No. 11-55169

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ANDERSON, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CHRISTOPHER COX, et al.,	)
	)
Defendants-Appellees.	)
	)

DEFENDANTS-APPELLEES' ANSWERING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. SACV 10-00031 JVS (MLGx)

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2. Whether the *Bivens* claim should be dismissed where the FAC alleges generally that SEC Commissioners engaged in actions that deprived Appellants of funds in which they contend they have an interest (if such funds exist), but do not present any factual allegations showing that the Commissioners had any personal involvement in the alleged acts?

3. Whether the FAC should be dismissed because it is based on conclusory allegations and allegations that are not sufficiently plausible to state a claim?

4. Whether the SEC Commissioners have qualified immunity for Appellants' takings and due process claims under the Fifth Amendment because a clearly established right is not at issue where the Appellants making the claim have acknowledged that they do not have any "specific case authority" supporting their claim that they have a property right in the funds that they claim were taken

without just compensation and without due process of law?

5. Whether the district court properly dismissed the claim for declaratory judgment against government officials where Appellants rely on a waiver of sovereign immunity that applies only to claims for monetary damages?

II. STATEMENT OF JURISDICTION

Appellants invoked the jurisdiction of the district court under 28 U.S.C. § 1331. The district court entered an order dismissing Appellants' FAC, with prejudice, on December 29, 2010. Appellants filed a timely notice of appeal on January 27, 2011. Fed.R.App.P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellants are seven holders of stock in CMKM Diamonds Inc. ("CMKM"). This action arises out of the sale of stock from CMKM to Appellants, the corporation's subsequent resolution to self-liquidate, and the alleged involvement of the SEC in that process. Appellants contend that during the liquidation of CMKM's assets, Commissioners of the Securities and Exchange Commission ("SEC") repeatedly delayed distribution of money recovered and held in trust for Appellants. Appellants' FAC asserts claims for declaratory judgment and

deprivation of their Fifth Amendment rights under the Takings Clause and Due Process Clause, pursuant to *Bivens v. Six Unknown Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 297 (1971). Appellants claim that the Fifth Amendment protects their property interest in receiving distribution of assets that were allegedly collected upon liquidation of CMKM's assets.

The Commissioners contend that Appellants' FAC fails to: (1) state a plausible claim under the Takings and Due Process Clauses; (2) show that the Commissioners were sufficiently involved in the alleged actions to be subject to a *Bivens* action; (3) rebut the Commissioners' qualified immunity; and (4) state a claim for declaratory judgment. Therefore, dismissal of the action should be affirmed.

B. COURSE OF PROCEEDINGS BELOW

In January 2010, Appellants brought this action against nine current and former Commissioners of the SEC, including both the current chairman, Mary Schapiro, and her predecessor, Christopher Cox (collectively, the "Commissioners").

The original complaint stated two causes of action. First, the complaint sought a declaration that the Commissioners wrongfully "cause[d] certain acts and omissions to proceed in such manner" to "prevent the distribution of moneys held

for the benefit of [Appellants]" and that their actions caused Appellants "to be deprived of property without just compensation and without due process of law." (CR 1.)[1] Second, the complaint sought damages "in excess of 3.87 Trillion Dollars" based on the allegation that the Commissioners violated Appellants' "Fifth Amendment right to be secure in their property, free from taking without just compensation and without due process of law." (CR 1.)

The Commissioners moved to dismiss the original complaint on several grounds: (1) the declaratory judgment claim was barred by sovereign immunity; (2) Appellants failed to state a plausible claim; (3) Appellants failed to state a claim under *Bivens v. Six Unknown Agents of Fed. Bur. of Narc.*, 403 U.S. 388 (1971), because they did not allege the Commissioners were either personally involved in, or caused Appellants to be subjected to, a Constitutional deprivation; and (4) Appellants failed to set forth facts sufficient to overcome the Commissioners' qualified immunity. (CR 8.)

On August 2, 2010, the district court granted the motion to dismiss, holding that the "complaint fails to state a plausible claim since it does not assert a viable property interest under *Iqbal* standards. . . . Plaintiffs' vague allegations as to what

[1] "CR" refers to the Clerk's Record and is followed by the document control number. "ER" refers to the appellants' Excerpts of Record and is followed by the applicable page number. "AOB" refers to the appellants' opening brief followed by the applicable page number.

exactly their property interest is cannot withstand a motion to dismiss." (CR 15; ER 009.) The district court permitted Appellants to file an amended complaint.

Appellants then filed the FAC that added some new allegations but continued to rely on vague allegations as to the existence of money collected for the benefit of CMKM shareholders and the Commissioners' duty to provide for distribution of that money. (CR 24; ER 32.) The Commissioners moved to dismiss on the same grounds they had previously raised. (CR 25.)

Oral argument was heard by the district court on December 6, 2010. (CR 30.) On December 29, 2010, the district court issued its order granting the Commissioners' motion to dismiss, with prejudice, finding that Appellants had not identified a Constitutionally-protected property right and that the court lacked subject matter jurisdiction over the official capacity claims and claim for declaratory relief. (CR 32; ER 003.) This appeal followed.

C. STATEMENT OF FACTS

The FAC alleges that CMKM was formed in 2002 through a merger of other companies and, by July 2004, it had amended its Articles of Incorporation to authorize the issuance of 800,000,000,000 common shares with a par value of $0.0001. (CR 24; ER 038-39, ¶¶ 25-26.) The FAC alleges that during the summer or fall of 2004, the SEC allegedly "had an order placed on CMKM preventing any

public disclosure of anticipated mergers or other development information." (CR 24; ER 039, ¶ 27.) The FAC does not attach any such order, provide a date for the order, or provide any citation to it.[2]

In March 2005, the SEC imposed a temporary suspension on trading of CMKM stock based on concerns over the lack of adequate publicly available information because CMKM had not filed an annual or quarterly report with the SEC since November 2002, despite being required to do so. The SEC also brought an administrative proceeding alleging CMKM had failed to file required reports. (CR 24; ER 039-40, ¶¶ 28-29.) Despite those actions, trading in CMKM stock continued. (CR 24; ER 040, ¶ 30.)

In July 2005, an SEC administrative law judge found the facts to be as alleged by the SEC in the administrative proceeding.[3] (CR 24; ER 0041-42, ¶¶ 33-35.) In October 2005, CMKM allegedly started to wind up its affairs by selling its

[2] Moreover, a search of the SEC's website for "CMKM" leads to no results for orders entered in 2004 regarding CMKM. *See* www.sec.gov.

[3] That order is available at http://www.sec.gov/litigation/aljdec/id291bpm.htm. In the Order, the Administrative Law Judge concludes, "The facts of this case demonstrate a situation where management deprived shareholders and investors of material information in official filings, but promoted the company to investors through informal news releases and public statements that contained false information." *In the Matter of CMKM Diamonds, Inc.*, 85 SEC Docket 2814, 2005 WL 1652772, at*8 (July 12, 2005).

assets. *Id*. On October 28, 2005, the SEC entered an order de-registering CMKM shares. (CR 24; ER 042, ¶ 35.) At that time, CMKM allegedly had 703,518,875,000 shares of common stock issued and outstanding, and created a "Task Force" to liquidate CMKM assets. (CR 24; ER 042, ¶ 35.)[4]

The FAC alleges that from "June 1, 2004 through October 28, 2005 a total of 2.25 Trillion 'phantom' shares of CMKM Diamonds Inc, was sold into the

[4] Although this case was resolved on a motion to dismiss and the decision was based on the facts in the FAC, this Court may take judicial notice of the fact that the SEC brought a civil enforcement action, *See SEC v. CMKM Diamonds, Inc.*, No. 08-cv-0437 (D. Nev. June 23, 2009), against CMKM and individuals and entities who worked for or with CMKM, alleging that CMKM officers oversaw a complex scheme to issue and sell unregistered CMKM stock and to manipulate CMKM's stock price and volume through false statements. Fed.R.Evid 201(b) and (f); *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548 (1997). In that case, the SEC alleged that "[f]rom January 2003 through May 2005, eleven individuals and two entities assisted [CMKM] in fraudulently issuing hundreds of billions of shares of unrestricted CMKM stock." *SEC v. CMKM Diamonds, Inc.*, 635 F. Supp. 2d 1185, 1188 (D. Nev. 2009) (reciting facts alleged by SEC and stipulated to by several defendants). The SEC further alleged that CMKM "had no legitimate operations. Its only activities were illegally issuing and falsely promoting its own stock." *Id.* These allegations are inconsistent with Appellants' claims that CMKM was a company that had engaged in many business transactions and that had assets to distribute in a liquidation. In the SEC's civil enforcement action, judgment has been entered against all defendants. *SEC v. CMKM Diamonds, Inc.*, No. 08-cv-0437, 2011 WL 3047476, at *1 n.2 (D. Nev. 2011). In addition, while the SEC has obtained judgments requiring substantial payments of disgorgement and civil penalties against the defendants in its civil enforcement action, Appellants never mention the SEC's action in the FAC, nor suggest that these penalties and payments have been made.

public market . . . . The sales of the majority of such shares were at all times known to Defendants Cox, Glassman, Atkins, Campos and Nazareth." (CR 24; ER 045, ¶ 44.) This appears to relate to Appellants' allegations that the value of CMKM stock was being driven down by naked short sales.[5] The FAC does not allege why or how these Commissioners knew about these alleged sales. In particular, the FAC does not allege that there was any matter before the Commissioners that required them to consider these alleged sales.

The FAC further alleges that Commissioners Glassman, Atkins, Campos and the United States Department of Justice (with alleged assistance from the Department of Homeland Security) operated a "sting operation" and that prior to June 1, 2004, those Commissioners began using CMKM "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 in cellar boxing the company." (CR 24; ER 045-46, ¶ 45.) The FAC alleges that the Commissioners knew that the sting operation would drive CMKM out of business.

[5] The FAC does not define or explain naked short selling, and resolution of this matter does not require definition of that practice. However, some general information on naked short selling is available at http://www.sec.gov/spotlight/keyregshoissues.htm. Generally, "naked short selling" is the practice of short selling a tradeable asset without first borrowing the security or ensuring that the security can be borrowed, as is conventionally done in a short sale.

(CR 24; ER 047, ¶ 46.)

The sting operation allegedly involved several acts such as helping CMKM hire a former SEC staff person, encouraging CMKM to "'pump the stock' by expanding its promotional activities," facilitating the sale of CMKM assets to foreign corporations (and consenting to placement of the proceeds of some sales "into a frozen trust for disbursal at a later time upon self-liquidation") , and facilitating "numerous other acts and deceptions." (CR 24; ER 046-48, ¶¶ 45, 47.) In addition, Appellants allege that Commissioners Glassman, Atkins, and Campos, with assistance from the Department of Justice and the Department of Homeland Security, facilitated settlement conferences between CMKM and persons who had engaged in naked short selling. (CR 24; ER 047, ¶ 45(d).) The FAC does not define the role of the Commissioners in the settlement conferences or state that they personally participated.

In the purported settlement that followed, the short sellers allegedly "promised to pay negotiated amounts to a frozen trust for disbursal at a later time" in return for a promise that the United States government would not prosecute them. (CR 24; ER 048, ¶ 48.) The FAC does not identify a date in which this settlement occurred, other than sometime after August 2006, and does not identify the parties to the agreement. No documentation relating to the settlement is

attached to the FAC.

The FAC does not allege that the SEC was a party to the settlement, received anything from the settlement, or made any concessions in connection with the settlement.[6] However, the FAC alleges that once the money (presumably the money in the "frozen trust") was collected, Commissioners Cox, Glassman, Atkins, Campos, and Nazareth "assumed disbursement control of the funds, and the right to determine when the release of the moneys to the shareholders would occur"; "no CMKM liquidation assets would be distributed without consent of the Defendant Commissioners." (CR 24; ER 048-49, ¶ 49.) The FAC does not identify a document that set up such a trust, does not explain why the Commissioners allegedly had control over disbursement of the funds, and does not address what, if any, guidance they received or developed regarding when disbursement would be appropriate.

Appellants further allege that "other moneys have been collected for the benefit of the shareholders of CMKM Diamonds, Inc. from the Depository Trust & Clearing Corporation ["DTCC"], from the United States Government, and from the sale of additional assets" (apparently assets of CMKM). (CR 24; ER 049, ¶ 50.)

[6] The SEC has not brought any claims against naked short sellers in its civil enforcement action against CMKM or in any other action. *See* footnotes 2-4, *supra*.

These assets allegedly "have been placed in a trust, or are otherwise now held in trust, by the Depository Trust & Clearing Corporation . . . and the United States Treasury, pursuant to a Trust Agreement on behalf of the shareholders." (CR 24; ER 049, ¶ 51.) The FAC does not explain why the DTCC and United States Treasury would have provided funds for the benefit of CMKM shareholders, why assets from these three different sources were placed together in a trust, or identify the parties to the alleged trust agreement.

Without specifying what funds it is discussing, the FAC alleges that the Commissioners "held and hold the sole, final and absolute discretion to determine when moneys collected pursuant to the scheme set forth above would and could be released for distribution," but even though they have "absolute discretion," they "must do so pursuant to their mandate under the law to protect the shareholders." (CR 24; ER 049-50, ¶ 52.) The FAC also alleges that "the moneys were to have been released within one year of the time the company was originally de-listed, in October of 2005." (CR 24; ER 050, ¶ 53,) and that Appellants' "[d]emand for release of said moneys has been repeatedly presented to Defendants, and each of them, without result." (CR 24; ER 050, ¶ 54.) However, Appellants do not provide the dates of any such demands or identify the persons to whom they were allegedly sent.

IV. STANDARD OF REVIEW

This Court reviews de novo a dismissal for lack of subject matter jurisdiction or failure to state a claim on which relief may be granted. *See Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011); *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1282 (9th Cir. 1998). This Court may affirm on any ground finding support in the record. U.S. v. Lewis County, 175 F.3d 671, 679 (9th Cir. 1999).

V. SUMMARY OF THE ARGUMENT

The district court properly dismissed the FAC for failure to state a claim upon which relief can be granted because Appellants cannot identify a Constitutionally recognized property interest in the funds they claim are held in trust. Appellants do not identify any benefit to which they have a "legitimate claim of entitlement." Indeed, the FAC itself states that the Commissioners have "the sole, final and absolute discretion" to determine when to disburse the purported pool of money collected from naked short sellers and other entities, thus conceding that Appellants have no more than a "desire" or "unilateral expectation" that they will receive the funds.

Appellants do not directly own any part of CMKM's property or assets, but hold only a proportionate interest in the corporate equity remaining after a

corporation meets all its other debts and obligations. The profits themselves belong to the corporation, and do not pass to the shareholders unless and until the board of directors declares a dividend.

There are several additional deficiencies in the FAC that warrant its dismissal. First, Appellants have not sufficiently alleged that the Commissioners personally participated in or directed constitutional violations, or knew of constitutional violations of subordinates and failed to act to prevent them. The conclusory nature of the allegations regarding the Commissioners' involvement fails to establish that they had any personal involvement.

Second, key allegations in the FAC do not satisfy the pleading requirements explained by the Supreme Court in *Iqbal* because the allegations are either supported only by conclusory statements or are simply not plausible. *See Iqbal*, 556 U.S. at 679. The FAC's conclusory allegations that SEC Commissioners were personally involved in attempting to trap naked short sellers, and that a wide variety of entities later contributed funds to one or more trusts, seem to have no basis in fact. Instead, CMKM was a corporation with no legitimate operations, whose management defrauded its shareholders, resulting in no assets left for distribution to the shareholders.

Third, the Commissioners are entitled to qualified immunity because it is not clearly established that Appellants have a property interest in the funds – if they exist. Appellants admit that they have "not found specific case authority" supporting the existence of a property right in any such funds. (AOB at 33.)

Finally, the district court correctly dismissed Appellants' claim for declaratory judgment. To the extent this is a claim against the Commissioners acting in their official capacities, it is barred by sovereign immunity because Appellants have not identified a relevant waiver of sovereign immunity. Moreover, the Declaratory Judgment Act does not confer federal subject matter jurisdiction in the absence of an underlying claim.

VI. ARGUMENT

A. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' FIFTH AMENDMENT CLAIMS FOR FAILURE TO STATE A CLAIM.

Appellants assert three Fifth Amendment claims – a takings claim, a procedural due process claim, and a substantive due process claim. The FAC, however, fails to provide a basis for any of those claims because it fails to sufficiently allege a property interest of which Appellants could be deprived (assuming the claimed funds even exist).

To survive a motion to dismiss under Federal Rule of Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard does not require "detailed factual allegations," but the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombley*, 550 U.S. at 555-556). In short, the facts alleged in a complaint must "nudge [a plaintiff's] claims across the line from conceivable to plausible." *Twombley*, 550 U.S. at 570. A pleading presenting "'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 assertions' devoid of further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (internal citations omitted).

Appellants do not satisfy this standard. All of the Fifth Amendment claims that Appellants assert – takings and procedural and substantive due process – require evidence of deprivation of a property interest.[7] *See, e.g.*, *Bowers v.*

[7] Of course, evidence of loss of life or liberty would also suffice for the due process claims, but claims of that nature are not at issue here. Appellants discuss only property interests in their brief on appeal. (*See, e.g.*, AOB at 34 ["these shareholders have suffered a grievous property injury."])

Whitman, 671 F.3d 905, 912 (9th Cir. 2012) (first step in determining whether a taking has occurred is determining "whether the subject matter is 'property' within the meaning of the Fifth Amendment" (citations omitted)); *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1019 (9th Cir. 2011) (to succeed on either a procedural or substantive due process claim, a plaintiff "must first demonstrate that he was deprived of a Constitutionally protected property interest"); *Brewster v. Board of Education of the Lynwood Unified School Dist.*, 149 F.3d 971, 982 (9th Cir. 1998) (first element of a procedural due process claim is "a deprivation of a Constitutionally protected liberty or property interest"). Thus, to state a claim, Appellants must allege facts sufficient to state a plausible claim that they have a property interest in the purported trust funds described in the FAC.

In defining property interests protected by the Fifth Amendment, the Supreme Court has stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). If a right has not vested, it is not a cognizable property interest. *Peterson v. United States Dep't of Interior*, 899

F.2d 799, 807 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). In determining whether a right is vested, one must consider "the certainty of one's expectation in the property at issue." *Bowers*, 671 F.3d at 913 (quoting *Enquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008)). Thus, an individual does not have a Constitutionally protectable property interest in a particular benefit where a government agency retains discretion to grant or deny that benefit. *See e.g.*, *Id.* (under takings clause, "if the property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a Constitutional taking"); *Erickson v. United States*, 67 F.3d 758, 862 (9th Cir. 1995) (under due process clause, doctors had no property interest in continued participation in Medicare or Medicaid); *Greenwood v. FAA*, 28 F.3d 971, 976 (9th Cir. 1994) (where annual renewal of pilot examiner designation was left to the discretion of the FAA, plaintiff had no entitlement); *Swanson v. Babbitt*, 3 F.3d 1348, 1353-54 (9th Cir. 1993) (under takings clause, no vested right to obtain patent to mining claim upon filing of claim where agency had discretion to review claim).

Appellants do not identify any benefit to which they have a "legitimate claim of entitlement." While they twice argue in their opening brief that they have such a

claim, in neither instance do they provide legal support for their claim. (*See* AOB at 27, 33.)

Appellants appear to argue that they have a cognizable property interest in the trust funds because: (1) they are beneficiaries of the trusts referred to in the FAC, (2) these trusts contained the assets of CMKM and, as shareholders in CMKM, they are entitled to the trust funds because CMKM was liquidated, and/or (3) the Commissioners drove CMKM out of business by using CMKM to trap naked short sellers. None of those claims demonstrates a cognizable property interest in the funds.

Instead, Appellants' allegations demonstrate that they do not have a vested interest in any trust funds. Appellants claim that various entities (specifically, entities that purchased CMKM assets, naked short sellers, the DTCC, and the United States government) placed funds into one or more trusts and that those funds were intended to be used for the benefit of CMKM shareholders. (CR 24; ER 048-49, ¶¶ 47-51.) Appellants, however, do not point to any trust documents or any other contracts or agreements that would give them a "legitimate claim of entitlement" to these alleged funds. In fact, the FAC shows that, at most, they had a "unilateral expectation" of receiving the funds as the FAC states that the Commissioners have "the sole, final and absolute discretion" to determine when to

disburse the purported pool of money collected from naked short sellers and other entities. (CR 24; ER 049, ¶ 52.) Although Appellants suggest that the Commissioners' discretion was limited by their "mandate under the law to protect the shareholders," they do not explain how a responsibility to protect public shareholders generally could create a property interest in trust funds. (*Id.*) Similarly, even if, as Appellants allege, there was some expectation that the funds would be released by October 2005 and the Commissioners had represented that release of the funds was imminent (CR 24; ER 050, ¶¶ 53-54), Appellants provide no basis for finding that their expectations could create a property interest in the funds.

Appellants further suggest that, as CMKM shareholders, they have a pro rata property interest in the trust funds because CMKM was being liquidated. (CR 24; ER 044, ¶ 39; AOB at 33.) However, they acknowledge they lack any legal basis establishing that a shareholder has a Constitutionally-protected right "to receive proceeds from the winding up of a corporation." (AOB at 32-33.) Indeed, this Court has held that shareholders "do not directly own any part of a corporation's property or assets," but hold only a "proportionate interest in the corporate equity remaining after a corporation meets all its other debts and obligations. The profits themselves belong to the corporation, and do not pass to the shareholders unless

and until the board of directors declares a dividend." *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). The FAC fails to allege facts demonstrating that, even if the trusts represent corporate assets,[8] those assets have been distributed to all corporate debtors, and that the shareholders have a legal right to the remaining assets. Indeed, Appellants provide no reason for CMKM to liquidate its assets if those assets far exceed its debts or other obligations. Thus, Appellants' claim of entitlement to assets in the trust, based simply on their status as shareholders, does not sufficiently establish a property interest.

Similarly, any claim that the Commissioners drove CMKM out of business by using CMKM to trap naked short sellers (CR 24; ER 047, ¶ 46) fails to state a property interest because, as shareholders, Appellants "do not directly own any part of a corporation's property or assets." *Broad*, 85 F.3d at 430.

Since Appellants have not identified a property interest protected by the Fifth Amendment, they have not been deprived of property and cannot state a takings claim or a substantive or procedural due process claim. Consequently, the

[8] The FAC fails to allege that all of the assets in the alleged trust are corporate assets. Even assuming there is a trust, Appellants do not allege facts that show that assets from naked short sellers, the DTCC, or the United States government were corporate assets. In addition, even assets that allegedly originated from sales of CMKM assets would not be corporate assets if the Commissioners have discretion to distribute them.

district court properly dismissed the FAC for failure to state a Fifth Amendment claim.

B. OTHER DEFICIENCIES IN THE FAC ALSO WARRANT DISMISSAL.

The FAC may also be dismissed based on Appellants' failure to state a claim against the Commissioners, pursuant to *Iqbal*, and the Commissioners' qualified immunity, as further discussed below.

1. Appellants' *Bivens* Claim Should Be Dismissed Because They Have Not Alleged that the Commissioners Were Either Personally Involved in, or Caused Appellants to Be Subjected to, a Constitutional Deprivation.

In a *Bivens* action, the plaintiff must allege facts demonstrating that each defendant participated in or directed Constitutional violations, or knew of Constitutional violations of subordinates and failed to act to prevent them. *See Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) ("A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them."); *Pellegrino v. United States*, 73 F.3d 934, 936 (9th Cir. 1996) (*Bivens* liability premised on

proof of direct personal responsibility). In *Iqbal*, the Supreme Court rejected the notion that a supervisor's mere "knowledge and acquiescence in their subordinates [conduct]" could demonstrate the supervisor's violation of the Constitution; "purpose rather than knowledge is required to impose *Bivens* liability." *Iqbal*, 556 U.S. at 677; *see also Bibeau v. Pacific Northwest Research Foundation*, 188 F.3d 1105, 1114 (9th Cir. 1999) (finding that supervisors who were aware of a project that allegedly violated prisoners' rights but were not involved in any of the experiments were not liable under *Bivens*).

Appellants' FAC fails to allege facts demonstrating that the Commissioners had any personal involvement in the general matters asserted against the SEC. Excluding conclusory allegations, Appellants fail to state any facts establishing that these current and former Commissioners said, wrote, directed or instructed any of the conduct alleged. Instead, the allegations merely attribute all of the SEC's alleged conduct to the Commissioners without regard to whether any individual Commissioner actually engaged in any specific activity or had personal knowledge of a specific activity. Thus, Appellants have failed to state a *Bivens* claim against any of the Commissioners.

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2. Appellants' Allegations Are Not Sufficiently Plausible to State a Claim.

In addition to the fact that Appellants have failed to state a claim upon which relief can be granted because they have not identified a Constitutionally-protected property interest, the FAC suffers from numerous additional deficiencies because the allegations do not satisfy the plausibility requirements outlined in *Iqbal*. Two principles guide a court's analysis of the plausibility of the allegations in a complaint: (1) legal conclusions or recitals of the elements of a cause of action supported only by conclusory statements are not entitled to the presumption of truth; and (2) only a complaint stating a plausible, not merely possible, claim for relief can survive a motion to dismiss. *Iqbal*, 556 U.S. at 678-679.

Most of the allegations in the FAC are either conclusory or simply not plausible. For example, the FAC suggests that the Commissioners engaged in a "sting operation" involving pumping up the value of CMKM stock to trap persons engaged in naked short selling, but offer no specific actions by the Commissioners. In fact, the far more plausible explanation for the rapid increase in CMKM's stock is the one detailed in the SEC's complaint in its litigation involving CMKM: CMKM was a company with no legitimate operations and CMKM's management defrauded shareholders by attempting to make it appear that the company was

legitimate. *See SEC v. CMKM Diamonds, Inc.*, 635 F. Supp. 2d 1185 (D. Nev. 2009).

Similarly, the allegations that various entities placed funds for the benefit of CMKM shareholders in a trust (or in multiple trusts) are conclusory in that they fail to state fundamental facts establishing why the trusts were formed, who was designated to be the beneficiaries of those trusts, and the nature of the Commissioners' supposed responsibilities over those trusts. It is simply not plausible that the SEC, other government agencies, CMKM, naked short sellers, and others all played a role in negotiating settlement agreements and/or establishing trust accounts as to which the CMKM shareholders are beneficiaries, but neither the SEC nor other government agencies have provided any public information about the trusts. It is far more plausible that because CMKM had no assets to distribute and could not have entered into any legitimate agreements with other companies, there are no trusts and no funds to distribute to shareholders.

Because the allegations of the FAC are not plausible, dismissal of the FAC should be affirmed.

3. Appellants Have Failed to Set Forth Facts Sufficient to Overcome the Commissioners' Qualified Immunity.

Government officials are shielded from civil damage liability so long as their

conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *See Alston v. Read*, 663 F.3d 1094 (9th Cir. 2011). Qualified immunity "is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Iqbal*, 556 U.S. at 672 (internal citation omitted). As such, the Supreme Court has repeatedly underscored the importance of resolving qualified immunity questions at the earliest possible stage of litigation so that the costs and expenses of trial are avoided where the defense is dispositive. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

In *Saucier*, the Court established a two-part inquiry for determining whether qualified immunity applies: (1) whether taken in the light most favorable to the plaintiff, the facts alleged show the officer's conduct violated a constitutional right; and (2) whether the constitutional right in question was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted. *Saucier*, 533 U.S. at 201; *Marquez v. Gutierrez*, 322, F.3d 689, 692 (9th Cir. 2003).

As explained above, Appellants have failed to establish the existence of a protected property interest in the alleged funds. Absent such an interest, there can be no Fifth Amendment violation, and the first prong of the *Saucier* test cannot be

satisfied.

In addition, Appellants effectively admit that the second prong cannot be satisfied because they point to no clearly established law showing they have a constitutional interest in the funds they seek. They admit that they have "not found specific case authority" supporting the existence of a property right in the funds at issue, and they do not provide any analysis to support the existence of a right other than a general sense that there "must be a 'Constitutionally protected property right.'"(AOB at 32-33.) Thus, even if they could construct such a claim, the Commissioners are entitled to qualified immunity.

4. Appellants Have Abandoned Their Claim for Declaratory Judgment.

The FAC's first cause of action sought a declaratory judgment that declares the validity of Appellants' contentions. (CR 24; ER 054.) Appellants have abandoned this claim on appeal as they specifically assert that this action was brought pursuant to *Bivens*, which provides only for monetary relief. *Bivens*, 403 U.S. at 397. (AOB at 25.) Appellants concede that they do not rely on the Administrative Procedure Act, 5 U.S.C. 702, which waives the government's sovereign immunity for non-monetary claims. (AOB at 25.)

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Nonetheless, the district court properly dismissed Appellants' claim for declaratory judgment. To the extent this is a claim against the Commissioners acting in their official capacities, it is barred by sovereign immunity because there is no waiver of sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (stating that a plaintiff suing the United States bears the burden of showing an unequivocal waiver of sovereign immunity); *Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir. 2000) (plaintiffs "cannot state a claim against federal officers in their official capacities unless the United States waives its sovereign immunity").

To the extent the declaratory judgment claim is against the Commissioners in their individual capacities, it must be dismissed because Appellants have named the wrong defendants. The Commissioners – in their personal capacities – are not parties from whom a declaratory judgment (or any other equitable relief) can be obtained because the Commissioners cannot take government action in their individual capacities. *See, e.g.*, *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) (declaratory and injunctive relief only available in official capacity suit; it is not available in lawsuit against individual government employees in their personal capacities).

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Moreover, the Declaratory Judgment Act does not confer federal subject matter jurisdiction in the absence of an underlying claim. Thus, the district court properly dismissed the cause of action for declaratory judgment.

VII. CONCLUSION

For the foregoing reasons, the district court's order dismissing Appellants' claims, with prejudice, should be affirmed.

Dated: April 30, 2012

Respectfully submitted,

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VIII. STATEMENT OF RELATED CASES

The Appellees are unaware of any related actions pending in this Court.

Dated: April 30, 2012

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