

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HERON THERAPEUTICS, INC.,)
Plaintiff,)
v.) Civil Action No.
24-830 (WCB)
AZURITY PHARMACEUTICALS,)
INC., AZURITY)
PHARMACEUTICALS INDIA LLP)
F/K/A SLAYBACK PHARMA)
INDIA LLP, and SLAYBACK)
PHARMA LLC,)
Defendants.)

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HERON THERAPEUTICS, INC.,)
Plaintiffs,)
v.) Civil Action No.
24-1363 (WCB)
AZURITY PHARMACEUTICALS,)
INC., AZURITY)
PHARMACEUTICALS INDIA LLP)
F/K/A SLAYBACK PHARMA)
INDIA LLP, and SLAYBACK)
PHARMA LLC,)
Defendants.)

Monday, December 30, 2024
10:00 a.m.

BEFORE: THE HONORABLE WILLIAM C. BRYSON
United States District Court Judge

Jennifer M. Guy, RPR
jenniferguyrpr@gmail.com

HERON EXHIBIT 2008

Azurity Pharmaceuticals, Inc. et al. v. Heron Therapeutics, Inc.

PGR2025-00036

1 APPEARANCES:

2 MORRIS, NICHOLS, ARSHT & TUNNELL LLP
3 BY: JEREMY A. TIGAN, ESQ.

4 - and -

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14 WINDELS MARX LANE & MITTENDORF LLC
15 BY: CONSTANCE S. HUTTNER, ESQ.
16 ROBYN AST-GMOSER, ESQ.

17 Counsel for the Defendants
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1 THE COURT: This is Heron
2 against Slayback or Azurity, Numbers
3 24-830 and 24-1363.

4 The first thing I want to
5 do -- I guess let's first go ahead and
6 call the roll as to who is here for each
7 of the parties and who is going to be
8 speaking for each of the parties, the
9 plaintiff first.

10 MR. TIGAN: Yes, Your Honor.
11 This is Jeremy Tigan in Wilmington for
12 Heron. I'm joined by my co-counsel, Isaac
13 Ashkenazi, who will speak for us today,
14 Karthik Kasaraneni, Mark Sperling, and
15 Justin Fleischacker.

16 THE COURT: Okay. And for
17 the defendants.

18 MR. HITCH: Good morning,
19 Your Honor. On behalf of the defendants,
20 it's Cortlan Hitch from Morris James.
21 Joining me today are Constance Huttner and
22 Robyn Ast-Gmoser from Windels Marx, and I
23 believe Ms. Huttner will be addressing the
24 Court today.

1 THE COURT: Okay. Now, the
2 first thing I want to try to clarify for
3 my purposes is the business of the
4 expiration of the 30-month stay. This
5 case -- and I'm talking now about 1363 --
6 was filed, as I understand it, this month.
7 But I'm told by reading the scheduling
8 order -- not the scheduling order, the
9 docket, rather, that the 30-month stay
10 expires in June of '26. That's not 30
11 months, even backing up the 30 days for
12 filing the complaint. How is it the case
13 that this 30-month stay expires in June,
14 if somebody can tell me, June of '26?

15 MR. ASHKENAZI: Your Honor,
16 Isaac Ashkenazi for Heron. I can address
17 that.

18 THE COURT: Is that the date
19 this expires?

20 MR. ASHKENAZI: It is.

21 THE COURT: How can that be?

22 MR. ASHKENAZI: It's keyed
23 off of the first litigation.

24 THE COURT: Why should it be

1 keyed off the first litigation? Since I
2 became aware of this case when it was
3 filed only in December of '24.

4 MR. ASHKENAZI: So what
5 happens is it's based on the NDA that's
6 filed, in this case, the 505(b)(2) that
7 Azurity has filed. The timing of the
8 first notice letter, which is what
9 triggered the 24-830 case, is what starts
10 the 30-month stay. The two patents that
11 issued subsequently are not -- do not
12 ground the 30-month stay, and they don't
13 issue or they don't start a new 30-month
14 stay, Your Honor.

15 THE COURT: Why not?

16 MR. ASHKENAZI: That's the
17 way that the statute is set up. I would
18 imagine that's because they don't want
19 patents issuing, rolling, then 30-month
20 stays expiring.

21 THE COURT: Well, the trigger
22 for the 30-month stay, as I understand
23 it -- I have not done a deep dive on
24 this -- but the trigger is you get 45 days

1 from the date of the application, and you
2 get then 30 months after -- you have to
3 file a lawsuit within the 45 days, and
4 then the 30-month stay runs from the date
5 of the ANDA plus the filing.

6 Why does that change simply
7 because the filing, the ANDA was early and
8 the filing of the lawsuit occurred very
9 much later? What if this lawsuit had not
10 been filed, or if you planned to have more
11 patents, that this lawsuit is filed in May
12 of 2026? Do I have one month to resolve
13 the case?

14 MR. ASHKENAZI: No, you don't
15 have one month to resolve the case.

16 THE COURT: So why is it I
17 don't have 30 months to resolve this case?
18 What's the difference between the two?

19 MR. ASHKENAZI: When I say
20 you don't have one month to resolve it,
21 there potentially could be preliminary
22 injunction proceedings.

23 THE COURT: Yeah. As I
24 understand it, the 30-month stay is when I

1 have to get my work done absent an
2 extension, which is very closely
3 circumscribed by the statute. So why is
4 it that I have more than a month or only a
5 month in my hypothetical case to resolve
6 the case?

7 MR. ASHKENAZI: Your Honor, I
8 think the way to look at, and I offer my
9 colleague on the other side to jump in if
10 they have additional thoughts on this, but
11 the way that it's perceived by me, at
12 least, is that you get one 30-month stay,
13 and that starts from when the first
14 patents are challenged and you receive a
15 paragraph or a certification notice
16 letter.

17 If there are what we call
18 later issued patents, they don't start a
19 new 30-month stay. So it would become
20 like any other patent proceeding where,
21 you know, if somebody is about to launch a
22 product, let's say it's not a
23 pharmaceutical product, it's an
24 electronics product, they would be able

1 to, you know, you could have a lawsuit
2 brought and there may be early preliminary
3 injunction proceedings to make sure that
4 person doesn't launch.

5 The way that it is here, Your
6 Honor, is we believe that we could get
7 this all done within the 30 months that
8 originally prescribed, or if there's an
9 extension, we just want to avoid an API
10 proceeding.

11 THE COURT: No, I don't see
12 anything so far that would justify an
13 extension, since the extension statute is
14 very restrictive.

15 MS. HUTTNER: Your Honor, if
16 I may address your concern, this is Connie
17 Huttner for the defendants. Mr. Ashkenazi
18 is correct that there's one 30-month stay
19 and it runs from the time of the original
20 complaint that was filed, when that
21 complaint was filed and when the NDA was
22 filed in that case. The two patents that
23 they just added, as Mr. Ashkenazi noted,
24 are considered later added patents and

1 they don't count for purposes of this
2 stay.

3 THE COURT: Is there case law
4 on that or is there a statutory provision
5 that answers that question?

6 MS. HUTTNER: I believe there
7 are both, Your Honor. I don't have
8 anything to cite as I sit here. But the
9 way the rules work, you get one 30-month
10 stay per case, and after-added patents
11 don't count, they don't generate a new
12 stay. So the way we're proposing to
13 address your concern, which is that you
14 have adequate time to decide this case, [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED], which we're suggesting should
18 be a consolidated trial of both actions in
19 June of 2026. And at that time, [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

1 [REDACTED] At that point, you
2 will have heard the evidence at trial, you
3 have heard the evidence of the Mylan
4 trial, the Fresenius appeal, if there is
5 one, will have worked its way through the
6 courts, and parties will have completed
7 fact and expert discovery in both of the
8 cases here, and [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED].

12 I think the only real dispute
13 between the parties here is as to whether
14 you should give that guidance now,
15 approximately a year and a half before
16 we're requesting that the trial in the
17 consolidated action take place, or whether
18 it should wait until closer to trial or
19 after trial to tell us at that point. We
20 are committing you to -- you're right that
21 the circumstances that allow a court to
22 extend the automatic stay are limited, [REDACTED]

23 [REDACTED]
24 [REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

What we don't want to do is
commit prematurely to a situation, and
what they're asking for is in effect that
you order us, [REDACTED]
[REDACTED]
[REDACTED], so you would
have to effectively order it. And that's
where I think Your Honor is correct, that
that is a difficult thing under the law to
do.

To avoid the preliminary
injunction practice, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

MR. ASHKENAZI: Your Honor,
if I can.

THE COURT: Go ahead.

1 MR. ASHKENAZI: We're not
2 asking for an extension of the 30-month
3 stay right now. What we're trying to
4 figure out is a schedule that provides the
5 Court with enough time to decide the case,
6 or to avoid us having to actually brief a
7 preliminary injunction while we're at
8 trial or while we're in post-trial
9 submissions. We don't have to take an
10 extension of six months and have trial in
11 June. We're open to all possibilities.
12 The only thing we don't want is the need
13 to have to brief a preliminary injunction
14 when we're preparing for trial or right
15 after trial when we're in post- trial
16 submissions.

17 THE COURT: Let me tell you
18 what my concerns are, and I'll hear from
19 you on your concerns, and to the extent we
20 can get into the weeds on timing of
21 various things, I'm willing to do it at
22 this point, although I think that may need
23 to be postponed.

24 But as the way I've set this

1 up, perhaps unwisely, I left myself what I
2 regard as a minimum amount of time between
3 the date of trial and the date of the
4 expiration of the 30-month stay at six
5 months. However, that doesn't account for
6 briefing and ultimately writing an opinion
7 that can take a considerable amount of
8 time, particularly because I have a lot of
9 other matters, not only district court
10 matters, but matters sitting every month
11 in the Court of Appeals. Last year one of
12 the factors that got in the way of my
13 getting some of my ANDA cases done quickly
14 was that I had ten trials last year, five
15 of which were ANDA trials, in addition to
16 sitting in the court of appeals. Now,
17 that's not your problem, that's my
18 problem. But to the extent it's my
19 problem, it will have an effect on you.

20 So I am not going to hold off
21 and change the schedule in any way that
22 will reduce the amount of time I have.
23 I'm going to stick with giving myself the
24 minimum of six months, which means going

1 to trial in January, or try to find a way
2 to back the trial date up into 2025, which
3 is not going to come as welcome news to
4 any of you, I suspect. But the fact that
5 this case seems to continue to get larger,
6 the number of patents is greater, that
7 does make things somewhat more complex.

8 Now, I've looked at the 12
9 patents that are currently at issue, and
10 there's an awful lot of overlap, it
11 strikes me. To my view, and I haven't
12 studied them closely, but I've looked at
13 the claims and I've looked at the general
14 nature of the patents, and it looks to me
15 like an awful lot of them are just
16 aprepitant emulsion claims. Some
17 additional method claims, of course, but
18 that was true of the '229 and the '465
19 patents. There are other patents that are
20 directed more broadly at NK1 receptor
21 antagonists, which, of course, is broader
22 than aprepitant, and I can understand that
23 that will involve some other issues.

24 But I have two questions for

1 you. Number one, are you really planning,
2 Mr. Ashkenazi, to go to trial with 12
3 patents, or are you planning to reduce the
4 footprint of these patents to something
5 that will reduce the redundancy and make
6 the case more triable?

7 MR. ASHKENAZI: Your Honor,
8 it's the latter. Similar to what happened
9 in, just for context, the Fresenius case,
10 I think 9 out of those 12 patents were
11 there. As you saw when we got to trial,
12 we had narrowed it down to only certain
13 core claims from two patents, the '229 and
14 the '794. So we do plan on that.
15 However, at this early stage, as we're
16 still going through discovery, you know,
17 these narrow over time, Your Honor.

18 THE COURT: Well, that's
19 welcome news. I would hope that they
20 would get narrowed earlier rather than
21 later, because of course having all 12
22 patents makes the whole pretrial process
23 more cumbersome. I'll leave it at that
24 for now.

1 I guess the other question I
2 have -- well, I have several related
3 questions. One is it looks like if I'm
4 right, that these patents are largely
5 overlapping, particularly the ones that
6 are aprepitant patents; we had very little
7 by way of significant claim construction
8 disputes in the first case. I don't think
9 we had any in the Mylan case. And I'm
10 wondering whether devoting a significant
11 chunk of time to claim construction
12 processing in this case makes any sense at
13 all.

14 Is there -- and I ask both
15 sides on this -- is there a viable, real
16 significant, difficult claim construction
17 issue lurking in this case, or would I be
18 correct in assuming that the claim
19 construction is straightforward as it was
20 in the other two predecessor cases?

21 MR. ASHKENAZI: Your Honor,
22 from Heron's perspective, I do believe
23 from reading the notice letter and the
24 original contentions we received on the

1 first ten patents, that claim construction
2 may be an issue here. That's based on our
3 interpretation of Azurity's contentions.
4 I'll let my colleague on the other side
5 speak.

6 THE COURT: Let me hear from
7 the other side on claim construction.

8 MS. HUTTNER: Your Honor,
9 we're still evaluating the issue,
10 obviously, but I don't expect that there's
11 going to be a lot of the claim
12 construction issues, and I don't expect
13 that if there are claim construction
14 issues, that they're going to be any more
15 complicated than they were in the
16 Fresenius case.

17 THE COURT: Which was not
18 very.

19 MS. HUTTNER: I agree.

20 THE COURT: One of the things
21 that I would like to do, and having set a
22 trial date for January, I understand that
23 people have expectations that they'll have
24 at least until January to get ready. But

1 if, in fact, the claim construction and
2 perhaps even other issues in the case turn
3 out to be much simpler than would be
4 justified to have a lengthy claim
5 construction process, then I would like to
6 save ourselves the time that would
7 otherwise be spent on claim construction.

8 So give me an idea -- I know
9 you're still evaluating -- but give me an
10 idea of what claim construction issues you
11 think are apt to pop up in this case, to
12 the extent that you can tell me now. And
13 if you can't tell me now, then perhaps we
14 can have a session shortly in which after
15 you've had a chance to really dig in to
16 the claim construction issue, you can tell
17 me what they are. Because if they are not
18 much, then I want to cut out that part of
19 the pretrial proceedings, or cut it way
20 down. So tell me what you've got that
21 you've thought about so far.

22 MS. HUTTNER: Your Honor, we
23 really haven't made a determination yet
24 which issues we're going to pursue,

1 because some of it is depending on factual
2 investigation, which is still going on.
3 So I really can't give you --

4 THE COURT: Factual
5 investigation that deals with claim
6 construction?

7 MS. HUTTNER: Doesn't deal
8 with claim construction per se, but it
9 deals with if there will be a need for
10 claim construction on certain issues, and
11 that's something we're still evaluating.
12 So I really can't give you a better answer
13 than I have.

14 I would like to ask, if Your
15 Honor would, a question for you. I
16 understand your concern about wanting to
17 have at least six months to decide this
18 case, and I don't have authorization from
19 my client. 

20

21

22  would that resolve your concern
23 about moving the trial date?

24

 THE COURT: Well, I don't

1 want to move the trial date unless I see
2 some really good reason for it. In this
3 case, I'm looking at two patents, the '244
4 and '245, both of which are directed to
5 aprepitant emulsions. Now, I don't see,
6 at least on the face of it, that those two
7 patents are all that different from the
8 rest of the patents in the case. So I'm
9 not seeing any seismic event that occurred
10 in December of this year that -- when the
11 1363 suit was filed -- that dramatically
12 changes the posture of this case, other
13 than to add two patents that were not
14 there before. Can you tell me why this is
15 a dramatic change in a case that already
16 had ten patents and is adding two patents
17 that look pretty much the same as the
18 previous ten?

19 MS. HUTTNER: I don't
20 disagree that the patents all look the
21 same. The primary difference between
22 these two patents and the older patents
23 are the numbers that are in the various
24 ratios and concentrations in the

1 aprepitant emulsions claims. And there
2 are, as a result of those numbers being
3 different, there are different defenses
4 and different arguments with respect to
5 the two new patents than with respect to
6 the earlier patents. I mean, they're
7 similar, but they're different. And that
8 is --

9 THE COURT: Moderately
10 different. I looked at the numbers. I
11 would not go so far as to say that this is
12 a dramatic change in the nature of the
13 claims.

14 MS. HUTTNER: I'm not
15 suggesting that it's dramatic, but they
16 are different and they do require
17 different analysis, and that's what we
18 would like to undertake in a way that
19 doesn't compress our time to do that. I
20 mean, we haven't even answered the new
21 complaint yet. There are contentions that
22 need to be filed by both parties in the
23 new case, as well as Azurity would like to
24 file contentions in the original case, as

1 well.

2 And it just seems, since the
3 parties are willing to push the trial off,
4 that that made the most sense, obviously
5 not taking into account your schedule.
6 That's why I was inquiring, if Your
7 Honor's major concern is having enough
8 time to decide the case, [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 THE COURT: Well, one option,
15 which I am going to guess that neither
16 side wants, is that we not consolidate the
17 two cases. But since I'm told that the --
18 and I take your word for it -- that the
19 expiration of the 30-month stay is the
20 same for both cases, then that option
21 doesn't really buy any benefit for me or
22 ultimately for you. So I am inclined to
23 go ahead and consolidate the two cases,
24 which I take it is the position that both

1 parties prefer. I'm assuming that's true.
2 Is that right?

3 MS. HUTTNER: That's correct,
4 Your Honor.

5 MR. ASHKENAZI: Yes, Your
6 Honor.

7 Your Honor, if I may?

8 THE COURT: Yes.

9 MR. ASHKENAZI: Again, this
10 is all about your schedule, so I want to
11 be respectful. [REDACTED]

12 [REDACTED]
13 [REDACTED]

14 We've done that in other cases, Your
15 Honor, such that to not put pressure on
16 the Court, and we would be fine with that,
17 as well. Again, this has to do with your
18 schedule. I am just saying that that is a
19 fine option from our perspective.

20 THE COURT: Well, of course,
21 before making a decision on that, I would
22 want to have a firm agreement from the
23 parties on that. I understand Ms. Huttner
24 is not in a position to make a firm

1 commitment to that. For now, at least,
2 I'm going to assume that we're going to go
3 to trial in January and that a decision
4 will be forthcoming by June. Now, let's
5 assume that is the case, and if somebody
6 wants to come back to me with an
7 agreement, then I will certainly consider
8 it. But my inclination right now is to
9 move ahead with this case and not try a
10 work-around of the 30-month stay.

11 Now, if we do that, a couple
12 of things. I've already mentioned claim
13 construction. So what I want to hear from
14 you, and I want to hear it pretty soon, is
15 give me an idea of what claim construction
16 issues there will be. I won't hold you to
17 anything said today. But I would like for
18 the parties to identify within 14 days any
19 claim construction issues that you
20 anticipate will be necessary to be decided
21 by the Court in the claim construction
22 process. That should not be very
23 difficult. And I would like to see if a
24 schedule can be devised that will cut the

1 claim construction process way down. So
2 that's number one.

3 Number two, I will probably
4 expect the parties to -- normally what I
5 do in ANDA cases is to give the parties an
6 opportunity to file proposed findings of
7 fact and conclusions of law after the
8 trial. If there's only six months after
9 the trial, then in that case, I either
10 will have to very much curtail the length
11 of time for the findings of fact and
12 conclusions of law, or have the findings
13 of fact and conclusions of law prepared in
14 advance of the trial based on what you
15 expect the evidence to show. This is more
16 cumbersome in the sense that who knows if
17 the evidence will show exactly what you
18 expect, but it's doable. And I don't want
19 a chew-up of the six months that I've got
20 to work with. I don't want to chew up
21 three of them by briefing by the parties.
22 So one or the other of those two options
23 is possible.

24 There's a third possibility,

1 and this has been used by different judges
2 in the District of Delaware, and that is
3 to forgo the summary judgment process. I
4 think Judge Sleet used to do that fairly
5 regularly in ANDA cases, and I think some
6 of the other judges have done the same. I
7 don't know what parties have by way of
8 thinking about summary judgment, what sort
9 of process that you have in mind and what
10 sort of issues you have in mind. But I'd
11 like to hear, at least to the extent you
12 can give me an idea, whether there's any
13 realistic prospect that summary judgment
14 can be either shortened or can be forgone
15 altogether.

16 So Mr. Ashkenazi, it's
17 probably Ms. Huttner is the one who is
18 going to be more concerned on this score.

19 MR. ASHKENAZI: I would say
20 from our perspective, we can forgo summary
21 judgment.

22 MS. HUTTNER: Your Honor, my
23 only hesitation in agreement with
24 Mr. Ashkenazi is that I don't really have

1 a good sense of what claims he's going to
2 end up asserting here, and therefore, I
3 don't know if there's going to be any real
4 opportunity for summary judgment.

5 That said, my surmise is that
6 this is not a case where summary judgment
7 is going to be needed, but there may be
8 some issues on which it is needed,
9 depending upon which claims they end up
10 asserting. So if as part of this process
11 we could set a timeframe for reducing the
12 number of claims or patents or something,
13 that would be very helpful I think in both
14 determining what the schedule ought to be
15 and then streamlining it to avoid
16 unnecessary time spent on things that
17 don't really matter here.

18 THE COURT: That I think is a
19 very sensible suggestion, and I turn to
20 Mr. Ashkenazi.

21 I am inclined, Mr. Ashkenazi,
22 to agree the sooner the better, and it
23 falls to you to tell me about when you can
24 make a decision as to how much you want to

1 cut down on the case.

2 MR. ASHKENAZI: Your Honor,
3 we can absolutely do that. I'd have to
4 sit down with the calendar a little bit
5 just to see. But the way this normally
6 works, and this is the way it worked in
7 the other two cases, is we drop
8 contentions, and at the end of fact
9 discovery, once we know the facts, all the
10 details about their products, et cetera,
11 we will have dropped, and then usually
12 post expert discovery, we will then
13 further narrow the case.

14 I'm more than happy to work
15 and be willing to be a little flexible
16 there. What I will say is it's very hard
17 to say at this stage to say exactly what
18 claims I'm going to go to trial with if we
19 haven't finished fact discovery.

20 THE COURT: Give me an idea
21 of where we are, because I don't have --
22 well, I do have the scheduling order right
23 here, but you can help me. When is fact
24 discovery supposed to end at this point?

1 MR. ASHKENAZI: Fact
2 discovery was scheduled to end on April
3 9th, 2025.

4 THE COURT: Is there any
5 reason that date has to be changed,
6 Ms. Huttner?

7 MS. HUTTNER: Is there any
8 reason to change that date? As I sit here
9 now, I don't think so. I believe that --
10 I haven't received any discovery requests
11 in the new action, but I suspect that
12 they're going to be duplicative of what's
13 already in --

14 THE COURT: I would think so.

15 MS. HUTTNER: So I don't
16 think there will be anything new in that
17 regard. There may be additional
18 depositions, but there may not be. I
19 haven't thought that through yet.

20 THE COURT: Duplicative is
21 sort of the theme I think of a lot of
22 what's going on in this case, but we're
23 going to try to squeeze the water out of
24 it as much as we can as early as we can,

1 and the better job we do at that, the
2 better it is for everybody.

3 So Mr. Ashkenazi, you
4 mentioned both fact discovery and also
5 expert discovery. I would think, you
6 know, I would imagine, you have a pretty
7 good idea of what the experts are going to
8 say at this point. I can't imagine
9 there's going to be a whole lot of
10 surprises. So I would expect that you
11 ought to be able to do a significant
12 narrowing of your case at the close of
13 fact discovery. Is that something you can
14 do?

15 MR. ASHKENAZI: Yes, Your
16 Honor.

17 THE COURT: All right.
18 Here's what I would like. I mentioned
19 that I would like something from you on
20 claim construction in 14 days, because I
21 want to get that part of the schedule
22 taken care of as quickly as possible.

23 I would also like -- April is
24 a while, but I think we can live with it.

1 By let's say April 15th, I would like you
2 to, Mr. Ashkenazi, to indicate how much
3 you realistically expect to go to trial
4 with. And I will trust you to do, as was
5 done in the first case and I gather in the
6 second, to make a realistic paring down of
7 the case, and not leave a lot of
8 duplicative material in there to just gum
9 up the case. So that by April 15th.

10 Now, one other issue. The
11 problem with getting rid of summary
12 judgment is that we're still left with
13 Daubert, and that is less work usually,
14 but it still takes time. So one thing I
15 will look at is to try to figure out if
16 there's a way to streamline the Daubert
17 process. When is expert discovery
18 supposed to end? Do we have a date for
19 that? I don't have the scheduling --

20 MR. ASHKENAZI: Your Honor,
21 I'm going off what we had in both parties'
22 letters where there was a table that
23 listed the dates, but it looks like expert
24 discovery was completed on August 29th,

1 2025.

2 THE COURT: Now, you say
3 expert discovery. Does that include
4 expert depositions?

5 MR. ASHKENAZI: Yes, Your
6 Honor.

7 THE COURT: Well, I don't
8 know when the Dauberts right now are due.
9 Sometime in the fall, I would assume.

10 MR. ASHKENAZI: What I'm
11 looking at here -- again, Your Honor, I
12 think it's September 26, 2025.

13 THE COURT: All right.
14 Assuming that we have summary judgments
15 and Dauberts and that they are briefed on
16 time, then I would expect I would be able
17 to get something back to you on those
18 within I would hope a few weeks, and I
19 understand that September 26th would be
20 right now the first briefs in Daubert and
21 then summary judgment.

22 MR. ASHKENAZI: Your Honor, I
23 don't know if you have either our
24 letter or --

1 THE COURT: I have the
2 letters here. I don't want to spend time.

3 MR. ASHKENAZI: It may help
4 yourself. Just looking at our letter,
5 Heron's letter, you'll see the second
6 column on the original due dates. So that
7 may help Your Honor.

8 THE COURT: Yeah. I've got
9 it here, all right. Well, I'm going to
10 fiddle with these dates a little bit, and
11 I will not lock you into them; I will give
12 you an opportunity to respond. But I'm
13 going to propose something I think and
14 send it to you, which will be designed to
15 squeeze a little bit of the water out of
16 the period between October of '25 and
17 January of '26 to try to see if I can buy
18 a little more time for doing the opinion.

19 The problem -- the biggest
20 problem I see is that I don't want to
21 deprive you of the opportunity to brief
22 this case after the trial. We could do a
23 briefing before trial and then for me to
24 just take the transcript and the exhibits

1 and do the best I can without additional
2 briefing, and that would save time. But
3 that would be I think somewhat unfair to
4 you. It would not give you an opportunity
5 to argue the specifics that happened at
6 trial, including cross-examination, et
7 cetera, and it would deprive me of the
8 benefit of that briefing, which I have
9 invariably felt helpful.

10 So I'm looking for a way to
11 give myself as much time after the trial
12 with still giving you an opportunity to do
13 briefing after the trial and not put me in
14 a position that I have to do a full
15 findings of fact and conclusions of law
16 within a couple of months.

17 The fact that I am more
18 familiar with the case obviously than I
19 would be with a case just coming to me new
20 and will presumably after the next trial
21 be even more familiar with the case, and I
22 assume that much of the evidence will be
23 quite similar, that will help.

24 But it's just, in my

1 experience with these ANDA cases, and I
2 had five of them last year, so I'm having
3 second thoughts about the idea of knocking
4 out findings of fact and conclusions of
5 law in a week and a half. They are a lot
6 of work, and I've learned that the hard
7 way.

8 So I think there's one other
9 issue I wanted to visit --

10 MR. ASHKENAZI: Your Honor,
11 if I may, one point, just to put it in
12 your mind because we were talking about
13 summary judgment and Daubert, we could
14 forgo replies. I would offer that to my
15 colleague, also. But to the extent we
16 were filing any, I would be comfortable
17 with forgoing replies; that may save
18 another two weeks there, Your Honor.

19 THE COURT: Well, that's
20 possible, and that's certainly something I
21 will take into consideration.

22 Let me address something I
23 think Ms. Huttner raised a little bit
24 earlier in passing, and that is

1 contentions. I take it Azurity is really
2 a parent company to Slayback; is that
3 right?

4 MS. HUTTNER: Yes, Your
5 Honor.

6 THE COURT: So why is it you
7 think Azurity ought to have a whole
8 separate set of contentions here from what
9 Slayback had?

10 MS. HUTTNER: Your Honor,
11 they're a new party to the case, and they
12 are --

13 THE COURT: Are they really?
14 A parent is technically a new party, but
15 it's not as if there are any surprises.

16 MS. HUTTNER: I think they
17 have a due process right to file their own
18 contentions, Your Honor. I'm not
19 suggesting that they're going to radically
20 differ from what was filed previously, but
21 I think they should have as a matter of
22 due process an opportunity to look at what
23 was done and see if they want to add
24 anything to it, and the case law supports

1 that.

2 THE COURT: How much time
3 would they need to come up with new
4 contentions when presumably they've been
5 aware all along of what's going on?

6 MS. HUTTNER: I don't think
7 they require a lot of time. The parties
8 had previously discussed, and I'm not sure
9 if this date still works given where we
10 are today. I think we had originally
11 suggested that we could get them done
12 today. That's obviously not going to
13 happen. But I don't think it would
14 require much time to get those contentions
15 on file in the original case.

16 The question of the
17 contentions in the second case, neither
18 Azurity nor Slayback has filed, that might
19 be a slightly different date. But we
20 would agree with Mr. Ashkenazi that they
21 don't have to file the response to the
22 contentions until they're all in. So that
23 would encourage us to get them in sooner
24 rather than later, because obviously we

1 would like to see their responses so that
2 we know what issues we're facing here in
3 the case.

4 THE COURT: Now, Azurity and
5 Slayback have been represented by the same
6 counsel all along; is that right?

7 MS. HUTTNER: That's correct.

8 THE COURT: No new counsel?

9 MS. HUTTNER: No, Your Honor.
10 We were counsel for Slayback, and when
11 Azurity acquired Slayback, we retained the
12 representation of both companies.

13 THE COURT: As a practical
14 matter, it's not clear to me how anything
15 that has happened with respect to the
16 acquisition has a dramatic effect on the
17 lawyers' assessment of what the
18 contentions are going to be. Now, I
19 understand as a technical matter, it's
20 another party. But I'm having a difficult
21 time thinking that suddenly Azurity is
22 going to have a whole different set of
23 contentions from what Slayback has.

24 MS. HUTTNER: I don't think

1 it's going to be a whole different set.

2 THE COURT: How can it even
3 be likely to have any difference?

4 Presumably you put your best efforts as
5 your law firm into doing the contentions
6 in the first instance. Why is there a big
7 difference just because of the
8 acquisition? As a practical matter, it
9 doesn't make any sense to me, Ms. Huttner.

10 MS. HUTTNER: Well, Your
11 Honor, as you know, even though the
12 company may be a wholly owned subsidiary,
13 there are different constituencies within
14 each entity that weigh in with different
15 degrees of force, depending on who has got
16 the responsibility.

17 THE COURT: I understand
18 what you're saying. Just as a pragmatic
19 matter -- and I'm heavily into pragmatism
20 right now.

21 MS. HUTTNER: I don't think
22 it will delay things.

23 THE COURT: All right. Well,
24 we'll then come up with a date. Why don't

1 you suggest a date that is as soon as you
2 think Azurity can get its contentions in,
3 then I'll play with that date.

4 MS. HUTTNER: Okay.

5 THE COURT: Can you figure it
6 out right now?

7 MS. HUTTNER: I need to
8 consult with my colleague --

9 THE COURT: All right.

10 MS. HUTTNER: -- to answer
11 your question, but I would expect we would
12 get back to -- if you'd like us to get
13 back to the Court, we can do that, or we
14 can get back to Mr. Ashkenazi, whatever
15 you prefer.

16 THE COURT: You should
17 probably serve him with anything you send
18 to me.

19 MS. HUTTNER: Of course.

20 THE COURT: Can you get back
21 to us by ideally by the end of the day
22 tomorrow, or do you need until the end of
23 the week to tell me how much time you
24 need?

1 MS. HUTTNER: I'm just not
2 sure, because it's December 31st, I'm not
3 sure that everybody I need to inquire of
4 is going to be available. That's my only
5 hesitation. I could certainly get back to
6 you by January 3rd.

7 THE COURT: Why don't we say
8 January 3rd.

9 MR. ASHKENAZI: Your Honor,
10 if I can, one point I'd like to raise.
11 Again, just to be clear, we tried to get
12 Azurity added to the case before the
13 contentions were even filed. We reached
14 out to Ms. Huttner and her colleagues in
15 September before they even filed their
16 initial set of contentions in October.

17 But, again, we want to work,
18 you know, to reach an agreement here
19 that's going to be fine for both. But my
20 only concern is that if they submit
21 substantially new contentions and then we
22 only have a very short period of time to
23 respond, that poses a problem for us.

24 MS. HUTTNER: I don't think

1 that's going to be an issue, Your Honor.
2 Mr. Ashkenazi may disagree, but I don't
3 think he will at the end of the day.

4 THE COURT: Why don't we do
5 this. Let's go ahead and get back to me
6 by the end of the week as to the earliest
7 that you can get the contentions in, and
8 if it turns out that the contentions are
9 in any significant material respect
10 different from what we've already had,
11 then Mr. Ashkenazi can make a request for
12 additional time at his end.

13 This may be a little
14 Panglossian of me, but I'm going to go
15 ahead and assume that the contentions are
16 going to be largely the same and this
17 problem will go away, even though I
18 recognize it's a potential issue.

19 All right. That may be all
20 we can do for now. I am going to work on
21 this with an eye towards squeezing some of
22 the water out of the schedule, and maybe
23 pushing the trial back by -- well, a month
24 would put it right into the Christmas

1 holidays, but looking at maybe having a
2 trial before Christmas if we can do it. I
3 don't think that will impact anybody with
4 respect to what you're obliged to file in
5 this case. You may have other things
6 going on that you're going to have to let
7 me know will get in the way. But that is
8 something we can work out after I figure
9 out how much I can reduce the amount of
10 time between now and the actual trial.

11 MS. HUTTNER: Your Honor,
12 just to clarify one point on the
13 contentions.

14 THE COURT: Yeah.

15 MS. HUTTNER: We put the
16 contentions in the original case, but
17 there are also contentions that are due in
18 the new case. So by January 3rd, we will
19 let Your Honor and Mr. Ashkenazi know when
20 we can file those, as well.

21 THE COURT: Yes, I would
22 like, absolutely, to get everything tied
23 up together. Again, the new patents
24 looked to me like they are very similar to

1 several of the patents that went before.
2 So it's really hard for me to imagine that
3 the contentions will be dramatically
4 different. But I sometimes am surprised
5 by the creativity and imagination that
6 lawyers bring to the table. Often I'm
7 surprised.

8 Okay, I don't think there's
9 any more progress we can make on this. Is
10 there anything else -- so help me with
11 this, if there's anything else that I
12 ought to be focusing on with an eye
13 towards trying to get this case on track
14 and on a more expedited track, if
15 possible. Anything from either side? I'm
16 open to suggestions, questions, critiques
17 of anything that I have suggested.

18 MR. ASHKENAZI: Your Honor, I
19 would raise one more thing just for
20 consideration on your side. I know we're
21 going to try to figure out the scope of
22 claim construction. One way that the time
23 period could be compressed would be
24 simultaneous exchange of openings and

1 simultaneous exchange of responses. I
2 know that's not the Court's original
3 preference to have these staged, but I
4 wanted to put it out there as a
5 possibility.

6 THE COURT: Yes, and I had
7 that in mind. And the reason that the
8 sequencing was set up the way that it is
9 now is that I was basically following the
10 pattern that I followed in previous
11 scheduling orders, which I've borrowed
12 from -- I don't remember if this is Judge
13 Andrews' or Judge Stark's, but it was one
14 of the other judge's scheduling orders.

15 I have come to think that
16 there's too much briefing on claim
17 construction unless the claim construction
18 are really difficult, knotty, and
19 numerous. In a case which I anticipate --
20 maybe I'm wrong -- but I anticipate the
21 claim construction issues will be very
22 straightforward, I think fewer briefs are
23 better, and I think that can be done
24 without prejudicing anyone's rights to be

1 heard.

2 So, yes, I'm very much
3 considering cutting down on the back and
4 forth, the reply, response, reply,
5 surreply, all of that; it's exhaustive and
6 exhausting. But I'm not sure it advances
7 the ball a whole lot in cases in which
8 claim construction issues are not
9 difficult. So that's a suggestion that I
10 have very much in mind.

11 Anything else?

12 MR. ASHKENAZI: No, Your
13 Honor.

14 MS. HUTTNER: Not from us,
15 Your Honor. My suggestion is that we
16 continue to speak with plaintiffs,

17

18

19

20 In other words, push the trial off
21 rather than move it forward. I realize
22 that may not be Your Honor's preference,
23 but I think there's probably reasons both
24 parties would like to do that.

1 So we're going to continue to
2 talk to Mr. Ashkenazi both about that and
3 the schedule and hopefully we can reach an
4 agreement.

5 THE COURT: Yeah. I would be
6 reluctant to endorse a further delay.

7 MS. HUTTNER: Understood.

8 THE COURT: But I will
9 certainly hear you out. If there's a
10 reason that you can show me that I ought
11 to change my mind, then I will. I have
12 changed my mind on a number of matters
13 that lawyers have persuaded me that my
14 first instincts were wrong, and I'm
15 perfectly opening to considering it at
16 this time.

17 So if we have nothing else,
18 no other questions, you have a couple of
19 deadlines that I would like you to send me
20 materials on, and if something else comes
21 up that you need my attention, then I will
22 be happy to get back to you on that.

23 MS. HUTTNER: Thank you, Your
24 Honor.

1 THE COURT: Now, I will stay
2 on the line with the court reporter for a
3 couple of minutes after we adjourn just in
4 case there's anything that is needed to
5 clarify, anything that any of us have said
6 or if there were any -- I don't think
7 there were any cases mentioned, but just
8 in case the court reporter needs some help
9 on something, I'll be available for a
10 couple of minutes after that.

11 So that is all that I've got.
12 If nobody has anything further, then we're
13 adjourned.

14 MS. HUTTNER: Thank you, Your
15 Honor.

16 MR. ASHKENAZI: Thank you,
17 Your Honor.

18 (Hearing adjourned at 10:50
19 a.m.)
20
21
22
23
24

1 State of Delaware)
2)
New Castle County)

3
4 CERTIFICATE OF REPORTER

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9 the foregoing record, Pages 1 to 49
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Motions

[1:24-cv-00830-WCB Heron
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