2015 IL App (1st) 133785-U

FIFTH DIVISION
March 31, 2015

No. 1-13-3785

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALARON TRADING CORP.,	)	Appeal from the Circuit Court
	)	of Cook County,
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12 L 8217
	)	
CHRISTOPHER HEHMEYER,	)	Honorable
	)	Sanjay Tailor,
Defendant-Appellee	)	Judge Presiding.
	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff was involved in a prior arbitration with the corporation of which defendant was CEO and where the record shows that there was an identity of the prior arbitration and the present cause of action and that defendant was in privity with the corporation, the circuit court properly dismissed the present cause based on *res judicata*.

¶ 2 Plaintiff Alaron Trading Corporation, a former futures commission merchant, appeals from the circuit court's dismissal of its complaint against defendant Christopher Hehmeyer, the CEO of another futures commission merchant in his individual capacity, on the ground of *res judicata*. On appeal, Alaron contends that the circuit court erred by misconstruing the facts and

misapplying existing case law in ruling the plaintiff's action was barred by *res judicata*. We affirm.

¶ 3 The following background facts are taken from the instant complaint filed by Alaron. According to the complaint, at all times relevant Alaron was a futures commission merchant (FCM) "engaged in the execution of commodity futures and commodity options transactions for various customers." Alaron also cleared the trades for certain members of the Chicago Mercantile Exchange (CME), initially as a clearing member of the CME and later pursuant to agreement with Penson GHCO (Penson).

¶ 4 In August 2007, Sentinel Management Company (Sentinel), another FCM with which Alaron had $3 million worth of funds on deposit, filed bankruptcy. As a result, Alaron lost the $3 million and was forced to borrow $3 million in order to maintain sufficient capital to meet requirements imposed by the Commodity Futures Trading Commission (CFTC) and the CME. Subsequently, the Sentinel bankruptcy trustee filed an action against Alaron and a number of other FCMs who had deposited funds with Sentinel "to attempt to claw-back some of the withdrawals made by the FCMs during the sixty-days [prior] to" Sentinel filing bankruptcy.

¶ 5 In approximately September 2007, Alaron placed itself up for sale and, over the next year, Alaron's president, Steven A. Greenberg, met with various entities who were interested in purchasing Alaron. In early 2008, Penson Worldwide (Worldwide), an international securities clearing firm of which Penson was a subsidiary, made two offers to purchase Alaron through Penson. At that time, Hehmeyer was the CEO of Penson and the non-executive vice president of the National Futures Association (NFA), an industry organization that the CFTC delegates "much of the required statutory registration and oversight." Penson's general counsel, Carl Gilmore, was also appointed as a member of the creditors' committee in the Sentinel bankruptcy.

¶ 6 Alaron ultimately rejected the bids from Penson. However, Alaron entered into an introducing broker (IB) agreement with Penson "whereby Alaron would introduce two of its large traders to [Penson] in return for a $5 per trade commission from [Penson]."

¶ 7 In July 2008, as the result of Alaron's trading on the CME, a large debit occurred which required Alaron to increase its capital with the CME. Alaron began exploring different options, including opening a fully disclosed account with a clearing FCM "whereby all of Alaron's accounts would effectively be transferred to the new FCM, giving that FCM access to all of the customer information as well as the commission rates Alaron was charging its customers and introducing brokers." Another option Alaron considered was an offer for the purchase of Alaron from Rosenthal Collins. According to the complaint:

> "[ ] While opening a fully disclosed account with a clearing FCM could be the first step in an eventual sale, the drawback was that, if an eventual sale fell apart, the clearing FCM would have access to all of Alaron's confidential information regarding its customers, introducing brokers, internal pricing structure, marketing efforts, and business plan, enabling the clear FCM to obtain an unfair competitive advantage over Alaron.
>
> [ ] During the discussions between Alaron and [Penson], Hehmeyer assured Greenberg that he would never permit [Penson] to 'fish behind the net' if Alaron decided to enter a fully disclosed clearing agreement with Penson. Hehmeyer told Greenberg that if the fully disclosed clearing agreement expired or even if, during the one-year period contemplated for the fully disclosed

> agreement, *** Alaron decided to 'go in another direction,' *he (Hehmeyer) would insure that all of Alaron's business would be returned to it intact or [Penson] would pay an override to Alaron*." (Emphasis in original.)

¶ 8 In August 2008, Alaron entered into a fully disclosed non-clearing futures commodity merchant agreement with Penson (August NCFCM agreement). According to the complaint, Hehmeyer agreed to include a non-solicitation and non-compete provision in the agreement, which required that Penson not solicit any of Alaron's employees or customers during the term of the agreement and for one year after its termination. At the same time, Alaron also entered into an omnibus clearing agreement with Penson. Under an omnibus clearing agreement, one FCM opens an account at another FCM, and the latter FCM clears the trades for the omnibus account. The non-clearing FCM "still performs the backroom functions, uses its own trading desk, margin department, and other operational functions but no longer needs to maintain exchange floor [facilities] and personnel nor the large security deposits required by various exchanges."

¶ 9 In September 2008, Alaron cancelled the August NCFCM agreement with Penson and proceeded to clear through Penson under the omnibus clearing agreement only.

¶ 10 Also in September 2008, Hehmeyer learned that Worldwide's general counsel was "enraged" that Penson had entered into a NCFCM agreement with Alaron that included a non-solicitation and non-compete provision. According to the complaint:

> "The general counsel of Worldwide informed [Penson] that under no circumstances would Worldwide permit [Penson] to enter into any NCFCM agreement that contained such non-compete and non-solicitation agreements. Moreover, Worldwide informed [Penson]

> at this time that any purchase of Alaron or any type of referral agreement in which Alaron would essentially 'sell' customer accounts to [Penson] in return for a trailing payout would be contingent on Alaron entering into a settlement with the Sentinel bankruptcy trustee."

After becoming aware of Worldwide's requirements for a NCFCM agreement or a referral agreement, Hehmeyer nonetheless told Greenberg that because they had already done a NCFCM agreement, they only needed to "hammer out" a referral agreement. He did not disclose that Worldwide would not permit Penson to enter into a NCFCM agreement with a non-compete or non-solicitation clause or to enter into a referral agreement with Alaron before Alaron settled with the Sentinel bankruptcy trustee.

¶ 11 The complaint further alleged that, then, Greenberg informed Hehmeyer in confidence of two developments in Alaron's business: (1) that Alaron's Miami branch office, Alaron Latin America (ALA), was going to have to leave Alaron or lose the majority of its business because Alaron was no longer a clearing FCM and therefore Alaron was going to have to shop ALA to other FCMs because Alaron and Penson were not making progress on a referral agreement; and (2) Alaron's Russian introducing broker, Gene Leykin, stated that his customers, Russian financial institutions, were refusing to do business with Alaron because Alaron was no longer a clearing FCM and therefore Alaron was in talks with several other clearing FCMs to transfer Leykin's business in exchange for a referral fee. Hehmeyer told Greenberg that Hehmeyer had the authority to make representations regarding referral fees on behalf of Worldwide and that Penson would pay Alaron a 10% referral fee on all commissions and fees generated by ALA and

Leykin. In exchange, Hehmeyer asked Greenberg to help convert ALA into a branch of Penson and convince Leykin to enter into a contract with Penson, which Greenberg then did.

¶ 12 In December 2008, Alaron received an offer for the purchase of its assets from Peregrine Financial Group, Inc. (PFG). That same day, the NFA informed Alaron that it intended to impose temporary restrictions on Alaron, including preventing Alaron from holding or accepting customer funds. As a result, Alaron would be forced to either sell its assets or enter into a NCFCM agreement.

¶ 13 The following day, Greenberg met with Hehmeyer, who said that they would "do the same NCFCM Agreement we did in August and Carl Gilmore will write the referral agreement and get both to you tonight." That night, Penson sent a new NCFCM agreement to Alaron, which lacked a non-compete and non-solicitation provision. According to the complaint, Hehmeyer explained that Greenberg should not be concerned about the missing non-compete and non-solicitation provision, explaining that the referral agreement would protect Alaron because Alaron would receive a 10% fee on all the business that might stay with Penson. Hehmeyer also again said that he would "not permit [Penson] to 'fish behind the net' and take either Alaron's customers or its employees." (Emphasis omitted.)

¶ 14 Alaron ultimately executed the December 2008 NCFCM with a term of one year, based on Hehmeyer's alleged representations that the customers were to remain Alaron's customers and that Penson would return all of Alaron's customers intact or pay Alaron a 10% fee for four years on any accounts that stayed with Penson after the December NCFCM agreement terminated. The December NCFCM also included a $400,000 termination fee provision, in the event that Alaron sought to transfer its accounts out of Penson before the one-year term expired.

¶ 15 Alaron resumed its negotiations with PFG regarding the purchase of Alaron's assets. The negotiations centered on how Alaron's assets would be classified for the purposes of the payments PFG would make to Alaron. Russ Wasendorf, Jr., PFG's president, agreed that if Alaron assigned the 10% override Hehmeyer had promised to Alaron, PFG would count the assets in the accounts for which the override was received as assets for the purpose of the cash payments. At the time, ALA had $150 million in customer account assets and Leykin had assets in excess of $30 million.

¶ 16 However, Worldwide demanded a non-compete clause from ALA if ALA were to be a branch of Penson, which would prevent the ALA branch manager, Alberto Alvarez, from taking accounts to another FCM if he left Penson. As a result, "the concept of ALA becoming a branch office of [Penson] was no longer viable." Hehmeyer suggested that, as an alternative, ALA become a guaranteed introducing broker (GIB) of Penson and Alvarez agreed. However, Alaron was concerned with this arrangement because if ALA was a GIB of Penson rather than a branch office of Penson, the total of the 10% fee Alaron was to receive from Penson would be drastically reduced.

¶ 17 Meanwhile, relying on Hehmeyer's representation that Penson would pay a referral fee, Alaron executed an asset purchase agreement with PFG prior to the expiration of the December NCFCM's one-year term. According to the agreement, PFG would pay Alaron $2 million upon closing, $2 million one month after closing if sufficient customer assets transferred to PFG, and 40% of the net profits on the transferred accounts.

¶ 18 According to the complaint, subsequently "Hehmeyer intentionally induced Alvarez and the other brokers in the ALA office to breach their employment agreements and to transfer Alaron's customers in the ALA office to an independent introducing broker that cleared through

Penson." As a result, the assets of the ALA office were not counted toward the second $2 million payment from PFG.

¶ 19 Alaron refused to pay Penson the $400,000 termination fee for terminating the December NCFCM. In May 2009, Penson filed a breach of contract claim against Alaron with the NFA to recover the fee, captioned *Penson GHCO v. Alaron Trading Corp.*, NFA No. 09-ARB-109 (NFA Arbitration).[1]

¶ 20 In July 2009, Alaron filed a 32-page counterclaim and third-party complaint in response to Penson's claim, naming both Penson and Gilmore as parties. The counterclaim begins:

> "This is a claim that arises from a stunning betrayal of trust and the unmitigated arrogance of Gilmore, Penson's General Counsel and Managing Director. Gilmore believed that because Penson's President and Chief Executive Officer, Christopher K. Hehmeyer, is Vice Chairman of the NFA, Penson could act with impunity and steal Alaron's assets, disregarding the Fully Disclosed Non-Clearing FCM Agreement *** entered into with Alaron. As events, unfortunately, would later demonstrate, Gilmore and Penson had fraudulently induced Alaron to enter into the Clearing Agreement through various false representations, as Penson secretly intended to take advantage of Alaron's troubled economic status to steal as much of Alaron's business as possible, all while attempting to extort hundreds of thousands of dollars in fictitious penalties and payments from Alaron."

[1] Penson's NFA complaint is not included in the record on appeal.

¶ 21 Alaron ultimately alleged four causes of action: breach of contract against Penson; fraudulent inducement against Penson and Gilmore based on misrepresentations from Penson and Gilmore that Penson and Gilmore never intended to honor, including that all customers whose accounts were serviced under the clearing agreement would remain Alaron's customers, that Penson would reassign any of the agreements assigned to Penson as part of Alaron's transition from an omnibus FCM to a fully-disclosed FCM upon Alaron's request, and that Alaron could sell part or parts of its assets and require a bulk transfer of those assets to another firm without terminating the clearing agreement; conversion against Penson and Gilmore; and tortious interference with business relationships against Penson and Gilmore.

¶ 22 Alaron also alleged the following facts, in pertinent part: that Hehmeyer represented to Greenberg that Alaron's customers and IBs would remain Alaron's and that Alaron would be paid a referral fee for any accounts that remained with Penson if Alaron left; that Hehmeyer repeated the representation "a number of times during the coming months"; that Alaron relied on these representations in entering into the NCFCM agreement and clearing agreement; that Gilmore assured Alaron that it need not worry about the omission of the non-compete and non-solicitation clauses in the December NCFCM agreement because of Hehmeyer's personal guarantee that Penson would abide by the spirit of the previous non-compete and non-solicitation provision and that Alaron would be paid for any business that stayed with Penson after the December NCFCM expired or was terminated; that a member of PFG's management contacted Hehmeyer and Peter Wind, Penson's vice chairman, who assured PFG's representative that all of Alaron's accounts being serviced under the clearing agreement were Alaron's accounts, not Penson's; that while Alaron was in discussions with PFG, Hehmeyer again represented to Alaron that Penson would continue to pay Alaron a referral fee for all business that did not transfer to another clearing firm

or to a firm that purchased Alaron's assets as long as those assets remained on Penson's books, which played a "major role in Alaron's decision to sell a material part of its assets" to PFG; and that Alaron would not have entered into an asset purchase agreement with PFG had Gilmore or Hehmeyer spoken the truth, namely, "that Penson had every intention to compete with Alaron for its customers," to not pay Alaron for its referrals, and to declare the clearing agreement terminated upon any attempted sale of its assets.

¶ 23 In addition, in a footnote in the counterclaim, Alaron stated that at the time it filed its counterclaim it did not know "whether Hehmeyer and Wind were misled by Gilmore, or whether they were part of Gilmore's fraudulent scheme" and reserved the right to name either as a respondent in the arbitration pending the outcome of discovery.

¶ 24 In 2011[2], the parties filed a "Joint Hearing Plan." According to section 8(c) of the NFA Code of Arbitration[3]:

> "A hearing plan is a written document that summarizes each claim, Answer and Reply; identifies any facts the parties have agreed to; identifies the factual and legal issues in dispute; and lists the witnesses and exhibits that will be presented at the hearing. The parties shall serve on the NFA and all parties a joint hearing plan, or separate hearing plans if they cannot agree on a joint one, no later than 30 days before the oral hearing date."

[2] The exact filing date of the first hearing plan is unclear from the record on appeal.

[3] The NFA Code of Arbitration can be found online at https://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=5.

¶ 25 In the hearing plan, Alaron listed eight causes of action. In addition to the four causes of action that Alaron had alleged previously in its counterclaim and third-party complaint (breach of contract, fraudulent inducement, tortious interference with business relationships, and conversion), Alaron alleged four additional causes of action, including fraudulent misrepresentation, intentional interference with contractual relationships, promissory estoppel, and equitable estoppel. Alaron also listed 20 "issues in dispute."

¶ 26 In a footnote in the hearing plan, Penson and Gilmore stated:

> "While this Hearing Plan is filed jointly by all parties, Penson and Gilmore expressly reserve the right to object to certain of Alaron's Claims and Issues Presented as not being properly before the Panel. By its February 17, 2011 letter, NFA Staff specifically advised that, once the Hearing Plan was filed, if it contained any new claims, NFA staff would not forward that Plan to the Panel and would instruct Alaron that in order to present evidence and seek damages on the new claims, it must file an amendment to the counterclaim and obtain the Panel's consent to the new claim. Penson and Gilmore reserve the right to raise such issues and, as appropriate, to object."

¶ 27 The referenced letter is included in the record on appeal. The letter is dated February 17, 2011, from Carol Wooding, NFA Associate General Counsel, and indicates it was sent to all parties. In it, Wooding explains:

> "Penson is correct that Alaron may not seek damages related to a claim that is new or different from the claims included

> in their counterclaim unless the Panel consents to the claims being heard, and NFA has procedures in place to ensure that does not happen. ***
>
> Penson appears concerned that Alaron will include these new claims in the hearing plan that it is required to file with the Panel. If Alaron did include new claims in the hearing plan, NFA staff would not forward that Plan to the Panel and would instruct Alaron that in order to present evidence and seek damages on the new claims, it must file an amendment to the counterclaim and obtain the Panel's consent to the new claim. Penson, of course, would have an opportunity to file an objection to the amendment.
>
> Alaron should also be advised that if it intends to file any new claim related to these agreements, it must file a motion for leave to amend immediately."

¶ 28 In March 2011, Penson filed a motion to bar causes of action and strike issues in dispute, arguing that the four new claims Alaron alleged in the hearing plan were improperly before the NFA arbitration panel. Penson claimed that the four claims Alaron had asserted in its counterclaim and third-party complaint "were the basis upon which the parties conducted discovery and prepared for the hearing in this matter." Penson referenced the February 17, 2011, letter from the NFA that instructed Alaron to file a motion for leave to amend immediately if it was going to file any new claims, then continued:

> "Alaron did not respond to that invitation, it did not file a motion for leave to amend. Rather, in its submission in the

> Hearing Plan submitted on March 7, 2011, it listed not four, but eight claims, four of which were not included in the Counterclaim." (Emphasis in original.)

Penson concluded that the causes of action and the issues in dispute that were not included in the counterclaim were not properly before the NFA panel and requested that the new claims and issues be barred "unless and until leave to amend is sought and, if appropriate, granted."

¶ 29 Alaron subsequently filed a motion to amend its counterclaim and third-party complaint. In May 2011, the NFA panel entered an order denying Alaron's motion and instructing Alaron to revise its portion of the hearing plan to remove the contested causes of action, (fraudulent misrepresentation, tortious interference with contract, promissory estoppel, and equitable estoppel), and the contested issues in dispute, which included the following:

> "1. Whether Penson fraudulently induced Alaron not to enter into a referral agreement with another FCM relating to [foreign introducing broker] Gene Leykin's business;
>
> 2. Whether Penson fraudulent [*sic*] induced Alaron to encourage its Miami branch office to become a branch office or [introducing broker] of Penson;
>
> 3. Whether Alaron justifiably relied on Christopher Hehmeyer's representation that Penson would pay Alaron a 25% trailer on all Alaron business that remained with Penson;
>
> 4. Whether Penson is estopped from denying an agreement to pay Alaron a 25% trailer on all Alaron business that remained with Penson;

5. Whether Penson fraudulently induced Alaron not to enter into a referral agreement with Rosenthal Collins in December of 2008;

6. Whether Penson fraudulently induced Alaron not to enter into a referral agreement with Peregrine Financial Group, Inc. ('PFG') in December of 2008;

7. Whether Penson fraudulently induced Alaron to enter into the December 2008 NCFCM Agreement;

***

11. Whether Penson intentionally interfered with Alaron's contractual relationship with PFG;

***

13. Whether Penson owes Alaron a 25% trailer on net revenues for all business and/or customers that did not transfer to PFG;

***

18. Whether Penson is liable for at least $600,000 in lost net profits."

¶ 30 In October 2011, the parties filed a joint hearing plan that no longer included Alaron's additional claims and issues in dispute. The pertinent issues in dispute that were included from Alaron were: whether Penson intentionally interfered with Alaron's relationships with the GIB, independent introducing broker (IIB), foreign introducing brokers (FIBs), and commodity trading advisors (CTAs) that did not transfer to PFG; whether Penson intentionally interfered

with Alaron's business relationships; and whether Penson is responsible for the consequential damages (to wit: the lost revenue incurred by Alaron as a result of its business plan) that flowed from Penson's wrongful actions.

¶ 31 In the hearing plan, Alaron presented its version of the case. Alaron began by saying that it had wrongly believed Penson would honor a promise made to Alaron:

> "[The promise] induced Alaron to entering into a clearing agreement with Penson in December of 2008. That promise was to pay Alaron a trailer on any of its business that decided, for whatever reason, not to transfer from Penson should Alaron enter into a relationship with another clearing firm, decide to regain its clearing status for itself, or sell its business."

Alaron continued, alleging that: Alaron incurred a significant loss as a result of the Sentinel bankruptcy and therefore began looking into selling its assets; Penson was a potential purchaser; Alaron rejected bids from Penson, but a working relationship had developed between Greenberg and Hehmeyer, Penson's president; at that time, Gilmore was Penson's general counsel as well as a member of the Sentinel bankruptcy creditors committee; eventually, Alaron and Penson considered entering into a omnibus clearing agreement or a NCFCM agreement together; Alaron entered into an omnibus agreement with Penson in May 2008 and a NCFCM with Penson in August 2008; the August 2008 NCFCM agreement included a non-solicitation and non-compete clause; in September 2008, Alaron canceled the August NCFCM agreement and proceeded to clear through Penson under the omnibus agreement; at the time, Alaron was possibly going to lose its clearing status, so it was also facing pressure because if it lost its clearing status its relationship with Leykin and ALA would be jeopardized. At this point, Alaron alleged that

Greenberg discussed the various challenges facing Alaron and the possible solutions with Penson and that, in response:

> "Hehmeyer then made the representation that guided Alaron's conduct over the next eight months. Hehmeyer told Greenberg that Penson would not only pay Alaron a 25% trailer for four years on Leykin's business if he transferred his FIB directly to Penson and a similar trailer if Alaron's [ALA] branch transferred to Penson, but should Alaron entered [*sic*] into an NCFCM or Omnibus Agreement with Penson and later decided [*sic*] to leave, Penson would pay Alaron a 25% trailer for four years on all Alaron business that decided not to transfer.
>
> This promise to pay a 25% trailer on any business that remained, for any reason, at Penson in the event Alaron should decide, for any reason, to terminate its relationship with Penson was the catalyst of all of Alaron's actions from the date that Hehmeyer made the representation in August of 2008 through the signing of the December 2008 NCFCM agreement."

Alaron further alleged that: in reliance on this promise, Alaron convinced Leykin to work with Penson and convinced Alvarez at ALA to become a branch of Penson; on December 5, 2008, the NFA decreed that Alaron could no longer accept customer funds and Alaron looked to sign another NCFCM agreement with Penson; and unlike the August NCFCM, the December NCFCM did not include the non-compete and non-solicitation clause. Then:

> "Gilmore represented to Alaron that 'our parent' required the deletion of the non-compete/non-solicitation provision. Gilmore then represented to Alaron that even though the provision was not in the agreement that Penson would not solicit Alaron's customers if the NCFCM agreement was terminated and that 'this is matter of trust.' When confronted with the fact that the referral agreement providing for the trailers to be paid Alaron for any business that stayed at Penson should Alaron sell or transfer its business to another FCM, Hehmeyer told Greenberg not to worry, saying 'We have a deal.' "

Alaron agreed to the terms of the December NCFCM. Alaron continued its allegations of fact in the joint hearing plan, stating that: Gilmore then told Alaron that a referral agreement would not be signed until Alaron had settled with the Sentinel bankruptcy trustee; Alaron began talks of a possible asset purchase agreement with PFG; Hehmeyer once again assured Greenberg that Alaron would receive the previously promised trailers; at some point after January 2009, Penson began to urge Alvarez to form his own IB through Penson; Alaron continued its negotiations with PFG; in May 2009, Alaron and PFG entered into an asset purchase agreement; shortly thereafter, negotiations abruptly ended between PFG and Penson about PFG using Penson as its exclusive clearing firm; and, finally, also in May 2009, Alvarez and the ALA office, despite their employment agreements, executed an agreement with a Penson IB.

¶ 32 The NFA arbitration panel held a multiple-day hearing in November and December 2011. A transcript of Hehmeyer's testimony from the hearing was included in the record on appeal. We have included excerpts of Hehmeyer's testimony below for a full understanding of the present

appeal. The transcript shows that Hehmeyer was questioned about his alleged promise to Greenberg that Penson would pay referral fees to Alaron, to which he responded:

> "I never made any side agreement separate and apart from what we agreed to in those agreements that were official agreements signed by the organization—by me for the organization, committing the organization. Those agreements that we signed were the agreements, period.
>
> ***
>
> No way, no how did I ever represent that Penson would make some sort of payment that wasn't in one of those agreements that we agreed to."

In regard to not including the non-solicitation and non-compete clause in the December NCFCM, Hehmeyer testified that he and Gilmore both explained to Greenberg that the general counsel for the parent corporation was angry that they had committed to the clause in the previous agreement and they made clear to Greenberg that the clause could not be included in the December NCFCM. Hehmeyer further explained:

> "I made it very clear at the time, because Steve [Greenberg] then said on the phone to me, he said, 'Chris, what guarantee do I have that when we move your—our business under your books fully disclosed that you're not just going to cut us out immediately?'
>
> I said, 'Steve, we've been in this business for a long time at Goldenberg Hehmeyer[4] ***. We have lots of introducing brokers

[4] Prior, the company has been referred to as Goldberg Hehmeyer.

that have long histories at this company. We don't have a lot of turnover. We've created those relationships because we don't cut people out of the income stream. We don't—we're not going to cut you out.'

We're not going to—it's also known in the business as fishing behind the net, that we would go straight to their customers and basically develop the relationship and cut Steve out. In the document, we could do that.

And I told Steve, 'There's no guarantee that we can't do it. You're going to have to take our word that we are not going to cut you out of this agreement. ***

'Steve, you also know that we have a referral agreement on the table that we would be willing to discuss, which is a 25 percent of our net for four years, and then the customers are ours. You have no liability and no responsibility. Steve, you go fishing. We have two deals here. One, you stay involved. You keep the risk. You stay involved with the customers. We're not going to cut you out of that. Or a referral agreement.'

They don't go hand in hand. They were mutually exclusive, NCFCM or a referral agreement, one or the other, or you could stay on an omnibus, which was not an option for them anymore because they were undercapitalized. All were okay with us as long as we came to agreement. We came to an agreement on

> the NCFCM agreement, and I told him we weren't going to fish behind the net and cut him out if he was still in the NCFCM agreement.
>
> So yes, I promised him that we would not steal his customers and cut him out under the NCFCM agreement. The referral agreement, it's a moot point because he's—the idea of the referral agreement was 25 percent for four years, the customers are ours, he goes fishing, he's done. He has no more liability, no more phone calls, no nothing. Different agreements, different responsibilities, different liabilities."

¶ 33 Hehmeyer also testified about the concerns of ALA and Leykin and their subsequent moves to Penson. For example, Hehmeyer explained that the negotiation about ALA becoming a branch office of Penson "was sort of an ongoing discussion, and I don't even know if it really rose to the point of being a deep negotiation between Penson and Alaron because it was so complex, this issue of us having employees in Miami." He further stated:

> "Alberto [from ALA] wanted to talk about being an IB. I called Steve [Greenberg] afterwards and said—we called Steve, I think, from the car. Then I called Steve afterwards. I said, 'He's looking to be an IB, so that's something that you need to give attention to. We can go either way.'
>
> But it was complex because they had all these employees. It was a branch office. Alaron had their own separate agreement

> with them. And so that thing had a lot of different moving parts to it, but we tried very hard."

He also said:

> "[W]e didn't want to cut [Alaron] out. We wanted them involved and to keep that relationship up as long as they were taking the liability and servicing it. ***
>
> But my own feeling was, again, on this one-year agreement is that it's natural that the—that there starts to become a relationship between the firm and the customers because you earn trust. And so we didn't want to cut them out of anything and we were careful. And as a policy we wanted to keep them informed if we had interaction with their bigger customers."

Hehmeyer was cross-examined on ALA moving from Alaron to Penson, during which he said that Gilmore "knows a lot more about this [ALA] thing than I do."

¶ 34 Hehmeyer was also cross-examined by Alaron's lawyer on the issue of his representation that Penson would not "fish behind the net," on ALA, on Leykin. In regard to Leykin, Hehmeyer said that he was not aware that Leykin was not going to move to PFG after Alaron and PFG entered into the asset purchase agreement. Hehmeyer testified that "as a history, I told [Greenberg] we didn't do business that way. That's what I told him. I said, 'We don't do business that way, we don't fish behind the net,' which is true." Hehmeyer denied having cut Alaron out from ALA and explained that although a referral agreement had been discussed, the agreement was never actually reached or signed.

¶ 35 The transcript also shows that Hehmeyer was questioned extensively about his involvement in negotiations and discussions about the sale of Alaron to PFG and the effect of that sale on the December NCFCM agreement.

¶ 36 The record on appeal also includes the transcript of the closing argument made by Alaron's attorney at the NFA arbitration hearing. He argued, in pertinent part:

> "We are suing the firm run by the vice chairman of the [NFA] in a [NFA] arbitration.
>
> ***
>
> [W]hat happened to Alaron? What did Alaron do in the period from September of '08 to May of '09?
>
> Leykin is looking around. He wants to find someplace to go because he doesn't like the fact that it's an Omni clearing arrangement that Penson is on, that Alaron is on with Penson, so he's going to leave.
>
> [Greenberg] asks Hehmeyer, who testified, 'If I get him to stay, do we get 25 percent?' He got him to stay. Alberto is going to leave.
>
> He asked, 'If I get Alberto to stay or become a branch, 25 percent?
>
> 'Yes.'
>
> ***
>
> What happened? [ALA] is gone. Where did it go? PFG, Leykin—or to Penson?

Leykin is gone. Where did it go? Penson.

***

What is really sad about this whole thing is Carl Gilmore. This is the greatest deal for Penson and Alaron coming down the pike. The biggest problem here is valuing assets.

PFG is taking that risk. They are going to pay a total of $4 million if at least $130 million worth of assets transfer. What is Penson going to pay? Nothing, unless they make a profit. ***

***

What happened is, as you will see, Carl Gilmore mugged Alaron in December.

***

Following up on what I was saying about the referral agreement, we can see from Mr. Hehmeyer's testimony here, it starts about getting, be [*sic*] very simple.

'Did you ever tell in a meeting with Steve Greenberg and Russ [Wasendorf] that you agreed and/or were going—that you—Penson would be paying Steve a 25 percent trailer on business that did not move?

'I did not represent that we had any sort of agreement. I mentioned that I talked about that we were willing to do that.'

***

> They can say all they want, that Steve had no reason to rely on the word of the vice chairman of the NFA, that the vice chairman of the NFA could lie to him, that he could do whatever he wanted. That's not the law, that's not reality.
>
> ***
>
> If you find Carl Gilmore lied as he lied here and induced Alaron to enter this agreement by saying, 'it's not me, it's Dallas, Dallas wants the Sentinel,' and then Mr. Hehmeyer—remember what Mr. Hehmeyer says. The reason he enters it—and Mr. Hehmeyer said it wasn't a side agreement.
>
> Remember what Mr. Hehmeyer said? 'We don't make side agreements.'
>
> I said, 'Well, wasn't your agreement with Steve that you would not fish behind the net? Is that a side agreement' He said 'No.'
>
> I said, 'could Mr. Greenberg honor your word?' And in each one of these you'll say yes. If you do that and you have no intent to perform, then that's fraud all right. That's clear and simple fraud."

¶ 37 In January 2012, the NFA panel entered an order finding that Alaron was liable to Penson for the $400,000 early termination fee and dismissing all other claims, counterclaims, and third-party claims with prejudice.

¶ 38 In July 2012, Alaron filed the instant complaint against Hehmeyer, alleging, in part:

> "Hehmeyer had been one of the principals of Goldberg, Hehmeyer & Company that had been purchased by Penson Worldwide ('Worldwide') in 2007, an international securities clearing firm, thus the name. As part of the purchase, Hehmeyer received, in addition to cash, an override on [Penson]'s business for three years. The more business [Penson] attracted during that three-year period, the larger Hehmeyer's override. It was Hehmeyer's desire to cash-in on this override and to impress his superiors at Worldwide with his performance as CEO of [Penson]. Before February 2008, Hehmeyer's performance as CEO of [Penson] was lackluster, at best. The desire to improve his performance motivated Hehmeyer to engage in the fraudulent activities herein described."

Alaron alleged the following causes of action: negligent misrepresentation, alleging that Hehmeyer was acting outside the scope of his employment with Penson and for his own financial benefit when he made the misrepresentations and omissions of material facts to Greenberg and Alaron (count I); fraudulent misrepresentation (count II); tortious interference with prospective business relationships, alleging that Hehmeyer's actions were outside the scope of his employment and were committed for his own personal benefit (count III); and aiding and abetting breach of fiduciary duty (count IV).

¶ 39 Alaron's complaint also included the following factual allegations, in pertinent part: that during the discussions of Alaron and Penson possibly entering into a fully disclosed clearing agreement, Hehmeyer told Greenberg that, if the fully disclosed clearing agreement expired or

Alaron decided to go in another direction during the term of the clearing agreement, Hehmeyer would insure that "all of Alaron's business would be returned to it intact or [Penson] would pay an override to Alaron" (emphasis omitted); that Hehmeyer "willfully concealed" from Greenberg that general counsel for Worldwide was "enraged" about the non-compete and non-solicitation provision contained in the August NCFCM; that Hehmeyer "willfully failed to disclose" to Greenberg that Worldwide would not permit Penson to enter into a referral agreement with Alaron until Alaron settled with the Sentinel bankruptcy trustee; that at no time did Worldwide authorize Hehmeyer to withhold the information about the non-compete and non-solicitation provision or the referral agreement requirement; that Hehmeyer had no authority to make any oral representations regarding referral fees on behalf of Worldwide but told Greenberg that he did have such authority and promised that Penson would pay Alaron a 10% referral fee on all commissions generated from ALA and Leykin; that Hehmeyer intended for Greenberg to rely on his representations about the 10% referral fee; that, in December 2008, Hehmeyer falsely represented to Greenberg that Alaron and Penson would enter into "the same NCFCM Agreement we did in August and Carl Gilmore will write the referral agreement" despite knowing that Worldwide would not enter into a referral agreement with Alaron because Alaron had not settled with the Sentinel bankruptcy trustee and the new NCFCM would not contain a non-compete or non-solicitation clause; that Alaron relied on Hehmeyer's representations in entering into the December NCFCM agreement; that Hehmeyer made several more representations about Penson paying Alaron a 10% referral fee and, relying on these representations, Alaron entered into the asset purchase agreement with PFG; and that after Alaron entered into the asset purchase agreement with PFG, Hehmeyer refused to pay any referral fee to Alaron and "organized and ran a campaign to keep Alaron's customers and

introducing brokers as well as withheld Alaron's funds in an attempt to financially strangle Alaron." Finally, Alaron specifically alleged that "Worldwide was unaware of and never approved Hehmeyer's scheme to illegally raid Alaron's ALA branch office. His efforts were outside the scope of his employment and were calculated for his own personal benefits, to increase his override and improve upon his stature in Worldwide."

¶ 40 In September 2012, Hehmeyer filed a motion to dismiss pursuant to section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4) (West 2012)), arguing that Alaron's claims were barred by *res judicata*.

¶ 41 In October 2012, after briefing and arguments, the circuit court granted Hehmeyer's motion to dismiss, stating that: Hehmeyer had established the existence of both privity between himself and Penson and identity of the causes of action in Alaron's present complaint and its prior counterclaim before the NFA; Hehmeyer established that the NFA arbitration was a final adjudication on the merits and; Alaron failed to cite any authority that the removal of issues by the arbitration panel precluded the application of *res judicata*.

¶ 42 On appeal, Alaron argues that the circuit court erred in granting Hehmeyer's motion to dismiss based on *res judicata*.

¶ 43 A section 2-619 motion to dismiss admits as true all well-pleaded facts and all reasonable inferences there from. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Therefore, when ruling on a section 2-619 motion a court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Id.* "The purpose of section 2-619 is to afford litigants a means of disposing of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for trial." *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 413 (2003). In considering a ruling on a section 2-619

motion to dismiss, the reviewing court must determine whether a genuine issue of material fact exists and whether the defendants are entitled to judgment as a matter of law. *Id.* We review a section 2-619 dismissal *de novo*. *Porter*, 227 Ill. 2d at 352.

¶ 44 Section 2-619(a)(4) of the Code allows a circuit court to dismiss a cause of action based on the grounds that it "is barred by a prior judgment," (735 ILCS 5/2-619(a)(4) (West 2012)) incorporating the doctrine of *res judicata* (*Miner*, 342 Ill. App. 3d at 413). "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). *Res judicata* is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 890 (2009). " '*Res judicata* promotes judicial economy by preventing repetitive litigation and [additionally] protects parties from being forced to bear the unjust burden of relitigating essentially the same case.' " *Id.* (quoting *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004)). *Res judicata* extends to claims that were actually decided in the first action and to claims that could have been decided in the first action. *River Park*, 184 Ill. 2d at 302. To invoke the doctrine of *res judicata*, a defendant must show three elements: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of causes of action; and (3) an identity of the parties or their privies. *Id.*

¶ 45 The parties here do not dispute that the NFA panel's determination during the arbitration, which was confirmed by the circuit court, was a final judgment rendered on the merits by a court of competent jurisdiction. Instead, Alaron contends that Hehmeyer failed to establish both an

identity of the causes of action and an identity of the parties. First, we will consider whether Hehmeyer established an identity of the causes of action.

¶ 46 In order to determine whether there exists an identity of the causes of action, Illinois courts apply a "transactional test." *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009) (citing *River Park*, 184 Ill. 2d at 311. Under this analysis, separate claims are considered the same cause of action for the purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *River Park*, 184 Ill. 2d at 311. Even if there is not a substantial overlap of evidence between the claims asserted, claims will be considered the same cause of action as long as they arise from the same transaction. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 723 (2004).

¶ 47 Here, the claims identified by Alaron in the joint hearing plan and the claims in the present complaint arose out of the same group of operative facts: the actions Alaron took as a result of the Sentinel bankruptcy; Alaron rejecting a February 2008 purchase offer from Penson but continuing discussions about entering into some sort of relationship with Penson; Alaron entering into an omnibus clearing agreement and a NCFCM agreement with Penson in August 2008; the August NCFCM including a non-compete and non-solicitation provision; Hehmeyer assuring Greenberg that Alaron's customers and IBs would remain Alaron's customers and that, if Alaron left and any of Alaron's accounts stayed behind, Penson would pay Alaron a referral fee for those accounts; Alaron cancelling the August NCFCM and proceeding under the omnibus agreement only; the NFA looking into Alaron's capital requirements; Alaron having concerns about ALA and Leykin leaving when it lost its clearing status; Hehmeyer promising to pay a referral fee on all commissions and fees generated by ALA and Leykin if Greenberg helped convert ALA into a branch of Penson and convinced Leykin to sign a contract with Penson;

when Alaron and Penson discussed a new NCFCM agreement, that the non-solicitation and non-compete provision were eliminated from the new agreement; Hehmeyer's representation of his personal guarantee that, regardless of the missing non-compete and non-solicitation provision from the new NCFCM agreement, Penson would abide by the spirit of the provisions and Alaron would be paid for any business that stayed with Penson after the expiration or termination of the NCFCM; Alaron relying on this representation in signing the December NCFCM; Alaron entering into discussions about an asset purchase agreement with PFG; during the Alaron's talks with PFG, Hehmeyer once again representing that Penson would continue to pay Alaron a referral fee for any business that did not transfer to another clearing firm or to a firm that purchased Alaron's assets as long as the assets remained on Penson's books; Alaron executing an asset purchase agreement with PFG; and Alaron's ALA employees being induced to leave Alaron and form an IIB using Penson as one of its clearing firms.

¶ 48 In addition, the transcripts from Hehmeyer's testimony at the NFA hearing show that Hehmeyer was questioned about and testified about the same operative facts on which Alaron is basing its claims in its present complaint. Hehmeyer testified about the alleged promise to Greenberg that Penson would pay referral fees to Alaron, the allegation that Hehmeyer told Greenberg that Penson would never "fish behind the net," why the non-solicitation and non-compete provision was not included in the December NCFCM agreement, the possibility of both ALA becoming a branch office of Penson and Leykin moving to become a direct account of Penson, the concerns ALA and Leykin had about doing business with a company that was not a clearing FCM, whether Hehmeyer knew Leykin was not going to PFG, ALA's customers moving to Penson rather than PFG, and the alleged existence of an agreement for Penson to pay Alaron for any business that remained on Penson's books after Alaron's sale to Peregrine. Hehmeyer

also testified extensively about his involvement in negotiations and discussions about the sale of Alaron to PFG and the affect of that sale on the December NCFCM agreement. In addition, Hehmeyer specifically testified that "[n]o way, no how did I ever represent that Penson would make some sort of payment that wasn't in one of those agreements that we agreed to." Based on the record before us, it is clear that that there is an identity of the causes of action between Alaron's claims before the NFA and the claims in Alaron's present complaint.

¶ 49 Furthermore, Hehmeyer showed that privity existed between himself and Penson. The term "privity" has no general definition that automatically applies with respect to the doctrine of *res judicata*; rather, the determination of whether privity exists requires a court to carefully examine the circumstances of each case. *Purmal*, 354 Ill. App. 3d at 722. "Privity expresses 'the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties.' " *Id*. at 722-23. Privity is generally found to exist where the parties adequately represent the same legal interests. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992). "Illinois courts have relied on the Restatement (Second) of Judgment for guidance in defining privity." *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶ 28 (citing *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 559 (2009)). This court has previously noted:

> "The Restatement (Second) of Judgments explains that privity refers to a cluster of relationships, [citation] under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships

> to that party. [Citation]. The Restatement (Second) further explains that there are three general categories of relationships that may establish privity. [Citations.] *** The second category of relationships includes an array of substantive legal relationships, *** in which one of the parties to the relationship is treated as having the capacity to bind the other to a judgment in an action to which the latter is not a party. [Citation.] These relationships include, *inter alia*, co-obligors, parties who are vicariously liable for one another, bailees and bailers, co-owners of property, assignees and assignors, the promise and intended beneficiary of a contract, *corporations and their officers, directors, and shareholders*, and members of partnerships. [Citation.]" (Internal quotations omitted). *State Farm*, 394 Ill. App. 3d at 559-560.

¶ 50 In the present case, the relationship between Hehmeyer and Penson clearly falls under the second category of relationships—Hehmeyer was the CEO of Penson at the times relevant to both the NFA arbitration and the present lawsuit. In addition, the record shows that although Hehmeyer was not a named party in the first action, he was heavily involved as his statements were a basis for Alaron's claims and he testified in the hearing itself. As we discussed above, Alaron alleged substantively the same underlying facts to support its claims before the NFA as it did in the present complaint, especially that: Hehmeyer assured Greenberg that Alaron's customers and IBs would remain Alaron's customers and that, if Alaron left and any of Alaron's accounts stayed behind with Penson, Penson would pay Alaron a referral fee for those accounts; Hehmeyer represented that he personally guaranteed that, regardless of the missing non-compete

and non-solicitation provision from the December NCFCM agreement, Penson would abide by the spirit of the provisions and Alaron would be paid for any business that stayed with Penson after the expiration or termination of the NCFCM; Alaron relied on this representation in signing the December NCFCM; during talks with PFG, Hehmeyer once again represented that Penson would continue to pay Alaron a referral fee for any business that did not transfer to another clearing firm or to a firm that purchased Alaron's assets as long as the assets remained on Penson's books; and Alaron's ALA employees were induced to leave Alaron and form an IIB using Penson as one of its clearing firms. Hehmeyer was questioned about every one of these issues at the NFA hearing and would be forced to essentially repeat his testimony if the present case were to proceed in the circuit court. Furthermore, in its closing argument at the NFA hearing, Alaron argued about what Greenberg's reliance on Hehmeyer's representation meant:

> "If you find Carl Gilmore lied as he lied here and induced Alaron to enter this agreement by saying, 'it's not me, it's Dallas, Dallas wants the Sentinel,' and then Mr. Hehmeyer—remember what Mr. Hehmeyer says. *The reason he enters it—and Mr. Hehmeyer said it wasn't a side agreement*.
>
> Remember what Mr. Hehmeyer said? 'We don't make side agreements.'
>
> I said, 'Well, wasn't your agreement with Steve that you would not fish behind the net? Is that a side agreement' He said 'No.'
>
> I said, 'could Mr. Greenberg honor your word?' And in each one of those you'll say yes. If you do that and you have no

> intent to perform, then that's fraud all right. That's clear and simple fraud."

Here, Alaron is making essentially the same claims arguments Hehmeyer, the CEO of Penson, which it made against Penson in the NFA arbitration. This sort of repetitive litigation requiring Hehmeyer to bear the unjust burden of relitigating essentially the same case is what *res judicata* seeks to prevent. *Piagentini*, 387 Ill. App. 3d at 890. In addition, not only were these factual allegations already heard by the NFA arbitration panel, but we also note that the NFA arbitration panel found in favor of Penson and Gilmore on all the claims before it based on the factual allegations at issue in the present case. Because Hehmeyer already defended against these same factual allegations as the CEO of Penson, allegations based on which Alaron lost on its claims before the arbitration panel, we conclude that Penson and Hehmeyer adequately represented the same legal interests and are therefore in privity.

¶ 51 Moreover, we find that Alaron's allegation that Hehmeyer was acting outside the scope of his employment was not sufficiently pleaded and was, instead, conclusory. When ruling on a section 2-619 motion to dismiss, a court must accept as true all well-pleaded facts and any reasonable inferences arising there from, but a court cannot accept as true mere conclusions unsupported by specific facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 52 Here, Alaron's allegations that Hehmeyer acted outside the scope of his authority are based on its statements that Worldwide at no time authorized Hehmeyer to withhold information about the non-compete and non-solicitation provision or the referral agreement requirement that Alaron settle with the Sentinel bankruptcy trustee and that Worldwide did not authorize Hehmeyer to make oral representations regarding referral fees. First, we note that Worldwide

has never been named a party in these actions. Moreover, Alaron is simply making statements that Hehmeyer did not have authority; however, its conclusion that Hehmeyer was acting without authority is unsupported by any further fact. In addition, it does not appear that Penson ever argued that Hehmeyer was acting outside the scope of his authority at the arbitration. Under these circumstances, we cannot find that the trial court erred in disregarding Alaron's unsupported conclusion that Hehmeyer was acting outside the scope of his authority.

¶ 53 Furthermore, the case on which Alaron relies in support of arguing that Hehmeyer is not in privity with Penson is distinguishable from the present case. See *Atherton v. Connecticut General Life Insurance Co.*, 2011 IL App (1st) 090727. There, the plaintiffs, Phil and Tracy Atherton as the parents and next friends of Brooke Atherton, filed an action for declaratory and injunctive relief against the State of Illinois Quality Care Health Plan (QCHP) in a Pulaski County court, "challenging a reduction in the number of hours of private in-home skilled nursing care provided to Brooke, who is severely mentally and physically disabled and in need of ongoing medical care." *Id.* ¶¶ 1-3. The Pulaski County court granted the plaintiffs' complaint for declaratory and injunctive relief requiring the QCHP to cover the hours of care that Brooke's treating physician had determined were "medically necessary." *Id.* ¶ 3. The plaintiffs then filed suit in Cook County against the following defendants: Connecticut General Life Insurance Company (CGLIC); Cigna Healthcare of Illinois, Inc. (Cigna); International Rehabilitation Associates, Inc. (Intracorp); LuAnn York, a registered nurse and caseworker employed by Intracorp; and Dr. Daniel Ober, also employed by Intracorp. The complaint alleged common law fraud and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Specifically, the plaintiffs alleged:

> "[T]he defendants, as the administrators of the QCHP plan, committed common law fraud and statutory fraud by engaging in an orchestrated pattern and scheme of misrepresentation, omission, and concealment to reduce the number of hours of private in-home skilled nursing care Brooke received, even though her treating physician insisted that the number of hours previously approved under the QHCP plan was 'medically necessary,' and even though the supervisor of skilled nursing services documented that such care was 'medically necessary.' " *Id.*

The Cook County circuit court granted the defendants' motion for summary judgment, finding that the plaintiffs' claims were barred by *res judicata* based on the Pulaski Court judgment. *Id.*

¶ 54 On appeal, the defendants argued that they were in privity with QCHP in the Pulaski County suit because of their agency relationship with QCHP. *Id.* ¶ 13. The First District disagreed, concluding that a genuine issue of material fact existed as to whether the defendants were in privity with QCHP in the Pulaski County suit. *Id.* ¶ 17. Accordingly, the court found that the grant of summary judgment had been improper and reversed and remanded the cause to the circuit court for further proceedings. *Id.* ¶ 22.

¶ 55 We find *Atherton* distinguishable on its facts. The first suit filed in *Atherton* in Pulaski County sought, among other things, a declaration challenging the reduction in the number of hours of private in-home skilled nursing care to be provided to a severely mentally and physically disabled person. The subsequent complaint in *Atherton* against numerous parties alleged common law and statutory fraud in an orchestrated scheme to reduce medically necessary hours of in-home medical care needed by that person. In addition, the question of

privity in *Atherton* involved a health care plan in the prior suit and the administrators of that health care plan in a subsequent suit, whereas here the question of privity involves a company, Penson, in the prior suit and the CEO of that company, Hehmeyer, in the present suit. As we observed, the Restatement (Second) of Judgments recognizes a category of relationships that may establish privity including "corporations and their officers, directors, and shareholders." Restatement (Second) of Judgments §§ 45 through 61 (1982). No such parallel relationship to the relationship at issue in *Atherton* is recognized by the Restatement (Second) of Judgments. Based on the facts before us, we have concluded that Penson and Hehmeyer, as the CEO of Penson, were in privity. Alaron has cited no legal authority in which the CEO of a company was found not to be in privity with that company for the purposes of *res judicata*. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). *Atherton* is factually distinguishable from the present case and, accordingly, inapplicable.

¶ 56 Finally, the record shows that Alaron could have raised the claims that it has raised in its present complaint before the circuit court in the counterclaim filed before the NFA arbitration panel. All of Hehmeyer's alleged misrepresentations were made to Greenberg, Alaron's president, and therefore Alaron was aware of the potential allegations against Hehmeyer at the time it filed its counterclaim. We acknowledge that, as Alaron points out, in Illinois counterclaims are permissive rather than mandatory. *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 531 (2005). Therefore, a defendant may generally raise a claim against the plaintiff either by a counterclaim or in a separate action. *Id*. at 531-32. Alaron seems to conclude that, because its counterclaim was permissive, it should be allowed to bring some claims before the

NFA arbitration panel and some in a separate complaint before the circuit court. However, Illinois law further dictates that "if the defendant's claim involves the same operative facts as the plaintiff's claim, *res judicata* may bar the defendant from raising his or her claim in a subsequent action." *Id.* at 532. Here, although Penson's own complaint before the NFA was based only on Alaron's alleged breach of the December NCFCM agreement, Alaron's counterclaim expanded the operative facts covered by the first action to include Hehmeyer's representations to Alaron, Alaron entering into discussions about an asset purchase agreement with PFG, Alaron executing the asset purchase agreement with PFG, and Alaron's customers that stayed with Penson after the execution of the asset purchase agreement with PFG. As mentioned above, the doctrine of *res judicata* extends to what was actually decided in the first action, as well as matters *that could have been decided* in the first action. *River Park*, 184 Ill. 2d at 302. Alaron's present complaint is based on the same group of operative facts as its counterclaim before the NFA. Alaron has failed to cite any case law in which a defendant brought a counterclaim against the plaintiff and then subsequently filed a separate complaint based on the same group of operative facts as its prior counterclaim, as Alaron has done in the present case. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). Because Alaron could have brought these claims in its original counterclaim before the NFA, we find that the circuit court properly applied the doctrine of *res judicata* to the claims in the present complaint.

¶ 57 Alaron contends that the circuit court improperly applied *res judicata* because the claims in the present complaint were never before the NFA arbitration panel. Alaron bases its argument on the NFA arbitration panel ordering Alaron to remove the claims and issues it added to the

joint hearing plan that had not been included in its counterclaim. Alaron has not cited any legal authority in support of its argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). In addition, the record shows that the NFA advised Alaron in a February 2011 letter that if it wanted to add additional claims to the hearing plan that were not included in its counterclaim, Alaron was required to file an amendment to its counterclaim and obtain consent to add the claim. The NFA letter specifically said that "Alaron should also be advised that if it intends to file any new claim related to these agreements, it must file a motion for leave to amend *immediately*." (Emphasis added.) Alaron did not seek to amend its counterclaim at that time. Instead, Alaron added the new claims and issues to the joint hearing plan and only requested leave to file an amended counterclaim after Penson filed its motion to bar the new causes of action. Its request was denied. From the record, it is unclear why Alaron did not seek to amend its counterclaim sooner as instructed or why it did not include the claims in its original counterclaim but, nonetheless, the record clearly shows that Alaron could have brought its claims in the first action. Having failed to do so, the doctrine of *res judicata* bars Alaron from bringing those claims in its present complaint.

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court

¶ 59 Affirmed.