

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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AUDIO EYE, INC.,

Plaintiff,

- against -

ADRIAN ROSELLI.

Defendants.

Motion Seq. 001

Index No. 803054/2023

**AFFIDAVIT OF
ADRIAN ROSELLI**

-----X

STATE OF NEW YORK)
)
COUNTY OF ERIE)

ADRIAN ROSELLI, being duly sworn, deposes and says:

1. I am the Defendant in the matter named above, and submit this affidavit in support of my motion to dismiss, and based upon my personal knowledge.

2. I want to start with this: I made every statement in this case based on beliefs — and to express the opinions — that I still hold: that certain products sold by AudioEye, which can be categorized as “overlay” products¹, are insufficient to achieve actual accessibility for disabled people on the internet, and do not work very well. I think they are the wrong approach for digital accessibility.

¹ For purposes of this document, “overlay products” or “tools” refer to automated software which is supposed to run on the user interface of websites and mobile apps, using third-party source code (like JavaScript) to impact the front-end code of the site, with the goal of changing the website’s appearance in such a way as to aid in its accessibility and readability.

3. Nothing in Plaintiff's complaint² has changed my opinions of its overlay products. In fact, I believe that AudioEye intends to bully into silence those who legitimately criticize its overlay products.

4. At no point in time — even through today — have I entertained any serious doubts, or for that matter, doubts of any kind, about the truth of the statements AudioEye has sued me over.

5. That is, I am happy to say under oath: AudioEye's overlay products do not work well. In fact, they often fail to work at all. And beyond that, AudioEye falsely represents how effective its products are. I do not think overlay products are the best way to approach digital accessibility, and overlay products — at least in a meaningful sense — will always, to some degree and for many people with disabilities, *not work*. I am always going to hold that opinion, because it is a basic fact of how the digital accessibility space operates.

My Involvement with Digital Accessibility

6. I am a web developer who has been developing websites and software interfaces for over 30 years. From 1998 to 2015, I was a co-founder and partner of a software consulting company that focused on web design. I now own a consulting business where clients hire me to design accessible websites. I work full time in the field of digital accessibility.

7. I have also run a blog, on adrianroselli.com, for twenty-four years, on which I write about issues such as digital accessibility and the technology associated with it. I have a bachelor's degree in Media Study from the State University of New York at Buffalo.

8. I also served as an Invited Expert for the W3C HTML Working Group, the standards body responsible for developing HTML. I was also a member of the Accessible

² I refer to both the initial complaint and the amended complaint using the word "complaint" in this affidavit, since for relevant purposes, they are not different.

Platform Architectures Working Group, Accessible Rich Internet Applications Working Group, HTML Accessibility Task Force, and Web Platform Working Group (formerly the HTML Working Group). I am a founding member of evolt.org, one of the very first communities (dating back to 1998) made up of web professionals from around the globe who share their knowledge and experience in web development.

9. I have also been published on issues of web design and accessibility, including writing articles for trade journals and web sites, and participated as an author and editor for several books, including [*Web Graphics for Non-Designers*](#), [*Cascading Style Sheets*](#) and [*Usability: The Site Speaks for Itself*](#). I have also acted as a technical editor on published literature for web design professionals. My work has been cited in many books and articles on usability, accessibility, and interface design. I have also been a guest on several podcasts to discuss digital accessibility issues.

10. Accessibility can mean many things—it impacts diverse communities, such as blind or low-vision people, dyslexic people, deaf people, color-blind people, people with various fine motor abilities or challenges with dexterity, and people with diverse cognitive abilities, just to name some key examples. It is not a one-size-fits-all issue.

11. It is my belief, based on my years of experience in the digital accessibility field, that accessibility principles need to be integrated into the design of websites and mobile applications during their development, rather than what “overlay tools” do, which is to “overlay” onto already-existing websites, impacting only what is referred to as “rendered HTML code”, code that has been turned into an interactive webpage.³ With these types of tools, each

³ For purposes of this document, “source code” refers to libraries, frameworks, databases, and business logic that are used to create and build a website, and “rendered HTML code” is how an interactive webpage is experienced by a user.

individual user makes them on each visit to a website, rather than the “fix” being done by the site owner.

12. My opinion is that digital accessibility is best achieved by addressing issues in source code before it is delivered to users’ browsers by rendered HTML code. For instance, by creating conformant representative templates that each page within a website can use, so that every user can use it as they wish, with or without assistive technology. These templates can hold representative content and information and structures, such as alternative text for images, or header text, et cetera. This allows for technologies to interact with rendered HTML in predictable ways, making the site possible to be used for people of diverse abilities.

13. Overlay products only impact the rendered HTML, which has already been delivered to the user’s browser. My opinion is that overlay products, which are designed, quite literally, to lay over existing websites without impacting their source code, are insufficient to achieve accessibility, as defined by the Web Content Accessibility Guidelines (“WCAG”),⁴ and often do not work. I do not believe they can bring websites into true compliance or achieve meaningful accessibility.

14. I am not a proponent of the “ground up” approach to digital accessibility, as disparagingly and curiously asserted by Plaintiff. I am not familiar with this term as used by Plaintiff in the complaint, which appears to be being used in a very specific sense, but one that I am not aware of. My beliefs are described above, and include a varied set of approaches, mostly focused on addressing source code.

15. I also believe that the sale of overlay products to corporate clients, such as those sold by AudioEye, can be detrimental to achieving accessibility, because they encourage

⁴ The WCAG is a set of guidelines published by the Web Accessibility Initiative of the World Wide Web Consortium, which is widely seen as the main international standards organization for the Internet. WCAG defines baseline techniques for creating accessible user interfaces.

performative compliance by companies rather than approaches that would lead to more meaningful accessibility.

16. It is well documented that a good number of disabled people do not like overlay products, and many of my opinions reflect their complaints. Plenty of well-known media outlets have reported on and documented disabled people's complaints about overlay products.⁵

17. As someone who is involved in accessibility work, and as a published author, subject-matter expert, and accessibility activist, I view it as essential that I provide critique where I believe it is due, in order to further the overarching goal of achieving greater digital accessibility, and ultimately, better user experiences.

The Twitter Thread of March 29, 2022

18. On March 29, 2022, I published a three-tweet thread on my Twitter account.

19. I had become aware that J.D. Power was a client of AudioEye's overlay products, because it was promoted on Twitter.

20. I also became aware that J.D. Power had an accessibility statement on its website, in which it stated it wanted to "provide a fully accessible" user experience.

21. I also became aware that J.D. Power had a place on its site where users could submit feedback on accessibility and user experience issues, but that all complaints of that type were routed through and collected by AudioEye *exclusively*. This posed a certain kind of conflict issue to me, as J.D. Power might not be aware of all of the complaints about the overlay products and accessibility issues on its site.

22. I was also aware that there had been litigation over the use of AudioEye's overlay products for a different corporate client's website. That case settled and a true and correct copy

⁵ Amanda Morris, *For Blind Internet Users, the Fix Can Be Worse Than the Flaws*, N.Y. Times, (July 13, 2022)

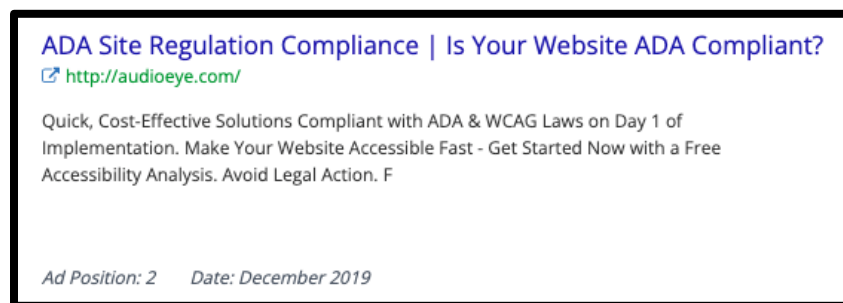
of the settlement is attached hereto as **Exhibit 1** (the “*Lighthouse* Settlement”). As set out in the *LightHouse* Settlement, for the purposes of the impact litigators at Disability Rights Advocates, after a massive suit that “allege[d] that Defendants are violating the rights of LightHouse and its blind and visually impaired employees,” the parties stipulated that AudioEye overlay products were “insufficient for accessibility compliance going forward,” and could not be used on their own to achieve true accessibility.⁶ *LightHouse* Settlement at 1-2. Indeed, that was not just a term, but literally how the parties to *LightHouse* **defined** the terms “Accessible,” “Accessibility,” and “Access.” As important context for the *LightHouse* Settlement, the suit came about because after “working for a long time with AudioEye for website remediation,” ADP “was sued due to consistent failures in AudioEye services and products to be used by blind people.” David Thompson, [AudioEye's Customer Sued By San Francisco Lighthouse for the Blind for Web Accessibility Failures](#), TECH TIMES (Dec. 27, 2021).⁷ That is, AudioEye products rendered ADP’s Human Resources “platform ... not accessible to [blind users] and rather than improve their user experience it created obstacles and significantly prolonged what should have been straightforward HR tasks.” *Id.*

23. It was upon these facts, as well as my own use of AudioEye, that I formed my opinions that use of the AudioEye overlay tools can cause “reputational harm.”

24. I am also aware that AudioEye has advertised itself in substantially the way shown below:

⁶ That case is *LightHouse et al. v. ADP Inc., et al.*, Case No. 4:20-cv-09020 (HSG), in the Northern District of California.

⁷ As further discussed in the accompanying memorandum, the Tech Times article pre-dates any of the statements AudioEye is suing over, yet, firmly establishes a pre-existing reputation for getting customers sued, as well as “consistent failures” of “services and products” (or, in plain English, a reputation for products “not work[ing]”). It is hard to see how the present complaint is not frivolous given the incremental harm doctrine. It seems that AudioEye is tired of its (long earned) poor reputation for accessibility and is explicitly trying to chill anyone speaking about it. The fact that AudioEye admits it harassed Tech Times into retracting the article and demanded to name and shame the journalist who wrote the piece just adds to that unfortunate truth. See NYSCEF Doc. No. 5 ¶ 27.

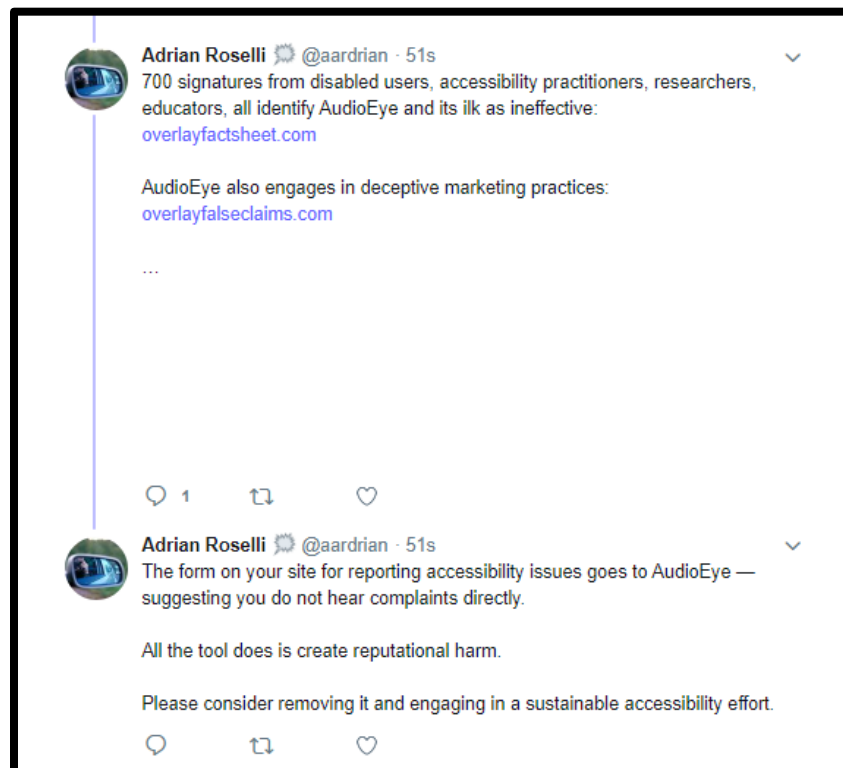
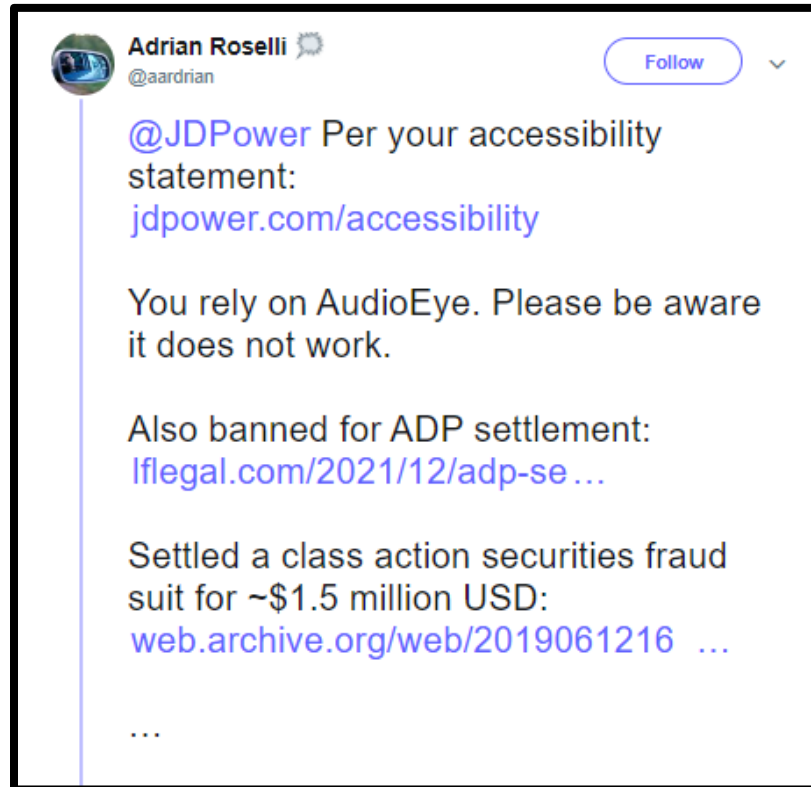


25. I did and still do find that type of marketing to be “deceptive.” I cannot understand how AudioEye can claim to protect companies “from day one” when it does anything but that — it simply papers over shortcomings.

26. I did not author or create Karl Groves’s “Overlay Fact Sheet,” referenced in the complaint. A true and correct copy of the Overlay Fact Sheet is attached as **Exhibit 2**. I retweeted a link to the website, which is an open letter signed by over 700 experts in the field.⁸ It is also hard to see how, essentially, AudioEye believe over 700 experts in the field are engaged in a knowing conspiracy to make things up about AudioEye products.

⁸ Signatories include: Contributors and editors for WCAG, ARIA, and HTML specifications, consultants from the US, UK, NL, CA, JP, DE, FR, SE, NO, BE, PL, AU, DK, IL, CL and more, internal accessibility experts for companies like Google, Microsoft, Apple, NBC, Squarespace, BBC, VMWare, Shopify, ServiceNow, Dell, Lyft, HCL, Costco, Expedia, eBay, Cigna, Target, CVS Health, Kijiji, Orange, Pearson, Mitre, Sapient, and Pearson Assessments, and from higher education institutions like Syracuse, CSU, Stuttgart Media University, University of Massachusetts, San Francisco State University, Gallaudet University, Carnegie Mellon, West Virginia University, MIT, Lawyers for the disabled, contributors to assistive technology software such as JAWS and NVDA, and end users with disabilities.

27. In light of the above, I decided to tweet to J.D. Power to share my opinion. I published the following Twitter thread (“Statement 1”):



It appears that the images from ¶ 35 of complaint are representations of those tweets, though I cannot call them “true and accurate” because Plaintiff’s pulled-out quotes appear to block sections of the tweets, making it so they cannot be read in their entirety.

28. I believed at the time, and still believe both the opinions and facts in Statement 1 are true. That is, I believed (1) AudioEye’s overlay tools do not work well; (2) that AudioEye’s overlay tools are not sufficient to bring a company’s website into compliance; (3) that AudioEye engages in deceptive marketing practices in exaggerating how effective its overlay tools are; (4) a company’s use of AudioEye overlay tools can create reputational harm.

29. I still believe the opinions and facts reflected in Statement 1.

30. My statement that the overlays tools were “banned for ADP settlement” was true or substantially true, as in that agreement, the parties agreed that AudioEye’s overlay products alone were insufficient to achieve compliance, and could not be used on their own going forward.

31. Shortly after I wrote these tweets, on April 5, 2022, I was served with a Cease and Desist letter from AudioEye’s attorneys. In it, they attempted to refute points I had made (I disagree on whether they were persuasive), which was well within their rights, but the letter continued with a “demand” that I “immediately remove” the posts they did not like, and threatened litigation.

32. I believed then, and still do, that AudioEye was attempting to chill my right to speak about issues of public concern that matter to me. I have a right to express my opinions about a product I see as detrimental to a community.

The Video Series and Twitter Thread of May 30, 2022

33. In an effort to demonstrate some of the flaws with AudioEye's overlay tools, I made a series of very short videos, and tweeted them with a brief written description of each.

34. In total, there were eight videos, each highlighting a different AudioEye overlay tool from its "Visual Toolkit", which is a "widget" toolbar with a menu of options, such as "Focus", "Cursor", "Highlight", "Text Size", "Spacing", "Font", and "Image". Each is supposed to impact the given website one is looking at in such a way as to be helpful for increased accessibility.

35. Each video shows me clicking on a tool from the toolbar, and then trying to use it. A text bubble then pops up with my brief assessment of the tool's effect on the webpage.

36. Each tweet also provided some brief commentary on what was reflected in the video.

37. In each video, I blocked out the URL of the webpage I was on, which would have identified AudioEye's corporate client. I did so in order to avoid what I had come to see as AudioEye's aggressiveness and intimidation toward people who criticize its products. It is puzzling that Plaintiff would *now* criticize me for not showing its client's name.

38. Despite Plaintiff's assertions in CMP, no aspect of the video was "doctored." This is patently false and incorrect.

39. These are the tweets I posted (collectively, along with the videos each Tweet linked,⁹ "Statement 2"), read from left to right, then top to bottom:

⁹ It is worth noting that Twitter, as a medium, frequently requires users to view videos to fully understand a statement. Any user of Twitter would understand the tweets in Statement 2 as commentary on the videos, and know the videos were vital context for the text (and visa-versa).

Adrian Roselli (no blue check) @aardrian · May 30, 2022

I feel like an overlay with a button labeled 'Focus' should have some effect on focus styles on the page. In this case, I get the same black outline both before and after activation.

Maybe it does something else? Maybe the label is confusing?

Using the AudioEye Overlay, Focus'

0:22

1 3 4

Adrian Roselli (no blue check) @aardrian · May 30, 2022

The 'Cursor' button shows a picture of a mouse pointer suggesting it affects the pointer somehow. But what does it do? It does not change or resize my mouse pointer.

This overlay offers a 'Visual Toolkit' that so far seems to do nothing visually.

Using the AudioEye Overlay, Cursor'

0:06

1 2 1

Adrian Roselli (no blue check) @aardrian · May 30, 2022

The 'Highlight' button cycles through headings, links, and buttons (by changing the accName of the button).

Again, no visual change to elements which I demonstrate with dev tools are definitely headings, links, and buttons.

It is not clear what this overlay does so far.

Using the AudioEye Overlay, Highlight'

1:07

1 1

Adrian Roselli (no blue check) @aardrian · May 31, 2022

'Text Size' also cycles through three options, also by changing its accessible name.

And it also has no effect on the page content. However, it does scale the navigation and footer.

Using the AudioEye Overlay, Text Size'

0:17

1 1

Adrian Roselli (no blue check) @aardrian · May 31, 2022

'Spacing' only affects the letter spacing in the navigation and footer, having no effect on the page content (other than pushing it down a bit).

The page content for the accessibility statement. Which the overlay vendor provides.



0:05

1 retweet 2 likes

Adrian Roselli (no blue check) @aardrian · May 31, 2022

Also affecting only the navigation and footer, 'Font' cycles through three options with the third being OpenDyslexic (or similar), which performs no better than any other typeface. Most overlays use it, and it is performative.

Also uses an accessible name change.



0:07

1 retweet 1 like

Adrian Roselli (no blue check) @aardrian · May 31, 2022

'Image' has no effect on the single image in the content. It is not clear what its purpose is.

Maybe a more robust page would get value from it? In which case, why is this not disabled by the AI?

Overlays in general (or specifically this one) do not seem to offer much value.



0:32

1 retweet 1 like

Adrian Roselli (no blue check) @aardrian · May 31, 2022

This last tweet in the thread demonstrates how sometimes the overlay script does not load. The user is left with none of the claimed... benefits... of the overlay.

As we saw, the overlay failing to run seems to be no loss to the user.

Thanks for attending this thread.

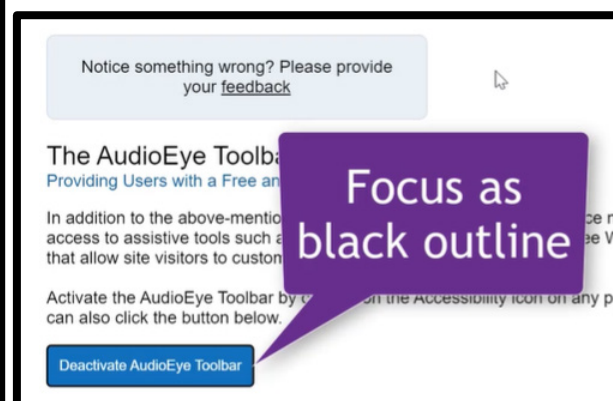
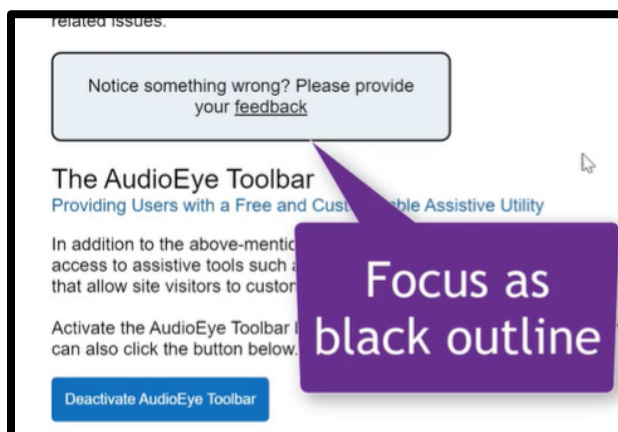
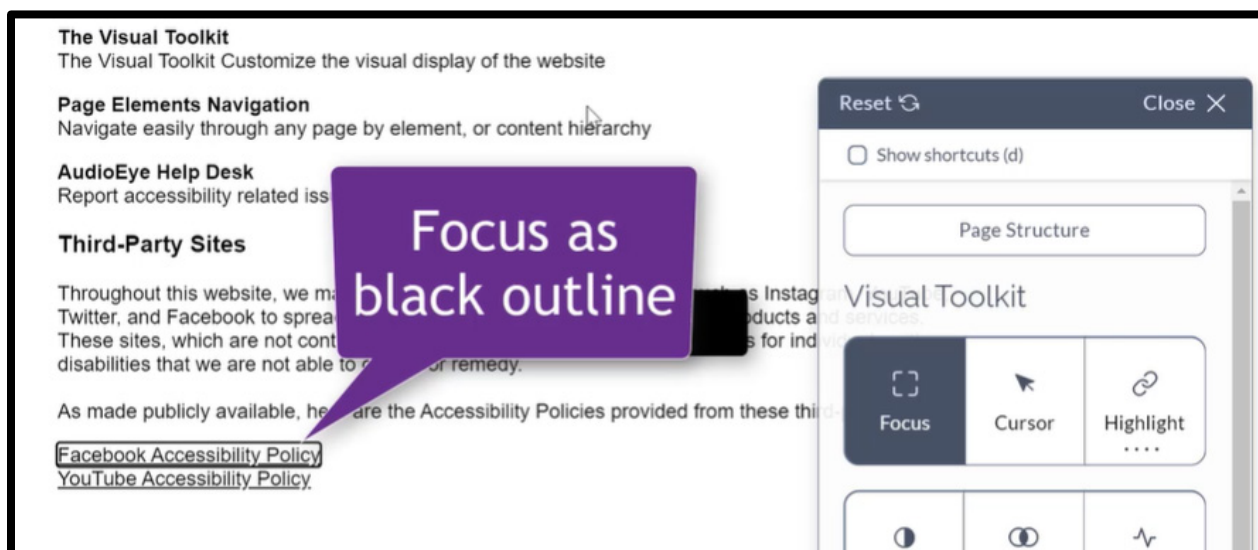


0:43

1 retweet 1 like

It appears that images from CMP ¶ 43 are representations of those tweets, but as before, Plaintiff's pulled-out text appears to block sections of the tweets. The videos are also not produced, though screenshots are, making those versions incomplete, since the videos are the primary expressive content of the tweets.

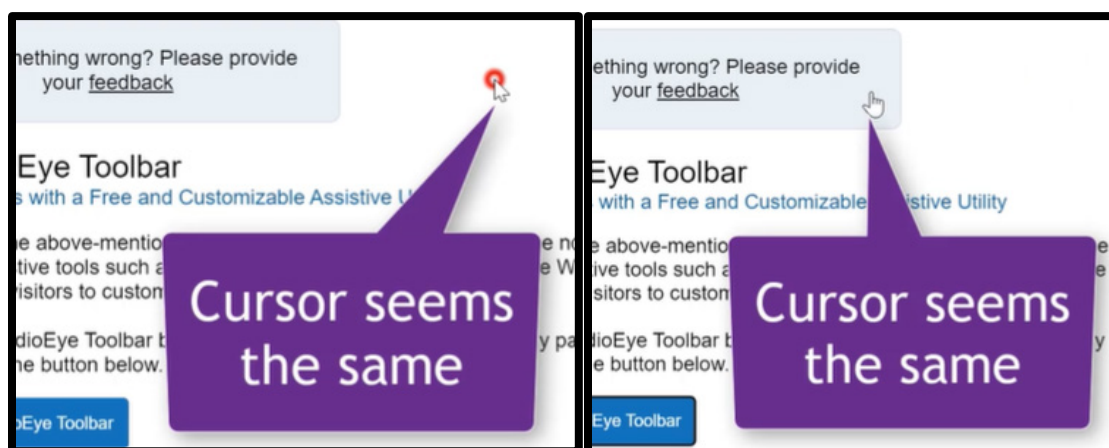
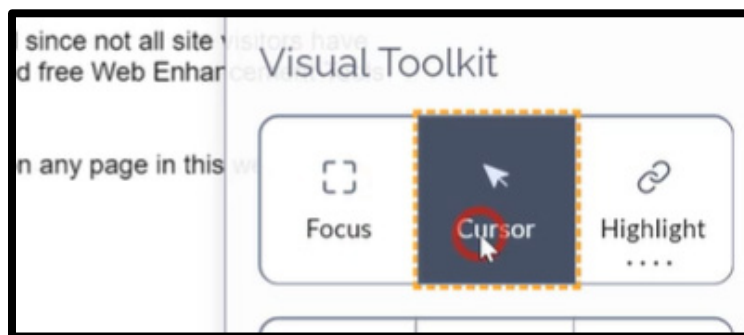
40. To walk through the videos, in my first video, I used the "Focus" tool from the AudioEye toolbar widget. In my video, I demonstrated the tool, and my text bubble reads: "Focus as black outline", as the tool caused a black outline to form around text when using the "Tab" key to move between links on a webpage.



The full video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_focus.mp4

41. In my accompanying tweet, I commented on the video. Plaintiff seems to take issue with my statement that, “In this case, I get the same black outline both before and after activation.” But, I believed then, and still believe now, that that was true — and it is obviously an accurate description of the video, as the Court can see. *That is what happened in the video.* That is, the tool is supposed to make the outline more easy to “focus” on — hence the name. Instead, it does not change from the default black border a user would see moving around when using the “Tab” key without AudioEye.

42. In my second video, I used the “Cursor” tool from the AudioEye toolbar widget. I demonstrated using it, and the video reflects that there was no change to the cursor icon. My text bubble reads, “Cursor seems the same.”¹⁰

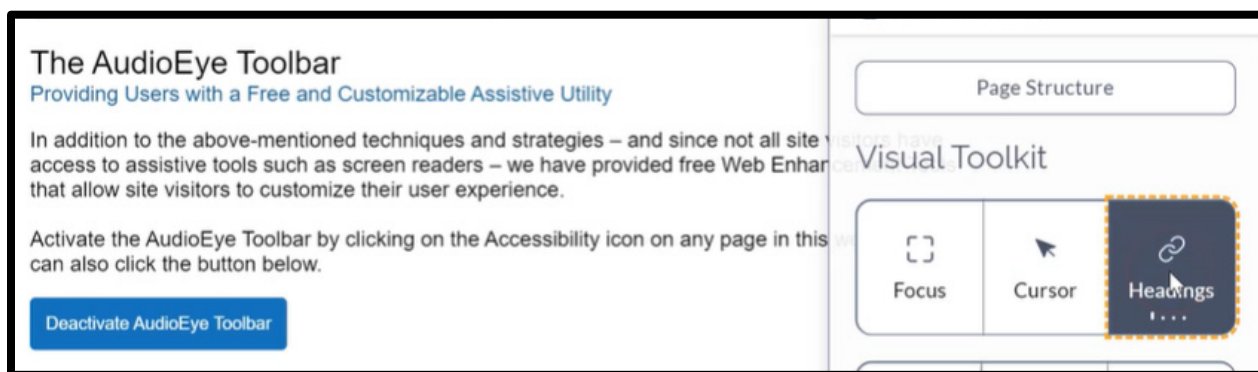


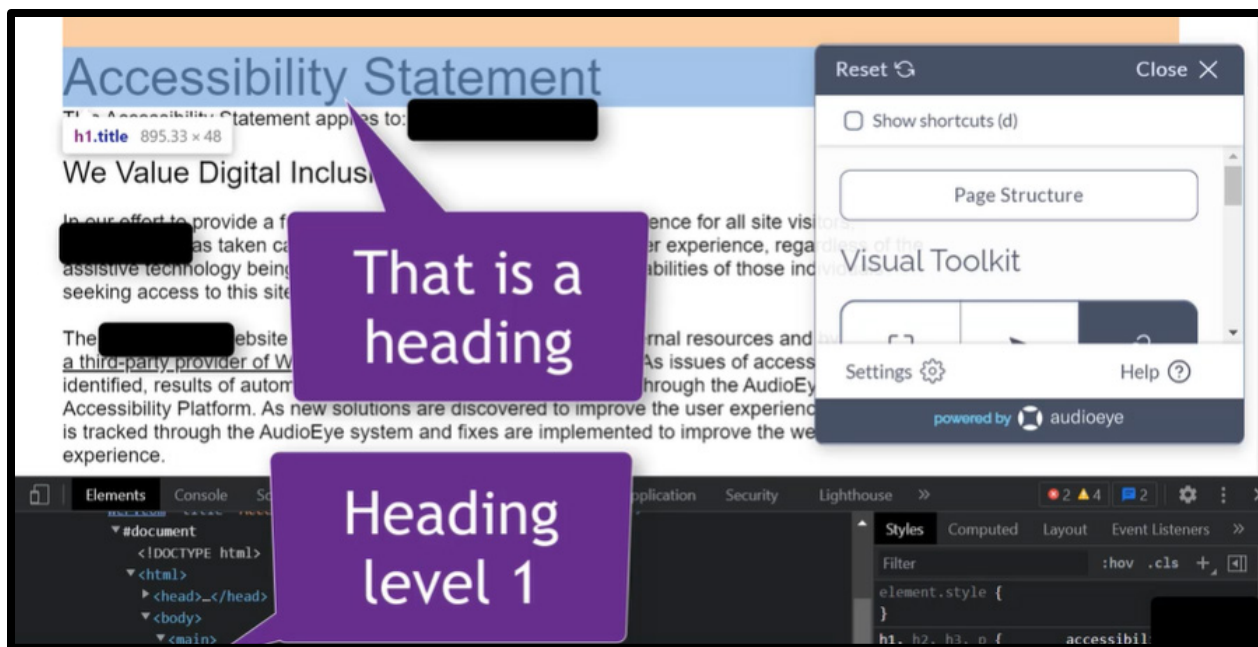
¹⁰ The red circles that ripple from my cursor when I click are something added by my recording/post-production software (Camtasia) to make the video easier to follow — basically they show when a click takes place and draw attention to the cursor. It is a standard feature used by many people who make screen recordings.

The full video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_cursor.mp4

43. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement that “This overlay offers a ‘Visual Toolkit’ that so far seems to do nothing visually.” I believed then, and still believe now, that my opinion was appropriate. That is what happened in the video. The Cursor button did not alter the cursor icon or the webpage.

44. In my third video, I used the “Highlight” tool. I demonstrated using it. The video reflected that the tool cycled through different options, “Headings”, “Links”, and “Buttons”, but that when I clicked on what were the headings, links, and buttons, there was no visual change. I then click “Inspect” to show the site’s source code, and make sure there is text that should appear as (and was coded as) headings, links, and so on. My text bubbles read: “That is a heading”, “That is a button”, etc. The video reflected that there were no visual changes to relevant parts of the webpage when using the tool.

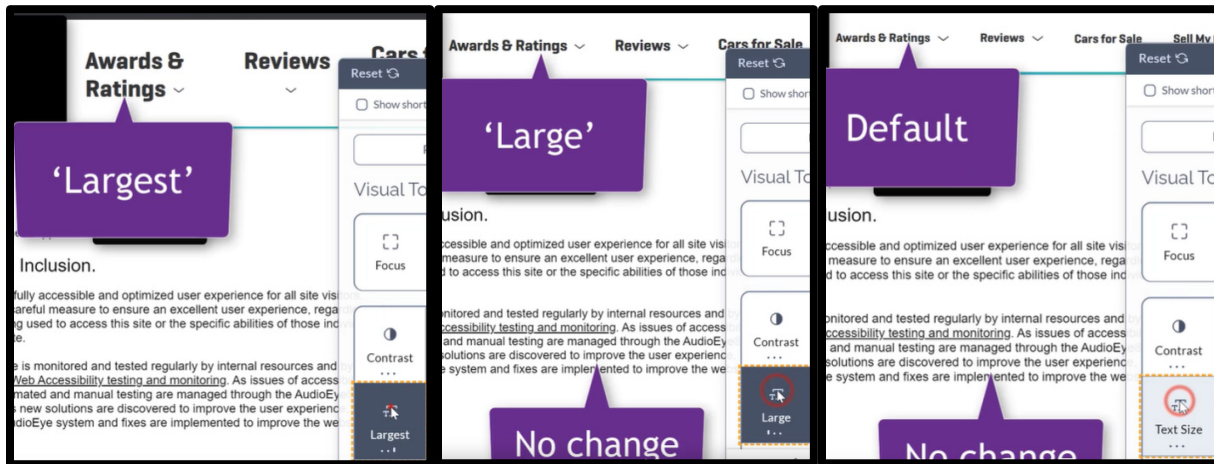




45. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement “Again, no visual changes to elements.” I believed then, and still believe now, that my opinion was appropriate. That is what happened in the video. The ‘Highlight’ button did not visually alter the page, and the HTML source code confirmed that, if it was supposed to change headings (for example) to a different color or size, it was not doing it to those page elements coded as headings.

46. In my fourth video, I used the “Text Size” tool. I clicked the tool, and then demonstrated using it on the webpage. My demo showed that the text changes only occurred in the headers and footers on the website, but not body of the page. My text bubbles read: “Scrollbar is jumping”, and “Largest”, “Default”, “Large”, describing the tools as it cycled through options, and “No change in size” as I used it. Curiously, however, the tool *did change*

the size of the navigation bar at the top and footer – showing the that the tool is doing *something*, just not what it is supposed to — but did not change the main body text on the page.



The full video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_text-size.mp4

47. In my accompanying tweet, I provided additional commentary on the video.

Plaintiff seems to take issue with my statement that “And it has no effect on the page content.” I believed then, and still believe now, that my opinion was correct. That is what happened in the video. The text tool only altered the header text, and made no visual change to the webpage’s body.

48. In my fifth video,¹¹ I used the “Spacing” tool. I demonstrated the use of the tool, click on areas of the website, and demonstrated that it only made visual changes to the header and footer, not the body of the website. My text bubbles read: “More space” in the header and “No change in spacing” in the body. The full video can be viewed here:

https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_spacing.mp4

¹¹ I omit, for space, images illustrating the remaining videos. They are substantively of a kind with those above, and the full videos are linked if the Court wishes to review them.

49. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement that “‘Spacing’ only affects the letter spacing in the navigation and footer, having no effect on the page content (other than pushing it down a bit).” I believed then, and still believe now, that my opinion was appropriate. That is what happened in the video. The tool only altered the spacing of the header and footer of the webpage, not the webpage’s body.

50. In the sixth video, I used the “Font” tool. In the video, I demonstrate the tool, showing how it cycles through a few options, including “Dyslexic.” I demonstrated that again the tool only had effect in the header of the website, and not the body. My text bubbles read, “Different sans serif”, “Serif Font”, and “Problematic dyslexia font” as the tool cycled through options, and “No font change” in the body of the webpage. The full video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_font.mp4

51. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement that “[] OpenDyslexic (or similar), which performs no better than any other typeface.” I believed then, and still believe now, that my opinion was appropriate. Without going into too much detail, “Open Dyslexic” is a typeface that is marketed as being helpful for dyslexic people, and is often utilized in overlays such as this one, but studies have shown it does not improve the ease of reading for dyslexic people. My opinion is based on that research. If the Court is interested, I am happy to provide the studies documenting that fact, but for the moment, I assume Plaintiff does not dispute that research exists.

52. In the seventh video, I demonstrated the “Image” tool. In the video, I clicked on the tool, clicked on an “image” on the website, and showed, based on the source code, that it was in fact an image. My text bubble said, “Is this an image” when clicking the image, then when in

the source code, the bubble says “”, proving that it was in fact coded as an image. The video showed that the image tool had no effect on the image on the page. The full video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_images.mp4

53. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement that “‘Image’ has no effect on the single image in the content. It is not clear what its purpose is.” I believed then, and still believe now, my opinion. Using the tool, I clicked on the only image on the webpage and it had no impact on the image. That is what happened in the video.

54. In the eighth video, I demonstrated how the overlay tool can fail to load altogether. I clicked on “Activate AudioEye Toolbar” on the corporate client’s webpage, and the tool failed to pop up. There is no text bubble in this video. The video can be viewed here: https://adrianroselli.com/wp-content/uploads/2022/05/AudioEye-Redacted_broken.mp4

55. In my accompanying tweet, I provided additional commentary on the video. Plaintiff seems to take issue with my statement that “sometimes the overlay script does not load. The user is left with none of the claimed...benefits...of the overlay.” I believed then, and still believe now, that my opinion was appropriate. That is what happened in the video. The AudioEye Toolbar did not load when I clicked on it.

56. The tweets contained in FAC ¶ 43 are my opinions based on the videos in which I demonstrated the tools. I demonstrated that there are at times problems with AudioEye’s overlay tools, in that they may make no or limited visual impact.

57. The claim by Plaintiff that I “do not show the toolbar working on a live website” is false, speculative, and based on nothing. The videos linked above are true and correct videos of the performance of the AudioEye corporate client’s website, as of the day I used it. I

intentionally used a live webpage for my videos and demonstrations, and my videos reflected what actually happened when I used the tools from AudioEye's toolbar widget. To claim otherwise is an invention with no plausible basis in reality.

58. I also never "doctored" (FAC ¶ 46) any of the videos. What I demonstrated is what happened. This is a completely false claim by Plaintiff, and Plaintiff never explains this conclusory assertion.

59. My videos and commentary were in regards to the AudioEye overlay toolbar widget that was featured in my videos.

60. As with Statement 1, I believed at the time that each of the opinions and facts in Statement 2 were true.

61. I still believe that the opinions and facts I shared in Statement 2 (inclusive of the videos contained therein) are true.

62. Upon information and belief, in the time since I published Statement 2, AudioEye has addressed some of the issues that I pointed out, and fixed tools that I had demonstrated as ineffectual or not working in my videos. Since this complaint was filed, I have re-tested the tools, and some of what I had highlighted no longer appeared to be occurring.

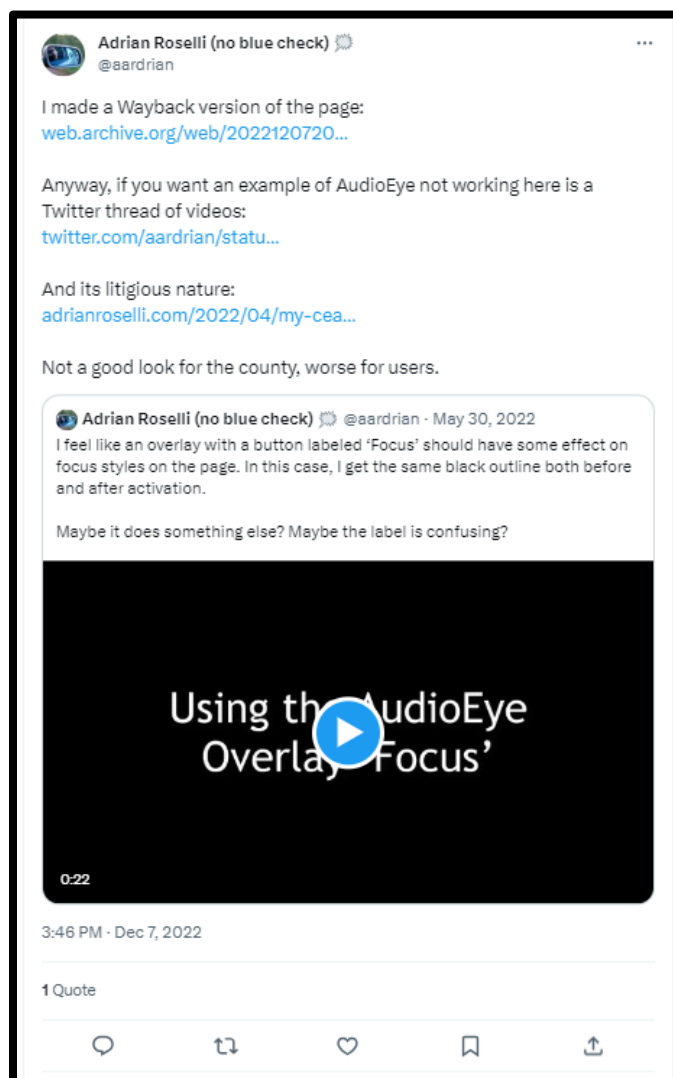
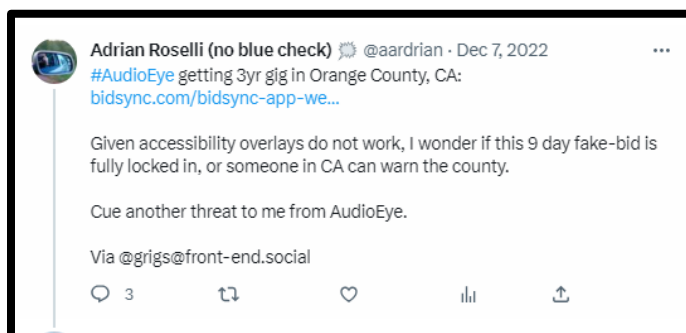
Tweets Regarding AudioEye Client Orange County on December 7, 2022

63. On or around December 7, 2022, I became aware that Orange County, California had put out a request for proposals to solicit bids for a contract titled "AudioEye web content accessibility and compliance services", and that AudioEye had this contract, and was re-bidding to renew it.

64. I was of the opinion that that was a poor choice for the County, because of my existing opinions that AudioEye's overlay products do not work well and are not a good option for increasing accessibility.

65. I was also of the opinion that this request for bids seemed non-competitive and “fake” since it was a request for a specific brand’s products.

66. To share my opinion, I drafted two tweets. These are the tweets I posted (collectively, Statement 3):



The linked tweet at the bottom is Statement 2. The other links are to Orange County's bid contract with AudioEye¹² and a blog post where I discussed the frivolous cease and desist law firm Cozen O'Connor sent to me on behalf of AudioEye.¹³ It appears that images from FAC ¶ 53 are a representation of those tweets. As above, Plaintiff's pulled-out text appears to block a section of one of the tweets.

67. It is not clear to me, from reading Plaintiff's complaint, which statements it considers to be tortious.

68. I shared the opinion, as I've shared before, that I do not think overlay products work well, including AudioEye's.

69. I also expressed the concern that the bidding process was anti-competitive and "fake", and questioned whether the County was locked into the contract or if someone could "warn the county" before it renewed the contract for three years.

70. To support my opinion that the AudioEye overlay products don't work, I included a link to the video demonstrations from Statement 2.

71. In paragraph ¶ 55 of Plaintiff's complaint, it references two Twitter accounts who "challenge[d]" my tweets, presumably to show that someone could hold an opinion different from my own, which I already know to be true.

72. The first account Plaintiff references, @aleksandrturin, last tweeted on February 2, 2023, and the tweet included the term "#audioeye." Its next most recent tweet, from March 2, 2022, references "AEYE", which is the stock ticker symbol for AudioEye, Inc. Before April 2020, the account *exclusively* retweeted the AudioEye twitter account. Many of its reply tweets

¹² <https://web.archive.org/web/20221207202933/https://www.bidsync.com/bidsync-app-web/vendor/links/BidDetail.html?bidid=2110276&roundId=null>

¹³ <https://adrianroselli.com/2022/04/my-cease-desist-from-audioeye.html>

to other accounts simply state “Let’s talk about website accessibility.” Up through February 2022, the account also often responded to criticism of AudioEye. For instance, when one user criticized AudioEye’s overlay tools and deceptive marking practices, @aleksandrturin responded with, “Can you show me where they currently market that? I’ve only heard AudioEye state that remediation takes automation + manual touch,” a familiar refrain even for one who has only read the Complaint in this case. To assume that this is a “sock puppet”¹⁴ account run by AudioEye or an agent is, I think, a safe bet.

73. The second twitter account Plaintiff references as having criticized me I believed to be a representative for AudioEye, and the account has since been deleted.

74. Plaintiff incorrectly claims that I “falsely implied” that the County’s website had the same issues as the webpage from my video series. I made no such claim. I did not claim to have tested out any AudioEye overlay tools on the County’s website, and nothing in Statement 3 says anything of the kind (and it is hard to see why Plaintiff says it does). Rather, Statement 3 was a criticism of the apparent all-but-no-bid process. Based on what I know about government contracts of this kind, it is almost unthinkable that a serious bidding process could take place in *nine days*. Rather, that kind of process is inherently suspicious — and that is what I was commenting on.

75. As with Statements 1 and 2, I believed at the time that each of the opinions and facts in Statement 3 were true.

76. I still believe that the opinions and facts I shared in Statement 3 are true.

¹⁴ That is, an account pretending to be a random member of the public, when it is anything but. Notably, in the Statement 3 thread, even that account (seemingly run by a person whose sole online raison d’etre is attacking AudioEye critics) acknowledges — though it diminishes — that Statement 2 was substantially true, saying, “You demonstrated that one feature on one website had a minor issue.” See <https://twitter.com/aleksandrturin/status/1601215806901485569?s=20>

77. I am unclear which aspect of Statement 3 Plaintiff is claiming was defamatory or tortious.

Blog Post from February 26, 2023

78. On February 26, 2023, I published a blog post on my website. It was titled “#AudioEye Will Get You Sued.” The full post is attached as **Exhibit 3**.

79. I stated, near the beginning of the post, that, “This post and the headline is my opinion. I provide verifiable facts throughout to inform that opinion. I am also not a lawyer and this post does not constitute legal advice. The content reflects my genuinely held beliefs and opinions.”¹⁵ This was, and continues to be, true. These are my opinions. It is obvious that the post is opinion in context,

80. The post also states:

AudioEye is one of many vendors that claims its accessibility overlay product can make your site “accessible”. Like the other overlay vendors, AudioEye’s overlay does not. If you have been lead to believe that AudioEye’s overlay will protect you from complaints, whether via AudioEye advertising or sales efforts, then it is important to know that may not be true.

81. The piece was titled “#AudioEye Will Get You Sued” because I believe that the use of AudioEye overlay products can be a liability, because they do not actually bring companies into compliance.

82. This was, and continues to be, my opinion of AudioEye’s overlay products, and its overly promising marketing.

83. I also stated in my blog post, “It is important to note that AudioEye also offers human testing and remediation...My concern with AudioEye has consistently been its overlay product.” This is true. I have always been criticizing AudioEye’s overlay products.

¹⁵ The post is also literally tagged as a “rant” when viewed online at <https://adrianroselli.com/2023/02/audioeye-will-get-you-sued.html>

84. Throughout the blog post, I point out certain problems with the overlay, as I have discussed throughout my Affidavit, including some more technical information.

85. I also discussed various litigation that AudioEye has been involved in, including the *LightHouse* litigation.

86. I also linked to other blog posts I have published concerning the overlay products of *other* overlay product vendors.

87. I also quoted a New York Times article, which states, “Last year, more than 400 companies with an accessibility widget or overlay on their website were sued over accessibility.”¹⁶

88. The New York Times article also provides quotes from disabled people with criticisms of overlay products, and stating that “hundreds of people with disabilities [] have complained about issues with automated accessibility web services.”¹⁷

89. I also quoted an article from the *Tech Times* which discussed the Lighthouse litigation, which stated, “Despite working for a long time with AudioEye for website remediation, ADP, the human resources management software and resources giant, was sued due to consistent failures in AudioEye services and products to be used by blind people.”

90. I agreed with, and still agree with, my statement that “AudioEye’s overlay can add demonstrable WCAG failures and in some cases have no impact for users.”¹⁸ I’ve heard the criticism from users of overlay products, and I believe I have demonstrated a small set of failures as well, including instances where the overlay tool had no impact on a webpage.

¹⁶ Amanda Morris, *For Blind Internet Users, the Fix Can Be Worse Than the Flaws*, N.Y. Times, (July 13, 2022), <https://www.nytimes.com/2022/07/13/technology/ai-web-accessibility.html>

¹⁷ I was also quoted in this article.

¹⁸ WCAG is an acronym for the “Web Content Accessibility Guidelines, which is a set of guidelines published by the Web Accessibility Initiative of the World Wide Web Consortium, which is widely seen as the main international standards organization for the Internet.

91. I believed, and still believe, my statements that amount to my opinion that using AudioEye overlay products is a liability and compliance concern. I also believe AudioEye to be litigious and aggressive in how it pursues its critiques, and in fact, criticizing it *did* get me sued.

92. As with Statements 1, 2, and 3, I believed at the time—and still believe—that the opinions in Statement 4 are true.

93. Indeed, it is unequivocally a true statement to say AudioEye **has gotten** people sued,¹⁹ including in *LightHouse et al. v. ADP Inc., et al.*, Case No. 4:20-cv-09020 (HSG), in the Northern District of California and *Tucker et al. v. C.S. Babylon Marine, Inc.*, Case No. 1:22-cv-3642 (LGS), in the Southern District of New York;²⁰ *Gomez v. Jackson Family Wines, Inc.*, (N.D. Cal. Civ., 3:22-cv-00957, February 16, 2022);²¹ and Anthony Hammond Murphy v. Eyebobs, LLC, (W.D. Pa. Civ. R. 1:21-cv-17, January 7, 2021).

94. Finally, anyone reading my blog would understand it in the context of my similarly named other posts, [#UserWay Will Get You Sued](#), [#FACILiti Will Get You Sued](#), and [#accessiBe Will Get You Sued](#). These are all similarly tagged “rants” that are about companies that sell cheap, inadequate solutions to large companies that want to **look** like they are providing accessible services, without actually doing the hard work of providing those services.

CONCLUSION

¹⁹ As explained in the accompanying memorandum, obviously, a prediction about the future could never be a statement of fact that is capable of being proven true or false.

²⁰ AudioEye itself acknowledges that this case was about its products in a press release. See <https://www.prnewswire.com/news-releases/audioeye-successfully-defends-customer-in-precedent-ada-case-for-website-accessibility-301785612.html> It was resolved by a stipulation of voluntary dismissal, with no public indication of whether a confidential payment was made by AudioEye or its client — though apparently AudioEye, as described in the press release’s title, handled the defense.

²¹ Jeff Quackenbush, *Dozens of Northern California Wineries Face Website Accessibility Lawsuits*, North Bay Business Journal (April 1, 2022). <https://www.northbaybusinessjournal.com/article/industrynews/dozens-of-northern-california-winerics-face-website-accessibility-lawsuits/>

95. Finally, I want to wrap up with a brief comment on the experience of being on the receiving end of AudioEye's ire. Receiving this lawsuit has been terrifying. I find it stunning that a company would pay \$1000+/hr lawyers to attack me over tweets that got a handful of likes **when they got any at all**. The message is abundantly clear: Shut up, if you know what's good for you.

96. I very nearly did. My attorneys in this case are working on contingency, because New York's anti-SLAPP law (they tell me) allows them to do so. I previously consulted with a different firm that said defense of this case would cost me \$50,000.00 just to go through the initial motion stage — and if that was true, I would literally have no option but to do whatever AudioEye demanded of me. It would have ruined my life.

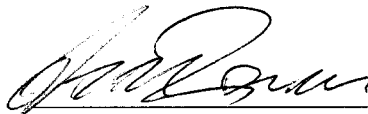
97. And all of this is just because I expressed a fairly obvious opinion: A product, in an area I know very well, does not do what it's supposed to do. That is, it doesn't work. I'm not the only one who thinks that — over 700 signatories signed the Overlay Fact Sheet that calls out AudioEye by name, and concludes “overlays are not an effective means of ensuring accessibility.”

98. Yet, AudioEye sued **me**. There are significantly bigger pockets they could have come after. And to me, that says exactly why we are here. AudioEye expected me to simply fold — and did not want to take on a defendant with the resources to actually challenge the suit.

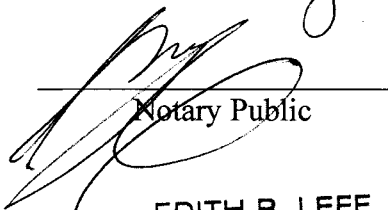
99. But, for the reasons above, I still hold my opinions about AudioEye's products. They do not work. They are a disservice to the accessibility community. And AudioEye's mode of pushing them makes it **much much** harder for end users with disabilities to actually receive accessible accommodations. I believe strongly in my right to speak about this vital issue of public concern, and therefore — as set out above and in these papers accompanying this affidavit — ask the Court to grant the anti-SLAPP relief sought.

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Dated: July 7, 2023
BUFFALO, New York


Adrian Roselli

Duly sworn to before me on
the 05 day of July, 2023


Notary Public

EDITH R. LEFF
Notary Public, State of New York
Qualified in Erie County
Reg. No. 01LE4629097
My Commission Expires 5/31/2026