Miller v. Facebook, Inc. et al

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8		UNITED STATES	DISTRICT COURT		
9	N	ORTHERN DISTR	ICT OF CALIFORNIA	L	
10		SAN FRANCI	SCO DIVISION		
11			G N 605 00115	** ** *	
12 13	ABBOTT DIABETES CA ABBOTT LABORATORI		Case Nos. C05-03117 C04-02123	WHA	
13	Plaintiffs/Counterd	lefendants,	C04-03327 C04-03732		
15	v.				
16	ROCHE DIAGNOSTICS	CORP., ROCHE	BAYER AND BD/NO JOINT SPECIAL VE		
17	DIAGNOSTICS OPERAT BAYER HEALTHCARE	,	'551 ISSUES – PHASE I		
18	Defendants/Counter	erplaintiffs.			
19	THERASENSE, INC., and	I ABBOTT			
20	LABORATORIES,				
21 22	Plaintiffs,				
22	V.				
24	NOVA BIOMEDICAL CO BECTON, DICKINSON				
25	Defendants.				
26					
27					
28					
	Bayer and BD/Nova's Propose Case No. C05-03117 WHA; C			A; Case No. C04-03'	732 WHA
	of 2514670				

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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	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA
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1	Phase I
2	I. OBVIOUSNESS
3	1. Did Defendants prove that it is highly probable that the asserted claims of the '551
4	patent are obvious in light of the prior art?
5	Yes (for Defendants) No (for Abbott)
6	
7	II. WRITTEN DESCRIPTION
8	2. Did Defendants prove that it is highly probable that the specification of the '551
9	patent does not contain an adequate written description of the "without an intervening membrane
10	or other whole blood filtering member" claim element?
11	Yes (for Defendants) No (for Abbott)
12	III. INEQUITABLE CONDUCT
13 14	3. Did Defendants prove that it is highly probable that Dr. Sanghera or Mr. Pope or
14	both of them withheld material information with the intent to deceive the U.S. Patent Office
15	during the prosecution of the '551 patent?
17	Yes (for Defendants) No (for Abbott)
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28	Bayer and BD/Nova's Proposed Special Verdict Form
	Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -3-

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1	IV. <u>PROSECUTION LACHES</u>
2	4. Did Defendants prove that it is highly probable that Abbott and/or Medisense
3	unreasonably delayed in obtaining the '551 patent, and that one or more of the Defendants were
4	prejudiced by Abbott and/or Medisense's delay?
5	Yes (for Defendants) No (for Abbott)
6	
7	WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE
8 9	FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.
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28	Bayer and BD/Nova's Proposed Special Verdict Form
	Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -4-

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8		UNITED STATES I		
9	N		CT OF CALIFORNIA	
10		SAN FRANCIS	SCO DIVISION	
11	ABBOTT DIABETES CA	RE, INC. and	Case Nos. C05-03117	WHA
12	ABBOTT LABORATORI	ES,	C04-02123 C04-03327	
13	Plaintiffs/0	Counterdefendants,	C04-03732	
14	v.			
15	ROCHE DIAGNOSTICS		BAYER AND BD/NO JOINT SPECIAL VE	
16	DIAGNOSTICS OPERAT BAYER HEALTHCARE		'551 ISSUES – PHASE II	
17		s/Counterplaintiffs.		
18 19	THERASENSE, INC., and			
19 20	LABORATORIES,			
20 21	Plaintiffs,			
21	v.			
22	NOVA BIOMEDICAL CO	ORPORATION and		
23	BECTON, DICKINSON	AND COMPANY,		
25	Defendants	5.		
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	Bayer and BD/Nova's Propose Case No. C05-03117 WHA; Ca	ase No. C04-02123 WHA;	Case No. C04-03327 WHA -5-	; Case No. C04-03732 WHA

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2	Phase II	
3	I. <u>INFRINGEMENT - BAYER</u>	
4	1. Did Abbott prove that it is more likely than not that Bayer's blood glucose test	
5	strips literally <b>do not</b> have a "membrane or other whole blood filtering member?"	
6	Autodisc: Yes (for Abbott) No (for Bayer)	
7	Microfill: Yes (for Abbott) No (for Bayer)	
8	2. Did Abbott prove that it is more likely than not that the first and second electrodes	s
9	in Bayer's blood glucose test strips are literally "not in electrical contact" before the blood is	
10	applied?	
11	Autodisc: Yes (for Abbott) No (for Bayer)	
12	Microfill: Yes (for Abbott) No (for Bayer)	
13	3. Did Abbott prove that it is more likely than not that Bayer's blood glucose test	
14	strips have the substantial equivalent of a "reference counterelectrode"?	
15	Autodisc: Yes (for Abbott) No (for Bayer)	
16	Microfill: Yes (for Abbott) No (for Bayer)	
17	4. Did Abbott prove that it is more likely than not that Bayer's blood glucose test	
18	strips have electrodes that can literally be "simultaneously completely covered" by a single drop	
19	of whole blood?	
20	Autodisc: Yes (for Abbott) No (for Bayer)	
21	Microfill: Yes (for Abbott) No (for Bayer)	
22		
23	5. Did Abbott prove that it is more likely than not that every element of the asserted	
24	claims of the '551 patent is included in Bayer's blood glucose test strips?	
25	Autodisc: Yes (for Abbott) No (for Bayer)	
26	Microfill: Yes (for Abbott) No (for Bayer)	
27		
28	Bayer and BD/Nova's Proposed Special Verdict Form	
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2	II. <u>INFRINGEMENT - ROCHE</u>
3	[Roche has submitted a separate proposed set of infringement instructions
4	entitled "ROCHE DIAGNOSTICS OPERATIONS, INC. AND ROCHE DIAGNOSTICS CORPORATION'S PROPOSED VERDICT FORM FOR
5	PROPOSED PHASE II – INFRINGEMENT OF THE '551 PATENT AND FOR ALL ISSUES CONCERNING THE '745 PATENT"]
6	ALL ISSUES CONCERNING THE 745TATENT ]
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28	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA
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1	III. <u>INFRINGEMENT – BD AND NOVA</u>
2	6. Did Abbott prove that it is more likely than not that BD and Nova's blood glucose
3	test strips literally <b>do not</b> have a "membrane or other whole blood filtering member?"
4	BD <sup>TM</sup> Test Strips: Yes (for Abbott) No (for BD and Nova)
5	7. Did Abbott prove that it is more likely than not that the first and second electrodes
6	in BD and Nova's blood glucose test strips are literally "not in electrical contact" before the blood
7	is applied?
8	BD <sup>TM</sup> Test Strips: Yes (for Abbott) No (for BD and Nova)
9	8. Did Abbott prove that it is more likely than not that BD and Nova's blood glucose
10	test strips have the substantial equivalent of a "reference counterelectrode"?
11	BD <sup>TM</sup> Test Strips: Yes (for Abbott) No (for BD and Nova)
12	9. Did Abbott prove that it is more likely than not that BD and Nova's blood glucose
13	test strips have electrodes that can literally be "simultaneously completely covered" by a single
14	drop of whole blood?
15	BD <sup>TM</sup> Test Strips: Yes (for Abbott) No (for BD and Nova)
16	10. Did Abbott prove that it is more likely than not that every element of the asserted
17	claims of the '551 patent is included in BD and Nova's blood glucose test strips?
18	BD <sup>TM</sup> Test Strips: Yes (for Abbott) No (for BD and Nova)
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20	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -8-

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1 2 3 4 5	IV. <u>ESTOPPEL - BAYER</u> 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?
6 7	Yes (for Bayer) No (for Abbott)
8	V. ESTOPPEL - ROCHE
9	11. Did Roche prove that it is highly probable that Abbott unreasonably delayed in
10	asserting the '551 patent against Roche, that Roche was prejudiced by Abbott's delay, that
11	Abbott induced Roche to believe that it had abandoned its claim, and that Roche relied on that
12	belief to its detriment?
13	Yes (for Roche) No (for Abbott)
14	
15	WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE
16	FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.
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28	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -9-

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1 2 3 4 5 6 7				
8		UNITED STATES	DISTRICT COURT	
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10		SAN FRANC	ISCO DIVISION	
11				
12	ABBOTT DIABETES CA ABBOTT LABORATOR	-	Case Nos. C05-03117 C04-02123	
13	Plaintiffs/	Counterdefendants,	C04-03327 C04-03732	
14	v.	,		
15 16 17	v. ROCHE DIAGNOSTICS DIAGNOSTICS OPERA' BAYER HEALTHCARE	TIONS, INC. and	BAYER AND BD/NO JOINT SPECIAL VE '551 ISSUES – PHASE III	
18	Defendan	ts/Counterplaintiffs.		
19	THERASENSE, INC., an	d ABBOTT		
20	LABORATORIES,			
21	Plaintiffs,			
22	v.			
23	NOVA BIOMEDICAL C BECTON, DICKINSON			
24	Defendant			
25	Defendant			
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28	Bayer and BD/Nova's Propos Case No. C05-03117 WHA; C sf-2514670			A; Case No. C04-03732 WHA
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1	Phase III
2	[TO BE REVISED DEPENDING ON WHICH PRODUCTS
3	ARE FOUND TO BE INFRINGING]
4	I. <u>MARKING</u>
5	1. Did Abbott prove that Abbott and its licensees marked substantially all Abbott
6	Precision Xtra, Precision QID, Precision PCx, Relion, ExacTech, ExacTech RSG, and LifeScan
7	FastTake products containing test strips with the number of the '551 patent prior to the filing of
8	this lawsuit?
9	Yes (for Abbott) No (for Defendants)
10	2. If your answer to Question 1 is Yes, identify the date on which Abbott and its
11	licensees started marking substantially all of Abbott Precision Xtra, Precision QID, Precision
12	PCx, Relion, ExacTech, ExacTech RSG, and LifeScan FastTake products containing test strips
13	with the number of the '551 patent:
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	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -11-

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 <b>Microfill starting on</b> the <b>earlier</b> 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?
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28	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -12-

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1	III. <u>DAMAGES - ROCHE</u>
2	7. What amount of lost profits damage, if any, has Abbott proven by a preponderance
3	of evidence to a reasonable certainty, resulting from Roche's sale of ACCU-CHEK <sup>®</sup> Comfort
4	Curve products between May 16, 2006 and September 17, 2007?
5	8. What is the reasonable royalty (in dollars) that Abbott proved Roche should pay on
6	sales of ACCU-CHEK <sup>®</sup> Comfort Curve products between May 16, 2006 and September 17,
7	2007 for which you did <b>not</b> award lost profits?
8	9. What amount of lost profits damage, if any, has Abbott proven by a preponderance
9	of evidence to a reasonable certainty, resulting from Roche's sale of ACCU-CHEK <sup>®</sup> Aviva
10	between August 1, 2005, and September 17, 2007?
11	10. What is the reasonable royalty (in dollars) that Abbott proved Roche should pay on
12	Roche's sale of ACCU-CHEK <sup>®</sup> Aviva between August 1, 2005, and September 17, 2007 for
13	which you did <b>not</b> award lost profits?
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	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -13-

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1	IV. <u>DAMAGES – BD AND NOVA</u>
2	11. What amount of lost profits damage, if any, has Abbott proven by a preponderance
3	of evidence to a reasonable certainty, resulting from sales of <b>BD</b> <sup>TM</sup> <b>Test Strips starting on</b> the
4	earlier of (1) the date, if any, that you wrote in response to Question 2, or (2) March 4, 2005, and
5	ending on September 30, 2006?
6	12. What is the reasonable royalty (in dollars) that Abbott proved BD and Nova should
7	pay on sales of <b>BD</b> <sup>TM</sup> Test Strips starting on the earlier of (1) the date, if any, that you wrote in
8	response to Question 2, or (2) March 4, 2005, and ending September 30, 2006 for which you did
9	not award lost profits?
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20	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -14-

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1	V. <u>WILLFULNESS - BAYER</u>
2	13. Did Abbott prove that it is highly probable from an objective point of view that the
3	defenses put forth by Bayer failed to raise a substantial question with regard to validity,
4	infringement, or enforceability of the '551 patent?
5	Yes (for Abbott) No (for Bayer)
6	14. If you answered Yes to question 13, then did Abbott prove that it is highly
7	probable that Bayer actually knew, or it was so obvious that Bayer should have known, that its
8	actions constituted infringement of a valid and enforceable patent?
9	Yes (for Abbott) No (for Bayer)
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1	VI.WILLFULNESS - ROCHE15.Did Abbott prove that it is highly probable from an objective point of view that the
2	defenses put forth by Roche failed to raise a substantial question with regard to validity,
3	infringement, or enforceability of the '551 patent?
4	
5 6	Yes (for Abbott) No (for Roche) 16. If you answered Yes to question 15, then did Abbott prove that it is highly
0 7	probable that Roche actually knew, or it was so obvious that Roche should have known, that its
8	actions constituted infringement of a valid and enforceable patent?
9	Yes (for Abbott) No (for Roche)
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28	Bayer and BD/Nova's Proposed Special Verdict Form
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2	<ul> <li>VII. <u>WILLFULNESS – BD AND NOVA</u></li> <li>17. Did Abbott prove that it is highly probable from an objective point of view that the</li> </ul>
3	defenses put forth by BD failed to raise a substantial question with regard to validity,
4	infringement, or enforceability of the '551 patent?
5	
6	Yes (for Abbott) No (for BD)
7	18. If you answered Yes to question 17, then did Abbott prove that it is highly
8	probable that BD actually knew, or it was so obvious that BD should have known, that its actions
9	constituted infringement of a valid and enforceable patent?
10	Yes (for Abbott) No (for BD)
11	19. Did Abbott prove that it is highly probable from an objective point of view that the
12	defenses put forth by Nova failed to raise a substantial question with regard to validity,
13	infringement, or enforceability of the '551 patent?
14	Yes (for Abbott) No (for Nova)
15	20. If you answered Yes to question 19, then did Abbott prove that it is highly
16	probable that Nova actually knew, or it was so obvious that Nova should have known, that its
17	actions constituted infringement of a valid and enforceable patent?
18	Yes (for Abbott) No (for Nova)
19	WHEN YOU HAVE COMPLETED THIS VERDICT FORM, PLEASE HAVE THE
20	FOREPERSON SIGN AND DATE IN THE SPACES INDICATED BELOW.
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	Bayer and BD/Nova's Proposed Special Verdict Form Case No. C05-03117 WHA; Case No. C04-02123 WHA; Case No. C04-03327 WHA; Case No. C04-03732 WHA -17-
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