IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KYPHON INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 04-204-JJF
DISC-O-TECH MEDICAL TECHNOLOGIES LTD., and DISC ORTHOPAEDIC TECHNOLOGIES, INC.,	)	
Defendants.	)	

DEFENDANTS DISC-O-TECH MEDICAL TECHNOLOGIES, LTD.'S AND DISC ORTHOPAEDIC TECHNOLOGIES, INC.'S RESPONSE TO KYPHON'S LIMITED OBJECTION TO SPECIAL MASTER'S OPINION IN SUPPORT OF SUMMARY JUDGMENT

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June 3, 2005

Defendants Disc-O-Tech Medical Technologies, Ltd. and Disc Orthopaedic Technologies, Inc. (collectively "DOT") submit the following Response to Kyphon's Limited Objection To Special Master's Opinion in Support of Summary Judgment ("Response").

DOT does not dispute Kyphon's legal analysis regarding inducement of infringement, and DOT agrees with Kyphon that if DOT's SKy Bone Expander (the "SKy Device") is found to infringe the patents-in-suit, DOT is liable for inducement of infringement. As Kyphon pointed out in its Objection to Special Master's Opinion in Support of Summary Judgment of U.S. Patent Nos. 4,969,888 and 5,108,404, the parties' Statement of Stipulated Facts leads to that conclusion. (See D.I. 230 at 2; [Proposed] Joint Pre-Trial Order, D.I. 204, Appendix 1 at ¶¶ 12-13.)

However, DOT agrees with the Special Master's characterizations of DOT's state of mind and belief that the SKy Device does not infringe the patents-in-suit. More specifically, DOT agrees with the Special Master's statements that:

- DOT alleges that it first learned of the existence of the '888 and '404 patents on or about March 3, 2004. (D.I. 212 at 19.)
- Kyphon's president acknowledged in his deposition that, as of March 2004, "it was clear that [Disc-O-Tech] did not believe their device infringed our patents." (Id.)
- On April 2, 2004, Kyphon filed the complaint in this action. (Id.)

- In June 2004, DOT obtained opinion letters from the law firm of Fleshner & Kim opining that the SKy Device did not infringe at least two of the patents-in-suit.[1] (Id.)

DOT intends to present additional evidence showing a lack of willful infringement.

Because the factual characterizations discussed above are relevant to any willfulness inquiry that may be undertaken in this case in the future, DOT submits this Response so that the record is clear regarding DOT's contentions relating to DOT's intent.

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[1] DOT respectfully notes that the Special Master's statement regarding the Fleshner & Kim opinion letters was not entirely accurate. To clarify, DOT received an opinion letter for each of U.S. Patent Nos. 6,235,043, 4,969,888 and 5,108,404. DOT received the opinion letter for the '043 Patent on June 18, 2004, and later received the opinion letters for the '888 and '404 Patents on July 14, 2004.

CERTIFICATE OF SERVICE

I, Maryellen Noreika, hereby certify that on June 3, 2005 I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will send notification of such filing(s) to the following:

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I also certify that copies were caused to be served on June 3, 2005 upon the following in the manner indicated:

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