

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

KYPHON INC.,
a corporation.

File No. 071-1010

PETITION OF KYPHON INC.
FOR APPROVAL OF PROPOSED DIVESTITURE

Pursuant to Section 2.41(f) of the Federal Trade Commission (“Commission”) Rules of Practice and Procedure, 16 C.FR. 2.41(f) (2002), and Paragraph II.A. of the Decision and Order in the above-captioned matter (the “Decision and Order”), Kyphon Inc., (“Kyphon”) hereby petitions the Commission to approve the divestiture of the Confidence Assets (as defined in the Decision and Order) to DePuy Spine, Inc. (“DePuy Spine”), a Johnson & Johnson company.

I. CONSENT AGREEMENT AND COMPLAINT

On October 5, 2007, the Commission issued a complaint and accepted for public comment an Agreement Containing Consent Orders, which included the Decision and Order (collectively the “Consent Agreement”) to settle the Commission’s charges that Kyphon’s acquisition of certain assets of Disc-O-Tech violated federal antitrust laws. The Consent Agreement expressly provides that it does not constitute an admission by Kyphon that the law had been violated or that the facts alleged by the Commission in its Complaint are true. The public comment period is pending.

The Commission’s Complaint had charged that the effects of the acquisition, if consummated, may be substantially to lessen competition in the U.S. market for minimally invasive vertebral compression fracture treatment products. Section II of the

Decision and Order requires that, no later than 60 days after the Commission accepted the Consent Agreement for public comment, Kyphon shall divest the Confidence Assets. Such a transaction must receive the prior approval of the Commission.

This Petition describes the principal terms of the agreement by which Kyphon plans to sell the Confidence Assets to DePuy Spine and explains why that agreement satisfies the purposes of the Decision and Order.

II. THE TRANSACTION DOCUMENTS

Kyphon and DePuy Spine have reached an agreement for the divestiture of the Confidence Assets, subject to the approval of the Commission and other foreign competition authorities. The agreement is embodied in an Assignment, Assumption and License Agreement (“Agreement”). A copy of that Agreement and its attachments, exhibits and schedules (the “Transaction Documents”) is attached to this Petition as Confidential Appendix A. In essence, that Agreement provides that DePuy Spine will be assigned Kyphon’s agreement with Disc-O-Tech to acquire the Confidence Assets. The Agreement contains the licenses and covenants required by the Decision and Order. Under the terms of that Agreement and the underlying Asset Purchase Agreement, at the closing of the sale of the assets, Disc-O-Tech and DePuy Spine will enter into a Vertebroplasty Transition Services Agreement that will end no later than September 30, 2008. There will otherwise be no on-going entanglements among Medtronic/Kyphon on the one hand and DePuy Spine on the other hand that will occur as a result of the Agreement.

Kyphon requests that the Transaction Documents and other information provided in Confidential Appendix A be treated by the Commission as strictly confidential and not be made available to the public. Confidential Appendix A contains commercially and

competitively sensitive information relating to the divestiture of the Confidence Assets. Disclosure of the information contained in Confidential Appendix A to the public may prejudice Kyphon and DePuy Spine. Kyphon requests that the Commission inform it immediately if the Commission will not treat the accompanying Confidential Appendix A as confidential so that Kyphon and DePuy Spine may seek appropriate relief.

The terms of the Transaction Documents comply with and satisfy the purposes of the Decision and Order.

III. THE PROPOSED ACQUIRER

A. Background and Relevant Experience

DePuy Spine is a subsidiary of Johnson & Johnson, one of the largest health care companies in the world. DePuy Spine's innovative products cover a wide range of spinal pathologies that provide surgeons with the best available tools to help their patients. It has extensive experience interacting with the physicians who treat spinal problems including vertebral compression fractures. This acquisition is a logical line extension for it.

B. Financial Capability

In 2006, Johnson & Johnson's consolidated sales worldwide exceeded \$53 billion. Of this \$53 billion, approximately \$29.8 billion in sales were generated in the United States, and \$23.5 billion in sales were generated internationally.

As of July 1, 2007, Johnson & Johnson reported approximately \$5.57 billion in cash and cash equivalents on its balance sheet. DePuy Spine, as a subsidiary of Johnson & Johnson, unquestionably has the financial capability to complete this transaction, and provide ample investment capital for the business.

IV. ABSENCE OF MARKET PRESENCE

DePuy Spine does not currently sell in the United States products for the minimally invasive treatment of vertebral compression fractures. Accordingly, the divestiture of the Confidence Assets to DePuy Spine does not create any competitive concerns.

V. CONCLUSION

The proposed divestiture to DePuy Spine will accomplish the purposes of the Consent Agreement and remedy any alleged lessening of competition in the market for minimally invasive vertebral compression fracture treatment products. DePuy Spine has the financial capability and relevant experience to ensure that the Confidence Assets will be used so as to become a viable and effective competitor to Kyphon. Accordingly, Kyphon requests that the Commission approve the proposed divestiture and acquirer.

Dated: November 6, 2007

Respectfully submitted,

Deborah L. Feinstein
Arnold & Porter LLP
Counsel for Kyphon Inc.