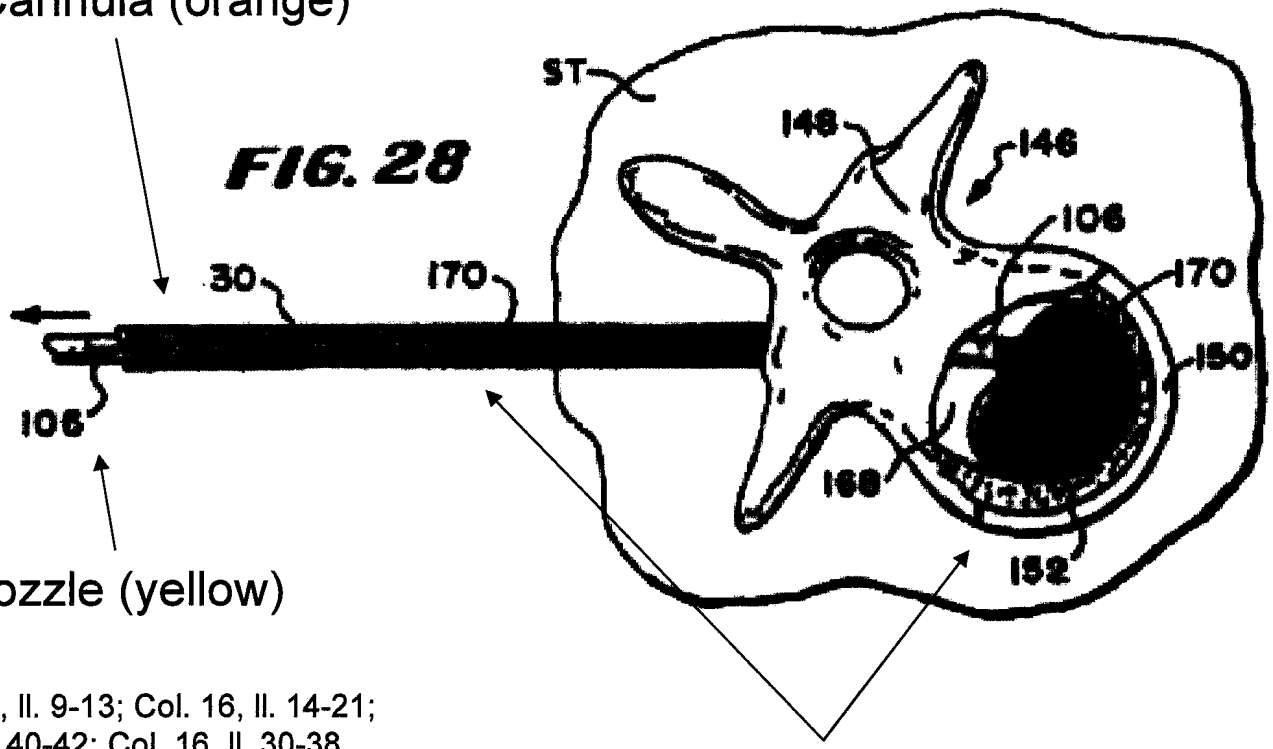
As the Nozzle is Withdrawn From the Cannula, Material is Expelled into the Bore (and Contacts the Inner Walls) of the Cannula

Cannula (orange)



Nozzle (yellow)

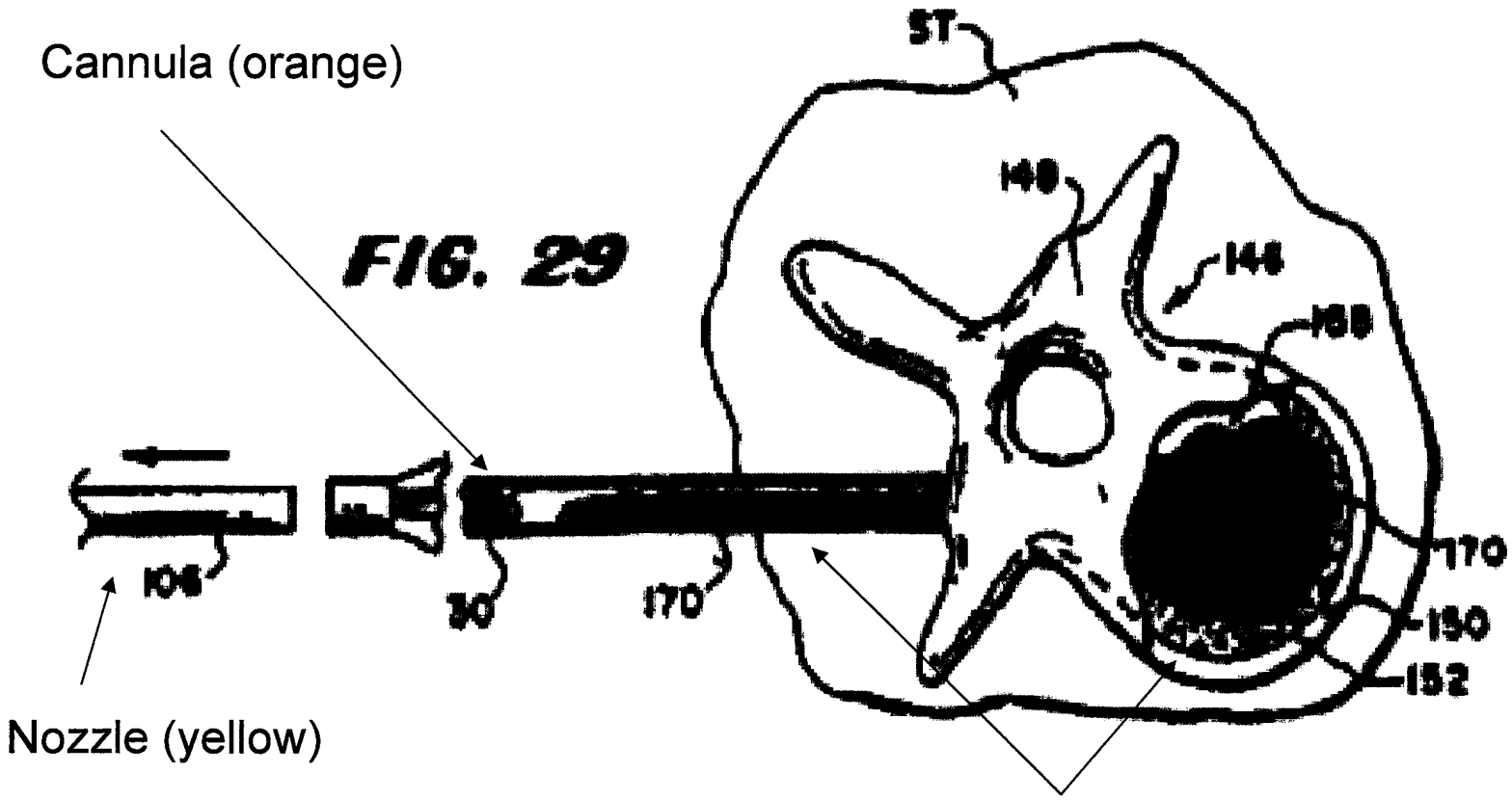
'734, Col. 11, ll. 9-13; Col. 16, ll. 14-21; Col. 18, ll. 40-42; Col. 16, ll. 30-38

Material (blue)

The arrow (on the left) indicates the withdrawal of the Nozzle from the Cannula

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 1 of 11

After the Nozzle is Completely Withdrawn, Residual Material is Left Contacting the Inner Walls of the Cannula



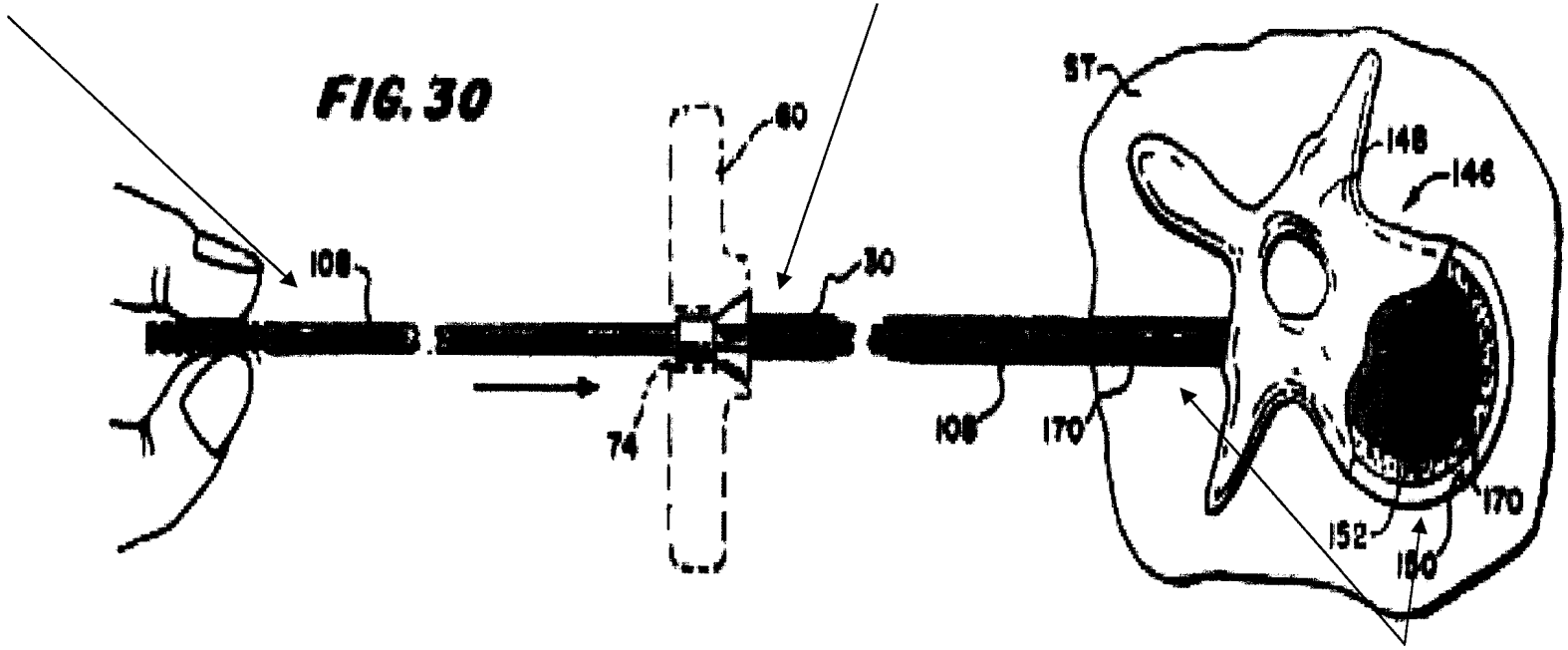
'734, Col. 11, ll. 43-45; Col. 18, ll. 41-44; Col. 16, ll. 33-35

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 2 of 11

The Tamping Instrument (Separate and Apart From the Nozzle) is Inserted into the Cannula

Tamping Instrument (pink)

Cannula (orange)



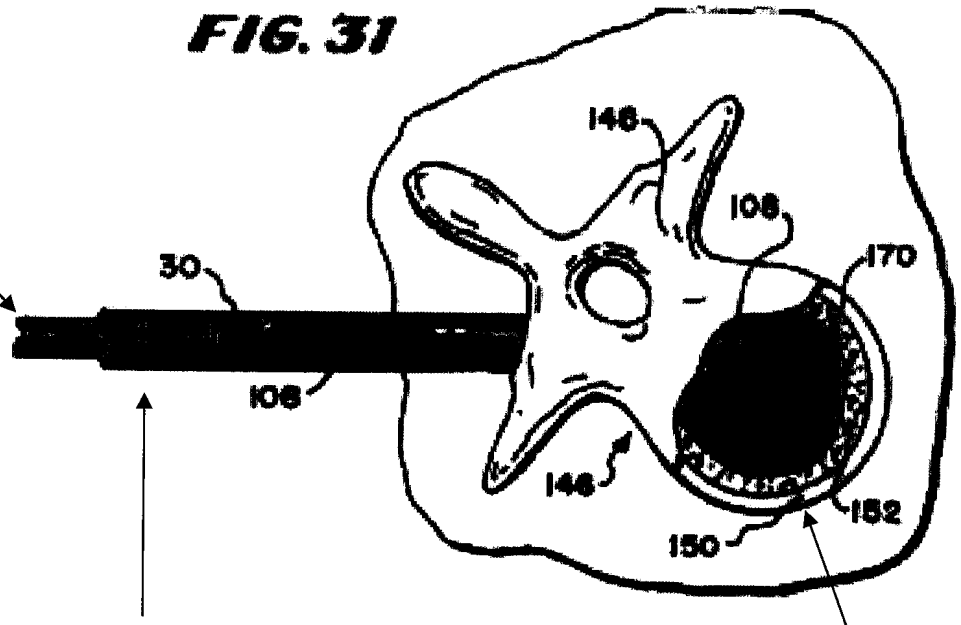
Material (blue)

'734, Col. 16, ll. 43-45; Col. 11, ll. 45-55; Col. 16, ll. 50-50

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 3 of 11

The Tamping Instrument Clears the Residual Material From the Inner Walls of the Cannula into the Bone Cavity

Tamping Instrument (pink)



Cannula (orange)

Material (blue)

('734, Col. 16, ll. 43-45; Col. 11, ll. 45-55; Col. 16, ll. 50-50)

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 4 of 11

The Bone Filler Patents Define the Distinct Purpose of the Tamping Instrument

"The purpose of the tamping instrument 108 is to displace the residual material out the distal end 36 of the cannula instrument 30 and into the cavity . . . The tamping instrument 108 thereby serves to clear residual material from the cannula instrument 30."

'734, Col. 11, ll. 45-55

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 5 of 11

A Nested Stylet/Nozzle Can Also Serve as a Tamping Instrument

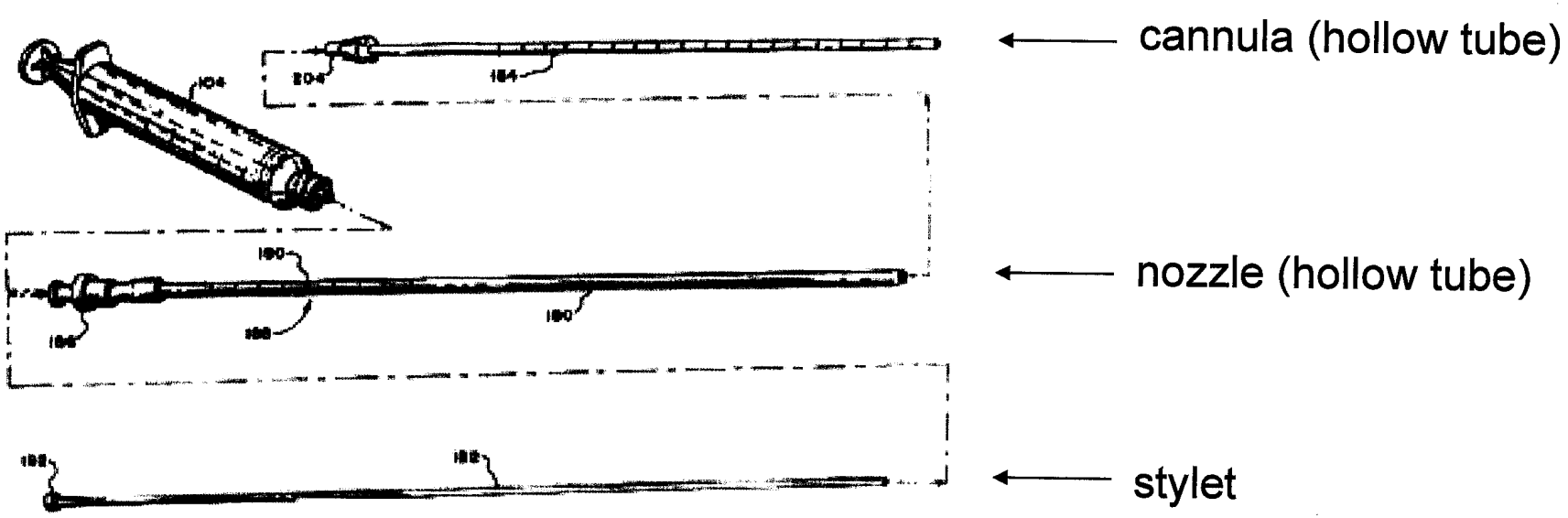
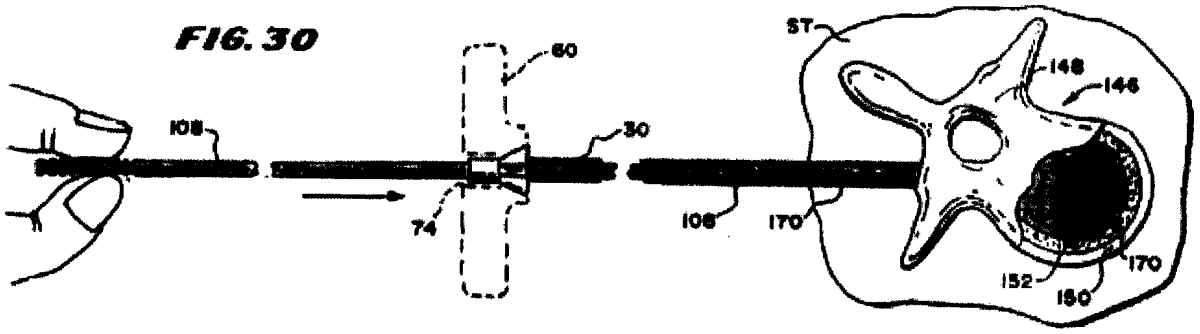


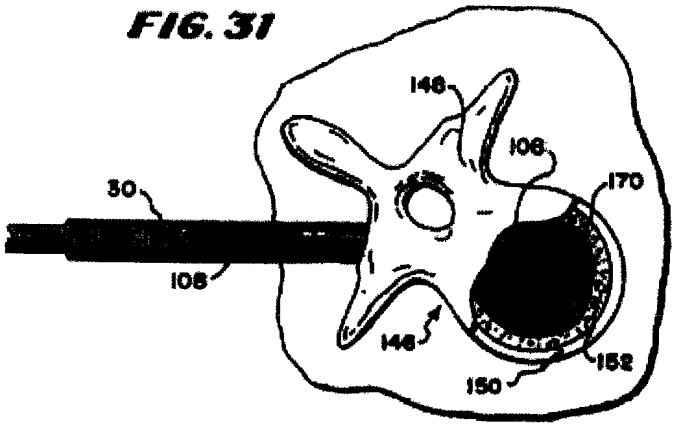
FIG. 33

The stylet is inserted into the nozzle; the nested stylet/nozzle is inserted into the cannula to clear residual material therein

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 6 of 11

Instead of the Tamping Instrument (in Pink) Below, a Nested Stylet/Nozzle Clears Residual Material From the Inner Walls of the Cannula into the Bone Cavity





'734, Col. 2, ll. 61-67; Col. 18, ll. 45-59; Col. 18, ll. 26-30

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 7 of 11

Key Factors in Claim Construction of Bone Filler Patents

- Even though the nozzle instrument and cannula are both hollow tubes, they are distinct instruments with distinct purposes and operations.
- Because the nozzle is withdrawn from the cannula as material is expelled, material gets expelled into the bore (that contacts the inner walls) of the cannula.

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 8 of 11

Key Factors in Claim Construction of Bone Filler Patents

- All tamping operations are relative to the cannula in order to clear residual material contacting the inner walls of cannula.
- After the nozzle instrument is removed from the cannula, one of two tamping operations occurs relative to the cannula:
  - a nested stylet/nozzle combination
  - a tamping instrument separate and distinct from the nozzle instrument.

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 9 of 11

Kyphon's Claim Construction is Inconsistent With the Specification

- Kyphon ignores the distinct purpose and operation of the nozzle instrument.

- Kyphon contends the cannula can comprise an "inner" cannula and "outer" cannula.

"cannula"

('734 indep. Claim 1, 12, 15;

'054 indep. Claim 26, 36, 41, 46, 48)



cannula may consist of one or more components

(See, e.g., Kyphon's Opp. Claim Constr. Br. at pp. 3, 28, 31; Addendum to Kyphon's Opp. Claim Constr. Br.)

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 10 of 11

Kyphon's Claim Construction is Inconsistent With the Specification

"material residing in the cannula" → material located at any point within the cannula

('054, indep. Claim 26; see also '734, indep., Claims 1, 15)

- Kyphon contends that material "need not be in direct contact with the outer cannula" so that:
  - material can be in contact with the inner walls of an inner cannula that is, in turn, inserted into an outer cannula.

(See, e.g., Kyphon's Opp. Claim Constr. Br. at pp. 28, 31; Addendum to Kyphon's Opp. Claim Constr. Br.)

Case 1:04-cv-00204-JJF Document 196-19 Filed 04/27/2005 Page 11 of 11