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A

Appendix 9A

Kyphon's Proposed Special Verdict Form[1]

We, the jury, unanimously find as follows:

[1] In an effort to narrow the asserted claims, Kyphon will conduct a further assessment of the claims to be asserted at trial promptly upon issuance of the Court's rulings regarding claim construction and summary judgment.

I. U.S. PATENT NO. 4,969,888 (THE '888 PATENT)

A. Infringement: Literal Infringement

1. Do you find that Kyphon Inc. ("Kyphon") has shown by a preponderance of the evidence that Disc-O-Tech Medical Technologies Ltd. and Disc Orthopaedic Technologies, Inc. (collectively, "DOT") infringe one or more of the following claims of the '888 Patent? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1	YES ___	NO ___
Claim 3	YES ___	NO ___
Claim 7	YES ___	NO ___
Claim 8	YES ___	NO ___
Claim 9	YES ___	NO ___
Claim 11	YES ___	NO ___
Claim 14	YES ___	NO ___

B. Infringement: Doctrine of Equivalents

2. If your answer to one or more of the claims in Question 1 is "NO," do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of such claims under the doctrine of equivalents? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1	YES ___	NO ___
Claim 3	YES ___	NO ___
Claim 7	YES ___	NO ___
Claim 8	YES ___	NO ___
Claim 9	YES ___	NO ___
Claim 11	YES ___	NO ___
Claim 14	YES ___	NO ___

C. Infringement: Willfulness

3. If you answered "YES" for any of the claims in Questions 1 or 2, do you find that Kyphon has proven by clear and convincing evidence that DOT's infringement of the '888 Patent was willful? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

YES ____ NO ____

D. Validity: Anticipation

4. Do you find that DOT has shown by clear and convincing evidence that any of the following claims of the '888 Patent is invalid as anticipated by the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1 YES ____ NO ____

Claim 3 YES ____ NO ____

Claim 7 YES ____ NO ____

Claim 8 YES ____ NO ____

Claim 9 YES ____ NO ____

Claim 11 YES ____ NO ____

Claim 14 YES ____ NO ____

E. Validity: Obviousness[2]

5. For each of the claims in Question 4 for which your answer is "NO," do you find that DOT has shown by clear and convincing evidence that it is invalid as obvious over the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1 YES ____ NO ____

Claim 3 YES ____ NO ____

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[2] Kyphon believes that the issue of obviousness is not properly presentable to the Jury. However, in the event that the Court decides otherwise, Question Nos. 6 & 7 (Part I.E) set forth Kyphon's proposed special verdict on the issue of obviousness.

Claim 7 YES ___ NO ___

Claim 8 YES ___ NO ___

Claim 9 YES ___ NO ___

Claim 11 YES ___ NO ___

Claim 14 YES ___ NO ___

II. U.S. PATENT NO. 5,108,404 ("THE '404 PATENT")

A. Infringement: Literal Infringement

6. Do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of the following claims of the '404 Patent? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1 YES ___ NO ___

Claim 3 YES ___ NO ___

Claim 8 YES ___ NO ___

Claim 9 YES ___ NO ___

Claim 10 YES ___ NO ___

Claim 12 YES ___ NO ___

Claim 15 YES ___ NO ___

B. Infringement: Doctrine of Equivalents

7. If your answer to one or more of the claims in Question 6 is "NO," do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of such claims under the doctrine of equivalents? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1 YES ___ NO ___

Claim 3 YES ___ NO ___

Claim 8 YES ___ NO ___

Claim 9 YES ___ NO ___

Claim 10 YES ___ NO ___

Claim 12 YES ___ NO ____

Claim 15 YES ___ NO ____

C. Infringement: Willfulness

8. If you answered "YES" for any of the claims in Questions 6 or 7, do you find that Kyphon has proven by clear and convincing evidence that DOT's infringement of the '404 Patent was willful? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

YES ____ NO ____

D. Validity: Anticipation

9. Do you find that DOT has shown by clear and convincing evidence that any of the following claims of the '404 Patent is invalid as anticipated by the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1 YES ___ NO ____

Claim 3 YES ___ NO ____

Claim 8 YES ___ NO ____

Claim 9 YES ___ NO ____

Claim 10 YES ___ NO ____

Claim 12 YES ___ NO ____

Claim 15 YES ___ NO ____

E. Validity: Obviousness[3]

10. For each of the claims in Question 9 for which your answer is "NO," do you find that DOT has shown by clear and convincing evidence that it is invalid as obvious over the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1 YES ___ NO ____

[3] Kyphon believes that the issue of obviousness is not properly presentable to the Jury. However, in the event that the Court decides otherwise, Question Nos. 13 & 14 (Part II.E) set forth Kyphon's proposed special verdict on the issue of obviousness.

Claim 3 YES ___ NO ___

Claim 8 YES ___ NO ___

Claim 9 YES ___ NO ___

Claim 10 YES ___ NO ___

Claim 12 YES ___ NO ___

Claim 15 YES ___ NO ___

III. U.S. PATENT NO. 6,235,043 ("THE '043 PATENT")

A. Infringement: Literal Infringement

11. Do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of the following claims of the '043 Patent? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 2 YES ___ NO ___

Claim 17 YES ___ NO ___

Claim 20 YES ___ NO ___

Claim 23 YES ___ NO ___

Claim 24 YES ___ NO ___

Claim 25 YES ___ NO ___

Claim 26 YES ___ NO ___

Claim 28 YES ___ NO ___

B. Infringement: Doctrine of Equivalents

12. If your answer to one or more of the claims in Question 11 is "NO," do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of such claims under the doctrine of equivalents? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 2 YES ___ NO ___

Claim 17 YES ___ NO ___

Claim 20 YES ___ NO ___

Claim 23 YES ___ NO ____

Claim 24 YES ___ NO ____

Claim 25 YES ___ NO ____

Claim 26 YES ___ NO ____

Claim 28 YES ___ NO ____

C. Infringement: Willfulness

13. If you answered "YES" for any of the claims in Questions 11 or 12, do you find that Kyphon has proven by clear and convincing evidence that DOT's infringement of the '043 Patent was willful? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

YES ____ NO ____

D. Validity: Obviousness[4]

14. Do you find that DOT has shown by clear and convincing evidence that any of the following claims of the '043 Patent is invalid as obvious over the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 2 YES ___ NO ____

Claim 17 YES ___ NO ____

Claim 20 YES ___ NO ____

Claim 23 YES ___ NO ____

Claim 24 YES ___ NO ____

Claim 25 YES ___ NO ____

Claim 26 YES ___ NO ____

Claim 28 YES ___ NO ____

[4] Kyphon believes that the issue of obviousness is not properly presentable to the Jury. However, in the event that the Court decides otherwise, Question Nos. 18 & 19 (Part III.D) set forth Kyphon's proposed special verdict on the issue of obviousness.

IV. U.S. PATENT NO. 6,241,734 ("THE '734 PATENT")

A. Infringement: Literal Infringement

15. Do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of the following claims of the '734 Patent? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1	YES ____	NO ____
Claim 3	YES ____	NO ____
Claim 4	YES ____	NO ____
Claim 5	YES ____	NO ____
Claim 7	YES ____	NO ____
Claim 8	YES ____	NO ____
Claim 10	YES ____	NO ____
Claim 11	YES ____	NO ____
Claim 12	YES ____	NO ____
Claim 13	YES ____	NO ____
Claim 14	YES ____	NO ____
Claim 15	YES ____	NO ____
Claim 16	YES ____	NO ____
Claim 17	YES ____	NO ____
Claim 19	YES ____	NO ____
Claim 20	YES ____	NO ____
Claim 21	YES ____	NO ____

B. Infringement: Doctrine of Equivalents

16. If your answer to one or more of the claims in Question 15 is "NO," do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of such claims under the doctrine of equivalents? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 1	YES ____	NO ____
Claim 3	YES ____	NO ____
Claim 4	YES ____	NO ____
Claim 5	YES ____	NO ____
Claim 7	YES ____	NO ____
Claim 8	YES ____	NO ____
Claim 10	YES ____	NO ____
Claim 11	YES ____	NO ____
Claim 12	YES ____	NO ____
Claim 13	YES ____	NO ____
Claim 14	YES ____	NO ____
Claim 15	YES ____	NO ____
Claim 16	YES ____	NO ____
Claim 17	YES ____	NO ____
Claim 19	YES ____	NO ____
Claim 20	YES ____	NO ____
Claim 21	YES ____	NO ____

C. Infringement: Willfulness

17. If you answered "YES" for any of the claims in Questions 15 or 16, do you find that Kyphon has proven by clear and convincing evidence that DOT's infringement of the '734 Patent was willful? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

YES ____ NO ____

D. Validity: Anticipation

18. Do you find that DOT has shown by clear and convincing evidence that any of the following claims of the '734 Patent is invalid as anticipated by the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1	YES ___	NO ___
Claim 3	YES ___	NO ___
Claim 4	YES ___	NO ___
Claim 5	YES ___	NO ___
Claim 7	YES ___	NO ___
Claim 8	YES ___	NO ___
Claim 10	YES ___	NO ___
Claim 11	YES ___	NO ___
Claim 12	YES ___	NO ___
Claim 13	YES ___	NO ___
Claim 14	YES ___	NO ___
Claim 15	YES ___	NO ___
Claim 16	YES ___	NO ___
Claim 17	YES ___	NO ___
Claim 19	YES ___	NO ___
Claim 20	YES ___	NO ___
Claim 21	YES ___	NO ___

E. Validity: Obviousness[5]

19. For each of the claims in Question 18 for which your answer is "NO," do you find that DOT has shown by clear and convincing evidence that it is invalid as obvious over the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 1	YES ___	NO ___
Claim 3	YES ___	NO ___

[5] Kyphon believes that the issue of obviousness is not properly presentable to the Jury. However, in the event that the Court decides otherwise, Question Nos. 25 & 26 (Part IV.E) set forth Kyphon's proposed special verdict on the issue of obviousness.

Claim 4	YES ___	NO ___
Claim 5	YES ___	NO ___
Claim 7	YES ___	NO ___
Claim 8	YES ___	NO ___
Claim 10	YES ___	NO ___
Claim 11	YES ___	NO ___
Claim 12	YES ___	NO ___
Claim 13	YES ___	NO ___
Claim 14	YES ___	NO ___
Claim 15	YES ___	NO ___
Claim 16	YES ___	NO ___
Claim 17	YES ___	NO ___
Claim 19	YES ___	NO ___
Claim 20	YES ___	NO ___
Claim 21	YES ___	NO ___

V. U.S. PATENT NO. 6,613,054 ("THE '054 PATENT")

A. Infringement: Literal Infringement

20. Do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of the following claims of the '054 Patent? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 26	YES ___	NO ___
Claim 27	YES ___	NO ___
Claim 28	YES ___	NO ___
Claim 29	YES ___	NO ___
Claim 36	YES ___	NO ___
Claim 37	YES ___	NO ___
Claim 38	YES ___	NO ___

Claim 39 YES ___ NO ____

Claim 41 YES ___ NO ____

Claim 42 YES ___ NO ____

Claim 43 YES ___ NO ____

Claim 44 YES ___ NO ____

Claim 46 YES ___ NO ____

Claim 47 YES ___ NO ____

Claim 48 YES ___ NO ____

Claim 49 YES ___ NO ____

B. Infringement: Doctrine of Equivalents

21. If your answer to one or more of the claims in Question 20 is "NO," do you find that Kyphon has shown by a preponderance of the evidence that DOT infringes one or more of such claims under the doctrine of equivalents? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

Claim 26 YES ___ NO ____

Claim 27 YES ___ NO ____

Claim 28 YES ___ NO ____

Claim 29 YES ___ NO ____

Claim 36 YES ___ NO ____

Claim 37 YES ___ NO ____

Claim 38 YES ___ NO ____

Claim 39 YES ___ NO ____

Claim 41 YES ___ NO ____

Claim 42 YES ___ NO ____

Claim 43 YES ___ NO ____

Claim 44 YES ___ NO ____

Claim 46 YES ___ NO ____

Claim 47 YES ___ NO ____

Claim 48 YES ___ NO ____

Claim 49 YES ___ NO ____

C. Infringement: Willfulness

22. If you answered "YES" for any of the claims in Questions 20 or 21, do you find that Kyphon has proven by clear and convincing evidence that DOT's infringement of the '054 Patent was willful? A "YES" answer is a finding for Kyphon. A "NO" answer is a finding for DOT.

YES ____ NO ____

D. Validity: Obviousness[6]

23. Do you find that DOT has shown by clear and convincing evidence that any of the following claims of the '054 Patent is invalid as obvious over the prior art? A "YES" answer is a finding for DOT. A "NO" answer is a finding for Kyphon.

Claim 26 YES ___ NO ____

Claim 27 YES ___ NO ____

Claim 28 YES ___ NO ____

Claim 29 YES ___ NO ____

Claim 36 YES ___ NO ____

Claim 37 YES ___ NO ____

Claim 38 YES ___ NO ____

Claim 39 YES ___ NO ____

Claim 41 YES ___ NO ____

Claim 42 YES ___ NO ____

Claim 43 YES ___ NO ____

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[6] Kyphon believes that the issue of obviousness is not properly presentable to the Jury. However, in the event that the Court decides otherwise, Question Nos. 30 & 31 (Part V.D) set forth Kyphon's proposed special verdict on the issue of obviousness.

Claim 44 YES ___ NO ____

Claim 46 YES ___ NO ____

Claim 47 YES ___ NO ____

Claim 48 YES ___ NO ____

Claim 49 YES ___ NO ____

VI. DAMAGES

Only answer the following questions if you find that DOT infringes one or more valid claims of the '888 patent, and/or the'404 patent, and/or the '043 patent, and/or the '734 patent, and/or the '054 patent.

24. What amount of lost profits, based on lost sales, do you find by a preponderance of the evidence that Kyphon has suffered as a result of DOT's infringement of the '888, '404, '043, '734, and/or '054 patents?

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25. If you determine that Kyphon is not entitled to any lost profits, or is entitled to some but not all lost profits it claims, what amount of reasonable royalty on the remaining sales do you find, by a preponderance of the evidence, that DOT owes Kyphon for infringing the '888, '404, '043, '734, and/or '054 patents?

$ _____

26. If you determine that Kyphon is entitled to some but not all lost profits it claims, add the dollar amounts in your answers to Questions 24 and 25 to determine the total damages that DOT owes Kyphon for infringing the '888, '404, '043, '734, and/or '054 patents:

$ _____

You each must sign this Verdict Form:

Dated:_____

_____
(Foreperson)

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