UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAILIAN OVERSEAS CONSULTING GROUP, LTD., Plaintiff, -against- NEW YORK CITY REGIONAL CENTER LLC, Defendant.	Civil Action No. 1:17-cv-9004 (LLS) ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NEW YORK CITY REGIONAL CENTER LLC'S MOTION TO DISMISS THE COMPLAINT

David J. Lender
Adam B. Banks
Alea J. Mitchell
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
david.lender@weil.com
adam.banks@weil.com
alea.mitchell@weil.com

Attorneys for Defendant New York City Regional Center LLC

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Defendant New York City Regional Center LLC ("NYCRC") respectfully submits this reply memorandum of law in further support of its motion to dismiss the Complaint.

PRELIMINARY STATEMENT

NYCRC showed in its moving brief that Wailian is not entitled to bonus payments because it concededly did not comply with the unambiguous contractual requirements to earn them. In its opposition brief, as in its Complaint, Wailian does not dispute this: it admits that the bonus payment provisions are unambiguous, that it did not comply with the terms of the provisions, and that under a straight-forward reading of the agreements it would not be entitled to any bonus. Instead, Wailian's principal response is that the Court should ignore the plain language of the contracts because it is "hyper-technical." But that is no response at all. Contracts should be enforced according to their express terms. And the settled law demands that unambiguous conditions, like those attached to the bonus payments, must be literally enforced, "hyper-technical" or otherwise. Wailian's admission that it did not meet the express conditions for any of the projects subject to this motion seals its fate and should put the matter at rest.

To avoid this result, Wailian posits several "theories" for why the Court should ignore the clear, dispositive contractual language and instead look outside the four corners of the agreement. None of these theories holds water. Although they proceed under different labels—"modification by conduct," "waiver and estoppel," "substantial performance," and "materiality"—at their core, each essentially asserts that the contractual requirements should be set aside because NYCRC continued to accept referrals from Wailian after the bonus deadlines specified in the contracts. This argument—whatever its label—fundamentally fails because that alleged conduct is ***wholly consistent*** with the clear and unambiguous contractual language. As Wailian concedes, the Schedule A's contemplate two separate forms of payment, each predicated on Wailian's compliance with separate sets of conditions. Opp. at 4. And in accordance with the

governing contracts, NYCRC paid Wailian its standard referral fees when Wailian satisfied the first set of conditions—and there is no dispute that it earned ***$14 million*** in such fees over the life of the parties' relationship. But NYCRC did not pay Wailian when it failed to meet the second set of conditions. That is exactly what the contracts say, and exactly what Wailian alleges happened here. None of that conduct justifies altering the plain language of the parties' agreement.

Wailian's various supporting arguments fare no better. Wailian argues that the parties modified or waived the deadlines through "discussions" or "acknowledgements," but both the contract and the governing law—including the parol evidence rule—preclude oral modifications or waivers. Wailian claims that the contracts were also modified in "writing," but it fails to point to any actual writing doing so; in fact, the only writing it does identify—the revised Schedule A for the Brooklyn Arena Infrastructure Project—expressly ***retains*** the original deadline. Wailian contends that NYCRC is somehow estopped from relying on the deadlines because it praised Wailian's "stellar" work, but this of course does not meet the high bar necessary to show waiver or estoppel, particularly when the "praise" is in no way inconsistent with the existing contractual requirements. Wailian argues it is due compensation because it "substantially performed" the contract, ignoring that it ***was*** compensated for the performance it actually delivered: the $14 million in standard referral fees it actually earned. And, Wailian argues, for the first time in its opposition brief, that the date term in the parties' contract may not be material. But Wailian cannot have it both ways: Wailian cannot argue that one-half of a contractual provision is material—here, the one that promises bonus payments—but that the consideration exchanged for it—here, the conditions—is not.

Finally, Wailian's alternative attempt to recover on a *quantum meruit* theory must also

fail. Wailian's opposition confirms that there is no bona fide dispute that a valid contract exists covering the subject matter of the parties' dispute here.

In the end, Wailian admits that it did not comply with the contract, so it invites the Court to re-write it. The Court should decline to do so. Wailian failed to meet the bonus payment requirements that were clear conditions for receiving the bonus, and nothing it argues in its opposition brief changes this outcome. The Complaint should be dismissed.

ARGUMENT

I. WAILIAN'S BREACH OF CONTRACT CLAIM SHOULD BE DISMISSED

A. Wailian Admits that the Plain Language of the Agreement Precludes its Claim

There is no dispute that Wailian has no right to recover additional bonus payments under the plain language of the parties' agreements. Wailian concedes, as it must, that the parties' agreements called for two separate "forms of payment," Opp. at 4, each attached to different conditions and requirements: (1) a flat referral fee for each investor NYCRC accepted from Wailian upon completion of necessary paperwork and other prerequisites (*see, e.g.*, Ex. B ¶ 2); and (2) an additional bonus payment, to be paid annually, but only "provided" that Wailian met certain conditions, including referring all of its allocated investors, by a specified deadline (*see, e.g.*, Ex. B ¶ 3).[1] There is no dispute that Wailian received all of the referral fees it earned. And, in its Complaint and again in its opposition brief, Wailian admits that it did not meet the express requirements set forth in the parties' written agreements to earn those second, bonus payments. Compl. ¶¶ 26, 41, 46, 50; Opp. at 5-8. Wailian failed to fill its allocations by the deadline for the Brooklyn Arena Infrastructure and Medical Campus Projects and ***never*** filled its allocations for either the Brooklyn Navy Yard II or CBD Projects. *See* Mot. at 14-15.

[1] References to "Ex. __" are to the Declaration of David J. Lender, dated January 5, 2018.

Nor does Wailian argue in its opposition brief that the language of the written contracts is in any way ambiguous or susceptible to more than one interpretation. Instead, Wailian asks this Court to ignore the dispositive contractual text, arguing that enforcing the plain and unambiguous language of its agreements would be "hyper-technical." Opp. at 1. But this plea only proves the point. A court cannot simply refuse to enforce a clear contractual provision because the language is too "technical" or otherwise depends on a close reading of the contract. Indeed, the well-settled, fundamental law is exactly to the contrary: a court must enforce the unambiguous terms of the parties' written agreements as they are written. *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645-46 (2009); *Birnbaum v. Bank of America*, No. 06 Civ. 8218 (LTS)(KNF), 2009 WL 8599404, at *5 (S.D.N.Y. Feb. 17, 2009); *Knutson v. G2 FMV, LLC*, 14 Civ. 1694 (RWS), 2018 WL 286100, at *5 (S.D.N.Y. Jan. 3, 2018). The Court should dismiss the Complaint on this basis alone.

B. None of Wailian's "Theories" Excuse its Non-Compliance with the Unambiguous Contractual Language

Wailian's admission that the plain language of the governing contracts precludes its claim to additional bonus payments should be the end of the matter. Recognizing this, Wailian advances four "theories" for why the Court should set aside the text of the agreement and nonetheless award it the bonus payments the plain language of the contract forecloses. Opp. at 1. Specifically, Wailian contends that (1) the parties "modified the dates in writing or by conduct"; (2) NYCRC "waived the dates or is otherwise estopped from relying on them"; (3) Wailian "substantially performed" the contract; and (4) the "dates in question were not material to the bargain." *Id.* Each of these theories fails.

1. Wailian's Contract Modification Argument Fails as a Matter of Law

Wailian first tries to escape the plain language of the governing contracts by arguing that

the parties "modified the dates in writing or by conduct," thus requiring NYCRC to pay Wailian bonus payments despite Wailian's failure to comply with the contract. Opp. at 1, 9–10. This fails.

At the outset, the notion that the parties modified the dates in the Schedule A's "***in writing***," as Wailian now claims, is entirely unsupported—even by any allegation in the Complaint. Aside from the CBD Project—where Wailian concedes that it failed to comply even with the ***extended*** deadline (*see* Compl. ¶ 50)—Wailian has not identified any writing in which the parties agreed to extend the deadline for a particular project. To be sure, as NYCRC acknowledged (Mot. at 14, 21), the parties exchanged writings that modified ***other*** terms of the Schedule A's from time to time. But the parties never agreed—and certainly not in writing—to modify the dates specified in the schedules.

In particular, in arguing modification by "writing," Wailian focuses heavily on the Brooklyn Arena Infrastructure Project. Nothing in the writings exchanged in connection with that project, however, demonstrates an agreement to modify the April 1, 2011 deadline. Indeed, the revised Schedule A that the parties actually executed expressly ***retained***, rather than modified, the April 1, 2011 deadline. *See* Ex. E ¶ 3. Acknowledging this, Wailian faults NYCRC for asking the Court to "focus on the fact that the parties did not expressly alter the timing provision" in that schedule. Opp. at 12. But that is the exactly what the Court should focus on—the timing provision is precisely the provision that Wailian claims the parties altered. Asking the Court to enforce the plain text of the revised Schedule A, with the unmodified deadline, is not a "stilted reading" of the contract, as Wailian claims (Opp. at 13), nor does it "contravene the rule that 'provisions in contracts must be given a practical interpretation.'" Opp. at 12–13 (quoting *Aeolus Down, Inc. v. Credit Suisse Int'l*, No. 10 CIV. 8293 (LLS), 2011 WL 5570062, at *4 (S.D.N.Y. Nov. 16, 2011)). Instead, the parties agreed in plain English to maintain, and not to

alter, the April 1, 2011 deadline. To ascribe an alternate intent to the parties' conduct would impermissibly re-write the parties' unambiguous agreement. *See Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, No. 07 Civ. 0432 (LAP), 2008 WL 650403, at *6 (S.D.N.Y. Mar. 7, 2008) ("Courts will not examine extrinsic evidence 'to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face.'").

Wailian's further contention that the parties agreed to modify the deadlines "by conduct" likewise cannot carry the day. For one thing, much of what Wailian claims as "conduct" reduces to alleged oral modifications or waivers. For example, Wailian contends that "the parties discussed Wailian's entitlement to annual fees for several months" (Opp. at 11) and "NYCRC affirmatively acknowledged Wailian's entitlement to annual payments" (Opp. at 12). But the contract, New York law, and the longstanding parol evidence rule all preclude oral modifications and waivers such as these. Specifically, as NYCRC showed in its opening brief, the parties' Referral Agreement itself makes plain that its terms "may not be waived, changed or terminated orally." Ex. A ¶ 11; *see also* Mot. at 16–17, 22. New York law takes these provisions seriously: the General Obligations Law, which Wailian nowhere even acknowledges, provides that a written agreement "cannot be changed by an executory agreement unless such executory agreement is in writing." N.Y. Gen. Oblig. L. 15-301 (McKinney 2007). And the parol evidence rule, deeply enshrined in New York law, prohibits the introduction of alleged "oral modifications" to alter the terms of a written agreement. *See Solomon v. Burden*, 104 A.D.3d 839, 840 (2d Dep't 2013). Wailian's principal response is that parol evidence is admissible when the contract is unclear.[2] Opp. at 13 n.4. But Wailian fails to identify any ambiguity—and there is

[2] Wailian tries to distinguish the court's exclusion of parol evidence in *Ixe Banco* because the case involved a "fully integrated agreement" between the parties. Opp. at 13 n.4. But Wailian ignores that the Referral Agreement states that it "fully and completely expresses our

none.[3] Accordingly, Wailian's claims that the parties modified their conduct through "discussions" or "acknowledgments" are barred because the contract and governing law expressly prohibit unwritten modifications. *See* Mot. at 16–18.

In any event, the allegations in the Complaint are insufficient as a matter of law to demonstrate a modification of the deadlines by conduct. NYCRC showed—and Wailian nowhere challenges—that Wailian faces a high bar in demonstrating that the parties' conduct modified their written contract. *See* Mot. at 18–19. In particular, Wailian must show that the parties' conduct was "not otherwise compatible with the contract as written." *Picture Patents, LLC v. Aeropostale, Inc.*, 788 F. Supp. 2d 127, 144 (S.D.N.Y. 2011). And, "[t]o be valid, a contractual modification must satisfy each element of a contract, including offer, acceptance, and consideration." *O'Grady v. BlueCrest Capital Mgmt. LLP*, 111 F. Supp. 3d 494, 502 (S.D.N.Y 2015); *see also Jofen v. Epoch Biosciences, Inc.*, No. 01 CIV. 4129 (JGK), 2002 WL 1461351, at *5 (S.D.N.Y. July 8, 2002), *aff'd*, 62 F. App'x 410 (2d Cir. 2003) (holding that Plaintiffs' allegations of oral or course-of-conduct modification failed as a matter of law where there was no allegation of consideration); *Kamdem-Ouaffo v. Pepsico, Inc.*, No. 14-CV-227 (KMK), 2015 WL 1011816, at *8 (S.D.N.Y. Mar. 9, 2015) (holding that Plaintiff failed to plead acceptance or adequate consideration to constitute a "valid modification").

Wailian does not challenge these high standards, and its modification arguments do not meet them. Although Wailian advances slightly different arguments for each of the four projects, its overarching contention is that the parties modified the contracts' deadlines through a "course

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agreement." Ex. A; *see also Ixe Banco, S.A.*, 2008 WL 650403, at *7 ("The purpose of a merger clause is to require the full application of the parol evidence rule to bar the introduction of extrinsic evidence to alter, vary, or contradict the terms of the writing.").

[3] Wailian also argues in a footnote that no-oral-modification clauses can be waived (*see* Opp. at 14 n.5), but then never argues or alleges what conduct constituted waiver of that clause.

of dealing" in which NYCRC continued to accept referrals after the deadlines specified in the projects' Schedule A's. Opp. at 14. But, as NYCRC explained (Mot. at 17-20), that alleged conduct is "wholly consistent" with the contracts as written, and therefore "insufficient to demonstrate modification" of that contract. *Picture Patents*, 788 F. Supp. 2d at 144. The Schedule A's, as Wailian concedes (Opp. at 4), contemplate two separate forms of payment, each predicated on Wailian's compliance with separate sets of conditions. The fact that NYCRC paid Wailian for satisfying the first set of conditions is obviously fully compatible with *not* paying Wailian when it *failed* to meet the second set. It is also "wholly consistent" with the contractual language for NYCRC to continue to accept referrals after the bonus deadline and pay Wailian only the associated referral fee—but not any bonus payment—when Wailian did not satisfy the express requirements to receive those bonuses. Indeed, that is exactly what the contract, as written, allows.

Nor does Wailian identify any additional consideration extended to NYCRC for the supposedly modified contracts in which the parties agreed to extend or eliminate the deadlines. As noted, a contractual modification must itself be supported by consideration. *O'Grad*y, 111 F. Supp. 3d at 502; *Jofen*, 2002 WL 1461351, at *5. But the benefit a party is already due to receive in exchange for performance under a contract cannot serve as consideration for the modification to the contract. *Kamdem-Ouaffo*, 2015 WL 1011816, at *8. Thus, courts have dismissed allegations of contract modification where, as here, "plaintiffs neither undertook a new obligation nor gave up any right as consideration for a modification." *LaGuardia Assocs. v. Holiday Hosp. Franchising Inc*., 92 F. Supp. 2d 119, 129 (E.D.N.Y. 2000).

Wailian's project-specific arguments likewise fail to demonstrate that the parties reached a "meeting of the minds" to modify the deadline dates in the respective Schedule A's.

Medical Campus Project. Wailian argues that the parties fell into an "established course of dealing" in which the Schedule A's were a "mere starting point" that "evolved as the projects developed." Opp. at 14. In particular, Wailian claims, for the Medical Campus Project, the "time for performance was similarly modified" when NYCRC increased Wailian's allocation "two weeks" before the project's deadline. Opp. at 15. But, as Wailian also euphemistically acknowledges, "certain terms remained the same." Opp. at 14. These "certain terms" included the deadlines. Thus, the parties' express modification of some terms in the Schedule A—like the number of allocations—does not demonstrate an unequivocal intent to modify other terms, like the deadline. Indeed, it demonstrates exactly the opposite: an agreement by the parties to retain the original deadline. Nor does the fact that NYCRC "consented" to the revised allocations and "accepted" Wailian's performance under the revised contract show that NYCRC also (silently) agreed to modify additional terms of those contracts.[4]

CBD Project. Wailian's modification argument as to the CBD Project fails for the same reason. Wailian claims that the parties' modifications of the number of allocations for the CBD Project somehow demonstrates an intent to also modify the deadline. But nothing other than Wailian's mere say-so supports that conclusion. And, for the CBD Project, Wailian not only failed to refer its total allocation by the deadline, but it ***never*** met the total number of allocations required to receive the bonus at all—it referred only 115 of the original 175 allocations. *See* Compl. ¶ 46. Thus, not only must Wailian show that the parties modified the "deadline" (which it cannot do), but also that they modified the requirement that Wailian fill ***all*** of its investor allocations to be eligible for the bonus payment. *See* Ex. H. Nothing in the Complaint even

[4] Moreover, for the Medical Campus Project, Wailian failed to meet even the *original* allocation of 50 investors by the July 15, 2012 deadline. *See* Compl. ¶ 50. So, Wailian's suggestion that the timing of NYCRC's alleged request implied an extension of the deadline does not help Wailian. Even absent the request, Wailian would have failed to fulfill its initial allocation by the deadline.

purports to allege this modification.

Brooklyn Arena Infrastructure Project. Wailian acknowledges that the parties executed a revised Schedule A for the Brooklyn Arena Infrastructure Project that retained the original April 1, 2011 deadline for receiving bonus payments. Opp. at 11. Nonetheless, Wailian asks the Court to "infer" that the parties did not mean what they said. According to Wailian, it is "common sense" to infer that the parties "intended to modify the April 1, 2011 'deadline' in order to allow Wailian to receive annual payments for the Arena Project."[5] *Id.* As an initial matter, the written, revised Schedule A executed by both parties would "supersede[] any prior oral agreements . . . under New York law" assuming such an intention ever existed. *Jofen*, 2002 WL 1461351, at *5. But, at any rate, there is no reason for the Court to draw inferences about the parties' intent: the clear and unambiguous text of the parties' written amendment reveals what the parties intended. *See Ixe Banco, S.A.*, 2008 WL 650403, at *6. Wailian's contention that the clear text would nullify the parties alleged "discussions" about Wailian's "entitlement to annual fees" runs headlong into the parol evidence rule, which prohibits relying on such extra-contractual discussions to alter the plain meaning of a contract. *Id.* (citing *Rodolitz v. Neptune*

[5] Several of the claims made in the opposition brief are not alleged in the Complaint. For example, Wailian cites paragraph 24 of the Complaint to support its allegation that "it became clear that April 1, 2011 would no longer be an appropriate benchmark date for NYCRC or Wailian," Opp. at 5. But the Complaint alleges only that "through their conduct, the parties waived that 'deadline,' and NYCRC continued to hold Wailian's allocation open." Compl. ¶ 24. Wailian's opposition claims NYCRC affirmed "Wailian's entitlement to annual interest payments for the Arena Project." Opp. at 5. The Complaint, however, alleges that NYCRC "reaffirmed . . . Wailian's entitlement to annual payments" in the *East River Waterfront Project*, saying nothing about the Brooklyn Arena Infrastructure Project. Compl. ¶ 37. Wailian similarly claims "the parties discussed Wailian's entitlement to annual fees for several months after April 1, 2011," which is wholly absent from the Complaint. *See Longo v. Ortiz*, 15-CV-7716 (VEC), 2016 WL 5376212, at *4 (S.D.N.Y. Sept. 26, 2016) ("[T]he Court will not consider factual allegations that Plaintiff raised for the first time in [Plaintiff's] opposition brief . . . . [I]t is 'axiomatic that the Complaint cannot be amended by briefs in opposition to a motion to dismiss.'").

Paper Products, Inc., 22 N.Y.2d 383, 386 (1968) ("Nor will a court 'under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract.'")). And, as addressed above, Wailian's claim that the Court should infer that the parties intended to modify the deadline because they continued to "perform" under the revised contract fails. The Schedule A, including as revised, made clear that Wailian could continue to perform—*i.e.*, refer investors—and NYCRC would continue to accept them, but Wailian would get paid only the standard referral fee, not the bonus. In short, had the parties intended to modify the deadline in the amended Schedule A, they would have done so expressly. They did not.

Brooklyn Navy Yard II Project. Finally, Wailian's attempt to recover bonus payments for the Brooklyn Navy Yard II Project fails under the weight of the facts alleged in the Complaint. Contrary to Wailian's representation in its opposition brief (*see* Opp. at 16–17), the Complaint ***does*** allege a minimum allocation of 42 placements. *See* Compl. ¶ 39. And the Complaint alleges that Wailian ***never*** met that target—referring only 41 placements.[6] Compl. ¶ 40; *see also* Opp. at 16. Significantly, even by the Complaint's own admission, in July 2012, NYCRC reminded Wailian of the 42-placement allocation and the requirement that Wailian must fill all of its allocations to be entitled to the bonus payment. Compl. ¶ 39; *see also* Ex. G. Still, as the Complaint alleges, even by May 2013, nearly a year later, Wailian had failed to complete its

[6] For that reason, among others, Wailian's claim that the Brooklyn Navy Yard II Project was identical to the East River Waterfront Project fails. *See* Opp. at 16. The East River Waterfront Project Schedule A contained no allocation for Wailian to satisfy to receive bonus payments. *See* Ex. C. By contrast, even the Complaint alleges a minimum allocation of 42 placements for the Brooklyn Navy Yard II Project.

allocation.[7] So, Wailian cannot argue that it comported with the requirement to fill all of its allocations, and there is no allegation anywhere in the Complaint that the parties agreed to modify or waive that requirement.

The most Wailian can muster is to point to an email in which NYCRC agreed to increase the ***rate*** of the bonus payment for all projects going forward. Opp. at 16; *see also* Ex. G. Nothing in that email, however, modified the deadlines for the projects or altered the requirement that Wailian had to fill all of its allocations to be eligible for the bonus payment. In the end, contrary to Wailian's assertion, there are no "fact issues as to the terms of the parties' bargain" to be resolved on this Motion. On Wailian's own admission, it never filled the required allocation, whether the Court considers the allegations in the Complaint, the emails exchanged between the parties, or the actual Schedule A for the project.

2. Wailian's Waiver and Estoppel Arguments Also Fail

Wailian further argues that the express language of the parties' agreements should be set aside because "NYCRC waived the dates or is otherwise estopped from relying on them." Opp. at 1. But establishing waiver and estoppel, like modification by conduct, is a high bar—one that Wailian cannot meet on the facts alleged in the Complaint. Waiver requires "the voluntary and intentional relinquishment of a known right that would have been enforceable without the waiver." *Jofen*, 2002 WL 1461351, at *6. As NYCRC demonstrated, alleging wavier therefore requires Wailian to set forth facts demonstrating an intent to waive that is "unmistakably manifested" and conduct that "evidence[s] an indisputable mutual departure from the written agreement." Mot. at 18–19 (citing *Jofen*, 2002 WL 1461351, at *7; *Picture Patents*, 788 F. Supp.

[7] Wailian claims NYCRC "*concedes that Wailian performed*." Opp. at 16 (emphasis in original) (citing Def. Br. 14). In fact, the exact opposite is true: NYCRC said then, and repeats here, that Wailian filled 41 of its 42 investor placements, and this not until May 2013, so Wailian clearly did *not* perform under the bonus payment provision. *See* Mot. at 14.

2d at 143–44). Likewise, succeeding on an estoppel theory would require Wailian to allege not only that NYCRC's conduct induced its "significant and substantial reliance," but also that its conduct was "***not otherwise compatible with the agreement as written***." *Ixe Banco, S.A.*, 2008 WL 650403, at *8 (emphasis in original) (quoting *Rose v. Spa Realty Ass'n*, 42 N.Y.2d 338, 344 (1977)). Wailian nowhere disagrees that it must carry these heavy burdens to succeed on its waiver and estoppel theories, and it is clear from facts alleged in the Complaint that it cannot meet them.

Wailian's core theory remains that NYCRC "caused Wailian to believe that it would not enforce the timing provisions of the Schedule A's" because NYCRC "accepted Wailian's performance – timely or not – without reservation." Opp. at 18. But, again, NYCRC's conduct is entirely consistent with the governing contracts. The Schedule A's explain exactly what happens when Wailian continues to refer—and NYCRC continues to accept—investors after the specified bonus deadlines: Wailian gets a referral fee for each investor (and there is no dispute that NYCRC paid Wailian the $14 million in referral fees it earned), but does not get any additional bonus payment. *See, e.g.*, Ex. B. And, of course, as the Complaint itself alleges, NYCRC performed exactly according to these terms, never paying a bonus payment when Wailian failed to satisfy the contractual requirements for earning them. *See* Compl. ¶ 6. In short, nothing in NYCRC's acceptance of late-referred investors reflected an "indisputable mutual departure from the written agreement," as required to find a waiver. *Picture Patents*, 788 F. Supp. 2d at 143–44. The law does not require NYCRC to reiterate what the contract says on its face to be able to enforce its clear and unambiguous provisions.

Wailian further insists that NYCRC waived or is estopped from enforcing the deadlines because NYCRC allegedly made "affirmative representations that Wailian's performance was

stellar." Opp. at 18. This contention fails. As discussed above, the contract makes clear that its provisions cannot be "waived" orally (*see* Ex. A ¶ 11), so allegations resting on supposed conversations praising Wailian's work (*see, e.g.*, Compl. ¶ 54), even if true, would be insufficient to effect a waiver. Moreover, and in any event, none of these alleged representations reflect NYCRC's "unmistakable intent" to waive its contractual rights. It is of course wholly consistent with the contractual language for NYCRC to voice its approval of Wailian's performance, and to pay Wailian the standard referral fees it earned, while withholding the bonus payments Wailian did not earn. An allegation that NYCRC praised Wailian's work does not demonstrate an unequivocal relinquishment of a known right required to find a waiver.

Finally, Wailian contends that NYCRC "affirmatively acknowledged" Wailian's right to receive bonus payments for the Brooklyn Arena Infrastructure Project, including by incorporating bonuses into its formal projections and continuing to track Wailian's progress to filling its 100-investor allocation after the deadline. Opp. at 12. Again, to the extent that these allegations rest on oral conversations, as the Complaint alleges (*see, e.g.*, Compl. ¶ 59), they cannot overcome the parties' express agreement that such conversations could not effect a waiver. And the allegation that NYCRC continued to monitor Wailian's progress after the deadline does not show an intentional relinquishment of the deadline. Instead, it reflects that NYCRC continued to keep track of how many allocations Walian had filled—and how many it still had open—so Wailian could continue to earn its standard referral fee. Nothing in NYCRC's continued tracking of Wailian's performance constitutes a definitive promise to excuse the deadline for awarding additional bonus payments.

3. Wailian Cannot Excuse its Failure to Comply with Deadlines by Claiming it "Substantially Performed" the Contract

Wailian next argues that the Court should excuse its failure to comply with the

contractual prerequisites to earning the bonus payments because it "substantially performed the agreements in question." Opp. at 19. This, of course, is a stark admission that Wailian did not comply with the contractual conditions to payment. Nonetheless, according to Wailian, it is still entitled to a bonus because "[w]here a party substantially performs a contract, it is due compensation thereunder." *Id*. But Wailian ***was*** compensated for its actual performance under the contract—NYCRC paid Wailian more than $14 million in referral fees for its work in performing under the contract. And, again, the contract itself makes clear what happens when Wailian performs some of the terms of the contract, but not all: Wailian receives the standard referral fee, but not the bonus. Nothing in the law of "substantial performance" allows the Court to ignore that half of the parties' bargain. Indeed, as NYCRC showed in its opening brief, conditions precedent such as these "must be literally observed when a contract's language unmistakably expresses them." *Karmilowicz v. Hartford Fin. Serv. Grp*., No. 11 Civ. 539 (CM)(DCF), 2011 WL 2936013, at *10 (S.D.N.Y. July 14, 2011); *see also* Mot. at 13.

Wailian implicitly acknowledges this hurdle, so it advances two additional arguments for why the Court should ignore the express condition in the contract. First, Wailian claims that the failure to comply with a condition precedent is an affirmative defense, so the question cannot be resolved on this motion. Opp. at 19. Here, however, Wailian's problem is not merely that it failed to allege that the conditions were satisfied, as in the cases it cites,[8] but rather that the Complaint affirmatively alleges that the conditions ***were not*** met. *See* Mot. at 12. This Court may appropriately grant a motion to dismiss on that basis, as courts routinely do. *See, e.g.*, *Baraliu v. Vinya Capital, L.P.*, No. 07 Civ. 4626 (MHD), 2009 WL 959578, at *5 (S.D.N.Y. Mar. 31, 2009) (granting motion to dismiss where plaintiff "***admits*** in another part of his complaint that the

[8] *Endovasc. Ltd. v. J.P. Turner & Co.*, 169 F. App'x 655 (2d Cir. 2006) and *United Res. Recovery Corp. v. Ramko Venture Mgmt., Inc.*, 584 F. Supp. 2d 645 (S.D.N.Y. 2008).

conditions precedent were not satisfied") (emphasis added); *Cohen v. Avanade, Inc.*, 874 F. Supp. 2d 315, 321–22 (S.D.N.Y. 2012) (granting motion to dismiss where "[plaintiff], ***by his own admission***, failed to meet the specified sales and revenue targets" rendering him eligible for a claimed bonus) (emphasis added).[9]

Second, Wailian now claims that the contractual requirements for the bonus payments are not conditions precedent at all, but promises that are "reviewable for substantial performance."[10] Opp. at 19. This is at odds with the Complaint, where Wailian expressly alleged that the requirements were "conditions." *See, e.g.*, Compl. ¶ 19 (alleging that NYCRC was to pay bonus payments, "subject to certain conditions"). Wailian's argument is also at odds with the contractual language. The Schedule A's state that bonus payments would be paid "[p]rovided" that Wailian meet certain requirements. *See, e.g.*, Ex. B ¶ 3. Courts have routinely recognized that language as imposing conditions to payment. *See Vemics, Inc. v. Meade*, No. 06 CIV. 8716 (RLC), 2009 WL 2191334, at *2 (S.D.N.Y. July 23, 2009), *aff'd in part, appeal dismissed in part*, 371 F. App'x 181 (2d Cir. 2010) (finding that "parties may also create a condition by drafting provisions which use the words 'such as, if, on condition that, subject to, and provided,' which as a general rule demonstrate an intent to make an express condition precedent"). And it functions that way here: the Complaint does not allege that Wailian was making a promise to fill

[9] Wailian attempts to distinguish NYCRC's authorities "involving employee bonuses," which it claims "are not relevant" because such bonuses "are awarded in an employer's 'sole and absolute discretion.'" Opp. at 20 n.8 (citing *Cohen*, 874 F. Supp. 2d at 321). Yet, in such cases, to even be eligible to receive a bonus, including a bonus subject to an employer's discretion, employees first had to meet certain requirements; where they did not, the Court held that they were not eligible for a bonus. *See, e.g., Cohen*, 874 F. Supp. 2d at 31 ("The claim fails as a matter of law if the plaintiff fails to allege that he or she met the conditions required to receive the bonus.")

[10] Wailian relies on *Nature's Plus Nordic A/S v. Natural Organics, Inc.*, 980 F. Supp. 2d 400 (E.D.N.Y. 2013) to argue that the language "in order for" constitutes a promise not a condition. Not only did the court not consider that question but that holding would not apply here, anyway, because the Schedule A's use different language that courts have held ***does*** establish a condition.

an allocation by a deadline, but instead acknowledges the requirements it had to meet in order to be eligible for the additional bonus payments. *See* Compl. ¶¶ 19, 60.

4. Wailian's Materiality Argument Fails as a Matter of Law

Wailian last argues that the Court should ignore the deadlines and other requirements specified in the parties' agreement because there are "factual questions" whether they were "material" to the bargain. Opp. at 21. At the outset, nowhere in the Complaint does Wailian argue that the deadlines and bonus requirements were not "material." Indeed, as noted, the Complaint acknowledges that Wailian's right to recover the bonus payments was "subject to certain conditions," never once alleging that those conditions were not material to the parties' bargain. *See* Compl. ¶ 19. That alone should be dispositive on this motion—Wailian cannot amend its Complaint by way of an opposition brief. *Longo*, 2016 WL 5376212, at *4.

Wailian further argues that the timing condition could not be material because nowhere do the agreements say that "time is of the essence." Opp. at 21. But the conditions attached to Wailian's entitlement to bonus payments were not merely timing provisions. The contract also included a requirement that Wailian fill all of its investor allocations—something that Wailian ***never*** accomplished for at least two of the projects. *See* Compl. ¶¶ 39, 41 (Brooklyn Arena Infrastructure Project) & 44, 46 (CBD Project).

Moreover, there would be a failure of consideration if the bonus requirements were not material to the parties' bargain. As noted, Wailian received $14 million in standard referral fees for its work securing investors for NYCRC. Those amounts were already guaranteed in a separate provision of the schedule in exchange for delivering investors. The only additional consideration that supports NYCRC's promise to pay bonus payments are the conditions attached to them—the timely referral of investors and the completion of Wailian's full allocation. If those conditions were not material, then there would be no additional consideration to support

Wailian's claimed entitlement to the additional payments. In that case, the promise to pay additional bonus payments, for nothing material in exchange, would fail for want of consideration. *See Tierney v. Capricorn Inv'rs, L.P.*, 189 A.D.2d 629, 631 (1st Dep't 1993) (dismissing plaintiff's claim for breach of contract and holding "[n]either a promise to do that which the promisor is already bound to do, nor the performance of an existing legal obligation constitutes valid consideration."); *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 58 F. Supp. 2d 228, 252 (S.D.N.Y. 1999) ("Under New York law, a contract unsupported by consideration is generally invalid. If the promisor loses nothing, and the promisee acquires nothing by an arrangement, then there is no valid consideration.").[11]

In the end, Wailian cannot have it both ways. Wailian cannot assert that the conditions, including the deadline requirement, are not material but the promised payment streams—attached to the conditions in the same provision—are central to the agreement.

II. WAILIAN'S QUANTUM MERUIT CLAIM SHOULD BE DISMISSED

Wailian's quantum meruit claim also fails. As NYCRC argued, Wailian's quantum meruit claim is barred because valid agreements exist that govern the subject matter of this dispute. *See* Mot. at 23 (citing cases); *see also Poplar Lane Farm LLC v. Fathers of Our Lady of Mercy*, 449 F. App'x 57, 59 (2d Cir. 2011) (attempts to "repackage" claims for breach of contract as "unjust enrichment, implied and quasi contract, and quantum meruit, are generally precluded, unless based on a duty independent of the contract.").

Wailian does not dispute that its breach of contract claim covers the same subject matter as its quantum meruit claim. Instead, Wailian argues that it may plead its contract and quantum

[11] For that reason, *Aeolus Down, Inc. v. Credit Suisse Int'l*, 2011 WL 5570062, on which Wailian heavily relies, is inapposite. In that case, the payments due to plaintiff were supported by several other forms of consideration in addition to the promise to perform by a deadline. Here, as explained, the only consideration that supports Wailian's claim to bonus payments are the conditions attached to them.

meruit claims in the alternative. Courts do allow these claims to proceed in the alternative, but only when there is a "***bona fide dispute*** over the existence of the contract or the contract does not cover the dispute in question." *Shanghai Weiyi Int'l Trade Co. v. Focus 2000 Corp.*, No. 15 CIV. 3533 (CM), 2015 WL 6125526, at *6 (S.D.N.Y. Oct. 16, 2015) (emphasis added). Accordingly, when "both parties agree that a valid and enforceable contract exists between them, Plaintiff may not plead the quasi-contractual theory of unjust enrichment." *New Paradigm Software Corp. v. New Era of Networks, Inc*., 107 F. Supp. 2d 325, 329 (S.D.N.Y. 2000).

There is no bona fide dispute here. Both parties agree that Wailian has alleged the existence of a valid contract governing the dispute about its entitlement to bonus payments.[12] *See, e.g.*, Opp. at 6. Indeed, the only dispute Wailian even purports to identify in its opposition is a question whether a Schedule A exists for the Brooklyn Arena Infrastructure Project. *See* Opp. at 23. But there can be no genuine dispute on that score: the Complaint alleges that the parties executed not one, but two, Schedule A's for the Brooklyn Arena Infrastructure Project (*see* Compl. ¶¶ 23, 25), and NYCRC attached the amended, executed Schedule A to its motion to dismiss. *See* Ex. E.[13] Wailian also suggests that there could be a question whether "Wailian's claims fall within the ambit of a formal Schedule A or an email agreement," but it never explains what questions those could be. Opp. at 23. Indeed, as NYCRC argued in its opening brief,

[12] In fact, Wailian only pleads its *quantum meruit* claim "in the alternative to its claim for breach of contract and in the event that NYCRC disputes the applicability and/or enforceability of the Referral Agreement and/or the relevant Schedule A's. . . ." Compl. ¶ 72. Needless to say, NYCRC does not dispute the existence of the agreements between the parties with respect to any of the six projects alleged in Wailian's Complaint.

[13] Wailian may have meant to claim that there is a dispute about whether the parties executed a Schedule A for the Brooklyn Navy Yard II Project. Still, as NYCRC argued (Mot. at 14-15), and as Wailian ***agrees*** (Opp. at 15-16; Compl. ¶ 39), the writings exchanged by the parties, including the Referral Agreement itself and the parties' emails, set out the terms relating to that project, including an allocation of 42 investors—an allocation that Wailian concedes it ***never*** met. *See supra* 11; Compl. ¶ 41.

Wailian's only claim for an entitlement to any bonus payment at all derives from the Schedule A's (including, incidentally, the Schedule A for the Brooklyn Navy Yard II Project, which it claims never to have seen). *See* Mot. at 24–25. Absent those Schedules, Wailian identifies nothing that would give rise to a meeting of the minds that it should be entitled to any bonus payment for its referral of investors. Wailian's attempt to use a quantum meruit theory to selectively enforce the part of the Schedule granting it bonus payments, while ignoring the part attaching conditions to those payments, should be rejected.

CONCLUSION

For the foregoing reasons, and those set forth in NYCRC's opening brief, the Court should dismiss the Complaint with prejudice.[14]

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Respectfully submitted,

/s/ David J. Lender

David J. Lender
Adam B. Banks
Alea J. Mitchell
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
david.lender@weil.com
adam.banks@weil.com
alea.mitchell@weil.com

Attorneys for Defendant

[14] Contrary to Wailian's request (*see* Opp. at 24 n.11), the Complaint should be dismissed with prejudice because any amendment would be futile, particularly in light of Wailian's admissions that it failed to comply with the express conditions to receive the claimed bonus payments. *See, e.g., Cabrera Capital Mkts., LLC v. Further Lane Sec., L.P.*, No. 12 Civ. 2898 (DAB), 2013 WL 5462373, at *8 (S.D.N.Y. Sept. 25, 2013) (dismissing action with prejudice where "amendment would be futile because Plaintiff would not be able to allege that the condition precedent occurred"); *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.,* No. 10 Civ. 8 (DAB), 2011 WL 1044898, at *8 (S.D.N.Y. Mar. 10, 2011) (complaint dismissed with prejudice and leave to replead denied as futile where "facts pled are incompatible with Plaintiff's legal claims").