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.	Civil Action No. 04-0204-JJF

DEFENDANTS' DISC-O-TECH MEDICAL TECHNOLOGIES, LTD. AND DISC ORTHOPAEDIC TECHNOLOGIES, INC.'S COUNTER-DESIGNATIONS AND OBJECTIONS

Kyphon's Deposition Designations—Liability Phases

Eisenhart

DOT Objections: DOT objects to the use of any portion of Mr. Eisenhart's testimony at phases 1 and 2 of trial. Mr. Eisenhart is an attorney who prepared non-infringement opinions relating to the '404, '888 and '043 patents, which DOT will rely on as part of DOT's evidence of lack of willfulness, should there be a trial on that issue. Mr. Eisenhart's testimony is relevant only to phase three of trial, should there be one, relating to willfulness and damages. It is improper to use his testimony as, in effect, expert testimony. His role as a fact witness was restricted to the context of willfulness, and his testimony should, accordingly, be limited to phase three willfulness issues, should a phase three trial occur.

In addition to the foregoing objections, and without waiver of them, in the event the Court were to permit the introduction of Mr. Eisenhart's testimony during

phases one or two of trial, DOT proffers the following counter-designations and objections.

Kyphon Designations	DOT objections	DOT counterdesignations	Kyphon objections
4:25-5:4	Irrelevant		
6:6-11	Irrelevant		
14:10-18	Irrelevant		
14:23-15:18	Irrelevant		
16:15-17	Irrelevant		
22:19-25	Irrelevant		
23:10-16	Irrelevant		
89:10-17	Irrelevant	88:14-18; 88:20-24	
90:18-91:19	Irrelevant		
91:23-93:17	Irrelevant	93:19-21; 93:25-94:3	
97:9-98:11	Irrelevant		
99:4-6	Irrelevant	100:3-19; 101:1-10	
99:14-100:1	Irrelevant	101:14-23; 102:1-11; 102:15-17	
Reilly Designations			
4:24-5:2			
7:18-8:3			
9:14-21			
12:13-15			
13:13-15			
14:4-9			
14:17-21			
29:5-12	Irrelevant	29:13-24	
30:13-18	Irrelevant		
31:2-4	Irrelevant	45:2-48:7 and PTX 156	
49:23-50:4	Irrelevant; FRE 403; lack of foundation	50:5-10	
50:11-51:5	Irrelevant; FRE 403; lack of foundation	51:6-19	
51:23-52:6	Irrelevant; FRE 403; lack of foundation	77:2-78:6	
55:5-17			

MORRIS, NICHOLS, ARSHT & TUNNELL

/s/ Maryellen Noreika (#3208)

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June 14, 2005

CERTIFICATE OF SERVICE

I, Maryellen Noreika, hereby certify that on June 14, 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 14, 2005 upon the following in the manner indicated:

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