STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. No. 2017-CP-42-03283

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

Plaintiff,

v.

ISCO Industries, Inc.,

Defendant.

ORDER DENYING
DEFENDANT'S MOTION TO AMEND AND
CERTIFYING THE CLASS

This case arises from a March 2016 data breach, which occurred when an employee of Defendant ISCO Industries, Inc. ("Defendant") released the W2s of 449 employees to cyber criminals. Plaintiff Daniel Lee Davis ("Mr. Davis" or "Plaintiff") filed this case against Defendant as a putative class action pursuant to Rule 23, SCRCP, on September 13, 2017, seeking represent all victims of Defendant's data breach. The Amended Complaint asserts a cause of action for negligence against ISCO by Mr. Davis and on behalf of all those similarly situated.

On June 7, 2023, Plaintiff filed a Motion for Class Certification, seeking to certify a class of "All current and former ISCO Industries' employees whose PII was released as a result of the Data Breach." (Pl's. Mot. for Class Certification; Am. Compl. ¶ 31.) The Court held a hearing on Plaintiff's class certification motion on November 2, 2023, prior to which Plaintiff filed a Memorandum in Support and Defendant filed a Response in Opposition. After hearing arguments from both sides, the Court permitted the parties to file supplemental briefs in support of their respective

positions. Additionally, Defendant filed a Motion to Amend its Answer to Plaintiff's Complaint, seeking the Court's permission to assert S.C. Code § 15-5-150 (the "Door Closing Statute") as a defense.

Both Plaintiff's Motion for Class Certification and Defendant's Motion to Amend have been fully briefed and are ripe for determination. Because the issues raised in Defendant's Motion to Amend relate to those raised in Plaintiff's Motion for Class Certification, the Court will address both motions in this Order. Having fully considered the parties' filings and the arguments of counsel, and for the reasons set forth herein, the Court hereby **DENIES** Defendant's Motion to Amend and **GRANTS** Plaintiff's Motion for Class Certification.

Factual Background

Plaintiff Daniel Lee Davis ("Mr. Davis") worked for Defendant ISCO Industries, Inc. as a mechanic and fusion technician for eight years, from March 2007 until March 2015. (Am. Compl. ¶¶ 9, 11.) ISCO is a global piping solutions provider, and Mr. Davis worked at one of its plants in Wellford, South Carolina. When ISCO hired Mr. Davis, it required him to provide, among other information, his name, contact information, and Social Security number. (*Id.* ¶ 10.) Much like any other employer, ISCO required all employees to provide this information when they were hired.

About a year after Mr. Davis left his employment with ISCO, on March 2, 2016, ISCO's Director of Human Resources, Heather Cheek, received an email requesting that she respond and provide the prior year W2s for all ISCO employees. Ms. Cheek obliged, sending back an email with an unencrypted PDF attachment containing the W2s for 449 current and former ISCO employees. Although the email request appeared to come from the email account of ISCO's chairman, Jimmy Kirchdorfer, Ms. Cheek did not verify that the request was legitimate before providing the

information. Shortly after the W2s were sent, it was discovered that the email request had come from unknown cybercriminals and was not in fact a legitimate request from Mr. Kirchdorfer.

A W2 is an IRS form that contains each employee's name, address, social security number, annual compensation, and tax withholding information. This type of information, which is often referred to as "personal identifying information" or "PII," is sensitive information that, if released, can expose an individual to identity theft and other forms of fraudulent activity. *See* S.C. Code Ann. § 16-13-510(D) (defining "personal identifying information"). As a result of this incident, the PII for hundreds of current and former ISCO employees, including Mr. Davis, was disclosed to unknown criminal actors who had specifically targeted this information.

It is undisputed that, in response to the breach, ISCO sent uniform letters to all victims notifying them of the breach and offering to provide credit monitoring services through LifeLock. However, Plaintiff submitted exhibits and discovery material in connection with the Motion for Class Certification that indicate the LifeLock service was merely passive and did not prevent any misuse of victims' PII. ISCO denies Plaintiff's allegations that it did not provide a sufficient response to the data breach and that it did not provide a sufficient credit monitoring service to impacted individuals. Additionally, Plaintiff alleges that: (1) ISCO had been on notice of prior attempts to obtain sensitive and/or confidential information utilizing similar e-mail tactics in the months before the Data Breach; and (2) ISCO did not maintain any written policies or procedures governing how to protect PII, and ISCO employees could not point to any pre-breach training that the company provided regarding email scams. ISCO alleges that it did maintain written policies related to maintaining employee PII as confidential, and that it took steps to protect that information by limiting who had access to that information to only select employees in Human Resources and having password protections for those employees to access this information. ISCO

also alleges that it took steps to address email phishing issues and to protect its servers and systems from outside criminal breaches, but admits that it did not conduct any specific training related to the type of spoofing attack that occurred in this case.

Plaintiff alleges that shortly after the breach, Mr. Davis and the other victims began experiencing fraudulent attempts to misuse their PII. Some of those attempts were successful—e.g., some of the employees had fraudulent tax returns filed in their name, while others, like Mr. Davis, had fraudulent credit cards opened in their names. Even where the fraudulent attempts did not result in an out-of-pocket financial loss, Plaintiff's exhibits and supporting materials show that the experiences of other victims were similar to those of Mr. Davis. Plaintiff alleges that victims of the data breach were required to spend a significant amount of time and energy dealing with the effects of their PII having been released—e.g., responding to false credit inquiries, communicating with the credit bureaus and others, and monitoring credit reports—and Defendant's own data breach notification letters outlined various, time-consuming steps that the victims should take to try to protect their identities and their finances. Further, ISCO's data breach exposed one of the most sensitive types of PII—individual social security numbers. Because this was a targeted spoofing attack where the email appeared to come from a legitimate source, Plaintiff alleges that the only reasonable explanation for why the cybercriminals obtained the victims' PII is that they intended to misuse it, either themselves or by selling it to other criminals. Plaintiff alleges that because their PII will forever be exposed, the victims of ISCO's data breach will always be at risk of having their identities stolen and their PII being fraudulently misused.

Procedural History

This case has been pending since September 13, 2017, when Mr. Davis filed this lawsuit as a putative class action against ISCO for releasing his PII and the PII of 448 other individuals in a data breach incident that occurred on March 2, 2016. The original complaint asserted claims on behalf of Mr. Davis "individually and on behalf of all those similarly situated." (Compl. 1.). When Mr. Davis filed an amended complaint two months later, he continued to maintain that the case was proper for class action treatment under Rule 23, SCRCP, and both pleadings expressly state that:

> Plaintiff brings this action on behalf of himself and, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, as named representative of a Class defined as follows: All current and former ISCO Industries' employees whose PII was released as a result of the Data Breach.

(Compl. ¶ 24, Sept. 13, 2017; Am. Compl. ¶ 31, Nov. 15, 2017.) Although the complaints "reserve[] the right to amend the Class definition," the complaints also alleged that "the exact number of Class members [was] unknown and . . . [was] within the exclusive control of the Defendant." (Compl. ¶¶ 25–26; Am. Compl. ¶¶ 32–33.)

ISCO responded by filing motions to dismiss the original complaint and to compel arbitration on October 16, 2017, and ISCO moved to dismiss the amended complaint and to compel arbitration on November 30, 2017. Both sets of motions contained statements about the number of potential class members and the fact that ISCO knew its data breach victims were located in multiple states. For example, ISCO filed the affidavit of Christopher Feger, which stated: "I am aware that the data breach that is the subject of Mr. Davis'[s] Complaint occurred on March 2, 2016. It affected 449 current and former employees throughout 35 states." (Feger Aff. ¶ 8, Ex. A to Def.'s Mot. to Dismiss, Nov. 30, 2017.) Importantly, however, ISCO did not assert or argue that non-

resident putative class members did not, and could not, have the capacity to bring their claims in South Carolina state court.

ISCO filed its answer to the amended complaint on March 21, 2018, following the hearing on its motions to dismiss and to compel arbitration. In the answer, ISCO denied most of Mr. Davis's allegations, denied most of the class action allegations, and asserted 15 defenses and affirmative defenses, including a statutory defense based on S.C. Code § 39-1-90. (*See* Def.'s Answer 6 ¶ (d), Mar. 21, 2018.) Despite knowing that Mr. Davis sought to represent a class of "[a]ll current and former ISCO Industries' employees whose PII was released as a result of the Data Breach," (Am. Compl. ¶ 31), and despite admitting that "the data breach affected 449 current and former employees of Defendant throughout 35 states," ISCO never invoked Section 15-5-150, never challenged the non-resident victims' capacity to sue, and did not otherwise assert that the Court would be foreclosed from certifying a class of all data breach victims because 438 of them lived outside the State of South Carolina.

Thereafter, the Court entered an order denying ISCO's motion to compel arbitration, and ISCO appealed. (Notice of Appeal, May 3, 2018.) During the appeal, the parties agreed to a stay of discovery. The case was remitted to the circuit court, and the remittitur was filed on September 12, 2022, following the South Carolina Supreme Court's denial of Defendant's Petition for a Writ of Certiorari. ISCO did not raise the application of § 15-5-150 or otherwise challenge the non-resident putative class members' capacity join a class at any point while the appeal was pending, nor did ISCO raise the issue after the case returned to the trial court. After this case was returned to the trial court, the parties began engaging in discovery. ISCO waited until November 1, 2023, when it filed its response in opposition to Plaintiff's June 7, 2023 Motion for Class Certification,

to assert for the first time that § 15-5-150 operates as an absolute bar to the Court's ability to certify a class that includes individuals who reside outside South Carolina.

Despite knowing the number and residences of the putative class members since March 2016, ISCO only recently sought to amend its answer to add the Door Closing Statute as an affirmative defense. (*See* Def.'s Mot. to Amend its Answer to Pl.'s Am. Compl., Nov. 16, 2023.) Additionally, ISCO filed a supplemental memorandum in opposition to Plaintiff's class certification motion, in which ISCO argued that the Door Closing Statute limits class membership in all cases to South Carolina residents, and, because there are only 11 South Carolina data breach victims (again, a fact that ISCO has known since 2016), Plaintiff's proposed class did not meet the numerosity requirement of Rule 23, SCRCP. (*See* Def.'s Supp. Mem. of Law in Opp'n to Pl.'s Mot. for Class Certification 16, Nov. 16, 2023.) ISCO's Answer to the Amended Complaint does deny that this case is appropriate for a class action and raise as a defense that venue is not proper in South Carolina because ISCO is a Kentucky Corporation with its principal place of business in Louisville, Kentucky and that the breach that is the subject of this lawsuit occurred in Kentucky. Defendant's Answer further states "Defendant moves to dismiss for improper venue and in the alternative moves to change venue to Kentucky." (Answer to Am. Compl. Defense (c).)

Applicable Legal Standards

Rule 15, SCRCP, provides that "leave [to amend a pleading] shall be freely given when justice so requires," but the Rule also instructs that any such amendment may "not prejudice any other party." Rule 15(a), SCRCP. Although South Carolina courts generally permit parties to amend their pleadings in the absence of prejudice, courts find that prejudice exists so as to prevent amendment where another party's proposed amendment would put the opposing party at a significant disadvantage in terms of defending on the merits, delay, or incurring litigation costs. *See*

Patton v. Miller, 420 S.C. 471, 491-92, 804 S.E.2d 262–63 (2017). Further, even though the Rules contemplate amendment of pleadings, they require parties to set forth their affirmative defenses, and a party's failure to do so may result in waiver. *See Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."); *Town of Kingstree v. Chapman*, 405 S.C. 282, 313, 747 S.E.2d 494, 510 (Ct. App. 2013) (same). *See generally* Rule 9(a), SCRCP (providing specific pleading rules for special matters and requiring parties who wish to challenge "the capacity of any party to sue or be sued in a representative capacity" to "do so by specific negative averment").

Under Rule 23, SCRCP, the circuit courts may enter an order certifying a class action if it finds the following requirements are met:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP. "The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). Although the proponents of class action treatment "have the burden of proving these prerequisites of class certification have been met," *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990), it is well-established that "[i]t is within a trial court's discretion whether a class should be certified." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 421, 717 S.E.2d 765, 774 (Ct. App. 2011). Additionally, the trial courts have a duty to protect "the interests of putative class members." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 459, 661 S.E.2d 81, 91 (2008); *see also* Rule 23(d)(2), SCRCP ("The court may at any time

impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.").

Analysis

1. Defendant's Motion to Amend.

As set forth above, Defendant did not raise the Door Closing Statute until November 1, 2023, more than six years after this case was filed. Defendant attempted to do so in opposing Plaintiff's Motion for Class Certification, without ever having pleaded the Door Closing Statute in its Answers or otherwise previously raising the issue. Although Defendant moved to amend its answer after the hearing on the class certification motion, the Court finds that Defendant's Motion to Amend is far too late and permitting amendment would not promote justice and would instead result in prejudice to the putative class members.

The "Door Closing Statute" set forth in Section 15-5-150 of the South Carolina Code provides that actions against foreign corporations may be brought in the circuit court by South Carolina residents for any cause of action or by non-residents "when the cause of action shall have arisen or the subject of the action shall be situated within this State." S.C. Code Ann. § 15-5-150. In *Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003), the South Carolina Supreme Court concluded that this statute "does not affect subject matter jurisdiction" and instead "determines the capacity of a party to sue." *Id.* at 556, 579 S.E.2d at 327–28. The *Farmer* court also referred to the statute as an "affirmative defense," which makes sense because a challenge to a party's capacity to sue must be raised as early as possible. *See Haddock Flying Serv. v. Tisdale*, 288 S.C. 62, 64, 339 S.E.2d 525, 527 (Ct. App. 1986) ("It is well settled by a long line of cases that where the defendant's objection to the right of the plaintiff to bring the action appears upon the face of the complaint his remedy is to demur to the complaint. A failure to raise an objection to Plaintiff's capacity to sue by demurrer or answer will constitute a waiver of that objection."

(internal citations omitted)); *Bardoon Props., NVC v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) ("The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it. A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived." (internal citation omitted)).

Another "door closing statute" is found at Section 33-15-102 of the South Carolina Code. In *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 413 S.E.2d 827 (1992), which the *Farmer* court relied on, the Supreme Court determined that this statute was not jurisdictional, did not affect the court's power to hear the case, and instead affected "a party's capacity to sue." 307 S.C. at 35, 413 S.E.2d at 828. Additionally, the Court finds that the Official Comments to Section 33-15-102 are instructive. The Comments note that Section 33-15-102(c) "authorizes a court to stay a proceeding" if a litigant challenges capacity to sue under the statute. Such a stay serves to protect the corporation and "to eliminate the temptation to raise [door closing statute] defenses only after applicable statutes of limitations have run."

A court has a duty to protect litigants. Here, Defendant seeks to raise the Door Closing Statute more than six years after this case began, even though Defendant has been fully aware since the beginning that the putative class included 449 current and former employees located across 35 states. To permit Defendant's proposed amendment at this late juncture would potentially close the door to 437 of the Data Breach victims since, presumably, the applicable statutes of limitations will have run as to their claims if they were forced to refile suit. Because there could be no greater prejudice to an opposing party than to foreclose their right to seek redress, the Court

finds that Defendant's proposed amendment is not permissible under Rule 15(a), SCRCP, and, therefore, Defendant's Motion to Amend is **DENIED**.

2. Plaintiff's Motion to Certify the Class.

In opposing Plaintiff's Motion to Certify the Class, Defendant relies on *Farmer v. Monsanto* to argue it was not required to plead the Door Closing Statute as an affirmative defense, but Defendant reads *Farmer* too narrowly. This Court has reviewed the procedural history of both *Farmer*, C.A. No. 1999-CP-25-00424, and a related case, C.A. No. 1999-CP-25-00423, both of which were filed in the Hampton County circuit court. The defendants in *Farmer* appealed the trial court's order "striking their affirmative defenses based on the 'door-closing' statute," 353 S.C. at 555–56, 579 S.E.2d at 327, and the defendants in the related case plead the door closing statute as an affirmative defense following removal to federal court and subsequent remand. Unlike this case, the defendants in those cases raised the Door Closing Statute as an affirmative defense, and the motions and orders striking the defense all occurred within thirteen months of filing.

Here, in contrast, Defendant could have and should have raised Section 15-5-150 as an affirmative defense at the earliest opportunity, but Defendant waited over six years to assert the Door Closing Statute. Defendant did so despite always knowing the composition and residences of the putative class. Defendant is incorrect that it was not required to affirmatively plead the Door Closing Statute as an affirmative defense.[1] The *Farmer* case and the *Chet Adams* case are clear that door closing statutes affect capacity to sue and are affirmative defenses that can be waived if not raised timely. *See Farmer*, 353 S.C. at 556, 579 S.E.2d at 327–28; *Chet Adams*, 307 S.C. at

[1] The Court rejects Defendant's argument that, under the reasoning of *Garrison v. Target Corp.*, 435 S.C. 566, 869 S.E.2d 797 (2002), the Door Closing Statute is not an affirmative defense.

37, 413 S.E.2d at 829. Because the Court has denied Defendant's Motion to Amend, *supra*, Defendant has waived the Door Closing Statute as an affirmative defense. *See generally Wright v. Craft*, 372 S.C. at 21, 640 S.E.2d at 497 ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it.").

Having found that Defendant has waived the Door Closing Statute in this case, the Court further finds that Rule 23's requirements of numerosity, commonality, typicality, adequacy of representation, and amount in controversy are all satisfied such that class action treatment is warranted. The class consists of 449 identified data breach victims, which easily satisfies the numerosity requirement. There are also common questions of law and fact among the class members—for example, all class members had the same PII exposed during the same data breach, and ISCO's failures to adequately protect sensitive PII were the same as to all class members. Typicality exists between the claims of the named plaintiff, Mr. Davis, and the claims of the other class members for similar reasons. *Cf. In re Countrywide Fin. Corp. Customer Data Security Breach Litig.*, 2009 U.S. Dist. LEXIS 119870, at *18–19 (W.D. Ky. Dec. 22, 2009) (finding typicality where the same data breach incident exposed both the named plaintiff's and the class members' PII to fraudulent misuse). The adequacy of representation requirement is also satisfied, both by the named plaintiff and by class counsel, neither of which have any conflict of interest that would prevent them from advancing the interests of the class as a whole. *See Waller*, 300 S.C. 468, 388 S.E.2d at 801. Finally, the amount in controversy requirement is satisfied because all victims had their sensitive PII exposed and Plaintiff alleges that all class members will have incurred at least $100 in damages associated with time and efforts spent protecting their identities and responding to the Data Breach. *Cf. Remijas v. Neiman Marcus Group, LLC*, 794 F3d 688, 692 (7th Cir. 20150)

(recognizing that when victims' information is exposed in a targeted data breach, "there are identifiable costs associated with the process of sorting things out"); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388 (6th Cir. 2016) (recognizing that the threat of future harm from a targeted data breach is continuing and not merely speculative).

ORDER

The Court has considered all of the arguments of Plaintiff and ISCO. Under the circumstances of this case, the Court finds that ISCO's attempt to assert the Door Closing Statute is far too late, and the Court DENIES Defendant's Motion to Amend its Answer to Plaintiff's Amended Complaint. As such, the Door Closing Statute does not prevent the Court from certifying a class of all ISCO data breach victims, and the class is not limited to residents of South Carolina. Because the Court finds that all the requirements for class certification under Rule 23, SCRCP, have been met, the Court GRANTS Plaintiff's Motion for Class Certification and certifies the following class in this case: All current and former employees of ISCO Industries, Inc. whose personal identifying information ("PII") was released as a result of the March 2016 Data Breach.

Additionally, the Court appoints the following attorneys as class counsel: John B. White, Jr., Marghretta Shisko, and Griffin L. Lynch of John B. White, Jr., P.A. and John S. Simmons and Rachel G. Peavy of Simmons Law Firm, LLC. The Court further directs that class counsel may take such action as they deem reasonable and necessary to further this class action, including proceeding with filing a motion for this Court to consider and approve a plan for providing notice of the action to the class members.

Judge's Signature Page Follows

Spartanburg Common Pleas

Case Caption: Daniel Lee Davis VS Isco Industries, Inc.

Case Number: 2017CP4203283

Type: Order/Class Certification

It is so Ordered.

s/ R. Keith Kelly - 2165