12 would take us from month 15 to the end of 2000.

13 So this is from the beginning of the company's research when
14 they first got their laboratory, to more than two years later,
15 they were still working on the 768 feasibility.

16 Let me show you what Dr. Czarnik -- These numbers are so
17 crazy, it was hard to even fit them onto this chart. We did the
18 best we could. In 30 days, using a different method of decoding,
19 in 30 days Dr. Czarnik was being asked to show feasibility for 16
20 beads. In 60 days, approximately two months, he was being asked
21 to show feasibility for 256 bead types. And then three months, 90
22 days, Dr. Czarnik was being asked to show feasibility for 4096
23 different bead types. He was asked to do this working alone,
24 using a brand new method of decoding. He was being asked to do
25 something that the entire company, all the scientists working
26 together as a team from the inception of the company, was not able
27 to do. He was asked to do it in 90 days.

28 Remember, I asked John Stuelpnagel, did the company ever do

1 a 4096-bead experiment? Of course the answer was no.

2 Then if you look at the one-year goal, we've been referring
3 to that number as approximately a million codes. It's actually a
4 1,048,576 codes. I'm told by the person who made this chart that
5 if order to depict in scale what that million goal number would
6 be, it would require us to blow through about 10 floors of an
7 office building. Obviously we weren't able to depict that in any
8 meaningful way except show this arrow. It would be astronomical.

9 So I think the evidence is pretty clear what Dr. Czarnik was
10 being asked to do was unreasonable in terms of numbers and in
11 terms of time.

12 Now, even though these goals were unreasonable, in
13 particular the second goal, we've just reviewed the numbers of the
14 time frames, --

15 By the way, I forgot to mention something I pointed out in
16 the trial. Somebody tacked on on the third goal this "Submit a
17 grant application." I don't think that was coincidental. I think
18 they knew this was an issue that caused Dr. Czarnik's breakdown in
19 the first place. He detested writing grants, on top of I don't
20 think, on top of those unreasonable goals, somebody would tack on
21 a grant application.

22 Even though the evidence shows these were unreasonable, Dr.
23 Czarnik did make some progress toward these goals. He worked to
24 try to tackle the goals as best he could under the circumstances.
25 We showed you numerous e-mails that Dr. Czarnik submitted to Jay
26 Flatley where he reviewed his progress toward the goals. Those
27 are in evidence. We showed you that self-evaluation form that Dr.
28 Czarnik submitted. And that just wasn't a self-serving, I'm doing

1 great, self-evaluation form. That form, as we showed you, had 20
2 items listed on it. I encourage you to take a look at it in the
3 jury lounge. It's Exhibit 320. There's an accomplishment section
4 in Exhibit 320. It lists 20 specific things that Dr. Czarnik did
5 in terms of working toward his goals and progress that Dr. Czarnik
6 made in working toward his goals.

7 On the day of his termination, Dr. Czarnik testified that
8 Jay Flatley asked him for everything he has, give me every
9 conceivable thing you have that showed the work you did on the
10 experiments, and he submitted a package of approximately 50 pages
11 into Jay Flatley's mailbox on the day of termination. We know it
12 didn't matter because these goals were designed in the first place
13 for failure.

14 Let me speak briefly about the whistleblowing claim in the
15 case. You recall that experiment, or demonstration, rather, that
16 Mark Chee did up here where he mixed different colors into various
17 bottles? I suppose that was intended to show you that there was
18 nothing wrong with the experiment. I trust that's not the
19 conclusion you reach from that little demonstration. Ladies and
20 gentlemen, all of the scientists who testified about the 768
21 decode experiment, every single one of the scientists who
22 testified, said there was something wrong with the experiment and
23 the experiment had to be redone. You don't redo good experiments.
24 Something was seriously wrong with this experiment.

25 You heard from Kevin Gunderson, who is the lead scientist on
26 this 768 experiment. He told you that there was something
27 seriously wrong with this experiment. You recall the memo. Will
28 you put the memo up, please, 354. You recall this was a memo that

1 Dr. Gunderson wrote about a year after the experiment was done.
2 He says in the summary section that the results -- rather that
3 the quality and accuracy of the data may have been somewhat
4 compromised by the mix-up in a lot of dye. He was the lead
5 scientist on this experiment.

6 When he testified in person, he told you he knew something
7 was wrong with the experiment. He wasn't getting the results he
8 thought he should get. When he found out about the mislabeled
9 dye, he said that's it, that's why I wasn't getting the proper
10 results, and he told you that he, the lead scientist on this
11 experiment, he could draw no conclusions from that experiment with
12 respect to the number of beads that could be decoded. He's the
13 lead scientist. He told you it wasn't until after we did the
14 experiment again, until after we ran it, after the roadshow, that
15 any meaningful data was obtained regarding the number of bead
16 types.

17 So I think the consensus of the scientific evidence in the
18 case was that there was something seriously wrong with this
19 experiment because of the mislabeled dye.

20 Take a look at Exhibit 355.

21 MS KEARNS: Which exhibit is this, Counsel?

22 MR. PANTONI: 355.

23 I'm showing you this because I think it's very important
24 that in Quarter 4 of 2000, that's after the roadshow, after Dr.
25 Czarnik was fired, the goal was to decode how many beads? 500
26 beads. Goal was only 500 because the 768 decoding experiment was
27 not effective.

28 Now, in terms of Dr. Czarnik's whistleblowing, Dr. Czarnik

1 testified that he spoke with Mark Chee about the mislabeled dye
2 issue. You recall that. He found out about the mislabeled dye,
3 he went to Mark Chee. Mark Chee was the right person to talk to
4 because he was in charge of the decoding effort. He was Kevin
5 Gunderson's boss, and Mark Chee was in charge at Illumina during
6 the roadshow. John Flatley sent out a memo during the roadshow
7 Mark Chee is in charge. So he was right person to go to.

8 Dr. Czarnik told you I went to Mark Chee, told him about the
9 mislabeled dye issue, questioned him about the issue. He told
10 Mark Chee you need to contact the roadshow team, you need to tell
11 them about this problem, and not to do that, failing to do that,
12 could constitute fraud on investors. That was Dr. Czarnik's
13 testimony.

14 Mark Chee didn't deny that that conversation took place.
15 Mark Chee was adamant about a lot of things in this case, as were
16 several of the defense witnesses. But I asked him two or three
17 times about that conversation, and each time he simply said I
18 don't recall.

19 I said, "You don't recall or are you denying the
20 conversation?"

21 He repeated, "I simply don't recall."

22 It's important that Mark Chee didn't deny that that
23 conversation took place.

24 We also showed you in the course of the trial several
25 e-mails that Czarnik sent out about this problem, the decoding
26 problem. Sent an e-mail to David Walt. That's e-mail that David
27 Walt said he only read the first paragraph of. He sent that out.
28 He sent an e-mail to Mark Chee and to Jay Flatley on the subject

1 of decoding problems.

2 Now, Illumina says that the decoding had nothing to do with
3 Dr. Czarnik's termination. Any concerns that Dr. Czarnik may have
4 had about decoding had nothing to do with the termination. I
5 don't think that's the case. I don't think you can find that
6 that's the case.

7 You'll recall those notes that Jay Flatley wrote in
8 conjunction with the discussion he had with Jennifer Kearns. I'm
9 sure you remember these notes. These are notes that Mr. Flatley
10 and Miss Kearns talk about on the telephone. It's essentially a
11 script for what to say to Dr. Czarnik at his termination. The
12 first point on these notes states, "I understand you have
13 expressed some strong opinions in the last few days about this
14 --" Jay Flatley told you he made statements, all the other
15 statements on these notes, except for that one. You are going to
16 have to decide whether that's credible or not. These notes were
17 prepared in anticipation of a meeting. Miss Kearns and Jay
18 Flatley discussed what would be said to Tony Czarnik at the
19 termination meeting. Dr. Czarnik remembers these statements being
20 made. They are on Jay Flatley's notes.

21 I think that's compelling, ladies and gentlemen, the
22 decoding and the terms Dr. Czarnik expressed had something to do
23 with his termination.

24 I want to take a few minutes to talk to you about the
25 verdict form in this case. This is the actual verdict form, a
26 blow-up of the verdict form you will have in the jury room. These
27 are the questions you will be asked to decide in this case. Now,
28 rather than focusing your attention on the exact, all the language

1 in the verdict form, I'm not going to take you through every
2 question, I just want to point out a few things that I think will
3 be helpful in understanding the verdict form when you deliberate.

4 The first thing is the questions are divided up into three
5 different sections in terms of liability. You are asked questions
6 about disability discrimination, you are asked questions about
7 retaliation, and you are going to be asked questions about
8 termination and violation of public policy. That's the same thing
9 as whistleblowing.

10 Now, there are three separate claims in the case. One thing
11 you need to know is you are to decide each one of these claims
12 separately. The fact that you may find in favor of one party on
13 one claim, it doesn't necessarily mean that you must find in favor
14 of the same party on any other one. They are separate and
15 independent claims and you decide them separately.

16 There's a phrase that's used repeatedly in the verdict form,
17 and that's asking you whether you find that the termination or
18 other adverse action was in whole or in part caused by some
19 illegal factor, disability or retaliation or whistleblowing. You
20 are being to asked to find whether Illumina took action in whole
21 or in part for certain reasons.

22 Now, "in whole or in part" means that in order to find
23 liability, you've got to find that, for example, discrimination
24 played a role in the decision to terminate. "In whole or in part"
25 means you don't have to find that was the only reason for the
26 termination or that was the only reason for any other action taken
27 against Dr. Czarnik. All you need to find that it was a
28 contributing factor in the decision, because employers can have

1 multiple reasons for termination or have multiple reasons for any
2 employment action. You just need to find that the illegal reason
3 played a role in the decision to terminate.

4 Now, because I told you there are three separate claims, I
5 want to show you two jury instructions that you are going to be
6 given about two of the claims. When the closing arguments are
7 over, Judge Prager will be reading this instruction along with
8 many others, but I want to highlight something about this
9 retaliation claim. The retaliation claim is the claim that Dr.
10 Czarnik was fired in part because he complained about
11 discrimination. It's important to note because this is a separate
12 claim, separate from the other two, that in order to prevail on
13 this claim, Dr. Czarnik does not have to prove that he was
14 actually discriminated against. In other words, conceivably you
15 could find that Dr. Czarnik wasn't discriminated against but was
16 retaliated against. Proving actual discrimination is not a
17 necessary element of the retaliation. All you have to find is
18 that Dr. Czarnik had a good-faith belief that he was being
19 discriminated against and that Illumina fired him for or took
20 other action against him in whole or in part for that reason.

21 Similarly, on the whistleblowing claim, we can't show you,
22 we can't prove to you that Illumina actually used the pretty
23 picture on the roadshow. We're not going to be able to prove
24 that, we didn't prove that in the case, but legally that's
25 irrelevant. This instruction tells you why. In order to prevail
26 on the whistleblowing claim, Dr. Czarnik does not have to prove
27 that Illumina actually did disclose information from this
28 experiment. All we need to prove, and I believe we did prove, is

1 that Dr. Czarnik had a reasonable belief that Illumina may have
2 used or was planning to use this information. He raised these
3 concerns and that Illumina took action against him in whole or in
4 part because he raised those concerns.

5 Employers may not retaliate against employees who reasonably
6 blow the whistle, whether or not a violation of law actually
7 occurred, which means in the whistleblowing claim, you need to
8 decide whether Dr. Czarnik had a reasonable belief that the
9 information being sent to the roadshow was faulty and that
10 Illumina took action because of that.

11 Let me conclude this portion of my closing. I'm going to
12 save some time to rebut what Miss Kearns may have to say.

13 Going back to the issue of the goals, going back to the
14 issue of whether Jay Flatley, whether he gave those goals to Tony
15 Czarnik on May 19 of 2000, was that set up, were those legitimate
16 goals or were they set up designed for failure, ladies and
17 gentlemen, if you had any doubt, any more doubt after looking at
18 the graph that we showed you in terms of the unreasonableness of
19 the goals, in terms of their numbers, in terms of the time frame,
20 in terms of the fact that Dr. Czarnik had to work alone, if you
21 have any doubt whatsoever this was a set-up, I want to show you
22 one more document that's in evidence. Can you call up 223.

23 Exhibit 223. This is a fax sent by a lawyer in Washington
24 D.C. to Jay Flatley and John Stuelpnagel. You saw this during the
25 trial. This is a mark-up of the S1 registration statement.
26 Notice the date of the fax. May 18 of 2000. Now, the date the
27 goal sheet that was assigned to Dr. Czarnik, May 18 of 2000, same
28 day, given to Dr. Czarnik the next day, May 19 of 2000.

1 Flip forward to page 33 of the exhibit. We have a blow-up
2 of it, too.

3 There's a lot of writing on this. There's a reference here
4 to Dr. Czarnik and there's a reference to Rich Pytelewski. You'll
5 recall Jay Flatley actually told Rich Pytelewski he was being
6 terminated. He was the other senior manager who is actually
7 terminated. Next to both Rich Pytelewski's name and Dr. Czarnik's
8 name you find this asterisk. Look at the language for the
9 asterisk. Let me draw your attention. This note says, "Modify
10 Czarnik and Pytelewski to reflect terminations."

11 Why would a lawyer in Washington D.C. sending Jay Flatley a
12 fax with notes saying that this document is to be modified to
13 reflect Czarnik and Pytelewski termination? See the date of the
14 fax? May 18 of 2000. The very next day, May 19 of 2000, Dr.
15 Czarnik was given these goals.

16 I think the inference from that language on the same day
17 modified to reflect termination is compelling evidence these goals
18 were designed as a set-up from the very beginning.

19 I'll reserve the rest of my time.

20 THE COURT: Thank you very much Mr. Pantoni.

21 MS KEARNS: May we take our morning break?

22 THE COURT: Yes, we'll take our morning recess at this
23 time. We'll be in recess until 25 minutes after 10:00. Please
24 remember the admonition not to form or express any opinions about
25 the case, not to discuss case among yourselves or with anyone
26 else. We'll be in recess until 10:25. 10:25.

27 (Recess.)

28 THE COURT: Record will indicate all the jurors are

1 present, both counsel and parties present.

2 Mr. Pantoni has completed his first phase of his closing
3 argument, and he'll have an opportunity to rebut, but now it's
4 Miss Kearns' opportunity to present her closing argument.

5 MS KEARNS: Thank you, your Honor.

6 THE COURT: Miss Kearns.

7 MS KEARNS: Well, good morning. This is a moment that
8 has been a long time in coming, and I'm sure it's felt like a
9 longer time in coming for all of you. I, like Mr. Pantoni, want
10 to thank you very much for your attention, your cooperation, the
11 fact that you've remained attentive during times when the
12 testimony was lengthy and at times tedious. And for that I thank
13 you, and I think that you've done a wonderful service by remaining
14 on the jury. You saw when we started we had many more people, and
15 we're down to 12 plus one alternate.

16 Well, it's rare that I would have an opportunity to thank my
17 opposing counsel in a closing argument, but in fact I have the
18 opportunity to do that. The last board which Mr. Pantoni put up
19 on the screen actually was a portion of a facsimile, and you
20 remember that that fax was a fax cover sheet sent by lawyers who
21 were working on the S1 registration statement, sending a draft
22 mark-up to Jay Flatley, and during Mr. Flatley's testimony, you
23 heard him talk about the S1 and how there were 10, 20 drafts a day
24 going back and forth. They were all copied to him as the CEO of
25 the company. But Mr. Flatley testified he didn't read these in
26 detail. These were comments from Illumina's lawyers, the
27 underwriter's lawyers going back and forth.

28 The portion of the e-mail, the e-mail cover sheet that was

1 put up, shows there was a transmission on May 18th, 2000.
2 Mr. Pantoni had Dr. Czarnik scroll back to page 33 of that exhibit
3 and it showed mark-ups all over the page. Frankly, I wouldn't
4 have wanted to be a lawyer on that deal. But what he pointed out
5 is next to Pytelewski and next to Czarnik, there were asterisks,
6 at the and the legend at the bottom of the page says, "Revise to
7 reflect terminations."

8 Now, I thank Mr. Pantoni, because this is evidence that
9 absolutely corroborates what we have been telling you all the
10 time, which is that on March 22 or March 23, Tony Czarnik walked
11 into Jay Flatley's office and said I quit. I'm a research fellow
12 now, it's intolerable to me, I want to be gone, I want to be gone
13 immediately, and I want to take all my stock. This is the first
14 bit of evidence offered by the Plaintiff on his own initiative
15 that shows that the resignation which Dr. Czarnik now so adamantly
16 denies happened, did in fact happen. That is why the lawyers
17 working on the deal knew that Tony Czarnik was going to be leaving
18 the company.

19 Now, Mr. Pantoni in rebuttal is probably going to get up and
20 say well, the word was "termination," not "resignation." But the
21 bottom line is from a legal perspective whether it's a resignation
22 or termination, it is a departure from the company, and Tony
23 Czarnik told Jay Flatley on March 22 or 23rd that he felt it
24 intolerable to remain as research fellow and that he was quitting.

25 Now I need to go through a few of the points that
26 Mr. Pantoni made before kind of launching into my own overview of
27 the case. One thing that Mr. Pantoni said very early on is that
28 the only reason given to Dr. Czarnik for his termination on

1 September 5, 2000, was his failure to meet goals. That is
2 absolutely incorrect. If you wish to take notes, you are free to
3 do so, but I'm going to read into -- I'm going to tell you about
4 certain pieces of evidence that came in that absolutely show that
5 the version of the facts that I'm describing to you is true.

6 Bear in mind that during your deliberations, after you are
7 instructed by Judge Prager, if you wish to review testimony of any
8 witness, we've had a very competent court reporter here throughout
9 the proceedings. You can always ask to see the transcript of what
10 the witness testified to if you need to refresh your recollection.

11 Similarly, exhibits that were admitted in evidence will go
12 with you into the jury room and you'll have an opportunity to look
13 at those. And frankly, if you want to ask for a transcript of
14 these closings so you can see what I've told you in print, you are
15 welcome to do that.

16 Addressing the issue that Dr. Czarnik says the only reason
17 given to him for his termination was his failure to meet goals,
18 not true at all. Jay Flatley testified that during the
19 termination meeting he handed Tony Czarnik a termination memo, and
20 if you look at the termination memo, which is in evidence, it's
21 Exhibit 334, let's put that up, the termination memo references,
22 "Your progress toward goals has been insufficient." It's in the
23 bottom of the first paragraph. "Your progress toward the goals
24 has been insufficient," and as of really the hundred-day mark many
25 of the 30-day goals were still not met.

26 So Dr. Czarnik was told he hadn't met goals. He was also
27 explicitly informed he hadn't made progress toward goals. He
28 hadn't made effort.

1 Another issue that Mr. Pantoni brought up in his closing was
2 he claimed that Kevin Gunderson, who was the chief scientist
3 leading up the 768 decode experiment, he says that Kevin Gunderson
4 admitted or said that no conclusions could be drawn from that
5 experiment. This is an absolute misrepresentation of what the
6 evidence showed. Kevin Gunderson and others testified that there
7 wasn't one 768 decode experiment, there was a series of 768 decode
8 experiments, and the first one was done in the spring of 2000,
9 April to be exact. That is the experiment as to which Kevin
10 Gunderson testified no conclusions could be drawn. It was, you
11 know, a mess.

12 Mr. Pantoni argued that if you do a good experiment, you
13 don't repeat it. As any of the scientists in this room know,
14 including Dr. Czarnik, you do repeat good experiments. It's
15 called replication. One of the reasons to show that an experiment
16 is successful is the ability to do it over and over and over and
17 to get same result. So that statement is inaccurate. But the
18 statement that Kevin Gunderson said the 768 yielded no results, it
19 ignores the fact there were several such experiments and it
20 ignores the fact what Kevin Gunderson was talking about when he
21 talked about an experiment from which you could draw no
22 conclusions was the first one in the series, the April 1, not the
23 one done during June, July of 2000.

24 Now, another issue I want to touch upon briefly is this
25 issue about Dr. Czarnik's goals. Mr. Pantoni in closing noted
26 that there's this draft S1 going back and forth between lawyers and
27 talking to Jay Flatley on May 18th. He then puts up Dr. Czarnik's
28 ultimate goals and says look, these goals dated May 18th were

1 actually given to Dr. Czarnik on May 19th. Well, we already know
2 why the goals were given to Dr. Czarnik on the 19th rather than on
3 the 18th, and that is because Dr. Czarnik was supposed to meet
4 with Jay Flatley on May 18th. On May 17th Dr. Czarnik
5 unilaterally tells Jay Flatley, "By the way I may not be able to
6 make our meeting tomorrow because I'm going to go to the DFEH."
7 But the reality is that the goals that were ultimately delivered
8 to Dr. Czarnik on May 19th were already created, they were ready
9 to go, and Jay Flatley would have given them to him on May 18th
10 had he appeared for his meeting. Instead he didn't show, and so
11 they were given to him on the 19th.

12 The attempt to draw a connection between a draft S1 that
13 came to Jay Flatley on May 18th and the date of the goals is just,
14 frankly, in a word, it's preposterous. If we had determined that
15 the inference was going to be drawn, we probably could have
16 burdened you with draft S1's that were exchanged and copied to Jay
17 Flatley on May 17th, May 16th, May 15, May 14, so on. There is no
18 connection between a draft S1, probably one of 10 or 12 that day,
19 going to Jay Flatley, and the development of the goals.

20 Now I'll say a word for a moment about the goals themselves,
21 because Mr. Pantoni has insisted that the goals given to Tony
22 Czarnik were unreasonable, unattainable. He said particularly the
23 second goal, the binary oligo encoding goal. In fact, in opening
24 statements, and again you can request a copy of the transcript of
25 openings if you wish to, Mr. Pantoni called that second goal the
26 killer goal.

27 Now, it's interesting that the killer goal was based upon an
28 invention developed by no one other than Tony Czarnik. It's also

1 interesting that the evidence has shown that the killer goal,
2 which Tony Czarnik says was impossible, and which Mr. Pantoni has
3 had a very interesting and entertaining chart prepared about, is a
4 goal which was worked on by a junior-level scientist, Gali
5 Steinberg, and feasibility of decoding a thousand bead types using
6 a binary oligo encoding technique was demonstrated by Gali
7 Steinberg, a junior scientist, working alone, within a period of
8 about 60 days.

9 Now, Mr. Pantoni has spent a lot of time in presenting the
10 evidence and in closing on arguing that if by a certain point in
11 time the company had only achieved a certain number of decoding
12 results, in other words if the company had only actually decoded a
13 certain number of beads, he uses that and says look how
14 unreasonable it is to ask Tony Czarnik to do much more. Well, a
15 couple of analogies are in order here. I think we have an analogy
16 earlier in the case about last name/first name. If you look at it
17 this way, from the outset at the beginning of the company, perhaps
18 Illumina was going to develop a library of 128 first names. What
19 did it have to do to get there? It had to develop an alphabet.
20 It had to develop a system for putting letters together. It had
21 to develop a system for making combinations of letters that
22 actually were pronounceable. And after a period of time, it may
23 have had a library of a certain number of first names.

24 After doing that, it may have said let's go ahead and
25 develop a library of an equal number of last names, and by that
26 point, though, it no longer needed to develop an alphabet, it no
27 longer needed to develop a system for putting letters together, it
28 simply needed to sort of replicate what it did in the first phase

1 and create a different set of last names.

2 And then when you say as a third test develop a library of
3 paired names, first name with a last name, it's a simple
4 mathematical combination. It's a permutation, basically. You
5 take first name number one and combine it with each and every one
6 of those last names. You then take first name number 2 and
7 combine it with each and every one of those last names. What you
8 get, I believe, is with a library of 128 first names and 128 last
9 names, when you combine them, you have a library of 16,000 first
10 last names.

11 Another analogy which I developed, and maybe less
12 entertaining, is a sandwich shop. Say the first test when you
13 start up the company is say let's develop a sandwich shop. You
14 send months developing recipes. Let's say you spent months
15 designing the machinery you are going to use, designing, building
16 an oven. You spend months developing a recipe to make bread. You
17 spend months developing outside vendors to supply you with meat,
18 cheese, for the sandwiches. Finally you get to the point where
19 you are able to bake the bread, get the other goods in, assemble
20 the sandwiches, and you are an operational sandwich shop. So when
21 your next goal is to produce 500 sandwiches a day, you are not
22 having to reinvent everything that you did to get there, you are
23 able to piggy-back, if you will, on all the prior work. And
24 that's what the binary oligo encoding goal was asking of Dr.
25 Czarnik.

26 Dr. Czarnik is trying to say that he was being asked to do
27 the impossible, but in fact if that's the case, then Gali
28 Steinberg is an absolute genius because she virtually achieved the

1 impossible within a short period of time working alone and without
2 the benefit of the same level of scientific training and
3 experience Dr. Czarnik had.

4 Now, one of the things I want to focus upon now is that the
5 Plaintiff in this case, Dr. Czarnik, at all times has the burden
6 of proof on each of his three claims. The judge is going to
7 instruct you on this, but it's important to remember Illumina does
8 not have, did not have, the burden to disprove anything that Dr.
9 Czarnik has said. We did not have the burden to prove the reasons
10 why he was fired. But we did so. The evidence in this case has
11 shown that Dr. Czarnik was poorly equipped to fill the CSO
12 position from the beginning. Mr. Pantoni said a lot of time has
13 been spent on Dr. Czarnik's work ethic, and in fact that's because
14 that lack of work ethic, the lack of business sense, the lack of
15 drive on Dr. Czarnik's part is what led to John Stuelpnagel and
16 Mark Chee really being the driving forces, the driving engines of
17 this company from the very beginning.

18 We heard testimony from persons like Marsha Bakko, persons
19 like Deborah Flamino, who indicated that by the end of 1998, early
20 1999, well before any disclosure of depression, it was widely
21 viewed within the company that it was John and Mark running the
22 company. The evidence has shown that Dr. Czarnik failed to make
23 significant scientific or business contributions to Illumina.
24 Sometimes it's difficult in closing to say things so bluntly, but
25 they have to be said because this is a case in which Dr. Czarnik
26 is attacking the credibility, the honesty, of all of the witnesses
27 who testified against him. What I want to draw your attention to
28 is that for the most part, many of these witnesses who testified,

1 Steve Barnard, Todd Dickinson, Changeng Zhao, Diping Che, Kevin
2 Gunderson, these people are scientists with Illumina, but they
3 were called in this case in Dr. Czarnik's case in chief. He chose
4 to put these witnesses on. And in fact I examined them once they
5 were put on. But Dr. Czarnik made a conscious choice to put these
6 people on the stand and to have them testify.

7 The evidence has shown that Dr. Czarnik has a tremendous
8 ego. I think the evidence, which I'll talk about in a moment, has
9 shown that there is absolutely a monetary motivation behind his
10 bringing of this case. We heard Dr. Mallinger read his notes into
11 the record. Dr. Czarnik told Mallinger this was the best
12 opportunity he was likely to have. He made statements to Dr.
13 Mallinger that he thought it was going to be a \$10 million score.
14 He talked to him about the ego perks of being a high level
15 scientist within the company.

16 And a comment made by Dr. Barnard in his testimony really
17 sums things up. Dr. Barnard told us you can like somebody, you
18 can respect somebody, but you can feel that they are not doing a
19 good job. And in fact that's how most of Dr. Czarnik's colleagues
20 felt about him. They liked him, they respected him for what he
21 did know well, which is combinatorial chemistry. But as we all
22 know, the company moved in a direction that was not combi-chem, it
23 was genomics. Dr. Czarnik has admitted himself he has little if
24 any expertise in that area. The very sad thing is although he was
25 chief scientific officer, Dr. Czarnik didn't try to educate
26 himself in the area of genomics at all.

27 I want to talk very briefly about some red herrings. This
28 is a legal term. Basically red herrings are irrelevant

1 distractions. We've heard about a number of them in this case.
2 I'm touching upon them only to show you there are a number of
3 things that are thrown out at you to try to distract you. Why
4 would that be the case? That would be the case because the
5 Plaintiff doesn't have any evidence of discrimination, retaliation
6 or whistleblowing. So he wants to throw out there issues which
7 may cause you to feel some sympathy or cause you to feel some
8 sense that he has been wronged.

9 What I'm talking about includes things like founder status.
10 Founder status is legally irrelevant. It doesn't matter if you
11 are a founder. It does not guarantee you the right to stay with
12 the company. It doesn't guarantee you the right to vest in all of
13 your stock. But we've heard founder, founder, founder, almost
14 every day of this trial.

15 Mr. Pantoni will argue that there is a requirement in Dr.
16 Czarnik's offer letter he be acknowledged as a founder. When you
17 are back in the jury room, take a look at Exhibit 24. The
18 language makes it very clear, it's a unilateral problem where Tony
19 Czarnik said to acknowledge CW Group as a founder. No one agreed
20 to acknowledge Tony Czarnik or Mark Chee, Larry Bock. It was a
21 unilateral problem.

22 One of the interesting issues is the April 6, 1996
23 breakdown. It's been a pivotal event that's been discussed
24 throughout the case. This is something very important to
25 remember. With respect to Tony Czarnik's discrimination claim,
26 he's claiming that Illumina discriminated against him because of
27 his disability, depression. The testimony was absolutely clear
28 out of Tony Czarnik's own mouth that on April 6 when he had his

1 breakdown, he did not tell Mark and John that he had depression.
2 He didn't say I have an emotional or mental problem. He did
3 exhibit tearfulness, he did exhibit he was very upset, but John
4 Stuelpnagel is not a mind reader. Mark Chee is not a mind reader.
5 So the bottom line is if Mr. Pantoni is arguing that John
6 Stuelpnagel's allegedly callous, uncaring behavior in an April 6
7 meeting was discriminatory. It could not have been discriminatory
8 because nobody had any knowledge on that date that Tony Czarnik
9 suffered from any disability.

10 So I submit to you that the April 6 breakdown has been
11 thrown in certainly to set some context, I won't disagree with
12 that, but also to prejudice the jury against Illumina and against
13 John Stuelpnagel in particular.

14 But the reality is, however, John Stuelpnagel behaved during
15 that April 6 meeting, and I think you've heard Dr. Stuelpnagel's
16 testimony on that point, as well as Dr. Chee's, no one knew Tony
17 Czarnik had any disability at that point, and any attempt to try
18 to categorize what happened in that meeting as discrimination is
19 essentially what I'll call retroactive discrimination. It's
20 saying you didn't know I had a disability at the time but you
21 treated me in a way that I don't think is the right way to be
22 treated, therefore you discriminated against me. It's not a
23 logical argument.

24 The proposed reduction in stock once Dr. Czarnik became a
25 research fellow. Another red herring. It didn't happen. It's
26 true Jay Flatley asked him if he'd sign a change in position
27 agreement. He declined. The change didn't happen. And in
28 opening, Mr. Pantoni said well, Mark Chee as a research fellow

1 hasn't had his stock vesting reduced. In fact his stock vesting
2 has been reduced to one-half the rate that it was to reflect his
3 one-half time commitment.

4 The other point to remember with respect to Dr. Chee is
5 we're now two years further along. At the time that Tony Czarnik
6 quit, he wanted to take all of his stock. He had vested in 40
7 percent of it and he was saying give me the additional 60 percent
8 and let me walk. Jay Flatley, an experienced, seasoned CEO of a
9 public company, knew that he has responsibilities to shareholders,
10 investors and other employees, and that it would be frankly very
11 inappropriate for him to let an employee who had been unproductive
12 and subversive walk away with 60 percent of stock vesting in which
13 he had only acquired vested right in the earlier 40 percent.

14 The assignment to Jay Flatley once he was a research fellow,
15 Tony Pantoni said in closing after he becomes research fellow he
16 reports to David Barker but then miraculously he's assigned to Jay
17 Flatley. Again we have to understand the context in which these
18 things occurred. What happens is on March 8, Tony Czarnik
19 announces to the entire company that he has stepped down to become
20 a research fellow. In his e-mail of March 8 he actually tells
21 everyone in the company that he is better suited to a research
22 fellow position; that his abilities lie more in that area, and he
23 is as of that point reporting to David Barker.

24 By March 22 or 23, Tony Czarnik has come into Jay Flatley
25 and say I quit, it's intolerable, I don't like the change in
26 position, I want to leave, I want to take all my stock. At that
27 point it becomes clear that Tony Czarnik is intending to leave the
28 company. That began a fairly protracted series of negotiations

1 about a severance package with Tony Czarnik leading the charge and
2 saying give me all my stock.

3 Remember David Barker was new. He had just come on board,
4 and to put it very bluntly, as I recall from time to time in this
5 opening, he was cleaning up Tony Czarnik's messes. He was trying
6 to unify the chemistry group, the molecular biology group. He
7 realized from conversations with Jay that Tony had resigned, was
8 going to be on his way out, and I believe that Dr. Barker's own
9 testimony was that he felt that it would be better for Tony to
10 report to Jay while they continued to try to negotiate a severance
11 and for David Barker to focus upon unifying the two scientific
12 groups, getting up to speed on the science and not having the
13 distraction of managing a problem employee.

14 Furthermore, Dr. Barker recognized that many of the chemists
15 who have previously reported to Tony Czarnik liked him immensely.
16 He didn't want as their new boss to have to come in and be seen as
17 the bad guy coming down hard on the guy they used to report to and
18 a guy that they still liked very, very much. There's an
19 absolutely credible, reasonable explanation for having Tony
20 Czarnik report to Jay Flatley. I've just explained the
21 circumstances under which that came about, and bear in mind there
22 were only scientists who reported to Jay Flatley. David Barker
23 was one of them. David Barker reported to Jay Flatley. [Michal]⁴¹
24 Lebl, another very senior level scientist, the inventor of the
25 Oligator, about which you heard in testimony, he also reported to
26 Jay Flatley. Jay Flatley certainly had scientific resources,
27 including the new CSO, available to him to evaluate Tony Czarnik's
28 progress.

1 Now let me jump ahead a bit.

2 Your Honor what time did I begin?

3 THE COURT: 10:27.

4 MS KEARNS: 10:27. Okay.

5 Yes, we set this schedule for ourselves and we're really
6 trying to stick to it.

7 We've got three different claims in this case. We've got
8 discrimination, we've got retaliation and we've got
9 whistleblowing. These claims are, with the exception of the first
10 two, the first two are really unrelated to the second, and I do
11 suggest to you that this is one of those cases, you've heard the
12 common phrase throw everything against the wall and see what
13 sticks, I think that's what's going on here. I think that, as I
14 explained, some of the testimony and evidence that has come in
15 this case, Dr. Czarnik knew he was going to be leaving Illumina.
16 He knew it was performance related. He knew that he intended to
17 sue the company. So he developed, I'm sure with the assistance of
18 some counsel, not necessarily Mr. Pantoni, but he developed some
19 theories, and he then put in place certain actions, certain
20 statements that he felt would support his case down the road.

21 Now let me give you an example. We know from Dr. Czarnik's
22 testimony in deposition -- And let me just stop there for a
23 moment.

24 There was a little moment of humor when I asked Dr. Czarnik
25 on cross-examination whether he remembered me deposing him, and we
26 all kind of, at least those of us in the case, laughed, because I
27 did over a period of six days, last summer and fall, three days in
28 July, three days in September. The transcript length is almost a

1 thousand pages. Dr. Czarnik read all thousand pages, actually 932
2 pages, of his deposition, and he made no changes or corrections
3 whatsoever.

4 During his deposition, which is under oath, the same oath he
5 took here on the witness stand, I asked Dr. Czarnik when the first
6 time is that he consulted with any lawyer regarding his employment
7 situation at Illumina. What Dr. Czarnik said under oath was it
8 was in the first quarter of 1999.

9 Okay, first quarter of 1999 is January, February or March,
10 1999. Two important things about that timing. It's after,
11 shortly after the November, 1998 counseling with John Stuelpnagel
12 in which John gave Dr. Czarnik a wake-up call about his
13 performance. Second important temporal issue: It's before Tony
14 Czarnik has this breakdown and discloses he has depression.

15 Now, in closing arguments lawyers are entitled to suggest to
16 the jury that certain inferences are reasonable and certain
17 inferences are unreasonable. I think it's unreasonable to suggest
18 that an employee contacts a lawyer about his employment situation
19 at a company unless he thinks there's a problem. Tony Czarnik
20 knew there was a problem because in November of 1998, John had a
21 very pointed discussion with him. That's why he contacted a
22 lawyer about his employment situation at Illumina in Q1, 1999.

23 Now, what did Dr. Czarnik do with that when I asked him
24 about it on cross-examination? Said it was a mistake. Said he
25 meant to say Q1 of 2000. Well, all I can say is Dr. Czarnik had
26 six days of deposition testimony, he had the chance and in fact
27 admitted he did read every transcript. He did not make any
28 changes. I suggest that he's changing his testimony here in court

1 because it better fits with his theory of the case.

2 Now, another issue that we have to focus upon now is let's
3 talk about the disability claim. The Plaintiff bears the burden
4 at all times. The first disclosure of depression occurs April 8,
5 1999. So frankly, anything that happened prior to April 8, 1999,
6 is irrelevant to the disability claim because no one knew he had a
7 disability. But if there is anything that happened before April,
8 1999, that was viewed as negative, such as a performance
9 counseling, maybe one that occurred in August of 1998, walking
10 around Cardiff, or one that occurred in November, 1998, with John
11 Stuelpnagel, these things happened to Tony Czarnik in the absence
12 of any information about his medical condition. It's Dr.
13 Czarnik's burden on his first claim to show that after his
14 disclosure he in fact was treated differently and negatively by
15 Illumina. You'll also be instructed by the judge that if Illumina
16 has offered any evidence of a legitimate reason for the way Dr.
17 Czarnik was treated post-disclosure, he has to show that the
18 reason offered by Illumina is false and he has to convince you
19 that the real reason was disability discrimination.

20 Now, first of all, Dr. Czarnik has failed to meet his burden
21 on his discrimination claim to this first reason I'll talk about.
22 He hasn't shown that he was treated any differently after his
23 disclosure of depression.

24 Very quickly, and I'm going to try not to be too rapid-fire
25 here, the evidence has shown by December of '98 or January '99,
26 many people perceive that the company was really being run by John
27 Stuelpnagel and Mark Chee. That's before the disclosure of
28 disability. Dr. Czarnik claimed on cross-examination that after

1 he disclosed his depression on April 8, 1999, John Stuelpnagel
2 stopped talking to him entirely. When I pressed him on
3 cross-examination and read from his deposition, he then admitted
4 it was just reduced communication.

5 Now, this is one point in which I really want to make
6 emphasis. During the period April 23, '99, about two or three
7 weeks after the breakdown, for about a year period, Dr. Czarnik
8 was treating with Dr. Mallinger. You saw Dr. Mallinger. I think
9 he's a very, very credible witness. He's neutral. He has no
10 desire -- he had no desire to be here. He has no interest in
11 Illumina. Frankly, if his loyalties lay anywhere, they had to be
12 with his former patient, Tony Czarnik, not the company for which
13 Tony Czarnik worked.

14 Dr. Mallinger on my examination was allowed to read into the
15 record, a record that's available to you should you wish to
16 examine it, what Tony Czarnik was saying to him at the time of
17 these events.

18 Now, Mr. Pantoni has characterized the period after April 8
19 as one in which Tony Czarnik was being shut out. He wasn't being
20 talked to by John Stuelpnagel. His opinions weren't being
21 solicited or valued. Ask to see the transcript of Dr.
22 Mallinger's testimony. You will see that Dr. Mallinger was told
23 by Tony Czarnik as of June 1st things were much better at work.
24 He was then telling Dr. Mallinger that John Stuelpnagel was
25 soliciting and valuing his opinions more than before.

26 I submit to you Dr. Czarnik had no incentive to lie to his
27 therapist at the time. Dr. Mallinger had no reason to put things
28 into his written notes that weren't said by the patient. Dr.

1 Mallinger's notes are a very accurate record of what Tony Czarnik
2 was saying at the time. At the time. April, May, June of '99,
3 before he was embroiled in a lawsuit against Illumina.

4 Dr. Czarnik on his own examination admitted even after his
5 disclosure of depression he continued to be invited to board of
6 directors meetings by John Stuelpnagel. Remember Tony Czarnik was
7 never a member of the board, but it was John Stuelpnagel's
8 practice to include all of his senior management in those board
9 meetings. That didn't change. He continued to include Tony
10 Czarnik in those meetings. He continued to include Tony Czarnik
11 in senior staff meetings when they occurred.

12 Virtually all of the witnesses testified they never saw
13 anyone treat Tony Czarnik with disrespect. To draw a contrast,
14 one example we heard about is that Tony Czarnik in fact did treat
15 others with disrespect. When the company made the cover of the
16 electronic publication Bio World, Tony Czarnik made an especially
17 nasty, vicious crack at John Stuelpnagel's expense. What should
18 have been a very happy, exciting, positive energy moment for
19 Illumina finally making the news, Tony Czarnik says, "What, has
20 John been indicted?"

21 That is highly offensive, and I think it speaks volumes
22 about Dr. Czarnik's character.

23 Remember he said this in an open room, the big room, with
24 all the scientists.

25 Dr. Czarnik is now contending that after his disclosure of
26 depression he was cut out of all the important business activities
27 at Illumina. In fact, they put up a slide with a list of all the
28 things he was supposedly cut out from. I can't address all of

1 them in the half hour I have remaining, but let me say this: On
2 cross-examination, Dr. Czarnik admitted the company was a genomics
3 company. He finally admitted on my examination that before his
4 disclosure of depression, there were several genomics related
5 business development meetings that he did not participate in, was
6 not asked to participate in. I read them name-by-name. Some of
7 them may come to mind. Celera, that's the one that comes to my
8 mind at the moment, but I probably rattled off 10 different
9 company names said to him was this a genomics-related approach.
10 For many of them he said yes, for some he said I don't know, I
11 didn't even know we were talking to them. But I have established
12 through the Plaintiff's own testimony that there were genomics
13 related business activities ongoing before his disclosure in which
14 he was not involved.

15 There were admittedly ones in which he was not involved
16 after his disclosure. But the fact is that's not a change. It's
17 not a change. Pre-disclosure, post-disclosure. It's a
18 continuation.

19 Tony Czarnik did not have genomics expertise. He's admitted
20 that. He didn't do anything to try to develop genomics expertise.
21 And one of the interesting things -- You know, I've commented
22 about the fact I think Tony Czarnik is having -- Let me put this
23 this way. He's having very different recall now. He has a vested
24 interest in the case. Tony Czarnik, the only evidence we have
25 that Tony Czarnik had any involvement in bringing ABI to the table
26 is his own testimony. He says I gave a talk at UCSD sometime in
27 February of 1999 and I had dinner after that with Michael Albin,
28 who told me that my talk in February, 1999, brought ABI to the

1 table or made ABI interested.

2 Well, we put up Exhibit 49. Exhibit 49 is the board of
3 directors board packet for the February 19th, 1999 meeting. What
4 we see is that as of the board meeting we show that we already
5 were in a marketing relationship with Applied Biosystems; that the
6 last contact with the company had been February 1st, 1999, and
7 that the next scheduled sit-down meeting with that company was
8 February 19th.

9 So Tony Czarnik's talk in February of -- sometime in
10 February '99, because he wasn't able to be more specific, it
11 didn't bring ABI to the table. We'd already been talking with ABI
12 as of February 1 and we already had a meeting scheduled with ABI
13 for February 19.

14 Now, note also when Tony Czarnik complains that he wasn't
15 involved in negotiating the ABI deal and as a consequence didn't
16 get a hundred thousand shares of stock for it, Rich Pytelewski
17 wasn't involved in negotiation the ABI deal. Rich Pytelewski
18 didn't get a hundred thousand shares of stock either. Tony
19 Czarnik and Rich Pytelewski didn't do the work involved in
20 bringing this deal in, negotiating it and closing it. And lest
21 anyone think there was a one week's worth of work, it was a
22 nine-month process. The ABI deal, it took nine months to
23 negotiate and close. It did not close until Jay Flatley was
24 already on board and had been on board for about a month, and a
25 good portion of Jay Flatley's own time in that first month of
26 employment was spent working on the ABI deal, dedicating his
27 energy and efforts. And did Jay Flatley get a bonus of stock for
28 the ABI deal? No.

1 Now, we also have heard testimony that Dr. Czarnik was not
2 involved in the recruitment of the new CEO Jay Flatley. In fact,
3 Dr. Czarnik interviewed Jay Flatley, just as the other senior
4 managers did. He had the same degree of contact with Jay Flatley
5 as Mark Chee and Rich Pytelewski. The only person who had greater
6 contact with Jay Flatley was John Stuelpnagel, his predecessor.

7 Change in position. So another issue I now need to address
8 is Dr. Czarnik's contention that Jay Flatley knew he had a
9 disability. I remember being particularly aghast at Dr.
10 Czarnik's suggestion that by telling Jay Flatley he could
11 sometimes be cynical, this really meant depressed, and that Jay
12 Flatley really knew that that's what he was talking about. I
13 don't know whether anyone else in this room beside says Tony
14 Czarnik thinks that "cynical" is code for "depressed." I think
15 that position is ludicrous.

16 Now, we've heard a theme running through Mr. Pantoni's
17 argument that neither John Stuelpnagel nor Jay Flatley used Tony
18 Czarnik as a real CSO. That's because Tony Czarnik didn't perform
19 as a real CSO. Jay Flatley came to that conclusion without input
20 from John Stuelpnagel, and Mr. Pantoni is suggesting that that's
21 incredulous, that it's, you know, a ridiculous argument.

22 Well, let talk about Tony Czarnik's performance in the first
23 few weeks of Jay Flatley's tenure as CSO. First of all, he
24 e-mails Jay Flatley at home before Jay Flatley even begins and
25 says I want to have a special schedule so I can go swimming in the
26 afternoon. Not a huge point, but unusual. Unusual for a senior
27 manager to be e-mailing his new boss weeks before the boss's
28 arrival to say I need a special swimming schedule.

1 Tony Czarnik told us in his direct examination that he
2 finally asked Jay Flatley to lunch after Jay Flatley had been
3 there for weeks, not using him as a real CSO. Well, in fact this
4 is another revisionist version of what happened. If you see
5 Exhibit 89, that's an e-mail from Tony Czarnik to Jay Flatley on
6 his first day of employment, October 18, 1999, asking Jay Flatley
7 to lunch. So the suggestion, and again these are points that all
8 are woven together to create a fabric of a story, and the fact is
9 Dr. Czarnik is trying to say I wasn't being used, and so finally I
10 was compelled to ask Jay to lunch because I wasn't being used.
11 Well, he asks Jay to lunch the very first day Jay is on the job.

12 Again, another slight change in what really happened to
13 better suit the story that's being told here in this court.

14 We heard testimony about Dr. Czarnik's abysmal performance
15 at the November off-site strategic meeting after Jay Flatley's
16 arrival. We have also heard testimony from several persons, Jay
17 Flatley, John Stuelpnagel, Dr. David Walt, about Tony Czarnik's
18 very, very poor performance and lack of preparation for the
19 January 2000 Scientific Advisory Board meeting. So bad that David
20 Walt called Jay Flatley with his concerns about it, spoke with
21 Czarnik, got a sense that Dr. Czarnik was just rationalizing,
22 couldn't hear his concerns.

23 Take a look at Exhibit 124. This is an e-mail in which Tony
24 Czarnik says to Jay Flatley, you know, had a great breakfast with
25 David and I've relieved him of several misconceptions regarding
26 the SAB meetings were addressed. They weren't misconceptions.
27 These were performance issues. Dr. Czarnik failed to recognize
28 them as such.

1 Finally, remember in the first couple of months of Jay
2 Flatley's tenure at the company, Chevron is on site. An important
3 collaboration. They have some group meetings, and the lead person
4 from Chevron says I need a one-on-one with you. He talks to Jay
5 Flatley and expresses extreme dissatisfaction with Tony Czarnik's
6 performance.

7 So in summary there, to the extent Mr. Pantoni is trying to
8 say Jay Flatley did not have an adequate chance to reach his own
9 conclusions about Tony Czarnik's conclusions and must have been
10 briefed by John Stuelpnagel, I say the evidence says exactly the
11 opposite. And remember, Jay Flatley did not just fall off a
12 turnip truck. Jay Flatley has led other companies from start-up
13 to being public companies. He's an experienced executive who
14 knows what to look for. And these were rather glaring examples of
15 failure, all of them occurring in the first eight to ten weeks of
16 Jay Flatley being on board. So Jay's conclusion that a new CSO
17 was going to be needed was an absolutely reasonable one.

18 Now I'm going to jump ahead for a moment and explain about
19 the whistleblowing issue because this is taking up a lot of time
20 in the case. One of the things we really need to remember on the
21 whistleblowing claim-- Actually let me just back up and say with
22 respect to retaliation, Tony Czarnik goes to the DFEH. To the
23 extent he's trying to say that his termination or anything that
24 happened to him after he went was retaliatory, it's really kind of
25 ludicrous, because, frankly, if the company wanted to retaliate
26 against him and fire him for going to the DFEH, it could have done
27 so at that time. Instead it kept him on for another five months,
28 pulling down five more months of 165,000 a year salary, pulling

1 down five more months of stock vesting at the rate of 6666.67
2 shares per month. Those additional five months significantly
3 enriched Tony Czarnik. They also involved a significant
4 investment of time, effort, energy on the part of Jay Flatley, who
5 had many other important things to be attending to, including the
6 company's IPO. And what did Illumina get in return for those
7 five months? Nothing. Actually what we got in return is this
8 lawsuit. This is our big thank you.

9 So if Mr. Flatley had known once Tony Czarnik went to DFEH
10 that he's gone, he would have fired him at that time.

11 Now let's talk about the whistleblowing claim. It is Tony
12 Czarnik's burden to show several different elements on the
13 whistleblowing claim. He has to show that he actually had a
14 belief that misleading data was going to be shown to investors.
15 It is -- This is a very critical point. It is not enough to show
16 that Tony Czarnik had generalized criticisms of any scientific
17 experiment. It is not enough to show that he may have proposed
18 other ways in which experiments could have been done. The
19 whistleblowing claim is absolutely rooted in the idea that
20 whistleblower is someone who voices a complaint that raises an
21 issue that's of concern to the public in general. That's where
22 the investor issue comes in, because frankly, when you make a
23 public offering and you are seeking money from investors in the
24 public, that's the issue. Complaining about something going on
25 that's just internal to the company, that's not whistleblowing.

26 So Dr. Czarnik has the burden of showing that he in fact
27 voiced a concern to Illumina about a fraud on the public. He says
28 he did. I'll come back to that. He also has to show that that

1 belief was reasonable under the circumstances.

2 Now, Dr. Czarnik is not a lay person like me. You know, I
3 might interpret certain information or data in a certain way. I'm
4 a lawyer. I'm not a scientist. Dr. Czarnik is, in his counsel's
5 words, a world-renowned chemist. Somebody who in his own words
6 insists upon scientifically rigorous procedures.

7 So let's first talk about whether Dr. Czarnik's belief that
8 the 768 decode experiment done in the summer was flawed and
9 misleading. Well, this rigorous scientist didn't do any portion
10 of the 768 that was done in the summer. This rigorous scientist
11 did not go and talk one-on-one with any of the people who did the
12 experiments. This rigorous scientist did not look at the data
13 first hand. This rigorous scientist jumped to a conclusion. He
14 learned that some dye had been mislabeled. I think he assumed
15 that an entire dye lot was mislabeled and there were two colors
16 instead of three. That turned out not to be true. It was just a
17 few -- I think it was three vials out of 11. That's my
18 recollection.

19 My point is it was not reasonable for Tony Czarnik, a Ph.D
20 level scientist, to draw those conclusions without doing a little
21 due diligence of his own. If anyone else at Illumina had
22 interpreted an experiment of his by just drawing a conclusion, not
23 looking at the data, not talking to the people who actually did
24 the hands-on lab work, he would have said that's not
25 scientifically rigorous. But that's exactly what he did.

26 So my first point is if Dr. Czarnik really held the belief
27 that the 768 decode data from the summer of 2000 was flawed, I
28 don't think it was reasonable. He should have dug in and looked

1 at the data or talked to the people who did the experiment and
2 find out what went wrong. He didn't do that.

3 The second burden he has on this whistleblower claim is to
4 show that he actually, actually voiced that specific concern to
5 Illumina. And here on the stand for the first time I heard Dr.
6 Czarnik say, "Oh, I went to Mark Chee and I told Mark Chee that he
7 needed to call Jay Flatley on the roadshow and make sure that Jay
8 didn't use the recent data sent because it might defraud the
9 investors."

10 Well, I've got to tell you at our table over here, we were
11 shocked. Because in the six days in which I deposed Dr. Czarnik,
12 we talked about the whistleblower claim, we talked about his
13 alleged conversation with Mark Chee, and all Dr. Czarnik said
14 during that deposition under oath is, "I told Mark that he needed
15 to contact Jay and tell him the dye was bad." He had every
16 opportunity when I deposed him to say, "I told him I was worried
17 about fraud on investors," but he didn't say that in deposition.
18 I read that testimony in.

19 Now, Mr. Pantoni makes a big deal of the fact that Mark Chee
20 doesn't recall this discussion. Well, I'll suggest to you Mark
21 Chee didn't recall it because it never happened. That's a very
22 good reason for Mark Chee not to recall such a conversation.

23 So what we have is a situation in which we've got Tony
24 Czarnik claiming I had this belief, I don't think it's reasonable,
25 I communicated it to Mark Chee.

26 So the roadshow ends and Jay Flatley comes back. Now, Dr.
27 Czarnik testified that he in fact did have a conversation with Jay
28 Flatley about the mislabeled dye. Dr. Czarnik admits he talked to

1 Jay Flatley and said, "Hey, is it okay if I contact Molecular
2 Probes, try to get us a refund for the bad dye?" There was
3 evidence in the case Dr. Czarnik did that.

4 Now, if Dr. Czarnik was so concerned that misleading data
5 had been shown to the investors to the roadshow, and he's talking
6 with Jay Flatley about that same issue, the mislabeled dye, don't
7 you think he would have said to Jay Flatley, "Jay, by the way,
8 that data wasn't shown on the roadshow, was it, because it might
9 have been misleading." Didn't say that. Admitted on
10 cross-examination that he never had such a conversation with Jay
11 Flatley or with any of the other people who were on the roadshow,
12 including David Barker, John Stuelpnagel, Tim Kish. Did not do
13 it. And I submit to you he didn't do it because he didn't have
14 the concern. I think that concern was developed in anticipation
15 of this trial.

16 Another point to note, Dr. Czarnik is suggesting that well,
17 he told Mark Chee because Mark Chee was the person in charge of
18 the company at the time. Tony Czarnik was in e-mail communication
19 with Jay Flatley during the roadshow. He in fact sent his work
20 plan on his two experimental goals to Jay Flatley while Jay was on
21 the roadshow, July 12, 2000. He was in e-mail communication with
22 Jay Flatley, and if he really had grave concerns about fraud on
23 investors, -- Oh, by the way, he sent Jay an e-mail on the 12th,
24 and I believe you'll have to check, there may have even been a
25 response.

26 But the bottom line is he was communicating with Jay during
27 the roadshow on other matters. If he had a grave concern about
28 fraudulent data being disseminated to investors, don't you think

1 he would have sent Jay or someone else on the roadshow an e-mail
2 to that effect?

3 What actually happened is Tony Czarnik realized that he was
4 going to be fired. His performance was poor. He had been
5 counseled. Now, admittedly Mr. Pantoni says there's nothing in
6 his personnel file prior to May 4th. Remember in the very early
7 days of Illumina there were two employees, three employees, six
8 employees. Anyone who knows anyone who has worked in a start-up,
9 anyone who has worked in a start-up realizes you are pushing to
10 try to just get some marketable idea together and develop it. You
11 are not immediately creating pretty, perfect personnel files. You
12 often don't even have an employee handbook for months and months.

13 So the reality is there isn't written documentation of
14 counseling prior to May 4th, except for certain notes which are
15 not in evidence for evidentiary reasons that -- evidentiary
16 rulings of the Court. But John Stuelpnagel was allowed to read
17 into the record during his testimony his handwritten notes from
18 the November, 1998 counseling session. Although it's not before
19 you and not in evidence, you have at least heard testimony that
20 there was a written record of a counseling meeting that Dr.
21 Czarnik testified that in the November '98 meeting. Dr.
22 Stuelpnagel had notes with him, he said several pages, and that he
23 appeared to be referring to them.

24 So I think that that negates the suggestion that there are
25 -- there is no written documentation, it's not in his personnel
26 file.

27 Now, why didn't Dr. Stuelpnagel search for a new CSO. Well,
28 one thing that Tony Pantoni said in closing is to take a look at

1 John's -- at a note or testimony which John said, "I'm convinced
2 I have hired the right people, right managers." If you look back
3 at that testimony, that's not what John Stuelpnagel said. I've
4 looked at the notes themselves. He said "convinced I've hired
5 good managers." He didn't single Tony Czarnik out as a good
6 manager. He just said "convinced I've hired good managers."

7 And Dr. Stuelpnagel, I think, gave an absolutely credible
8 explanation for why he didn't fire Tony Czarnik and why he didn't
9 seek to find a replacement for Tony Czarnik. Dr. Stuelpnagel knew
10 that he himself would soon be stepping down as chief executive
11 officer. He knew -- He had a sense of disappointment in himself
12 that he had been unable to draw the level of performance out of
13 Tony Czarnik, and frankly Rich Pytelewski, that he needed to do.
14 He felt embarrassed about it. He did feel to some degree it
15 reflected upon his leadership.

16 But more importantly, John Stuelpnagel is not somebody who
17 judged Tony Czarnik a failure. John Stuelpnagel, as he testified,
18 believed maybe a more seasoned, different CEO, can pull out of
19 these two guys the kind of performance I haven't been able to.
20 Maybe there's going to be a different dynamic between them and a
21 new CEO. So for that reason, John Stuelpnagel didn't recommend to
22 Jay Flatley that he get rid of Tony Czarnik or Rich Pytelewski.
23 He purposely avoided making commentary upon the performances of
24 those two senior managers and basically let them make their own
25 impressions upon Jay Flatley. And as I've indicated previously,
26 Tony Czarnik most certainly did make an impression upon Jay
27 Flatley within eight to ten weeks through a series of negative
28 performance issues.

1 Now, remember a couple of things here. A failure on Dr.
2 Czarnik's part to meet a burden of proof means you have to find
3 against him. Let's go ahead and put up the verdict form on the
4 ELMO and I'll come back to that in a moment. One of the things
5 you have to remember in this case is that, as I said, Illumina
6 didn't have a burden of providing -- did not have the burden of
7 offering an explanation for what happened to Dr. Czarnik, but in
8 fact we did produce lots and lots of evidence of his poor
9 performance. Now, Mr. Pantoni says -- Let's just not put
10 something up until I'm ready to use it.

11 Mr. Pantoni said we heard about work ethic and that's really
12 irrelevant. It's not irrelevant. Work ethic from day one is what
13 caused this company to get off the ground, and it, frankly, is on
14 the shoulders of John Stuelpnagel and Mark Chee, and the early
15 scientists, Steve Barnard, Todd Dickinson, Kevin Gunderson, that
16 this company went anywhere. The fact Dr. Czarnik evidenced such a
17 different work ethic in the early days is what caused the company
18 to really be run by John and Mark from the beginning.

19 Now, Tony Czarnik was involved, but as the fact emerged that
20 he would sit in strategic meetings and not have any input, not
21 have any contribution, gradually you come to ask for his
22 participation less and less. And that is frankly what John
23 Stuelpnagel told him expressly, in November of 1998, that unless
24 he became productive, unless he became contributory, he was going
25 to be marginalized, he was going to have less responsibility, and
26 he was going to have less respect. That's exactly what happened,
27 and it's all because of Tony Czarnik's own failures, it's not
28 because Illumina wanted him out.

1 Now, as I said, we've had Dr. Mallinger, his personal
2 therapist, testify. I do urge you very strongly to ask for the
3 transcript of Dr. Mallinger's testimony, because what you can do
4 is take a look at what Tony Czarnik says is happening in the April
5 through December and onward time frame. Look at what he was
6 telling Dr. Mallinger at the time.

7 First of all he says, May 7th, '99, "For the last six months
8 or so, my boss has been unhappy with my performance."

9 Now that we're in trial, Dr. Czarnik is trying to
10 characterize the November '98 counseling as an harangue session in
11 which John Stuelpnagel was upset with the progress of the company
12 overall, but he says it wasn't a personally directed counseling
13 session.

14 On May 7th, Dr. Czarnik tells Dr. Mallinger for the last six
15 months or so, John has been unhappy with his performance, and he
16 also tells Dr. Mallinger that he has a fantasy of being called
17 into John's office, being told that his efforts and the product of
18 his efforts are not sufficient, and he says, "and this actually
19 happened in November." He told Dr. Mallinger that on June 1,
20 1999.

21 Now, another nit that I have to touch upon here is when
22 Mr. Pantoni said in closing that the inclusion of a grant writing
23 task in the goals was no coincidence. There's this ominous
24 suggestion that somebody put that in there to try to make Dr.
25 Czarnik have another breakdown. He said in his closing that
26 Illumina knew that the grant writing was one of the causes of Dr.
27 Czarnik's breakdown.

28 That's not what Dr. Czarnik told us when I examined him.

1 Dr. Czarnik said the reason for the breakdown was the change in
2 meds. Dr. Czarnik absolutely denied that grant writing was the
3 cause of his breakdown. Said he'd written about 40 of them when
4 he was a professor in academia, had done so, and had never broken
5 down. Dr. Czarnik denied that grant writing was a cause of his
6 breakdown, and yet his counsel is suggesting to you that we put a
7 grant writing task in there to try to cause a breakdown.

8 Another nit. Dr. Czarnik testified about a company photo.
9 IPO photo. We had two witnesses, both of whom are credible,
10 Deborah Flamino, Connie Brick, testify that the first group shot
11 taken was miserable, there was glare, sun in everyone's face, and
12 for that reason it was retaken. Dr. Czarnik says that's nonsense,
13 and in some rather colorful testimony he said it was an example
14 very much like Stalinist Russia, he was being written out of
15 history.

16 Well, I think that's absurd, and the testimony that came in
17 from other witnesses, including Deborah Flamino, is that there are
18 other group photographs of people at Illumina, including the first
19 group photograph, that still hang right outside the company board
20 room and Tony Czarnik is prominently displayed in that photograph.

21 Focusing now upon the claims that are going to be made,
22 again I think the remaining portion of Mr. Pantoni's rebuttal --
23 By my count, I have about 12 to 15 minutes left. I want to
24 comment upon the economic damages evidence that came into this
25 case.

26 Dr. Czarnik had his expert, Brian Brinig, come on, give you
27 two different scenarios of how to calculate economic loss. Let me
28 first go through the verdict form with you. Bear in mind economic

1 loss or money damages is something that you only reach if you
2 decide that Illumina has engaged in unlawful behavior.

3 So question one, number one, is going to be do you find
4 Illumina terminated Dr. Czarnik's employment in whole or in part
5 because of his disability, depression. Answer yes or no. The
6 second question is going to be whether you find that he was denied
7 a stock grant in connection with ABI in whole or in part because
8 of his disability.

9 I suggest to you that the evidence shows very clearly his
10 employment was terminated due to his poor performance and his lack
11 of effort. Yes, he was terminated from a research fellow
12 position, and what has the evidence shown? The evidence has shown
13 he was given goals which, although he calls them unreasonable,
14 unattainable, were in fact reasonable. And the killer goal, I
15 keep coming back to that, was in fact attained by a junior
16 scientist working on it for about two months.

17 So we also see that two of his goals were experimental in
18 nature. We saw from the counseling memos that Jay Flatley gave
19 him he had no experimental results to show even after 60 days. In
20 fact, his laboratory notebook, the lab notebook is what scientists
21 record their experimental results in, he didn't even check one out
22 until July 21, 2000, 60 days into -- more than 60 days into his
23 goals. He wasn't trying. He wasn't making an effort.

24 We already feel that we've determined, we've demonstrated,
25 the evidence shows the reason he didn't get a stock grant in
26 connection with ABI is because he had no involvement in the deal.
27 It would not have been appropriate to include him in the deal
28 since he had no genomics expertise and was not making any effort

1 to have any. And we've also shown other senior, senior managers,
2 including the new CEO, who spent a lot of time. Mr. Flatley spent
3 a lot of time on that deal. He didn't get a stock bonus in
4 connection with that deal.

5 Let's go ahead on the verdict form.

6 So I submit your first two answers should be no, no. Do you
7 find Illumina took any other adverse employment action because of
8 his disability. We believe the evidence shows everything that was
9 done was done as a direct result of Dr. Czarnik's poor performance
10 and his lack of effort.

11 Retaliation. Do you find that we terminated his employment
12 in whole or in part because he complained about discrimination?
13 Quite the contrary. He first raised the specter of discrimination
14 in April. We allowed him to continue working until September 5.

15 Now, one of the critical things you have to come back to on
16 the termination is this: Remember that on August 29 Mr. Flatley
17 testified that he had one of his regular meetings with Tony
18 Czarnik; that he asked Tony Czarnik on that meeting to bring his
19 lab notebook and to show him all the experimental results. Tony
20 Czarnik brought into that meeting a lab notebook in which there
21 were six pages of writing. Six pages of writing for roughly a 90-
22 day work period.

23 This showed that there had been virtually nothing done, no
24 effort, and on that date, Mr. Flatley testified he decided he was
25 going to fire Tony Czarnik. He communicated that to other
26 persons, including John Stuelpnagel, who corroborated that.

27 So the reason for the termination had nothing to do with the
28 raising of a complaint of discrimination several months earlier.

1 It had to do with what was going on in late August, 19 -- 2000,
2 which was very, very little.

3 We also submit you should not find there was any other
4 adverse action taken on account of his complaint of
5 discrimination. In fact, we continued to work with him and to
6 just move on, and essentially to try to extract from him some
7 contribution and some performance.

8 Termination in violation of public policy. Again, this is
9 the whistleblowing claim. So first you have to find whether he
10 had a reasonable belief that Illumina was going to use or was
11 planning to use conclusions from the summer 768 decode experiment
12 in the roadshow, and that whether he had a reasonable belief that
13 data would be misleading to investors.

14 One point I'd like to make here as a non-scientist. I
15 struggled with and have had to learn about and hear about the 768
16 decode experiments over and over and over. I sense that perhaps
17 members of the jury heard much more about the 768 decode
18 experiment than you would have liked to hear. Let me suggest
19 this: If you heard much more about the 768 decode experiments
20 than you would have liked to have heard, trust me, investors who
21 are sitting in a 20-minute presentation would not have wanted to
22 hear detailed data about the 768 experiment, would not have
23 understood it when presented in a 20-minute total speech-length
24 format, and would not have been misled by anything that could have
25 been said about the 768 decode experiment within the context of
26 these 20-minute roadshow presentations.

27 Furthermore, we did establish through testimony of
28 Mr. Flatley, testimony of other persons who were on the roadshow,

1 there was no presentation of scientific data relating to decoding
2 on the roadshow.

3 And Dr. Czarnik has not been able to show that is false.
4 Dr. Czarnik could have in discovery taken depositions of investors
5 who got the roadshow presentations made to them. He didn't
6 because he knows the data wasn't shown. So the answer to this
7 question should also be no.

8 You then move on, answer no, you move further. But question
9 7, do you find that Dr. Czarnik raised concerns to anyone about
10 what he reasonably believed to be the use or planned use of
11 information from 768. This is the point that I made earlier. In
12 deposition, Dr. Czarnik didn't say anything about raising concerns
13 of fraud on investors. But now, a year later, now that he's had a
14 chance to become more educated in what the elements of his claim
15 are, what he has to prove, now he says yes, I talked to Mark Chee,
16 and oh, yes, I used the word fraud. I submit to you that is not
17 credible testimony; that it is impeached by his deposition
18 testimony; and that if when he was reviewing that 932-page
19 transcript, he saw that he had said, "I told Mark the dye was bad
20 and he needed to contact Jay," if he really had told Mark, "and I
21 was worried about fraud on investors," he would have written that
22 in. When you review a deposition, you have the chance to correct
23 it, and to add to your answer if you need to. He didn't do that.
24 And the reason he didn't do it is because he never had that
25 conversation with Mark Chee.

26 Let's go down. Do you find we terminated his employment in
27 full or in part because of whistleblowing? Well, the one thing
28 that Mr. Pantoni has made a lot of is that handwritten note that

1 Jay Flatley took because of a conversation he had with me, and
2 it's true, the conversation occurred. It is true that by this
3 point in time Dr. Czarnik was just suggesting issues relating to
4 decoding, because he knew, he knew, he had a regularly scheduled
5 meeting with Jay Flatley. The last one was August 29th, where he
6 brought his lab notebook with six pages of writing, and after that
7 Jay Flatley said, "You know, give me anything else showing that
8 you've been doing anything for the last hundred days." Tony
9 Czarnik knew he was going to get fired September 5. So what did
10 he say? On September 5, he sent the infamous "Code Blew" e-mail
11 to Mark Chee. He send the infamous "Code Blew" e-mail to Mark
12 Chee saying, "Did you tell Jay about the dye problem?"

13 Now, interestingly, he didn't say in that e-mail, "Did you
14 tell Jay about the dye problem and did you follow up with Jay
15 about the potential fraud on investors?" No. He just says, "Jay
16 was out when we learned of the roadshow decode experiment was
17 flawed. Is he now aware of the problem? When did you let him
18 know?"

19 This is particularly disingenuous, two-faced, because Tony
20 Czarnik himself already admitted he had already talked with Jay
21 about the dye problem. He already knew that Jay knew. So why is
22 he sending this to Mark Chee a couple of hours before his
23 scheduled meeting with Jay? I'll tell you the reason is he
24 believed that he could create a whistleblower claim by sending
25 this e-mail. What he said was, "Hi, Tony, if the 'roadshow decode
26 experiment,' as you call it, was flawed, then that's a big
27 surprise to me. If we're talking about the same experiment, I
28 assume you mean the 768 complexity decode feasibility experiment,

1 it worked as designed and provided valuable information on
2 decoding and a complex sample. I would be happy to explain the
3 experiment in more detail if that would help remove any confusion
4 you might have in your understanding of it."

5 So it may be the case that when Mr. Flatley and I talked,
6 Mr. Flatley may have been aware that Tony Czarnik was suddenly
7 raising issues about decoding. I don't think there's any evidence
8 that Mr. Flatley in this case, any evidence that Mr. Flatley had a
9 very complete understanding of what Dr. Czarnik was saying or
10 expressing concerns about, but it's clear he didn't express any
11 concerns about fraud on investors. I think that's clear.

12 And to the extent that there's any discussion about any
13 scientific experiment being done, whether it be decoding or
14 something else, that's not in the public domain. That is
15 confidential information. So it would not have been inappropriate
16 if Mr. Flatley had told him keep all scientific experimental
17 information to yourself, and that's what ultimately Mr. Flatley
18 decided to do, rather than singling out decoding. Because he had
19 very scant information about the nature of Dr. Czarnik's concerns
20 or complaints, he realized hey, decoding is just part of science,
21 and what I'm going to do, I'm going to tell Tony Czarnik as you
22 leave you need to keep all of our science confidential because
23 it's not in the public domain. Mr. Flatley explained that. I
24 submit to you don't fault him for making a judgment different than
25 that which his attorney may have suggested to him. I certainly
26 don't fault him for it, and I think his statement about just
27 maintaining confidentiality of scientific results generally is a
28 totally appropriate thing to do.

1 So I'm coming very close to the end of my time. It's been a
2 challenge. I haven't covered everything I wanted to do. But what
3 I would suggest to you is this: I stand before you not telling
4 you that Tony Czarnik is a bad person. I think that Tony Czarnik
5 is a person who has great difficulty seeing himself the way others
6 do. I think Tony Czarnik is a person who admitted in his
7 cross-examination that he has a general impairment of memory. I
8 think that Tony Czarnik is having different memories today in this
9 trial than he had over a course of six days last summer when I
10 deposed him.

11 And I suggest to you that the reason motivating Tony Czarnik
12 in this case is hurt feelings and vindictiveness. He hates John
13 Stuelpnagel. He wants to hurt John, he wants to hurt the company,
14 and frankly, Tony Czarnik, you'll see this, this is where you'll
15 see it, is in Dr. Mallinger's testimony, Tony Czarnik viewed the
16 Illumina opportunity as the big cash cow. I'm not saying he used
17 those words, but that's what he meant. It was going to be his big
18 score. And notwithstanding the fact Tony Czarnik walked away with
19 a lot of stock from Illumina which he didn't really contribute to
20 earn, he wants it all. He wants it all.

21 And when I suggest to you on economic damages it's an issue
22 you shouldn't even be reaching because I don't think the Plaintiff
23 has met his burden of showing that Illumina did anything wrong,
24 but if you got to economic damages, I suggest that you take a look
25 very carefully at the economic analysis provided by our expert,
26 Dr. Michael Ward, who took into account the gain that Dr. Czarnik
27 made and who took -- who didn't take into account but suggested
28 to you you need to think about the fact that Dr. Czarnik as a

1 result of leaving Illumina has had the opportunity to go with a
2 new start-up and have stock in that company.

3 In summary, ladies and gentlemen, I thank you very much,
4 very much for your attention throughout this trial. I know that
5 you will make the right decision. And I suggest to you that the
6 evidence, whatever you think of it, I think the only conclusion
7 that can be reached is that the Plaintiff has failed to meet his
8 burden.

9 There may still be unanswered questions for you, why did
10 someone do this, why did someone do that, but the bottom line you
11 need to focus upon are what are the elements of each claim, did
12 Tony Czarnik prove by a preponderance of the evidence each of the
13 elements of each of his claims. I think the answer is no. He
14 didn't prove any of his claims, and for that reason, he deserves
15 to recover nothing from Illumina.

16 Thank you.

17 THE COURT: Thank you, Miss Kearns.

18 Now Mr. Pantoni will have his opportunity to rebut anything
19 he wishes from Miss Kearns' argument.

20 MR. PANTONI: There are so many things I want to say,
21 but time and your patience won't permit me. I can either talk
22 really fast or try to hit the high points. I hope you can hang in
23 with me for another 15 minutes or so.

24 Let me first talk about Dr. Mallinger and his notes. I want
25 you to remember the testimony in terms of what the purpose of
26 those sessions were, why Tony Czarnik was seeing Dr. Mallinger,
27 what Dr. Mallinger was interested in. He told you he was
28 interested in how Tony Czarnik was feeling personally, how he was

1 doing on his medication.

2 Dr. Czarnik told you he was seeing Dr. Mallinger for
3 treatment of a mental illness. That's the purpose for the notes.
4 That reflects how he was feeling personally. Dr. Mallinger wasn't
5 interested in what role he was playing at Illumina, what tasks
6 were taken away from you at Illumina, how do you see yourself as a
7 CSO. Those weren't what Dr. Mallinger was interested in talking
8 about. That's not what Czarnik was interested in talking about.

9 Now, with respect to the whistleblowing. First of all,
10 Kevin Gunderson's testimony. You recall what Kevin Gunderson
11 said. I'm sure you recall. If you don't, I take Miss Kearns up
12 on her offer. Check the transcript. He was talking about the
13 experiment that happened in summer of 2000. He said he could draw
14 no conclusions from that experiment with respect to the number of
15 bead types.

16 He said he left for vacation the same day Mark Chee sent his
17 e-mail. I drew that connection when Kevin Gunderson was on the
18 stand. He talked about the experiment that happened in the summer
19 of 2000 during the roadshow. Kevin Gunderson told you what he
20 thought about that experiment.

21 The problem with the experiment was the dye was mixed. It's
22 so fundamental. I was thinking of a cute little way to phrase it.
23 "If the dye ain't right --" I couldn't think of another --

24 THE COURT: What about, "If the glove don't fit"?

25 MR. PANTONI: That's what got me -- I couldn't get
26 thinking in rhyme.

27 But the dye was wrong and the experiment was flawed. Dr.
28 Czarnik is an expert in fluorescent tags. They told you that; he

1 told you that. This is his area. So his belief, Dr. Gunderson's
2 belief, other people's belief that the dye screwed up this
3 experiment is certainly reasonable.

4 Illumina seems to be taking the position that hey, we got
5 some useful information from this experiment. Wasn't totally
6 useless. They are essentially telling you this experiment was
7 good enough. Was this experiment good enough? Not if you are
8 trying to raise a hundred million dollars of investor money. Then
9 the experiment was not good enough.

10 I agree with Miss Kearns, investors don't understand
11 science. I barely understood it having worked with the case. I'm
12 sure you are struggling with it. The fact that the public doesn't
13 really understand the science, the fact that you may not fully
14 understand the science, the fact that investors don't fully
15 understand the science, that's why we have whistleblowing statutes
16 and laws. That's why it's important for us for a scientist like
17 Dr. Czarnik to speak up, because he understands the science and
18 investors don't. So that's why we have whistleblowing, to
19 safeguard the investor public in situations like this, where he
20 knows the science, he knows it's wrong, and he knows investors
21 wouldn't fully understand it.

22 Miss Kearns showed you the September 5 e-mail, had "Code
23 Blew" e-mail Dr. Czarnik sent the day that he was fired. That
24 wasn't the only time Dr. Czarnik made noises about this. You've
25 heard other testimony about things that happened earlier in the
26 case.

27 Miss Kearns questioned why did he send the e-mail on
28 September 5. Why did he ask Mark Chee, "Did you inform Jay

1 Flatley about this problem?" Dr. Czarnik explained that to you.
2 He did it because the previous workday, September 1st, Jay Flatley
3 made a presentation where he for the first time acknowledged the
4 coding was a problem in the company and that they were going to
5 form a workforce, a task force, rather, on decoding. So finally
6 Jay Flatley was acknowledging that there was a problem, and that's
7 why he sent out an e-mail on September 5, the next workday.

8 Now let me say a few words about the goals again.
9 Especially that second goal, binary oligo encoding. This was a
10 different method of decoding. I think you know that by now. This
11 was Dr. Czarnik's invention. He invented this area of binary
12 oligo encoding. He told you that the project that Gali Steinberg
13 described, or rather that David Barker described, that wasn't the
14 same project as his invention. That wasn't binary oligo encoding.
15 Gali Steinberg, Miss Kearns said in the opening statement, that
16 Gali Steinberg had had her baby. She had already had her baby.
17 We've been here going on a month now. Presumably she had her baby
18 four or five weeks ago. She never was brought in to testify. She
19 works at Illumina. She could have come in and explained the
20 experiment. She didn't. They didn't bring her in here for a
21 reason.

22 But again, this was Dr. Czarnik's invention. Binary oligo
23 encoding.

24 You know, we are dealing with some very smart people on the
25 other side. Jay Flatley told you he was Phi Beta Kappa. John
26 Stuelpnagel told you he was top two percent in his class. Mark
27 Chee is obviously a bright guy. David Barker is a bright guy.
28 These are smart people. I'd submit to you what better way to set

1 up somebody if you are setting them up for failure, what better
2 way to set up Dr. Czarnik than give him goals in an area that he
3 invented. That's what they did in this case.

4 In terms of adding grant writing, mentioned they added grant
5 writing as a third goal, I didn't say or I didn't mean to say that
6 Dr. Czarnik said his breakdown was caused by the grant writing.
7 What I meant to say is that Illumina believed that. Illumina saw
8 him break down over grant writing. Illumina thought he detested
9 grant writing. So their state of mind was he broke down on this
10 once, he detests grant writing, let's throw this in on top of all
11 the other goals, including the experimental goals that we
12 included.

13 Miss Kearns, she thanked me, I accept her thanks, for
14 showing this exhibit. This exhibit is Exhibit 223. Page 33. She
15 says this proves Dr. Czarnik resigned. I hope I don't have to
16 convince you that Dr. Czarnik never resigned. If I do, I'll speak
17 to that. It just doesn't make any sense. He wouldn't have quit,
18 just walked out and resigned, leaving no stock, leaving all his
19 stock on the table. You heard that when they offered him three
20 months' stock, three months' salary he said no. When they offered
21 him six months' stock and salary, he said no. When they offered
22 him nine months' stock and salary, he said no. Yet they want you
23 to believe at some point he said I quit, I'm walking out, I'm
24 leaving all my stock here. It didn't happen. But even according
25 to Jay Flatley, and Illumina, and Miss Kearns repeated it in her
26 closing, the so-called resignation happened in March. March of
27 2000.

28 We're talking about -- And he allegedly made the

1 resignation and then withdrew his resignation. That's what's in
2 the termination memo. He resigned back in March and then withdrew
3 his resignation. This is in May of 2000, when this lawyer is
4 saying we need to revise this to reflect Czarnik and Pytelewski
5 termination. This is in May, not in March, when that alleged
6 resignation took place.

7 How did that lawyer get that information? I was very
8 careful to ask Jay Flatley because I knew he had this authority.
9 Who is the only person who had authority to make these termination
10 decisions? He said me, Jay Flatley. He was the only one
11 authorized to terminate in May of 2000. Reasonable inference is
12 this could only have come from Mr. Flatley.

13 Ladies and gentlemen, I submit to you that Jay Flatley and
14 Illumina are not being straight with you. Just not being straight
15 with you. Remember this? Receipt for lunch in November, November
16 4 of 1999. I still haven't heard anything that happened in the
17 first two weeks that was allegedly -- first two weeks of
18 Mr. Flatley's employment that would cause him to tell a board
19 member I've got performance problems with Czarnik and I'm
20 considering changes.

21 Check the record. Every single thing that Jay Flatley said
22 he was concerned about with respect to performance, everything,
23 happened after November 4 of '99. Nothing related to performance.

24 I submit they haven't been straight with you with respect to
25 this Larry Bock lunch. They haven't been straight with you with
26 respect to what this means, termination in May of 2000. Haven't
27 been straight with you with respect to what Mr. Flatley said to
28 Tony Czarnik.

1 Do they work on a script? Miss Kearns and Mr. Flatley work
2 on a script of what to say? Miss Kearns is a good lawyer. I
3 presume Mr. Flatley would take her advice. Yet he denies -- He
4 told you I never said anything about decoding. It's the first
5 line on the script.

6 He wasn't just talking about what happened on September 5,
7 the day of termination. Miss Kearns just showed you that "Code
8 Blew" e-mail dated September 5. She said he was making that up.
9 Mr. Flatley's notes say that Dr. Czarnik expressed strong opinions
10 in the last few days prior to the termination, not just on the day
11 of termination.

12 Miss Kearns talked about financial interest Tony Czarnik has
13 at stake here, and obviously he does. This trial we want to win,
14 we want you to award significant damages. But again, remember he
15 passed on several lucrative severance offers when he was working
16 at the company because he wanted to stay.

17 Talk about financial interest. Jay Flatley held about a
18 million shares in Illumina. David Walt had I believe he said
19 1,400,000 shares. That's a huge financial interest. On the day
20 Jay Flatley fired Tony Czarnik, he had about a million shares, and
21 the stock on that day was trading at over \$40 a share. That's
22 some significant, significant financial interest.

23 Let's take a look at exhibit -- I believe use this board.

24 This is Mr. Brinig's economic loss calculation. It's
25 Exhibit 380. I want to make a few points about it. I want you to
26 recall, if you would, the defense expert, Michael Ward,
27 essentially agreed with scenario one. He essentially agreed that
28 bottom line number is an accurate number if you assume that Dr.

1 Czarnik would still be working there and would work there in the
2 future but for his termination. He agreed these were proper
3 assumptions for Mr. Brinig to make. Mr. Ward basically said this
4 number is correct.

5 On the other hand, he was instructed by Miss Kearns only
6 calculate damages out for six months. There's no basis for that
7 assumption, if you find it, and I think you should, that Dr.
8 Czarnik was wrongfully fired and that there weren't legitimate
9 reasons for his termination. There's no reason to think he
10 wouldn't still be there today. It's a public company. He would
11 be vesting 6600 shares a month. He'd be crazy to leave once the
12 company went public, once the company hit it big. He wanted to
13 stay there and invest and vest his shares.

14 There's one question on the verdict form I want to bring to
15 your attention, and it's the last question. Last but certainly
16 not least. This is a very, very important question on what you
17 would give due consideration to. It's essentially asking if you
18 answer yes to some of the previous questions, and you find
19 liability, do you find by clear and convincing evidence that
20 Illumina acted with malice, fraud or oppression toward Dr.
21 Czarnik. It's a very important question. These terms, "malice,
22 fraud and oppression" are going to be defined for you by the
23 judge. I urge you, ladies and gentlemen, to find that Illumina
24 acted maliciously toward Dr. Czarnik and answer yes to that
25 question.

26 Ladies and gentlemen, we have a system of laws in place to
27 prevent Tony Czarnik from experiencing what he did at Illumina.
28 We have laws prohibiting discrimination. These laws are supposed

1 to prevent employers from making assumptions about people with
2 mental illness. They are supposed to prevent employers from
3 taking away job responsibilities from employees because they are
4 perceived as likely to crack under pressure. We have laws in
5 place to protect people like Dr. Czarnik. We have laws to protect
6 people who complain about discrimination. Whether or not actual
7 discrimination occurred, as I say, is legally irrelevant.

8 If you find Dr. Czarnik made a good-faith complaint of
9 discrimination and he was retaliated against, you are obligated to
10 find in his favor. And we have laws to prevent employers from
11 retaliating against employees who blow the whistle on bad science.

12 It's up to you, ladies and gentlemen, to uphold these laws
13 and to apply each of them to the facts of this case, and I ask
14 that you return a verdict in favor of the Plaintiff, Tony Czarnik.

15 Thank you very much.

16 THE COURT: Thank you, Mr. Pantoni.

17 If I could see counsel in the hall briefly about scheduling.

18 (Discussion off the record.)

19 THE COURT: We'll take our noon recess at this time.
20 We'll be in recess until 1:15. Remember the admonition not to
21 form or express any opinions about the case, not to discuss the
22 case. We'll be in recess until 1:15.

23 The jury instructions, I'm not sure exactly how long they
24 will take. Probably 45 minutes. Then you'll begin your
25 deliberations.

26 1:15. See you at that time.

27 (Proceedings resumed outside the presence of the jury.)

28 THE COURT: One thing I want to discuss with counsel, I

1 just thought of, this question about asking for transcripts.
2 Generally what I tell the jury is that there are no transcripts
3 but they have the reporter's notes. In this case there are some
4 transcripts. But, for example, closing arguments, they haven't
5 been reduced to transcripts.

6 MR. PANTONI: I didn't bring it up.

7 THE COURT: Always urge them to try to rely on their
8 independent recollection. I think I'll just say not all the
9 testimony has been reduced to transcripts. Actually if it came to
10 something that was in a transcript, I don't know if you'd
11 stipulate it's in the transcript. Would you stipulate to that?
12 How do you want to handle this?

13 MR. PANTONI: I'd like to deal with it as it arises.

14 THE COURT: Okay. I'm going to kind of discourage
15 them. I'm tell them not everything has been reduced to
16 transcripts.

17 So if you could try to agree then, I'll see you at one
18 o'clock to resolve the disagreements.

19 (Lunch recess taken at 12:05 p.m.)

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1 SAN DIEGO, CALIFORNIA, MONDAY, JULY 8, 2002; 1:15 P.M.

2 THE COURT: The record will indicate all the jurors are
3 present, both counsel are present, parties present.

4 Yes, sir?

5 JUROR NO. 6: Sir, may I be so bold as to ask his Honor
6 to bring the microphone a little closer.

7 THE COURT: You mean you really want to hear these
8 instructions?

9 THE JUROR NO. 6: I want to give these two people equal
10 chance.

11 THE COURT: Okay.

12 While I'm thinking about it, I meant to compliment the
13 attorneys. I think you are fortunate to have a case provided by
14 two highly qualified attorneys. Once they set the time limits for
15 the witnesses and for all phases of the case, they have strictly
16 abided by those time limits, so I think we all should be grateful
17 to them. They have both done a fine job presenting their cases.

18 You've heard all the evidence, you've heard the closing
19 arguments of the attorneys, and now what remains is simply the
20 jury instructions, and then you'll begin your deliberations.

21 Ladies and gentlemen of the jury, it is now my duty to
22 instruct on the law that applies to this case. It is your duty to
23 follow the law. As jurors it is your duty to determine the effect
24 and value of the evidence and to decide all questions of fact.

25 You must not be influenced by sympathy, passion or
26 prejudice.

27 You must decide all questions of fact in this case from the
28 evidence received in this trial and not from any other source.

1 You must not make any independent investigation of the facts or
2 the law or consider or discuss facts as to which there is no
3 evidence. This means, for example, that you must not on your own
4 visit the scene, conduct experiments, none of those, absolutely no
5 genotyping experiments, or consult reference works for additional
6 information.

7 If any matter is repeated or stated in different ways in my
8 instructions, no emphasis is intended. Do not draw any inference
9 because of a repetition. Do not single out any individual rule or
10 instruction and ignore the others. Consider all the instructions
11 as a whole and each in light of the others.

12 The order in which the instructions are given has no
13 significance as to their relative importance.

14 The fact that a corporation is a party must not prejudice
15 you in your deliberations or your verdict. Do not discriminate
16 against a corporation and natural individuals. Each is a person
17 in the eyes of the law and entitled to the same fair and impartial
18 consideration, and to justice by the same legal standards.

19 There is no evidence before you that any party has or does
20 not have insurance for the Plaintiff's claim. Whether such
21 insurance exists has no bearing upon any issue in this case. You
22 must not discuss or consider it for any purpose.

23 The pronoun form as used in these instructions, if
24 applicable as shown by the text of the instruction and the
25 evidence, applies to a corporation.

26 In this trial, the Plaintiff is Tony Czarnik, an individual,
27 and the Defendant is Illumina Incorporated, a corporation. Dr.
28 Czarnik is seeking to recover compensatory damages against

1 Defendant Illumina based upon claims of disability,
2 discrimination, retaliation and wrongful termination in violation
3 of public policy.

4 Evidence means testimony, writings, material objects or
5 other things presented to the senses and offered to prove the
6 existence or nonexistence of a fact.

7 Evidence is either direct or circumstantial. Direct
8 evidence proves a fact without an inference, and if true,
9 conclusively establishes that fact. Circumstantial evidence
10 proves a fact from which an inference of the existence of another
11 facts or facts may be drawn.

12 An inference is a deduction of fact that may logically and
13 reasonably be drawn from another fact or group of facts
14 established by the evidence.

15 The law makes no distinction between direct and
16 circumstantial evidence as to the degree of proof required. Each
17 is a reasonable method of proof. Each is respected for such
18 convincing force as it may carry.

19 Weighing conflicting testimony: You are not required to
20 decide any issue according to the testimony of a number of
21 witnesses which does not convince you as against the testimony of
22 a smaller number or other evidence which is more convincing to
23 you. The testimony of one witness worthy of belief is sufficient
24 to prove any fact. This does not mean that you are free to
25 disregard the testimony of any witness merely from caprice or
26 prejudice or from a desire to favor either side. It does mean
27 that you must not decide anything by simply counting the number of
28 witnesses who have testified on the opposing sides. The test is

1 not in the number of witness but the convincing force of the
2 evidence.

3 If weaker and less satisfactory evidence is offered by a
4 party when it was within such party's ability to produce stronger
5 and more satisfactory evidence, the evidence offered should be
6 viewed with distrust.

7 Failure to deny or explain adverse evidence: In determining
8 what inferences to draw from the evidence, you may consider, among
9 other things, a party's failure to explain or deny such evidence.

10 Limited admission of evidence: Certain evidence was
11 admitted for a limited purpose. Do not consider it for any other
12 purpose. Your attention was called to these matters when the
13 evidence was admitted.

14 Deposition testimony: Testimony has been read from
15 depositions. A deposition is testimony taken under oath before a
16 trial and preserved in writing. You must consider that testimony
17 as if it had been given here in court.

18 Interrogatories: An interrogatory is a written question
19 asked by one party of another who must answer it under oath and in
20 writing. You must consider interrogatories and the answers
21 thereto just as if the questions had been asked and answered here
22 in court.

23 Believability of witnesses: You are the sole and exclusive
24 judges of the believability of the witnesses and the weight to be
25 given to the testimony of each witness. In determining the
26 believability of a witness, you must consider any matter that has
27 a tendency in reason to prove or disprove the truthfulness of the
28 testimony of a witness, including, but not limited to the

1 following:

2 The demeanor and the manner of the witness while testifying;
3 the character and quality of that testimony;

4 The extent of the capacity of the witness to perceive, to
5 recollect or to communicate any matter about which the witness
6 testified;

7 The opportunity of the witness to perceive any matter about
8 which the witness has testified;

9 The existence or nonexistence of a bias, interest or other
10 motive;

11 A statement previously made by the witness that is
12 inconsistent or consistent with the testimony of the witness;

13 The existence or nonexistence of any fact testified to by
14 the witness;

15 The attitude of the witness toward this action or toward the
16 giving of testimony;

17 An admission by the witness of untruthfulness;

18 The character of the witness for honesty or truthfulness or
19 their opposites.

20 Discrepancies in testimony: Discrepancies in a witness'
21 testimony or between such witness' testimony and that of other
22 witnesses, if there were any, do not necessarily mean that any
23 such witness should be discredited. Failure of recollection is
24 common. Innocent misrecollection is not uncommon. Two persons
25 witnessing an incident or a transaction often will see or hear it
26 differently.

27 Whether a discrepancy pertains to an important matter or
28 only to something trivial should be considered by you.

1 Witness willfully false: A witness false in one part of his
2 or her testimony is to be distrusted in others. You may reject
3 the entire testimony of a witness who willfully has testified
4 falsely on a material point unless, from all the evidence, you
5 believe that the probability of truth favors his or her testimony
6 in other particulars.

7 Extrajudicial admissions: A statement made by a party
8 before trial which tends to prove or disprove any material fact in
9 this action and which is against such party's interest is an
10 admission. Evidence of an oral admission not made under oath
11 should be viewed with caution.

12 No unfavorable inference from exercise of a privilege: If,
13 at a deposition or in answers to interrogatories a privilege not
14 to testify with respect to any matter or refuse to disclose or
15 present another from disclosing any matter has been exercised, no
16 assumption of fact is to be made by you because of the exercise of
17 such privilege, and you must not draw any inference therefrom as
18 to the believability of the witness or as to any matter in issue
19 in this trial.

20 Expert testimony - Qualifications of expert: Witnesses who
21 have special knowledge, skill, experience, training or education
22 in a particular subject have testified to certain opinions. Any
23 such witness is referred to as an expert witness. In determining
24 what weight to give any such opinion, you should consider the
25 qualifications and the believability of the witness, the facts or
26 materials upon which each opinion is based, and the reasons for
27 each opinion.

28 An opinion is only as good as the facts and reasons on which

1 it is based. If you find that any such fact has not been proved
2 or has been disproved, you must consider that in determining the
3 value of the opinion. Likewise, you must consider the strengths
4 and weaknesses of the reasons on which it is based.

5 You are not bound by an opinion. Give each opinion the
6 weight you find it deserves. However, you may not arbitrarily or
7 unreasonably disregard the expert testimony in this case.

8 Weighing conflicting expert testimony: In resolving the
9 conflict in the testimony of expert witnesses, you should weigh
10 the opinion of one expert against that of another. In doing this,
11 you should consider the qualifications and believability of each
12 witness, the reasons for each opinion, and the matter upon which
13 the based.

14 Hypothetical questions: A hypothetical question is a
15 question in which an expert witness is asked to assume that
16 certain facts are true and to give an opinion based upon that
17 assumption. If any fact assumed in such a question has not been
18 established by the evidence, you should determine the effect of
19 that omission upon the value of an opinion based on that fact.

20 Burden of proof and preponderance of the evidence:
21 Plaintiff is seeking damages based upon claims of disability
22 discrimination, retaliation, and wrongful termination in violation
23 of public policy. Plaintiff has the burden of proving by
24 preponderance of the evidence all of the facts necessary to
25 establish the essential elements of each separate claim. The
26 essential elements of each separate claim are set forth elsewhere
27 in these instructions.

28 In addition to these essential elements, the Plaintiff has

1 the burden of proving by preponderance of the evidence all the
2 facts necessary to establish the nature and extent of the damages
3 claimed to have been suffered, the elements of the Plaintiff's
4 damage and the amount thereof.

5 Preponderance of the evidence means evidence that has more
6 convincing force than that opposed to it. If the evidence is so
7 evenly balanced that you are unable to say that the evidence on
8 either side of an issue preponderates, your finding on that issue
9 shall be against the party who has the burden of proving it.

10 You should consider all the evidence bearing upon every
11 issue regardless of who produced it.

12 Burden of proof and clear and convincing evidence: The
13 Plaintiff has the burden of proving by clear and convincing
14 evidence all the facts necessary to establish whether there was
15 oppression, malice or fraud in any conduct upon which you may base
16 any finding of liability.

17 Clear and convincing evidence means evidence that has such
18 convincing force that it demonstrates, in contrast to the opposing
19 evidence, a high probability of the truth of the facts for which
20 it is offered as proof. Such evidence requires a higher standard
21 of proof than proof by a preponderance of the evidence.

22 You should consider all the evidence bearing upon every
23 issue regardless of who produced it.

24 Wrongful termination - violation of public policy -
25 essential elements: The Plaintiff seeks to recover damages based
26 upon a claim of wrongful termination in violation of public
27 policy. The essential elements of such a claim are:

28 1. Plaintiff was employed by the Defendant;

1 2. The defendant terminated Plaintiff's employment in
2 violation of the public policy; and

3 3. The termination caused Plaintiff to suffer injury,
4 damage, loss or harm.

5 Violation of public policy defined: The termination of an
6 employee by an employer in violation of public policy is a
7 wrongful termination. An employee who is terminated in violation
8 of public policy is entitled to recover damages from the employer.

9 To establish a termination of employment in violation of
10 public policy, it must be established that the termination of
11 Plaintiff's employment was a violation of public policy. The
12 public policy of the State of California and the United States is
13 that a company may not make any representations or omissions of
14 material facts to potential investors that the company knew or
15 should have known were false or misleading in connection with the
16 sale of or offer to sell stock or other securities.

17 If you find that Plaintiff is entitled to recover damages
18 for wrongful termination in violation of public policy, such
19 damages must include the value of any economic losses suffered by
20 the Plaintiff as a result and any damages for emotional distress
21 suffered by Plaintiff.

22 Employment discrimination: The Plaintiff also seeks to
23 recover damages based upon a claim that the Defendant engaged in
24 certain unlawful employment practices under the Fair Employment
25 and Housing Act, known as F-E-H-A, FEHA. The FEHA or F-E-H-A
26 makes it an unlawful employment practice for an employer to
27 discriminate against any employee upon certain bases, including,
28 but not limited to, a mental disability.

1 Plaintiff has alleged that the Defendant engaged in the
2 unlawful employment practice of discrimination based upon the
3 Plaintiff's mental disability, major depression.

4 Plaintiff's allegations of discrimination are based upon the
5 theory of disparate treatment. Disparate treatment means the
6 employer treats some individual less favorably than others because
7 of the disability. Disparate treatment generally requires proof
8 that the Plaintiff's disability was a motivating factor of the
9 improper treatment.

10 Employment discrimination -- Disparate treatment: The
11 essential elements that are claimed for unlawful employment
12 discrimination on the basis of disability are:

- 13 1. The Defendant was an employer;
- 14 2. The Plaintiff was an employee of the Defendant;
- 15 3. The Defendant made a decision adverse to the Plaintiff
16 in regards to compensation or terms, conditions or privileges of
17 employment, including but not limited to termination of
18 Plaintiff's employment;
- 19 4. The Plaintiff's disability was a motivating factor in
20 the Defendant's conduct; and,
- 21 5. The Defendant's conduct has caused Plaintiff injury,
22 damage, loss or harm.

23 A motivating factor is something that moves the will and
24 induces action even though other matters may have contributed to
25 the taking of the action.

26 Retaliation: The essential elements of the claim for
27 unlawful employment retaliation are:

- 28 1. The Defendant was an employer;

1 2. Plaintiff was a employee of the Defendant;

2 3. Plaintiff engaged in a legally protected activity,
3 namely, making a complaint that he believed he had been
4 discriminated against by his employer;

5 4. The Defendant subjected Plaintiff to adverse employment
6 action, including but not limited to termination of employment;

7 5. Plaintiff's protected activity was a motivating factor
8 for the Defendant's adverse employment action; and,

9 6. The defendant's action caused Plaintiff injury, damage,
10 loss or harm.

11 The essential elements of the claim for unlawful disability
12 discrimination are:

13 1. The Plaintiff is an individual with a mental or physical
14 disability;

15 2. The Defendant was an employer;

16 3. Plaintiff was an employee of the Defendant;

17 4. The Defendant subjected Plaintiff to adverse employment
18 action, including but not limited to termination of employment;

19 5. The Plaintiff's disability was a motivating factor for
20 the Defendant's adverse employment action; and,

21 6. The Defendant's action caused Plaintiff to suffer
22 injury, damage, loss or harm.

23 Mental disability includes, but is not limited to, all of
24 the following:

25 1. Having any mental or psychological disorder or condition
26 such as mental retardation, organic brain syndrome, emotional or
27 mental illness or specific learning disabilities that limits a
28 major life activity;

1 2. Having a record or history of a mental or psychological
2 disorder or condition described in paragraph 1, which is known to
3 the employer; or,

4 3. Being regarded or treated by the employer as having, or
5 having had, a mental or psychological disorder or condition that
6 has no present disabling effect but that may become a mental
7 disability as described in paragraph 1.

8 Limits shall be determined without regard to mitigating
9 measures such as medication or reasonable accommodations unless
10 the mitigating measure itself limits a major life activity.

11 A physiological disease, disorder or condition limits a
12 major life activity if it makes the achievement of the major life
13 activity difficult.

14 Major life activity shall be broadly construed and includes
15 physical, mental and social activities and working.

16 Now, just in case there's one or two of you that hasn't
17 gotten each of these points down up until now, and there's still
18 more to go, I won't keep you in suspense any longer, these
19 instructions will be made available to you in written form for use
20 in the jury room, but the law requires that I read them to you.

21 Special Jury Instruction No. 1: Mental Disability -
22 discrimination: The evidence has established and the parties have
23 agreed that Dr. Czarnik suffers from chronic major depression.
24 You are instructed that Dr. Czarnik's depression is a disability
25 for purposes of our state discrimination law, known as California
26 Fair Employment Housing Act, also F-E-H-A, also FEHA. All the
27 same thing.

28 Retaliation - good faith belief: In order to prevail on his

1 claim that Illumina retaliated against him because he complained
2 about disability discrimination, Dr. Czarnik does not have to
3 prove that he was actually discriminated against. Rather, Dr.
4 Czarnik need only prove he had a good faith belief he was being
5 discriminated against and Illumina took adverse action against him
6 in whole or in part because he complained about discrimination.

7 The law prohibits employers from retaliating against
8 employees who make good faith complaints of discrimination whether
9 or not any discrimination actually occurred.

10 Whistleblowing - good faith belief: In order to prevail on
11 his whistleblower claim Dr. Czarnik does not have to prove
12 Illumina actually did disclose information or conclusions derived
13 from the 768 decoding experiment on its roadshow. Rather, Dr.
14 Czarnik only need only prove that:

15 1. He had a reasonable belief that Illumina may have used
16 or was planning to use such information or conclusions in its
17 roadshow presentations in a manner that would be misleading to
18 potential investors;

19 2. He raised his concerns that Illumina may have used or
20 was planning to use such information or conclusions in its
21 roadshow presentations; and,

22 3. Illumina took adverse action against him in whole or in
23 part because he raised such concerns.

24 Employers may not retaliation against employees who
25 reasonably blow the whistle on possible wrongdoing whether or not
26 any violation of law actually occurred.

27 Discrimination/retaliation need not be sole factor: In
28 order to prove his employment was terminated on account of his

1 disability, complaint of discrimination and/or whistleblowing, Dr.
2 Czarnik is not required to prove that his disability, complaint of
3 discrimination or whistleblowing was the sole reason or even the
4 primary reason for Illumina's action. There may be more than one
5 reason or factor influencing an employer's decision. Dr. Czarnik
6 need only show that his disability, complaints of discrimination
7 or whistleblowing was a motivating factor in the decision to
8 terminate.

9 Retaliation - Timing of Employer's Action May Prove Motive:
10 The timing of an employer's adverse employment action may tend to
11 prove employer's motive. A employer's retaliatory motive may be
12 proved by showing that the employee engaged in protected activity,
13 such as making a complaint of discrimination or opposing what he
14 reasonably believes to be conduct by the employer that is illegal,
15 and that the employer's adverse employment action followed within
16 a relatively short time thereafter. However, timing alone does
17 not necessarily prove motive. You must determine motive based
18 upon all of the circumstances, including timing.

19 Pretext: If you find that Illumina's explanation for
20 terminating Dr. Czarnik's employment or taking other adverse
21 employment action against him is a pretext for discrimination or
22 retaliation, you may find in favor of Dr. Czarnik. The word
23 "pretext" as used in these instructions means a false reason or
24 excuse designed to hide the real reason.

25 Employer's duty to investigate discrimination: Employers
26 are required by law to investigate claims of discrimination and
27 take prompt, corrective action to remedy discrimination. You may
28 consider the fact that Illumina did not investigate Dr. Czarnik's

1 claim of discrimination in deciding whether Illumina discriminated
2 or retaliated against Dr. Czarnik and in deciding whether Illumina
3 acted with malice toward Dr. Czarnik. However, the fact that
4 Illumina did not investigate Dr. Czarnik's claim does not
5 necessarily prove that any discrimination or retaliation occurred
6 or that Illumina acted with malice.

7 At-will employment: The fact that you may have seen or
8 heard that Dr. Czarnik was an at-will employee has no bearing on
9 this case. You are not to consider such evidence in your
10 deliberations.

11 Separate claims: In this case, Dr. Czarnik has made claims
12 against Illumina on the basis of three separate legal claims. You
13 are to decide each claim separately. The fact you may decide one
14 claim in favor of a particular party does not necessarily mean
15 that you must decide any other claim or claims in favor of that
16 same party.

17 Damages: If you find that the Plaintiff is entitled to
18 recover damages for unlawful employment discrimination and/or
19 retaliation, the damages must be include the value of any loss of
20 compensation and benefits suffered as a result of the
21 discrimination and/or retaliation, and any damages for emotional
22 discredits suffered by Plaintiff, provided that you find that the
23 loss or harm was or will be suffered by the Plaintiff and was or
24 will be caused by the act or omission upon which you base your
25 finding of liability.

26 Emotional distress: If you find that Plaintiff is entitled
27 to a verdict against Defendant, you must then award Plaintiff
28 damages in an amount that will reasonably compensate Plaintiff for

1 all loss or harm, provided that you find it was or will be
2 suffered by the Plaintiff and was caused by the Defendant's
3 conduct.

4 The amount of such award shall include reasonable
5 compensation for any fears, anxiety or other emotional distress
6 suffered by the Plaintiff and for similar suffering reasonably
7 certain to be experienced in the future from the same cause. This
8 is a non-economic damage.

9 No definite standard or methodical of calculation is
10 prescribed by law by which to fix reasonable compensation for
11 emotional distress. Nor is the opinion of any witness required as
12 to the amount of such reasonable compensation. Furthermore, the
13 arguments of counsel as to the amount of damages is not evidence
14 of reasonable compensation. In making an award if emotional
15 distress, you shall exercise your authority with calm and
16 reasonable judgment, and the damages you fix shall be just and
17 reasonable in light of the evidence.

18 Illumina, Inc. is a corporation and as such can act only
19 through its officers and employees. Any act or omission of an
20 officer or employee within the scope of authority or employment is
21 in law the act or omission of such corporation.

22 Punitive damages: If you find that Plaintiff suffered
23 actual injury, harm or damage caused by disability discrimination,
24 retaliation or wrongful termination in violation of public policy,
25 you must decide in addition whether by clear and convincing
26 evidence you find that there was oppression, malice or fraud in
27 the conduct on which you base your finding of liability.

28 Oppression means despicable conduct that subjects a person

1 to cruel and unjust hardship in conscious disregard of that
2 person's rights.

3 Malice means conduct which is intended by the Defendant to
4 cause injury to the Plaintiff, or despicable conduct which is
5 carried on by the Defendant with a willful and conscious disregard
6 for the rights of others.

7 Despicable conduct is conduct which is so contemptible,
8 miserable or loathsome that it would be looked down upon and
9 despised by ordinary decent people.

10 Fraud means an intentional misrepresentation, deceit or
11 concealment of a material fact known to the Defendant with the
12 intention on the part of the Defendant of thereby depriving a
13 person of property or legal rights or otherwise causing injury.

14 You must now determine whether you should award --

15 MR. PANTONI: I don't think this should be read.

16 THE COURT: This is too soon. That's for later on.
17 Only if needed.

18 The terms "managing agent" includes only those corporate
19 employees who exercise substantial independent authority and
20 judgment in their corporate decision-making so that their
21 decisions ultimately determine corporate policy. The mere ability
22 to hire and fire employees is not in itself sufficient.

23 MS KEARNS: Your Honor, I think the second portion of
24 this instruction may be premature as well.

25 THE COURT: Okay. Actually we'll delete that at this
26 time and then we'll give it later on if necessary.

27 You agree with that, Mr. Pantoni?

28 MR. PANTONI: Yes.

1 THE COURT: Jury not to take cue from judge: I have
2 not intended by anything I have said or done or by any questions
3 that I have asked to suggest how you should decide any question of
4 fact or that I believe or disbelieve any witness. If anything I
5 have done or said has seemed to so indicate, you must disregard it
6 and form your own opinion.

7 I'm not going to use the next one.

8 The purpose of the court's instructions is to instruct you
9 as to the applicable law so that you may arrive at a just and
10 lawful verdict. Whether some instructions apply will depend upon
11 what you find to be the facts. Even though I've instructed you on
12 various subjects, including damages, you must not treat the
13 instructions as indicating the court's opinion on how you should
14 decide any issue in this case or as to which party is entitled to
15 your verdict.

16 In the jury room it is your duty to discuss the case in
17 order to reach an agreement if you can. Each of you must decide
18 the case for yourself, but should do so only after considering the
19 views of each juror.

20 You should not hesitate to change an opinion if you are
21 convinced it is wrong. However, you should not be influenced to
22 decide any question in a particular way simply because a majority
23 of the jurors or any one of them favor such a decision.

24 How juries should approach their task: The attitude and
25 conduct of jurors at the beginning of their deliberations are very
26 important. It is rarely helpful for a juror on entering the jury
27 room to express an emphatic opinion on the case or announce a
28 determination to stand for a certain verdict. When one does that

1 at the outset, a sense of pride may be aroused and one may
2 hesitate to change an opinion even if shown it is wrong.
3 Remember, you are not partisans or advocates in this matter, you
4 must be impartial judges of the facts.

5 Ladies and gentlemen, you must not determine any issue in
6 this case by chance, such as the flip of a coin, drawing of lots
7 or any other chance determination.

8 I always get worried when the jury doesn't laugh at that.

9 For example, if you determine that a party is entitled to
10 recover, you must not arrive at any amount of damages to be
11 awarded by agreeing in advance to determine an average and make
12 that your verdict without further exercise of your independent
13 consideration, judgment and decision.

14 The instructions which I'm now giving you will be made
15 available in written form for your deliberations. You may find
16 that the instructions may be typed, printed or handwritten.
17 Portions may have been added or deleted. You must disregard any
18 deleted part of an instruction and not speculate as to what it was
19 or as to the reasons for its deletion. You are not to be
20 concerned with the reasons for any modification. Every part of
21 the text of an instruction, whether typed, printed or handwritten
22 is of equal importance. You should be governed by the instruction
23 in its final wording.

24 You will be permitted to separate at the noon and evening
25 recess. During your absence the courtroom will be locked. During
26 such periods of recess, you must not discuss with anyone any
27 subject connected with this trial and you must not deliberate
28 further upon the case until all 12 of you are together and

1 reassembled in the jury room. At such time you should notify the
2 bailiff that the jury is reassembled and continue your
3 deliberations.

4 You shall now retire and select one of your number to act as
5 foreperson. Your foreperson shall preside over your
6 deliberations. All jurors should participate in all deliberations
7 and vote on each issue. Answer the questions according to the
8 directions on the form and all the instructions of the court.

9 If nine or more can agree on the answer, you should return a
10 special verdict in the form of written answers to questions on a
11 form you'll be given. As soon as nine or more jurors have agreed
12 upon each answer, have the answer signed and dated by your
13 foreperson and return with it to this room. It need not be the
14 same nine or more jurors who agree on each answer to the
15 questions.

16 You may be polled in open court. If so, each juror must be
17 able to state truthfully that the answer does or does not express
18 his or her vote.

19 So we have prepared to assist you the special verdict form
20 which you've already seen. The purpose of this form really is to
21 walk you through the questions you need to answer and then to
22 direct you in such a way you don't answer questions you don't have
23 to answer.

24 So, for example, question 1, "Do you find that Illumina
25 terminated Dr. Czarnik's employment in whole or in part because of
26 his disability (depression)? Answer yes or no." As soon as nine
27 or more of you have agreed on an answer, the foreperson records
28 that answer. Then in this case you move on to the next one.

1 At other points in the verdict form it will tell you, for
2 example, question number 7, "Do you find that Dr. Czarnik raised
3 concerns to anyone at Illumina about what he reasonably believed
4 to be Illumina's use or planned use of information or upon
5 conclusions derived from the 768 decoding experiment in its
6 roadshow presentation to potential investors? Yes or no. As soon
7 as nine or more agree, the foreperson records the answer, and if
8 you answered yes, you go on to the next. If you answer no, you
9 skip to question 10, so forth. The form tells you what to do.

10 Now, the original is a white form, and we have made copies
11 for each of you which are what color?

12 THE CLERK: Green.

13 THE COURT: Green. The green ones are for you to
14 record your own decision. At the end of the case when you
15 announce your verdict, you may be polled. Each of you has your
16 individual answers to each one of the questions, so you can use
17 the green form to record your own individual answer, and we do
18 that to make sure nine or more of you of actually agree on the
19 answers. The green form will assist you because there are so many
20 questions that you may be called upon to answer to recall how you
21 answered each question.

22 Before the foreperson records the yes or no answer, you
23 should do your own yes or no in the same blank.

24 Couple of other things. With regard to jury questions,
25 questions may be sent to the court in written form through the
26 foreperson. As far as mechanics of getting a question answered,
27 once I receive the question, I will attempt to locate the
28 attorneys. It's possible that one of them or both of them may be

1 involved in another courtroom somewhere. So that sometimes take
2 time. Then we have to get together either telephonically or
3 oftentimes they just come into the courtroom and we try to agree
4 on an answer as to your question. That takes time. So if you
5 write us a question and you don't get an answer right away, it's
6 not that we're ignoring the question. It's that mechanically that
7 it may take awhile to get everybody together and formulate an
8 answer.

9 Again on the subject of questions, questions generally
10 concern either the law or the facts. As far as the law is
11 concerned, the jury instructions are our best attempt to give you
12 all the law that we think you'll need to resolve the questions in
13 the case. So before you send us a question, make sure that the
14 question is not already answered in the jury instructions.

15 As far as the facts are concerned, generally the
16 recollection of 12 people such as yourselves who are paying very
17 close attention, many of you taking notes, is excellent. Try to
18 rely upon your own independent recollection. If you need to have
19 read -- If you need to have testimony, some portions of the
20 testimony have already been put into transcripts, but the vast
21 bulk of the testimony and the arguments, -- Generally there's
22 been a suggestion you could have the arguments read back, and
23 that's a little unusual, the arguments of the attorneys. But if
24 you ask for that, we can discuss it, but we don't have a
25 transcript of that, just as we don't have a transcript of most of
26 the testimony.

27 So most of the time if you ask a question, we're going to
28 have to send the reporter into the jury room and have the reporter

1 read back testimony. Oftentimes it's hard to pinpoint the exact
2 testimony that you want read back or it involves some judgment on
3 our part, which is really your job to decide facts, so oftentimes
4 we end up having the reporter read back the entire direct and
5 cross-examination of the witness, which is very time consuming.

6 So that can be done if it's absolutely necessary. Try to
7 rely upon your independent recollection if you can.

8 As far as the exhibits are concerned, we've had hundreds of
9 documents displayed or referred to in the case. Not all of those
10 have been admitted into evidence. Those which have been admitted
11 into evidence will be sent into the jury room. As to those that
12 aren't sent into the jury room, they are not admitted and you'll
13 have to rely upon your recollection of whatever it is that was
14 said about them, testified to, or whatever, if they were
15 displayed, if you can recall. But generally only those exhibits
16 that have been admitted are the ones that are going to be sent
17 into the jury room.

18 Anything else that counsel want to bring to my attention
19 before we have the bailiff sworn?

20 MR. PANTONI: No, your Honor

21 THE COURT: The clerk will please swear the bailiff.

22 (The bailiff was sworn to take charge of the jury;
23 jurors excused to commence deliberations.)

13 (Proceedings recessed at 2:00 p.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Department 69 Hon. Ronald S. Prager, Judge

ANTHONY W. CZARNIK,)
)
Plaintiff,)
)
vs.) No. GIC763972
)
ILLUMINA, INC., a corporation; and)
DOES 1 through 20, inclusive,)
)
Defendants.)
_____)

Reporter's Transcript of Proceedings
Volume 9
San Diego, California
July 9, 10, 11, 12, 2002

Appearances:
For the Plaintiff: MR. ANTHONY PANTONI, Esq.
401 West A Street
Suite 1820
San Diego, California 92101
For the Defendants: MS JENNIFER A. KEARNS, Esq.
Brobeck, Phleger & Harrison
12390 El Camino Real
San Diego, California 92130
MS NOEMI C. ESPINOSA, Esq.
Illumina, Inc.
9885 Towne Centre Drive
San Diego, California 92121

Reported By: Peter C. Stewart, CSR No. 3184
Official

1 SAN DIEGO, CALIFORNIA, TUESDAY, JULY 9, 2002; 2:30 P.M.

16 (Recess.)

17 THE COURT: Record will indicate all the jurors are
18 present, Counsel and parties present.

19 Mr. Ware, you are the foreperson?

20 JUROR WARE: Yes, I am.

21 THE COURT: Has the jury reached a verdict?

22 JUROR WARE: Yes, they have, sir.

23 THE COURT: Please hand the verdict form to the
24 bailiff.

25 Thank you.

26 The clerk will please read the verdict.

27 THE CLERK: "Superior Court of California, County of
28 San Diego, Case Number GIC 763972, Anthony W. Czarnik, Plaintiff

1 versus Illumina, Incorporated, a corporation, and Does 1 through
2 20, inclusive, Defendant.

3 "Verdict: We, the jury, in the above-entitled action, find
4 the following special verdict in this case:

5 "Disability Discrimination:

6 "Question No. 1: Do you find Illumina terminated Dr.
7 Czarnik's employment in whole or in part because of his disability
8 (depression)?

9 "Answer: Yes.

10 "Question No. 2: Did you find that Illumina denied Dr.
11 Czarnik a stock grant in connection with the closing of Illumina's
12 collaboration with Applied Biosystems, Incorporated (ABI) in whole
13 or in part because of his disability (depression)?

14 "Answer: No.

15 "Question No. 3: Do you find that Illumina took any other
16 adverse employment action against Dr. Czarnik during his
17 employment in whole or in part because of his disability
18 (depression)?

19 "Answer: Yes.

20 "Retaliation:

21 "Question No. Number 4: Do you find that Illumina
22 terminated Dr. Czarnik's employment in whole or in part because he
23 complained about discrimination?

24 "Answer: Yes.

25 "Question No. 5: Do you find Illumina took any other
26 adverse employment action against Dr. Czarnik during his
27 employment in whole or in part because he complained about
28 discrimination?

1 "Answer: Yes.

2 "Termination In Violation Of Public Policy:

3 "Question No. 6: Do you find that Dr. Czarnik had a
4 reasonable belief that Illumina used or was planning to use
5 information or conclusions derived from the 768 decoding
6 experiment in its roadshow presentation to potential investors in
7 a manner that would be misleading to such potential investors?

8 "Answer: Yes.

9 "Question No. 7: Do you find that Dr. Czarnik raised
10 concerns to anyone at Illumina about what he reasonably believed
11 to be Illumina's use or planned use of information or conclusions
12 derived from the 768 decoding experiment in its roadshow
13 presentation to potential investors?

14 "Answer: Yes.

15 "Question No. 8: Do you find that the persons making the
16 decision to terminate Dr. Czarnik's employment were aware that Dr.
17 Czarnik had raised concerns about the use or planned use of
18 information or conclusions derived from the 768 decoding
19 experiment and in its roadshow potential to potential investors?

20 "Answer: Yes.

21 "Question No. 9: Do you find that Illumina terminated Dr.
22 Czarnik's employment in whole or in part because he raised
23 concerns that Illumina used or was planning to use information or
24 conclusions derived from the 768 decoding experiment in a
25 misleading manner in its roadshow presentation to potential
26 investors?

27 "Answer: Yes.

28 "Economic Damages:

1 "Question No. 10: If your answer to questions No. 1, 2, 4
2 or 9 (any or all such questions) is 'yes,' what amount, if any, do
3 you award Dr. Czarnik to reasonably compensate him for the
4 economic damages that he lost or incurred as a result of
5 Illumina's conduct?

6 "Answer: \$1,696,935.

7 "Noneconomic Damages:

8 "Question No. 11: If your answer to Question No. 1, 2, 3,
9 4, 5 or 9 (any or all of such questions) is 'yes,' what amount, if
10 any, do you award Dr. Czarnik to reasonably compensate him for
11 noneconomic damages such as pain, suffering and mental or
12 emotional distress that he suffered as a result of Illumina's
13 conduct?

14 "Answer: \$500,000.

15 "Malice, Fraud or Oppression:

16 "Question No.12: If your answer to Question No. 1, 2, 3, 4,
17 5 or 9 (any or all of such questions) is 'yes,' did you find by
18 clear and convincing evidence Illumina acted with malice, fraud or
19 oppression towards Dr. Czarnik?

20 "Answer: Yes.

21 "Please sign and date this jury form.

22 "Dated July 9th, 2002. Michael M. Ware, Jury Foreperson."

23 Ladies and gentlemen of the jury, was this and is this your
24 verdict as read?

25 (Jurors inaudibly indicate in the affirmative.)

26 THE COURT: Does either side wish polling of the jury?

27 MS KEARNS: Yes, your Honor.

28 THE COURT: What I think I will do is I will just go

1 through each question and ask the question again and ask each
2 juror individually what his answer or her answer to that question
3 was. Is that agreeable?

4 MR. PANTONI: Yes.

5 THE COURT: Okay.

6 Starting with Question No. 1, "Do you find that Illumina
7 terminated Dr. Czarnik's employment in whole or in part because of
8 disability depression?

9 "Answer yes or no."

10 Miss Basulto, what's your answer?

11 JUROR BASULTO: No.

12 THE COURT: Mr. Martinez.

13 JUROR MARTINEZ: No.

14 THE COURT: Your answer is no?

15 JUROR MARTINEZ: (Witness shaking head.)

16 THE COURT: Mr. Beltran.

17 JUROR BELTRAN: Yes.

18 THE COURT: Miss Kelly.

19 JUROR KELLY: Yes.

20 THE COURT: Miss Donovan.

21 JUROR DONOVAN: Yes.

22 THE COURT: Mr. Smith.

23 JUROR SMITH: Yes, sir.

24 THE COURT: Okay.

25 Miss Mack.

26 JUROR MACK: Yes.

27 THE COURT: Miss Lukas, your answer?

28 JUROR LUKAS: Yes.

1 THE COURT: Mr. Jaurequi.

2 JUROR JAUREQUI: Yes.

3 THE COURT: Miss Gladney.

4 JUROR GLADNEY: Yes.

5 THE COURT: Miss Vaughn.

6 JUROR VAUGHN: Yes

7 THE COURT: Mr. Ware.

8 JUROR WARE: No.

9 THE COURT: I get 9 to 3 on that one.

10 Next, "Do you find that Illumina denied Dr. Czarnik a stock
11 grant in connection with the closing of Illumina's collaboration
12 with Applied Biosystems, Incorporated in whole or in part because
13 of his disability, (depression)?"

14 "Answer yes or no."

15 Miss Basulto.

16 JUROR BASULTO: No.

17 THE COURT: Mr. Martinez.

18 JUROR MARTINEZ: No.

19 THE COURT: Thank you.

20 Mr. Beltran.

21 JUROR BELTRAN: No.

22 THE COURT: Miss Kelly.

23 JUROR KELLY: No.

24 THE COURT: Miss Donovan.

25 JUROR DONOVAN: No.

26 THE COURT: Mr. Smith.

27 JUROR SMITH: No, sir.

28 THE COURT: Next, Miss Mack.

1 JUROR MACK: No.

2 THE COURT: Miss Lukas.

3 JUROR LUKAS: No.

4 THE COURT: Mr. Jaurequi.

5 JUROR JAUREQUI: No.

6 THE COURT: Miss Gladney.

7 JUROR GLADNEY: No.

8 THE COURT: Miss Vaughn.

9 JUROR VAUGHN: No.

10 THE COURT: Mr. Ware.

11 JUROR WARE: No.

12 THE COURT: I get 12-zero on that.

13 If either attorney disagrees with my total, bring it to my

14 attention at that time.

15 Next, "Do you find Illumina took any adverse employment

16 action against Dr. Czarnik during his employment in whole or in

17 part because of his disability (depression)?

18 "Answer yes or no." This is Question No. 3.

19 Miss Basulto.

20 JUROR BASULTO: Yes.

21 THE COURT: Mr. Martinez.

22 JUROR MARTINEZ: Yes.

23 THE COURT: Mr. Beltran.

24 JUROR BELTRAN: Yes.

25 THE COURT: Miss Kelly.

26 JUROR KELLY: No.

27 THE COURT: Miss Donovan.

28 JUROR DONOVAN: Yes.

1 THE COURT: Mr. Smith.
2 JUROR SMITH: Yes, sir.
3 THE COURT: Miss Mack.
4 JUROR MACK: No.
5 THE COURT: Miss Lukas.
6 JUROR LUKAS: Yes.
7 THE COURT: Mr. Jaurequi.
8 JUROR JAUREQUI: Yes
9 THE COURT: Miss Gladney.
10 JUROR GLADNEY: Yes.
11 THE COURT: Miss Vaughn.
12 JUROR VAUGHN: Yes.
13 THE COURT: Mr. Ware.
14 JUROR WARE: Yes -- I'm sorry, that's a no.
15 THE COURT: No?
16 JUROR WARE: No.
17 THE COURT: Okay.
18 So I get 9 yes, 3 no.
19 "Retaliation: Do you find --" This is Question No. 4: "Do
20 you find Illumina terminated Dr. Czarnik's employment in whole or
21 in part because he complained about discrimination?
22 "Answer yes or no."
23 Miss Basulto.
24 JUROR BASULTO: Yes.
25 THE COURT: Mr. Martinez.
26 JUROR MARTINEZ: Yes.
27 THE COURT: Mr. Beltran.
28 JUROR BELTRAN: Yes.

1 THE COURT: Miss Kelly.
2 JUROR KELLY: Yes.
3 THE COURT: Mr. Miss Donovan.
4 JUROR DONOVAN: Yes.
5 THE COURT: Mr. Smith.
6 JUROR SMITH: Yes, sir.
7 THE COURT: Miss Mack.
8 JUROR MACK: No.
9 THE COURT: Miss Lukas.
10 JUROR LUKAS: Yes.
11 THE COURT: Mr. Jaurequi.
12 JUROR JAUREQUI: Yes.
13 THE COURT: Miss Gladney.
14 JUROR GLADNEY: Yes.
15 THE COURT: Miss Vaughn.
16 JUROR VAUGHN: Yes.
17 THE COURT: Mr. Ware.
18 JUROR WARE: No.
19 THE COURT: That's 10-2 are yes.
20 Question -- That was Question 4, is that right?
21 Question 5: "Do you find that Illumina took any other
22 adverse employment action against Dr. Czarnik during his
23 employment in whole or in part because he complained about
24 discrimination?
25 "Answer yes or no."
26 Miss Basulto.
27 JUROR BASULTO: Yes.
28 THE COURT: Mr. Martinez.

1 JUROR MARTINEZ: Yes.
2 THE COURT: Mr. Beltran.
3 JUROR BELTRAN: Yes.
4 THE COURT: Miss Kelly.
5 JUROR KELLY: Yes.
6 THE COURT: Miss Donovan.
7 JUROR DONOVAN: Yes
8 THE COURT: Mr. Smith.
9 JUROR SMITH: Yes.
10 THE COURT: Miss Mack.
11 JUROR MACK: No.
12 THE COURT: Miss Lukas.
13 JUROR LUKAS: Yes.
14 THE COURT: Mr. Jaurequi.
15 JUROR JAUREQUI: Yes.
16 THE COURT: Miss Gladney.
17 JUROR GLADNEY: Yes.
18 THE COURT: Miss Vaughn.
19 JUROR VAUGHN: Yes.
20 THE COURT: And Mr. Ware.
21 JUROR WARE: No.
22 THE COURT: That's 10 to 2 are yes.
23 Number 6: "Do you find that Dr. Czarnik had a reasonable
24 belief that Illumina used or was planning to use information or
25 conclusions derived from the 768 decoding experiment in its
26 roadshow presentation to potential investors in a manner that
27 would be misleading to such potential investors?
28 "Yes or no."

1 Miss Basulto.

2 JUROR BASULTO: Yes.

3 THE COURT: Mr. Martinez.

4 JUROR MARTINEZ: Yes.

5 THE COURT: Mr. Beltran.

6 JUROR BELTRAN: Yes.

7 THE COURT: Miss Kelly.

8 JUROR KELLY: Yes.

9 THE COURT: Miss Donovan.

10 JUROR DONOVAN: Yes.

11 THE COURT: Mr. Smith.

12 JUROR SMITH: Yes, sir.

13 THE COURT: Miss Mack.

14 JUROR MACK: Yes.

15 THE COURT: Miss Lukas.

16 JUROR LUKAS: Yes.

17 THE COURT: Mr. Jaurequi.

18 JUROR JAUREQUI: Yes.

19 THE COURT: Miss Gladney.

20 JUROR GLADNEY: Yes.

21 THE COURT: Miss Vaughn.

22 JUROR VAUGHN: Yes.

23 THE COURT: And Mr. Ware.

24 JUROR WARE: No.

25 THE COURT: 11 to 1. That's for yes. That's Question

26 6.

27 Question 7: "Do you find that Dr. Czarnik raised concerns

28 to anyone in Illumina about what he reasonably believed to be

1 Illumina's use or planned use of information or conclusions
2 derived from the 768 decoding experiment in its roadshow
3 presentations to potential investors?

4 "Answer yes or no."

5 Miss Basulto.

6 JUROR BASULTO: Yes.

7 THE COURT: Mr. Martinez.

8 JUROR MARTINEZ: Yes.

9 THE COURT: Mr. Beltran.

10 JUROR BELTRAN: Yes.

11 THE COURT: Miss Kelly.

12 JUROR KELLY: No.

13 THE COURT: Miss Donovan.

14 JUROR DONOVAN: Yes.

15 THE COURT: Mr. Smith.

16 JUROR SMITH: Yes, sir.

17 THE COURT: Miss Mack.

18 JUROR MACK: No.

19 THE COURT: Miss Lukas.

20 JUROR LUKAS: Yes.

21 THE COURT: Mr. Jaurequi.

22 JUROR JAUREQUI: Yes.

23 THE COURT: Miss Gladney.

24 JUROR GLADNEY: Yes.

25 THE COURT: And Miss Vaughn.

26 JUROR VAUGHN: Yes.

27 THE COURT: And Mr. Ware.

28 JUROR WARE: No.

1 THE COURT: 9-3 yes.

2 8, "Do you find that the persons making the decision to
3 terminate Dr. Czarnik's employment were aware that Dr. Czarnik had
4 raised concerns about the use or planned use of information or
5 conclusions derived from the 768 decoding experiment in its
6 roadshow presentation to potential investors?"

7 "Answer yes or no."

8 Miss Basulto.

9 JUROR BASULTO: Yes.

10 THE COURT: Mr. Martinez.

11 JUROR MARTINEZ: Yes.

12 THE COURT: Mr. Beltran.

13 JUROR BELTRAN: Yes.

14 THE COURT: Miss Kelly.

15 JUROR KELLY: Yes.

16 THE COURT: Miss Donovan.

17 JUROR DONOVAN: Yes.

18 THE COURT: Mr. Smith.

19 JUROR SMITH: Yes, sir.

20 THE COURT: Miss Mack.

21 JUROR MACK: Yes.

22 THE COURT: Miss Lukas.

23 JUROR LUKAS: Yes.

24 THE COURT: Mr. Jaurequi.

25 JUROR JAUREQUI: Yes.

26 THE COURT: Miss Gladney.

27 JUROR GLADNEY: Yes.

28 THE COURT: Miss Vaughn.

1 JUROR VAUGHN: Yes.

2 THE COURT: Mr. Ware.

3 JUROR WARE: Yes.

4 THE COURT: 12-zero. That was No. 8.

5 Now number 9: "Do you find that Illumina terminated Dr.
6 Czarnik's employment in whole or this part because he raised
7 concerns that Illumina used or was planning to use information or
8 conclusions derived from the 768 decoding experiment in a
9 misleading manner in its roadshow presentation to potential
10 investors?

11 "Answer yes or no."

12 Miss Basulto.

13 JUROR BASULTO: No.

14 THE COURT: Mr. Martinez.

15 JUROR MARTINEZ: Yes.

16 THE COURT: I didn't year you.

17 JUROR MARTINEZ: Yes.

18 THE COURT: Thank you.

19 Mr. Beltran.

20 JUROR BELTRAN: Yes.

21 THE COURT: Miss Kelly.

22 JUROR KELLY: Yes.

23 THE COURT: Miss Donovan.

24 JUROR DONOVAN: Yes.

25 THE COURT: Mr. Smith.

26 JUROR SMITH: Yes, sir.

27 THE COURT: Miss Mack.

28 JUROR MACK: Yes.

1 THE COURT: Miss Lukas.
2 JUROR LUKAS: Yes.
3 THE COURT: Mr. Jaurequi.
4 JUROR JAUREQUI: Yes.
5 THE COURT: Miss Gladney.
6 JUROR GLADNEY: No.
7 THE COURT: Miss Vaughn.
8 JUROR VAUGHN: Yes.
9 THE COURT: Mr. Ware.
10 JUROR WARE: No.
11 THE COURT: 9-3 for yes.
12 Economic damages: "What amount, if any, do you award Dr.
13 Czarnik to reasonably compensate him for the economic damages he
14 lost or incurred as a result of Illumina's conduct?
15 "Answer: \$1,696,935."
16 Was this your answer, Miss Basulto?
17 JUROR BASULTO: Yes.
18 THE COURT: Mr. Martinez.
19 JUROR MARTINEZ: Yes.
20 THE COURT: Mr. Beltran.
21 JUROR BELTRAN: Yes.
22 THE COURT: Miss Kelly.
23 JUROR KELLY: Yes.
24 THE COURT: Miss Donovan.
25 JUROR DONOVAN: Yes.
26 THE COURT: Mr. Smith.
27 JUROR SMITH: Yes, sir.
28 THE COURT: Miss Mack.

1 JUROR MACK: Yes.

2 THE COURT: Miss Lukas.

3 JUROR LUKAS: Yes.

4 THE COURT: Mr. Jaurequi.

5 JUROR JAUREQUI: Yes.

6 THE COURT: Miss Gladney.

7 JUROR GLADNEY: Yes.

8 THE COURT: Miss Vaughn.

9 JUROR VAUGHN: Yes.

10 THE COURT: Mr. Ware.

11 JUROR WARE: Yes.

12 THE COURT: Okay.

13 12-zero.

14 Non-economic damages: "What amount, if any, do you award to

15 Dr. Czarnik to reasonably compensate him for non-economic damages

16 such as pain, suffering, mental or emotional distress that he

17 suffered as a result of Illumina's conduct?

18 "\$500,000."

19 Miss Basulto, is that your answer?

20 JUROR BASULTO: Yes.

21 THE COURT: Mr. Martinez.

22 JUROR MARTINEZ: Yes.

23 THE COURT: Mr. Beltran.

24 JUROR BELTRAN: Yes.

25 THE COURT: Miss Kelly.

26 JUROR KELLY: Yes.

27 THE COURT: Miss Donovan.

28 JUROR DONOVAN: Yes.

1 THE COURT: Mr. Smith.
2 JUROR SMITH: Yes, sir.
3 THE COURT: Miss Mack.
4 JUROR MACK: Yes.
5 THE COURT: Miss Lukas.
6 JUROR LUKAS: Yes.
7 THE COURT: Mr. Jaurequi.
8 JUROR JAUREQUI: Yes.
9 THE COURT: Miss Gladney.
10 JUROR GLADNEY: Yes.
11 THE COURT: Miss Vaughn.
12 JUROR VAUGHN: Yes.
13 THE COURT: Mr. Ware.
14 JUROR WARE: No.
15 THE COURT: That's 11 to 1 for that number, 500,000.
16 Finally, "Do you find by clear and convincing evidence that
17 Illumina acted with malice, fraud or oppression towards Dr.
18 Czarnik?
19 "Answer yes or no."
20 Miss Basulto.
21 JUROR BASULTO: Yes.
22 THE COURT: Mr. Martinez.
23 JUROR MARTINEZ: Yes.
24 THE COURT: Mr. Beltran.
25 JUROR BELTRAN: Yes.
26 THE COURT: Miss Kelly.
27 JUROR KELLY: Yes.
28 THE COURT: Miss Donovan.

1 JUROR DONOVAN: Yes.

2 THE COURT: Mr. Smith.

3 JUROR SMITH: Yes, sir.

4 THE COURT: Miss Mack.

5 JUROR MACK: Yes.

6 THE COURT: Miss Lukas.

7 JUROR LUKAS: Yes.

8 THE COURT: Mr. Jaurequi.

9 JUROR JAUREQUI: Yes.

10 THE COURT: Miss Gladney?

11 JUROR GLADNEY: Yes.

12 THE COURT: Miss Vaughn.

13 JUROR VAUGHN: Yes.

14 THE COURT: And Mr. Ware.

15 JUROR WARE: Yes.

16 THE COURT: Okay. That's 12-zip.

17 Okay.

18 Now we have another phase of the case, but I think we'll do
19 that tomorrow. I want to talk to the attorneys just for a moment
20 about scheduling. This phase probably doesn't take that long, but
21 I think it's too late to do it today. We'll talk with counsel.

22 (Discussion off the record.)

23 THE COURT: Generally Phase 2 will involve a little bit
24 of testimony, one or two jury instructions, and then one more
25 question. So it has to be the same jury.

26 Mr. Smith? Didn't I tell you I didn't allow questions? Go
27 ahead.

28 JUROR SMITH: No, I'm sorry.

1 THE COURT: What is your question?

2 JUROR: Sir, my question is what is the basis? May I
3 ask that?

4 THE COURT: Can I say what the phase of the case is
5 called?

6 JUROR SMITH: It doesn't matter. We'll get it
7 tomorrow.

8 THE COURT: It's not going to be tomorrow either. The
9 attorneys have to do a little more work before this. Can I tell
10 them what the phase involves?

11 MR. PANTONI: I have no problem.

12 MS KEARNS: Yes.

13 THE COURT: It's a punitive damage phase. By saying
14 that you find fraud, oppression or malice by clear and convincing
15 evidence, that triggers the punitive damage phase. It's very
16 limited testimony, one or two instructions and brief argument by
17 the attorneys.

18 Trying to schedule this in with the Court's -- I already
19 have something else scheduled at 9:00 a.m. on Thursday. We're
20 talking 1:15 Thursday afternoon. It's absolutely imperative that
21 we have you all here. It has to be the same jury. So 1:15
22 Thursday afternoon.

23 Please do not discuss the case. The same admonition still
24 applies. Don't form any additional opinions on the case. Don't
25 discuss the case with anybody else. Don't tell anybody, if they
26 ask what you've done, don't tell them what you've done. And then
27 return at 1:15 Thursday afternoon.

28 I think it's not going to take that long. This phase of the

1 case, although it's an important phase, generally in most cases
2 just does not take that long, because 99 percent of the evidence
3 you've already heard in the case and there's some additional
4 evidence, a little bit of additional evidence, and then some brief
5 argument by the attorneys and then it's up to you.

6 So we'll be in recess until 1:15 on Thursday afternoon.

7 Leave your notebooks. They will still be here when you get back.

8 Leave your green sheet, too, on your seats. Nobody is going
9 to look at them. They'll just be there.

10 Thank you very much, ladies and gentlemen. See you Thursday
11 at 1:15.

12 (Proceedings resumed outside the presence of the jury.)

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(Proceedings recessed at 4:50 p.m.)

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1 SAN DIEGO, CALIFORNIA, THURSDAY, JULY 11, 2002; 1:05 P.M.

2 (Proceedings in chambers.)

26 (Proceedings resumed in open court.)

27 THE COURT: The record will indicate all the jurors are
28 present, counsel and the parties present.

1 During this phase of the case there will be first of all
2 evidence presented. You have a witness you want to call at this
3 time, Mr. Pantoni?

4 MR. PANTONI: I do, your Honor. Timothy Kish

5 TIMOTHY KISH,
6 called as a witness by the Plaintiff, having been first duly
7 sworn, was examined and testified as follows:

8 THE CLERK: Would you please state your full name and
9 spell your last name for the record.

10 THE WITNESS: Timothy M. Kish, K-i-s-h.

11 THE CLERK: Thank you.

12 DIRECT EXAMINATION

13 BY MR. PANTONI:

14 Q Mr. Kish, by whom are you employed?

15 A By Illumina, Inc.

16 Q And how long have you been employed by Illumina?

17 A Since May of 2000.

18 Q What is your current position with Illumina?

19 A I'm vice president and chief financial officer.

20 Q So you are the CFO?

21 A Correct.

22 Q Are you a CPA, sir?

23 A Yes, I am.

24 Q I'd like you to look, please, at what we have marked as
25 Exhibit 389 in front of you. Show you the first page. Mr. Kish,
26 is Exhibit 389 a copy of excerpts from Illumina's most recent 10-Q
27 report?

28 A Yes, it appears to be.

1 Q This is filed with the United States Security and
2 Exchange Commission?

3 A That's correct.

4 Q And briefly for the record what is a 10-Q report?

5 A A Form 10-Q means a public corporations have to file
6 each quarter a set of financial statements with the Securities and
7 Exchange Commission, and so that form is called a 10-Q. Each year
8 we have to file a 10-K, which is an annual statement.

9 Q So is this document for the quarter ending March 31,
10 2000?

11 A 2002.

12 Q I'm sorry. This is the 10-Q for the quarterly period
13 ended March 31, 2002?

14 A Correct.

15 Q That's the most recent set of financial statements that
16 Illumina has filed publicly?

17 A It's the most recent public -- It's the most recent
18 that's available.

19 Q And are the 10-Q reports mailed to shareholders?

20 A They are not mailed to shareholders, no.

21 Q Just filed with the SEC?

22 A That's correct.

23 Q The 10-K reports, are they mailed to shareholders?

24 A Yes, they are.

25 Q All right.

26 I have a blow-up of the second page of Exhibit 389. Is the
27 second page of Exhibit 389 a copy of a portion of that same 10-Q
28 report?

1 A Yes, it is.

2 Q This is Illumina's balance sheets?

3 A Correct, as of March 30th.

4 Q Can you tell the jury what a balance sheet is?

5 A A balance sheet is a statement that shows all the
6 company's assets, such as its cash and its building and its
7 equipment and its liabilities, the mortgages on those buildings,
8 the amounts that we owe vendors, and at the bottom it shows our
9 net worth, which is called stockholders' equity.

10 Q As of the quarter ending March 31, 2002, if I'm reading
11 this correctly -- By the way, these numbers are in thousands, is
12 that correct?

13 A That's correct.

14 Q So as of the end of the quarter dated March 31, 2002,
15 Illumina' total assets were a little over \$140 million?

16 A That's correct.

17 Q And of that a little over 10 million was in cash?

18 A That's correct.

19 Q And the investments available for sale, that means
20 liquid assets, does it not?

21 A That's correct.

22 Q So it's true then that as of this date, March 31, 2002,
23 Illumina had approximately \$87 million in liquid assets?

24 A That's correct.

25 Q The total liabilities are shown on this exhibit as
26 about \$4.9 million?

27 A That would be total current.

28 Q Where are total liabilities seen?

1 A Balance sheets usually don't have a subtotal for total
2 liabilities. They usually balance the combination of all
3 liabilities, which is something kept on the line called
4 stockholders equity, and then they combine the stockholders
5 equity. The total equals the amount of total assets.

6 Q So is the total, then, you said stockholders equity is
7 the same thing as net worth?

8 A That's correct.

9 Q So the net worth of Illumina as of its most recently
10 filed statement was \$99.131 million?

11 A That's correct.

12 Q Let's take a look at the third page of this exhibit,
13 please. You recognize the third page of Exhibit 389 is a page
14 from the same 10-Q report?

15 A That's correct, yes.

16 Q The first section discusses legal proceedings?

17 A Uh-huh.

18 Q Yes?

19 A Yes.

20 Q By the way, in your capacity as CFO, are you
21 responsible for reviewing and approving the financial statements
22 that are filed with the SEC?

23 A Yes, I am.

24 Q So in this particular filing, the most recent public
25 filing, Illumina stated that Dr. Czarnik's lawsuit is without
26 merit?

27 A That's correct, that was our opinion as a company and
28 with legal counsel.

1 Q In fact in every public filing have you commented on
2 Dr. Czarnik's lawsuit?

3 A In every one?

4 Q Since the filing of the lawsuit.

5 A I couldn't answer that. There may have been selected
6 ones where we have or have not. I can't attest to that.

7 Q But on more than one occasion?

8 A Absolutely.

9 Q You have?

10 A Correct.

11 Q Is it true in every time that you've commented on this
12 lawsuit in public filings, you've indicated that the lawsuit is
13 without merit?

14 A That's correct.

15 Q The final page of Exhibit 389, that reflects your
16 signature, sir?

17 A That's correct.

18 Q You signed on behalf of Illumina?

19 A That's correct.

20 Q All right.

21 Now -- I move for the introduction of Exhibit 389.

22 THE COURT: Any objection?

23 MS KEARNS: Well, Exhibit 389 is only selected excerpt
24 from the entire 10-Q which was produced, so we would just suggest
25 that the entire 10-Q be offered rather than the selected excerpt.

26 MR. PANTONI: It's 50 pages long. These are the only
27 pages I needed to refer to.

28 THE COURT: Could I see the entire document

1 It seems it's a very voluminous document with a lot of
2 information that's extraneous. Since what's been referred to up
3 until now is the only pertinent part --

4 MS KEARNS: We'll stipulate to just the entry of that
5 part.

6 THE COURT: Thank you.

7 MR. PANTONI: Q Dr. Kish, let's take a look at
8 Exhibit 390, which is in front of you, and I have a blow-up of it.
9 Can you tell the jury what Exhibit 390 is?

10 A 390 is the same type of document we were just looking
11 at, the balance sheet for Illumina, but now as of June 30th, 2002,
12 and it was our estimate of the numbers that reflected all of the
13 amounts that we will report publicly on July 18th except for the
14 amount of the verdict that's been awarded, and that will also end
15 up being reflected in here as well as an adjustment to these
16 numbers.

17 Q When was this prepared, sir?

18 A It was prepared I think the evening that it was
19 requested. We were in the process of closing the books as these
20 events were unfolding.

21 Q When was this document prepared?

22 A I think we provided it to you on Tuesday, so it would
23 have been Tuesday the 9th. Is that the 9th?

24 Q This document is labeled confidential. Is that because
25 this information is not available publicly?

26 A That's correct. So this hasn't been filed publicly
27 yet, so it's still confidential.

28 Q And again on this balance sheet, if I'm reading this

1 correctly, as of essentially today Illumina's total assets are
2 over \$133 million?

3 A Excluding the amount of the \$2.2 million verdict, that
4 would be correct. That's the only number we will adjust these by
5 when we file these.

6 Q As we speak today, the total assets of \$133 million?

7 A Well, so a small clarification, given the appropriate
8 accounting recognition of the verdict that's been awarded would be
9 to reflect that in the June 30th financial statement. So --

10 Q So it is correct, so we have a clear record, as we
11 speak today, Illumina's total assets of are approximately \$133
12 million, correct?

13 A If we have to pay a settlement, we will lose \$2.2
14 million of cash out of the total assets column.

15 Q And today's cash and liquid investments you have about
16 \$80 million?

17 A That's correct.

18 Q What is the current stockholder's equity or net worth?

19 A As shown here, it's \$92.4 million, but again that would
20 be reduced by \$2.2 million.

21 MR. PANTONI: Nothing further. Thank you very much.

22 CROSS-EXAMINATION

23 BY MISS ESPINOSA:

24 Q Mr. Kish, you looked at the 10-Q just earlier, Exhibit
25 389.

26 A Yes.

27 Q Does the SEC require you to report legal actions that
28 are pending?

1 A Yes, generally, so generally as a matter of principle
2 they need to be disclosed.

3 Q How many people are employed by Illumina today?

4 A About 200 --

5 MR. PANTONI: Objection, relevance.

6 THE COURT: Overruled.

7 THE WITNESS: About 215.

8 MS ESPINOSA: Q How many facilities does Illumina own?

9 A We own one facility here in San Diego.

10 Q And are all the Illumina employees shareholders of the
11 company?

12 A All the employees own stock options and a large group
13 of employees also own shares outright.

14 Q Mr. Pantoni just asked you about the company's most
15 recent net worth calculation. I think you said it was 92.4
16 million. Does that mean the company has all of that money
17 available to it?

18 A No, it does not, unfortunately.

19 Q What part of that is available?

20 A Do you have a slide that --

21 Q Let's put up Exhibit 390. That's not it. Is it the
22 net worth calculation?

23 A Yes.

24 Q We haven't marked this yet.

25 MS KEARNS: 391.

26 MR. PANTONI: I haven't seen it.

27 MS ESPINOSA: This will be a demonstrative. We need to
28 give Mr. Pantoni a copy.

1 THE CLERK: You'll be marking this 391?

2 MS KEARNS: 391.

3 THE COURT: Didn't we mark something else 391?

4 MS KEARNS: Did we?

5 MS ESPINOSA: In chambers. This would be 392.

6 MR. PANTONI: Your Honor, if this was prepared just for
7 purposes of examination, I have an objection to it. It's not a
8 business record.

9 MS ESPINOSA: It's just a demonstrative, your Honor.

10 THE COURT: You may display it. I don't know that it
11 will be received in evidence.

12 MS ESPINOSA: Q If you could please use Exhibit 392
13 to explain what part of that money is available, please.

14 A So if we look at the top line, it says the total net
15 worth of the company after the judgment is about 90.19 million.
16 So that's the 92 million that we talked about a couple of minutes
17 ago on Exhibit 390 less \$2.2 million for the judgment that's been
18 awarded.

19 Now, just like individuals, when you compute your own net
20 worth, if you own a house, let's say that costs \$200,000 and you
21 have a mortgage on it, that's 150,000, your net worth is 50,000,
22 at least relating to that house, but that's not necessarily
23 available or liquid to you because you would have to sell your
24 house in order to obtain the piece of net worth that's represented
25 by it.

26 So companies are in exactly the same situation. Instead of
27 a house, we have a building that we house our people in, and we
28 have, instead of furnishings and furniture we have equipment and

1 other assets, and the total of all of those as was shown on
2 Exhibit 390 is \$49.4 million. However, again comparable to an
3 individual's situation we have a mortgage on that building, and
4 that's again as per Exhibit 390, \$25.96 million. So the net worth
5 that's related to that building and that's not available to us
6 unless we sell that building and therefore close down our
7 operations is \$23.45 million.

8 So the amount of net worth that's available to us to support
9 the company is almost \$67 million as opposed to 90.

10 Now, that's the amount of money that we then use to run our
11 company, and to pay for the fixed cost of things like salaries,
12 supplies for our laboratory people, utilities, taxes, so on, so
13 forth.

14 Just to give you an example of the cost of one of those, for
15 the 250 employees we talked about, the salary for those folks is
16 about \$20 million a year. So we are committed to pay those
17 salaries. So if you assumed, for example, that we had to pay them
18 for a full year, the remainder of that net worth after paying
19 those salaries would only be \$47 million.

20 So another way of thinking about it is that the amount of
21 expenses that we incur every quarter is about \$10 million, so
22 every quarter we roll \$10 million off of that net worth amount.

23 Q So is Illumina's net worth today higher or lower than
24 it was at the end of the first quarter of the year?

25 A It's about \$9 million lower. It would have been \$99
26 million on Exhibit 389, and it is today, before the adjustments,
27 it's \$90 million.

28 Q Is Illumina profitable?

1 A No, Illumina is too early in its development stage to
2 be profitable. Last year we lost \$25 million. This year we have
3 lost in the first six months of the year \$17 million, plus the \$2
4 million verdict, so that's \$19 million. So we are on our way to
5 about a \$35 million loss for this year, \$10 million more than last
6 year.

7 Q Sounds pretty bad. Is that unusual for a start-up
8 company?

9 MR. PANTONI: Objection, leading.

10 MS ESPINOSA: Just an observation.

11 THE WITNESS: It's actually very typical for a start-up
12 company. Start-ups, especially high tech start-ups, require tens
13 of millions and usually a couple hundred million dollars of
14 investment and spending before their products are developed and
15 launched in the marketplace. So it is very typical that obviously
16 they will be spending all that money without any revenues and
17 every quarter they will have losses that are like this.

18 MS ESPINOSA: Q Does the money have any -- Does the
19 company have any money coming in?

20 A We have a small amount of revenues coming in. For
21 example, in the first six months of this year, our total revenues
22 were about \$3 million, 3.2 million actually. But that is of
23 course substantially smaller than the 20 to \$22 million of
24 expenses that we incurred during the first six months of this
25 year.

26 Q Where does the revenue come from?

27 A So our revenue, the larger part of our revenue has been
28 from government grants. If we go back to the beginning of the

1 company, 1998, about four years ago, and look over that four year
2 time frame, we've earned about \$4.7 million of government grants
3 since that time. We've also had some sales of products and
4 services, but it's been much less than that. We've had sales
5 during again that four-year time frame of about 2.8 million of
6 products and services.

7 Now, we of course have to manufacture the products before we
8 can sell them, so we have a cost of doing that, which is a million
9 and a half dollars. So if I subtract that from the \$2.8 million,
10 the amount, total amount of net revenue the company has earned
11 since its inception, is only a little more than \$1 million.

12 Q So how much longer can Illumina continue to operate
13 based on this current --

14 MR. PANTONI: Objection, calls for speculation,

15 THE COURT: Overruled.

16 THE WITNESS: Actually it's a publicly disclosed
17 disclosure made in the first quarter 10-Q. We indicated there as
18 is required by the SEC to make statements about the adequacy of
19 our capital, and in that report we said that at that time we had
20 sufficient capital to operate for about 24 months. It is now of
21 course three months later than that, so we're down to 21 months,
22 and then we have to add the or subtract, if you will, the value of
23 the judgment, which will reduce that time further.

24 MS ESPINOSA: Q I think you said the entire net
25 revenue is a little over a million dollars, so how does the award
26 of \$2.2 million affect Illumina's operations?

27 A Well, it's a very substantial penalty to the company.
28 If you again think about it from an individual standpoint or

1 family standpoint, you might not have a steady income stream. We
2 would act just in the same way. We live on a very tight budget,
3 and to the extent that we have unexpected expenses, we have to
4 find some other way of reducing some other expenses to make up for
5 that.

6 To put this in perspective a little bit, \$2.2 million
7 represents the salaries of about 30 people at Illumina at our
8 average salary rate. That's about 15 percent of our total
9 employees. So what that means is that going forward, since from a
10 corporation standpoint the most controllable cost we have is
11 people, that we will not be able to have on board all the people
12 that we would like or need to develop our products and to
13 commercialize them. So that could have some dire consequences.

14 If we fail to commercialize our products in time to beat our
15 competitors, then we would fail as a company, and of course that
16 would mean laying off most if not all of our employees.

17 Q So are there any other impacts on the company as far as
18 the award?

19 A Yes, there have been. As I indicated, it's a very
20 large number, and we, of course, did not have the ability to hear,
21 if you will, the jury's thinking as they went through the
22 deliberation process, but we clearly saw the result. You voted 12
23 to zero against the company. You awarded a significant penalty to
24 the company, and so we've clearly come to understand the
25 significance of that --

26 MR. PANTONI: Objection and move to strike, your Honor.

27 THE COURT: Motion to strike is granted. I think you
28 might be opening up something you don't want to open up.

1 MS ESPINOSA: Nothing further, your Honor.

2 MR. PANTONI: Your Honor, I'd like an instruction to the
3 jury that the first phase of the trial was not a penalty, it was
4 compensatory damages, in light of what Mr. Kish just said.

5 THE COURT: As far as Mr. Kish's remarks about the
6 first phase of the case and -- Just disregard those remarks. I
7 don't mean to fault him, but it really wasn't proper evidence in
8 this case. Just disregard those remarks.

9 REDIRECT EXAMINATION

10 BY MR. PANTONI:

11 Q Mr. Kish, you don't tell the government things
12 differently than you are telling us here in this courtroom, do
13 you?

14 A That's correct.

15 Q You don't tell your shareholders things that aren't
16 true, do you?

17 A That's correct.

18 Q Just so we're clear, the most recent financial
19 statement that was filed with the United States government tells
20 us that Illumina's net worth was over \$99 million?

21 A That's correct.

22 Q And tells us that liquid cash and investments are over
23 \$87 million?

24 A That's correct.

25 Q So Miss Espinosa pointed out it sounded like you were
26 describing a bad financial situation at Illumina, is that your
27 opinion, sir?

28 A It's just one where we have to live within a

1 constrained budget to accomplish our goals.

2 Q Do you recognize this?

3 A That's the annual report we put out.

4 Q This is this year's annual report?

5 A That's correct.

6 MR. PANTONI: To I want to mark this as next.

7 THE CLERK: 393.

8 MR. PANTONI: Can I use it now and mark it later?

9 THE COURT: Sure.

10 MR. PANTONI: Q This is the one with the picture of
11 Jay Flatley inside, true?

12 A True.

13 Q And last page you recognize Jay Flatley's signature?

14 A That's correct.

15 Q So in the most recent annual report that you sent to
16 shareholders, you describe the company as having a strong
17 financial position, is that correct, sir?

18 A We use those words.

19 Q You would agree that Illumina has a strong financial
20 position, would you not?

21 A Those are the words that we use.

22 Q You don't lie to shareholders, do you?

23 A No.

24 Q Again you recognize that as Jay Flatley's signature?

25 A Correct.

26 Q Did you review and approve this before it went out?

27 A Yes.

28 MR. PANTONI: Nothing further.

1 RE-CROSS-EXAMINATION

2 BY MS ESPINOSA:

3 Q Let's put the same document back up, 393.

4 Mr. Kish, does this contradict anything you said to me
5 during your testimony earlier?6 A No, I believe it shows the same net loss that I
7 described of \$25 million for 2001.8 Q It reflects a loss and that loss of 18.6 million,
9 correct?

10 A That would be the loss for 2000.

11 Q And the numbers that Mr. Pantoni pointed out to you on
12 his big poster board that were reported to the U.S. government
13 with the big number on it, does that contradict anything you said
14 to me in your testimony, the \$99 million number on it, \$92 million
15 number on it?

16 A No.

17 Q So the numbers you were discussing with me are more
18 current information after this was submitted to the government, is
19 that correct?20 A I'm sorry, it was -- This is more current information
21 than the information that was submitted to the government.

22 Q More current than what you filed with the government?

23 A That's correct.

24 Q It's confidential so far but we will be releasing that
25 sometime this month?

26 A That's correct.

27 MS ESPINOSA: Nothing further.

28 MR. PANTONI: Nothing more, Judge

1 THE COURT: Thank you very much, sir, you may step
2 down.

3 Call your next witness, please.

4 MR. PANTONI: No further live witnesses.

5 THE COURT: Okay. Any evidence on behalf of the
6 defendant?

7 MS ESPINOSA: No, your Honor.

8 THE COURT: Very well.

9 We've now completed the evidence in the punitive damage
10 phase the case, ladies and gentlemen. Each of the attorneys will
11 be given the opportunity to present argument, beginning with the
12 Plaintiff's counsel, Mr. Pantoni.

13 MR. PANTONI: So some of you may be wondering what we're
14 doing here today again. You may, I know, be thinking to yourself
15 haven't we already decided this case, haven't we already resolved
16 all the issues in the case. The answer is obviously no, there's
17 still one more issue to resolve. There were legal reasons as to
18 why the first phase of the trial had to be split up from the
19 second phase of the trial. I can assure you, unless there's
20 something I don't know about, that there won't be a third phase of
21 the trial. This is it.

22 This is a very, very important phase of the trial, ladies
23 and gentlemen. Although obviously the testimony was far more
24 brief than the initial testimony, and the arguments will be
25 briefer, it's still very, very important. It may be the most
26 important phase of this trial.

27 The first phase of the trial was a phase where you decided
28 liability, who should prevail, and you decided something called

1 compensatory damages. You decided how much Dr. Czarnik should be
2 compensated in light of his damages, how much he should be
3 compensated for the lost stock, how much he should be compensated
4 for the emotional distress damages. That's the first phase of the
5 trial.

6 This phase is a phase called punitive damages. In this
7 phase of the trial, you need to decide, as the name implies,
8 punitive, what amount is appropriate to punish the defendant, what
9 amount is appropriate to deter this conduct from happening in the
10 future. That's what this phase is about.

11 This is not us coming to you a second time asking you for
12 compensation for Dr. Czarnik. Please understand the difference.
13 This is what amount is an appropriate amount to award in order to
14 make an example of and to deter this conduct from happening in the
15 future.

16 Now, as was the phase during the first phase of the trial,
17 the judge is going to instruct you again and you are going to be
18 getting another verdict form. The good news is that there's only
19 one instruction, and there's only one question that you are going
20 to need to answer. I have a blow-up of the instruction and I'd
21 like to walk through it with you. This instruction describes what
22 punitive damages are and what you are supposed to consider in
23 determining what the appropriate amount of punitive damages is.

24 Now, as you can see, the judge will be reading this to you.
25 You are going to be determining what amount you should award as
26 punitive damages for the sake of example and by way of punishment.
27 That's the concept here. There are essentially three factors that
28 you are supposed to consider in making this determination.

1 The first factor is the reprehensibility of the conduct of
2 the Defendant, why you awarded compensatory damages in the first
3 place, the conduct you found gave rise to liability. I don't
4 think I need to remind you what the evidence showed in this case.
5 I won't belabor the point. You arrived at your decision based on
6 that evidence. I need for you to consider it again in determining
7 the reprehensibility of that conduct.

8 I do want to remind you this isn't a case where you found
9 just one legal violation. Some cases punitive damages are awarded
10 when you find one violation. You recall we talked about there
11 were three separate claims in the case and you were to decide
12 those three claims separately and independently, and you did that,
13 and you found three different violations of law on behalf of
14 Illumina, discrimination, retaliation and the whistleblowing
15 claim. So I ask you to consider the fact when you consider the
16 first factor that there were three separate and independent
17 violations of law when you reexamine Illumina's conduct in this
18 case.

19 The second factor to consider is the amount of punitive
20 damages which will have a deterrent effect on the Defendant in
21 light of the Defendant's financial condition. That's why we spent
22 sometime earlier today with some brief testimony on the
23 Defendant's financial condition.

24 Obviously the greater the Defendant's net worth, in this
25 case \$99-million company or \$92-million company, the greater the
26 Defendant's net worth, the more money they have, the greater the
27 amount the punitive damages has to be in order to have a deterrent
28 effect on the company.

1 And the third factor is the punitive damages must bear a
2 reasonable relation to the injury that was suffered by the
3 Plaintiff. I think we proved to you that the injury suffered by
4 the Plaintiff in this case was significant. So if your punitive
5 damage award is going to bear a reasonable relation to the actual
6 injury, your punitive damage award should be significant as well.

7 Ladies and gentlemen, when you deliberate on the issue of
8 punitive damages, I'd like you to recall the fact that the
9 Defendant was not straight with you, was not honest with you,
10 during the initial phase of the trial. I'm not going to belabor
11 the evidence again. I want to remind you just of two or three
12 things, two or three examples in which I believe the Defendants
13 were not straight with you on the initial phase of the trial.

14 First is was it an error or an oversight on the part of Jay
15 Flatley not to recognize Dr. Czarnik as a founder. I don't think
16 so. Remember what we talked about in terms of Jay Flatley
17 allegedly starting with a clean slate, no preconceived notions.
18 We showed you two weeks into Mr. Flatley's employment he met with
19 a board member, two weeks into the job he says there are
20 performance problems, I need to make changes.

21 Jay Flatley told you the goals he assigned to Dr. Czarnik
22 were reasonable. I believe we proved to you that they were
23 unreasonable and that they were set up to fire Dr. Czarnik. Jay
24 Flatley told you decoding had nothing to do with the termination
25 decision. Remember that? And he didn't even mention decoding at
26 the termination meeting. And yet we showed you the script that
27 Miss Kearns and Mr. Flatley worked through. He says I didn't
28 follow the script.

1 The point obviously is they haven't been straight with you,
2 they weren't straight with Dr. Czarnik when he worked there, now
3 is the time for them to pay for it.

4 So the question, ladies and gentlemen, is how much obviously
5 is it going to take to make an example of Illumina. How much is
6 it going to take to act as a deterrent, how much of an award do
7 you need to issue in order to impact them bottom line, to make
8 them feel it.

9 You saw the most recent public filing showed that Illumina
10 was -- had a net worth of \$99 million. Mr. Kish says that
11 internally they recently created a second financial report and
12 that shows a net worth of only \$92 million. I don't know about
13 potential accounting irregularities. I'd like to go with the --

14 MS KEARNS: I object, and I hate to interrupt a
15 closing, but there's no evidence of accounting irregularities in
16 this case. I think it's improper and prejudicial.

17 THE COURT: Sustained.

18 MR. PANTONI: I think you should go with the publicly
19 filed document, which shows \$99 million. My point was going to be
20 I'm not sure it matters much given that their internal document
21 says their net worth is \$92 million. So, frankly, you could go
22 with either number.

23 The question is what is it going to take to punish a company
24 with this financial condition, what's it going to take to make
25 them feel it on the bottom line, and that's going to be ultimately
26 up to you to decide.

27 I'm going to make a suggestion. It's only a suggestion.
28 You awarded 2.2 million in actual compensatory damages. Often

1 actual damages are a multiple of compensatory damages. Miss
2 Kearns knows there are many cases reported where punitive damages
3 of many times compensatory damages were awarded. I'm going to
4 suggest to you, because the punitive damages must bear a
5 reasonable relation to the actual damages, and because it has to
6 hurt in terms of financial condition, I'm going to suggest to you
7 you use a multiple of four to five times compensatory damages,
8 which would mean punitive damages of 8.8 to \$11 million, somewhere
9 in that range. For a hundred-million-dollar company, a modest
10 multiple of four to five times. That's what I think is an
11 appropriate award in this case.

12 You might go higher, you might be lower. You have to
13 exercise your independent judgment.

14 Thank you.

15 THE COURT: Thank you, Mr. Pantoni.

16 MS ESPINOSA: Ladies and gentlemen of the jury, I had
17 kind of a sense you didn't want to be here today, and I'm really
18 sad to be here today. I'd love to go back over all of the
19 evidence and try to fix some of the misperceptions you might have
20 had from the evidence, but you've obviously ruled the way you
21 ruled, so I'd like to go back over the founder issue and tell you
22 how irrelevant that is.

23 That was a genuine mistake the first time, and after Dr.
24 Czarnik left the company, there was no reason to list him. People
25 really didn't care if he had been there before because there are
26 lots of people who used to be at Illumina and we don't recognize
27 them.

28 I'd love to have you go back over the Bock testimony, what

1 he actually talked to Jay Flatley about during his lunch with Jay
2 shortly after joining the company. There were things Jay
3 discussed with him, and he didn't say he was thinking about
4 replacing a CSO at that early point in time. It was about that
5 skeptical versus cynic conversation he had, and the e-mail about
6 going swimming every day. It was just some little weird signals
7 that Jay picked up.

8 And the goals and decoding and all of that stuff, and the
9 financial information, this is not an Enron case. Tim Kish just
10 testified that the last public filing was the end of March. It's
11 now July. So we're burning \$10 million a quarter. So I can tell
12 you those numbers go down every month. It's an important thing to
13 understand, because you've asked -- You've given us a verdict of
14 \$2.2 million, as we explained. That is punishment, so that's the
15 whole point of my testimony right now, my argument right now.

16 MR. PANTONI: Objection, your Honor.

17 MS ESPINOSA: My argument right now

18 THE COURT: It's argument, not testimony.

19 MS ESPINOSA: This is an argument, not evidence. This
20 is argument.

21 So the \$2.2 million verdict hurts us, there's no doubt about
22 that, and it's very painful. It was a unanimous message that we
23 committed acts of fraud, malice or oppression. It's a terrible
24 thing to hear. It's just an amazing thing to hear from people
25 that are neutral observers. We must have done something to have
26 you perceive that, and we feel that we understand that message.

27 We're going to remind you that this punitive damages phase
28 is entirely optional. You didn't have to be here today, but I

1 don't think you realize by checking box number 12 you were going
2 on to a new phase, and that's a legal reason for that. We hope
3 you feel we've been punished enough.

4 We know you are telling us that you never want this to
5 happen to another employee again. We certainly have that same
6 concern. We don't ever want to go through a litigation again.
7 But Illumina is not some giant public company. It's a start-up
8 culture still today. We all work together in a single facility on
9 two floors, and this company supports 215 San Diego families. So
10 the \$2.2 million verdict you've already hit us with is 30
11 employees for a year. It's very tough. The market out there is
12 really tough right now, and the people at Illumina are really well
13 intended. The whole point of our technology is to make
14 personalized medicine a possibility. Something that would have
15 prevented what happened to Dr. Czarnik in April of 1999 when he
16 switched to the wrong medication.

17 So if you award additional punitive damages, what you would
18 really be doing is punishing the entire company, those people as
19 employees who have nothing to do with Dr. Czarnik's employment
20 issues with us, and the shareholders, stockholders. We have about
21 2000 individual stockholders who never did anything to harm Dr.
22 Czarnik.

23 So you've heard from Mr. Kish the impact of this verdict as
24 it stands will hurt us. This company is not guaranteed to
25 survive. It's small, it's fragile. Yes, we believe in our
26 technology very much, but when you see how that money gets burned
27 up, it's easy to understand why many, many biotech companies with
28 really good technology that's supposed to improve human health and

1 longevity have not made it.

2 So Illumina is in a real race with time. We had 20 to 24
3 months to survive on the money we had before. Now that lifeline,
4 that savings account that we're living off of it, is shorter.

5 You've heard about how cheap everyone was at Illumina in the
6 early days. Even today we have to be frugal. We had nothing in
7 the budget for a \$2.2 million verdict.

8 So money is precious when you are not bringing in revenues,
9 and we're not quite there yet.

10 So today Illumina stock is at 4.20 a share. The \$2.2
11 million verdict you've already rendered is equivalent to over
12 500,000 shares, which is more than what Dr. Czarnik's original
13 grant was. So we believe that you will understand that by
14 awarding Dr. Czarnik \$2.2 million, that's more than -- that is
15 every dollar that we've ever earned in revenues since the history
16 of this company. I think that's a pretty harsh punishment
17 already.

18 It means the same thing that it would to a household where
19 the breadwinner is out of a job, you are living on your savings,
20 and you don't have credit cards, and suddenly you have major car
21 repairs. The purpose of punitive damages is not to destroy the
22 company, to put it out of business, the purpose is to be a
23 deterrent, and I think \$2.2 million is definitely a deterrent. We
24 don't want to spend that money on an award and we've been hit with
25 that award.

26 So using that yardstick, this is not supposed to put the
27 company out of business. Our net worth, that we presented is \$67
28 million now, means it will only last until 2004, and that now with

1 the 2.2 award against us, that will be less time.

2 So the business world is hard out there. It leaves very
3 little room for mistakes. You've decided we've made mistakes. So
4 we have to take our licks from that, we have to learn from it, and
5 move on if we can.

6 Mr. Pantoni has asked you for a lot more money. I think
7 he's implying that \$2.2 million is somehow just a slap on the
8 wrist. It's a lot more like a punch in the nose if you are on a
9 tight budget.

10 So we hope you'll be compassionate and understand the
11 concept of punitive damages as deterrent, and that 2.2 million is
12 a deterrent, and that it took over 200 people working very hard to
13 get to the point where we could sell beads, arrays and genotyping
14 services, and you are taking away all the revenues that we've ever
15 made on that.

16 Thank you.

17 THE COURT: Thank you, Miss Espinosa.

18 Mr. Pantoni rebuttal.

19 MR. PANTONI: First let me say that the legal reason,
20 the reason we are here a second time, is that Illumina requested
21 that the trial be split into two phases. We're certain they are
22 certainly entitled to do that, that was their option, but that was
23 their call, not us.

24 I think Illumina has demonstrated and the people from
25 Illumina have demonstrated that they will say whatever it takes to
26 accomplish the purpose at hand, and you do need to send them a
27 strong message. I want to give you three examples what I'm
28 talking about in terms of Illumina saying what they need to say to

1 suit their present purposes.

2 First example I want to give is John Stuelpnagel. Remember
3 his testimony? When he testified at trial, he called Dr. Czarnik
4 every name in the book. He said he was a miserable failure who
5 contributed nothing to the company. At one point he said he had
6 to treat Tony Czarnik like a fourth grader. I don't know if
7 anybody remembered that testimony. Treat him like a fourth
8 grader. And yet when he was out trying to raise money with his
9 business plan, and I'm reading, I'm quoting now, "When he's
10 raising money, in his business plan Dr. Czarnik is part of a world
11 class management team and an internationally recognized expert."

12 He says whatever he needs to say to suit his purposes.

13 Jay Flatley. He approved Illumina's response to the
14 Department of Fair Employment and Housing. Remember we showed you
15 that. That response said, and I'm quoting again, "Dr. Czarnik
16 never lodged an internal complaint of discrimination in a manner
17 that would have afforded Illumina the chance to address his
18 concerns. Dr. Czarnik never lodged any internal complaints."
19 Problem is he lodged a complaint with Mr. Flatley, and there's
20 apparently an exception for the CEO at Illumina.

21 When he was questioned by Miss Kearns, however, at this
22 trial, he said something to the effect gee, if I had it all to do
23 over again, I probably would have investigated.

24 Finally, you recall Miss Kearns' closing. She said in her
25 closing, "I need to be blunt." Remember she said that word, "I
26 have to be blunt about some things," and she called some of our
27 claims in this case "preposterous." She characterized the fact
28 that we made three separate claims, she characterized that as

1 "throwing stuff onto the wall to see what sticks."

2 My point is she'll say whatever it takes to suit the
3 purposes at hand.

4 You need to send them a message. A strong message, that the
5 three laws that they broke, discrimination, retaliation,
6 whistleblowing, these are important laws. They need to get the
7 message.

8 On discrimination, they need to get the message you don't
9 make assumptions about people because of mental illness. You
10 don't make assumptions that they can't perform tasks. You don't
11 make assumptions that they can't be trusted with important
12 assignments.

13 On retaliation, they need to understand that our laws are
14 designed to encourage people to come forward with complaints, not
15 discourage people to come forward with complaints. They have to
16 be able to come forward with complaints without any fear of
17 reprisal or any fear of retribution. Employers are supposed to
18 investigate claims of discrimination, not retaliate.

19 On whistleblowing, again the whistleblowing laws are
20 designed to encourage people to come forward when they see
21 something wrong, when they see fraud on investors, not discourage
22 people from coming forward. They need to get the message.

23 If you think Illumina takes this case seriously and accepts
24 your verdict and is going to change, that's your view. I think
25 the evidence showed that they didn't take Tony Czarnik seriously
26 when he worked there, they didn't take his complaint seriously.
27 They need to be sent a clear and strong message.

28 And you did vote 12-zero on the issue of whether this was

1 malicious. Stand by that vote. Follow it up. Read the
2 instructions, or the instruction. Miss Espinosa totally
3 mischaracterized what the first part the trial was. The judge
4 instructed you on the first part of the trial. Look at the
5 verdict form. It was purely to compensate. The verdict form you
6 are going to read now has nothing to do with compensation. It
7 only has to do with deterrence, making an example, and punishment.
8 Stand by your 12-zero verdict. Return a punitive damage award,
9 and make it significant.

10 Thank you.

11 THE COURT: Thank you, Mr. Pantoni.

12 Ladies and gentlemen, you must now determine whether you
13 should award punitive damages against Defendant Illumina for the
14 sake of example and by way of punishment. Whether punitive
15 damages should be imposed, and if so, the amount thereof, is left
16 to your sound discretion, exercised without passion or prejudice.

17 If you determine that punitive damages should be assessed
18 against the Defendant, in arriving at the amount of such an award,
19 you must consider, 1, the reprehensibility of the conduct of the
20 Defendant; 2, the amount of punitive damages which will have a
21 deterrent effect on the Defendant in light of the Defendant's
22 financial condition; 3, that the punitive damages must bear a
23 reasonable relation to the injury, harm or damage actually
24 suffered by the Plaintiff.

25 So to assist you in this phase of the case, we have a
26 verdict form that has just one question: "What amount, if any, do
27 you award Dr. Czarnik as punitive damages against Illumina for the
28 sake of example and by way of punishment?"

1 "Answer: \$."

2 That's where you come in.

3 So once nine or more of you have agreed on the number, then
4 and -- and it can be, the amount, what amount, if any, and it's
5 according to the standards that I've given you. Once nine or more
6 have agreed, let the bailiff know, and then you return to the
7 court and we'll take your verdict at that time.

8 The bailiff has already been sworn, I believe.

9 THE CLERK: Yes. He has.

10 THE COURT: Do we swear him again?

11 THE CLERK: No.

12 THE COURT: You are already under oath.

13 THE BAILIFF: Thank you.

14 (Jurors excused to commence deliberations.)

15 THE COURT: You want to standby?

16 MS KEARNS: I think we'll be standing by. If they do
17 return a verdict today, your Honor, we would request that you give
18 the standard statement that they are free to speak with us.

19 THE COURT: I always say that.

20 MS KEARNS: I'm sure both sides are interested in
21 speaking with them.

22 THE COURT: Yes.

23 MS KEARNS: Thank you.

24 (Recess.)

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1 SAN DIEGO, CALIFORNIA, FRIDAY, JULY 12, 2002; 11:50 A.M.

2 THE COURT: Good morning, ladies and gentlemen. Record
3 indicate all the jurors are present, counsel, parties present.

4 You still the foreman, Mr. Ware?

5 JUROR WARE: Yes, sir.

6 THE COURT: Has the jury reached a verdict on the
7 punitive damages?

8 JUROR WARE: Yes, we have, sir.

9 THE COURT: Please hand the form to the bailiff.
10 The clerk will please read the verdict.

11 THE CLERK: Superior Court of California, County of San
12 Diego, Case No. GIC 763972, Anthony W. Czarnik, Plaintiff versus
13 Illumina, Incorporated, a corporation, and Does 1 through 20
14 inclusive.

15 Verdict: "We, the jury, in the above-entitled action, find
16 the following special verdict in this case with regard to the
17 issue of punitive damages:

18 "Punitive Damages:

19 "What amount, if any, do you award Dr. Czarnik as punitive
20 damages against Illumina for the sake of example and by way of
21 punishment?

22 "Answer: \$5 million.

23 "Dated July 12th, '02. Michael Ware, Jury Foreperson."

24 Ladies and gentlemen of the jury, was this and is this your
25 verdict as read?

26 (Jurors indicate inaudibly in the affirmative.)

27 THE COURT: Does either side wish to have the jurors
28 polled individually?

1 MS KEARNS: Yes, please.

2 THE COURT: Very well.

3 Could I have the verdict form, Madam Clerk.

4 I'll read the question and the answer and then I'll just say
5 to each of you was this your verdict, yes or no.

6 Question: "What amount, if any, do you award Dr. Czarnik as
7 punitive damages against Illumina for the sake of example and by
8 way of punishment?"

9 "Answer: 5 million," and there's a dollar sign before that,
10 \$5 million.

11 Miss Basulto, was this your verdict.

12 JUROR BASULTO: No.

13 THE COURT: Mr. Martinez.

14 JUROR MARTINEZ: Yes.

15 THE COURT: Mr. Beltran.

16 JUROR BELTRAN: Yes.

17 THE COURT: Miss Kelly.

18 JUROR KELLY: Yes.

19 THE COURT: Miss Donovan.

20 JUROR DONOVAN: Yes.

21 THE COURT: Mr. Smith.

22 JUROR SMITH: Yes, sir.

23 THE COURT: Miss Mack.

24 JUROR MACK: No.

25 THE COURT: Miss Lukas.

26 JUROR LUKAS: Yes.

27 THE COURT: Mr. Jaurequi.

28 JUROR JAUREQUI: No.

1 THE COURT: Miss Gladney.

2 JUROR GLADNEY: Yes.

3 THE COURT: Miss Vaughn.

4 JUROR VAUGHN: Yes.

5 THE COURT: Mr. Ware.

6 JUROR WARE: Yes.

7 THE COURT: So I get 9 yes, 3 no.

8 Any further polling desired?

9 MS KEARNS: No, your Honor.

10 THE COURT: The clerk will please record the verdict.

11 Ladies and gentlemen of the jury, I want to sincerely thank
12 you for your dedicated service in this case. Without public
13 spirited individuals such as yourselves, we wouldn't be able to
14 have the jury system that we are so fortunate to have.

15 So we are all indebted to you for your diligent service in
16 this case.

17 I'm going to be releasing you from the order you not discuss
18 the case. You'll be free to discuss the case with anybody you
19 wish or not. It's totally up to you.

20 What I'm going to say now is what I say to jurors in every
21 case, a couple of observations. One, the statements that you make
22 if you decide to talk -- and generally what happens is the
23 attorneys are in here for about two minutes after you leave, so if
24 you want to talk, just remain outside in the hallway. They'll be
25 out there just shortly after you leave.

26 You might want to keep the following things in mind:

27 Statements that jurors make at the conclusion of trials are taken
28 very seriously, so some might say that if you are not prepared to

1 swear to it, don't say it, because it might come to that. In
2 other words, it could be what you say could be significant, it
3 could somehow come back in the form of a post-trial motion. So
4 the attorneys take what you say very seriously.

5 As far as what you are prepared to discuss, some feel that
6 comments made by other jurors in the confidential environment of
7 the jury deliberation room should remain confidential. They may
8 distinguish between sharing with the attorneys what they
9 themselves felt versus what others may have said in the
10 confidentiality of the jury deliberation. That's another thing.

11 But again, whether you talk to the attorneys, it's totally
12 up to you. You can talk to them or not. It's totally up to you.

13 So with that, once again, our sincere thanks to you for your
14 diligent service in this case.

15 Please report to the jury services office just to tell them
16 so they'll know you were here today and your jury service is
17 completed.

18 Thank you again for your diligent service in this case,
19 ladies and gentlemen. You are excused at this time.

20 MS KEARNS: I'd like to make one brief statement if I
21 may to the jury.

22 THE COURT: Yes.

23 MS KEARNS: Obviously we at Illumina are very, I think,
24 very somber. We hear your message, and one of the things I want
25 to say is it's very, very important to us that this be a learning
26 experience for the company. We would like to speak with as many
27 of you as would like to stay behind. We want to solicit your very
28 candid input on what led to this result.

1 And in addition, another thing I wanted to say is you've
2 been wonderful in terms of sitting through about a month of highly
3 technical scientific data. I want to leave business cards for my
4 co-counsel Nicky Espinosa and her legal assistant Rose Mercado.
5 Next Wednesday at 6:00 p.m. at Illumina we would like to invite
6 any of you who wish to be there to come. We'll have light
7 refreshments at 6:00 p.m. on Wednesday. We will show those who
8 have an interest the technology which you've heard so much about,
9 and we would hope to further receive additional candid feedback
10 from you on how you reached your decision in case any of you can't
11 stay today. I'll just leave this here.

12 Thank you.

13 THE COURT: You wish to say anything Mr. Pantoni, equal
14 time?

15 MR. PANTONI: Yeah, I want to know if we're invited to
16 the 6:00 p.m. meeting.

17 Other than that, I obviously want to thank the jury for
18 their service as well.

19 THE COURT: Once again, thank you very much. You are
20 excused at this time.

21 You can keep those or leave them on your chair. If you
22 leave them on your chair, we'll probably just destroy them.

23 MS KEARNS: Again that's next Wednesday, 6:00 p.m. at
24 Illumina.

25 (Jurors excused.)

26 THE COURT: May it be stipulated that the exhibits will
27 be returned?

28 JUROR SMITH: Is there any chance we can get a picture

1 with the judge?

2 THE COURT: Sure.

3 Stipulate to the release of the exhibits to the proponents?

4 MR. PANTONI: Yes, your Honor.

5 MS KEARNS: Yes, your Honor.

6 THE COURT: You'll prepare a judgment?

7 MR. PANTONI: Yes.

8 THE COURT: Anything else at this time?

9 MS KEARNS: No, your Honor.

10 THE COURT: Thank you very much.

11 (Proceedings concluded at 11:55 a.m.)

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