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To be Argued by:
STEVEN BANKS

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

New York Supreme Court

Appellate Division – First Department

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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STATUTES

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 reply in further 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

Respondents' argument that they were "forced" to choose between "two unpalatable options" when faced with changes in funding for their Advantage program, Resp'ts' Br. at 1, ignores a third option they had. The Respondents could – and should – have honored their contractual commitments to current Advantage Landlords and Tenants, and not entered into new Advantage commitments going forward. Indeed, Respondents' legal obligations to provide shelter to homeless families and individuals mandated that they should have taken this third option.

Respondents now attempt to defend their decision not to honor their commitments by spending the majority of their brief arguing that there are no

[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, Ms. Zheng withdrew as one of the class representatives, though she remains a member of the Appellant class. The Respondents agreed to a certified class consisting of some 16,000 formerly homeless families and individuals in receipt of Advantage rent subsidies at the time this litigation was commenced in March 2011. R-793-794.

legally enforceable contracts between the Respondents and the Advantage Tenants. For all of the reasons explained in Appellants' opening brief, Respondents are wrong.[2] Moreover, Respondents virtually ignore Appellants' argument that Respondents entered into contracts with the Advantage Landlords – contracts to which Appellants are intended third-party beneficiaries.[3] And for good reason – the Advantage Landlords are private parties receiving no social service benefit and with no legal duty to participate in Advantage. Indeed, Respondents admit in their responsive brief that they used the promise of guaranteed payments to induce these landlords to participate in Advantage. See Resp'ts' Br. at 18. Further,

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[2] For example, Respondents, citing the testimony of class representative and domestic violence survivor A.T., argue that no contracts exist between the City and the Advantage Tenants because shelter residents who secured Advantage apartments had a pre-existing legal obligation to accept suitable permanent housing or face loss of shelter eligibility. Resp'ts' Br. at 31-32. Respondents then claim that because "when Advantage Tenants and Landlords signed their leases, the subsidy made their apartments affordable," id., the Advantage Tenants were obligated to take their Advantage apartments. This argument, however, is undercut by Respondents' other argument that they had the right to end Advantage payments at any time for any reason. If Respondents could end the subsidy at any time for any reason then, not only did the apartments became unaffordable, but the Advantage Tenants were subject at any time to immediate eviction, repeat homelessness, and potential irremediable and life-threatening injury. Brief of Amici Curiae Sanctuary for Families, New Destiny Housing Corporation, Center Against Domestic Violence, Safe Horizon, Violence Intervention Program, Inc., New York Asian Women's Center, Good Shepherd Services, Barrier Free Living, and Homeless Services United at 14, 19 ("The mission of Advantage was to procure leases for homeless and domestic violence shelter inhabitants by convincing landlords that the City would assure rental payments... Advantage members generally could not have afforded the rentals without City backing, and no landlord would have staked his lease on the low or non-existent incomes of the victims leaving shelters."). And, Respondents admit that shelter residents did not have to accept housing that they could not afford. Id. at 32.

[3] Before the trial court, Respondents conceded that Appellant Advantage Tenants are third-party beneficiaries of any agreements between the Respondents and the Advantage Landlords. See R-104. In their brief, Respondents do not even attempt to contest this point.

Respondents do not even address the trial court's finding that the Advantage Landlords did provide adequate consideration to Respondents. R-116. Accordingly, even if no contract existed between the Respondents and the Advantage Tenants, the record evidence demonstrating the contract between the Respondents and the Advantage Landlords compels the reversal of the trial court's erroneous decision.

Respondents' claim that Appellants unreasonably sought to delay the trial court proceedings after obtaining an appellate injunction must also fail. Before the appellate injunction, Appellants sought to move quickly to prevent the imminent eviction of some 16,000 formerly homeless families and individuals. Many of these formerly homeless New Yorkers would have had no option other than to live on the streets because the City's municipal shelter system simply could not have accommodated all of them. With the appellate injunction in place and the threat of imminent eviction lifted, Appellants shifted their focus to gathering the evidence needed to keep these thousands of households in their homes. Accordingly, Appellants sought limited additional time to complete discovery to gather the required evidence and prepare for trial. The trial court erred in denying this brief extension of time even though it would not have prejudiced Respondents in any way. See R-369-370.

ARGUMENT

I. Respondents Entered Into Legally Enforceable Contracts With The Advantage Landlords

As shown in Appellants' opening brief, there are three elements required to form a legally enforceable contract: capacity, consideration, and mutual assent. Opening Br. at 16-17. That Respondents and the Advantage Landlords have the legal capacity to contract was never in dispute. See R-23-24, ¶¶ 5-7. Moreover, Respondents did not dispute the trial court's finding that consideration was exchanged between Respondents and the Advantage Landlords. See R-116 (the trial court 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]"); Resp'ts' Br. at 31 (Respondents argue that any contract between the City and Advantage Tenants would fail for lack of consideration, but do not argue similarly with respect to Advantage Landlords).[4] Thus, the only remaining issue is whether Respondents and the Advantage Landlords mutually assented to contract. As shown in Appellants' opening brief, the evidence at trial established the Respondents' and

[4] Respondents similarly cannot defend the clear legal error committed by the trial court in analyzing the term "guarantee" through the lens of Guaranty and Suretyship law. See Resp'ts' Br. at 27. The trial court's misapplication of the definition of "guaranty" to the "guarantee" made by Respondents led the court to improperly conclude that the Advantage agreements were not contracts. Opening Br. at 33-34.

Advantage Landlords' objective manifestations of assent, and the trial court erred in not finding assent. See Opening Br. at 21-22, 29-37. Respondents spend little, if any, time addressing Appellants' evidence regarding the mutual assent of the Respondents and Advantage Landlords.

A. Respondents And The Advantage Landlords Mutually Assented To Enter Into Contracts For The Provision Of Housing To The Advantage Tenants

1. The Certification Letters Were Explicitly Directed To The Advantage Landlords And Contained Offers To Enter Into A Contractual Relationship

Respondents argue that their Advantage Certification Letters were not offers to the Advantage Landlords to contract because they were addressed to prospective tenants, not to landlords. Contrary to Respondents' arguments, though, the record evidence showed that Respondents did address the Certification Letters directly to prospective Advantage Landlords. As the trial court found:

> Defendants required prospective Advantage Tenants to show their Certification Letters to brokers and landlords who could assist them to obtain an apartment. See A.T.'s Dec. 6, 2010 Certification Ltr. (Ex. 24) ("Please show this letter to landlords and brokers during your apartment search."), R-1551; Advantage Certification Ltr. (Ex. 244), R-2433; Cadichon Test. at 476:17-21, 477:12-23, 480:5-8, 11 (in a typical Certification Letter, such as Ex. 244, there was a specific section with information for landlords and brokers and instructions to call the DHS hotline to participate in Advantage and DHS wanted tenants to show this section to landlords when looking for an apartment), R-1275, R-1276, R-1279; Hess Dep. (Ex. 249) at 83:20-84:6; 84:8-14 (Certification Letters

were given to families in shelter with the intent that the letters be shown to prospective landlords), R-2520-2521.

The typical Certification Letters contained a section entitled, "Information for Brokers and/or Landlords." See, e.g, DHS Certification Ltr. from Robert Hess (Ex. 62), R-1954; A.T.'s Certification Ltr. (Ex. 24), R-1551. Defendants instructed prospective Advantage Tenants that they could use the Certification Letter as a "voucher" with landlords. See, e.g., May 8, 2007 Adults Fact Sheet (Ex. 19) ("use this letter as a voucher with landlords"), R-1515.

R-44, ¶¶ 73, 74.

Thus, not only did the letters explicitly instruct the prospective tenants to show the letters to prospective landlords, but the letters also contained a specific section titled "Information for Brokers and/or Landlords" that Respondents intended to be read directly by landlords. This section gave landlords directions and a phone number to call on how to accept Respondents' offer and become Advantage Landlords. See, e.g., R-2433. At trial, Advantage Landlords testified that they read Respondents' Certification Letters and followed Respondents' instructions on acceptance by calling the provided phone number, arranging inspections of their apartments and then leasing their apartments to Advantage Tenants. R-44-46, ¶¶ 76-79. Moreover, Respondents concede that the statement in the Certification Letters that rental payments would be "guaranteed" was meant to "induce landlords to participate in the program." Resp'ts' Br. at 18 (emphasis

added). Thus, the Certification Letters were direct offers to the Advantage Landlords, that they could – and did – accept by calling Respondents.[5]

2. The Testimony At Trial Shows That The Advantage Landlords Believed They Entered Into Binding Advantage Agreements With Respondents

Contrary to Respondents' claims, the testimony at trial showed that the Advantage Landlords did believe that they were entering into binding agreements with Respondents. In fact, the trial court even cited this testimony in its findings of fact. See R-44, ¶ 76 (Mr. Reaccuglia, A.T.'s landlord, read A.T.'s Certification letter to mean that "the Advantage program guarantees the portion of her rent directly sent to [him] for the term of one year"; Ms. Guggenheim, a not-for-profit landlord, understood the Advantage Certification Letters to mean "[t]hat the subsidy would be guaranteed for the year."); R-45, ¶ 77 (Mr. Nussbaum, an Advantage Landlord, participated in Advantage because he was presented with Certification Letters issued by Respondents that stated that the City's rent payments were guaranteed; Mr. Reaccuglia chose A.T. as a tenant over others partly because of "the guarantee that the City was going to help her pay the rent."); R-67-68, ¶¶ 145, 148 (Mr. Reaccuglia was induced into an Advantage Agreement – he chose A.T. over other potential tenants – by Respondents' promise to make

[5] Respondents' arguments that the Certification Letters did not have all the material terms of the lease, Resp'ts' Br. at 20, is meritless. As explained in Appellants' opening brief, all the material terms of the contract were contained in the Certification Letters. See Opening Br. at 26-28.

Advantage payments); R-52, ¶ 100 (Mr. Reaccuglia understood the Advantage Landlord Statement of Understanding to mean that "the City was going to pay their proportionate share monthly" and that in turn, he had obligations such as providing heat and hot water to the tenant; Mr. Nussbaum believed, based on the Landlord Statement, that the City would pay a portion of the tenant's rent throughout the term of the Advantage lease.); R-60, ¶ 120 (Ms. Guggenheim believed Advantage payments would be "made on a monthly basis," she "had no reason to believe that it would stop," and she had no question that Advantage would last two years for each tenant because "[t]here was no indication that it would be stopped at any time"; Mr. Reaccuglia was never told by Respondents that the Advantage payments could stop before the end of the one-year lease term; Mr. Nussbaum was never told by Respondents that the City could stop paying its portion of the rent while the Advantage leases were in effect); R-62, ¶ 127 (Mr. Reaccuglia thought the City would pay for an Advantage Tenant's rent as long as he held up his end of the bargain, i.e., provided heat and gas and kept the apartment in good shape.).

In a failed attempt to overcome the weight of this evidence, Respondents misstate the testimony of a real estate broker, Mr. Karman. Respondents claim that Mr. Karman, when "[f]aced with his deposition testimony that Advantage was 'less of a contract and more of a subsidy', [ ] said he had never given much thought to whether the City entered into contracts in the Advantage program and did not

know whether it had done so." Resp'ts' Br. at 8 (citations omitted). But Mr. Karman never said that Advantage was "less of a contract and more of a subsidy." At his pre-trial deposition, he said he believed that HSP – not Advantage – was "less of a contract and more of a subsidy." R-996-997. Whether Respondents entered into contracts with HSP landlords is not even an issue in this case.[6] Moreover, whether Mr. Karman, a layperson and real estate broker (not an Advantage Landlord), believes that other parties entered into binding contracts cannot determine the legal question of whether such contracts were formed. What is critical, however, is his understanding that the City committed to "guaranteeing the rents." R-1027.

3. The Absence Of Certain Formalities Does Not Preclude The Existence Of Enforceable Contracts Between Respondents And The Advantage Landlords

A contract need not be embodied in a single document to be enforceable under New York law. See Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985) ("Under New York Law, parties are free to enter into a binding contract without memorializing their agreement in a fully executed document."). Respondents themselves concede that "Advantage is couched in language with a superficial similarity to promises that lead to contractual relationships" and that the

[6] Contrary to Respondents' arguments, Resp'ts' Br. at 41, Appellants have never claimed HSP leases were not contracts. To the contrary, Appellants have argued that HSP leases were contracts. See Opening Br. at 51-52.

Advantage documents have "ostensible similarities" to contracts. Resp'ts' Br. at 23.

To try to blunt the impact of this fact and law, Respondents make much of the fact that the City did not hand sign certain Advantage documents. There is no requirement, however, that a contract contain any formal language or even be affixed with a signature. Under New York law, not only are parties "free to enter into a binding contract without memorializing their agreement in a fully executed document," Winston 77 F.2d at 80, but also "a contract may be valid even if it is not signed by the party to be charged." Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d 363, 368, 828 N.E.2d 593, 597, 795 N.Y.S.2d 491, 494 (2005). New York law adopts an expansive definition of "signature" and it includes "any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing." N.Y. Gen. Constr. Law § 46 (McKinney). The official letterhead of the City's Department of Homeless Services and Human Resources Administration is such a mark; the letterhead was used to authenticate – or make official – the Advantage documents.

In any event, there can be no dispute that the City drafted the Advantage documents and required them to be signed by all Advantage Landlords. The absence of a signature in this context means nothing because – aside from

formalities – signatures are used to identify parties. The City agency parties were clearly self-identified by their own letterhead.

4. Whether The City Was A Party To The Standard Form Leases Between Advantage Landlords And Tenants Has No Bearing On The Existence Of An Enforceable Contract Between Respondents And The Advantage Landlords

Respondents argue that the testimony of Suzie Cadichon, the director of DHS' Rental Subsidy Unit, showed that the Respondents told Advantage Landlords that they would not enter into any contractual relationship with Respondents. See Resp'ts' Br. at 8-9, 28. Yet, as even Respondents' paraphrasing makes clear, Ms. Cadichon's testimony was just about the standard form leases that Advantage Landlords were required to bring to Advantage lease signings at Respondents' offices:

> Ms. Cadichon testified that at these [housing] fairs and meetings, landlords and brokers asked her on 15 separate occasions if the City would enter into a lease directly with landlords. Each time she stated unequivocally that the lease was between the landlords and tenants only; the City was not a party.

Resp'ts' Br. at 9. Thus, Respondents' argument is nothing but sophistry. Appellants do not argue – and have never argued – that Respondents are parties to the standard form leases.[7] Rather, Appellants have shown that Respondents are

[7] Furthermore, the Advantage Lease Rider – which was drafted and provided by Respondents – states in its first paragraph that the Lease Rider supersedes the lease between the landlord and the tenant in the event of a conflict and acknowledges that the Lease Rider is legally enforceable. See R-1952. Moreover, the Lease Rider explicitly altered the landlords' standard form leases in

parties to separate contracts with the Advantage Landlords that require Respondents to make monthly payments to the Advantage Landlords.[8]

B. The Advantage Landlords Are Not Recipients Of Any Social Benefit Under Advantage, And, Therefore, Respondents' Social Services Argument Does Not Apply To The Advantage Landlords

Respondents continue to argue that Advantage, as a social services program, could only give rise to benefits, not contractual obligations. Resp'ts' Br. at 22-24. Respondents further argue that it is Appellants' burden to prove that Respondents operated Advantage through contracts and insist that the "burden cannot be met by pointing to language stating an intention to pay benefits." Resp'ts' Br. at 23. Respondents, though, never address the fact that the Advantage Landlords were not recipients of social service benefits under Advantage. Rather, the Advantage Landlords were independent parties that entered into agreements with Respondents to accept Advantage Tenants in exchange for money. See Opening Br. at 40. Therefore, even if Respondents could show that the Advantage Tenants were only

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several material aspects. For example, if the landlord were in default of any obligation to the City whatsoever, DHS could withhold the Advantage payment for the purpose of set-off, and if the tenant left the apartment due to an eviction or move, the landlord would return any pre-paid rent to the City or allow the City to place another Advantage client into the apartment for the remainder of the lease period. Id.

[8] Respondents attempt to discredit Mr. Reaccuglia, A.T's landlord, by pointing to his testimony that he believed that the City had contractually obligated itself under HSP. Although HSP contracts are not at issue, it is Appellants' position that, like Advantage, the HSP program was implemented by contracts as well. Respondents argument only underscores the improper discovery limitations placed by the trial court which prevented Appellants from obtaining evidence which could have been used to prove HSP, like Advantage, was implemented through private contracts with landlords. Opening Br. at 49 n.7.

recipients of public benefits, not parties to a contract, this still does not show that Advantage Landlords were recipients of public benefits. Indeed, Respondents' admission that "Advantage is couched in language with a superficial similarity to promises that lead to contractual relationships," Resp'ts' Br. at 23, proves Appellants' argument vis-à-vis the Advantage Landlords.

II. Respondents' Guaranteed Rental Payments To The Advantage Landlords Were Not Conditioned On The Availability Of State Funding

The documents forming the Advantage agreements between Respondents and the Advantage Landlords made clear that rental payments were guaranteed for one or two years and contained no provision conditioning this guarantee on the availability of funding from the State. See Opening Br. at 29-30, 52. Indeed, Respondents' argument that "guarantee" only meant that rental payments were not tied to the status of the tenants' public assistance cases is a red herring. Respondents concede that the word "guarantee" was used to "induce landlords to participate in the [Advantage] program." Resp'ts' Br. at 18.

The evidence showed – and Respondents do not dispute – that Respondents had to use the word "guarantee" to induce landlords into the Advantage Program because those same landlords had become wary of Respondents' housing subsidy programs after enduring significant problems with payment disruptions under Advantage's predecessor program, HSP. R-25-26, ¶¶ 12-15; R-30-32, ¶¶ 33-35; R-

2443 ("Rent will be guaranteed for the entire year. We expect and hope that this will make the program much more appealing to landlords."). Obviously, landlords needed to be lured into accepting Advantage Tenants with a real promise of uninterrupted payments by Respondents. See R-68, ¶ 148; R-814-816 (Mr. Reaccuglia testified there were other potential tenants interested in the apartment he leased to A.T., but he chose A.T. over others because of the City's guarantee to pay a portion of the rent). A guarantee such as the one now propounded by Respondents – one that is no guarantee at all and can be voided at the "guaranteeing" party's discretion – is simply not the type of guarantee that could convince landlords that agreeing to lease to Advantage Tenants was in their financial interest.[9] It defies reason to argue that the Advantage Landlords knowingly entered into rental agreements that permitted the City to end payments at any time for any reason when those same landlords had already walked away from the HSP rental agreements that permitted the City to end payments only when tenants lost their public assistance.

[9] Respondents acknowledge that the "guarantee" of rent payments was "usually" tied to tenants' ongoing receipt of public assistance benefits. Resp'ts' Br. at 7. While the City was clearly attempting in some documents to reassure landlords that Advantage rent payments would not be disrupted in the same manner that HSP payments were, the City unequivocally bound itself in the Participant Statements of Understanding, the Landlord Statements of Understanding, and the Lease Riders by promising that the City "will pay" the Advantage rent payments without any reference to public assistance status. R-1560-1562, R-1816-1817, R-1950-1951.

III. Appellants Are Entitled To Second Year Renewals On Their Advantage Leases

Respondents cite cases suggesting that the use of the word "may" means that second-year Advantage renewals were discretionary. Resp'ts' Br. at 33-35. Respondents' own citations, though, show that the opposite is true as well. Words like "shall" are used to "import duty, not discretion." Id. Respondents ignore the Advantage Participant Statement, signed by Advantage recipients as well as DHS representatives, which provides: "If I am found eligible for a second year of Advantage [pursuant to specified eligibility criteria], the City will pay a second year of Advantage Rent Payments to my Landlord on a monthly basis." R-1560, ¶ 3 (emphasis added). "Will" is a synonym for "shall" and, thus, according to Respondents' argument, "will" imports duty, not discretion. See Thesaurus.com's synonyms for "shall" (available at http://thesaurus.com/browse/shall).

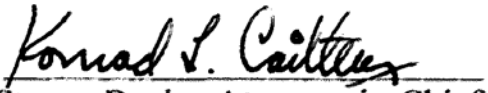
Moreover, in all the time that Respondents administered Advantage, every Advantage Tenant who met Respondents' Advantage renewal criteria received a second year of Advantage rental assistance. R-38-39, ¶ 55 (Linda Gibbs, the Deputy Mayor and former Commissioner of DHS, testified that it was envisioned that everyone who was eligible under the program criteria would be eligible to receive a second year; Sara Zuiderveen, the Assistant Commissioner for Prevention Services at DHS, testified that Work Advantage Tenants in the seventh month of

their leases were automatically sent renewal letters stating that to renew for a second year and some tenants were renewed even if they did not meet the renewal criteria); R-3030-3031 (Commissioner Diamond testified that all Advantage Tenants who met the renewal criteria in the Children's and Fixed Income Advantage programs were renewed for a second year). Thus, Respondents' arguments that they should have the discretion to deny a second year of assistance to Advantage Tenants even if they meet Respondents' renewal criteria are belied by the undisputed history of their past actions. There is no evidence that the Advantage documents should be read in any way other than in the manner propounded by Appellants: if the Advantage Tenant meets the renewal criteria, Respondents must make Advantage payments for a second year, but if the Advantage Tenant does not meet the renewal criteria, Respondents may, in their discretion, make or decline to make Advantage payments for a second year.

CONCLUSION

For all of the foregoing reasons and all of the reasons set forth in their opening brief, 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. Appellants also respectfully request that this Court grant such other and further relief as this Court deems just and reasonable.

Dated: December 16, 2011
New York, New York



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