

6975

1-12-6965

New York County Clerk's Index No. 400806/11

MICRO-FILM For the Archived by: STEVEN BANKS

**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

THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
(212) 577-3300
sbanks@legal-aid.org

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
konrad.cailteux@weil.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
A. The City’s Obligation to Provide Shelter	6
B. The Advantage Program	7
C. Respondents’ Unilateral Decision to Breach the Advantage Contracts	10
D. Procedural History	11
E. Discovery	12
F. The Trial and the Final Decision.....	14
ARGUMENT	16
I. Appellants Are Entitled To Appellate Relief Because The Trial Court Misapplied The Law And Misinterpreted The Facts In Mistakenly Denying Appellants’ Contract Claim On The Ground That There Was A Lack Of Mutual Assent Between Respondents And Advantage Landlords	16
A. Appellants Are Third-Party Beneficiaries Of The Advantage Contracts Between Respondents And The Advantage Landlords.....	18
B. The Trial Court’s Finding That The Third Element Of Contract – Mutuality Of Assent -- Was Lacking Was Based On A Misapplication Of The Law And Misinterpretation Of The Facts	21
1. The Trial Court Improperly Applied The Legal Standard For Finding Mutual Assent	23

TABLE OF CONTENTS
(continued)

	Page
2. The Trial Court Misinterpreted Significant Objective Evidence Of Mutuality Of Assent In The Form Of Language In The Advantage Documents Themselves Showing That A Contract Had Been Formed	29
3. The Trial Court Misinterpreted The Significance Of The Advantage Contracts Taking Place Within A Social Services Program And The Non-Traditional Format Of The Advantage Agreement Documents	37
II. The Trial Court's Erroneous Discovery And Evidentiary Rulings Also Prejudiced Appellants And Precluded Them From Presenting Their Full Case At Trial	41
A. The Trial Court Improperly Denied Appellants The Right To Discover Material Evidence	41
1. The Trial Court Improperly Denied Appellants' Discovery Requests To, Among Other Things, Depose Certain Witnesses And Obtain Respondents' Internal Documents Before Trial	42
2. The Trial Court Failed To Enforce Its Own Order Requiring Respondents To Produce E-mail Communications With Third Parties	47
B. The Trial Court Improperly Relied On Evidence About Prior Rental Subsidy Programs Even Though It Precluded Appellants From Offering Evidence Regarding The Same	49

TABLE OF CONTENTS
(continued)

	Page
III. The Trial Court Also Erred In Finding That There Was No Enforceable Contract Between Appellants and Respondents	56
CONCLUSION.....	60

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Accurate Realty, LLC v. Donadio,</u> 80 A.D.3d 1041, 915 N.Y.S.2d 394 (3d Dep't 2011)	23, 29
<u>Ahlstrom Mach., Inc. v. Assoc. Airfreight, Inc.,</u> 272 A.D.2d 739, 708 N.Y.S.2d 497 (3d Dep't 2000)	24
<u>Alleghany Corp. v. James Found., Inc.,</u> 115 F.Supp. 282 (S.D.N.Y. 1953)	25
<u>Allen v. Crowell-Collier Publ. Co.,</u> 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968)	42, 50, 51, 53
<u>Best & Co. Haircutters, Ltd. v. Semon,</u> 81 A.D.3d 766, 916 N.Y.S.2d 632 (2d Dep't 2011)	22
<u>Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.,</u> 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1977)	23
<u>Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc.,</u> 28 F.3d 259 (2d Cir. 1994)	59
<u>Cobble Hill Nursing Home v. Henry & Warren Corp.,</u> 74 N.Y.2d 475, 548 N.E.2d 203, 548 N.Y.S.2d 920 (1989)	24
<u>Conopco, Inc. v. Wathne Ltd.,</u> 190 A.D.2d 587, 593 N.Y.S.2d 787 (1st Dep't 1993)	23
<u>Farago Adver., Inc. v. Hollinger Int'l,</u> 157 F.Supp.2d 252 (S.D.N.Y. 2001)	24
<u>Flickinger v. Harold C. Brown & Co.,</u> 947 F.2d 595 (2d Cir. 1991)	18
<u>Forum Ins. Co. v. Worcester County Inst. for Sav.,</u> 219 A.D.2d 492, 631 N.Y.S.2d 165 (1st Dep't 1995)	22

<u>Four Seasons Hotels Ltd. v. Vinnik,</u> 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dep't 1987)	24
<u>Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.,</u> 66 N.Y.2d. 38, 485 N.E.2d 208, 495 N.Y.S.2d 1 (1985)	20
<u>Gargano v. V.C. & J. Constr. Corp.,</u> 148 A.D.2d 492, 538 N.Y.S.2d 953 (2d Dep't 1989)	43
<u>Gregoris Motors Inc. v. Nissan Motor Corp.,</u> 80 A.D.2d 631, 436 N.Y.S.2d 90 (2d Dep't 1981), <u>aff'd</u> , 54 N.Y.2d 634, 425 N.E.2d 893, 442 N.Y.S.2d 505 (1981)	22
<u>Gui's Lumber & Home Ctr., Inc. v. Mader Constr. Co.,</u> 13 A.D.3d 1096, 787 N.Y.S.2d 555 (4th Dep't 2004)	24
<u>Gulf Ins. Co. v. Transatlantic Reinsurance Co.,</u> 13 A.D.3d 278, 788 N.Y.S.2d 44 (1st Dep't 2004)	22
<u>Hoening v. Westphal,</u> 52 N.Y.2d 605, 422 N.E.2d 491, 439 N.Y.S.2d 831 (1981)	42
<u>In re 166 Mamaroneck Ave.,</u> 78 N.Y.2d 88, 575 N.E.2d 104, 571 N.Y.S.2d 686	24
<u>In re Gray v. Chambers,</u> 206 A.D.2d 619, 614 N.Y.S.2d 591 (3d Dep't 1994)	21
<u>In re Loehr v. Governor's Office of Employee Relations,</u> 3 A.D.3d 653, 771 N.Y.S.2d 215 (3d Dep't 2004)	21
<u>In re Maria Mejias v. Town of Shelter Island Zoning Bd.,</u> 298 A.D.2d 458, 751 N.Y.S.2d 409 (2d Dep't 2002)	21
<u>In re N.Y. County DES Litig.,</u> 171 A.D.2d 119, 575 N.Y.S.2d 19 (1st Dep't 1991)	43
<u>In re Prinze,</u> 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (1976)	19
<u>In re Secreto v. County of Ulster,</u> 228 A.D.2d 932, 644 N.Y.S.2d 439 (3d Dep't 1996)	21

<u>Kamhi v. Dependable Delivery Service, Inc.</u> , 234 A.D.2d 34, 650 N.Y.S.2d 676 (1st Dep't 1996)	43
<u>Keis Distrib., Inc. v. N. Distrib. Co.</u> , 226 A.D.2d 967, 641 N.Y.S.2d 417 (3d Dep't 1996)	23
<u>King v. King</u> , 208 A.D.2d 1143, 617 N.Y.S.2d 593 (3d Dep't 1994)	25
<u>Kowalchuk v. Stroup</u> , 61 A.D.3d 118, 873 N.Y.S.2d 43 (1st Dep't 2009).....	18
<u>Lebensfeld v. Bashkin</u> , 144 A.D.2d 542, 534 N.Y.S.2d 221 (2d Dep't 1989)	20
<u>Levin v. Tiber Holding Corp.</u> , 277 F.3d 243 (2d Cir. 2002)	18
<u>Make The Rd. by Walking, Inc. v. Turner</u> , 378 F.3d 133 (2d Cir. 2004)	19
<u>Mandel v. Liebman</u> , 303 N.Y. 88, 100 N.E.2d 149 (1951)	59
<u>Mann v. Cooper Tire Co.</u> , 33 A.D.3d 24, 816 N.Y.S.2d 45 (1st Dep't 2006).....	42
<u>Maritas v. Campbell</u> , No. 84 Civ. 2270-CSH, 1985 WL 1407 (S.D.N.Y May 22, 1985).....	19
<u>Marks v. City of New York</u> , 121 Misc. 2d 303, 467 N.Y.S. 2d 137 (N.Y.C. Civ. Ct. 1983)	38
<u>Martin Delicatessen, Inc. v. Schumacher</u> , 52 N.Y.2d 105, 417 N.E.2d 541, 436 N.Y.S.2d 247 (1981)	24
<u>McNeill v. N.Y.C. Hous. Auth.</u> , 719 F. Supp. 233 (S.D.N.Y. 1989)	38
<u>Mencher v. Weiss</u> , 306 N.Y. 1, 114 N.E.2d 177 (1953)	59

<u>Mitchell v. Stuart,</u> 293 A.D.2d 905, 740 N.Y.S.2d 250 (3d Dep't 2002)	43
<u>Mut. Hous. of Tompkins County, Inc. v. Hawes,</u> 4 Misc. 3d 247, 780 N.Y.S.2d 276 (Ithaca City Ct. 2004).....	37
<u>Orbit Holding Court v. Anthony Hotel Corp.,</u> 121 A.D.2d 311, 503 N.Y.S.2d 780 (1st Dep't 1986).....	22
<u>Poey v. Eggleston,</u> 3 Misc. 3d 543, 777 N.Y.S.2d 227 (Sup. Ct. N.Y. County 2003).....	19
<u>Rosendale v. Mahoney,</u> No. 05 Civ. 01966, 2008 WL 2061266 (S.D.N.Y. Mar. 27, 2008).....	18
<u>TAJ Int'l Corp. v. Bashian & Sons, Inc.,</u> 251 A.D.2d 98, 674 N.Y.S.2d 307 (1st Dep't 1998)	23
<u>Town of Cheektowaga v. Starlite Builders, Inc.,</u> 247 A.D.2d 933, 668 N.Y.S.2d 973 (4th Dep't 1998)	53
<u>Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.,</u> 487 F.3d 89 (2d Cir. 2007)	24
<u>U.S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC,</u> 14 A.D.3d 836, 788 N.Y.S.2d 252 (3d Dep't 2005)	23
<u>Verni v. State,</u> 31 A.D.2d 727, 297 N.Y.S.2d 190 (1968).....	54
<u>Wasserstein Perella Emerging Mkts. Fin., L.P. v. Province of Formosa,</u> No. 97-CIV-793, 2002 WL 1453831 (S.D.N.Y. July 2, 2002).....	18, 25, 26, 27
<u>Weiss v. Weiss,</u> 266 A.D. 795, 41 N.Y.S.2d 777 (2d Dep't 1943)	19
<u>Zheng v. City of New York,</u> M-2295, (1st Dep't 2011).....	12

STATUTES

CPLR § 3101.....42
CPLR § 5518..... 15
New York Contract Law §2:14 (2005)..... 19

OTHER AUTHORITIES

18 N.Y.C.R.R. § 352.35.....57
18 N.Y.C.R.R. § 352.35(c)(3)58
22 N.Y. JUR. 2D § 311.....20
63 NY Jur 2d, Guaranty and Suretyship, § 2.....33
Black’s Law Dictionary 723 (8th ed. 2004)33, 34
Black’s Law Dictionary 772 (9th ed. 2009)29, 31, 32
CORBIN ON CONTRACTS §§ 5.02, 5.04 (Desk ed. 2011)59
N.Y.C. Charter §§ 389(c), 612(1)..... 19
RESTATEMENT (SECOND) OF CONTRACTS § 2 (1) (2001)23
RESTATEMENT (SECOND) OF CONTRACTS §§ 9, 12, 17 (2001)..... 18

Appellant A.T.,¹ on behalf of herself and all others similarly situated, by her attorneys The Legal Aid Society and Weil, Gotshal & Manges, LLP submits this brief in support of the appeal from the judgment of the Supreme Court, New York County (Gische, J.S.C.), entered by the Clerk of the Court on October 6, 2011.

PRELIMINARY STATEMENT

The City of New York (“the City”) has an established court-ordered obligation to provide shelter to all of the City’s homeless families and individuals. In order to make it possible for the City to meet its obligations to provide shelter to newly homeless New Yorkers, the City has for decades been providing housing subsidies to current shelter residents in order to permit them to return to the community, thus freeing up shelter beds. In recent years, to meet its legal obligations, the City has entered into private contracts with independent third parties who provide various types of housing in exchange for monetary consideration. In 2007, the City, the New York City Department of Homeless Services (“DHS”), the New York City

¹ In order to ensure her safety, the Appellant 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 Respondents have been provided with A.T.’s full name and Respondents have consented to these safety precautions in the proceedings before the trial court. The Complaint in this action included Jasmine Zheng as an additional named class representative. After the filing of the Complaint, however, Ms. Zheng withdrew as one of the class representatives, though she remains a member of the Appellant class.

Human Resources Administration (“**HRA**”), Seth Diamond as Commissioner of DHS, and Robert Doar as Commissioner of HRA (collectively, “**Respondents**”) launched the Advantage rent subsidy program, designed to place homeless families and individuals into private housing that they could not otherwise afford. Under Advantage, Respondents entered agreements with thousands of private owners of rental properties (“**Advantage Landlords**”) who had no preexisting obligation to lease their apartments to tenants participating in the Advantage program. Under these agreements, Respondents guaranteed to pay a specified amount of the Advantage tenants’ monthly rents directly to the Advantage Landlords for a minimum of one year – and for a second year so long as the tenants met certain conditions. The Advantage Landlords, in turn, agreed to have their apartments inspected by Respondents, enter leases with Advantage tenants, turn over control of the occupancy of their apartments to Respondents, and forgo annual rent increases and other rights they would have enjoyed by renting their apartments to other tenants.

In March 2011, Respondents unilaterally decided to breach their agreements with the Advantage Landlords and immediately stop making their monthly payments on the apartments occupied by more than 16,000 formerly homeless Advantage tenants. In response, on March 28, 2011, a

class of formerly homeless New Yorkers currently living in Advantage apartments (“**Appellants**”) brought this action in New York State Supreme Court on their own behalf and as third-party beneficiaries, asserting claims for specific performance, injunctive relief, and declaratory judgment, and violations of their due process rights.

After an unnecessarily expedited discovery period and rushed trial, the trial court - ignoring the overwhelming weight of the evidence presented at trial - erroneously found that the agreements between Respondents and the Advantage Landlords were not legally enforceable contracts, purportedly because there was insufficient evidence to prove that Respondents and Advantage Landlords mutually assented to contract. In reaching this conclusion, the court failed to give appropriate weight to the fact that the word “guarantee” and synonymous terms were used throughout the Advantage documents to memorialize the terms of the parties’ agreements, demonstrating the parties’ objective intent to contract. The trial court further confused the term “guarantee” with the term “guaranty” which has an entirely different legal meaning and was not used at all in the Advantage documents. Finally, the trial court wrongly overlooked the fact that the City has long used contracts with third parties to carry out social service programs when it erroneously found that because the agreements between

Respondents and Advantage Landlords took place within the context of implementing a social service program - and through documents that do not strictly mirror traditional contract documents - this somehow precluded the formation of a contract. Had the trial court properly analyzed the facts of this case and properly weighed the evidence showing that two sophisticated parties exchanged mutual consideration in entering an agreement for which the terms were explicitly spelled out, it would have found a legally enforceable contract that Respondents should be compelled to uphold.

The trial court also made a series of other errors throughout the discovery period and at trial which prejudicially limited the ability of Appellants to try their case. First, the trial court denied Appellants' reasonable discovery requests for Respondents' internal communications regarding the Advantage program. Second, the trial court refused to enforce its own order requiring the discovery of Respondents' external communications about Advantage. Third, the trial court prohibited Appellants from introducing relevant evidence about prior rental subsidy programs, in particular preventing Appellants from showing that prior programs were also carried out through private contract. The trial court compounded the prejudice of this error when it then relied on this very type

of evidence, but reached the opposite conclusion that prior programs were not carried out through private contract, in rendering its final opinion.

The effect of the trial court's cumulative errors resulted in prejudice against Appellants who the trial court explicitly recognized would be third-party beneficiaries of any contracts between Respondents and the Advantage Landlords. Therefore, the trial court opinion and judgment should be vacated and an order should be entered granting specific performance in favor of Appellants, or in the alternative, the trial court's opinion and judgment should be vacated and the case should be remanded for further proceedings in the trial court.

QUESTIONS PRESENTED

Did the trial court commit reversible error in misapplying the law to the facts of this case when it found that there was no mutual assent to contract between Respondents and Advantage Landlords, despite the overwhelming evidence to the contrary?

Did the trial court commit reversible error by misinterpreting material facts in the trial record which, contrary to the trial court's mistaken interpretation, showed a mutual assent by Respondents and Advantage Landlords to enter into an enforceable contract?

Did the trial court commit reversible error by improperly limiting discovery and therefore denying Appellants a fair opportunity to develop a complete record of evidence before trying their case and at trial?

Did the trial court commit reversible error by relying in its opinion on evidence that Appellants had been precluded from taking discovery about or admitting at trial, and which was therefore presented in a light that was prejudicial to Appellants?

Did the trial court commit reversible error in finding that there was no contract between Appellants and Respondents?

STATEMENT OF THE CASE

A. The City's Obligation To Provide Shelter

Under the Final Judgment in *Boston v. City of New York*, Index No. 402295/08 (Sup. Ct. N.Y. County Dec. 12, 2008), Respondents are required to provide shelter to homeless families with children. Similarly, under the rulings and orders in *Callahan v. Carey*, Index No. 42582/79 (Sup. Ct. N.Y. County), and *Eldredge v. Koch*, Index No. 41494/82 (Sup. Ct. N.Y. County), Respondents are required to provide shelter to homeless single adult women and men. R-23 ¶ 4. One of the ways that Respondents ensured that they could comply with these legal obligations was by making room for newly homeless New Yorkers in the shelter system by moving current shelter

residents out through a program called Advantage. Respondents designed the Advantage program to relocate homeless New Yorkers out of shelter and into permanent housing.

B. The Advantage Program

Respondents designed the Advantage program to induce Advantage Landlords to accept eligible individuals and families as tenants, notwithstanding the prospective tenants' clear inability to pay the full rent of the apartments on their own. R-906:11-15; R-815:18-19, 22-24; R-816:2-8; R-1109:26-R-1110:7, R-1114:8-R-1115:10. Respondents did this by agreeing to pay all or a portion of the Advantage tenants' rent each month for one year directly to the Advantage Landlords. See R-1647-1648 ¶¶ 31-33; see also R-1931; R-1551. A second year was guaranteed as well, so long as Advantage Tenants met certain requirements which were outlined in the Advantage agreements. R-1504; see also R-1647-1648 ¶ 31. It was necessary for the City to make such guarantees because rent payments under the City's prior rent subsidy program, Housing Stability Plus ("HSP"), were frequently disrupted, and landlords became hesitant to enter into agreements with the City to provide housing to shelter residents, in time offering fewer apartments. R-950:11-953:8; see R-1109:3-20; R-1426-1427.

To carry out the Advantage program, Respondents prepared various documents that reflected their agreements with the Advantage Landlords:

(i) **Certification Letters** – letters on DHS and HRA letterhead addressed to homeless individuals and heads of household, which directed the recipients to show the Certification Letters to prospective Advantage Landlords, offered enrollment in the Advantage program, stated the maximum monthly rent for an apartment as well as the portion that would be paid by the City, advised that all apartments would have to pass a Housing Quality Standard inspection before being leased, and promised Advantage Landlords that if they entered into Advantage agreements, the tenants' rents would be guaranteed. R-1551-1552; R-2433; R-1787;

(ii) **Participant Statements of Understanding** – agreements signed by Appellants and Respondents' agents in which the Advantage tenants acknowledged their responsibilities under the program and confirmed the City's payment obligations pursuant to the Advantage program. See R-1560-1562 ("Under the Advantage program, the City of New York ('City') will pay a portion of my monthly rent (over and above my family's monthly rent contribution) directly to my landlord."); R-902:8-21; R-3063-3064 ("Under the Work Advantage Program, the City will issue a monthly rent

supplement (over and above my family's monthly cash assistance shelter allowance, if applicable) to eligible clients enrolled in the program");

(iii) **Landlord Statements of Understanding** – agreements signed by Advantage Landlords and Respondents' agents, in which the Advantage Landlords acknowledged their responsibilities under Advantage. Among other things, the Landlord Statements of Understanding provide, "Under the Advantage Program, the City... will pay directly to me, the Landlord, monthly rent in the amount of... for a period of one year, on behalf of the eligible Advantage client." R-1950-1951.; see also R-1558; R-1652 ¶ 43; R-1808-1814; R-2796:6-25;

(iv) **Advantage Lease Riders** – riders to the underlying leases signed by Appellants, Advantage Landlords, and Respondents' agents, which provide, among other things, that they supersede any conflicting language in the leases between Appellants and the Advantage Landlords, that Respondents will pay monthly rents directly to the Advantage Landlords for one year and for a second year so long as the tenants remain eligible, that the Advantage Landlords will not charge the tenants more than the tenants' share of the monthly rent, that the Advantage Landlords will renew the leases for a second year at no rental increase, and that the Advantage Landlords give control to the City to place other Advantage tenants in their apartments if the

original tenant moves out. See, e.g., R-1555-1557; R-1952-1953; See R-1655 ¶ 50 (a caseworker employed by the City signed the Advantage Lease Rider); R-901:21-902:7, 17-21 (A.T. testified that she signed Ex. 26, an Advantage Lease Rider, in order to participate in the Advantage program); R-2357-2361; R-2801:11-2802:16, 2818:3-18.

C. Respondents' Unilateral Decision to Breach the Advantage Contracts

On March 17, 2011, purportedly in response to budgetary constraints – specifically, the lack of ongoing funding for operating Advantage being provided to Respondents by New York State - Respondents announced to the public and notified Appellants and the Advantage Landlords that the City would not honor its contractual obligations to pay monthly rents to the Advantage Landlords on behalf of Appellants, beginning April 1, 2011. See, e.g., R-2111; R-1935-1937. As the trial court found, the budget negotiations between Respondents and New York State – including the question of whether or not New York State would reimburse Respondents for the costs associated with the Advantage program – had absolutely no bearing on Respondents' authorization or ability to continue to run the Advantage program, R-101-102; and to the extent contractual agreements were formed in the implementation of Advantage, Respondents' budgetary considerations

did not offer any legally cognizable justification for breaching those contractual obligations. R-100-102.

D. Procedural History

On March 28, 2011, Appellants filed a Complaint asserting claims for specific performance, injunctive relief, and declaratory judgment, and violations of their due process rights. See R-121, R-125 ¶¶ 3, 15.

Appellants also filed a motion seeking a preliminary injunction and certification of a class action (the “**PI Motion**”). R-118-140. The trial court, in its March 28, 2011 Order to Show Cause, granted a Temporary Restraining Order pending a decision on the PI Motion. R-244-245. On April 14, 2011, Respondents filed a Notice of Cross-Motion to Dismiss, alleging failure to state a claim upon which relief may be granted.

In its May 2, 2011 Order, the trial court denied Respondents’ Cross-Motion to Dismiss the Complaint for failure to state a claim, finding a triable factual dispute, and also denied the PI Motion

In response, and to avoid the imminent evictions and repeat homelessness of tens of thousands of children and adults in Advantage households, on May 12, 2011, Appellants filed a Motion for Interim Relief with this Court seeking injunctive relief to maintain the status quo. On June 2, 2011, this Court granted Appellants’ motion and ordered Respondents to

maintain the status quo and continue to make the Advantage payments pending hearing and determination of the appeal. Zheng v. City of New York, M-2295, June 2, 2011 Order of the Appellate Division, First Department.

Before the trial began, Respondents agreed to the certification of the plaintiff class in this action. See R-793:23-794:8.

E. Discovery

On May 17, 2011, the trial court held a preliminary conference for purposes of setting forth a discovery schedule and trial schedule. R-160-165. At this time, Appellants agreed to an expedited trial date because no preliminary relief had yet been granted, and the options were to proceed with the trial as quickly as possible or face imminent eviction. Under the schedule set by the trial court, Respondents were required to provide to Appellants any documents they expected to rely on at trial by June 3, 2011. R-162-164. All depositions were set to take place during a single week, starting on June 13th – a mere ten days after Appellants received notice of evidence Respondents would rely on at trial, and without any provision in place to ensure that Appellants would receive responses to their document requests prior to this time. Id. Trial was scheduled to begin less than one week after the close of depositions. Id. On June 2, 2011, Appellants served

Plaintiffs' First Document Requests to Defendants, as well as Plaintiffs' First Interrogatories. R-201-216. Specifically, Appellants requested, among other things, that Respondents "Produce all Documents Referring or Relating to Communications internal to the City and/or any of its departments or agencies Referring or Relating to Advantage..." R-202-203. In response, Respondents, made a blanket objection to all requests and refused to produce any documents. As a result, on June 7, 2011, Appellants filed a motion by Order to Show Cause to compel production of documents and answers to interrogatories in light of Appellants' urgent need for documents to prepare for depositions pursuant to the trial court's expedited discovery schedule. R-166-167.

At the June 10, 2011 hearing, the trial court ruled that it would continue with the expedited trial and discovery period, despite the fact that the stay granted by this Court rendered such an expedited schedule no longer necessary and that Appellants had requested a more reasonable timeframe, and despite the fact that Respondents had not yet produced any documents and depositions were scheduled to start within days. R-369:14- 26. Furthermore, the trial court denied Appellants discovery of internal communications relating to Advantage. R-371. The trial court did, however, rule that Respondents were required to search for and produce e-

mail communications with third parties, though no clear deadline for production was established. R-383:6-387:2. Ultimately, the trial court's schedule required Appellants to depose many of Respondents' present and former employees and then to begin trying their case before Respondents were even required to begin producing documents. R-385-386.

F. The Trial and the Final Decision

At trial, two witnesses for Respondents, including DHS' Advantage administrator Susie Cadichon and Commissioner Seth Diamond, testified that they had had e-mail communications with third parties about Advantage, although no such communications had been produced to Appellants. R-1268:19-23; R-1281:21-R-1281:2; R-1367:4-22. The trial court ordered that Ms. Cadichon's e-mails with third parties be produced, finding that such communications were discoverable and relevant. R-1284:25-R-1285:8. On July 1, 2011, however, Respondents informed the court that after searching Ms. Cadichon's e-mails using the key word "Advantage," there were over 31,000 e-mails. R-1409:9-1410:7. Although Appellants offered to formulate a list of proposed searches to try to narrow the electronic search, the trial court instead excused Respondents from producing any of Ms. Cadichon's e-mails. R-1411:6-R-1412:9.

At trial, the trial court also sustained Respondents' objection to the introduction of evidence relating to the federal Section 8 Housing Assistance Program ("Section 8"), on relevance grounds. R-1071:12-R-1073:5. Specifically, on June 24, 2011, Appellants attempted to move a Housing Assistance Payment contract issued by Section 8 into evidence. Id. After a side bar, the trial court sustained Respondents' objection to Plaintiff's Exhibit 243 ("PEX 243"), finding that such document was "irrelevant to this case." R-1072:25-1073:5.

On September 13, 2011, the trial court issued its decision dismissing Appellants' Complaint, and its Order was entered on October 6, 2011. R-97-117. Despite the trial court's denial of admission at trial of any evidence of prior rental assistance programs other than HSP, the trial court's Order and Decision referred to Section 8, see R-116, as well as other rental assistance programs. See, e.g., R-110, R-115, R-116, R-117. The trial court's decision also compared Advantage to the federal Social Security program, see R-109, despite its ruling that no evidence relating to any governmental programs other than HSP and Advantage were admissible at trial. See R-1072-1073.

On October 7, 2011, Appellants filed a motion, pursuant to CPLR § 5518, requesting continued interim relief to preserve the status quo pending

the determination of this appeal from the trial court's October 6, 2011 Order, in effect extending this Court's June 2, 2011 appellate injunction prohibiting Respondents from discontinuing Advantage rent payments. Respondents also filed a motion on the same day seeking to vacate this Court's prior order.

On this appeal, some 11,000 remaining class members, formerly homeless families and individuals, face eviction and repeat homelessness unless this Court vacates the trial court's erroneous opinion and judgment refusing to enforce the Advantage agreements among Respondents, Advantage Landlords, and Appellants.

ARGUMENT

I. Appellants Are Entitled To Appellate Relief Because The Trial Court Misapplied The Law And Misinterpreted The Facts In Mistakenly Denying Appellants' Contract Claim On The Ground That There Was A Lack Of Mutual Assent Between Respondents And Advantage Landlords

The trial court found that Appellants had established the majority of elements necessary to prove their contract claim. First, the trial court found that Appellants would be third-party beneficiaries of the Advantage agreements between Respondents and the Advantage Landlords, so long as those agreements were legally enforceable contracts. The trial court further found that two of the three elements necessary to form a legally enforceable

contract were present: (i) that Respondents and Advantage Landlords had legal capacity to contract; and (ii) that they had exchanged mutual consideration. The trial court erred, though, when it opined that the element of mutual assent was not present. This erroneous finding ignored the volume of objective evidence showing that these two sophisticated parties had a meeting of the minds in forming agreements with specific terms, including a “guarantee” that Respondents would continue to make payments on behalf of Appellants for a minimum of one year – and two years for eligible Advantage tenants.

The trial court’s error occurred because it did not apply the appropriate standard for determining mutual assent and misinterpreted the evidence before it. For example, the trial court confused the term “guarantee” with the entirely different legal term “guaranty” and then gave little weight to the clear meaning of the word “guarantee” which was used throughout Advantage agreement documents and clearly evidenced objective mutual assent to contract. In addition, the trial court erroneously found that the fact that the agreements took place within the social service context, and used non-traditional contract documents, served to undermine the existence of mutual assent, despite the fact Respondents have consistently used third-party contracts to carry out social service programs.

A. Appellants Are Third-Party Beneficiaries Of The Advantage Contracts Between Respondents And The Advantage Landlords

The requirements for the formation of a contract under New York law are: (i) at least two parties with legal capacity to contract; (ii) mutual assent; and (iii) 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); Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43, 46 (1st Dep’t 2009) (“To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound.”). Furthermore, a third party is an intended beneficiary of a contract if “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Levin v. Tiber Holding Corp., 277 F.3d 243, 248 (2d Cir. 2002). Consequently, a third party has the legal right to enforce the contract for which it is an intended beneficiary. Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 600 (2d Cir. 1991).

The trial court held that there was no dispute that the parties had the capacity to contract. R-103-104. Respondents have the legal authority to enter contracts in fulfilling their official responsibilities. See N.Y.C. Charter §§ 389(c), 612(1); Make The Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 141 n.2 (2d Cir. 2004); Poey v. Eggleston, 3 Misc. 3d 543, 547, 777 N.Y.S.2d 227, 230 (Sup. Ct. N.Y. County 2003). Likewise, there was no question the Advantage Landlords met the legal requirements for having the capacity to enter a contract. R-104 (citing 28 Glen Banks, New York Contract Law §2:14 (2005); In re Prinze, 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (1976)).

The trial court also found that Advantage Landlords had provided sufficient consideration and therefore “consideration is not an impediment to finding a contractual relationship between Advantage landlords and [Respondents].” R-116. Consideration is commonly defined as a bargained-for benefit to the promisor or a bargained-for detriment to the promisee; a 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). The trial record

showed that the Advantage Landlords provided consideration by, for example, registering their apartments for inspection by Respondents, agreeing to take on tenants who could not otherwise afford their rent, agreeing to forgo legally permissible rent increases, and agreeing to allow Respondents to place another tenant in their apartment if the original Advantage tenant vacated the apartment. See R-815:18-19, 22-24; R-816:2-8; R-1109:26-1110:7; R-1114:8-1115:10; R-1555; R-1815-1830.

Finally, the trial court found, and Respondents conceded, that the Advantage Tenants would be third-party beneficiaries of any enforceable contract between Respondents and the Advantage Landlords. R-104. And, it is well-settled that Appellants, as third-party beneficiaries, can enforce their rights under enforceable contracts between Respondents and the Advantage Landlords. 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 1989) (action for specific performance); 22 N.Y. JUR. 2D § 311.

B. The Trial Court's Finding That The Third Element Of Contract – Mutuality Of Assent – Was Lacking Was Based On A Misapplication Of The Law And Misinterpretation Of The Facts

The trial court based its erroneous finding “that there are no enforceable contracts between Advantage [L]andlords and [Respondents]” solely upon the lack of mutual assent. R-116. The trial court, however, ignored the weight of the evidence presented to the contrary and misapplied the legal standard for mutual assent to the facts of this case. In fact, like all other elements of Appellants’ contract claim, the evidence at trial overwhelmingly established the existence of mutual assent to contract.

Appellate courts in this jurisdiction consistently reverse lower court judgments where the wrong legal standard has been applied. See In re Maria Mejias v. Town of Shelter Island Zoning Bd., 298 A.D.2d 458, 751 N.Y.S.2d 409 (2d Dep’t 2002); In re Secreto v. County of Ulster, 228 A.D.2d 932, 644 N.Y.S.2d 439 (3d Dep’t 1996); In re Loehr v. Governor's Office of Employee Relations, 3 A.D.3d 653, 771 N.Y.S.2d 215 (3d Dep’t 2004); In re Gray v. Chambers, 206 A.D.2d 619, 614 N.Y.S.2d 591 (3d Dep’t 1994). Moreover, New York State appellate courts have the right to conduct a de novo review of the evidence that was before the trial court in a contract case, and can overturn a decision where the trial court improperly

analyzed the facts or misapplied the law to the facts. Gulf Ins. Co. v. Transatlantic Reinsurance Co., 13 A.D.3d 278, 279, 788 N.Y.S.2d 44, 45 (1st Dep't 2004) (citing Gregoris Motors Inc. v. Nissan Motor Corp., 80 A.D.2d 631, 436 N.Y.S.2d 90 (2d Dep't 1981), aff'd, 54 N.Y.2d 634, 425 N.E.2d 893, 442 N.Y.S.2d 505 (1981)). In fact, the appellate court "is equally empowered" as the trial court "to draw inferences and make findings of fact based upon the evidence in the record" in order to correct an improperly drawn inference from the court below. Forum Ins. Co. v. Worcester County Inst. for Sav., 219 A.D.2d 492, 492, 631 N.Y.S.2d 165, 166 (1st Dep't 1995) (quoting Orbit Holding Court v. Anthony Hotel Corp., 121 A.D.2d 311, 315, 503 N.Y.S.2d 780, 783 (1st Dep't 1986)); Best & Co. Haircutters, Ltd. v. Semon, 81 A.D.3d 766, 767, 916 N.Y.S.2d 632, 634 (2d Dep't 2011). Because the trial court in this instance both misapplied the legal standard and misinterpreted the factual evidence regarding the critical element of mutual assent, Appellants are clearly entitled to a reversal of the trial court's decision.

1. The Trial Court Improperly Applied The Legal Standard For Finding Mutual Assent

Courts should apply an objective test to determine whether parties gave mutual assent to be bound by an agreement. TAJ Int'l Corp. v. Bashian & Sons, Inc., 251 A.D.2d 98, 100, 674 N.Y.S.2d 307, 309 (1st Dep't 1998). Only a manifestation of intent, and not a party's actual intent, may justify a promisee in understanding that a contract has been made; therefore it is the outward manifestations that control. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1) (2001); Accurate Realty, LLC v. Donadio, 80 A.D.3d 1041, 1041, 915 N.Y.S.2d 394, 395 (3d Dep't 2011); Keis Distrib., Inc. v. N. Distrib. Co., 226 A.D.2d 967, 968-69, 641 N.Y.S.2d 417, 419 (3d Dep't 1996); Conopco, Inc. v. Wathne Ltd., 190 A.D.2d 587, 593 N.Y.S.2d 787 (1st Dep't 1993). Therefore, when determining the existence of mutual assent, it is necessary for the court to look to the parties' expressed words and deeds, and to consider the meaning that arises when these communications are taken altogether. Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399-400, 361 N.E.2d 999, 1001-02, 393 N.Y.S.2d 350, 351 (1977); U.S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC, 14 A.D.3d 836, 838, 788 N.Y.S.2d 252, 254 (3d Dep't 2005);

Ahlstrom Mach., Inc. v. Assoc. Airfreight, Inc., 272 A.D.2d 739, 741, 708 N.Y.S.2d 497, 499 (3d Dep't 2000).

These manifestations of mutual assent should be “sufficiently definite to assure that the parties are in agreement with respect to all material terms.” See Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007). This means the parties’ communications should consist of an offer followed by an acceptance of an arrangement having definite essential terms. Gui’s Lumber & Home Ctr., Inc. v. Mader Constr. Co., 13 A.D.3d 1096, 1096, 787 N.Y.S.2d 555, 556 (4th Dep't 2004); Cobble Hill Nursing Home v. Henry & Warren Corp., 74 N.Y.2d 475, 483, 548 N.E.2d 203, 206, 548 N.Y.S.2d 920, 923 (1989); see also Martin Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109, 417 N.E.2d 541, 543, 436 N.Y.S.2d 247, 249 (1981). But, “definiteness is essential . . . only as to material terms.” Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 317, 515 N.Y.S.2d 1, 6 (1st Dep't 1987) (internal citation omitted); In re 166 Mamaroneck Ave., 78 N.Y.2d 88, 91, 575 N.E.2d 104, 105, 571 N.Y.S.2d 686, 687; Cobble Hill, 74 N.Y.2d at 482, 548 N.E.2d at 206, 548 N.Y.S.2d at 923.

Under New York law, “an offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract,” and an acceptance is the exercise of such power. Farago Adver.,

Inc. v. Hollinger Int'l, 157 F.Supp.2d 252, 258 (S.D.N.Y. 2001) (citing Alleghany Corp. v. James Found., Inc., 115 F.Supp. 282, 299 n.29 (S.D.N.Y. 1953)). Moreover, under New York law, in order to accept an offer to contract, such acceptance “must comply with the terms of the offer and be clear, unambiguous and unequivocal.” 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) (citing King v. King, 208 A.D.2d 1143, 1143-44, 617 N.Y.S.2d 593, 594 (3d Dep’t 1994)).

The overwhelming objective evidence at trial showed that the Advantage Landlords and Respondents came to a meeting of the minds over all essential terms of their Advantage agreements. The record indisputably shows that, having been induced after the demise of HSP to resume making apartments available to tenants using the City’s new Advantage rental subsidies, the Advantage Landlords made certain apartments available to Appellants, and Respondents guaranteed in writing to pay all or a portion of Appellants’ rents for such apartments directly to the Advantage Landlords for a specific period of time, curing the defect in the earlier HSP subsidy to which landlords had objected. Thus, Respondents and Advantage Landlords came to agreement about what apartments were being rented and what portion of the rents Respondents guaranteed to pay to the Advantage

Landlords each month for a specific period of time. The record evidence also indisputably shows that these terms were expressed through contract offers made by Respondents, which the Advantage Landlords then accepted.

Respondents included the terms of their offers in the Certification Letters issued to prospective Advantage tenants. See R-1551; R-894:13-23; 895:17-24. In these Certification letters, Respondents instructed the Advantage tenants to show the letters to prospective Advantage Landlords. See R-1551; see also R-899:18-26; R-900:2-13. And, the certification letters had a section addressed specifically to the Advantage Landlords. See, e.g., R-1954; R-1551. Moreover, contrary to the trial court's erroneous conclusion, Respondents' Certification Letters specifically laid out the essential and material terms of the offer. See, e.g. R-1551. The Certification Letters set forth the maximum monthly rental amount of any apartment the Advantage tenant could rent, the amount of Respondents' subsidy, and the duration of the contract (one year with a renewal for a second year if specified criteria are met). Id. The Certification Letter also instructed Advantage Landlords on how to accept the offer and whom to contact. See, e.g., R-1954 (contains a section titled "Information for Brokers and/or Landlords"); R-1551 (same). Most importantly, in the certification letters Respondents offered to guarantee payment of the rental subsidies to

the Advantage Landlords for the one-year term, with a renewal for another year for tenants who met the specified eligibility criteria. Id.; see also R-810:21-811:22; R-1058:8-20; R-1061:12-21. Contrary to the trial court's suggestion, details such as the addresses of the apartments ultimately offered to the Advantage tenants were not material to the agreements, especially because the Certification Letters required the Advantage Landlords to submit the apartments to Respondents for inspection and then approval by the City. See R-1551; R-1954; see also R-2573:7-10, 13-17 (an apartment had to meet the City's approval process or "that apartment could not be used in the Advantage program"); R-1651 ¶ 42 ("Before any [Advantage] lease signing could occur, DHS' Office of Rehousing ("OOR") employed a multi-step process with built-in quality assurance checks," including an inspection of the apartment).

The Advantage Landlords, in turn, manifested their willingness to be bound by the terms of the Certification Letters by contacting Respondents to undertake the process of having a specific apartment approved by Respondents for participation in the Advantage program and agreeing to lease that apartment to an Advantage tenant for an amount that did not exceed the maximum set forth in the Certification Letter. R-1038:23-1039:25; R-815:12-17; R-3098:25-3099:2, 8-10, 12-14; R-2573:7-10, 13-17.

These actions, taken as a whole, objectively demonstrate clear, unambiguous, and unequivocal offer by Respondents and acceptance by the Advantage Landlords. Thus, under the proper standard for determining mutual assent through consideration of the parties' words and deeds that signify offer and acceptance of an agreement with definite material terms, the trial court should have found legally enforceable contracts.

The trial court, however, failed to recognize that the offers by Respondents which were accepted by the Advantage Landlords and contained definite terms were, in and of themselves, sufficient proof of mutual assent to contract. Moreover, in reviewing the terms of the agreements, the trial court failed to appreciate that all of the material terms were clear and definite. The trial court focused instead on the fact that certain formalities were not followed, namely that the agreements did not contain the traditional words "covenant" or "agree" and that certain terms – such as the specific addresses of the apartments – were not contained within the documents. See R-108, 113. For the trial court to require – as it suggested - that all agreements contain language like "the parties agree" would be a higher standard than required under New York law to find mutual assent among parties. See R-108 ("None of the program documents use traditional contract phrases like 'the parties agree' or 'the parties

covenant.”). In so holding, the trial court overlooked the fact that the words and deeds are to be considered in sum, and analysis should not be limited to searching the documents for key phrases. The trial court also appeared to be distracted by the unorthodox nature of the contracting and negotiation process with the Advantage Landlords, see infra p. 37, and failed to recognize that the material terms to the contracts were all contained in the Advantage documents and sufficiently definite for the parties to have understood their agreements. Had the trial court conducted a proper analysis, it would have found the existence of an enforceable contract as the overwhelming weight of the evidence conclusively supported a finding that the parties provided their mutual assent to contract through the process of offer and acceptance.

2. The Trial Court Misinterpreted Significant Objective Evidence Of Mutuality Of Assent In The Form Of Language In The Advantage Documents Themselves Showing That A Contract Had Been Formed

Viewed objectively, the words used by Respondents in their Advantage program documents and materials - such as “guaranteed,” “shall pay,” “will pay,” “will issue,” and “commitment” - evince Respondents’ objective assent to be contractually bound. See R-1787; R-2203-2204; R-2361; R-2439; Accurate Realty, 80 A.D.3d at 1041, 915 N.Y.S.2d at 395

(citations omitted); see also Black's Law Dictionary 772 (9th ed. 2009)

("guarantee" is "[t]he assurance that a contract or legal act will be duly carried out"). Respondents' explicit communications indicating their commitment to make Advantage payments on behalf of Appellants are numerous, but some of the most notable examples of statements made in documents drafted by Respondents include:

(i) The Certification Letters issued to each Advantage tenant state: "Please show this letter to landlords and brokers during your apartment search. . . . The Advantage program guarantees that the subsidy portion of the rent will be paid directly to your landlord for one year." R-1954.

(ii) The Participant Statements of Understanding state: "Under the Advantage Program, the City of New York . . . will pay a portion of my monthly rent (over and above my family's rent contribution) directly to my Landlord. . . . I understand that I will sign a one-year Lease with my Landlord and the City will pay the Advantage Rent Payment directly to my Landlord on a monthly basis, for the first year of the Advantage Program." R-1560-1562.

(iii) The Lease Riders state: "The City shall pay the Program Tenant's rent directly to the Landlord. . . ." R-1816-1817.

(iv) The Landlord Statements of Understanding state: "Under the Advantage Program, the City . . . will pay directly to me, the Landlord, monthly rent in the amount of [rental subsidy amount] . . . for a period of one year, on behalf of the eligible Advantage client. . . ." R-1950-1951.

(v) The DHS Advantage Rental Assistance Program Brochure states: "Work Advantage . . . assures landlords of monthly rent payments with no payment disruptions." R-2009-2010.

Ignoring this overwhelming evidence of the clear language in the documents drafted by Respondents that the City had committed to make Advantage payments, the trial court erroneously suggested that the City did not manifest an intent to be contractually bound. R-150. Clearly, the trial court did not properly apply the standard for finding mutual assent under New York law to the facts of this case.

Even more puzzling is the trial court's finding that the Advantage Landlords did not objectively manifest an intent to be contractually bound. Id. This ignores the weight of the evidence to the contrary and is not supported by the record. Indeed, all of the following contractual terms found in documents that Respondents required the Landlords to sign show objective evidence of the Advantage Landlords' intent to be bound to the Advantage agreements:

(i) The Landlords committed under the Landlord Statement of Understanding: "I understand that if the tenant leaves the apartment due to an eviction or move, I, 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 lease period." R-1950-1951.

(ii) The Landlord Statements also state: "I understand that if the tenant is found eligible for a second year of the [] Advantage program, I must offer the tenant a one-year lease renewal at the same rent level." Id.

(iii) The Landlord Statements also state: “I understand that I will sign a one-year lease and [] Advantage lease rider and cannot charge my [] Advantage tenant an amount above that stipulated in the lease for the entire period of the lease, regardless of changes in family composition.” Id.

(iv) The Lease Riders state: “The Landlord acknowledges and agrees that in the event that the Landlord is in default of any obligation to the City of New York, DHS may withhold for purpose of set-off, all or a portion...of the Rent payment...” R-1815-1817 ¶ 12

(v) The Lease Riders also state: “Landlord agrees that it shall not demand, request, or receive any payments or other consideration from Program Tenant...beyond that authorized in the Lease and this Rider...Landlord understands that in the event of any breach of this provision...the City shall have the right to bar Landlord from further participation in any City rental assistance program.” Id. ¶ 6.

Each of these clauses clearly demonstrates commitments made by the Advantage Landlords to Respondents. Perhaps most importantly, the Advantage Landlords ceded control over occupancy of their apartments to Respondents, not just in accepting one particular Advantage tenant to occupy the unit, but in also agreeing that in the event that the tenant moved out, Respondents – at their sole discretion – could place any other individual into that unit for the duration of the one or two-year lease term originally agreed to. R-1950-1951. These commitments were made in exchange for Respondents’ promise to make “guaranteed” rental payments for one or two years. Not only do these communications clearly demonstrate the

Advantage Landlords' objective intent to be contractually bound, but the exchange of promises, which were even memorialized in a writing, provides a textbook example of mutual assent.²

The trial court also failed to give proper weight to the contractual term "guarantee." Indeed, the trial court erroneously viewed the term guarantee exclusively through the lenses of guaranty and suretyship law. The trial court suggested that "guarantee" refers to an obligation to be responsible for the debt of another," citing 63 NY Jur 2d, Guaranty and Suretyship, § 2. None of the Advantage documents, however, use the term "guaranty" with a "y" or the term "guarantor." "Guarantee" in legal parlance is "[t]he assurance that a contract or legal act will be duly carried out." Black's Law Dictionary 723 (8th ed. 2004). "Guaranty," on the other hand, means a "promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." *Id.* at 724. Appellants made no claim that Respondents would be responsible to the Advantage Landlords in the event that the Advantage tenants failed to pay their portion of the rent. Instead, consistent with the

² Indeed, it is difficult to understand how Respondents could control who may go into the Advantage Landlords' apartments if the original agreements were not contractual in nature and did not contractually guarantee payments to Respondents for the specified period of time during which Respondents retained such control.

express terms of the documents drafted by Respondents, Respondents assured Advantage Landlords that the City would carry out its direct and primary obligation to make the payments they assured – “guaranteed” – to Advantage Landlords under the Advantage agreements.

The trial court further incorrectly assumed that Respondents intended the guarantee language in the Advantage agreements to refer only to the fact that as a social service program, Advantage payments on behalf of tenants would not be disrupted in the event that Advantage tenants lost their eligibility for public assistance. R-154-155. This facet of the Advantage program stands in contrast to a predecessor rent subsidy program, HSP, where a lapse in public assistance eligibility caused a lapse in subsidy payments as well. Id. While it is true that the “guarantee” of Advantage payments being made every month, with no clause in the Advantage agreements allowing an exception, was a feature that distinguished Advantage from HSP,³ the record evidence shows that the trial court was

³ The record evidence shows that the term “guarantee” was used in the Advantage agreements in response to the fact that rental payments under the prior HSP rent subsidy program were disrupted as a result of issues with tenants’ public assistance benefits. See R-2458:4-23, R-2459:16-25). Because many landlords therefore ultimately declined to continue entering into the HSP contracts, without any assurance that rents would continue for the duration of the lease, the Advantage contracts were drafted with the “guarantee” language to induce the Advantage landlords to contract with Respondents by assuring they would continue to receive rent payments for the terms of the leases. See R-2463:20-2465:7; R-2443 at 4; see also R-1646-1647; R-1735.

wrong in finding that Respondents used the word “guarantee” in Advantage agreement documents solely to assure Advantage Landlords that an Advantage tenant’s public assistance eligibility could not interrupt rent payments. Instead, a truly objective review of the record evidence shows that the term “guarantee” served a dual purpose in conveying the terms of the Advantage agreements to the Advantage Landlords. First, the term “guarantee” explained the difference between Advantage and HSP so that Advantage Landlords could be confident that, unlike under HSP agreements, they would have a steady stream of uninterrupted payments under the Advantage agreements. Second, the term “guarantee” reinforced the nature of the agreements between Respondents and Advantage Landlords as legally enforceable contracts.

Respondents’ argument that “guarantee” only meant that the agreements would remain in place despite tenants’ public assistance eligibility, and did not represent a bargained for commitment that they would remain in place despite other external changes in circumstance, such as loss of State funding for the program, is belied by the record. From an objective standpoint, there is little difference to an Advantage Landlord between a disruption due to the tenant’s public assistance status or one due to a lack of funding or any other factor left to the City’s discretion. The term

“guarantee” in the Advantage agreements objectively conveyed to Advantage Landlords that disruptions would not occur, regardless of cause, for one to two years (see R-1043:26-1044:6; R-960:5-18), and Respondents’ unilateral termination of the subsidies represented a breach of that contractual agreement.⁴

Finally, the trial court’s assertion that the program documents “do not use contractual phrases” is not supported by the record. As the trial court itself pointed out, the term “guarantee” is used in several Advantage program documents and “is a contractual term.” R-152. The trial court further acknowledged that the Advantage documents use the contractual term “guarantee” and that the term is “problematic for the [Respondents].” The trial court, though, inexplicably went on to dismiss this “problem” term because “the word [guarantee] alone, does not unambiguously connote what the terms of that relationship may be.” R-152-153. But the contractual term “guarantee” is not used in isolation in the Advantage program documents; instead, it is used along with other words to indicate what is being guaranteed. See infra p. 38. In fact, the trial court itself found that the word

⁴ Moreover, the trial court conceded that changes to Respondents’ budget would not serve as an excuse for Respondents to terminate contractual responsibilities under the Advantage agreements should they be legally enforceable contracts (R-146), which the record evidence proves they were.

“guarantee” was not used in isolation, but that its use “was deliberate and made to induce landlords to participate in the Advantage rental assistance program.” Thus, the trial court held that Respondents deliberately used a contractual term to induce the Advantage Landlords to enter into the Advantage agreements and that it was not an isolated term. Notwithstanding that the Advantage Landlords took Respondents’ contractual bait (see R-815:18-19, 22-24; R-816:2-8 (landlord chose Advantage tenant over other private tenants because of the City’s guarantee)), the trial court then erroneously held that the repeated use of the word “guarantee” was not strong enough to support mutual assent to contract. R-153-155. Given the weight of the objective evidence to the contrary, this was clear legal error by the trial court.

3. The Trial Court Misinterpreted The Significance Of The Advantage Contracts Taking Place Within A Social Services Program And The Non-Traditional Format Of The Advantage Agreement Documents

“Program” is not a legally operative word, and there is nothing that prevents parties from carrying out social service programs through contractual agreements. Indeed, City programs are frequently carried out through contracts with third parties. See, e.g., Mut. Hous. of Tompkins County, Inc. v. Hawes, 4 Misc. 3d 247, 255-56, 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.C. 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); see also McNeill v. N.Y.C. Hous. Auth., 719 F. Supp. 233, 249 (S.D.N.Y. 1989) (federal district court found that 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).

Accordingly, the trial court erroneously gave improper weight to the fact that the agreements between Respondents and Advantage Landlords took place within the context of the Advantage “program” in finding that there was therefore no objective intent to contract. R-152, R-154-155. The trial court also improperly weighed the protocol used to carry out the Advantage program – particularly the fact that certain program documents were signed by City caseworkers as witnesses – to manufacture the absence of mutual assent, overlooking the fact that social service programs are often carried out through private contractual arrangements with third parties.

The trial court's opinion recognized that the agreements between Respondents and the Advantage Landlords took place within the context of the administration of a social services program and that the documents comprising the Advantage agreements are different than what one might expect in a traditional contract document. The evidence also showed that the steps of contract formation between Respondents and Advantage Landlords were intermingled with the procedure for providing tenants with the Advantage subsidy. See R-1067:2-25 (Advantage lease signings combined gathering and finalizing all Advantage documents related to the agreements between Respondents and Advantage Landlords as well as all documents needed to enroll tenants in the Advantage program; all parties or their agents were present to discuss their respective roles and obligations). This does not, however – as the trial court suggests – preclude the formation of a contract between Respondents and Advantage Landlords. Nor does it provide objective evidence that the parties did not intend to contract, or otherwise undermine the overwhelming evidence that there was mutuality of assent. Viewed objectively, the evidence on the whole proved by more than a preponderance of the evidence that the Advantage documents memorialized a meeting of the minds between Respondents and the Advantage Landlords, under which an agreement with clear terms and

promises was entered into for the purpose of meeting Respondents' responsibility to provide shelter to homeless families and individuals.

Moreover, it is beyond dispute that the Advantage Landlords were not recipients of any social services benefit. Nor were the Advantage Landlords obliged in any way to participate in Advantage absent an independent contractual incentive from Respondents. These were agreements that were voluntarily entered just like any other contracts between two private independent parties. The fact that Respondents used the agreements to provide housing to homeless families and individuals under the Advantage program is irrelevant to the issue of whether they entered into enforceable contracts with third-party providers. Therefore, the record evidence overwhelmingly establishing the formation of a contract between Respondents and the Advantage Landlords, for which Appellants are third-party beneficiaries, is not in any way compromised by the context in which those contracts were formed. It was therefore clear legal error for the trial court not to enforce these contracts.

II. The Trial Court's Erroneous Discovery And Evidentiary Rulings Also Prejudiced Appellants And Precluded Them From Presenting Their Full Case At Trial

The Trial Court did not allow Appellants a fair opportunity to present their case. Initially, the trial court limited the scope of Appellants' discovery by denying access to information that was both relevant and material to the case, and further failed to ensure that even its own limited discovery orders were followed with respect to Appellants' access to information. Further, in its opinion, the trial court based its decision on legal conclusions about entirely different rent subsidy programs, even though Appellants were prohibited from introducing evidence about those programs at trial. Thus, Appellants had no opportunity to comment on the evidence relied upon by the trial court so it could be considered in a fair and balanced light. Indeed, the trial court's findings with respect to those other rent subsidy programs were both erroneous and highly prejudicial to Appellants.

A. The Trial Court Improperly Denied Appellants The Right To Discover Material Evidence

While trial courts are generally given discretion with regard to matters of discovery, the trial court in this case abused its discretion by denying Appellants access to evidence critical to Appellants' case. Appellants, a certified class of formerly homeless families and individuals, were by far the

less sophisticated party in the underlying transaction, and most of the information about the Advantage program was under the control of Respondents' own employees or was contained in Respondents' records and files. By denying Appellants' requests to access these sources, the trial court prevented Appellants from gathering potentially relevant evidence necessary to present their case in full. Accordingly, the trial court committed reversible error in forcing Appellants into an expedited trial with the bare minimum of publicly available information.

1. The Trial Court Improperly Denied Appellants' Discovery Requests To, Among Other Things, Depose Certain Witnesses And Obtain Respondents' Internal Documents Before Trial

The New York Civil Practice Law and Rules ("CPLR") § 3101 mandates "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." See Hoenig v. Westphal, 52 N.Y.2d 605, 608, 422 N.E.2d 491, 492, 439 N.Y.S.2d 831, 832 (1981). The scope of disclosure set forth in § 3101 is generous, broad, and to be construed liberally. Mann v. Cooper Tire Co., 33 A.D.3d 24, 29, 816 N.Y.S.2d 45, 51 (1st Dep't 2006). The "phrase 'material and necessary' must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy." Id. (quoting Allen v.

Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968) (internal quotations omitted)).

Although a trial court has broad discretion with regard to discovery and its orders relating to discovery, it is well-settled that a trial court's discretion may be reversed upon a showing of either (i) an abuse of discretion; or (ii) a showing that the trial court unreasonably interfered with the disclosure of relevant and necessary material. Mitchell v. Stuart, 293 A.D.2d 905, 906, 740 N.Y.S.2d 250, 251 (3d Dep't 2002) (holding that the Supreme Court's denial of plaintiff's motion to compel as to certain demands constituted an abuse of discretion since such demands were "useful and reasonable" and "not overburdensome"); Gargano v. V.C. & J. Constr. Corp., 148 A.D.2d 492, 493, 538 N.Y.S.2d 953, 954-55 (2d Dep't 1989) (finding that "it was an improvident exercise of discretion to deny [discovery of the timesheets]" since "appellants demonstrated 'an ample need' for [the] discovery"); Kamhi v. Dependable Delivery Service, Inc., 234 A.D.2d 34, 650 N.Y.S.2d 676, 677 (1st Dep't 1996). Moreover, the appellate court is vested with the authority to substitute its own discretion for that of the trial court, even in the absence of abuse. See In re N.Y. County DES Litig., 171 A.D.2d 119, 124, 575 N.Y.S.2d 19, 23 (1st Dep't 1991).

Here, not only did the trial court impose an extremely abbreviated and expedited discovery schedule that was not necessary,⁵ but it also severely restricted the scope of Appellants' discovery. See R-160-165; R-351-395. Specifically, the trial court denied Appellants access to any internal communications between Respondents' employees. Restricting Appellants from obtaining *any* internal communications constituted an abuse of discretion as it prevented disclosure of facts that would have undoubtedly had bearing on whether Respondents entered into enforceable contracts with the Advantage Landlords.

At the June 10, 2011 hearing, the trial court denied Appellants' request for Respondents to produce internal documents relating to the Advantage program because the trial court did not "believe that internal documents [were] particularly relevant in showing what outsiders may have understood or may have intended in terms of contractual relationship." R-371:18-22. The trial court's restriction of not just a few documents, but rather an entire category of documents constituted an abuse of discretion.

⁵ While Respondents claimed that the proceedings had to be expedited because of the appellate stay maintaining the status quo, the appellate stay did not necessitate things to move as quickly as the trial court required; several weeks could have been allotted for document discovery before depositions and trial without affecting the timing of the trial court's final decision, which even under the court ordered schedule was not entered until October 2011.

Indeed, such denial prevented Appellants from fully discovering all facts bearing on the issues in this case and from fully developing their case for trial. Whether internal communications are relevant is impossible to determine without ever having access to them. If there was a possibility that *any* of these communications *could* have had a bearing on the controversy or *could* have led to further discoverable evidence, then they should have been disclosed. Indeed, it was an abuse of discretion for the trial court to assume that *all* internal communications between Respondents were irrelevant and immaterial to the issues in this case. These communications may well have referenced the meaning of the term “guarantee,” the reason why it was included in the Advantage agreements, or the rationale behind implementing the Advantage program through private contract in a manner that would have contradicted Respondents’ – and ultimately the trial court’s – position that there was no objective mutual assent to contract. Given that this case turned on the ultimate issue of whether there was sufficient evidence of mutual assent, there was a high likelihood that the discovery requests would have, in fact, revealed not only relevant, but highly material information.

Although under New York law, the intent to contract is best evidenced by the parties’ objective actions, if Respondents’ internal communications had stated that they believed a contract existed, such an admission could not

have been ignored by the trial court. Nor could the trial court have ignored internal communications suggesting that the term “guarantee” was specifically used to induce landlords to participate in Advantage by assuring that they would receive payments for one to two years without any kind of interruption. Furthermore, knowing which representatives of Respondents made such statements would have affected Appellants’ determination of which witnesses to depose. Finally, internal communications between Respondents could have also led to other relevant facts, which would have, in turn, affected the way Appellants conducted depositions. The mere fact that internal communications by their nature are not objective evidence does not automatically mean that the content within those communications are all irrelevant to the facts at issue in this case. Some of the communications would have undoubtedly been relevant to the issues in this case or would have led to other relevant facts and testimony that were critical to Appellants’ ability to build its case for trial. Appellants, however, were never afforded an opportunity to determine if such communications existed, much less which witnesses made them.

2. The Trial Court Failed To Enforce Its Own Order Requiring Respondents To Produce E-mail Communications With Third Parties

At trial, Respondents conceded that they violated a trial court order to produce to Appellants e-mail communications between themselves and third parties regarding the Advantage program. At the June 10, 2011 hearing, counsel for Appellants expressly sought, and obtained, clarification from the trial court that Respondents were required to search for and produce e-mail communications with third parties. R-386:6-387:2. After the two witnesses who testified for Respondents at trial both testified that they, in fact, had e-mail communications with third parties, even though no such communications had been produced to Appellants, Respondents' counsel conceded that they had not produced such communications notwithstanding the Court's prior order to disclose the communications to Appellants.⁶ R-1268:19-23; R-1281:21-1282:2; R-1367:4-22.

At that point, the trial court should have ordered Respondents to search for all e-mail communications within the scope of the original request; however, inexplicably, the trial court only ordered Respondents to search for the external communications of Respondents' two trial witnesses.

⁶ This disclosure also raised the question of how many other City employees' files were likewise not searched for responsive documents.

R-1288:13-1290:18; R-1367:4-R-1371:25. Moreover, when Respondents came back and advised the court it would be too cumbersome to create searches and produce the relevant e-mails for one of their two trial witnesses, the trial court excused them from doing so. R-1409:5-1412:9. Thus, the trial court not only allowed the proceedings to continue without any follow-up discovery after Respondents' violation of the discovery order was revealed, but also allowed Respondents to intentionally violate that discovery order with impunity. R-1411:26-1412:9.

The prejudicial error committed by the trial court in denying Appellants access to Respondents' external communications regarding Advantage, including the external e-mail communications of one of Respondents' two trial witnesses, cannot be overstated. This litigation centers on the issue of mutual assent, and, as previously stated, mutual assent is determined by looking at a parties express "words and deeds." There is a high likelihood that such communications contain significant additional objective evidence to support the existence of mutual assent, particularly by explaining the meaning of the term "guarantee" and its use in Advantage program documents, yet Appellants were never given the opportunity to review this evidence before presenting their case at trial, nor to present this evidence to the trial court. The trial court forced Appellants

to try the case without access to any of Respondents' internal communications and with only external e-mail communications from one of Respondents' employees. Thus, not only did the trial court initially impose prejudicial limitations on discovery, but the trial court's subsequent rulings exacerbated those limitations and Appellants were thereby forced to proceed to trial without the ability to create a full record. Indeed, from start to finish, Appellants were forced to litigate with both hands tied behind their backs.

B. The Trial Court Improperly Relied On Evidence About Prior Rental Subsidy Programs Even Though It Precluded Appellants From Offering Evidence Regarding The Same

In determining whether the parties evidenced mutual assent to contract in entering the Advantage agreements, the trial court looked to the nature of previous agreements between Respondents and private landlords that were entered in order to implement prior rental subsidy programs. The trial court, however, denied Appellants the opportunity to discover material evidence concerning those same prior programs.⁷ In addition, the trial court denied Appellants the opportunity to introduce critical evidence of the

⁷ While the trial court officially prohibited discovery related to Section 8, it actually did allow for discovery related to HSP. Due to the expedited discovery schedule set by the trial court, as discussed above, however, Appellants were unable to access all material evidence regarding HSP, particularly evidence which could have been used to prove that HSP, like Advantage, was implemented through private contracts with landlords.

parties' previous agreements, particularly with respect to the Section 8 housing program, a program in which many Advantage Landlords participated. Even worse, after denying Appellants the opportunity to introduce evidence relevant to Section 8, the trial court then relied on evidence not introduced at trial to erroneously hold that the parties have a history of participating in prior rental assistance programs, such as Section 8, without forming a contractual relationship. R-116. As discussed more fully below, the trial court committed reversible error by excluding the discovery and admission of evidence regarding Respondents' prior agreements with the Advantage Landlords and then relying on such evidence as part of its holding.

The trial court's refusal to permit discovery of evidence regarding any prior rental assistance program – with a minor exception for certain limited evidence about HSP - is indistinguishable from the reversible error committed by the trial court in Allen v. Crowell-Collier Publ. Co. 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). In Allen the plaintiffs were former employees of a publisher's plant who sued for severance and retirement pay based on a claim that the defendant had established a practice of making severance payments upon the termination of an employee and that the employees had “‘started or continued in defendant's employ,’ knowing

of and relying upon this policy.” Id. at 405, 235 N.E.2d at 430, 288 N.Y.S.2d at 449. The plaintiffs submitted interrogatories to the defendant pursuant to § 3101 seeking information about practices with regard to severance at the plant where the workers had been employed as well as other plants and offices of the defendant. The defendant moved to strike most of the interrogatories as “not material and necessary” to the resolution of the issues. Id. at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452. The trial court granted the defendant’s motion and the Appellate Division affirmed. The Court of Appeals, however, stated that while the courts “do undoubtedly possess a wide discretion . . . that discretion is not unlimited.” Id. Thus, the Court of Appeals reversed the order and held that, “since the information sought by the plaintiffs is material and necessary to the prosecution of their action, they are entitled to answers to their interrogatories.” Id.

In the present case, Appellants’ document requests regarding programs such as HSP and Section 8, like the interrogatories regarding sister plants in Allen, were directly relevant to the critical issue of mutual assent because they related to the context and history by which the parties entered into the Advantage agreements. Moreover, had Appellants been given the opportunity to admit evidence regarding prior rental assistance programs, Appellants could have shown that programs such as HSP and Section 8 were

also implemented through contracts with third parties – in particular, in some instances, with the same landlords who later became Advantage Landlords. Indeed, Appellants were prepared to show that the context of the parties' relationship - throughout the implementation of a succession of rental subsidy programs via private agreements - suggested that the parties supplied their mutual assent to be contractually bound by the Advantage Program, just as they supplied their mutual assent under both HSP and Section 8. Instead, however, the trial court refused to admit any evidence regarding Section 8 and set an expedited discovery and trial schedule which did not allow the nature of HSP to be fully explored. Appellants could have used Section 8 documents to show that those agreements, unlike the Advantage documents, did provide a clause that would allow Respondents to terminate the subsidy should the City's funding be discontinued. The fact that the Advantage agreements contained no such clause indicates a clear objective intent to not include such an exit strategy in the documents and indeed, serves as objective evidence that the guarantee for one year meant just that, not one year so long as funding is available.

When Appellants attempted to introduce evidence relating to the federal Section 8, Respondents objected on relevance grounds and the trial court sustained the objection, specifically stating on the record: "I believe

[Section 8] is irrelevant to this case.” R-1073. The trial court’s refusal to admit evidence concerning other rental assistance programs was indistinguishable from the erroneous decision in Allen, in which the court had held that evidence of the defendant’s practices at other plants were “not material and necessary” to the resolution of the issues. 21 N.Y.2d at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

Despite denying Appellants’ request to introduce evidence on rental assistance programs other than Advantage and HSP, the trial court itself then explicitly used these programs in reaching its decision. The trial court discussed Section 8 in its Decision, once explicitly, see R-116, and implicitly on several occasions where the trial court referred to other rental assistance programs (in the plural), see, e.g., R-110, 115, 116, 117.

It is reversible error for a court to base part of its holding on evidence that was not admitted at trial and about which it prohibited Appellants from taking discovery. Town of Cheektowaga v. Starlite Builders, Inc., 247 A.D.2d 933, 934, 668 N.Y.S.2d 973, 973 (4th Dep’t 1998) (court erred in basing a damages award on an appraisal report that had not been admitted into evidence, thus denying claimants the opportunity to challenge the validity of the reports); see also Verni v. State, 31 A.D.2d 727, 727, 297 N.Y.S.2d 190, 191 (1968) (“it is improper for a court to consider evidence

not in the record, unless it is something of which it can take judicial notice”) (citations omitted). Indeed, the trial court erred in reaching a legal conclusion on an issue that was not properly before it; namely, whether prior rental assistance programs were carried out by Respondents through contract. This improper legal conclusion had a significant impact on the trial court’s holdings on the ultimate legal questions because the trial court used this conclusion to frame the context for analyzing the objective evidence of mutual assent to contract with regard to Advantage agreements.⁸

The trial court also erred in basing its findings, in part, on a comparison of Advantage to the federal Social Security program. As discussed above, the trial court did not allow any evidence relating to any governmental programs other than HSP and Advantage at trial. Specifically, there was no testimony or evidence introduced at trial relating to Social Security. Yet the trial court *sua sponte* compared Advantage to Social Security, stating that “representations that social security guarantees a

⁸ After objecting at trial to the admission of evidence regarding Section 8, Respondents nevertheless referenced Section 8 in their post-trial submissions. Ironically, Respondents’ own statements actually supported the proposition that Section 8 was carried out through private contracts by pointing to the language in Section 8 documents which “bound” Respondents to proffer Section 8 subsidies to independent third-party landlords. R-3260. Appellants, however, were never given the opportunity to point out this obvious conclusion because of the trial court’s evidentiary rulings. And, the trial court overlooked the clear wording of the Section 8 program materials in erroneously finding that no contracts were formed in the administration of the Section 8 program.

standard of income, does not give rise to a contractual right against the federal government.” R-109. The comparison was not only improper in light of the trial court’s evidentiary rulings, but it was also inapposite. The federal government’s operation of the Social Security income program is simply not analogous to Respondents’ implementation of the Advantage program through agreements with private third parties - the Advantage Landlords.

Accordingly, the trial court’s reliance on the very evidence it excluded at trial, and on which it denied discovery, was prejudicial to Appellants. If the court had entertained the full spectrum of evidence on these prior programs, it would have concluded that the prior programs had also been implemented through contracts between Respondents and third-party landlords – contracts that nonetheless differed in significant respects from the Advantage agreements in this case.⁹ This established relationship between Respondents and Advantage Landlords, contrary to the trial court’s findings, actually provides objective support for the existence of mutual assent between Respondents and the Advantage Landlords, the only element

⁹ Specifically, those contracts contained provisions that allowed Respondents to terminate their responsibilities due to lack of funding or due to the ineligibility of tenants for public assistance benefits, where – as discussed above – Advantage contracts contained no such termination clause but, in contrast, “guaranteed” payment.

of contract formation that the trial court found to be lacking from Appellants' case.

III. The Trial Court Also Erred In Finding That There Was No Enforceable Contract Between Appellants and Respondents

The trial court erroneously concluded, despite overwhelming evidence to the contrary, that "participation in the Advantage program was required as part of continued eligibility to continue in temporary housing," and consequently held that there was no consideration offered by Appellants in exchange for Respondents' Advantage subsidy and therefore no contract was formed between Appellants and Respondents. R-115. The evidence presented at trial, however, clearly showed that Appellants had no preexisting obligation to move into apartments they could not afford on their own, to pay rent to Advantage Landlords, to abide by the terms and conditions of their leases or the rules of the Advantage program, or to participate in Respondents' surveys or otherwise compromise their privacy to promote Respondents' Advantage program. These were all obligations that they assumed upon entering into Advantage agreements with Respondents in order to receive the Advantage subsidies in exchange. These obligations, moreover, benefited Respondents in multiple ways, most critically by allowing Respondents to fulfill their legally mandated

obligation to provide Appellants' homeless households with adequate shelter.

Despite the trial court's finding that there was no consideration to support a contract between Appellants and Respondents, the evidence presented at trial plainly showed that Appellants were not under a legal duty to rent Advantage apartments they could not afford, and they could not have been sanctioned pursuant to 18 N.Y.C.R.R. § 352.35 for refusing an apartment they could not afford. R-2863:18-2864:8 (if a client cannot afford an apartment being offered, that client would not be subject to sanctions under the Client Responsibility Program because, in that case, "the client did nothing wrong"); R-2304 (Winter testified that "[o]ut of the 79,646 individuals who have come through the adult shelter system between January 1, 2005 through June 14, 2009, DHS has only had to discontinue shelter for 15 individuals. Given these numbers, it is clear that [sanctions are] a tool that we have only used as a last resort and on rare occasions."); R-1342-1345; R-1351:10-15 (There were several options available to shelter clients looking to move into permanent housing, including Section 8 and NYCHA. In general, if shelter clients "don't have the income to pay for an apartment, then [DHS] would not require them to accept an apartment"); 18

N.Y.C.R.R. § 352.35(c)(3); R-1877-1878 (administrative finding that tenant was justified in refusing to sign a lease he could not afford).

Furthermore, the trial court simply ignored the evidence establishing that Appellants gave up various rights and entitlements in entering into Advantage leases. For example, a variety of social services are available to individuals and families when they reside in shelters, including group counseling, individual counseling, substance abuse counseling/referrals, court advocacy, advocacy for public assistance entitlements, pre-employment assessment/referrals, and referrals for long-term care. See, e.g., R-2401 (listing the various social services provided by the Parrish House shelter). Shelters also provide on-site child care and meals in some cases. See R-2871:17-25, R-2872:13-16, 19-24. When individuals and families left shelters for Advantage apartments, they gave up access to these shelter services. See R-921:26-922:20 (A.T. testified that, after leaving the Safe Horizon Shelter, she could not return there for any services). Additionally, in order to participate in Advantage, many Advantage tenants had to agree to pay a portion of the rent for the Advantage apartment. See, e.g., R-1560-1562 (stating that A.T.'s portion of the rent is \$367.20); R-1571; R-902:22-23, 903:8-19 (A.T. reviewed Ex. 34, which provided her with information about her lease signing and stated that her monthly rent payment would be

\$367.20). In sum, the actions taken and promises made by Appellants in entering the Advantage agreements constituted adequate consideration to establish a contract between Appellants and Respondents.¹⁰

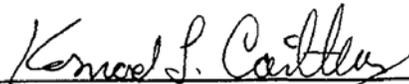
The trial court additionally found, that as with Advantage Landlords, there was no mutual assent to contract in the formation of the Advantage agreements between Appellants and Respondents. R-106. As with the agreements between Respondents and Advantage Landlords discussed above, however, the agreements between Respondents and Appellants were explicitly outlined in program documents which constituted offers by Respondents and acceptances by Appellants of agreements with sufficiently definite terms to form legally enforceable contracts. These thousands of formerly homeless children and adults are entitled to the benefits of these contracts in order to avoid imminent eviction and a return to homelessness, which will overwhelm the already overburdened municipal shelter system.

¹⁰ In general, only the existence - and not the adequacy - of consideration is relevant. According to the famous old adage, even a "peppercorn" will suffice as consideration. See generally, John Edward Murray, Jr., CORBIN ON CONTRACTS §§ 5.02, 5.04 (Desk ed. 2011); 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).

CONCLUSION

For all of the foregoing reasons, Appellants respectfully submit that this Court should vacate the opinion and judgment of the trial court and enter an order granting specific performance in favor of Appellants, or in the alternative, vacate the opinion and judgment of the trial court and remand the case for further proceedings. This Court should further grant such relief and further relief as this Court deems just and reasonable.

Dated: November 7, 2011
New York, New York


Steven Banks, Attorney-in-Chief
Jane Sujen Bock, of counsel
Joshua Goldfein, of counsel
Judith Goldiner, of counsel
THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038
Tel: (212) 577-3300
Fax: (212) 809-1574

Debra A. Dandeneau
Konrad L. Cailteux
Isabella C. Lacayo
Adam Lavine
Arielle Lenza
Jesse Morris
Kyle Ortiz
Emily Pincow
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007
Attorneys for Plaintiffs-Appellants