

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Daniel Lee Davis, individually and on behalf
of all those similarly situated,

Plaintiff,

v.

ISCO Industries, Inc.,

Defendant.

C. A. NO. 2017-CP-4203283

DEFENDANT’S ANSWER TO THE AMENDED COMPLAINT

COMES NOW Defendant, ISCO Industries, Inc., by and through its undersigned counsel, and submits this Answer to the Amended Complaint.

PARTIES

1. Responding to Paragraph 1, Defendant lacks knowledge of Plaintiff’s current residence. Plaintiff’s listed residence while working for Defendant was in Spartanburg County.
2. The allegations of Paragraph 2 are admitted.

JURISDICTION

3. Responding to the allegations of Paragraph 3, Defendant incorporates its responses above as if fully stated herein.
4. The allegations in Paragraph 4 are denied.
5. Responding to Paragraph 5, Defendant admits that this court has jurisdiction over this case, subject to its defense that this case is subject to mandatory arbitration and that venue is not proper.
6. The allegations in Paragraph 6 are denied.

RESPONSE TO GENERAL ALLEGATIONS AND FACTUAL BACKGROUND

7. Responding to the allegations of Paragraph 7, Defendant incorporates its responses above as if fully stated herein.

8. Responding to Paragraph 8, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

9. The allegations in Paragraph 9 are admitted.

10. The allegations in Paragraph 10 are admitted.

11. The allegations in Paragraph 11 are admitted.

12. Responding to Paragraph 12, Defendant admits only that Plaintiff signed an arbitration agreement. The remaining allegations of Paragraph 12 are denied.

13. The allegations in Paragraph 13 are admitted.

14. The allegations in Paragraph 14 are admitted.

15. The allegations in Paragraph 15 are admitted.

16. The allegations in Paragraph 16 are admitted.

17. The allegations in Paragraph 17 are admitted.

18. The allegations in Paragraph 18 are admitted.

19. The allegations in Paragraph 19 are admitted.

20. The allegations in Paragraph 20 are denied. Defendant further states that the LifeLock protection provided by Defendant came with identity fraud alerts, privacy monitoring, identity restoration support, live member service support, and reimbursement of up to \$25,000 toward stolen funds.

21. Responding to Paragraph 21, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

22. Responding to Paragraph 22, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

23. Responding to Paragraph 23, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

24. The allegations in Paragraph 24 are denied.

25. Responding to Paragraph 25, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

26. Responding to Paragraph 26, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

27. Responding to Paragraph 27, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

28. Responding to Paragraph 28, Defendant admits that it renewed the LifeLock protection for its employees for an additional year, providing a total of two years of free protection. Plaintiff enrolled in the free LifeLock protection provided by Defendant on March 7, 2016 and has received continuous protection from this date through March 31, 2018. Defendant further states that the LifeLock protection provided by Defendant came with identity fraud alerts, privacy monitoring, identity restoration support, live member service support, and reimbursement of up to \$25,000 toward stolen funds.

29. Responding to Paragraph 29, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this Paragraph and therefore denies them.

RESPONSE TO CLASS ACTION ALLEGATIONS

30. Responding to the allegations of Paragraph 30, Defendant incorporates its responses above as if fully stated herein.

31. Paragraph 31 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

32. Paragraph 32 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

33. Responding to Paragraph 33, Defendant admits that the data breach affected 449 current and former employees of Defendant throughout 35 states. The remaining allegations of Paragraph 33 are denied.

34. Paragraph 34 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

35. Paragraph 35 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

36. Paragraph 35 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

37. The allegations of Paragraph 37 are denied. Each potential member of the Class had LifeLock protection for up to \$25,000.

38. Paragraph 35 contains legal statements and/or conclusions to which Defendant is not required to respond. However, Defendant does not challenge the competency or capability of Plaintiff's chosen legal counsel.

39. Paragraph 39 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

40. Paragraph 40 contains legal statements and/or conclusions to which Defendant is not required to respond. To the extent a response is required, the allegations are denied.

RESPONSE TO FIRST CAUSE OF ACTION

(Alleged Negligence)

41. Responding to the allegations of Paragraph 41, Defendant incorporates its responses above as if fully stated herein.

42. The allegations of Paragraph 42 are admitted.

43. Responding to Paragraph 43, Defendant admits that it had knowledge of the sensitivity of PII and was aware of its duty to promptly notify the affected individuals upon Defendant's notice of the data breach. Defendant complied with this duty and in addition to that duty provided free LifeLock Protection to those affected for two years. The remaining allegations of Paragraph 43 are denied.

44. The allegations of Paragraph 44 are denied. Defendant's duty under South Carolina law is found in S.C. Code Ann. § 39-1-90 and it fully complied with the obligations in this statute.

45. The allegations of Paragraph 45 are denied. Defendant took reasonable steps to prevent harm by promptly notifying individuals of the breach and providing two years of LifeLock protection.

46. The allegations of Paragraph 46 are denied.

Response to Prayer for Relief

47. Defendant denies that Plaintiff is entitled to any relief and specifically deny the allegations set forth in the prayer for relief in the WHEREFORE paragraph following Paragraph 46. This denial includes subparts A, B, C, D, E, F, and G. Defendant further states that Plaintiff

is not entitled to seek punitive damages or attorney's fees for his sole claim for negligence as alleged in the Amended Complaint and moves to strike these requests.

General Denial

48. Defendant further denies any allegations of the Amended Complaint not expressly admitted herein and demand strict proof thereof.

DEFENSES

In further response to the Amended Complaint, Defendant sets forth the following defenses and affirmative defenses:

(a) Some or all of Plaintiff's Amended Complaint fails to state facts sufficient to constitute a cause of action.

(b) Plaintiff's claim is barred because Plaintiff has not suffered an injury in fact and cannot establish damages or standing to pursue his claim.

(c) Venue is not proper in South Carolina. Defendant is a Kentucky Corporation with its principal place of business in Louisville, Kentucky. Plaintiff's Personal Identifying Information was maintained in Kentucky. The breach that is the subject of this lawsuit occurred in Kentucky. The most substantial part of the acts or omissions giving rise to the claim in this case occurred in Kentucky. Defendant moves to dismiss for improper venue and in the alternative moves to change venue to Kentucky.

(d) Plaintiff's claim is barred because Defendant fully complied with its duties under S.C. Code Ann. § 39-1-90.

(e) Plaintiff claim is subject to mandatory arbitration pursuant to an Arbitration Agreement. This Agreement is governed by the Federal Arbitration Act.

(f) The potential Class claim is subject to mandatory arbitration pursuant to an Arbitration Agreement.

(g) Plaintiff's claim is barred by the doctrines of estoppel and/or waiver because Plaintiff received the benefit of the LifeLock protection Defendant provided free of charge for two years and because Plaintiff failed to properly utilize the protection offered, failed to submit any claim of damages to LifeLock, and failed to take the other reasonable protective and preventative measures provided by and explained by Defendant.

(h) Plaintiff has the duty to mitigate any alleged losses, his entitlement to recovery for which is expressly denied, and any claim for relief must be set off and/or reduced by mitigation measures available with the exercise of reasonable diligence by Plaintiff.

(i) Defendant reasonably responded to a criminal act by a third party and took reasonable steps to prevent harm to Plaintiff. Plaintiff did not notify Defendant (and upon information and belief did not inform LifeLock) of any alleged damages prior to filing this action.

(j) Plaintiff's claim is barred because he has not suffered any actual damages.

(k) Plaintiff's claim is barred because he cannot prove that any attempt to improperly use his information or any identity theft was the result of the data breach at Defendant. Plaintiff cannot prove that any future harm was solely caused from the data breach at Defendant. Upon information and belief, Plaintiff's Personal Identifying Information has been stolen from sources other than Defendant. It is likely that Plaintiff's Personal Identifying Information will be stolen in future data breaches not involving Defendant. Thus, it is impossible to determine whether any identity theft is the result of information stolen from Defendant compared to other breaches.

(l) Plaintiff's claim for punitive damages is barred because Defendant has not engaged in any practice with actual malice or wanton or willful disregard for Plaintiff's alleged rights. Defendant moves to strike any claim for punitive damages.

(m) Plaintiff's claim for attorney's fees is barred because Plaintiff's sole cause of action is for negligence, which is a common law claim and attorney's fees is not an available remedy. Defendant moves to strike any claim for attorney's fees.

(n) This case is not appropriate for a class action. There are not questions of law or fact common to the class. Plaintiff has asserted a claim for negligence under South Carolina common law. The common law for negligence will differ in each state. Furthermore, some states (like South Carolina) have adopted laws to specifically address data breach issues. In addition the enforceability of the arbitration agreement may differ in each states.

(o) Plaintiff claims for damages are not typical of the class. Defendant is not aware of any facts to suggest that other individuals whose information was involved in the data breach paid for their own protection in addition to the LifeLock protection or spent the amount of time Plaintiff alleges he spent monitoring his credit report. It is also likely that the other members of the class took extra precautions that were suggested by Defendant to prevent identity theft, such as changing passwords and freezing credit reports. There is no commonality of alleged damages in this case, and in fact no damages exist because of the LifeLock protection and coverage for loss of up to \$25,000. Defendant states that no employee suffered a loss in excess of this coverage. There is no evidence to suggest that the class members suffered in excess of \$100 in damages.

(p) Defendant reserves the right to assert further defenses as they become evident through discovery or investigation.

WHEREFORE, having fully answered Plaintiff's Amended Complaint, and asserted its defenses thereto, Defendant requests that Plaintiff's Amended Complaint be dismissed in its entirety, that this case be dismissed for improper venue, that the requests for punitive damages and attorney's fees are stricken from the Amended Complaint, that judgment be entered in favor of Defendant, that Defendant recover its costs and expenses, and/or that Defendant receive such other and further relief as the Court may deem just and proper.

Dated this the 21st day March, 2018.

Respectfully submitted,

By: 

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