

John M. Abel
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-9707
Email: jabel@attorneygeneral.gov

Patrick M. Greene
Office of Attorney General
Health Care Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 705-6938
pgreene@attorneygeneral.gov

RECEIVED
JUL 11 2023
11:10:33
CLERK OF COURT

IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
by ATTORNEY GENERAL :
MICHELLE HENRY :

Petitioner, :

v. :

VISIBLY, INC., :

Respondent. :

NO. 2023 CV 2075

CIVIL ACTION-EQUITY

ASSURANCE OF VOLUNTARY COMPLIANCE

Pursuant to 73 P.S. § 201-5 of the Unfair Trade Practices and Consumer Protection Law, the parties hereto consent to the filing of the attached Assurance of Voluntary Compliance in the Dauphin County Court of Common Pleas. The parties further agree that the Court shall maintain continuing jurisdiction over this Assurance in accordance with Section 201-5 and Section 201-8(a) of the Consumer Protection Law, 73 P.S. §§ 201-5 and 201-8(a).

ASSURANCE OF VOLUNTARY COMPLIANCE

1. This Assurance of Voluntary Compliance¹ (“Assurance”) is entered into by the Attorneys General of the States of Illinois, Mississippi, Nebraska, Nevada, South Dakota, Texas, Vermont, Washington and Wisconsin and the Commonwealths of Kentucky and Pennsylvania (collectively, “Participating States”), and Respondent Visibly, Inc. (collectively “the Parties”).
2. Visibly, Inc., formerly known as Opternative, Inc., is an Illinois corporation organized under the laws of the State of Delaware with its address at 207 E Ohio, #233, Chicago, Illinois 60611.
3. Visibly, Inc., formerly known as Opternative, Inc., advertised, offered for sale, sold and made its Products accessible to consumers in the Participating States, either through Visibly’s own website or through those of third party licensees.

I. BACKGROUND

4. This Assurance constitutes a good faith settlement and release between the Parties of claims related to an investigation by the Signatory Attorneys General as to whether certain business practices allegedly engaged in by Visibly, Inc. in the course of marketing and selling, directly and through third parties, an online vision test to consumers violate the consumer protection and trade practice statutes listed herein at footnote 2 and/or the regulations promulgated pursuant to the same (collectively, “Consumer Protection Statutes”) (“the

¹ This Assurance of Voluntary Compliance shall, for all necessary purposes, also be considered an Assurance of Discontinuance

Investigation”).²

II. DEFINITIONS

The following definitions shall be used in construing this Assurance:

- a. “Advertise” or “Advertising” shall mean any oral, written, graphic, or pictorial statement or representation, including but not limited to testimonials, endorsements, or other Third Party representations, regardless of the medium of communication employed, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of any product or service from Visibly.
- b. “Clear and Conspicuous” statement, or a statement presented “Clearly and Conspicuously” shall mean a statement or communication, written or oral, presented in such font size, color, location, audibility, and contrast against the background in which it appears, compared to the other matter with which it is presented, so it is easily noticed and readily understood. If such statement or communication modifies, explains, or clarifies other information with which it is presented, it must be presented in close proximity to such other information and in the same manner (audible or visual) so it is easily noticed and readily understood. In addition, the term means that:
 - i. With respect to any Promotional materials communicated through any non-print medium (including such formats as telephone, television, radio, CD-ROM, DVD, other electronic,

² Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*; Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1, *et seq.*; Kentucky Consumer Protection Act, Ky. Rev. Stat. 367.110-.300; Mississippi Consumer Protection Act, Miss. Code § 75-24-1, *et seq.*; Nebraska Consumer Protection Act, Neb. Rev. Stat. §§59-1601, *et seq.* and the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§87-301, *et seq.*; Nevada Deceptive Trade Practices Act, NRS 598.0903-.0999; Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.*; SDCL Chapter 37-24; Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.41; Vermont Consumer Protection Act, § 9 V.S.A. 2451, *et seq.*; Washington Consumer Protection Act, RCW ch. 19.86; and Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18(1).

magnetic, or interactive media, and including the Internet and online services), audio disclosures shall be delivered in a volume and cadence sufficient to be easily heard and readily understood, and video disclosures shall be of a size and shade, in contrast with the background with which it appears, and shall appear on the screen for a period of time sufficient to make them easily read and readily understood.

ii. In addition to the foregoing, in media such as the Internet, online services, or other interactive software, the disclosures shall also be unavoidable and shall require the consumer to affirmatively assent or click "OK" to the disclosures prior to the consumer being requested to agree to incur any obligation, financial or otherwise.

c. "Competent and Reliable Scientific Evidence" shall mean tests, analyses, research, or studies, that have been conducted and evaluated in an objective manner by qualified persons, using procedures that are generally accepted in the profession to yield accurate and reliable results, and that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

d. "Covered Conduct" shall mean Visibly's Marketing or sale of its online vision tests, whether accessible through Visibly's website(s), through the websites of Third Party licensees or by any other method, through the Effective Date of the Assurance. Covered Conduct does not include Visibly's business practices, or the practices of any Third Party or any person or entity identified in Paragraph 9, as they relate to any standard of care, licensing, or telehealth requirements set forth in any applicable law, regulation, or rule.

e. "Visibly" shall mean Visibly, Inc., formerly known as Opternative, Inc., including all of its past and present subsidiaries, predecessors, successors, and assigns.

f. "Effective Date" shall mean the date of signature of the last signatory to this Assurance.

- g. "FDA" shall mean the United States Food and Drug Administration.
- h. "FDA Authority" shall mean all FDA regulations or other processes, whether formal or informal, by which the FDA permits Visibly to Market certain products or services, including but not limited to the issuance of Emergency Use Authorizations under 21 U.S.C. 301, et seq.
- i. "FDCA" shall mean the Federal Food, Drug and Cosmetic Act.
- j. "Market" or "Marketing" shall mean any act or process or technique of promoting, offering, selling, or distributing a Product or service.
- k. "Promotion" or "Promotional" shall mean all representations and activities (including, but not limited to, direct contact with consumers) that Advertise, intend to increase sales of, or result in a sale of any Visibly Product.
- l. "Third Party" shall mean (a) any entity that is not owned or controlled by Visibly, and (b) any person who is not acting in his or her capacity as an officer or employee of Visibly or any entity owned or controlled by Visibly.
- m. "Product" or "Products" shall mean any online vision test including full refraction, over-refraction, visual acuity or any other method for assessing vision health or quality, whether accessible through Visibly's website(s), through websites of Third Party licensees or by any other method, and any other Product or service Marketed, offered for sale or sold by Visibly for the purpose of diagnosing, mitigating, treating, curing, or preventing any disease or condition.
- n. "Signatory Attorneys General" shall mean the Attorneys General representing Illinois, Kentucky, Mississippi, Nebraska, Nevada, Pennsylvania, South Dakota, Texas, Vermont, Washington and Wisconsin, or their authorized designees.
- o. The terms "and" and "or" in this Assurance shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

III. SUMMARY OF THE STATES' ALLEGATIONS

5. The Participating States allege that Visibly has Advertised, Marketed, promoted, offered for sale and sold its online vision tests in a manner that fails to comply with the Signatory Attorneys General's Consumer Protection Statutes, as well as the health and safety laws of their respective states, including without limitation, by Advertising, Marketing, promoting, offering for sale and selling Products without the required clearance or approval from the FDA.

6. The States also allege that Visibly made Advertising or Marketing claims that were not properly substantiated and that were false or misleading in nature, including claims about its Products' accuracy and safety that were not substantiated by Competent and Reliable Scientific Evidence.

7. The States further allege that Visibly made unfair and/or deceptive representations about other aspects of its Products, including, for instance, customer satisfaction rates and satisfaction guarantees.

8. Visibly denies the allegations of the Participating States, including those set forth in Paragraphs 5-7, denies any wrongdoing or liability of any kind, and enters into this Assurance solely for the purpose of resolving certain disputed claims of the Participating States.

IV. APPLICABILITY

9. The provisions of this Assurance are applicable to Visibly, its directors, officers, agents, employees, subsidiaries, parent or controlling entities, and any assigns or successor corporation or business entities.

V. ASSURANCES

10. Visibly agrees to comply with the Consumer Protection Statutes in connection with its business practices.
11. Visibly agrees not to Advertise, Market, promote, offer for sale, or sell any Product to consumers, unless the Product may be legally Marketed in accordance with the FDCA or other FDA Authority.
12. Visibly agrees not to represent, directly or indirectly, that any Product is intended to diagnose, cure, mitigate, treat, or prevent any disease or condition, or will otherwise affect the structure or any function of the body, unless such representations may be made in accordance with the FDCA or other FDA Authority.
13. In the event Visibly offers a Product for which Visibly, after a good faith assessment, does not believe that the FDA requires clearance or approval but for which Visibly has sought FDA evaluation (*e.g.*, as to the classification of the device and whether it requires FDA clearance or approval) through a formal determination request pursuant to Section 513(g) of the FDCA, Visibly agrees to Clearly and Conspicuously disclose to consumers that it is in the process of seeking such evaluation from the FDA.
14. Visibly agrees that all claims it makes or that otherwise appear on its website or in its Advertising, regarding consumers' satisfaction with products or services offered by Visibly, shall be truthful and non-misleading.
15. Visibly agrees not to make representations comparing the safety or effectiveness of any Product it offers to products or services provided by medical professionals via in-person

examinations without possessing Competent and Reliable Scientific Evidence that substantiates such representations.

16. Visibly agrees not to Advertise or represent, directly or indirectly, that any Product is superior to or comparable to any device cleared/approved by the FDA, unless: a) such advertisements or representations may be made in accordance with the FDCA or other FDA Authority; or b) Visibly possesses Competent and Reliable Scientific Evidence that substantiates such advertisements or representations.

17. Visibly agrees not to make any misrepresentation, directly or indirectly, about the efficacy, health benefits or performance, safety, or side effects of any Product.

18. Visibly agrees not to misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, analysis, research, or other evidence used in connection with the Advertising, Promotion, offering for sale or sale of any Product.

19. Visibly agrees to ensure that any satisfaction guarantee, money back guarantee, or other offer of refund to consumers will be accompanied by a Clear and Conspicuous disclosure of any terms or conditions that a consumer must meet to be eligible for such offer or refund.

20. Visibly agrees that it will ensure that all optometrists and ophthalmologists who contract with Optimized Eye Care, PC, or other organization for which Visibly acts as a Managed Services Organization that provide prescriptions to consumers following the use of Visibly's Product are licensed and in good standing in those states where such prescriptions are issued. Specifically, Visibly will require Optimized Eye Care, PC to certify to Visibly, on at least an

annual basis, that the optometrists and ophthalmologists issuing prescriptions to Visibly's consumers have active licenses in those states where such consumers are located at the time of the test.

21. Visibly agrees that, to the extent it operates any "Find A Doctor" or similar locator feature or service by which consumers can search for, identify and/or locate health care providers, Visibly will Clearly and Conspicuously disclose that none of its Products have been endorsed by any health care provider appearing in such a feature or service, unless Visibly has obtained such endorsements. Visibly will remove any health care provider who requests removal within 30 calendar days of receiving that request.

22. Visibly agrees that it shall Clearly and Conspicuously disclose to consumers that Visibly's online vision test is not a substitute for an in-person comprehensive eye examination and Visibly will urge consumers to seek a comprehensive in-person eye examination with a licensed eye care provider to determine overall eye health, unless the online vision test is FDA-indicated as a substitute for an in-person comprehensive eye examination to determine overall eye health.

VI. PAYMENT

23. Within fifteen (15) calendar days of the Effective Date, Visibly shall pay a total amount of Five Hundred Thousand Dollars (\$500,000.00) to be divided and paid by Visibly to each Signatory Attorney General in amounts to be designated by and in the sole discretion of the Multistate Executive Committee.³ Said payments shall be used by the States as attorneys' fees

³ The payment to the Commonwealth of Pennsylvania under this paragraph shall be Seventy Three Thousand Three Hundred and Twelve Dollars and Sixty Seven Cents (\$73,312.67).

and other costs of investigation and litigation, or to be placed in, or applied to, consumer protection enforcement funds, including future consumer protection enforcement, consumer education, litigation or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, or for any lawful purpose, at the sole discretion of each Signatory Attorney General.

VII. PRESERVATION OF AUTHORITY

24. Nothing in this Assurance shall be construed to limit the authority or ability of an Attorney General to protect the interest of his/her State or the people of his/her State. Further, nothing contained in this paragraph shall be construed to limit the ability of the Attorneys General to enforce the obligations that Visibly has under this Assurance. This Assurance shall not bar any Attorney General or any other governmental entity from enforcing laws, regulations, or rules against Visibly for conduct subsequent to or otherwise not covered by this Assurance.

VIII. RELEASE

25. Subject to the reservations set forth in Paragraph 26 below, upon execution of this Assurance and payment made pursuant to Paragraph 23, the Participating States shall hereby release and discharge Visibly and those others identified in Paragraph 9 (the "Released Parties") from all civil claims that the Signatory Attorneys General could have brought under the Consumer Protection Statutes resulting from the Covered Conduct up to and including the Effective Date.

26. Notwithstanding any term of this Agreement, specifically reserved and excluded from the release in Paragraph 25 as to any entity or person, including Released Parties, are any and all of

the following:

- a. Any criminal liability;
- b. Any civil or administrative liability that any person or entity, including Released Parties, has or may have to any or all of the Signatory Attorneys General, under any statute, regulation or rule not expressly covered by the release in Paragraph 25, including, but not limited to, any state or federal antitrust violations, Medicaid claims, state false claims violations or any liability based upon obligations created by this Agreement;
- c. Any civil or administrative liability that any person or entity, including Released Parties, has or may have to any state licensing board or authority; and
- d. Any private right of action.

IX. SEVERABILITY

27. If any portion, provision or part of this Assurance is held invalid, unenforceable, or void for any reason whatsoever, that portion shall be severed from the remainder and shall not affect the validity or enforceability of the remaining portions.

X. GENERAL PROVISIONS

28. This Assurance shall take effect immediately upon execution by the Parties.

29. Visibly has read this Assurance and understands all aspects of it.

30. The Parties understand and agree that this Assurance shall not be construed as an

approval or a sanction by the Attorneys General of Visibly's business practices nor shall Visibly represent that this Assurance constitutes an approval or sanction of its business practices.

31. Nothing in this Assurance shall be construed as relieving Visibly of the obligation to comply with all applicable state and federal laws, regulations, and rules, nor shall any of the provisions of this Assurance be deemed to be permission to engage in any acts or practices prohibited by such laws, regulations, and rules.

32. In states where statute requires that this Assurance be filed with and/or approved by a court, Visibly consents to the filing of this Assurance and to its approval by a court, and authorizes the Attorneys General in such states to represent that Visibly does not object to the request that the court approve the Assurance. Visibly also acknowledges that such States may have to submit additional documents to their respective courts as part of seeking the court's approval, such as Orders Approving AVC, and authorizes the Attorneys General to represent that Visibly does not object to such additional documents. Visibly further consents to be subject to the jurisdiction of such courts (if legally required) for the exclusive purposes of having such courts approve or enforce this Assurance. To the extent that there are any court costs associated with the filing of this Assurance (if legally required), Visibly agrees to pay such costs.

33. Visibly shall not participate in any activity to form, organize, or reorganize into a separate entity or corporation that engages in acts or practices in whole or in part that are prohibited by this Assurance or for any other purpose that would otherwise circumvent any term of this Assurance. Visibly shall not knowingly cause, permit, or encourage any other persons or entities acting on its behalf, to engage in practices prohibited by this Assurance.

34. This Assurance may be executed by any number of counterparts and by different

signatories on separate counterparts, each of which shall constitute an original counterpart thereof and all of which together shall constitute one and the same document. One or more counterparts of this Assurance may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

35. The undersigned Visibly representatives state that they are authorized to enter into and execute this Assurance on behalf of Visibly and, further agree to execute and deliver all authorizations, documents, and instruments that are necessary to carry out the terms and conditions of this Assurance.

36. This Assurance shall not be construed to waive any claims of sovereign immunity the States may have in any action or proceeding.

37. It is agreed and understood that this Assurance shall in no way affect the rights of individual citizens, nor shall it be interpreted to create in any way any private right of action.

38. This Assurance is not intended for use by any Third Party in any other proceeding and is not intended, and should not be construed, as an admission of any fact or legal conclusion related to the Investigation, or of any wrongdoing or liability by Visibly, and Visibly expressly denies any such admission, wrongdoing, or liability.

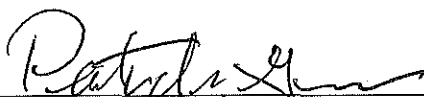
REMAINDER OF PAGE INTENTIONALLY BLANK

For the Petitioner:

**Commonwealth of Pennsylvania,
Office of Attorney General**

**MICHELLE HENRY
ATTORNEY GENERAL**

Date: 4/14/23

By: 

Patrick M. Greene
Attorney I.D. No. 309722
Office of Attorney General
Health Care Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 705-6938
Email: pgreene@attorneygeneral.gov

John M. Abel
Senior Deputy Attorney General
Assistant Director for Multistate and Special Litigation
Attorney I.D. No. 47313
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 787-9707
Email: jabel@attorneygeneral.gov

For the Respondent:

COZEN O'CONNOR

Counsel for Visibly, Inc.

By: *Maria Colsey Heard*

Maria Colsey Heard
Attorney I.D. No. 71487
1200 19th Street, N.W.
Suite 300
Washington, DC 20036
Telephone: (202) 471-3419
Email: mheard@cozen.com

Christopher J. Allen
1200 19th Street, N.W.
Suite 300
Washington, DC 20036
Telephone: (202) 471-3421
Email: callen@cozen.com

DATE: *March 27, 2023*

IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
by ATTORNEY GENERAL :
MICHELLE HENRY :

Petitioner, :

v. :

VISIBLY, INC., :

Respondent. :

NO. 2023 CV 2075

CIVIL ACTION-EQUITY

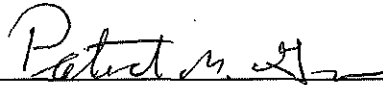
CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: _____

4/14/23

By: _____



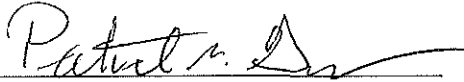
Patrick M. Greene
Deputy Attorney General
Attorney I.D. No. 309722
Office of Attorney General
Health Care Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 705.6938
Facsimile: (717) 787.1190
Email: pgreene@attorneygeneral.gov

CERTIFICATE OF SERVICE

I, Patrick M. Greene, do hereby certify that a true and correct copy of the foregoing
Assurance of Voluntary Compliance was served upon the following via First Class Mail and
Email on the date noted below:

Maria Colsey Heard
Christopher J. Allen
1200 19th Street, N.W.
Suite 300
Washington D.C. 20036
mheard@cozen.com
callen@cozen.com

Date: 4/14/23

By: 
Patrick M. Greene
Deputy Attorney General