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16 THERASENSE, INC.
17 and ABBOTT LABORATORIES

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 THERASENSE, INC. and ABBOTT
21 LABORATORIES,

22 Plaintiffs,

23 vs.

24 NOVA BIOMEDICAL CORPORATION,

25 Defendant.

26 CASE NO. C04-3732 MJJ

27 **FIRST AMENDED COMPLAINT**

28 **DEMAND FOR JURY TRIAL**

FIRST AMENDED COMPLAINT

1
2 Plaintiffs TheraSense Inc. (“TheraSense”) and newly-added party Abbott
3 Laboratories (“Abbott”), for this First Amended Complaint against defendant Nova Biomedical
4 Corporation (“defendant” or “Nova”), each allege upon personal knowledge with respect to itself
5 and its own acts, and upon information and belief with respect to all other matters, as follows:

6 **THE PARTIES**

7 1. TheraSense is a Delaware corporation with its principal place of business in
8 Alameda, California. TheraSense is a worldwide leader in the development, manufacture and
9 marketing of blood, glucose self-monitoring systems. The TheraSense systems feature very small
10 sample size, rapid test results, and less-painful testing systems for people with diabetes.

11 2. Abbott Laboratories is an Illinois corporation which maintains its principal offices
12 and research facilities in Abbott Park, Illinois. TheraSense is a wholly-owned subsidiary of
13 Abbott. Abbott is a worldwide leader in the area of pharmaceutical products and medical devices.

14 3. TheraSense and Abbott (collectively “Plaintiffs”) are informed and believe, and on
15 that basis allege, that Defendant Nova is a Massachusetts corporation with its principal place of
16 business in Waltham, Massachusetts. Plaintiffs are informed and believe that Defendant Nova
17 has business operations and/or regularly conducts business in this District either directly or
18 through its distributors.

19 **JURISDICTION AND VENUE**

20 4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
21 §§1331, 1332 and 1338, in that this is a civil action for patent infringement arising under the
22 Patent Laws of the United States, Title 35, United States Code, and the parties are citizens of
23 different states. This Court has personal jurisdiction over Defendant because Defendant regularly
24 does business in this district, and/or Defendant has committed acts of patent infringement in this
25 district.

26 5. Venue is proper in this district under 28 U.S.C. §§1391(b) and (c) and 1400(b)
27 because Defendant is subject to personal jurisdiction in this district, Defendant resides and/or may
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1 be found in this district, and/or Defendant has committed acts of patent infringement and
2 regularly does business in this district.

3 **FIRST CAUSE OF ACTION**

4 Patent Infringement – United States Patent No. 6,143,164

5 6. Plaintiffs hereby refer to and incorporate each and every allegation set forth in
6 paragraphs 1 through 5 of this Complaint as though fully set forth herein.

7 7. On November 7, 2000, the PTO duly issued to Adam Heller, Benjamin J.
8 Feldman, James Say, and Mark S. Vreeke United States Letters Patent No. 6,143,164 (the “‘164
9 patent”), entitled “Small Volume In Vitro Analyte Sensor,” a true and correct copy of which is
10 attached hereto as Exhibit A. Messrs. Heller et al. assigned the ‘164 patent to E. Heller & Co.
11 The patent was subsequently assigned to TheraSense.

12 8. In violation of 35 U.S.C. § 271(a), Defendant has made, used, offered for sale
13 and/or sold in the United States products that infringe one or more claims of the ‘164 patent.

14 9. Defendant also has actively induced the infringement of, and/or contributed to the
15 infringement of, one or more claims of the ‘164 patent in violation of 35 U.S.C. §§ 271(b) and
16 271(c).

17 10. On information and belief, Defendant knew of and willfully and deliberately
18 infringed the ‘164 patent.

19 11. TheraSense has suffered damages in excess of \$75,000 resulting from Defendant’s
20 infringement, in an amount to be determined according to proof.

21 12. Plaintiffs have suffered and will continue to suffer serious irreparable injury unless
22 Defendant’s infringement of the ‘164 patent is enjoined.

23 **SECOND CAUSE OF ACTION**

24 Patent Infringement – United States Patent No. 6,592,745

25 13. Plaintiffs hereby refer to and incorporate each and every allegation set forth in
26 paragraphs 1 through 5 of this Complaint as though fully set forth herein.

27 14. On July 15, 2003, the PTO duly issued to Benjamin J. Feldman, Adam Heller,
28 Ephraim Heller, Fei Mao, Joseph A. Vivolo, Jeffery V. Funderburk, Fredric C. Colman, and

1 Rajesh Krishnan United States Letters Patent No. 6,592,745 (the “‘745 patent”), entitled “Method
2 of Using A Small Volume In Vitro Analyte Sensor With Diffusible Or Non-Leachable Redox
3 Mediator,” a true and correct copy of which is attached hereto as Exhibit B. Messrs. Feldman et
4 al. assigned the ‘745 patent to TheraSense.

5 15. In violation of 35 U.S.C. § 271(a), Defendant has made, used, offered for sale
6 and/or sold in the United States products that infringe one or more claims of the ‘745 patent.

7 16. Defendant also has actively induced the infringement of, and/or contributed to the
8 infringement of, one or more claims of the ‘745 patent in violation of 35 U.S.C. §§ 271(b) and
9 271(c).

10 17. On information and belief, Defendant knew of and willfully and deliberately
11 infringed the ‘745 patent.

12 18. TheraSense has suffered damages in excess of \$75,000 resulting from Defendant’s
13 infringement, in an amount to be determined according to proof.

14 19. Plaintiffs have suffered and will continue to suffer serious irreparable injury unless
15 Defendant’s infringement of the ‘745 patent is enjoined.

16 **THIRD CAUSE OF ACTION**

17 Patent Infringement – United States Patent No. 5,628,890

18 20. Plaintiffs hereby refer to and incorporate each and every allegation set forth in
19 paragraphs 1 through 5 of this Complaint as though fully set forth herein.

20 21. Abbott is the successor in interest to MediSense, Inc., the assignee of United States
21 Patent Nos. 5,628,890 and 5,820,551.

22 22. On May 13, 1997, the PTO duly issued to Nigel F. Carter, Geoffrey R. Chambers;
23 Graham J. Hughes, Steven Scott, Gurdial S. Sanghera and Jared L. Watkin United States Letters
24 Patent No. 5,628,890 (the “‘890 patent”), entitled “Electrochemical sensor,” a true and correct
25 copy of which is attached hereto as Exhibit C. Messrs. Carter et al. assigned the ‘890 patent to
26 MediSense, Inc. As the successor in interest to MediSense Inc., Abbott is the assignee of the ‘890
27 patent.
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1 23. In violation of 35 U.S.C. § 271(a), Defendant has made, used, offered for sale
2 and/or sold in the United States products that infringe one or more claims of the '890 patent.

3 24. Defendant also has actively induced the infringement of, and/or contributed to the
4 infringement of, one or more claims of the '890 patent in violation of 35 U.S.C. §§ 271(b) and
5 271(c).

6 25. On information and belief, Defendant knew of and willfully and deliberately
7 infringed the '890 patent.

8 26. Plaintiff Abbott has suffered damages in excess of \$75,000 resulting from
9 Defendant's infringement, in an amount to be determined according to proof.

10 27. Plaintiff Abbott has suffered and will continue to suffer serious irreparable injury
11 unless Defendant's infringement of the '890 patent is enjoined.

12 **FOURTH CAUSE OF ACTION**

13 Patent Infringement – United States Patent No. 5,820,551

14 28. Plaintiffs hereby refer to and incorporate each and every allegation set forth in
15 paragraphs 1 through 5 and 21 of this Complaint as though fully set forth herein.

16 29. On October 13, 1998, the PTO duly issued to Hugh Allen Oliver Hill, Irving John
17 Higgins, James Michael McCann, and Graham Davis United States Letters Patent No. 5,820,551
18 (the "'551 patent"), entitled "Strip Electrode with Screen Printing" a true and correct copy of
19 which is attached hereto as Exhibit D. Messrs. Hill et al. assigned the '551 patent to MediSense,
20 Inc. As the successor in interest to MediSense Inc., Abbott is the assignee of the '551 patent.

21 30. In violation of 35 U.S.C. § 271(a), Defendant has made, used, offered for sale
22 and/or sold in the United States products that infringe one or more claims of the '551 patent.

23 31. Defendant also has actively induced the infringement of, and/or contributed to the
24 infringement of, one or more claims of the '551 patent in violation of 35 U.S.C. §§ 271(b) and
25 271(c).

26 32. On information and belief, Defendant knew of and willfully and deliberately
27 infringed the '551 patent.
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1 33. Plaintiff Abbott has suffered damages in excess of \$75,000 resulting from
2 Defendant's infringement, in an amount to be determined according to proof.

3 34. Plaintiff Abbott has suffered and will continue to suffer serious irreparable injury
4 unless Defendant's infringement of the '551 patent is enjoined.

5 Wherefore, Plaintiffs respectfully request that this Court enter judgment in its
6 favor and against Defendants and grant the following relief:

7 A. A judgment that Defendant has infringed the '164, '745, '890, and '551
8 patents in violation of 35 U.S.C. §§ 271(a), (b) and (c);

9 B. A judgment that Defendant's infringement of the '164, '745, '890, and
10 '551 patents has been willful and deliberate;

11 C. A preliminary and permanent injunction, pursuant to 35 U.S.C. § 283,
12 enjoining Defendant, and all persons in active concert or participation with them, from any
13 further acts of infringement, inducement of infringement, or contributory infringement of the
14 '164, '745, '890, and '551 patents;

15 D. An order, pursuant to 35 U.S.C. § 284, awarding Plaintiffs damages
16 adequate to compensate Plaintiffs for Defendant's infringement of the '164, '745, '890, and '551
17 patents, in an amount to be determined at trial, but in no event less than a reasonable royalty;

18 E. An order, pursuant to 35 U.S.C. § 284, and based on Defendant's willful
19 and deliberate infringements of the '164, '745, '890, and '551 patents, trebling all damages
20 awarded to Plaintiffs;

21 F. An order, pursuant to 35 U.S.C. § 284, awarding to Plaintiffs interest on
22 the damages and costs incurred in this action;

23 G. An order, pursuant to 35 U.S.C. § 285, finding that this is an exceptional
24 case and awarding to Plaintiffs any reasonable attorneys' fees incurred in this action; and

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H. Such other and further relief as this Court may deem just and proper.

DATED: March 4, 2005

MUNGER, TOLLES & OLSON LLP

By: _____ /s/
TED G. DANE

Attorneys for Plaintiffs
THERASENSE, INC. and
ABBOTT LABORATORIES

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JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and the Seventh Amendment of the Constitution of the United States, plaintiffs, TheraSense Inc. and Abbott Laboratories, Inc., demand a trial by jury of all claims and issues triable as of right by jury in this action.

Dated: March 4, 2005

MUNGER, TOLLES & OLSON LLP

By _____ /s/
TED G. DANE

Attorneys for Plaintiffs
THERASENSE, INC. and
ABBOTT LABORATORIES