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8 CALIFORNIA

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

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12
13 **THE PEOPLE OF THE STATE OF**
14 **CALIFORNIA,**

15 Plaintiff,

16 v.

17 **PRESENCELEARNING, INC.,**

18 Defendant.
19

Case No.

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

1 The People of the State of California (“the People”), by and through Xavier Becerra,
2 Attorney General of the State of California, based on information and belief, allege in this
3 complaint as follows:

4 **PARTIES**

5 1. Plaintiff is the People. Business and Professions Code sections 17200 et seq. (“the
6 Unfair Competition Law”) and 17500 et seq. (“the False Advertising Law”) provide that
7 enforcement actions may be brought by the Attorney General in the name of the People of the
8 State of California. The People bring this action under the authority granted to them by the
9 Unfair Competition Law and the False Advertising Law.

10 2. Defendant PresenceLearning, Inc. (“PresenceLearning” or “Defendant”) is, and at
11 all times mentioned herein was, a Delaware corporation with its principal place of business
12 located at 530 7th Avenue, Suite 407, New York, NY 10018. PresenceLearning also has offices in
13 San Francisco, California, and Salt Lake City, Utah. At all times relevant herein,
14 PresenceLearning transacted business throughout California.

15 **JURISDICTION AND VENUE**

16 3. This Court has jurisdiction over this matter pursuant to California Constitution,
17 article VI, section 10.

18 4. This Court has jurisdiction over Defendant because Defendant is a business entity
19 that does sufficient business and/or has sufficient minimum contacts in California, or otherwise
20 intentionally avails itself of the California market so as to render the exercise of jurisdiction over
21 it by the California courts consistent with traditional notions of fair play and substantial justice.

22 5. The violations of law alleged in this Complaint occurred in San Francisco County
23 and elsewhere throughout California.

24 **CALIFORNIA AND FEDERAL CONSUMER PROTECTION LAWS**

25 **A. False Advertising Law**

26 6. Section 17500 of the Business and Professions Code provides that it is unlawful
27 for any person, “with intent directly or indirectly . . . to perform services, professional or
28 otherwise, or anything of any nature whatsoever or to induce the public to enter into any

1 obligation relating thereto, to make or disseminate . . . any statement concerning . . . those
2 services . . . which is untrue or misleading, and which is known, or which by the exercise of
3 reasonable care should be known, to be untrue or misleading.”

4 7. Business and Professions Code section 17508, subdivision (a) prohibits “any false
5 or misleading advertising claim, including claims that (1) purport to be based on factual,
6 objective, or clinical evidence, (2) compare the product’s effectiveness or safety to that of other
7 brands or products, or (3) purport to be based on any fact.”

8 8. Business and Professions Code section 17533.6, subdivision (a) provides that it is
9 unlawful for a business “to use a seal, emblem, insignia, trade or brand name, or any other term,
10 symbol, or content that reasonably could be interpreted or construed as implying any federal,
11 state, or local government . . . connection, approval, or endorsement of any product or services”
12 unless that business “has an expressed connection with, or the approval or endorsement of,” those
13 government entities.

14 9. The Attorney General may commence an action for equitable relief for violations
15 of section 17500 et seq., including injunctive relief and restitution. The Attorney General may
16 also seek civil penalties of up to \$2,500 for each violation. (Bus. & Prof. Code, §§ 17535,
17 17536.) The remedies and penalties for making false and misleading statements are cumulative to
18 each other and to the remedies or penalties available under other California laws. (*Id.* at §
19 17534.5.)

20 **B. Unfair Competition Law**

21 10. California Business and Professions Code section 17200 provides that “unfair
22 competition shall mean and include any unlawful, unfair, or fraudulent business act or practice
23 and unfair, deceptive, untrue or misleading advertising.” Section 17203 provides that “[a]ny
24 person performing or proposing to perform an act of unfair competition within this state may be
25 enjoined in any court of competent jurisdiction.”

26 11. Section 17206(a) provides that any person violating Section 17200 “shall be liable
27 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,
28 which shall be assessed and recovered in a civil action brought in the name of the people of the

1 State of California by the Attorney General or any district attorney.” Under section 17205, these
2 penalties are “cumulative to each other and to the remedies or penalties available under all other
3 laws of this statute.”

4 **C. Consumers Legal Remedies Act**

5 12. California Civil Code section 1770, subsection (a) prohibits specified “unfair
6 methods of competition and unfair or deceptive acts or practices” that are “intended to result or
7 that result[] in the sale or lease of goods or services to any consumer,” including misrepresenting
8 the “sponsorship, approval or certification of goods or services.”

9 **D. Federal Trade Commission Standards**

10 13. Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §
11 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

12 14. Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of false
13 advertisements “in or having an effect upon commerce, by any means, for the purpose of
14 inducing, or which is likely to induce, directly or indirectly,” the purchase of services.

15 15. Under FTC standards, an advertiser must have a reasonable basis for all claims—
16 both express and implied—*before* they are disseminated. An advertiser’s failure to possess and
17 rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or
18 practice in violation of Section 5 of the Federal Trade Commission Act. (*FTC Policy Statement*
19 *Regarding Advertising Substantiation* (March 11, 1983), appended to *Thompson Medical Co.,*
20 *Inc., v. F.T.C.* (1984) 104 F.T.C. 648.)

21 16. If an advertisement contains an express or implied statement regarding the amount
22 of support the advertiser has for the claim, the advertiser must have at least the advertised level of
23 substantiation. (*Id.*)

24 17. Advertisers must possess “competent and reliable scientific evidence” in support
25 of their claims, typically defined as “tests, analyses, research, studies, or other evidence based
26 upon the expertise of professionals in the relevant area, that has been conducted and evaluated in
27 an objective manner by persons qualified to do so, using procedures generally accepted in the
28 profession to yield accurate and reliable results.” (*Brake Guard Products, Inc.* (1998) 125 F.T.C.

1 138, 217; see also 16 C.F.R. § 260.2.)

2 18. FTC regulations also provide that “[i]t is deceptive to misrepresent, directly or by
3 implication, that a product, package, or service has been endorsed or certified by an independent
4 third party” and prohibit the improper “use of the name, logo, or seal of approval of a third-party
5 certifier or organization.” (16 C.F.R. § 260.6(a)-(b).)

6 **FACTUAL BACKGROUND**

7 **A. PresenceLearning’s Business Structure**

8 19. PresenceLearning is a privately held company. Its business includes providing
9 online teletherapy sessions to K-12 students with special needs across the United States through a
10 network of speech language pathologists, occupational therapists, and behavioral and mental
11 health professionals.

12 20. In its ten-year existence, PresenceLearning has received at least \$37.5 million in
13 venture capital funding.

14 21. PresenceLearning has agreements with nearly 650 educational entities in 43 states,
15 including in California, to provide services to their students. During the time period relevant to
16 this Complaint, PresenceLearning provided services to over 4,000 California students in over 100
17 different California schools.

18 22. All of the students to whom PresenceLearning agrees to provide services have
19 been diagnosed with a disability affecting their learning, or are suspected of having such a
20 disability.

21 23. In its agreements with schools, PresenceLearning states that it will provide
22 services that students are entitled to receive as part of their Individualized Education Programs
23 (“IEP”). Specifically, PresenceLearning commits to providing all services specified in a student’s
24 IEP unless otherwise agreed to, utilizing “evidence-based practices” when it provides them.

25 24. PresenceLearning contracts with clinicians to provide services using
26 PresenceLearning’s platform via web-based video.

27 25. The services that PresenceLearning agrees to provide to students are primarily
28 speech-language therapy and occupational therapy, both of which are critical to students with

1 disabilities' ability to meaningfully access a free and appropriate public education, as guaranteed
2 under federal and state law.

3 26. The code of ethics applicable to speech-language therapists requires that they
4 "evaluate the effectiveness of services provided, technology employed, and products dispensed,"
5 and that they only "provide services or dispense products . . . when benefit can reasonably be
6 expected." Further, therapists "shall not guarantee—directly or by implication—the results of any
7 treatment or procedure," and "shall make use of technology and instrumentation consistent with
8 accepted professional guidelines in their areas of practice." Am. Speech-Language-Hearing Ass'n
9 (ASHA), *Code of Ethics* (eff. Mar. 1, 2016),

10 27. The code of ethics applicable to occupational therapists requires that they
11 "[p]rovide appropriate evaluation and a plan of intervention for recipients of occupational therapy
12 services specific to their needs" and "[u]se, to the extent possible, evaluation, planning,
13 intervention techniques, assessments, and therapeutic equipment that are evidence based, current,
14 and within the recognized scope of occupational therapy practice." Am. Occupational Therapy
15 Association, 2015 *Occupational Therapy Code of Ethics*.

16 **B. \$PresenceLearning's Dissemination of Misinformation**

17 28. PresenceLearning made or disseminated untrue or misleading statements or caused
18 untrue or misleading statements to be made in or from California, to induce school districts and
19 parents of K-12 students who have, or are suspected of having, learning disabilities to use its
20 teletherapy services. Specifically, the untrue or misleading statements included, but were not
21 limited to, the following:

- 22 a. "Statements regarding students' progress in meeting IEP goals. PresenceLearning
23 misrepresented that students who use its teletherapy services make progress 22%
24 faster than students with disabilities in traditional therapy. These statements were
25 untrue or misleading when made because PresenceLearning lacked competent and
26 reliable scientific evidence that is sufficient in quality and quantity based on
27 standards generally accepted in the relevant field, when considered in light of the
28 entire body of relevant and reliable scientific evidence, to substantiate these

1 representations.

2 b. "Statements about the effectiveness of online speech therapy. PresenceLearning
3 misrepresented that online speech therapy is just as effective as, and produces
4 outcomes that are as good or better than, face-to-face therapy; that this claim is
5 supported by decades of research; and that the body of such research was "large
6 and growing." These statements were untrue or misleading when made because
7 PresenceLearning lacked competent and reliable scientific evidence that is
8 sufficient in quality and quantity based on standards generally accepted in the
9 relevant field, when considered in light of the entire body of relevant and reliable
10 scientific evidence, to substantiate these representations.

11 c. "Statements that U.S. government research found that online speech therapy yields
12 outcomes equal or better to those of traditional speech therapy. PresenceLearning
13 misrepresented that recent research funded by the U.S. Department of Education
14 shows that PresenceLearning's services yield equal or better outcomes for students
15 with disabilities compared to national norms for traditional speech therapy. These
16 statements were untrue or misleading when made because PresenceLearning
17 lacked competent and reliable scientific evidence that is sufficient in quality and
18 quantity based on standards generally accepted in the relevant field, when
19 considered in light of the entire body of relevant and reliable scientific evidence, to
20 substantiate these representations.

21 d. "Statements regarding the effectiveness of online occupational therapy in meeting
22 goals in IEPs. PresenceLearning misrepresented that online occupational therapy
23 is effective for meeting 70% of students with disabilities' posture, motor skills,
24 and sensory goals. These statements were untrue or misleading when made
25 because PresenceLearning lacked competent and reliable scientific evidence that is
26 sufficient in quality and quantity based on standards generally accepted in the
27 relevant field, when considered in light of the entire body of relevant and reliable
28 scientific evidence, to substantiate these representations.

1 e. "Statements regarding the effectiveness of online occupational therapy in
2 addressing occupational therapy issues. PresenceLearning misrepresented that
3 online occupational therapy is effective for most students with disabilities'
4 occupational therapy issues related to IEP goals from pre-K through high school,
5 including scissor skills, sensory integration, and visual motor integration. These
6 statements were untrue or misleading when made because PresenceLearning
7 lacked competent and reliable scientific evidence that is sufficient in quality and
8 quantity based on standards generally accepted in the relevant field, when
9 considered in light of the entire body of relevant and reliable scientific evidence, to
10 substantiate these representations.

11 f. "Statements that online speech-language therapists address "98 percent" of speech
12 issues. PresenceLearning misrepresented that its online speech-language
13 pathologists address 98 percent of students with disabilities' issues, including
14 language processing, autism, articulation disorders, and other challenges. These
15 statements were untrue or misleading when made because PresenceLearning
16 lacked competent and reliable scientific evidence that is sufficient in quality and
17 quantity based on standards generally accepted in the relevant field, when
18 considered in light of the entire body of relevant and reliable scientific evidence, to
19 substantiate this representation.

20 g. "Statements regarding the adoption of PresenceLearning's services by school
21 districts. PresenceLearning misrepresented that school districts that have adopted
22 PresenceLearning's services have found these services appropriate for the
23 majority, if not all, of its students with disabilities needing speech language
24 therapy and 70 percent or more of its students with disabilities who need
25 occupational therapy. These statements were untrue or misleading when made
26 because PresenceLearning lacked competent and reliable scientific evidence that is
27 sufficient in quality and quantity based on standards generally accepted in the
28 relevant field, when considered in light of the entire body of relevant and reliable

1 scientific evidence, to substantiate these representations.

2 h. "Statements regarding the overall volume of delivered services. PresenceLearning
3 misrepresented that it had delivered 1 million “successful” sessions of teletherapy.
4 PresenceLearning made these statements despite its lack of evidence of the actual
5 number of sessions delivered. Further, PresenceLearning failed to consider
6 whether a given session was successful as far as meeting the student with
7 disabilities’ needs. Therefore, these statements were untrue or misleading when
8 made.

9 i. "Statements regarding PresenceLearning’s therapists’ areas of specialization.
10 PresenceLearning misrepresented that its therapists have specialties in areas
11 including autism, writing, and phonology. These were untrue or misleading when
12 made because PresenceLearning lacked evidence that these therapists possessed
13 “advanced knowledge, skills, and experience” in these areas per the relevant
14 professional standards. *ASHA, Clinical Specialty Certification.*

15 29. PresenceLearning’s marketing and advertising cited to numerous leading national
16 medical associations and federal agencies, including the Mayo Clinic, the American Speech-
17 Language-Hearing Association, the American Occupational Therapy Association, the American
18 Psychological Association, and the U.S. Department of Health and Human Services, falsely
19 implying that these entities endorsed and recognized the effectiveness of its teletherapy services.
20 These statements were untrue and misleading when made, because none of these entities had, in
21 fact, sponsored, approved, certified, or endorsed PresenceLearning’s services.

22 30. PresenceLearning’s marketing and advertising used logos from the Mayo Clinic,
23 the U.S. Department of Education, and the American Telemedicine Association, falsely implying
24 that these entities endorsed PresenceLearning’s teletherapy services. The use of these logos was
25 untrue and misleading because none of these entities had, in fact, sponsored, approved, certified
26 or endorsed PresenceLearning’s services, and PresenceLearning had no ongoing connection with
27 these entities or permission to use their logos.

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1 **FIRST CAUSE OF ACTION §**
2 **VIOLATIONS OF FALSE ADVERTISING LAW §**
3 **(Bus. & Prof. Code, § 17500 et seq.) §**

4 31. The People reallege all paragraphs set forth above and incorporate them by
5 reference as though they were fully set forth in this cause of action.

6 32. PresenceLearning has engaged in the dissemination of untrue or misleading
7 statements relating to its teletherapy services to students with disabilities in violation of
8 California’s False Advertising Law, Business and Professions Code section 17500 et seq.

9 **SECOND CAUSE OF ACTION §**
10 **VIOLATIONS OF UNFAIR COMPETITION LAW §**
11 **(Bus. & Prof. Code, § 17200 et seq.) §**

12 33. The People reallege all paragraphs set forth above and incorporate them by
13 reference as though they were fully set forth in this cause of action.

14 34. PresenceLearning has engaged in unlawful and unfair business practices relating to
15 its teletherapy services to students with disabilities in violation of California’s Unfair
16 Competition Law, Business and Professions Code section 17200 et seq.

17 35. PresenceLearning’s conduct in disseminating untrue or misleading statements
18 relating to its teletherapy services to students with disabilities in violation of Business and
19 Professions Code section 17500, as set forth above, violates California’s Unfair Competition
20 Law, Business and Professions Code section 17200 et seq.

21 36. PresenceLearning’s conduct in in engaging in unfair methods of competition and
22 unfair or deceptive acts and practices in violation of Civil Code section 1750, as set forth below,
23 violates California’s Unfair Competition Law, Business and Professions Code section 17200 et
24 seq.

25 **THIRD CAUSE OF ACTION §**
26 **VIOLATIONS OF THE CONSUMERS LEGAL REMEDIES ACT §**
27 **(Civil Code, § 1750 et seq.) §**

28 37. The People reallege all paragraphs set forth above and incorporate them by
reference as though they were fully set forth in this cause of action.

38. PresenceLearning has engaged in unfair methods of competition and unfair or
deceptive acts or practices by misrepresenting that it had the sponsorship, approval or

1 certification of leading national medical organizations and federal agencies in violation of the
2 Consumers Legal Remedies Act, Civil Code section 1750 et seq.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, the People respectfully request that the Court enter judgment in favor of
5 the People and against PresenceLearning as follows:

6 1. That PresenceLearning, its successors, agents, representatives, employees, assigns
7 and all persons who act in concert with PresenceLearning be permanently enjoined from making
8 any untrue or misleading statements in violation of Business and Professions Code sections
9 17500 and 17508, under the authority of Business and Professions Code section 17535;

10 2. That PresenceLearning, its successors, agents, representatives, employees, assigns
11 and all persons who act in concert with PresenceLearning be permanently enjoined from engaging
12 in unfair competition as defined in Business and Professions Code section 17200, under the
13 authority of Business and Professions Code section 17203;

14 3. That PresenceLearning, its successors, agents, representatives, employees, assigns
15 and all persons who act in concert with PresenceLearning be permanently enjoined from engaging
16 in unfair methods of competition and unfair or deceptive acts or practices in violation of the
17 Consumers Legal Remedies Act, Civil Code section 1750 et seq.;

18 4. That PresenceLearning be ordered to pay a civil penalty for each violation of
19 Business and Professions Code section 17500, under the authority of Business and Professions
20 Code section 17536;

21 5. That PresenceLearning be ordered to pay a civil penalty for each violation of
22 Business and Professions Code section 17200, under the authority of Business and Professions
23 Code section 17206;

24 6. That the Court make such orders or judgments as may be necessary, including
25 preliminary injunctive and ancillary relief, to prevent the use or employment by PresenceLearning
26 of any practice which violates Business and Professions Code section 17500, under the authority
27 of Business and Professions Code section 17535;

28 7. That the Court make such orders or judgments as may be necessary, including

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preliminary injunctive and ancillary relief, to prevent the use or employment by PresenceLearning of any practice which constitutes unfair competition, under the authority of Business and Professions Code section 17203;

8. That PresenceLearning be ordered to implement the injunctive relief provisions as set forth in the proposed Stipulated Judgment;

9. That the Court issue an order entering final judgment;

10. That the Court exercise, pursuant to the terms of the Stipulated Judgment, continuing jurisdiction over this action to ensure that PresenceLearning complies with the judgment as set forth in the proposed Stipulated Judgment;

11. That the People recover their costs of suit, including costs of investigation;


12. That the People receive all other relief to which they are legally entitled; and

13. That the Court award such other relief that it deems just, proper, and equitable.

Dated: August 19, 2020

Respectfully Submitted,

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