Kyphon's Claim Construction is Inconsistent with the Specification

" tamping instrument for advancement through the cannula"
('054 indep. Claim 26, 36, 41, 46, 48)

"advancement of the tamping terminus in the cannula"
('054, indep. Claim 26)

"tamping instrument capable of advancement into the subcutaneous cannula"
('734, indep. Claim 1, 12)

A tamping instrument [for advancement/ capable of advancing] through any point within the subcutaneous cannula, where the tamp and the cannula may consist of one or more components

(See Addendum to Kyphon's Opp. Claim Constr. Br.)

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Kyphon's Claim Construction is Inconsistent with the Specification

- Kyphon contends that the tamping instrument "need not be in direct contact with the outer cannula" so that:
  - a tamping instrument is advanced "into" a cannula if it is inserted into 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.)

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Even Kyphon's Analogy in Support of Its Broad Interpretation of "Into" the Cannula is Strained

- Kyphon's analogy: if a person steps into an elevator which is in an elevator-shaft, that person (who is inside the elevator) is "in" the elevator-shaft.
- But, if someone walks into an elevator, one would describe the person as having walked into the elevator, not into the elevator shaft.

(See Kyphon's Claim Constr. Opening Br. at p. 23; DOT's Resp. tp Kyphon's Claim Constr. Br. at p. 19)

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CLAIM CONSTRUCTION – "TAMPING" CLAIM TERMS

- "tamping instrument for advancement through a cannula"

  (See '054, indep. Claim 36 and 41, 46 and 48; see also '734, indep. Claim 15)

- "tamping instrument capable of advancement into the subcutaneous cannula"

  (See '734, indep. Claims 1 and12)

An instrument that, when it advances, clears the residual material from the inner walls of the cannula into the bone cavity

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CLAIM CONSTRUCTION – "TAMPING" CLAIM TERMS

- "a tamping instrument having a tamping terminus which . . . urges material residing in the subcutaneous cannula into bone"

  (See '734, indep. Claims 1 and 15)

- "advancement of the tamping terminus in the cannula to urge material residing in the cannula into bone"

  (See '054, indep. Claim 26)

An instrument with a terminus that, when it advances, clears the residual material from the inner walls of the cannula into the bone cavity

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CLAIM CONSTRUCTION – "TAMPING" CLAIM TERMS

- "a stylet . . . with the nozzle instrument, forming a tamping instrument capable of advancement into the subcutaneous cannula to urge residual material from the subcutaneous cannula"

  (See '734, indep. Claim 12)

→ Nested stylet/nozzle instrument that, when it advances, clears the residual material from the inner walls of the cannula into the bone cavity

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CLAIM CONSTRUCTION – "MARKINGS" CLAIM TERMS

- "tamping instrument . . . including at least one marking
  to visually gauge the advancement of the terminus
  relative to the distal end of the cannula"

- "tamping instrument includes markings
  to visually gauge the advancement of the tamping terminus
  through the subcutaneous cannula"

An instrument with [markings/at least one marking]
relative to the cannula to visually gauge the advancement of the terminus of the instrument
as it clears the residual material from the inner walls of the cannula into the bone cavity

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CLAIM CONSTRUCTION – "MARKINGS" CLAIM TERMS

- "tamping instrument . . . wherein the at least one marking indicates when the distal end of the tamping instrument is aligned with the distal end of the cannula instrument"

→ An instrument with at least one marking relative to the cannula indicating when the distal ends of the instrument and cannula are aligned, where the tamping instrument clears residual material from the inner walls of the cannula into the bone cavity

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CLAIM CONSTRUCTION – "MARKINGS" CLAIM TERMS

- "tamping instrument includes a set point marking spaced from the terminus at a distance generally equal to the length of the cannula"

→

An instrument with a set point marking relative to the cannula spaced from the terminus at a distance generally equal to the length of the cannula to visually gauge the advancement of the terminus of the instrument as it clears residual material from the inner walls of the cannula into the bone cavity

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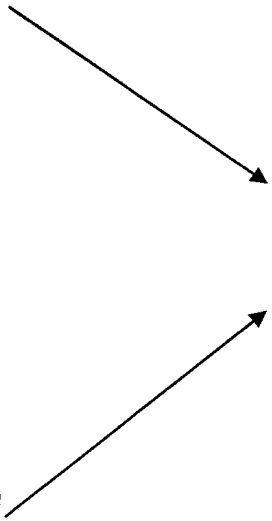
CLAIM CONSTRUCTION – "CAVITY FORMING" CLAIM TERMS

- "a cavity forming instrument to compress cancellous bone"
- "wherein the cavity forming instrument includes an expandable structure"



Requires inflatable device disclosed in '404 and '888 Patents

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