

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Robert Pitofsky, Chairman
Mary L. Azcuenaga
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle

In the Matter of

Summit Technology, Inc. a Corporation, and VISX, Inc., a Corporation.

Docket No. 9286

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Summit Technology Inc. ("Summit"), a corporation, and VISX, Inc. ("VISX"), a corporation, hereinafter sometimes referred to as Respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Background

1. Respondent Summit is a corporation organized, existing, and doing business under and by virtue of the laws of Massachusetts with its office and principal place of business located at 21 Hickory Drive, Waltham, Massachusetts 02154.
2. Respondent VISX is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 3400 Central Expressway, Santa Clara, California 95051.
3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices alleged herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
4. Photorefractive keratectomy ("PRK") is a form of eye surgery used to correct vision disorders. PRK uses specialized, computer-guided laser equipment to reshape the cornea.
5. Before VISX and Summit pooled their patents, each firm owned or controlled numerous patents related to PRK.
6. VISX and Summit are the only firms whose laser equipment has received marketing approval from the United States Food and Drug Administration

("FDA") for performing PRK. As a result, VISX and Summit are the only two firms legally able to market laser equipment to be used for PRK in the United States.

7. Except to the extent that VISX and Summit have restrained competition as alleged herein, they have been, and are now, in competition with each other in connection with the sale or lease of PRK equipment and the licensing of technology related to PRK.

The Patent Pool

8. On or about June 3, 1992, pursuant to a series of agreements hereinafter collectively referred to as the "PPP Agreement," VISX and Summit pooled most of their existing, as well as certain future, patents related to PRK in a newly created partnership, called Pillar Point Partners ("PPP"). VISX and Summit have pooled at least 25 patents, containing more than 500 method and apparatus claims, in PPP ("PPP Patents"). Notwithstanding these patents, in the absence of the PPP Agreement, VISX and Summit could have and would have competed with one another in the sale or lease of PRK equipment by using their respective patents, licensing them, or both. In addition, VISX and Summit would have engaged in competition with each other in connection with the licensing of technology related to PRK.
9. Under the PPP Agreement, PPP has the right to license the PPP Patents to persons engaged in the business of manufacturing PRK equipment, and VISX and Summit each have relinquished the right to unilaterally license to any such person any patent that either firm contributed to PPP.
10. Under the PPP Agreement, VISX and Summit each have the unilateral right and power to prevent PPP from licensing any of the PPP Patents to other persons engaged in the business of manufacturing PRK equipment.
11. Under the PPP Agreement, PPP has licensed back to VISX and Summit all of the PPP Patents. Also under the PPP Agreement, VISX and Summit each may sell, lease or otherwise make available PRK equipment covered by the PPP Patents to laser users and may sublicense those users to perform PRK and related procedures.
12. With certain exceptions, under the PPP Agreement, VISX and Summit each must pay a fee to PPP each time any laser user performs a PRK procedure under any PPP Patents sublicensed by Summit or VISX. Under the PPP Agreement, the level of this Per-Procedure Fee can range from \$30 to \$250, and is set at the higher of the amounts separately proposed by VISX and Summit. Since receiving FDA approval to market their lasers, VISX and Summit have set this Per-Procedure Fee at \$250. Since receiving FDA approval to market their lasers, VISX and Summit each has charged its sublicensees a \$250 per-procedure fee, with certain minor exceptions. Under the PPP Agreement, all third party manufacturers that might be licensed by PPP would be required to pay this Per-Procedure Fee to PPP.
13. As a result of their agreement with respect to the Per-Procedure Fee under the PPP Agreement, VISX and Summit charged consumers significantly more than

they would have been charged in the absence of the agreement. Based on the number of procedures performed in 1996, it is likely that this overcharge exceeded \$10.5 million. Based on estimates for procedures performed in 1997, it is likely that this overcharge exceeded \$30 million.

Fraud and Inequitable Conduct

14. VISX is the firm that resulted from the November 26, 1990, acquisition of the former VISX, Inc. ("Old VISX"), by Taunton Technologies, Inc. ("Taunton"). After that acquisition, VISX caused four interference proceedings that were pending before the United States Patent and Trademark Office ("PTO") to be resolved. In each instance, VISX resolved a dispute between Old VISX and Taunton over patents and patent applications related to PRK, and each culminated in the grant or retention of patents that VISX later contributed to PPP. VISX then prosecuted patent applications that had been the subject of two of the interferences.
15. One of the interferences referred to in Paragraph 14 was between Dr. Francis A. L'Esperance, Jr., and Dr. Stephen Trokel ("Trokel-L'Esperance Interference"). The Trokel- L'Esperance Interference arose in the following manner: On May 19, 1987, the PTO issued to Dr. L'Esperance U.S. Patent No. 4,665,913 ("?913 patent"), which contained claims covering methods for performing PRK. That patent was held by Taunton. On December 15, 1983, Dr. Trokel filed an application for a patent that contained claims conflicting with claims in the ?913 patent. Dr. Trokel assigned his rights under that application to Old VISX. On the basis of conflicts between the ?913 patent and Dr. Trokel's application, the PTO declared the Trokel- L'Esperance interference on September 30, 1988. VISX resolved the Trokel-L'Esperance Interference by telling the PTO that Dr. Trokel had priority with respect to the claimed invention at issue in that interference. Subsequently, partially in reliance on VISX's determination of priority, a new patent, U.S. Patent No. 5,108,388, covering that claimed invention, was issued to Dr. Trokel.
16. During the prosecution of Dr. Trokel's patent, VISX, through its attorneys and on behalf of Dr. Trokel, withheld from the PTO, articles, patents, and patent applications that VISX, its attorneys and Dr. Trokel knew were material prior art. During the course of the Trokel- L'Esperance Interference, VISX, through its attorneys and on behalf of Dr. Trokel, was aware of the following material that constituted prior art: U.S. Patent application 894,520 [Blum]; U.S. Patent 4,784,135, [Blum]; German Patent DE 3,148,748 [Karp]; Keates et al., "Carbon Dioxide Laser Beam Control for Corneal Surgery," 12 *Ophthalmic Surgery* 117 (Feb. 1981); L. Girard, "Advanced Techniques in Ophthalmic Microsurgery," Volume Two *Corneal Surgery*, C.V. Mosby Company 1981.
17. Three of the interferences referred to in Paragraph 14 were between Dr. L'Esperance and Dr. Charles Munnerlyn ("Munnerlyn-L'Esperance Interferences"). The Munnerlyn-L'Esperance Interferences arose in the following manner: The PTO had issued Dr. L'Esperance three patents that included claims covering methods for preparing the cornea before PRK is performed. Each of

these patents were held by Taunton. On August 5, 1987, Dr. Munnerlyn filed an application for a patent related to PRK. Dr. Munnerlyn assigned his rights under that application to Old VISX. On August 1, 1989, based on conflicts between Dr. L'Esperance's three patents and Dr. Munnerlyn's patent application, the PTO declared the Munnerlyn-L'Esperance Interferences. VISX resolved one of the Munnerlyn-L'Esperance Interferences by telling the PTO that Dr. Munnerlyn had priority with respect to the claimed invention at issue in that interference. Subsequently, partially in reliance on VISX's determination of priority, a new patent, U.S. Patent No. 5,163,934, covering that claimed invention, was issued to Dr. Munnerlyn. VISX resolved the other two Munnerlyn-L'Esperance Interferences by telling the PTO that Dr. L'Esperance had priority with respect to the claimed inventions at issue in those interferences, and he retained the claims in those two patents.

18. During the course of the interferences referred to in Paragraph 14, Dr. L'Esperance intentionally did the following:

a. Fabricated, back-dated, and falsified his scientific records. In particular, in 1984 or thereafter, Dr. L'Esperance fabricated and falsified an entry in his scientific notebook dated August 15, 1980, which contains a detailed description of PRK, including citations to medical books. He actually wrote this notebook page in 1984 or later, and he and his adult son each signed the notebook page and falsified the dates of their signatures.

b. In response to a motion seeking the inspection of his scientific papers by an expert in altered documents, Dr. L'Esperance, through his attorneys, made misleading statements to the PTO about the authenticity of his scientific notebook.

c. Fabricated, back-dated, and falsified a diary page dated January 22, 1983 to establish when he had conceived of the inventions at issue in the Munnerlyn-L'Esperance Interferences. He did so in 1989 and included information on the diary page that was not known to him in 1983. His attorneys made false statements to the PTO by failing to fully inform it about the fabrication, back-dating, and falsification of the diary page.

19. During the course of the Trokel-L'Esperance Interference and the Munnerlyn-L'Esperance Interferences, and in resolving those interferences after the merger of Old VISX and Taunton, VISX knowingly and willfully misled the PTO about Dr. L'Esperance's fraudulent conduct, failed to disclose that conduct to the PTO and deceived the PTO about the bases for its resolution of the interferences and the true inventor of the inventions at issue.

20. The actions of Dr. Trokel, Dr. L'Esperance and VISX alleged in Paragraphs 14-19 constituted inequitable conduct and willful fraud on the PTO.

21. VISX has collected royalties on, and brought lawsuits and threatened to bring lawsuits to enforce, one or more of the patents described in Paragraphs 14-20.

The Relevant Markets

22. The sale or lease of PRK equipment, including the licensing of patents for use in

- performing PRK, is a relevant line of commerce in which to analyze the effects of Respondents' conduct.
23. The licensing of technology related to PRK is a relevant line of commerce in which to analyze the effects of Respondents' conduct.
 24. A relevant geographic area in which to analyze the effects of Respondents' conduct is the United States.

Violations of Section Five of the FTC Act

Count I

25. The acts and practices of Respondents as alleged herein constitute a contract, combination or conspiracy in restraint of commerce, and have had, and continue to have, the purpose, effect, tendency and capacity to, among other things:
 - a. Raise, fix, stabilize and maintain the price that physicians must pay to perform PRK procedures;
 - b. Raise the cost of, prevent entry into and deter the sale or leasing of PRK equipment and the licensing of technology related to PRK; and
 - c. Deprive consumers of the benefits of competition in the sale and leasing of PRK equipment and the licensing of technology related to PRK.
26. The acts and practices of Respondents as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Count II

27. The acts and practices of Respondents as alleged herein constitute the willful acquisition and maintenance of a monopoly, or a conspiracy or attempt to monopolize, and had the purpose, effect, tendency and capacity to, among other things:
 - a. Create, maintain or have a dangerous probability of creating, a monopoly in the sale or leasing of PRK equipment and the licensing of technology related to PRK;
 - b. Raise, fix, stabilize and maintain the price that physicians must pay to perform PRK procedures;
 - c. Raise the cost of, prevent entry into and deter the sale or leasing of PRK equipment and the licensing of technology related to PRK; and
 - d. Deprive consumers of the benefits of competition in the sale and leasing of PRK

equipment and the licensing of technology related to PRK.

28. The acts and practices of Respondents as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Count III

29. The acts and practices of Respondent VISX as alleged herein, which constitute the acquisition of a patent or patents by inequitable conduct in violation of Section 5 of the Federal Trade Commission Act, or by fraud in violation of Section 5 of the Federal Trade Commission Act, before the PTO, and the enforcement thereof, have had, and continue to have, the purpose, effect, tendency and capacity to, among other things:

- a. Unreasonably restrain trade in the sale or leasing of PRK equipment and the licensing of technology related to PRK;
- b. Raise, stabilize and maintain the price of PRK equipment and procedures;
- c. Raise the cost of, deter and prevent entry into the sale or leasing of PRK equipment and the licensing of technology related to PRK; and
- d. Deprive consumers of the benefits of competition in the sale or leasing of PRK equipment and the licensing of technology related to PRK.

30. The acts and practices of Respondent VISX as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to each of the Respondents hereinbefore named that the sixteenth day of April, 1998, at 10:00 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a

concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is a Notice of Contemplated Relief which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions, as to one or more of the Respondents hereinbefore named, might be inadequate to fully protect the consuming public, or to protect competitive conditions, the Commission may order such other relief as it finds necessary or appropriate.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that one or both of the Respondents VISX, Inc. ("VISX"), and Summit Technology, Inc. ("Summit"), are in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

I. A requirement that Respondents cease and desist from entering into, adhering to, participating in, enforcing or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with each other, to:

A. (1) Fix, construct, stabilize, standardize, raise, maintain, or otherwise affect or control any price, royalty or fee for, any aspect of any price, royalty or fee for, or the terms or conditions associated with, the purchase, license or use of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates, in whole or in part, the use of, a laser to

perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) Establish, require, charge, collect or pay any Per-Procedure Fee;

B. (1) Restrict the right or ability of one or both Respondents to sell or license any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates, in whole or in part, the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) Grant one or both Respondents the right or ability to prevent the sale or license by one or both Respondents of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates, in whole or in part, the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery.

II. A requirement that Respondents shall:

A. Take all actions necessary to dissolve PPP.

B. Take all actions necessary to cause full right, title and ownership in all patents that Respondent Summit contributed to PPP under the Formation Agreement, under the General Partnership Agreement or otherwise (including but not limited to the patents listed in Schedule A) to revert to the sole ownership and control of Summit.

C. Take all actions necessary to cause full right, title and ownership in all patents that Respondent VISX contributed to PPP under the Formation Agreement, under the General Partnership Agreement or otherwise (including but not limited to the patents listed in Schedule B) to revert to the sole ownership and control of Respondent VISX.

D. Distribute by first-class mail a copy of the Order and the accompanying complaint to any person that has requested a license of any of the PPP Patents since June 3, 1992.

E. (1) Allow any person with which one or both Respondents have entered into any agreement from June 3, 1992, until the time when PPP is dissolved, for the purchase, license or use of any of the PPP Patents, to withdraw at any time from such agreement without penalty or obligation.

(2) Distribute by first-class mail a copy of the Order, the accompanying complaint, and a letter containing the following statement to any person that is then a licensee of any of the PPP Patents:

The FTC has ordered Summit [VISX] to dissolve the Pillar Point Partners arrangement with VISX, Inc.[Summit Technology, Inc.] The Order, among other things, prohibits Summit [VISX] from agreeing with VISX [Summit] on a Per-Procedure Fee. Under that Order, we are obligated to give you an opportunity to withdraw at any time from your

license agreement with Summit [VISX] without any penalty or obligation.

(3) Refrain from taking any action to prevent, impede, threaten or discourage:

(a) Respondent VISX [Summit] from entering or attempting to enter into an agreement for the purchase, license or use of any of the PPP Patents with any person that is or was a party to an agreement that is covered by Paragraph II .E. (1) of the Order; or

(b) any person from exercising any right it may have under Paragraph II. E. (1) of the Order.

III. A requirement that Respondent VISX shall refrain from taking any action to enforce, or seek licensing revenue from: U.S. Patents Nos. 5,108,388 (Trokkel) and 5,163,934 (Munnerlyn) as well as any patents that are continuations, continuations-in-part, divisionals, substitutions, reissues or reexaminations of these patents or their original applications; and U.S. Patents Nos. 4,773,414 (L'Esperance) and 4,798,204(L'Esperance).

IV. Any other provisions appropriate to correct or remedy, or prevent recurrence of, the anticompetitive practices engaged in by one or both Respondents.

V. A requirement that Respondents file periodic compliance reports with the Commission.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be here affixed at Washington, D.C. this twenty- fourth day of March, 1998.

By the Commission.

Donald S. Clark
Secretary

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Schedule A

Summit PRK Patents Contributed to PPP

Patent Number

4, 856, 513

4, 941, 093

4, 973, 330

4. 994, 058

5, 019, 074

5, 423, 801

5, 324, 281

Schedule B

VISX PRK Patents Contributed to PPP

Patent Number

4, 665, 913

4, 669, 466

4, 718, 418

4, 721, 379

4, 729, 372

4, 732, 148

4, 770, 172

4, 773, 414

4, 798, 204

4, 903, 695

4, 911, 711

5, 108, 388

5, 163, 934

5, 188, 631

5, 207, 668

5, 219, 343

5, 219, 344

5, 312, 320