IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KYPHON, INC., Plaintiff, vs. DISC-O-TECH MEDICAL TECHNOLOGIES, LTD. and DISC ORTHOPAEDIC TECHNOLOGIES, INC., Defendants.	Civil Action No. 04-0204-JJF

STIPULATION AND ORDER

WHEREAS, defendants Disc-O-Tech Medical Technologies, Ltd. and Disc Orthopaedic Technologies, Inc. (collectively "DOT") asserted defenses related to Dr. Brent Constantz ("Dr. Constantz") and Norian Corporation ("Norian"), including defenses which appeared in DOT's preliminary injunction opposition papers, DOT's contention interrogatory responses dated January 24, 2005, and in the expert report of Dr. David Mitchell regarding invalidity issues, dated March 7, 2005, and which defenses included allegations that: (1) one or more Norian business plans was a printed publication disclosing one or more claims of the patents-in-suit more than a year before the effective filing date of the patents (the "Critical Date"); (2) one or more of the asserted patent claims was in public use by a Dr. Stuart Young and/or Norian before the Critical Date; (3) one or more patents-in-suit is unenforceable for inequitable conduct based on a failure to name Dr. Constantz as an inventor; and (4) one or more Norian business plans constituted an offer for sale of the claimed invention of the patents-in-suit before the Critical Date. (The foregoing defenses are referred to collectively as the "Constantz Defenses.")

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among plaintiff Kyphon, Inc. ("Kyphon") and DOT, through their undersigned counsel, as follows:

1. That DOT hereby dismisses with prejudice, pursuant to Rule 41(a)(1)(ii) and Rule 41(c) of the Federal Rule of Civil Procedure, DOT's counterclaims and defenses relating to the Constantz Defenses;

2. DOT will not call Dr. Constantz as a witness at trial, either live or by deposition;

3. DOT, DOT attorneys, and witnesses called by DOT, will not refer to, examine on, argue regarding, offer or introduce at trial, testimony, documents or other evidence relating to the Constantz Defenses, Dr. Constantz, Norian or Synthes, Inc. (which purchased the Norian business);

4. DOT will caution all trial witnesses it presents, who have information about the Constantz Defenses, Dr. Constantz, Norian or Synthes, Inc., of the terms of this stipulation and order; and

5. The Court will have continued authority to make all such further orders as is necessary to enforce this stipulation and order.

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Attorneys for Defendants Disc-O-Tech Medical Technologies, Ltd. and Disc Orthopaedic Technologies, Inc.

IT IS SO ORDERED this _____ day of _____, 2005.

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United States District Judge

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