UNITED STATES OF AMERICA
Before the
U.S. SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21776

In the Matter of **KROLL BOND RATING AGENCY, LLC,** **Respondent.**	**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION TO MODIFY ORDERED UNDERTAKINGS IN ADMINISTRATIVE PROCEEDING, STAY EFFECTIVENESS OF UNDERTAKINGS, AND FOR ADMINISTRATIVE STAY**

The Division of Enforcement ("Division") respectfully submits this opposition to Respondent Kroll Bond Rating Agency LLC's ("Respondent") Motion to Modify Ordered Undertakings in Administrative Proceeding, Stay Effectiveness of Undertakings, and for Administrative Stay ("Motion" or "Mot."). The Commission should deny Respondent's Motion as impermissibly seeking to revisit and vacate relief to which Respondent expressly agreed in its prior settlement of this matter with the Commission.

PRELIMINARY STATEMENT

On September 29, 2023, the Commission instituted a settled Order Instituting Proceedings ("Settled OIP") against Respondent, in which Respondent admitted that it willfully violated Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 17g-2(b)(7) thereunder by failing to maintain or preserve employees' communications on personal devices ("off-channel communications") that were required to be preserved under those Rules. The Settled OIP orders Respondent to comply with a series of undertakings designed to

remediate those violations. The undertakings ordered in the Settled OIP were the outcome of voluntary negotiations between the Division and Respondent in which the Respondent was represented by sophisticated counsel. The Commission ordered these undertakings upon its acceptance of Respondent's formal written settlement offer, which resolved the Division's investigation of those violations. Respondent now seeks: (1) the Commission's permission to back out of that agreement; and (2) a stay of the undertakings ordered in the Settled OIP pending the resolution of its Motion. The Commission should deny Respondent's Motion in full because Respondent fails to offer an adequate basis in law or fact to support its Motion to reopen the Settled OIP.

Respondent's sole argument—that purportedly similarly situated respondents in separate proceedings later received a better outcome for themselves—is insufficient to justify permitting Respondent to vacate its agreement in order to get what it views as a better deal. Modifications of settlements are widely disfavored, and federal courts and the Commission grant such modifications only in rare circumstances that are not present here. Indeed, granting Respondent's requested relief would open the floodgates—inviting other respondents to relitigate all manner of settled Commission administrative proceedings—and, thus, would undermine the finality of the Commission's orders and the efficacy of the Commission's enforcement program. The Commission also should reject Respondent's request for a stay pending the outcome of its motion as procedurally improper and, in any event, not warranted here.

OS Received 03/19/2025

ARGUMENT

I. The Commission Should Deny Respondent's Motion to Modify the Ordered Undertakings

It is well-established by federal courts—under Fed. R. Civ. P. 60(b), which the Commission has followed in analogous motions—that defendants seeking to vacate a final judgment face a high bar. Indeed, such modifications are reserved only for "exceptional circumstances" and are "generally not favored." *See SEC v. Allaire*, No. 03-cv-4087, 2019 WL 6114484, at *2 (S.D.N.Y. Nov. 18, 2019). Moreover, where a defendant "wishes to disturb a consent judgment," this standard is "even harder to reach." *SEC v. Alexander*, No. 06-cv-3844, 2013 WL 5774152, at *2 (E.D.N.Y. Oct. 24, 2013); *see also Sampson v. Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970) ("[A] motion [for relief from a judgment] under [Federal Rule of Civil Procedure] 60(b) cannot be used to avoid the consequences of a party's decision to settle the litigation . . ."); *United States v. Radiology Grp.*, No. 19-cv-3542, 2024 WL 5247887, at *3 (S.D.N.Y. Dec. 30, 2024) (respondent "cannot be relieved" of obligations "merely because [its] assessment of the consequences was incorrect").

Citing such precedent, the Commission has held that there must be "compelling circumstances" to justify vacating a settlement. *See In the Matter of Gregory Bolan*, Exch. Act Rel. No. 85971, 2019 WL 2324336, at *3 (May 30, 2019) (settlements "should be upheld whenever equitable and policy considerations so permit"); *cf. In the Matter of Gregory Osborn*, Sec. Act Rel. No. 10641, 2019 WL 2324337, at *3 (May 19, 2019) **(**Commission rejected collateral attack on settlement, noting that respondent's "choice [to settle] was a risk, but calculated and deliberate and such as follows a free choice").

Thus, where a defendant makes a "free, bilateral decision to settle," a "failure to properly estimate the loss or gain from entering a settlement agreement is not an extraordinary

circumstance that justifies relief" from the terms of the settlement. *United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994). "To hold otherwise would undermine the finality of judgments in the litigation process." *Id.* at 759; *see also SEC v. Longfin Corp.*, 18-cv-2977, 2020 WL 4194484, at *2 (S.D.N.Y. July 21, 2020) (Rule 60(b)(6) "is not intended to relieve a party from an agreement that he voluntarily entered but now regrets.").

Respondent's sole basis for vacating the ordered undertakings in its Settled OIP—that is, that different respondents in later, similar cases received a better deal—does not constitute the "exceptional circumstances" or "compelling circumstances" required for such relief. To the contrary, granting such relief now would create perverse incentives in settlement and set a new precedent that would severely undermine the Commission's enforcement program. *Cf. In the Matter of Richard Feldmann*, Sec. Act Rel. No. 10078, 2016 WL 2643450, at *2 (May 10, 2016) (that respondent would have received less severe sanction had he continued to litigate was not a "compelling circumstance[]").

The Commission precedent that Respondent cites is inapposite. Those decisions involved respondents who—unlike Respondent here—had complied for years (sometimes nearly a decade) with their ordered undertakings. Moreover, the respondents in those cases sought relief from their prior settlement obligations when the undertakings had purportedly become impractical or outdated, and the Division had either supported the requested relief or did not oppose it. *See, e.g.*, *In the Matter of Millenium Partners et al.*, Exch. Act Rel. No. 78364, 2016 WL 3902753, at *1 (July 19, 2016) (relief granted more than ten years after original order; and respondent represented that it had "completely discharged all of the obligations under the Order that can be discharged" and Division did not oppose relief); *see also*, *In re MDC Holdings*, Exch. Act Rel. No. 39537, 1998 WL 23204 (Jan. 9, 1998) (respondent represented that it had complied

with the order for nearly 10 years and Division supported request for relief); *In re Putnam Inv. Mgmt.*, Adv. Act Rel. No. 3600 (May 3, 2013) (relief granted over nine years after initial OIP); *In re Mass. Fin. Servs.*, Adv. Act Rel. No. 3312 (Nov. 9, 2011) (relief granted over seven years after initial OIP); *In re Janus Cap. Mgmt.*, Adv. Act Rel. No. 3065 (Aug. 5, 2010) (relief granted over six years after initial OIP).

Respondent notes that, in the Commission "market timing" cases (*e.g.*, *Millennium*), later-in-time respondents settled on less stringent terms. However, unlike Respondent here, the earlier-in-time respondents in those cases did not seek to back out of their agreements. To the contrary, those respondents first performed under their original agreements for years, undergoing several biannual independent compliance reviews. At least some sought "sunset" provisions for undertakings that had an indefinite time frame. Here, by contrast, Respondent's undertakings are not indefinite, and the OIP sets out a clear schedule for their completion. Respondent seeks much broader, consequential relief: to be absolved of the ordered undertakings under the Settled OIP—and it does so about eighteen months after agreeing to perform them. The Commission should not incentivize respondents to seek such relief.[1]

[1] Respondent further argues that the undertakings are disproportionately severe in this case because they allegedly were designed for broker-dealers rather than Respondent, a nationally-recognized statistical rating organization ("NRSRO"). Respondent asserts that: (1) the undertakings are less necessary for NSROs, which are subject to narrower Commission recordkeeping rules and annual Commission examinations; and (2) the undertakings disproportionately impact smaller NRSROs (such as Respondent), which may find it more difficult to bear the associated compliance costs. *See* Mot. at 6. Again, however, these arguments ignore the fact that the undertakings were the product of Respondent's voluntary negotiations with the Commission, and that the concerns Respondent now raises already existed at the time Respondent freely agreed to the Settled OIP.

II. The Commission Should Deny Respondent's Request to Stay the Effectiveness of the Ordered Undertakings Pending Resolution of the Motion

The Commission also should deny Respondent's request to stay its obligations under the undertakings in the Settled OIP pending resolution of its motion. (Mot. at 1.) Respondent's stay request comes in two forms, neither of which has any basis in the Commission's Rules of Practice or other precedent cited.

Respondent broadly invokes Rule 401, but that Rule applies only to stays pending appeals to the Commission or a federal court. *See*, *e.g.*, *In the Matter of the Application of Scottsdale Cap. Advisors Corp.*, Exch. Act Rel. No. 83783, 2018 WL 3738189 (Aug. 6, 2018) (cited by Respondent and granting a stay pending appeal to Commission of FINRA determination); *In the Matter of Micah J. Eldred.*, Exch. Act Rel. No. 96083, 2022 WL 9195015, at *1 (Oct. 14, 2022) (noting Rule 401 was improper for a stay request where there was no final Commission Order reviewable by a federal court of appeals).

Respondent's reliance on Rule 401(d), under which it seeks an "administrative" stay, is equally unavailing. While it is not clear what distinct relief Respondent seeks under Rule 401(d), the rule is inapplicable on its face as it applies only to appeals of actions by "self-regulatory organizations," not of Commission Orders. *See* Rule 401(d)(1) (providing for a "motion for a stay of an action by a self-regulatory organization [SRO] for which the Commission is the appropriate regulatory agency"); *In the Matter of Minim, Inc.*, Exch. Act Rel. No. 101502, 2024 WL 4650996 (Nov. 1, 2024) (Commission order issuing administrative stay pending review of the NASDAQ Stock Market LLC's decision to delist its common stock.).

Moreover, even if Rule 401 were applicable, Respondent cannot satisfy the well-established requirements for the "'extraordinary remedy" of a stay. *Scottsdale*, 2018 WL 3738189, at *2 (internal citations omitted). "The Commission considers whether: (i) there is a

strong likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) another party will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest." *Id.*

First, for the reasons set forth above, Respondent cannot show "a strong likelihood that [it] will eventually succeed on the merits." *Scottsdale*, 2018 WL 3738189, at *2 (movant under 401 "must at least show that it has . . . 'raised a serious legal question on the merits'") (quoting *In the Matter of the Application of Bruce Zipper for Rev. of Action Taken by FINRA*, Exch. Act Rel. No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017)). As explained above, as a matter of law, Respondent's request to vacate a negotiated and settled Commission OIP faces an extremely high legal bar—one that Respondent is highly unlikely to overcome.

Respondent also has failed to allege that it will suffer irreparable harm without a stay. Respondent argues that it "continues to devote substantial time and resources to comply with the ongoing obligations imposed by the Ordered Undertakings, including prospective compliance with the Ordered Undertakings"; and that the Order will "impose additional costs and burdens absent a stay." (Mot. at 10.) However, "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." *Scottsdale*, 2018 WL 3738189, at *3 (quoting *In the Matter of the Application of Robert J. Prager*, Exch. Act Rel. No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004)). Respondent's purported injury of "additional costs and burdens" falls far short of the injury cited in *Scottsdale*—where the respondent established irreparable harm by presenting credible evidence that, absent a stay, his businesses would have to "cut staff" and "likely become insolvent," "causing the loss of a large percentage of jobs," and threatening or significantly limiting ongoing operations. *Scottsdale*, 2018 WL 3738189, at *3-4; *see also In the Matter of Minim, Inc.*, Release No. 34-102482, 2025

WL 606061 at *4 (Feb 25, 2025) (cited by Respondent; granting motion to stay pending appeal to Commission of NASDAQ Stock Market LLC's decision to delist applicant's common stock where applicant presented evidence of securities purchase agreement transactions with another company that it would lose absent a stay and further indicated that it would lose other business opportunities if its common stock was delisted from NASDAQ).

These "first two factors are the most critical," *Scottsdale*, 2018 WL 3738189, at *2, but Respondent fares no better on the third and fourth factors. Respondent's argument—that "no other party will suffer harm as a result of the stay," (Mot. at 10), is based on the faulty assumption that the investor protections implicit in the undertakings are unnecessary. Relatedly, the ordered undertakings are specifically designed to address Respondent's admitted recordkeeping and supervision failures, which persisted over a long period of time and throughout Respondent's organization. The undertakings serve to ensure that remedial measures are promptly undertaken to correct these failures. The public interest is served when firms comply with their obligations under the securities laws—indeed, such compliance helps to ensure fair, transparent markets. Moreover, the public has a strong interest in the finality of Commission settlements, and a stay would serve only to undermine the credibility and effectiveness of the Commission's orders.

Conclusion

For the foregoing reasons, the Commission should deny Respondent's motion in its entirety.

Dated: March 19, 2025

Respectfully Submitted,

s/ Ben Kuruvilla
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STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

I certify that on March 19, 2025, I caused to be filed the foregoing DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION TO MODIFY ORDERED UNDERTAKINGS IN ADMINISTRATIVE PROCEEDING, STAY EFFECTIVENESS OF UNDERTAKINGS, AND FOR ADMINISTRATIVE STAY with the Commission through the Office of the Secretary by the eFAP filing system, and further caused the same to be served on the following persons in the manner indicated:

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OS Received 03/19/2025

CERTIFICATE OF COMPLIANCE

Pursuant to the Commission's Rule of Practice 151(e), I hereby certify that I have omitted or redacted any sensitive personal information, as defined by Rule of Practice 151(e)(3), from this filing.

s/ Ben Kuruvilla
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