IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KYPHON INC., Plaintiff, v. DISC-O-TECH MEDICAL TECHNOLOGIES, LTD., and DISC ORTHOPAEDIC TECHNOLOGIES, INC., Defendants.	C.A. 04-204-JJF

SPECIAL MASTER'S MEMORANDUM ORDER RE: D.I. 134

1. Defendants Disc-O-Tech Medical Technologies, Ltd. and Disc Orthopaedic Technologies, Inc. (collectively, "Disc-O-Tech") have moved for Summary Judgment of Non-Infringement of U.S. Patent Nos. 4,969,888 (the '888 patent), 5,108,404 (the '404 patent) and 6,235,043 B1 (the '043 patent).

2. Because the Special Master, by order issued contemporaneously herewith, has granted partial summary judgment of infringement in favor of Kyphon as to the '888 and '404 patents, Disc-O-Tech's motion for summary judgment of non-infringement as to the '888 and '404 patents is hereby **DENIED**.

3. Based on the Special Master's claim construction and where the conflicting expert opinions offered by the parties evidence the existence of genuine issues of material fact, Disc-O-Tech's motion for summary judgment of noninfringement as to the '043 patent is hereby **DENIED**.

/s Vincent J. Poppiti
Vincent J. Poppiti (DSBA No. 100614)
Special Master

Dated: May 16, 2005