

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

CHERYL LENART, *etc.*

Plaintiff

v.

VISIONWORKS OF AMERICA, INC.

Defendant

Case No. 16 Civ. 5935

Honorable Matthew F. Kennelly

**FIRST AMENDED**  
**CLASS ACTION COMPLAINT**  
**JURY DEMANDED**

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**PREAMBLE**

Pursuant to Fed. R. Civ. P. 15(a)(1)(B), Plaintiff Cheryl Lenart brings this First Amended Complaint against Defendant Visionworks of America, Inc., on behalf of herself and on behalf of a class of all other similarly-situated consumers in the state of Illinois.

**NATURE OF THE ACTION**

1. The Illinois legislature has enacted robust legislation to protect consumers and to prohibit retailers from manipulating their price regimes by using deceptive marketing. The Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 *et seq.* (the “Act”), prohibits “unfair or deceptive acts or practices, including but not limited to the use of employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, or the use of employment of any practice described in Section 2 of the [Act] ... whether any person has in fact been misled, deceived or damaged thereby.”

2. Section 2 of the Act identifies as deceptive business practices, among other things, any action which “makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions,” as well as “any other conduct which similarly creates a likelihood of confusion or misunderstanding.”

3. And the Act directs that, in determining whether a business practice is unfair or deceptive, “consideration shall be given to the interpretation of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.”

4. Illinois courts have held that the use of the word *free* in a “buy-one-get-one free” offer is a deceptive business practice under the Act “when, with respect to the article of merchandise required to be purchased in order to obtain the ‘free’ article, the offeror ... increases the ordinary and usual price.” *See Fineman v. Citicorp USA, Inc.*, 137 Ill. App. 3d 1035 (1st Dist. 1985).

5. And the FTC prohibits the use of “free” offers for more than six months during any 12-month period. *See* 16 C.F.R. 251.1(h).

6. Visionworks has and continues to use the word “free” in its retail offers throughout the state of Illinois. Visionworks solicits consumer to “buy one” pair of eyeglasses to “get one free.” Visionworks limits this free offer only to consumers who do not have vision insurance benefits.

7. Visionworks violates the Act and the FTC regulation by making its free offer continuously and repeatedly, month-after-month for the vast majority of the year. Visionworks’s constant and perpetual use of the word free increases the ordinary and usual price for a single pair of eyeglasses, such that the second pair is not truly free, and the consumer is paying more than the regular price for a single pair of eyeglasses.

8. Ms. Lenart brings this case as a proposed class action under the Act, and seeking all remedies afforded to Illinois citizens under that consumer-protection legislation.

#### **JURISDICTION & VENUE**

9. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds \$5 million (exclusive of interest and costs), and this is a class action in which the plaintiff and class members (who are citizens of Illinois) are diverse from the defendant (who is a citizen of Texas).

10. This Court has personal jurisdiction over the defendant because it conducts substantial business in the state of Illinois.

11. This Court is a proper venue for this action under 28 U.S.C. § 1391 because the defendant does business in this district and a substantial part of the acts or omissions giving rise to plaintiff's claims—namely, the solicitation and consummation of the free offer—occurred in this judicial district.

12. Ms. Lenart is a resident of Cook County and a citizen of Illinois.

13. Visionworks is a Texas corporation with a San Antonio headquarters. Visionworks is one of the largest retailers of eyeglasses in the country, with at least 33 retail stores in Illinois, including a Schaumburg Mall location in Cook County, where Ms. Lenart was solicited to consummate the free offer giving rise to her claims.

#### FACTUAL ALLEGATIONS

##### *Ms. Lenart's Transaction*

14. In late summer and fall 2015, Visionworks solicited Ms. Lenart to purchase eyeglasses under a buy-one-get-one-free offer. Ms. Lenart received multiple online and print advertisements in a weekly coupon newsletter known as Red Plum; she viewed a sign at the Schaumburg Mall entrance to Visionworks; and she received the free offer from the store salesclerk.

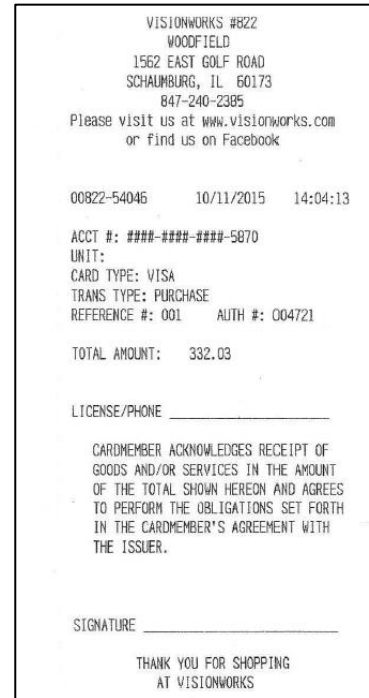
15. Each of the written forms of the free offer—online, in print, and on the sign—were virtually identical and substantially similar to the following example:

16. After Ms. Lenart received the online and print solicitations, she visited the Schaumburg Mall on October 11, 2015. She was again solicited by the sign outside the Visionworks store. When she inquired about the offer inside the store, a salesclerk



quoted her a price of \$332.03 for a single pair of eyeglasses, and stated that the second pair of eyeglasses would be “free” under the offer. Ms. Lenart accepted the “free” offer:

17. The \$332.03 price for a single pair of eyeglasses was not Visionworks’s ordinary and usual price. Rather, the ordinary and usual price for such a single pair of eyeglasses was approximately 40% less than the price Ms. Lenart paid. Thus, the “free” second pair was not really free. Instead, Visionworks—by using the word *free* continuously and repeatedly—had inflated the price of the first pair of eyeglasses well beyond its true price. Thus, Ms. Lenart overpaid for a single pair of eyeglasses by \$132.81, which constitutes her actual economic damages recoverable under the Act. To put this another way, the pair of eyeglasses Ms. Lenart purchased were worth \$132.81 less than what she paid.



18. In the alternative, the value of the second pair of eyeglasses which Ms. Lenart should have—but did not—receive for free upon paying full price for the first pair of eyeglasses is approximately \$132.81, which constitutes her actual economic damages recoverable under the Act. To put this another way, Ms. Lenart paid \$132.81 for a second pair of eyeglasses that were supposed to be priced for \$0.

19. Ms. Lenart was actually deceived by Visionworks’s use of the word *free*. She only discovered the deception after her transaction had been consummated.

20. At the time of Ms. Lenart’s transaction, other eyeglasses of similar quality were available from other retailers. Ms. Lenart forewent other retailers because she was attracted to Visionworks by its use of the word *free*.

**Visionworks’s Uniform Wrongful Conduct**

21. Visionworks—a national eyeglasses retailer with a \$50 million annual marketing budget—has studied what advertising is effective. And, according to former Vice President of

Marketing Emily White-Keating, the company has concluded that the use of the word *free* is “a message that matters to consumers ... helping to drive sales” and which has had a positive effect on securing sales. During the relevant time period, Ms. White-Keating was “responsible for the strategy and planning and execution of all marketing and advertising for Visionworks” nationwide.

22. Visionworks aggressively uses the word *free* in its marketing on television, online, in direct mailings, in emails, and on signage at retail locations. These extensive sales efforts are corporately-designed and uniformly-executed, with no variation from one store or state to another. Sales clerks are given consistent, mandatory, and comprehensive directives, training, and scripting on how to use the word *free* in making the buy-one-get-one-free sales:

**SOP 4.46: UNLIMITED BOGO DISCOUNT RULES**

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**Introduction**

Multiple pair promotions offer the greatest value per pair for our customers. In most cases the POS will automatically calculate the correct price for both pairs and apply the applicable promotional rule. In those instances where the POS is unable to apply the correct business rule it is the Associate’s responsibility to adhere to promotional business rules per company guidelines.

**Buy One, Get One Free**

Unlimited Buy One Get One Free promotions automatically follow business rules when sold to the same customer. The business rules are as follows:

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-7.*

<b>ACT NOW</b>		<b>New Market BOGO, 40% off Complete Pair, \$19 Eye Exam Coup</b>	
INITIATIVE/SUBJECT			
ACTION STEPS & TIMELINES (TASK AND TIME-SPECIFIC ACTIONS REQUIRED, CHECKLIST)			
Date/Time	Who	Vehicle / Notes	Notes / Complete
05/09	GM	Store receives Act Now communication	
05/17	GM → Associates	Store training huddle to cover all rules of promotion	
5/18	Store	Offer is valid beginning today	
RELEVANT FAQs (POTENTIAL QUESTIONS AND ANSWERS)			
QUESTION		ANSWER	
BOGO/40% OFF: Can these promotions be combined with my Managed Vision Care Benefit?		No, CANNOT be combined with MVC.	
40%OFF Single Pair: Will I receive 40% OFF Signage?		No, 40% OFF is un advertised and you will not receive signage.	
Will I receive new Signage?		Stores that have opened since the last \$19 EE event will receive new \$19 EE signage. Otherwise, you will not receive new signage. Please refer to your signage plan-o-guide for placement.	

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-6.*

## What is Simplified Pricing?

- **The implementation of ONE pricing strategy across the entire Visionworks retail network!**

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-9.*

- **First promotions start on June 30**
  - Unlimited BOGO
  - Unadvertised single pair offer: 40% off Complete Pair

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-10.*

### **Smile and Greet On the Phone**

*"Thank you for calling Visionworks, during our Unlimited Buy One Get One offer. (Then, later in the conversation...) Right now, we have two great pairs for one great price!"*

### **Smile and Greet In Person**

*"Welcome to Visionworks. My name is \_\_\_\_\_. Will you be using vision insurance or taking advantage of our Unlimited BOGO? It's a great time to get two great pairs for one great price!"*

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-11.*

23. Visionworks marketing team describes the *free*-related offers of "BOGO and 40% off as our day-in-and-day-out offers ... promos we use every day ... all year long."

**From:** <White-Keating>, Emily <[EWhite-Keating@visionworks.com](mailto:EWhite-Keating@visionworks.com)>  
**Date:** Friday, November 14, 2014 at 11:50 AM  
**To:** Jennifer Munoz <[jmunoz@moroch.com](mailto:jmunoz@moroch.com)>  
**Cc:** Sheila Lemon <[SLemon@moroch.com](mailto:SLemon@moroch.com)>, Nancy Terrell <[NTerrell@Moroch.com](mailto:NTerrell@Moroch.com)>, Brooke Boston <[BBoston@Moroch.com](mailto:BBoston@Moroch.com)>, Ashlie Felts <[AFelts@Moroch.com](mailto:AFelts@Moroch.com)>  
**Subject:** RE: Visionworks Press Releases for Your Review

Hi Jen,

Sorry I'm late on these, I'm trying to catch up. NO WORRIES. I KNOW YOU'RE BUSY. :)

I'm not comfortable at all with the BOGO release. I think it is too self-serving and since it is a promo we use every day, I would prefer to not use. I would rather wait until we figure out a way to give an eye exam or something next summer and really do some good rather than just make our day in and day out promo sound like an act of kindness.  
UNDERSTOOD.

*Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-12.*

**2014 PROMOTIONAL CALENDAR - TRADITIONAL VISIONWORKS STORES**

	January					February					March					April					May					June				
'13 vol	2	13	17	15	18	8	6	4	3	5	1	9	7	19	34	25	28	30	36	40	48	50	39	42	43	27				
wk	1	2	3	4	1	2	3	4	1	2	3	4	5	1	2	3	4	1	2	3	4	1	2	3	4	5				
date	12/29	1/5	1/12	1/19	1/26	2/2	2/9	2/16	2/23	3/2	3/9	3/16	3/23	3/30	4/6	4/13	4/20	4/27	5/4	5/11	5/18	5/25	6/1	6/8	6/15	6/22				
'14 Promo	Unl BOGO (40% off CP unadvertised)															60% off Clearance/BOGO														
	Seniors Discount/\$19EE (employed)															\$19 EE (employed)														
'13 Promo	Unl BOGO; Unl BOGO, 49.95 CP; 2/\$99, 49.95 CP; 2/\$99, \$50 yc prem. Lenses										2/\$99 + 49.95 CP - added BOGO 4/11/13					2/\$89 Clear. + 49.95 added BOGO 5/26														

	July				August				September				October				November				December						
'13 vol	46	23	26	21	16	12	11	14	22	44	41	38	37	35	32	24	29	49	33	31	45	0	52	51	47	20	10
wk	1	2	3	4	1	2	3	4	1	2	3	4	5	1	2	3	4	1	2	3	4	5	1	2	3	4	5
date	6/29	7/6	7/13	7/20	7/27	8/3	8/10	8/17	8/24	8/31	9/7	9/14	9/21	9/28	10/5	10/12	10/19	10/26	11/2	11/9	11/16	11/23	11/30	12/7	12/14	12/21	12/28
'14 Promo	60% off	BTS Unlimited BOGO 2/\$99 Kids							Unl BOGO (40% off CP unadv)				\$69.95 Clearance Frames/ BOGO				UIOLI										
	\$19 EE								\$19 EE (employed + Atlanta); \$29 EE tests																		
'13 Promo	Clear. + 49.95	BTS Unlimited BOGO/49.95 CP 2/\$99 Kids							Unlimited BOGO/49.95 CP				2/\$89 Clearance w/49.95 CP (test: 60% off Clearance )				UIOLI										

Volume weeks  
 1-8  
 9-15  
 16-25  
 26-30  
 31-52

Indicates holiday shift  
 53rd Week  
 Seniors Discount Promoted

Taken from N.D. Ohio Case. No. 1:15-cv-02306, Doc. 40-3.

24. As the marketing calendar above demonstrates, Visionworks used the word *free* as part of its buy-one-get-one-free offer (“BOGO”) 48 weeks in 2014. The company continued the high duration and frequency of BOGO offers in 2015, and continues the high duration and frequency in 2016.

25. Visionworks’s buy-one-get-one-free offer had two components: (1) an *advertised* two-pair offer in which the consumer pays the price for a single pair of eyeglasses and is supposed to receive a second pair of eyeglasses for free; and (2) an *unadvertised* alternative in which the consumer pays 40% less than the listed price for a single pair of eyeglasses and only receives one pair of eyeglasses. That is, “if a customer comes in the BOGO” but does not want

to pay the BOGO price, “they’re going to get moved into an offer that’s a single pair offer,” namely, the 40% ‘discount.’

26. The unadvertised single-pair alternative price is evidence that the *true* regular price of a single pair of glasses, uninflated by the constant use of the word *free*, is actually 40% less than the price offered in the buy-one-get-one-free offer. That is, since the word *free* is used continuously and repeatedly, over time the price of a single pair of glasses inflates to cover both the first pair and the second, supposedly ‘free’ pair.

27. Thus, consumers who consummate the two-pair BOGO transaction do not receive anything for free and *pay more than the regular price* for a single pair of eyeglasses.

28. Visionworks has been (and continues to be) engaged in litigation in the Northern District of Ohio regarding its continuous and repeated use of the word *free* and the alleged violation of Ohio’s consumer protection laws. *See Graiser v. Visionworks of America, Inc.*, N.D. Ohio No. 1:15-cv-02306. That litigation began in 2013, yet Visionworks has persisted to continuously and repeatedly use the word *free* in violation of Illinois’s (and Ohio’s) prohibitions.

#### CLASS ALLEGATIONS

29. This action is brought on behalf of the following Class: ***All consumers who purchased eyeglasses from Visionworks in Illinois during a “Buy One, Get One Free” promotion during the three-year period preceding the commencement of this action.*** Excluded from this Class are the following: (A) consumers who used an insurance benefit; (B) consumers who participated in a Visionworks promotion to buy eyeglasses for a flat advertised price (*e.g.*, a complete pair of frames and lenses for \$69.95); and (C) counsel, the Court and its staff, and the immediate family members of the same.

30. The Class is so numerous that the joinder of all members is impracticable: Visionworks is one of the largest retailers of eyeglasses in Illinois and has engaged in tens of thousands of qualifying consumer transactions during the class period.



31. There are questions of law and fact common to the Class; among others, whether Visionworks continuously or repeatedly used the word *free*; and whether Visionworks's use of the word *free* violated Illinois law.

32. Ms. Lenart will fairly and adequately protect the interests of the Class. She has retained experienced counsel and is committed to playing the interests of the Class over her own individual interests.

33. A class action is appropriated under Fed. R. Civ. P. 23(b)(3) because the common questions predominate over any individual questions, and a class action is superior to other methods for fairly and efficiently adjudicating the controversy. That is, whether Visionworks's continuous and repeated use of the word *free* violates Illinois law is the central issue in this case, and resolution of that issue in favor of (or against) any one class member would necessarily result in the same resolution for any and all other class members: to litigate for one is to litigate for all. And given the costs and resources needed to prosecute this litigation, to allow one to litigate for all is the most efficient use of the class's resources.

#### **CLAIM FOR RELIEF**

34. This claim for relief is brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10(a), on behalf of Mr. Lenart and the Class. It incorporates each allegation in this Complaint.

35. Ms. Lenart and each class member were "consumers" within the meaning of the Act, and they utilized the eyeglasses purchased from Visionworks for personal and family purchases, and not for resale in the ordinary course of their trade or business.

36. Visionworks was and is engaged in trade or commerce within the meaning of the Act.

37. Visionworks violated the Act by (A) continuously, for more than 6-of-12 months each year of the class period, using the word *free* in its offers; (B) repeatedly, several times throughout the year and without a 30-day break between offers, using the word *free* in its offers;

and (C) passing on to consumers the price of the purportedly “free” eyeglasses by raising the ordinary and usual price of the first pair of eyeglasses.

38. Visionworks knew at the time of each class-member transaction that the price offered as the usual and ordinary base-pair price was substantially in excess of the true usual and ordinary price.

39. Visionworks’s conduct was an unfair and deceptive business practice in violation of the Act.

40. Visionworks knowingly committed the unfair and deceptive businesses practices at issue in this Complaint.

41. Ms. Lenart and the class members are entitled to the remedies and relief set forth in § 505/10(a)-(c) of the Act, including (but not limited to) actual damages and attorney’s fees.

**PRAYER FOR RELIEF**

Therefore, Plaintiff Lenart seeks judgment against Defendant Visionworks as follows:

- A. An order certifying this action as a class action under Fed. R. Civ. P. 23(b)(3);
- B. An order appointing Ms. Lenart as the class representative;
- C. An order appointing Ms. Lenart’s counsel as class counsel;
- D. Actual damages;
- E. Punitive damages as allowed by law;
- F. Attorney’s fees under 815 ILCS 505/10(c) or as otherwise allowed by law;
- G. Costs of suit;
- H. Pre- and post-judgment interest;
- I. Declaratory, equitable, and injunctive relief;
- J. Such other relief as this Court finds just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Respectfully submitted,

s/ Douglas M. Werman

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Douglas M. Werman

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*Counsel for Plaintiff*

**PROOF OF SERVICE**

A copy of this document was served by the Court's ECF System on counsel of record on August 2, 2016, pursuant to Fed. R. Civ. P. 5(b)(2)(E).

Signed by,

s/ Douglas M. Werman

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Douglas M. Werman