

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF INDIANA
 INDIANAPOLIS DIVISION

3 IN RE RECOMBINANT DNA TECHNOLOGY)
 PATENT AND CONTRACT LITIGATION)
 4) MDL Docket No. 912
 THE REGENTS OF THE UNIVERSITY OF)
 5 CALIFORNIA)
)
 6 Plaintiff,)
) CAUSE NO. IP 92-224-C D/G
 7 -vs-) Indianapolis, Indiana
) August 28, 1995
 8 ELI LILLY AND COMPANY,)
)
 9 Defendant.)

10 Before the

11 HONORABLE S. HUGH DILLIN

12 TRANSCRIPT OF PROCEEDINGS AT TRIAL

13 APPEARANCES:

14 For the Plaintiff: Arthur I. Neustadt
 15 Jean-Paul Lavalleye
 16 Marc R. Labgold
 17 William J. Healey
 Amy Levinson
 18 Kevin Bell
 Susan B. Tabler

19 For the Defendant: Donald R. Dunner
 20 Charles E. Lipsey
 Amy E. Hamilton
 21 John C. Jenkins
 Jeffrey Karceski

22 Court Reporter: Patricia A. Cline, CM
 23 Antonette Thompson, RPR-CSR

24 PROCEEDINGS TAKEN BY MACHINE SHORTHAND
 25 COMPUTER-AIDED TRANSCRIPT

1 call these witnesses as part of their case, which they
2 could have done.

3 So I just checked with Judge Barker. She does have
4 some things scheduled for trial the week after this. But I
5 have a suggestion that would maybe help us along, which is
6 that instead of going 9 to 5, we go 8:30 to 6.

7 MR. DUNNER: That's fine, Your Honor.

8 THE COURT: Or if you prefer 8 to 6.

9 MR. NEUSTADT: 8 to 6 is fine with us, Your Honor.

10 MR. DUNNER: That's fine, Your Honor.

11 THE COURT: Okay. We'll do it 8 to 6.

12 We're still on cross-examination. Okay.

13 MR. DUNNER: Thank you Your Honor.

14 MR. NEUSTADT: You thank, Your Honor.

15 CROSS-EXAMINATION (continued)

16 BY MR. DUNNER:

17 Q. Good morning, Dr. Greenlee.

18 A. Good morning, Mr. Dunner.

19 THE WITNESS: Can you hear me?

20 THE COURT: I heard that very well.

21 THE WITNESS: Good. I think they've got the mike
22 working now.

23 MR. DUNNER: Your Honor, I've been advised that
24 there is an error in the record. It's just a single entry.
25 I'd like to correct it, if I may. On page 867, line 20,

1 the words "GCCC" should, in fact, be "GGCC."

2 THE COURT: The record may be changed in
3 accordance with that.

4 BY MR. DUNNER:

5 Q. Dr. Greenlee, I'd like you to turn to 3089B, if you
6 would, in your book.

7 A. Okay.

8 Q. Do you have that?

9 A. Yes.

10 Q. That exhibit consists of a cover sheet from a file
11 history and a letter dated August 18, 1980, from Lorance
12 Greenlee to Edward Waters and Sons. Is that letter one
13 that you wrote?

14 A. It has my signature.

15 Q. I didn't hear you, Dr. Greenlee.

16 A. I'm sorry. I signed it. I believe that I did write
17 it.

18 Q. And that letter was to your Australian associate for
19 the purpose of filing the Australian equivalent to the '740
20 application?

21 A. That appears to be the case.

22 MR. DUNNER: Your Honor, I'd like to move
23 Exhibit 3089B into evidence.

24 MR. HEALEY: Your Honor, they just managed to get
25 this exhibit over to me. We haven't had a minute to look

1 at it. If you would excuse us for a moment.

2 Your Honor, I would object to this exhibit and ask
3 that the entire file wrapper DX3089 be admitted into
4 evidence.

5 MR. DUNNER: Your Honor, I have no trouble
6 admitting the entire file wrapper into evidence, but for
7 purposes of my examination I will agree to that, but I
8 would like to have this in addition admitted into evidence.

9 THE COURT: It will be received.

10 (Defendant's Exhibit(s) 3098B received in evidence.)

11 Q. Now, Dr. Greenlee, do you agree that, in fact, the
12 Australian equivalent -- or Australian counterpart to the
13 '740 application was, in fact, filed in Australia through
14 Edward Waters and Sons, correct?

15 A. It appears that that was the case from this letter. I
16 don't have a direct recollection of that.

17 Q. But you agree that appears to be the case?

18 A. From this letter that appears to be the case.

19 Q. I'd like you to look at 3092A. And that exhibit is the
20 front page of a file wrapper, an Israeli counterpart of the
21 '740 case. And attached to it is a letter dated August 18,
22 1980 from Lorance L. Greenlee to an Israeli firm,
23 W-O-L-F-F, Wolff, et al. Did you write that letter?

24 A. This is my signature. I assume I wrote it.

25 Q. And you agree that this letter and its accompanying

1 cover sheet represents your effort to file the counterpart
2 of the '740 application in Israel?

3 A. Is that a question?

4 Q. Yes. I asked you if you agreed with that.

5 A. Yes.

6 Q. And in fact, this application, the counterpart of the
7 '740 application, was filed in Israel through this firm,
8 Wolff, et al., correct?

9 A. I don't presently recall.

10 Q. But does that seem like a reasonable conclusion from
11 this document?

12 THE COURT: It seems reasonable to me. Let's move
13 on.

14 MR. DUNNER: Fine. I'd like to move into evidence
15 3092A.

16 THE COURT: It will be received.

17 (Defendant's Exhibit(s) 3092A received in evidence.)

18 MR. HEALEY: Again, Your Honor, we would like the
19 entire file DX3092 --

20 THE COURT: You have the opportunity on rebuttal
21 to put in anything you want.

22 Q. 3093B, please look at that document.

23 A. Yes.

24 Q. That document includes a cover sheet of a New Zealand
25 application and a letter from Lorance L. Greenlee to A. J.

1 Park and Son. Did you write that letter?

2 A. Yes, it appears that way.

3 Q. And does this letter request that A. J. Park and Son
4 file the New Zealand application which was a counterpart to
5 the '740 case?

6 A. I believe so, yes.

7 Q. And in fact, you did use that firm for that purpose?

8 A. I don't presently recall.

9 Q. But that was your intent in this letter, correct?

10 A. I can only say what the letter says. I don't have an
11 immediate specific recollection.

12 MR. DUNNER: I'd like to move that into evidence,
13 Your Honor.

14 THE COURT: It will be received in evidence. And
15 if Plaintiffs want to put in the entire file wrapper on
16 rebuttal, they may do so.

17 (Defendant's Exhibit(s) 3093B received in evidence.)

18 Q. Okay. 3079.

19 A. Yes.

20 Q. That is a letter dated August 18, 1980, from Lorance
21 Greenlee to Cabinet Lavoix, L-A-V-O-I-X, dated August 18,
22 1980. Did you write that letter?

23 A. This is my signature, so it's a fair assumption.

24 Q. And was the purpose of this letter to file a
25 counterpart in France of the '740 application?

1 THE COURT: It speaks for itself. Let's move on.

2 A. I believe so.

3 MR. DUNNER: I move that into evidence, Your
4 Honor.

5 THE COURT: It will be received.

6 (Defendant's Exhibit(s) 3079 received in evidence.)

7 Q. Dr. Greenlee, when we broke on Friday, we were talking
8 about the U-3 application. And I just want as a starting
9 point to tell you where we ended up or close to it. I was
10 asking you about UC-3, and on page 991 of the record, I
11 asked you, "And was your belief at the time you're
12 prosecuting these cases that that could not be cited as
13 prior art?" And we're talking about UC-3.

14 "Answer: Correct.

15 "That could not be cited as prior art, correct, while
16 it was an application?" And you answered that,
17 "Evidently."

18 Now, what I'd like to know, do you agree that, in fact,
19 UC-3 never issued as a patent, correct?

20 A. I don't know -- excuse me, I do know. In the U.S. UC-3
21 did not issue.

22 Q. I didn't hear you.

23 A. In the U.S. UC-3 did not issue. I do recall that.

24 Q. In fact, it was abandoned, correct?

25 A. I believe so.

1 Q. And it was abandoned, at least in part, because
2 notebook entries were altered to make --

3 MR. HEALEY: Objection, Your Honor. This is a
4 line of questioning that they tried to bring up last week,
5 and we successfully kept out in front of Dr. Rutter. I
6 don't see any relevance to this witness any reason that
7 UC-3 may have been abandoned.

8 MR. DUNNER: Your Honor, what it shows is, first
9 of all, it was abandoned; and therefore, it could not have
10 been cited as an application in this witness' belief. And
11 secondly, it shows as a pattern of conduct that they
12 altered dates to avoid regulations of the University of
13 California.

14 THE COURT: I'm sure the witness will tell you he
15 doesn't know.

16 MR. DUNNER: Your Honor, he said in his deposition
17 that he did know; and in fact, that is exactly what he
18 said.

19 MR. HEALEY: Again, Your Honor, this goes to the
20 pattern of conduct relating to an application with
21 inventors that are not the same inventors that are on the
22 patents at issue in this suit.

23 MR. DUNNER: Your Honor, they are in part
24 included, if I recall correctly, in Rutter and Goodman and
25 Baxter.

1 THE COURT: Well, I'll overrule the objection.

2 Q. Mr. Greenlee, would you like the question repeated?

3 A. Please.

4 Q. Is it true that this case was, in fact, abandoned
5 because of notebook dates -- at least in part because of
6 notebook dates that were altered to make it appear that the
7 inventors had complied with guidelines of the University of
8 California Institutional Biosafety Committee?

9 A. It's my understanding and my recollection that the case
10 was an interference; that in reviewing the actions -- the
11 notebooks relating to dates of invention, that there were
12 notebooks which had altered dates in them.

13 Q. And they were altered to make it appear that there had
14 been compliance with the Institutional Biosafety Committee
15 guidelines?

16 A. They were altered to make it appear that the
17 experiments had been done at a later date than they
18 actually were done.

19 Q. So it would appear like they complied with these
20 guidelines, correct?

21 MR. HEALEY: Objection, lack of foundation that
22 this witness knows why an act committed by someone else was
23 committed.

24 MR. DUNNER: Your Honor, I can just read from the
25 record. We can end this line of questioning with one more

1 question. May I do that?

2 THE COURT: I'll sustain the objection. Yes, you
3 may ask the question.

4 A. Would you repeat the question, please?

5 MR. DUNNER: Would you repeat the question?

6 (The requested material was read back by the reporter.)

7 A. I don't know of my own knowledge why they did this. I
8 don't recall at the present time why they changed these
9 dates.

10 MR. DUNNER: Your Honor, may I just read from his
11 deposition?

12 THE COURT: Yes.

13 Q. I'd like you to turn to the deposition of July 12,
14 1991, page 161. Do you have that line 2? See where it
15 says, "Question: Both Dr. Seeburg and Dr. Ullrich," on
16 page 161, line 2?

17 A. Yes.

18 Q. I want to know if you gave these answers to these
19 questions.

20 "Question: Both Dr. Seeburg and Dr. Ullrich were
21 working in Dr. Goodman's laboratory; is that right?

22 "Answer: I think Dr. Ullrich worked in Dr. Rutter's
23 lab. I believe Dr. Seeburg worked in Dr. Goodman's lab, to
24 the best of my recollection.

25 "Question: But in the course of your investigation,

1 did you find that some of the original laboratory work
2 conducted by U.C. had been dated inaccurately in order to
3 conceal the fact that the work had been done originally and
4 not in compliance with the NIH guidelines?

5 "Answer: Is that two questions? Can you make it --

6 "Question: Let me break it up.

7 "Answer: Please.

8 "Question: Did you discover in the course of your
9 investigation that some of the original laboratory records
10 of the work done at U.C. had been dated incorrectly?

11 "Answer: Yes.

12 "Question: And did you determine that that original
13 laboratory work, when actually done, had been done not in
14 compliance with the NIH guidelines?

15 "Answer: That was my understanding, yes.

16 "Question: And were the dates on the laboratory
17 records, which you did find, ones which, if accurate, would
18 not have demonstrated noncompliance with the NIH
19 guidelines?

20 "Answer: I need to have that one reread." And the
21 question was reread.

22 "THE WITNESS: The issue that I understand, the problem
23 that I understand, that the data was altered to avoid --
24 was not precisely compliance with the NIH guidelines, but
25 whether the experiment had been approved by the

1 Institutional Biosafety Committee. And it is my
2 understanding that the experiments were performed before
3 that approval had been given; and that the dates had been
4 altered to make it appear that they had been done at a
5 later date.

6 "Question: Was the alteration of the dates on the
7 original laboratory records a factor which you considered
8 in deciding to abandon the contest in the interference with
9 Dr. Gilbert?

10 "Answer: Yes. I should point out that it was not my
11 decision to abandon; that happened after I had left the
12 case."

13 Did you give those answers to those questions?

14 A. Well, that's the record of deposition. I don't -- this
15 was back in 1991. I don't remember everything that I said
16 at that time.

17 Q. But it appears that you gave those answers to those
18 questions?

19 A. Yes. But I believe that your question to me previously
20 was whether or not the issue was in compliance with NIH
21 guidelines, and I believe this record says -- but it wasn't
22 precisely that. It was a question of whether a particular
23 experiment had been approved by the Institutional Biosafety
24 Committee.

25 Q. Now, in fact, during the prosecution of the '740

1 application, you filed a prior art statement, did you not?

2 A. Pardon me? Would you repeat that, please.

3 Q. I'll do it to facilitate this: During the prosecution
4 of the '740 application, you filed what was called or what
5 was the equivalent of a prior art statement where you
6 listed prior art to the examiner, correct?

7 A. Yes.

8 Q. Let us look at that prior art statement. It is in
9 3029K, which is in your book. It's at page 57, just to
10 facilitate your finding it.

11 A. Yes, I have it.

12 Q. Now, in this prior art statement, this was filed by
13 you, correct?

14 A. Yes.

15 Q. And it was filed in order to bring prior art to the
16 attention of the examiner, correct?

17 A. Yes.

18 Q. And you agree that this was done in what you felt was
19 compliance with your duty of disclosure to the examiner?

20 A. In part, yes.

21 Q. And you listed on the first page, Item cited in the
22 specification; do you see that?

23 A. Yes.

24 Q. And you actually gave the examiner copies of those
25 things, correct?

1 A. I presume I did.

2 Q. It says, Copies are submitted herewith. You, in fact,
3 accompanied it with copies?

4 A. I don't recall now.

5 Q. And then on page 2, which is 58 of the exhibit, you
6 actually cited items not cited in the specification,
7 correct?

8 A. Yes.

9 Q. And then you went on and cited items in the
10 specification over and above what you had earlier cited,
11 correct?

12 A. Yes.

13 Q. But in this list you never cited the UC-3 application,
14 did you?

15 A. I believe that's correct.

16 Q. And in fact, if you look at column 7 of the patent,
17 which is actually Exhibit 3000 in your book, do you see
18 column 7, lines 18 through 37? Do you see where you cite a
19 whole batch of references?

20 A. Yes.

21 Q. And also the UC-3 application at the very end of it?

22 A. Yes.

23 Q. You cited every one of the references in this
24 paragraph, but you did not cite UC-3. I'm talking about
25 the prior art statement.

1 A. The prior art statement, although the UC-3 application
2 was incorporated into this one by references as set forth
3 in full.

4 Q. But you didn't cite it as prior art in this prior art
5 statement, did you?

6 A. Not in a prior art statement.

7 Q. Now, I'd like to talk a little about Edward Irons for
8 whom you worked at Irons and Sears. Do you agree that you
9 and Mr. Irons were involved in preparing an evaluation for
10 the U.C. patent portfolio for Mr. Ditzel of the University
11 of California?

12 A. At what time period are you speaking?

13 Q. 1979, before you left Irons and Sears.

14 A. In late 1979?

15 Q. Mid to late 1979.

16 A. I don't recall the -- in late 1979 there was --
17 Mr. Irons primarily was working on such a memo.

18 Q. And you assisted him; is that correct?

19 A. Only in a peripheral way.

20 Q. But you did assist him?

21 A. In a peripheral way.

22 Q. Now, I'd like you to look at DX3467.

23 A. What was the number?

24 Q. 3467.

25 A. Okay.

1 Q. That's a letter dated September 14, 1979, from Roger
2 Ditzel to you, correct?

3 A. It's addressed to me.

4 MR. DUNNER: I'd like to introduce this into
5 evidence, Your Honor.

6 MR. HEALEY: No objection.

7 THE COURT: It will be received.

8 (Defendant's Exhibit(s) 3467 received in evidence.)

9 Q. And in this letter dated September 14, 1979, you were
10 authorized to conduct an evaluation of the University of
11 California patent position with respect to recombinant DNA
12 technology; is that correct?

13 A. This letter states what it states.

14 Q. But do you agree that that's how you understood this
15 letter?

16 A. Mr. Ditzel was asking for an evaluation. That's what
17 the letter says.

18 Q. And do you agree that Mr. Ditzel was the contact person
19 at the University of California for this project?

20 A. Yes.

21 Q. And do you further agree that it was your practice to
22 keep Mr. Ditzel informed as to what you were doing in
23 connection with this project?

24 A. I kept Mr. Ditzel informed of developments in the
25 prosecution of the cases. I'm not sure it was -- I don't

1 recall it was my practice to give him progress reports on
2 work in progress.

3 Q. Now, you agree that you respected Mr. Irons as a
4 lawyer; that his opinions were carefully investigated and
5 carefully articulated; and that his opinions were legally
6 sound?

7 A. I respected Mr. Irons as a lawyer and a good legal
8 thinker.

9 Q. Let me read from your deposition, July 13, 1991.

10 MR. HEALEY: I object to his reading from the
11 deposition just to read from the deposition. If he wants
12 to impeach the witness, that's one thing --

13 THE COURT: I sustain the objection because he has
14 agreed that Mr. Irons is a good lawyer and a good legal
15 thinker. He doesn't have to phrase it exactly the same way
16 he might have phrased it before. He stated that. It just
17 takes time for nothing.

18 MR. DUNNER: Okay, Your Honor.

19 Q. Do you agree that his opinions were carefully
20 investigated?

21 A. I can't recall. I don't know if I have experience on
22 that.

23 Q. Do you agree that his opinions were carefully
24 articulated?

25 A. Mr. Irons was a very articulate man.

1 MR. DUNNER: Your Honor, I would like to just read
2 from the deposition, July 13, 1991, at 214.

3 THE COURT: Well, you're going to read what you've
4 already put into questions after I sustained the objection,
5 I presume.

6 MR. DUNNER: No, Your Honor. I asked him a
7 question about a point, and he said he didn't have any
8 memory; in fact, he did have a memory at his deposition on
9 exactly that point.

10 I'll go on, Your Honor. Let me move on.

11 Q. I'd like you to look at Exhibit 3203. Do you have 3203
12 in your book?

13 A. Yes.

14 Q. On direct you talked about an article on biotechnology
15 patents that Mr. Irons had written; do you recall that?

16 A. Yes. I stated that he had written an article on the
17 patentability of microorganisms, and I believe this is the
18 article.

19 MR. DUNNER: I'd like to move this into evidence,
20 Your Honor.

21 MR. HEALEY: No objection.

22 THE COURT: It will be received.

23 (Defendant's Exhibit(s) 3203 received in evidence.)

24 Q. Now, Dr. Greenlee, on direct you said that it was not
25 clear in 1976 what, if anything, in the biotech field was

1 patentable. Do you remember giving testimony along that
2 line?

3 A. Yes.

4 Q. By 1980 it was very clear, at least in a broad sense,
5 what was patentable in biotechnology. Was that not true?

6 A. If you're referring to the Chakrabarty decision,
7 C-H-A-K-R-A-B-A-R-T-Y decision, I don't remember.

8 Q. It came down in 1980?

9 A. Okay.

10 Q. Do you agree that by that time the Supreme Court made
11 it clear that -- if it had not been clear before -- that
12 one could get patents for life forms and in the
13 biotechnology area, correct?

14 A. That is correct. And prior to that time the United
15 States Patent Office had suspended all of the prosecution
16 of all the applications in this area pending the outcome of
17 that decision. So there was clearly an issue with regard
18 to not only microorganisms but to recombinant DNA in
19 general.

20 Q. But as of that date the Supreme Court cleared up at
21 least that basic question, correct?

22 A. Yes.

23 Q. And thereafter, you continued to prosecute the '740
24 application, correct?

25 A. Yes.

1 Q. After Chakrabarty?

2 A. Yes.

3 Q. Now, you also said on direct that Mr. Tanenholtz was
4 the only one working in the technology forming the subject
5 matter of the '740 patent, correct?

6 A. Prior to about 1980, I believe that's correct.

7 Q. And after 1980 that was not correct?

8 A. Well, they hired a guy named James Martinel who had a
9 background in biotechnology, and then they began hiring
10 others after that. This is my recollection. It's not
11 expert knowledge of what went on in the patent office.

12 Q. But you were not aware at the time you were prosecuting
13 the '740 patent application that Examiner Tanenholtz was
14 examining the Itakura and Riggs U.S. '362 application, were
15 you?

16 A. I was not privy to -- I knew he was prosecuting Cohen
17 and Boyer because he told me. But I don't recall that he
18 told me that he was examining Itakura and Riggs. I don't
19 have any other way of knowing really.

20 Q. Now, isn't it true, Dr. Greenlee, that you personally
21 cited references to the patent office even when you thought
22 they were non-enabling?

23 A. My practice was to cite what I considered to be the
24 most relevant references.

25 Q. Well, let us look at Exhibit 3028C. I'd like you to

1 look at a paper titled Supplementary Prior Art Statement in
2 that exhibit. And your name appears on page 182 of that,
3 correct?

4 A. Yes.

5 Q. And this was a paper that you filed in one of the U.C.
6 applications in the patent office?

7 A. Yes.

8 Q. In fact, it was part of the prosecution of the '525
9 patent, am I correct?

10 A. No. One can tell from the serial number. I don't
11 remember the serial numbers of applications.

12 Q. I'll just show you the filing date on the first page,
13 May 27, 1977. That was the first case you filed, correct?

14 A. That's probably it, yes.

15 Q. I'd like you to look on the first page of the
16 Supplementary Prior Art Statement, and the first sentence
17 says, "Certain items of prior art of possible relevance are
18 noted in addition to the prior art previously cited." Do
19 see that?

20 A. Yes.

21 Q. And then on the second page you cite two other
22 references, a British patent and a U.S. patent at the top
23 of the page.

24 A. Yes.

25 Q. And you say right after that, "Both references purport

1 to disclose the cloning of the gene coding for insulin and
2 its expression in the microorganism. Both purport to
3 achieve these goals by methods that now appear to be
4 inoperable as disclosed." Do you see that?

5 A. Yes.

6 Q. Do you agree that what you were telling the examiner
7 was that these references were not enabled because they
8 were inoperable?

9 A. Whenever I cited a reference in the Supplementary Prior
10 Art Statement, it was my practice at the time not to simply
11 just give the reference in trying to submit the paper, but
12 to also explain to the examiner something about my view of
13 what the reference contained and what its significance
14 would be in relation to patentability.

15 I did this in particular because a reference like this
16 would have been decided late or at some stage in the
17 prosecution; whereas, in the case of a prior art statement
18 the examiners had a chance to -- at the early stage he has
19 the opportunity to see the references and make his own
20 decisions. Instead of just submitting something at a later
21 date, that as a matter of courtesy, the examiner, if
22 nothing else, to say what's in the record so he doesn't
23 have to go back and reinvent the wheel, so to speak, in
24 terms of his analysis.

25 Q. That wasn't my question, Dr. Greenlee. I just want to

1 know were you telling the examiner that you were citing
2 these references even though they were not enabled?

3 A. I think this document speaks for itself. I haven't
4 read it in 15 years.

5 Q. When you say something is inoperable, doesn't that mean
6 it's not enabling?

7 A. It says it's inoperable.

8 Q. Now, I just want to talk about Lilly's role in the
9 prosecution of the U.C. cases. Do you agree that the Lilly
10 attorneys did not correspond with the foreign associates in
11 connection with the U.C. applications?

12 A. As I recall, at the time that I was involved in these
13 cases, the instructions would come to me and I would pass
14 them through to the associate.

15 Q. So the answer to my question is correct, you agree with
16 me, Lilly did not correspond with the foreign associates?

17 A. I don't know whether they did or not. All I know is
18 what they sent to me.

19 Q. I'd like you to look at the June 23, '94 deposition,
20 page 676.

21 A. What date?

22 Q. 676, please.

23 A. No, what date?

24 Q. Oh, June 23, '94.

25 A. I don't seem to have June 23.

1 Q. I'm sorry. Can you not find it, June 23?

2 A. I don't seem to have it.

3 MR. HEALEY: I'd like to object and point out,
4 Your Honor, that the question in the deposition is
5 referring not to Lilly but specifically to Mr. Sparrow.
6 And it also gives the same answer, which is not to his
7 knowledge.

8 Q. Have you found it, 676?

9 A. No, I don't have June 23.

10 Q. You don't have June 23, '94?

11 THE COURT: That's what he said. Show him your
12 copy.

13 Q. Do you see at line 8 on 676?

14 A. Yes.

15 Q. Okay. "Question: During the course of your work with
16 Mr. Sparrow and your prosecution of the foreign patents,
17 did Mr. Sparrow deal directly with any of the foreign
18 correspondent firms that you used in prosecuting these
19 foreign patents?

20 "Answer: Not to my knowledge.

21 "Question: So would it be accurate to state that any
22 instructions or correspondence between the University of
23 California and foreign correspondent firms with respect to
24 these foreign prosecutions would have gone through your
25 office?

1 "Answer: To the best of my recollection, yes."

2 Did you give those answers to those questions?

3 A. Yes, I believe that's consistent with what I just told
4 you.

5 MR. DUNNER: Your Honor, I forgot to introduce
6 into evidence 3028C, and I would like to do so now.

7 THE COURT: It will be received.

8 (Defendant's Exhibit(s) 3028C received in evidence.)

9 Q. Do you agree that the U.S. prosecution work that you
10 did for the University of California was directed to the
11 University patent administrator, Mr. Ditzel?

12 A. I directed my correspondence to him, yes. I also
13 corresponded directly to the inventors.

14 Q. Do you agree that there was no systematic way of
15 informing Lilly about the U.S. prosecution of the U.C.
16 cases?

17 A. That's my recollection, yes.

18 Q. And it is also true that you do not recall discussing
19 with Lilly the cancellation of claims for the U.S. cases,
20 correct?

21 A. Well, I certainly had discussions with Lilly's people
22 about the U.C. cases because, of course, there was some
23 concern that the cases be prosecuted in a way that would
24 provide proper patent protection for Lilly's interest,
25 which was purportedly the licensee in this case.

1 So you asked me if I remember if there was specific
2 instruction from the Lilly people; I don't recall that
3 there was.

4 Q. But beyond that, I asked you whether it is true that
5 you did not recall discussing with Lilly the cancellation
6 of claims for the U.S. prosecution. You said that in your
7 deposition; do you agree with that?

8 A. I don't recall specifically discussions about
9 cancellation of claims, that's correct.

10 Q. And you don't know if Lilly was consulted when
11 amendments to the U.S. claims were considered, do you?

12 A. No, I don't presently recall the substance of any of
13 those discussions really.

14 MR. DUNNER: Your Honor, I'd like to introduce
15 into evidence two documents, DX2260, which should be in the
16 book although I don't see it. It's the Cohen Boyer patent.

17 MR. HEALEY: No objection to 2260.

18 THE COURT: It will be received.

19 (Defendant's Exhibit(s) 2260 received in evidence.)

20 MR. DUNNER: Your Honor, I would also like to
21 introduce into evidence DX3182, which is the Villa-Komaroff
22 publication.

23 MR. HEALEY: No objection.

24 THE COURT: It will also be received.

25 (Defendant's Exhibit(s) 3182 received in evidence.)

1 Q. Dr. Greenlee, you were aware of an incident at the
2 University of California involving the cloning of rat
3 proinsulin in a plasmid known as pBR322, correct?

4 A. I had some knowledge of that, yes.

5 Q. In fact, you were consulted about that incident by Drs.
6 Goodman and Rutter about one week before the filing of the
7 '525 application, were you not?

8 A. I believe that's correct. They told me that the rat
9 insulin cDNA had originally been cloned in the pBR322, and
10 that it had, as I testified here on learning that the
11 clones had not been -- that the vector had been certified,
12 destroyed the clones and recloned the cDNA in pMB9.

13 Q. You say you heard that in Court?

14 A. I'm saying consistent with what was testified in Court.
15 But I recall that that was what I was told by Dr. Rutter, I
16 believe, at the time.

17 Q. In fact, you recall being informed of the decision by
18 Drs. Rutter and Goodman to keep the isolated rat insulin
19 cDNA inserts from pBR322, do you not?

20 A. No, I don't recall that.

21 Q. Let us look at your June 21st '94 deposition. At
22 page 502, do you have that, at line 2?

23 "Question: Do you recall being informed of the action
24 reflected in Greenlee Exhibit 110 of deciding to keep the
25 isolated rat insulin cDNA inserts in the course of your

1 consultation with Drs. Goodman and Rutter?" And your
2 answer was yes. Did you give that testimony?

3 MR. HEALEY: I would object to the deposition
4 question as being vague because it's not clear exactly what
5 it is being referred to. We have here a situation where
6 the cDNA inserts, I think, is vague. We've had several
7 witnesses testify that the cDNA inserts could have been
8 referring to the initial prep that was made before it was
9 ever cloned in pBR322.

10 I think this is a vague question, and we've already
11 heard what Dr. Greenlee remembers about his conversation
12 Dr. Rutter.

13 MR. DUNNER: Your Honor, let me read a little
14 earlier. I don't think that's a valid objection, but let
15 me read a little earlier.

16 Q. Look at page 501, starting at line 13. Do you have
17 that Martin letter, Greenlee Exhibit 109? Do you see that?
18 501, line 13.

19 A. Okay.

20 MR. HEALEY: Excuse me. If he's going to refer to
21 an exhibit within a deposition, can he be shown that
22 exhibit now as he's looking at his testimony, please. That
23 was an objection, Your Honor. Can he be shown that
24 exhibit?

25 THE COURT: Yes, show him the exhibit. If you're

1 going to ask him about an exhibit, you'll have to show it
2 to him.

3 MR. DUNNER: Your Honor, we'll try to get that.
4 Actually this question describes the exhibit right in it,
5 but we'll try to get the -- I've been advised that 109 is
6 3399, which is in the book.

7 Q. Do you see that, Dr. Greenlee?

8 A. Yes. I'm sorry, what?

9 Q. If you want to read that, feel free to do so.

10 A. I'm sorry, what exhibit?

11 Q. It's 3399. Do you see that exhibit?

12 A. I see the exhibit, yes.

13 Q. If you want to read it, you may.

14 A. I don't believe I've ever seen this before.

15 Q. Well, it was shown to you at your deposition.

16 A. Okay. I've scanned it. Do you want me to read all of
17 it or did you have a specific thing you want me to look at?

18 Q. No, I don't want you to read any of it. Your counsel
19 asked that I make it available to you. I would like to
20 read your testimony from your deposition, and I'm merely
21 doing that because your counsel asked me to. May I? Let
22 me read from your deposition starting at page 501, line 13:

23 "Question: The Martin letter, Greenlee Exhibit 109,
24 indicates on the first page toward the bottom, again, in
25 reference to Drs. Goodman and Rutter, quoting 'They had, as

1 I am sure they have shown to you, a typed chronology of
2 events during the period of time when the attempt was being
3 made to clone the rat insulin gene in pBR322.' Do you
4 recall being shown a typed chronology of events at the time
5 of your consultation with Drs. Goodman and Rutter on this
6 topic?

7 "MR. LAVALLEYE: You can answer that yes or no.

8 "Answer: The question is do I recall? No.

9 "Question: Do you recall being informed of the action
10 reflected in Greenlee Exhibit 110 of deciding to keep the
11 isolated rat insulin cDNA inserts in the course of your
12 consultation with Drs. Goodman and Rutter --"

13 MR. HEALEY: Before we get to that answer, he
14 doesn't have Greenlee Exhibit 110. He has Greenlee
15 Exhibit 109. Greenlee Exhibit 109 is a letter that he
16 never saw before. You showed him over 109 exhibits at his
17 deposition. This is one he just read again. He didn't see
18 it before. He hasn't seen it since. Greenlee Exhibit 110
19 is another exhibit he doesn't know what you're talking
20 about. You want to see what he knows about this
21 information, and I would like him to have Greenlee
22 Exhibit 110 before him as well.

23 MR. DUNNER: Your Honor, Mr. Healey keeps
24 interrupting me before I even finish. If you want another
25 document, we'll look for another document. But we'll never

1 finish at this rate.

2 THE COURT: All right. Let me read the question.

3 MR. HEALEY: Your Honor, when this all started, my
4 objection was because he's trying to impeach him on his
5 understanding of whether cDNA inserts were kept. My
6 problem with this is there has been some loose language on
7 how we're identifying cDNA inserts; if they were the
8 original cDNA inserts isolated, or whether they were cDNA
9 inserts kept out of pBR322. Without referring to Greenlee
10 110 that would, I assume, clarify the issue, I'm troubled
11 by asking him from his memory to be sure what he was
12 talking about at his deposition as they're trying to
13 impeach him right now.

14 MR. DUNNER: Your Honor, this is redirect
15 examination. If Mr. Healey wants to challenge the witness
16 or challenge what he said, he may do so. But all I'm doing
17 is reading from his deposition. He said he wanted the
18 first exhibit. We gave it to him. I don't know that we
19 have the other exhibit right here, although we're looking
20 for it.

21 MR. HEALEY: No, what I want to challenge is your
22 inability to ask him a question and get an answer. He's
23 giving a truthful answer that he doesn't remember. You're
24 ineffectively trying to impeach him on something he doesn't
25 remember from a record that was not very clear.

1 THE COURT: Well, do we have the exhibit that's in
2 the question or do you not?

3 MR. DUNNER: I will find out exactly, Your Honor.

4 THE COURT: Why don't you ask him about something
5 else while your associates look for it, unless this is
6 going to be your last question.

7 MR. DUNNER: I will ask him one other thing. This
8 is close.

9 Q. I'd like you to look at Exhibit 3474.

10 A. 347 what?

11 Q. 3474.

12 A. 74? I don't seem to have that.

13 Q. I don't seem to have it either.

14 MR. DUNNER: Hold it one second, Your Honor. I
15 have 110, Your Honor. May I hand it to the witness, Your
16 Honor?

17 THE COURT: Yes.

18 MR. DUNNER: Your Honor, I understand this is in
19 evidence, but I will hand it up to you so you'll have a
20 copy.

21 Q. If you want to read that, you may.

22 A. Go ahead.

23 Q. All right. I read you the earlier part on 501. I'd
24 now like to read the last part, which I never got a chance
25 to finish, starting on line 2, page 502: "Do you recall

1 being informed of the action reflected in Greenlee
2 Exhibit 110 of deciding to keep the isolated rat insulin
3 cDNA inserts in the course of your consultation with Drs.
4 Goodman and Rutter?

5 "Answer: Yes."

6 Did you give those answers to those questions,
7 including the ones I previously read?

8 A. I don't presently recall that, but I do recall being
9 asked practically the same question in my 1991 deposition,
10 and there I said, "I don't believe so. I don't recall."

11 Q. But here you said what I just read, correct?

12 A. I don't have any reason to think that it was reported
13 wrongly.

14 Q. Now, 3474.

15 MR. DUNNER: I'd like to hand this to the witness.
16 It's not in the book, Your Honor.

17 Q. Dr. Greenlee --

18 MR. HEALEY: Can we hold off on the question until
19 we get a copy of the exhibit, please.

20 MR. DUNNER: Oh, I'm sorry. It's the December 7,
21 1979 opinion from Dr. Greenlee to Roger Ditzel.

22 MR. HEALEY: Thank you.

23 Q. Dr. Greenlee, is this a letter which you wrote to
24 Mr. Ditzel on December 7, 1979?

25 A. Yes.

1 patent as of date on this letter, which is April 22, 1986?

2 A. No, I was not. I had not been for sometime.

3 Q. Mr. Dunner asked you a question and you answered that
4 Lilly was not involved directly in the prosecution as of
5 some date. What date were you referring to?

6 A. Well, I was referring to the dates -- I'm sorry, not
7 directly involved in the foreign prosecution?

8 Q. In the foreign prosecution or the U.S. prosecution.

9 A. Well, the question was whether they were directly
10 corresponding with the associates. They certainly were
11 directly involved. The question was whether they were
12 directly corresponding with associates, I believe. And
13 during the time that I was in charge of these cases, which
14 was up until October of 1982, that was the case. After
15 that, I don't know.

16 Q. Mr. Dunner also asked you about some notebook entries
17 relating to the UC-3 application. Dr. Greenlee, were those
18 notebook entries those that belonged to any of the
19 inventors of either the '525 or the '740 patent?

20 A. No.

21 Q. On Friday Mr. Dunner asked you to compare some claims,
22 but he didn't give you the opportunity to look at them side
23 by side. And I'll ask you to do that right now on the
24 screen. We're comparing Claim 2 on the bottom from the
25 European patent application corresponding to the '740

1 patent, and on top Claim 5 from the issued '740 patent.

2 Can you see those claims, Dr. Greenlee?

3 A. Yes. Is it possible to scroll it down just a line or
4 two?

5 Q. Which, the upper one?

6 A. Yes. I can't quite see the first line of the claim.

7 Q. We'll attempt to do that. Dr. Greenlee, have you had
8 an opportunity to examine these claims side by side?

9 A. Yes, I have.

10 Q. Here's Claim 5 from the '740 patent on the screen.

11 A. Yes.

12 Q. Are these claims, Claim 2 from the European application
13 and Claim 5 of the '740 patent, of the same scope?

14 A. No, they're not.

15 Q. What is different about them?

16 A. Claim 2 is broader than Claim 5.

17 Q. What about Claim 5 tells you that Claim 2 is broader
18 than Claim 5?

19 A. Claim 5 contains the limitation consisting essentially
20 of a plus strand having the sequence.

21 Q. And is that limitation found in European Claim 2?

22 A. No, that claim contains comprising a DNA
23 deoxynucleotide sequence, so that allows for a wider range
24 of things to be in that deoxynucleotide sequence.

25 Q. Mr. Dunner then asked you some questions about excuses.

1 withstand the validity challenge on the basis of prior art
2 that wasn't cited. So I was very concerned of all the
3 cases that I prosecuted to cite the best and most relevant
4 prior art that I knew of or could find. So I have no doubt
5 that I did that in this case.

6 MR. HEALEY: Thank you, Dr. Greenlee.

7 Your Honor, I have no further questions.

8 REXCROSS-EXAMINATION

9 BY MR. DUNNER:

10 Q. Dr. Greenlee, you were asked to compare Claim 2 of the
11 European application with Claim 5 of the issued patent, do
12 you remember? You said they were a different scope.

13 A. Yes.

14 Q. Do you remember that you were asked when you knew of
15 the rejection in the European Patent Office of Claim 2 and
16 the prior art statement?

17 A. Which are you referring to, the prior art statement or
18 the rejection?

19 Q. Well, let's start with prior art statement.

20 A. They're different. The prior art statement is a
21 statement from the searching authority of what it believes
22 to be the relevant art. A rejection came in an office
23 action about two years later. And the office action did
24 not reject Claim 5; the office action stated that Claim 5
25 was free of the art.

1 Q. I'd like you to look at Exhibit 3065, please. Do you
2 have that?

3 A. Yes.

4 Q. You received that sometime in 1982, correct?

5 A. Yes. The received stamp says August 5th, 1982.

6 Q. And let's look at --

7 A. Well, sorry, there is --

8 Q. Let's look at the prior art report in 3091.

9 A. Yes.

10 Q. Do you see December 12, 1980 is the date on the bottom
11 of that?

12 A. Yes.

13 Q. And do you recall that you received a copy of that not
14 long after that?

15 A. No. I think you asked me that already.

16 Q. 3064, you see that's a letter to you transmitting a
17 search report from the European Patent Office January 21,
18 1981?

19 A. Yes.

20 Q. Now, as of that date, namely the 1981 date, Claim 5 of
21 the U.S. patent as it ultimately issued had not been
22 allowed, had it?

23 A. As of what date?

24 Q. 1981.

25 A. That's correct.

1 Q. And in fact, what happened was that the examiner had
2 suggested that if the claims were restricted to tailored
3 claims, they might be allowed at some point in the
4 prosecution, correct? You had an interview with him?

5 A. You're talking about --

6 Q. The U.S. prosecution.

7 A. Oh, the U.S.? That, as I recall from reviewing the
8 record recently, occurred in March of '82.

9 Q. And before that, in July of 1981, if you will look at
10 3029 -- 3029K, if you'll look at page 149, as of that date,
11 which is July 1981, a date after the notification of the
12 European rejection, the claim as it ultimately issued,
13 Claim 5, had not been allowed, had it, in the '740 U.S.
14 case?

15 A. I tried to point out earlier that that European search
16 report was not a rejection.

17 Q. I didn't ask that, Dr. Greenlee. I just asked you as
18 of that date --

19 A. What was your question?

20 Q. As of that date the U.S. claim as it ultimately issued
21 in the U.S. patent had not been allowed, had it?

22 A. As of July 1981 the U.S. claim had not been allowed,
23 that's correct.

24 Q. And that was after you had been notified of the
25 European search report, correct?

1 THE COURT: Well, the record will speak for
2 itself.

3 Q. In fact, that claim as it ultimately issued in the
4 patent in the United States case, Claim 5, had not been
5 allowed even in 1982 as of the date of receipt of the
6 rejection in the European patent case, correct?

7 A. That claim, Claim 5, was not rejected in the European
8 patent case.

9 Q. I'm talking about the U.S. case. Claim 5 in the U.S.
10 case had not been allowed as of the date of the European
11 Patent Office rejection, correct, which was in 1982?

12 A. Oh. Let's see. Looking at the record, it looks to me
13 as though I had the interview and had agreed to amend the
14 claims for tailoring prior to receiving this European
15 office action.

16 MR. DUNNER: Would you please read that back to
17 me?

18 (The requested material was read back by the reporter.)

19 Q. But the claims -- assuming that is true, the claims had
20 not been allowed as of the date of the European office
21 action, had they?

22 A. In terms of the formal notice of allowance, that's
23 correct.

24 Q. In fact, the claims were rejected after that point,
25 were they not?

1 A. Do you want to turn to the examiner's interview
2 summary? He made it very clear that he will allow a
3 claim --

4 Q. Let's look at 172, page 172 in 3029.

5 MR. HEALEY: Your Honor, I object to the
6 continuing questioning of this --

7 THE COURT: I sustain the objection. A lot of
8 this has been gone over yesterday, was it not? If not, it
9 wasn't in redirect examination; and therefore, it's
10 improper recross-examination. And last, but not least, the
11 matter of these dates can and should be set out in your
12 post-trial brief, and I can read. So I sustain the
13 objection.

14 MR. DUNNER: Fine, Your Honor. I have no further
15 questions.

16 MR. HEALEY: Nothing further. Thank you, Your
17 Honor.

18 THE COURT: All right. We'll be in recess for
19 about ten minutes.

20 (The Court recessed from 10:30 a.m. to 10:40 a.m.)
21
22
23
24
25

1 THE COURT: Just remain standing, if you will.
2 Raise your right hand.

3 MR. NEUSTADT: Excuse me, Your Honor. I was going
4 to do one preliminary matter before the witness. I wanted
5 to move in some deposition designations.

6 THE COURT: Well, let's just swear the witness in.
7 He must be uncomfortable standing there.

8 MR. NEUSTADT: Sure.

9 PLAINTIFF'S WITNESS, ALLEN B. WAGNER, SWORN

10 MR. NEUSTADT: I have a streamlining matter, Your
11 Honor.

12 THE COURT: Okay.

13 MR. NEUSTADT: Prior to trial Mr. Lipsey and I, in
14 accordance with the pretrial order, agreed that we would
15 designate the portions of depositions that we wanted in,
16 and then he would counterdesignate. And he did the same
17 with his. And there are over 700 depositions. We have
18 gotten them down to a few pages. And I don't know if Your
19 Honor has to read any of them unless they're referred to in
20 a post-trial brief. But I do want to move them into
21 evidence at this time.

22 MR. DUNNER: Your Honor, I am not really sure what
23 Mr. Neustadt is doing, but this weekend -- if this includes
24 exhibits as well, this weekend we were given a large list
25 of exhibits that they wanted to include to move into

1 evidence. And we got a list partly on Saturday, was
2 supplemented on Sunday. We had somebody staying up all
3 night last night to review these exhibits to see whether we
4 had objections. And we have people working right now to
5 review their list. I think it would be much more
6 productive if we waited until we completed our review, and
7 then we could respond immediately to whether we objected or
8 not. It just would save a lot of time to do it that way.

9 MR. NEUSTADT: Your Honor, I think Mr. Dunner has
10 misspoken. I'm not talking about the exhibits now. I am
11 talking about the deposition designations. And I think
12 those were all done prior to trial. And so there was no
13 disagreement with respect to that. We were citing portions
14 of depositions; Mr. Lipsey then was citing
15 counterdesignations. That's all I'm talking about now.

16 All this was done prior to trial. Nothing was done
17 during trial that changed any of that. It's just a simple
18 matter of moving in these deposition designations.

19 MR. LIPSEY: Your Honor, if these are the complete
20 designations and counterdesignations that were exchanged
21 prior to the trial, there's clearly no problem with that.
22 I understood that U.C. had pared down its designations in
23 the materials which they sent over for our review, and we
24 were attempting to respond by paring down our
25 counterdesignations. And I don't know whether what Mr.

1 Neustadt there has is the full pretrial designation,
2 counterdesignation, or the refined one. I would suggest
3 that it might be easier for the Court, if it is the refined
4 one, if we have an opportunity also to refine ours.

5 MR. NEUSTADT: I think that's fine, Your Honor.
6 We'll put our refined one down; they can put their refined
7 one in later, and I think we're in full agreement.

8 MR. LIPSEY: Well, if there's no objection to our
9 supplementing these materials or refining them in our case,
10 then I guess I don't see a problem with that.

11 MR. NEUSTADT: We have no objection to that.

12 THE COURT: All right. I'm not quite sure how
13 these are identified. Could I see a for instance?

14 MR. NEUSTADT: Sure. If I might pass these up to
15 Your Honor. This is a --

16 THE COURT: Just one will be enough. I see. And
17 all of this paper is similar to this, they're Plaintiff's
18 deposition designations?

19 MR. NEUSTADT: That's correct. And this is what
20 one of them will look like. It's just pages from the
21 transcript.

22 MR. LIPSEY: Your Honor, I understand that the
23 counterdesignations are not included in here. This is just
24 the designated part, and it would seem counterproductive to
25 have two copies of the same transcript with the designation

1 and counterdesignation. And perhaps we should merge them
2 together rather than having us submit ours later.

3 THE COURT: Well, let me finish comparing this
4 then, will you?

5 All right. What was handed to me was Plaintiff's
6 deposition designations, and that would be in full, I take
7 it?

8 MR. NEUSTADT: Yes, Your Honor.

9 THE COURT: And on page 2 is Gambrow or Gambrell
10 deposition, May 15, 1995, pages 99 to 100, 106 to 115, 157
11 to 158. That's on the designation. Then I was handed
12 excerpts from the deposition of this witness which coincide
13 exactly with the designation, which means that the excerpts
14 from the depositions which Plaintiff wishes to move in
15 evidence at this time are Plaintiff's designations and do
16 not include the counterdesignations of the Defendant. I
17 see nothing wrong with that. You can hand up your own
18 counterdesignations. They will not be duplications. They
19 are not duplication two or three lines on a page, but they
20 certainly do not duplicate what's here, I don't believe.

21 MR. LIPSEY: Okay. I was unaware that the
22 particular transcript you had was in there. That Grambrell
23 deposition is of an expert, one of our experts who's not
24 going to testify at the trial. So we would obviously
25 object to that particular --

1 THE COURT: Of course you want to put yours in.

2 MR. LIPSEY: I mean, I think his deposition
3 testimony is not usable for any purpose here. He's not
4 going to testify at the trial. He was an expert, a
5 potential expert.

6 THE COURT: Well --

7 MR. NEUSTADT: We took his deposition. He gave us
8 useful testimony that we wanted to use. They said they
9 weren't going to have him testify, so it's the normal
10 situation where you take the deposition of an individual;
11 and if he's not here to testify, you put in his deposition
12 transcript, the portion that you're interested.

13 MR. LIPSEY: May I make a suggestion? Rather than
14 take up Court time with this may we submit -- to the extent
15 we have any objections to any particular transcript of that
16 sort, may we submit that in writing a brief for the Court
17 and the Court can resolve it in due course?

18 THE COURT: Fine with me.

19 MR. LIPSEY: Okay. Thank you, Your Honor.

20 MR. NEUSTADT: One other matter of streamlining,
21 Your Honor.

22 THE COURT: Meanwhile, we will receive these in
23 evidence subject to later objections by the Defendant.

24 MR. NEUSTADT: In connection with the pretrial
25 procedure we exchanged exhibits and then we made our

1 objection to exhibits. What I want to move in now are
2 Plaintiff's exhibits that Defendant indicated during his
3 pretrial procedure it had no objection to. And since they
4 stated they were having no objection to this exhibit, we
5 assumed that it would be entered in the Court, and now
6 we're just moving to have it entered.

7 MR. DUNNER: Your Honor, this is a matter about
8 which Mr. Neustadt and I had long discussions last night.
9 I told Mr. Neustadt that we were reviewing all of his
10 proposed entries of exhibits into evidence, and that we
11 would give him a response today. I have not had an
12 opportunity to look at what he's submitting. If, in fact,
13 what he's submitting is unobjectionable, I will so tell
14 him.

15 But I think it would be much more productive to permit
16 us to complete our review which we have not completed. We
17 learned this weekend of almost 180 documents that they
18 wanted introduced, and we are proceeding systematically to
19 review them all. Our review should be completed today. We
20 will respond to Mr. Neustadt as soon as it's completed. I
21 have not looked at those exhibits to see what objections
22 we've made or not made. And I'm unable to respond right
23 now.

24 MR. NEUSTADT: Your Honor, if I might pass this up
25 to the Court, this was a list that we generated in

1 accordance with the pretrial procedure. All of those
2 exhibits Lilly formally indicated to us in the pretrial
3 that it had no objection to. And I also have a copy of
4 Lilly's list in which he stated that he had no objections
5 to those, and I don't think there's any dispute concerning
6 those.

7 MR. DUNNER: Your Honor, there may not be a
8 dispute. All I'm saying is permit us to review them and
9 we'll give them a prompt response today to all of his
10 proposals.

11 THE COURT: That seems reasonable to me.

12 MR. NEUSTADT: Your Honor, it's -- if Mr. Dunner
13 is --

14 THE COURT: Unless you're about to rest or
15 something, why --

16 MR. NEUSTADT: No.

17 THE COURT: -- they will keep.

18 MR. NEUSTADT: The difficulty, Your Honor, is we
19 got the notice prior to trial that there was going to be no
20 objection; and therefore, we didn't provide any mechanism
21 for bringing these in if all of a sudden Mr. Dunner was
22 going to object at trial. After a formal pretrial
23 procedure he said he had no objection.

24 THE COURT: Well, he may not have an objection,
25 but there are several scores of exhibits listed here. And

1 he would surely have the opportunity to check this list
2 against his own list if he has one. I presume he does have
3 one done.

4 MR. DUNNER: Your Honor, we do.

5 THE COURT: To give us the final word on it. So
6 let's just do that.

7 MR. NEUSTADT: Very well, Your Honor.

8 Your Honor, Dr. Labgold will examine the next
9 witness.

10 THE COURT: Okay. Now those that we have received
11 I think --

12 MR. NEUSTADT: I'll give these to your clerk.
13 These are all of those, the whole --

14 THE COURT: Just put them on the table. She'll be
15 happy to have them.

16 MR. LABGOLD: Your Honor.

17 DIRECT EXAMINATION

18 BY MR. LABGOLD:

19 Q. Will the witness please state his full name for the
20 record.

21 A. Yes. My name is Allen Wagner.

22 Q. And could you state your full address.

23 A. My residence is 1980, 1-9-8-0, El Dorado, capital E-L,
24 capital D-O-R-A-D-O, Avenue, in Berkeley, California.

25 Q. Okay. What is your current position?