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11  
12 **UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF NEVADA**  
14

15 SECURITIES AND EXCHANGE  
16 COMMISSION,

17 Plaintiff,

18 vs.

19 CAPSOURCE, INC.,  
20 STEPHEN J. BYRNE, and  
21 GREGORY P. HERLEAN  
22 Defendants.

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

**FINAL JUDGMENT AS TO  
DEFENDANT GREGORY P.  
HERLEAN**

23 Plaintiff, the United States Securities and Exchange Commission (the  
24 “Commission”) having filed a Complaint and Defendant <sup>Gregory P. Herlean</sup>~~Stephen J. Byrne~~ (“Byrne”  
25 or “Defendant”) having entered a general appearance; consented to the Court’s  
26 jurisdiction over Defendant and the subject matter of this action; consented to entry  
27 of this Final Judgment without admitting or denying the allegations of the Complaint  
28 (except as to jurisdiction and except as otherwise provided herein in paragraph VIII);  
waived findings of fact and conclusions of law; and waived any right to appeal from  
this Final Judgment:

## I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

## II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;

- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

### III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or
- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise

1 any security, unless a registration statement has been filed with the  
2 Commission as to such security, or while the registration statement is the  
3 subject of a refusal order or stop order or (prior to the effective date of  
4 the registration statement) any public proceeding or examination under  
5 Section 8 of the Securities Act [15 U.S.C. § 77h].

6 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as  
7 provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also  
8 binds the following who receive actual notice of this Final Judgment by personal  
9 service or otherwise: (a) Defendant's officers, agents, servants, employees, and  
10 attorneys; and (b) other persons in active concert or participation with Defendant or  
11 with anyone described in (a).

12 IV.

13 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that  
14 Defendant is permanently restrained and enjoined from violating Section 15(a) of the  
15 Exchange Act [15 U.S.C. § 78o(a)], by using any means or instrumentality of  
16 interstate commerce, to effect any transactions in, or to induce or attempt to induce  
17 the purchase or sale of, any security (other than an exempted security or commercial  
18 paper, bankers' acceptances, or commercial bills) while not associated with a broker  
19 or dealer registered in accordance with subsection Section 15(b) of the Exchange Act  
20 [15 U.S.C. § 78o(b)].

21 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as  
22 provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also  
23 binds the following who receive actual notice of this Final Judgment by personal  
24 service or otherwise: (a) Defendant's officers, agents, servants, employees, and  
25 attorneys; and (b) other persons in active concert or participation with Defendant or  
26 with anyone described in (a).

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of \$760,303, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$90,319, and a civil penalty in the amount of \$192,768 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Defendant shall satisfy this obligation by paying \$1,043,390 to the Securities and Exchange Commission pursuant to the terms of the payment schedule set forth in paragraph VI below after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center

Accounts Receivable Branch

6500 South MacArthur Boulevard

Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Gregory P. Herlean as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

1       The Commission may enforce the Court’s judgment for disgorgement and  
2       prejudgment interest by using all collection procedures authorized by law, including,  
3       but not limited to, moving for civil contempt at any time after 30 days following entry  
4       of this Final Judgment.

5       The Commission may enforce the Court’s judgment for penalties by the use of  
6       all collection procedures authorized by law, including the Federal Debt Collection  
7       Procedures Act, 28 U.S.C. § 3001 *et seq.*, and moving for civil contempt for the  
8       violation of any Court orders issued in this action. Defendant shall pay post  
9       judgment interest on any amounts due after 30 days of the entry of this Final  
10      Judgment pursuant to 28 U.S.C. § 1961. The Commission shall hold the funds,  
11      together with any interest and income earned thereon (collectively, the “Fund”),  
12      pending further order of the Court.

13      The Commission may propose a plan to distribute the Fund subject to the  
14      Court’s approval. Such a plan may provide that the Fund shall be distributed  
15      pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of  
16      2002. The Court shall retain jurisdiction over the administration of any distribution  
17      of the Fund and the Fund may only be disbursed pursuant to an Order of the Court.

18      Regardless of whether any such Fair Fund distribution is made, amounts  
19      ordered to be paid as civil penalties pursuant to this Judgment shall be treated as  
20      penalties paid to the government for all purposes, including all tax purposes. To  
21      preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or  
22      reduction of any award of compensatory damages in any Related Investor Action  
23      based on Defendant’s payment of disgorgement in this action, argue that he is entitled  
24      to, nor shall he further benefit by, offset or reduction of such compensatory damages  
25      award by the amount of any part of Defendant’s payment of a civil penalty in this  
26      action (“Penalty Offset”). If the court in any Related Investor Action grants such a  
27      Penalty Offset, Defendant shall, within 30 days after entry of a final order granting  
28      the Penalty Offset, notify the Commission’s counsel in this action and pay the amount

1 of the Penalty Offset to the United States Treasury or to a Fair Fund, as the  
 2 Commission directs. Such a payment shall not be deemed an additional civil penalty  
 3 and shall not be deemed to change the amount of the civil penalty imposed in this  
 4 Judgment. For purposes of this paragraph, a “Related Investor Action” means a  
 5 private damages action brought against Defendant by or on behalf of one or more  
 6 investors based on substantially the same facts as alleged in the Complaint in this  
 7 action.

## 8 VI.

9 Gregory P. Herlean shall pay the total of disgorgement, prejudgment interest,  
 10 and penalty due of \$1,043,390 in four installments to the Commission according to  
 11 the following schedule: (1) \$260,847.50, within 14 days of entry of this Final  
 12 Judgment; (2) \$260,847.50, within 180 days of entry of this Final Judgment; 3)  
 13 \$260,847.50, within 270 days of entry of this Final Judgment; and 4) \$260,847.50,  
 14 within 360 days of entry of this Final Judgment. Payments shall be deemed made on  
 15 the date they are received by the Commission and shall be applied first to post  
 16 judgment interest, which accrues pursuant to 28 U.S.C. § 1961 on any unpaid  
 17 amounts due after 30 days of the entry of Final Judgment. Prior to making the final  
 18 payment set forth herein, Gregory P. Herlean shall contact the staff of the  
 19 Commission for the amount due for the final payment.

## 20 VII.

21 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the  
 22 Consent is incorporated herein with the same force and effect as if fully set forth  
 23 herein, and that Defendant shall comply with all of the agreements set forth therein,  
 24 including, but not limited to:

- 25 (a) Defendant shall immediately resign from any position(s) of management  
 26 of CapSource, Inc. (“CapSource”) upon appointment of a Chief  
 27 Restructuring Officer for CapSource (the “CRO”), and not resume such  
 28 position(s) or any employment with CapSource after the date of this

1 Final Judgment;

2 (b) Defendant shall preserve and turn over all books, records, documents,  
3 and accounts relating to CapSource to the CRO;

4 (c) Defendant shall not request or receive, directly or indirectly, any  
5 payment or other benefit from CapSource after the date of this Final  
6 Judgment;

7 (d) Defendant shall cooperate with all requests made by the CRO, including  
8 providing information or taking those actions needed to transfer control  
9 of CapSource's property to the CRO;

10 (e) Defendant shall be responsible for and pay the CRO's fees (jointly and  
11 severally with Defendant Stephen J. Byrne);

12 (f) If the CRO resigns or is otherwise unwilling or unable to perform his  
13 duties, the Commission may petition the Court for appointment of a  
14 receiver over CapSource, which the Defendant will not oppose; and

15 (g) Defendant shall, upon request by Commission, certify, in writing,  
16 compliance with the agreements set forth above. The certification shall  
17 provide written evidence of compliance in the form of a narrative, and be  
18 supported by exhibits sufficient to demonstrate compliance. The  
19 Commission staff may make reasonable requests for further evidence of  
20 compliance, and Defendant agrees to provide such evidence. Defendant  
21 shall submit the certification and supporting material to Ian S. Karpel,  
22 Assistant Regional Director, with a copy to the Office of Chief Counsel  
23 of the Enforcement Division, no later than sixty (60) days from the date  
24 of the request for certification.

25 If Defendant fails to comply any of the agreements set forth in this paragraph, the  
26 Commission may petition the Court for the appointment of a receiver over  
27 CapSource, which Defendant will not oppose. Defendant will also not oppose any  
28 petition for appointment of a receiver over CapSource filed by the Commission based



1 on the failure of any other defendant in this action to comply with agreements set  
2 forth in their consents and judgments.

3 VIII.

4 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for  
5 purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code,  
6 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant,  
7 and further, any debt for disgorgement, prejudgment interest, civil penalty or other  
8 amounts due by Defendant under this Final Judgment or any other judgment, order,  
9 consent order, decree or settlement agreement entered in connection with this  
10 proceeding, is a debt for the violation by Defendant of the federal securities laws or  
11 any regulation or order issued under such laws, as set forth in Section 523(a)(19) of  
12 the Bankruptcy Code, 11 U.S.C. §523(a)(19).

13 IX.

14 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court  
15 shall retain jurisdiction of this matter for the purposes of enforcing the terms of this  
16 Final Judgment.

17 X.

18 There being no just reason for delay, pursuant to Rule 54(b) of the Federal  
19 Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith  
20 and without further notice.

21  
22 Dated: May 5, 2021

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25 \_\_\_\_\_  
26 RICHARD F. BOULWARE, II  
27 UNITED STATES DISTRICT JUDGE  
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