Appeal No. 11-55169
USDC Case No. 8:10-cv-00031-JVS-MLG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

David Anderson, Lt. Col; Nelson L. Reynolds, Lt. Col; Sheila Morris; Robert Hollenegg; Reece Hamilton, individually and on behalf of all similarly situated,

Plaintiffs-Appellants,

— v.—

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; Kathleen L. Casey,

Defendants-Appellees.

Appeal from the United States District Court
Central District of California
District Court No. 8:10-cv-00031-JVS-MLG
Hon. James V. Selna, Judge Presiding

Appellant's Opening Brief

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Jurisdiction

This putative class action was originally filed in Federal Court seeking declaratory relief and damages pursuant to Article III of the United States Constitution and the Fifth Amendment thereto. (E.R. Vol. 2, p. ER032) The Federal Court's jurisdiction is premised on the foregoing citations and, in addition, Title 28 U.S.C., Section 1331, and the case law of *Bivens v. Six Unknown Agents of the FBI*, 403 U.S. 388 (1971).

This appeal is from the final judgment of dismissal entered on December 29, 2010 (E.R. Vol. 1, p. ER001) after the District Court granted the motion to dismiss Plaintiffs' First Amended Complaint brought by the Defendants, each a Commissioner of the United States Securities and Exchange Commission, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The named Plaintiffs filed notice of appeal on January 27, 2011. (E.R. Vol. 2, p. ER015) This Court of Appeals has appellate jurisdiction over District Court judgments: "The courts of appeals . . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." [28 U.S.C. §1291]

Issues Presented

Put in its simplest terms, this appeal asks whether the Fifth Amendment to the U.S. Constitution continues today to protect individual United States citizens from having their property taken by Federal agents acting under color of law without just compensation and/or without due process of law. More pointedly, this case presents the question of whether shareholders of a public company which has officially announced its intention to self-liquidate and distribute massive net assets to those shareholders, who later discover they have been unwilling and unknowing victims of the U.S. Government's desire to run a "sting" operation, have a Constitutionally protectable property interest in receiving such net asset distribution.

As it seems perfectly clear from the teachings of the Supreme Court in *Marbury v. Madison* (5 U.S. (1 Cranch) 137 [1803]), *Bell v. Hood* (327 U.S. 678 [1946]) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (403 U.S. 388 [1971]) that every citizen has a right to claim protection of the laws when injured directly by government agents acting under color of law, this appeal also asks whether the principles enunciated therein remain viable.

Statement of the Case

This is an appeal from a judgment of dismissal entered after the District Court granted Defendants' and Appellees' motion brought under Federal Rules of Civil Procedure Rule 12(b)(1) and 12(b)(6). This case was originally brought under *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) 403 U.S. 388 as a putative class action on behalf of seven named Plaintiffs and some 50,000 others similarly situated against some ten individuals, each of whom had personally participated in refusing to allow these Plaintiffs and putative class members to receive moneys due to them.

Prior to June 1, 2004, the then sitting U.S. Securities and Exchange Commission (hereinafter "SEC") Commissioners, in concert with the Department of Justice of the United States (hereinafter "DOJ"), entered into an agreement with Robert A. Maheu and others, to utilize CMKM Diamonds, Inc. for the purpose of trapping a number of widely disbursed entities and persons who were believed to be engaged in naked short selling of the publicly traded stock of CMKM Diamonds, Inc., and cellar boxing the company. The SEC and the DOJ, with assistance from the Department of Homeland Security, believed

and developed supporting evidence that said short sellers were utilizing their activities to illegally launder monies, wrongfully export monies, avoid payment of taxes, and to support foreign terrorist operations. To fulfill a plan to criminally trap such wrongdoers, these SEC Commissioners, with assistance from the Departments of Justice and Homeland Security, without notice to the company's shareholders, engaged in a lengthy "sting" operation.

Later, acting on behalf of CMKM Diamonds, Inc., Director Robert A. Maheu negotiated a settlement with the illegitimate persons and entities who had engaged in naked short selling of CMKM Diamonds, Inc. stock. In exchange for a promise of no prosecution by the United States Government for such sales, the wrongdoers each promised to pay negotiated amounts to a frozen trust for disbursal at a later time. Other monies were also collected for the benefit of the shareholders of CMKM Diamonds, Inc., from the Depository Trust & Clearing Corporation, from the United States Government, and from the sale of additional assets. The SEC Commissioners, however, reserved unto themselves, the sole and absolute discretion to determine when monies collected pursuant to its scheme could and would be released for distribution. Subsequently, the company

declared that it would self-liquidate, and distribute its very substantial remaining net assets to its shareholders.

Demands for the release of said moneys and other assets were thereafter repeatedly presented to the SEC Commissioners, without result. Although agents and employees of the SEC and the DOJ repeatedly represented over a number of years that the release of moneys for distribution was imminent, each such promise proved false.

These actions of withholding distribution of said monies, without compensation and without due process of law, amount to a taking of the property of the Appellants, and establish the necessary foundation for an action brought under *Bivens*. Accordingly, this action was filed in January, 2010, more than five years after the moneys were to originally be released.

The named Defendants filed motions under Federal Rules of Civil Procedure (hereinafter, "FRCP") Rule 12(b)(1) and Rule 12(b)(6) arguing that: 1.) these SEC Commissioners enjoyed sovereign immunity resulting in the Court not having subject matter jurisdiction; and 2.) Plaintiffs had failed to state a compensable claim in that they had no protectable property interest under the 'Takings Clause' nor the

'Due Process Clause.' On August 2, 2010 the District Court granted their Motion, with leave to amend. (E.R. Vol. 1, p. ER009)

Appellants filed a Revised First Amended Complaint in September, 2010 (E.R. Vol. 2, p. ER032) which was similarly attacked by Defendants on essentially the same grounds. The action was thereafter dismissed with prejudice, the Court holding that Plaintiffs had failed to factually state any property interest which enjoyed protection under the U. S. Constitution. (E.R. Vol. 1, p. ER003) The Order of Dismissal was entered on December 29, 2010. (E.R. Vol. 1, p. ER001) This appeal followed.

Statement of Facts

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 its 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. (E.R. Vol. 2, pg. ER038, ¶ 25.)

During the succeeding months, CMKI declared a 2 for 1 stock split, and filed with the SEC: Form 15 exemption claim in July, 2003; Certificate of Amendment to Articles of Incorporation, changing its name to CMKM Diamonds, Inc. (CMKM) on 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, on 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 on 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 on July 13, 2004. (E.R. Vol. 2, pg. ER039, ¶26.)

During the summer and fall of 2004: New York Attorney Roger Glenn was retained by CMKM; the property upon which CMKM held claims increased to over 1.2 million acres; claims development activity was pursued by CMKM; 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 company personnel,

and to announce an agreed-upon merger with another public company, U.S. Canadian Minerals, Inc. On the eve of the party celebration, the SEC Commissioners placed an order on CMKM preventing any public disclosure of anticipated mergers or other development information. (E.R. Vol. 2, pg. ER039, ¶27.)

In early 2005, CMKM announced the addition of Robert A. Maheu to the Board of Directors, who shortly thereafter became the co-chairman of the Board; CMKM announced a new "corporate strategy plan to dramatically and comprehensively transform" the company for generation of consistent, long-term growth and profitability for the shareholders; CMKM filed an amended Form 15 on February 17, 2005, reinstating the company to a public reporting status; and on March 3, 2005, was notified by the SEC Commissioners of a 'temporary suspension' of trading of the company's stock (Pink Sheets – "CMKX") based upon, *inter alia*, concerns over the "adequacy" of publicly available information. (E.R. Vol. 2, pg. ER039, ¶ 28.)

On March 16, 2005, the SEC Commissioners instituted a public administrative proceeding pursuant to Section 12(j) of the Securities Exchange Act of 1934, against CMKM to determine whether the company was required to file periodic reports under Section 12(g), and

whether CMKM failed to comply with Section 13(a), and rules thereunder, by failing to so file. CMKM responded on April 11, 2005, admitting that CMKM had a duty to file public reports and alleging various grounds of mistake, malpractice and other affirmative defenses to the factual allegations. (E.R. Vol. 2, pg. ER040, ¶29.)

From March 17, 2005, through April 29, 2005, CMKM traded publicly in the United States, under the trading symbol "CMKX," a total of 551,756,751,833 shares, an average share volume of more than 17 billion shares per day, reaching a maximum on April 21, 2005, of 94,654,588,201 shares. These figures do not include foreign trades nor trades made on an ex-clearing basis, such as those disclosed by Jefferies & Company, Inc. on May 6, 2005: between March 25, 2004, and September 21, 2004, Jefferies traded 111,780,681,204 shares of CMKX stock on an ex-clearing basis. (E.R. Vol. 2, pg. ER040, ¶30.)

On May 10, 2005, the Section 12(j) administrative proceeding was conducted in a United States Central District of California courtroom; the Administrative Law Judge, Honorable Brenda P. Murray entered her decision on July 12, 2005, finding the facts to be as alleged by the SEC Commissioners. CMKM then filed a Petition for

Review, which was granted, and a briefing schedule set. (E.R. Vol. 2, pg. ER041, ¶33.)

On October 20, 2005: Robert A. Maheu resigned as a member and co-chairman of the CMKM Board of Directors; Urban Casavant agreed to remain as the sole officer and Director of CMKM until the affairs of CMKM were wound up, to ensure all shares and other assets of CMKM were properly distributed to its stockholders; CMKM entered into an agreement with Entourage Mining Ltd., pursuant to which CMKM assigned its 50% interest in United Carina Resources Corp. to Entourage for 15,000,000 shares of stock, sold its 36% interest in Nevada Minerals, Inc. claims to Entourage for 5,000,000 shares of stock, and made a joint agreement with 101047025 Saskatchewan, Inc. and Entourage, whereby certain claims were transferred and CMKM became entitled to receive 20,000,000 shares of stock; CMKM's other agreements with United Carina Resources Corp. and Nevada Minerals, Inc. were terminated. (E.R. Vol. 2, pg. ER041, ¶34.)

On October 21, 2005, pursuant to a corporate resolution to self liquidate, CMKM approved formation of a Task Force consisting of Robert A. Maheu, California Attorney Donald J. Stoeckleiin and Texas Attorney Bill Frizzell for the purpose of assisting CMKM and Mr.

Maheu, as "designated Trustee, to conduct an orderly and verifiable pro rata liquidating distribution of any Entourage Mining Ltd. Shares . . . and any other available assets of CMKM;" the SEC Petition for Review was withdrawn by CMKM, and an SEC Order de-registering CMKM was formally entered on October 28, 2005. CMKM had 703,518,875,000 shares of common stock issued and outstanding on that date. (E.R. Vol. 2, pg. ER042 ¶35.)

On November 4, 2005, CMKM established a website (CMKMTaskForce.com) for the purpose, *inter alia*, of advising all shareholders to request physical share certificates evidencing their ownership interest in CMKM as one means of establishing that they were bona fide shareholders of the company. CMKM intended at that time, pursuant to the adopted resolution, to wind up its affairs and distribute the 50 million shares of Entourage Mining Ltd. Stock and any other assets, including previously unpaid dividends, to the bona fide shareholders. The website set forth procedures to be followed and established a means of registering all bona fide shareholder certificates prior to December 31, 2005; certificates evidencing 43,309,298,585 shares had been registered at that time. (E.R. Vol. 2, pg. ER042, ¶36.)

A frequently asked question (FAQ) page was added to the website on the evening of November 4, 2005, and in response to a question about the degree of naked shorting of CMKM stock, the Task Force stated that "Credible information indicates the number of naked short shares is potentially as high as 2 trillion shares." (E.R. Vol. 2, pg. ER043, ¶37.)

The Task Force issued a press release on January 19, 2006, discussing a reduction in total shares of Entourage Mining Ltd. Stock to be distributed to CMKM shareholders from 50 million shares to 45 million shares, as a result of a reduction in mining claims involved. The Task Force also discussed issues involving difficulties obtaining physical share certificates being experienced by shareholders; accordingly, the deadline date for registration of shares was extended to March 15, 2006. The Task Force was provided a new "cert list" by First Global Stock Transfer, showing certificates issued "and active" on January 13, 2006; ADP Services also provided information to the Task Force, which data reflected a sample of 25,021 certificates representing 350,000,000,000 plus shares of stock and a total of more than 67,000 additional certificates to be counted. (E.R. Vol. 2, pg. ER043, ¶38.)

On March 16, 2006, the CMKM Task Force issued a public release that ". . . we received a visit in our office [in Tyler, Texas] by an E-Trade rep today. This rep personally hand delivered copies of approximately 4000" certificates. Further information regarding ongoing discussions with the DTCC and other brokerage houses was also provided. (E.R. Vol. 2, pg. ER044, ¶40.)

The Task Force provided additional information on March 20, 2006, extending the time for registration of certificates to May 15, 2006, advising the shareholders that Urban Casavant and his immediate family would not participate in the share distribution, and advising that a printed notice to stockholders would be published in at least one nationally circulated United States newspaper. (E.R. Vol. 2, pg. ER044, ¶41.)

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

the Task Force would honor any bona fide shareholder at the time of asset distribution. By late Fall, 2006, the Task Force had received and counted copies of certificates from more than 39,000 shareholders, evidencing more than 635 billion shares. (E.R. Vol. 2, pg. ER044, ¶42.)

During the summer of 2006, Kevin West was hired pursuant to a written agreement by CMKM, to assist in winding up the affairs of the company and, more specifically, coordinating the share certificate pull. After serving nearly a year as Interim CEO, Kevin West was appointed Chairman of the Board on March 29, 2007, after which Urban Casavant stepped down as sole director, president, secretary, and treasurer of CMKM Diamonds, Inc. Mr. West soon thereafter appointed Bill Frizzell as CMKM General Counsel, and provided instructions for the filing of a number of lawsuits to attempt to recover monies and other assets which had been wrongfully taken from the company. (E.R. Vol. 2, pg. ER045, ¶ 43.)

During the period of June 1, 2004, through October 28, 2005, there was a total of 2.25 trillion "phantom" shares of CMKM Diamonds, Inc. sold into the public market through legitimate brokers, illegitimate brokers and dealers, market makers, hedge funds, ex-clearing transactions and private transactions. The sales of the

majority of such shares were at all times known to the SEC Commissioners, including Defendants herein. (E.R. Vol. 2, pg. ER045, ¶44.)

At some point prior to June 1, 2004, the SEC Commissioners, in concert with the Department of Justice of the United States (hereinafter "DOJ"), entered into an agreement with Robert A. Maheu and others, to utilize CMKM Diamonds, Inc. for the purpose of trapping a number of widely disbursed entities and persons who were believed to be engaged in naked short selling of CMKM Diamonds, Inc. stock, and cellar boxing the company. The SEC Commissioners and the DOJ, with assistance from the Department of Homeland Security, believed and developed evidence that said short sellers were utilizing their activities to illegally launder moneys, wrongfully export moneys, avoid payment of taxes, and to support foreign terrorist operations. To fulfill the plan to criminally trap such wrongdoers, the SEC Commissioners, with assistance from the Departments of Justice and Homeland Security:

- Assisted in and approved the retention of Roger Glenn, an ex-SEC trial attorney and drafter of Sarbanes-Oxley, to join CMKM Diamonds, Inc., for the purpose of verifying claims value, increasing

authorized shares of stock to 800,000,000,000, and supervising from the inside of the company;

- Encouraged the company to expand its promotional activities, assisted in the setup of the "racing activities" of the company, and underwrote a substantial portion of the cost of such activities;

- Consented to, facilitated, and supported the sale of certain company claims to several foreign corporations;

- Consented to, facilitated, and supported the conferences between Robert A. Maheu and his associates on the one 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 United States Government, and a representation of no criminal prosecution for such illegal sales;

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

- 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. (E.R. Vol. 2, pg. ER045, ¶ 45.)

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 the SEC Commissioners. Proceeds from the consummation of such sales were placed into a frozen trust for disbursal at a later time. (E.R. Vol. 2, pg. ER048,¶ 47.)

During the period from March, 2004, through August, 2006, on behalf of CMKM Diamonds, Inc., Robert A. Maheu, with assistance from others, negotiated a settlement with the illegitimate brokers, dealers, market makers, hedge funds, and other persons and entities that had engaged in naked short selling of CMKM Diamonds, Inc. stock and cellar boxing the company. In exchange for a United States Government promise of no prosecution for such sales, the wrongdoers each promised to pay negotiated amounts to a frozen trust for disbursal at a later time. (E.R. Vol. 2, pg. ER048,¶ 48.)

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

Clearing Corporation, from the United States Government, and from the sale of additional assets, including consent to enter into joint venture agreements with other companies holding mineral claims in Saskatchewan, Canada. Said moneys, collected for the benefit of shareholders have also been placed in a trust, or otherwise held in trust by the Depository Trust & Clearing Company and the United States Treasury. (E.R. Vol. 2, pg. ER049, ¶¶50,51.)

The SEC Commissioners reserved unto themselves the sole and absolute discretion to determine when moneys collected pursuant to the scheme outlined above, would and could be released for distribution to the shareholders of CMKM. (E.R. Vol. 2, pg. ER049, ¶ 52.)

Demand for the release of said moneys has been repeatedly presented to the SEC Commissioners, without result. Agents and employees of these Commissioners and the DOJ have represented repeatedly that the release of moneys for distribution was imminent, and would occur 'within several weeks', and/or would occur 'within less than a month.' Each of such representations was false, and was made with knowledge of its falsity, at the specific direction of the named Defendants. These actions of intentionally withholding distribution of

said moneys, without compensation and without due process of law, amount to a taking of the property of the Appellants. (E.R. Vol. 2, pg. ER050, ¶ 54.)

The actions of the named Defendants, as set forth above, were taken with deliberate indifference or reckless disregard for the Constitutional and other rights of all Appellants, or with the intention and knowledge that they were violating their Constitutional or other rights, or to cause them damage and loss. As a result of Defendants' misconduct, Appellants have been denied their Constitutional rights, including, but not limited to, their Fifth Amendment right to be secure in their property, free from taking without just compensation and without due process of law, and have each suffered damages and property loss. (E.R. Vol. 2, pg. ER050, ¶¶ 55, 56.)

Summary of Argument

The U. S. Constitution, Fifth Amendment, provides that no person shall ". . . . be deprived of . . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." While Appellants freely admit that this is not your

"usual" *Bivens* case, they strongly demur to the District Court's determination that they had no property interest under the U.S. Constitution and, that even if they had such property interest, no Constitutional taking could have occurred as the courts have "almost universally" held that such "takings claims involve rights to real property." (E.R. Vol. 1, pg. ER007)

Under the statutory scheme in effect since the 1930's, the SEC Commissioners are fully in charge of all acts, decisions and omissions of the Agency, and are charged with the highest duty to safeguard the integrity of the companies they supervise, to promote a fair and level 'playing field' and to ensure the transparent safety of public investors. Their behavior as described in Appellants' First Amended Complaint could not be more at odds with their statutorily defined duties and responsibilities.

Rather than taking to heart the teaching of the U.S. Supreme Court in *Bivens,* the District Court here felt constrained by the lack of precedent wherein the facts involved 'personal' property and/or did not involve public company stock. However, it has long been settled that where legal rights have been invaded and Federal law provides for a general right to sue for such invasion, Federal courts may use any

available remedy to make good the wrong done. *Bell v. Hood* (1946) 327 U.S. 678 at 392. The *Bivens* Court later opined that the question of whether a cause of action for damages arose from unconstitutional conduct of a federal agent acting under color of law was settled by its holding. *Bivens* at 388-399. Accordingly, the District Court had an obligation to find a remedy to "make good the wrong done" to these Appellants and to the putative class of 50,000 CMKM shareholders.

Rather than following the teaching of that Court, that when Federally protected rights have been invaded, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," the Court here focused on whether any other Federal Court had similarly so held. The Court states that Appellants have failed "to set forth factual allegations supporting their claim to a property interest" (E.R. Vol. 1, pg. ER006) and then continues to the effect that even if they had a property interest, the "takings claim" fails because it involves shareholder interests, and the "due process" claim fails because Appellants "have not cited authority suggesting that such a right is constitutionally protectable." (E.R. Vol. 1, pg. ER007)

In fact, as is set forth below, there is no distinction in the source documents upon which this case is premised, regarding the nature of the property that enjoys protection from government taking and which taking is afforded the protection of due process of law and just compensation. The Constitution does not in any way limit such protection to real property, nor does it in any fashion intimate or suggest that intangible rights may be freely taken under color of law by a Federal agent without due process and just compensation. As is demonstrated below, Appellants here do in fact have a protectable property interest under both the takings clause and the due process clause of the U.S. Constitution.

Legal Argument

I. Appellants Have a Protectable Property Interest Under the Takings Clause of the U.S. Constitution

The Fifth Amendment to the U. S. Constitution provides in pertinent part that no person shall ". . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Although Appellants

complained in great factual detail (see E.R. Vol. 2, pgs. ER038 –050) to demonstrate the taking of their property, the District Court determined that they had no property interest under the U.S. Constitution, and that even if they had such an interest, no Constitutional taking could have occurred as the Courts have "almost universally" held that such "takings claims involve rights to real property." (E.R. Vol. 1, pg. ER007)

It must be realized that the statutory framework of the SEC vests the Chairman and other sitting Commissioners of the SEC with the ultimate authority for approval or disapproval, and direction of all actions taken by the SEC. As the pleadings demonstrate, all ten individual Defendants were active Commissioners, and were acting under color of their office during the timeframe applicable to all causes of action set forth in the Appellants' First Amended Complaint (hereinafter, FAC). (E.R. Vol. 2, pg. ER032)

Under the statutory scheme which authorizes and controls the SEC, the Commissioners have a high duty to safeguard the integrity of the companies that they supervise, to promote a fair and level 'playing field' and to ensure the transparent safety of

public investors. Contrast that with the acts of which these Commissioners are accused including promoting a scam-fronted publicity campaign, knowingly allowing billions and billions of unpaid-for shorted shares of a publicly traded company to be freely traded, assisting with and approving distribution of a stock dividend to holders of more than 1.4 trillion shares of CMKM stock, and then cooperating with the collection of funds from those traders of unpaid-for shorted shares to the extent of promising no Federal prosecution in exchange for payments to the company. Surely it is obvious that these acts, while performed by the SEC Commissioners under color of their authority are completely beyond the scope of their duties and responsibilities; that they are *ultra vires,* is truly beyond dispute.

Although the Doctrine of Sovereign Immunity shields the United States, its agencies and employees from suit absent a waiver, and the SEC is specifically immune from suit, a Federal agency, including the SEC, may be sued in the limited circumstances where Congress has expressly waived sovereign immunity. *United States v. Dalm*, 494 U.S. 596, 608 (1990). There are three potential avenues which provide Congressional

waivers of sovereign immunity – the Administrative Procedures Act, the Federal Tort Claims Act, and a *Bivens* action. This action is brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) 403 U.S. 388, which provides the only real avenue for these parties to seek remedies from the individual Federal agents who commit Constitutional wrongs. Sovereign immunity does not bar actions for damages against Federal officials in their individual capacities for violations of individuals' statutory or Constitutional rights. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

The *Bivens* Court originally held that violations by a Federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct:

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

> his unconstitutional conduct. Today, we hold that it does." *Bivens*, at 388-389.

In their individual capacities, the Defendants herein violated Appellants' Constitutional rights, and those violations have been duly and appropriately pled in detail. Where Federally protected rights have been invaded, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, at 392.

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

> "In such cases, there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name."

The fact that damages may be obtained for injuries consequent upon violations of Constitutional rights by Federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an

invasion of personal interests in liberty. *Bivens*, *supra*, at 395. It is well settled that, where legal rights have been invaded, and a Federal statute provides for a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, *supra*, at 684.

"The very essence of civil liberty consists in the right of every individual to claim the protection of laws, whenever he receives an injury." *Bivens*, *supra*, at 397. The FAC sets forth allegations which show that these Defendant Commissioners, at the specific times they were sitting as Commissioners of the SEC, were personally involved in the deprivation of these parties' Constitutional rights. And, as further alleged, only they could authorize release of Appellants' funds; to date they have refused, and continue to refuse, for a period now well in excess of five years, to do so. Appellants have thus effectively had taken from them, their vested "legitimate claim of entitlement" to receive a pro-rata distribution of CMKM assets. The pleading of these facts is more than sufficient to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

II. Appellants Have a Protectable Property Interest Under the Due Process of Law Clause of the U.S. Constitution

The Fifth Amendment to the U. S. Constitution provides in pertinent part that no person shall ". . . . be deprived of life, liberty or property, without due process of law . . . " Although it seems obvious, it is worth pointing out that 'property' is a word set forth without qualification, modification or limitation. In other words, 'property' as used in the Fifth Amendment is not limited to real estate property, nor to any particular category of personal property, nor is it specific to either tangible or intangible property.

The District Court below held that Appellants failed to set forth factual allegations supporting their claim to a property interest, and that since there was no property interest, Appellants failed to state "enough facts to state a claim to relief that is plausible on its face." *Bell v. Atlantic Corp. v. Twombly*, 554 U.S. 550, 570 (2007).

The Supreme Court discussed the question of sufficiency of factual support for hard-to-accept claims against high officials in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). There, a fairly grave accusation was brought against very high officials of the U.S.

Government by a man who was imprisoned by the U.S. Immigration Department sweep of Arab nationals present in this country after 9/11. He said he was assaulted and mistreated while in custody, and wrongfully held for months, and alleged the Attorney General and the head of the FBI had caused this as part of an effort, and with intent, to discriminate against Arabs. The issue before the court was whether the minimalistic FRCP Rule 8, as interpreted by the Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), and successive cases, requires that the defendants, - especially those of such high rank – be held to answer on the plaintiff's unsupported, 'conclusory' allegation of unlawful intent.

The *Ashcroft* court said "No;" bare allegations of wrongdoing will not suffice, regardless of the "notice pleading" principle adopted in *Conley*. Some factual foundation must be supplied for what are otherwise implausible – or unprove-able – 'conclusory' claims. Carefully reviewing its recent, extensive analysis in *Bell v. Atlantic Corp. v. Twombly*, 554 U.S. 550 (2007), the court observed that the Rule 8 "pleading standard . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." A pleading that offers "labels and conclusions," or "a formulaic recitation of the elements of a

cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]," devoid of "further factual enhancement." (*Ashcroft*, at 1949; see: *Twombly*, 550 U.S. 555-557.) Drawing further on the *Twombly* discourse, the court said:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 1949.
>
> "To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical . . . or because they are 'too chimerical to be maintained. <u>It is the conclusory nature of respondent's allegations, rather than</u>

their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.*, at 1951 (emphasis added). **See**: *Bell v. Twombley*, 550 U.S. at 550-557.

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

In the face of such a narrative, the Court's conclusion that Appellants failed to state a factually based claim is empty of meaning but for the issue of their property interest. That is not to say the claim here is routine or familiar in any way, or less than mortally shocking and off-putting, and it is clearly not rooted in any direct precedent. Nevertheless, the intimation that the Constitution would provide no protection against the perversion of official power as alleged here, itself seems frivolous.

Appellants here were victims of an unprivileged, substantive deprivation of the rights to their property, in violation of the substantive right of due process of law clause under the Fifth Amendment, by acts and omissions of the named Defendant Commissioners, so reckless and extreme that their conduct genuinely and radically shocks the conscience. These injuries were brought about by the Commissioners' *ultra vires* acts under color of law, co-opting and abusing official power, heedlessly and wantonly creating great danger to Appellants and others. These acts were produced in concerted fashion with knowing and deliberate indifference to, and reckless, callous disregard for, the loss of constitutional rights.

A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.1998). The District Court suggested that even if one assumed that a property right in the abstract had been specified, no cited authority exists suggesting that such property right is Constitutionally protectable; the Court then seems to conclude that therefore no property interest exists. While it must be conceded that counsel for Appellants has similarly not found

specific case authority, the right of a shareholder to receive proceeds from the winding up of a corporation is and must be a 'Constitutionally protected property right' entitling the shareholder to a due process hearing. This case setting is inapposite to *Brewster*; here, Appellants were clearly specified pro-rata beneficiaries of a very lucrative, self-liquidating public company. They had considerably more than a "unilateral expectation;" they in fact had a vested "legitimate claim of entitlement" to receive their pro-rata distribution of corporate assets; that interest is and must be entitled to Fifth Amendment protection.

Conclusion

"The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). This exact citation appears within *Bivens* (at 397) as a foundation of the Court's developmental process. And what could be more foundational than the Fifth Amendment and such a seminal case as *Marbury*? Indeed, what could be more to the point of this appeal? For what is at issue here is exactly that to which the

Marbury Court refers – grievously injured shareholders seeking the protections of the laws founded in the U.S. Constitution and further defined by the U.S. Supreme Court. These shareholders petition this Court of Appeals to allow them, as all citizens are entitled to, the protection and aid of the law. This *Bivens* action is in fact their only remedy as they are otherwise prohibited from suing these SEC Commissioners or the SEC itself.

These Defendant Commissioners engaged in conduct under color of their appointed positions which is grievous on its face. Looking more deeply at the facts which pertain, their personal conduct was secret, conspiratorial, *ultra vires*, and in large measure illegal. As a direct result of said conduct these shareholders have been deprived for well over five years of their individual vested distribution of a public company's net assets.

The U. S. Supreme Court in *Marbury* and *Bivens* has set forth the correct and controlling standards for this Court of Appeal to rule in this matter. It is really quite simple: these shareholders have suffered a grievous property injury; the injury was originally caused by the *ultra vires* acts of the Defendant Commissioners and then exacerbated by their continued refusal to allow release of CMKM

assets for distribution to these shareholders; the Defendant Commissioners were at all times acting under color of their office; and, the specified acts of these Defendant Commissioners was the direct cause of such property damage. Because these shareholders have no other remedy available to them, this case must be allowed to proceed.

Accordingly, Appellants pray this Court to reverse the District Court's Judgment of Dismissal and remand the matter with instructions to allow the claims made in the First Amended Complaint to proceed to trial.

Dated: December 5, 2011.

Respectfully submitted,

HODGES AND ASSOCIATES

s/ A. Clifton Hodges
A. Clifton Hodges

Certification of Compliance

The undersigned counsel for appellants hereby certifies that according to the word counting feature of the Word program, the foregoing appellants' opening brief, including headings, footnotes, and quotations, but excluding tables of contents and authorities contains 7,608 words.

Dated: December 5, 2011.

Respectfully submitted,

HODGES AND ASSOCIATES

s/ A. Clifton Hodges
A. Clifton Hodges

Appeal No. 11-55169
USDC Case No. 8:10-cv-00031-JVS-MLG

IN THE

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FOR THE NINTH CIRCUIT

David Anderson, Lt. Col; Nelson L. Reynolds, Lt. Col; Sheila Morris; Robert Hollenegg; Reece Hamilton, individually and on behalf of all similarly situated,

Plaintiffs-Appellants,

— v.—

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; Kathleen L. Casey,

Defendants-Appellees.

Appeal from the United States District Court
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Hon. James V. Selna, Judge Presiding

Appellant's Excerpts of Record

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