2021 IL App (1st) 200893

THIRD DIVISION
September 30, 2021

No. 1-20-0893

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANDY AMBROSIUS, DAVE CRABILL, and MICHELLE SOBARNIA, Plaintiffs-Appellants, v. CHICAGO ATHLETIC CLUBS, LLC; EVANSTON ATHLETIC CLUB, INC.; LINCOLN PARK ATHLETIC CLUB, INC.; LPAC HOLDINGS LLC; WESTLOOP ATHLETIC CLUB LLC; LAKEVIEW ATHLETIC CLUB, INC.; LINCOLN SQUARE ATHLETIC CLUB LLC; WICKER PARK ATHLETIC CLUB LLC; and BUCKTOWN ATHLETIC CLUB LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County 2019-CH-008662 Honorable Sophia H. Hall, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Burke concurred in the judgment and opinion.

OPINION

¶ 1 This appeal involves a free rewards program that was offered to members of Chicago Athletic Clubs, LLC, and its associated health clubs (collectively CAC) between 2015 and 2018. After the program was terminated, plaintiffs Andy Ambrosius, Dave Crabill, and Michelle Sobarnia filed a putative class action complaint against CAC, asserting causes of action for a violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2018)), promissory estoppel, and unjust enrichment. Plaintiffs

generally alleged that CAC wrongly terminated the rewards program and refused to redeem points that plaintiffs had accrued. CAC filed a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2018)), showing that when signing up for the program, the plaintiffs had agreed to terms and conditions of the program that allowed CAC to terminate the program at any time, and, nonetheless, CAC had in fact continued to allow members to redeem their points even after the program's termination. The circuit court granted CAC's motion to dismiss and dismissed plaintiffs' complaint with prejudice. Plaintiffs appeal that dismissal.

¶ 2 The record shows that plaintiffs, who were members of gyms operated by CAC, brought a class action complaint against CAC on July 24, 2019. Plaintiffs alleged that CAC began offering a rewards program in December 2015, pursuant to which gym members could earn points for various activities, including going to the gym, completing health challenges, referring friends, and purchasing personal training sessions. The members could then redeem points for various goods and services, including CAC merchandise, guest passes, membership dues, or personal training sessions. Two and a half years later, on July 16, 2018, CAC announced that it was terminating its rewards program. Plaintiffs contended that CAC "refused to allow" gym members to redeem their unused reward points. Plaintiffs alleged that they were "unable to use" the rewards points they "accrued and they were not "given any credit or compensation for [their] unused" points.

¶ 3 Plaintiffs further claimed that they had not been informed that their reward points could expire or that CAC could cancel the rewards program without prior notice. Plaintiffs stated that CAC's termination of the rewards program conflicted with advertisements on CAC's website and the website for Perkville, the third-party platform that hosted CAC's rewards program, which

represented that members could redeem their points "at any time." Plaintiffs also alleged that by plaintiffs' participation in the rewards program, CAC "obtain[ed] monetary and marketing benefits" from members who "spent time and energy posting on social media platforms about [CAC's] gyms, referred others to become CAC Members, and purchased goods and services from [CAC] in order to obtain" reward points.

¶ 4 Plaintiffs further stated that after CAC terminated its program, many members "voiced their disappointment" with CAC's decision. Thereafter, CAC "attempted to partially reinstate" the rewards program by allowing members to continue redeeming their points. Plaintiffs, however, maintained that CAC's efforts were "insufficient" because they did not allow members to earn more points. Therefore, members were "not able to obtain the higher valued goods and services that require[d] more points" than they had earned, and the "lower valued goods and services" that they could obtain with their rewards points "may not be desirable to" plaintiffs and other putative class members. Finally, plaintiffs asserted that even if they redeemed their reward points for lower valued goods and services, they would have some points remaining that were "worthless."

¶ 5 The three plaintiffs alleged that they enrolled in the CAC rewards program, and "[o]n information and belief," they were "never presented with terms and conditions of service for the Perkville website that [they] w[ere] required to read and assent to before enrolling." Based on the above, plaintiffs alleged that CAC violated the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2018)) in that its conduct "constitutes unfair, deceptive, and oppressive acts or practices." Plaintiffs further alleged a claim of promissory estoppel, in that CAC "unambiguously promised Plaintiffs and Class members that they would be able to earn CAC Rewards Points that never expire, that they could 'redeem points at any time' while they are active CAC Members, and they

could redeem the points on certain enumerated goods and services," and that plaintiffs reasonably relied on those promises. Finally, plaintiffs alleged an unjust enrichment claim, stating that they "conferred a benefit" on CAC by, among other things, spending money on goods and service and posting on social media and that CAC's "retention of the benefit violates the fundamental principles of justice, equity, and good conscience" because CAC misled plaintiffs and other putative class members.

¶ 6 On October 29, 2019, CAC filed a motion to dismiss plaintiffs' complaint pursuant to section 2-619 of the Code. In that motion, CAC stated that plaintiffs enrolled in the rewards program online and agreed to the terms of service of the program, which specifically provided that the rewards program could be changed or terminated at any time. A copy of the terms of service was attached as an exhibit. Those terms include, among other things, the following bullet points:

> "• [CAC] reserve[s] the right, at their sole discretion, to modify, add, or remove any portion of their Reward Program, in whole or in part, at any time.
>
> • [CAC] may change, suspend, or discontinue any aspect of their Reward Program at any time or terminate it at any time. [CAC] may at their sole discretion, cancel your membership in the Reward Program at any time.
>
> • [CAC,] in their sole discretion, may determine that certain services or items are not eligible for point accumulation. [CAC] may change their list without notice.
>
> • [CAC] [is] not responsible for any unredeemed points or any points which are lost."

¶ 7 CAC further stated that, although it had no obligation to do so, it had continued to allow members to redeem their points, even after the termination of the rewards program. CAC attached

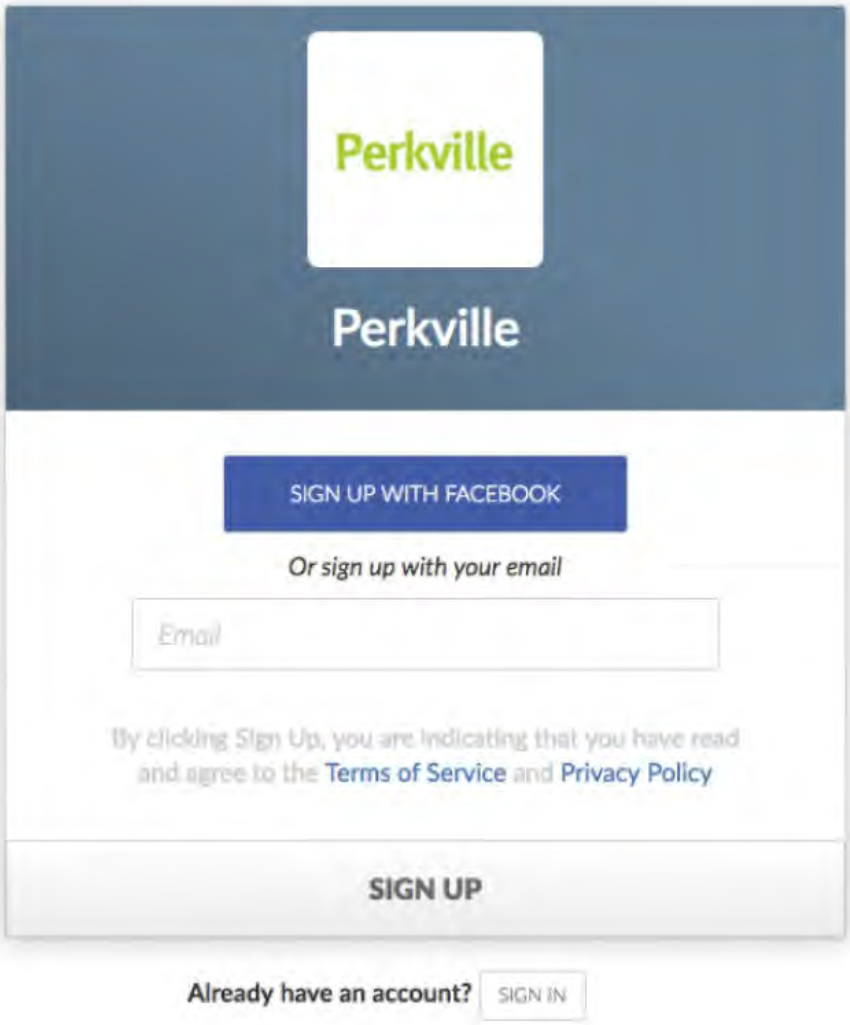
specific email communications that it had with two of the plaintiffs, Ambrosius and Crabill, in which those plaintiffs requested assistance redeeming their points and CAC confirmed that they could do so.

¶ 8 CAC's motion to dismiss was supported by two declarations from Kate Kreissl, the Director of Customer Service for CAC since 2011. In the first, Kreissl identified and attached an email chain between her and Ambrosius on August 1 and 2, 2018. Ambrosius contacted Kreissl to ask about redeeming his reward points, and Kreissl confirmed that he had points available and told him that she would be "happy to help apply those points" to a list of available goods and services. Kreissl also identified and attached an email CAC sent to members on August 10, 2018, which stated,

> "We've received your feedback and hear you. You are able to redeem your CAC Rewards points earned through 7/15/18 any time during the life of your membership. If you have not already reached out to a CAC Manager to redeem points, please reply to this email address any time so that a CAC Manager can assist in doing so."

¶ 9 Crabill also emailed CAC, stating that he would "like to redeem the points that [he] earned" and asking how he could "do that." A CAC representative similarly replied that she was "happy to assist," listing various options for which he could redeem his unused points.

¶ 10 In the second declaration, Kreissl described the process by which members signed up for the rewards program. She explained that CAC members could sign up for the rewards program online at www.perkville.com and attached the following "true and correct copy of the form and content of the sign-up page."



¶ 11 Specifically as to the three plaintiffs, Kreissl stated that they enrolled in the rewards program online at www.perkville.com and that, by signing up online, they were required to fill out the information on the sign-up page, including confirming their agreement with the terms of service.

¶ 12 In response to CAC's motion to dismiss, plaintiffs asserted that CAC had failed to show that they "manifested assent to the Perkville Terms." Plaintiffs characterized the purported agreement as a "browsewrap agreement," further stating that it was "too inconspicuous to provide

reasonable notice of the terms" to which plaintiffs were purportedly agreeing. Plaintiffs additionally argued that, even if they had agreed to the terms, the agreement was illusory, the specific language of the terms did not allow CAC to terminate the program "without prior notice," and the terms were in conflict with CAC's other representations that they could "earn" points that could be redeemed "at any time."

¶ 13 Finally, plaintiffs also argued that CAC had not "provide[d] any evidence pertaining to what process Plaintiffs used for registering," and specifically, that for registrants who used a smartphone, a pop-up keyboard obscured reference to the terms, and it was possible for members to sign up by only pressing "go" and without actually clicking the "Sign Up" button.

¶ 14 In support of that argument, one of the attorneys for plaintiffs, Jeffrey Blake, filed a declaration. Blake stated that "on December 17, 2019," he registered an account at Perkville.com, using "an iPhone SE and Apple's Safari Internet Browser." Blake attached screenshots of what he encountered during the registration process. First, Blake navigated to www.Perkville/login/#join. Blake attached a screenshot showing a Perkville logo and options to sign up with Facebook or to sign up with an e-mail. Under those options was a notice that begins, "By clicking Sign Up, you are indicating that you have read." The sentence apparently concludes below the viewable portion of the screen. Blake stated that he selected "Email" and a keyboard "automatically popped up, covering approximately half of the screen." Again, the screenshot included the beginning of the notice, "By clicking Sign Up, you are" with the remainder of that sentence obscured by the keyboard pop-up. Blake entered an e-mail address and clicked "go." Blake then clicked on a link in an e-mail sent from Perkville to verify his account and was directed back to www.perkville.com, where he was prompted to enter his first and last names and enter a password. After entering that

information, Blake again selected the "go" button. "A pop-up window for Apple's automatic password saving feature asked if [he] wanted to save the password," and again, "By clicking Sign Up, you are" was displayed above the pop-up window, with the remainder of the sentence obscured. Blake pressed "Not Now." Blake then stated, "[w]ithout ever seeing more than an instantaneous flash of a hyperlink to the 'terms of service' as [he] transitioned from one page to the next, [Blake] was registered for Perkville's app." Blake stated that he never clicked a button that said, "Sign Up." Blake further stated that he also attempted to register using the "Sign up with Facebook" button, however, he ultimately encountered an error message that the "application you're trying to use is either no longer available or access is restricted."

¶ 15 In reply, CAC reiterated that it had, in fact, identified how plaintiffs enrolled in the program—online at www.perkville.com, not through Facebook or a smartphone—and that plaintiffs had not suggested anything to contradict that they signed up online. CAC further argued that plaintiffs mischaracterized the online agreement as "browsewrap," which describes when a party gives assent to terms and conditions simply by using a website and no affirmative action is required to indicate their assent. To the contrary, here, plaintiffs affirmatively indicated their agreement with the terms of service when they signed up for the rewards program. CAC contended that this agreement was more accurately termed a "clickwrap" or "sign-in wrap" agreement, which are routinely enforced by courts, even if a user does not choose to visit the hyperlink or read the terms of the agreement. CAC also pointed out that plaintiffs had never attempted to redeem their points and been denied and had, in fact, been informed of their ability to redeem their points even after the program's termination. In sum, CAC stated that plaintiffs' claims hinged upon the theories

that CAC had no contractual right to terminate the program and that plaintiffs were denied the opportunity to redeem points, both of which were clearly false.

¶ 16 On January 9, 2020, CAC filed a motion to strike Blake's declaration. CAC argued that Blake's attempt to introduce evidence regarding his own sign-up process for an account on Perkville—17 months after the rewards program was terminated, and where the plaintiffs did not sign up for the rewards program using a smartphone—was totally irrelevant to the sign-up process used by plaintiffs.

¶ 17 Plaintiffs responded to CAC's motion to strike, arguing that the declaration "illustrate[d] that there are at least two ways to enroll in Perkville that [we]re not described in" Kreissl's declaration—specifically, through Facebook or using a smartphone—and that it "establishe[d] that CAC ha[d] not affirmatively demonstrated *** that Plaintiffs agreed to the Perkville Terms." Plaintiffs did not respond to CAC's argument that Blake's narrative of his experience signing up for Perkville in 2019 was irrelevant to the sign-up process plaintiffs encountered years earlier.

¶ 18 The court held a hearing on the motions to dismiss and to strike Blake's affidavit, although no transcript of that hearing appears in the record on appeal. Thereafter, on August 12, 2020, the circuit court entered a written order dismissing the case with prejudice. The court explained,

> "Defendants' Motion to Dismiss Pursuant to 735 ILCS 5/2-619 is granted. Count I, alleging a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, is dismissed for the reason that the Perkville webpage *** has a hyperlink to Terms, which provide that the Rewards Program at issue in the Complaint may be terminated without notice. Therefore, Plaintiffs' claim that [CAC] omitted from them that the Rewards Program could be terminated

> without notice is not well taken and the webpages are not deceptive. Count II, alleging promissory estoppel, and Count III, alleging unjust enrichment, are dependent upon Count I. Because the Court dismissed I, as discussed above, Counts II and III are accordingly dismissed as well."

¶ 19 The court further concluded that the dismissal of plaintiffs' complaint did not require resolution of the motion to strike Blake's declaration, and accordingly, that motion was not considered. Plaintiffs filed a timely notice of appeal from that order on August 21, 2021.

¶ 20 In this appeal, plaintiffs ask this court to reverse the circuit court's dismissal, contending that they adequately pleaded claims of consumer fraud, promissory estoppel, and unjust enrichment. They argue that there was no evidence that they actually assented to the Perkville terms or, if they did, that their assent was meaningful. Plaintiffs further argue that the terms are "substantively unconscionable" because they "contradict other (more material) terms of the agreement between the parties *** and/or render those terms illusory."

¶ 21 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). The moving party admits the legal sufficiency of the complaint, all well-pleaded facts, and all reasonable inferences therefrom, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Id.* The court views the pleadings and any supporting documentary evidence in the light most favorable to the nonmoving party. *Id.* at 367-68. This court reviews *de novo* a dismissal under section 2-619 of the Code. *Id.* at 368; see also *Thomas v. Weatherguard Construction Co.*, 2015 IL App (1st) 142785, ¶ 63 (under *de novo* review, the reviewing court performs the same analysis the trial court would perform). Dismissal of a complaint under section

2-619 is appropriate only if the plaintiff can prove no set of facts that would support a cause of action. *In re Estate of Boyar*, 2013 IL 113655, ¶ 27. "If a defendant satisfies its initial burden of presenting affirmative matter defeating a plaintiff's complaint, the burden then shifts to the plaintiff to show that the asserted defense is unfounded or leaves unresolved issues of material fact as to an essential element." *Badette v. Rodriguez,* 2014 IL App (1st) 133004, ¶ 16. If the plaintiff fails to carry the shifted burden of going forward, the complaint will be dismissed. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). We can affirm the circuit court's dismissal for any reason found in the record. *Akemann v. Quinn*, 2014 IL App (4th) 130867, ¶ 21.

¶ 22 The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers and others against fraud, unfair methods of competition, and other unfair or deceptive acts or practices in the conduct of any form of trade or commerce. *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 233-34 (2005). To state a claim of consumer fraud, a plaintiff must show

> "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009).

A statutory consumer fraud claim must be pled with the same particularity and specificity as that required under common law fraud. *Id.; Robinson v. Toyota Motor Credit Corp.,* 201 Ill. 2d 403, 419 (2002) ("The complaint must state with particularity and specificity the deceptive manner of defendant's acts or practices, and the failure to make such averments requires the dismissal of the complaint.").

¶ 23 The Consumer Fraud Act defines deceptive acts or practices as

> "including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact *** in the conduct of any trade or commerce." 815 ILCS 505/2 (West 2018).

In analyzing an allegedly deceptive act or practice, the court's "analysis must consider whether the act was deceptive as reasonably understood in light of *all the information* available to plaintiffs." (Emphasis in original.) *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 44.

¶ 24 Plaintiffs contend that they properly pleaded a cause of action under the Consumer Fraud Act. They assert that CAC made "false representations and material omissions of fact," in that CAC's advertising informed members that they could redeem points "at any time," and did not warn them "that CAC reserved the right to terminate the Program at any time, in its discretion, without notice and wipe out all point totals then existing." CAC responds that the circuit court properly dismissed plaintiffs' claims because "the Terms of the free rewards program: (1) were made available to Plaintiffs, and (2) warned them that Defendants had the right to terminate the rewards program at any time."

¶ 25 Plaintiffs' brief rests almost entirely on the argument that the trial court erred in concluding that they agreed to the terms and conditions of the rewards program. We note, however, that in reviewing the dismissal of plaintiffs' consumer fraud claim, this court is not required to determine whether plaintiffs actually assented to the terms or whether a valid contract exists. The question is not whether the terms were sufficient to form an enforceable contract, but rather, whether the evidence put forth by CAC—that plaintiffs were informed that CAC could terminate the program

at any time—defeated any of the elements of plaintiffs' consumer fraud claim. Even if there was some defect in the way that CAC displayed its terms of service such that plaintiffs would not be deemed to have assented to them, that would only support a consumer fraud claim if plaintiffs could show the elements of such a claim, including that CAC's actions were deceptive and that CAC intended for plaintiffs to rely on that deception. See *De Bouse*, 235 Ill. 2d at 550. Likewise, it does not appear that the trial court's dismissal was based on a conclusion that the terms were necessarily enforceable as a matter of contract, but rather, on a finding that, regardless of whether plaintiffs assented to the terms, CAC did not act deceptively where it had previously informed plaintiffs that it could terminate the program at any time.

¶ 26 Because this is not a contract case, plaintiffs' arguments relating to the alleged "unenforc[eability]" of the terms of service based on those terms being "substantively unconscionable" or "illusory," are not particularly relevant to the question in this appeal—namely, whether plaintiffs adequately pleaded a consumer fraud claim. Rather, we will review the notice provided to plaintiffs, and the evidence that plaintiffs manifested their assent to the terms, not to determine whether the contract was valid, but rather to determine if evidence exists to support plaintiffs' claim that CAC acted deceptively.

¶ 27 Here, the evidence shows that, in offering the rewards program, CAC presented plaintiffs with a hyperlink providing them the opportunity to review the terms of participation in the rewards program. Those terms informed plaintiffs, among other things, that CAC could terminate the program at any time.

¶ 28 In general, an online prompt to read terms that are available at a hyperlink, and manifest assent thereto by clicking on a box, can be sufficient to form a contract. See *Sgouros v. TransUnion*

Corp., 817 F.3d 1029, 1033-34 (7th Cir. 2016) ("Courts around the country have recognized that this type of electronic 'click' can suffice to signify the acceptance of a contract.").

¶ 29 In analyzing web-based agreements, courts have discussed the difference between "clickwrap" and "browsewrap" agreements, terms describing the manner in which a user manifests assent. See *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). A clickwrap agreement requires a website user to expressly assent to the website's terms of use by clicking on an "I agree" box after being presented with terms, before continuing with an Internet transaction. *Id.* By contrast, pursuant to a browsewrap agreement, the user of an Internet website need not expressly indicate assent. Instead, the website owner seeks to bind website users to terms and conditions merely by virtue of the user navigating or browsing the website, by posting the terms somewhere on the website. *Id.* Courts have also recognized that some agreements do not "fit neatly into the clickwrap or browsewrap categories." *Id.* Like the agreement at issue here, some hybrid agreements "notify the user of the existence of the website's terms of use and, instead of providing an 'I agree' button, advise the user that he or she is agreeing to the terms of service when registering or signing up." *Id.* at 75-76; *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 386, 398 (E.D.N.Y. 2015) (describing such agreements as "sign-in-wraps"); *Vernon v. Qwest Communications International, Inc.*, 857 F. Supp. 2d 1135, 1149-50 (D. Colo. 2012), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013) ("Under this hybrid arrangement, the customer is told that consequences will necessarily flow from his assenting click and also is placed on notice of how or where to obtain a full understanding of those consequences.").

¶ 30 In arguing that they did not agree to the terms, plaintiffs describe the purported agreement here as "browsewrap," which courts enforce "only when there is actual or constructive knowledge

of terms." *Sgouros v. TransUnion Corp.*, No. 14 C 1850, 2015 WL 507584, at *6 (N.D. Ill. Feb. 12, 2018). Plaintiffs characterize the agreement as "browsewrap" because the terms "were only accessible via a hyperlink on the Program's signup page, instead of being displayed on that page itself." However, the defining characteristic of browsewrap agreements is not that the terms are available via a hyperlink, but instead that the website owner is attempting to bind users to terms and conditions without the user taking any specific action to manifest their assent; a user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a web page exists. *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013).

> "Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." *Van Tassell v. United Marketing Group, LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011) (citing *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)).

¶ 31 Here, by contrast, in signing up for the rewards program, plaintiffs were asked to affirmatively manifest their assent to the terms of service and were informed that, by signing up, they were agreeing to those terms of service, which appeared via hyperlink. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) ("[C]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant."). The form of the sign-up page and the terms of service notice used by CAC, a

screenshot of which appears above, is very similar to others that have been found sufficient to form a contract in other cases. See *Meyer*, 868 F.3d at 78-79 ("[T]he language '[b]y creating an Uber account, you agree' is a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms."); *Fteja*, 841 F. Supp. 2d at 840 ("Here, [the plaintiff] was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough."). Similarly, the fact that plaintiffs may not have clicked on the hyperlink or read through the terms of service before signing up for the rewards program does not preclude the formation of a contract or mean that CAC acted deceptively. See *id.* ("While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice."); *Blau v. AT&T Mobility*, No. C 11-00542-CRB, 2012 WL 10546, at *4 (N.D. Cal. Jan. 3, 2012) ("If a party could get out of a contract by arguing that he did not recall making it, contracts would be meaningless. It is not even relevant if Plaintiffs did not read the agreements before signing them."); *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 117 (2010) (finding that the failure to read an agreement before manifesting assent to it does not invalidate the agreement; "plaintiff had a duty to read the agreement before she signed it. She did not read it. She was not prevented from reading it. It was her own decision not to read it.").

¶ 32 In light of all the information available to plaintiffs when they signed up for the rewards program, a reasonable consumer would not have interpreted CAC's advertisement stating that members could redeem points "at any time" as a promise to never cancel the program. Nothing in CAC's advertisement promised that the rewards program would be available, or that members could earn points, in perpetuity. Moreover, even if we were to accept plaintiffs' contention that

CAC's advertisement constituted a specific promise to not "wipe out all existing point balances," the record shows that CAC has not done so. There is also no real dispute that CAC continued to allow members to redeem points after the termination of the program, and that plaintiffs could have redeemed their reward points, despite continuing to maintain in these proceedings that they were prevented from doing so.

¶ 33 CAC's continued redemption of points also illustrates another defect in plaintiff's claim, specifically that they are unable to show an injury from CAC's allegedly deceptive conduct. As stated above, to state a cause of action under the Consumer Fraud Act, plaintiffs must show that they sustained "actual damage" as a result of the deception. *De Bouse,* 235 Ill. 2d at 550. The Act provides remedies for purely economic injuries. *White v. DaimlerChrysler Corp.,* 368 Ill. App. 3d 278, 287 (2006). Actual damages must be calculable and "measured by the plaintiff's loss." (Internal quotation marks omitted.) *Morris v. Harvey Cycle & Camper, Inc.,* 392 Ill. App. 3d 399, 402 (2009). The failure to allege specific, actual damages precludes a claim brought under the Act. *White,* 368 Ill. App. 3d at 287. The purpose of awarding damages to a consumer-fraud victim is not to punish the defendant or bestow a windfall upon the plaintiff, but rather to make the plaintiff whole. *Mulligan v. QVC, Inc.,* 382 Ill. App. 3d 620, 629 (2008).

¶ 34 There is no evidence that plaintiffs actually suffered any economic damages due to the defendant's deceptive advertisement. Although one way that participants in the rewards program earned points was by purchasing goods and services, there is no evidence that plaintiffs paid more for those goods or services than their actual value. See *id.* at 628. Moreover, even after the program's termination, plaintiffs were still permitted to use their points to redeem rewards. While this is not the basis on which the trial court granted CAC's motion to dismiss, it is well settled that

we may affirm on any basis appearing in the record. *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010).

¶ 35 Plaintiffs, however, are unsatisfied, claiming that CAC's continued redemption of points is insufficient because they were "saving up" for higher point rewards. They also argue that, even if they were to redeem their points for lower point rewards, some of their points will be left over and "go to waste" because they do not have the exact number of points needed to redeem a particular award.

¶ 36 This argument also does not provide evidence of any injury from CAC's allegedly deceptive conduct, as plaintiffs are in no worse a position than before they saw the allegedly deceptive advertisement. Indeed, plaintiffs are in no worse a position than when the rewards program was still in effect. Even during the lifetime of the rewards program, it was possible that a participant could have less than the number of points needed to redeem the lowest value item.

¶ 37 Moreover, just as no reasonable person would interpret CAC's advertisement as promising that members could earn points forever and that CAC would never cancel the program, no reasonable person would believe that CAC was promising that members would always be able to earn the higher value rewards that they found more desirable or that they would never have remaining points in less than the amount of the lowest value item. In these circumstances, plaintiffs cannot show that CAC engaged in a deceptive act; accordingly, plaintiffs can prove no set of facts that would support a cause of action.

¶ 38 Plaintiffs, however, point to their complaint to suggest that there is a question of fact as to whether they were ever actually presented with the terms. In their complaint, plaintiffs alleged that "[o]n information and belief, [they] w[ere] never presented with terms and conditions of service

for the Perkville website that [they] w[ere] required to read and assent to before enrolling in the CAC Rewards Program, and [they] did not read or assent to any such terms and conditions of service." Plaintiffs, however, pleaded no factual basis informing that purported belief.

¶ 39 In response, CAC provided evidence that plaintiffs had, in fact, signed up for the rewards program online at www.perkville.com, where they were presented with a link to the terms of service before registering, and that plaintiffs affirmatively clicked a button to indicate their assent, before signing up for the program. The copy of the sign-up page, displayed above, shows the following sentence directly above the "Sign Up" button: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service ***," with a hyperlink to the Terms of service appearing in blue font.

¶ 40 Statements made "on information and belief" are insufficient when opposed by positive, detailed averments of fact. *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971) (indicating that statements made on information and belief are "not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the 'facts' referred to"). Accordingly, plaintiffs' conclusory claim to have never seen the terms is not sufficient to create an issue of fact as to whether those terms were presented to them. See *Federal Kemper Life Assurance Co. v. Ellis*, 28 F.3d 1033, 1040 (10th Cir. 1994) (holding that a defendant's simple denial of receipt did not create an issue for the jury as to whether notice was mailed in the face of plaintiff's evidence of standard mailing procedures).

¶ 41 At oral arguments, plaintiffs' counsel agreed that it was undisputed that plaintiffs went to the signup page displayed above, but argued that, once plaintiffs were at the signup page, Kreissl never identified how they actually signed up for the program. Counsel stated that, once plaintiffs

were at that page, plaintiffs could have signed up either by inputting their email, or by clicking the "SIGN UP WITH FACEBOOK" button. Counsel further argued that Kreissl never identified whether plaintiffs used a smart phone to access the website's signup page. Counsel stated that Blake's affidavit provides "contrary evidence" that plaintiffs could have signed up in a way that would have obscured the notice, or that they could have signed up by clicking a "go" button on their phone keyboard rather than clicking "sign up." Counsel further acknowledged that plaintiffs never articulated the ways in which they signed up, but argued that it was CAC's burden to show how plaintiffs signed up for the program and whether they received actual notice of the terms.

¶ 42 Initially, we reiterate that this is not a contract case. Even if plaintiffs could argue that they avoided agreeing to the terms in some hyper-technical fashion—by avoiding clicking a "sign up" button and instead pressing "go" on an iPhone keyboard—the issue in this case is not whether a valid contract was formed between the parties. Instead, plaintiffs brought an action under the Consumer Fraud Act, and accordingly, plaintiffs are required to show, not that the contract between them should be held invalid, but that CAC acted *deceptively*. We cannot find evidence of deception here where, regardless of whether plaintiffs chose to click the "SIGN UP WITH FACEBOOK" button or to input their email addresses, there was a notice that plaintiffs were agreeing to the terms of service directly under both options.

¶ 43 We are also unpersuaded that plaintiffs' attorney Blake's affidavit provides "contrary evidence" to support plaintiffs' claim that they never received notice or agreed to the terms. In that declaration, Blake narrated the procedure he took to sign up for Perkville on his iPhone in 2019. Blake maintains that references to the terms were obscured by his pop-up keyboard and a pop-up password prompt. Blake apparently admitted seeing the hyperlink to the terms of service, but

described it as only "an instantaneous flash *** as [he] transitioned from one page to the next." Using this declaration, plaintiffs essentially allege that they also may have signed up for Perkville in a way that obscured their view of the terms of service, and that CAC "failed to foreclose the possibility" that they did so.

¶ 44 Initially, we observe that Blake's declaration is wholly irrelevant. The record shows that plaintiffs signed up for the rewards program between December 2015 and February 2016, and the rewards program was terminated in 2018. It was not until approximately four years after plaintiffs registered, and seventeen months after the program was terminated, that Blake attempted to sign up for Perkville and test whether he observed the terms of service. Blake's experience says nothing about the sign-up process that was available while the rewards program existed or that was used by plaintiffs. Plaintiffs' contention that they *may have* signed up in a different way than Kriessel identified, which *may have* obscured their view of the terms of service, is pure speculation and insufficient to prevent the dismissal of their claims.

¶ 45 Additionally, even if we were to credit Blake's declaration, it supports the conclusion that there was no deceptive act or practice by CAC. In the screenshots included in Blake's declaration, there is a notice beginning, "By clicking Sign Up, you are indicating that you have read," which then continues either off screen or behind a pop-up keyboard or password prompt. Blake does not dispute that the terms of service hyperlink appears in the remainder of this sentence, only that it was obscured from his view, or only viewable in an "instantaneous flash."

¶ 46 Blake also does not assert that CAC had any control over the size of his screen or keyboard, which pop-ups appeared on his iPhone, or anything else that could possibly make CAC responsible for the terms being obscured from his view. Accordingly, even if there was a question of fact as to

whether plaintiffs agreed to the terms of service, there is no question that CAC advised members who wanted to participate in the rewards program of the terms of their participation and that they did so in a way that is routinely upheld. See *Meyer*, 868 F.3d at 78-79; *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1226 (D. Haw. 2010). In these circumstances, CAC did not engage in deceptive or unfair conduct, and the trial court properly dismissed plaintiffs' consumer fraud claim.

¶ 47 We next turn to plaintiffs' claim for promissory estoppel. To establish such a claim, plaintiffs must prove that (1) CAC made an unambiguous promise to plaintiffs, (2) plaintiffs relied on such promise, (3) plaintiffs' reliance was expected and reasonably foreseeable by CAC, and (4) plaintiffs relied on the promise to their detriment. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). Application of promissory estoppel is proper only in the absence of an express agreement. *Matthews v. Chicago Transit Authority*, 2016 IL 11763.

¶ 48 We concluded above that CAC's advertisement stating that members could redeem points "at any time," was not an unambiguous promise to never cancel the program, and, even if CAC promised not to strip members of their points, it has continued to follow through on that promise. Accordingly, plaintiffs cannot establish a promissory estoppel claim.

¶ 49 Finally, plaintiffs challenge the dismissal of their unjust enrichment claim. To state a cause of action based on a theory of unjust enrichment, plaintiffs must allege facts supporting the conclusion that CAC unjustly retained a benefit to plaintiffs' detriment, and that CAC's retention of the benefit violates the principles of justice, equity, and good conscience. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). This court has previously held that unjust enrichment is not a separate cause of action that, standing alone, will justify an action for recovery. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 631 (2008); *Lewis v. Lead*

Industries Ass'n, 342 Ill. App. 3d 95, 105 (2003). Where an underlying claim of fraud is deficient, this court has affirmed the dismissal of the unjust enrichment claim. *Mulligan*, 382 Ill. App. 3d at 631 (citing *Mosiman v. BMW Financial Services NA, Inc.*, 321 Ill. App. 3d 386, 392 (2001)). Here, plaintiffs' unjust enrichment claim alleges facts that are virtually identical to those alleged in their consumer fraud claim. We have already held that the consumer fraud claim was properly dismissed, and accordingly, we affirm the circuit court's dismissal of plaintiffs' unjust enrichment claim as well.

¶ 50 For the foregoing reasons, we affirm the circuit court's dismissal of plaintiffs' complaint with prejudice.

¶ 51 Affirmed.

No. 1-20-0893

Cite as:	*Ambrosius v. Chicago Athletic Clubs, LLC*, 2021 IL App (1st) 200893
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 2019-CH-008662; the Hon. Sophia H. Hall, Judge, presiding.
Attorneys for Appellant:	Thomas A. Zimmerman Jr., Sharon A. Harris, Matthew C. De Re, and Jeffrey D. Blake, of Zimmerman Law Offices, P.C., of Chicago, for appellants.
Attorneys for Appellee:	Robert D. Carroll, of Latimer LeVay Fyock, LLC, of Chicago, for appellees.