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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

ABBOTT DIABETES CARE, INC. and  
ABBOTT LABORATORIES,

Plaintiffs/Counterdefendants,

v.

ROCHE DIAGNOSTICS CORP., ROCHE  
DIAGNOSTICS OPERATIONS, INC. and  
BAYER HEALTHCARE LLC,

Defendants/Counterplaintiffs.

THERASENSE, INC., and ABBOTT  
LABORATORIES,

Plaintiffs,

v.

NOVA BIOMEDICAL CORPORATION and  
BECTON, DICKINSON AND COMPANY,

Defendants.

Case Nos. C05-03117 WHA  
C04-02123 WHA  
C04-03327 WHA  
C04-03732 WHA

**BAYER AND BD/NOVA'S PROPOSED  
JOINT SPECIAL VERDICT FORM ON  
'551 ISSUES  
- PHASE I**

1 Bayer, BD, and Nova respectfully submit their Proposed Special Verdict Form. This  
2 Special Verdict Form is limited to issues to be tried in a separate trial on the '551 patent against  
3 all parties on all issues. It separates the trial into three phases as suggested by the Court.

4 Bayer, BD, and Nova reserve the right to propose additional and modified verdict forms  
5 as the issues to be tried are further framed by the parties and this Court.

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**Phase I**

**I. OBVIOUSNESS**

1. Did Defendants prove that it is highly probable that the asserted claims of the '551 patent are obvious in light of the prior art?

Yes \_\_\_\_\_ (for Defendants) No \_\_\_\_\_ (for Abbott)

**II. WRITTEN DESCRIPTION**

2. Did Defendants prove that it is highly probable that the specification of the '551 patent does not contain an adequate written description of the “without an intervening membrane or other whole blood filtering member” claim element?

Yes \_\_\_\_\_ (for Defendants) No \_\_\_\_\_ (for Abbott)

**III. INEQUITABLE CONDUCT**

3. Did Defendants prove that it is highly probable that Dr. Sanghera or Mr. Pope or both of them withheld material information with the intent to deceive the U.S. Patent Office during the prosecution of the '551 patent?

Yes \_\_\_\_\_ (for Defendants) No \_\_\_\_\_ (for Abbott)

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**IV. PROSECUTION LACHES**

4. Did Defendants prove that it is highly probable that Abbott and/or Medisense unreasonably delayed in obtaining the '551 patent, and that one or more of the Defendants were prejudiced by Abbott and/or Medisense's delay?

Yes \_\_\_\_\_ (for Defendants)      No \_\_\_\_\_ (for Abbott)

**WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.**

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v.

ROCHE DIAGNOSTICS CORP., ROCHE  
DIAGNOSTICS OPERATIONS, INC. and  
BAYER HEALTHCARE LLC,  
  
Defendants/Counterplaintiffs.

**BAYER AND BD/NOVA'S PROPOSED  
JOINT SPECIAL VERDICT FORM ON  
'551 ISSUES  
- PHASE II**

THERASENSE, INC., and ABBOTT  
LABORATORIES,  
  
Plaintiffs,

v.

NOVA BIOMEDICAL CORPORATION and  
BECTON, DICKINSON AND COMPANY,  
  
Defendants.

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**Phase II**

**I. INFRINGEMENT - BAYER**

1. Did Abbott prove that it is more likely than not that Bayer’s blood glucose test strips literally **do not** have a “membrane or other whole blood filtering member?”

Autodisc: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

Microfill: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

2. Did Abbott prove that it is more likely than not that the first and second electrodes in Bayer’s blood glucose test strips are literally “not in electrical contact” before the blood is applied?

Autodisc: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

Microfill: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

3. Did Abbott prove that it is more likely than not that Bayer’s blood glucose test strips have the substantial equivalent of a “reference counterelectrode”?

Autodisc: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

Microfill: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

4. Did Abbott prove that it is more likely than not that Bayer’s blood glucose test strips have electrodes that can literally be “simultaneously completely covered” by a single drop of whole blood?

Autodisc: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

Microfill: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

5. Did Abbott prove that it is more likely than not that every element of the asserted claims of the ‘551 patent is included in Bayer’s blood glucose test strips?

Autodisc: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

Microfill: Yes\_\_\_ (for Abbott) No\_\_\_ (for Bayer)

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**II. INFRINGEMENT - ROCHE**

[Roche has submitted a separate proposed set of infringement instructions entitled “ROCHE DIAGNOSTICS OPERATIONS, INC. AND ROCHE DIAGNOSTICS CORPORATION’S PROPOSED VERDICT FORM FOR PROPOSED PHASE II – INFRINGEMENT OF THE ‘551 PATENT AND FOR ALL ISSUES CONCERNING THE ‘745 PATENT”]

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**III. INFRINGEMENT – BD AND NOVA**

6. Did Abbott prove that it is more likely than not that BD and Nova’s blood glucose test strips literally **do not** have a “membrane or other whole blood filtering member?”

BD<sup>TM</sup> Test Strips: Yes\_\_\_\_ (for Abbott) No\_\_\_\_ (for BD and Nova)

7. Did Abbott prove that it is more likely than not that the first and second electrodes in BD and Nova’s blood glucose test strips are literally “not in electrical contact” before the blood is applied?

BD<sup>TM</sup> Test Strips: Yes\_\_\_\_ (for Abbott) No\_\_\_\_ (for BD and Nova)

8. Did Abbott prove that it is more likely than not that BD and Nova’s blood glucose test strips have the substantial equivalent of a “reference counterelectrode”?

BD<sup>TM</sup> Test Strips: Yes\_\_\_\_ (for Abbott) No\_\_\_\_ (for BD and Nova)

9. Did Abbott prove that it is more likely than not that BD and Nova’s blood glucose test strips have electrodes that can literally be “simultaneously completely covered” by a single drop of whole blood?

BD<sup>TM</sup> Test Strips: Yes\_\_\_\_ (for Abbott) No\_\_\_\_ (for BD and Nova)

10. Did Abbott prove that it is more likely than not that every element of the asserted claims of the ‘551 patent is included in BD and Nova’s blood glucose test strips?

BD<sup>TM</sup> Test Strips: Yes\_\_\_\_ (for Abbott) No\_\_\_\_ (for BD and Nova)



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**IV. ESTOPPEL - BAYER**

10. Did Bayer prove that it is highly probable that Abbott unreasonably delayed in asserting the '551 patent against Bayer, that Bayer was prejudiced by Abbott's delay, that Abbott induced Bayer to believe that it had abandoned its claim, and that Bayer relied on that belief to its detriment?

Yes \_\_\_\_\_ (for Bayer)                      No \_\_\_\_\_ (for Abbott)

**V. ESTOPPEL - ROCHE**

11. Did Roche prove that it is highly probable that Abbott unreasonably delayed in asserting the '551 patent against Roche , that Roche was prejudiced by Abbott's delay, that Abbott induced Roche to believe that it had abandoned its claim, and that Roche relied on that belief to its detriment?

Yes \_\_\_\_\_ (for Roche)                      No \_\_\_\_\_ (for Abbott)

**WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.**

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ROCHE DIAGNOSTICS CORP., ROCHE  
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BAYER HEALTHCARE LLC,  
  
Defendants/Counterplaintiffs.

**BAYER AND BD/NOVA'S PROPOSED  
JOINT SPECIAL VERDICT FORM ON  
'551 ISSUES  
- PHASE III**

THERASENSE, INC., and ABBOTT  
LABORATORIES,

Plaintiffs,

v.

NOVA BIOMEDICAL CORPORATION and  
BECTON, DICKINSON AND COMPANY,  
  
Defendants.

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**Phase III**

**[TO BE REVISED DEPENDING ON WHICH PRODUCTS  
ARE FOUND TO BE INFRINGING]**

**I. MARKING**

1. Did Abbott prove that Abbott and its licensees marked substantially all Abbott Precision Xtra, Precision QID, Precision PCx, Relion, ExacTech, ExacTech RSG, and LifeScan FastTake products containing test strips with the number of the '551 patent prior to the filing of this lawsuit?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Defendants)

2. If your answer to Question 1 is Yes, identify the date on which Abbott and its licensees started marking substantially all of Abbott Precision Xtra, Precision QID, Precision PCx, Relion, ExacTech, ExacTech RSG, and LifeScan FastTake products containing test strips with the number of the '551 patent: \_\_\_\_\_.

1 **II. DAMAGES - BAYER**

2 3. What amount of lost profits damage, if any, has Abbott proven by a preponderance  
3 of evidence to a reasonable certainty, resulting from Bayer's sale of **Autodisc** products between  
4 May 16, 2006 and September 17, 2007? \_\_\_\_\_

5 4. What is the reasonable royalty (in dollars) that Abbott proved Bayer should pay on  
6 sales of **Autodisc** products between May 16, 2006 and September 17, 2007 for which you did **not**  
7 award lost profits? \_\_\_\_\_

8 5. What amount of lost profits damage, if any, has Abbott proven by a preponderance  
9 of evidence to a reasonable certainty, resulting from Bayer's sale of **Microfill starting on the**  
10 **earlier** of (1) the date, if any, that you wrote in response to Question 2, or (2) August 1, 2005, and  
11 **ending on** December 31, 2006? \_\_\_\_\_

12 6. What is the reasonable royalty (in dollars) that Abbott proved Bayer should pay on  
13 sales of **Microfill starting on the earlier** of (1) the date, if any, that you wrote in response to  
14 Question 2, or (2) August 1, 2005, and **ending on** December 31, 2006 for which you did **not** award  
15 lost profits? \_\_\_\_\_

**III. DAMAGES - ROCHE**

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7. What amount of lost profits damage, if any, has Abbott proven by a preponderance of evidence to a reasonable certainty, resulting from Roche's sale of **ACCU-CHEK® Comfort Curve** products between May 16, 2006 and September 17, 2007? \_\_\_\_\_

8. What is the reasonable royalty (in dollars) that Abbott proved Roche should pay on sales of **ACCU-CHEK® Comfort Curve** products between May 16, 2006 and September 17, 2007 for which you did **not** award lost profits? \_\_\_\_\_

9. What amount of lost profits damage, if any, has Abbott proven by a preponderance of evidence to a reasonable certainty, resulting from Roche's sale of **ACCU-CHEK® Aviva** between August 1, 2005, and September 17, 2007? \_\_\_\_\_

10. What is the reasonable royalty (in dollars) that Abbott proved Roche should pay on Roche's sale of **ACCU-CHEK® Aviva** between August 1, 2005, and September 17, 2007 for which you did **not** award lost profits? \_\_\_\_\_

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**IV. DAMAGES – BD AND NOVA**

11. What amount of lost profits damage, if any, has Abbott proven by a preponderance of evidence to a reasonable certainty, resulting from sales of **BD™ Test Strips starting on the earlier** of (1) the date, if any, that you wrote in response to Question 2, or (2) March 4, 2005, and **ending** on September 30, 2006? \_\_\_\_\_

12. What is the reasonable royalty (in dollars) that Abbott proved BD and Nova should pay on sales of **BD™ Test Strips starting on the earlier** of (1) the date, if any, that you wrote in response to Question 2, or (2) March 4, 2005, and **ending** September 30, 2006 for which you did **not** award lost profits? \_\_\_\_\_

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**V. WILLFULNESS - BAYER**

13. Did Abbott prove that it is highly probable from an objective point of view that the defenses put forth by Bayer failed to raise a substantial question with regard to validity, infringement, or enforceability of the '551 patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Bayer)

14. If you answered Yes to question 13, then did Abbott prove that it is highly probable that Bayer actually knew, or it was so obvious that Bayer should have known, that its actions constituted infringement of a valid and enforceable patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Bayer)

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**VI. WILLFULNESS - ROCHE**

15. Did Abbott prove that it is highly probable from an objective point of view that the defenses put forth by Roche failed to raise a substantial question with regard to validity, infringement, or enforceability of the '551 patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Roche)

16. If you answered Yes to question 15, then did Abbott prove that it is highly probable that Roche actually knew, or it was so obvious that Roche should have known, that its actions constituted infringement of a valid and enforceable patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Roche)



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**VII. WILLFULNESS – BD AND NOVA**

17. Did Abbott prove that it is highly probable from an objective point of view that the defenses put forth by BD failed to raise a substantial question with regard to validity, infringement, or enforceability of the '551 patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for BD)

18. If you answered Yes to question 17, then did Abbott prove that it is highly probable that BD actually knew, or it was so obvious that BD should have known, that its actions constituted infringement of a valid and enforceable patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for BD)

19. Did Abbott prove that it is highly probable from an objective point of view that the defenses put forth by Nova failed to raise a substantial question with regard to validity, infringement, or enforceability of the '551 patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Nova)

20. If you answered Yes to question 19, then did Abbott prove that it is highly probable that Nova actually knew, or it was so obvious that Nova should have known, that its actions constituted infringement of a valid and enforceable patent?

Yes \_\_\_\_\_ (for Abbott) No \_\_\_\_\_ (for Nova)

**WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON