

1-11-5678

To be Submitted by:  
KONRAD CAILTEUX

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**New York Supreme Court**  
**Appellate Division – First Department**

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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.*

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**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS**

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The Plaintiff-Appellants, the Advantage Tenants,<sup>1</sup> by their attorneys The Legal Aid Society and Weil, Gotshal & Manges LLP, submit this reply in further support of their 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 and in response to the Respondents' Brief, filed August 10, 2011.

### **PRELIMINARY STATEMENT**

Respondents fail to answer the key question raised by the Advantage Tenants' appeal: whether the trial court erred as a matter of law by finding that the Advantage Tenants did not show a likelihood of success on their claims even though it found that the Advantage Tenants had stated viable claims that survived Respondents' motion to dismiss. As discussed in the Opening Brief, the Advantage Tenants showed that not only was it improper for the trial court to weigh evidence without a hearing at that preliminary stage of litigation, but, as the trial court itself conceded in denying Respondents' motion to dismiss, the Advantage Tenants made a prima facie showing that contracts exist between Respondents and the Advantage Tenants, as well as between Respondents and the Advantage Landlords. Thus, the trial court applied the wrong standard in

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the brief for Plaintiffs-Appellants in support of the appeal, filed on July 11, 2011 (the "Opening Br.").

determining that the Advantage Tenants are not likely to succeed on the merits of their claims and incorrectly denied the Advantage Tenants' preliminary injunction.

**I. THE ADVANTAGE TENANTS' ALLEGATIONS STATED A CLAIM THAT RESPONDENTS ENTERED INTO CONTRACTS WITH THE ADVANTAGE TENANTS AND THE ADVANTAGE LANDLORDS: THUS, THE ADVANTAGE TENANTS MADE A PRIMA FACIE SHOWING OF A LIKELIHOOD OF SUCCESS ON THEIR CLAIMS AND THE PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED**

As discussed in the Opening Brief at 16-17, and as Respondents have apparently conceded, two of the three elements necessary for issuance of a preliminary injunction are uncontested – that the Advantage Tenants will suffer irreparable harm without a preliminary injunction and that a balancing of the equities weighs heavily in the Advantage Tenants' favor. As shown in the Opening Brief, the Advantage Tenants also met the third element by making a prima facie showing of a likelihood of success on the merits. See Opening Br. at 17-19. Thus, the trial court should have granted the Advantage Tenants' request for a preliminary injunction. None of Respondents' arguments can explain or justify the trial court's failure to do so.

**A. The Trial Court Applied The Wrong Legal Standard**

The Advantage Tenants' burden in seeking the preliminary injunction at issue was to make a prima facie showing that Respondents entered into contracts, or Advantage Agreements, with them and or their Landlords by showing

the parties' capacity to contract, intent to contract, and consideration exchanged. See Opening Br. at 19-20. As to the element of intent, Respondents admit that the appropriate standard in determining whether there is intent to form a contract is an objective rather than a subjective one. See Resp'ts' Br. at 9. Recognizing the fatal impact of that admission on their defense, Respondents argue that the trial court properly applied this objective standard because the trial court opinion did not use the word "subjective." Id. In fact, while the trial court opinion used neither the word "subjective" nor the word "objective," the opinion stated that the Advantage Tenants were required to prove that all parties had "an actual intention to be bound contractually" in order to succeed on their underlying claim. R-28 (emphasis added). An "actual intention" requires a subjective analysis and therefore - contrary to Respondents' arguments - the language of the opinion shows that the trial court applied the wrong standard. See Merriam-Webster's Collegiate Dictionary (10th ed.) (defining "actual" as "existing in act and not merely potentially," "existing in fact or reality," and "not false or apparent"). The trial court, looking for evidence of the parties' "actual intention" to be contractually bound, found 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 (emphasis added).

Accordingly, the trial court's application of the wrong standard requires reversal of its denial of a preliminary injunction.<sup>7</sup>

At the same time, Respondents fail to explain how the evidence in the appellate record is insufficient to support a prima facie showing of objective intent. Respondents simply state that “[i]t need only be said that the LAS Court properly declined to find that program documents evinced a likelihood that plaintiffs would succeed in showing City contracts with Advantage recipients or landlords.” Resp’ts’ Br. at 10-11. However, nowhere do Respondents refute the Advantage Tenants’ claim that the Advantage documents provide prima facie evidence of objective intent to contract. All of the parties voluntarily agreed to the terms of these documents and consequently took on rights and responsibilities that were not otherwise mandated. Opening Br. at 21-29.

**B. The Advantage Agreements Do Not Need To Be Contained In A Single Document Or Be Signed**

A contract need not be embodied in a single document to be enforceable under New York law. Indeed, an oral agreement may constitute a contract. Songbird Jet Ltd. v. Amax Inc., 581 F. Supp. 912, 921 (S.D.N.Y. 1984).

<sup>7</sup> Even though no evidentiary hearing of any kind had been held, the Advantage Tenants’ Complaint contains numerous allegations from which the parties’ intent to be contractually bound can be found, see R-184-204, as do the documents referenced in the Complaint. See, e.g., R-114-140. At this preliminary stage of the case, these allegations and documents more than satisfy the Advantage Tenants’ required showing of a likelihood of success on the merits.

Even when a writing is required, a court may find the existence of a contract despite the parties' failure to set forth their agreement in a single fully executed document. Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985) ("Under New York Law, parties are free to enter into a binding contract without memorializing their agreement in a fully executed document."); see also Am. Smelting & Ref. Co. v. United States, 259 U.S. 75, 78 (1922) ("Of course the expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had.").

In this case, the Certification Letters, the Participant Statements, the Landlord Statements, and the Lease Riders collectively set forth the terms of the Advantage Agreements. See Opening Br. at 9 n.8; R-119, 120, 130, 132, 339-376. That the terms of the Advantage Agreements were never presented in a single document labeled as a "Contract" does not preclude the existence of a binding contractual agreement. See Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 52, 110 N.E.2d 551, 552 (1953) (holding employment agreement to be a valid contract even though its essential terms were found on a "pay-roll change card" and a notepad that "happened to be at hand"); Raubitschek v. Blank, 80 N.Y. 478 (1880) (holding that a signed check and a receipt constituted a contract for the sale of land).

Respondents focus on the absence of hand signatures by the City on certain Advantage documents (or the City's signing as a witness) as an indication that Respondents could not be contractually bound by the Advantage Agreements. See Resp'ts' Br. at 12. Yet contracts need not bear the parties' signatures to be enforceable. Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d 363, 368, 828 N.E.2d 593, 597, 795 N.Y.S.2d 491, 494 (2005) ("We have long held that a contract may be valid even if it is not signed by the party to be charged...."). Thus, the mere presence or absence of a signature cannot be conclusive evidence as to whether the parties agreed to contract.

Even when a signature is required, New York law does not require that the signor handwrite his or her signature in ink. N.Y. Gen. Constr. Law § 46 (McKinney). Rather, New York law defines the term "signature" expansively; the definition includes "any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing." Id. Here, the delivery of the Advantage documents to the Advantage Tenants and Landlords on the City's Department of Homeless Services and Human Resources Administration letterhead is more than sufficient to constitute a signature under New York law. See, e.g., Ahouse v. Herbert, 78 A.D.2d 713, 432 N.Y.S.2d 274, 276 (3d Dep't 1980) (finding there was a sufficient signature where the memorandum was written

on company stationery and bore the initials at the end); Pearlberg v. Levisohn, 112 Misc. 95, 97, 182 N.Y.S. 615, 616 (2d Dep't 1920) (finding there was a valid signature where "[a]t the head of [the document was] the name of the defendants' firm"); Raubitschek, 80 N.Y. at 481-82 (signed receipt constituted a valid signature); see also Rail Media Mgmt., Inc. v. Ill. Cent. Gulf R.R., No. 86-1982, 1986 WL 8455, at \*4 (N.D. Ill. July 29, 1986) (signed check constituted a valid signature). Further, the appellate record shows that City officials did in fact hand sign certain Advantage documents containing terms of the Advantage Agreements. See R-339.

Even if the presence or absence of a hand signature were relevant to this case - which it is not - the signing of certain Advantage documents by City representatives provides evidence that the City and the Advantage Tenants entered into a contract. For example, City representatives signed the Participant Statement of Understanding beneath the following signature block:

I confirm that all present household adult members have verbalized their understanding to the agreement outlined in this document, and that all adult household members have signed and received a copy of this agreement.

R-350. Respondents drafted the Participant Statement, provided it to the Advantage Tenants, required the Advantage Tenants to sign it, and had their representatives sign it below the signature block quoted above. The signature

block's reference to an "agreement" highlights the contractual nature of the Advantage Agreements. Moreover, contrary to Respondents' contention, the City representative's signature, which was intended to confirm the Advantage Tenants' "understanding to the agreement outlined in this document," shows that Respondents and the Advantage Tenants came to a meeting of the minds as to certain essential terms of the Advantage Agreements.

**C. Respondents Specifically Used Words With Contractual Significance In Their Advantage Documents And Communications**

Respondents argue that the Advantage Tenants mistakenly label certain words in the Advantage documents as words of commitment and that those words should be narrowly construed. See Resp'ts' Br. at 15-16. For example, Respondents claim that the term "guaranteed" as used in the Advantage documents only meant that Advantage payments would be made regardless of the Advantage Tenant's public assistance status. See id. at 16. The Advantage documents, though, almost always used the word "guaranteed" without any qualifier. See, e.g., R-130-131, 342, 343, 344, 345, 346, 347, 348, 387-389. Nowhere do any of these "guarantees" say they are subject to funding. See id. Thus, Respondents' use of the word "guaranteed," combined with the lack of any provision making Respondents' guaranteed Advantage payments contingent on funding, shows that

the Advantage payments Respondents seek to discontinue in this case were in fact guaranteed for the term of the Advantage Agreements.<sup>3</sup>

Respondents further argue that their use of the term “guarantee” in the Certification Letters is meaningless because the Certification Letters, “do not constitute a part of the Advantage lease documents.” Resp’ts’ Br. at 17. For several reasons, this argument cannot be sustained. First, as the Advantage Tenants have shown, the Certification Letters contain essential terms of the Advantage Agreements. Opening Br. at 7-8, 9 n.8; R-119, 130, 339-348. Second, under New York law, the terms of an agreement need not be contained in a single document, and courts can, and do, look to multiple writings relating to the same transaction to determine the essential terms of a contract. See Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 52, 110 N.E.2d 551, 552 (1953) (holding employment agreement to be a valid contract even though its essential terms were found on a “pay-roll change card” and a notepad that “happened to be at hand”); Raubitschek v. Blank, 80 N.Y. at 482 (“A letter containing an offer to

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<sup>3</sup> Moreover, if what Respondents argue were true, and Respondents’ Advantage payments were subject to funding, the record suggests that landlords would not have been willing to accept Advantage Tenants, just as they had stopped accepting Housing Stability Plus tenants after discovering that HSP payments were often cut off in the middle of lease terms as a result of changes to HSP tenants’ public assistance status. See R-215, ¶ 26.

sell or to purchase, signed by the party and specifying the terms of the agreement, with an acceptance, will constitute a valid contract.”).

Respondents also argue that if the term “guarantee” were given its plain meaning, it would be inappropriate in the context because “[a] guaranty ‘is a contract of secondary liability under which the guarantor will be required to make payment only when the primary obligor has first defaulted.’” Resp’ts’ Br. at 17. This straw man argument cannot save Respondents, though, because the Advantage Tenants have never claimed that the City is a “guarantor” to agreements between the Advantage Tenants and Landlords. Rather, the Advantage Tenants have shown that the City is a party to an agreement with the Advantage Tenants and the Advantage Landlords. Thus, the definition ascribed to the word “guaranty” by a treatise on suretyship law has no bearing on this case.

In any event, Respondents admit that they drafted all Advantage documents and, under New York law, it is well-settled that if a writing “[i]s ambiguous because it did not state a term explicitly, then its terms must be construed against the drafter.” Cheng v. Modansky Leasing Co., Inc., 73 N.Y.2d 454, 460, 539 N.E.2d 570, 573, 541 N.Y.S.2d 742, 745 (1989). Thus, the Court should adopt the Advantage Tenants’ straightforward interpretation of the word “guarantee.” See Black’s Law Dictionary 772 (9th ed. 2009) (defining “guarantee” as “[t]he assurance that a contract or legal act will be duly carried out”).

**D. Respondents' Prior Course Of Dealing With Advantage Tenants And Landlords Shows That Respondents Intended To Enter Into Contracts**

Respondents suggest that the City's course of dealing with Advantage Tenants and Landlords undermines the Advantage Tenants' contract claims because the parties' relationships were "in the context of providing a public assistance benefit through programs like Housing Stability Plus, not as parties to contracts with each other." Resp'ts' Br. at 19 (emphasis added by Respondents). Respondents overlook the fact that the provision of public assistance benefits through programs like HSP and Advantage can -- and often does -- include contractual agreements. See Opening Br. at 38-39. Therefore, the existence of a social services program can neither preclude nor undermine the existence of a contract.

Furthermore, while it may be true that the Advantage Tenants, during their shelter residency, had certain obligations attendant to their receipt of social service benefits, see Resp'ts' Br. at 20, those obligations are separate from the Advantage Tenants' voluntary acquisition of additional obligations under the Advantage Agreements. The additional obligations the Advantage Tenants undertook through their Advantage Agreements were contractual in nature. See Opening Br. at 38-39.

Respondents' reference to HSP as an example of a non-contractual prior dealing, Resp'ts' Br. at 19, is also inaccurate and misplaced. HSP – like Advantage – did in fact give rise to contractual obligations.<sup>1</sup> Thus, the fact that HSP was the precursor to Advantage, that some of the Advantage Landlords were former HSP landlords, that similar language is used in HSP and Advantage documents to create contracts, and that the Advantage documents – unlike the HSP documents – guaranteed payments to Advantage Landlords, shows that the course of dealing between the parties to the Advantage Agreements supports the Advantage Tenants' contract claims, not Respondents' arguments.

#### **E. The Advantage Tenants Provided New and Adequate Consideration**

Respondents argue that the Advantage Tenants had a pre-existing duty to enter into Advantage leases and thus did not supply new consideration. Resp'ts' Br. at 21-22. To support this claim, Respondents refer to the DIIS Commissioner's statement that "DHS has, in fact, imposed sanctions against families and individuals for failure to seek and accept housing if they were certified to participate in the Advantage Program..." See *id.* at 22. Respondents, however, have failed to specify any statute or regulation providing that individual Advantage Tenants must enter into particular Advantage leases if they are certified to

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<sup>1</sup> Significantly, the HSP agreements, like the Advantage Agreements, did not allow for Respondents' payments to stop as a result of a lack of funding. R-270-272, 273-274, 281, 289-290, 293, 294-295.

participate in Advantage. There is, in fact, no such requirement. To the contrary, a shelter resident may refuse to accept any individual apartment if doing so would be reasonable, and DHS itself has conceded that a shelter resident's decision not to enter a lease because he or she could not afford the full rental amount is reasonable. See R-405-414 (DHS' own administrative decision finding that tenant was justified in refusing to sign a lease he could not afford); R-28 (the trial court found that homeless families and individuals "need not accept permanent housing that is unaffordable").

Moreover, recipients of temporary housing assistance are not under any obligation to enter into Advantage leases: they may enter into leases with any landlord of their choosing, relocate to other appropriate residential facilities, or reunify with family members. Thus, the Advantage Tenants entered their individual Advantage leases voluntarily and without a pre-existing duty to do so. Without such a pre-existing duty, the Advantage Tenants provided consideration when entering into the Advantage leases because they promised to incur a new legal obligation – leasing apartments that they could not afford without Respondents' financial assistance.<sup>5</sup>

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<sup>5</sup> To the extent that Respondents argue that the Advantage Tenants had a pre-existing duty to enter into the Advantage leases because they could afford the apartments with Respondents' financial assistance, Respondents attempt to have their cake and eat it, too. On the one hand, Respondents say that the Advantage

**F. Respondents Did Not Provide Public Assistance Benefits Or Social Services To The Advantage Landlords, And The Advantage Tenants Can Enforce Their Rights As Third Party Beneficiaries**

Respondents argue that Advantage is a “public aid program” and that “[f]or decades, public bodies have wrestled with how best to shape public assistance programs so that they provide necessary benefits, conserve limited public funds, and avoid fostering excessive dependency on public aid.” Resp’ts’ Br. at 13-14. Respondents further argue – without offering any foundation for their claim – that the provision of social services through Advantage precludes the parties from entering into contractual relationships. *Id.* at 19. As set forth in the Opening Brief at 38-39, however, social services may be provided through contracts.

Moreover, even assuming arguendo that Advantage created no contractual rights for the Advantage Tenants because they were “mere” recipients of social services, Respondents cannot credibly argue that they provided any public

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Tenants were legally obligated to enter into the Advantage leases because Respondents made it financially possible for them to do so. On the other hand, Respondents say that they can stop making the very payments that made it possible for the Advantage Tenants to enter into the Advantage leases in the first place at any time based on funding. The end result of this illogical position would be that although Advantage Tenants could be required to enter into leases they could not afford without Respondents’ financial assistance, Respondents would be able to cut off that financial assistance at any time based on a condition never previously disclosed to either the Advantage Tenants or their Landlords, and then require the Advantage Tenants and Landlords to bear the costs of eviction proceedings. For the Advantage Tenants, those costs are severe and include repeat homelessness.

assistance benefits or social services to the Advantage Landlords. Respondents do not even attempt to identify any public assistance benefit or social service received by the Advantage Landlords. Of course, the Advantage Landlords – all private individuals or entities – received no social services from Respondents. See R-138-140. To the extent that Respondents may imply that the Advantage Landlords were, like them, providers of social services, see Resp'ts' Br. at 19, there is simply no support for the proposition. The record on appeal shows the contrary – that the Advantage Landlords were parties entering into a contractual relationship with the City for their own business interest or financial benefit. R-138-140.

Indeed, as long as the Advantage Tenants lived in the apartment under the terms of the Lease Rider, Respondents guaranteed to make "Advantage Rent Payments" to the Advantage Landlords. See R-364-365, 368-370, 371-373, 374-376; see also R-120, 366-367. In exchange, the Advantage Landlords promised Respondents that they would lease their private property to an individual or family residing in shelter, a promise which undoubtedly constitutes consideration. The Landlord Statements drafted and provided by Respondents and signed by the Advantage Landlords state:

I understand that if the Program Tenant terminates the Lease because I have materially violated the Lease or Rider, or obtains a money judgment against me directing me to disgorge any payments or other consideration I received for the

Apartment, the City shall have the right to recoup any security deposit and or pre-paid Advantage Rent Payments made to me, and to bar me from any further participation in any City rental assistance program.

R-82, ¶ 8 (emphasis added). Thus, the Advantage Landlords received consideration in exchange for the use of their apartments just as granting use of their apartments to the Advantage Tenants was consideration for guaranteed Advantage payments from Respondents.

The Advantage Landlords also incurred other legal detriments, such as agreeing to (i) return pre-paid deposits to the City if the Advantage Tenant left the apartment, (ii) not charge Advantage Tenants more than the share determined by Respondents, (iii) renew rent at the same level of rent for a second year (foregoing their right to increase rent upon the expiration of a lease), (iv) allow Respondents -- at their option -- to install a different tenant in their apartment on the same terms and conditions if the Advantage Tenant vacated the apartment, and (v) allow Respondents to offset any amounts owed to the Landlord against any other amounts owed by the Landlord to Respondents under any other arrangement. See R-359-363, 364-365, 368-370, 371-373, 374-376. Moreover, to the extent that Respondents' arguments go to the adequacy of consideration, courts do not engage in such analyses and rather look just for the existence of any consideration. See Opening Br. at 30.

Thus, the record shows that Respondents entered into contracts with the Advantage Landlords, and the Advantage Tenants can enforce their rights as intended third-party beneficiaries to those contracts. See Opening Br. at 40. Furthermore, contrary to Respondents' argument, see Resp'ts' Br. at 24-25, no "durational limit" in the Lease Riders was ever "triggered" by the State Legislature's actions that would excuse Respondents from their contractual obligations to the Advantage Landlords. To make this argument, Respondents point to a clause in the Lease Riders stating that "[t]he Landlord acknowledges that (1) the amount and duration of the [Advantage] Program rent Payment is subject to all applicable rules and requirements of the [ ] Program . . . ." Resp'ts' Br. at 24 (emphasis added by Respondents). Respondents jump from this language to the assumption that "those 'rules and requirements' include the State regulation under which reimbursement for Advantage rent supplements is an essential prerequisite for the program." Id. There is, however, no reference to any "State regulation" as part of Advantage's "rules and requirements" in any Advantage Lease Rider or any of the other Advantage materials. See R-120-121, 364-365, 366-367, 368-370, 371-373, 374-376. Nor have Respondents cited to any source stating as much. That is because, as explained in the Opening Brief at 41-44 and below, no State regulation compelled the termination of Advantage when State funding was withdrawn.

**G. The State Did Not “Effectively End” Advantage With Respect To The Advantage Tenants**

Respondents allege that even if they entered into contracts, the State’s discontinuance of funding for the overall Advantage program terminated the program and discharged their obligations. See Resp’ts’ Br. at 24-27. This is incorrect. Respondents chose to breach their contractual obligations and discontinue making Advantage payments, not the State.

Respondents assert that the State terminated Advantage and “effectively ended” the Advantage program. See Resp’ts’ Br. at 27. While the State declined to assist in the further funding of the program, Respondents do not cite to any evidence that the State ever required Respondents to discontinue Advantage. To the contrary, the State specifically notified Respondents that they could continue to administer Advantage. R-465. Whether Respondents continue Advantage for new Advantage Tenants is not at issue in this case. All that is relevant is whether Respondents can evade their contractual obligation to make Advantage payments for current Advantage Tenants until their Advantage Agreements expire.

## II. RESPONDENTS MUST GRANT A SECOND YEAR OF ADVANTAGE PAYMENTS FOR ADVANTAGE TENANTS THAT MEET RESPONDENTS' PREVIOUSLY ESTABLISHED RENEWAL CRITERIA

As shown in the Opening Brief and herein, valid contracts exist between the Respondents and the Advantage Tenants and Landlords. Respondents' obligations under those contracts includes making a second year of Advantage rent payments on behalf of any Advantage Tenant who meets Respondents' renewal criteria. See, e.g., R-342-345, 349-350, 364-365.

Respondents now argue that an Advantage Tenant's renewal for a second year of Advantage was and should be "subject to the City's discretion" even when the Advantage Tenant meets all renewal criteria. See Resp'ts' Br. at 27-30. Respondents make several claims with absolutely no record evidence to support their untenable argument that they retained such unfettered discretion. See, e.g., id. at 28 (stating that "the eligibility criteria simply define the pool of people who will be considered for a second year if they apply for it" and that "[r]enewal is still defined as a discretionary act," but citing nothing in support).

Respondents then cite to their Advantage proposal sent to OTDA stating that "[c]lients may be renewed for a second year if they meet the Year 2 eligibility requirements . . . ." in support of their argument. Resp'ts' Br. at 28. Although Respondents argue that the word "may" means that the City may

exercise its discretion to deny a second year of Advantage to an Advantage Tenant who meets the renewal criteria, their argument is not supported by the appellate record or their conduct with respect to Advantage renewals. Indeed, Respondents opportunistically ignore the Advantage Participant Statement, signed by Advantage recipients as well as DHS representatives, which provides: “If I am found eligible for a second year of 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 Advantage documents provided to the Advantage Tenants thus show that Respondents must determine whether an Advantage Tenant meets the renewal criteria and may deny renewal only if that criteria is not met. In other words, if the Advantage Tenant meets the renewal criteria, Respondents must make Advantage payments for a second year but if the Advantage Tenant does not meet the renewal criteria, Respondents may, in their discretion, decline to make Advantage payments for a second year.

Moreover, Respondents’ reliance on case law discussing statutory interpretation of the word “may,” see Resp’ts’ Br. at 29-30, is misplaced. As Respondents themselves note, “the course of dealings and the relations between the parties and the language of the instrument itself” will determine the parties’ intention.” Id. at 10 (quoting Mayer v. Crandall, 285 A.D. 723 (3d Dep’t 1955).

Accordingly, Respondents' use of the word "may" for second year Advantage renewals must be defined in the context of the documents that established the terms of the Advantage Agreements, including the Participant Statement, and Respondents' past practices in renewing Advantage.

In any event, the Advantage Tenants seek to maintain the status quo, and this is what Respondents should be ordered to do. In maintaining the status quo, Respondents cannot suddenly decide that the renewal criteria are void or implement a policy that no Advantage Tenants can be eligible for a second year of Advantage even when individual Advantage Tenants meet the Respondents' own published renewal criteria.

### **CONCLUSION**

For the reasons presented in the Advantage Tenants' brief in support of the appeal and in this reply, the Advantage Tenants respectfully request that the Court vacate the trial court's order and grant the requested preliminary injunction to prevent Respondents from discontinuing Advantage rent payments on behalf of the current Advantage Tenants until their Advantage Agreements expire, pending a final determination on the merits of their claims. The Advantage Tenants also respectfully request that this Court grant such other and further relief as is just and proper.

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