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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbor
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of **KYPHON INC.,** **a corporation,** **DISC-O-TECH MEDICAL TECHNOLOGIES LTD. (Under Voluntary Liquidation),** **a corporation,** **and** **DISCOTECH ORTHOPEDIC TECHNOLOGIES INC.,** **a corporation.**	**Docket No. C-4201**

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission, having reason to believe that Kyphon Inc., a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation) and Discotech Orthopedic Technologies Inc., corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Commission" means the Federal Trade Commission.

2. "Kyphon" means Kyphon Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Kyphon Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

3. "Disc-O-Tech" means Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation), its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation), including Discotech Orthopedic Technologies Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. "Vertebral Compression Fracture" or "VCF" means a fracture of the vertebral body such as that which may result from osteoporosis, cancer, or trauma.

5. "Kyphoplasty" means a minimally invasive vertebral compression fracture treatment during which bone cement is injected through a needle into the vertebral body after a void in the vertebral body has been created by the insertion and inflation of one or two balloon-tipped catheters.

6. "Vertebroplasty" means a minimally invasive vertebral compression fracture treatment during which cement is injected through a needle into the vertebral body.

7. "FDA" means the United States Food and Drug Administration.

II. RESPONDENTS

8. Respondent Kyphon is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1221 Crossman Avenue, Sunnyvale, California 94089. Kyphon, among other things, is engaged in the design, manufacture, marketing, and sale of single-use and implantable medical device products used in minimally invasive therapies for the treatment and restoration of spinal anatomy, including the KyphX Kyphoplasty products.

9. Respondent Disc-O-Tech is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Israel, with its office and principal place of business located at 11 Ha'hoshlim Street, Herzeliya, Israel 46724. Disc-O-Tech's United States subsidiary, doing business as Discotech Orthopedic Technologies Inc., is located at 7 Centre Dr., Suite 1, Monroe Township, New Jersey 08831. Disc-O-Tech, among other things, is engaged in the research, development, marketing, and sale of medical device products used in minimally invasive therapies for the treatment and restoration of spinal anatomy, including the Confidence Vertebroplasty system.

10. Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. PROPOSED ACQUISITION

11. On December 20, 2006, Kyphon agreed to acquire the spinal assets of Disc-O-Tech (the "Acquisition"), including Disc-O-Tech's intellectual property, sales agreements, and other assets relating to its Confidence minimally invasive VCF treatment product business. The Acquisition was structured as two transactions – an Asset Purchase Agreement (Vertebroplasty Assets) and an Asset Purchase Agreement (Non-Vertebroplasty Assets) – that have a combined value of approximately $220 million.

IV. RELEVANT MARKET

12. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of minimally invasive VCF treatment products. Minimally invasive VCF treatment products include, among other things, Kyphoplasty products, Disc-O-Tech's Confidence system, and traditional Vertebroplasty products.

13. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce. To compete in the United States minimally invasive VCF treatment product market, a firm must have FDA approval or clearance for its device, establish a local sales and service organization, and its product must not infringe any other firm's intellectual property.

V. STRUCTURE OF THE MARKET

14. Kyphon's Kyphoplasty products account for more than 90 percent of the market (by revenue) for research, development, manufacture, and sale of minimally invasive VCF treatment products. Disc-O-Tech's recently-launched Confidence system is a novel Vertebroplasty product that uses a highly viscous cement and proprietary delivery system. It is the only product currently on the market that is likely to provide significant and unique competition to Kyphon in the near term and is poised to take a significant share of Kyphon's sales. Disc-O-Tech's Confidence system would provide particularly vigorous competition to Kyphon if acquired by a major spine competitor, as would have occurred but for the Acquisition. Traditional Vertebroplasty products differ significantly from Kyphoplasty products and the Confidence system, and are low-cost products that are virtually commodities and provide only limited competition to Kyphon. There are other competitors in the minimally invasive VCF treatment product market, including Medtronic and Spineology, but none of those competitors provide the near-term competitive threat to Kyphon that Disc-O-Tech does. Although several additional firms are attempting to enter the minimally invasive VCF treatment product market, the time line for commercialization of those firms' products is significantly behind that of the Confidence system, and none appears to have the Confidence system's ultimate prospects for success.

VI. ENTRY CONDITIONS

15. Developing minimally invasive VCF treatment products, working around and/or acquiring the necessary licenses to critical intellectual property, obtaining FDA approval, and building a marketing infrastructure, takes significantly longer than two years. Therefore, entry into the relevant line of commerce described in Paragraph 12 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, would be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. eliminating actual, direct, and substantial competition between Kyphon and Disc-O-Tech in the market for the research, development, marketing, and sale of minimally invasive VCF treatment products;

b. increasing Kyphon's ability to raise prices unilaterally in the relevant market; and

c. reducing research and development in the relevant market.

VIII. VIOLATIONS CHARGED

17. The Asset Purchase Agreement (Vertebroplasty Assets) constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The Acquisition described in Paragraph 11, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of October, 2007, issues its Complaint against said Respondents.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

Donald S. Clark
Secretary

SEAL: