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June 10, 2005

BY E-FILING

The Honorable Joseph J. Farnan, Jr.
United States District Court
844 King Street
Wilmington, Delaware 19801

Re: Kyphon, Inc. v. Disc-O-Tech Medical Technologies, Ltd., *et al.*,
C.A. No. 04-0204 (JJF)

Dear Judge Farnan:

We write on behalf of Disc-O-Tech ("DOT") in response to the June 7, 2005 letter from Kyphon's counsel regarding Kyphon's trial exhibit list, which exceeds by two-thirds the number that was ordered by the Court.

Specifically, at the pre-trial conference held on May 17, 2005, the Court instructed the parties to limit the number of proposed trial exhibits to one hundred. Your Honor cautioned the parties with respect to the limitation, stating: "I don't want you playing games" in listing multiple documents as a single exhibit. (See Transcript of Pretrial Conference held on 5/17/05, D.I. 224, at 12.) Kyphon failed to heed that warning.

Not only has Kyphon failed to reduce its trial exhibit list to one hundred exhibits, but its now-revised exhibit list contains 161 entries, many of which are compilation exhibits. (See Exhibit A hereto, Kyphon's revised exhibit list.) By way of example, Kyphon's exhibit PTX 1, described as "New articles re Kyphon/Kyphoplasty," contains more than forty separate articles (which are also hearsay and irrelevant), and many of them have authentication problems. Kyphon listed an additional 14 compilation exhibits (see PTX Nos. 8, 36, 37, 44, 72, 80, 92, 124, 129, 133, 144, 150, 155 and 161), which account for a total of at least 75 separate documents. Thus, by a conservative estimate, Kyphon's revised exhibit list contains more than 235 separate exhibits. Kyphon's exhibit list also contains dozens of irrelevant and hearsay documents. By contrast, DOT's revised trial exhibit list contains ninety exhibits.

Regarding Kyphon's claim that Your Honor intended the parties to have two separate trial exhibit lists of one hundred exhibits each, while Your Honor certainly knows what he intended, the transcript from the pre-trial conference does not support Kyphon's

interpretation. (See D.I. 224 at pp. 12-15.) Your Honor first directed unequivocally that the parties should pare their exhibit lists down to one hundred exhibits. Only subsequently did the Court discuss splitting the trial into three phases. The Court said nothing to countermand its direction as to the number of exhibits.

With respect to deposition designations, Your Honor permitted four per side in total. DOT has designated none for the first two phases, and Kyphon has designated from two witnesses. DOT believes that Kyphon should be limited to two additional designations for any remaining phase of trial.

Thank you for your consideration.

Respectfully,

/s/ Maryellen Noreika
Maryellen Noreika (#3208)

MN/bls

cc: Peter T. Dalleo, Clerk (By Hand)
Thomas L. Halkowksi, Esquire (By Hand)