

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 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-

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of certain vertebral compression fracture repair system assets of Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation) and Discotech Orthopedic Technologies Inc. (hereafter collectively referred to as “Respondent DOT”) by Kyphon Inc. (hereafter referred to as “Respondent Kyphon”), and Respondents Kyphon and DOT having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate Order”), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Kyphon Inc. 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, CA 94089.
2. Respondent Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation) 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 St., 46724 Herzeliya, Israel.
3. Respondent Discotech Orthopedic Technologies Inc. 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 7 Centre Dr., Suite 1, Monroe Township, NJ 08831.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Kyphon” or “Respondent Kyphon” means Kyphon Inc., its directors, officers, employees, agents, representatives, successors (including Medtronic, if Kyphon is acquired by

Medtronic), and assigns; and 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.

- B. "DOT" or "Respondent DOT" means Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation) and Discotech Orthopedic Technologies Inc., their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups and affiliates controlled by Disc-O-Tech Medical Technologies Ltd. and Discotech Orthopedic Technologies Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Commission" means the Federal Trade Commission.
- D. "Acquirer" means each Person that receives the prior approval of the Commission to acquire the Confidence Assets pursuant to Paragraphs II or III of this Order. DOT is not excluded from being considered an Acquirer.
- E. "Affiliate" means any entity or acquired business that directly or indirectly is controlled by either Respondent or Acquirer, but only so long as such control exists, control being the direct or indirect ownership of at least fifty percent (50%) of the stock entitled to vote upon election of directors or persons performing similar functions, or direct or indirect ownership of the maximum percentage permitted under local laws or regulations in those countries where fifty percent (50%) ownership by a foreign entity is not permitted.
- F. "Assumed Contracts" means those contracts as defined and listed in the Kyphon-DOT APA (Vertebroplasty Assets).
- G. "Confidence Assets" means all assets and intellectual property of Respondent DOT Relating To the research, development, manufacture, marketing, distribution, and sale of products accessing, diagnosing, or treating spinal disease states or disorders that are proposed to be acquired or have been acquired by Respondent Kyphon pursuant to the Kyphon-DOT APA (Vertebroplasty Assets), which assets and intellectual property include, but are not limited to:
 - 1. the Confidence Products, together with the related cement system and cement injectors including, but not limited to:
 - a. documents Relating To quality control,
 - b. documents Relating To Suppliers,

- c. copies of contracts with Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Kyphon or DOT to make such disclosure;
2. all Assumed Contracts;
3. all Intangible Property exclusively Relating To the Confidence Products and the Next Generation Product;
4. all technology rights licenses, franchises, know-how, inventions, designs, specifications, plans and drawings primarily used in the research, development, manufacture, marketing, distribution, and sale of products accessing, diagnosing, or treating spinal disease states or disorders;
5. all Books and Records, as that term is defined in the Kyphon-DOT APA (Vertebroplasty Assets);
6. brochures and marketing information;
7. all permits and licenses that are necessary to enable the Acquirer to manufacture, sell, and distribute the Confidence Products, including the related cement system and cement injectors;

PROVIDED, HOWEVER, that “Confidence Assets” does not include Excluded Assets.

- H. “Confidence Products” means the products or product line currently manufactured and sold by Respondent DOT and that the Acquirer develops, manufactures, distributes, or sells as a result of the acquisition of the Confidence Assets including, but not limited to, the cement and cement delivery system. Confidence Products refers solely to vertebroplasty products.
- I. “Date Of Divestiture” means the date upon which the Confidence Assets are divested to an Acquirer pursuant to this Order.
- J. “Excluded Assets” means:
 1. assets and Intangible Property that are proposed to be acquired or have been acquired from Respondent DOT by Respondent Kyphon pursuant to the Kyphon-DOT APA (Non-Vertebroplasty Assets) including, but not limited to, the B-Twin products and related Intangible Property, the SKy Bone Expander products and related Intangible Property, and other rights and assets proposed to be acquired or acquired pursuant to the Kyphon-DOT APA (Non-Vertebroplasty Assets);
 2. all cash, cash equivalents, and short term investments of cash;

3. accounts and notes receivable;
 4. rights to the names “Kyphon,” and “Disc-O-Tech” and any variation of those names;
 5. prepaid items or rebates;
 6. minute books, tax returns, and other corporate books and records;
 7. any inter-company balances due to or from DOT;
 8. all benefits plans;
 9. all writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information specifically Relates To the Confidence Assets;
 10. assets specifically excluded in the Kyphon-DOT APA (Vertebroplasty Assets).
- K. “Governmental Approvals” means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.
- L. “Governmental Approvals For Divestiture” means any Governmental Approvals that an Acquirer must have to own, develop, manufacture, distribute, and sell the Confidence Assets.
- M. “Intangible Property” means intangible property including, but not limited to, intellectual property, software, computer programs, Patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property.
- N. “Kyphon-DOT APA (Non-Vertebroplasty Assets)” means the December 20, 2006, Asset Purchase Agreement (Non-Vertebroplasty Assets) by and among Disc-O-Tech Medical Technologies Ltd. (In Liquidation), Discotech Orthopedic Technologies Inc., and Kyphon Inc., including all amendments, exhibits, attachments, agreements, and schedules thereto.
- O. “Kyphon-DOT APA (Vertebroplasty Assets)” means the December 20, 2006, Asset Purchase Agreement (Vertebroplasty Assets) by and among Disc-O-Tech Medical Technologies Ltd. (In Liquidation), Discotech Orthopedic Technologies Inc., and Kyphon Inc., including all amendments, exhibits, attachments, agreements, and schedules thereto.

- P. “Material Confidential Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, Patents, technologies, processes, or other trade secrets.
- Q. “Medtronic” means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Medtronic, Inc. (including Kyphon, after the date on which it acquires Kyphon) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- R. “Next Generation Product” means a vertebral compression fracture repair system, not yet fully developed or marketed by DOT, defined in Exhibit D (the “Non-Competition, Confidentiality and Development Agreement”) to the Kyphon-DOT APA (Vertebroplasty Assets).
- S. “Patents” means all patents, patent applications, and statutory invention registrations (which shall be deemed to include provisional applications, invention disclosures, certificates of invention and applications for certificates of invention), in each case existing as of the date this Order is accepted by the Commission for public comment, and includes all reissues, divisions, continuations, continuations-in-part, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world.
- T. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- U. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- V. “Remedial Agreement” means any agreement between both or either of the Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order.
- W. “Successor” means the Acquirer’s successor or Affiliate, or any Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Confidence Products or Next Generation Products pursuant to Intangible Property transferred or licensed pursuant to Paragraphs II or III of this Order.

- X. “Supplier” means any Person that has sold to DOT any goods or services for use with the Confidence Assets.
- Y. “Third Party” means any private entity other than the following: (1) Respondents, (2) Medtronic, or (3) the Acquirer.
- Z. “Transferred Non-Vertebroplasty Intangible Property” means any Intangible Property that is proposed to be transferred or has transferred to Respondent Kyphon from Respondent DOT as part of the Kyphon-DOT APA (Non-Vertebroplasty Assets).
- AA. “Transferred Vertebroplasty Intangible Property” means any Intangible Property that has been transferred or licensed to the Acquirer from Respondents pursuant to the Remedial Agreement and this Decision and Order.

II.

IT IS FURTHER ORDERED that:

- A. Respondent Kyphon shall, within sixty (60) days after the date on which the Agreement Containing Consent Orders, in this matter, is accepted by the Commission for placement on the public record for comment, divest, absolutely, and in good faith, at no minimum price, the Confidence Assets to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. Respondent DOT shall:
 - 1. take no actions to interfere with the divestiture of the Confidence Assets;
 - 2. enter into and execute all documents, agreements, and other instruments that may be required to consummate the divestiture of the Confidence Assets to an Acquirer; and
 - 3. transfer all assets and intellectual property required to be transferred to the Acquirer pursuant to the Remedial Agreement.
- C. Until the Date Of Divestiture, Respondents shall:
 - 1. take such actions as are necessary to maintain the viability and marketability of the Confidence Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Confidence Assets, except for ordinary wear and tear;

2. not sell, transfer, encumber or otherwise impair the economic viability, marketability, or competitiveness of the Confidence Assets; and
3. not consummate the acquisition contemplated by the Kyphon-DOT APA (Vertebroplasty Assets).

D. Respondent Kyphon shall:

1. not join, file, induce, prosecute or maintain any suit, in law or equity, against the Acquirer or Successor to the extent that such suit alleges that such Acquirer or Successor has infringed or is infringing any Transferred Non-Vertebroplasty Intangible Property with the Confidence Product or Next Generation Product developed, designed, manufactured, licensed, or otherwise sold by or on behalf of Acquirer or Successor pursuant to the Transferred Vertebroplasty Intangible Property, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution or sale of such Confidence Products or Next Generation Products; and
2. in the event it assigns, transfers, or licenses Transferred Non-Vertebroplasty Intangible Property to a Third Party, include in such assignment, transfer, or license a covenant not to sue the Acquirer or Successor at least as protective as those extended pursuant to the preceding Paragraph II.D.1, as a condition of such assignment, transfer or license.

E. Any Remedial Agreement related to the Confidence Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the Confidence Assets shall constitute a failure to comply with this Order.

F. The Remedial Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Acquirer, or any obligations of Respondents, under the Remedial Agreement.

G. Respondent Kyphon shall include in any Remedial Agreement related to the Confidence Assets the following provisions:

1. Respondent Kyphon shall covenant to the Acquirer that Respondent Kyphon shall not join, file, induce, prosecute or maintain any suit, in law or equity, against the Acquirer or Successor to the extent that such suit alleges that such Acquirer or Successor has infringed or is infringing any Transferred Non-Vertebroplasty Intangible Property with the Confidence Product or Next Generation Product developed, designed, manufactured, licensed, or otherwise sold by or on behalf of Acquirer or Successor pursuant to the Transferred Vertebroplasty Intangible Property, if such suit would have the potential to

interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution or sale of such Confidence Products or Next Generation Product; and

2. Respondent Kyphon shall covenant to the Acquirer that any Third Party assignee, transferee or licensee of Transferred Non-Vertebroplasty Intangible Property shall agree to provide a covenant not to sue the Acquirer or Successor at least as protective as those extended pursuant to the preceding Paragraph II.G.1, as a condition of such assignment, transfer or license.
- H. Respondents shall grant to the Acquirer royalty-free, perpetual, worldwide, non-exclusive licenses to the Transferred Non-Vertebroplasty Intangible Property for the field of use of vertebroplasty that, as of the time of the signing of the Agreement Containing Consent Orders in this matter, is used in the research, development, manufacture, use, export, distribution, or sale of Confidence Products or Next Generation Products (including the right to transfer or sublicense such license rights in such Intangible Property, exclusively or nonexclusively, to others by any means).
- I. Until the Date Of Divestiture, Respondents shall:
1. cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, before the Date Of Divestiture in obtaining all Government Approvals For Divestiture;
 2. do nothing to prevent or discourage Suppliers that, prior to the Date Of Divestiture, supplied goods and services for the Confidence Assets from continuing to supply goods and services for the Confidence Assets.
- J. Respondent DOT shall, (i) at the option of the Acquirer, (ii) no later than the Date Of Divestiture, and (iii) as part of the Remedial Agreement, enter into:
1. one or more transition agreements for the short-term provision of services to be provided by Respondent DOT to the Acquirer. *PROVIDED, HOWEVER*, Respondent DOT shall not be required to agree to transition services (i) other than those similar in form and substance to the transition services that are a part of the Kyphon-DOT APA (Vertebroplasty Assets), and (ii) for a term longer than nine (9) months, but in any case such transition agreements shall not terminate later than December 1, 2008; and
 2. one or more non-competition, confidentiality, and development agreements between Respondent DOT and the Acquirer similar in form and substance and length of time as similar agreements in Exhibit D to the Kyphon-DOT APA (Vertebroplasty Assets).
- K. The purpose of Paragraph II of this Order is to ensure the continuation of the Confidence Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition by Kyphon of the

Confidence Assets, to ensure that the Confidence Assets are operated independently of, and in competition with, Kyphon, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. If Respondents:

1. have not divested, absolutely and in good faith and with the Commission's prior approval, the Confidence Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest the Confidence Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order; or
2. close the Kyphon-DOT APA (Vertebroplasty Assets) before the Date Of Divestiture as prohibited in Paragraph II.C of this Order, the Commission immediately may appoint a trustee to divest the Confidence Assets that have not been divested pursuant to Paragraph II of this Order, notwithstanding that the time allowed to divest pursuant to Paragraph II.A has not expired, in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience

and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

- C. Within ten (10) days after appointment of a trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
- D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Confidence Assets that have not been divested pursuant to Paragraph II of this Order.
 - 2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *PROVIDED, HOWEVER*, the Commission may extend the divestiture period only two (2) times.
 - 3. Subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order, and to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph III in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
 - 4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *PROVIDED, HOWEVER*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets,

the trustee shall divest the assets to the acquiring entity selected by Respondents from among those approved by the Commission; *PROVIDED, FURTHER, HOWEVER*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of Respondent Kyphon, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
 6. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
 7. The trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
 9. Respondents may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the trustee from providing any information to the Commission.
- E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph III.

- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that for a period of two (2) years from the date this Order becomes final, Respondent Kyphon shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly acquire or receive a license for any of the Confidence Assets transferred pursuant to the Remedial Agreement.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or license or the proposed agreement or license with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. §§ 801-803, relating to the proposed transaction (hereinafter referred to as “the Notification”), *PROVIDED, HOWEVER*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Kyphon and not from any other party to the transaction. Kyphon shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Kyphon shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

PROVIDED, FURTHER, HOWEVER, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

- A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A, II.B., II.C., II.G.

II.H., II.I., and II.J. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order and the Hold Separate Order.

- B. On the first and second anniversary of the date this Order becomes final, Respondent Kyphon shall submit to the Commission a verified written report setting forth in detail the manner and form in which it is complying and has complied with this Order, the Hold Separate Order, and the Remedial Agreement. Respondent Kyphon shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

VI.

IT IS FURTHER ORDERED that Respondent Kyphon shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent Kyphon,
- B. Any proposed acquisition, merger, or consolidation of Respondent Kyphon, *PROVIDED, HOWEVER*, if Medtronic acquires Respondent Kyphon, that acquisition shall be excluded from this notice requirement, or
- C. Any other change in Respondent Kyphon that may affect compliance obligations arising out of this Order, including but, not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Kyphon.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate five (5) years from the date the Order is made final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: