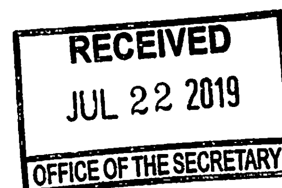
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of KAREN BRUTON and HOPE ADVISORS, LLC, **Respondents.**	**ADMINISTRATIVE PROCEEDING FILE NO. 3-18789 and 3-18790**



RESPONDENTS' SURREPLY IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S CONSOLIDATED MOTION FOR SUMMARY DISPOSITION

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Respondents Karen Bruton and Hope Advisors, LLC ("Hope Advisors") submit this surreply brief in further opposition to the Division of Enforcement's (the "Division") Consolidated Motion for Summary Disposition (the "Motion"). As Ms. Bruton and Hope Advisors demonstrate below, the Division's Reply in Support of the Motion (the "Reply") is long on *ipse dixit* "say so," but short on legal authority or logic. Accordingly, Ms. Bruton and Hope Advisors request that the Court deny the Motion and dismiss this proceeding, with prejudice.

INTRODUCTION

Ms. Bruton and Hope Advisors demonstrated in their Opposition to the Motion (the "Opposition") that the sanctions the Division asks this Court to impose are neither remedial nor in the public interest, both of which are required for the Court to grant the Motion. Stripped of the rhetoric and conclusory declarations, the Division has failed to show that barring Ms. Bruton or censuring Hope Advisors would be remedial *or* in the public interest.

First, with respect to whether barring Ms. Bruton and censuring Hope Advisors would be remedial, this Court's analysis must be guided by *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). In *Kokesh*, the U.S. Supreme Court held that if a civil sanction does not *solely* serve a remedial purpose and instead also serves retributive or deterrence purposes, it is a punishment. 137 S. Ct. at 1645. The Division urges the Court to ignore *Kokesh* because the U.S. Supreme Court did not directly address bars or censures. But, of course, this Court must "treat[] as authoritative" the "carefully considered language of the Supreme Court," including the deliberate distinction *Kokesh* drew between remedial sanctions and punishments. *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quotations and citation omitted).

Significantly, the Commission has repeatedly stated that bars and censures are imposed to prevent future violations by the alleged wrongdoer and to deter others from violating the securities laws. The framework for the Court's analysis required by *Kokesh,* coupled with the Commission's

stated position on the deterrent purpose of bars and censures, compels the conclusion that imposing a bar or censure in this case is outside of the Court's jurisdiction. This conclusion is buttressed by the Division's failure to identify *any* remedial purpose that would be served by barring Ms. Bruton or censuring Hope Advisors.

Second, Ms. Bruton and Hope Advisors have demonstrated that neither a bar nor a censure is in the public interest. In response, the Division bootstraps the conclusion that sanctions are warranted simply because it filed a civil enforcement action against Ms. Bruton and Hope Advisors. If these sanctions are the mandatory consequence of the civil enforcement action, then this proceeding was nothing but a "sham," in which neither Ms. Bruton nor Hope Advisors had any meaningful opportunity to defend themselves. The Division "must do more than say, in effect, petitioners are bad and must be punished." *SEC v. Siegel*, 592 F.3d 147, 157 (D.C. Cir. 2010) (quotations and citation omitted).

There are two additional reasons that this Court should deny the Division's Motion. One, this Court lacks statutory authority under the Advisers Act to censure Hope Advisors, which is neither registered as an investment advisor nor conducting any activity that falls within the statutory definition of an "investment adviser." Two, the Commission's "Gag Rule," 17 C.F.R. § 202.5(e), violates the First and Fifth Amendments of the U.S. Constitution and substantially precludes Ms. Bruton and Hope Advisors from defending themselves in this administrative proceeding. None of the Division's arguments in the Reply demonstrate otherwise.

I. The Court Lacks Authority to Bar Ms. Bruton or Censure Hope Advisors.

A. Because Barring Ms. Bruton or Censuring Hope Advisors Is Not Remedial, Those Sanctions Are Punishments Under *Kokesh*.

The Division does not and cannot dispute that the jurisdiction of this Court allows for the imposition of "sanctions for a remedial purpose, but not for punishment." *McCurdy v. SEC*, 396

F.3d 1258, 1264 (D.C. Cir. 2005). In that regard, this Court cannot ignore the U.S. Supreme Court's analysis of the distinction between remedial sanctions and punishments in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Specifically, in *Kokesh*, the U.S. Supreme Court explained 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, as we have come to understand the term." 137 S. Ct. at 1645 (emphasis in original) (quotations and citation omitted).

That *Kokesh* did not expressly address bars or censures is of no moment because "[t]he Supreme Court's reasoning in *Kokesh* was not limited to the specific statute at issue" in that case. *Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring). Thus, *Kokesh* is highly relevant here, and this Court has authority to impose sanctions against Ms. Bruton and Hope Advisors only if those sanctions can "fairly be said *solely* to serve a remedial purpose." *Kokesh*, 137 S. Ct. at 1645 (emphasis in original) (quotations and citation omitted).

Ms. Bruton and Hope Advisors agree with the Division that "unless and until the Commission changes its binding precedent, the Court should apply the existing framework to determine whether remedies are appropriate." (Reply, at 7.) Under the Commission's binding precedent, bars and censures are imposed to (i) prevent future violations by the alleged wrongdoer and (ii) deter others from violating the federal securities laws. (Opp., at 12-13.) In other words, bars and censures are not solely remedial. Furthermore, the Division has not identified any remedial purpose that would be served by barring Ms. Bruton or censuring Hope Advisors.

In its Reply, the Division mischaracterizes Ms. Bruton's and Hope Advisors' argument regarding *Kokesh* and *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017). Ms. Bruton and Hope Advisors do not argue that, after *Kokesh*, the Commission and this Court lack statutory authority to issue bars and censures. (Reply, at 2-3.) Rather, bars or censures issued by this Court must comply

with *Kokesh*, and since the sanctions the Division requests in this case are ***not*** solely remedial, *Kokesh* compels the conclusion that the Court lacks authority to impose those sanctions.

The Commission has not rejected these arguments, as the Division suggests. (Reply, at 2.) The sole case the Division cites addressed only whether an individual who was barred before *Kokesh* was decided could seek to vacate that bar on the grounds that it is punitive under *Kokesh*. *In the Matter of Brett Thomas Graham*, Admin Proc. File No. 3-16389, 2018 SEC LEXIS 2266, at *1, 32-41 (Sept. 12, 2018). Here, no sanctions have been issued against Ms. Bruton or Hope Advisors, and *Kokesh* remains relevant to cases where sanctions have not yet been imposed. *Id.*, at *35 (explaining that the respondent in another case "could rely on *Kokesh* to argue that his bar was punitive because [his] case was not final at the time the Supreme Court issued *Kokesh*").[1]

The Division then argues that *Kokesh* should be limited to *monetary* penalties. (Reply, at 4.) *Kokesh*, however, was based on general legal principles regarding the distinction between punishments and remedial sanctions. For this reason, other lower courts have not hesitated to apply *Kokesh* to non-monetary remedies. *See, e.g., SEC v. Cohen*, 332 F. Supp. 3d 575, 592-595 (E.D.N.Y. 2018) (applying *Kokesh* and holding that an injunction is a penalty under 28 U.S.C. § 2462); *SEC v. Gentile*, No. 16-1619 (JLL), 2017 U.S. Dist. LEXIS 204883, at *6-11 (D.N.J. Dec. 13, 2017) (applying *Kokesh* and holding that an injunction and "penny stock bar" are penalties under 28 U.S.C. § 2462). The Division cites no court that has limited *Kokesh* to monetary remedies, and this Court should not be the first.

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[1] After deciding *Graham*, the Commission denied Ms. Bruton's motion to lift her *ex parte* temporary suspension, and held that "need not resolve here" (i.e., in that decision) "the ramifications of *Kokesh* for the imposition of sanctions other than disgorgement," which clearly suggests that it had not already resolved that issue in *Graham*. *In the Matter of Karen Bruton*, Admin. Proc. File No. 3-18790, 2018 SEC LEXIS 3274, at *6 (Nov. 19, 2018) (emphasis added). Indeed, the Commission invited Ms. Bruton and Hope Advisors to "address any arguments based on *Kokesh* . . . that they believe are relevant to any final sanction that may be imposed." *Id.*, at 9.

The Division's reliance on double jeopardy principles to avoid *Kokesh* is likewise misplaced. (Reply, at 5.) The Double Jeopardy Clause "applies to criminal rather than civil sanctions" and it "is not applicable to these [administrative] proceedings." *In the Matter of Barr Fin. Grp., Inc.*, Admin. Proc. File No. 3-9918, 2003 SEC LEXIS 2873, at *4 (Dec. 3, 2003); *In the Matter of Peter Emrich, et al.*, Admin. Proc. File No. 3-14509, 2012 SEC LEXIS 1110, at *11 (Apr. 4, 2012) (rejecting Double Jeopardy Clause argument because "[d]ouble jeopardy set out in the Fifth Amendment to the Constitution is a doctrine applied in criminal, not civil, law").[2]

The Division suggests next that the Commission's previous *ex parte* temporary suspension is reason enough to impose a permanent bar. (Reply, at 6-7.) This "shortcut" argument ignores that the Commission upheld Ms. Bruton's *ex parte* temporary suspension "*pending a hearing* to determine what, if any [final] sanction, is appropriate." *Bruton*, 2018 SEC LEXIS 3274, at *8 (emphasis added). In other words, the Commission upheld the temporary suspension to preserve the *status quo*, as Ms. Bruton was already subject to an *ex parte* temporary suspension. The Commission's temporary affirmance to preserve the *status quo* should not be the basis for this Court to permanently bar Ms. Bruton or censure Hope Advisors.

Finally, the Division fails to distinguish the numerous decisions in which the Commission held that it imposes bars and censures to prevent future violations and deter others from violating the federal securities laws. (Opp., at 12-13.) The Division argues that deterrence was neither a "necessary" nor a "sufficient consideration" in those decisions, but that argument finds no support in the cases. (Reply, at 6.) On the contrary, the Commission repeatedly held that it imposed bars and censures for deterrence purposes. *See, e.g.*, *In the Matter of Michael C. Pattison, CPA*, Admin

[2] The Division cites *Hudson v. United States*, 522 U.S. 93, 105 (1997), which held that "the mere presence of a deterrent purpose" for "debarment sanctions" is not enough to "render[] such sanctions 'criminal' *for double jeopardy purposes*." 522 U.S. at 105 (emphasis added).

Proc. File No. 3-14323, 2012 SEC LEXIS 2973, at *51 (Sept. 20, 2012) (issuing permanent practice bar "because it will . . . *deter others* from disregarding their professional responsibilities"); *In the Matter of Montford & Co.*, Admin Proc. No. 3-14536, 2014 SEC LEXIS 1529, at *86-87 (May 2, 2014) (issuing associational bar because it "will . . . serve as a deterrent to others from engaging in similar misconduct"); *In the Matter of Robert L. Burns*, Admin. Proc. File No. 3-12978, 2011 SEC LEXIS 2722, at *24-25 (Aug. 2, 2011) (issuing a censure because it "will . . . encourag[e] other traders to observe scrupulously the[ir] fiduciary duties").

For each of these reasons, barring Ms. Bruton or censuring Hope Advisors is a punishment under *Kokesh*, and, as such, those sanctions are outside of this Court's jurisdiction.

B. The Court Lacks Statutory Authority to Censure Hope Advisors.

The Division asks this Court to censure Hope Advisors pursuant to Section 203(e) of the Advisers Act. (Motion, at 10.) As Hope Advisors demonstrated in the Opposition, however, Section 203(e) only authorizes this Court to censure an "investment adviser," and it is undisputed that Hope Advisors is *not* registered with the SEC as an investment advisor nor does it fall within the Advisers Act's statutory definition of an "investment adviser." (Opp., at 15-16.) Thus, this Court lacks authority to censure Hope Advisors under Section 203(e). (*Id.*)

The Division does not challenge Hope Advisors' plain language reading of the statute, nor does the Division dispute that Hope Advisors is no longer an "investment adviser" under the Advisers Act. (Reply, at 12-13.) Moreover, Hope Advisors did not "suspend[] operations" after this proceeding was filed. (Reply, at 13.) Hope Advisors is in the process of being dissolved and it has not been an operational entity since Ms. Bruton retired shortly after the resolution of the District Court Action. (Opp., Ex. A ¶¶ 12-13.)

Based on the plain language of Section 203(e) and the undisputed fact that Hope Advisors is *not* an "investment adviser," this Court lacks statutory authority to censure Hope Advisors.

C. **The Commission's "Gag Rule" Is Unconstitutional.**

1. *Neither Ms. Bruton Nor Hope Advisors Waived Their Right to Challenge the Constitutionality of the "Gag Rule."*

The Division argues that Ms. Bruton and Hope Advisors waived their right to challenge the constitutionality of the "Gag Rule" by agreeing to comply with it in the District Court Action settlement. (Reply, at 7-9.) The Division, however, fails to cite a single case permitting the government to condition the settlement of civil litigation on the waiver of the settling party's First Amendment rights. Five of the six cases cited in the Reply did not address governmentally imposed waivers of constitutional rights,[3] and the Division's only remaining case, *Town of Newton v. Rumery*, 480 U.S. 386 (1987), is inapplicable. *Rumery* does not broadly hold that the government may condition civil settlements on the waiver of constitutional rights, nor are the facts of this case analogous to *Rumery*. In that case, the U.S. Supreme Court upheld the government's conditioning of the dismissal of criminal charges on the defendant's agreement not to sue local governments and officials under 42 U.S.C. § 1983, but only because the government had "an independent, legitimate reason . . . directly related to [its] prosecutorial responsibilities" for seeking that waiver—namely, sparing the victim of "the public scrutiny and embarrassment she would have endured" in § 1983 litigation. 480 U.S. at 398.

Accordingly, there is no basis for the Division's contention that Ms. Bruton and Hope Advisors waived their right to challenge the constitutionality of the "Gag Rule."

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[3] *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192 (3d Cir. 2012) (action between private parties); *Northridge Church v. Charter Township of Plymouth*, 647 F.3d 606 (6th Cir. 2011) (challenge to consent order that purportedly violated federal statute, not the U.S. Constitution); *Lake James Comm. Volunteer Fire Dep't. v. Burke Cty.*, 149 F.3d 277 (4th Cir. 1998) (challenge to a speech restriction a local fire department agreed to follow, rather than a governmentally-imposed speech restriction); *U.S. v. Int'l Brotherhood of Teamsters, etc.*, 931 F.2d 177 (2d Cir. 1991) (challenge to private agreement to publish union campaign literature); *In re George F. Nord Building Corp.*, 129 F.2d 173 (7th Cir. 1942) (action between private parties).

2. *The "Gag Rule" Violates the First Amendment.*

As Ms. Bruton and Hope Advisors demonstrated in their Opposition, the "Gag Rule" is a prior restraint on speech that violates the First Amendment. (Opp., at 16-17.) In the Reply, ***the Division did not respond to Ms. Bruton's and Hope Advisors' argument that the "Gag Rule" is an unconstitutional prior restraint on speech***, and it is axiomatic that where a party "does not respond to [an] argument . . . . The court construes this silence as a concession of [the] argument." *Papasan v. Dometic Corp.*, No. 16-cv-02117-HSG, 2017 U.S. Dist. LEXIS 178749, at *55 (N.D. Cal. Oct. 27, 2017). For this reason alone, the Court should deny the Division's Motion.

In addition, the Reply does not dispute that the "Gag Rule" is a content-based restriction. (Opp., at 17.) As such, to comply with the First Amendment, it must be "necessary to serve a compelling state interest" and "narrowly tailored to achieve that end." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (quotations and citation omitted). Nowhere, however, does the Division argue that the "Gag Rule" serves any "compelling state interest." Instead, the Division argues that the "Gag Rule" serves certain "competing interest[s]," but it fails to cite any authority holding that these "competing interest[s]" are "compelling" for purposes of the First Amendment. (Reply, at 9.) Accordingly, even if the "Gag Rule" was narrowly tailored to serve those "competing interest[s]" (and it is not),[4] the Division's argument that the "Gag Rule" is consistent with the First Amendment fails. (Opp., at 16-17.)

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[4] The Division argues that the "Gag Rule" is "narrowly tailored" because it "only prohibits the Respondents from denying allegations that the Commission believes are, in fact, true and supported by credible evidence." (Reply, at 10.) As the Division's own arguments demonstrate, however, that is not correct. The "Gag Rule" not only prohibits Ms. Bruton and Hope Advisors from denying the Division's allegations, it also bars Ms. Bruton and Hope Advisors from, according to the Division, making public statements "that could lead to an inference that they are denying the allegations of the Amended Complaint," even if such statements do not, in fact, deny any allegation made by the Division. (Reply, at 11.)

3. *The "Gag Rule" Violates the Fifth Amendment.*

Ms. Bruton and Hope Advisors also demonstrated that the "Gag Rule" violates the Fifth Amendment because it provides almost no limiting principle on the scope of speech that is prohibited. (Opp., at 18.) In the Reply, the Division first argues that the Fifth Amendment does not apply to the "Gag Rule" because it "is not a law." (Reply, at 10.) But that is of no consequence since the "Gag Rule" is a federal regulation, and the Fifth Amendment's Due Process Clause applies to federal regulations. *See FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process [under the Fifth Amendment] if the statute or *regulation* under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.") (emphasis added) (quotations and citation omitted).

Next, the Division argues that the "Gag Rule" "survives constitutional scrutiny" under the Fifth Amendment because it only prohibits statements that "could lead to an inference that [Ms. Bruton or Hope Advisors] are denying the allegations of the Amended Complaint." (Reply, at 10-11.) The Division's argument, however, only confirms that the "Gag Rule" is impermissibly vague. Swapping the word "impression" (from the "Gag Rule") for "inference" (in the Division's argument) makes no difference to the Fifth Amendment analysis. Either way, the "Gag Rule" is unconstitutional because it does not "give fair notice of conduct that is forbidden" and it vests with the Commission sole discretion to decide whether Ms. Bruton or Hope Advisors has created an impermissible "impression" or "inference." *FCC*, 567 U.S. at 253-54.

* * *

For the reasons explained herein and in the Opposition, the Division's Motion should be denied because the Commission's "Gag Rule" is unconstitutional and it substantially interferes with Ms. Bruton's and Hope Advisors' right to defend themselves in this proceeding.

II. Ms. Bruton and Hope Advisors Have Demonstrated that the Sanctions Sought by the Division Are Not In the Public Interest.

In their Opposition, Ms. Bruton and Hope Advisors analyzed each of the *Steadman* public interest factors and explained, citing to applicable legal authorities and relevant factual evidence in the record, why each of those factors advises against sanctions in this case. (Opp., at 18-24.) Ms. Bruton and Hope Advisors further demonstrated that sanctions are not in the public interest for the additional and independent reason that barring Ms. Bruton or censuring Hope Advisors will principally harm Just Hope International's charitable works around the world. (*Id.*, at 22-24.)

In its Reply, the Division has done little more than argue that because a civil enforcement action was filed against Ms. Bruton and Hope Advisors, a bar and censure are warranted. (Reply, at 11-12.) To show that sanctions are in the public interest, however, the Division "must do more than say, in effect, petitioners are bad and must be punished." *Siegel*, 592 F.3d at 157 (quotations and citation omitted).

Rather than engage with the factual and legal arguments made in the Opposition, the Division claims that Ms. Bruton's and Hope Advisors' arguments are "tantamount to a denial that Ms. Bruton did anything wrong." (Reply, at 11-12.) Not so. Based on applicable legal authorities and relevant factual evidence in the record, the Opposition demonstrated that the alleged misconduct was isolated, did not involve a high degree of scienter and was not egregious. (Opp., at 20-22.) The Division's conclusory argument does not meaningfully respond to the legal authorities and factual evidence cited by Ms. Bruton and Hope Advisors.

Likewise, as to the likelihood that Ms. Bruton or Hope Advisors could violate the federal securities laws in the future, the Opposition cites applicable legal authorities and relevant factual evidence explaining why this *Steadman* factor weighs heavily against sanctions. (Opp., at 19-20.) In response, the Division argues that "[v]oluntary (or involuntary) cessation of the offending

activity is not a sufficient reason not to bar Ms. Bruton," citing to one case, *SEC v. Weed*, 315 F. Supp. 3d 667 (D. Mass. 2018) that addressed the issue only in passing. (Reply, at 12.) The Division's argument does not address or distinguish the cases cited in the Opposition, which held that the respondent's inability to violate the federal securities laws in the future as a factor weighing against a bar or censure. (Opp., at 19-20.) Accordingly, the Division has provided no credible reason why this factor does not weigh heavily in Ms. Bruton's and Hope Advisors' favor.

Finally, the Division does not respond at all to the Opposition's argument that it is not in the public interest to sanction Ms. Bruton and Hope Advisors because those sanctions will predominantly harm Just Hope International and, in turn, the thousands of impoverished persons around the world who depend on Just Hope International's charitable programs and services. (Opp., at 22-24.) In fact, for this reason, as Ms. Bruton and Hope Advisors have demonstrated, it is actually *against* the public interest for this Court to impose sanctions in this case. (*Id.*, at 24.)

Accordingly, Ms. Bruton and Hope Advisors have clearly demonstrated that it is not in the public interest for this Court to impose the sanctions requested by the Division.

CONCLUSION

For each of the reasons explained herein and in the Opposition, Ms. Bruton and Hope Advisors respectfully request that the Court deny the Division's Motion and dismiss this consolidated administrative proceeding, with prejudice.

Respectfully submitted this 17th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of July, 2019, a true and correct copy of the foregoing **RESPONDENTS' SURREPLY BRIEF IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S CONSOLIDATED MOTION FOR SUMMARY DISPOSITION** was delivered to the following via facsimile and by depositing three true and correct copies of the same in the U.S. mail, first class postage prepaid:

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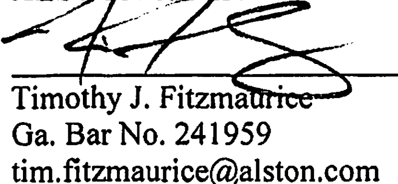

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