

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**

Robert Pitofsky, Chairman  
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**

**AGREEMENT CONTAINING  
CONSENT ORDER TO CEASE AND DESIST**

The agreement herein, by and between VISX, Incorporated ("VISX"), a corporation, by its duly authorized officer, hereafter sometimes referred to as "Respondent," and its attorney, and counsel for the Federal Trade Commission ("Commission"), is entered into in accordance with the Commission's Rules governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent 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.
2. Respondent has been served with a copy of the Complaint issued by the Commission charging it with violation of Section 5 of the Federal Trade Commission Act, and Respondent has filed its Answer to said Complaint denying said charges.
3. Respondent admits all the jurisdictional facts set forth in paragraphs 2 and 3 of the Complaint in this proceeding.
4. Respondent waives:
  - a. any further procedural steps;
  - b. the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;
  - c. all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
  - d. any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify Respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Complaint, or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may, without further notice to the Respondent, (1) issue its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public with respect thereto. When so entered, the order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to order to Respondent's address as stated in this agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The Complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Respondent has read the Complaint and order contemplated hereby. Respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

## **ORDER**

### **I**

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

A The term "PPP" means Pillar Point Partners, the partnership formed between Summit Partner, Inc., and VISX Partner, Inc., on or about June 3, 1992.

B. The term "VISX" or "Respondent" means VISX, Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to VISX Partner, Inc.) and affiliates controlled by VISX, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. The term "Summit" means Summit Technology, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to Summit Partner, Inc.) and affiliates controlled by Summit Technology, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. The term "Commission" means the Federal Trade Commission.

E. The term "person" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "Formation Agreement" means the agreement established in the document entitled "Formation Agreement Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, among Summit Technology, Inc., a Massachusetts corporation; VISX, Inc., a Delaware corporation; Summit Partner, Inc., a Delaware corporation; and VISX Partner, Inc., a Delaware corporation.

G. The term "General Partnership Agreement" means the agreement established in the document entitled "General Partnership Agreement of Pillar Point Partners Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, by and between Summit Partner, Inc., a Delaware corporation, and VISX Partner Inc., a Delaware corporation.

H. The term "Per-Procedure Fee" means any payment for the use of any product, device, method, patent, intellectual property, or technology, which payment depends in any way on the amount of use of, including the number of procedures performed using, the product, device, method, patent, intellectual property, or technology.

I. The term "PRK" means photorefractive keratectomy, an excimer laser-based form of eye surgery used to correct refraction disorders.

J. The term "PRK equipment" means any laser or other device that could be used in connection with performing PRK.

K. The term "PPP Patents" means all patents that have been contributed to PPP pursuant to Articles 2.3 and 2.4 of the Formation Agreement and Article 6.2 of the General Partnership Agreement, and all patents that have been contributed to PPP since June 3, 1992. The term "PPP Patents" includes but is not limited to all patents listed in Schedule A and Schedule B of this Order.

L. The term "Settlement and Dissolution Agreement" means the June 4, 1998 Settlement and Dissolution Agreement between Summit Technology, Inc. and VISX, Incorporated. The Settlement and Dissolution Agreement is appended to this Order in redacted form as Appendix I.

**IT IS FURTHER ORDERED** that Respondent, directly or indirectly, or through any person or other device, in or in connection with activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, cease and desist, except as provided in Paragraph III of this Order or in the Settlement and Dissolution Agreement, from entering into, adhering to, participating in, enforcing or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with Summit:

A. (1) To 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) To establish, require, charge, collect or pay any Per-Procedure Fee;

B. (1) To restrict the right or ability of Respondent or Summit 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) To grant Respondent or Summit the right or ability to prevent the sale or license by Respondent or Summit 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.

**PROVIDED, HOWEVER,** that nothing in this Order shall prevent Respondent from entering into or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with Summit with respect to patents other than PPP Patents, if Respondent notifies the Commission in writing at least forty-five (45) days prior to entering into, forming or participating in such contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination. Such notification shall include (1) a description of the patent or patents subject to or affected by the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, including a copy of each such patent, and (2) a copy of the document or documents that memorialize all of the terms and conditions of the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, unless such document or documents do not exist at the time of the notification, in which case Respondent shall include a summary of the terms and conditions.

### III

**IT IS FURTHER ORDERED** that Respondent shall, no later than twenty (20) days from

the date this Order becomes final, license to Summit the patents that Respondent contributed to, or agreed to contribute to, PPP, including but not limited to all patents listed in Schedule B of this Order, and any divisions, reissues, re-examinations, continuations, continuations in part, renewals, extensions and additions thereof. Such license(s) shall be royalty-free and non-exclusive as set forth in the Settlement and Dissolution Agreement.

#### IV

**IT IS FURTHER ORDERED** that Respondent shall take no action inconsistent with the dissolution of PPP or the disposition of the PPP Patents as set forth in the Settlement and Dissolution Agreement. Consistent with the Settlement and Dissolution Agreement, PPP may wind up its affairs, defend or settle litigation in which it is or becomes a defendant and complete the defense of any such litigation.

#### V

**IT IS FURTHER ORDERED** that:

A. Within sixty (60) days after the date this Order becomes final, Respondent shall distribute by first-class mail a copy of this Order (not including Appendix I) and the Complaint to any person that requested a license to use any of the PPP Patents in the manufacture, assembly or sale of PRK equipment since June 3, 1992.

B. (1) Respondent shall allow any person ("Customer") with which Respondent entered into any agreement that includes an obligation to pay a Per-Procedure Fee to license any of the PPP Patents ("Agreement Containing License") between June 3, 1992 and June 5, 1998, to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to Respondent under the Agreement Containing License or any other agreement with Respondent, other than obligations already incurred for goods, assets or services previously provided by Respondent, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased by Respondent.

(2) Provided, however, that any further use or disposition of the laser system shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement of the Customer and Respondent.

(3) Provided further that nothing in this Paragraph V.B. shall be interpreted to prevent Respondent from seeking any remedy against a Customer that continues to use any intellectual property, good, asset or service that was the subject of the Agreement Containing License or any other agreements relating to the use of the laser system without complying with such agreement.

(4) Within twenty (20) days after the date this Order becomes final, Respondent shall distribute by first-class mail a copy of this Order (not including Appendix I), the Complaint,

and a letter containing the following statement to any person to which Respondent then licenses any of the PPP Patents under an Agreement Containing License that was entered between June 3, 1992 and June 5, 1998:

VISX and Summit have agreed to dissolve the Pillar Point Partners arrangement and have agreed with the FTC to an Order concerning Pillar Point Partners. The Order, among other things, prohibits VISX from agreeing with Summit on a Per-Procedure Fee.

You have entered into an agreement with VISX to license one or more of the Pillar Point Partners Patents (the "Agreement Containing License"). Under the Order with the FTC, VISX is obliged to give you the opportunity to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to VISX under the Agreement Containing License or any other agreement with VISX, except as provided below.

Please note that the Order does not affect obligations you have already incurred for goods, assets or services previously provided by VISX, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased to you by VISX.

Please note further that any further use or disposition of the laser system by you shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement between you and VISX.

(5) Respondent shall refrain from taking any action to prevent or impede:

(a) any person covered by Paragraph V.B.(1) of this Order from entering or attempting to enter into an agreement for the purchase, sale, license, use, lease, option, or other disposition of any product manufactured or assembled for use in PRK; or

(b) any person from exercising any right it may have under Paragraph V.B. of this Order.

## VI

**IT IS FURTHER ORDERED** that:

A. For a period of ten (10) years after the date this Order becomes final, Respondent shall distribute by first-class mail a copy of this Order (not including Appendix I) and the Complaint in this matter to any person that requests a license of any of Respondent's PPP Patents.

B. Respondent shall file within sixty (60) days after the date this Order becomes final, annually thereafter for ten (10) years on the anniversary of the date this Order became final,

and at such other times as the Commission may require, a verified written report setting forth in detail the manner and form in which it has complied and is complying with the Order.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its structure, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the Order.

D. For a period of ten (10) years after the date this Order becomes final, Respondent shall notify the Commission in writing forty-five (45) days prior to forming or participating in the formation of, or joining or participating in, any exclusive patent licensing arrangements, patent pool arrangements, partnerships or joint ventures if the arrangement, partnership or joint venture (1) involves United States patents that relate to the use, manufacture, marketing or sale of PRK equipment; and (2) includes any person engaged in the research, development, marketing or sale of PRK equipment. Such notification shall include a copy of the document or documents that memorialize all of the terms and conditions of the licensing arrangements, patent pool arrangements, partnerships or joint ventures, unless such document or documents do not exist at the time of the notification, in which case Respondent shall include a summary of the terms and conditions.

E. For the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and (2) upon five business days' notice to Respondent, and without restraint or interference from it, to interview officers, directors, or employees of Respondent in the presence of counsel representing said officers, directors or employees.

## VII

**IT IS FURTHER ORDERED** that this Order will terminate upon the expiration of the last to expire of the PPP Patents.

FEDERAL TRADE COMMISSION

By:  
Michael D. McNeely  
Senior Litigation Counsel  
Bureau of Competition  
Counsel for Federal Trade Commission

By:  
Veronica G. Kayne  
Acting Assistant Director

VISX, Incorporated

By:  
Mark B. Logan  
Chairman of the Board, President, and  
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By:  
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APPROVED:

Willard K. Tom  
Deputy Director  
Bureau of Competition

William J. Baer  
Director  
Bureau of Competition

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**Schedule A**

**Summit PPP Patents**

**Patent Number**

4, 856, 513

4, 941, 093

4,973,330

4. 994, 058

5, 019, 074

5, 423, 801

5, 324, 281

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**Schedule B**

**VISX PPP Patents**

**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  
5 ,711,762

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