BEFORE THE UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

3-19250

UPPER STREET MARKETING INC. an Oklahoma corporation, and JOSEPH EARLE, a shareholder,

Petitioners

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Respondent

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. 34-86228 (June 27, 2019)

REPLY BRIEF OF PETITIONERS UPPER STREET MARKETING INC. AND JOSEPH EARLE

FOLEY & LARDNER LLP
Pamela L. Johnston
555 South Flower Street, Suite 3300
Los Angeles, California 90017
Telephone: 213.972.4500
Fax: 213.486.0065
Email: pjohnston@foley.com

KRÜEGER LLP
Blair Krueger
7486 La Jolla Boulevard
La Jolla, California 92037
Telephone: 858.405.7385
Fax: 858.454.2411
Email: blair@thekruegergroup.com

Attorneys for Petitioners UPPER STREET MARKETING INC. and JOSEPH EARLE

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INTRODUCTION

The United States Securities and Exchange Commission ("Commission") must address three issues in this matter: (1) did the staff of the Division of Enforcement of the Commission (the "Staff ") act prematurely or upon incorrect facts?; (2) were the processes which the Staff implemented or followed constitutional?; and (3) is the Staff's "grey" market solution advisable, good policy (or, frankly, even a realistic legal option for OTC issuers like UPPR)?

First, as to the factual record, as the Staff concedes on several occasions in its Opposition, the Staff made a host of factual errors. Throughout its opposition brief (the "Opposition"), the Staff fails to distinguish between UPPR's prior management and quasi-dormant operations from "before" the Growing Springs transaction in mid-2018 (the "Pre-merger company"), and current management and operations "after" the merger transaction, including the appointment of Joe Earle as President of UPPR (the "Post-merger company"). This factual and legal distinction between UPPR as the Pre-merger company and the Post-merger company is important and should not be ignored, as the Staff cavalierly does in its Opposition brief. At its core, the main factual problem is that the Staff misunderstood that the new management at UPPR after the Post-merger company brought important improvements and a marked "sea change" or "break" from UPPR's past management mistakes and operations of the Pre-merger company. The problematic trading alleged by the Staff in its Opposition was done by a legacy shareholder who, since last year, has not been a part of UPPR's new management's team. As demonstrated by petitioner Joseph Earle's declaration at paragraph 17, Mr. Earle does not know William Clayton, has never met him, and has only heard of his name when reviewing past records for UPPR. Mr. Earle played no role in Mr. Clayton's trading of UPPR shares. *See* Earle Decl., at ¶¶ 17–18, Mr. Clayton chose to sell his shares, which was not illegal or problematic.

Last year UPPR was an old, public OTC "shell" company transitioning from quasi-dormancy into fully-reporting status under the Exchange Act. Naturally, this process takes a substantial "while" to jump through all of the regulatory hurdles imposed by the Commission, FINRA, and OTC Markets, Inc. During this past year of transition, and led by Joe Earle, UPPR has implemented an entirely new business plan, plans of operations, and distribution of products; in addition, Mr. Earle has integrated into the Post-merger company an entirely new management team, new securities attorneys, and new auditors and accountants into UPPR's operational structure, as well as existing senior management from UPPR's acquisition and merger with PrimaPharm. None of the new management and advisors had ties with old management and advisors, other than Joe Earle.

In retrospect, the Staff's ongoing campaign against this fledgling, transitioning Post-merger company was neither fair nor constitutional. The Staff failed to provide UPPR, either Pre-merger or Post-merger, with adequate notice, a hearing or even any material constitutional due process before the effective date of the SEC's trading suspension, which became permanent automatically because UPPR trades on the OTC. The Staff's haste hence killed UPPR's stock price, and value, of course, but also stranded UPPR's existing shareholders (and even petitioner Earle with all of his millions of UPPR shares) without any way to liquidate their UPPR shares in a public exchange or trading platform. The Commission's excuses for failing to provide due process before suspending this OTC stock fall far short of what due process requires. *See, e.g., Sloan v. Securities and Exchange Commission* ("Congress invariably requires the Commission to give some sort of notice and opportunity to be heard. For example, § 12 (j) of the Act authorizes the Commission, as it deems necessary for the protection of investors, to suspend the registration of a security for a period not exceeding 12 months if it makes certain findings "on the record after

notice and opportunity for hearing....")(emphasis added). There was no reason for the Staff to act hastily here; instead, the Staff had every reason to act more cautiously and deliberately. The Commission erred in failing to provide UPPR and petitioner Earle with an opportunity to correct the situation before stripping UPPR and Mr. Earle of UPPR's ability to trade its shares via the OTC.

Third, this "grey" market solution that the Staff presses in its answering brief is simply bad policy, for many reasons, not the least of which is that—like the 15c2-11 (h) trading applications which the Staff proposes for UPPR and its OTC brethren—the Grey market is ineffective, seldom used and irrelevant.

ARGUMENT

A. The Staff's Opposition Contravenes The Supreme Court's Ruling In *SEC v. Sloan*, Which Dramatically Restricts The Commission's Discretionary Authority To Extend Or Expand The Ten-Day Trading Suspension Period.

This case's outcome is guided by the principles laid down by the Supreme Court in *Sec. & Exch. Comm'n v. Sloan*, 436 U.S. 103 (1978). In *Sloan,* the SEC was authorized by statute to issue summary orders suspending trading in any security for ten days. The agency had used that authority to impose consecutive ten-day suspensions of trading in a particular stock so that the aggregate suspension had lasted over a year. 436 U.S. at 105–06. The practice of issuing consecutive summary suspension orders had been noted and approved in a 1963 Senate committee report. *Id.* at 119–120. Commenting on the SEC's argument that the Supreme Court should follow Congressional approval of the agency's construction of the statute, the majority reasoned that the Court must be hesitant to follow agency construction when it would be at odds with the statutory language and would vest in the agency far-reaching power. *Id.* (emphasis added).

The *Sloan* Court then proceeded to clip the Commission's wings with respect to the scope of discretionary power Congress had authorized. The Commission advanced four basic arguments in support of its position, all of which missed their mark. First, that only the SEC's interpretation makes sense out of the statute. That is, if the Commission discovers a manipulative scheme and suspends trading for 10 days, it can suspend trading 30 days later upon the discovery of a second manipulative scheme. "But if trading may be suspended a second time 30 days later upon the discovery of another manipulative scheme, it surely could be suspended only 10 days later if the discovery of the second scheme were made on the eve of the expiration of the first order. And, continues the Commission, *since nothing on the face of the statute requires it to consider only evidence of new manipulative schemes when evaluating the public interest and the needs of investors, it must have the power to issue consecutive suspension orders even in the absence of a new or different manipulative scheme, as long as the public interest requires it.*" *Id.* at 122 (emphasis added). The Supreme Court was unpersuaded. Even assuming that the Commission could suspend trading again in *Sloan* upon learning of another event which threatens the stability of the market, it does not follow that the Commission necessarily has the power to do so even in the absence of such a discovery. *Id.* The Supreme Court's decision in *Sloan* compels this Court to act to preserve the ten-day rule for UPPR and other OTC issuers.

1. *The Staff's Wholesale Reliance On SEC Administrative Cases Such As* Bravo *And* Immunotech *Labs is Misplaced.*

Curiously, the Staff avoids addressing or confronting the Supreme Court's important holdings in Sloan exaggerating the authority of the SEC to fill in all the gaps without legislative authority. The Staff cites predominantly to SEC administrative cases, like *Bravo* and *Immunotech Labs*, rather than to circuit and Supreme Court cases. *See* Opposition at 7–9.

Neither case is applicable to UPPR's factual circumstance. In *Immunotech Labs., Inc., Exchange Act*, Release No. 73899, 2014 WL 7243176, at *1 (Dec. 19, 2014), the shares of the aggrieved issuer had resumed trading. A similar result ensued for the respondents in *In the Matter of Bravo Enterprises Ltd. and Jaclyn* Cruz, Release No. 75775 (August 27, 2015). In *Bravo*, the court found that, based on legislative history, "Congress drew a distinction between short-term, temporary trading suspensions based on...the public interest and longer suspensions based on a finding of a failure to comply" with applicable securities laws. *Id.* (citations omitted).

The Commission's decisions in *Bravo* and *Immunotech Labs* facially reserve broad regulatory powers to the agency that the Commission has, over many years, reserved and taken for itself notwithstanding Congress's lack of express legislation authorizing the Commission's exercise of broad discretionary powers. Both cases facially conflict with the Supreme Court's decision in *Sloan*. Federal law should govern the disposition of this case.

2. *The OTC Flush Rule, Which Effectively Disqualifies OTC Issuers From Ever Trading Again, Does Not Amount To Proper Legal Authority Upon Which The Commission May Rely.*

The Commission's discretion to impose rules and practices without direct, express Congressional authority is limited. *See SEC v. Sloan*, 436 U.S. 103, 118 (1978) (court must determine whether agency's exercise of discretion is within the scope of its statutory authority); *see also Downey v. Crabtree*, 100 F.3d 662, 666 (9th Cir. 1996) ("[The agency's] endowment of broad discretion does not immunize its decisions from judicial review, especially concerning questions of statutory interpretation."). The SEC has, in effect, adopted a quasi-regulatory practice of imposing summary permanent trading bars on OTC companies in the guise of "temporary" suspensions, thanks to the intersection of the requirements of Rule 15c2-11 and FINRA Rule 6432 with the almost total absence of market makers able to file the Form 211 required under FINRA Rule 6432. Let us call this the "OTC Flush Rule."

The OTC Flush Rule imposing summary permanent trading bars was never published or formally promulgated as a regulation. Neither was the summary trading suspension order in this case the outcome of an adjudication. Accordingly, they are entitled to no deference. *See Hunnicutt v. Hawk*, 229 F.3d 997, 1000 (10th Cir. 2000). The Supreme Court's holding in *Sloan*, discussed above, shows that even if the OTC Flush Rule had been properly promulgated as a regulation and thus entitled to *Chevron* deference, it would have exceeded the powers granted to the Commission as inconsistent with statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

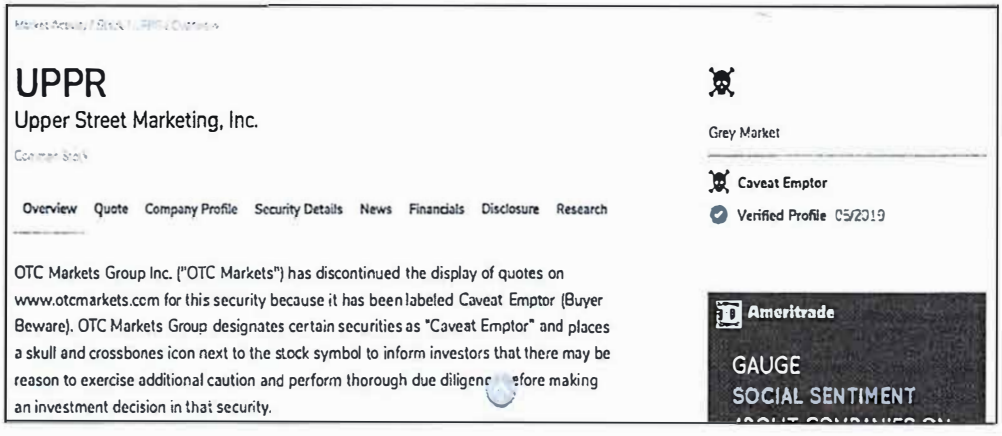
While the Commission is accorded broad discretion over regulation of the United States securities laws and financial markets, it must exercise this discretion within the prescribed parameters of its statutory authority. *Chevron* deference in this proceeding should not be afforded to SEC agency pronouncements that lack the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference."); *Via Christi Reg'l Med. Ctr., Inc.*, 509 F.3d 1259, 1272 (10th Cir. 2007) (same).

3. *The Grey Sheets Are Worthless, Downright Scary, And Basically Illiquid To OTC Investors And Issuers.*

For any OTC company that does *not* file reports with the SEC, a temporary trading suspension by the Commission permanently ends trading of its stock. Notwithstanding this indisputable fact, in its Opposition the Staff pushes the so-called "Grey Sheets" as the final resting stop for non-compliant OTC companies by arguing that "[i]nvestors may trade in the subject security [on the Grey Sheets] and even have a 'broker-dealer submit quotations on his or her

behalf'." Opposition at 7. Yes, this could be possible, but only if, and when, a brave market maker jumps in and risks life and limb to ensure that a broken OTC deal gets fixed with a compliant Form 211. . .despite the inherent risk of liability for any market maker associating with an OTC company that recently suffered a trading suspension by the SEC.

The fact that OTC Markets, Inc. posts a Skull and Crossbones symbol on its website to tout, tongue-in-cheek, the Grey Sheets to hesitant investors and issuers pretty much says it all – the Grey Sheets are not a liquid, viable, safe market for anyone to buy or sell securities. OTCmarkets.com, in fact, dramatically warns investors against buying shares through the Grey Sheets: "The skull and crossbones warning indicates that a company has a Caveat Emptor (or buyer beware!) status." The Staff's decision to push the Grey Sheets is bad policy and should not be adopted by the Commission. UPPR's symbol on its OTC Pink listing has now been proudly adorned with the skull and crossbones logo since the trading suspension transpired (86 days since June 17, 2019).



In its Opposition, the Staff argues that after the ten-day suspension expires, "unsolicited trading under Rule 15c2-11(f)(2) is nevertheless permissible." Opposition at 15. The Staff explains that "Investors may trade in the subject security and even have a 'broker-dealer submit quotations

on his or her behalf'." Opposition at p. 15. The Staff's authority for this claim is an explanatory note in an SEC opinion. *See In the Matter of Bravo Enterprises, Ltd. and Jacyln Cruz*, Release No. 75775, 2015 WL 5047983, at *12 n. 72.This position stands in direct opposition to the OTC's own statement about the Grey Sheets on its website:

> Grey Market, "OTC" or "Other OTC" is a security that is not currently traded on the OTCQX, OTCQB or Pink markets. Broker-dealers are not willing or able to publicly quote OTC securities because of a lack of investor interest, company information availability or regulatory compliance.

See OTC Markets Website Glossary at *www.otcmarkets.com/glossary*.

The Staff cannot have it both ways. A trading suspension is either temporary or it is not. For UPPR, like all other OTC issuers, the trading suspension is permanent, especially so now that no market makers presently service OTC issuers through sponsoring new 211 applications. Microcap is mired in illiquidity, accentuating the dearth of capital formation and the complete breakdown of protections for UPPR and its investors. No market makers means no market for UPPR's shares (or the shares of any other OTC issuer). The SEC states the problem clearly: "If there is no market to trade the shares, they may be worthless." *See Investor Bulletin: Trading Suspensions, Office of Investor Education and Advocacy, Securities and Exchange Commission* (Dec. 3, 2018). *See* www.sec.gov/investor/alerts/tradingsuspensions.pdf.

B. The Errors In The Tercero Declaration Are Both Relevant and Material

The Staff's contention that many of its acknowledged errors in the Tercero Declaration were "immaterial" to its decision to suspend trading of UPPR is implausible on its face. The Staff presented the Tercero Declaration as part of its Information. Indeed, the Staff framed the Information as the "**substantive** facts before the Commission at the time of trading suspension of [UPPR]." Information, at p. 1 (emphasis added). If the Staff suspended trading based on admittedly incorrect "substantive" facts, the suspension was without merit.

For example, the Staff concedes that UPPR did not hire an investor relations firm to solicit brokers to purchase UPPR stock. Opposition at p. 6, n.2. Instead, the Staff clarifies that UPPR hired a firm to place UPPR stock on the radar of brokers as a possible investment opportunity. *Id.* While the Staff contends this was "immaterial" to its decision, they in fact devoted nine paragraphs of the Information to this incorrect assertion, and the events that allegedly followed. *See* Info., at ¶¶ 19–26. The Staff relied on an anonymous witness to support this assertion, which the Staff now acknowledges is incorrect. It is difficult to believe that the Staff focused so much effort on "immaterial" facts.

The Staff also incorrectly contends that Gordon McDougall is UPPR's sole member of its board of directors. Info. at ¶ 28. The Staff uses this information to emphasize the purported impropriety of McDougall's ownership of UPPR shares through a separate entity. *Id.* Again, the Staff's presentation of this incorrect data is inconsistent with their contention that these erroneous assertions were "immaterial" in the Staff's decision to suspend trading.

The Staff's contentions that trading suspension of UPPR stock was necessary due to UPPR's mistakes in filings, increase in stock price, and owners of shares makes the errors pointed out by UPPR in its Petition more than "immaterial,"—they formed the basis of the suspension. The Staff suspended trading based on incorrect facts, and this suspension should be reversed.

CONCLUSION

Petitioners UPPR and Earle respectfully request that the Commission:

a. In reliance on *Sloan* and the other cases cited by petitioners, correct the fundamental lack of due process afforded to UPPR and Earle in the current regulatory regime;

b. Enforce strictly FINRA's three-day notice rule under FINRA Rule 6432 in order to engender more Form 211s filings by Market Makers for OTC-reporting companies; and

c. Cease its unlawful exercise of *ultra vires* authority over OTC companies.

The Commission is targeting OTC companies unfairly while relying upon an informal rule that violates the Administrative Procedures Act that demands an automatic re-filing of a 211 by a Market Maker if the issuer's trading is suspended, even temporarily. Accordingly, for the reasons stated above, the Petitioners request that the Commission vacate, rescind and void its June 27, 2019, Order and direct 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 immediately on OTC Link. Petitioners should be returned to their previous financial and legal positions.

Respectfully submitted,

FOLEY & LARDNER LLP

Pamela L. Johnston, Esq.

KRÜEGER LLP
Blair Krueger

Attorneys for Petitioners UPPER STREET MARKETING INC. and JOSEPH EARLE

DATE: September 11, 2019

CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief uses a 12-point, Times New Roman font and contains 2888 words.

Dated: September 11, 2019

Respectfully submitted,

FOLEY & LARDNER LLP

Pamela Johnston, Esq.
Attorneys for Petitioners UPPER STREET MARKETING INC. and JOSEPH EARLE

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I caused copies of the foregoing **REPLY BRIEF OF PETITIONERS UPPER STREET MARKETING INC. AND JOSEPH EARLE** to be served on the parties listed below via the methods set forth for each recipient.

Secretary of the Commission
100 F Street NE
Mail Stop 1090
Washington, DC 20549
Phone 202-551-5400
Fax 703-813-9793
(*via hand delivery*)

Roberto A. Tercero
Amy Jane Longo
Douglas M. Miller
Securities and Exchange Commission
Division of Enforcement
444 South Flower Street, Suite 900
Los Angeles, CA 90071
Phone: 323-965-3891 (Tercero)
Phone 323-965-3835 (Longo)
Phone 323-965-3837 (Miller)
terceroa@sec.gov
longoa@sec.gov
millerdou@sec.gov
(*via email*)

Dated: September 11, 2019

Adrian Jensen /JLB

Adrian Jensen
Foley & Lardner LLP
3000 K Street NW, Ste. 600
Washington, D.C. 20007
T: (202) 295-4077
ajensen@foley.com