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

MEMORANDUM OF LAW IN 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Defendant New York City Regional Center LLC ("NYCRC") respectfully submits this memorandum of law in support of its motion, under Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiff's Complaint.

PRELIMINARY STATEMENT

This breach of contract case should be dismissed for a simple reason: the Complaint itself admits that the contract was not breached. Defendant NYCRC is a U.S. Department of Homeland Security-approved regional center that provides financing for economic development projects in New York City. Under the United States Citizenship and Immigration Services ("USCIS") EB-5 immigrant investment program, NYCRC secures capital from foreign investors and invests those funds in job-creating real estate and infrastructure projects throughout New York City. In exchange for their investments, eligible foreign investors obtain a path toward lawful permanent residence in the United States.

Beginning in 2009, NYCRC hired Plaintiff Wailian Overseas Consulting Group, a "leading" immigration agency that identified and referred eligible Chinese nationals to invest in qualified EB-5 projects managed by NYCRC. The parties' arrangement was straightforward. For each specific project, NYCRC would pay Wailian a referral fee for each qualified investor it referred. In addition, because securing funding on a timely basis was critical to the success of the underlying investment projects, NYCRC agreed to pay Wailian a separate bonus payment if Wailian referred a target number of investors and met other conditions by a specific deadline for each project.

NYCRC paid Wailian all of the referral fees it earned—there is no dispute about this. Instead, this dispute concerns solely Wailian's claimed entitlement to additional bonus payments. But the Complaint itself alleges that Wailian failed to refer the target number of investors to NYCRC by the specified deadline for the relevant projects. In other words, Wailian admits that it

did not do what the contracts required it to do to be eligible for the bonus payments it now claims. These admissions demolish the Complaint.

Because Wailian has no right to recover under the plain language of the contract, Wailian alleges that the parties modified the express language of the contract "either orally, in writing, or through conduct." Compl. ¶ 21. These excuses all fail. To begin, the contract itself makes clear that its terms "may not be waived, changed or terminated orally." Ex. A ¶ 11.[1] So, Wailian's suggestion that NYCRC orally waived the deadlines, or otherwise acknowledged an obligation to pay bonuses when Wailian missed the deadlines—even if true—could not effectively modify the parties' express written agreement to the contrary. Nor did the parties waive the deadlines through any conduct alleged in the Complaint. To be sure, NYCRC continued to accept investors from Wailian after the projects' bonus deadlines expired, and NYCRC paid Wailian referral fees for these additional investors. But the contracts made clear that Wailian would be entitled to the additional bonus payments ***only if*** it met the prerequisite targets by the deadline, and as the Complaint alleges, NYCRC consistently enforced that requirement—never paying a bonus when Wailian missed a deadline. Thus, the parties' alleged conduct was wholly consistent with the contracts' express provisions, not a waiver of them. And, although the parties executed written amendments to certain other provisions of the contracts from time to time, they never amended the ***deadlines*** specified in the contracts for bonus payments—the provisions pertinent here.

Wailian's claim for quantum meruit is equally infirm. At the outset, when, as here, there is a written agreement covering the subject matter of the parties' dispute, no quasi contract claim exists. Moreover, there is no dispute here that Wailian was paid referral fees for referring investors to NYCRC. This dispute concerns solely bonus payments contingent on meeting

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

conditions expressly specified in written agreements. And, as explained, the Complaint makes clear that Wailian did not meet the conditions necessary to earn those bonus payments.

STATEMENT OF FACTS[2]

A. The Parties

Defendant NYCRC provides financing for job-creating real estate and infrastructure projects in New York City. Compl. ¶ 15. NYCRC has raised capital via the EB-5 immigrant investment program since it was approved by USCIS in 2008. *Id.* Congress created the EB-5 program to stimulate economic development and job creation through foreign investment while affording eligible foreign investors the chance to become lawful permanent residents of the U.S. Compl. ¶¶ 2, 12.

Since its designation by USCIS, NYCRC has worked closely with government entities, economic development agencies, and private developers to provide capital for real estate and infrastructure projects that create jobs in high unemployment areas.[3] Loans provided by NYCRC-managed funds have been used in 21 economic development projects throughout the city, including the redevelopment of the Brooklyn Navy Yard, renovation of the George Washington Bridge Bus Station in Washington Heights, redevelopment of a cargo facility at JFK airport, and construction of the City's subway and street-level high-speed WiFi infrastructure networks. *Id.* In addition to fueling economic development, to date, NYCRC project offerings have enabled over 4,600 individuals to become permanent U.S. residents and over 5,500 individuals to become conditional U.S. residents through the EB-5 program.

---

[2] The facts, assumed to be true for the purpose of this motion only, are based on the allegations in the complaint as well as documents attached thereto, and those incorporated by reference.

[3] *See http://www.nycrc.com/about.html* (last visited January 5, 2018). A court may take judicial notice of information publicly announced on a party's website on a 12(b)(6) motion. *See Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 (S.D.N.Y. 2006).

Chinese nationals have historically demonstrated high interest in investing in EB-5 program projects to pursue permanent residency in the United States. Because NYCRC is not licensed by the Chinese government to engage in immigration investment, it collaborates with licensed immigration agencies that help identify and secure prospective Chinese investors for EB-5 projects. Plaintiff Wailian, one such immigration agency, identifies, recruits and refers to regional centers, like NYCRC, Chinese investors who are able to meet the USCIS's stringent requirements for immigration applicants and invest capital in EB-5 program projects. Compl. ¶¶ 2, 13.

B. The Documents Governing the Relationship Between NYCRC and Wailian

Beginning in 2009, and continuing through 2012, NYCRC hired Wailian to secure hundreds of Chinese investors to invest in several EB-5 program projects managed by NYCRC. On November 6, 2009, the parties executed a Referral Agreement that, together with individual "Schedule A's" for each specific project, governed the parties' relationship. Compl. ¶ 17; Ex. A. In general, under the Referral Agreement, Wailian would refer qualified foreign investors to NYCRC to invest in EB-5 program real estate and infrastructure projects in New York City and, in return, NYCRC would pay Wailian a fee for each referred investor, as provided for in the Schedule A for each individual project. Compl. ¶ 18. Specifically, the Referral Agreement provides in pertinent part:

> **Compensation[.]** A potential investor that has been introduced to and approved in writing by the NYCRC is hereafter referred to as a "Prospective Client". NYCRC agrees to pay Agent the referral amounts set forth in Schedule A hereto for Prospective Clients that qualify for an Investment Project, are accepted for investment by NYCRC in such Investment Project, and invest in such Investment Project . . . .

Ex. A ¶ 2(a).

Although the specific terms of the Schedule A for each project varied in their particulars, each Schedule A followed the same general three-part structure. First, the Schedule A would set forth an "allocation" of a certain number of investor placements that NYCRC guaranteed to hold open through a specified date for Wailian's referrals to the project. Compl. ¶ 20. This guarantee was important and conferred significant value on Wailian. NYCRC, like other regional centers, works with numerous immigration agencies in its attempts to secure sufficient financing for its projects. The guarantee meant that NYCRC promised to hold open a certain number of investment slots for Wailian before it began looking to fill those slots with investors referred by other immigration agents. Often the Schedule A placed a time limit on this guarantee. *See, e.g.*, Ex. B ¶ 1; Compl. ¶ 20. After that date, NYCRC could continue to accept investor placements from Wailian, but it could no longer guarantee that it could place the allocated number of investors out of Wailian's referrals, turning in addition to other agents to help fill those slots.

Second, the Schedule A would provide for NYCRC to pay Wailian a referral fee for each qualified investor upon receipt of the investment and completion of certain documentation requirements. *See* Compl. ¶ 18; *see also, e.g.*, Ex. B ¶ 2. Typically, a certain portion of the referral fee would be paid upon receipt of the foreign investor's wire transfer of the investment funds. *Id.* NYCRC would pay another portion after the investor had satisfactorily completed and submitted an I-526 Petition to USCIS, and would pay the remainder upon notice that USCIS had approved the investor's petition. *Id*.

Third, because each EB-5 investment project related to an infrastructure or real estate development project, which operate on strict construction and other deadlines, it was imperative that NYCRC receive investment funds in a timely manner. Thus, to incentivize Wailian to recruit and submit investor applications promptly, NYCRC agreed to pay Wailian an additional bonus if

Wailian secured investors by a deadline specified in the Schedule A for each project. *See, e.g.*, Ex. B ¶ 3. If Wailian met these deadlines—which required Wailian to fill ***all*** of its allocated investor placements and deliver other required documentation by the deadline—NYCRC would make an additional annual payment to Wailian for five years after the first anniversary of each investor's I-526 Petition approval. *Id.*

C. The Investment Projects

As alleged in the Complaint, between 2009 and 2012 NYCRC and Wailian collaborated on eight EB-5 program investment projects. Compl. ¶ 16. Over the course of these projects, NYCRC and Wailian raised hundreds of millions of dollars in foreign investments in job-creating projects in New York City; Wailian referred 464 foreign investors and NYCRC paid Wailian approximately $14 million in referral fees. The four projects that are the subject of the motion to dismiss the breach of contract claim are discussed below.[4]

1. Brooklyn Arena Infrastructure Project

As alleged in the Complaint, in September 2010, Wailian began recruiting investors to fund a project involving infrastructure improvements surrounding the Barclays Center in downtown Brooklyn. Compl. ¶ 23 (the "Brooklyn Arena Infrastructure Project"). The Schedule A that memorialized the parties' agreement concerning the Brooklyn Arena Infrastructure Project allocated to Wailian a total of 100 investor placements and extended the guarantee

[4] The Complaint does not allege that NYCRC owes any payments for two of the projects—the first Brooklyn Navy Yard Project and the Steiner Studios Project. Compl. ¶ 22; *see also* Compl. Ex. A (listing no payments owed for these two projects). In addition, NYCRC does not move to dismiss the breach of contract allegations as to two other projects, the East River Waterfront Project and the George Washington Bridge Bus Station Project. *See* Compl. ¶¶ 28–35. NYCRC does move to dismiss the quantum meruit claim as to these projects including because, as discussed below, the projects are governed by express written agreements. *See* Ex. C and Ex. D (Schedule A's for the East River Waterfront Project and the George Washington Bridge Bus Station Project, respectively). *See infra* pp. 23-25.

through April 1, 2011. Compl. ¶ 23; Ex. E ¶ 2. The Schedule A further provided Wailian a total referral fee of $25,000 per investor, with $5,000 payable "upon the satisfactory completion and submittal of the foreign investor's I-526 Petition to the USCIS" and "[t]he balance of any referral fee due Agent shall be paid upon the USCIS's approval of the foreign investor's I-526 Petition and the receipt of such USCIS approval notice by NYCRC and the foreign investor's legal counsel." *Id.* ¶ 1(a)–(b).

Separately, the Brooklyn Arena Infrastructure Project Schedule A provided for an annual bonus payment if certain conditions were met—specifically, Wailian would be entitled to a bonus "[p]rovided ***all*** of the investors set forth in the Paragraph 2 allocation sign the necessary NYCRC documents (all signature pages) and NYCRC receives all investors' funds into the Project Escrow Account no later than ***April 1, 2011***[.]" *Id.* ¶ 3 (emphasis added). If Wailian met that deadline for all 100 investors, Wailian would "be paid an additional USD $3,000 per year" for each investor over a five year period. *Id*.

The Complaint alleges that "several months" after the April 1, 2011 deadline, the parties "renegotiated" the bonus payment, and that on September 4, 2011, NYCRC confirmed in writing that it would be raising the amount of the bonus payment. Compl. ¶ 25.[5] The Complaint further alleges that in January 2012, the parties executed a "revised" Schedule A for the Brooklyn Arena Infrastructure Project that reflected an increase in the bonus payment from $3,000 to $4,000. Compl. ¶ 25. Critically, however, the Complaint nowhere alleges that the parties amended the

[5] The September 4, 2011 email, referenced in the Complaint and attached hereto as Exhibit F, provided that referral fees for the Waterfront, George Washington Bridge Bus Station, Brooklyn Navy Yard II, and City Point Projects would be raised to $32,500 per investor, and that the interest payments for the Brooklyn Arena Project would be raised to .8% (i.e., $4,000) and the bonus payment for all future projects to 1% (i.e., $5,000). The email did not disturb the deadlines for receiving those bonus payments for the Arena project or any other. *See* Ex. F.

deadline—either in writing or orally—and it is clear from the revised Schedule A that the deadline remained ***April 1, 2011***. *See* Ex. E ¶ 3.

As the Complaint itself alleges, Wailian secured only 58 investors by the April 1, 2011 deadline. Compl. ¶ 26. Wailian alleges that, by December 2011, the "completion of the project's fundraising efforts," Wailian had secured an additional 42 investors, for a total of 100. *Id*. There is no dispute that, for referring these 100 investors, NYCRC paid Wailian $2.5 million in referral fees. *See* Ex. E ¶ 1.

2. Brooklyn Navy Yard II Project

According to the Complaint, in July 2011, NYCRC proposed allocating to Wailian 30 investor placements for a second project to redevelop the Brooklyn Navy Yard (the "Brooklyn Navy Yard II Project"). Compl. ¶¶ 38–39. On August 4, 2011, according to the Complaint, the parties agreed to increase Wailian's allocation to 42 investor placements. *Id.*; *see also* Ex. G ¶ 1.

The Schedule A for the Brooklyn Navy Yard II Project provided Wailian a total referral fee of $32,500 per investor, with $5,000 payable "upon receipt of the foreign investor's full wire into the escrow account"; $10,000 payable "upon the satisfactory completion, submittal, and receipt of the foreign investor's I-526 Petition to USCIS"; and the balance payable "upon USCIS's approval of the foreign investor's I-526 Petition." Ex. G ¶ 2(a)–(c); *see also* Ex. F.

Like other projects, the Brooklyn Navy Yard II Schedule A also provided for a bonus payment, upon Wailian's compliance with certain prerequisites. Specifically, Wailian would be entitled to bonus payment "[p]rovided ***all*** investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and fully completed source of funds information packages by ***December 1, 2011***[.]" Ex. G ¶ 3 (emphasis added). If Wailian secured all 42 investor placements by that deadline and otherwise met those

requirements, Wailian would be entitled to an additional $5,000 per year for each investor for five years beginning on the first anniversary of the approval of the investor's I-526 petition. *Id*.

The Complaint alleges that Wailian did not receive the Schedule A for the Brooklyn Navy Yard II Project, or otherwise learn of the December 1, 2011 bonus deadline, until July 2012. Compl. ¶ 40. Still, as the Complaint admits, Wailian secured only 41 investors for the Brooklyn Navy Yard II Project through ***May 2013***. Compl. ¶ 41. There is no dispute that NYCRC paid Wailian more than $1.3 million in referral fees for the 41 investor placements for the Brooklyn Navy Yard II Project as required by the Schedule A. *See* Ex. G ¶ 2.

3. Central Business District Project

As the Complaint alleges, in September 2011, Wailian began recruiting investors for a project to develop retail space in downtown Brooklyn (the "CBD Project"). Compl. ¶ 44. As memorialized in the CBD Project Schedule A, the parties initially agreed on an allocation of 175 investor placements to Wailian and a total referral fee of $32,500 per investor, payable like other projects in stages upon receipt of the investors' wire transfers and I-526 petition documentation. Ex. H ¶¶ 1–2; Compl. ¶ 44. NYCRC guaranteed the allocation through March 31, 2012. Ex. H. ¶ 1. The Complaint alleges that on October 30, 2011, the parties increased Wailian's allocation for the CBD Project to 185 investors. Compl. ¶ 45.

In addition, the CBD Project Schedule A provided for a bonus payment upon Wailian's satisfaction of certain prerequisite conditions. Specifically, Wailian would be entitled to an annual bonus of $5,000 per investor, "[p]rovided ***all*** investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and source of funds packets by ***March 31, 2012***[.]" Ex. H ¶ 3 (emphasis added).

According to the Complaint, Wailian referred only 54 investors by the March 31, 2012 deadline. Compl. ¶ 46. Wailian referred another 61 investors by July 2012, for a total of 115

investors. There is no dispute that NYCRC paid Wailian more than $3.7 million in referral fees for referring the 115 investors. *See* Ex. H ¶ 2.

4. Medical Campus Project

Finally, the Complaint alleges that in May 2012, Wailian began referring investors to NYCRC for a project to help finance the redevelopment of a commercial area in the Bronx (the "Medical Campus Project"). Compl. ¶ 48. The Medical Campus Project Schedule A memorializes the parties' agreement to pay Wailian a total referral fee of $35,000 per investor, payable upon receipt of the investors' wire transfers and I-526 petition paperwork. Ex. B ¶ 2.

The parties initially agreed on an allocation of 40 investor placements, with a guarantee deadline of July 1, 2012. Ex. B ¶ 1. The parties subsequently amended the Schedule A to provide for a total of 50 investor placements, and extended the guarantee deadline to July 15, 2012. Ex. I ¶ 1; Compl. ¶ 48. The amended Schedule A, like other projects, also provided for Wailian to receive an annual bonus of $5,000 per investor, and set a deadline of July 15, 2012 for Wailian to refer all 50 investors to receive the bonus payment. Ex. I ¶ 3. Specifically, the Schedule A entitled Wailian a bonus payment "[p]rovided ***all*** investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and fully completed source of funds packets by ***July 15, 2012***[.]" *Id.* (emphasis added).

As the Complaint alleges, Wailian referred only 43 investors by July 15, 2012. Compl. ¶ 50. Wailian referred an additional seven investors after the deadline, for a total of 50. *Id.* There is no dispute that, for referring these 50 investors, NYCRC paid Wailian a total of more than $1.7 million in referral fees. *See* Ex. I ¶ 2.

ARGUMENT

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "sufficient factual matter . . . to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible only when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "If the allegations of a pleading are contradicted by documents made a part thereof, the document controls," and the Court need not accept the complaint's allegations as true. *Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, No. 14–CV–3251 (JPO), 2017 WL 4386902, at *6 (S.D.N.Y. Sept. 29, 2017) (internal quotation marks and citation omitted). The Court may consider "the full text of documents that are quoted in or attached to the complaint, or that the plaintiff either possessed or knew about and relied upon in bringing the suit." *Karmilowicz v. Hartford Fin. Serv. Grp.*, No. 11 Civ. 539 (CM)(DCF), 2011 WL 2936013, at *5 (S.D.N.Y. July 14, 2011) ("Plaintiff's failure to include matters . . . which were integral to [its] claim—and that [plaintiff] apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion." (quoting *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991))).

I. PLAINTIFF'S BREACH OF CONTRACT CLAIM MUST BE DISMISSED

To state a claim for breach of contract under New York law,[6] a plaintiff "must allege facts that prove: '1) the making of a contract, 2) plaintiff's performance of the contract, 3) defendant's breach of the contract and 4) damages suffered by the plaintiff.'" *Baraliu v. Vinya Capital, L.P.*, No. 07 Civ. 4626 (MHD), 2009 WL 959578, at *4 (S.D.N.Y. Mar. 31, 2009) (citation omitted). As explained below, the Complaint fails to allege the most basic of these elements—breach. Wailian does not dispute that it was paid all applicable referral fees for its EB-5 program investments with NYCRC. Instead, this dispute concerns solely Wailian's claimed

[6] The Referral Agreement specifies that the interpretation and enforcement of the agreement is governed by New York law. Ex. A ¶ 10.

entitlement to bonus payments in connection with those projects. But, by Wailian's own admissions—stated plainly on the face of the Complaint—it failed to meet the express contractual prerequisites to earn those bonus payments. Wailian's claim for breach of contract therefore fails as a matter of law.[7]

A. Wailian Admits It Did Not Meet the Condition Precedent to Earn the Bonus Payments

The relevant contractual language is unambiguous—and Wailian does not claim otherwise. Under the various Schedule A's applicable to the projects subject to this motion, Wailian was entitled to a bonus payment only if "***all*** investors" in its allocation delivered their investment funds and completed all requisite documentation by a specified deadline.[8] This clear condition precedent had to be satisfied before NYCRC assumed any obligation to pay Wailian a bonus payment for these projects. *See, e.g.*, *O'Grady v. BlueCrest Cap. Mgmt. LLP*, 111 F. Supp. 3d 494, 503 (S.D.N.Y. 2015) ("[T]he satisfaction of a condition precedent 'must occur before a duty to perform . . . arises[.]'" (quoting *Oppenheimer & Co. v. Oppenheimer*, 86 N.Y. 2d 685, 690 (1995))); *Baraliu*, 2009 WL 959578, at *5 ("'Most conditions precedent describe acts or

[7] As noted *supra* note 4, NYCRC does not move to dismiss the breach of contract claim as to the East River Waterfront Project and George Washington Bridge Bus Station Project.

[8] *See* Ex. H ¶ 3 (CBD Project) ("Provided all investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and source of funds packets by **March 31, 2012** Wailian shall be paid an additional USD $5,000 per year . . . .") (emphasis added); Ex. E ¶ 3 (Brooklyn Arena Infrastructure Project) ("Provided all of the investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents (all signature pages) and NYCRC receives all investors' funds into the Project Escrow Account no later than **April 1, 2011** Agent will be paid an additional USD$4,000 per year . . . .") (emphasis added); Ex. G ¶ 3 (Brooklyn Navy Yard II Project) ("Provided all of the investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and fully completed source of funds information packages by **December 1, 2011** Wailian will be paid an additional USD$5,000 per year . . . .") (emphasis added); Ex. I ¶ 3 (Medical Campus Project, as amended) ("Provided all of the investors set forth in the Paragraph 1 allocation sign the necessary NYCRC documents and NYCRC receives all investors' funds and fully completed source of funds information packages by **July 15, 2012**, Wailian will be paid an additional USD$5,000 per year . . . .").

events which must occur before a party is obliged to perform a promise made pursuant to an existing contract.'" (quoting *Oppenheimer*, 86 N.Y. 2d at 690)).

It is blackletter law that unambiguous contracts will be strictly enforced according to their express terms. As courts have explained, "the fundamental objective when interpreting a written contract is to determine the intention of the parties as derived from the language employed in the contract unless statutory language or public policy dictates otherwise." *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). "Where a contract is 'unambiguous on its face, its proper construction is a question of law.'" *O'Grady*, 111 F. Supp. 3d at 500 (quoting *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (discussing New York law)).[9] And these same principles apply with equal force to conditions precedent: a condition precedent "must be literally observed when a contract's language unmistakably expresses them." *Karmilowicz*, 2011 WL 2936013, at *10; *see also Baraliu*, 2009 WL 959578, at *5 (holding that "literal observance is required").

The Complaint nowhere alleges that the text of the Schedule A's setting forth the condition precedent to receiving the bonus payment was anything but clear and unmistakable. And the Complaint itself equally establishes that, for each project subject to this motion, Wailian failed to meet the bonus payment deadline that was a condition precedent to receiving the bonus:

[9] *See also Ixe Banco, S.A.*, 2008 WL 650403, at *6 ("[C]ourts will not look beyond the four corners of a contract unless the contractual terms are ambiguous . . . . Courts will not examine extrinsic evidence "to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face.'") (citation omitted); *Grey v. F.D.I.C.*, No. 88 Civ. 7452 (MJLTHK), 1998 WL 483460, at *5 (S.D.N.Y. Aug. 14, 1998) ("The Court should accord the words and phrases of the contract their plain meaning and 'should not rewrite [an] unambiguous agreement.'") (citation omitted).

Medical Campus Project. For the Medical Campus Project, NYCRC and Wailian agreed to an allocation of 50 investor placements and a deadline to receive bonus payments of ***July 15, 2012***. Ex. I ¶¶ 1, 3; Compl. ¶ 48. But, as the Complaint alleges, by the July 15 deadline, Wailian had fulfilled only 43 investor allocations. *Id*. ¶ 50. By the Complaint's own words, then, the condition precedent was not satisfied, and Wailian was not entitled to the bonus payment.

CBD Project. Similarly, for the CBD Project, NYCRC guaranteed Wailian "an allocation of 175 investor placements" and set a bonus payment deadline of ***March 31, 2012***. Compl. ¶ 44; Ex. H ¶¶ 1, 3. By Wailian's own admission, it "[u]ltimately placed 115 investors for the CBD Project," and only 54 of these by March 31, 2012. Compl. ¶ 46. Thus, not only did Wailian ***never*** satisfy the investor placements allocated to it under the contract, it placed only one-third of those by the deadline. Accordingly, Wailian was not entitled to receive bonus payments.

Brooklyn Arena Infrastructure Project. For the Brooklyn Arena Infrastructure Project, NYCRC guaranteed to Wailian "100 investor placements" and set an ***April 1, 2011*** bonus payment deadline. Compl. ¶¶ 23, 24; Ex. E ¶ 3. Wailian admits that by April 1, 2011, it only had "referred 58 investors to the Arena Project." Compl. ¶ 26. Accordingly, Wailian was not entitled to receive the bonus payment. Although, as discussed below, Wailian alleges that the parties amended the amount of the bonus payment payable under the Brooklyn Arena Infrastructure Project's Schedule A, it is undisputed that the parties never modified the ***deadline*** Wailian had to meet to earn those payments—the revised Schedule A for this project maintains the express April 1, 2011 deadline on its face. *See* Ex. E ¶ 3; *infra* pp. 20-22.

Brooklyn Navy Yard II Project. For the Brooklyn Navy Yard II project, NYCRC guaranteed Wailian 42 investor placements (*see* Compl. ¶ 39), but as the Complaint alleges, Wailian only ever filled 41 of those placements—and not until May 2013. Compl. ¶ 41. The

Schedule A for the project stated a deadline of ***December 1, 2011*** for Wailian to be eligible for the bonus payment, Ex. G ¶ 3, so the Complaint necessarily fails to allege that Wailian met this deadline. As discussed below, Wailian alleges that it never received the Schedule A for the Brooklyn Navy Yard II Project—and so "did not agree to the December 1, 2011 deadline." Compl. ¶¶ 40-41. But, even if true, this does not help Wailian establish an entitlement to the bonus payments. The Complaint alleges that the parties agreed—in writing—to allocate 42 investor placements to Wailian (Compl. ¶ 39), and it is clear from the Complaint's own allegations that Wailian ***never*** met that allocation. Compl. ¶ 41. Therefore, Wailian was not entitled to receive the bonus payment, ***whatever the deadline***, because it never satisfied the condition precedent at any time.

Finally, in any event, if, as Wailian contends, it never saw the Schedule A or agreed to the deadline, then there was no meeting of the minds between the parties that Wailian would be entitled to any bonus payment whatsoever. The Referral Agreement provided that Wailian would be compensated for referring investors to NYCRC (*see* Ex. A ¶ 2(a)), and it was, through $1.3 million in referral fees covering all 41 investors. Wailian cannot seek to selectively enforce certain additional provisions of the Schedule A, including a promise by NYCRC to pay bonus payments, while ignoring other provisions of the Schedule A, including the critical condition precedent to those bonus payments. *See also* discussion *infra* p. 24-25.[10]

[10] The Complaint does not make clear whether Wailian alleges breach of contract with respect to the Brooklyn Navy Yard II project. The project is not included in the list of projects under the heading describing the breach of contract cause of action (*see* Compl. ¶¶ 65–68), but the alleged damages associated with the project are included in the total demand for the breach of contract claim. *See* Compl. ¶ 69 (seeking $9.4 million); *compare* Compl. Ex. A (chart listing total damages for all six claimed projects as $9.4 million). In any event, any breach of contract claim with respect to the Brooklyn Navy Yard II Project would fail for the reasons discussed in the text.

* * *

In short, there is no ambiguity in the language of the Schedules: to qualify for the bonus incentive payment under Paragraph 3 of each Schedule A, Wailian needed to secure investors' payments and documentation by specified deadlines. Wailian admits it missed every single deadline—in two instances, it admits that it *never* provided NYCRC with the number of placements it contracted for, notwithstanding the deadline. Wailian's claim that it is entitled to the additional bonus payments must therefore fail based on the plain language of the Schedules and Wailian's express admissions that the condition precedent was not satisfied. *See Karmilowicz*, 2011 WL 2936013, at *10 (granting dismissal where Plaintiff "pleaded no fact that would obviate any of these condition precedents"); *Cohen v. Avanade, Inc.*, 874 F. Supp. 2d 315, 321 (S.D.N.Y. 2012) ("[Plaintiff] cannot claim any entitlement to a bonus under the terms of the Plan because he did not meet the sales goals that would trigger an incentive payment . . . [T]he 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.").

B. Wailian's Attempts to Excuse Its Failure to Meet the Deadlines All Fail

Because Wailian concedes that the plain language of the Schedule A's would defeat its claims, it attempts to argue that the contracts say something else: that is, that the contractual promises memorialized in the plain language of the Schedule A's were somehow modified "orally, in writing, or through conduct" from their original form. Compl. ¶ 21. These efforts all fail, defeated by the express contractual language, longstanding principles of contract interpretation, and, indeed, the very allegations of the Complaint.

At the outset, the Referral Agreement makes clear that the agreement "fully and completely expresses [the parties'] agreement and ***may not be waived, changed or terminated orally***." Ex. A ¶ 11 (emphasis added). These types of provisions mean what they say, and courts

will strictly enforce them: "A clause prohibiting oral modification is afforded 'great deference' by New York courts." *Ixe Banco, S.A. v. MBNA America Bank, N.A.*, 2008 WL 650403, at *9 (citing *Healy v. Williams*, 30 A.D.3d 466, 467 (2d Dep't 2006)). Accordingly, when a written contract contains such a provision, "an oral modification is not enforceable." *Id.* (citing *Tierney v. Capricorn Investors, L.P.*, 189 A.D.2d 629, 631 (1st Dep't 1993); *see also* N.Y. Gen. Oblig. L. 15-301 (McKinney 2007) ("A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought, or by his agent. . . ."). Thus, as particularly relevant here, alleged "oral promises by company officers to award incentive payments cannot override a written agreement" to the contrary. *Karmilowicz*, 2011 WL 2936013, at *6.

The plain language of the Referral Agreement and this settled law defeats Wailian's attempt to argue that the parties effectively "modified" the contract orally. Compl. ¶ 21. In particular, Wailian alleges that NYCRC "explicitly acknowledged Wailian's entitlement to—and NYCRC's obligation to pay—[outstanding annual payments]," and that Wailian's insistence that the deadlines were real and would be enforced "was totally inconsistent with NYCRC's prior conduct and its prior representations." Compl. ¶¶ 59–60. But NYCRC's position—enforcing the deadlines as written—was totally consistent with the plain language of the contract. That is all that matters; any alleged oral modifications to the contrary would be ineffective. *See Karmilowicz*, 2011 WL 2936013, at *6 (finding that even if Defendant's agent had explicitly promised payments of certain awards, his statement could not override the terms of the incentive payment plans); *see also Ixe Banco*, 2008 WL 650403, at *8–9 ("The party claiming the modification must show not only that the parties' conduct is incompatible with the terms of the

agreement as written, but also that the conduct is unequivocally referable to the oral modification itself. An act is not unequivocally referable to an oral modification if it is equally consistent with the agreement as written.").

Wailian's reference to other oral communications are even further afield. Wailian asserts that NYCRC "regularly and consistently expressed its satisfaction with and approval of Wailian's performance." Compl. ¶ 54. Wailian further alleges that NYCRC "made false representations in response to Wailian's repeated requests for payment." *Id*. ¶ 61. Putting aside that these vague oral communications would be ineffective at modifying the parties' express written agreement, these statements have no bearing on—much less waive—Wailian's deadline to earn the bonus payments. The fact that NYCRC "expressed satisfaction" with Wailian's work does not mean that NYCRC had agreed to waive the bonus deadline or that Wailian had otherwise earned those bonuses. In the end, Wailian's allegation that "NYCRC was in regular communication with Wailian, but NYCRC never stated or implied that it would not make the annual payments" is telling. Compl. ¶ 5. NYCRC of course did state—clearly, in writing, in the text of the parties' agreement—that it would not make bonus payments unless Wailian satisfied the condition precedent to receiving them. NYCRC did not have to consistently reiterate that requirement in the parties' interactions to be able to enforce it.

Wailian's attempts to allege that the parties waived the bonus deadlines or otherwise modified their agreement through conduct are equally unsuccessful. "Under New York law, a waiver requires the voluntary and intentional relinquishment of a known right that would have been enforceable without the waiver." *Jofen v. Epoch Biosciences, Inc.*, No. 01 Civ. 4129 (JGK), 2012 WL 1461351, at *6 (S.D.N.Y. July 8, 2002). A "waiver of a contractual condition is 'not lightly presumed' under New York law: 'the intent to waive must be unmistakably manifested,

and is not to be inferred from a doubtful or equivocal act.'" *Jofen*, 2012 WL 1461351, at *7. Indeed, "'for conduct to amount to a waiver . . . , it 'must not otherwise be compatible with the agreement as written;' rather, 'the conduct of the parties must evidence an indisputable mutual departure from the written agreement.'" *Picture Patents, LLC v. Aeropostale, Inc.*, 788 F. Supp. 2d 127, 143–44 (S.D.N.Y. 2011) (quoting *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003) (citation omitted)). As particularly relevant here, "conduct that is 'wholly consistent with' a contract is insufficient to demonstrate modification of that contract." *Picture Patents, LLC*, 788 F. Supp. 2d at 144 (quoting *Dallas Aerospace, Inc.*, 352 F.3d at 783). "Whether parties' actions are compatible with the written agreement is a matter of law for the court to decide." *Ixe Banco, S.A.*, 2008 WL 650403, at *8. And, "[t]o be valid, a contractual modification must satisfy each element of a contract, including offer, acceptance, and consideration. The course of conduct must evince a meeting of the minds in order to modify the Agreement." *O'Grady*, 111 F. Supp. 3d at 502 (citations omitted).

Wailian alleges that the parties waived the deadline for bonus payments because, even after the deadlines passed, NYCRC continued to "hold Wailian's allocation[s] open," "encourage Wailian to refer investors," and "measure Wailian's progress" toward its original allocations of investor placements. Compl. ¶¶ 24, 26. Wailian further claims that, "with NYCRC's consent," Wailian referred investors beyond the deadlines, who NYCRC accepted. *Id.* ¶¶ 41, 46, 49, 50.

None of these allegations about NYCRC's conduct is inconsistent with the plain language of the contracts, much less demonstrates NYCRC's "unmistakable intent" to waive the required bonus deadlines. The contracts clearly contemplated that Wailian would continue to earn standard referral fees for investors it referred, even after the deadlines stated in the Schedule A's. *See, e.g.,* Ex. B ¶ 2. And the parties' conduct reflected this understanding: NYCRC paid Wailian

the standard referral fees reflected in the Schedule A's for all investors Wailian referred, including those referred after the deadlines. But the contracts equally made clear that Wailian would not be entitled to a bonus payment unless it referred all investors for a particular project's allocation by the specified deadline. *See, e.g.,* Ex. B ¶ 3. And, NYCRC consistently treated this deadline as binding: the actual alleged conduct shows that NYCRC never made a bonus payment when Wailian failed to meet the deadline for earning it.[11] Thus, "NYCRC's prior conduct and its prior representations to Wailian," Compl. ¶ 60, were entirely consistent, and in keeping, with the contract.

Indeed, Wailian's breach of contract theory would lead to a bizarre result: Wailian seeks payments a contract did not promise on the ground that one party's conduct in *not* making those payments showed that the other party was entitled to them. This theory fails (as it must) as a matter of law. NYCRC's alleged conduct was "wholly consistent" and entirely "compatible with the agreement as written," *Picture Patents, LLC,* 788 F. Supp. 2d at 143–44, and does not "unmistakably manifest[]" an intent to waive the bonus payment deadlines. *Jofen*, 2012 WL 1461351, at *7.

Finally, Wailian's attempt to excuse its failure to comply with the Brooklyn Arena Infrastructure Project's deadline by pointing to a purported written amendment and the surrounding conduct likewise fails. There is no dispute that the Schedule A for the Brooklyn Arena Infrastructure Project provided for an allocation of 100 investor placements and an April

[11] For example, Wailian offers in support of its allegations that it "referred an additional 42 investors" after the bonus payment deadline and NYCRC did not "pa[y] *any* annual payments," Compl. ¶¶ 26, 27. This, in fact, demonstrates that NYCRC acted in accordance with the Schedule A's, which only provided for payment of a bonus if Wailian completed all of its placement obligations by the stated deadline. *See also* Compl. ¶¶ 41–42, 46–47, 50–51 (alleging that NYCRC accepted investors beyond the deadlines and paid no annual fees in the Brooklyn Navy Yard II, CBD and Medical Campus Projects, respectively).

1, 2011 deadline to receive the bonus payments. *See* Ex. E ¶ 3; Compl. ¶¶ 23–24. Nor is there any dispute that Wailian failed to meet that April 1, 2011 deadline for this project. Compl. ¶ 26; *see also supra* p. 14. The Complaint alleges that sometime after the April 1 deadline, the parties agreed, first orally, then in writing, to modify the ***amount*** of the bonus payment Wailian would earn if it met the allocation target deadline. *See* Compl. ¶ 25; Ex. E ¶ 3. Wailian contends that this written amendment, and the fact that it was allegedly executed after April 1, 2011, demonstrates the parties' intent to also modify or waive the contractual deadline for Wailian's eligibility for bonus payments. Wailian is wrong.

To begin, the September 4, 2011 email that Wailian contends constituted an amendment was neither specific to the Brooklyn Arena Infrastructure Project nor said anything whatsoever about the project's deadline for earning bonus payments. *See* Ex. F. Instead, the email was addressed in general to pending and future projects, and was totally silent as to the bonus deadlines for the Brooklyn Arena Infrastructure Project or any others. Thus, rather than evidence an intent to modify or waive those deadlines, if anything, the email demonstrated that the bonus deadlines for any pending project would remain unchanged from the plain text of the existing Schedule A's. The written amendments to the Schedule A for the Brooklyn Arena Infrastructure Project cement this view. Those amendments show that the parties agreed to change the amount of any bonus payment, but they left Wailian's deadline for earning the bonus payments completely untouched. *See* Ex. E. Again, this textual modification shows that the parties' did not intend to waive or modify the bonus deadline for this project. Had they intended to do so, they would have made a written amendment to the language of the Schedule A, just as they altered other provisions. Instead, both parties signed the revised Schedule A without any changes to the bonus deadline. The plain and unambiguous language of that revised agreement must control.

Moreover, the fact that the amendment to the bonus amount ultimately had no effect (because Wailian had not met the deadline) does not affect the interpretation of the revised Schedule's unambiguous text. The parties' motives for executing the revised Arena Infrastructure Project Schedule A "are irrelevant to the breach of contract inquiry" and "inadmissible in a straightforward application of the parol evidence rule." *Ixe Banco, S.A.*, 2008 WL 650403, at *7. The amendment simply meant that Wailian would have been entitled to additional bonus amounts had it met the deadline—which it did not. Nor can Wailian make any arguments that it labored under an implied promise to pay a higher bonus amount. According to the Complaint's own admissions, by the time the revised Schedule A was executed (in January 2012, *see* Compl. ¶ 25), Wailian had already referred all 100 investors subject to that project's allocation. *See id.* ¶ 26 (alleging that all investors referred by December 2011).

For the same reasons, Wailian's contention that NYCRC "include[ed] Arena Project annual payments in the income forecasts it provided," Compl. ¶ 59, fails to demonstrate an "unmistakable intent" to waive the deadlines for that project. Even accepting Plaintiff's factual allegations as true, such a projection is (a) consistent with the contract insomuch as it forecasted monies Wailian *could* have earned under the contract had Wailian complied with the deadlines, and (b) at any rate irrelevant, as it does not reflect a modification of the parties' written contract.

II. PLAINTIFF'S QUANTUM MERUIT CLAIM MUST BE DISMISSED

To state a claim for quantum meruit, a plaintiff must allege "(1) the performance of the services in good faith, (2) the acceptance of services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the service." *Mid-Hudson Catskill Rural Migrant Ministry Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005) (Sotomayor, J.). "A complaint does not state a cause of action in unjust enrichment if it

fails to allege that defendant received something of value which belongs to the plaintiff." *Karmilowicz*, 2011 WL 2936013, at *10 (internal quotation marks and citations omitted).

Wailian's quantum meruit claim fails at the threshold because it duplicates its breach of contract claim.[12] Under longstanding New York law, because quantum meruit is rooted in quasi contract, it "may only apply 'in the absence of an express agreement.'" *4Kids Ent., Inc. v. Upper Deck Co.*, 797 F. Supp. 2d 236, 249 (S.D.N.Y. 2011) (quoting *Clark–Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987)). Thus, "New York law does not permit recovery in quantum meruit . . . if the parties have a valid, enforceable contract that governs the same subject matter as the quantum meruit claim." *Mid-Hudson*, 418 F.3d at 175 (citing *Clark–Fitzpatrick*, 70 N.Y.2d at 388); *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 587 (2d Cir. 2006) (New York law "precludes unjust enrichment claims whenever there is a valid and enforceable contract governing a particular subject matter, whether that contract is written, oral, or implied-in-fact."). Accordingly, "[i]t is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Clark–Fitzpatrick*, 70 N.Y.2d at 389.

There is no dispute that a valid, written contract exists between the parties governing their relationship, and in particular, Wailian's identification and referral of qualified foreign investors to NYCRC for investment in these specific EB-5 program projects. The parties' general relationship is governed by the Referral Agreement, and the Schedule A's for each project dictate the precise terms of those particular engagements. *See* Compl. ¶ 17 ("The parties' relationship was governed by a Referral Agreement between NYCRC and Wailian dated

[12] NYCRC moves against the quantum meruit claim with respect to all six of the projects that are alleged in the Complaint.

November 6, 2009 (the 'Referral Agreement') and by subsequent 'Schedule A' agreements executed in connection with each individual Project. . . ."). The existence of these agreements forecloses any relief on a quantum meruit theory.

Wailian alleges that it never received or executed a Schedule A for the Brooklyn Navy Yard II Project, but even assuming *arguendo* that this true, it does not mean there was no written agreement covering this project. As noted, the Referral Agreement generally governed all of the projects that NYCRC and Wailian collaborated on, and Wailian does not dispute this. And, as the Complaint alleges, the basic terms of the Brooklyn Navy Yard II Project were exchanged between the parties in additional writings. The September 4, 2011 email, according to the Complaint, set forth the amounts of the referral fee it would earn for each investor, as well as any bonus payment it would be entitled to if it completed its allocation. *See* Compl. ¶¶ 36, 42. The Complaint further alleges that the parties agreed to an allocation of 42 investors in an August 4, 2011 email. Compl. ¶ 39. So, the basic terms relating to the Brooklyn Navy Yard II Project ***were*** agreed to by the parties in writing. The existence of these written agreements thus precludes relief on a quantum meruit theory. (And, as explained above, any breach of contact claim would fail because, as the Complaint itself admits, Wailian failed to meet this allocation by ***any*** deadline, precluding its entitlement to any bonus payment. *See supra* p. 15.)

Finally, even if these writings did not constitute enforceable contracts precluding its quantum meruit claim, Wailian's claim would still fail on its own terms. NYCRC fairly compensated Wailian for its performance under each Schedule A, including the Brooklyn Navy Yard II Project, by paying Wailian the referral fees it was entitled. Wailian does not dispute this. Ironically, Wailian attempts to locate a right to receive even more—the additional bonus payments—in the Schedule A it now claims not to have received. But if Wailian is right about

this, and it never saw, and the parties never executed, the Schedule A for the Brooklyn Navy Yard II Project, then there was no meeting of the minds as to the terms specified therein, including the right to receive any bonus payments whatsoever. In other words, Wailian cannot contend on the one hand that it was unaware of the terms of the Schedule A, but on the other hand demand the bonus payments the schedule set forth, free of all conditions attached to them. Wailian should not be allowed to repudiate one portion of the contract it performed under while raking in the benefits from said contract, and should be barred from seeking recovery on this claim, even on a quantum meruit theory.

In the end, as Wailian has acknowledged, the bonus payments were to be awarded "subject to certain conditions" (Compl. ¶ 19) and those conditions reflected the additional value to NYCRC in securing all investors allocated by a certain date. Because Wailian missed those deadlines and did not refer investors to NYCRC on a timely basis for these projects, it did not confer that additional value on NYCRC, and NYCRC was not required to compensate Wailian for it. *See supra* pp. 12-16. Indeed, for the Brooklyn Navy Yard II Project, Wailian never completed its allocation. Wailian received fair compensation, in the form of referral fees, for the investors it did refer but it is not entitled under a quantum meruit theory to receive any more.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint.

Dated: New York, New York
January 5, 2018

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