To be Argued by
STEVEN BANKS

New York County Clerk's Index No. 400806 11

New York Supreme Court
Appellate Division – First Department

JASMINE ZHENG and A.T., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– against –

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, SETH DIAMOND, as Commissioner of the New York City Department of Homeless Services, and ROBERT DOAR, as Commissioner of the New York City Human Resources Administration,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiff A.T. ("Appellant"),[1] on behalf of herself and all others similarly situated (collectively, "Advantage Tenants"), by her attorneys The Legal Aid Society and Weil, Gotshal & Manges LLP, respectfully submits this brief in support of the appeal from the order of Supreme Court, New York County (Gische, J.S.C.), entered by the Clerk of the Court on May 2, 2011.

PRELIMINARY STATEMENT

Appellant, on behalf of herself and all other similarly situated formerly homeless Advantage Tenants, appeals from the trial court's denial of the Advantage Tenants' request for a preliminary injunction because the trial court erred as a matter of law by applying the wrong standard in determining that the Advantage Tenants are not likely to succeed on the merits of their claims. The record evidence before the trial court clearly establish that A.T., and some 15,000 similarly situated formerly homeless Advantage Tenants, face imminent eviction and repeat homelessness if Advantage rent payments to their landlords (the "Advantage Landlords") are terminated before their Advantage Agreements expire. Before the trial court, there was no dispute that the Advantage Tenants faced

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[1] In order to ensure her safety, the Plaintiff class representative, a survivor of domestic violence, will be referred to by her initials, A.T., in all documents submitted to the Court. Counsel for the Respondents have been provided with A.T.'s full name and the Respondents have consented to these safety precautions in the proceedings before the trial court. The Complaint (as hereafter defined) included Jasmine Zheng, one of the Advantage Tenants. After the filing of the Complaint, Ms. Zheng withdrew as one of the class representatives, but remains a member of the class of Advantage Tenants.

irreparable harm in the absence of the relief requested and that a balancing of the equities favored the Advantage Tenants -- the trial court found as much, and the Respondents[2] conceded both points.[3] See Record ("R") 22-23.

Given the magnitude of the irreparable harm that the Advantage Tenants faced and the weight of the equities in their favor, the Advantage Tenants only needed to make a minimal showing of likelihood of success. The Advantage Tenants did so; indeed, the trial court concluded that the Advantage Tenants had stated a cognizable claim for relief that Respondents are contractually obligated to continue rent payments to the Advantage Landlords on behalf of the Advantage Tenants until their Advantage Agreements expire. Nevertheless, the trial court improperly speculated, without having conducted any evidentiary hearing, that the Advantage Tenants might not be able to produce sufficient evidence at trial showing that the parties intended to form a contract. Based on this speculation, the trial court improperly denied Appellant's request for relief. If the trial court had properly applied the standard for evaluating the Advantage Tenants' request for interim relief pending a trial on the merits, the Advantage Tenants would have

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[2] The City of New York (the "City"), the New York City Department of Homeless Services ("DHS"), the New York City Human Resources Administration ("HRA"), Seth Diamond, as Commissioner of DHS, and Robert Doar, as Commissioner of HRA shall be collectively referred to as the "Defendants-Respondents" or "Respondents".

[3] Before the trial court, the Defendants-Respondents agreed to apply a ruling in favor of A.T. to all other similarly situated formerly homeless Advantage Tenants. See R-15. After the closing of the record on this appeal, the Defendants stipulated to class certification.

been entitled to a preliminary injunction in order to preserve the status quo until a final decision is reached on the merits.[4]

At the preliminary stage of the litigation before the trial court, the Advantage Tenants established a foundation for a finding of likelihood of success on their claims, and it was improper for the trial court to make an evidentiary finding without a hearing at that early juncture. Indeed, valid and enforceable contracts exist between Respondents and the Advantage Tenants' landlords, as well as between Respondents and the Advantage Tenants. Respondents agreed to pay a specified amount of the Advantage Tenants' monthly rents directly to the Advantage Landlords for one year, and for a second year if the Advantage Tenants met the Respondents' stated criteria. In exchange for the Respondents' guarantees to supply a portion of the rent for leases the Advantage Tenants could not otherwise afford, the Advantage Landlords agreed to rent apartments to the Advantage Tenants. Further, by moving into these apartments, not only did the Advantage Tenants relieve Respondents of their legal obligation to provide temporary, emergency shelter and the cost of providing such shelter to thousands of homeless women, men and children, but the Advantage Tenants took on leases

[4] A.I. and some 15,000 similarly situated formerly homeless Advantage Tenants have only averted imminent eviction and repeat homelessness during the pendancy of this appeal because this Court granted an appellate injunction pursuant to CPLR Section 5518 directing the Respondents to continue making rent payments to the Advantage Landlords on behalf of the Advantage Tenants pending a hearing and determination of this appeal

they could not otherwise afford and gave up services in shelter and their opportunity to apply for other forms of housing. Thus, the Advantage Agreements created contractual obligations between parties with the legal capacity to enter into such contracts, and the parties manifested a clear objective intent to be bound by the obligations contained therein.[4]

Moreover, contrary to the Respondents' claims, the State's decision to cut off reimbursement to Respondents for the Advantage Program has no bearing on the enforceability of the Advantage Agreements; the contracts between Respondents and the Advantage Landlords and Respondents and the Advantage Tenants do not contain a single term conditioning Respondents' guaranteed obligation to pay all or part of the Advantage Tenants' rent on the availability of State or federal reimbursement. And even though the Respondents argue that the Advantage Program should be considered a social services program, this would still not preclude the Advantage Program documents from forming contractual obligations.

Thus, Appellant satisfied her burden of showing a likelihood of success on the claim that Respondents are contractually obligated to continue the Advantage Tenants' rent payments; the trial court should have granted a

[4] Respondents have conceded that, if valid contracts existed with the Advantage Landlords, the Advantage Tenants are intended third party beneficiaries of such contracts. See R-29 ("[Respondents] do [] not dispute that, if there were enforceable contacts with the landlords, the [Advantage Tenants] would be third party beneficiaries thereof.").

preliminary injunction requiring Respondents to continue making such payments to the Advantage Landlords pending a trial and a final determination of the merits of the claims in this case.

Accordingly, the trial court's denial of the Appellant's request for a preliminary injunction was improper, and this Court should reverse the trial court's order.

QUESTION PRESENTED

Did Appellant make a sufficient showing of a likelihood of success on her claim on behalf of herself and others similarly situated that Respondents are contractually obligated to continue rent payments to the Advantage Landlords on behalf of the Advantage Tenants until their Advantage Agreements expire, such that the trial court should have granted a preliminary injunction requiring Respondents to continue making such payments pending a trial and a final determination on the merits of Appellant's claims?

The court below answered in the negative.

STATEMENT OF THE CASE

Respondents are legally required to provide shelter to homeless families with children, as well as homeless single adult women and men.[2] One of

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[2] See Boston v. City of New York, Index No. 402295/08 (Sup. Ct. N.Y. County Dec. 12, 2008) (the "Boston Final Judgment") (R. 53-61) and Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 26, 1981) ("Callahan") (R. 62-81).

the programs Respondents implemented to comply with these legal obligations by relocating homeless New Yorkers to permanent housing is a short-term rental program in New York City known as Advantage (the "Advantage Program"). See R-44.

A. The Advantage Program & The Advantage Agreements

In order to qualify for the Advantage Program, the Advantage Tenants had to meet eligibility criteria, including "work requirement[s]" and a "client contribution." R-109. Homeless families and individuals who left Respondents' shelters to move into private, permanent housing through the Advantage Program relieved Respondents of their legal obligations to provide them with shelter and services and the Advantage Tenants entered into leases that they could not otherwise afford and gave up their ability to pursue other subsidized housing.

Respondents "marketed" the Advantage Program to prospective Advantage Tenants, shelter providers, and prospective Advantage Landlords through fliers, brochures and pamphlets prepared by Respondents. See, e.g., R-84-90. None of these informational materials states that Respondents' Advantage payments are contingent in any way on funding. Indeed, the Advantage Program documents attached to Respondents' own papers set forth the terms of the Advantage Agreements exactly as the Advantage Tenants spelled out in their

moving papers below -- Respondents guaranteed rent payments for one or two years without any funding condition. See, e.g., R-342-357, 359-367.

When a homeless family or individual was deemed eligible by Respondents for Advantage, Respondents issued them a Certification Letter on the letterhead of the Commissioner of DHS and signed by a representative of DHS (including the Commissioner himself). See, e.g., R-339, 130-131. Respondents' Certification Letter notified the Advantage recipients that: (i) they were eligible for the Advantage Program, (ii) they could seek an apartment with a specified maximum monthly rent, (iii) they had to continue to meet Advantage's eligibility criteria on the date of their lease signing, (iv) they should show the Certification Letter to landlords and brokers during their apartment search,[7] (v) they may be required to pay for a portion of their monthly rent if so determined by HRA based on their income and family circumstances, and (vi) Respondents' payments of a specified portion or all of their monthly rent "will be guaranteed" for one year and for a second year if they meet the Advantage Program eligibility criteria. See, e.g., R-130 ("The Advantage program guarantees that the subsidy portion of the rent will be paid..."); R-342, R-44, ¶ 6. After being certified by Respondents to receive

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[7] The Certification Letter had a specific section addressed to Landlords. This section explained the various payments that would be made to the Landlords. This section also gave Landlords contact information if they wanted to accept the Respondents' offer and get their apartments inspected and approved for an Advantage Agreement. See, e.g., R-130 and R-339.

the Advantage rent payments, the Advantage recipients could then sign leases with private landlords and become Advantage Tenants. See R-44, ¶ 6.

When Advantage Tenants entered into leases, Respondents required them to sign an Advantage Program Participant Statement of Understanding ("Participant Statement") that was also signed by a DHS representative. See, e.g., R-132-134. The Participant Statement sets forth, among other things, that (i) the amount the Advantage Tenant must pay as monthly rent was "fixed" at the time of the Certification Letter and "will not change" for one year, (ii) Respondents will pay the entire first month's rent directly to the landlord, (iii) the Advantage Tenant is responsible for a portion of the monthly rent for the remaining eleven months in the year and, if deemed eligible for a second year, twelve months in that second year, and (iv) Respondents "will pay" the specified monthly rent payment directly to the landlord for one year and for a second year if the Advantage Tenant meets the Advantage eligibility requirements. Id.; see also R-349, R-353.

Respondents required the Advantage Landlords to sign an Advantage Program Landlord Statement of Understanding or Landlord Statement of Commitment ("Landlord Statement") that the Respondents prepared with their letterhead at the top. See, e.g., R-359-360, R-361-363. The Landlord Statement sets forth, among other things, that Respondents will make monthly payments directly to the landlord to cover some or all of the Advantage Tenants' monthly

rent. In exchange, the Advantage Landlords made commitments to Respondents, including agreeing that, if the Advantage Tenant vacated his or her apartment, Respondents could install another Advantage Tenant in the apartment without any change in the lease terms and without the Advantage Landlord being able to screen and reject the new tenant as a landlord normally would. See, e.g., R-359, 361.

Respondents also prepared an Advantage Lease Rider with their own letterhead at the top, which was attached to each Advantage lease. See e.g., R-364-376. The Advantage Lease Rider provides that the City shall pay a monthly rent directly to the landlord for one year and for a second year if the Advantage Tenant meets certain criteria. Moreover, pursuant to the Respondents' initial Advantage Lease Rider, when the Respondents renewed an Advantage Tenant for a second year, the Rider required the Advantage Landlords to agree to forego any rent increases to which they would normally be entitled for renting their apartment for a second year. See e.g., R-364, 366, 368.

Nowhere in any of the Advantage documents[8] did Respondents condition their obligations to pay part or all of the Advantage Tenants' rent on receipt of funding or Respondents' fiscal condition. Nowhere in any of the

[8] The Advantage Tenants refer to the documents described above as the "Advantage Agreements." The terms of the Advantage Agreements are defined by one or more documents described above, including the Certification Letter, the Participant Statement, the Landlord Statement, and/or the Lease Rider. The term "Advantage Agreements" encompasses contracts entered into by Respondents, both with the Advantage Tenants and the Advantage Landlords.

Advantage documents did Respondents retain the right to terminate their obligations based on lack of funding during the term of Advantage Lease. Respondents clearly knew how to retain termination rights because other, similar agreements contain precisely those limitations.[9] Moreover, as the Respondent's own trial court papers reveal, the State has specifically told Respondents that the withdrawal of State and federal support did not terminate Respondents' authority to continue the Advantage rent payments. R-465.

B. Proceedings Below

New York City has been engaged in a dispute with the State of New York over the State's funding of the City's budget for this next fiscal year. The State announced that it would no longer offer funding for the City that was earmarked for the Advantage Program, and the City publicly contested the State's decision. In March 2011, Respondents then announced their intention to unilaterally breach the Advantage Agreements. On March 28, 2011, to stop Respondents from breaching their contractual obligations which would subject the 15,000 Advantage Tenants to imminent eviction and repeat homelessness,

[9] Indeed, the Rider to the Advantage leases for participants in the Children's Advantage Program contains a clause indicating that acceptance into the New York City Housing Authority's' Section 8 program would terminate the participants' Advantage eligibility and thereby terminate the Respondents' obligation to continue Advantage payments. See R-366. Thus, Respondents clearly knew how to make their contractual obligations to Advantage recipients contingent upon a future event. See id.; see also R-270-271. They simply did not do so in this case with respect to funding.

Appellant, on behalf of the Advantage Tenants, brought an action asserting claims for specific performance, injunctive relief, declaratory judgment and violations of Advantage Tenants' due process rights (the "Complaint"). At the same time, Appellant filed a motion (the "Motion") for a preliminary injunction to prohibit Respondents from discontinuing rent payments on behalf of the Advantage Tenants prior to the expiration of the Advantage Agreements.[10] On March 28, 2011, the trial court, by an Order to Show Cause, granted a temporary restraining order pending a decision on the Advantage Tenants' Motion, thereby requiring Respondents to honor their obligations under the Advantage program with respect to April and May rent payments. On April 14, 2011, Respondents cross-moved to dismiss the Advantage Tenants' Complaint for failure to state a claim upon which relief may be granted.

On their Motion, the Advantage Tenants demonstrated -- and Respondents conceded -- that the Advantage Tenants would face irreparable harm in the absence of a preliminary injunction. The trial court agreed. R-22-23. Similarly, the Advantage Tenants demonstrated - and Respondents conceded -- that a balancing of the equities weighed in favor of the Advantage Tenants' Motion for a preliminary injunction. The trial court also agreed. R-23. The trial court further

[10] In the same motion, the Advantage Tenants also requested certification of a class of over 15,000 formerly homeless Advantage Tenants. The trial court denied the Advantage Tenants' motion for class certification as unnecessary at that time because Respondents had agreed to treat all Advantage Tenants similarly situated in accordance with the trial court's rulings. See R-35.

found that the Advantage Tenants' claims, as set forth in their Complaint, stated a cause of action as a matter of law and denied Respondents' cross-motion to dismiss the Complaint for failure to state a claim. R-33.

The trial court, however, denied the Advantage Tenants' Motion for a preliminary injunction to continue the trial court's interim relief pending a determination of the litigation (the "May 2 Order"). The Court speculated that the Advantage Tenants were "not likely to succeed on the merits because there [is] little evidence that NYC and the landlords intended to be contractually bound at the time documents were signed." R-33. No evidentiary hearing, though, had been held in the case. Moreover, in denying Respondent's motion to dismiss the Advantage Tenants' Complaint for failure to state a claim, the trial court specifically concluded that there is an "open [ ] question as to whether the [Advantage] program documents created a contract in the first place or whether they were just part of the delivery of a social service program." R-33.

In other words, the trial court did not find in its May 2 Order that the Advantage Tenants' claims fail as a matter of law; rather, the trial court found that the Advantage Tenants have a possibility of prevailing on the merits of their claims. However, contrary to the legal standard for granting interim relief pending a trial on the merits, the trial court denied the Advantage Tenants' request for a preliminary injunction.

The Advantage Tenants appealed from the May 2 Order.

Recognizing the irreparable harm and inequity facing the Advantage Tenants, the trial court stayed its vacatur of its temporary restraining order for ten days to enable the Advantage Tenants to seek interim relief from the Appellate Division. R-37. Appellant filed with this Court a Motion for Interim Relief to Preserve the Status Quo Pending Appeal or for an Expedited Appeal with a Time Preference ("Motion for Status Quo"). In the Motion for Status Quo, Appellant requested that this Court grant the Advantage Tenants interim relief to preserve the status quo pending this appeal. Alternatively, the Advantage Tenants requested that the Court grant the Advantage Tenants an expedited appeal with a time preference and calendar the appeal for the June 2011 term, because, without interim relief, the Advantage Tenants faced imminent eviction proceedings in June 2011.

On June 2, 2011, this Court ordered that the Motion for Status Quo be granted "to the extent of directing the aforesaid payments be maintained pending hearing and determination of the appeal, on condition that the appeal be perfected on or before July 11, 2011 for the September 2011 Term."

Following the issuance of this appellate injunction, at the insistence of the Respondents and without the benefit of this Court's decision on this appeal, the

trial court has conducted a trial on the merits and a b[illegible]g schedule has been set with final submissions due on August 11, 2011.

On this appeal, the Advantage Tenants ask this Court to reverse the trial court's May 2 Order denying the Advantage Tenants' request for a preliminary injunction to prevent imminent eviction and repeat homelessness.

ARGUMENT

I. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD IN EVALUATING THE ADVANTAGE TENANTS' REQUEST FOR A PRELIMINARY INJUNCTION

A. The Advantage Tenants Met The Requirements For A Preliminary Injunction

A preliminary injunction may be granted "in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." N.Y. C.P.L.R. § 6301.

Courts grant preliminary injunctions where (1) the party seeking the injunction has a likelihood of ultimate success on the merits, (2) the moving party may suffer irreparable injury if the injunction is withheld, and (3) a balancing of the equities tips in favor of the moving party. See Terrell v. Terrell, 279 A.D.2d 301, 303, 719 N.Y.S.2d 41, 43 (1st Dep't 2001); Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc., 306 A.D.2d 4, 5, 764 N.Y.S.2d 1, 2 (1st Dep't 2003);

Wright v. Lewis, No. 12376/08, 2008 WL 4681929 (Sup. Ct. Kings County Oct. 23, 2008). As a general matter, a lower court's denial of a preliminary injunction is reviewed for an abuse of discretion. Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F. 3d 108, 114 (2d Cir. 2006); Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990). A lower court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law, such as the application of an incorrect legal standard. Id.; See, e.g., Four Time Square Assocs., 306 A.D.2d 4, 764 N.Y.S.2d 1 (denial of preliminary injunction reversed); Ma v. Lien, 198 A.D.2d 186, 604 N.Y.S.2d 84 (1st Dep't 1993) (same); Societe Anonyme Belge D'Exploitation De La Navigation Aerienne (Sabena) v. Feller, 112 A.D.2d 837, 492 N.Y.S.2d 756 (1st Dep't 1985) (same).

Because the three-factor test is not rigid, courts may weigh the "irreparable harm" and "balance of the equities" factors of the preliminary injunction analysis more heavily than the "likelihood of success" factor. Gluck v. Chevre Liady Nusach Hoary, No. 0320/07, 2007 WL 6895263 (Sup. Ct. Rockland County Apr. 30, 2007) *aff'd*, 55 A.D.3d 668, 865 N.Y.S.2d 356 (2nd Dep't 2008); see also Reuters Ltd., 903 F.2d at 907 ("Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.") (internal quotation marks and citation omitted); Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001) (same). Indeed, New York courts apply a reduced

standard when evaluating the likelihood of success factor if the denial of the injunctive relief would render the final judgment ineffectual. See, e.g., Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942, 943, 892 N.Y.S.2d 430 (2nd Dep't 2009) (plaintiff entitled to a reduced degree of proof on likelihood of success because the denial of a preliminary injunction would disturb the status quo, likely render the final judgment ineffectual and cause irreparable harm in the loss of a long-term leasehold interest); 5 W. 120th Realty Corp. v. Cont'l Capital Group, LLC., No. 110318/05, 2005 WL 2741954, at *3 (Sup. Ct. N.Y. County Oct. 24, 2005) (preliminary injunction to maintain property must be granted to maintain the status quo "even if the movant's success on the merits [could not] be determined at the time that the application for a preliminary injunction [was] brought" because, under the circumstances, "the equities lie in favor of preserving the status quo").

1. Respondents Conceded That The Advantage Tenants Will Suffer Irreparable Injury Absent A Preliminary Injunction And That A Balancing Of The Equities Favors The Advantage Tenants

Respondents did not contest that the Advantage Tenants will suffer irreparable injury if the Respondents breach the Advantage Agreements. R-22-23. Respondents also did not contest that the balancing of the equities weighed in favor of the Advantage Tenants. R-23. Indeed, Respondents affirmatively agreed that

the Advantage Tenants will suffer irreparable injury as a result of Respondents' discontinuance of the Advantage payments.[11]

Thus, the Advantage Tenants have met the second and third elements for a preliminary injunction.

2. The Advantage Tenants Made A *Prima Facie* Showing Of Likelihood Of Success On Their Claims For Specific Performance, Declaratory Relief, And Injunctive Relief

The "likelihood of success on the merits" factor requires only a "*prima facie* showing of a right" and not "actual proof of the case." Terrell, 279 A.D.2d 301, 303, 719 N.Y.S.2d 41, 43 (denial of preliminary injunction reversed because the trial court failed to recognize that "a *prima facie* showing of a right to relief is sufficient" for likelihood of success on the merits and that "actual proof of the case should be left to further court proceedings") (citations omitted); see also Four Times Square Assocs., 306 A.D.2d 4, 5, 764 N.Y.S.2d 1, 2 ("It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive."); Gambar Enters., Inc. v. Kelly Servs., Inc., 69 A.D.2d 297, 306, 418 N.Y.S.2d 818, 824 (4th Dep't 1979) ("As to likelihood of success, '[i]t is enough if the moving party makes a

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[11] See R-96 (Respondents state that "(e)nding Advantage will have devastating consequences," including forcing families back into homelessness, and placing survivors of domestic violence at greater risk of having to return to unsafe living conditions."); R-22-23 ("There is no serious dispute that the plaintiffs (and other similarly situated) will be irreparably harmed if the injunction is not granted. [Respondents] admit[] that the end of the Advantage program will subject many of the 15,000 [Advantage Tenants] to eviction... ").

prima facie showing of his right to relief...'") (citation omitted) (alteration in original). Thus, a judicial determination regarding likelihood of success on the merits should not amount to a pre-determination of the issues. Bingham v. Struve, 184 A.D.2d 85, 88, 591 N.Y.S.2d 156, 158 (1st Dep't 1992) (quoting Tucker v. Toia, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475, 478 (4th Dep't 1976)).

Indeed, it is not for the court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the *status quo* until a decision is reached on the merits. Tucker, 54 A.D.2d at 325-26, 388 N.Y.S.2d at 477-78. Therefore, it is enough that the moving party make a *prima facie* showing of a right to relief, and the actual proving of the case should be left to a full hearing on the merits. McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., 114 A.D.2d 165, 172-73, 498 N.Y.S.2d 146, 152 (2nd Dep't 1986) ("As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings.").

The mere fact that there may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction. Egan v. N.Y. Care Plus Ins. Co., 266 A.D.2d 600, 601-02, 697 N.Y.S.2d 776, 777 (3rd Dep't 1999) ("[T]he first requirement does not compel a demonstration that

success on the merits is practically a certitude."); see Melvin v. Union Coll., 195 A.D.2d 447, 448-49, 600 N.Y.S.2d 141, 142-43 (2nd Dep't 1993).

Inexplicably, the trial court here found that the Advantage Tenants had made a *prima facie* showing of a right to relief that survived Respondents' motion to dismiss the Complaint, but did not have a likelihood of success on the merits because there was "little evidence" of Respondents' intent to be contractually bound by the Advantage documents. In reaching this conclusion, the trial court applied the incorrect legal standard when evaluating a request for a preliminary injunction and improperly made a factual finding without even holding an evidentiary hearing. In denying Respondents' motion to dismiss the Complaint, the trial court actually found that the Advantage Tenants' claims had a sufficient legal foundation and that they had shown a *prima facie* right to relief. Equally, the Advantage Tenants also made the necessary *prima facie* showing of the right to relief required to establish the likelihood to succeed on the merits of their claims that a movant must show to obtain a preliminary injunction.

a. **The Advantage Agreements Satisfy The Requirements For The Formation Of A Contract**

The requirements for the formation of a contract are (1) at least two parties with legal capacity to contract, (2) mutual assent to be bound as manifested by the parties' words and deeds, and (3) consideration. See RESTATEMENT (SECOND) OF CONTRACTS §§ 9, 12, 17 (2001); see also, Rosendale v. Mahoney,

No. 05 CIV. 01966, 2008 WL 2061266, at *7 (S.D.N.Y. Mar. 27, 2008);

Wasserstein Perella Emerging Mkts. Fin., L.P. v. Province of Formosa, No. 97 CIV. 793, 2002 WL 1453831, at * 13 (S.D.N.Y. July 2, 2002). As shown below, the Advantage Agreements meet all three of these requirements.

(i) The Department of Homeless Services Commissioner Had Legal Capacity To Enter Into Contracts To Provide Housing For Homeless New Yorkers

Section 612 of the New York City Charter expressly grants the Commissioner of DHS the power to enter into and administer contracts to provide transitional housing and services for homeless families and individuals:

> The commissioner shall have the powers and perform the duties of a commissioner of social services under the social services law for the purpose of fulfilling his or her responsibilities under this chapter. In the performance of his or her functions, the commissioner shall: 1. be responsible for transitional housing and services provided by the city for eligible homeless families and individuals. ... In performing such duties, the commissioner may...enter into and administer contracts....

New York City Charter § 612(1) (emphasis added).

Indeed, this is precisely what the Commissioner of DHS did as part of the Advantage Program. The Commissioner of DHS sent Certification Letters to eligible Advantage Tenants, explicitly stating that the Advantage Program "guarantee[d]" that their rent would be paid directly from DHS to their landlord for one or two years and delegating to a DHS housing specialist the responsibility for

administering the signing of the particular Advantage leases. See R-339. Each of these letters was on the letterhead of the Commissioner of DHS and was formally signed by a representative of DHS (including the Commissioner himself). See, e.g., R-339, 130-131. Thus, it is clear that the Commissioner of DHS and his delegated representatives had actual authority to enter into the Advantage Agreements with the Advantage Tenants and the Advantage Landlords and to administer those contracts. Such statutorily authorized contracts between the City and the Advantage Tenants and Advantage Landlords are valid and enforceable.

(ii) The Parties Manifested An Objective Intent To Be Contractually Bound As Evidenced By The Advantage Documents And The Parties' Conduct

The existence of a binding contract is not dependent upon the parties' subjective intent. P.J. Carlin Constr. Co. v. Whiffen Elec. Co., 66 A.D.2d 684, 684, 411 N.Y.S.2d 27, 28 (1st Dep't 1978) ("Determination as to the existence of a contractual agreement and its terms depends, not upon the subjective intent of either of the parties...") (citation omitted); Brown Bros. Elec. Contractors v. Beam Constr. Corp., 41 N.Y.2d 397, 399, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 351-52 (1977). Rather, courts look "to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" to determine whether parties have entered into a contractual agreement. Id.; see also Ahlstrom Mach., Inc. v. Associated Airfreight Inc., 272 A.D.2d 739, 741, 708 N.Y.S.2d 497, 499

(3d Dep't 2000) ("In determining whether a party entered into a binding contract, courts eschew the subjective and look to objective manifestations of intent as established by 'words and deeds.'") (internal citation omitted). The rationale behind applying an objective standard is that only a manifestation of intent, and not a party's actual intent, may justify a promisee in understanding that a commitment has been made. Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 460 N.E.2d 1077, 472 N.Y.S.2d 592 (1984); Accurate Realty, LLC v. Donello, 80 A.D.3d 1041, 1041, 915 N.Y.S.2d 394, 395 (3d Dep't 2011) ("Interpretation of a written agreement requires us to determine the parties' intent as derived from the language of the instrument, with the words and phrases employed given their plain meaning.") (citations omitted).

The trial court stated that the Advantage Tenants did not have a high probability of success on the merits because in order to succeed on their contract claim, the Advantage Tenants "would need to prove that, at the time the program documents were signed, NYC and the tenant participant each had an actual intention to [be] bound contractually." R-28. (emphasis added). Likewise, the trial court stated that the Advantage Tenants are "not likely to succeed on the merits because there is little evidence that [Respondents] and the landlords intended to be contractually bound at the time the documents were signed." R-33. In both of these statements, the trial court articulated a requirement for courts to

discern the subjective intent of the parties in order to determine whether a contract has been formed. But, the trial court applied the wrong standard by focusing on subjective intent and failing to focus on the "objective manifestations of the intent of the parties as gathered by their expressed words and deeds." Brown Bros., 41 N.Y.2d at 399, 361 N.E.2d at 1001, 393 N.Y.S.2d at 351-52; Keis Distrib. Inc. v. N. Distrib. C., 226 A.D.2d 967, 968, 641 N.Y.S.2d 417, 419 (3rd Dep't 1996) ("Where the parties' intention to be bound is evidenced by a document's language and terms, then it is such manifestation of the parties' intention, rather than actual or real intention, which controls.") (emphasis added).[12]

When one considers the objective manifestation of the parties' intent from the documents in the record, the contractual nature of the Advantage Agreements becomes clear. With respect to the parties' expressed words, the Advantage documents include a Certification Letter on the Respondents' letterhead from Respondents to the Advantage Tenants, a Participant Statement drafted by Respondents on their letterhead and required to be signed by both the Advantage Tenant and a City representative, a Landlord Statement on the Respondents'

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[12] Indeed, there would be no certainty in contracts if subjective intent governed whether a contract exists. A party could simply claim later that it did not really intend to be bound, regardless of the objective manifestation of that parties' intention at the time of the contract execution. See Winkler v. Kingston Hous. Auth., 259 A.D.2d 819, 686 N.Y.S.2d 513, (3d Dep't 1999) ("In determining whether an agreement has been reached the court looks not to the parties' after-the-fact professed subjective intent, but rather at their objective intent as manifested by their expressed words and conduct at the time of the agreement.") (citation omitted); Jump v. Jump, 268 A.D.2d 709, 701 N.Y.S.2d 503 (3d Dep't 2000).

letterhead required to be signed by the Advantage Landlords, and a Lease Rider drafted by the Respondents on their letterhead and then signed by a City representative, the Advantage Tenants, and the Advantage Landlords.

Not only did the City require the Advantage Tenants and the Advantage Landlords to sign a number of these documents, an act which by itself has contractual significance, but the City also included contractual language within the documents it drafted:

1) "The Advantage program guarantees that the subsidy portion of the rent will be paid directly to your landlord for one year." R-130. (emphasis added).

2) "Rental payment to your landlord will be guaranteed for one year and you may be qualified to receive a second year of rental assistance...." R-342 (emphasis added).

3) "Under the Advantage Program, the City of New York ("City") will pay a portion of my monthly rent (over and above my family's rent contribution) directly to my Landlord." R-132 (emphasis added); see also R-394.

4) "Under the HRA Advantage Program, the City will issue a monthly rent supplement for a period of one year, directly to me, the landlord, on behalf of the eligible HRA Advantage client ("tenant")." R-361 (emphasis added).

In addition to the contractual language found in the body of the Advantage documents, one version of the Landlord Statement of Understanding was actually entitled, "Landlord Statement of Commitment." R-361 (emphasis added). Even the City's Advantage informational materials contained contractual

language. For example, a fact sheet on Work Advantage states that the program involves "guaranteed rent payment" to landlords for twelve months. R-89 (emphasis added). Viewed objectively, words such as "guaranteed," "will pay," "will issue," "shall pay," and "commitment" clearly evince an objective intent by the City to be bound contractually. See Accurate Realty, 80 A.D.3d at 1041, 915 N.Y.S.2d at 395 ("Interpretation of a written agreement requires us to determine the parties' intent as derived from the language of the instrument, with the words and phrases employed given their plain meaning.") (citations omitted); Black's Law Dictionary 772 (9th ed. 2009) (defining the word "guarantee" as "[t]he assurance that a contract or legal act will be duly carried out").

With respect to the conduct of the parties, Respondents objectively manifested an intent to be bound by the Advantage Agreements by becoming extensively involved in drafting the Advantage documents and in the Advantage lease signing process. Specifically, Respondents required each Advantage Tenant, each Advantage Landlord, and a City representative to attend a meeting where both the apartment lease and the Respondents Advantage documents, including the Respondents' lease rider, were signed after all parties reviewed the documents together. R-220-225, ¶¶ 42-51. At this meeting, the City representative also (i) signed the Respondents' Lease Rider, (ii) provided the Advantage Tenant with apartment keys, (iii) scheduled a move-in date, and (iv) paid the security deposit

and three months rent directly to the Advantage Landlord using the Respondents' checks. R-220 ¶ 42. This meeting clearly involved a meeting of the minds, and, by signing a Lease Rider that the City prepared on its letterhead and paying monies to a landlord with City checks in exchange for the landlord's signature and keys to the apartment, the City clearly manifested an intent to be bound by the Advantage Agreements.

The City also manifested an intent to be bound by the Advantage Agreements when it purposefully inserted the term "guarantee" into the Advantage Program documents. Prior to the Advantage Program, the City ran a program called Housing Stability Plus. See R-208, ¶ 9. This program provided rental assistance to former shelter residents; however, payment of the rental assistance depended on the tenant having an open and active public assistance case. Respondents themselves acknowledge that the program ultimately failed because landlords were hesitant to rent apartments when their rental revenue streams could be disrupted by a tenant losing his or her entitlement to public assistance. See R-27 n.5. ("[Respondents] claim[] that landlords were reluctant to participate in prior programs because payment of the subsidy was contingent on the status of the [public assistance] case. The language of guarantee was added to inform landlords that they would be paid regardless of the status of the [public assistance] case."). Thus, Respondents developed the Advantage Program, a program that guaranteed

payment of a tenant's rent, in the hopes of attracting greater landlord participation. In light of the failure of Housing Stability Plus, an objective observer would view Respondents' insertion of the word "guarantee" to mean that Respondents are now unconditionally obligated to make the rental payments. In other words, an objective observer would view the Respondents' undertaking as a contractual obligation, for anything less than an unconditional obligation had already proven ineffectual.

Like the conduct of Respondents, the conduct of the Advantage Tenants also represents an objective manifestation of their intent to be contractually bound to the Advantage agreements. While the trial court stated that the Advantage Tenants' actions may be "consistent with having to meet eligibility requirements for a particular social services program," R-28, in actuality, the Advantage Tenants acted in ways that are quite different from typical recipients of public benefits. For example, the Advantage Tenants legally bound themselves to leases they could not afford on their own, gave up their judicially required right to shelter with roofs over their heads and associated social services, gave up their ability to seek other forms of housing (including supportive housing or other subsidized housing), and moved their families and/or themselves out of shelters in reliance on Respondents' promises. Absent government commitments to pay rent subsidies, recipients of social services generally do not bind themselves to

contracts they cannot otherwise afford — nor are they obligated to do so by any social services program.

With respect to the objective manifestations of the Advantage Landlords' intent, the trial court stated that "general arguments [ ] about whether the parties intended to be bound in contractual relationships, as opposed to becoming participants in a social services program, apply equally to the alleged contract with [ ] landlords." R-28. This reasoning is erroneous, however, because the Advantage Landlords, unlike recipients of public benefits, are private businesses that did not enter into Advantage leases for the purpose of receiving social services. Some Advantage Tenants are certified for leases under which they do not pay any portion of their rent and, thus, the Advantage Landlord receives the entire monthly rent from Respondents. The certainty provided by Respondents' commitments actually induced the Advantage Landlords to lease apartments to the Advantage Tenants since the Advantage Landlords made deliberate business decisions to undertake the process of qualifying their apartments for participation in the Advantage Program and rent these apartments to tenants who could not otherwise afford such apartments. See R-138-139. Indeed, there is no evidence that the Advantage Landlords sought or agreed to participate in the Advantage program without any contractual assurances that they would receive the agreed-upon payments, and it is inconceivable that the Advantage Landlords would have

entered into the Advantage Leases if they knew the City could unilaterally discontinue rental payments based on a claim of financial constraints. Id.[13]

Moreover, various terms of the Landlord Statement and Advantage Lease Rider contain commitments of the Advantage Landlord to the City that go beyond the particular Advantage lease that the Advantage Landlord and the Advantage Tenant were signing. For example, the Advantage Landlord agreed that, if the Advantage Tenant vacated his or her apartment, the City could install a different tenant in such apartment on the same terms and conditions. See, e.g., R-359. The City also required each Advantage Landlord to agree that the City could offset any amounts owed to such landlord against any other amounts owed by the landlord to the City under any other arrangement. See, e.g., R-369, ¶ 12. Moreover, the City required the Advantage Landlords to forego their rights to raise the rent for Advantage Tenants who were renewed for a second year. R-369, ¶ 3; see also R-359. To simply state Respondents' position -- that they have no contractual obligations to Advantage Landlords but could nevertheless force Advantage Landlords to agree to certain provisions that benefited the City exclusively -- is to demonstrate how legally insupportable such position is.

(iii) The Advantage Agreements Are Supported By Adequate Consideration

[13] Indeed, in prior programs such as Housing Stability Plus, landlords had dropped out of the program because rent payments were not guaranteed. See R-306.

Consideration is a bargained-for benefit to the promisor or a bargained-for detriment to the promisee. While a promise to perform a pre-existing legal duty does not constitute valid consideration, the promisee's promise or performance of an act that he or she is not legally obligated to do may be considered a legal detriment even if it does not create an actual loss to the promisee. See Weiss v. Weiss, 266 A.D. 795, 41 N.Y.S.2d 777 (2d Dep't 1943); see also Maritas v. Campbell, No. 84 Civ. 2270-CSH, 1985 WL 1407, at *4 (S.D.N.Y May 22, 1985). Courts generally inquire only into the existence -- and not the adequacy -- of consideration such that, as the famous old adage says, even a "peppercorn" would suffice as consideration. See generally, JOHN EDWARD MURRAY, JR., CORBIN ON CONTRACTS (Desk ed. 2011) §§ 5.02, 5.04; Mencher v. Weiss, 306 N.Y. 1, 8, 114 N.E.2d 177, 181 (1953); Mandel v. Liebman, 303 N.Y. 88, 93, 100 N.E.2d 149, 152 (1951); Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc., 28 F.3d 259, 265 (2d Cir. 1994).

As discussed above, in exchange for Respondents' promises to pay some or all of the Advantage Tenants' rents, the Advantage Tenants entered into leases they could not otherwise afford, gave up their judicially required right to shelter with roofs over their heads and associated social services, and gave up their opportunity to apply for other forms of housing, including supportive housing or other subsidized housing. See, e.g., R-125-129. Respondents' promises, thus,

induced thousands of homeless New Yorkers to move out of shelters and into private, permanent housing. Contrary to Respondents' contentions before the trial court, the Advantage Tenants did not have a pre-existing legal duty to enter into Advantage leases, especially at rent levels that they could not afford. See R-28 ("While the regulations do require homeless families and individuals in the shelter system to seek, cooperate and not refuse permanent housing, or risk sanctions, they need not accept permanent housing that is unaffordable."). While homeless shelter residents should "actively seek housing other than temporary housing ... and not unreasonably refuse or fail to accept any such housing," they are under no obligation to seek or accept housing they cannot afford in the absence of the Advantage payments. See 18 N.Y. Comp. Codes R. & Regs. tit. 18, § 352.35(c)(3); R-28 (homeless families and individuals are not required to accept housing that is unaffordable); R-410-411 (administrative finding that tenant was justified in refusing to sign a lease he could not afford).

Moreover, the Advantage Tenants promised, among other things, to abide by the terms and conditions of their leases and "to participate in surveys and/or publicity for the Advantage Program." R-349. These promises represent a new legal detriment to the Advantage Tenants because prior to signing their leases, they had no obligation to pay rent, no obligation to abide by the terms and conditions of their leases or Advantage more generally, and no obligation to

participate in Respondents' surveys or give up their privacy to promote Respondents' Advantage program. See Becker v. Colonial Life Ins. Co., 153 A.D. 382, 138 N.Y.S. 491 (2d Dep't 1912); Richman v. Brookhaven Servicing Corp., 80 Misc. 2d 563, 363 N.Y.S.2d 731 (Dist. Ct. Suffolk County 1975); Gottlieb v. Tropicana Hotel & Casino, 109 F. Supp. 2d 324, 329 (E.D. Pa. 2000) (holding that the minimal detriment to a participant in a promotional contest, including allowing a casino to gather personal information about her, was sufficient consideration for a valid contract). Thus, the Advantage Tenants incurred a legal detriment as a result of entering into the Advantage Agreements.

The Advantage Landlords also incurred legal detriment by entering into the Advantage Agreements. For example, the Advantage Landlords promised to return any pre-paid deposit to the City if any Advantage Tenant left an apartment due to an eviction or move, or, at the option of the City, to allow a new Advantage Tenant to reside in the apartment if the original Advantage Tenant vacated the apartment. See R-359, 361, 397. In addition, the Advantage Landlords promised not to charge Advantage Tenants more than their share (i.e. the non-guaranteed portion) of the rent under the leases and to renew the leases of the Advantage Tenants at the same rent level if so directed by the City. See R-359, 361, 397. These promises, made directly to Respondents in exchange for the certainty of Respondents' guaranteed commitment to pay a portion of the

Advantage Tenants' rent, clearly represent new legal detriment to the Advantage Landlords.[13]

While both the Advantage Tenants and Advantage Landlords incurred legal detriments, Respondents acquired substantial benefits through the Advantage Agreements. First, by leaving the Respondents' homeless shelters to move into permanent housing through Advantage, the Advantage Tenants relieved the Respondents of their obligation to provide them shelter and services under the Boston Final Judgment and the rulings and orders in Callahan. Second, by entering into the Advantage Agreements, the Advantage Tenants provided a significant benefit to the City's bottom line in terms of a gross dollar amount. Finally, as the operators of the homeless shelter system, Respondents are subject to various liabilities, owing those in shelter special duties of care. When Advantage recipients left shelters and entered into private apartments, many of those liabilities ceased to exist for Respondents.

The trial court stated that what the Advantage Tenants have identified as consideration "can be equally consistent with [an Advantage Tenant's] decision to participate in a voluntary social services program." R-27-28. However, the Court found that whether the Advantage Tenants' actions constituted consideration

[13] By entering into the Advantage Agreements -- to their detriment -- the Advantage Landlords also gave up the opportunity to rent to other tenants who had the ability to pay rent on their own because they were induced by the City's rent payment guarantees and upfront rent payments. See R-139, ¶ 5.

or were "merely aspects and consequences of participating in the Advantage program" could not be determined as a matter of law, thus rejecting Respondents' argument that the Complaint should be dismissed for want of consideration. R-28. The Advantage Tenants' actions, however, are not mere aspects or consequences of participating in the Advantage program. Rather, the Advantage Tenants' actions are objective manifestations of their intent to be contractually bound by the terms of the Advantage Agreements and demonstrate their reliance on Respondents' commitment to be contractually bound by the Advantage Agreements as well.

Thus, the Advantage Tenants presented more than sufficient evidence establishing that both the Advantage Tenants and the Advantage Landlords provided adequate consideration to Respondents.

b. The Advantage Tenants Are Likely To Succeed On Their Claim For Specific Performance

Under New York State common law, specific performance should be granted where "(1) there is a valid contract between the parties; (2) the plaintiff has substantially performed under the contract and is willing and able to perform its remaining obligations; (3) the defendant is able to perform its obligations; and (4) the plaintiff has no adequate remedy at law." Niagara Mohawk Power Corp v. Graver Tank & Mfg. Co., 470 F. Supp. 1308, 1324 (N.D.N.Y. 1979); see also Piga v. Rubin, 300 A.D.2d 68, 69, 751 N.Y.S.2d 195, 195 (1st Dep't 2002); Del Valle v. Broccoli, No. 13757 00, 2008 WL 7674448 (Sup. Ct. Kings County Oct. 25,

2008). The facts set forth by the Advantage Tenants easily satisfied these elements.

As discussed above, the Advantage Agreements into which the Respondents entered with each Advantage Tenant are valid and enforceable contracts. The Advantage Tenants have relied on these contractual agreements in exiting the shelter system and entering into private residential leases with their landlords. R-127-128, ¶¶ 9, 12. Respondents did not dispute that the Advantage Tenants have complied, and continue to comply, with the terms of the Advantage contracts in all material respects. The Advantage Tenants' initial relocation from public shelter to private housing subject to Advantage leases constitutes substantial performance under their contracts with Respondents. The Advantage Tenants are also willing and able to perform any and all remaining contractual obligations. R-47, ¶ 13.

Finally, there is no adequate remedy at law that would make the Advantage Tenants whole if Respondents were to discontinue their rent payments pending a final decision on the merits. The Advantage Tenants do not have the resources to find alternative affordable housing on only weeks' or days' notice. Nor can they afford to continue to pay the rent under the leases they signed relying on Respondents' guarantees. R-129, ¶ 14. In fact, it is precisely the Advantage Tenants' precarious financial situations that have rendered them eligible for

participation in the Advantage program in the first place. If Respondents discontinue the payments, the Advantage Tenants will likely either be forced back into the shelter system – assuming that the City has, which it does not, sufficient shelter for 15,000 additional households – or will become homeless on the streets of the City. In either event, Respondents' unilateral abrogation of their contractual obligations to Advantage Tenants will cause irreparable harm, which, as discussed above, Respondents do not dispute. Thus the Advantage Tenants have met the requirements to obtain specific performance.

II. THE ADVANTAGE AGREEMENTS ARE ENFORCEABLE CONTRACTS, AND THE ADVANTAGE TENANTS ARE ENTITLED TO A SECOND YEAR OF ADVANTAGE RENTAL PAYMENTS IF THEY MEET RESPONDENTS' PREVIOUSLY ESTABLISHED CRITERIA

A. Respondents' Advantage Agreements With The Advantage Tenants Are Based On Bargained-For Exchange

For a contract to be enforceable, a connection must exist between the consideration and the party's promise for the consideration. In other words, "[t]he promise and the consideration must purport to be the motive each for the other, in whole or at least in part." Allegheny Coll. v. Nat'l Chautauqua County Bank, 246 N.Y. 369, 373, 159 N.E. 173, 174, 57 A.L.R. 980, 980 (1927). If these conditions are met, there has a been a bargained-for exchange sufficient to create a contract. See id.; Banque Arabe et Internationale D'Investissement v. Bulk Oil (USA) Inc., 726 F. Supp. 1411, 1419 (S.D.N.Y. 1989) (applying New York law).

In this case, by promising to be bound by their leases with the Advantage Landlords and thereby move out of the municipal shelter system, the Advantage Tenants provided substantial benefits to the Respondents, and these benefits motivated the Respondents to enter into the Advantage Agreements. Likewise, the Respondents' promise to make payments directly to the Advantage Landlords motivated the Advantage Tenants to enter into the Advantage Agreements. See, e.g., R-125-129. Thus, there was a bargained-for exchange.

The Respondents' contention that they did not receive a legal benefit from the Advantage Agreements is not only wrong, but patently disingenuous. First, by leaving the Respondents' homeless shelters to move into permanent housing through Advantage, the Advantage Tenants relieved the Respondents of their obligation to provide them shelter under the Boston Final Judgment and the rulings and orders in Callahan. Second, by entering into the Advantage Agreements, the Advantage Tenants provided a significant benefit to the City's bottom line in terms of a gross dollar amount.[15] As the Respondents have admitted, in the absence of Advantage, Respondents will now need to open and operate 70 new shelters throughout the City and expect to incur increased shelter expenses, combined with increased cash assistance and related expenditures. See

[15] Indeed, in announcing the Advantage Program, the State Respondents admitted that moving the Advantage Tenants out of shelters would reduce the State and City's shelter costs. See R-301.

R-111. Thus, the cost of running the Advantage program is significantly lower than the cost of providing temporary shelter and related assistance and is of significant benefit to Respondents.

Finally, Respondents received a benefit from making Advantage payments because the payments transformed the cost of supporting those in homeless shelters from a variable cost to a fixed cost. Without the Advantage program, Respondents' expenses, as they relate to Advantage Tenants, would have been unknowable because the Advantage Tenants might have been in and out of the shelter system for the duration of their Advantage leases. Under the Advantage program, however, the City pays a predetermined amount to Advantage landlords each month, and this payment represents a fixed cost to the City.[16]

B. The Advantage Agreements Are Enforceable Contracts Within The Advantage "Social Services" Program

Respondents have argued that, because Advantage is a social services program, the Advantage Agreements cannot be enforceable contracts. This argument is without merit. As discussed supra at 20, Section 612(1) of the New York City Charter expressly grants the DHS Commissioner the power to enter into contracts to provide transitional housing and services for the homeless.

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[16] As noted supra on page 33, by moving out of the shelters and into Advantage apartments, the Advantage Tenants also helped to reduce the Respondents' liabilities associated with the provision of emergency shelter.

New York courts have found that social services program assistance may be provided by contract. See, e.g., Mut. Hous. of Tompkins County, Inc. v. Hawes, 4 Misc. 3d 247, 780 N.Y.S.2d 276, 283 (Ithaca City Ct. 2004) (deal negotiated between the Department of Social Services ("DSS") and landlord for payment of tenant's rent qualified as a contract); Marks v. City of New York, 121 Misc. 2d 303, 305, 467 N.Y.S. 2d 137, 138 (N.Y. Civ. Ct. 1983) (stating that it is "well settled" that the City and DSS have an obligation to pay a landlord rent for a social service recipient's housing if there is privity of contract between the landlord and the City and DSS). Federal courts have also determined that social services programs and contracts within those programs are not mutually exclusive. See McNeill v. N.Y.C. Hous. Auth., 719 F. Supp. 233, 249 (S.D.N.Y. 1989) (legislation requiring Section 8 housing to meet federal housing standards did not prevent New York City Housing Authority from contracting with landlords to comply with these standards). Thus, the express grant of power to the DHS Commissioner to enter into contracts in furtherance of his duty to provide transitional housing and services to homeless New Yorkers negates Respondents' argument that the benefits provided by the Advantage Program cannot co-exist with enforceable contracts.

C. The Advantage Agreements Are Also Enforceable By The Advantage Tenants As Third-Party Beneficiaries

Wholly apart from the fact that the Advantage Tenants have supplied adequate consideration and that valid contracts exist between the Advantage Tenants and the Respondents, the Advantage Tenants may also enforce their rights as third-party beneficiaries of the contracts between Respondents and the Advantage Landlords.

It is well settled that a person for whose benefit a contract is made may maintain an action against the promisor, including an action for specific performance, even when such person is both a stranger to the contract and to the consideration that supports it. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d. 38, 485 N.E.2d 208, 495 N.Y.S.2d 1 (1985); Lebensfeld v. Bashkin, 144 A.D.2d 542, 534 N.Y.S.2d 221 (2d Dep't 1988) (action for specific performance); 22 N.Y. JUR. 2D § 311 (2008).

As the trial court found, Respondents do not dispute that the Advantage Tenants are third-party beneficiaries if a contract exists between Respondents and the Advantage Landlords.[17] R-29. Here, enforceable contracts do exist between the Advantage Landlords and Respondents. Key terms of the contracts:

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[17] Nor do Respondents dispute that the Advantage Tenants would be intended – as opposed to incidental – beneficiaries. See R-29 ("Respondents] do [] not dispute that, if there were enforceable contracts with the landlords, the [Advantage Tenants] would be third party beneficiaries thereof.").

1) The landlord will accept rent partly from the Advantage Tenant, and partly from the City for one or two years. See, e.g., R-364, ¶¶ 2, 6.

2) The landlord cannot charge an Advantage Tenant an amount above that stipulated in the lease, regardless of changes in family composition. See, e.g., R-359.

3) If the tenant leaves the apartment due to an eviction or move, the landlord will return any pre-paid rent payments to the City of New York or allow, if the City elects this option, another Advantage client to reside in the apartment for the remainder of the period. See, e.g., id.

4) The landlord must agree to renew the Advantage Tenant's lease for a second year at the same rent if the Advantage Tenant receives Advantage payments for a second year from Respondents. See R-359, 361, 364, 398.

In return for these promises, the Advantage Landlords received guaranteed rent payments from Respondents on behalf of the Advantage Tenants for one or two years. Respondents did not condition their obligations to the Advantage Landlords upon funding.

The State's discontinuance of funding for the overall Advantage program does not excuse Respondents from complying with their contractual obligations and terminating the existing Advantage Agreements. See Boccardi v. Horn Constr. Corp., 204 A.D.2d 502, 503, 612 N.Y.S.2d 180, 182 (2d Dep't 1994) (granting specific performance despite claimed defense of impossibility and holding that just because fulfilling Respondents' contractual obligations "may be more difficult or costly than anticipated does not excuse the defendants' performance"); see also N.Y. Pub. Interest Research Group v. Dinkins, 83 N.Y.2d 377, 386, 632 N.E.2d 1255, 1259, 610 N.Y.S.2d 932, 936 (1994) (fiscal year

budget modifications do not excuse public officials from performing a "duty enjoined upon them"); Natural Res. Def. Council, Inc. v. N.Y.C. Dep't of Sanitation, 83 N.Y.2d 215, 630 N.E.2d 653, 608 N.Y.S.2d 957 (1994) (the Legislature's failure to appropriate funds does not discharge the municipality's legal duties).

The existing contracts between Respondents and the Advantage Landlords and Respondents and the Advantage Tenants do not contain a single term conditioning Respondents' guaranteed obligation to pay all or part of the Advantage Tenants' rent on the availability of State or federal reimbursement.[18] While the Lease Riders state that the "duration" of rent payments is subject to all applicable "rules and requirements" of Advantage, the plain language of the Lease Riders indicates that such "rules and requirements" are those discontinuing payments if Advantage Tenants receive federal Section 8 rental assistance or move out before the end of the lease term; requiring the landlords to accept substitute tenants under such circumstances; requiring landlords to provide heating and other services that go to the habitability of the Advantage Tenants' apartments; and

[18] Respondents imply that the great expense of continuing the Advantage subsidy payments for the Advantage Tenants somehow excuses them from doing so. See R-232, ¶ 72. But the fact that fulfilling a contractual obligation is costly is not a legally cognizable defense, excuse or justification for Respondents' breach of their contractual obligations. See N.Y. Pub. Interest Research Group, 83 N.Y.2d at 386, 632 N.E.2d at 1259, 610 N.Y.S.2d at 936 (lack of funding is not a justification for a municipality to disobey its duties under the law); Natural Res. Def. Council, Inc., 83 N.Y.2d at 630 N.E.2d at 608 N.Y.S.2d 957 (same).

prohibiting landlords from soliciting additional payments in excess of lease rents and barring the Landlords from receiving rent increases for the second year of the program. See R-364-365; see also, R-220 ¶ 42 (explaining that Advantage included the City's efforts to ensure that Advantage apartments were habitable). Indeed, the trial court found that Respondents have not "cited to any express program rules or regulations that allow [them] to terminate the program if funds become unavailable." R-32.

Furthermore, New York State's Office of Temporary and Disability Assistance ("OTDA") told Respondents that the State's reimbursement regulations do not require termination of Advantage. R-465. "'The interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable.'" Lefkowitz v. Pub. Serv. Comm'n of State, 77 A.D.3d 1043, 1044, 912 N.Y.S.2d 307, 309 (3d Dep't 2010) (internal quotation omitted). Because OTDA administers 18 N.Y.C.R.R. § 352 and granted initial authorization for Advantage, OTDA's interpretation of this regulation is controlling as to Respondents. Therefore, Respondents' argument that the State regulation overrides their ability to continue to make Advantage rent payments to Advantage Landlords on behalf of the Advantage Tenants until their existing Advantage

Agreements expire or that their obligations to the Advantage Landlords are extinguished by the discontinuance of funding is patently incorrect.[19] See R-465.

D. The Advantage Tenants Must Be Granted A Second Year Of Advantage Rental Payments If They Meet Respondents' Previously Established Criteria

As shown above, Advantage Tenants entered into their Advantage Agreements in reliance on the terms of the Advantage program, which included a second year of rent payments if the Advantage Tenants upheld their obligations under the renewal clause. See, e.g., R-342-345, 349-350, 364-365. Thus, the Advantage Tenants had requested the preliminary injunction to extend through the conclusion of the Advantage Agreements.

In disagreeing with the Advantage Tenants, Respondents cite to the "Pamphlet for Clients in the DHS Shelter" and allege that the use of the word "may" in the phrase "[y]ou may be eligible for a renewal of your lease for a second year" indicates that an Advantage Tenant's renewal is at Respondents' sole and unfettered discretion. Id.; R-384-386. What Respondents do not cite is the Participant Statement, signed by Advantage recipients as well as DHS representatives, which states: "If I am found eligible for a second year of

[19] Moreover, the Advantage Tenants may enforce their rights as third-party beneficiaries even if the Court finds that the Advantage Tenants' Agreements do not grant them any contractual rights vis-à-vis the Respondents. Likewise, as third-party beneficiaries, the Advantage Tenants may enforce their rights stemming from the contracts between Respondents and the Advantage Landlords even if the Court were to determine that the Advantage Tenants did not provide adequate consideration as part of the Advantage Agreements.

Advantage [pursuant to specified eligibility criteria], the City will pay a second year of Advantage Rent Payments to my Landlord on a monthly basis." R-132, ¶ 3 (emphasis added); see also R-349, 353. The language in this document signed by the parties is controlling.

Moreover, Respondents' use of the word "may" is immediately followed by an enumeration of Advantage's criteria for renewal. Thus, "may" does not mean that Respondents can refuse to renew an Advantage Tenant's rent subsidy irrespective of whether the Advantage Tenant meets the renewal criteria; rather, "may" conditions the renewal upon an Advantage Tenant's satisfaction of Advantage's eligibility requirements. Nowhere have Respondents reserved for themselves the right to unilaterally determine that the criteria are void and that no Advantage Tenants will ever be eligible for a second year of rent subsidies.

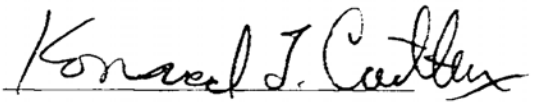
Many of the Advantage Tenants have already entered into the second year of their Advantage leases. Well before the trial court and this Court granted interim relief to continue the Advantage rent payments to the Advantage Landlords, Respondents have continued to pay their rent subsidies to date, thereby conceding that these Tenants have met the renewal criteria and are entitled to maintain their Advantage subsidies for the duration of the two-year term. The City cannot seriously argue that it can now discontinue those mid-stream second-year payments because it had the discretion not to renew for a second year in the first

instance. For Advantage Tenants who have not yet entered the second year, Respondents are contractually bound to uphold the renewal clause of the Advantage Agreement and extend the rent subsidies for a second year, so long as Tenants meet the indicated renewal criteria Respondents established for the Advantage program.

CONCLUSION

For all of the foregoing reasons, the Advantage Tenants respectfully request that the Court vacate the trial court's May 2 Order and grant the requested preliminary injunction to prevent the Respondents from discontinuing Advantage rent payments on behalf of the current Advantage Tenants until their Advantage Agreements expire, pending a trial and a final determination on the merits of their claims. The Advantage Tenants also respectfully request that they be granted such other and further relief as is just and proper.

Dated: July 11, 2011
New York, New York



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