

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

KAREN POTEAT, *etc.*

Plaintiff

v.

VISIONWORKS OF AMERICA, INC.

Defendant

CHERYL LENART, *etc.*

Plaintiff

v.

VISIONWORKS OF AMERICA, INC.

Defendant

Case No. 1:15-cv-02306

Judge James S. Gwin

Case No. 1:16-cv-02505

**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

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MOTION

Plaintiffs Karen Poteat¹ and Cheryl Lenart² move this Court for preliminary approval of the proposed settlement of their class-action claims against Defendant Visionworks of America, seeking an Order from the Court:

1. Entering preliminary approval of the Proposed Settlement, the terms of which are set forth in the parties' *Settlement Agreement*, which is submitted as **Exhibit 1** to this motion;
2. Conditionally certifying a class of Ohio consumers and a class of Illinois consumers for settlement purposes only, defined as follows:

Ohio Settlement Class. All consumers who completed a Buy-One-Get-One-Free transaction at a Visionworks store located in Ohio from June 25, 2012, through September 15, 2016.

Illinois Settlement Class. All consumers who completed a Buy-One-Get-One-Free transaction at a Visionworks store located in Illinois from June 8, 2013, through September 15, 2016.

3. Appointing Plaintiff Poteat as Class Representative of the Ohio Settlement Class and Plaintiff Lenart as Class Representative of the Illinois Settlement Class;
4. Appointing Drew Legando, Jack Landskroner, and Tom Merriman of Landskroner Grieco Merriman, LLC; Mark Schlachet; and Doug Werman and Maureen Salas of Werman Salas, P.C., as Settlement Class Counsel;
5. Approving the parties' negotiated forms of *Class Notice*, which are submitted as **Exhibits 2 and 3** to this motion; and
6. Appointing KCC, LCC, as Claims Administrator, and directing the firm to disseminate notice and to process and report upon claims as set forth in Section IV of the *Settlement Agreement*.

¹ Ms. Poteat is the named plaintiff in Case No. 15-cv-2306. *See* Second Amended Complaint (Doc. 51). By order of this Court (Doc. 42), Ms. Poteat was substituted into this case as the proposed class representative to replace Elliott Graiser, the original named plaintiff. Thus, for most of the life of this case, it was styled *Graiser v. Visionworks of America, Inc.* As a result of the substitution, the caption was changed to replace Mr. Graiser with Ms. Poteat.

² Ms. Lenart is the named plaintiff in Case No. 16-cv-02505. *See* First Amended Complaint (Doc. 25). Her case was originally filed in the U.S. District Court for the Northern District of Illinois, but was transferred by Judge Matthew Kennelly to this Court for resolution with the *Poteat* action. *See* Minute Entry (Doc. 39). Upon transfer, the *Lenart* action was initially assigned to Judge Solomon Oliver, who granted the Parties' Joint Motion to Reassign the case to this Court. *See* Order (Doc. 52).

The parties have extensively negotiated the terms of the Settlement Agreement and the forms of Class Notice. They have agreed on the details related to settlement, notice, certification, and approval of the proposed settlement. As such, Visionworks does not oppose this motion. And a *Proposed Order* granting the requested relief is being submitted as **Exhibit 4** to this motion.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff Karen Poteat (on behalf of an Ohio class) and Plaintiff Cheryl Lenart (on behalf of an Illinois class) brought consumer-protection claims against Defendant Visionworks of America related to the company's well-marketed use of a buy-one-get-one-free ("BOGO") sale of eyeglasses at its retail locations.

Plaintiffs alleged that Visionworks made its BOGO offers continuously and repeatedly, such that, over time, the cost of the first pair of eyeglasses inflated above its regular price and covered part of the cost of the second pair of eyeglasses, which was supposed to have been free.³ Plaintiffs further alleged that Visionworks sometimes offered an *unadvertised* alternative to the BOGO offer, which its sales clerks were uniformly trained to offer if a customer balked at the high BOGO price. The alternative *single-pair* offer was purportedly a 40% discount from the regular price of a single pair of eyeglasses. Based on this evidence, Plaintiffs' theory of damages was that the single-pair price was the *true* regular price that BOGO purchasers should have paid. Thus, according to Plaintiffs and their expert economist, class members' damages are equal to 40% of the price they paid.⁴ Visionworks has at all times vigorously denied Plaintiffs' allegations and its alleged liability to Plaintiffs and further denied that Plaintiffs suffered any

³ See *Poteat* Second Amended Complaint (Doc. 51), ¶¶3-4, 15, 20; accord *Lenart* First Amended Complaint (Doc. 25), ¶¶6-7, 17, 37.

⁴ See Expert Report of John Burke, Ph.D. (Doc. 40-8), PageID # 2383-84.

damages, steadfastly taking the position that its BOGO promotion complies with all applicable laws.

The cases were extensively and vigorously litigated for two and a half years, including proceedings in front of a state court and two federal courts, as well as an interlocutory appeal to the Sixth Circuit, wherein the Sixth Circuit affirmed the propriety of Visionworks' removal to federal court. Plaintiffs' counsel opposed *five* dispositive motions (one of Visionworks' motions resulted in a conditional dismissal of Plaintiffs' action and another of which resulted in a separate dismissal of Plaintiffs' claim for fraud) and *four* critical discovery motions; they rescued the class claims in the Ohio action by successfully substituting the lead plaintiff after this Court granted summary judgment to Visionworks on Mr. Graiser's class claims; they obtained important corporate testimony from Visionworks' then-Vice President of Marketing under Rule 30(b)(6); they defended the deposition of Mr. Graiser, the former Ohio plaintiff; and they reviewed approximately 36,000 pages of documents, including voluminous electronically-stored information.⁵

After about six months of active litigation, Plaintiffs' counsel and Visionworks' counsel engaged in a day-long mediation before James McMonagle, Esq., on December 16, 2014. This arms-length negotiation did not result in resolution of the action. After almost another year of fierce litigation, Plaintiffs' counsel and Visionworks' counsel engaged in a second day-long mediation before Mr. McMonagle on October 29, 2015. This second mediation session did not result in resolution of the action.⁶

After almost another year of continued extensive litigation, Plaintiffs' counsel and Visionworks' counsel participated in a pretrial conference in the Ohio action, in which the Court conducted a half-day judicially-administered settlement conference.⁷ This third mediation

⁵ See Declaration of Drew Legando, ¶4, submitted as **Exhibit 5** to this motion.

⁶ *Id.* at ¶6.

⁷ *Id.*

session ultimately resulted in the global class-wide settlement of both the Ohio action and the Illinois action.⁸

The proposed settlement provides class members who submit claims a recovery of up to \$100 per BOGO transaction.⁹ The average BOGO price was approximately \$400; therefore, claimants will likely receive the equivalent of a 25% refund. Plaintiffs' theory of damages, it should be recalled, was that class members were entitled to the equivalent of a 40% refund. Thus, claimants stand to recover in this settlement **62.5%** of the absolute-best-day-after-trial damage figure. Given the substantial risks and costs associated with additional dispositive motions and class certification, possible interlocutory appeal, and trial, the Proposed Settlement represents a fair, reasonable, and adequate resolution of these claims with substantial benefits to class members.¹⁰ Therefore, this Court should grant the Proposed Settlement preliminary approval and direct Notice to be issued to a certified Settlement Class.

II. TERMS OF THE PROPOSED SETTLEMENT

In exchange for a release of all class claims, Visionworks has agreed to fund a "Gross Settlement Amount" of \$4,209,280 to pay claims submitted by class members. The Gross Settlement Amount is comprised of two components: a maximum payment to Ohio claimants of \$1,155,280; and a maximum payment to Illinois claimants of \$3,054,000. Each claimant,

⁸ See *Poteat* Transcript of Settlement (Doc. 56).

⁹ See Settlement Agreement (Ex. 1), §§ 7.1.1-7.2.2. The Parties agreed that claims will be capped at \$1,155,280 for Ohio class members and \$3,054,000 for Illinois class members. The Parties also agreed that Plaintiff's counsel may petition for a 1/3 fee from the gross settlement amount of \$4,203,093, and that the fee would be applied proportionately to the Ohio and Illinois caps. Assuming the fee is approved, there would be enough funds available under the two caps for over 26% of both classes to make claims and each claimant would still recover the full \$100 amount. If more than 26% of a state class made claims, then the amount of each claimant's recovery would be reduced from \$100 proportionately. (It should also be noted that if a claimant's paid less than \$100 for the BOGO transaction, he or she will receive a full refund of that purchase price, rather than \$100.)

¹⁰ See Legando Declaration at ¶7.

regardless of his or her state, is entitled to \$100 cash (or, for those who paid a purchase price of less than \$100, a cash payment equal to the purchase price).¹¹

Visionworks has agreed to pay for class notice (the form and plan for which are discussed in **Section V** below).¹² Visionworks has also agreed not to oppose Plaintiffs' counsel's forthcoming petition for an award of fees and expenses (including costs of administration), so long as the total award sought by the petition does not exceed 1/3 of the Gross Settlement Amount.¹³ The fee award will be "counted against" the Ohio maximum payment cap and the Illinois maximum payment cap on a proportionate basis: since the Ohio cap is about 40% of the Gross Settlement Amount, 40% of the fee award will be counted against that cap; and since the Illinois cap is about 60% of the Gross Settlement Amount, 60% of the fee award will be counted against that cap.¹⁴

Thus, under the Settlement, the Parties expect class members who submit claims to receive a \$100 in cash (or a full refund if they paid less than \$100) for *each* BOGO transaction they completed within the statute of limitations for consumer claims in their state. (That is, class members are eligible for the \$100 payment for multiple BOGO transactions within the relevant period.) As stated above, the average price of eyeglasses purchased under the BOGO promotion was approximately \$400; therefore, each claiming class member will receive the equivalent of a 25% refund on average. Since Plaintiffs' damage theory sought—on its best day at trial—the equivalent of a 40% refund on average, the class recovery is very strong and should be approved.

¹¹ See Settlement Agreement (Ex. 1) at §§ 1.15, 7.1.1-7.2.2, 11.1-11.4. In the event that the total number of claims for a given state, combined with the portion of the fee award attributed to that state, would result in a payment for that state in excess of the cap for that state, settlement payments to the claimants from that state would be reduced on a pro-rata basis, so that all claimants from that state receive equal treatment.

¹² *Id.* at § 4.3.1.

¹³ *Id.* at § 1.1, 9.1. Plaintiffs' counsel intends to include in the forthcoming petition a request for modest incentive/service awards for the two lead plaintiffs, and that these amounts be taken from the attorney's-fee component and thus subject to the negotiated 1/3 cap on the total award. That is, the incentive awards will reduce the attorney's-fee request, and would not be borne by class members.

¹⁴ *Id.* at §§ 7.1.2, 7.2.2.

III. ARGUMENT IN SUPPORT OF PRELIMINARY APPROVAL

At the preliminary-approval stage, the Court must only determine whether the proposed settlement “fair, adequate, and reasonable.”¹⁵ Given that the Court will have an opportunity to analyze the Proposed Settlement at a final approval hearing, “at this junction, [the Court] is not obligated to, nor could it reasonable, undertake a full and complete fairness review.”¹⁶

“In making a preliminary assessment of the fairness of the proposed settlement agreement, the Court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.”¹⁷ This assessment should take into account the uncertainty of outcome in litigation and the cost of continued litigation.¹⁸ The Court should not second guess the settlement terms, and should presume that the settlement is fair given the extensive negotiations of experienced counsel.¹⁹

A. The Proposed Settlement Is the Result of Arm’s-Length Negotiations between Experienced Counsel and Conducted by an Independent Mediator and the Court

This Court is aware of the vigorous representation by Visionworks’ counsel and Plaintiffs’ counsel from the extensive briefing and in-chambers conferences, as well as the dockets from the Illinois court and the Ohio state court. The Court has also been advised of the two day-long mediation sessions—one conducted after substantial discovery, the other after

¹⁵ *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

¹⁶ *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 379 (N.D. Ohio 2001).

¹⁷ *Id.* (quoting *Officers for Justice v. Civil Serv. Comm’n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), *cert denied*, 459 U.S. 1217 (1983)).

¹⁸ *See Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 7 (N.D. Ohio 1982).

¹⁹ *See Officers for Justice* at 625; *Vukovich* at 923; *see also Armstrong v. Bd. of School Directors of City of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980).

discovery had been completed and a number of important motions decided—before an experienced and well-respected mediator. And, of course, the Court itself facilitated the negotiations that resulted in the Proposed Settlement.

Under such circumstances, “it is beyond dispute that the settlement was the result of arms-length negotiation, free of collusion or fraud, conducted by experienced counsel for all parties, and achieved through formal mediation conducted by a neutral mediator” on two occasions and by the Court on the third.²⁰ Indeed, “[t]he participation of an independent mediator”—not to mention the Court—“virtually insures that the negotiations were conducted at arm’s length and without collusion between the parties.”²¹

B. The Proposed Settlement Is Fair, Reasonable, and Adequate

Fairness involves “a comparative analysis of the treatment of class members vis-à-vis each other.” *Reasonableness* involves “an analysis of the class allegations and claims and the responsiveness of the settlement to those claims.” And *adequacy* involves “a comparison of the relief granted relative to what class members might have obtained without using the class action process.”²²

The Proposed Settlement is fair because it treats all class members the same: each is entitled to receive up to \$100, and any reduction in that amount (due to fees, costs, and an extremely high claims rate) will be borne equally by all class members who submit claims.

The Proposed Settlement is reasonable because it compromises claims that were in dispute and at risk in exchange for a recovery that is 62.5% of Plaintiffs’ damages theory. As an initial matter, neither the Illinois court nor this Court had certified a class, but Plaintiffs were able to achieve a class-wide settlement. Moreover, the claims in Illinois and in this Court were

²⁰ *Swigart v. Fifth Third Bank*, 2014 U.S. Dist. LEXIS 94450, at *6 (S.D. Ohio July 11, 2014).

²¹ *Bert v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 111711, at *2 (S.D. Ohio Oct. 23, 2008).

²² Manual for Complex Litigation § 21.62 (4th ed. 2004).

both subject to dispositive motions regarding whether *any* damages could be recovered. As this Court explained,

[There is a] disagreement among state and federal courts addressing consumer protection laws. Some courts maintain that consumers are entitled to the benefit-of-the-bargain when they purchase artificially inflated items that are subsequently discounted or offered for buy-one-get-one free. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013).... Other courts disagree with this approach, finding that because the consumer willingly paid the price, regardless of how it was inflated and then discounted, there are no actual damages. *See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 740 (7th Cir. 2014).²³

The Sixth Circuit has not decided this question, this Court had not yet done so (but had given Visionworks leave to file a dispositive motion raising it), and the Illinois court would have been bound to follow or somehow distinguish the Seventh Circuit law on the point.²⁴ Thus, the ultimate viability of the claims was in serious question, and fell between two opposing lines of contradictory case law, which made success *uncertain*—and appeals, perhaps in both Illinois and Ohio, *near-certain*, which, if Plaintiffs were success at the trial court level, would have delayed any recovery to class members for months and probably years. Therefore, Plaintiffs' accepting a compromise of their claims that returned a substantial recovery on their damage theory *without further expense or delay* was well within the range of reasonable settlements.

The Proposed Settlement is adequate because “[i]t is beyond question that, due to the small amounts of damages allegedly suffered by individual class members [*i.e.*, an average of \$160], maintenance of this case as a class action provides the only feasible procedural mechanism for the proposed class to pursue their claims.”²⁵

Therefore, the Court should grant preliminary approval over the Proposed Settlement.

²³ *Poteat* Opinion and Order (Doc. 42), p. 11.

²⁴ *See Lenart* Plaintiff's Opposition to Defendant's Motion to Dismiss (Doc. 35), pp. 3-12 (setting forth arguments to distinguish *Camasta* and similar cases).

²⁵ *Pfaff v. Whole Foods Market Grp. Inc.*, 2010 U.S. Dist. LEXIS 104784, at *18-19 (N.D. Ohio Sept. 29, 2010) (Gwin, *J.*).

IV. ARGUMENT IN SUPPORT OF CERTIFICATION OF THE SETTLEMENT CLASS

“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”²⁶ This policy is at work when considering certification of a settlement class, since the law favors the settlement of such actions.²⁷

“Class certification is appropriate if the district court finds ... that the requirement of Rule 23 have been met.”²⁸ Rule 23(a) establishes four requirements: (1) numerous class members, (2) who have a question of law or fact in common, (3) which is being pursued by a representative whose claims are typical of those of the class members, and (4) who will adequately protect the interests of the other class members.²⁹

And Rule 23(b)(3) establishes two additional requirements: (1) “that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof,”³⁰ and (2) “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”³¹ Because Plaintiffs are seeking certification of a settlement class, such issues as reliance and damages—which are commonly raised when a plaintiff seeks certification of a class for litigation purposes, and which go to manageability—are not a concern in this context.

²⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

²⁷ *See Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991).

²⁸ *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015).

²⁹ *In re Whirlpool Corp. Front-Loading Washing Prods. Liab. Litig.*, 722 F.3d 838, 849 (6th Cir. 2013).

³⁰ *Bridging Communities, Inc. v. Gamble Plumbing & Heating, Inc.*, 2016 U.S. App. LEXIS 22297, at *9-10 (6th Cir. Dec. 15, 2016) (quoting *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007)).

³¹ FED. R. CIV. P. 23(b)(3).

Instead, "[t]he Rule 23(b)(3) predominance inquiry tests whether [the] proposed class[is] sufficiently cohesive to warrant adjudication by representation."³²

A. The Settlement Classes Are Ascertainable For Present Purposes

The Parties have defined the Settlement Classes as follows:

Ohio Settlement Class. All consumers who completed a Buy-One-Get-One-Free transaction at a Visionworks store located in Ohio from June 25, 2012, through September 15, 2016.

Illinois Settlement Class. All consumers who completed a Buy-One-Get-One-Free transaction at a Visionworks store located in Illinois from June 8, 2013, through September 15, 2016.

Each of these definitions provide “objective criteria” by which the Court can determine whether a person is included or excluded from the Settlement Classes—indeed, Visionworks has sales records identifying each qualifying consumer—such that the classes are properly defined for purposes of certifying a settlement class and administering the proposed settlement.³³

B. The Settlement Classes Are Sufficiently Numerous and Joinder Is Impracticable For Present Purposes

The first requirement of Rule 23(a)—numerosity—“requires that the class be ‘so numerous that joinder of all members is impracticable.’”³⁴

There are over 100,000 qualifying BOGO transactions between the two states within the relevant time periods, representing tens of thousands of individual class members (*i.e.*, some class members may have made multiple BOGO transactions). This is sufficiently large number

³² *Amchem Prods., Inc. v. Winsor*, 521 U.S. 591, 623 (1997). Defendant has stated that it does not waive the right to object to class certification in a litigation context de novo in the event the proposed settlement is terminated for any reason. (See Settlement Agreement §§ [TK] (reciting that fact).)

³³ *Cf. Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012).

³⁴ *Amos v. PPG Indus., Inc.*, Case No. 2:05-cv-70, 2015 WL 4881459, at *6 (quoting Fed. R. Civ. P. 23(a)(1) and certifying, for settlement purposes, a class of “more than 1,600 individuals”).

of geographically dispersed persons to satisfy Rule 23(a)(1) for purposes of certifying the settlement class.³⁵

C. There Is a Question of Law or Fact Common to the Classes

The second requirement of Rule 23(a)—commonality—is satisfied where “there are questions of law or fact common to the class.”³⁶ This requires a common contention that is of such a nature that it is capable of class-wide resolution, meaning that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”³⁷ “The commonality test is qualitative rather than quantitative, that is, there need only be a single issue common to all members of the class.”³⁸ In *Wal-Mart*, the U.S. Supreme Court clarified that Rule 23(a)'s commonality requirement turns on “the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.”³⁹ And “[s]ettlement” can “provide[] an answer to the common issues raised by class members, regardless of specific types of injury suffered by the alleged violations.”⁴⁰

The proposed settlement class satisfies the commonality requirement of Rule 23(a). Plaintiffs allege that Visionworks made its BOGO offer continuously, and therefore they have identified a factual question common to all members of the proposed settlement class (how often did the company make its BOGO offer). And that common factual question raises legal

³⁵ See *Taylor v. CSX Transportation, Inc.*, 264 F.R.D. 281, 288 (N.D. Ohio 2007) (“it is generally accepted that a class of 40 or more members is sufficient”).

³⁶ Fed. R. Civ. P. 23(a)(2).

³⁷ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

³⁸ *In re Inter-Op*, 204 F.R.D. at 340 (internal quotation marks and citation omitted).

³⁹ 131 S. Ct. 2541, 2551 (2011) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)) (emphasis in original).

⁴⁰ *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548(RLE), 2012 WL 1320124, at *3 (S.D.N.Y. Apr. 16, 2012) (certifying settlement class and granting final approval of a class settlement).

questions common to the proposed settlement class as well: can a consumer recover actual damages if he willingly paid the retail price, regardless of whether it was inflated.

Thus for purposes of certifying the proposed settlement class, the commonality standard is met.

D. Plaintiffs' Claims Are Typical of the Classes' Claims For Present Purposes

“Typicality [is] liberally construed [and] does not mean identical,” and “is met if the class members’ claims are fairly encompassed by the named plaintiff’s claims.”⁴¹ A claim is typical if it “arise[s] from the same course of conduct and is predicated on the same legal theories as the claims of the Settlement Class.”⁴²

Ms. Poteat’s consumer-protection claim is typical of the proposed Ohio settlement class’s consumer-protection claim because all such claims arise from the same alleged practice—Visionworks’ allegedly continuous and repeated BOGO offers—and are predicated on the same legal theory—a *per se* violation of the Ohio Consumer Sales Practices Act.

Similarly, Ms. Lenart’s consumer-protection claim is typical of the proposed Illinois settlement class’s consumer protection claim because all such claims arise from the same alleged practice—Visionworks’ alleged use of BOGO offers for more than six months during a 12-month period—and are predicated on the same legal theory—a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (which refers to a Federal Trade Commission rule regarding such offers).

E. Plaintiffs Are Adequate Class Representatives For Present Purposes

The fourth element of Rule 23(a)—adequacy—“requires the representative parties will fairly and adequately protect the interests of the class. Due process demands this inasmuch as a

⁴¹ *Swigart*, 288 F.R.D. at 184; *In re Whirlpool Front-Loading Washing Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013).

⁴² *Amos*, 2015 WL 4881459, at *7; *see also Beattie v. CentryTel, Inc.*, 511 F.3d 554, 560-61 (6th Cir. 2007).

final judgment will bind all class members. To establish adequacy of representation, plaintiffs must satisfy two elements. First, the representatives must have interests common with the unnamed members of the class, Second, it must be shown that the representatives—through qualified counsel—will vigorously prosecute the interests of the class.”⁴³

Ms. Lenart and Ms. Poteat are both members of their respective classes, have the same interest in recovering a portion of the purchase price of the BOGO transaction, and have no conflicts with the class and have pursued and approved of a class-wide settlement which benefits all class members equally.

And Plaintiffs’ counsel are experienced in consumer class-action litigation⁴⁴ and vigorously litigated the case (in multiple forums) over a number of years and at substantial time and expense. They were able to negotiate a substantial settlement in favor of the class as a whole. Indeed, they have “worked diligently to identify and investigate the potential claims in this matter, [have] shown an eagerness to prosecute the case, [including] time-consuming discovery and extensive briefing, [and] well briefed the matters before the Court,” which justifies their appointment as lead counsel for the Settlement Class.⁴⁵

F. Common Questions Predominate For Present Purposes

Because Plaintiffs seek certification of a settlement class, the focus of the predominance inquiry here is whether the proposed settlement class is sufficiently cohesive to warrant adjudication by representation.⁴⁶ This Court “need not inquire whether the case, if tried, would present intractable management problems,” and “individual issues relating to causation, injury,

⁴³ *Amos*, 2015 WL 4881459, at *7 (internal quotation marks and citations omitted).

⁴⁴ *See* Firm Resumes and Attorney CVs submitted with the Legando Declaration (Ex. 5).

⁴⁵ *Jenkins v. Hyundai Motor Fin. Co.*, 2008 U.S. Dist. LEXIS 23073, at *31 (S.D. Ohio March 24, 2008).

⁴⁶ *See Amchem*, 521 U.S. at 623.

and damage also disappear because the settlement's objective criteria provide for an objective compensation scheme."⁴⁷

At root, Rule 23(b)(3)'s predominance requirement "is meant to help courts identify cases in which aggregate treatment would be efficient."⁴⁸ A settlement class under Rule 23(b)(3) is "appropriate whenever the actual interests of the parties can be served best by settling their differences in a single action"; "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."⁴⁹

Here, it is most efficient to resolve the claims of the settlement class through a class settlement. Each settlement class member purchased eyeglasses from Visionworks through a BOGO promotion, and each member's claim is fundamentally about that promotion and how often it was offered. In other words, "the common issues that preexisted the proposed settlement -- involving a common [purchase], defendant, and course of conduct -- when considered in light of the proposed settlement, predominate over any individual issues between class members."⁵⁰

G. Class Litigation Is Superior to Individual Adjudications For Present Purposes

To determine whether a class action is a superior vehicle for adjudicating common issues, the district court should consider: (1) the interest of members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by members of the class; (3) the desirability of

⁴⁷ *Id.* at 620; *In re Inter-Op*, 204 F.R.D. at 347.

⁴⁸ 2 William B. Rubenstein, *Newberg on Class Actions* § 4:49 (5th ed. 2013).

⁴⁹ *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

⁵⁰ *In re Inter-Op*, 204 F.R.D. at 347.

concentrating the litigation of the claims in a single forum; and (4) any likely difficulties in managing the case as a class action.⁵¹ "In the settlement context, however, the latter consideration is not relevant."⁵²

Here, a class action is superior to other available methods of adjudication for precisely these reasons. Because Visionworks allegedly engaged in exactly the same conduct with respect to every member of the proposed settlement class, and this is a proposed settlement class aimed at settling the claims of the proposed settlement class, a class action is by far a superior method of adjudicating this dispute. Individual class members have little incentive to control the prosecution of separate individual actions because the time and expense associated with such litigation would easily exceed the potential individual recovery, especially when compared with the relief available under the proposed settlement presently before the Court (but those who wish to do so would be able to opt out of the proposed settlement class).

Consequently, the proposed settlement class satisfies Rule 23(b)(3). And because it satisfies Rule 23(a) as well, the proposed Settlement Classes should be certified for settlement purposes only.

V. THE NOTICE, NOTICE PLAN, APPOINTMENT OF THE CLAIMS ADMINISTRATOR & ARGUMENTS IN SUPPORT THEREOF

A. Form of Notice

The proposed Notices "inform the class members of the nature of the pending action[s], the general terms of the settlement, that complete and detailed information is available ... that any class member may appear and be heard at the hearing," and "class members' right to exclude themselves and the results of failure to do so."⁵³ Indeed, the Notices advise class members of

⁵¹ FED. R. CIV. P. 23(b)(3).

⁵² *In re Inter-Op*, 204 F.R.D. at 347 (citing *Amchem*, 521 U.S. at 620).

⁵³ *See Gooch v. Life Investors Ins. Co. of American*, 672 F.3d 402, 423 (6th Cir. 2012).

their rights to object, opt-out, or to participate in the settlement by filing a claim form, and the Notice provides deadlines and instructions for each option. Therefore, the Notices are proper.

The Notices will be sent in the best form practicable: a double-sided postcard with a tear-off claims form, which will be sent by regular mail, postage prepaid, to the addresses for each class member maintained by Visionworks in its electronic customer databases.⁵⁴ If an address change notification is received, a second postcard will be sent.⁵⁵ The Parties have also agreed to the establishment of a website containing information about the Settlement, which will include the Notice, the Preliminary Approval Order and other relevant orders from the Court, and contact information for Plaintiff's counsel and the Claims Administrator.⁵⁶

B. Timing of Notice and Claims Period

Within 7 days after the entry of a Preliminary Approval Order, Visionworks will provide the Claims Administrator with the class list.⁵⁷ Within 30 days after the entry of a Preliminary Approval Order, the Claims Administrator will mail the Notices.⁵⁸ Class members will have 90 days from the mailing of the Notices to submit Claim Forms.⁵⁹ Upon completion of the verification process, production of lists of Claims, Opt-Outs, and the filing of any timely Objections, the Parties will request the Court schedule a Final Approval Hearing.

This timeline affords class members ample opportunity to submit claims, to opt-out, or to lodge objections.⁶⁰

⁵⁴ See Settlement Agreement (Ex. 1) at §§ 4.1.1, 4.2.2.

⁵⁵ *Id.* at § 4.2.2.

⁵⁶ *Id.* at § 4.2.3.

⁵⁷ *Id.* at § 4.1.1.

⁵⁸ *Id.* at § 4.2.2.

⁵⁹ *Id.* at § 5.1.

⁶⁰ *Cf. In re Whirpool*, 2016 U.S. Dist. LEXIS 174542 at *22 (N.D. Ohio May 11, 2016) (90-day period sufficient even though direct mail notice to many class members would not be possible).

C. The Claims Administrator

After the solicitation of various bids, the Parties agreed on the selection of KCC, LLC, a national settlement administration firm, to serve as the Settlement Claims Administrator.⁶¹ KCC is a well-established, competent, and respected firm in the industry and should therefore be appointed as the Claims Administrator for notice and claims administration related to this settlement, as set forth in the Notice Plan (Section IV of the Settlement Agreement).

VI. CONCLUSION

Therefore, the Court should (1) grant preliminary approval of the Proposed Settlement; (2) conditionally certify the proposed Settlement Classes for settlement purposes only; (3) appoint the named Plaintiffs as Class Representatives of the respective Settlement Classes; (4) appoint Plaintiffs' counsel as Settlement Class Counsel; (5) approve the form of Notice and Notice Plan negotiated by the Parties; (6) appoint KCC, LLC, as the Claims Administrator and direct the company to disseminate notice and process claims as set forth in the Parties' Settlement Agreement; and (7) direct the Parties to submit a Joint Status Report at the close of the Claims Period and to request the scheduling of a Final Approval of Hearing in such report.

Respectfully submitted,

s/ Drew Legando

Drew Legando (0084209)
Jack Landskroner (0059227)
Tom Merriman (0040906)
Edward S. Jerse (0013155)
LANDSKRONER GRIECO MERRIMAN LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113
T. (216) 522-9000
F. (216) 522-9007
E. drew@lgmlegal.com
jack@lgmlegal.com
tom@lgmlegal.com
ed.jerse@lgmlegal.com

⁶¹ See Settlement Agreement (Ex.1) at § 3.3.

Mark Schlachet (0009881)
3515 Severn Road
Cleveland, Ohio 44118
T. (216) 225-7559
F. (216) 514-6406
E. markschlachet@me.com

Douglas M. Werman
Marueen Salas
WERMAN SALAS P.C.
77 W. Washington Street, Suite 1402
Chicago, Illinois 60602
T. (312) 419-1008
F. (312) 419-1025
E. dwerman@fshalaw.com
msalas@fshalaw.com

Counsel for Plaintiffs

PROOF OF SERVICE

A copy of this document was served by the Court's ECF System on counsel of record on January 9, 2017, pursuant to Fed. R. Civ. P. 5(b)(2)(E).

Signed by,

s/ Drew Legando

Drew Legando (0084209)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“**Settlement Agreement**”) is made and entered into by and between (1) Plaintiffs Karen Poteat and Cheryl Lenart (collectively, “**Plaintiffs**”; each a “**Plaintiff**”), on behalf of themselves individually and as representatives of the proposed Settlement Classes (defined below); and (2) Defendant Visionworks of America, Inc. (“**Visionworks**”). Plaintiffs and Visionworks are collectively referred to as the “**Parties**,” each of which is a “**Party**.” This Settlement Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle all released rights and claims to the extent set forth below, subject to the terms and conditions set forth herein.

RECITALS

WHEREAS, on June 24, 2014, Elliott Graiser (“**Graiser**”) commenced the putative class action lawsuit styled *Graiser v. Visionworks of America, Inc.*, Case No. CV-14-828880, filed in the Cuyahoga County Court of Common Pleas, which was ultimately removed to the United States District Court for the Northern District of Ohio (the “**Court**”) on November 10, 2015, and assigned Case No. 1:15-cv-2306 (the “**Ohio Action**”).

WHEREAS, on September 12, 2016, a second amended complaint was filed adding Karen Poteat as a new putative class representative in the Ohio Action and Graiser filed a notice of voluntary dismissal of his claims in the Ohio Action, so that the Ohio Action is now styled as *Poteat v. Visionworks of America, Inc.*; and

WHEREAS, on June 7, 2016, Cheryl Lenart commenced the putative class action lawsuit styled *Lenart v. Visionworks of America, Inc.*, Case No. 1:16-cv-05935, in the United States District Court for the Northern District of Illinois (the “**Illinois Action**”); and

WHEREAS, on September 15, 2016, the parties to the Ohio Action, including Settlement Class Counsel, participated in a status conference in the Ohio Action during which they engaged

in arm's-length settlement discussions with the assistance of the Court and, as a result of those settlement discussions, agreed to the structure of this settlement; and

WHEREAS, Settlement Class Counsel (defined below)—as counsel for Plaintiffs—have undertaken substantial investigation and discovery in the Litigation (defined below), including review of thousands of pages of documents produced by Visionworks, retention of and consultation with an expert, interviews with numerous consumers, creation and review of analyses of documents produced by Visionworks, defending the deposition of Graiser, and taking the deposition of Visionworks pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, through a senior representative designated under that rule; and

WHEREAS, on December 16, 2014, and October 29, 2015, Graiser and Visionworks engaged in two separate day-long mediations before James McMonagle, Esq., which were not successful in resolving the matter; and

WHEREAS, on September 28, 2016, the court in the Illinois Action granted the Parties' joint motion to transfer the Illinois Action to the United States District Court for the Northern District of Ohio, where it has been assigned Case No. 1:16-cv-2505; and

WHEREAS, the Parties are willing to enter into this Settlement Agreement to settle the claims of the Settlement Classes because of, among other reasons, the attendant expense, risks, difficulties, delays, and uncertainties of continued litigation; and

WHEREAS, Plaintiffs and Settlement Class Counsel have concluded, based on their investigation, that this Settlement Agreement provides fair, reasonable, and adequate relief to the Settlement Classes, and is in the best interest of the Settlement Classes, after having considered

(a) the benefits that the Settlement Classes will receive from the settlement of the Litigation, (b) the attendant risks of continuing the Litigation, and (c) the desirability of permitting the settlement to be consummated on the terms set forth below, subject to approval of the Court; and

WHEREAS, Visionworks avers that it has acted lawfully and in compliance with all applicable, statutes, regulations, and laws; denies all claims asserted against it in the Litigation; denies that class certification would be appropriate if the cases were litigated rather than settled; denies all allegations of wrongdoing and liability; and denies that anyone was harmed by the alleged relevant conduct; but nevertheless desires to settle the Released Claims (defined below) on the terms and conditions set forth in this Settlement Agreement solely for the purpose of avoiding the burden, expense, risks and uncertainty of continuing the proceedings in the Litigation, without in any way acknowledging any wrongdoing, fault, liability, or damages to Plaintiffs or the Settlement Classes or conceding that it engaged in the alleged conduct or the truth of any other allegations in any complaint filed in the Ohio Action or in the Illinois Action;

NOW THEREFORE, IT IS AGREED, by and among the Parties, that all Released Claims shall be fully, finally, and forever compromised, settled, and released as to all the Released Persons and the Litigation shall be dismissed with prejudice on the merits, on the terms set forth below, subject to the approval of the Court.

The recitals stated above are true and accurate, and are hereby made a part of the Settlement Agreement.

I. DEFINITIONS

As used in this Settlement Agreement, the terms defined below or in the preceding RECITALS or first paragraph of this Settlement Agreement shall have the meanings assigned to them when capitalized in the same fashion.

- 1.1. “**Attorneys’ Fees**” means the attorneys’ fees and expenses applied for by Settlement Class Counsel under this Settlement Agreement and approved by the Court.
- 1.2. “**Approved Claimant**” means a Settlement Class Member who timely submits an approved Claim Form.
- 1.3. “**BOGO Transaction**” means a transaction in which a consumer purchased two pairs of eyeglasses from Visionworks under a “Buy One, Get One Free” promotion for which the consumer paid the list price for one complete pair of eyeglasses (frames and lenses) (a) from a Visionworks store in Ohio from June 25, 2012, through September 15, 2016, or (b) from a Visionworks store in Illinois from June 8, 2013, through September 15, 2016. For purposes of clarity, only consumers who paid money to Visionworks (in the form of cash, check, money order, credit card, or like instrument) are considered to have engaged in a BOGO Transaction.
- 1.4. “**Claimant**” means a Settlement Class Member who submits a Claim Form.
- 1.5. “**Claim Deadline**” means 11:59 p.m. Eastern Time on the 90th day from the Notice Date.
- 1.6. “**Claim Form**” means the documents attached hereto as Exhibits C-1 and C-2.
- 1.7. “**Class Settlement Payment**” means a payment to a Settlement Class Member as set forth in Section VII of this Settlement Agreement.
- 1.8. “**Defense Counsel**” means Ronald D. Holman, II, David H. Wallace, and Michael J. Zbiegien, Jr. of Taft Settinius & Hollister LLP (in the Ohio Action) and Matthew R. Kipp, Jennifer H. Berman, James R. Carroll, and David S. Clancy of Skadden, Arps, Slate, Meagher & Flom LLP (in the Illinois Action).
- 1.9. “**Effective Date**” is the date on which the Final Approval Order and the Court’s order regarding Attorneys’ Fees have all become final, and is the first business day after (a) the time provided in the applicable rules of procedure within which an appeal may be filed has lapsed if

no appeal of either the Final Approval Order or the Court's order regarding Attorneys' Fees has been filed, or (b) if one or more timely appeals have been filed, all such appeals are finally resolved, with no possibility of further appellate review, resulting in final judicial approval of this Settlement. For purposes of this definition, the term "appeal" includes proceedings for a writ of certiorari.

1.10. Intentionally Left Blank.

1.11. "**Financial Institution**" means a federally insured financial institution selected by Settlement Class Counsel, subject to Court approval.

1.12. "**Final Approval**" means the approval of the Settlement Agreement by the Court at or after the Final Approval Hearing, and entry on the Court's docket of the Final Approval Order.

1.13. "**Final Approval Hearing**" means the hearing at which the Court will consider and finally decide whether to approve this settlement, enter final judgment, and make such other rulings as are contemplated by this Settlement Agreement. The Final Approval Hearing shall not be scheduled for a date less than 90 days following the mailing of the notice mandated by 28 U.S.C. § 1715.

1.14. "**Final Approval Order**" means an order and judgment entered by the Court, giving Final Approval of the Settlement, dismissing the Litigation with prejudice, and entering a judgment in accordance with the terms set forth in this Settlement Agreement.

1.15. "**Gross Settlement Amount**" means the sum of the Illinois Settlement Payments and the Ohio Settlement Payments, and shall not exceed \$4,209,280.

1.16. "**ICFA**" means the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq.

- 1.17. “**Illinois Settlement Class**” means all consumers who completed a BOGO Transaction from a Visionworks store located in Illinois from June 8, 2013, through September 15, 2016.
- 1.18. “**Litigation**” means the Ohio Action and the Illinois Action.
- 1.19. “**Mail Notice**” means the notice provided by Section 4.2.2.
- 1.20. “**Notice Date**” means the date on which the Settlement Administrator first mails the Mail Notice, which date will be no later than 30 days following Preliminary Approval.
- 1.21. “**Notice Plan**” means the plan for disseminating notice to Settlement Class Members, as described in Sections 4.1 and 4.2.
- 1.22. “**Objection Deadline**” means the date 60 days after the Notice Date.
- 1.23. “**OCSPA**” means the Ohio Consumer Sales Practices Act, Ohio R.C. 1345.01, et seq. and related administrative regulations.
- 1.24. “**Ohio Settlement Class**” means all consumers who completed a BOGO Transaction from a Visionworks store located in Ohio from June 25, 2012, through September 15, 2016.
- 1.25. “**Opt Out Deadline**” means the date 60 days after the Notice Date.
- 1.26. “**Preliminary Approval**” means the preliminary approval of the Settlement by the Court, and entry on the Court’s docket of the Preliminary Approval Order.
- 1.27 “**Preliminary Approval Order**” means the order granting preliminary approval of the Settlement Agreement, conditional certification of the Settlement Class, and approval of the method and content of notice to the Settlement Class.
- 1.28. “**Released Claims**” means those claims released as set forth in Section XI below.
- 1.29. “**Released Parties**” means Visionworks, its parents, subsidiaries, and affiliates, and the present, former and future officers, directors, partners, employees, agents, attorneys, servants, members, member entities, shareholders, predecessors, successors, affiliates, subsidiaries,

parents, representatives, trustees, principals, insurers, and assigns of each, individually, jointly, and severally.

1.30. “**Settlement**” means the agreement between Plaintiffs, on behalf of themselves and as proposed representatives of the Settlement Classes, and Visionworks to settle and compromise Plaintiffs’ and the Settlement Class Members’ claims in the Litigation fully, finally, and forever, on the terms set forth in this Settlement Agreement.

1.31. “**Settlement Administrator**” shall mean the administrator for the Settlement Agreement that Settlement Class Counsel will identify and propose as described in Section 3.3.

1.32. “**Settlement Agreement**” means this Settlement Agreement and Release.

1.33. “**Settlement Classes**” means the Illinois Settlement Class and the Ohio Settlement Class.

1.34. “**Settlement Class Counsel**” means Drew Legando, Jack Landskroner, Tom Merriman, and Ed Jerse of Landskroner Grieco Merriman LLC; Mark Schlachet; and Douglas Werman and Maureen Salas of Werman Salas P.C.

1.35. “**Settlement Class Member**” means a person who is a member of either the Illinois Settlement Class or the Ohio Settlement Class. Settlement Class Member shall exclude (a) all persons who would otherwise qualify for membership in the “Settlement Classes” but for the fact that such person previously has released all claims as to Visionworks or received a full refund or store credit from Visionworks for all BOGO Transactions within the period covered by the Settlement Classes; (b) Visionworks’ officers, directors, and employees; (c) Visionworks’ attorneys; (d) Plaintiffs’ attorneys; (e) any judge who has presided over either mediation or disposition of this case and the members of his or her immediate family; and (f) James McMonagle, Esq.

1.36. “**Settlement Fund**” means the fund established pursuant to Section X.

1.37. “**Settlement Website**” means the internet website established and maintained by the Settlement Administrator for purposes of facilitating notice to, and communicating with, the Settlement Class and for receipt of online claims.

1.38. “**Taxes**” means the taxes, interest, or penalties described in Section 10.2.2.

1.39. “**Tax Expenses**” means the expenses described in Section 10.2.3.

II. NO ADMISSION OF LIABILITY OR ELEMENTS OF CLASS CERTIFICATION

2.1. Visionworks’ Denial of Wrongdoing or Liability

This Settlement Agreement, whether or not consummated, and any actions or proceedings taken pursuant to this Settlement Agreement, is for settlement purposes only and entered into solely for the purpose of avoiding possible future expenses, burdens, or distractions of litigation, and Visionworks and the Released Parties specifically deny any and all wrongdoing. Visionworks has asserted and continues to assert that it has complied with all applicable statutes, regulations and laws. Further, Visionworks has asserted and continues to assert many defenses in the Litigation, and Visionworks and the Released Parties specifically and expressly deny any and all fault, wrongdoing or liability in connection with any claims which have been made or could have been made, or which are the subject matter of, arise from, or are connected directly or indirectly, with or related in any way to the Litigation, including but not limited to any violations of any federal or state law (whether statutory or common law), rule or regulation, and Visionworks and the Released Parties deny that any violation of any such law, rule or regulation has ever occurred, as well as the validity of each of the claims and prayers for relief asserted in the Litigation. The Parties expressly acknowledge and agree that neither the fact of, nor any provision contained in, this Settlement Agreement (whether or not it becomes final), nor any of the implementing documents or actions taken under them, shall constitute, be construed as, or be admissible in evidence as, any admission for or against Visionworks, the

Released Parties, or Plaintiffs of the validity of any position, any claim, any status, or any fact alleged in the Litigation or any fault, wrongdoing, violation of law, or liability of any kind on the part of Visionworks, or any admission by any Party of any claim or allegation made in any action or proceeding by or against such Party. This Settlement Agreement, any document referred to herein, any action taken to carry out this Settlement Agreement and/or the Settlement, Visionworks' willingness to enter into this Settlement Agreement, or any or all negotiations, communications, and discussions associated with the Settlement (a) shall not be admissible in any action or proceeding for any reason, other than an action to enforce the terms hereof; and (b) shall not be described as, construed as, offered, or received against the Released Parties as evidence of and/or deemed to be evidence of any presumption, concession, or admission by any of the Released Parties of the truth of any fact alleged by Plaintiffs; the validity of any claim that has been or could have been asserted in the Litigation or in any other litigation; the appropriateness of certifying a non-settlement class; the deficiency of any defense that has been or could have been asserted in the Litigation or in any other litigation; or any liability, negligence, fault, or wrongdoing of any of the Released Parties.

2.2. No Admission of Elements of Class Certification

2.2.1. Visionworks denies that a class should be certified other than for purposes of this Settlement and reserves its rights to contest any class certification motion. Visionworks contends that the Litigation could not be certified as a class action for trial purposes under Federal Rule of Civil Procedure 23. In the event that the Settlement Agreement does not become final for any reason, Visionworks reserves its rights to oppose certification of any plaintiff's claim in future proceedings. In such circumstances, this Settlement Agreement shall not be described as, construed as, offered, or received against any of the Released Parties as res

judicata, issue preclusion, law of the case, estoppel, or any other legal or equitable theory as to the propriety of certification of any class under Rule 23, either Plaintiff's affirmatively demonstrating her compliance with Rule 23, or the Court's satisfaction after rigorous analysis that Rule 23 has been satisfied.

2.2.2. The certification of the Settlement Classes shall be binding only with respect to the settlement of the Litigation. Should the Court not enter the Final Approval Order or the Effective Date not occur, the certification of the Settlement Class shall be immediately void, the Settlement Class should be automatically decertified, the Litigation shall proceed as though the Settlement Classes had never been certified, in which case this Settlement Agreement shall not constitute, be construed as, or be admissible in evidence as, an admission or be used for any purpose whatsoever in the Litigation or any other pending or future action.

III. MOTION FOR PRELIMINARY APPROVAL

3.1. On or before January 5, 2017, Plaintiffs shall file a Motion for entry of the Preliminary Approval Order that seeks entry of an order that would, for settlement purposes only:

(a) consolidate the Litigation under *Poteat v. Visionworks of America, Inc.*, Case No. 1:15-cv-2306 (N.D. Ohio); (b) conditionally certify a settlement class under Federal Rule of Civil Procedure 23 composed of the Settlement Class Members, appointing Plaintiffs as the representatives of that class and Settlement Class Counsel as counsel under Rule 23(g); (c) preliminarily approve the proposed Settlement Agreement; (d) approve the proposed notices to the Settlement Classes in a form substantially similar to those attached hereto as Exhibits A and B; and (e) appoint the Settlement Administrator. The motion for entry of the Preliminary Approval Order shall include (i) a proposed form of Preliminary Approval Order; and (ii) a proposed form of Mail Notice, the form of each of which shall have been agreed to among the

Parties. Visionworks may, but is not required to, file a brief in support of the motion, within one day of the filing of that motion.

3.2. For purposes of this Settlement only, Plaintiffs and Visionworks stipulate to the certification of the Settlement Classes, which is contingent upon the Court's Final Approval of the Settlement and the occurrence of the Effective Date.

3.3. Settlement Class Counsel will cause to be hired KCC, LLC as the Settlement Administrator, subject to approval by the Court.

IV. NOTICE PLAN

4.1. Preparation and Production of List of Identified Settlement Class Members

4.1.1. Visionworks agrees to use reasonable efforts, based on information in its internal records, to provide the Settlement Administrator, within 7 days after entry of the Preliminary Approval Order, a list of Settlement Class Members in the form and with the identifiers required by the Settlement Administrator. The class list shall include any electronic mail address of any Settlement Class Member known to Visionworks through its ordinary business processes.

Visionworks does not agree to and shall not be required to perform any other searches to locate Settlement Class Member information outside of the information maintained by Visionworks in its electronic records.

4.1.2. The class lists shall be used solely for the purpose of effectuating the Settlement Agreement and for no other purpose. The Settlement Administrator (and any person retained by the Settlement Administrator) shall sign a confidentiality agreement in a form agreed to by Defense Counsel and Settlement Class Counsel. The confidentiality agreement will provide that Defense Counsel, Settlement Class Counsel, and the Settlement Administrator (and any person retained by the Settlement Administrator) shall treat as confidential the names, addresses and all other identifying information concerning Settlement Class Members provided as or with the class

lists. The confidentiality agreement will further provide that Defense Counsel, Settlement Class Counsel, and the Settlement Administrator (and any person retained by Defense Counsel, Settlement Class Counsel, and/or Settlement Administrator) shall use the class lists or any other information provided by or on behalf of Visionworks only for purposes of fulfilling the duties and responsibilities provided for under this Settlement Agreement, and shall not disclose the class lists, in whole or in part, to any other person without prior written approval by Visionworks.

4.2. Notice Process

4.2.1. For purposes of providing court-approved class notice and establishing that the best practicable notice has been given, the provision of class notice will be accomplished in accordance with the following provisions.

4.2.2. Mail Notice for Settlement Class Members

No later than 30 days following Preliminary Approval, the Settlement Administrator shall cause Mail Notice, in a form substantially similar to that attached hereto as Exhibit A for each Ohio Settlement Class Member and Exhibit B for each Illinois Settlement Class Member, to be sent via first-class U.S. Mail, postage prepaid, requesting either forwarding service or change service. For up to 45 days following the mailing of these notices, the Settlement Administrator will re-mail one time only the notices via standard U.S. Mail, postage prepaid, to updated addresses of Settlement Class Members to the extent that the Settlement Administrator receives address change notifications from the U.S. Postal Service. If no forwarding address is available, the Settlement Administrator shall take reasonable steps to locate the Settlement Class Member for purpose of securing delivery. Any Mail Notice returned to the Settlement Administrator a second time as not deliverable and not forwarded will not be re-sent. Visionworks will pay the

costs of printing and mailing the Mail Notice. Not later than 20 days before the Final Approval Hearing, the Settlement Administrator shall cause proof of the mailing of the Mail Notices to be filed with the Court. Neither the Parties nor the Settlement Administrator shall have any further obligation to send notice of the Settlement to the Settlement Class Members. The Court may continue hearings from time to time without further notice to the individual class members, but Settlement Class Counsel must post any such continuances to the Settlement Website.

4.2.3. Internet Notice

The Settlement Administrator shall establish an internet website containing information about the Settlement. The Settlement Website will be accessible no later than 25 days after entry of the Preliminary Approval Order. The Settlement Website will set forth the following information: (a) the full text of the Settlement Agreement; (b) the Mail Notice; (c) the Preliminary Approval Order and other relevant orders of the Court; and (d) contact information for Settlement Class Counsel and the Settlement Administrator. The title and URL for the Settlement Website shall be approved by the Parties. In addition, any language or documents appearing on the Settlement Website in addition to the above-listed documents shall be approved by the Parties. Not later than 20 days before the Final Approval Hearing, the Settlement Administrator shall cause proof of the establishment and maintenance of the Settlement Website to be filed with the Court. The Settlement Website shall be deactivated 180 days following the Effective Date.

4.2.4. Settlement Class Counsel Assistance

As necessary, the Settlement Administrator shall coordinate with Settlement Class Counsel for Settlement Class Counsel to provide telephonic support, advice, and assistance.

4.3. Expenses of Notice and Administration

4.3.1. Visionworks shall pay the costs associated with creation of the class lists pursuant to Section 4.1 and the Mail Notice pursuant to Section 4.2.2.

4.3.2. All costs of administration of the Settlement other than those set forth in Section 4.3.1 shall be paid by Settlement Class Counsel.

4.3.3. Within 15 days after the Claim Deadline, the Settlement Administrator will provide to Settlement Class Counsel a detailed statement of the costs that have been and will be incurred in administration.

V. VERIFICATION PROCESS

5.1. In order to be eligible to receive a Class Settlement Payment, a Settlement Class Member must submit a completed Claim Form within 90 days from the Notice Date. A Settlement Class Member who completed multiple BOGO Transactions need only submit a single Claim Form, but on that Claim Form, the Settlement Class Member must provide the required information about each BOGO Transaction for which that Settlement Class Member is submitting a claim; provided, however, that Settlement Class Members who completed BOGO Transactions in both Ohio and Illinois must submit separate Claim Forms for their Ohio BOGO Transactions and for their Illinois BOGO Transactions. Only those Settlement Class Members who timely submit an approved Claim Form shall be eligible to receive a Class Settlement Payment. In order for a Claim Form submitted online to be considered timely, the Settlement Administrator must receive the completed Claim Form by 11:59 p.m. Eastern Time on the Claim Deadline. In order for a Claim Form submitted by U.S. Mail to be considered timely, it must be postmarked on or before the Claim Deadline and received by the Settlement Administrator on or before the 14th calendar day after the Claim Deadline. These deadlines shall be set forth clearly in the Notice. The Claim

Form agreed to by the Parties and subject to Court approval is included as part of the Mail Notice under Section 4.2.2 attached hereto as Exhibits A and B.

5.2. In order for a Claim Form to be approved, the Claimant must meet the following criteria:

5.2.1. The Claimant must complete in full all fields on each Claim Form submitted; and

5.2.2. Claim Forms shall be executed under penalty of perjury, but need not be notarized.

5.3. Submission by a Settlement Class Member of an incomplete Claim Form may render the Claim Form(s) submitted by that Settlement Class Member invalid and ineligible for a Class Settlement Payment. The Settlement Administrator shall send to all Settlement Class Members who have submitted incomplete Claim Forms a notice of deficiency with instructions on how to cure the deficiency. Settlement Class Members will have 30 days from the date notice is sent to cure any identified deficiency.

5.4. Within 10 days after the deadline to submit Claim Forms, the Settlement Administrator shall provide a spreadsheet to Settlement Class Counsel and to Defense Counsel that contains sufficient information for the Parties to determine the number of approved Claims made by the members of the Ohio Settlement Class and the Illinois Settlement Class respectively.

Visionworks shall have the right, if it so elects, to audit the Claim Forms submitted by Settlement Class Members to ensure that no Settlement Class Member receives Class Settlement Payments for more BOGO Transactions than Visionworks' records indicate that individual completed. The Settlement Administrator shall also provide information regarding rejected Claim Forms, as well as the reasons why each Claim Form was rejected. The Settlement Administrator shall retain the original of all Claim Forms (including any envelopes with the postmarks) received from Claimants, and shall make copies or the originals available to both Settlement Class Counsel or Defense Counsel within five days upon request from either counsel.

VI. PROCEDURES FOR OPT OUTS AND OBJECTIONS

6.1. Opt-Out Procedures for Settlement Class Members

6.1.1. The Mail Notice and Settlement Website shall contain information and restrictions about the manner in which a Settlement Class Member may opt out of the Settlement, as well as the potential implications of doing so.

6.1.2. A Settlement Class Member may request to be excluded from the Settlement Classes by sending a written request for exclusion to the Settlement Administrator with the notification: “Exclusion Requests – *Visionworks* Settlement Administrator.” The proposed Settlement Class Member’s opt-out request must contain the class member’s name, original signature, current postal address and telephone number, and a specific statement that the proposed Settlement Class Member wants to be excluded from the Settlement Classes. The Parties agree that a statement to the effect that “I wish to opt out of the settlement” or “I wish to be excluded from the settlement” will be sufficient. A sample opt-out form shall be maintained on the Settlement Website. Opt-out requests must be postmarked by the Opt Out Deadline. In no event shall Settlement Class Members be able to opt out of the Settlement Classes as a group, aggregate, or class consisting of more than one consumer. Requests for exclusion that do not comply with any of the foregoing requirements are invalid.

6.2. List of Opt Outs

No later than 7 days after the Opt Out Deadline, the Settlement Administrator shall provide to Settlement Class Counsel and Defense Counsel a complete list of all persons who have properly opted out of the Settlement. Copies of the opt-out requests shall be provided to Settlement Class Counsel and to Defense Counsel upon request.

6.3. Intentionally Left Blank

6.4. Objections from Settlement Class Members

6.4.1. Any Settlement Class Member who does not opt out, but who instead wishes to object to the Settlement or any other matters as described in the Mail Notice may do so by filing with the Court a notice of his or her intention to object (which shall set forth the name of the Litigation, each objection and the basis therefor, and contain the objecting Settlement Class Member's name and signed verification of membership in the Settlement Class), with any papers in support of his or her position, and serve copies of all such papers upon Settlement Class Counsel and Defense Counsel by first class mail, postage prepaid, CM/ECF Notification, or any other form of service upon counsel of record permitted by Rule 5(b)(2) of the Federal Rules of Civil Procedure.

Objections must be filed and served no later than the Objection Deadline.

6.4.2. Objections to Settlement Class Counsel's attorneys' fees may be supplemented up to 7 days after the filing of a motion for such fees to address additional information or materials in the motion.

6.4.3. The written objection must indicate whether the class member and/or his or her lawyer(s) intend to appear at the Final Approval Hearing. Any lawyer who intends to appear at the Final Approval Hearing must file a written Notice of Appearance of Counsel with the Clerk of the Court no later than the date set by the Court in the Preliminary Approval Order and shall include the full caption and case number of each previous class action case in which that counsel has represented an objector. The Court will consider all objections filed by the Objection Deadline.

VII. SETTLEMENT RELIEF

7.1. Ohio Action

7.1.1. Subject to the terms and conditions of this Settlement Agreement, Visionworks shall pay each Approved Claimant who is a member of the Ohio Settlement Class \$100 per BOGO

Transaction, unless the Approved Claimant's actual BOGO Transaction price was less than \$100, in which case Visionworks shall pay the actual BOGO Transaction price for that BOGO Transaction.

7.1.2. If the combined sum of the aggregate payments to the Ohio Settlement Class under Section 7.1.1 plus 40% of the total award of Attorneys' Fees (collectively, the "**Ohio Settlement Payments**") exceeds \$1,155,280, then all such payments shall be reduced on a pro rata basis so that the total Ohio Settlement Payments equal \$1,155,280.

7.2. **Illinois Action**

7.2.1. Subject to the terms and conditions of this Settlement Agreement, Visionworks shall pay each Approved Claimant who is a member of the Illinois Settlement Class \$100 per BOGO Transaction, unless the Approved Claimant's actual BOGO Transaction price was less than \$100, in which case Visionworks shall pay the actual BOGO Transaction price for that BOGO Transaction.

7.2.2. If the combined sum of the aggregate payments to the Illinois Settlement Class under Section 7.2.1 plus 60% of the total award of Attorneys' Fees (collectively, the "**Illinois Settlement Payments**") exceeds \$3,054,000, then all such payments shall be reduced on a pro rata basis so that the total Illinois Settlement Payments equal \$3,054,000.

7.3. **No Liability for Determinations Relating to Validity of Claims**

No person shall have any claim against Visionworks, Plaintiffs, the Settlement Classes, Settlement Class Counsel, Defense Counsel, Visionworks' insurers, the Settlement Administrator, or any Released Parties based on any claims determinations made in accordance with this Settlement Agreement.

VIII. FINAL APPROVAL HEARING AND FINAL APPROVAL

8.1. Final Approval Hearing

Within 30 days after the Claim Deadline, or on such other date as set by the Court, Plaintiffs shall file a motion for approval and entry of the Final Approval Order, the text of which the Parties shall in good faith agree upon, in support of which Visionworks may, but is not required to, file a brief (subject to Visionworks' right to object to Attorneys' Fees, as specified elsewhere herein). The Parties agree that the Final Approval Order will constitute a final judgment dismissing the Litigation with prejudice. The Final Approval Order shall include, at a minimum, the substance of the following provisions:

- (a) approving this Settlement and its terms as being a fair, reasonable, and adequate settlement as to the Settlement Class Members within the meaning of Federal Rule of Civil Procedure 23 and directing its consummation according to its stated terms;
- (b) ruling on Settlement Class Counsel's application for an award of attorneys' fees and costs;
- (c) finding that all Settlement Class Members shall be bound by this Settlement Agreement including the release provisions;
- (d) as to Visionworks, directing that the Litigation be dismissed with prejudice and, except as provided for in this Settlement Agreement, without costs;
- (e) finding that the notice given constitutes due, adequate and sufficient notice and meets the requirements of due process and the Federal Rules of Civil Procedure;
- (f) incorporating the releases set forth in Section XI of this Settlement Agreement, and forever barring any claims or liabilities related to the Litigation or any Released Claims against any of the Released Parties; and

(g) reserving exclusive jurisdiction over the Settlement and this Settlement Agreement, including the administration and consummation of this Settlement.

8.2. Final Approval

All relief contemplated by this Settlement or Settlement Agreement is expressly contingent upon the Settlement Agreement receiving Final Approval.

IX. ATTORNEYS' FEES

9.1. No later than 14 days before the Final Approval Hearing, Settlement Class Counsel shall file a motion for an award of reasonable Attorneys' Fees. In the application(s) for Attorneys' Fees, Settlement Class Counsel shall calculate their fees using either or both a lodestar basis and/or a percentage of the fund method, so long as the total Attorneys' Fees sought do not exceed 1/3 of the Gross Settlement Amount. Visionworks reserves the right to challenge any request for Attorneys' Fee that it considers unreasonable, but Visionworks agrees that it will not oppose or otherwise challenge an Attorneys' Fees request so long as Settlement Class Counsel do not seek an award of fees in excess of 1/3 of the Gross Settlement Amount.

9.2. The application or applications for Attorneys' Fees shall be noticed to be heard at the Final Approval Hearing. If Visionworks decides to challenge the amount of or allocation of Settlement Class Counsel's Attorneys' Fees, it shall do so in a brief filed no later than 7 days after Settlement Class Counsel files their motion for an award of Attorneys' Fees.

9.3. Plaintiffs and Settlement Class Counsel agree that this Settlement Agreement is not conditional on the Court's approval of Attorneys' Fees in the requested amount or in any amount whatsoever. The Court's ruling on the application or applications for such fees shall not operate to terminate or cancel the Settlement.

9.4. Visionworks shall have no responsibility for, nor any liability with respect to, the payment of Attorneys' Fees to Settlement Class Counsel beyond that which is set forth in this Settlement Agreement.

9.5. Attorneys' Fees in the amount approved by the Court will be paid through distribution by the Settlement Administrator within 14 days after the Effective Date. The Attorneys' Fees approved by the Court shall be paid by the Settlement Administrator in accordance with written instructions to be provided by attorney Jack Landskroner from Landskroner Grieco Merriman, LLC, as authorized representative of all Settlement Class Counsel.

X. SETTLEMENT FUND

10.1. Creation of and Deposit Into Settlement Fund

The Settlement Administrator shall establish a qualified settlement fund or equivalent account approved by Visionworks at the Financial Institution to hold the Settlement Fund. The Settlement Fund shall be considered a common fund created as a result of the Litigation. Settlement Class Counsel and Defense Counsel shall direct the Settlement Administrator to make distributions from the Settlement Fund only in accordance with this Settlement Agreement and orders of the Court. The Settlement Administrator shall promptly notify the other Parties of the date of the establishment of the account. No later than 7 days after the Effective Date, Visionworks shall cause to be deposited with the Financial Institution, by draft or by wire, the Gross Settlement Amount. The Settlement Fund may not be commingled with any other funds and may be held in cash, cash equivalents, certificates of deposit or instruments insured by an arm of or backed by the full faith and credit of the United States Government. Interest earned, if any, on the Settlement Fund shall be for the benefit of the Settlement Classes in the event this Settlement Agreement is not terminated by Visionworks and the Effective Date otherwise occurs.

10.2. Settlement Fund Tax Status

10.2.1. The Parties agree to treat the Settlement Fund as being at all times a “qualified settlement fund” within the meaning of Treas. Reg. § 1.468B-1. In addition, the Settlement Administrator shall timely make such elections as necessary or advisable to carry out the provisions of this Subsection, including the “relation back election” (as defined in Treas. Reg. § 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Settlement Administrator to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

10.2.2. For the purpose of Treas. Reg. § 1.468B, as amended, and the regulations promulgated thereunder, the “administrator” shall be the Settlement Administrator. The Settlement Administrator shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including, without limitation, the returns described in Treas. Reg. § 1.468B-2(k)). Such returns (as well as the election described in Subsection 13.2.1) shall be consistent with this Subsection and in all events shall reflect that all federal or state income taxes (including any estimated taxes, interest or penalties) (“Taxes”) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in Subsection 10.2.3 hereof.

10.2.3. All (a) Taxes (including any estimated Taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including any Taxes or tax detriments that may be imposed upon the Released Parties with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a “qualified settlement fund”

for federal or state income tax purposes, and (b) expenses and costs incurred in connection with the operation and implementation of this Subsection (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in Subsection 10.2.2 (“**Tax Expenses**”)), shall be paid out of the Settlement Fund; in no event shall the Released Parties have any responsibility for or liability with respect to the Taxes or the Tax Expenses. The Settlement Administrator shall indemnify and hold the Released Parties harmless for Taxes and Tax Expenses (including, without limitation, Taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be timely paid by the Settlement Administrator out of the Settlement Fund without prior order from the Court, and the Settlement Administrator shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(1)); the Released Parties are not responsible therefor nor shall they have any liability with respect thereto. The Parties hereto agree to cooperate with the Settlement Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this Section.

10.2.4. No opinion concerning the tax consequences of this Settlement to Settlement Class Members is given or will be given by Visionworks, Defense Counsel, or Settlement Class Counsel, nor are any representations or warranties regarding such tax consequences made by virtue of this Settlement Agreement. Each Settlement Class Member’s tax obligations, and the determinations thereof, are the sole responsibility of each individual Settlement Class Member,

and it is understood that the tax consequences may vary depending on the particular circumstances of each individual Settlement Class Member.

10.3. Use and Disbursement of Settlement Fund

10.3.1. The Settlement Fund shall be used only in the manner and for the purposes provided for in this Settlement Agreement. No portion of the Settlement Fund shall be disbursed except as expressly provided for herein.

10.3.2. Within 14 days after the Effective Date, the Settlement Administrator shall mail the settlement checks to Approved Claimants via U.S. Mail. Payment notices accompanying the payment checks shall notify the recipients of the following: (a) that the checks must be cashed within 90 days from the date on the payment notice, (b) that the enclosed check shall not be valid after that date, and (c) that the check incorporates the releases set forth in Section 11.2. If the check has not been deposited or cashed by 120 days after the date on the payment notice, the amount of the check shall be returned to Visionworks.

10.4. Capped Fund

Except for Visionworks' costs identified in Section 4.3.1, all of the following must be paid from the Gross Settlement Amount: (a) payments to the Settlement Class Members, and (b) payments to Settlement Class Counsel for Attorneys' Fees. The Parties and their respective counsel agree that, excepting the costs identified in Section 4.3.1, Visionworks and/or its insurers will not pay or cause to be paid more than the Gross Settlement Amount.

XI. RELEASE OF CLAIMS

11.1. Upon the Effective Date, Plaintiffs and each Settlement Class Member who has not opted out as provided herein, and for themselves and on behalf of their spouse, heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors and assigns and all those otherwise acting or purporting to act on behalf of each acknowledge full

satisfaction of, and shall be conclusively deemed to have fully, finally and forever settled, released, and discharged the Released Parties of and from, the Released Claims. Subject to the Court's approval, this Settlement Agreement shall bind all Settlement Class Members, and all of the Released Claims shall be dismissed with prejudice and released as against the Released Parties, even if a Settlement Class Member never received actual notice of the Settlement prior to the hearing on final approval of the Settlement.

11.2. Released Claims

In exchange for the relief described in this Settlement Agreement, the Plaintiffs, Settlement Class Members, and/or his or her respective spouse, heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors and assigns and all those acting or purporting to act on their behalf agree to release and discharge the Released Parties from all duties, obligations, demands, claims, actions, causes of action, suits, damages, rights or liabilities of any nature and description whatsoever, whether arising under local, state or federal law, whether by Constitution, statute (including, but not limited to, the OCSPA and ICFA, and any assertions of liability, debts, covenants, guarantees, projections, losses, endorsements, controversies, suits, actions, rights, legal duties, warranties, torts, unfair or deceptive practices, statutory violations, contracts, agreements, obligations, promises, promissory estoppel, detrimental reliance, or unjust enrichment), tort, contract, common law or equity or otherwise, whether known or unknown, concealed or hidden, suspected or unsuspected, anticipated or unanticipated, asserted or unasserted, foreseen or unforeseen, actual, fixed, contingent, or vested, liquidated or unliquidated, direct or indirect, matured or unmatured, individually or on behalf of or as part of any putative, proposed, or certified class or other aggregate proceeding, related to, arising out of, concerning or in connection with in any way, any and all alleged direct or indirect

acts, omissions, representations, conducts, legal duties, unjust enrichment, trade practices, or obligations that arise out of, or are related or connected in any way with, Visionworks' sale or advertising of eyeglasses to that Settlement Class Member. This release includes, but is not limited to, all claimed or unclaimed compensatory damages, actual damages, damages stemming from any allegations of willfulness or recklessness, damages for emotional distress, statutory damages, consequential damages, incidental damages, nominal damages, treble damages, punitive and exemplary damages, injunction, rescission, reformation, restitution, disgorgement, constructive trust, as well as all claims for equitable, declaratory or injunctive relief under any federal or state statute or common law or other theory that was alleged or could have been alleged in the Litigation, including but not limited to, any and all claims under deceptive or unfair practices statutes, or any other statute, regulation or judicial interpretation. This release also includes interest, costs, and fees arising out of any of the claims described above. Nothing in this Settlement Agreement shall be deemed a release of the Parties' respective rights and obligations under this Settlement Agreement.

11.3. Release of Unknown Claims

The claims described in Section 11.1 or 11.2, as applicable, are released and discharged regardless of whether they are known or unknown, concealed or hidden, suspected or unsuspected, anticipated or unanticipated, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, fixed or contingent.

11.4. Waiver of California Civil Code Section 1542

Plaintiffs and each Settlement Class Member who does not opt out as provided elsewhere herein, acknowledge that they are aware that they may hereafter discover facts in addition to or different from those that they or Settlement Class Counsel now knows or believes to be true with

respect to the subject matter of these releases, but it is their intention to, and they do hereby, upon the Effective Date of this Settlement Agreement, fully, finally and forever settle and release any and all Released Claims, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiffs and each Settlement Class Member who does not opt out as provided elsewhere herein waive any and all rights and benefits afforded by California Civil Code Section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs, Settlement Class Members, and Settlement Class Counsel understand and acknowledge the significance of this waiver of California Civil Code Section 1542 and/or of any other applicable federal or state law relating to limitations on releases, and further, upon the Effective Date, shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state, the District of Columbia, or territory of the United States, by federal law, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to Section 1542 of the California Civil Code

XII. TERMINATION

12.1. Right to Terminate Agreement

12.1.1. Visionworks' willingness to settle this Litigation on a class basis and to agree to the certification of conditional Settlement Classes is expressly dependent upon achieving finality in this Litigation, and the desire to avoid the expense of this and other litigation. Consequently, Visionworks shall have the unilateral and unfettered right to terminate this Settlement

Agreement, declare it null and void, and have no further obligations under this Settlement Agreement to the Plaintiffs, Settlement Class Members, or Settlement Class Counsel if any of the following conditions subsequently occurs:

- (a) The Court fails or declines to grant Preliminary Approval;
- (b) The Court materially modifies the Final Approval Order such that it is not acceptable to Visionworks, as determined in Visionworks' sole discretion; or
- (c) The Effective Date does not occur for any reason, including the entry of an order by any court that would require either material modification or termination of the Settlement.

12.1.2. Additionally, if more than 3% of the Settlement Class Members request to opt out of the Settlement pursuant to Section 6.1, Visionworks may, at its sole option, no later than 14 days after the Opt Out Deadline, terminate this Settlement Agreement, declare it null and void, and have no further obligations under this Settlement Agreement to the Plaintiffs, Settlement Class Members, or Settlement Class Counsel.

12.1.3. Plaintiffs shall have the unilateral and unfettered right to terminate this Settlement Agreement, declare it null and void, and have no further obligations under this Settlement Agreement to Visionworks if any of the following conditions subsequently occurs:

- (a) The Court fails or declines to grant Preliminary Approval; or
- (b) The Court materially modifies the Final Approval Order such that it is not acceptable to Plaintiffs.

12.1.4. The failure of any court to approve the Attorneys' Fees in the requested amounts, or any amount whatsoever, or any service payments to Plaintiffs in the requested amounts or in any

amount whatsoever, shall not be grounds for Plaintiffs or Settlement Class Counsel to terminate this Settlement Agreement.

12.2. Effect of Termination on This or Future Litigation

If this Settlement Agreement is terminated:

- (a) any provision of this Settlement Agreement stipulating to or supporting certification of a Settlement Class shall have no further force and effect, and shall not be offered in evidence or used in the Litigation or in any other proceeding;
- (b) counsel for the Parties shall seek to have any Court orders, filings, or other entries in the Court's file that result from this Settlement Agreement set aside, withdrawn, and stricken from the record;
- (c) the Settlement Agreement and all negotiations, proceedings, and documents prepared, and statements made in connection with either of them, shall be without prejudice to any Party and shall not be deemed or construed to be an admission or confession by any Party of any fact, matter, or proposition of law nor offered into evidence in any judicial proceeding or other action;
- (d) the Parties shall stand in the same procedural position as if the Settlement Agreement had not been negotiated, made, or filed with the Court; and
- (e) any provision elsewhere herein concerning the effect if the Settlement does not receive Final Approval or the Effective Dates does not occur shall have continuing effect.

12.3. Effect of Termination on Monies Paid by Visionworks Pursuant to Settlement Agreement

If this Settlement Agreement is terminated, the Settlement Fund, including interest earned, less Taxes, Tax Expenses, and notice, claims, and other administration costs (including

fees, costs, and other expenses of the Settlement Fund) that have been properly disbursed pursuant to this Settlement Agreement, shall be returned to Visionworks.

XIII. PUBLIC STATEMENTS

13.1. Aside from the filing of court papers with the Court related to the Settlement, the Parties shall not, nor shall they cause any other person to, make any public statement with regard to the Settlement or any terms thereof, without the express written authorization of the other Parties, until such time as the terms of the Settlement are made public as a result of Court-ordered notice to the Settlement Classes. This prohibition is inapplicable to Settlement Class Counsel's communications with Settlement Class Members or potential Settlement Class Members. Before Final Approval, Plaintiffs shall not, nor shall they cause any other person to, issue any press release regarding the Settlement or any terms thereof without express written authorization of the other Parties.

XIV. MISCELLANEOUS PROVISIONS

14.1. Admissibility of Settlement Agreement

This Settlement Agreement shall not be offered or be admissible in evidence in any action or proceeding except (a) as necessary to obtain and implement Court approval of this Settlement; or (b) to enforce the terms of this Settlement Agreement or any related order by the Court. For purposes of clarity, this Section permits use of Section II herein (i.e., that nothing in this Settlement Agreement is an admission of liability or elements of class certification by Visionworks or any of the Released Parties), Section XII herein (i.e., concerning public statements about the Settlement), or Section XIV herein (e.g., the choice of law and forum selection provisions).

14.2. Successors and Assigns

The terms of this Settlement Agreement shall be binding upon and inure to the benefit of the Parties as well as their heirs, successors, assigns, executors, and legal representatives.

14.3. Communications Relating to Settlement Agreement

All notices or other formal communications under this Settlement Agreement shall be in writing and sent by mail to counsel for the Party to whom the notice is directed at the following addresses:

If to Plaintiffs:

Karen Poteat
c/o Drew Legando
Landskroner Grieco Merriman LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113

Cheryl Lenart
c/o Drew Legando
Landskroner Grieco Merriman LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113

With copies to:

Drew Legando
Landskroner Grieco Merriman LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113

If to Visionworks:

Visionworks of America, Inc.
c/o Cristina R. Silva
Sr. Counsel
Highmark Health
120 Fifth Avenue, Suite 2180
Pittsburgh, PA 15222

With copies to:

Ronald D. Holman, II
Taft Settinus & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114

James R. Carroll
Skadden, Arps, Slate, Meagher & Flom LLP
500 Boylston Street
Boston, MA 02116

Any Party may, by written notice to all the other Parties, change its designated recipient(s) or notice address provided above.

14.4. Visionworks' Communications with Settlement Class Members in the Ordinary Course of Business

Visionworks reserves the right to continue communicating with its customers and with consumers, including Settlement Class Members, in the ordinary course of business. To the extent Settlement Class Members initiate communications regarding this Settlement Agreement, Visionworks may confirm the fact of a settlement, state that it disputes the claims in the Litigation, and refer inquiries to Settlement Class Counsel. Nothing herein is intended to prohibit Visionworks from communicating with Settlement Class Members regarding issues related to the Settlement Class Member's personal eyeglass transactions.

14.5. Efforts to Support Settlement

The Parties and their counsel agree to cooperate fully in seeking Court approval for this Settlement Agreement and to use their best efforts to effect the consummation of the Settlement and to protect the Settlement Agreement by applying for appropriate orders enjoining others from initiating or prosecuting any action arising out of or related to facts or claims alleged in the Litigation, if so required.

14.6. Procedures for Disputes Between Parties Relating to the Settlement Agreement

To the extent any disputes or issues arise with respect to documenting or effecting the Settlement Agreement, the Parties agree to use their best efforts to informally resolve any such disputes or issues, and, in the event any such dispute or issue cannot be resolved informally, to bring any such dispute or issue to the Court for resolution.

14.7. Entire and Voluntary Agreement

The Parties intend the Settlement Agreement to be a final and complete resolution of the Litigation. The Parties agree that the terms of the Settlement Agreement were negotiated at arm's length and in good faith and were reached voluntarily after consultation with competent

legal counsel. There shall be no presumption for or against any Party that drafted all or any portion of this Settlement Agreement. This Settlement Agreement contains the entire agreement and understanding concerning the subject matter between the Parties and supersedes all prior negotiations and proposals, whether written or oral (except as provided elsewhere herein), including but not limited to statements made on the record in the Ohio Action on September 15, 2016. No Party or any agent or attorney of any Party has made any promise, representation or warranty whatsoever not contained in this Settlement Agreement to induce another Party to execute the same. The Parties represent that they have not executed this instrument or the other documents in reliance on any promise, representation or warranty not contained in this Settlement Agreement. This Settlement Agreement may not be changed, modified, or amended except in writing signed by all Parties, subject to Court approval; provided, however, that the Parties may effect such changes, modifications, or amendments of this Settlement Agreement and their implementing documents (including any exhibits to them) without notice to or approval by the Court if such changes are consistent with the Court's Final Approval. The Parties further contemplate that, subject to Court approval or without such approval where legally permissible, the exhibits to this Settlement Agreement may be modified by subsequent agreement of counsel for the Parties prior to dissemination of the Class Notice to the Settlement Class.

14.8. Headings for Convenience Only

The headings in this Settlement Agreement are for the convenience of the reader only and shall not affect the meaning or interpretation of this Settlement Agreement.

14.9. Settlement Agreement Controls

All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth herein. To the extent that there is any conflict between the terms of this Settlement Agreement and the exhibits attached hereto, this Settlement Agreement shall control.

14.10. Authorization of Counsel

Settlement Class Counsel, on behalf of the Settlement Classes, are expressly authorized by Plaintiffs to take all appropriate action required or permitted to be taken by the Settlement Classes pursuant to the Settlement Agreement to effectuate its terms, and also are expressly authorized to enter into any modifications or amendments to the Settlement Agreement on behalf of the Settlement Classes that Settlement Class Counsel deems necessary or appropriate. Each attorney executing the Settlement Agreement on behalf of any Party hereto hereby warrants that such attorney has the full authority to do so.

14.11. Confidentiality

All agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Settlement Agreement. Within 30 days of the Effective Date, all confidential documents and information obtained during discovery, including copies, summaries, or other reproductions or derivations of such materials, shall be returned promptly to the party that produced the materials. In the alternative, the party possessing the information shall destroy it and provide the opposing party a certification to that effect unless such copies must be maintained pursuant to applicable Rules of Professional Conduct.

14.12. Court's Jurisdiction

The Court shall retain continuing jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement.

14.13. Severability

The failure of one Party to insist upon strict adherence to any term of this Settlement Agreement on any occasion shall not be considered a waiver thereof or deprive any Party of the right thereafter to insist upon strict adherence to that term or any other term of this Settlement Agreement.

14.14. Construction

Each of the Parties has cooperated in the drafting and preparation of this Settlement Agreement. Hence, in any construction to be made of this Settlement Agreement, the same shall not be construed against any of the Parties. Before declaring any provision of this Settlement Agreement invalid, a court should first attempt to construe the provision valid to the fullest extent possible, consistent with applicable precedent, so as to find all provisions of this Settlement Agreement valid and enforceable.

Any notice period or deadline set forth in this Settlement Agreement shall be calculated pursuant to Rule 6(a)(1) of the Federal Rules of Civil Procedure.

14.15. No Claims Arising from this Settlement Agreement

No person shall have any claim against Visionworks, Defense Counsel, Visionworks' insurers, Plaintiffs or Settlement Class Counsel based on distribution of benefits made substantially in accordance with this Settlement Agreement or any Settlement-Agreement-related order(s) of the Court.

14.16. Choice of Law and Forum Selection

This Settlement Agreement shall, in all respects, be interpreted, construed and governed by and under the laws of the United States of America and the State of Ohio (without reference to Ohio's choice-of-law rules). All judicial proceedings regarding this Settlement Agreement

shall be brought only in the Court (or, if the Court determines it lacks subject matter jurisdiction of the claims in that proceeding, in any other court of competent jurisdiction located in Cuyahoga County, Ohio). All parties subject to this Settlement Agreement consent to the personal jurisdiction of a court located in Cuyahoga County, Ohio for purposes of resolving disputes under, about, or concerning this Settlement Agreement.

The Parties make these selections for clarity, predictability, and efficiency and because this is the forum of the Ohio Action.

14.17. Counterparts

This Settlement Agreement may be executed in one or more counterparts and by facsimile or by PDF. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the Parties shall exchange among themselves signed counterparts, and a complete set of executed counterparts shall be filed with the Court.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

SIGNATURE PAGE TO FOLLOW

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives.

Date: 1/6/17

By: 
Karen Poteat (Jan 6, 2017)
Karen Poteat, Plaintiff

Date: 1/4/17

By: 
Cheryl Lenart (Jan 4, 2017)
Cheryl Lenart, Plaintiff

Date: 1/4/17

By: 
Drew Legando
Counsel for Plaintiffs

Date: 1/3/17

By: 
James Eisen, President
Visionworks of America, Inc.

Date: _____

By: _____
Ronald D. Holman, II
Counsel for Visionworks of America, Inc.

17973838

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be executed
by their duly authorized representatives.

Date: _____

By: _____
Karen Poteat, Plaintiff

Date: _____

By: _____
Cheryl Lenart, Plaintiff

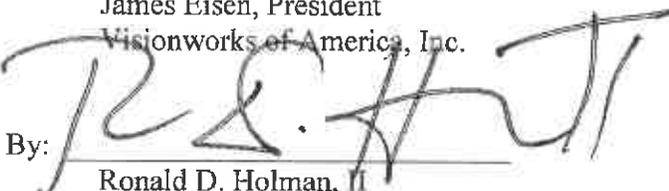
Date: _____

By: _____
Drew Legando
Counsel for Plaintiffs

Date: _____

By: _____
James Eisen, President
Visionworks of America, Inc.

Date: 12/22/16

By: 
Ronald D. Holman, II
Counsel for Visionworks of America, Inc.

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