UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **Karen Bruton and Hope Advisors, LLC,** **Respondents.**	**Administrative Proceeding** **Files No. 3-18790 and 3-18789**

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF CONSOLIDATED MOTION FOR SUMMARY DISPOSITION

Respectfully submitted,

DIVISION OF ENFORCEMENT
By its Attorney:

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I. INTRODUCTION

In response to the Division's relatively straight-forward motion for summary disposition, the Respondents raise several faulty legal arguments and, in essence, seek to re-write the history of the underlying action against them. The legal arguments can be rejected out of hand, and the other major arguments can be rejected for a simple reason—the Respondents are precluded from denying the allegations of the Complaint in the district-court action. Those allegations, which this Court must accept as true, show that Ms. Bruton engaged in an intentional, multi-year scheme to cover up losses and steal unearned fees from a fund that she managed. She persisted with the scheme even after her own controller objected that it was deceptive and resigned in protest, telling him that she "had bills to pay." If Ms. Bruton's egregious fraud does not show that she is a danger to the investing public, nothing would.

II. ARGUMENT

A. The Remedies Requested by the Division Are Not Barred by *Kokesh*.

Respondents argue that, no matter how grave a risk they pose to the investing public and the Commission's processes, the Court lacks authority to impose a censure, an associational bar, and a suspension from appearing or practicing before the agency because, in respondents' view, each of these remedies is categorically impermissible under *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Respondents are mistaken. Congress expressly authorized the Commission to impose these remedies. *Kokesh*'s application of a statute of limitations not implicated in this case to a remedy (disgorgement) also not at issue here does not vitiate that authority.

1. *Kokesh*'s holding has no bearing on this case.

Respondents do not and cannot dispute that Congress has expressly authorized each of the remedies at issue in this case. Section 203 of the Advisers Act authorizes censures and associational bars to be imposed in the public interest. 15 U.S.C. § 80b-3(e)-(f). Section 4C of the Exchange Act codifies the Commission's long-standing regulation of accountants and other professionals that appear or practice before it by authorizing temporary and permanent suspensions from such appearance or practice where appropriate to protect the agency's processes. 15 U.S.C. § 78d-3.

The Commission has already rejected the argument that *Kokesh*'s holding nullifies express congressional grants of authority such as these. *See Brett Thomas Graham*, Exchange Act Rel. No. 84106, 2018 WL 4348490 (Sept. 12, 2018). *Graham* explained that the only question at issue in *Kokesh* was whether disgorgement is punitive "for purposes of" the statute of limitations in 28 U.S.C. § 2462. *Id.*, 2018 WL 4348490 at *8; *see also Kokesh*, 137 S. Ct. at 1642, n.3 ("The *sole question presented* in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.") (emphasis added). In answering that question, the Commission reasoned, *Kokesh* "said nothing about ... the standards for imposing a bar." *Graham*, 2018 WL 4348490, at *8. Because the Supreme Court also said nothing about the standards for imposing the remedies at issue here, "*Kokesh*'s holding has no bearing" on the Court's authority to determine the appropriate remedies for respondents' admitted violations in this case. *Id.*

2. *Kokesh*'s reasoning does not preclude the imposition of the remedies sought.

Unable to find support in *Kokesh*'s holding, respondents argue that the Supreme Court's "dictum" should be treated as "authoritative." Br. 11, n.6. But the Court did not say anything—even in dictum—about non-monetary remedies such as those sought here. Respondents' reliance on *Kokesh*'s "reasoning" is similarly unpersuasive.

a. Respondents misconstrue Judge Kavanaugh's concurrence in *Saad*.

As an initial matter, although respondents claim that the radical result they seek follows from Judge Kavanaugh's concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), that opinion expressly disclaims respondents' characterization of it. Judge Kavanaugh thought that *Kokesh* should inform *how* the Commission should justify expulsions or suspensions—he argued that *Kokesh* requires explanation of why those sanctions serve "the purposes of punishment." *Id.* at 306. But Judge Kavanaugh went out of his way "not to suggest that FINRA lacks power" to impose "sanctions such as expulsions or suspensions." *Id.* at 306. "After all," Judge Kavanaugh reasoned, FINRA's rules "expressly allow[] FINRA to impose expulsions and suspensions in appropriate cases," and Congress expressly authorized these sanctions in the Exchange Act. *Id.* That *Saad* involved a FINRA, rather than a Commission, bar makes no difference: Judge Kavanaugh acknowledged that Congress authorized "FINRA *and* the SEC [to] still impose expulsions and suspensions in certain cases." *Id.* at 306 (emphasis added). So although respondents claim their rule stems from Judge Kavanaugh's opinion, in reality it contradicts it.[1]

[1] The Commission recently ruled that a litigant who contended that *Saad* had "clouded the issue of whether a permanent bar can even be considered remedial" had failed to establish a likelihood

b. Respondents' remaining arguments are meritless.

Respondents' theory for why the remedies that Congress authorized are categorically impermissible is based on two premises they seek to derive from *Kokesh*: that a sanction (1) is punitive if it is imposed to serve general deterrence instead of to compensate; and (2) constitutes punishment, notwithstanding any remedial goals it serves, if it is punitive even in part. Citing cases in which the Commission has held that sanctions such as those sought here advance general deterrence, respondents claim that under *Kokesh* these sanctions are categorically punitive even if they also serve a remedial goal. Finally, because controlling precedent holds that the Commission can impose these sanctions as a remedy, but not to punish, respondents contend that *Kokesh* deprives the Court from ordering the sanctions at all. Respondents' premises and the conclusions they draw are incorrect.

First, respondents' emphasis on compensation misses the mark because the sanctions at issue in this case and in *Kokesh* are different, and the difference matters. *Kokesh* involved disgorgement, a monetary sanction. The Court's analysis was thus geared at determining when "pecuniary" remedies operate as penalties. 137 S. Ct. at 1642. It is in that context that the Court distinguished sanctions that are "sought 'for the purpose of punishment, and to deter others from offending in like manner,'" on the one hand, "as opposed to" those that "compensat[e] a victim for his loss." 137 S. Ct. at 1642. It makes no sense to apply this distinction to non-monetary remedies.

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of success in arguing that "*Kokesh* renders FINRA bars impermissible." *Southeast Investments, N.C., Inc.*, Exchange Act Rel. No. 860097, 2019 WL 2448245, at *4 (June 12, 2019).

Second, respondents misapprehend *Kokesh*'s statement that "[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." 137 S. Ct. at 1645 (internal quotation marks omitted). Outside the context of Section 2462, the Court has held that "the mere presence" of a purpose to "deter others from emulating [the violator's] conduct" does not render a sanction punitive. *Hudson v. United States*, 522 U.S. 93 (1997) (banking bar designed to "promote the stability of the banking industry" was not punitive); *see also Saad*, 873 F.3d at 309, n.1 (separate opinion of Millett, J.) ("[T]he Supreme Court [has] recognized the important remedial role that [occupational] debarments can play in protecting the integrity of an industry and those members of the public who interact with it."). *Kokesh*'s discussion of when a monetary remedy with multiple purposes is sufficiently punitive "within the meaning of § 2462," 137 S. Ct. at 1639, should not be read as implicitly overturning that precedent. *See Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").[2]

Regardless, the "solely remedial" test does not preclude imposing the remedies sought here because of a dispositive difference between disgorgement and sanctions such as bars. *Kokesh* ruled that in a significant category of cases general deterrence is the "primary purpose" of disgorgement. 137 S. Ct. at 1643. For instance, tippers in an insider-trading scheme may be ordered to disgorge funds that they never obtained. *Id.* at 1644-45. In such cases, the remedial

[2] The cases that respondents cite as holding that bars and suspensions are categorically penalties ruled only that those remedies can be subject to the statute of limitations in Section 2462. *See Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996); *SEC v. Gentile*, 2017 WL 6371301 (D.N.J. Dec.

purposes of disgorgement—such as restoration of the status quo—are insufficient to justify a disgorgement award. *Id.* Rather, disgorgement can "only be explained" by the need to achieve general deterrence. *Id.* at 1645.[3]

Sanctions like bars do not work this way. Quite the opposite, general deterrence "is not, by itself, sufficient justification for expulsion or suspension." *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005). To be sure, general disgorgement can be considered "as part of the overall remedial inquiry." *Id.* But in respondents' entire survey of Commission decisions (at Br. 12-13), they are unable to cite a single case where general deterrence was a necessary and a sufficient consideration in imposing any of the remedies that the Division seeks in this case.

So even assuming that general deterrence is a punitive objective, the Court can impose remedies in this case without resorting to that goal. The Commission's decision refusing to set aside Bruton's temporary suspension *in this very case* provides a straightforward path. Citing the same decisions that she now cites to this Court, Bruton argued that a temporary suspension under Rule 102(e) is categorically punitive and can never be imposed. The Commission acknowledged that it had previously held that permanent suspensions, in addition to preventing the respondents' misconduct and protecting the Commission's processes, "deter others" from disregarding their professional responsibilities. *Karen Bruton*, Exchange Act Rel. No. 84627,

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13, 2017), *appeal pending*, 18-1242 (3d Cir.). Neither case so far as suggested that the remedies could not be imposed even if brought within the limitations period, as respondents argue here.

[3] The two cases that *Kokesh* cited for the proposition that general deterrence is a punitive objective did not speak to a court's authority to impose an expressly authorized sanction. One of the cases addressed the constitutionality of conditions of pre-trial confinement, such as "body-cavity searches." *Bell v. Wolfish*, 441 U.S. 520, 558 (1970). The other concerned an Eighth Amendment challenge to criminal money forfeiture. *United States v. Bajakajian*, 524 U.S. 321 (1998).

2018 WL 6061351, at *2 (Nov. 19, 2018). Nevertheless, the Commission declined to lift the temporary suspension. It ruled that even under *Kokesh* the suspension was a "remedial measure" because it "protect[ed] the public and the Commission's processes." *Id.* at *3. The need to provide general deterrence served as no part of the Commission's analysis.

The Court can take the same approach here. The fact that the Commission allowed Bruton on remand to make *Kokesh*-based arguments about the imposition of a final sanction, *see id.*, should make no difference. Just as protecting the public and the Commission's processes are remedial when done on a temporary basis, they are remedial when a suspension is permanent—particularly given that "permanent" is a misnomer, as even those suspensions may be lifted in appropriate circumstances. Similarly, the Court need not rely on general deterrence in articulating the need for an associational bar and a censure. In short, unless and until the Commission changes its binding precedent, the Court should apply the existing framework to determine whether remedies are appropriate. Respondents' contention that *Kokesh* disables the Court from even considering whether to impose the sanctions that Congress authorized is baseless.

B. The Commission's No-Admit, No-Deny Policy Does Not Violate the First or Fifth Amendments.

1. The Respondents Waived their Constitutional Rights When They Agreed to the Consent Judgment.

The Respondents have waived their right to contest the constitutionality of the no-deny provision of their Consent Agreement. A party to a judicially supervised consent judgment can waive his Constitutional rights. *See Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987);

Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 205 (3d Cir. 2012) (declining to vacate a consent decree holding that the party "voluntarily agreed" to "abide by the very provisions that it now challenges as unconstitutional."); *Lake James Cmty. Volunteer Fire Dept. v. Burke Cty.*, 149 F.3d 277, 280-82 (4th Cir. 1998) (enforcing a waiver of First Amendment rights in a government contract that affected the right to petition); *United States v. Int'l Bhd. of Teamsters, etc.*, 931 F.2d 177, 187-88 (2d Cir. 1991) (holding that even if a contract provision encroached upon the First Amendment, any objection to it was waived by consent).

Defendants' cite *Crosby v. Bradstreet Co.* to argue that a party cannot waive First Amendment rights. *See Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963). But *Crosby* is inapplicable because the Court ruled on jurisdictional grounds—it held that a court of law lacked jurisdiction to enjoin libel—and Supreme Court and other appellate precedent has made clear that a party can voluntarily waive a variety of constitutional rights, including First Amendment rights, in an agreement to settle claims that the party violated federal law. *See Rumery*, 480 U.S. at 393-94; *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 612 (6th Cir. 2011) (holding that *Crosby* did not apply to a constitutional waiver because it "rested on a unique jurisdictional issue" which limited a court's power to enjoin libel); *Crosby*, 312 F.2d at 485. Here, Respondents expressly conceded that the District Court had jurisdiction over the Commission's action. (Consent ¶ 1.)

The Respondents had the opportunity to proceed to trial in the underlying litigation. Instead, they voluntarily agreed to the Consent with advice from private counsel. "One who has been a party to a proceeding wherein a consent decree has been entered and who has been a party to that consent, is in no position to claim that such decree restricts his freedom of speech." *In re*

George F. Nord Bldg. Corp., 129 F.2d 173, 176 (7th Cir. 1942). Because the Respondents voluntarily signed the Consent, they waived their Constitutional rights.

2. The No-Deny Provision is Consistent with the First Amendment.

Even if Respondents' waiver of First Amendment rights could somehow be disregarded and the no-deny provision could be viewed as a judicial restraint on speech, it "is constitutional as long as it is properly justified." *United States v. Morrow*, 2005 U.S. Dist. Lexis 8330, at *20-21 (D.D.C. 2005) (citing *In Re Dow Jones & Co.*, 842 F.2d 603, 610-11 (2d Cir. 1988)). A consent judgment that restrains speech should be upheld if the restrained activity threatens a competing interest and the "order has been narrowly drawn and is the least restrictive means available." *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000).

The competing interest here is the public interest in the Commission's effective enforcement of the securities laws and preservation of judicial resources. First, a private settlement with a no-deny provision serves as a record of the Commission's investigation and its determination that a violation of the securities laws occurred. *See SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 2000). Second, the no-deny provision promotes the Commission's ability to obtain the best and most efficient result for the public interest in its enforcement cases. *Citigroup*, 752 F.3d at 29. Finally, the no-deny provision allows for the preservation of "judicial resources," *Clifton*, 700 F.2d at 748, and in furtherance of the "strong federal policy" favoring the "approval and enforcement" of consent judgments. *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). The no-deny provision is narrowly tailored and is limited to one particular type of speech that relates specifically to the Commission's interest in the Respondents' statements; *i.e.*, the

consent order only prohibits the Respondents from denying allegations that the Commission believes are, in fact, true and supported by credible evidence.

3. The No-Deny Provision is Consistent with the Fifth Amendment.

The no-deny provision of the Consent is not unconstitutionally vague under the Fifth Amendment. The Respondents rely on the proposition that "[a] fundamental principle in our legal system is that *laws* which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox TV Stations Inc.*, 567 U.S. at 253 (emphasis added). The no-deny provision is not a law; it is a provision of a private agreement negotiated between the Respondents and the Commission. Consent of Def.'s at 4-6.

Even if the vagueness analysis could be applied in this context, the no-deny provision survives constitutional scrutiny. "An unconstitutionally vague law invites arbitrary enforcement in this sense if it 'leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case[.]'" *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (quoting *Giaccio v. Pennslyvania*, 382 U.S. 399, 402-03 (1966)). In order to avoid being unconstitutionally vague, the meaning and application of a particular statute only needs to be "readily ascertainable". *See Roberts v. United States Jaycees*, 468 U.S. 609, 629-30 (1984) (holding a statute is not unconstitutionally vague when it provides some objective or specific criteria to determine whether the statute or penalty applies in a particular case).

The no-deny provision of the defendants' Consent Agreement does not invite arbitrary enforcement because its meaning is ascertainable. The Respondents challenge the provision that they "will not take any action or make or authorize any other person to make any public statement denying, directly or indirectly, any allegation in the Amended Complaint or creating

the impression that the Amended Complaint is without factual basis[.]" Consent at 7. The Consent requires that the Respondents public statements do not create an "impression that the Amended Complaint is without factual basis" not that the Respondents are restricted from making impressions. The term "impression" only covers actions directly tied to public statements that are made by the Respondents that could lead to an inference that they are denying the allegations of the Amended Complaint.

C. The Division's Request for Sanctions is in the Public Interest because it has Satisfied all of the *Steadman* Factors.

As set forth in the Commission's opening brief, all of the *Steadman* factors support a bar in this case. By accepting a settlement with the SEC, the Respondents knowingly and voluntarily waived their right to contest the allegations of the complaint. That waiver is fully enforceable. *See e.g.*, *Gibson v. SEC*, 561 F.3d 548, 553 (6th Cir. 2009) (holding that when a defendant in an SEC action has agreed to a no-deny provision they are precluded from disputing the facts of the complaint or attempting to litigate factual issues during a follow-on administrative proceeding).

The amended complaint alleges a recurring and egregious fraudulent scheme perpetrated by the Respondents. The scheme trades were ongoing and the defendants collected millions in unearned fees as a result of their fraudulent actions. Am. Compl. ¶ 113. The Respondents acted with a high level of scienter; the Scheme Trades were intentional and designed to cover up losses and show a "profit" to investors each month. Am. Compl. ¶¶ 60-70. (4). But in addition to the egregious underlying conduct, most importantly, the Respondents have not provided any sincere assurances that they will not engage in securities laws violations in the future. (Opposition at 21-22.) Indeed, their entire opposition brief is tantamount to a denial that Ms. Bruton did anything

wrong and, indeed, that she and her charity are victims of the Commission. Such a refusal to accept responsibility shows quite plainly that Ms. Bruton continues to be a danger to the investing public. *See SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002) ("The criminal who in the teeth of the evidence insists that he is innocent, that indeed not the victims of his crime but he himself is the injured party, demonstrates by his obduracy the likelihood that he will repeat his crime.").

The Respondents also argue that sanctions are unwarranted because Ms. Bruton has retired and Hope Advisors is no longer managing a fund. Voluntary (or involuntary) cessation of the offending activity is not a sufficient reason not to bar Ms. Bruton. *SEC v. Weed*, 315 F. Supp. 3d 667, 677-78 (D. Mass. 2018) (holding that in an effort to proactively protect investors, the defendant should barred from the industry even though he had retired and would not be released from prison until after he was sixty). Even when a respondent is no longer an investment adviser, the person can be barred from the industry so long as they were previously affiliated with an investment advisor. *See Bartko v. Securities and Exchange Commission*, 845 F.3d 1217, 1220-21 (D.C. Cir. 2017) (explaining that a bar from affiliation as an investment adviser can be appropriate when the defendant had a previous affiliation with an investment adviser).

D. The Commission Has Authority to Sanction Hope Advisors.

Finally, the Respondents argue that the Commission lacks authority to censure Hope Advisors because it is no longer an "investment adviser." This argument is completely without merit. Section 203(e) of the Advisers Act, 15 U.S.C. § 80b-3(e), specifically permits the Commission to censure investment advisers who have been enjoined against violations of the securities laws. Respondents do not dispute that Hope Advisors was a registered investment

adviser at the time of the misconduct or that it was an unregistered investment adviser once it terminated its registration. Rather, the Respondents make the novel argument that Hope Advisors is not an investment advisor *at this particular moment in time* because, for now, it has ceased offering investment advice or managing a fund. If Respondents' argument were correct, any investment adviser could avoid being censured simply by ceasing to do business for a month or two while an administrative proceeding was pending against it. Respondents cite to no case interpreting Section 203(e) so narrowly, and for good reason—surely Congress did not intend any such absurd result. Instead, by the plain language of the statute, Hope Advisors is an investment adviser, and it cannot cease to be an investment adviser simply by voluntarily suspending operations once an administrative proceeding has been filed against it. Based on the ease with which Hope Advisors could reenter the business and engage in future violations, the Court should impose the Division's requested sanctions.

IV. CONCLUSION

Accordingly, for the foregoing reasons and for the reasons set forth in the Division's opening brief, the Division respectfully requests that its motion for summary disposition of this action be granted, and that an order be issued barring Bruton from practicing before the Commission, barring Bruton from the securities industry, and censuring Hope.

Respectfully submitted,

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Dated: July 3, 2019.

CERTIFICATE OF SERVICE

On July 3, 2019, I sent via UPS overnight service and electronic mail the original and three copies of the foregoing to:

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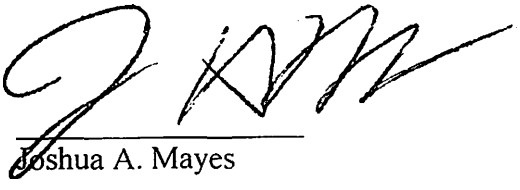

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