UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAILIAN OVERSEAS CONSULTING GROUP, LTD., Plaintiff, v. NEW YORK CITY REGIONAL CENTER LLC, Defendant.	Civil Action No. 17-cv-9004 (LLS)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

KASOWITZ BENSON TORRES LLP

David E. Ross (dross@kasowitz.com)
Danielle R. Gill (dgill@kasowitz.com)
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Plaintiff

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Plaintiff Wailian Overseas Consulting Group, Ltd. ("Wailian") respectfully submits this memorandum of law in opposition to defendant New York City Regional Center LLC's ("NYCRC") motion for partial dismissal dated January 5, 2018 (the "Motion").[1]

PRELIMINARY STATEMENT

NYCRC contends that, though it received all of the benefits of Wailian's performance under the parties' agreements, NYCRC need not pay Wailian the nearly $9 million it earned under those agreements. NYCRC seeks to escape its payment obligation by relying on a hyper-technical construction of the agreements, asserting that Wailian missed certain deadlines and thus is not entitled to be paid for its work. The law provides otherwise. Wailian's well-pleaded Complaint alleges facts supporting multiple theories that preclude NYCRC's arguments, including that the parties modified the dates in writing or by conduct, that Wailian substantially performed, that the dates in question were not material to the bargain, and that NYCRC waived the dates or is otherwise estopped from relying on them. The Complaint indisputably pleads valid claims for breaches of contract and for *quantum meruit* in the alternative. Because NYCRC merely disputes Wailian's well-pleaded facts which state valid claims, the Motion should be denied.

* * * *

As alleged in the Complaint, Wailian performed every material aspect of each of the parties' six separate agreements, providing NYCRC with investors who contributed nearly $130 million to those projects. Though NYCRC received all of its bargained for benefits under the agreements, and repeatedly praised Wailian in writing for its work, NYCRC now claims a right

[1] NYCRC's Memorandum of Law in Support of the Motion (Doc. No. 14) is referenced herein as "Def Br." and the Declaration of David J. Lender dated January 5, 2018 in support thereof (Doc. No. 15) is referenced as "Lender Decl." All terms not defined herein have the meaning ascribed to them in the Complaint (Doc. No. 1) ("Complaint" or "Compl.").

to deny Wailian half of its contractual compensation because Walian provided some investors to NYCRC after the date stated in some of the initial agreements. In essence, NYCRC asserts that because Wailian was "a day late," Wailian gets none of the second half of the compensation it earned. The law does not permit a contracting party to reap all the benefits of a contract and then deny the other party its promised payment on the basis of some non-material, or hyper-technical breach, much less where, as alleged here, the parties modified their bargain by conduct or by a writing, and NYCRC waived or is estopped from relying on deadlines it now invokes.

Wailian's Complaint pleads facts to establish each element of its claims for breach of the parties' agreements. The Complaint alleges that Wailian fully performed under the terms of the parties' agreements, as modified in writing, by conduct or by implication, or as waived by NYCRC. NYCRC has no answer for the well-pleaded allegations in Wailian's Complaint. Instead, it asks the Court to focus only on the language of the parties' agreements as originally drafted, and to ignore the subsequent events modifying or waiving the date terms as Wailian has pled. As the Court must, on this Motion, accept as true the Complaint's factual allegations, the Motion should be denied.

The Complaint also pleads facts to establish that NYCRC cannot rely the date provisions that it now invokes to excuse its breaches. NYCRC's conduct, as alleged in the Complaint, including its unequivocal acceptance and encouragement of Wailian's continued performance, estops it from this belated attempt to rely on such date terms, which in any event, were not material. The Complaint also pleads Wailian's substantial performance under the relevant agreements, further foreclosing NYCRC's attempt to deprive Wailian of its contractually-earned compensation. These fact issues also cannot be resolved on this Motion, requiring its denial.

FACTUAL BACKGROUND

A. Wailian, NYCRC and the EB-5 Program

Wailian is a leading immigration agency that promotes to Chinese investors EB-5 program projects, including those overseen by NYCRC. Compl. ¶ 13. The EB-5 program is administered by the U.S. Customs and Immigration Service ("USCIS"). *Id.* ¶ 12. The program allows foreign nationals who invest in approved U.S.-based commercial projects to obtain green cards, and become lawful permanent residents of the United States. *Id.* ¶ 12. Together, immigration agencies and regional centers are key facilitators of the EB-5 program. *Id.* ¶ 14. Immigration agencies like Wailian identify qualified foreign investors and refer them to regional centers in the U.S., including NYCRC. *Id.* The regional centers in turn direct foreign investment to specific qualifying projects and oversee the investments and the projects' compliance with EB-5 program requirements. *Id.*

NYCRC is a regional center that organizes and administers special purpose financing vehicles for EB-5-eligible real estate and infrastructure projects in New York City. Compl. ¶ 15. Foreign investors fund these vehicles, which in turn make loans to carry out the EB-5 projects. *Id.* NYCRC relies entirely on immigration agencies, such as Wailian, to refer qualified investors, and does not itself recruit such investors.

B. NYCRC Contracts with Wailian to Provide Qualified Investors

In November 2009, Wailian and NYCRC executed a Referral Agreement dated as of November 6, 2009 (the "Referral Agreement") to govern the general terms of their relationship, under which Wailian would serve as a referral agent to NYCRC. Compl. ¶¶ 17, 19; Lender Decl.

Ex. A.[2] The Referral Agreement provides that NYCRC is to pay Wailian for each qualifying investor Wailian refers, with the details of compensation to be set forth in one or more future "Schedule A's" to the Referral Agreement. Compl. ¶ 17.

NYCRC and Wailian subsequently executed Schedule A agreements for the individual projects they worked on together. *Id.* Each Schedule A, like the Referral Agreement, was unilaterally drafted by NYCRC. *Id.* ¶ 21. For the six projects at issue in the Complaint (together the "Projects" and each a "Project"), the parties agreed that Wailian would receive two forms of payment: (1) an upfront "referral fee," payable upon submission and approval of an investor's USCIS immigration application, and (2) thereafter, on the first five anniversaries of that investor's immigration application approval, an "annual payment." *See id.* ¶ 19. Additionally, four of the Schedule A's provided that NYCRC was to guarantee a certain number of investor placements (or "allocations") to Wailian as of a particular date, and three provided for Wailian to deliver such investors to NYCRC on the same date. *Id.* ¶¶ 18-20.

The key terms of the Schedule A's were frequently modified as the Projects evolved. Compl. ¶ 21. For example, NYCRC modified its obligations with respect to the allocations guaranteed to Wailian for the George Washington Bridge ("GWB") Project four times over the seven months that Wailian worked on that project. *Id.* ¶¶ 30-32.

C. Wailian Refers Hundreds of Investors to NYCRC That NYCRC Accepts

From 2010 through 2012, pursuant to the Referral Agreement and the project-specific Schedule A's, Wailian referred hundreds of investors to NYCRC, providing NYCRC with nearly $130 million for the Projects. Compl. ¶ 17. NYCRC owes, and has failed to pay, Wailian more

[2] "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

than $9 million for the six Projects: the Arena Project, the Navy Yard II Project, the Waterfront Project, the GWB Project, the CBD Project, and the Medical Campus Project. On its Motion, NYCRC concedes the sufficiency of the Complaint's breach of contract claims as to the agreements at issue for the GWB and Waterfront Projects. *See* Def. Br. 6 n.4. Accordingly, Wailian addresses here the facts relevant to the other four projects, known as the Arena, Navy Yard II, CBD, and Medical Campus Projects, respectively.

1. Arena Project

In or about September 2010, Wailian began recruiting investors for the Arena Project. Compl. ¶ 23. Wailian and NYCRC executed the Arena Project Schedule A, in which NYCRC agreed to guarantee Wailian 100 investor placements through April 1, 2011. *Id.*; Lender Decl. Ex. E at § 2. The original Arena Project Schedule A provided for Wailian to be paid a $25,000 referral fee for each investor and a $3,000 annual "interest" payment on the first five anniversaries of an investor's immigration application approval. Compl. ¶ 19; Lender Decl. Ex. E at §§ 1, 3.

As NYCRC and Wailian worked together on the Arena Project, it became clear that April 1, 2011 would no longer be an appropriate benchmark date for NYCRC or Wailian. *See* Compl. ¶ 24. Accordingly, NYCRC extended that date through December 2011 and accepted all 100 investors – who invested a total of $53,800,000 – that Wailian referred for the Arena Project from the beginning of the Project through December 2011. *Id.* ¶¶ 24, 26. Several times in writing, NYCRC affirmed this extension, as well as Wailian's entitlement to annual interest payments for the Arena Project. On September 4, 2011, NYCRC wrote to Wailian to confirm that NYCRC would be "raising the [annual] interest payment [for each investor] on Arena Project to .8%," or $4,000. *Id.* ¶ 25. Then, in January 2012, Wailian and NYCRC executed a revised Schedule A for the Arena Project that reflected the increased annual payment amount.

Id. Despite the foregoing, NYCRC has refused to pay the $2,000,000 in annual payments Wailian earned for the Arena Project. *Id.* ¶ 27.

2. Navy Yard II Project

NYCRC engaged Wailian to refer investors to the Navy Yard II Project as well, Wailian and NYCRC never executed a Schedule A agreement for the Navy Yard II Project, despite Wailian's repeated requests for one. Compl. ¶ 40. Instead, the terms of the parties' agreement with respect to the Navy Yard II Project (the "Navy Yard II Agreement") are reflected in their emails. In a September 4, 2011 e-mail, the parties agreed that Wailian would receive a $32,500 referral payment for each investor along with a 1%, or $5,000, annual interest payment for that project and all other projects subsequent to the Arena Project. *Id.* ¶ 36. In a July 18, 2011 email, NYCRC guaranteed Wailian an allocation of 30 investor placements. *Id.* ¶ 39. In an August 4, 2011 email, NYCRC unilaterally increased the number of placements allocated to Wailian to 42. *Id.* The Navy Yard II Agreement does not provide a date for Wailian's performance.

Despite Wailian's repeated requests, NYCRC did not provide a copy of a draft Schedule A for the Navy Yard II Project until July 2012. Compl. ¶ 40. It was only then – a year after Wailian had begun working on the project and 10 months after the parties had entered the Navy Yard II Agreement – that Wailian learned that the draft Schedule A for Navy Yard II Project proposed a deadline of December 1, 2011, *a date seven months prior*. *Id.* Wailian never agreed to that deadline (or signed the Schedule A), and it continued to refer investors to the Navy Yard II Project, which NYCRC continued to accept without reservation. *Id.* ¶ 41. Wailian ultimately referred 41 investors, who invested a total of $22,160,500 in the Navy Yard II Project, entitling Wailian to $1,025,000 in annual fees, which remain unpaid. *Id.* ¶¶ 41-42.

3. CBD Project

In September 2011, Wailian began recruiting investors for the CBD Project. Compl. ¶ 44. The original CBD Project Schedule A provided for NYCRC to guarantee Wailian 175 investor placements through March 31, 2012 and for Wailian to receive annual payments of $5,000 per investor. *Id.* As with the Schedule A's that preceded it, the CBD Project Schedule A was modified by the parties shortly after its execution. In an October 30, 2011 email, NYCRC informed Wailian that it needed to reduce Wailian's allocation for the GWB Project as a result of an earlier-than-expected "wrap up [of] the [fund]raising for both the NYC Waterfront Project and the GWB Project," but offered to "guarantee them a spot in either the BNY II Project or the CBD Project" in exchange for the reduced GWB Project allocation. *Id.* ¶ 45; Exhibit 1 to the Declaration of David E. Ross dated February 9, 2018 ("Ross Decl.").

Ultimately, Wailian referred 115 investors to the CBD Project, for a total benefit to NYCRC of $62,157,500, for which NYCRC owes Wailian a total of $2,850,000 in annual fees, which remain unpaid. Compl. ¶¶ 46-47.

4. Medical Campus Project

In early May 2012, Wailian began work on its last project with NYCRC, the Medical Campus Project. Compl. ¶ 48. The original Medical Campus Project Schedule A guaranteed Wailian an allocation of 50 investor placements through July 15, 2012, for which Wailian was to be paid referral fees, plus $5,000 per investor in annual payments for five years. *Id*. On June 28, 2012, just two weeks before what NYCRC now claims is a "deadline," NYCRC asked Wailian if it could supply an additional 10 investors by July 9. *Id.* ¶ 49. Wailian informed NYCRC that it was unsure of timing, and NYCRC ultimately permitted Wailian to refer investors after that "deadline," accepting investment from 7 additional investors during that time without reservation or protest. *Id.*

Ultimately, between February 29 and July 25, 2012, Wailian referred 50 investors and $27,025,000 to NYCRC for the Medical Campus Project. *Id.* ¶ 50. NYCRC has not paid Wailian any of the $1,250,000 in annual fees that Wailian earned for the Medical Campus Project. *Id.* ¶ 51.

D. NYCRC Accepts Wailian's Full Performance Without Reservation, and Then Refuses to Pay Any Annual Fees to Wailian

NYCRC accepted the benefits of each and every qualified investor referred by Wailian – and the $130 million in total that these investors provided to the Projects. *See* Compl. ¶ 55. NYCRC regularly and consistently expressed its appreciation of and satisfaction with Wailian's performance under the parties' agreements, and it confirmed its acknowledgment of Wailian's entitlement to receive annual payments thereunder. *See id.* ¶¶ 54, 59.

Despite its acceptance of Wailian's performance under the parties' agreements, NYCRC has refused to pay any part of the annual payments earned by Wailian. *Id.* ¶¶ 58, 60.

ARGUMENT

Dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is only proper where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744, 2017 WL 6547902, at *4 (S.D.N.Y. Dec. 20, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). "The issue is not whether a plaintiff will or might ultimately prevail on [its] claim but whether [it] is entitled to offer evidence in support of the allegations in the complaint." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59, 62 (2d Cir. 1997). In considering the sufficiency of a pleading, the Court must thus "accept[ ] as true all facts alleged in the complaint and draw[ ] all inferences in favor of the plaintiff." *Faulkner v. Beer*, 463 F.3d 130, 133 (2d Cir. 2006) (quotation omitted). The Court's review is limited to the Complaint and the documents

incorporated therein, and factual allegations contained in legal memoranda may not be considered. *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988).

I. THE COMPLAINT ALLEGES THAT WAILIAN PERFORMED AND THAT NYCRC BREACHED THE RELEVANT AGREEMENTS, AS WRITTEN, MODIFIED OR WAIVED

"To state a claim in federal court for breach of contract under New York law, a complaint need only allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Axiom Inv. Advisors, LLC by & through Gildor Mgmt., LLC v. Deutsche Bank AG*, 234 F. Supp. 3d 526, 535 (S.D.N.Y. 2017) (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996)). If the pleading is sufficient and the plaintiff has an arguable claim under the contract, then the claim should not be dismissed. *See, e.g., Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 56 (2d Cir. 2012). Wailian's Complaint amply meets this standard for each of the four agreements that NYCRC challenges on this Motion.

A. NYCRC Concedes That the Complaint Properly Alleges Breach of the GWB Project and Waterfront Project Schedule A's

NYCRC does not move to dismiss, and therefore concedes, that the Complaint properly pleads claims for breach of the GWB Project Schedule A agreement and the Waterfront Project Schedule A agreement. *See* Def. Br. 6 n.4. Accordingly, the Complaint should be sustained as to those two agreements.

B. Wailian Properly Alleges Breach of the Arena Project Schedule A

1. Wailian Alleges Breach of the Arena Project Schedule A As Modified

The Complaint properly pleads each and every element of a breach of contract claim as to the Arena Project. Wailian alleges that the parties' agreement as to the Arena Project consists of the original Arena Project Schedule A and pleads facts establishing agreed-upon modifications

effected both in writing and by conduct. Compl. ¶¶ 24-26. Wailian adequately alleges the terms of such agreement, which provide that, in exchange for Wailian's referral of investors to the Arena Project, NYCRC would pay a referral fee of $32,500 per investor plus annual payments of $4,000 for five years. *See id.* ¶ 25. Wailian also alleges that it performed its obligations under the modified Arena Project Schedule A, referring 100 investors to that Project, and that NYCRC subsequently breached that agreement by failing to pay any annual payments. *Id.* ¶ 26.

2. Wailian Alleges That the Parties Modified or Waived Certain Terms of the Arena Project Schedule A

In the Motion, NYCRC effectively asks the Court to look only at the original Arena Project Schedule A and to ignore the Complaint's allegations as to subsequent events giving rise to modification and/or waiver of the terms NYCRC now seeks to strictly enforce. Def. Br. 14. The Court should decline to do so.

It is axiomatic that "parties may modify a contract by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel." *Belsito Commc'ns, Inc. v. Dell, Inc.*, No. 12-CV-6255 CS, 2013 WL 4860585, at *4 (S.D.N.Y. Sept. 12, 2013) (quoting *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003)). A plaintiff need only allege facts that "support[ ] a plausible inference" that the parties so modified their agreement. *Aeolus Down, Inc. v. Credit Suisse Int'l*, No. 10 CIV. 8293, 2011 WL 5570062, at *2 (S.D.N.Y. Nov. 16, 2011) (Stanton, J.). As detailed herein, Wailian has done that and more, pleading specific facts that demonstrate that the parties intended to – and did – modify the terms of the original Arena Project Schedule A.

The original Arena Project Schedule A states that "[p]rovided that all [100] investors . . . sign the necessary NYCRC documents . . . and NYCRC receives all investors' funds . . . no later than April 1, 2011, [Wailian] will be paid an additional USD$3,000 per year." Lender Decl. Ex.

E at § 3. The Complaint alleges that the parties modified the amount of the annual payment, increasing it to $4000 in a September 4, 2011 email and in a formal modification of the Schedule A in January 2012. Compl. ¶ 25. The Complaint also alleges that Wailian referred a total of 100 investors for this project as requested: 54 investors as of April 1, 2011, and an additional 46 investors between April 2, 2011 and December 2011, all of which NYCRC accepted. *Id.* ¶ 26. It requires no more than common sense to conclude that a modification made several months after a purported "deadline" was necessarily intended to authorize the performance that occurred after that deadline. It is therefore evident, and certainly, at minimum, plausible to infer, from the timing of the parties' modifications to the payment term that they intended to modify the April 1, 2011 "deadline" in order to allow Wailian to receive annual payments for the Arena Project.

Further, "[s]uch affirmative conduct and failure to act after the deadline had passed might be found to be a waiver," not just a modification. *Aeolus Down*, 2011 WL 5570062, at *2. NYCRC contends that, under the terms of the original Arena Project Schedule A, if Wailian did not deliver 100 investors for the Arena Project by April 1, 2011, Wailian could not receive any annual payments for that project. *See* Def. Br. 20-21. Under this view, the plain language of the Arena Project Schedule A would have foreclosed the possibility of Wailian receiving annual payments, and any and all post-April 1, 2011 discussions about same would be fundamentally incompatible with that agreement. And yet, the Complaint states just that. Wailian alleges that, contrary to the language of the original Arena Project Schedule A, the parties discussed Wailian's entitlement to annual fees for several months after April 1, 2011 and agreed upon the amount of the annual payments that Wailian would receive for the Arena Project, including in an email dated September 4, 2011 and by execution of an amended Schedule A in January 2012. Compl. ¶ 25.

The Complaint also pleads additional conduct by NYCRC that is inconsistent with an April 1, 2011 cut-off date. Wailian alleges that NYCRC affirmatively acknowledged Wailian's entitlement to annual payments for the Arena Project after that date, going so far as such payments in its formal financial projections. *See id.* ¶ 59. Wailian also alleges that NYCRC continued to measure Wailian's progress toward the 100 investor goal after April 1, 2011. *Id.* ¶ 24. However, the date and the number of investors that Wailian was to provide were included in the same provision of the Schedule A. Lender Decl. Ex. E at § 3. Thus, by continuing to require Wailian to refer 100 investors long after the date in question, NYCRC waived the date term, even assuming *arguendo* that it was a material term.

NYCRC's conduct thus plainly "evidence[s] an indisputable mutual departure from the written agreement," or – by NYCRC's own definition – a waiver. *See* Def. Br. 19 (quoting *Picture Patents, LLC v. Aeropostale, Inc.*, 788 F. Supp. 2d 127, 144 (S.D.N.Y. 2011)).[3] These facts, which must also be assumed true, likewise require denial of the Motion.

Rather than contradict Wailian's factual allegations and the more than plausible inferences of modification and waiver that flow therefrom, NYCRC asks the Court to ignore them. *See* Def. Br. 21. NYCRC implicitly asks the Court instead to construe the parties' written agreement in a vacuum – to ignore the timing of the changes made by the parties, and instead to focus on the fact that the parties did not expressly alter the timing provision. *Id.* at 22. That request is contrary to the standard for evaluating the Complaint at this stage: whether it pleads facts that plausibly state a claim for breach of contract. It would also contravene the rule that

[3] *Picture Patents* does not compel a contrary conclusion. There, the Court concluded that an email in which defendant stated that it was not certain that it owned the intellectual property at issue did not amount to a waiver of ownership. 788 F. Supp. 2d at 144. The *Picture Patents* defendant's equivocal statement stands in sharp contrast to NYCRC's clear writings and affirmative conduct acknowledging Wailian's right to receive annual payments, as alleged in the Complaint. *See, e.g.*, Compl. ¶¶ 24-25, 36, 59.

"provisions in contracts must be given a practical interpretation to the language employed and the parties' reasonable expectations." *Aeolus Down*, 2011 WL 5570062, at *4 (quotation omitted).[4] As NYCRC's stilted reading is contrary to the facts plead in the Complaint, the Motion should be denied as to the Arena Project Schedule A agreement.

The Complaint plainly pleads facts to establish that the parties modified the date term of the agreement in question, or, alternatively, to show that NYCRC waived such term or should be estopped from enforcing it, NYCRC's Motion should be denied as regards the Arena Schedule A agreement.

C. Wailian Alleges That NYCRC Breached the Schedule A Agreements for the Medical Campus Project and CBD Project, As Modified or Waived

NYCRC's Motion also fails as to Wailian's claims for breach of the Medical Campus Project and the CBD Project Schedule A agreements. The Complaint alleges that, as modified, those Schedule A's obligate NYCRC to pay a referral fee of $32,500 and $35,000, respectively, per qualifying investor, plus an annual fee of $4,000 per investor for five years. *See* Compl. ¶¶ 44, 48.

As with the Arena Project, NYCRC relies on the original Schedule A's executed for the Medical Campus and CBD Projects, arguing that they are facially conclusive on the issue. Def. Br. 14. NYCRC argues that the Referral Agreement – the master agreement between the parties – precludes oral modifications. Def. Br. 16-17. As set forth below, that argument cannot carry

[4] This is not, as NYCRC contends, parol evidence the Court may not consider when evaluating the Complaint. *See* Def. Br. 22. Parol evidence is admissible to interpret a contract that is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Info. Superhighway, Inc. v. Talk Am., Inc.*, 274 F. Supp. 2d 466, 470 (S.D.N.Y. 2003). *Ixe Banco, S.A. v. MBNA America Bank, N.A.*, on which NYCRC relies, is obviously distinguishable because there plaintiff contended that a previously-discussed oral term should be included in the parties' unmodified, fully-integrated agreement. No. 07 CIV. 0432, 2008 WL 650403, at *7 (S.D.N.Y. Mar. 7, 2008) (cited in Def. Br. at 22). Here, by contrast, Wailian pleads modification by writing or by conduct, and in the alternative, that NYCRC waived the date term or that it was not material, and that in all events, Wailian substantially performed.

the day because the Complaint pleads facts showing modifications by conduct, which are not precluded by the "no oral modification" on which NYCRC relies.

The Referral Agreement provides that such "Agreement . . . may not be waived, changed or terminated *orally*." Lender Decl. Ex. A at § 11 (emphasis added). Because the Referral Agreement "does not speak to whether the provisions may be waived [or modified] by the parties' *conduct*," it cannot be said to proscribe such modifications. *See J & R Elecs. Inc. v. Bus. & Decision N. Am., Inc.*, No. 12 CIV. 7497, 2013 WL 5203134, at *6 (S.D.N.Y. Sept. 16, 2013) (emphasis added) (construing similarly worded provision). *Ixe Banco, S.A. v. MBNA America Bank, N.A.*, on which NYCRC relies heavily, does not compel a different result: the Referral Agreement does not require written modification, in contrast to the agreement at issue in that case, which provided that it could not be "be waived, altered, amended, supplemented or modified *except by written instrument*." 2008 WL 650403 at *8 (emphasis added).[5] Thus, *Ixe Banco* is inapposite, and, in any event, "[a]t this early stage of the pleadings, [Wailian's] allegation that the parties' course of dealings modified the [relevant agreements], despite the no-oral modification clause, is sufficient." *Randolph Equities, LLC v. Carbon Capital, Inc.*, No. 05 CIV 10889, 2007 WL 914234, at *3 (S.D.N.Y. Mar. 26, 2007).

Specifically, Wailian alleges that by the time it began working on the CBD and Medical Campus Projects, it had settled into an established course of dealing with NYCRC, where the original Schedule A agreement for a Project was a mere starting point, and, although certain terms remained the same, the details often evolved as the projects developed. *See, e.g.*, Compl. ¶¶ 45, 49; Ross Decl. Ex. 1. As alleged in the Complaint, that course of conduct continued, with

[5] In addition, as the *Ixe Banco* court noted, "[n]o-oral-modification clauses, [ ], can themselves be waived" by conduct. *See* 2008 WL 650403, at *9.

NYCRC several times modifying Wailian's allocations for the CBD Project and the Medical Campus Project. Compl. ¶ 48. The time for performance was similarly modified, as when, for example, only two weeks before the "deadline" for the Medical Campus Project, NYCRC asked Wailian to refer an additional 10 investors to that project. *Id.* ¶ 49. NYCRC's "requests for significant modifications" and subsequent acceptance of Wailian's performance constitute a modification or a waiver of the date term in the Schedule A's in question. *See Scavenger, Inc. v. GT Interactive Software, Inc.*, 273 A.D.2d 60, 61, 708 N.Y.S.2d 405, 406 (1st Dep't 2000) (defendant waived argument that plaintiff breached timing provision by "defendant's requests for significant modifications . . . and by defendant's acceptance" of plaintiff's performance). Wailian's allegations that its performance under the modified agreements was undertaken with NYCRC's consent and acceptance, and met with NYCRC's express approval, further support an inference of modification and/or waiver. *See, e.g.*, Compl. ¶¶ 41, 46, 49, 50. Because Wailian has pled facts sufficient to establish modification and/or waiver of the deadline NYCRC claims was operative, the Motion should be denied as to the CBD Project and Medical Campus Project Schedule A agreements.[6]

D. Wailian Properly Alleges Breach of the Navy Yard II Agreement

The Motion should also be denied as to Wailian's claim for breach of the Navy Yard II Agreement. The Complaint alleges that the parties agreed by email that (1) Wailian would refer investors to the Navy Yard II Project, (2) NYCRC would receive a referral fee of "$32,500 per investor," which was expressly made applicable to the "BNY II Project," and (3) that an "interest

[6] Even crediting NYCRC's contentions, NYCRC at most raises disputed issues of fact requiring denial of the Motion. *See Advanced Mktg. Grp., Inc. v. Bus. Payment Sys., LLC*, 300 F. App'x 48, 49 (2d Cir. 2008) (reversing dismissal because contract did not "unambiguously" require plaintiff to forfeit compensation if it did not meet production benchmarks in full); *see generally Rounds v. Beacon Assocs. Mgmt. Corp.*, No. 09 CIV. 6910, 2009 WL 4857622, at *3 (S.D.N.Y. Dec. 14, 2009) ("[O]n a motion to dismiss all ambiguities must be decided in plaintiff's favor").

payment" of 1%, or $5,000, per investor for each of five years would be applicable to "all projects after the Arena project," including the Navy Yard II Project. Compl. ¶ 36; *see also* Def. Br. 24. Such an exchange of emails constitutes a binding contract under New York law. *See, e.g.*, *E. European Trading, Corp. v. Knaust*, 128 A.D.3d 589, 589, 11 N.Y.S.3d 112, 113 (1st Dep't 2015) (holding that email communications pled existence of binding agreement); *see generally Louros v. Cyr*, 175 F. Supp. 2d 497, 511 (S.D.N.Y. 2001) ("While plaintiffs do not allege that there was a single, signed agreement, any reasonable reading of the Complaint and the exhibits attached thereto alleges a valid written contract between the parties.").

Wailian also pleads its performance under the Navy Yard II Agreement and NYCRC's subsequent non-performance and breach. Wailian alleges that it referred 41 investors to the Navy Yard II Project, who together invested more than $22 million in that Project. Compl. ¶ 41. Furthermore, NYCRC *concedes that Wailian performed*. *See* Def. Br. 14. Despite Wailian's performance, NYCRC has not paid any of the annual fees that Wailian earned. *See* Compl. ¶ 42.

Though NYCRC challenges Wailian's contract claim as to the Navy Yard II Project, its concession that the Complaint pleads a valid breach of contract claim as to the Waterfront Project undermines such challenge because the facts are identical. The terms of the two projects are the same; namely, there was no guaranteed allocation or date specified for performance, and Wailian was to be paid a referral fee of $32,500 per investor referred and a 1% (or $5,000) annual fee for each investor for five years. *See id.* ¶¶ 29, 36; *see also* Lender Decl. Ex. C. Accordingly, NYCRC cannot validly dispute the sufficiency of the contract claim as regards the Navy Yard II Agreement.

NYCRC nevertheless improperly challenges the pleading by arguing facts not pled in the Complaint or in the documents referenced therein. NYCRC argues that the Navy Yard II

Agreement contained two additional terms: a minimum number of investors that Wailian was required to refer, and a date certain by which it was required to do so. Def. Br. 15. But these purported facts are not in the Complaint or the documents referenced therein, and thus they cannot be considered. *See Fonte*, 848 F.2d at 25. Moreover, even if such facts were properly before the Court, they would at most create fact issues as to the terms of the parties' bargain that could not be resolved on this Motion. *See Advanced Mktg. Grp.*, 300 F. App'x at 49 (holding, in reversing dismissal, "we do not agree that the contract unambiguously provides that if [plaintiff] did not meet its production requirements in full each month, [it] would lose residuals . . . Additional evidence regarding the contract negotiations and course of dealings between the parties is required to resolve this ambiguity."). For all these reasons, NYCRC's motion to dismiss Wailian's claim for breach of the Navy Yard II Agreement should also be denied.

E. NYCRC's Arguments Premised on Strict Compliance with a Waived Term Likewise Fail

In addition to the foregoing defects in NYCRC's motion to dismiss Wailian's breach of contract claims, NYCRC's final argument – that satisfaction of the date term was a condition precedent to Wailian's entitlement to annual payments – must also be rejected. *See* Def. Br. 12-16. As demonstrated above, the date term in the respective Schedule A's was neither material nor enforced, and it was never identified as a condition precedent to Wailian earning annual fees. Furthermore, in addition to the modifications and waivers detailed above that require denial of the Motion, NYCRC's reliance on the date terms in question is also foreclosed, at least at the pleading stage, by the doctrines of estoppel and substantial performance.

1. NYCRC Is Estopped from Arguing That Wailian's Performance Was Deficient

The Complaint pleads facts to demonstrate that NYCRC is equitably estopped from invoking the date provisions in the Schedule A agreements. Estoppel applies where "the

enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001); *see also Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 107, 850 N.E.2d 653, 660 (2006) ("[E]stoppel is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.") (internal quotation omitted).

Here, the Complaint alleges, irrespective of any modification, that NYCRC caused Wailian to believe that it would not enforce the timing provisions of the Schedule A's, and, in reliance on NYCRC's conduct and representations, Wailian continued to perform. *See, e.g.*, Compl. ¶¶ 36-37, 41, 49-50. Throughout the years that Wailian performed under the parties' agreements, NYCRC accepted Wailian's performance – timely or not – without reservation. *See id.* ¶¶ 54, 60. And, in fact, NYCRC expressly acknowledged Wailian's entitlement to annual fees for the Arena Project, the first project under which Wailian earned such amounts,[7] further inducing Wailian to believe that NYCRC would not rely on the date provisions in question. *Id.* ¶ 59. In addition, NYCRC knew that Wailian would rely on its affirmative representations that Wailian's performance was stellar, and Wailian did so, devoting time and resources referring more and more investors to NYCRC projects. Based on the facts alleged, NYCRC is estopped from relying on the date terms in question to defeat Wailian's contract claims on this Motion. *See Kosakow*, 274 F.3d at 726.

[7] Prior to the Arena Project and the other Projects that are the subject of this action, Wailian and NYCRC worked together on two other projects, but these projects did not provide for annual payments. *See* Compl. ¶ 22.

2. Wailian Substantially Performed the Terms of the Unmodified Schedule A's

The Complaint likewise establishes Wailian's substantial performance of the Schedule A's, which also compels denial of the Motion.

The Motion posits that NYCRC breached "express contractual prerequisites" to recovery. Def. Br. 12. First, the Second Circuit has recognized that such an argument should not be considered in deciding a motion to dismiss, as, "under New York law, the failure of a plaintiff to comply with conditions precedent is an affirmative defense." *Endovasc, Ltd. v. J.P. Turner & Co., LLC*, 169 F. App'x 655, 657 (2d Cir. 2006) (vacating dismissal); *see also United Res. Recovery Corp. v. Ramko Venture Mgmt., Inc*., 584 F. Supp. 2d 645, 657 (S.D.N.Y. 2008).

Second, the Complaint pleads that Wailian substantially performed the agreements in question. *See, e.g.*, Compl. ¶¶ 26, 41, 46, 50, 54. Where a party substantially performs a contract, it is due its compensation thereunder. *See Innovative Biodefense, Inc. v. VSP Techs., Inc.*, 176 F. Supp. 3d 305, 317 (S.D.N.Y. 2016) ("A breach is not material, and the aggrieved party is not excused from performance of its obligations, if the breaching party has substantially performed his end of the contract.").

Third, because the timing provision was at most a promise reviewable for substantial performance, Wailian's allegations of substantial performance defeat NYCRC's attempt to obtain dismissal based on its contention that the date terms were conditions precedent. *See* Def. Br. 13. "[T]he law does not favor a construction that creates a condition precedent," and, if there is any question as to the parties' intent, a provision should not be construed to operate as a condition precedent, but, rather, a promise. *Mahoney v. Sony Music Entm't*, No. 12 CIV. 5045, 2013 WL 491526, at *6 (S.D.N.Y. Feb. 11, 2013) (quoting *Kass v. Kass*, 235 A.D.2d 150, 159, 663 N.Y.S.2d 581, 588 (2d Dep't 1997)). In determining what language clearly demonstrates a

condition precedent, "New York courts have held that if the contract actually uses the term 'condition precedent,' then the term will be construed as a condition rather than simply a promise," reviewable for substantial performance. *Int'l Fid. Ins. Co. v. Cty. of Rockland*, 98 F. Supp. 2d 400, 434 (S.D.N.Y. 2000) (collecting cases and finding that term providing that party's obligation "shall arise after . . ." was promise, not condition precedent); *see also Nature's Plus Nordic A/S v. Natural Organics, Inc.*, 980 F. Supp. 2d 400, 411, 413 (E.D.N.Y. 2013).

In *Nature's Plus*, the court rejected defendant's attempt to characterize as a condition precedent a term providing "in order for" plaintiff to maintain a sole distributorship, plaintiff was required to meet minimum purchase requirements during a given time period. 980 F. Supp. 2d at 404. Instead, the *Nature's Plus* court found the term to be a promise reviewable for substantial performance. *See id.* Thus, although plaintiff fell short of the minimum purchase requirements, its substantial performance thereof permitted plaintiff to pursue its breach of contract claim. *See id.* at 411. The same conclusion follows here. Even if the date provision of the Schedule A's was not modified or waived as alleged in the Complaint, Wailian nevertheless pleads that it substantially performed within the time provided, requiring rejection of the Motion premised on NYCRC's "condition precedent" contention.[8]

Accordingly, because Wailian plausibly alleges facts showing its substantial performance under the Schedule A agreements, NYCRC's Motion should be denied even if, *arguendo*, the date terms of the respective contracts were not modified or waived, as Wailian's Complaint so pleads. *See Ace Sec. Corp. Home Equity Loan Tr., Series 2007-HE3 ex rel. HSBC Bank USA,*

[8] The authorities cited by NYCRC do not compel a contrary conclusion, nor do they apply to the issues at bar. NYCRC merely attempts to invoke cases involving employee bonuses, which plainly are not relevant to this case. *See* Def. Br. 12-13. In contrast to the annual payments owed to Wailian, employee bonuses are not part of an employee's contractual compensation; bonuses are awarded in an employer's "sole and absolute discretion," whereas Wailian's compensation was not based in any respect on NYCRC's discretion. *See Cohen v. Avanade, Inc.*, 874 F. Supp. 2d 315, 321 (S.D.N.Y. 2012). In addition, the agreements here do not describe the annual payments as a bonus.

Nat. Ass'n v. DB Structured Prod., Inc., 5 F. Supp. 3d 543, 563 (S.D.N.Y. 2014) (denying motion to dismiss where plaintiff plausibly alleged substantial performance).

3. The Motion Should Also Be Denied Because There Are Questions of Fact As to Whether the Date Terms Were Material, and Also Whether NYCRC Excused What It Claims Is the Untimeliness of Wailian's Performance

Even if, *arguendo*, NYCRC were correct that the Schedule A's were unmodified *and* that they contained a condition precedent, the Motion should nevertheless be denied because the Complaint's allegations further factual questions as to whether the date terms for performance were material or not and whether NYCRC excused what it claims was Wailian's untimely performance.

First, the Complaint pleads facts sufficient to establish that the date term of the agreements was not material. This Court has previously held that a timing condition is not material where "[n]o clause states that time is of the essence . . . , and that meaning cannot be inferred from the mere presence of the [timing] condition in the contract. Nor is there evidence that a delay would prejudice [defendant]." *Aeolus Down*, 2011 WL 5570062 at *3 (citing *Urban Archaeology Ltd. v. Dencorp Inv., Inc.*, 783 N.Y.S.2d 330, 335, 12 A.D.3d 96, 103 (1st Dep't 2004)). Here, the agreements in question do not provide that time is of the essence (nor do they state what relevance, if any, such time periods had to the parties' performance), and NYCRC never objected to – let alone rejected – a single "late" investor provided by Wailian. NYCRC's affirmative praise of Wailian's performance, and its absolute lack of complaint or protest precludes a determination at this stage that the date term was material, or that time was of the essence, or that NYCRC was prejudiced by any claimed delay in performance. *See, e.g.*, Compl. ¶¶ 26, 41, 46, 50. Thus here, as in *Aeolus Down*, the date provision does bar not Wailian's recovery because it cannot be determined whether or not it was even a material term. *See Aeolus*

Down, 2011 WL 5570062 at *3; *see also CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 467 (S.D.N.Y. 2010) ("There is absolutely no indication from the terms of the [relevant] agreements that an error of a few days . . . was the sort of material breach that should result in a complete forfeiture."); *accord Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691, 660 N.E.2d 415, 418 (1995) ("[A] court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.") (internal quotation omitted) (cited in Def. Br. at 12, 13).[9]

Second, the Complaint also pleads facts that support an inference that, whether the date terms were or were not material, NYCRC excused performance thereof. Where a party excuses performance of a contract term, that party cannot deny the counterparty the benefit of the contract premised on a breach of that condition. *See, e.g.*, *Aeolus Down*, 2011 WL 5570062 at *2. Here, Wailian has alleged facts to support that NYCRC excused the purported date term in the Schedule A agreements in question. *See, e.g.*, Compl. ¶¶ 24-26, 36-37, 54; *see also supra* at Section I.B, C. Wailian is therefore "entitled to prove that the condition was excused," and the Motion should be denied. *AdiPar Ltd. v. PLD Int'l Corp.*, No. 01 CIV. 0765, 2002 WL 31740622, at *8 (S.D.N.Y. Dec. 6, 2002).

That NYCRC's counsel now makes conclusory and unsupported assertions that the date terms were material, *see* Def. Br. 5, does not alter this conclusion. Such unsworn statements

[9] The conditions at issue in the cases cited by NYCRC are not at all similar in nature to those NYCRC now seeks to impose and generally relate to "an employer's requirement that an employee be *employed* through a certain time period," which "New York Courts have repeatedly upheld[ ] as a valid condition precedent." *Karmilowicz v. Hartford Fin. Servs. Grp.*, No. 11 CIV. 539, 2011 WL 2936013, at *10 (S.D.N.Y. July 14, 2011) (quotation omitted); *O'Grady v. BlueCrest Capital Mgmt. LLP*, 111 F. Supp. 3d 494, 501 (S.D.N.Y. 2015). NYCRC's cases, in further contrast to that at bar, also involved no cognizable allegations of waiver. *See, e.g.*, *Baraliu v. Vinya Capital, L.P.*, No. 07 CIV. 4626, 2009 WL 959578, at *5 (S.D.N.Y. Mar. 31, 2009) (where employment contract provided for bonus when employer's assets reached $300 million, plaintiff not entitled to bonus where assets only ever reached maximum of $58.3 million and facts did not give rise to inference of forfeiture or waiver); *Jofen v. Epoch Biosciences, Inc.*, No. 01 CIV. 4129, 2002 WL 1461351, at *8 (S.D.N.Y. July 8, 2002) (plaintiff failed to any conduct inconsistent with contract, in addition to failing to allege any cognizable right under contract).

cannot be considered, *see Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) ("[A] district court errs when it considers affidavits and exhibits submitted by defendants or relies on factual allegations contained in legal briefs or memoranda") (quotations and citations omitted), and in any event only serve to raise a factual dispute that similarly requires denial of the Motion.

II. THE COMPLAINT PROPERLY ALLEGES *QUANTUM MERUIT* IN THE ALTERNATIVE

Wailian also properly alleges its claim of *quantum meruit* in the alternative to its claim for breach of contract. Where the validity of a contract may be in dispute at the pleading stage, a plaintiff may, consistent with Federal Rule of Civil Procedure 8, plead both a breach of a contract claim and, in the alternative, a claim sounding in *quasi*-contract. *Hallmark Aviation Ltd. v. AWAS Aviation Servs., Inc.*, No. 12 CIV. 7688, 2013 WL 1809721, at *5 (S.D.N.Y. Apr. 30, 2013) ("[I]t is not always apparent at the pleading stage whether a contract both is valid and governs the subject matter of the dispute. New York law therefore permits the alternative pleading of breach of contract and unjust enrichment claims – and the survival of both claims at the motion to dismiss stage . . . consistent with Rule 8(d) of the Federal Rules of Civil Procedure."). Wailian is entitled to do so here because there are disputes as to the existence of some of the Schedule A agreements (for example, as regards the Arena Project), or as to whether Wailian's claims fall within the ambit of a formal Schedule A agreement or an email agreement. *See Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 531 (S.D.N.Y. 2007) ("When there is a bona fide dispute as to the existence of a contract, a party may proceed upon a theory of unjust enrichment, and an unjust enrichment claim may be alleged alongside a breach of contract claim."). Here, even if NYCRC "assert[s] that [it] will not dispute the existence of a contract with respect to this dispute, [it] ha[s]not even filed an answer yet and it is unclear whether the written contract will foreclose other alternative *quasi*-contract theories of liability asserted by

plaintiff." *Nat'l City Commercial Capital Co., LLC v. Glob. Golf, Inc.*, No. 09-CV-0307, 2009 WL 1437620, at *1 (E.D.N.Y. May 20, 2009).[10] Accordingly, the Motion should be denied as to Wailian's *quantum meruit* claim.

CONCLUSION

For the foregoing reasons, Wailian respectfully requests that the Court deny the Motion in its entirety.[11]

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KASOWITZ BENSON TORRES LLP

/s/ David E. Ross

David E. Ross (dross@kasowitz.com)
Danielle R. Gill (dgill@kasowitz.com)
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Plaintiff

[10] NYCRC's reliance on decisions in the context of motions for summary judgment further underscores that this issue is not ripe for determination in connection with the instant motion. *See* Def. Br. 23. The sole decision on a motion to dismiss that NYCRC cites also fails to support its position, as there it "was undisputed that the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions" and plaintiff's sole basis for its *quasi*-contractual claim was that it could have rescinded the applicable contract to allege one (but did not). *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190 (1987).

[11] If the Court determines that any aspect of Wailian's pleading is deficient, Wailian seeks leave to amend, which should be "freely given." *See* Fed.R.Civ.P. 15(a); *see also Ronzani v. Sanofi, S.A.*, 899 F.2d 195, 198 (2d Cir. 1990) (where plaintiff had not previously sought leave to replead and had offered to amend complaint, district court abused discretion in dismissing complaint without leave to replead).