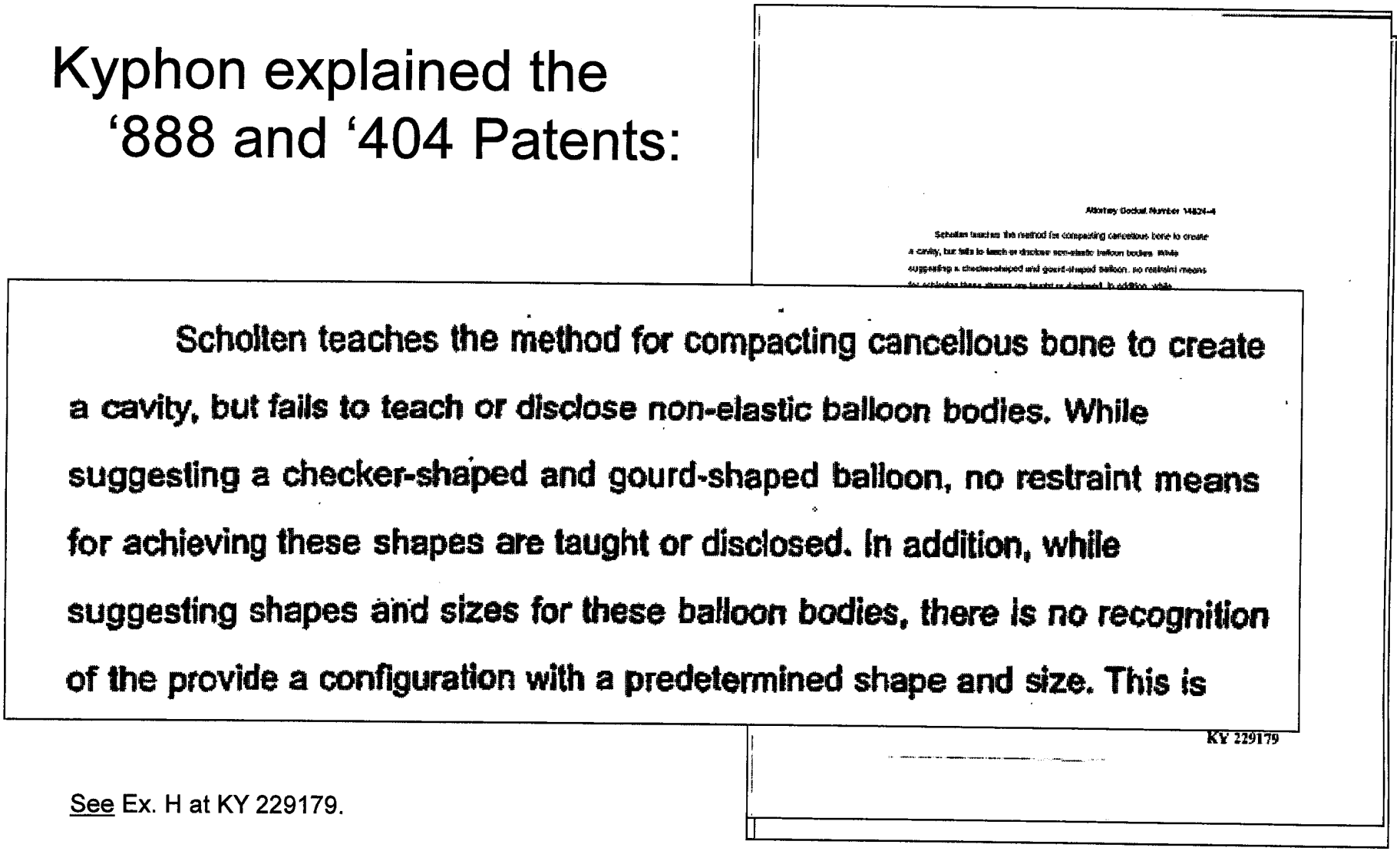
The Prosecution History of the Asserted '043 Patent

Kyphon explained the '888 and '404 Patents:



Scholten teaches the method for compacting cancellous bone to create a cavity, but fails to teach or disclose non-elastic balloon bodies. While suggesting a checker-shaped and gourd-shaped balloon, no restraint means for achieving these shapes are taught or disclosed. In addition, while suggesting shapes and sizes for these balloon bodies, there is no recognition of the provide a configuration with a predetermined shape and size. This is

KY 229179

See Ex. H at KY 229179.

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The SKy Device Does Not Literally Infringe the '043 Patent (Independent Claims 2 and 17)

- Both Claims Require a Balloon
- The SKy Device Has No Internal Restraint (claim 2 limitation)
- The SKy Device Does Not Need the Internal Restraint Because Its Plastic Polymer Tube Expands Only So Far as the Length of the Pre-Cut Slits, When Axially Compressed

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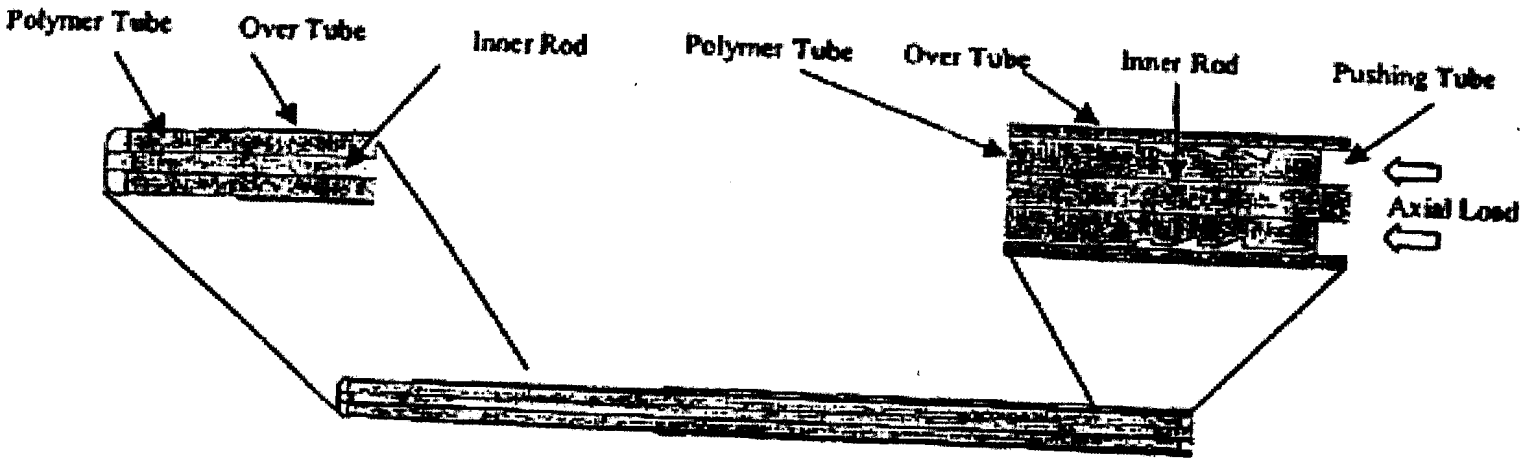
No Restraint On SKy Device Polymer Tube

- Expands Based on Axial Compression
- Pre-Determined Expansion Size Based on Length of Slits
- Inner Rod Does Not Constrain, Or Determine Extent of, Expansion



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No Literal Infringement of Claim 17 of the '043 Patent

- Again, the Claim Requires a Balloon
- The SKy Device does not have "two materials" to constrain expansion
  - SKy Device has no material to constrain expansion
  - Extent of expansion is pre-determined based on length of slits

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CLAIM CONSTRUCTION
Claim 17 – "Two Materials"

Claim 17 requires a second material, either internal or external, that is attached to the balloon that holds it back from expanding in certain places

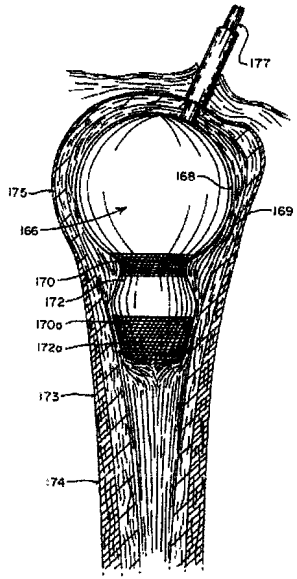

FIG. 18

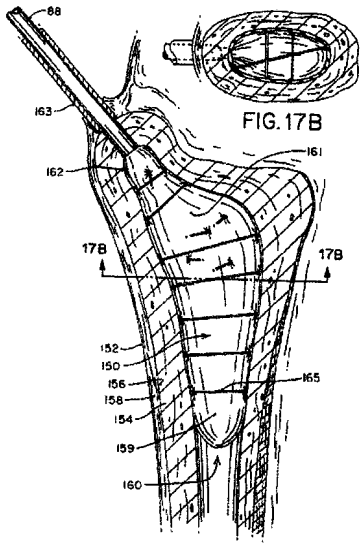

FIG. 17B

FIG. 17A

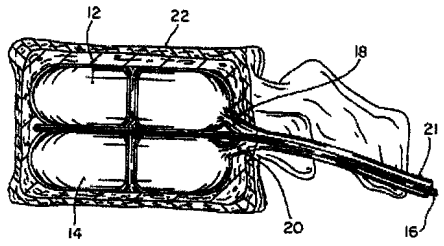

FIG. 2

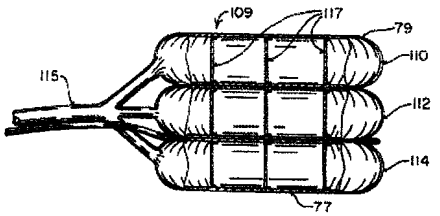

FIG. 3

'043 Patent: No Infringement Under Doctrine of Equivalents

- No Balloon Under Doctrine of Equivalents, For All the Reasons Stated Above for '888/'404 Patents
- Since There Is No Restraint Material or Structure At All In the SKy Device, There is No Equivalent of Any Restraint Element

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END OF CLAIM CONSTRUCTION/NON-INFRINGEMENT OF BALLOON PATENTS

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