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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 vs.

14 CAPSOURCE, INC., *et al.*

15 Defendants.

Case No. 2:20-CV-02303-RFB-DJA

**RECEIVER’S MOTION FOR
APPROVAL OF:**

(1) **INTERIM DISTRIBUTION PLAN;**

-AND-

(2) **PROCEDURES FOR DISPOSITION
OF THE ESTATE’S INTERESTS IN
CERTAIN REAL PROPERTY**

17 Receiver Geoff Winkler submits this Motion for Approval of (1) the Receiver’s Interim
18 Distribution Plan and (2) Procedures for the Disposition of the Estate’s interests in Certain Real
19 Property. The Motion is based on the following Memorandum of Points and Authorities, the
20 pleadings and papers on file, and any further argument or evidence the Court may hear. A
21 proposed form of order is attached as **Exhibit 1**.

22 DATED this 5th day of April, 2023.

GREENBERG TRAUIG, LLP

24 By: */s/ Kara B. Hendricks*

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 This is a unique case in which Geoff Winkler, the Receiver, was formerly appointed by the
4 Court to serve as the Chief Restructuring Officer (“CRO”) of CapSource, Inc. (“CapSource”) for
5 purposes of winding down its business operations. As alleged in the Complaint, CapSource sold
6 securities through unregistered offerings to finance projects of various real estate developers. Each
7 project had a separate investor list and at this juncture there six known outstanding loans. Prior to
8 the Receivership, many of the investors for the outstanding loans were receiving interest payments
9 and all had the expectation that when the property they invested in was sold, that they would
10 receive a payment relating to the same.

11 The Receiver, in his work winding down the affairs of Receivership Defendant CapSource,
12 Inc., anticipates selling or releasing the Receivership Estate’s interest in certain real property assets
13 to obtain funds to be returned to CapSource investors. The Receiver is also collecting, or
14 anticipates collecting, interim payments of principal and/or interest on a periodic or *ad hoc* basis
15 for some of the loan deals CapSource placed for its investors. These interim payments take the
16 form of monthly interest payments, proceeds from one-time sales of lots or parcels made by the
17 developers or sponsors responsible for certain CapSource loan deals, and other transactions
18 associated with specific deals.

19 The Receiver has determined that based on (a) the assets collected to date, (b) the
20 anticipated claims and other liabilities of CapSource, and (c) anticipated future cash flow to the
21 Receivership Estate, these interim payments can – and should – be distributed to the investors
22 associated with the specific loans generating these interim receipts. Such distributions will
23 partially compensate investors until a claims and final distribution process can be proposed,
24 authorized, and administered. The Receiver therefore requests authority to make such distributions
25 to investors, subject to a 25% to 40% hold-back – depending on the type of receipt – to cover
26 known and unknown contingencies associated with the loans and with the overall CapSource
27 enterprise, including taxes and other transaction costs.

28 ///

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1 The Receiver also proposes and seeks authority from the Court to pursue sales procedures
 2 associated with his anticipated disposition of the real property assets described above, subject to
 3 further Court approval of specific sales prior to closing the sales. These requests are described in
 4 more detail below, and the Receiver has attached a proposed order consistent with the relief
 5 requested as **Exhibit 1**.

6 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

7 **A. The Underlying Fraud and Violations of the Securities Laws**

8 As alleged in the Securities and Exchange Commission's December 21, 2020, Complaint,
 9 this case concerns multiple fraudulent and unregistered securities offerings conducted by Las
 10 Vegas-based hard money lender CapSource, Inc. and its principals, Stephen J. Byrne and Gregory
 11 P. Herlean.¹ From approximately January 2015 through May 2019, CapSource offered and sold
 12 over \$151 million of securities through unregistered offerings to finance projects of various real
 13 estate developers.²

14 By engaging in this conduct, and as explained in further detail in the SEC's Complaint,
 15 Defendants violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 [15
 16 U.S.C. §§ 77e(a), 77e(c), and 77q(a)] and Sections 10(b) and 15(a) of the Securities Exchange Act
 17 of 1934 [15 U.S.C. §§ 78j(b) and 78o(a)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].³

18 **B. Defendants' Final Judgments and Appointment of the CRO**

19 The SEC sought permanent injunctions against each of the Defendants, enjoining each of
 20 them from future violations of the securities laws mentioned herein, disgorgement of their ill-
 21 gotten gains from the unlawful activity set forth in this Complaint, together with prejudgment
 22 interest, and civil penalties against each of the Defendants under Section 20(d) of the Securities
 23 Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], and
 24 such other relief as the Court might deem appropriate, including equitable relief with regard to
 25 enforcing the judgments it sought.⁴

26 ¹ (Compl. ¶ 4, ECF No. 1).

27 ² (*Id.* ¶ 5).

28 ³ (*Id.* ¶ 11; *see also id.* ¶¶ 16-105 (setting forth Defendants' unlawful conduct in detail)).

⁴ (*Id.* ¶ 12).

1 Contemporaneously with filing its Complaint, the SEC submitted a joint motion for
 2 stipulated final judgments as to all Defendants.⁵ On May 5, 2021, the Court entered Judgment as
 3 to CapSource, Byrne, and Herlean.⁶ Among other things, each Defendant agreed to retain Geoff
 4 Winkler of American Fiduciary Services Inc. – now the Court-appointed Receiver – as chief
 5 restructuring officer or “CRO” of CapSource.⁷ It also enumerated Mr. Winkler’s responsibilities
 6 and duties, including winding down CapSource to preserve its assets to satisfy a monetary
 7 judgment benefiting the SEC, serving as a fiduciary to act in good faith and the best interests of
 8 investors in the securities offered and sold by CapSource, having the sole power to act for
 9 CapSource, and requiring he file a quarterly report and accounting to the Court, among other
 10 things.⁸

11 The final judgments against Byrne and Herlean required them to take or refrain from taking
 12 certain actions. Many of these requirements were designed to aid the CRO in his responsibilities
 13 and/or prevent Byrne and Herlean from interfering with those duties.⁹ The Judgments also provide
 14 that any failure to comply requires the CRO to notify the SEC, permit the SEC to then move to
 15 appoint a receiver, and prohibit Defendants from objecting to such a motion. *Id.*

16 **C. The Court Converts the Case to a Receivership**

17 Despite the best efforts of the CRO, who was specifically requested by Byrne and Herlean,
 18 their conduct hindered the CRO from fulfilling his duties to wind down CapSource, perform an
 19 accounting, and return money to investors. The CRO therefore recommended that “the case be
 20 converted to a receivership in order to allow the receiver to continue to work with all the parties
 21 to ensure loans are paid off in a way that maximizes return to investors without the interference
 22 currently being experienced by the CRO.”¹⁰

23
 24
 25 ⁵ (See ECF No. 2, pp. 1-2).

26 ⁶ (See Judgments, ECF Nos. 7-9).

27 ⁷ (See, e.g., CapSource Judgment, ECF No. 7, ¶ VI pp. 5-9).

28 ⁸ (See CapSource Judgment, ECF No. 7, ¶ VI p. 6)

⁹ (See Byrne Judgment, ECF No. 8, ¶ VII pp. 7-9; Herlean Judgment, ECF No. 9, ¶ VII pp. 7-9).

¹⁰ (See CRO’s Second Quarterly Report, ECF No. 11, p. 27).

1 On March 21, 2022, the SEC submitted its Motion to Appoint Receiver over Defendant
2 CapSource, Inc.¹¹ On August 26, 2022, having found that “the appointment of a receiver in this
3 action is necessary and appropriate for the purposes of marshaling and preserving all assets of the
4 Defendant CapSource, Inc.,” the Court granted the SEC’s motion and appointed Winkler as
5 Receiver for CapSource.¹² Among other things, the Appointment Order provided the receiver with
6 the following powers and duties relevant here:

7 A. To use reasonable efforts to determine the nature, location and value of
8 all property interests of the Receivership Defendant, including, but not
9 limited to, monies, funds, securities, credits, effects, goods, chattels,
10 lands, premises, leases, claims, rights and other assets, together with all
11 rents, profits, dividends, interest or other income attributable thereto, of
12 whatever kind, which the Receivership Defendant own, possess, have a
13 beneficial interest in, or control directly or indirectly (“Receivership
14 Property” or, collectively, the “Receivership Estates”);

15 B. To take custody, control and possession of all Receivership Property
16 and records relevant thereto from the Receivership Defendant; to sue for
17 and collect, recover, receive and take into possession from third parties
18 all Receivership Property and records relevant thereto;

19 * * *

20 D. To use Receivership Property for the benefit of the Receivership
21 Estates, making payments and disbursements and incurring expenses as
22 may be necessary or advisable in the ordinary course of business in
23 discharging his duties as Receiver;

24 * * *

25 K. To take such other action as may be approved by this Court.¹³

26 Further, the Appointment Order provides that “upon further Order of this Court, pursuant
27 to such procedures as may be required by this Court and additional authority such as 28 U.S.C.
28 §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property
in the Receivership Estate.¹⁴

¹¹ (See Mot. to Appt. Receiver, ECF No. 12).

¹² (See Appointment Order, ECF No. 17).

¹³ (Appointment Order, ECF No. 17, pp. 2-3).

¹⁴ (*Id.* p. 11 ¶ 36).

1 **D. Certain CapSource “Projects” are Generating Interim Cash Flow**

2 On January 31, 2023, the Receiver filed his Second Quarterly Report to the Court.^{15,16} As
3 set forth in the Report, *see pp. 4-6*, CapSource’s remaining business consists of servicing and
4 managing outstanding notes receivable, each of which governs a specific loan for a particular
5 development project, with a total face value of approximately \$18.8 million.¹⁷ A few of these loan
6 deals are generating periodic monthly income. For instance, the Receivership receives monthly
7 interest payments on a deal known as “JC Commercial.”¹⁸

8 **E. “Investments” In Capsource Are Marketed to Investors for Specific “Deals”**
9 **Pursued By Ostensibly Independent Developers**

10 As referenced above, each investment that an investor made in CapSource was marketed
11 and sold in connection with financing a specific “deal” or “project” by an ostensibly independent
12 developer, often referred to as the “borrower” or “sponsor.”¹⁹ CapSource would pool investments
13 from a group of investors and loan the collective money to a developer as a construction or
14 similarly structured loan, usually secured by the real property under development. Some of these
15 projects performed better than others, and some of them have wound up (or were wound up by the
16 Receiver or CRO), while other projects are still yielding payments of interest and/or principal from
17 the developers. In other words, at least as they were marketed to investors, the “investments” of
18 the many victims of Defendants’ scheme were not the same—each investor’s contribution was tied
19 to a specific property, loan, and developer, and the performance of any one project was not tied to,
20 or dependent on, the performance of any other Project or its development. Investors expected that
21 each project stood on its own legally and practically.

22 Relatedly, for each project or deal, CapSource maintained records identifying each distinct
23 investor and the amount of that investor’s contribution. Each project has a unique investor list.

24 _____
25 ¹⁵ (*See* ECF No. 28)

26 ¹⁶ The Receiver previously filed four quarterly reports in his capacity as the company’s CRO. (*See*
27 Quarterly Reports, ECF Nos. 10, 11, 13, and 16).

28 ¹⁷ (*See* Receiver’s Second Quarterly Report, ECF No. 28, p. 4).

¹⁸ (*See* Receiver’s First Quarter Report, ECF No. 21, pp. 6-7).

¹⁹ (*See, e.g.*, CRO’s First Quarterly Report, ECF No. 10, pp. 11-19 (Section VI – describing CapSource deals))

1 Based on the analysis performed to date, which is ongoing, the Receiver believes the company’s
2 records are reasonably complete and accurate with respect to the number and identity of investors
3 and the *pro rata* share of each such investment in a particular project. The Receiver has therefore
4 determined the records are reliable for the purposes of making the interim distributions proposed
5 in this Motion.

6 **F. The Receiver’s Sale of Certain Real Property and Anticipation of Disposing of**
7 **Other Assets Securing CapSource “Projects”**

8 As discussed in his last quarterly report, the Receiver has already received the proceeds of
9 sales of certain real property associated with the winding down of certain CapSource projects,
10 including by closing a previously-contracted-for sale of real property associated with a CapSource
11 Project referred to as the “5th Avenue Estates.”²⁰ The Receiver also anticipates selling further real
12 property (or interests in real property, such as deeds of trust) and has received offers from potential
13 buyers for real property interests associated with certain CapSource deals, as discussed in the
14 Receiver’s Status Reports.

15 **III. LEGAL AUTHORITY**

16 **A. The Court has Broad Discretion to Approve the Court’s Distribution Plan and**
17 **Other Actions in Administering the Estate**

18 Federal district courts are vested with wide discretion to enter appropriate orders
19 empowering receivers to pursue specific claims processes and plans for the distribution of assets
20 held by the Receivership. “The power of a district court to impose a receivership or grant other
21 forms of ancillary relief ... derives from the inherent power of a court of equity to fashion effective
22 relief.”²¹ The “primary purpose of equity receiverships is to promote orderly and efficient
23 administration of the estate by the district court for the benefit of creditors.”²²

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27 ²⁰ (See Second Quarterly Report, ECF No. 28, pp. 3 & 5).

28 ²¹ *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (collecting cases).

²² *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986).

1 A “district court’s power to supervise an equity receivership and to determine the
2 appropriate action to be taken in the administration of the receivership is extremely broad.”²³
3 District courts have the general power to employ summary procedures in allowing, disallowing,
4 and subordinating the claims of creditors to receivership estates.²⁴ As part of its oversight, the
5 Court may “make rules which are practicable as well as equitable.”²⁵

6 **B. The Court has Broad Discretion to Approve Sales**

7 Federal district courts having custody and control of property have the power to order a
8 sale of the same in their discretion.²⁶ “The power of sale necessarily follows the power to take
9 possession and control of and to preserve property.”²⁷ “When a court of equity orders property in
10 its custody to be sold, the court itself as vendor confirms the title in the purchaser.”²⁸ That being
11 the case, a “court of equity, under proper circumstances, has the power to order a receiver to sell
12 property free and clear of all encumbrances.”²⁹ Moreover, a federal court is not limited or deprived
13 of any of its equity powers by state statute.³⁰

14 Generally, when a court-appointed receiver is involved, the receiver, as agent for the court,
15 should conduct the sale of the receivership property.³¹ The receiver’s sale conveys “good”
16 equitable title enforced by an injunction against the owner and against parties to the suit.³²
17

18 ²³ *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005); *see also SEC v. Topworth Int’l,*
19 *Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) (“This court affords “broad deference” to the [district] court’s
20 supervisory role, and “we generally uphold reasonable procedures instituted by the district court that serve
th[e] purpose” of orderly and efficient administration of the receivership for the benefit of creditors.”)
(quoting *Hardy*, 803 F.2d at 1037-38).

21 ²⁴ *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984); *Hardy*, 803 F.2d at 1040
(summary proceeding to approve categorization scheme for investors’ claims was reasonable; fair notice
and a reasonable opportunity to respond was given).

22 ²⁵ *Hardy* at 1039 (quoting *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1368 (9th Cir. 1978)).

23 ²⁶ *See, e.g., Capital Consultants*, 397 F.3d at 738 (holding the district court has broad powers and wide
discretion to determine relief in an equity receivership).

24 ²⁷ *SEC v. Am. Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (citing 2 Ralph Ewing Clark, *Treatise*
on Law & Practice of Receivers § 482 (3d ed. 1992)).

25 ²⁸ 2 Ralph Ewing Clark, *Treatise on Law & Practice of Receivers* § 487.

26 ²⁹ *Miners’ Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933); *see also* 2 Ralph Ewing Clark,
Treatise on Law & Practice of Receivers § 500.

27 ³⁰ *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925).

28 ³¹ *Blakely Airport Joint Venture II v. Fed. Sav. & Loan Ins. Corp.*, 678 F. Supp. 154, 156 (N.D. Tex. 1988).

³² *See* 2 Ralph Ewing Clark, *Treatise on Law & Practice of Receivers* §§ 342, 344, 482(a), 487, 489, 491.

1 Importantly, “[i]n authorizing the sale of property by receivers, courts of equity are vested with
2 broad discretion as to price and terms.”³³

3 **IV. PROPOSED DISTRIBUTION PLAN**

4 **A. Proposed Distribution of Funds Received**

5 The Receiver proposes making interim distributions of funds associated with particular
6 CapSource deals, as described above, until such time as a claim and final distribution process may
7 be authorized. Specifically, the Receiver seeks authority to make partial distributions to the
8 investors associated with each CapSource deal or project on a *pro rata* basis unless and until such
9 investors have received full repayment of their principal investment. Importantly, the Receiver
10 only proposes making such distributions to the extent of each investor’s original contribution to
11 the deal. Once the investors of a particular deal have received *total* distributions over the course
12 of the loan – including any previous payments of principal and/or interest – in an amount equal to
13 their original principal investment, any remaining funds associated with that deal and collected by
14 the Receiver will be held in trust. These funds will not be further distributed until the Court’s
15 approval of a final distribution plan following a claims process through which all creditors of the
16 Receivership Estate may make or dispute any claim to the funds.

17 Based on (i) the assets collected to date; (ii) analysis of known creditors based both on the
18 Receiver’s work as Receiver and, formerly, as CRO; and (3) anticipated future collections, the
19 Receiver has determined in his business judgment that the Estate possesses sufficient funds to
20 make *partial* distributions on specific transactions in which funds have been and/or are being
21 received, while maintaining sufficient cash to satisfy future claims against the estate. To provide
22 protection from contingencies, the Receiver proposes holding back 25% to 40% of such interim
23 distributions, depending on the nature of the funds paid to the Receiver. Specifically, the Receiver
24 proposes holding back (i) 25% of any periodic payment of interest and/or principal and (ii) 40%
25 of any funds received from the sale or other disposition of an interest in real property. Put
26 differently, the Receiver only proposes distributing 60% to 75% of any interim payments received
27 for a particular CapSource deal to its associated investors, depending on the nature of the receipt.

28 ³³ *Gockstetter v. Williams*, 9 F.2d 354, 357 (9th Cir. 1925).

1 The funds held back will be maintained for the payment of taxes, claims, or other expenses
2 associated with that CapSource deal, as well as general administration and contingency for claims
3 against the estate.

4 For example, as noted above, the Receiver believes at this time that CapSource's records
5 are reasonably complete with respect to number and identity of investors and amount of each
6 investment for each deal. However, there is a possibility that other investors or purported investors
7 may make claims against the Estate later. Further, there is a possibility that a particular investor's
8 *pro rata* share will be subject to adjustment following resolution of the claims process. In the
9 event that (i) additional *bona fide* investors are identified during or before the claims process but
10 after the Receiver has made interim distributions or (ii) minor adjustments must be made to a
11 particular investor's *pro rata* share of proceeds, the Receiver will true up those investors at the
12 time of the claims process out of the held back funds. Any such true up will occur
13 contemporaneously with or prior to making further and/or final distributions. The Receiver
14 believes that the 25% and 40% holdbacks proposed above will provide sufficient cash on hand to
15 cover any such true-up distributions, which the Receiver anticipates will be limited.

16 Further, the Receiver proposes making the interim distributions on a quarterly basis for
17 each deal for which the Receiver collected payments during the quarter prior. A quarterly payment
18 balances the goal of returning funds to victims promptly with the competing goal of minimizing
19 expense to the state by avoiding unnecessary transaction costs associated with distributing
20 payments to investors on a monthly basis. Monthly distributions would be particularly costly when
21 the receipts for certain of the CapSource deals are relatively small, as described below.
22 Specifically, the Receiver requests that the Court order the interim distributions to be made 45
23 days after the close of each calendar quarter, providing sufficient time for the Receiver to close the
24 books for the quarter, determine appropriate distributions for each investor, and process those
25 distributions.

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1 **B. Specific Interim Receipts Known to the Receiver**

2 The Receiver has, will, or will continue to receive periodic payments associated with
3 certain CapSource deals.³⁴ These payments come in the form of monthly interest, proceeds from
4 the sales of individual parcels/lots in the developments funded by certain CapSource loans, usually
5 residential lot sales, or proceeds from the disposition of a unified tract of commercial real estate
6 securing other loans, typically a commercial property with or without its planned improvements.

7 Specifically, the Receiver is currently receiving monthly interest payments for the
8 following properties:³⁵

9 1. **JC Commercial – Monthly Rent Payments of \$6,000**

10 This loan was made to a borrower who defaulted approximately 3 years
11 ago.³⁶ The property is in Minneapolis, Minnesota, and currently has a used
12 car lot as the tenant.³⁷ When the borrower defaulted, CapSource negotiated
13 a deed in lieu of foreclosure and put the property in an LLC in the names of
14 the investors.³⁸ CapSource then negotiated a new lease with the car
15 dealership, which has made its lease payments as agreed upon for
16 approximately 24 months.³⁹ Before the Receivership, CapSource continued
17 to pay all lease payments to the investors as they were received.⁴⁰

18 Since the Receivership was established, however, these payments have been
19 held in the Receivership's trust account and have not been distributed. The
20 Receiver proposes distributing funds collected to date on a *pro rata* basis
21 and continuing to make interim distributions on a quarterly basis with a
22 hold-back of 25%, and subject to the other terms described in Section IV.A
23 above.

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26 ³⁴ (See, e.g., Receiver's First Quarter Report, ECF No. 21, pp. 6-7).

27 ³⁵ The Receiver also receives monthly payments of \$2,604.17 flowing from a deal called "Doumani," see
28 ECF No. 28 at p. 4. This deal is associated with an entity owned by Defendant Steve Byrne, which
purportedly currently owns all interest in the loan underlying the deal, and Mr. Byrne claims a right to the
money for that reason. The Receiver directed these payments to be made to the Receivership, however,
and not Mr. Byrne's entity. The Receiver's investigation of this deal's relationship to CapSource investors
is ongoing, however, and the Receiver therefore does not propose distributing the funds to investors until
more is understood regarding Doumani and Bael LLC, Mr. Byrne's entity.

³⁶ (See *id.* p. 8)

³⁷ (See *id.*)

³⁸ (See *id.*)

³⁹ (See *id.*)

⁴⁰ (See *id.*)

2. **ARC RE** – *Monthly interest payments of \$10,833.33 and \$43,333.32*

The America’s Rehab Centers or “ARC” CapSource deal is discussed in more detail in the Receiver’s First Quarterly Report.⁴¹ ARC has many investors, some of whom participated through the “ARC RE” deal and others who purportedly participated in what is known as a Regulation D offering. Most of the ARC RE investors participated in a debt restructuring that separated investors into three tranches or “Options,” and investors have been paid back varying amounts of principal and interest based on the option they elected.⁴² The Receiver currently collects monthly interest payments of \$10,833.33 associated with “Option 3” ARC RE investors. Other ARC investors participated in what is described as the “Reg. D” offering, for which the Receiver collects monthly interest payments of \$43,333.32.⁴³

Although the Receiver has been collecting and continues to collect monthly interest payments (of \$10,833.33 and \$43,333.32 for Option 3 and Reg. D, respectively) and continues to do so, these receipts have not been distributed to the ARC RE Option 3 Investors or the Reg. D Investors. The Receiver now proposes distributing funds collected to date to each of these classes of investors on a *pro rata* basis and continuing to make interim distributions on a quarterly basis with a hold-back of 25%, and subject to the other terms described in Section IV.A above.

The Receiver also recently collected \$653,375.50 associated with the sale of the final residential parcel developed in the “5th Avenue Estates” deal.⁴⁴ Similarly, the Receiver anticipates periodically receiving payments associated with lot sales for the “King 261” and “Meadows 78” deals based on the developers’ recent transitions from a “build-to-own” model to a “build-to-rent” model.^{45,46} The Receiver proposes distributing the proceeds received from the 5th Avenue Estates sale and the anticipated sales of King 261 and Meadows 78 lots. Each of these distributions would

⁴¹ (See ECF No. 21, pp. 8-14).

⁴² (See *id.* at pp. 9-13).

⁴³ (See *id.* at pp. 9 & 14).

⁴⁴ (See Receiver’s Second Quarterly Report, ECF No. 28, p. 5).

⁴⁵ (See *id.*)

⁴⁶ Prior to the developer’s business model transition, CapSource regularly received monthly interest payments from the “King 261” and “Meadows 78” developer, who still anticipates making a normal pay down on the loan and payment of accrued interest, resulting in a positive outcome for repayment of these loans. (See *id.*; see also Receiver’s First Quarterly Report, ECF No. 21, pp. 6-7).

1 be made to the investors of each deal on a *pro rata* basis and subject to the 40% hold back described
2 above, as well as the other terms in Section IV.A.

3 Finally, subject to final Court approval, the Receiver anticipates reaching a proposed
4 settlement and compromise with the borrowers of the loans associated with the “ARC RE,”
5 “Fillmore RE Partners,” and “Texas 156” deals. The contemplated settlements would include
6 reconveying or otherwise extinguishing CapSource’s first-position deeds of trust for the associated
7 real property securing the loans. Upon approval and closing of the anticipated deals, the Receiver
8 also proposes making interim distributions. These distributions, and any such future transactions
9 proposed by the Receiver and approved by the Court, would be subject to the 40% hold back, *pro*
10 *rata* distributions to investors associated with each specific deal, and the other terms described in
11 Section IV.A above.

12 **C. The Proposed Distributions are Appropriate and Equitable**

13 The interim distributions proposed by the Receiver are equitable and appropriate. As an
14 initial matter, making distributions on a deal-by-deal basis until investors are repaid their principal
15 in full is the equitable result under the facts of this Receivership. Unlike many SEC enforcement
16 actions involving allegations of Ponzi schemes, the investors here did not invest in the overall
17 investment enterprise or in qualitatively similar investments, but instead in specific loans
18 associated with actual development opportunities with access to information regarding the specific
19 project underlying the development, allowing the investors to associate their contribution of capital
20 with the risks and opportunities inherent to that particular project. Accordingly, up at least until
21 the investors have received return of their full principal, it is appropriate to treat each deal
22 separately, such that investors in more successful projects obtain return of their capital before
23 investors in less successful projects.

24 Further, as discussed in the Receiver’s status reports, the Estate has collected and
25 monetized significant assets to date. In the Receiver’s judgment, there is sufficient cash on hand
26 and reasonably certain future cash flow to make interim distributions while maintaining sufficient
27 assets to satisfy creditors during the claims process. These interim distributions will reduce

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1 hardship on the investors while the Receiver’s work is ongoing and until such time as a claim
2 process can be instituted and administered and final distributions can be made.

3 Finally, the (i) 25% or 40% hold back and (ii) freeze on deal-by-deal payments upon full
4 repayment of investors’ principal are reasonably calculated to preserve Receivership assets and
5 maintain equity pending the Court’s approval of a claims and final distribution process. The
6 Receiver anticipates certain deals, such as ARC RE, will likely result in significant returns to the
7 CapSource enterprise. On the other hand, certain deals like “Fillmore RE Partners” and
8 “Texas 156” have underperformed and are expected to continue to do so. The Receiver expects to
9 make the sales of the land, deed of trust, or other security interest in real property associated with
10 these deals at a loss for investors. So, while an interim return of investors’ principal will ease
11 some hardship experienced by these investors, return of more than the principal to investors in
12 deals like ARC RE while investors in other deals, like Texas 156, may not obtain return of their
13 full principal on an interim basis, would be inequitable, at least on an interim basis. Accordingly,
14 the Receiver proposes holding back *all interest* (or any return beyond the principal invested –
15 however styled) on *all deals*. Any such further returns will instead be subject to approval of an
16 appropriate distribution method once the Receiver is prepared to initiate a claims process.

17 **V. PROPOSED PROCEDURES FOR SALES OR OTHER DISPOSITIONS OF THE**
18 **ESTATE’S INTERESTS IN REAL PROPERTY**

19 As described above, the Receiver anticipates a settlement and compromise of the notes
20 associated with the ARC RE, Fillmore RE Partners, and Texas 156 deals. In those cases,
21 CapSource’s interest in the real property securing those loans will be reconveyed or extinguished.
22 However, the Receiver has not made a final determination that this is the treatment that will be
23 proposed to the Court or that agreement will be reached with the borrowers. If those notes are not
24 compromised, the Receiver may be forced to foreclose or otherwise sell the real property
25 associated with the notes. Moreover, due to a foreclosure that occurred prior to creation of the
26 Receivership, the Estate is already in possession of a fee simple interest in the land associated with
27 the JC Commercial property. This property must be sold to liquidate the Estate’s interest. The
28 Receiver requests approval for the following sales procedures for the disposition of the JC

1 Commercial property and any other properties or property interests the Receiver determines should
2 be sold and not compromised. With the Court’s preliminary approval of the procedures, the
3 Receiver can market the properties and negotiate a proposed plan for disposition of the assets. Any
4 proposed disposition will remain subject to final Court approval.

5 For disposition of the JC Commercial property and any other real property interest the
6 Receiver determines should be sold, the Receiver proposes to follow the public sale requirements
7 of 28 U.S.C. §§ 2001–2002 through a specific procedure designed to allow the Receiver to market
8 the unique properties and/or security interests at issue here in a targeted manner while complying
9 with the notice and market check requirements of the statutes, as described in more detail below.
10 As appropriate, in the Receiver’s discretion, certain properties will be listed with and marketed by
11 qualified, licensed commercial real estate brokers to the extent they have not been so listed already.
12 The properties will be sold on an “as is-where is” basis, unless otherwise agreed by the Receiver,
13 in his sole discretion. The brokers will conduct a customary and appropriate process of
14 recommending a list price, publicly marketing the property, providing access for site inspections,
15 soliciting offers, and negotiating with prospective purchasers, where appropriate, to obtain the
16 highest and best offer. Other interests in the property will be extinguished or compromised based
17 on separately negotiated pay-offs or settlement agreements with the borrowers.

18 **B. Arms-Length Negotiated Sales and Public Auctions**

19 The Receiver anticipates administering the sale of interests in realty in one of two ways:
20 (1) via arms-length, negotiated sales to buyers or (2) via auction. The Receiver will seek Court
21 approval prior to closing any sale and provide, via motion, the specific procedures employed for
22 the proposed sale, the overbid or other process employed to ensure the Estate is obtaining a
23 competitive offer on the real property, and any other information the Receiver deems relevant for
24 the Court’s consideration.

25 For negotiated sales, after (a) the Receiver obtains and negotiates an offer and determines
26 acceptance of the offer to be in the best interests of the Receivership Estate; (b) the Receiver
27 verifies the buyer’s ability to complete the transaction; (c) the parties enter a purchase and sale
28 agreement and earnest money is deposited into escrow; and (d) the buyer has removed all

1 contingencies (i.e., putting its earnest money deposit at risk if it fails to complete the transaction),
 2 the Receiver will file a noticed motion for Court approval of the sale, subject to overbid.
 3 Importantly, the Receiver will publish notice of the sale in a newspaper of general circulation in
 4 the area in which the property is located for three (3) consecutive weeks. The notice will state the
 5 deadline and requirements for submitting a qualified overbid.

6 As is customary in commercial transactions, upon execution of a confidentiality agreement
 7 and access agreement, the Receiver or his broker may make available certain due diligence
 8 materials (including a form purchase and sale agreement) for buyer review. Depending on the
 9 marketing prospects of the property, the Receiver, in consultation with the broker, may set a “Call
 10 for Offers” date or may wait for offers to be received.⁴⁷

11 In the unlikely event that the Receiver determines that certain real properties are better sold
 12 via public auction, the process will be substantially similar, save the arms-length negotiation with
 13 an initial contemplated purchaser. Instead, the Receiver will file a noticed motion for Court
 14 approval of the public auction of any appropriate property, after which he will publish notice of
 15 the sale in a newspaper of general circulation in the area in which the property is located for
 16 three (3) consecutive weeks. The notice will state the deadline and requirements for participating
 17 in the auction, along with the date and time of the auction. Once the auction is completed, the
 18 Receiver will petition for orders approving sales to the winning bidders.

19 **C. Overbids and Auctions**

20 In a negotiated sale scenario, if a qualified overbid is received on or before the published
 21 deadline and the proposed buyer (with highest and best offer) or another qualified bidder is
 22 prepared to continue to bid, the Receiver will (a) notice to the Court that an auction will be
 23

24 ⁴⁷ In a Call for Offers scenario, once (a) prospective buyers have completed their due diligence and removed
 25 all contingencies (thereby putting their earnest money deposit at risk if they fail to complete the transaction);
 26 (b) the buyer’s ability to complete the transaction is verified; and (c) purchase and sale agreements have
 27 been submitted for review prior to the Call for Offers deadline, the Receiver will review all submitted
 28 agreements and select the highest and best offer. Thereafter, the Receiver will notify all prospective buyers
 of the highest and best offer, will qualify prospective overbidders (as applicable), and, upon deposit of the
 earnest money into escrow by the proposed buyer, the Receiver will file a noticed motion seeking Court
 approval of the sale, subject to overbid. The Receiver will publish notice of the sale in a newspaper of
 general circulation in the area in which the property is located for three (3) consecutive weeks. The notice
 will state the deadline and requirements for submitting a qualified overbid.

1 conducted; and (b) invite all qualified bidders to said auction. Such invitation and notice to the
 2 Court will include auction instructions for the qualified bidders. At the conclusion of the auction,
 3 the Receiver will file a notice of the highest/winning (and, if applicable, backup) bid, along with
 4 an amended proposed order seeking approval of the sale to the highest/winning (and if applicable,
 5 backup) bidder.

6 If no qualified overbids are received on or before the published deadline, the Receiver will
 7 advise the Court and seek approval of the sale to the original proposed buyer. The Receiver will
 8 also seek authority to pay the commission for the real estate broker (including the buyer's broker)
 9 from the sale proceeds.

10 **D. The Proposed Real Property Sale Procedures are Appropriate and Comply**
 11 **with 28 U.S.C. § 2001.**

12 28 U.S.C. § 2001 imposes specific procedures for sales of any interest in real property by
 13 court order.⁴⁸ Subsection (a) provides requirements for public sales, and subsection (b) provides
 14 for private sales.⁴⁹ Section 2001 thus “sets out two possible courses of action: (1) property may
 15 be sold in public sale; or (2) property may be sold in a private sale, provided that three separate
 16 appraisals have been conducted, the terms are published in a circulated newspaper ten days prior
 17 to sale, and the sale price is no less than two-thirds of the valued price.”⁵⁰ Both processes involve
 18 significant cost and delay, but by proceeding under § 2001(a), the Receivership Estate can avoid
 19 the significant costs and delay of (a) the Court having to appoint three disinterested appraisers, and
 20 (b) obtaining three appraisals from such appraisers.

21 The requirements of a public sale under § 2001(a) are that notice of the sale be published
 22 as prescribed by § 2002 and a public auction be held at the courthouse “as the court directs.” *See*
 23 28 U.S.C. §§ 2001(a) and 2002. Specifically, section 2002 requires that notice be published once
 24 a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of
 25

26 _____
 48 See 28 U.S.C. § 2001.

27 49 *See id.*

28 50 *SEC v. Goldfarb*, No. 11-cv-00938, 2013 WL 4504271, at *2, 2013 U.S. Dist. LEXIS 118942, at *5 (N.D. Cal. Aug. 21, 2013).

1 general circulation in the county, state, or judicial district where the realty is located.⁵¹ “These
 2 safeguards of notice and opportunity to submit overbids help to ensure that the sale is able to fetch
 3 the best price possible, which is consistent with the principle that ‘a primary purpose of equity
 4 receiverships is to promote orderly and efficient administration of the estate by the district court
 5 for the benefit of creditors.’”⁵²

6 The Court may limit the auction to qualified bidders, who “(i) submit to the Receiver ... in
 7 writing a bona fide and binding offer to purchase the [property]; and (ii) demonstrate ... to the
 8 satisfaction of the Receiver, that it has the current ability to consummate the purchase of the
 9 [property] per the agreed terms.”⁵³

10 The Proposed Procedures require that all real property will be listed with a licensed broker
 11 and shown to interested parties. The Proposed Procedures further require that notice of the sale be
 12 publicly published for three consecutive weeks before closing the sale, and during that time, all
 13 real property sold will be subject to overbid to further ensure the highest and best price is obtained.
 14 If any qualified overbid is received and qualified bidders wish to continue, a live auction will be
 15 conducted. In other words, the Proposed Procedures are tailored specifically to satisfy the
 16 Receiver’s obligations under §§ 2001(a) and 2002, and to maximize the prices obtained for any
 17 real property sold out of receivership while mitigating cost by avoiding a formal public auction if
 18 no qualified overbidder indicates the willingness and capacity to bid on the property.

19 VI. CONCLUSION

20 The Receiver has discussed the above with counsel for the SEC who consents to the
 21 Motion.

22 For the foregoing reasons the Receiver respectfully requests this Court enter an order:

- 23 1. Allowing the Receiver to make *pro rata*, interim distributions to investors
 24 of all funds obtained by the Receiver *on a deal-by-deal* basis up to a return of all principal
 25

26 ⁵¹ *SEC v. Champion-Cain*, No. 3:19-cv-01628-, 2021 U.S. Dist. LEXIS 212777, at *6-7 (S.D. Cal. Nov. 2,
 2021).

27 ⁵² *Id.* (quoting *Hardy*, 803 F.2d at 1038).

28 ⁵³ *Regions Bank v. Egyptian Concrete Co.*, No. 4:09-CV-01260, 2009 WL 4431133, at *3 (E.D. Mo. Dec. 1,
 2009).

1 invested by each investor in a particular deal and subject to a twenty-five percent (25%) or
2 forty percent (40%) hold-back, consistent with the process described above; and

3 2. Approving the real property sales procedures described above subject to
4 further court order with regard to specific properties to be sold.

5 The proposed form of order attached as **Exhibit 1** sets forth the specific orders the Receiver
6 seeks through this Motion. *See generally Ex. 1.*

7 DATED this 5th day of April, 2023.

8 **GREENBERG TRAUIG, LLP**

9 By: */s/ Kara B. Hendricks*

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12 KYLE A. EWING

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16 *Attorneys for Receiver Geoff Winkler*

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CERTIFICATE OF SERVICE

I hereby certify that, on the **5th day of April, 2023**, a true and correct copy of the foregoing was filed electronically via the Court’s CM/ECF system. Notice of filing will be served on all parties by operation of the Court’s CM/ECF system, and parties may access this filing through the Court’s CM./ECF system.

/s/ Evelyn Escobar-Gaddi

An employee of GREENBERG TRAURIG, LLP

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LIST OF EXHIBITS

EXHIBIT	DESCRIPTION
Exhibit 1	[Proposed] Order

Greenberg Traurig, LLP
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EXHIBIT 1

EXHIBIT 1

Proposed Order

1 KARA B. HENDRICKS, Bar No. 7743
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8 *Attorneys for Receiver Geoff Winkler*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 vs.

15 CAPSOURCE, INC., STEPHEN J. BYRNE,
16 AND GREGORY P. HERLEAN,

17 Defendants.

CASE NO. 2:20-CV-02303-RFB-DJA

**[PROPOSED] ORDER GRANTING
RECEIVER'S MOTION FOR
APPROVAL OF:**

(1) INTERIM DISTRIBUTION PLAN

-AND-

**(2) PROCEDURES FOR DISPOSITION
OF THE ESTATE'S INTERESTS IN
CERTAIN REAL PROPERTY**

18
19 Presently before the Court is Receiver Geoff Winkler's Motion for Approval of (1) the
20 Receiver's Interim Distribution Plan and (2) Procedures for the Disposition of the Estate's
21 interests in Certain Real Property, ECF No. 049. Having reviewed the Motion and found that
22 notice of the same was proper, and with no opposition having been filed, the Court finds that
23 good cause exists to grant the Motion for the reasons set forth by the Receiver in his brief.

24 Specifically, the court finds the interim distributions proposed by the Receiver, as well as
25 the Receiver's proposed procedures for the disposition of certain real property or interests in real
26 property belonging to the Receivership Estate, are appropriate, proper, and equitable under the
27 circumstances identified by the Receiver.

28 ///

1 Accordingly, it is hereby **ORDERED, ADJUDGED, AND DECREED** that Receiver
2 Geoff Winkler’s Motion for Approval of (1) the Receiver’s Interim Distribution Plan and
3 (2) Procedures for the Disposition of the Estate’s interests in Certain Real Property, ECF No. 049,
4 be, and the same hereby is, **GRANTED** in accordance with the terms set forth in the Motion.

5 **IT IS FURTHER ORDERED** that the Receiver is authorized to make *pro rata*
6 distributions to certain CapSource creditors on an interim basis consistent with the terms proposed
7 in the Receiver’s Motion (the “Interim Distributions”). Interim Distributions will be made only
8 when the Receiver collects funds (i) in the form of periodic payments of interest and/or principal
9 associated with a particular CapSource loan (“Periodic Payments”) or (ii) resulting from the sale
10 or other disposition of the Receivership Estate’s interest in real property (“Disposition Payments”).

11 **IT IS FURTHER ORDERED** that the Receiver may announce and make Interim
12 Distributions on a quarterly basis with distributions for any Payments collected during a given
13 calendar quarter being provided to qualifying creditors forty-five (45) days after the last day of
14 that quarter.

15 **IT IS FURTHER ORDERED** that the Receiver shall make Interim Distributions on a
16 loan-by-loan basis such that distributions for a particular CapSource loan are made to each of the
17 known investors for that specific loan and to those creditors only.

18 **IT IS FURTHER ORDERED** that the Receiver shall determine the prorated amount of
19 Interim Distribution for each specific investor by multiplying the total Interim Distribution
20 associated with a particular CapSource loan by a ratio equal to the investor’s share of the total
21 investment from *all* investors for that loan, rounding as appropriate.

22 **IT IS FURTHER ORDERED** that the Receiver shall cease making interim payments to
23 any investor once that investor has received total distributions– including any payments of
24 principal and/or interest made over the course of the loan prior to appointment of the Receiver –
25 in an amount equal to the investor’s original principal investment for that loan.

26 ///

27 ///

28 ///

1 **IT IS FURTHER ORDERED** that the Receiver shall hold back forty percent (40%) of
2 each Interim Distribution comprised of Disposition Payments, holding such funds as property of
3 the Receivership Estate to be addressed subsequently through the Court’s approval and resolution
4 of a global claims and distribution process encompassing all remaining claimants.

5 **IT IS FURTHER ORDERED** that the Receiver shall hold back twenty-five percent
6 (25%) of each Interim Distribution comprised of Periodic Payments, holding such funds as
7 property of the Receivership Estate to be addressed subsequently through the Court’s approval and
8 resolution of a global claims and distribution process encompassing all remaining claimants.

9 **IT IS FURTHER ORDERED** that the Receiver is authorized to employ the procedures
10 described in the Motion for pursuing disposition of the Receivership Estate’s interests in real
11 property and/or claims secured by an interest in real property, subject to further court order
12 approving the specific proposed disposition for each such interest or claim.

13 **IT IS SO ORDERED.**

14 Dated this _____ day of April, 2023.

15 _____
16 DANIEL J. ALBREGTS
17 UNITED STATES MAGISTRATE JUDGE
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