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.	)	

JOINT PROPOSED FORM OF VERDICT AND SPECIAL INTERROGATORIES FOR THE VALIDITY CASE[1]

We, the jury, unanimously find as follows:

A. Invalidity of the '404 Patent – Anticipation

1. Has Disc-O-Tech proven by clear and convincing evidence that the following claims of the '404 Patent are anticipated, and therefore invalid?

Claim 1	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 3	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 8	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 9	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**

[1]The parties anticipate further revisions of the proposed verdict form prior to submission to the jury based on the evidence actually introduced in the trial.

Claim 10	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 12	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 15	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**

If you answered yes to Question 5 as to one or more claims, indicate the anticipated claims of the '404 patent by each of the following prior art references:

Prior Art References[2]	**Anticipated Claim(s)**
Article entitled "Transpedicular Fixation of Thoracolumbar Vertebral Fractures" by Olerud et al., February 1988 ("Olerud").	_____
Article entitled "Open Reduction of Central Compression Fractures of the Tibial Plateau" by Edeland, 1976 ("Edeland").	_____
Article entitled "Fractures of the Tibial Condyles: A Preliminary Report on Supplementary Fixation with Methylmethacrylate," by Kennedy, 1978 ("Kennedy").	_____
Article entitled "Transpedikuläre Reposition und erste Spongiosaplastik bei Wirbelkörperbrüchen der unteren Brust und Lendenwirbelsäule," by Daniaux, 1986 ("Daniaux 1986").	_____
Article entitled "Therapeutic Concept and Results of Operative Treatment in Acute Trauma of the Thoracic and Lumbar Spine: The Hannover Experience," by Blauth, 1987 ("Blauth").	_____
Chapter 35 in Operative Orthopaedics, by Schatzker, 1988 ("Schatzker").	_____

[2]The list of references will be adjusted, if and as necessary, based on evidence at trial.

B. Invalidity of the '888 Patent – Anticipation

2. Has Disc-O-Tech proven by clear and convincing evidence that the following claims of the '888 Patent are anticipated, and therefore invalid?

Claim 1	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 3	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 7	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 8	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 9	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 11	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**
Claim 14	**Yes _____ (for Disc-O-Tech)**	**No _____ (for Kyphon)**

If you answered yes to Question 6 as to one or more claims, indicate the anticipated claims of the '888 patent by each of the following prior art references:

Prior Art References	**Anticipated Claim(s)**
Article entitled "Transpedicular Fixation of Thoracolumbar Vertebral Fractures" by Olerud et al., February 1988 ("Olerud").	_____
Article entitled "Open Reduction of Central Compression Fractures of the Tibial Plateau" by Edeland, 1976 ("Edeland").	_____
Article entitled "Fractures of the Tibial Condyles: A Preliminary Report on Supplementary Fixation with Methylmethacrylate," by Kennedy, 1978 ("Kennedy").	_____

Article entitled "Transpedikuläre Reposition und erste Spongiosaplastik bei Wirbelkörperbrüchen der unteren Brust und Lendenwirbelsäule," by Daniaux, 1986 ("Daniaux 1986").	_____
Article entitled "Therapeutic Concept and Results of Operative Treatment in Acute Trauma of the Thoracic and Lumbar Spine: The Hannover Experience," by Blauth, 1987 ("Blauth").	_____
Chapter 35 in Operative Orthopaedics, by Schatzker, 1988 ("Schatzker").	_____

C. Invalidity of the '404 Patent – Obviousness

3. Has Disc-O-Tech proven by clear and convincing evidence that the following claims of '404 Patent are invalid for obviousness?

Claim 1	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 3	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 8	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 9	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 10	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 12	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 15	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**

If you answered yes to Question 7 as to one or more claims, indicate the claims of the '404 patent rendered obvious by any of the following references alone, or in combination with one of more of the other references listed here:

Prior Art References	**Claim(s) Rendered Obvious**
Article entitled "Transpedicular Fixation of Thoracolumbar Vertebral Fractures" by Olerud et al., February 1988 ("Olerud").	_____

Article entitled "Open Reduction of Central Compression Fractures of the Tibial Plateau" by Edeland, 1976 ("Edeland"). _____

Article entitled "Fractures of the Tibial Condyles: A Preliminary Report on Supplementary Fixation with Methylmethacrylate," by Kennedy, 1978 ("Kennedy"). _____

Article entitled "Transpedikuläre Reposition und erste Spongiosaplastik bei Wirbelkörperbrüchen der unteren Brust und Lendenwirbelsäule," by Daniaux, 1986 ("Daniaux 1986"). _____

Article entitled "Therapeutic Concept and Results of Operative Treatment in Acute Trauma of the Thoracic and Lumbar Spine: The Hannover Experience," by Blauth, 1987 ("Blauth"). _____

Chapter 35 in Operative Orthopaedics, by Schatzker, 1988 ("Schatzker"). _____

Chapter 44 in Campbell's Operative Orthopaedics, 1987 ("Campbell"). _____

Article entitled "Treated by Percutaneous Poking Reduction and Internal Fixation," by Ma, 1984 ("Ma"). _____

Article entitled "Technik und Ergebnisse der transpedikulären Spongiosaplastik bei Kompressionsbrüchen im Lendenwirbelsäulenbereich," Daniaux, 1982 ("Daniaux 1982"). _____

Article entitled "Use of the Acetabular Reamer to Harvest Autogeneic Bone Graft Material: A Simple Method for Producing Bone Paste," by Dick, 1986 ("Dick 1986"). _____

Article entitled "The Use of Methylmethacrylate in Repair of Neoplastic Lesions in Bone," by Carlson, 1974 ("Carlson"). _____

U.S. Patent No. 4,518,430, issued on May 21, 1985 to Brown et al. ("Brown and Chow patent"). _____

Article entitled "Effect of Cyrosurgery and Polymethyl Methacrylate on the Tumor Cavity," by Malawer and Marks, 1987 ("Malawer and Marks article"). _____

Chapter entitled "Effectiveness of Methyl Methacrylate as a Physical adjuvant in Local Tumor Control," 1987 ("Limb Salvage chapter"). _____

D. Invalidity of the '888 Patent – Obviousness

4. Has Disc-O-Tech proven by clear and convincing evidence that the following claims of 888 Patent are invalid for obviousness?

Claim 1	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 3	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 7	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 8	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 9	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 11	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**
Claim 14	**Yes** _____	**(for Disc-O-Tech)**	**No** _____	**(for Kyphon)**

If you answered yes to Question 8 as to one or more claims, indicate the claims of the '888 patent rendered obvious by any of the following references alone, or in combination with one of more of the other references listed here:

Prior Art References	Claim(s) Rendered Obvious
Article entitled "Transpedicular Fixation of Thoracolumbar Vertebral Fractures" by Olerud et al., February 1988 ("Olerud").	_____
Article entitled "Open Reduction of Central Compression Fractures of the Tibial Plateau" by Edeland, 1976 ("Edeland").	_____
Article entitled "Fractures of the Tibial Condyles: A Preliminary Report on Supplementary Fixation with Methylmethacrylate," by Kennedy, 1978 ("Kennedy").	_____
Article entitled "Transpedikuläre Reposition und erste Spongiosaplastik bei Wirbelkörperbrüchen der unteren Brust und Lendenwirbelsäule," by Daniaux, 1986 ("Daniaux 1986").	_____
Article entitled "Therapeutic Concept and Results of Operative Treatment in Acute Trauma of the Thoracic and Lumbar Spine: The Hannover Experience," by Blauth, 1987 ("Blauth").	_____
Chapter 35 in Operative Orthopaedics, by Schatzker, 1988 ("Schatzker").	_____
Chapter 44 in Campbell's Operative Orthopaedics, 1987 ("Campbell").	_____
Article entitled "Treated by Percutaneous Poking Reduction and Internal Fixation," by Ma, 1984 ("Ma").	_____
Article entitled "Technik und Ergebnisse der transpedikulären Spongiosaplastik bei Kompressionsbrüchen im Lendenwirbelsäulenbereich," Daniaux, 1982 ("Daniaux 1982").	_____

Article entitled "Use of the Acetabular Reamer to Harvest Autogeneic Bone Graft Material: A Simple Method for Producing Bone Paste," by Dick, 1986 ("Dick 1986"). _____

Article entitled "The Use of Methylmethacrylate in Repair of Neoplastic Lesions in Bone," by Carlson, 1974 ("Carlson"). _____

U.S. Patent No. 4,518,430, issued on May 21, 1985 to Brown et al. ("Brown and Chow patent"). _____

Article entitled "Effect of Cyrosurgery and Polymethyl Methacrylate on the Tumor Cavity," by Malawer and Marks, 1987 ("Malawer and Marks article"). _____

Chapter entitled "Effectiveness of Methyl Methacrylate as a Physical adjuvant in Local Tumor Control," 1987 ("Limb Salvage chapter"). _____

E. <u>Invalidity of the '043 Patent – Obviousness</u>

5. Has Disc-O-Tech proven by clear and convincing evidence that the following claims of '043 Patent are invalid for obviousness?

Claim 17	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 20	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 24	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**
Claim 26	**Yes _____**	**(for Disc-O-Tech)**	**No _____**	**(for Kyphon)**

If you answered yes to Question 9 as to one or more claims, indicate the claims of the '043 patent rendered obvious by U.S. Patent No. 5,108,404, issued on April 28, 1992 to Scholten et al. (" '404 Patent") in combination with one or more of the following references listed here:

Prior Art References	**Claim(s) Rendered Obvious**
U.S. Patent No. 3,626,949, issued on December 14, 1971 to Shute (" '949 Patent").	_____
U.S. Patent No. 4,878,495, issued on November 7, 1989 to Grayzel (" '495 Patent").	_____
U.S. Patent No. 4,909,252, issued on March 20, 1990 to Goldberger (" '252 Patent").	_____
U.S. Patent No. 5,049,132, issued on September 17, 1991 to Shaffer et al. (" '132 Patent").	_____

You must each sign this verdict form

Dated: _____

(Foreperson) _____

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