



**NAILAH K. BYRD**  
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1200 Ontario Street  
Cleveland, Ohio 44113

**Court of Common Pleas**

**COMPLAINT Electronically Filed:**  
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By: DREW LEGANDO 0084209

Confirmation Nbr. 421512

ELLIOTT GRAISER

CV 14 828880

vrs.

**Judge:**

VISIONWORKS OF AMERICA, INC.

PAMELA A. BARKER

**Pages Filed: 6**

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

ELLIOTT GRAISER, *etc.*

Plaintiff

v.

VISIONWORKS OF AMERICA, INC.

Defendant

Case No. CV-14-828880

Judge Pamela A. Barker

**PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

**PREAMBLE**

Pursuant to this Court's April 9, 2015 Order, Plaintiff Elliott Graiser ("Plaintiff" or "Graiser") brings this First Amended Complaint against Defendant Visionworks of America, Inc. ("Defendant" or "Visionworks"), on behalf of himself and a class of all other similarly-situated consumers (the "Class," as further defined below).

**NATURE OF THE ACTION**

1. Ohio Administrative Code § 109:4-3-04 (the "Code") regulates the use of the word "free" in the retail sector. The Code has three provisions central to this case:

It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word "free" ... except in conformity of this rule. It is the express intent of this rule to prohibit the practice of advertising or offering goods or services as "free" when in fact the cost of the "free" offer is passed on to the consumer by raising the regular (base) price of the goods or services that must be purchased in connection with the "free" offer. In the absence of such a base price a "free" offer is in reality a single price for combination of goods or services offered, and the fiction that any portion of the offer is "free" is inherently deceptive.

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"Regular price" means the price at which the goods or services are openly and actively sold by a supplier to the public on a continuing basis for a substantial period of time.

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Continuous or repeated "free" offers are deceptive acts or practices since the supplier's regular price for goods to be purchased by consumers in order to avail themselves of the "free" goods will, by lapse of time, become the regular price for the "free" goods or services together with the other goods or services required to be purchased. Under such circumstances, therefore, an offer of "free" goods or services is merely illusory and deceptive.

2. A violation of the Code is *per se* a violation of the Ohio Consumer Sales Practices Act, R.C. § 1345.01 *et seq.* (the “Act”).

3. Visionworks uses the word “free” in its advertising throughout the state of Ohio. Specifically, it solicits consumers to “buy one (eyeglasses), get one (eyeglasses) free.” But the cost of the “free” eyeglasses is passed on to the consumer by Visionworks’ raising of the regular price of the eyeglasses that must be purchased in order to receive the “free” eyeglasses.

4. More to the point, Visionworks continuously and repeatedly uses the phrase “Buy One, Get One Free,” month-after-month for the vast majority of the year. This continuous and/or repeated use of the word “free” is in violation of the Code’s express provisions.

5. This consumer class action seeks damages arising from Visionworks’ unlawful use of the word “free.”

#### **THE PARTIES**

6. Graiser is an Ohio citizen and a Cuyahoga County resident.

7. Visionworks is one of the largest retailers of eyeglasses in the country, with at least 12 retail stores in Ohio, including a Beachwood store in Cuyahoga County. Visionworks is a Texas corporation with a San Antonio headquarters.

#### **FACTUAL ALLEGATIONS**

8. On April 30, 2014, Graiser was solicited by Visionworks to purchase eyeglasses: a sign at the Beachwood Mall entrance of Visionworks advertised the “Buy One, Get One Free” offer, and when Graiser inquired inside, he was approached by salesperson Robert, who quoted Graiser a price of \$409.93 for eyeglasses, with a second eyeglasses “free” as per the sign.

9. When Graiser expressed sticker shock at the price of the eyeglasses, Visionworks told him he could buy a single eyeglasses for \$245.95.

10. The discrepancy between the price under the “buy one, get one free” offer and the single-pair offer shows that the “free” second pair is not really free. Instead, the price of the multiple-pair offer has been inflated by passing the cost of the “free” offer on to the consumer, in violation of the Code.

11. Given its repeated and continuous use of the word “free,” Visionworks had manipulated the regular price of its eyeglasses. Thus, when Graiser was offered a single-pair (instead of the inflated multiple-pair price), he was told he was receiving a “40% discount,” when, in truth, he was paying full price but did not receive a second eyeglasses free.

12. The value of the second eyeglasses Graiser should have received for free after he paid full price for the first eyeglasses is approximately \$245.95. The \$409.93 price is not the regular price of eyeglasses, it is an inflated price.

#### CLASS ALLEGATIONS

13. This action is brought on behalf of the following Class: *All consumers who purchased eyeglasses from Visionworks in Ohio during a “Buy One, Get One Free” promotion since June 24, 2012, but who did not receive any benefit of a truly-free offer.*

14. The Class is so numerous that the joinder of all members is impracticable: Visionworks is one of the largest retailers of eyeglasses in Ohio and has engaged in tens of thousands of consumer transactions during a “Buy One, Get One Free” promotion.

15. There are question of law of fact common to the Class, *inter alia*: whether Visionworks violates the Code and the Act by continuously and/or repeatedly using the word “free”; and whether Visionworks violated the Code and the Act by passing on the cost of purportedly “free” goods to the consumer by increasing the price of the base good.

16. The representative plaintiff will fairly and adequately protect the interests of the class: Graiser has retained experienced counsel for the Class and is committed to placing the interests of the Class before his own individual interests.

17. A class action is appropriate under Civil Rule 23(b)(3) because the questions of law or fact common to Class members predominates over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy: whether Visionworks’ continuous and repeated use of the word “free” violates the Code and the Act is the central issue in this case, and resolution of that issue in favor of (or against) any one Class member would necessarily result in the same resolution for

all Class members; that is, to litigate for one is to litigate for all. And, given the costs of litigation, to allow one to litigate for all is the most efficient use of the Class's resources.

#### **FIRST CAUSE OF ACTION**

18. This cause of action is brought under the Act, R.C. 1345.09. It incorporates each allegation in this amended complaint.

19. Visionworks is a "supplier," Graiser and each Class member are "consumers," and the solicitation, negotiation, and sale of eyeglasses is a "consumer transaction" under the Act, R.C. 1345.01.

20. Visionworks has violated the Code, and therefore the Act, by (a) repeatedly using the word "free" in its advertising and offers, which renders its price on eyeglasses illusory and deceptive; (b) continuously using the word "free" in its advertising and offers, which renders its prices on eyeglasses illusory and deceptive; (c) passing off to consumers the price of "free" eyeglasses by raising the price of the first eyeglasses that must be purchased to receive the "free" eyeglasses, which renders its prices on eyeglasses deceptive; and (d) failing to openly and actively sell eyeglasses to the public on a continuing basis for a substantial period of time, which renders its prices on eyeglasses deceptive.

21. Visionworks knew at the time of each consumer transaction that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers.

22. Visionworks' conduct is unfair, deceptive, and unconscionable under the Code, § 109:4-3-04, and the Act, §§ 1345.02(A) and 1345.03(A).

23. Visionworks knowingly committed the unfair, deceptive, and unconscionable acts at issue in this case.

24. Plaintiff and Class members are entitled to the remedies set forth by the Act, R.C. 1345.09, including (but not limited to) actual damages and attorney's fees.

### **SECOND CAUSE OF ACTION**

25. This cause of action is brought under Ohio's common law of negligent misrepresentation. It incorporates each of the allegations in this amended complaint.

26. In the course of its business selling eyeglasses, Visionworks makes representations about the regular price of eyeglasses which are false and misleading.

27. Visionworks fails to exercise reasonable care in making its representations about price and pricing.

28. Consumers justifiably rely on Visionworks' representations about its pricing of its eyeglasses.

29. As a direct and proximate results of Visionworks' negligent misrepresentations, Plaintiff and the Class members sustained pecuniary loss.

### **PRAYER FOR RELIEF**

Therefore, Plaintiff seeks judgment against the defendant and relief as follows:

- A. An order certifying this action as a class action under Civil Rule 23;
- B. An order appointing the named plaintiff as the class representative;
- C. An order appointing undersigned counsel as class counsel;
- D. Actual damages;
- E. Punitive damages as allowed by law;
- F. Attorney's fees under R.C. 1345.09 or any other applicable provision of statutory or common law;
- G. Costs of suit;
- H. Pre- and post-judgment interest;
- I. Declaratory, equitable, and injunctive relief;
- J. Such other relief as this Court finds just and proper.

### **JURY DEMAND**

Plaintiff demands a trial by jury.

Respectfully submitted,

*/s Drew Legando*

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**PROOF OF SERVICE**

A copy of this document was served by email on counsel of record on April 23, 2015, pursuant to Civil Rule 5(B)(2)(f).

Signed by,

*/s Drew Legando*

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