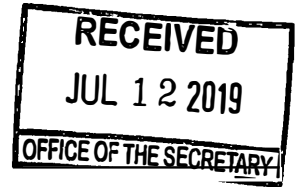


BEFORE THE UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.



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*Upper Street Marketing, Inc. et al. v. United States  
Securities and Exchange Commission*

3-19250

**UPPER STREET MARKETING INC. and  
JOSEPH EARLE, Shareholder,**

*Petitioners*

vs.

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

*Respondent*

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Petition to the United States Securities and Exchange  
Commission pursuant to Rule 550 of the Commission's Rules of Practice

Securities and Exchange Act of 1934,  
Release No. 34-8622 (June 27, 2019)

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**PETITION OF UPPER STREET MARKETING INC. AND JOSEPH EARLE  
UNDER RULE 550 OF THE SECURITIES AND EXCHANGE COMMISSION  
RULES OF PRACTICE**

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*Attorneys for Petitioner UPPER STREET MARKETING INC. and JOSEPH EARLE*

## INTRODUCTION

Petitioners Upper Street Marketing Inc. (“UPPR”) and Joseph Earle (“Mr. Earle”), UPPR’s President and a major shareholder, hereby file this timely<sup>1</sup> petition (this “**Petition**”) with the United States Securities and Exchange Commission (the “**Commission**”) pursuant to Rule 550 of the Rules of Practice of the Commission (the “**Commission Rules**”). Petitioners are requesting that the Commission (1) rescind and void its June 27, 2019, order (the “**Order**”) that suspended trading in UPPR’s stock for ten days (the “**Suspension**”) and, to the extent necessary, (2) not require the process outlined in Rule 15c2-11 under the Exchange Act (“Rule 15c2-11”), codified at 17 C.F.R. Section 240.15c2-11, be followed to recommence trading in UPPR stock.<sup>2</sup> *See* Declaration of Mr. Earle, ¶11. Because UPPR and Mr. Earle have been adversely affected by the Suspension, which the Commission issued pursuant to 15 U.S.C. 78l(k)(1)(A), they are entitled to petition for the above relief and, as more fully explained below, seek to show that such relief is warranted because the Suspension was issued without appropriate constitutional safeguards and was not necessary in the public interest or for the protection of investors.

## STATEMENT OF FACTS

### A. The Commission Suspended Trading in UPPR.

Without any prior notice of its concerns or any opportunity to address these concerns, on June 27, the Commission suspended trading in the securities of UPPR

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<sup>1</sup> The Commission served the Order by mail; Mr. Earle on received it on July 3, 2019. This petition, therefore, is timely filed. *See* Declaration of Mr. Earle, ¶11.

<sup>2</sup> The facts herein have been sworn to by Mr. Earle. *See* Declaration of Mr. Earle.

because of questions concerning the accuracy and adequacy of information publicly disseminated about UPPR since November 2018:

1. Public statements by UPPR dated May 8, 2019 and May 23, 2019 concerning \$10.55 million worth of purported financing for UPPR;
2. Public statements by UPPR dated April 30, 2019 and May 23, 2019 denying its retention of an investor relations firm despite apparent possible promotional activity on behalf of UPPR; and
3. Inadequate statements, since at least November 2018, concerning a possible private offering of at least \$3 million dollars in UPPR's common stock.

**B. UPPR Voluntarily Amended the Filings Referenced in the Order.**

In the two weeks since the Commission issued the Order, UPPR voluntarily amended the relevant filings to address the Commission's issues. If it had been provided with proper notice and an opportunity to cure these issues in advance of the Suspension, it would have been able to respond in a similarly expeditious manner. Specifically, by July 12, 2019, UPPR had amended the filings to provide a detailed description of: (a) the investor relations firms engaged by UPPR; (b) the law firms engaged by UPPR; (c) UPPR's independent auditor; (d) the merger and acquisition transaction; and (e) the history of UPPR's completed financings. *See* Declaration of Mr. Earle, ¶14.

**ARGUMENT**

**A. The Regulatory Scheme, As Applied to Suspend Trading in UPPR, Violates Due Process.**

*1. General Rule of Notice and Opportunity to Be Heard*

The Commission issued its Order on an *ex parte* basis without providing UPPR any notice of the action or opportunity to be heard prior to the Suspension; the Commission did not obtain this extraordinary relief from a neutral judicial officer. As such, the Commission did not comply with “the root requirement” of the due process clause to give notice *before* acting. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (emphasis in original).

2. *The Opp Cotton Exception Is Not Applicable*

With respect to actions taken by administrative agencies like the Commission, federal courts have held that the demands of due process may not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held *before* the final order becomes effective. Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941)(emphasis added). For OTC companies, however, a trading suspension is effectively a final order (and the likely demise of the company). Not only is there no further action that the Commission needs to take but also the consequences of the onerous 211 process that the SEC requires have lasting effects for OTC companies.

To the extent that the Commission may rely on a case that held that plaintiff’s due process rights were not denied by a prompt post-deprivation review of the trading suspension, Xumanii Int’l Holdings Corp. v. SEC, that case does not control here. 670 Fed. Appx. 508 (9th Cir. Oct. 19, 2016). First, Xumanii, as an unpublished case, not considered precedent. Ninth Circuit Rule 36-3. Second, Xumanii does not establish whether or not the Court considered the onerous burden of the Rule 15c2-11 process that the SEC requires, delaying the re-trading of the stock for two to six months, in its

decision that Xumanii's due process rights were adequately protected. *See* 670 Fed. Appx. at 509. Third, that decision is so bare as to be unusable.

Furthermore, the application of this practice is patently unfair to OTC issuers. A trading suspension for an OTC company equates to an unconstitutional de-listing. It evidently has also become the SEC policy now, as well, to support FINRA against OTC companies. This joint policy of FINRA and the SEC has developed slowly over many years and now imposes an automatic re-filing of a 211 by a market-maker for any OTC company which has any type of trading suspension, whether temporary or permanent. Here, the Commission did not hold a hearing before implementing a "temporary" suspension which, in fact, amounted to a *de facto* de-listing of UPPR's stock off of the OTC exchange.

SEC Rule 211 does not facially discriminate against OTC stocks. Still, based upon the steadfast application of FINRA and SEC "policy," the process of temporary suspension is never good for an OTC stock. When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). A party in UPPR's position must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon the proposal before the final order is issued. Morgan v. United States, 304 U.S. 1, 18-19 (1938).

**B. Pre-Action Notice and Hearing Protects UPPR's Investors.**

UPPR, Mr. Earle, other shareholders and its lenders are being hurt by the cessation of trading in UPPR's stock. In its Order, the Commission announced that it had issued a trading suspension of UPPR stock due to questions about the "accuracy and adequacy" of information publicly disseminated by or about UPPR in three key areas:

*1. Public Statements by UPPR Dated May 8, 2019 and May 23, 2019 Concerning Its \$10.55 Million in Financing*

UPPR did not issue any press releases on either date; rather, under previous advisory relationships with its prior legal counsel and auditors, UPPR made filings on these dates with the OTC. UPPR has now corrected and amended within the last two weeks as described more particularly above. No public issue remains about these filings. If the Commission had inquired about these filings, this amendment process would have occurred without the need to suspend trading.<sup>3</sup>

*2. Public Statements by UPPR Dated April 30, 2019 and May 23, 2019 Denying Retention of an Investor Relations Firm*

Again, since the issuance date of the Order, UPPR has corrected and amended these OTC filings. See Declaration of Mr. Earle, ¶14. UPPR has disclosed the investor relations firm with which it has been working.

*3. Inadequate Statements, Since November 2018, By UPPR about A Possible Private Offering of At Least \$3 Million.*

UPPR never announced publicly that it had obtained \$10.55 million in financing with Michael Sobec or anyone else. It did negotiate with Mr. Sobec for such financing, but that deal never closed. Instead, the \$10.55 million, comprised of a \$10 million equity line plus a \$500,000 bridge loan, never closed because the equity line required UPPR to

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<sup>3</sup> UPPR did not author, plan or distribute any offending press releases. Only those press releases which are authorized by UPPR's board are the lawful press releases of UPPR. UPPR publishes its press releases exclusively on *OTCmarkets.com*, and nowhere else. Any other releases are not authorize releases.

uplist to OTCQB and file an S-1 Registration Statement. The “\$3 million” raise predated the desired “\$10.5 million” raise by six months (approximately October 1, 2018) and was simply the sale of restricted stock to accredited investors under Rule 144.

Again, UPPR has amended to filings to make the history of its financing clearer and the history of its merger and acquisition transaction clearer.

### C. The Commission’s Actions Violate the APA.

The process here, once the ten day suspension expires, continues on without disclosure or resolution for UPPR or its shareholders. SEC has an informal rule, which violates the Administrative Procedures Act because this rule was not passed pursuant to the APA that requires the filing of new 15c2-11 filing pursuant to 17 C.F.R Section 240.15c2-11 without that regulation actually requiring it after a suspension of an OTC stock.<sup>4</sup> Stewart v. Smith, 673 F. 2d 485, 498 (1982) (“a rule may not be characterized as one of ‘management’ or ‘personnel’ if it has a substantial effect on persons outside the agency.”). This illegal process will harm UPPR’s shareholders in three ways. (1) UPPR’s shareholders now cannot trade for many months and their investment has become illiquid; (2) UPPR’s shareholders concurrently have experienced substantial dilution from predatory lenders who have added shares as the stock now remains dormant or “gray”; and (3) once trading re-opens (after a presumed minimum 6-month delay in 15c2-11 approval), the “old” stock price shall plummet. This whole process hurts investors, and it should not be imposed here.

This is not by law or regulation; rather, 17 CFR § 240.15c2-11 amounts to a mere *policy* requiring that broker-dealers file a “new 211” every time information about the

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<sup>4</sup> Here is one place informal rule is found. <https://www.sec.gov/investor/alerts/tradingsuspensions.pdf>

issuer goes stale. But a suspension does not mean that the information about the OTC filer is stale. SEC policy, especially here, should be waived.

D. The Commission Committed an Illegal Taking.

Without a hearing prior to the suspension, the suspension of an OTC stock amounts to an unlawful taking. Suspending trading essentially strips Mr. Earl's stock of its value, as it makes it illiquid. Suspending trading effects a taking of Mr. Earl's property by removing its value without compensation until a 211 is filed. See Knick v. Twp. Of Scott, 588 U.S. \_\_\_ slip op. at 8 (2019) ("a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it. ").

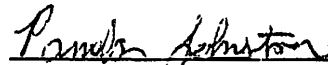


## CONCLUSION

The Commission is targeting OTC companies unfairly while relying upon an illegal, informal rule that demands automatic re-filing of a 211 by a market-maker if the issuer's trading is suspended, even temporarily. This is not rooted in law or regulation. To remedy this constitutionally deficient process, UPPR urges the Commission to vacate and rescind the Suspension, provide UPPR with a legitimate, transparent constitutional process to be heard, and have UPPR's arguments considered by a neutral judicial officer. If needed, the Petitioners also request that the Commission permit expedited briefing (including a short reply) and an expedited hearing on this petition and as result of that briefing and hearing, the Commission rescind and void the Suspension and order that no one is required to follow the process outlined in 17 C.F.R Section 240.15c2-11 for the shares of UPPR to commence trading again.

Respectfully submitted,

**FOLEY & LARDNER LLP**



Pamela L. Johnston

**KRÜEGER LLP**

Blair Kruger

*Attorneys for Petitioners UPPR  
STREET MARKETING INC. and  
JOSEPH EARLE*

DATE: July 12, 2019

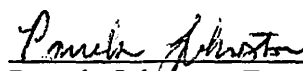
**CERTIFICATE OF COMPLIANCE**

I certify that the attached PETITION uses a 12-point, Times New Roman font and contains 2082 words.

Dated: July 12, 2019

Respectfully submitted,

**FOLEY & LARDNER LLP**



\_\_\_\_\_  
Pamela Johnston, Esq.

*Attorneys for Petitioner UPPER  
STREET MARKETING INC.*

## AFFIDAVIT OF JOSEPH EARLE

I, Joseph Earle, state:

1. I am the President of Upper Street Marketing Inc. I have had a long and successful business career of over 43 years: first, for two decades as a licensed stock broker; then second, over 30 years as executive management for a variety of both private and public operating companies.
2. From 1979 through 1998, I held a number of securities licenses with FINRA (then "NASDR"). Those various licenses included a Series 1 license, a Series 7, 24, 63 and others. I voluntarily let these licenses expire in 1998 through non-renewal. During these two decades, I had no disclosures or regulatory issues anywhere as reflected in my U-4.
3. During the past 24 years of my business career, I have served as a CFO, a CEO and COO of multiple technology and operating companies. These technologies include, but are not limited to, telecommunications, pharmaceuticals, medical devices, hardware and software engineering, electronic manufacturing as well as mechanical engineering and manufacturing. I have successfully executed numerous mergers, acquisitions and other exit strategies for these businesses.
4. In approximately April 2018, I was retained to manage and operate a water technology company, Growing Springs LLC ("Growing Springs") which provided their technology to hemp growers.
5. In August 2018, I expanded this opportunity to a dormant public company, Upper Street Marketing Inc. (OTC trading symbol: "UPPR"), in order to pursue opportunities in the Hemp and CBD markets domestically and internationally. In September 2018, I executed a reverse take-over of UPPR (the "RTO"). Since the RTO, and before, UPPR has never

engaged to any degree in any business pursuit within the so-called “Cannabis industry”, specifically, or in a segment or sub-segment of any type of commercial Cannabis enterprise, generally. The Petitioner, UPPR, is not a cannabis company.

6. Since September 2018, UPPR has raised approximately \$3 million dollars necessary to execute its business plan of hemp cultivation and CBD extraction via the sale of restricted 144 stock to accredited investors.
7. Since September 2018, UPPR has successfully acquired the use of over 1,200 acres needed to grow industrial hemp in and around Center, Colorado. UPPR has planted and is cultivating these 1,200 acres in order to produce 2,000,000 pounds of biomass needed to extract CBDs.
8. UPPR has purchased a 100,000 square foot CBD processing facility at 701 3<sup>rd</sup> St, Center, Colorado.
9. UPPR has leased a 12,000 square foot laboratory at 3444 Tripp Court, San Diego, California, needed to process and manufacture CBDs.
10. UPPR is poised to be one of the largest producers of CBDs in the world.
11. The Securities and Exchange Commission personally served me with the Cease Trade Order on behalf of the Petitioner on July 3, 2019. *See* Trading Suspension Order date June 27, 2019 (the (“Order”), Commission Release No. 34- 86228, [www.sec.gov/litigation/suspensions/2019/34-86228.pdf](http://www.sec.gov/litigation/suspensions/2019/34-86228.pdf)).
12. All UPPR press releases are on the OTC Markets website. Anything not on the OTC site is bogus or from unrelated and unknown third parties, bloggers or others not affiliated with UPPR. UPPR has never at any time released false and misleading information.

13. UPPR began selling restricted 144 stock to accredited investors in September 2018. These stock sales pre-dated the reference to a \$10.55 million facility in the Cease Trade Order. Under the terms of the Harbor Gate Financing, on or about April 26, 2019, UPPR and Harbor Gate LLC entered into a financing agreement with two important components: (a) a \$550,000 bridge loan fundable to UPPR immediately; and (b) a \$10,000,000 equity line fundable for UPPR upon (i) UPPR's uplisting to the OTCQB and (ii) UPPR's filing of an S-1 Registration Statement with the Commission, whichever event occurs later.
14. Since the date of the Order, UPPR has filed amendments to its filings with the OTC since September 2018. These amendments include and address each of the issues identified by the Commission in its Order, to wit:
  - a. Identifying names of, and details about, investor relations firms hired by UPPR in order to correct omissions or misstatements in UPPR's public OTC filings on April 30, 2019 and May 23, 2019;
  - b. Identifying names of, and details about: (a) the law firms engaged by UPPR; (b) UPPR's independent auditor; and (c) the merger and acquisition transaction, in order to correct omissions or misstatements in UPPR's public OTC filings.
  - c. Rectifying inadequate statements in public filings dated May 8 and May 23, 2019 of UPPR by providing, by amendment to its public OTC filings, a detailed description of the Harbor Gate transaction (with exhibits);
  - d. Rectifying inadequate or unintentionally omitted statements in public filings since November 2018 concerning the Harbor Gate Financing and other matters;

- e. Amending UPPR's public filings for December 31, 2018 and its quarterly report dated March 31, 2019.

The amendments to each of UPPR's filings are now presently available on the web at the following link to the OTC website: [www.otcmarkets.com/stock/UPPR/disclosure](http://www.otcmarkets.com/stock/UPPR/disclosure).

15. The recent SEC cease trade Order executed against Upper Street Marketing Inc. has greatly damaged me, my wife, and our family. Personally, I own 35 million shares of UPPR stock and 10 million Common Stock purchase warrants for a total of 45 million common shares, making me the largest shareholder of UPPR. Prior to the cease trade order the most recent price was \$1.50 cents per share. The effective value of my personal holdings was over \$67 million dollars. I am not able to trade my shares now; if this situation does not change, I will have lost \$67 million. At age 65, the cease trade Order, if not rescinded, may likely cause a substantial loss to me personally, which in turn shall dramatically affect my plans for our retirement. Prior to this cease trade Order, my wife and I were making a number of detailed retirement plans for the next few years that will likely be significantly impaired by the Order. Additionally, my wife and I were making plans for our children and grandchildren that are also impacted by the cease trade order. It is my wish that the Commission will reconsider its position and immediately rescind this unfair Order, let UPPR repair this damage, and get UPPR back to its true mission and corporate purpose.
16. The Cease Trade Order is doing irreparable damage to UPPR.
17. Paragraphs 18 through 25 have been intentionally omitted.

26. I have read and reviewed in detail the Petition filed by UPPR with the Commission. I hereby verify the facts alleged in the Petition by the attorneys for UPPR.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 11th day of July 2019 in San Diego, California.



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Joseph Earle

See attached  
Cent# 215375  
Op. 6/14/20

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )
County of SAN DIEGO )
On 7/11/19 before me, Emily Ann SELF, Notary Public,
Date Here Insert Name and Title of the Officer
personally appeared JOSEPH EARLE
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Handwritten Signature]
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: Affidavit of Joseph EARLE Document Date:
Number of Pages: Signer(s) Other Than Named Above:

Capacity(ies) Claimed by Signer(s)

Signer's Name:
[ ] Corporate Officer - Title(s):
[ ] Partner - [ ] Limited [ ] General
[ ] Individual [ ] Attorney in Fact
[ ] Trustee [ ] Guardian or Conservator
[ ] Other:
Signer Is Representing: