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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 DAVID ANDERSON, et al.,

12 Plaintiffs,

13
14 vs.

15 CHRISTOPHER COX, et al.,

16 Defendants.

Case No.: CV-01-03894-RSWL
(SHx)

**PLAINTIFFS' MEMORANDUM
IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS REVISED FIRST
AMENDED COMPLAINT**

Date: November 22, 2010
Time: 1:30 p.m.

Honorable James V. Selna

21 Plaintiffs DAVID ANDERSON, LT. COL.; NELSON L. REYNOLDS, LT.
22 COL.; SHEILA MORRIS; PATRICK CLUNEY; ROBERT HOLLENEGG; ALLAN
23 TREFFRY; and REECE HAMILTON, individually and on behalf of all
24 similarly situated, hereby provide their Memorandum in Opposition to
25 Defendants' Motion to Dismiss Revised First Amended Complaint.

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Statement in Compliance with Local Rule 7-3

Plaintiffs complied with Local Rule 7-3 on October 1, 2010.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

I

PARTIES

Plaintiffs DAVID ANDERSON, LT. COL.; NELSON L. REYNOLDS, LT. COL.; SHEILA MORRIS; PATRICK CLUNEY; ROBERT HOLLENEGG; ALLAN TREFFRY; and REECE HAMILTON, individually and on behalf of all similarly situated (hereinafter collectively "Plaintiffs"), citizens of the United States and owners of shares of stock in CMKM Diamonds, Inc. (Revised First Amended Complaint ("RFAC" ¶¶ 6-12) bring this action for declaratory judgment and for damages for violation of their constitutional rights against Defendants CHRISTOPHER COX, MARY L. SCHAPIRO, CYNTHIA A. GLASSMAN, PAUL S. ATKINS, ROEL C. CAMPOS, ANNETTE L. NAZARETH, TROY A. PAREDES, LUIS A. AGUILAR, ELISSE B. WALTER, and KATHLEEN L. CASEY (hereinafter collectively "Defendants"), current and former Chairmen and/or Commissioners of the Securities and Exchange Commission (hereinafter "SEC"), who have served since early 2006 (RFAC ¶¶ 13-24).

II

INTRODUCTION

The Revised First Amended Complaint succinctly details the Constitutional violations committed by each specifically named Defendant, acting in their governmental capacities by attaining control over disbursement of Plaintiffs' funds, maintaining that control and continuing to refuse to give authority for release of those funds.

III

FACTUAL BACKGROUND

In November and December, 2002, CYBER MARK INTERNATIONAL INC., a public company domiciled in Nevada, reverse-merged with Casavant Mineral Claims, which then held mineral claims to more than 600,000 acres within Saskatchewan, Canada, increased authorized capital from 500,000,000 to 10,000,000,000 common shares, cancelled all preferred shares, and changed its name to CASAVANT MINING KIMBERLITE INTERNATIONAL, INC. (CMKI); as of February 3, 2003, 7,241,653,404 shares were issued and outstanding. (RFAC ¶25.)

During the succeeding months CMKI declared a 2 for 1 stock split and filed with the Securities and Exchange Commission: Form 15 exemption claim, July, 2003; Certificate of Amendment to Articles of Incorporation changing its name to CMKM DIAMONDS, INC. (CMKM), February 5, 2004; Certificate of Amendment to Articles of Incorporation raising its authorized capital to 500,000,000,000 common shares @ \$0.001 par value, March 1, 2004; Certificate of Amendment to Articles of Incorporation correcting the par value of common shares as of December 26, 2002 to \$0.0001 par value, July 13, 2004; Certificate of Amendment to Articles of Incorporation raising its authorized capital to 800,000,000,000 common shares @ \$0.0001 par value, July 13, 2004. (RFAC ¶ 26.)

During the summer and fall of 2004: New York Attorney Roger Glenn was retained by the company; the number of acres upon which CMKM held claims increased to over 1.2 Million acres; claims development activity was pursued by the company; and a shareholders appreciation party was planned to be celebrated in Las Vegas, Nevada to thank the shareholders, to give them an opportunity to meet

1 company personnel, and to announce an agreed upon merger with
2 another public company, U.S. CANADIAN MINERALS INC. On the eve of
3 the party celebration, **Defendants GLASSMAN, ATKINS, and**
4 **CAMPOS**, *inter alia*, had an order placed on CMKM preventing any
5 public disclosure of anticipated mergers or other development
6 information. (RFAC ¶27.)

7 In early 2005, CMKM announced the addition of Robert A. Maheu
8 to the Board of Directors who shortly thereafter became the co-
9 chairman of the Board; CMKM announced a new "corporate strategy
10 plan to dramatically and comprehensively transform" the company for
11 generation of consistent, long-term growth and profitability for the
12 shareholders; CMKM filed an amended Form 15 on February 17, 2005
13 reinstating the company to a public reporting status; and on March 3,
14 2005 was notified by the Securities and Exchange Commission of a
15 temporary suspension of trading of the company's stock (Pink Sheets-
16 CMKX) based upon, *inter alia*, concerns over the "adequacy" of publicly
17 available information. (RFAC ¶28.)

18 On March 16, 2005, **Defendants GLASSMAN, ATKINS, and**
19 **CAMPOS**, *inter alia*, had a public administrative proceeding pursuant to
20 Section 12(j) of the Securities Exchange Act of 1934 instituted against
21 CMKM to determine whether the company was required to file periodic
22 reports under Section 12(g), and whether CMKM failed to comply with
23 Section 13(a), and rules there-under, by failing to so file. CMKM
24 responded on April 11, 2005 admitting that CMKM had a duty to file
25 public reports and alleging various grounds of mistake, malpractice and
26 other affirmative defenses to the factual allegations. (RFAC ¶29.)

27 From March 17, 2005 through April 29, 2005 CMKM traded
28 publicly in the US under the trading symbol "CMKX," a total of

1 551,756,751,833 shares, an average share volume of more than 17
2 billion shares per day, reaching a maximum on April 21, 2005 of
3 94,654,588,201 shares. These figures do not include foreign trades,
4 nor trades made on an ex-clearing basis such as those disclosed by
5 Jefferies & Company, Inc. on May 6, 2005: between March 25, 2004 and
6 September 21, 2004 Jefferies traded 111,780,681,204 shares of CMKX
7 stock on an ex-clearing basis. (RFAC ¶30.)

8 **More than 90 billion shares of this company were traded in**
9 **one day in April, 2005. Defendant COX has since been quoted as**
10 **saying this was the most heavily naked shorted company in the**
11 **history of the world. (RFAC ¶31.)**

12 **NASD companies in business during that period of time**
13 **were reportedly told: "It's free money; you can sell as many**
14 **shares as you can find buyers for and put all of the money in**
15 **your pocket. You don't ever have to buy the shares." Many of**
16 **those companies were on a no-borrow list at that time, and to**
17 **borrow shares, as a legitimate broker in 2005, required**
18 **\$2.50/share for borrowing. Nonetheless, some companies sold**
19 **an average of 17 billion shares a day into the market, with the**
20 **money accumulated subsequently transferred to offshore hedge**
21 **funds, Hezbollah, and various groups in Iraq, Iran and**
22 **Afghanistan. (RFAC ¶32.)**

23 On May 10, 2005 the Section 12(j) administrative proceeding was
24 conducted in a United States Central District of California courtroom;
25 the Administrative Law Judge, Honorable Brenda P. Murray entered her
26 decision on July 12, 2005, finding the facts to be as alleged by the
27 Securities and Exchange Commission and Defendants GLASSMAN and
28 ATKINS. CMKM then filed a Petition for Review, which was granted, and

1 a briefing schedule set. (RFAC ¶33.)

2 On October 20, 2005: Robert A. Maheu resigned as a member and
 3 co-chairman of the CMKM Board of Directors; Urban Casavant agreed to
 4 remain as the sole officer and Director of CMKM until the affairs of
 5 CMKM were wound up to ensure all shares and other assets of CMKM
 6 were properly distributed to its stockholders; CMKM entered into an
 7 agreement with Entourage Mining Ltd. pursuant to which CMKM
 8 assigned its 50% interest in United Carina Resources Corp. to Entourage
 9 for 15,000,000 shares of stock, sold its 36% interest in Nevada
 10 Minerals, Inc. claims to Entourage for 5,000,000 shares of stock, and
 11 made a joint agreement with 101047025 Saskatchewan Inc. and
 12 Entourage whereby certain claims were transferred and CMKM became
 13 entitled to receive 30,000,000 shares of Entourage stock; CMKM's other
 14 agreements with United Carina Resources Corp. and Nevada Minerals
 15 Inc. were terminated. (RFAC ¶34.)

16 On October 21, 2005 pursuant to a corporate resolution to self-
 17 liquidate, CMKM approved formation of a Task Force consisting of Robert
 18 A. Maheu, Donald J. Stoecklein and Bill Frizzell for the purpose of
 19 assisting CMKM and Mr. Maheu, as "designated Trustee, to conduct an
 20 orderly and verifiable pro rata liquidating distribution of any Entourage
 21 Mining Ltd. shares...and any other available assets of CMKM;" the SEC
 22 Petition for Review was withdrawn by CMKM on October 21, 2005 and a
 23 **Securities and Exchange Commission Order of Defendants COX,**
 24 **GLASSMAN, ATKINS, CAMPOS, and NAZARETH,** de-registering
 25 CMKM, subsequently was formally entered on October 28, 2005, based
 26 on the findings of Administrative Law Judge Brenda P. Murray. CMKM
 27 had 703,518,875,000 shares of common stock issued and outstanding
 28 on that date. (RFAC ¶35.)

1 On November 4, 2005 CMKM established a web site
2 (CMKMTaskForce.com) for the purpose, *inter alia*, of advising all
3 shareholders to request physical share certificates evidencing their
4 ownership interest in CMKM as one means of establishing that they were
5 bona fide shareholders of the company. Pursuant to its corporate
6 resolution, the company intended at that time to wind up its affairs and
7 distribute the 50 million shares of Entourage Mining Ltd. stock and any
8 other assets, including previously unpaid dividends, to the bona fide
9 shareholders. The web site set forth procedures to be followed and
10 established a means of registering all bona fide shareholder certificates
11 prior to December 31, 2005; certificates evidencing 43,309,298,585,
12 shares had been registered at that time. (RFAC ¶36.)

13 A frequently asked question (FAQ) page was added to the web site
14 on the evening of November 4, 2005 and in response to a question
15 about the degree of naked shorting of CMKM stock, the Task Force
16 indicated that "Credible information indicates the number of naked short
17 shares is potentially as high as 2 Trillion shares." (RFAC ¶37.)

18 The Task Force issued a press release on January 19, 2006
19 discussing a reduction in total shares of Entourage Mining Ltd. stock to
20 be distributed to CMKM shareholders from 50 Million shares to 45 Million
21 shares as a result of a reduction in mining claims involved. The Task
22 Force also discussed issues involving difficulties obtaining physical share
23 certificates being experienced by shareholders; accordingly the deadline
24 date for registration of shares was extended to March 15, 2006. The
25 Task Force was provided a new "cert list" by First Global Stock Transfer
26 showing certs issued "and active" on January 13, 2006; ADP Services
27 also provided information to the Task Force. This data reflected a
28 sample of 25,021 certificates representing 350,000,000,000 plus shares

1 of stock and a total of more than 67,000 additional certificates to be
2 counted. (RFAC ¶38.)

3 **The CMKM shareholders, at this time, properly believed a**
4 **pro-rata share of the assets that the company possessed would**
5 **be duly distributed. The company then owned all of the monies**
6 **that had been accumulated and placed into trusts. Since**
7 **Entourage had considerable assets and no substantial liabilities,**
8 **the shareholders then held a vested pro-rata property right**
9 **interest protected under the Constitution. (RFAC ¶39.)**

10 On March 16, 2006 the Task Force issued a public release which
11 stated "...we received a visit in our office [in Tyler, Texas] by an E-Trade
12 rep today. This rep personally hand delivered copies of approximately
13 4000" CMKM stock certificates. Further information regarding on-going
14 discussions with the DTCC and other brokerage houses was also
15 provided. (RFAC ¶40.)

16 The Task Force provided additional information on March 20,
17 2006, extending the time for registration of certificates to May 15,
18 2006, advising the shareholders that Urban Casavant and his immediate
19 family would not participate in the share distribution, and advising that
20 a printed notice to stock holders would be published in at least one
21 nationally circulated United States newspaper. (RFAC ¶41.)

22 On May 25, 2006 the Task Force received a second batch of 1,200
23 share certificates from AmeriTrade, having received some 1,000 share
24 certificates a week earlier. AmeriTrade's cover letter indicated that
25 several hundred more certificates would be delivered within "the next
26 few days." The deadline for registering certificates of May 15, 2006 had
27 not been extended, although the Task Force continued to advise
28 shareholders that they should obtain their certificates, and that the Task

1 Force would honor any bona fide shareholder at the time of asset
2 distribution. By late Fall, 2006, the Task Force had received and
3 counted copies of certificates from more than 39,000 shareholders,
4 evidencing more than 635 Billion shares. (RFAC ¶42.)

5 Kevin West was hired pursuant to a written agreement by CMKM
6 during the summer of 2006 to assist in winding up the affairs of the
7 company and, more specifically, coordinating the share certificate pull.
8 After serving nearly a year as Interim CEO, Kevin West was appointed
9 Chairman of the Board on March 29, 2007 after which Urban Casavant
10 stepped down as sole director, president, secretary and treasurer of
11 CMKM Diamonds, Inc. Mr. West soon thereafter appointed Bill Frizzell
12 as CMKM General Counsel and provided instructions for the filing of a
13 number of lawsuits to attempt to recover moneys and other assets
14 which had been wrongfully taken from the company. (RFAC ¶43.)

15 During the period of June 1, 2004 through October 28, 2005 a
16 total of 2.25 Trillion "phantom" shares of CMKM Diamonds Inc, was sold
17 into the public market through legitimate brokers, illegitimate brokers
18 and dealers, market makers, hedge funds, ex-clearing transactions and
19 private transactions. The sales of the majority of such shares were at
20 all such times known to **Defendants COX, GLASSMAN, ATKINS,**
21 **CAMPOS and NAZARETH.** (RFAC ¶44.)

22 At some date prior to June 1, 2004, **Defendants GLASSMAN,**
23 **ATKINS, and CAMPOS,** in concert with the Department of Justice of
24 the United States, together combined with Robert A. Maheu and others
25 to **facilitate a "sting operation,"** utilizing CMKM Diamonds, Inc.
26 **(without the knowledge or consent of its shareholders),** for the
27 purpose of trapping a number of widely disbursed entities and persons
28 who were believed to be engaged in naked short selling of CMKM

1 Diamonds Inc. stock, and in cellar boxing the company. **Defendants**
 2 **GLASSMAN, ATKINS and CAMPOS**, in conjunction with the
 3 Department of Justice, and with the assistance of the Department of
 4 Homeland Security, believed and developed evidence that said short
 5 sellers were utilizing their activities to illegally launder moneys,
 6 wrongfully export moneys, avoid payment of taxes, and to support
 7 foreign terrorist operations. To fulfill the plan to criminally trap such
 8 wrongdoers, **Defendants GLASSMAN, ATKINS and CAMPOS**, with
 9 assistance from the Departments of Justice and Homeland Security:

- 10 a) Assisted in and approved the retention of Roger Glenn, an
 11 ex-SEC trial attorney and drafter of Sarbanes-Oxley, to join
 12 CMKM Diamonds Inc. for the purpose of verifying claims
 13 value, increasing authorized shares of stock to
 14 800,000,000,000, and supervising from the inside of the
 15 company;
- 16 b) **Encouraged the company to "pump the stock,"** by
 17 expanding its promotional activities, assisting in the set up
 18 of the "racing activities" of the company, **underwriting a**
 19 **substantial portion of the cost of such activities with**
 20 **the purchase of a drag racing car with "CMKX"**
 21 **painted on the outside, photographs of which were**
 22 **publicly bandied about the Internet, and presenting**
 23 **the car for racing events in several jurisdictions;**
- 24 c) Consented to, facilitated, and supported the sale of certain
 25 company claims to several foreign corporations;
- 26 d) Consented to, facilitated, and supported the conferences
 27 between Robert A. Maheu and his associates on the one
 28 hand, and the wrongdoing short sellers on the other, all for
 the purpose of settling the potential liability of said

wrongdoers with consent of the U. S. Government and a representation of no criminal prosecution for such illegal sales;

e) Consented to, facilitated, and supported the declaration of dividends payable by the company to each common shareholder of CMKM Diamonds, Inc.;

f) Consented to, facilitated, and supported the distribution of shares of CIM, a private company owned by Urban Casavant, as a stock dividend, including consent and approval of distribution of said shares to holders of more than 1.4 Trillion shares of CMKM Diamonds, Inc. common stock; and

g) **Consented to, facilitated, and supported numerous other acts and deceptions consistent with effecting the "sting operation."** (RFAC ¶45.)

Defendants, and each of them, facilitated the above-described "sting operation" without the knowledge or consent of the shareholders, and entered into agreements Defendants knew would damage the shareholders by driving CMKM Diamonds, Inc. out of business. (RFAC ¶46.)

During the period from November, 2004 through April, 2005, CMKM Diamonds, Inc. negotiated the sale of some of its Saskatchewan, Canada mineral claims to three Chinese domiciled corporations **with the advice and consent, *inter alia*, of Defendants GLASSMAN, ATKINS and CAMPOS.** Proceeds from the consummation of such sales were **placed into a frozen trust for disbursal at a later time upon self-liquidation.** (RFAC ¶47.)

During the period from March, 2004 through August, 2006, on behalf of CMKM Diamonds, Inc. Robert A. Maheu, with assistance from

1 others, negotiated a settlement with the illegitimate brokers, dealers,
2 market makers, hedge funds, and other persons and entities that had
3 engaged in naked short selling of CMKM Diamonds Inc. stock and cellar
4 boxing the company. In exchange for a U. S. Government promise of no
5 prosecution for such sales, the wrongdoers each promised to pay
6 negotiated amounts to a frozen trust for disbursal at a later time. This
7 negotiated settlement was achieved by gathering representatives of the
8 illegitimate brokers, dealers, market makers, hedge funds and other
9 persons who had engaged in naked short selling of the stock into a large
10 venue, where they watched a video and slide presentation of all of the
11 evidence of their wrongdoing. They were offered an opportunity to
12 either pay a reasonable amount for each transaction conducted illegally,
13 or to walk out of the venue subject to criminal prosecution. They were
14 also placed on notice that the U.S. Government was watching them, and
15 warned to refrain from any future illicit and illegal behavior. Each
16 attendee paid. (RFAC ¶48.)

17 **Once the moneys had been collected, Defendants COX,**
18 **GLASSMAN, ATKINS, CAMPOS, and NAZARETH assumed**
19 **disbursement control of the funds, and the right to determine**
20 **when the release of the moneys to the shareholders would occur.**
21 **Because it was required to fulfill the "sting operation" goals,**
22 **Robert Maheu agreed that these Defendants should control the**
23 **distribution time for the funds after they determined the "sting**
24 **operation" goals had been fulfilled. Robert Maheu further agreed**
25 **that no CMKM liquidation assets would be distributed without**
26 **consent of the Defendant Commissioners. (RFAC ¶49.)**

27 Other moneys have been collected for the benefit of the
28 shareholders of CMKM Diamonds, Inc. from the Depository Trust &

1 Clearing Corporation, from the United States Government, and from the
2 sale of additional assets including consent to enter into joint venture
3 agreements with other companies holding mineral claims in
4 Saskatchewan, Canada. (RFAC ¶50.)

5 **Said moneys, collected for the benefit of shareholders have**
6 **been placed in a trust, or are otherwise now held in trust, by the**
7 **Depository Trust & Clearing Corporation,** a privately-owned clearing
8 house for all secured financial transactions which take place in the United
9 States, and the United States Treasury, **pursuant to a Trust**
10 **Agreement on behalf of the shareholders.** (RFAC ¶51.)

11 **By operation of Federal Law, the then acting Chairpersons**
12 **and Commissioners of the Securities and Exchange Commission**
13 **(the named Defendants herein) held and hold the sole, final and**
14 **absolute discretion to determine when moneys collected**
15 **pursuant to the scheme set forth above would and could be**
16 **released for distribution, and must do so pursuant to their**
17 **mandate under the law to protect the shareholders.** (RFAC ¶52.)

18 **Pursuant to the terms of the agreements entered into, all**
19 **moneys were to have been released within one year of the time**
20 **the company was originally de-listed, in October of 2005. It has**
21 **now been almost five years, and the Defendants, and each of**
22 **them, have failed and refuse to release these funds to the**
23 **shareholders.** (RFAC ¶53.)

24 Demand for release of said moneys has been repeatedly presented
25 to Defendants, and each of them, without result. Defendants, and each
26 of them, acting in concert with the Department of Justice have
27 represented repeatedly that the release of moneys for distribution was
28 imminent, and/or would occur within several weeks, and/or would occur

1 within less than a month. Each such representation has been made
 2 knowing it to be false. **These repeated actions of withholding**
 3 **distribution of said moneys, without compensation, and without**
 4 **due process of law, amount to a taking of the property of the**
 5 **individual Plaintiffs and of all similarly situated.** (RFAC ¶54.)

6 Defendants, and each of them, have acted with deliberate
 7 indifference or reckless disregard for the Constitutional and other rights
 8 of all Plaintiffs, or with the intention and knowledge that they were
 9 violating Plaintiffs' Constitutional or other rights or to cause them other
 10 injuries, losses and damage. (RFAC ¶55.)

11 As a result of misconduct of Defendants, and each of them, each of
 12 the named Plaintiffs and all of those similarly situated, have been denied
 13 their Constitutional rights, including, but not limited to, their Fifth
 14 Amendment right to be secure in their property, free from taking without
 15 just compensation and without due process of law, and have suffered
 16 injuries and property loss in excess of Three Trillion Dollars. (RFAC ¶56.)

17 18 IV

19 LEGAL ARGUMENT

20 A. Plaintiffs' Claim for Declaratory Relief Is Brought Against 21 the Proper Defendants, Who Are Not Protected By 22 Sovereign Immunity Under *Bivens*.

23 The statutory construction of the SEC vests the chairman and
 24 sitting commissioners of the SEC with ultimate authority for approval or
 25 disapproval of all actions taken by the SEC. As pled, all ten individual
 26 Defendants were active commissioners, and were acting within the
 27 course and scope of that capacity, during the timeframe applicable to all
 28 causes of action set forth in the RFAC.

1 The RFAC states in detail the occurrences and specifies the
 2 timeframe within which each individual Defendant had a duty and
 3 obligation to release payment of the funds, and failed to do so, pleading
 4 facts sufficient to state a claim for relief that is plausible on its face.
 5 *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

6 Although the Doctrine of Sovereign Immunity shields the United
 7 States, its agencies and employees from suit absent a waiver, and the
 8 SEC is specifically immune from suit, a federal agency, including the
 9 SEC, may be sued in the limited circumstances where Congress has
 10 expressly waived sovereign immunity. *United States v. Dalm*, 494 U.S.
 11 596, 608, 110 S.Ct. 1361. There are three potential avenues which
 12 provide congressional waivers of sovereign immunity – the
 13 Administrative Procedures Act, the Federal Tort Claims Act, and a *Bivens*
 14 action. This action is brought pursuant to *Bivens v. Six Unknown*
 15 *Named Agents of Federal Bureau of Narcotics* (1971) 403 U.S. 388,
 16 which provides the avenue for these Plaintiffs to seek remedies from the
 17 individual federal agents who commit constitutional wrongs. Sovereign
 18 immunity does not bar actions for damages against federal officials in
 19 their individual capacities for violations of individuals' statutory or
 20 constitutional rights. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.
 21 1985).

22 The *Bivens* Court held that violation of command by a federal
 23 agent acting under color of his authority gives rise to a cause of action
 24 for damages consequent upon his unconstitutional conduct:

25 "In *Bell v. Hood* (1946) 327 U.S. 678, we
 26 reserved the question whether violation of that
 27 command by a federal agent acting under color of
 28 his authority gives rise to a cause of action for

1 damages consequent upon his unconstitutional
2 conduct. Today, we hold that it does." *Bivens*, at
3 388-389.

4 In their individual capacities, the Defendants herein violated
5 Plaintiffs' constitutional rights, and Plaintiffs have appropriately pled
6 those violations. Where federally protected rights have been invaded, it
7 has been the rule from the beginning that courts will be alert to adjust
8 their remedies so as to grant the necessary relief. *Bivens*, at 392.

9 When discussing the rights of the private citizen, confronted by
10 one who acts under federal authority, the *Bivens* Court surmised:

11 "In such cases, there is no safety for the
12 citizen, except in the protection of the judicial
13 tribunals, for rights which have been invaded by the
14 officers of the government, professing to act in its
15 name. There remains to him but the alternative of
16 resistance, which may amount to crime."

17 That damages may be obtained for injuries consequent upon
18 violations of constitutional rights by federal officials should hardly seem
19 a surprising proposition. Historically, damages have been regarded as
20 the ordinary remedy for an invasion of personal interests in liberty.
21 *Bivens, supra*, at 395. It is well settled that, where legal rights have
22 been invaded, and a federal statute provides for a general right to sue
23 for such invasion, federal courts may use any available remedy to make
24 good the wrong done. *Bell v. Hood, supra*, at 684.

25 "The very essence of civil liberty consists in the right of every
26 individual to claim the protection of laws, whenever he receives an
27 injury." *Bivens, supra*, at 397.

1 Plaintiffs have set forth allegations which show that these
2 Defendants, at the specific times they were acting as commissioners of
3 the SEC, were personally involved in the deprivation of their
4 constitutional rights. As alleged, only they could authorize release of
5 Plaintiffs' funds, and they have refused, and continue to refuse to do so.

6 Plaintiffs' first cause of action for declaratory relief is properly
7 pled, as this suit "arises under the Constitution, laws or treaties of the
8 United States, 23 U.S.C. §1331, so as to enable [the] District Court to
9 give declaratory relief under the Declaratory Judgment Act." *Skelly Oil*
10 *Co. v. Phillips Petroleum Co.* (1950) 339 U.S. 667, 671. Plaintiffs
11 contend that the issues contained in this lawsuit assert their federal
12 rights. The Declaratory Judgment Act allowed relief to be given by way
13 of recognizing the plaintiffs' rights even though no immediate
14 enforcement of it was asked. *Id.*, at 671-672.

15 Plaintiffs' claim for declaratory relief sufficiently states the "case or
16 controversy" pursuant to Article III. The commissioners engaged in a
17 ploy which denied (and continues to deny) Plaintiffs procedural and
18 substantive due process. The initial taking of control over the
19 distribution of the funds, and the inaction of the commission in releasing
20 those funds have had the effect of unreasonably withholding the release
21 of proceeds of registered securities. **See:** *Nader v. FCC*, 520 F.2d 182,
22 172 U.S.App.D.C. 1 (1975).

23 An actual controversy exists, as the Defendants believed they had
24 and have no obligation to act to order release of the funds; somehow
25 entitling the funds to be held in perpetuity. Plaintiffs contend that the
26 commissioners have a duty to act to release those funds, and their
27 failure to exercise that obligation has led to the deprivation of Plaintiffs'
28 property rights. A registrant does have a right to have the Commission

1 follow the applicable statutes and regulations, and attempts by the
 2 Commission to circumvent statutorily imposed time limits may be
 3 attacked in a judicial proceeding. **See:** *SEC v. Sloan*, 436 U.S. 103, 98
 4 S.Ct. 1702 (1978).

5
 6 **B. Plaintiffs Have Pled Facts Sufficient to State a Plausible**
 7 **Claim.**

8 Defendants again point to the Supreme Court's opinion on the
 9 question of the sufficiency of factual support for hard-to-accept claims
 10 against high officials in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). There,
 11 a fairly grave accusation was brought against very high officials of the
 12 U.S. Government by a man who was imprisoned by the U.S.
 13 Immigration Department sweep of Arab nationals present in this country
 14 after 9/11. He said he was assaulted and mistreated while in custody,
 15 and wrongfully held for months, and alleged the Attorney General and
 16 the head of the FBI had caused this as part of an effort, and with intent,
 17 to discriminate against Arabs. The issue before the court was whether
 18 the minimalistic Rule 8, as interpreted by the court in *Conley v. Gibson*,
 19 355 U.S. 41, 78 S.Ct. 99 (1957), and successive cases, requires that
 20 the defendants, - especially those of such high rank - be held to answer
 21 on the plaintiff's unsupported, 'conclusory' allegation of unlawful intent.
 22 The *Ashcroft* court said, "No;" bare allegations of wrongdoing will not
 23 suffice, regardless of the "notice pleading" principle adopted in *Conley*.
 24 Some factual foundation must be supplied for what are otherwise
 25 implausible - or unprove-able - 'conclusory' claims. Carefully reviewing
 26 its recent, extensive analysis in *Bell v. Atlantic Corp. v. Twombly*, 554
 27 U.S. 550 (2007), the court observes that the Rule 8 "pleading standard .
 28 . . demands more than an unadorned, the-defendant-unlawfully-

1 harmed-me-accusation. A pleading that offers "labels and conclusions,"
2 or "a formulaic recitation of the elements of a cause of action will not
3 do." Nor does a complaint suffice if it tenders "naked assertion[s],"
4 devoid of "further factual enhancement." (*Ashcroft*, at 1949; see:
5 *Twombly*, 550 U.S. 555-557.) Drawing further on the *Twombly*
6 discourse, the court said:

7 "To survive a motion to dismiss, a complaint
8 must contain sufficient factual matter, accepted as
9 true, to 'state a claim to relief that is plausible on its
10 face.' A claim has facial plausibility when the
11 plaintiff pleads factual content that allows the court
12 to draw the reasonable inference that the defendant
13 is liable for the misconduct alleged. The plausibility
14 standard is not akin to a 'probability requirement,'
15 but asks for more than a sheer possibility that a
16 defendant has acted unlawfully. Where a complaint
17 pleads facts that are 'merely consistent with' a
18 defendant's liability, it 'stops short of the line
19 between possibility and plausibility of 'entitlement to
20 relief.'" *Id.*, at 1949.

21 "To be clear, we do not reject these bald
22 allegations on the ground that they are unrealistic or
23 nonsensical . . . or because they are 'too chimerical
24 to be maintained. It is the conclusory nature of
25 respondent's allegations, rather than their
26 extravagantly fanciful nature, that disentitles them
27 to the presumption of truth." *Id.*, at 1951 (emphasis
28

1 added). **See:** *Bell v. Twombly*, 550 U.S. at 550-
2 557.

3 The Plaintiffs here have met and exceeded this standard. An
4 extensive, possibly excessive, factual basis for the Plaintiffs' charges is
5 given, to the point where the problem in drafting was what to leave out.
6 So, where the Supreme Court found in *Ashcroft v. Iqbal* a complete lack
7 of articulable facts to support the plaintiff's allegation that the defendant
8 high officials meant to cause him harm, concrete factual allegations
9 abound in the instant case, including those which implicate these
10 Defendants individually, well within the rule of *Ashcroft v. Iqbal*.

11 In the face of such a narrative, Defendants' assertion that
12 Plaintiffs fail to state a claim is empty of meaning; instead presenting a
13 shell which the Court is invited to fill with an arbitrary pre-judgment.
14 That is not to say the Plaintiffs' claim is routine or familiar in any way,
15 or less than mortally shocking and off-putting, as discussed above; and
16 is clearly not rooted in any direct precedent. Nevertheless, the
17 intimation that the Constitution would provide no protection against the
18 perversion of official power as Plaintiffs' allege, and its injurious results,
19 itself seems frivolous.

20 Plaintiffs have alleged, and here reallege, that they were victims
21 of an unprivileged, substantive deprivation of the rights to their
22 property, in violation of the substantive right to due process of law
23 under the Fifth Amendment, by acts and omissions of Defendants, so
24 reckless and extreme that their conduct genuinely and radically shocks
25 the conscience. They assert their injuries were brought about by the
26 Defendants' acts under color of law, co-opting and abusing official
27 power, heedlessly and wantonly creating great danger to Plaintiffs and
28

1 others, by conspiracy and by Defendants' knowing and deliberate
 2 indifference to and reckless, callous disregard for the loss of rights.

3 The Complaint is certainly adequately pled pursuant to Rule 8,
 4 contrary to Defendants' protest.

5
 6 **C. Plaintiffs Have Properly Alleged that Defendants Were**
 7 **Personally Involved in or Caused Plaintiffs to be Subjected**
 8 **to a Constitutional Deprivation.**

9 Plaintiffs' constitutional causes of action rests on the substantive
 10 due process rights to life, liberty and property under the Fifth
 11 Amendment, pursuant to *Bivens v. Six Unknown Named Agents*, 403
 12 U.S. 388 (1971), and they allege, with great particularity, that the
 13 deprivation of these basic rights were brought about (at least in part) by
 14 the actions and conspiracy of these specifically named Defendants, who
 15 violated their liberty and property interests.

16 The Due Process Clause was intended to prevent government
 17 officials from abusing [their] power, or employing it as an instrument of
 18 oppression. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1988):

19 "As to the words from Magna Charta,
 20 incorporated into the Constitution of Maryland, after
 21 volumes spoken and written with a view to their
 22 exposition, the good sense of mankind has at last
 23 settled down to this: that they were intended to
 24 secure the individual from the arbitrary exercise of
 25 the powers of government, unrestrained by the
 26 established principles of private right and distributive
 27 justice. *Bank of Columbia v. Okely*, 17 U.S. 235, 4
 28 Wheat. 235-244, 4 L.Ed. 559 (1819), as cited in

1 *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. at
 2 117 (1884).” *Id.*, 523 U.S. at 845. See also oft-
 3 cited, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)
 4 (“The touchstone of due process is protection of the
 5 individual against arbitrary action of government,
 6 *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)”.)

7 The Court in *Sacramento v. Lewis* also said, not for the first time,
 8 “[o]ur cases dealing with abusive executive action have repeatedly
 9 emphasized that only the most egregious official conduct can be said to
 10 be ‘arbitrary in the constitutional sense.’” *Collins v. Harker Heights*, 503
 11 U.S. 115, 129, 112 S.Ct. 1071 (1992).

12 “[I]n a due process challenge to the executive
 13 action, the threshold question is whether the
 14 behavior of the governmental officer is so egregious,
 15 so outrageous, that it may fairly be said to shock the
 16 contemporary conscience. That judgment may be
 17 informed by a history of liberty protection, but it
 18 necessarily reflects an understanding of traditional
 19 executive behavior, of contemporary practice, and of
 20 the standards of blame generally applied to them.
 21 Only if the necessary condition of egregious behavior
 22 were satisfied would there be a possibility of
 23 recognizing a substantive due process right to be
 24 free of such executive action, and only then might
 25 there be a debate about the sufficiency of historical
 26 examples of enforcement of the right claimed, or its
 27 recognition in other ways. In none of our prior cases
 28 have we considered the necessity for such examples,

1 and no such question is raised in this case.” *County*
 2 *of Sacramento v. Lewis*, 523 U.S. at 847 (emphasis
 3 added).

4 Here, the Plaintiffs consider that, particularly in light of the unique
 5 and extreme character of their factual allegations, their claim of
 6 violations of the constitutional rights to substantive due process, by
 7 actions which so radically shock the conscience, is categorically clear
 8 and sufficient, without reference to any binding or even analogous
 9 precedent.

10 Defendants attack the sufficiency of Plaintiffs’ assertions of their
 11 personal involvement in the deprivation of Plaintiffs’ Constitutional
 12 rights. Here again, as discussed above, the requirements of the law are
 13 amply met in the Complaint, as Plaintiffs have clearly pled that the
 14 involvement of the Defendants was during the time periods within which
 15 their capacities vested by the SEC, as the chairman and sitting
 16 commissioners, possessing ultimate exclusive authority for approval or
 17 disapproval of all actions taken by the SEC, through their personal
 18 involvement. All ten individual Defendants were active commissioners,
 19 and were acting in their authorized capacities for approval or
 20 disapproval of actions as they alone determined, when monies collected
 21 pursuant to the scheme set forth above would and could be released for
 22 distribution. (Complaint ¶ 36.)

23
 24 **D. Defendants Are Not Entitled to Qualified Immunity.**

25 A “qualified immunity” from suit is available to public officials for
 26 acts and omissions by which they are said to have violated
 27 constitutional rights, or a right, if that right was not “clearly established
 28 in law.” *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The precise

1 conduct in question need not have been the subject of a prior decision
2 or statutory enactment, it is said, but "the contours of the right must be
3 sufficiently clear so that a reasonable official in the defendant's shoes
4 would know" that such action or inaction would be a violation. *Anderson*
5 *v. Creighton*, 483 U.S. 635, 640 (1987); *Hope v. Pelzer*, 536 U.S. 730,
6 741 (2002). The principle is said to protect "all but the plainly
7 incompetent or those who knowingly violate the law." *Malley v. Briggs*,
8 475 U.S. 335, 341 (1986).

9 "Qualified immunity 'shield[s] [government
10 agents] from liability for civil damages insofar as
11 their conduct does not violate clearly established or
12 constitutional rights of which a reasonable person
13 would have known.' *Behrens v. Pelletier*, 516 U.S.
14 299 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S.
15 800 (1982)). To evaluate a qualified immunity
16 claim, we follow a two-step analysis: 1) we ask
17 whether the law governing the official's conduct was
18 clearly established; 2) if so, we ask whether under
19 that law, a reasonable officer could have believed the
20 conduct was lawful." See *Katz v. United States* (9th
21 Cir. 1999) 194 F.3d 962, 967. [Citations omitted.]

22 In order for a right to be 'clearly established'
23 it's 'contours must be sufficiently clear that [at the
24 time of the alleged conduct] a reasonable official
25 would understand that what he is doing violates that
26 right.' *Anderson v. Creighton* (1987) 483 U.S. 635,
27 640." *Robinson v. Solano County* (9th Cir. 2000) 218
28 F.3d 1030, 1034-1035.

1 The absence of precedent addressing an identical factual scenario
 2 does not mean that the right is not clearly established. "Specific
 3 precedent is not required in order to overcome a qualified immunity
 4 defense, but the law in question must be sufficiently clear that the
 5 unlawfulness of the action would have been apparent to a reasonable
 6 official." **See:** *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1447; **see**
 7 **also** *Wilson v. Layne* (1999) 526 U.S. 603, 615, in which "clearly
 8 established" for the purposes of qualified immunity does not mean that
 9 "an official action is protected by qualified immunity unless the very
 10 action in question has previously been held unlawful."

11 "Our system of jurisprudence rests on the
 12 assumption that all individuals, whatever their
 13 position in government, are subject to federal law:

14 'No man in this country is so high that he is
 15 above the law. No officer of the law may set that
 16 law at defiance with impunity. All officers of the
 17 government, from the highest to the lowest, are
 18 creatures of the law, and are bound to obey it."

19 *United States v. Lee* (1882) 106 U.S. 196, 220.

20 Plaintiffs reiterate the Supreme Court's language quoted above,
 21 "[T]he Due Process Clause was intended to prevent government officials
 22 from abusing power, or employing it as an instrument of oppression."
 23 "[T]he substantive component of the due Process Clause is violated by
 24 executive action . . . when it 'can properly be characterized as arbitrary,
 25 or conscience shocking, in a constitutional sense.'" "[T]he words from
 26 Magna Charta, . . . were intended to secure the individual from the
 27 arbitrary exercise of the powers of government, unrestrained by the
 28

1 established principles of private right and distributive justice." See:
2 *County of Sacramento v. Lewis, supra*, 533 U.S. at 540.

3 The qualified immunity claim here is wholly unfounded, under the
4 circumstances pled, and frivolous; and in fact is transparently intended
5 only to provide grounds for an immediate appeal, under the rule of
6 *Mitchell v. Forsyth*, 472 U.S. 511 (1985), if the claim is denied.

7
8 **V**

9 **CONCLUSION**

10 Based on the foregoing, Plaintiffs respectfully request that this
11 Court deny Defendants' Motion to Dismiss the Revised First Amended
12 Complaint, and order Defendants to serve and file an Answer to the
13 Complaint within 30 days of its ruling.

14
15 Dated: November 5, 2010.

16 Respectfully submitted,

17 **HODGES AND ASSOCIATES**

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19
20 By: /s/ A. Clifton Hodges

21 A. CLIFTON HODGES

22 Attorneys for Plaintiffs
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