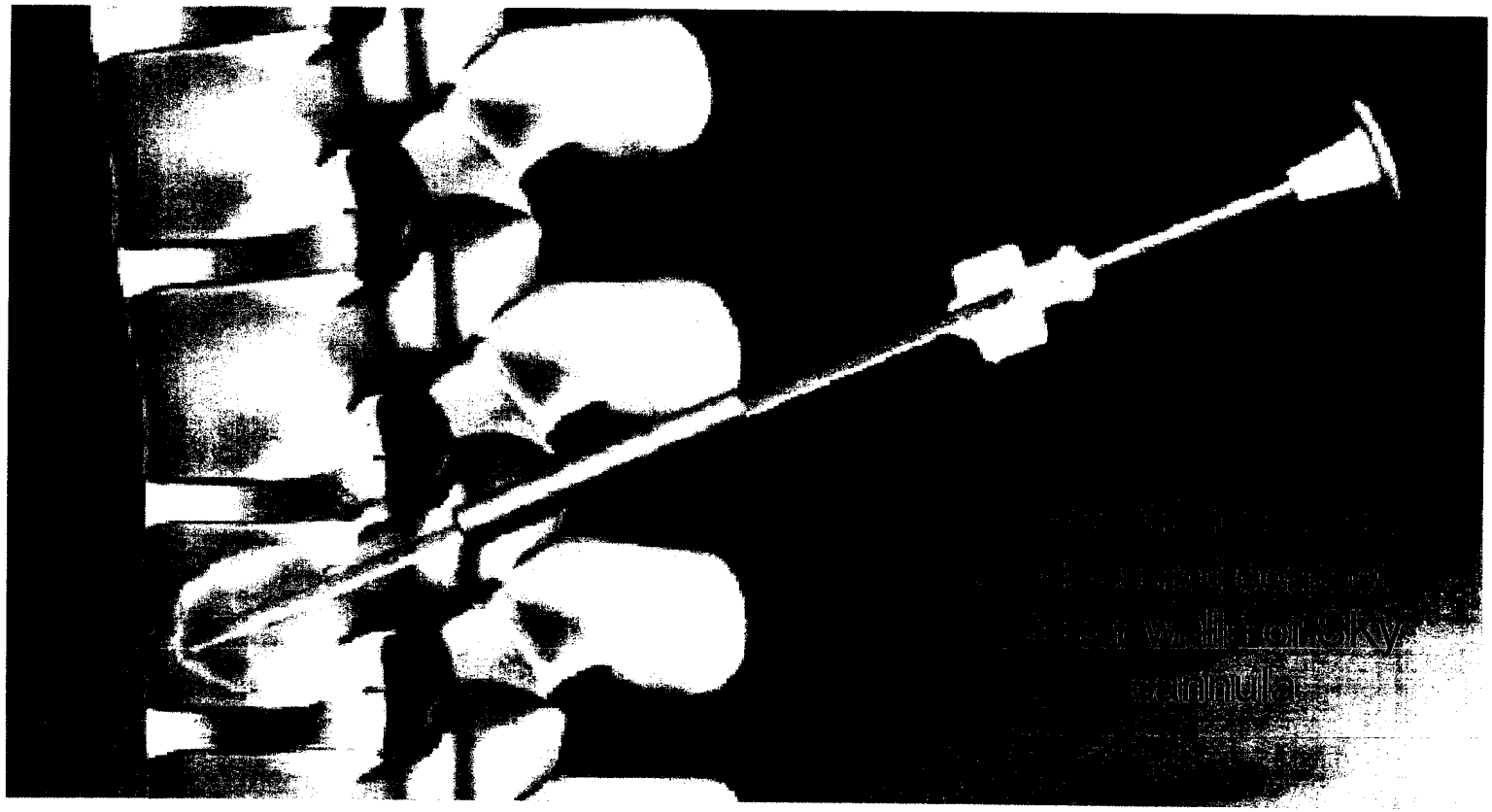
The SKy Cannula is a Re-usable Instrument Because Bone Filler Material Does Not Contact the Inner Walls of the SKy Cannula At Any Stage of the Procedure



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SUMMARY – NON-INFRINGEMENT OF BONE FILLER PATENTS

- Material does not get into the bore (or contacts the inner walls) of the SKy cannula.
- The Impactor Rod does not tamp relative to the cannula – it does not clear material from the bore (or that contacts the inner walls) of the SKy cannula.
- A nested Impactor Rod/Tube combination does not tamp relative to the cannula.
- Indeed, the tamping operation of the Impactor Rod is performed relative to the Impactor Tube.

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KYPHON's INFRINGEMENT CONTENTIONS LACK MERIT

- Kyphon contends that the SKy Impactor infringes if it is "capable" of being used in an infringing way -- regardless of whether the SKy Impactor is used in an infringing way (to tamp residual material from the cannula).

- Kyphon mischaracterizes the holding of Intel to be: A device infringes if it is capable of infringing use – even if a device is not intended to be and is not used in an infringing manner.

- The controlling law is: There is no infringement if a device is not designed to be used, intended to be used, or actually is used in a manner such that it meets the asserted claim.

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The Pre-July 2004 SKy Impactor was designed to be used, intended to be used, and, indeed, was actually used in a manner completely different from how the Bone Filler Patents dictate the claimed apparatus is designed and intended to be used.

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CERTIFICATE OF SERVICE

I, Maryellen Noreika, hereby certify that copies of the foregoing were caused to be served this 27th day of April, 2005 upon the following in the manner indicated:

BY HAND DELIVERY

Thomas L. Halkowski
FISH & RICHARDSON P.C.
919 N. Market Street, Suite 1100
P.O. Box 1114
Wilmington, DE 19899-1114

Maryellen Noreika (#3208)