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APPEARANCES:

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- and -

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Counsel for the Defendants

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

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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

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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. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] 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]

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

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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,

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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?

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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.)

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21  
22  
23  
24

1 State of Delaware)  
 )  
2 New Castle County)

3  
4 CERTIFICATE OF REPORTER

5  
6 I, Jennifer M. Guy, Registered  
7 Professional Reporter and Notary Public in  
8 the State of Delaware, do hereby certify that  
9 the foregoing record, Pages 1 to 49  
10 inclusive, is a true and accurate record of  
11 the above-captioned proceedings held on  
12 December 30, 2024, in Wilmington.

13  
14  
15 /s/ Jennifer M. Guy, RPR  
16 Jennifer M. Guy, RPR  
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/S [1] - 49:15				
<b>1</b>	<b>A</b>			
1 [1] - 49:9 10:00 [1] - 1:18 10:50 [1] - 48:18 12 [4] - 14:8, 15:2, 15:10, 15:21 1363 [2] - 4:5, 20:11 14 [2] - 24:18, 30:20 15th [2] - 31:1, 31:9	a.m [2] - 1:18, 48:19 able [3] - 7:24, 30:11, 32:16 above-captioned [1] - 49:11 absent [1] - 7:1 absolutely [2] - 28:3, 43:22 account [2] - 13:5, 22:5 accurate [1] - 49:10 acquired [1] - 38:11 acquisition [2] - 38:16, 39:8 action [2] - 10:17, 29:11 Action [2] - 1:4, 1:12 actions [1] - 9:18 actual [1] - 43:10 add [2] - 20:13, 36:23 added [4] - 8:23, 8:24, 9:10, 41:12 adding [1] - 20:16 addition [1] - 13:15 additional [5] - 7:10, 14:17, 29:17, 34:1, 42:12 address [4] - 4:16, 8:16, 9:13, 35:22 addressing [1] - 3:23 adequate [1] - 9:14 adjourn [1] - 48:3 adjourned [2] - 48:13, 48:18 advance [1] - 25:14 advances [1] - 46:6	after-added [1] - 9:10 agree [9] - 9:15, 11:10, 17:19, 19:19, 19:21, 22:9, 27:22, 37:20, 46:18 agreeing [2] - 10:24, 23:12 agreement [5] - 23:22, 24:7, 26:23, 41:18, 47:4 ahead [6] - 3:5, 11:24, 22:23, 24:9, 42:5, 42:15 allow [1] - 10:21 altogether [1] - 26:15 amount [4] - 13:2, 13:7, 13:22, 43:9 analysis [1] - 21:17 ANDA [7] - 6:5, 6:7, 13:13, 13:15, 25:5, 26:5, 35:1 Andrews' [1] - 45:13 answer [2] - 19:12, 40:10 answered [1] - 21:20 answers [1] - 9:5 antagonists [1] - 14:21 anticipate [3] - 24:20, 45:19, 45:20 API [1] - 8:9 appeal [1] - 10:4 Appeals [1] - 13:11 appeals [1] - 13:16 APPEARANCES [1] - 2:1 application [1] - 6:1 aprepitant [5] - 14:16, 14:22, 16:6, 20:5, 21:1 April [4] - 29:2, 30:23, 31:1, 31:9 apt [1] - 18:11 argue [1] - 34:5 arguments [1] - 21:4 ARSH [1] - 2:2 Ashkenazi [17] - 3:13, 4:16, 8:17, 8:23, 15:2, 26:16, 26:24, 27:20, 27:21, 30:3, 31:2,	37:20, 40:14, 42:2, 42:11, 43:19, 47:2 ASHKENAZI [29] - 2:5, 4:15, 4:20, 4:22, 5:4, 5:16, 6:14, 6:19, 7:7, 11:22, 12:1, 15:7, 16:21, 23:5, 23:9, 26:19, 28:2, 29:1, 30:15, 31:20, 32:5, 32:10, 32:22, 33:3, 35:10, 41:9, 44:18, 46:12, 48:16 asserting [2] - 27:2, 27:10 assessment [1] - 38:17 assume [5] - 24:2, 24:5, 32:9, 34:22, 42:15 assuming [3] - 16:18, 23:1, 32:14 AST [1] - 2:13 Ast [1] - 3:22 AST-GMOSER [1] - 2:13 Ast-Gmoser [1] - 3:22 attention [1] - 47:21 August [1] - 31:24 authorization [2] - 19:18, 22:12 automatic [1] - 10:22 available [2] - 41:4, 48:9 avoid [5] - 8:9, 9:20, 11:15, 12:6, 27:15 aware [2] - 5:2, 37:5 awful [2] - 14:10, 14:15 AZURITY [4] - 1:6, 1:6, 1:13, 1:14 Azurity [11] - 3:2, 5:7, 21:23, 36:1, 36:7, 37:18, 38:4, 38:11, 38:21, 40:2, 41:12 Azurity's [1] - 17:3	ball [1] - 46:7 based [3] - 5:5, 17:2, 25:14 became [1] - 5:2 become [1] - 7:19 BEFORE [1] - 1:21 behalf [1] - 3:19 benefit [2] - 22:21, 34:8 best [2] - 34:1, 39:4 better [5] - 19:12, 27:22, 30:1, 30:2, 45:23 between [7] - 6:18, 10:13, 11:17, 13:2, 20:21, 33:16, 43:10 big [1] - 39:6 biggest [1] - 33:19 bit [4] - 28:4, 33:10, 33:15, 35:23 borrowed [1] - 45:11 brief [3] - 12:6, 12:13, 33:21 briefed [1] - 32:15 briefing [7] - 13:6, 25:21, 33:23, 34:2, 34:8, 34:13, 45:16 briefs [2] - 32:20, 45:22 bring [1] - 44:6 broader [1] - 14:21 broadly [1] - 14:20 brought [1] - 8:2 BRYSON [1] - 1:21 business [1] - 4:3 buy [2] - 22:21, 33:17 BY [3] - 2:3, 2:10, 2:13
	<b>2</b>			<b>C</b>
2024 [2] - 1:18, 49:12 2025 [4] - 14:2, 29:3, 32:1, 32:12 2026 [2] - 6:12, 9:19 24-1363 [2] - 1:12, 3:3 24-830 [3] - 1:5, 3:3, 5:9 26 [1] - 32:12 26th [1] - 32:19 29th [1] - 31:24				calendar [1] - 28:4 captioned [1] - 49:11 care [1] - 30:22 case [63] - 4:5, 4:12, 5:2, 5:6, 5:9, 6:13, 6:15, 6:17, 7:5, 7:6, 8:22, 9:3, 9:10, 9:14, 9:17, 11:2, 12:5, 14:5, 15:6, 15:9, 16:8, 16:9, 16:12, 16:17, 17:16, 18:2, 18:11, 19:18,
<b>3</b>				
30 [7] - 1:18, 4:10, 4:11, 6:2, 6:17, 8:7, 49:12 30-month [18] - 4:4, 4:9, 4:13, 5:10, 5:12, 5:13, 5:19, 5:22, 6:4, 6:24, 7:12, 7:19, 8:18, 9:9, 12:2, 13:4, 22:19, 24:10 31st [1] - 41:2 3rd [3] - 41:6, 41:8,				
				<b>B</b>
				backing [1] - 4:11

<p>20:3, 20:8, 20:12, 20:15, 21:23, 21:24, 22:8, 24:5, 24:9, 25:9, 27:6, 28:1, 28:13, 29:22, 30:12, 31:5, 31:7, 31:9, 33:22, 34:18, 34:19, 34:21, 36:11, 36:24, 37:15, 37:17, 38:3, 41:12, 43:5, 43:16, 43:18, 44:13, 45:19, 48:4, 48:8</p> <p><b>cases</b> [13] - 10:8, 13:13, 16:20, 22:17, 22:20, 22:23, 23:14, 25:5, 26:5, 28:7, 35:1, 46:7, 48:7</p> <p><b>Castle</b> [1] - 49:2</p> <p><b>certain</b> [2] - 15:12, 19:10</p> <p><b>certainly</b> [4] - 24:7, 35:20, 41:5, 47:9</p> <p><b>CERTIFICATE</b> [1] - 49:4</p> <p><b>certification</b> [1] - 7:15</p> <p><b>certify</b> [1] - 49:8</p> <p><b>cetera</b> [2] - 28:10, 34:7</p> <p><b>challenged</b> [1] - 7:14</p> <p><b>chance</b> [1] - 18:15</p> <p><b>change</b> [6] - 6:6, 13:21, 20:15, 21:12, 29:8, 47:11</p> <p><b>changed</b> [2] - 29:5, 47:12</p> <p><b>changes</b> [1] - 20:12</p> <p><b>chew</b> [2] - 25:19, 25:20</p> <p><b>chew-up</b> [1] - 25:19</p> <p><b>Christmas</b> [2] - 42:24, 43:2</p> <p><b>chunk</b> [1] - 16:11</p> <p><b>circumscribed</b> [1] - 7:3</p> <p><b>circumstances</b> [1] - 10:21</p> <p><b>cite</b> [1] - 9:8</p> <p><b>Civil</b> [2] - 1:4, 1:12</p> <p><b>claim</b> [27] - 16:7, 16:11, 16:16, 16:18, 17:1, 17:7, 17:11, 17:13, 18:1, 18:4, 18:7,</p>	<p>18:10, 18:16, 19:5, 19:8, 19:10, 24:12, 24:15, 24:19, 24:21, 25:1, 30:20, 44:22, 45:16, 45:17, 45:21, 46:8</p> <p><b>claims</b> [10] - 14:13, 14:16, 14:17, 15:13, 21:1, 21:13, 27:1, 27:9, 27:12, 28:18</p> <p><b>clarify</b> [3] - 4:2, 43:12, 48:5</p> <p><b>clear</b> [2] - 38:14, 41:11</p> <p><b>client</b> [2] - 19:19, 22:12</p> <p><b>close</b> [1] - 30:12</p> <p><b>closely</b> [2] - 7:2, 14:12</p> <p><b>closer</b> [1] - 10:18</p> <p><b>co</b> [1] - 3:12</p> <p><b>co-counsel</b> [1] - 3:12</p> <p><b>colleague</b> [4] - 7:9, 17:4, 35:15, 40:8</p> <p><b>colleagues</b> [1] - 41:14</p> <p><b>column</b> [1] - 33:6</p> <p><b>comfortable</b> [1] - 35:16</p> <p><b>coming</b> [1] - 34:19</p> <p><b>comment</b> [1] - 23:11</p> <p><b>commercial</b> [2] - 10:1, 10:11</p> <p><b>commit</b> [1] - 11:6</p> <p><b>commitment</b> [1] - 24:1</p> <p><b>committing</b> [1] - 10:20</p> <p><b>companies</b> [1] - 38:12</p> <p><b>company</b> [2] - 36:2, 39:12</p> <p><b>complaint</b> [4] - 4:12, 8:20, 8:21, 21:21</p> <p><b>completed</b> [2] - 10:6, 31:24</p> <p><b>complex</b> [1] - 14:7</p> <p><b>complicated</b> [1] - 17:15</p> <p><b>compress</b> [1] - 21:19</p> <p><b>compressed</b> [1] - 44:23</p> <p><b>concentrations</b> [1]</p>	<p>- 20:24</p> <p><b>concern</b> [7] - 8:16, 9:13, 19:16, 19:22, 22:7, 22:9, 41:20</p> <p><b>concerned</b> [1] - 26:18</p> <p><b>concerns</b> [2] - 12:18, 12:19</p> <p><b>conclusions</b> [5] - 25:7, 25:12, 25:13, 34:15, 35:4</p> <p><b>Connie</b> [1] - 8:16</p> <p><b>consider</b> [1] - 24:7</p> <p><b>considerable</b> [1] - 13:7</p> <p><b>consideration</b> [2] - 35:21, 44:20</p> <p><b>considered</b> [1] - 8:24</p> <p><b>considering</b> [2] - 46:3, 47:15</p> <p><b>consolidate</b> [2] - 22:16, 22:23</p> <p><b>consolidated</b> [2] - 9:18, 10:17</p> <p><b>CONSTANCE</b> [1] - 2:13</p> <p><b>Constance</b> [1] - 3:21</p> <p><b>constituencies</b> [1] - 39:13</p> <p><b>construction</b> [27] - 16:7, 16:11, 16:16, 16:19, 17:1, 17:7, 17:12, 17:13, 18:1, 18:5, 18:7, 18:10, 18:16, 19:6, 19:8, 19:10, 24:13, 24:15, 24:19, 24:21, 25:1, 30:20, 44:22, 45:17, 45:21, 46:8</p> <p><b>consult</b> [1] - 40:8</p> <p><b>contentions</b> [26] - 16:24, 17:3, 21:21, 21:24, 28:8, 36:1, 36:8, 36:18, 37:4, 37:14, 37:17, 37:22, 38:18, 38:23, 39:5, 40:2, 41:13, 41:16, 41:21, 42:7, 42:8, 42:15, 43:13, 43:16, 43:17, 44:3</p>	<p><b>context</b> [1] - 15:9</p> <p><b>continue</b> [3] - 14:5, 46:16, 47:1</p> <p><b>core</b> [1] - 15:13</p> <p><b>correct</b> [5] - 8:18, 11:12, 16:18, 23:3, 38:7</p> <p><b>CORTLAN</b> [1] - 2:10</p> <p><b>Cortlan</b> [1] - 3:20</p> <p><b>Counsel</b> [2] - 2:8, 2:14</p> <p><b>counsel</b> [4] - 3:12, 38:6, 38:8, 38:10</p> <p><b>count</b> [2] - 9:1, 9:11</p> <p><b>County</b> [1] - 49:2</p> <p><b>couple</b> [5] - 24:11, 34:16, 47:18, 48:3, 48:10</p> <p><b>course</b> [5] - 14:17, 14:21, 15:21, 23:20, 40:19</p> <p><b>court</b> [5] - 10:21, 13:9, 13:16, 48:2, 48:8</p> <p><b>COURT</b> [58] - 1:1, 3:1, 3:16, 4:1, 4:18, 4:21, 4:24, 5:15, 5:21, 6:16, 6:23, 8:11, 9:3, 11:24, 12:17, 15:18, 17:6, 17:17, 17:20, 19:4, 19:24, 21:9, 22:14, 23:8, 23:20, 27:18, 28:20, 29:4, 29:14, 29:20, 30:17, 32:2, 32:7, 32:13, 33:1, 33:8, 35:19, 36:6, 36:13, 37:2, 38:4, 38:8, 38:13, 39:2, 39:17, 39:23, 40:5, 40:9, 40:16, 40:20, 41:7, 42:4, 43:14, 43:21, 45:6, 47:5, 47:8, 48:1</p> <p><b>Court</b> [7] - 1:21, 3:24, 12:5, 13:11, 23:16, 24:21, 40:13</p> <p><b>Court's</b> [1] - 45:2</p> <p><b>courts</b> [1] - 10:6</p> <p><b>creativity</b> [1] - 44:5</p> <p><b>critiques</b> [1] - 44:16</p> <p><b>cross</b> [1] - 34:6</p> <p><b>cross-</b></p>	<p><b>examination</b> [1] - 34:6</p> <p><b>cumbersome</b> [2] - 15:23, 25:16</p> <p><b>curtail</b> [1] - 25:10</p> <p><b>cut</b> [4] - 18:18, 18:19, 24:24, 28:1</p> <p><b>cutting</b> [1] - 46:3</p>
<b>D</b>				
				<p><b>date</b> [17] - 4:18, 6:1, 6:4, 13:3, 14:2, 17:22, 19:23, 20:1, 29:5, 29:8, 31:18, 37:9, 37:19, 39:24, 40:1, 40:3</p> <p><b>dates</b> [3] - 31:23, 33:6, 33:10</p> <p><b>Daubert</b> [4] - 31:13, 31:16, 32:20, 35:13</p> <p><b>Dauberts</b> [2] - 32:8, 32:15</p> <p><b>days</b> [5] - 4:11, 5:24, 6:3, 24:18, 30:20</p> <p><b>deadlines</b> [1] - 47:19</p> <p><b>deal</b> [1] - 19:7</p> <p><b>deals</b> [2] - 19:5, 19:9</p> <p><b>December</b> [5] - 1:18, 5:3, 20:10, 41:2, 49:12</p> <p><b>decide</b> [4] - 9:14, 12:5, 19:17, 22:8</p> <p><b>decided</b> [1] - 24:20</p> <p><b>decision</b> [6] - 19:20, 22:11, 23:13, 23:21, 24:3, 27:24</p> <p><b>deep</b> [1] - 5:23</p> <p><b>defendants</b> [3] - 3:17, 3:19, 8:17</p> <p><b>Defendants</b> [3] - 1:9, 1:16, 2:14</p> <p><b>defenses</b> [1] - 21:3</p> <p><b>defer</b> [1] - 46:18</p> <p><b>degrees</b> [1] - 39:15</p> <p><b>DELAWARE</b> [1] - 1:1</p> <p><b>Delaware</b> [3] - 26:2, 49:1, 49:8</p> <p><b>delay</b> [2] - 39:22, 47:6</p> <p><b>depositions</b> [2] - 29:18, 32:4</p>

<p><b>deprive</b> [2] - 33:21, 34:7</p> <p><b>designed</b> [1] - 33:14</p> <p><b>details</b> [1] - 28:10</p> <p><b>determination</b> [1] - 18:23</p> <p><b>determining</b> [1] - 27:14</p> <p><b>devised</b> [1] - 24:24</p> <p><b>devoting</b> [1] - 16:10</p> <p><b>differ</b> [1] - 36:20</p> <p><b>difference</b> [4] - 6:18, 20:21, 39:3, 39:7</p> <p><b>different</b> [16] - 20:7, 21:3, 21:4, 21:7, 21:10, 21:16, 21:17, 26:1, 37:19, 38:22, 39:1, 39:13, 39:14, 42:10, 44:4</p> <p><b>difficult</b> [6] - 11:13, 16:16, 24:23, 38:20, 45:18, 46:9</p> <p><b>dig</b> [1] - 18:15</p> <p><b>directed</b> [2] - 14:20, 20:4</p> <p><b>disagree</b> [2] - 20:20, 42:2</p> <p><b>discovery</b> [14] - 10:7, 15:16, 28:9, 28:12, 28:19, 28:24, 29:2, 29:10, 30:4, 30:5, 30:13, 31:17, 31:24, 32:3</p> <p><b>discussed</b> [1] - 37:8</p> <p><b>dispute</b> [1] - 10:12</p> <p><b>disputes</b> [1] - 16:8</p> <p><b>district</b> [1] - 13:9</p> <p><b>DISTRICT</b> [2] - 1:1, 1:1</p> <p><b>District</b> [2] - 1:21, 26:2</p> <p><b>dive</b> [1] - 5:23</p> <p><b>doable</b> [1] - 25:18</p> <p><b>docket</b> [1] - 4:9</p> <p><b>done</b> [10] - 5:23, 7:1, 8:7, 13:13, 23:14, 26:6, 31:5, 36:23, 37:11, 45:23</p> <p><b>down</b> [7] - 15:12, 18:20, 25:1, 28:1, 28:4, 31:6, 46:3</p>	<p><b>dramatic</b> [4] - 20:15, 21:12, 21:15, 38:16</p> <p><b>dramatically</b> [2] - 20:11, 44:3</p> <p><b>drop</b> [1] - 28:7</p> <p><b>dropped</b> [1] - 28:11</p> <p><b>due</b> [5] - 32:8, 33:6, 36:17, 36:22, 43:17</p> <p><b>duplicative</b> [3] - 29:12, 29:20, 31:8</p>	<p>46:6</p> <p><b>exhaustive</b> [1] - 46:5</p> <p><b>exhibits</b> [1] - 33:24</p> <p><b>expect</b> [9] - 17:10, 17:12, 25:4, 25:15, 25:18, 30:10, 31:3, 32:16, 40:11</p> <p><b>expectations</b> [1] - 17:23</p> <p><b>expedited</b> [1] - 44:14</p> <p><b>experience</b> [1] - 35:1</p> <p><b>expert</b> [7] - 10:7, 28:12, 30:5, 31:17, 31:23, 32:3, 32:4</p> <p><b>experts</b> [1] - 30:7</p> <p><b>expiration</b> [3] - 4:4, 13:4, 22:19</p> <p><b>expires</b> [3] - 4:10, 4:13, 4:19</p> <p><b>expiring</b> [1] - 5:20</p> <p><b>extend</b> [1] - 10:22</p> <p><b>extension</b> [7] - 7:2, 8:9, 8:13, 11:8, 12:2, 12:10</p> <p><b>extent</b> [5] - 12:19, 13:18, 18:12, 26:11, 35:15</p> <p><b>eye</b> [2] - 42:21, 44:12</p>	<p><b>fewer</b> [1] - 45:22</p> <p><b>fiddle</b> [1] - 33:10</p> <p><b>figure</b> [5] - 12:4, 31:15, 40:5, 43:8, 44:21</p> <p><b>file</b> [8] - 6:3, 21:24, 25:6, 36:17, 37:15, 37:21, 43:4, 43:20</p> <p><b>filed</b> [15] - 4:6, 5:3, 5:6, 5:7, 6:10, 6:11, 8:20, 8:21, 8:22, 20:11, 21:22, 36:20, 37:18, 41:13, 41:15</p> <p><b>filing</b> [5] - 4:12, 6:5, 6:7, 6:8, 35:16</p> <p><b>findings</b> [5] - 25:6, 25:11, 25:12, 34:15, 35:4</p> <p><b>fine</b> [3] - 23:16, 23:19, 41:19</p> <p><b>finished</b> [1] - 28:19</p> <p><b>firm</b> [3] - 23:22, 23:24, 39:5</p> <p><b>first</b> [14] - 3:4, 3:5, 3:9, 4:2, 4:23, 5:1, 5:8, 7:13, 16:8, 17:1, 31:5, 32:20, 39:6, 47:14</p> <p><b>five</b> [2] - 13:14, 35:2</p> <p><b>FLEISCHACKER</b> [1] - 2:7</p> <p><b>Fleischacker</b> [1] - 3:15</p> <p><b>flexible</b> [1] - 28:15</p> <p><b>focusing</b> [1] - 44:12</p> <p><b>followed</b> [1] - 45:10</p> <p><b>following</b> [1] - 45:9</p> <p><b>footprint</b> [1] - 15:4</p> <p><b>FOR</b> [1] - 1:1</p> <p><b>force</b> [1] - 39:15</p> <p><b>foregoing</b> [1] - 49:9</p> <p><b>forgo</b> [3] - 26:3, 26:20, 35:14</p> <p><b>forgoing</b> [1] - 35:17</p> <p><b>forgone</b> [1] - 26:14</p> <p><b>forth</b> [1] - 46:4</p> <p><b>forthcoming</b> [1] - 24:4</p> <p><b>forward</b> [1] - 46:21</p> <p><b>Fresenius</b> [3] - 10:4, 15:9, 17:16</p> <p><b>full</b> [1] - 34:14</p>	<p><b>G</b></p> <p><b>gather</b> [1] - 31:5</p> <p><b>general</b> [1] - 14:13</p> <p><b>generate</b> [1] - 9:11</p> <p><b>given</b> [1] - 37:9</p> <p><b>GMOSER</b> [1] - 2:13</p> <p><b>Gmoser</b> [1] - 3:22</p> <p><b>greater</b> [1] - 14:6</p> <p><b>ground</b> [1] - 5:12</p> <p><b>guess</b> [3] - 3:5, 16:1, 22:15</p> <p><b>guidance</b> [3] - 9:23, 10:14, 11:20</p> <p><b>gum</b> [1] - 31:8</p> <p><b>Guy</b> [3] - 49:6, 49:15, 49:15</p>
<p><b>earliest</b> [1] - 42:6</p> <p><b>early</b> [4] - 6:7, 8:2, 15:15, 29:24</p> <p><b>effect</b> [3] - 11:7, 13:19, 38:16</p> <p><b>effectively</b> [1] - 11:11</p> <p><b>efforts</b> [1] - 39:4</p> <p><b>either</b> [4] - 25:9, 26:14, 32:23, 44:15</p> <p><b>electronics</b> [1] - 7:24</p> <p><b>emulsion</b> [1] - 14:16</p> <p><b>emulsions</b> [2] - 20:5, 21:1</p> <p><b>encourage</b> [1] - 37:23</p> <p><b>end</b> [11] - 27:2, 27:9, 28:8, 28:24, 29:2, 31:18, 40:21, 40:22, 42:3, 42:6, 42:12</p> <p><b>endorse</b> [1] - 47:6</p> <p><b>entity</b> [1] - 39:14</p> <p><b>ESQ</b> [8] - 2:3, 2:5, 2:6, 2:6, 2:7, 2:10, 2:13, 2:13</p> <p><b>et</b> [2] - 28:10, 34:6</p> <p><b>evaluating</b> [3] - 17:9, 18:9, 19:11</p> <p><b>event</b> [1] - 20:9</p> <p><b>evidence</b> [5] - 10:2, 10:3, 25:15, 25:17, 34:22</p> <p><b>exactly</b> [2] - 25:17, 28:17</p> <p><b>examination</b> [1] - 34:6</p> <p><b>example</b> [1] - 19:20</p> <p><b>exchange</b> [2] - 44:24, 45:1</p> <p><b>exhausting</b> [1] -</p>	<p><b>E</b></p>	<p><b>F</b></p> <p><b>F/K/A</b> [2] - 1:7, 1:15</p> <p><b>face</b> [1] - 20:6</p> <p><b>facing</b> [1] - 38:2</p> <p><b>fact</b> [15] - 10:7, 14:4, 18:1, 25:7, 25:11, 25:13, 28:8, 28:19, 28:23, 29:1, 30:4, 30:13, 34:15, 34:17, 35:4</p> <p><b>factors</b> [1] - 13:12</p> <p><b>facts</b> [1] - 28:9</p> <p><b>factual</b> [2] - 19:1, 19:4</p> <p><b>fairly</b> [1] - 26:4</p> <p><b>fall</b> [1] - 32:9</p> <p><b>falls</b> [1] - 27:23</p> <p><b>familiar</b> [2] - 34:18, 34:21</p> <p><b>far</b> [4] - 8:12, 10:9, 18:21, 21:11</p> <p><b>felt</b> [1] - 34:9</p> <p><b>few</b> [1] - 32:18</p>	<p><b>H</b></p> <p><b>half</b> [2] - 10:15, 35:5</p> <p><b>happy</b> [3] - 22:11, 28:14, 47:22</p> <p><b>hard</b> [3] - 28:16, 35:6, 44:2</p> <p><b>HASTINGS</b> [1] - 2:5</p> <p><b>hear</b> [6] - 12:18, 17:6, 24:13, 24:14, 26:11, 47:9</p> <p><b>heard</b> [4] - 10:2, 10:3, 11:2, 46:1</p> <p><b>Hearing</b> [1] - 48:18</p> <p><b>heavily</b> [1] - 39:19</p> <p><b>held</b> [1] - 49:11</p> <p><b>help</b> [6] - 28:23, 33:3, 33:7, 34:23, 44:10, 48:8</p> <p><b>helpful</b> [2] - 27:13, 34:9</p> <p><b>hereby</b> [1] - 49:8</p> <p><b>HERON</b> [2] - 1:3, 1:11</p> <p><b>Heron</b> [3] - 3:1, 3:12, 4:16</p> <p><b>Heron's</b> [2] - 16:22, 33:5</p> <p><b>hesitation</b> [2] - 26:23, 41:5</p> <p><b>HITCH</b> [2] - 2:10, 3:18</p> <p><b>Hitch</b> [1] - 3:20</p> <p><b>hold</b> [2] - 13:20, 24:16</p> <p><b>holidays</b> [1] - 43:1</p> <p><b>Honor</b> [49] - 3:10, 3:19, 4:15, 5:14, 7:7, 8:6, 8:15, 9:7, 9:22, 10:8,</p>	

<p>11:1, 11:3, 11:12, 11:22, 15:7, 15:17, 16:21, 17:8, 18:22, 19:15, 23:4, 23:6, 23:7, 23:15, 26:22, 28:2, 30:16, 31:20, 32:6, 32:11, 32:22, 33:7, 35:10, 35:18, 36:5, 36:10, 36:18, 38:9, 39:11, 41:9, 42:1, 43:11, 43:19, 44:18, 46:13, 46:15, 47:24, 48:15, 48:17</p> <p><b>Honor's</b> [4] - 9:23, 22:7, 22:10, 46:22</p> <p><b>HONORABLE</b> [1] - 1:21</p> <p><b>hope</b> [2] - 15:19, 32:18</p> <p><b>hopefully</b> [1] - 47:3</p> <p><b>HUTTNER</b> [34] - 2:13, 8:15, 9:6, 17:8, 17:19, 18:22, 19:7, 20:19, 21:14, 23:3, 26:22, 29:7, 29:15, 36:4, 36:10, 36:16, 37:6, 38:7, 38:9, 38:24, 39:10, 39:21, 40:4, 40:7, 40:10, 40:19, 41:1, 41:24, 43:11, 43:15, 46:14, 47:7, 47:23, 48:14</p> <p><b>Huttner</b> [9] - 3:21, 3:23, 8:17, 23:23, 26:17, 29:6, 35:23, 39:9, 41:14</p> <p><b>Huttner's</b> [1] - 23:12</p> <p><b>hypothetical</b> [1] - 7:5</p>	<p><b>imagination</b> [1] - 44:5</p> <p><b>imagine</b> [4] - 5:18, 30:6, 30:8, 44:2</p> <p><b>impact</b> [1] - 43:3</p> <p><b>IN</b> [1] - 1:1</p> <p><b>INC</b> [4] - 1:3, 1:6, 1:11, 1:14</p> <p><b>inclination</b> [1] - 24:8</p> <p><b>inclined</b> [2] - 22:22, 27:21</p> <p><b>include</b> [1] - 32:3</p> <p><b>including</b> [3] - 34:6, 46:17, 46:19</p> <p><b>inclusive</b> [1] - 49:10</p> <p><b>INDIA</b> [4] - 1:7, 1:8, 1:14, 1:15</p> <p><b>indicate</b> [1] - 31:2</p> <p><b>initial</b> [1] - 41:16</p> <p><b>injunction</b> [6] - 6:22, 8:3, 9:21, 11:16, 12:7, 12:13</p> <p><b>input</b> [1] - 9:23</p> <p><b>inquire</b> [1] - 41:3</p> <p><b>inquiring</b> [1] - 22:6</p> <p><b>instance</b> [1] - 39:6</p> <p><b>instincts</b> [1] - 47:14</p> <p><b>interpretation</b> [1] - 17:3</p> <p><b>invariably</b> [1] - 34:9</p> <p><b>investigation</b> [2] - 19:2, 19:5</p> <p><b>involve</b> [1] - 14:23</p> <p><b>Isaac</b> [2] - 3:12, 4:16</p> <p><b>ISAAC</b> [1] - 2:5</p> <p><b>issue</b> [11] - 5:13, 11:17, 14:9, 16:17, 17:2, 17:9, 18:16, 31:10, 35:9, 42:1, 42:18</p> <p><b>issued</b> [2] - 5:11, 7:18</p> <p><b>issues</b> [14] - 14:23, 17:12, 17:14, 18:2, 18:10, 18:24, 19:10, 24:16, 24:19, 26:10, 27:8, 38:2, 45:21, 46:8</p> <p><b>issuing</b> [1] - 5:19</p>	<p><b>January</b> [8] - 14:1, 17:22, 17:24, 24:3, 33:17, 41:6, 41:8, 43:18</p> <p><b>Jennifer</b> [3] - 49:6, 49:15, 49:15</p> <p><b>JEREMY</b> [1] - 2:3</p> <p><b>Jeremy</b> [1] - 3:11</p> <p><b>job</b> [1] - 30:1</p> <p><b>joined</b> [1] - 3:12</p> <p><b>joining</b> [1] - 3:21</p> <p><b>Judge</b> [4] - 1:21, 26:4, 45:12, 45:13</p> <p><b>judge's</b> [1] - 45:14</p> <p><b>judges</b> [2] - 26:1, 26:6</p> <p><b>judgment</b> [9] - 26:3, 26:8, 26:13, 26:21, 27:4, 27:6, 31:12, 32:21, 35:13</p> <p><b>judgments</b> [1] - 32:14</p> <p><b>jump</b> [1] - 7:9</p> <p><b>June</b> [6] - 4:10, 4:13, 4:14, 9:19, 12:11, 24:4</p> <p><b>justified</b> [1] - 18:4</p> <p><b>justify</b> [1] - 8:12</p> <p><b>JUSTIN</b> [1] - 2:7</p> <p><b>Justin</b> [1] - 3:15</p>	<p>23:13, 46:19</p> <p><b>law</b> [9] - 9:3, 11:13, 25:7, 25:12, 25:13, 34:15, 35:5, 36:24, 39:5</p> <p><b>lawsuit</b> [5] - 6:3, 6:8, 6:9, 6:11, 8:1</p> <p><b>lawyers</b> [2] - 44:6, 47:13</p> <p><b>lawyers'</b> [1] - 38:17</p> <p><b>learned</b> [1] - 35:6</p> <p><b>least</b> [6] - 7:12, 17:24, 19:17, 20:6, 24:1, 26:11</p> <p><b>leave</b> [2] - 15:23, 31:7</p> <p><b>left</b> [2] - 13:1, 31:12</p> <p><b>length</b> [1] - 25:10</p> <p><b>lengthy</b> [1] - 18:4</p> <p><b>less</b> [1] - 31:13</p> <p><b>letter</b> [6] - 5:8, 7:16, 16:23, 32:24, 33:4, 33:5</p> <p><b>letters</b> [2] - 31:22, 33:2</p> <p><b>likely</b> [1] - 39:3</p> <p><b>limited</b> [1] - 10:22</p> <p><b>line</b> [1] - 48:2</p> <p><b>listed</b> [1] - 31:23</p> <p><b>litigation</b> [2] - 4:23, 5:1</p> <p><b>live</b> [1] - 30:24</p> <p><b>LLC</b> [3] - 1:8, 1:16, 2:12</p> <p><b>LLP</b> [7] - 1:7, 1:8, 1:14, 1:15, 2:2, 2:5, 2:10</p> <p><b>lock</b> [1] - 33:11</p> <p><b>look</b> [5] - 7:8, 20:17, 20:20, 31:15, 36:22</p> <p><b>looked</b> [5] - 14:8, 14:12, 14:13, 21:10, 43:24</p> <p><b>looking</b> [5] - 20:3, 32:11, 33:4, 34:10, 43:1</p> <p><b>looks</b> [3] - 14:14, 16:3, 31:23</p> <p><b>lurking</b> [1] - 16:17</p>	<p><b>materials</b> [1] - 47:20</p> <p><b>matter</b> [6] - 27:17, 36:21, 38:14, 38:19, 39:8, 39:19</p> <p><b>matters</b> [4] - 13:9, 13:10, 47:12</p> <p><b>mean</b> [2] - 21:6, 21:20</p> <p><b>means</b> [1] - 13:24</p> <p><b>mentioned</b> [4] - 24:12, 30:4, 30:18, 48:7</p> <p><b>method</b> [1] - 14:17</p> <p><b>might</b> [1] - 37:18</p> <p><b>mind</b> [7] - 26:9, 26:10, 35:12, 45:7, 46:10, 47:11, 47:12</p> <p><b>minimum</b> [2] - 13:2, 13:24</p> <p><b>minutes</b> [2] - 48:3, 48:10</p> <p><b>MITTENDORF</b> [1] - 2:12</p> <p><b>moderately</b> [1] - 21:9</p> <p><b>Monday</b> [1] - 1:18</p> <p><b>month</b> [8] - 4:6, 6:12, 6:15, 6:20, 7:4, 7:5, 13:10, 42:23</p> <p><b>months</b> [11] - 4:11, 6:2, 6:17, 8:7, 12:10, 13:5, 13:24, 19:17, 25:8, 25:19, 34:16</p> <p><b>morning</b> [1] - 3:18</p> <p><b>MORRIS</b> [2] - 2:2, 2:10</p> <p><b>Morris</b> [1] - 3:20</p> <p><b>most</b> [1] - 22:4</p> <p><b>move</b> [3] - 20:1, 24:9, 46:21</p> <p><b>moving</b> [1] - 19:23</p> <p><b>MR</b> [30] - 3:10, 3:18, 4:15, 4:20, 4:22, 5:4, 5:16, 6:14, 6:19, 7:7, 11:22, 12:1, 15:7, 16:21, 23:5, 23:9, 26:19, 28:2, 29:1, 30:15, 31:20, 32:5, 32:10, 32:22, 33:3, 35:10, 41:9, 44:18, 46:12, 48:16</p>					
<p><b>I</b></p>	<p><b>idea</b> [7] - 18:8, 18:10, 24:15, 26:12, 28:20, 30:7, 35:3</p> <p><b>ideally</b> [1] - 40:21</p> <p><b>identify</b> [1] - 24:18</p>	<p><b>J</b></p>	<p><b>JAMES</b> [1] - 2:10</p> <p><b>James</b> [1] - 3:20</p>	<p><b>K</b></p>	<p><b>KARTHIK</b> [1] - 2:6</p> <p><b>Karthik</b> [1] - 3:14</p> <p><b>KASARANENI</b> [1] - 2:6</p> <p><b>Kasaraneni</b> [1] - 3:14</p> <p><b>keyed</b> [2] - 4:22, 5:1</p> <p><b>knocking</b> [1] - 35:3</p> <p><b>knotty</b> [1] - 45:18</p> <p><b>knows</b> [1] - 25:16</p>	<p><b>L</b></p>	<p><b>LANE</b> [1] - 2:12</p> <p><b>largely</b> [2] - 16:4, 42:16</p> <p><b>larger</b> [1] - 14:5</p> <p><b>last</b> [3] - 13:11, 13:14, 35:2</p> <p><b>latter</b> [1] - 15:8</p> <p><b>launch</b> [10] - 7:21, 8:4, 9:16, 10:1, 10:11, 11:1, 19:21, 22:10,</p>	<p><b>M</b></p>	<p><b>major</b> [1] - 22:7</p> <p><b>Mark</b> [1] - 3:14</p> <p><b>MARK</b> [1] - 2:6</p> <p><b>MARX</b> [1] - 2:12</p> <p><b>Marx</b> [1] - 3:22</p> <p><b>material</b> [2] - 31:8, 42:9</p>

<p><b>MS</b> [33] - 8:15, 9:6, 17:8, 17:19, 18:22, 19:7, 20:19, 21:14, 23:3, 26:22, 29:7, 29:15, 36:4, 36:10, 36:16, 37:6, 38:7, 38:9, 38:24, 39:10, 39:21, 40:4, 40:7, 40:10, 40:19, 41:1, 41:24, 43:11, 43:15, 46:14, 47:7, 47:23, 48:14</p> <p><b>Mylan</b> [2] - 10:3, 16:9</p>	<p>47:17</p> <p><b>notice</b> [3] - 5:8, 7:15, 16:23</p> <p><b>number</b> [6] - 14:6, 15:1, 25:2, 25:3, 27:12, 47:12</p> <p><b>Numbers</b> [1] - 3:2</p> <p><b>numbers</b> [3] - 20:23, 21:2, 21:10</p> <p><b>numerous</b> [1] - 45:19</p>	<p>45:14</p> <p><b>original</b> [7] - 8:19, 16:24, 21:24, 33:6, 37:15, 43:16, 45:2</p> <p><b>originally</b> [2] - 8:8, 37:10</p> <p><b>otherwise</b> [1] - 18:7</p> <p><b>ought</b> [5] - 27:14, 30:11, 36:7, 44:12, 47:10</p> <p><b>ourselves</b> [1] - 18:6</p> <p><b>overlap</b> [1] - 14:10</p> <p><b>overlapping</b> [1] - 16:5</p> <p><b>own</b> [1] - 36:17</p> <p><b>owned</b> [1] - 39:12</p>	<p><b>people</b> [1] - 17:23</p> <p><b>per</b> [2] - 9:10, 19:8</p> <p><b>perceived</b> [1] - 7:11</p> <p><b>perfectly</b> [1] - 47:15</p> <p><b>perhaps</b> [4] - 11:3, 13:1, 18:2, 18:13</p> <p><b>period</b> [3] - 33:16, 41:22, 44:23</p> <p><b>person</b> [1] - 8:4</p> <p><b>perspective</b> [3] - 16:22, 23:19, 26:20</p> <p><b>persuaded</b> [1] - 47:13</p> <p><b>PHARMA</b> [4] - 1:7, 1:8, 1:15, 1:16</p> <p><b>pharmaceutical</b> [1] - 7:23</p> <p><b>PHARMACEUTIC ALS</b> [4] - 1:6, 1:7, 1:13, 1:14</p> <p><b>place</b> [1] - 10:17</p> <p><b>plaintiff</b> [1] - 3:9</p> <p><b>Plaintiff</b> [2] - 1:4, 2:8</p> <p><b>plaintiffs</b> [1] - 46:16</p> <p><b>Plaintiffs</b> [1] - 1:11</p> <p><b>plan</b> [1] - 15:14</p> <p><b>planned</b> [1] - 6:10</p> <p><b>planning</b> [2] - 15:1, 15:3</p> <p><b>play</b> [1] - 40:3</p> <p><b>plus</b> [1] - 6:5</p> <p><b>point</b> [11] - 10:1, 10:11, 10:19, 11:10, 11:20, 12:22, 28:24, 30:8, 35:11, 41:10, 43:12</p> <p><b>pop</b> [1] - 18:11</p> <p><b>poses</b> [1] - 41:23</p> <p><b>position</b> [4] - 10:9, 22:24, 23:24, 34:14</p> <p><b>possibilities</b> [1] - 12:11</p> <p><b>possibility</b> [3] - 9:20, 25:24, 45:5</p> <p><b>possible</b> [4] - 25:23, 30:22, 35:20, 44:15</p> <p><b>post</b> [3] - 12:8, 12:15, 28:12</p> <p><b>post-trial</b> [1] - 12:8</p> <p><b>postponed</b> [1] - 12:23</p> <p><b>posture</b> [1] - 20:12</p> <p><b>potential</b> [2] - 42:18, 46:19</p>	<p><b>potentially</b> [1] - 6:21</p> <p><b>practical</b> [2] - 38:13, 39:8</p> <p><b>practice</b> [2] - 9:21, 11:16</p> <p><b>pragmatic</b> [1] - 39:18</p> <p><b>pragmatism</b> [1] - 39:19</p> <p><b>predecessor</b> [1] - 16:20</p> <p><b>prefer</b> [2] - 23:1, 40:15</p> <p><b>preference</b> [2] - 45:3, 46:22</p> <p><b>prejudicing</b> [1] - 45:24</p> <p><b>preliminary</b> [6] - 6:21, 8:2, 9:20, 11:15, 12:7, 12:13</p> <p><b>prematurely</b> [1] - 11:6</p> <p><b>prepared</b> [1] - 25:13</p> <p><b>preparing</b> [1] - 12:14</p> <p><b>prescribed</b> [1] - 8:8</p> <p><b>pressure</b> [1] - 23:15</p> <p><b>presumably</b> [3] - 34:20, 37:4, 39:4</p> <p><b>pretrial</b> [2] - 15:22, 18:19</p> <p><b>pretty</b> [3] - 20:17, 24:14, 30:6</p> <p><b>prevent</b> [1] - 10:23</p> <p><b>previous</b> [2] - 20:18, 45:10</p> <p><b>previously</b> [2] - 36:20, 37:8</p> <p><b>primary</b> [1] - 20:21</p> <p><b>problem</b> [8] - 13:17, 13:18, 13:19, 31:11, 33:19, 33:20, 41:23, 42:17</p> <p><b>proceed</b> [1] - 9:24</p> <p><b>proceeding</b> [2] - 7:20, 8:10</p> <p><b>proceedings</b> [4] - 6:22, 8:3, 18:19, 49:11</p> <p><b>process</b> [10] - 15:22, 18:5, 24:22, 25:1, 26:3, 26:9, 27:10, 31:17, 36:17, 36:22</p>
<b>N</b>	<b>O</b>	<b>P</b>		
<p><b>narrow</b> [2] - 15:17, 28:13</p> <p><b>narrowed</b> [2] - 15:12, 15:20</p> <p><b>narrowing</b> [1] - 30:12</p> <p><b>nature</b> [2] - 14:14, 21:12</p> <p><b>nay</b> [1] - 10:9</p> <p><b>NDA</b> [2] - 5:5, 8:21</p> <p><b>necessary</b> [1] - 24:20</p> <p><b>need</b> [10] - 12:12, 12:22, 19:9, 21:22, 37:3, 40:7, 40:22, 40:24, 41:3, 47:21</p> <p><b>needed</b> [3] - 27:7, 27:8, 48:4</p> <p><b>needs</b> [1] - 48:8</p> <p><b>new</b> [16] - 5:13, 7:19, 9:11, 21:5, 21:20, 21:23, 29:11, 29:16, 34:19, 36:11, 36:14, 37:3, 38:8, 41:21, 43:18, 43:23</p> <p><b>New</b> [1] - 49:2</p> <p><b>news</b> [2] - 14:3, 15:19</p> <p><b>next</b> [1] - 34:20</p> <p><b>NICHOLS</b> [1] - 2:2</p> <p><b>NK1</b> [1] - 14:20</p> <p><b>nobody</b> [1] - 48:12</p> <p><b>normally</b> [2] - 25:4, 28:5</p> <p><b>Notary</b> [1] - 49:7</p> <p><b>noted</b> [1] - 8:23</p> <p><b>nothing</b> [2] - 10:23,</p>	<p><b>obliged</b> [1] - 43:4</p> <p><b>obviously</b> [5] - 17:10, 22:4, 34:18, 37:12, 37:24</p> <p><b>occurred</b> [2] - 6:8, 20:9</p> <p><b>October</b> [2] - 33:16, 41:16</p> <p><b>OF</b> [2] - 1:1, 49:4</p> <p><b>offer</b> [2] - 7:8, 35:14</p> <p><b>often</b> [1] - 44:6</p> <p><b>older</b> [1] - 20:22</p> <p><b>once</b> [1] - 28:9</p> <p><b>one</b> [24] - 6:12, 6:15, 6:20, 7:12, 8:18, 9:9, 10:5, 13:11, 15:1, 16:3, 17:20, 22:14, 25:2, 25:22, 26:17, 31:10, 31:14, 35:8, 35:11, 41:10, 43:12, 44:19, 44:22, 45:13</p> <p><b>ones</b> [1] - 16:5</p> <p><b>open</b> [2] - 12:11, 44:16</p> <p><b>opening</b> [1] - 47:15</p> <p><b>openings</b> [1] - 44:24</p> <p><b>opinion</b> [2] - 13:6, 33:18</p> <p><b>opportunity</b> [7] - 25:6, 27:4, 33:12, 33:21, 34:4, 34:12, 36:22</p> <p><b>option</b> [3] - 22:14, 22:20, 23:19</p> <p><b>options</b> [1] - 25:22</p> <p><b>order</b> [7] - 4:8, 9:19, 11:8, 11:11, 28:22</p> <p><b>orders</b> [2] - 45:11,</p>	<p><b>Pages</b> [1] - 49:9</p> <p><b>Panglossian</b> [1] - 42:14</p> <p><b>paragraph</b> [1] - 7:15</p> <p><b>parent</b> [2] - 36:2, 36:14</p> <p><b>paring</b> [1] - 31:6</p> <p><b>part</b> [3] - 18:18, 27:10, 30:21</p> <p><b>particularly</b> [2] - 13:8, 16:5</p> <p><b>parties</b> [16] - 3:7, 3:8, 10:6, 10:13, 11:18, 21:22, 22:3, 23:1, 23:23, 24:18, 25:4, 25:5, 25:21, 26:7, 37:7, 46:24</p> <p><b>parties'</b> [1] - 31:21</p> <p><b>party</b> [4] - 10:23, 36:11, 36:14, 38:20</p> <p><b>passing</b> [1] - 35:24</p> <p><b>patent</b> [1] - 7:20</p> <p><b>patents</b> [35] - 5:10, 5:19, 6:11, 7:14, 7:18, 8:22, 8:24, 9:10, 14:6, 14:9, 14:14, 14:19, 15:3, 15:4, 15:10, 15:13, 15:22, 16:4, 16:6, 17:1, 20:3, 20:7, 20:8, 20:13, 20:16, 20:20, 20:22, 21:5, 21:6, 27:12, 43:23, 44:1</p> <p><b>pattern</b> [1] - 45:10</p> <p><b>PAUL</b> [1] - 2:5</p>		

<p><b>processing</b> [1] - 16:12</p> <p><b>product</b> [3] - 7:22, 7:23, 7:24</p> <p><b>products</b> [1] - 28:10</p> <p><b>Professional</b> [1] - 49:7</p> <p><b>progress</b> [1] - 44:9</p> <p><b>propose</b> [2] - 9:21, 33:13</p> <p><b>proposed</b> [1] - 25:6</p> <p><b>proposing</b> [2] - 9:12, 11:18</p> <p><b>prospect</b> [1] - 26:13</p> <p><b>provides</b> [1] - 12:4</p> <p><b>provision</b> [1] - 9:4</p> <p><b>prudent</b> [1] - 10:10</p> <p><b>Public</b> [1] - 49:7</p> <p><b>purposes</b> [2] - 4:3, 9:1</p> <p><b>pursue</b> [1] - 18:24</p> <p><b>push</b> [2] - 22:3, 46:20</p> <p><b>pushing</b> [1] - 42:23</p> <p><b>put</b> [7] - 23:15, 34:13, 35:11, 39:4, 42:24, 43:15, 45:4</p>	<p>31:6</p> <p><b>realistically</b> [1] - 31:3</p> <p><b>realize</b> [1] - 46:21</p> <p><b>really</b> [14] - 11:16, 15:1, 18:15, 18:23, 19:3, 19:12, 20:2, 22:21, 26:24, 27:17, 36:1, 36:13, 44:2, 45:18</p> <p><b>reason</b> [5] - 20:2, 29:5, 29:8, 45:7, 47:10</p> <p><b>reasons</b> [1] - 46:23</p> <p><b>receive</b> [1] - 7:14</p> <p><b>received</b> [2] - 16:24, 29:10</p> <p><b>receptor</b> [1] - 14:20</p> <p><b>recognize</b> [1] - 42:18</p> <p><b>record</b> [2] - 49:9, 49:10</p> <p><b>reduce</b> [4] - 13:22, 15:3, 15:5, 43:9</p> <p><b>reducing</b> [1] - 27:11</p> <p><b>redundancy</b> [1] - 15:5</p> <p><b>regard</b> [3] - 13:2, 29:17, 46:17</p> <p><b>Registered</b> [1] - 49:6</p> <p><b>regularly</b> [1] - 26:5</p> <p><b>related</b> [1] - 16:2</p> <p><b>reluctant</b> [1] - 47:6</p> <p><b>remember</b> [1] - 45:12</p> <p><b>replies</b> [2] - 35:14, 35:17</p> <p><b>reply</b> [2] - 46:4</p> <p><b>REPORTER</b> [1] - 49:4</p> <p><b>reporter</b> [2] - 48:2, 48:8</p> <p><b>Reporter</b> [1] - 49:7</p> <p><b>representation</b> [1] - 38:12</p> <p><b>represented</b> [1] - 38:5</p> <p><b>request</b> [1] - 42:11</p> <p><b>requesting</b> [1] - 10:16</p> <p><b>requests</b> [1] - 29:10</p> <p><b>require</b> [3] - 21:16, 37:7, 37:14</p> <p><b>resolve</b> [7] - 6:12, 6:15, 6:17, 6:20,</p>	<p>7:5, 19:22, 22:9</p> <p><b>respect</b> [5] - 21:4, 21:5, 38:15, 42:9, 43:4</p> <p><b>respectful</b> [1] - 23:11</p> <p><b>respond</b> [2] - 33:12, 41:23</p> <p><b>response</b> [2] - 37:21, 46:4</p> <p><b>responses</b> [2] - 38:1, 45:1</p> <p><b>responsibility</b> [1] - 39:16</p> <p><b>rest</b> [1] - 20:8</p> <p><b>restrictive</b> [1] - 8:14</p> <p><b>result</b> [1] - 21:2</p> <p><b>retained</b> [1] - 38:11</p> <p><b>rid</b> [1] - 31:11</p> <p><b>rights</b> [1] - 45:24</p> <p><b>ROBYN</b> [1] - 2:13</p> <p><b>Robyn</b> [1] - 3:22</p> <p><b>roll</b> [1] - 3:6</p> <p><b>rolling</b> [1] - 5:19</p> <p><b>RPR</b> [2] - 49:15, 49:15</p> <p><b>rules</b> [1] - 9:9</p> <p><b>runs</b> [2] - 6:4, 8:19</p> <p><b>RUSSELL</b> [1] - 2:6</p>	<p><b>seek</b> [1] - 9:22</p> <p><b>seismic</b> [1] - 20:9</p> <p><b>send</b> [3] - 33:14, 40:17, 47:19</p> <p><b>sense</b> [6] - 16:12, 22:4, 25:16, 27:1, 39:9, 46:18</p> <p><b>sensible</b> [1] - 27:19</p> <p><b>separate</b> [1] - 36:8</p> <p><b>September</b> [3] - 32:12, 32:19, 41:15</p> <p><b>sequencing</b> [1] - 45:8</p> <p><b>serve</b> [1] - 40:17</p> <p><b>session</b> [1] - 18:14</p> <p><b>set</b> [9] - 5:17, 12:24, 17:21, 27:11, 36:8, 38:22, 39:1, 41:16, 45:8</p> <p><b>several</b> [2] - 16:2, 44:1</p> <p><b>short</b> [1] - 41:22</p> <p><b>shortened</b> [1] - 26:14</p> <p><b>shortly</b> [1] - 18:14</p> <p><b>show</b> [3] - 25:15, 25:17, 47:10</p> <p><b>side</b> [6] - 7:9, 17:4, 17:7, 22:16, 44:15, 44:20</p> <p><b>sides</b> [1] - 16:15</p> <p><b>significant</b> [5] - 16:7, 16:10, 16:16, 30:11, 42:9</p> <p><b>similar</b> [4] - 15:8, 21:7, 34:23, 43:24</p> <p><b>simpler</b> [1] - 18:3</p> <p><b>simply</b> [2] - 6:6, 11:18</p> <p><b>simultaneous</b> [2] - 44:24, 45:1</p> <p><b>sit</b> [3] - 9:8, 28:4, 29:8</p> <p><b>sitting</b> [2] - 13:10, 13:16</p> <p><b>situation</b> [1] - 11:6</p> <p><b>six</b> [6] - 12:10, 13:4, 13:24, 19:17, 25:8, 25:19</p> <p><b>SLAYBACK</b> [4] - 1:7, 1:8, 1:15, 1:15</p> <p><b>Slayback</b> [8] - 3:2, 36:2, 36:9, 37:18, 38:5, 38:10,</p>	<p>38:11, 38:23</p> <p><b>Sleet</b> [1] - 26:4</p> <p><b>slightly</b> [1] - 37:19</p> <p><b>sometime</b> [1] - 32:9</p> <p><b>sometimes</b> [1] - 44:4</p> <p><b>somewhat</b> [2] - 14:7, 34:3</p> <p><b>soon</b> [2] - 24:14, 40:1</p> <p><b>sooner</b> [2] - 27:22, 37:23</p> <p><b>sort</b> [3] - 26:8, 26:10, 29:21</p> <p><b>speaking</b> [1] - 3:8</p> <p><b>specifics</b> [1] - 34:5</p> <p><b>spend</b> [1] - 33:2</p> <p><b>spent</b> [2] - 18:7, 27:16</p> <p><b>SPERLING</b> [1] - 2:6</p> <p><b>Sperling</b> [1] - 3:14</p> <p><b>squeeze</b> [2] - 29:23, 33:15</p> <p><b>squeezing</b> [1] - 42:21</p> <p><b>stage</b> [2] - 15:15, 28:17</p> <p><b>staged</b> [1] - 45:3</p> <p><b>Stark's</b> [1] - 45:13</p> <p><b>start</b> [2] - 5:13, 7:18</p> <p><b>starts</b> [2] - 5:9, 7:13</p> <p><b>State</b> [2] - 49:1, 49:8</p> <p><b>statement</b> [1] - 23:12</p> <p><b>STATES</b> [1] - 1:1</p> <p><b>States</b> [1] - 1:21</p> <p><b>statute</b> [3] - 5:17, 7:3, 8:13</p> <p><b>statutory</b> [1] - 9:4</p> <p><b>stay</b> [22] - 4:4, 4:9, 4:13, 5:10, 5:12, 5:14, 5:22, 6:4, 6:24, 7:12, 7:19, 8:18, 9:2, 9:10, 9:12, 10:22, 11:9, 12:3, 13:4, 22:19, 24:10, 48:1</p> <p><b>stays</b> [1] - 5:20</p> <p><b>stick</b> [1] - 13:23</p> <p><b>still</b> [9] - 15:16, 17:9, 18:9, 19:2, 19:11, 31:12, 31:14, 34:12, 37:9</p> <p><b>straightforward</b> [2] - 16:19, 45:22</p> <p><b>streamline</b> [1] - 31:16</p> <p><b>streamlining</b> [1] -</p>
<b>Q</b>				
<p><b>questions</b> [4] - 14:24, 16:3, 44:16, 47:18</p> <p><b>quickly</b> [2] - 13:13, 30:22</p> <p><b>quite</b> [1] - 34:23</p>				
<b>R</b>				
<p><b>radically</b> [1] - 36:19</p> <p><b>raise</b> [2] - 41:10, 44:19</p> <p><b>raised</b> [1] - 35:23</p> <p><b>rather</b> [4] - 4:9, 15:20, 37:24, 46:21</p> <p><b>ratios</b> [1] - 20:24</p> <p><b>reach</b> [2] - 41:18, 47:3</p> <p><b>reached</b> [1] - 41:13</p> <p><b>reading</b> [2] - 4:7, 16:23</p> <p><b>ready</b> [1] - 17:24</p> <p><b>real</b> [4] - 10:12, 11:17, 16:15, 27:3</p> <p><b>realistic</b> [2] - 26:13,</p>	<p>regard [3] - 13:2, 29:17, 46:17</p> <p><b>Registered</b> [1] - 49:6</p> <p><b>regularly</b> [1] - 26:5</p> <p><b>related</b> [1] - 16:2</p> <p><b>reluctant</b> [1] - 47:6</p> <p><b>remember</b> [1] - 45:12</p> <p><b>replies</b> [2] - 35:14, 35:17</p> <p><b>reply</b> [2] - 46:4</p> <p><b>REPORTER</b> [1] - 49:4</p> <p><b>reporter</b> [2] - 48:2, 48:8</p> <p><b>Reporter</b> [1] - 49:7</p> <p><b>representation</b> [1] - 38:12</p> <p><b>represented</b> [1] - 38:5</p> <p><b>request</b> [1] - 42:11</p> <p><b>requesting</b> [1] - 10:16</p> <p><b>requests</b> [1] - 29:10</p> <p><b>require</b> [3] - 21:16, 37:7, 37:14</p> <p><b>resolve</b> [7] - 6:12, 6:15, 6:17, 6:20,</p>	<p><b>save</b> [3] - 18:6, 34:2, 35:17</p> <p><b>saw</b> [1] - 15:11</p> <p><b>schedule</b> [10] - 12:4, 13:21, 22:5, 23:10, 23:18, 24:24, 27:14, 30:21, 42:22, 47:3</p> <p><b>scheduled</b> [1] - 29:2</p> <p><b>scheduling</b> [6] - 4:7, 4:8, 28:22, 31:19, 45:11, 45:14</p> <p><b>scope</b> [1] - 44:21</p> <p><b>score</b> [1] - 26:18</p> <p><b>se</b> [1] - 19:8</p> <p><b>second</b> [4] - 31:6, 33:5, 35:3, 37:17</p> <p><b>see</b> [12] - 8:11, 11:21, 20:1, 20:5, 22:12, 24:23, 28:5, 33:5, 33:17, 33:20, 36:23, 38:1</p> <p><b>seeing</b> [1] - 20:9</p>	<p style="text-align: center;"><b>S</b></p>	

<p>27:15  <b>strikes</b> [1] - 14:11  <b>studied</b> [1] - 14:12  <b>submissions</b> [2] - 12:9, 12:16  <b>submit</b> [1] - 41:20  <b>subsequently</b> [1] - 5:11  <b>subsidiary</b> [1] - 39:12  <b>substantially</b> [1] - 41:21  <b>suddenly</b> [1] - 38:21  <b>suggest</b> [1] - 40:1  <b>suggested</b> [2] - 37:11, 44:17  <b>suggesting</b> [3] - 9:17, 21:15, 36:19  <b>suggestion</b> [3] - 27:19, 46:9, 46:15  <b>suggestions</b> [1] - 44:16  <b>suit</b> [1] - 20:11  <b>summary</b> [10] - 26:3, 26:8, 26:13, 26:20, 27:4, 27:6, 31:11, 32:14, 32:21, 35:13  <b>supports</b> [1] - 36:24  <b>supposed</b> [2] - 28:24, 31:18  <b>surmise</b> [1] - 27:5  <b>surprised</b> [2] - 44:4, 44:7  <b>surprises</b> [2] - 30:10, 36:15  <b>surreply</b> [1] - 46:5  <b>suspect</b> [2] - 14:4, 29:11</p>	<p>9:3, 11:24, 12:17, 15:18, 17:6, 17:17, 17:20, 19:4, 19:24, 21:9, 22:14, 23:8, 23:20, 27:18, 28:20, 29:4, 29:14, 29:20, 30:17, 32:2, 32:7, 32:13, 33:1, 33:8, 35:19, 36:6, 36:13, 37:2, 38:4, 38:8, 38:13, 39:2, 39:17, 39:23, 40:5, 40:9, 40:16, 40:20, 41:7, 42:4, 43:14, 43:21, 45:6, 47:5, 47:8, 48:1  <b>theme</b> [1] - 29:21  <b>THERAPEUTICS</b> [2] - 1:3, 1:11  <b>therefore</b> [1] - 27:2  <b>they've</b> [1] - 37:4  <b>thinking</b> [2] - 26:8, 38:21  <b>third</b> [1] - 25:24  <b>thoughts</b> [2] - 7:10, 35:3  <b>three</b> [1] - 25:21  <b>tied</b> [1] - 43:22  <b>TIGAN</b> [2] - 2:3, 3:10  <b>Tigan</b> [1] - 3:11  <b>timeframe</b> [1] - 27:11  <b>timing</b> [2] - 5:7, 12:20  <b>today</b> [6] - 3:13, 3:21, 3:24, 24:17, 37:10, 37:12  <b>together</b> [1] - 43:23  <b>tomorrow</b> [1] - 40:22  <b>towards</b> [2] - 42:21, 44:13  <b>track</b> [2] - 44:13, 44:14  <b>transcript</b> [1] - 33:24  <b>triable</b> [1] - 15:6  <b>trial</b> [40] - 9:16, 9:18, 10:2, 10:4, 10:16, 10:18, 10:19, 11:19, 12:8, 12:10, 12:14, 12:15, 13:3, 14:1, 14:2, 15:2, 15:11, 17:22, 19:21,</p>	<p>19:23, 20:1, 22:3, 24:3, 25:8, 25:9, 25:14, 28:18, 31:3, 33:22, 33:23, 34:6, 34:11, 34:13, 34:20, 42:23, 43:2, 43:10, 46:20  <b>trials</b> [2] - 13:14, 13:15  <b>tried</b> [1] - 41:11  <b>trigger</b> [2] - 5:21, 5:24  <b>triggered</b> [1] - 5:9  <b>true</b> [3] - 14:18, 23:1, 49:10  <b>trust</b> [1] - 31:4  <b>try</b> [7] - 4:2, 14:1, 24:9, 29:23, 31:15, 33:17, 44:21  <b>trying</b> [2] - 12:3, 44:13  <b>TUNNELL</b> [1] - 2:2  <b>turn</b> [2] - 18:2, 27:19  <b>turns</b> [1] - 42:8  <b>two</b> [18] - 5:10, 6:18, 8:22, 14:24, 15:13, 16:20, 20:3, 20:6, 20:13, 20:16, 20:22, 21:5, 22:17, 22:23, 25:3, 25:22, 28:7, 35:18</p>	<p>43:23, 45:8, 47:21</p> <p style="text-align: center;"><b>V</b></p> <p><b>various</b> [2] - 12:21, 20:23  <b>viable</b> [1] - 16:15  <b>view</b> [1] - 14:11  <b>visit</b> [1] - 35:9  <b>voluntarily</b> [2] - 9:15, 10:24</p> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> [2] - 10:18, 19:20  <b>wants</b> [2] - 22:16, 24:6  <b>water</b> [3] - 29:23, 33:15, 42:22  <b>WCB</b> [2] - 1:5, 1:12  <b>weeds</b> [1] - 12:20  <b>week</b> [3] - 35:5, 40:23, 42:6  <b>weeks</b> [2] - 32:18, 35:18  <b>weigh</b> [1] - 39:14  <b>welcome</b> [2] - 14:3, 15:19  <b>whole</b> [6] - 15:22, 30:9, 36:7, 38:22, 39:1, 46:7  <b>wholly</b> [1] - 39:12  <b>WILLIAM</b> [1] - 1:21  <b>willing</b> [5] - 10:24, 11:9, 12:21, 22:3, 28:15  <b>Wilmington</b> [2] - 3:11, 49:12  <b>WINDELS</b> [1] - 2:12  <b>Windels</b> [1] - 3:22  <b>wondering</b> [1] - 16:10  <b>word</b> [1] - 22:18  <b>words</b> [1] - 46:20  <b>work-around</b> [1] - 24:10  <b>works</b> [2] - 28:6, 37:9  <b>writing</b> [1] - 13:6</p> <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> [5] - 10:15, 13:11, 13:14, 20:10, 35:2  <b>yourself</b> [1] - 33:4</p>
<p style="text-align: center;"><b>T</b></p> <p><b>table</b> [2] - 31:22, 44:6  <b>technical</b> [1] - 38:19  <b>technically</b> [1] - 36:14  <b>ten</b> [4] - 13:14, 17:1, 20:16, 20:18  <b>THE</b> [60] - 1:1, 1:1, 1:21, 3:1, 3:16, 4:1, 4:18, 4:21, 4:24, 5:15, 5:21, 6:16, 6:23, 8:11,</p>	<p><b>ultimately</b> [2] - 13:6, 22:22  <b>under</b> [1] - 11:13  <b>understood</b> [1] - 47:7  <b>undertake</b> [1] - 21:18  <b>unfair</b> [1] - 34:3  <b>UNITED</b> [1] - 1:1  <b>United</b> [1] - 1:21  <b>unless</b> [2] - 20:1, 45:17  <b>unnecessary</b> [1] - 27:16  <b>unwisely</b> [1] - 13:1  <b>up</b> [15] - 4:11, 5:17, 13:1, 14:2, 18:11, 25:19, 25:20, 27:2, 27:9, 31:9, 37:3, 39:24,</p>	<p style="text-align: center;"><b>U</b></p>	

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**Motions**

[1:24-cv-00830-WCB Heron Therapeutics, Inc. v. Azurity Pharmaceuticals, Inc. et al](#)

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