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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 STATE OF ARIZONA, *ex rel.* MARK
12 BRNOVICH, Attorney General,
13 Plaintiff,

14 v.

15 DIY NEUROCARE OF AMERICA, LLC, an
16 Arizona limited liability company; LYLE K.
17 DAY, individually; LYLE K. DAY and
18 MICHELLE R. POLEN, husband and wife;
19 and JOSEPH O. DIDURO, individually,
20 Defendants.

Case No. CV2018-006242

CONSENT JUDGMENT

(Assigned to the Hon. Rosa Mroz)

20 The State of Arizona, *ex rel.* Mark Brnovich, the Attorney General (the “State”), filed a
21 Complaint alleging violations of the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521 to 1534
22 (the “CFA”), and Lyle K. Day (“Defendant Day”) and Michelle R. Polen (“Defendant Polen”)
23 waived service of the Complaint, has been advised of the right to a trial in this matter, and have
24 waived the same. Defendants Day and Polen admit the jurisdiction of this Court over the subject
25 matter and parties, stipulates that this Court may enter the following Findings of Fact,
26 Conclusions of Law and Judgment, and acknowledges that this Court shall retain jurisdiction for
27 the purpose of enforcing this Consent Judgment.
28

1 **PARTIES**

2 1. The State is authorized to bring this action under the Arizona Consumer Fraud
3 Act, A.R.S. §§ 44-1521 to 1534 (the “CFA”).

4 2. From July to December 2016 and then from mid-January to late January 2017,
5 Defendant Day directed, managed, and controlled DIY Neurocare of America, LLC (“DIY
6 Neurocare”) as the business’s Chief Executive Officer (“CEO”).

7 3. Defendant Polen is named solely for any interest she possesses in her marital
8 community with Defendant Day.

9 4. At all times relevant to this Consent Judgment, Defendants Day and Polen were
10 married to each other, and Defendant Day was acting for the benefit of himself and the marital
11 community between himself and Defendant Polen.

12 5. All events, acts and practices described in, and relevant to, this Consent Judgment
13 took place in Maricopa County, Arizona.

14 6. This Court has jurisdiction over the Complaint and the parties necessary for the
15 Court to enter this Consent Judgment and any orders hereafter appropriate pursuant to
16 A.R.S. § 44-1528 and this Consent Judgment.

17 7. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401(17) because the
18 action was brought on behalf of the State and the seat of the State is located in Maricopa
19 County, Arizona.

20 **FINDINGS OF FACT**

21 8. The State alleges that Defendant Day’s conduct as described below constituted
22 deceptive and/or unfair acts and practices in violation of the CFA.

23 9. Defendant Day co-founded DIY Neurocare with Joseph DiDuro in approximately
24 December 2015.

25 10. From July 2016 to early December 2017 and then in late January 2017, Defendant
26 Day acted as the CEO of DIY Neurocare and was responsible for directing the actions of DIY
27 Neurocare and its employees.

28 11. DIY Neurocare advertised, marketed, and sold DIY Neurocare Home Therapy

1 Systems (“Systems”) to consumers in several states, including Arizona consumers.

2 12. The main component of these Systems were low-level LED light pads that
3 consumers applied daily to affected areas of their bodies, which DIY Neurocare represented
4 would help treat symptoms of peripheral neuropathy, a painful neurological condition.

5 13. Sales representatives from DIY Neurocare represented to consumers that consumers
6 who applied the LED light pads twice daily for at least one year would see improvement in their
7 peripheral neuropathy.

8 14. The Systems also included coaching calls from DIY trained employees and various
9 vitamins and supplements represented as treatments for peripheral neuropathy.

10 15. DIY Neurocare sold Systems for approximately \$3,500 to \$4,500.

11 16. Often, DIY Neurocare salespeople enticed consumers to purchase Systems by
12 making consumers aware of the company’s “No Risk 100% Money Back Guarantee
13 (“Guarantee”).

14 17. The Guarantee was a promise that unsatisfied consumers could receive a full refund
15 of their purchase from DIY Neurocare if they: (1) followed the DIY Neurocare protocol for 12
16 months; (2) applied the LED light pads twice daily; (3) participated in all home coaching calls; (4)
17 used the nutritional support protocols for the entire period; and (5) followed the nutritional
18 guidelines and tutorial.

19 18. Numerous Arizona consumers purchased and followed the System’s protocol for 12
20 months.

21 19. Further, numerous Arizona consumers could not complete the conditions of the
22 Guarantee because DIY Neurocare ceased operating in approximately January 2017 and ceased to
23 provide the vitamins and coaching calls around the same time.

24 20. Since virtually all Arizona consumers purchased Systems after January 2016,
25 Arizona consumers who wanted to request a refund under the Guarantee after using the product
26 for 12 months were not able to do so.

27 21. Thus, DIY Neurocare ultimately failed to refund money to many Arizona consumers
28 who requested a refund.

1 32. The injunctive relief set forth in this Consent Judgment is binding upon any of the
2 following that receive actual notice of this Consent Judgment through personal service or
3 otherwise: (a) Defendant Day; (b) his officers, agents, servants, employees, and attorneys; and
4 (c) those persons in active concert or participation with Defendant Day or any of his officers,
5 agents, servants, employees, or attorneys.

6 33. Pursuant to A.R.S. § 44-1528, for a period of 10 years, Defendant Day is enjoined,
7 restrained and prohibited from selling medical devices to consumers in Arizona who do not
8 possess a valid, current medical license.

9 34. Pursuant to A.R.S. § 44-1528(A)(2), Defendants Day and Polen are liable and
10 obligated to pay to the Attorney General \$105,000 in consumer restitution to be deposited into an
11 interest-bearing consumer restitution subaccount of the Consumer Restitution and Remediation
12 Revolving Fund pursuant to A.R.S. § 44-1531.02(B). The Attorney General shall have sole
13 discretion as to how and when restitution funds are distributed to consumers and the eligibility of
14 any consumer to receive restitution. All unclaimed restitution shall be deposited into the
15 Consumer Protection–Consumer Fraud Revolving Fund established by A.R.S. § 44-1531.01 and
16 used for the purposes set forth therein.

17 35. Pursuant to A.R.S. § 44-1531, Defendants Day and Polen are liable and obligated to
18 pay to the Attorney General the amount of \$210,000 in civil penalties with interest accruing
19 thereon at the statutory rate until paid, to be deposited into the Consumer Protection–Consumer
20 Fraud Revolving Fund pursuant to A.R.S. § 44-1531.01, and used for the purposes set forth
21 therein.

22 36. Pursuant to A.R.S. § 44-1534, Defendants Day and Polen are liable and obligated to
23 pay to the Attorney General the amount of \$10,000 in attorneys’ fees and costs to be deposited
24 into the Consumer Protection–Consumer Fraud Revolving Fund pursuant to A.R.S. § 44-1531.01,
25 and used for the purposes set forth therein.

26 37. Before the State’s filing of this Consent Judgment, Defendants Day and Defendant
27 Polen have made an initial payment of \$50,000 in partial satisfaction of their restitution
28 obligations as established by this Consent Judgment.

1 38. For each dollar Defendants Day and Polen pay toward total restitution due under
2 this Consent Judgment without committing any breach of the Consent Judgment or defaulting on
3 any payment terms, the State agrees to forgo collecting two dollars of civil penalties due under
4 this Consent Judgment.

5 39. All partial payments of the total combined monetary award made by Defendants
6 Day and Polen shall be applied first to the restitution awarded under this Consent Judgment, then
7 to the attorneys' costs and fees award, then, if applicable, to any civil penalties owed, then, if
8 applicable, to any interest owed.

9 40. Defendants Day and Polen shall make monthly payments of at least \$1,000. The
10 first monthly payment is due by June 1, 2020, and each remaining monthly payment is due by the
11 first day of each month thereafter. Failing to make a monthly payment within 14 days of the date
12 due is a default on Defendants Day and Polen's payment obligations under this Consent
13 Judgment. The entire \$65,000 restitution award due after this Consent Judgment's entry must be
14 paid by June 1, 2023.

15 41. Should Defendants Day and Polen default on any payment obligation imposed by
16 this Consent Judgment, in addition to any other penalties and remedies provided by law, all
17 payments set forth herein shall be accelerated and shall become due and owing in their entirety as
18 of the default date, with interest accruing thereon at the current statutory rate for the full amount
19 owing as of that date.

20 42. Defendants Day and Polen may prepay all or any part of the outstanding balance at
21 any time without penalty, but must pay at least \$1,000 per month until the combined monetary
22 award is paid in full.

23 43. If Defendants Day and Polen satisfy the total combined monetary award without
24 breaching the Consent Judgment or defaulting on any payment terms, the State agrees to forgo the
25 collection of all interest accrued under this Consent Judgment.

26 44. Payments must be paid by cashier's checks or money orders made payable to "The
27 State of Arizona." Payments must be delivered, or mailed and postmarked, to:
28

1 Consumer Protection and Advocacy Section
2 The Office of the Arizona Attorney General
3 2005 N. Central Ave.
4 Phoenix, AZ 85004

5 45. Each partial payment made by Defendants Day and Polen shall be applied first to
6 the restitution awarded under this Consent Judgment, then to the attorneys' costs and fees award,
7 then, if applicable, to any civil penalties owed, and then, if applicable, to any interest owed.

8 46. Defendants Day and Polen agree that in any bankruptcy case or subsequent civil
9 litigation pursued by the State to enforce its rights to any payment or money judgment pursuant to
10 this Consent Judgment, the facts as alleged in this action's Complaint and this Consent
11 Judgment's Findings of Fact and Conclusions of Law in this Consent Judgment shall be taken as
12 true without further proof, including, but not limited to, a nondischargeability complaint in any
13 bankruptcy case. Defendants Day and Polen further stipulate and agrees that the facts alleged in
14 the Complaint establish all elements necessary to sustain an action by Plaintiff pursuant to Section
15 523(a)(2)(A) and/or Section 523(a)(7) of the Bankruptcy Code, 11 U.S.C. § 523(a), and that this
16 Consent Judgment shall have collateral estoppel effect for such purposes.

17 47. Defendants Day and Polen stipulate by entering this Consent Judgment that the
18 Findings of Fact and Conclusions of Law set forth herein establish all elements necessary to
19 sustain an action by the State pursuant to Section 523(a)(2)(A) and Section 523(a)(7) of the
20 Bankruptcy Code, 11 U.S.C. § 523(a), and that this Order shall have res judicata and collateral
21 estoppel effect for such purposes and proceedings to enforce payment, including, but not limited
22 to, a non-dischargeability complaint filed in a bankruptcy proceeding, and Defendants Day and
23 Polen waive any right to contest any of the allegations in the State's Complaint in any such
24 proceedings to enforce payment.

25 48. In the event Defendants Day and Polen materially breach this Consent Judgment, in
26 addition to all other remedies available under Arizona law and the penalties specifically provided
27 under A.R.S. § 44-1532, the State may, in its sole discretion, reopen proceedings and continue
28 with this case as though this Consent Judgment had not been entered, provided that Defendants

1 Day and Polen shall be entitled to an offset for any amount actually paid to the State and not
2 refunded to Defendants Day and Polen by the State.

3 49. Defendants Day and Polen warrant and represent that there is not pending any case,
4 proceeding, or other action seeking reorganization, arrangement, adjustment, liquidation,
5 dissolution, or recomposition of Defendants Day or Polen or their debts under any law relating to
6 bankruptcy, insolvency, reorganization, or the relief of debtors, or seeking the appointment of a
7 receiver, trustee, custodian, or other similar official for Defendants Day and Polen. Defendants
8 Day and Polen further warrant and represent that they will not file, or cause to be filed, any such
9 case, proceeding, or other action prior to 91 days after complete payment of all amounts due under
10 this Consent Judgment. If Defendants Day or Polen do file or cause to be filed such a case,
11 proceeding, or other action prior to the expiration of that time, then the State shall have the right,
12 at its sole discretion, to treat that as a material breach of this Consent Judgment, reopen
13 proceedings, and proceed with this case as though this Consent Judgment had not been entered,
14 provided that Defendants Day and Polen shall be entitled to an offset for any amount actually paid
15 to the State and not refunded to Defendants Day and Polen by the State.

16 50. Defendants Day and Polen shall provide the State with written notice within 15 days
17 of Defendants Day and Polen filing or causing to be filed any case, proceeding, or other action
18 seeking reorganization, arrangement, adjustment, liquidation, dissolution, or recomposition of
19 Defendants Day and Polen or their debts under any law relating to bankruptcy, insolvency,
20 reorganization, or the relief of debtors, or seeking the appointment of a receiver, trustee,
21 custodian, or other similar official prior to complete payment of all amounts due under this
22 Consent Judgment. If Defendants Day or Polen fail to provide the notice as required, the State
23 may, at its sole discretion, accelerate the remaining payments due under this Consent Judgment.
24 If the State chooses to accelerate the remaining payments, all amounts awarded under this Consent
25 Judgment not previously paid to the State shall become due and immediately payable in full to the
26 State, including interest accrued from the date the Consent Judgment is entered by the Court.

27 51. It is further ordered that Defendants Day and Polen must cooperate with the State
28 and its representatives in this case and in any investigation related to or associated with

1 transactions or occurrences that are the subject of the Complaint as it is currently written or as it
2 may be amended in the future. Defendants Day and Polen must provide truthful and complete
3 information, evidence, and testimony. Defendants Day and Polen must also appear for interviews,
4 discovery, hearings, trials, and any other proceeding that the State reasonably may request upon
5 reasonable notice, at such places and times as the State representative may designate, without the
6 service of a subpoena.

7 52. This Consent Judgment is contingent on Defendants Day and Polen's future
8 cooperation, and any refusal to comply with the cooperation provision in Paragraph 50 of this
9 Consent Judgment is a material breach of this Consent Judgment.

10 53. Nothing in this Consent Judgment shall be construed as an approval by the Attorney
11 General, the Court, the State of Arizona, or any agency thereof of Defendants Day or Polen's past,
12 present, or future conduct. Defendants Day and Polen shall not represent or imply that the
13 Attorney General, the Court, the State of Arizona, or any agency thereof has approved or approves
14 of any of Defendants Day and Polen's actions or any of Defendants Day and Polen's past, present
15 or future business practices.

16 54. This Consent Judgment represents the entire agreement between the parties, and
17 there are no representations, agreements, arrangements, or understandings, oral or written,
18 between the parties relating to the subject matter of this Consent Judgment which are not fully
19 expressed herein or attached hereto.

20 55. If any portion of this Consent Judgment is held invalid by operation of law, the
21 remaining terms thereof shall not be affected and shall remain in full force and effect.

22 56. Jurisdiction is retained by this Court for the purpose of entertaining an application
23 by the State for the enforcement of this Consent Judgment.

24 57. This Consent Judgment is the result of a compromise and settlement agreement
25 between the parties. Only the parties to this action may seek enforcement of this Consent
26 Judgment. Nothing herein is intended to create a private right of action by other parties.

27 58. This Consent Judgment shall not limit the rights of any private party to pursue any
28 remedies allowed by law.

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59. The effective date of this Consent Judgment is the date that it is entered by the Court.

60. This Consent Judgment resolves all outstanding claims expressly identified in the Complaint as to Defendants Day and Polen. Finding no just reason for delay, the Court enters this final judgment pursuant to Ariz. R. Civ. P. 54(b).

DATED this ____ day of _____, 20____.

JUDGE OF THE SUPERIOR COURT

1 **CONSENT TO JUDGMENT**

2 1. Defendants Day and Polen acknowledge that they have accepted service of the
3 Summons and Complaint, have read the Findings of Fact, Conclusions of Law and Order, and are
4 aware of their right to a trial in this matter and have waived the same.

5 2. Defendants Day and Polen admit the jurisdiction of this Court, admit that the
6 Findings of Fact are true and that the Conclusions of Law are correct and consent to the entry of
7 the foregoing Findings of Fact and Conclusions of Law and Order.

8 3. Defendants Day and Polen state that no promises of any kind or nature whatsoever
9 were made to induce them to enter into this Consent Judgment and declare that they have entered
10 into this Consent Judgment voluntarily.

11 4. This Consent Judgment is entered as a result of a compromise and a settlement
12 agreement between the parties. Only the parties to this action may seek enforcement of this
13 Consent Judgment. Nothing herein is intended to create a private right of action by other parties;
14 however, this Consent Judgment shall not limit the rights of any private party to pursue any
15 remedies allowed by law.

16 5. Defendants Day and Polen acknowledge that their acceptance of this Consent
17 Judgment is for the purpose of settling the ongoing consumer fraud lawsuit filed by the State, and
18 further acknowledge that this Consent Judgment does not preclude any other agency or officer of
19 this State or subdivision thereof from instituting other civil or criminal proceedings as may be
20 appropriate.

21 6. This Consent to Judgment may be executed in counterparts and be delivered by
22 facsimile or electronic transmission, or a copy thereof, such constituting an original counterpart
23 hereof, all of which together will constitute one and the same document.

1 DATED this 14th day of May, 2020.

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4 By: Lyle K. Day
5 Lyle K. Day

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7
8 By: Michelle R. Polen
9 Michelle R. Polen

10
11 **APPROVED AS TO FORM AND CONTENT:**

12 **MARK BRNOVICH**
13 **Attorney General**

14
15 By: B. Clark
16 Bryce Clark
17 Assistant Attorney General
18 Attorneys for the State of Arizona

CATALYST LEGAL GROUP

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By: Nathan Finch
Nathan Finch
Attorney for Defendants Day and Polen