

**NOTICE**  
Decision filed 09/03/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 230565

NO. 5-23-0565

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BRENT GAINES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 22-LA-924
	)	
CIOX HEALTH, LLC,	)	Honorable
	)	Christopher T. Kolker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court, with opinion.  
Justices Welch and McHaney concurred in the judgment and opinion.

**OPINION**

¶ 1 The defendant, Ciox Health, LLC (Ciox), appeals an order denying its motion to stay the proceedings in the circuit court and compel arbitration of claims for deceptive business practices and unjust enrichment brought by the plaintiff, Brent Gaines. Ciox claims that the circuit court erred in finding that Ciox failed to meet its burden to prove that the plaintiff assented to the terms and conditions on Ciox’s website, including an agreement to arbitrate. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Ciox is a Georgia-based health technology company. Ciox contracts with healthcare providers to fill requests for medical records that providers receive from their patients or their patients’ representatives. In 2019, Ciox offered a secure, web-based portal, “Ciox eDelivery,” for

the electronic delivery of requested records. Those requesting records could “opt in” to Ciox’s eDelivery by filling out a Ciox enrollment form and e-mailing it to Ciox’s customer service or by completing an online self-registration process. Those who registered could access and securely store medical records through the portal. In 2022, Ciox updated its online portal and renamed it “Ciox Smart Request.”

¶ 4 The plaintiff is a licensed attorney. His primary area of practice is representing persons making claims for Social Security disability benefits. In his practice, the plaintiff routinely sends written requests to health care providers for medical records to support his client’s disability claims. The plaintiff requests records directly from his clients’ medical care providers, and not from Ciox or other record delivery services. In years prior to 2019, the plaintiff received medical records through the United States mail. This was so whether the requests were filled by healthcare providers directly or through a medical records delivery service, such as Ciox. In November 2019, the plaintiff began receiving some records electronically through the Ciox eDelivery portal and others by mail. The plaintiff had no say in the method of delivery. Ciox billed the plaintiff for the medical records and the plaintiff paid the fees charged.

¶ 5 In January 2022, the plaintiff began to pay the fees charged by Ciox under protest. The plaintiff notified Ciox that its charges were unlawful under an amendment to section 8-2001 of the Code of Civil Procedure (735 ILCS 5/8-2001 (West 2022)). The amendment, effective January 1, 2022, required health care facilities and health care practitioners to “provide without charge one complete copy of a patient’s records” if the records are being requested for the purpose of supporting a claim for federal veterans’ disability benefits, Social Security or Supplemental Security Income benefits, or Aid to the Aged, Blind, or Disabled benefits. 735 ILCS 5/8-2001(h)

(West 2022). Between January 13, 2022, and September 2022, Ciox continued to bill the plaintiff for medical records.

¶ 6 On October 28, 2022, the plaintiff filed a putative class action complaint against Ciox, alleging violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2022)) (count I) and unjust enrichment (count II). The plaintiff generally alleged that Ciox engaged in deceptive billing practices when it charged fees to those requesting medical records for use in support of their clients' claims for veterans' disability benefits, Social Security and Supplemental Security Income benefits, and Aid to the Aged, Blind or Disabled benefits in violation of section 8-2001(h) of the Code of Civil Procedure<sup>1</sup> (735 ILCS 5/8-2001(h) (West 2022)). In count I, the plaintiff alleged that Ciox's unlawful billing practices constituted unfair acts or practices within the meaning of the Consumer Fraud Act because the practice of charging unauthorized fees for medical records caused injury to consumers and violated the public policy embodied in section 8-2001 of the Code of Civil Procedure. In count II, the plaintiff alleged that Ciox was unjustly enriched and that its retention of unauthorized fees violated fundamental principles of justice, equity, and good conscience. In the prayer for relief, the plaintiff sought damages and an order enjoining Ciox from engaging in the alleged unlawful billing practices. As an alternate remedy, the plaintiff sought restitution and disgorgement of profits. The plaintiff appended several Ciox invoices, issued between January 13, 2022, and September 1, 2022, in support of the allegations in his complaint. The invoices displayed itemized charges for basic fees, retrieval fees, per-page copy charges, and electronic data archive fees.

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<sup>1</sup>In 2001, the heading to part 20 of the Code of Civil Procedure was changed from "Inspection of Hospital Records" to "Inspection of Records." See Pub. Act 92-228, § 5 (eff. Sept. 1, 2001). Part 20 has been commonly referred to as the "Hospital Records Act." The plaintiff used this reference in the complaint and subsequent pleadings.

¶ 7 On April 5, 2023, Ciox filed a motion to stay the proceedings in the circuit court and compel arbitration. Ciox claimed that the plaintiff voluntarily registered for the Ciox eDelivery service and that by doing so, the plaintiff expressly agreed to the Terms and Conditions for Ciox eDelivery, including an agreement to arbitrate any disputes related to that service; and that the plaintiff continued to agree to those terms and conditions each time he accessed records through the Ciox online portal. Ciox further claimed that the arbitration agreement provided that the arbitration would be governed by the United States Arbitration Act (9 U.S.C. § 1 *et seq.* (2018)), commonly known as the Federal Arbitration Act (FAA) and the proceedings would be conducted in accordance with the rules of the American Arbitration Association (AAA), including the AAA’s Supplementary Rules for Consumer-Related Disputes. Ciox noted that under a delegation provision in the applicable rules of the AAA, the question of whether the plaintiff’s claims fell within the scope of the arbitration agreement was for the arbitrator to decide. Ciox concluded that the only issue for the circuit court was whether an arbitration agreement existed.

¶ 8 Ciox offered the declaration of Jason Martin, Ciox vice president of collections and billing, dated April 4, 2023, in support of its motion to compel arbitration. Therein, Martin certified that his declaration was based upon his “personal knowledge” and his “review of relevant records kept in the ordinary course of Ciox’s business,” copies of which were attached. Martin identified Ciox as a health technology company that provides “release of information (‘ROI’) services” for medical providers. According to Martin’s declaration, Ciox was in the business of processing and filling medical-records requests that medical providers received from their patients’ representatives. As part of its ROI service, Ciox offered those requesting records the use of its secure, web-based portal, Ciox eDelivery. Ciox eDelivery was an “opt-in” service through which a requester could “register and contract” with Ciox to have copies of requested medical records

delivered electronically via an online portal. Requesters could “track, view, download, print, pay for, and securely store their medical records request in one secure online location.” Martin stated that electronic delivery saved requesters postage fees associated with mailing paper records and provided quicker receipt of records. When requesters signed up for the eDelivery services, they had the option of selecting from three flat fees, ranging from \$2 to \$4.99, for online storage of records following delivery. Electronically delivered records could be securely stored and accessed on the eDelivery portal for up to a year.

¶ 9 Martin also offered information about the registration process:

“10. Prospective users can enroll in Ciox eDelivery in two ways. The first way is by completing and emailing to Ciox an Enrollment Form.

11. Prospective users can also enroll in Ciox eDelivery through a self-registration process online if a requestor<sup>[2]</sup> has already received an invoice from Ciox. These requestors can self-register directly only by inputting their invoice number and zip code, and clicking through a number of screens that permit the requestor to elect between the same three flat-fee pricing options referenced in Paragraph 9 above.

12. When going through the self-registration process online, requestors expressly agree to the ‘Terms and Conditions for CIOX eDelivery’ (the ‘Terms and Conditions’).

13. Attached hereto as Exhibit A is a true and correct copy of the Terms and Conditions.

14. Further, before accepting these Terms and Conditions, requestors must click a box certifying that they ‘ACKNOWLEDGE’ that the ‘ABOVE PRICE DOES NOT

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<sup>2</sup>Martin used the word, “requestor,” in his April 2023, affidavit. In a later affidavit, dated May 26, 2023, Martin used the word, “requester.” When directly quoting from the Martin affidavit of April 2023, we retained the spelling “requestor.”

CONSTITUTE FEES CHARGED BY MEDICAL FACILITIES FOR THE RELEASE OF INFORMATION UNDER ANY APPLICABLE STATE LAW.’ Attached hereto as Exhibit B is a true and correct copy of the screen with the Terms and Conditions that requestors must review and acknowledge by clicking ‘I accept.’

15. The Terms and Conditions are also available to requestors who registered for Ciox eDelivery each time they log into their portal, and requestors must accept and reincorporate the Terms and Conditions upon each such use of the portal.”

¶ 10 In the declaration of April 2023, Martin stated that in January 2019, the plaintiff created an account on the Ciox eDelivery portal, selected the fixed \$2 fee associated with 90 days of storage, and “agreed to and accepted the Terms and Conditions of the Ciox eDelivery portal.” Martin also stated that since January 2022, the plaintiff made nearly 100 records requests wherein records were delivered through the Ciox eDelivery portal and that the plaintiff “repeatedly agreed to the eDelivery Terms and Conditions to access these records through the portal.”

¶ 11 According to Martin’s declaration, the Terms and Conditions for Ciox eDelivery appeared in a scroll-down window (Terms and Conditions scroll window) on the Ciox webpage. A screen shot of the Terms and Conditions scroll window, marked Exhibit B, and a printed copy of the Terms and Conditions for Ciox eDelivery, marked Exhibit A, were attached to the Martin declaration. When printed, the Terms and Conditions for Ciox eDelivery covered six pages and included 22 single-spaced paragraphs containing terms and conditions. The subject arbitration provision is the sixteenth item, and it is located on the fifth page of the printed document. There is no “I decline” button or “I accept” button to click on to assent to the terms and conditions in the printed copy of the Terms and Conditions for Ciox eDelivery and no indication that those buttons

appeared at the end of the online scroll window. Additionally, there is no effective date within the body of the printed document. The arbitration provision provided in part:

“16. Arbitration. Please read this provision carefully. It requires that any and all claims must be resolved by binding arbitration or in small claims court. These limitations apply to any claims against CIOX, its subsidiaries or affiliates or any travel service providers or companies offering products or services through this site. Any dispute or claim relating in any way to your use of any CIOX Service, or to any software or services licensed, sold or distributed by CIOX, or through the CIOX website will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.

\* \* \*

To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to the CIOX Legal Department \*\*\*. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA’s Supplementary Procedures for Consumer Related Disputes. \*\*\*”

¶ 12 Exhibit B, identified as “a true and correct copy of the screen with the Terms and Conditions that requesters must acknowledge by clicking ‘I accept,’ ” is depicted below:

Note: Please have a CIOX Health Invoice available to begin the sign up process.

[Back To Login](#)

**Terms and Conditions for CIOX eDelivery**

NOTICE: THIS IS A LEGALLY BINDING CONTRACT. PLEASE READ IT CAREFULLY. BY ACCEPTING THE DELIVERY OF MEDICAL RECORDS THROUGH CIOX HEALTH, LLC'S INTERNET PORTAL LOCATED AT <https://edelivery.cioxhealth.com/portal/Login.aspx> (the "Site") YOU ACCEPT THIS AGREEMENT AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT.

CIOX Health, LLC, located at 925 North Point Parkway, Suite 350, Alpharetta, Georgia 30005. All rights reserved. By using CIOX Health, LLC ("CIOX") software and services, you the individual end-user (hereafter referred to as "CLIENT"), agree to the terms and conditions as outlined in this agreement (collectively referred to hereafter as the "Agreement"). By clicking on "I Agree" below CLIENT accepts and agrees to be legally bound by the terms and conditions of this Agreement. CIOX reserves the right to modify this Agreement and its website (<https://edelivery.cioxhealth.com/portal/Login.aspx>) at any time. Modifications to the website shall be effective immediately upon posting. CLIENT agrees to review the Agreement periodically to be aware of such modifications. CLIENT agrees that continued access or use of the website shall be deemed CLIENT'S conclusive acceptance of the modified Agreement.

1. Authorization. CLIENT affirms that it is authorized by law or by the subject patient to obtain, review and keep a copy of the subject patient's medical and other related records. CLIENT hereby authorizes CIOX to retrieve, obtain, store and transmit medical and other related records from healthcare and other service providers. CLIENT unconditionally represents and warrants to CIOX that CLIENT: (i) has requisite authority to enter into this Agreement and obtain any and all medical records that CLIENT requests; and (ii) is not seeking any records for any illegal or unethical purpose. CLIENT agrees to pay CIOX's fees for service in addition to any and all fees incurred in obtaining the requested medical records from a healthcare provider, including but not limited to: *per page copy fees, duplication fees, reproduction fees, clerical labor, witness fees, research fees.*

I HEREBY REPRESENT THAT I AM AUTHORIZED TO ACT FOR THE COMPANY OR FIRM IN WHOSE NAME THE ACCOUNT IS BEING ESTABLISHED (THE ROBERTS LAW FIRM) AND THAT SUCH AUTHORIZATION INCLUDES THE ESTABLISHMENT AND ADMINISTRATION OF THIS ACCOUNT FOR THE RECEIPT OF MEDICAL RECORDS BY CUSTOMER FROM CIOX. FURTHER, I ACKNOWLEDGE THAT THIS AGREEMENT IS SOLELY BETWEEN CIOX AND (THE ROBERTS LAW FIRM) FOR RECORDS DELIVERY, AND THE ABOVE PRICE DOES NOT CONSTITUTE FEES CHARGED BY MEDICAL FACILITIES FOR THE RELEASE OF INFORMATION UNDER ANY APPLICABLE STATE LAW, INCLUDING, BUT NOT LIMITED TO, CHARGES UNDER N.C.G.S.A. § 44-19.

¶ 13 The scroll window contains a heading, “Terms and Conditions for Ciox eDelivery,” and shows only the first few paragraphs of the document. Again, there is no effective date within those visible paragraphs. The first paragraph contains a notice that this is a legally binding contract and that those registering should read it carefully. There is also a notice that those accepting the delivery of medical records through Ciox’s Internet portal accept the agreement and agree to be bound by the terms and conditions of the agreement.

¶ 14 Beneath the “Terms and Conditions” scroll window, there is a free-standing acknowledgement of authorization. Just below the authorization, there is an “I decline” button and an “I accept” button. To acknowledge the authorization statement, it appears that a person



registering for eDelivery must check the square box located adjacent to the first line of the authorization and then click on either the “I decline” button or “I accept” button below that statement. Notably, the “Roberts Law Firm” is identified as the authorized representative in the authorization statement on Exhibit B.

¶ 15 The circuit court held a hearing on Ciox’s motion to compel arbitration on May 17, 2023. During the hearing, plaintiff’s counsel offered a PowerPoint presentation in response to Ciox’s motion to compel arbitration. Plaintiff’s counsel provided a screen-by-screen presentation of the current version of the Ciox online registration process to demonstrate that, contrary to the assertions of Ciox and Jesse Martin, a prospective user was not required to agree to the Terms and Conditions for Ciox Smart Request to enroll online. In addition, plaintiff’s counsel noted that if a registrant e-mailed a paper enrollment form, that form made no reference to any “Terms and Conditions” for the electronic delivery of records. During the presentation, counsel argued that Ciox failed to show by a preponderance of the evidence that Ciox had “any” agreement with the plaintiff, with or without an arbitration clause, and that Ciox failed to produce any evidence that the plaintiff agreed to its terms and conditions. Counsel further argued that when the plaintiff requested medical records from medical providers, approximately 40% of the medical records were paper records delivered by the United States Postal Service, and therefore, those records were not subject to the terms and conditions on the Ciox online portal.

¶ 16 In support of his arguments, plaintiff’s counsel referenced a declaration by the plaintiff. In the declaration, the plaintiff stated that when he logged onto the Ciox portal to access his clients’ medical records, he was not prompted to read or accept Ciox’s terms and conditions. The plaintiff further stated that in the regular course of his practice, he requested medical records directly from his clients’ medical care providers. He did not request records from Ciox or through its website,

and he did not have any input into the format in which the requested medical records were delivered to him. He averred that in 2022, more than 40% of the medical records he received were paper records delivered through the mail and that disputes regarding the fees for those records were not covered by the purported arbitration agreement.

¶ 17 Following the presentation by plaintiff's counsel, Ciox requested an opportunity to respond, noting that the presentation had not been filed or served on Ciox prior to the hearing. At the close of arguments, the circuit court continued the matter to permit Ciox to respond to the plaintiff's presentation.

¶ 18 In a reply dated May 26, 2023, Ciox argued that, notwithstanding the plaintiff's slide presentation and declaration, there was no dispute that the parties entered into an arbitration agreement when the plaintiff signed up for the Ciox online services in 2019. In the reply, Ciox also argued for the first time that the plaintiff's complaint (paragraphs 29 and 33) contained judicial admissions that the plaintiff agreed to the Terms and Conditions for Ciox eDelivery, including arbitration, when he enrolled in the online delivery process in 2019. Paragraph 29 of the complaint alleged, "As a condition for accessing medical records digitally through its online portal, CIOX requires \*\*\* users like the Plaintiff and class members to agree to its Terms and Conditions." Paragraph 33 alleged that, "CIOX demands that Plaintiff and class members assent to CIOX's Terms and Conditions as a condition for CIOX's provision of a complete copy of a patient's records."

¶ 19 Ciox also filed a second supporting declaration from Jesse Martin, dated May 26, 2023. Therein, Martin stated that near the end of 2022, Ciox's web-based portal was updated and renamed "Ciox Smart Request" and that, thereafter, any account previously made on the Ciox eDelivery portal was transferred to the Ciox Smart Request portal. Martin further stated that the

arbitration provision in the “Terms and Conditions for Ciox Smart Request” was the same as the arbitration provision in the “Terms and Conditions for Ciox eDelivery.” Finally, Martin noted that the screen shot with the Terms and Conditions for Ciox eDelivery, attached to his initial declaration as Exhibit B, was an “exemplar” of the screen that a requester would have clicked through during the self-registration process. Because the screen shot was an exemplar, it referenced a different firm (the Roberts firm). Martin stated that anyone going through the self-registration process, including the plaintiff, would have clicked through the same screen with the information contained in Exhibit B and accepted and acknowledged the terms and conditions by clicking “I accept.” A printout of the Terms and Conditions for Ciox Smart Request and a copy of the AAA Consumer Arbitration Rules were attached to the Martin Declaration, dated May 23, 2023. Martin had previously presented a copy of the AAA Commercial Arbitration Rules in his declaration of April 2023.

¶ 20 The hearing on the motion to compel reconvened on June 6, 2023. During the hearing, Ciox argued that the judicial admissions in the plaintiff’s complaint demonstrated that the plaintiff agreed to its terms and conditions when he enrolled in the online delivery process in 2019. Plaintiff’s counsel countered that the complaint was not verified and that the assertions were not admissions by the plaintiff, but instead the wording of counsel. Plaintiff’s counsel moved to amend the complaint by interlineation to state that Ciox “purported to require” online users to assent to Ciox’s terms and conditions. When Ciox’s counsel was asked whether he objected to the amendments by interlineation, counsel replied, “Your honor, that’s fine. That’s not the dispositive aspect.” The circuit court granted the amendment by interlineation, without objection.

¶ 21 At the close of the parties’ arguments, the circuit court issued an oral ruling denying Ciox’s motion to compel arbitration. On June 29, 2023, the court issued a written order outlining the

reasons for its decision. In the order, the court found that Ciox failed to carry its burden to show by a preponderance of the evidence that it had an agreement to arbitrate with the plaintiff. The court noted, among other things, that Jesse Martin, in his position in billing and collections, did not credibly demonstrate that he had any personal knowledge about the plaintiff's use of Ciox's web portal. The court also noted that while Ciox and Martin stated that the plaintiff "went through the self-registration process online" in January 2019, and that he "would have clicked through a screen with the Ciox eDelivery Terms and Conditions" and certified that he reviewed and accepted them, they did not produce any internal records or documents to support those statements. The court further noted that the plaintiff demonstrated, via a screen-by-screen presentation, that the online self-registration process did not require "viewing, much less agreeing, to any terms and conditions" and that a person could access records from the online portal without being required to view or agree to any terms and conditions.

¶ 22

## II. ANALYSIS

¶ 23 On appeal, Ciox contends that the circuit court erred in denying its motion to compel arbitration and stay the proceedings. Ciox points to the arbitration agreement in its Terms and Conditions for Ciox eDelivery and argues that by voluntarily registering for Ciox eDelivery in November 2019, the plaintiff agreed to those terms and conditions, including the agreement to arbitrate.

¶ 24 An order granting or denying a motion to compel arbitration is injunctive in nature and is appealable under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017). *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001). Generally, where an interlocutory appeal is brought under Rule 307(a)(1), the only issue is whether there was a showing sufficient to sustain the circuit court's order granting or denying the motion to compel arbitration. *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d

226, 229 (2009); *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002). Where the circuit court renders its decision without an evidentiary hearing and without making findings on any factual issues, the standard of review is *de novo*. *Keefe*, 393 Ill. App. 3d at 229; *Travis*, 335 Ill. App. 3d at 1174. In this case, the circuit court denied the motion to compel arbitration based upon the pleadings, exhibits, declarations, and the presentations by counsel, and so the standard of review is *de novo*.<sup>3</sup> *Schmitz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 405 Ill. App. 3d 240, 244 (2010).

¶ 25 Section 2-619(a)(9) of the Code of Civil Procedure allows for a dismissal of a claim or other appropriate relief, such as a stay of the proceedings, where the claim is barred by an affirmative matter that avoids the legal effect of or defeats a claim. 735 ILCS 5/2-619(a)(9) (West 2022). A motion to compel arbitration and stay the proceedings is essentially a section 2-619(a)(9) motion to stay an action in the trial court based on an affirmative matter—the exclusive remedy of arbitration. *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 21; *Travis*, 335 Ill. App. 3d at 1174. The moving party has the initial burden to establish that the parties have a valid agreement to arbitrate and that the controversy falls within the scope of the arbitration provision. *Sturgill*, 2016 IL App (5th) 140380, ¶ 22. In ruling on a motion to compel arbitration pursuant to section 2-619, the circuit court must construe all pleadings and supporting documents in a light most favorable to the nonmoving party. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004).

¶ 26 The purported arbitration agreement is governed by the FAA (9 U.S.C. § 1 *et seq.* (2024)). Under the FAA, state courts and federal courts are authorized to stay an action and compel

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<sup>3</sup>The circuit court did not hold an evidentiary hearing, but it did make some findings based upon the documentary evidence. The parties agree that the standard of review is *de novo*. However, even if the more deferential abuse-of-discretion standard applied, we would reach the same result.

arbitration upon being satisfied that the issue involved in the action or proceeding is referable to arbitration under a written agreement to arbitrate. See 9 U.S.C. §§ 2, 3 (2024).<sup>4</sup> Section 2 of the FAA provides that a written provision in a contract to settle a controversy by arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2024). Thus, the FAA reflects the fundamental principle that arbitration is a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Like any other contract, an arbitration agreement is a matter of consent, not coercion. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478-79 (1989). Arbitration is a way to resolve disputes, but only those disputes that the parties have agreed to submit to arbitration. *Coinbase, Inc. v. Suski*, 602 U.S. \_\_\_, \_\_\_, 144 S. Ct. 1186, 1192 (2024); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Before referring a dispute to an arbitrator, the court must decide whether a valid arbitration agreement exists. *Coinbase*, 602 U.S. at \_\_\_, 144 S. Ct. at 1193; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019).

¶ 27 It is well settled that where a dispute concerns the formation of a contract, the dispute is generally for the court to decide. *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010). A court should order arbitration “ ‘only where the court is satisfied that neither the formation of the parties’ arbitration agreement, *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the

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<sup>4</sup>In *Smith v. Spizzirri*, 601 U.S. 472, 475-76 (2024), the United States Supreme Court recently held that when a federal court finds that a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, § 3 of the Federal Arbitration Act (9 U.S.C. § 3 (2024)) compels the court to stay the judicial proceedings pending arbitration, and the court does not have the discretion to dismiss the action. The Supreme Court found that the plain text, structure, and purpose of § 3 requires the court to stay the proceedings and that staying rather than dismissing the action comports with the supervisory role that the FAA envisions for the courts.

dispute is in issue.’ ” (Emphasis in original.) *Peterson v. Devita*, 2023 IL App (1st) 230356, ¶ 22 (quoting *Granite Rock*, 561 U.S. at 299). State law principles of contract formation determine whether a contract exists between the parties. *First Options*, 514 U.S. at 944; *Peterson*, 2023 IL App (1st) 230356, ¶ 22.

¶ 28 Under Illinois law, an offer, acceptance, and consideration form the basic ingredients of a contract. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 151 (2006); *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 20. An enforceable contract must also include a meeting of the minds or mutual assent as to the terms of the contract. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991). Whether parties have mutually assented to a contract is a question of fact. *Arbogast*, 2021 IL App (1st) 210526, ¶ 20. Mutual assent is determined by an objective standard. *Arbogast*, 2021 IL App (1st) 210526, ¶ 20. It is not necessary that the parties share the same subjective understanding as to the contract’s terms, as it suffices if their conduct objectively indicates an agreement to the terms of the purported contract. *Academy Chicago Publishers*, 144 Ill. 2d at 30. Only overt acts and communications between the parties may be considered in determining whether and upon what terms they have entered into a contract. *Arbogast*, 2021 IL App (1st) 210526, ¶ 20. For a course of conduct to act as assent, it must be clear that the conduct relates to the specific contract in question. *Arbogast*, 2021 IL App (1st) 210526, ¶ 21.

¶ 29 There are different types of online consumer agreements. These include clickwrap agreements, browsewrap agreements, and hybrid versions of those agreements.<sup>5</sup> Regardless of the

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<sup>5</sup>A clickwrap agreement requires a website user to expressly assent to the website’s terms of use by clicking on an “I agree” button after being presented with the terms and conditions before the user can proceed with the transaction. In contrast, a browsewrap agreement does not require the user to expressly assent by clicking an “I agree” button. Browsewrap agreements can form when a notice on the website conditions use of the site upon compliance with certain terms and conditions that may be included on the same page as the notice or via a hyperlink. Because no affirmative action is required by the user to agree to

type of online agreement, the circumstances of the transaction must provide the offeree with reasonable notice that the terms of an agreement are being offered and that certain acts or conduct by the offeree will constitute acceptance of the offer. See *Arbogast*, 2021 IL App (1st) 210526, ¶ 27 (citing *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983-84 (2005)). The conduct of a party is not effective as a manifestation of assent, unless that party knows or has reason to know that the other party may infer from his conduct that he assents. *Arbogast*, 2021 IL App (1st) 210526, ¶ 27. Determining whether an Internet user has agreed to online terms of service is a “fact-intensive” inquiry. See *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016) (applying Illinois contract law). Courts may consider whether the web pages adequately communicated all the terms and conditions of the agreement and whether the circumstances support the assumption that the purchaser received reasonable notice of those terms and conditions. *Sgouros*, 817 F.3d at 1034. Thus, courts should look closely at the law and the facts to see if a reasonable person in the plaintiff’s shoes would have realized that he was assenting to the terms and conditions of the website when he registered for an online service. *Sgouros*, 817 F.3d at 1035.

¶ 30 In this case, Ciox failed to produce competent evidence that the plaintiff agreed to the Terms and Conditions for Ciox eDelivery when he registered to use the online portal. By all accounts, online self-registration for the Ciox eDelivery system, as it existed in 2019, was a multi-step process. Ciox did not produce any documents or screen shots to replicate the self-registration process. Ciox did not describe or attach screenshots to show the number of screens that a registrant would have had to “click through” to locate the screen containing the Terms and Conditions for Ciox eDelivery. According to the record, Ciox eDelivery portal was updated and renamed in 2022.

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the terms, other than mere navigation or use of the website, the validity of a browsewrap agreement often turns on whether the user has actual or constructive knowledge of the website’s terms and conditions. See generally *Van Tassell v. United Marketing Group, LLC*, 795 F. Supp. 2d 770, 790-91 (N.D. Ill. 2011).



There is no indication of whether Ciox archived or preserved online records from the 2019 self-registration process.

¶ 31 Ciox presented two declarations by Jesse Martin, its vice president of billing and collections, in support of its motion to compel arbitration. There is, however, no indication in the record that Ciox employed Martin in 2019, and no indication of whether Martin had any education, training, or experience regarding the Ciox online portal generally, or the 2019 version of online self-registration process. The Martin declarations stated in vague and conclusory fashion that the plaintiff would have clicked through to a screen with the Terms and Conditions for Ciox eDelivery and that the plaintiff would have accepted and acknowledged those terms and conditions, including the arbitration agreement contained therein, by clicking the “I accept” button. However, Martin offered no supporting documents or records connected to the plaintiff. In his declaration, Martin referred to and attached an undated “exemplar” screenshot (Exhibit B) that depicted a “Terms and Conditions” scroll window and an authorization paragraph. This “exemplar” pertained to “the Roberts Law Firm.” Martin did not produce a similar screenshot linked to the plaintiff’s law firm. The “Terms and Conditions” scroll window in Exhibit B displayed only the first few paragraphs of the terms and conditions.

¶ 32 Martin attached a printed copy of the Terms and Conditions for Ciox eDelivery to his declaration, and he represented that those terms and conditions were in effect in 2019. Based upon the printed copy of the document, an online registrant would be required to scroll through 16 numbered provisions to discover the arbitration provision. The arbitration provision is not printed in bold-face type or uppercase letters, and there is nothing to distinguish it from the other paragraphs in the document. Further, the printed copy of the Terms and Conditions for Ciox eDelivery did not contain an “I accept” button to manifest the registrant’s assent, and there is no

indication that such button appeared at the end of the online scroll window. Below the “Terms and Conditions” scroll window in Exhibit B, there is an authorization statement certifying that the registrant has the authority to obtain the requested medical records and buttons to either accept or decline the authorization certification statement. Given the configuration of the screen shot, the authorization statement and corresponding “I accept, I decline” buttons do not appear to be related to the “Terms and Conditions” scroll window.

¶ 33 In a presentation and arguments before the circuit court, plaintiff’s counsel called out the factual shortcomings in Ciox’s motion to compel arbitration. Plaintiff’s counsel demonstrated through a “click-by-click” slide presentation that a person could register for eDelivery without agreeing to the Terms and Conditions for Ciox Smart Request. Plaintiff’s counsel also demonstrated that the Terms and Conditions for Ciox Smart Request were not displayed when a user accessed the online portal to view medical records. Ciox filed a reply brief and supplemental declaration by Martin, but these submissions only highlighted the failure of proof. In sum, Ciox did not meet its burden to show that the plaintiff assented to the Terms and Conditions for Ciox eDelivery, including an agreement to arbitrate, either when he registered for Ciox eDelivery in 2019, or when he accessed medical records through the online portal.

¶ 34 Ciox also claims that the plaintiff’s complaint contained an admission that the plaintiff agreed to the Terms and Conditions for Ciox eDelivery. Ciox acknowledges that an admission in an unverified pleading that has been superseded by an amended pleading is an evidentiary admission and not a binding judicial admission. Ciox argues that the plaintiff offered no competent evidence to fully refute the evidentiary admission. We disagree.

¶ 35 A fact admitted in a verified pleading is considered a judicial admission, conclusive against the pleader, and dispenses with proof on that fact. *Chavez v. Watts*, 161 Ill. App. 3d 664, 672-73

(1987); *Bartsch v. Gordon N. Plumb, Inc.*, 138 Ill. App. 3d 188, 197 (1985). In contrast, an admission in an unverified pleading is considered as an admission against interest that is not conclusive against the pleader. *Chavez*, 161 Ill. App. 3d at 673. In contrast to judicial admissions, evidentiary admissions must be offered into evidence, and they are always subject to contradiction or explanation. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005).

¶ 36 In this case, the plaintiff filed an unverified complaint. The referenced admission in that pleading was an evidentiary admission that could be explained or contradicted. Plaintiff's counsel requested leave to amend the paragraphs containing those statements. He explained that the wording in the cited allegations was inartful pleading by counsel, and not the words or admissions of the plaintiff. Ciox's counsel had no objection to the amendment, and he indicated that "that's not the dispositive aspect." The circuit court granted leave to amend the complaint by interlineation, without objection. As noted, an evidentiary admission must be offered into evidence and is always subject to explanation or contradiction. Here, it is unclear from the response of Ciox's counsel whether he intended to abandon the evidentiary admission when he informed the court that it was "not the dispositive aspect." Nevertheless, plaintiff's counsel explained that the statement was not an admission by the plaintiff. He also demonstrated through a slide presentation that a person registering for use of the online portal was not required to accept the Ciox's terms and conditions for electronic delivery to gain access to his client's medical records. Thus, plaintiff's counsel produced evidence that contradicted the evidentiary admission. After considering the declarations, affidavits, exhibits, and presentations by counsel, the trial court, as factfinder, found that the evidentiary admission was refuted by other competent evidence and that Ciox failed to carry its burden to demonstrate that the plaintiff had notice of and agreed to the Terms and Conditions for Ciox eDelivery, including the arbitration provision therein.

¶ 37

### III. CONCLUSION

¶ 38 Arbitration is a matter of consent, and consent is to be determined by applying state contract law. After thoroughly reviewing the record, we find that the circuit court properly applied the principles of contract formation under Illinois law and correctly concluded that Ciox failed to meet its burden to establish that the parties had a valid agreement to arbitrate. Accordingly, the circuit court's decision to deny Ciox's motion to compel arbitration is affirmed.

¶ 39 Affirmed.

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*Gaines v. Ciox Health, LLC, 2024 IL App (5th) 230565*

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**Decision Under Review:** Appeal from the Circuit Court of St. Clair County, No. 22-LA-924; the Hon. Christopher T. Kolker, Judge, presiding.

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