

**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-4201

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

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 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 issues its complaint, makes the following jurisdictional findings and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate 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 Hold Separate Order, the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders in this matter shall apply to all capitalized terms in this Hold Separate Order, in addition to the following definitions:

- A. “Held Separate Business” means the Confidence Assets and the on-going manufacturing, distribution, marketing and sale of the Confidence Products.

II.

IT IS FURTHER ORDERED that:

- A. 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).
- B. Until the Date Of Divestiture:
1. Respondent DOT’s personnel operating the Held Separate Business must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, separate and apart from Respondent Kyphon and, except as is requested by Kyphon for purposes of the divestiture of the Confidence Assets as required by the Decision and Order, in this matter, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to Respondent Kyphon or with Respondent Kyphon’s personnel. Such DOT personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business; and
 2. Respondent Kyphon and Respondent Kyphon’s personnel shall not receive or use Material Confidential Information of the Held Separate Business except for purposes of divesting the Confidence Assets as required by the Decision and Order, in this matter.
- C. Until the Date Of Divestiture and unless otherwise provided for in this Hold Separate Order, Respondent Kyphon shall not permit any of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
- D. Until the Date Of Divestiture, Respondent Kyphon shall not offer Respondent DOT employees Related To the Held Separate Business positions with Respondent Kyphon.

- E. Until the Date Of Divestiture, Respondents shall 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.
- F. No later than five (5) days after the date this Hold Separate Order becomes final, Respondent DOT shall circulate to employees of the Held Separate Business and to Respondent DOT's employees who are responsible for the development, manufacture and sale of Confidence Products, a copy of this Hold Separate Order and the Consent Agreement.
- G. The purposes of this Hold Separate Order are to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent Kyphon until the divestiture required by the Decision and Order is achieved; (2) assure that no Material Confidential Information is exchanged between Respondent Kyphon and the Held Separate Business, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Acquisition.

III.

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.

IV.

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 Respondent, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the Date Of Divestiture required by the Consent Agreement.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

Donald S. Clark
Secretary

SEAL

ISSUED: October 5, 2007