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.,

Defendant.

C.A. No. 04-204-JJF

KYPHON'S RESPONSE TO MEDTRONIC'S RENEWED MOTION: (1) FOR LEAVE TO INTERVENE FOR THE PURPOSE OF MODIFYING THE STIPULATED PROTECTIVE ORDER; AND (2) TO MODIFY THE STIPULATED PROTECTIVE ORDER

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KYPHON, INC.

Dated: March 12, 2007

Plaintiff Kyphon, Inc. ("Kyphon") respectfully submits this response to the renewed motion by non-parties Medtronic Sofamor Danek, Inc., Medtronic Sofamor Danek USA, Inc., and SDGI Holdings, Inc. (collectively, "Medtronic") for leave to intervene for the purpose of modifying the stipulated protective order entered by this Court on September 30, 2004 ("Protective Order"), and to modify the Protective Order. (D.I. Nos. 292 and 51, respectively).

Because Kyphon does not object to producing the Disc-O-Tech litigation documents at issue[1] – but is unable to do so due to terms of the Protective Order – Kyphon does not oppose Medtronic's motion. Had Medtronic consulted Kyphon before filing, Kyphon would have so advised Medtronic.

Kyphon, however, needs to correct the following errors either set forth or implied within Medtronic's brief:

1. Kyphon's proposed acquisition of certain of Disc-O-Tech's assets does not give Kyphon the right to disclose Disc-O-Tech's confidential information that is protected by the Protective Order. Whether or not the acquisition ultimately closes, Disc-O-Tech will continue to exist as an independent company, and will have continuing confidentiality interests, even as to materials related to its spine-related assets. For example, Disc-O-Tech may wish to continue to protect its historical business strategy and financial information, even if it no longer owns the spine-related assets.

2. Medtronic's representation that it is defending against the same patent infringement claims as those at issue in this litigation is an

[1] Kyphon notes that it does not have possession of Disc-O-Tech's production documents, because, pursuant to the terms of this Court's Protective Order, those documents were destroyed following the termination of that lawsuit.

exaggeration. For example, the infringement claims in each of these cases are not the same because the accused products differ.

3. Medtronic apparently never served Kyphon with the November 9, 2006 subpoena to Disc-O-Tech as Medtronic was required to do pursuant to Fed. R. Civ. Proc. 45(b)(1). In addition, Kyphon is unaware that Medtronic has moved to compel under that subpoena.

Notwithstanding the above errors concerning Medtronic's filing, Kyphon does not oppose the granting of Medtronic's motion.

Dated: March 12, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2007, I electronically filed with the Clerk of Court **KYPHON'S RESPONSE TO MEDTRONIC'S RENEWED MOTION: (1) FOR LEAVE TO INTERVENE FOR THE PURPOSE OF MODIFYING THE STIPULATED PROTECTIVE ORDER; AND (2) TO MODIFY THE STIPULATED PROTECTIVE ORDER** using CM/ECF which will send electronic notification of such filing(s) to the following Delaware counsel. In addition, the filing will also be served on the attorneys of record at the following addresses as indicated:

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