THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2017-CP-42-03283

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

v.

ISCO Industries, Inc. — Appellant.

RECORD ON APPEAL

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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,

Defendant.

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

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

This matter came before the Court on Defendant's Motion to Compel Arbitration and Defendant's Motion to Dismiss Plaintiff's Amended Complaint. Plaintiff filed a Response in Opposition to Defendant's Motions, and the Court held a hearing on both motions on Friday, February 23, 2018, in Spartanburg, South Carolina. After careful consideration and review of the pleadings, motions, memoranda, and arguments of counsel, the Court rules as follows:

I. Defendant's Motion to Compel Arbitration is Denied.

Defendant moved to compel arbitration based on an arbitration agreement that Plaintiff signed at the outset of his employment with ISCO. The Court finds that the arbitration agreement is not applicable to this case.

In particular, the Court finds compelling the decision of the South Carolina Supreme Court in *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). In *Aiken*, the Supreme Court held that an arbitration agreement did not apply to a borrower's action against a finance company because the theft of the borrower's personal information was outrageous, tortious conduct that was unforeseeable. *Id.* at 149–52, 644 S.E.2d at 708–10. The arbitration agreement that Plaintiff signed applied to claims "arising out of or relating to my

candidacy for employment, employment and/or cessation of employment with ISCO," but Plaintiff's claims in this case arise out of Defendant's release of the personal identifying information of Plaintiff and others to cyber-criminals. (*See* Am. Compl. ¶¶ 13–21). The Court finds that there is no relationship between the subject matter of Plaintiff's claims in this case and the arbitration agreement, which relates to employment. Like the Court in *Aiken*, this Court holds that Plaintiff's claims in this case are "for unanticipated and unforeseeable tortious conduct" and are, therefore, not within the scope of the arbitration agreement. *See Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

II. Defendant's Motion to Dismiss is Denied.

Defendant moved to dismiss Plaintiff's Amended Complaint pursuant to S.C.R.C.P. 12(b)(1) and 12(b)(6) based on lack of standing and failure to state facts sufficient to constitute a cause of action. In support of its Motion to Dismiss, Defendant relied on matters outside the pleadings including an affidavit and other attachments. "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." S.C.R.C.P. 12(b); *see also Johnson v. Dailey*, 318 S.C. 318, 457 S.E.2d 613 (1995).

As to the SCRCP 12(b)(1) motion to dismiss for lack of standing, the Court finds that the plaintiff does have standing to bring suit. Plaintiff has alleged facts sufficient to establish injury and negligence on the part of the defendant.

Additionally, as to the SCRCP 12(b)(6) motion, the Court notes that "[s]ummary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Glover v. Cty. of Charleston*, 361 S.C. 634, 638, 606

S.E.2d 773, 775 (2004). "[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). "[S]ummary judgment is improper if the parties dispute the inferences to be drawn from the facts even if the facts themselves are not in dispute. *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct. App. 2004). "In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party." *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001). Importantly, "[i]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hutchinson v. Liberty Life Ins. Co.*, 393 S.C. 19, 24, 709 S.E.2d 130, 133 (Ct. App. 2011) (internal quotation marks omitted) (quoting *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). The Court has found that the plaintiff has alleged facts sufficient to clear this hurdle, thus the motion to dismiss is denied.

CONCLUSION

For all of the reasons stated above, Defendant's Motion to Compel Arbitration is **DENIED** and Defendant's Motion to Dismiss Plaintiff's Amended Complaint is **DENIED.**

JUDGE'S SIGNATURE PAGE TO FOLLOW

Spartanburg Common Pleas

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

Case Number: 2017CP4203283

Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SPARTANBURG	)	**FOR THE SEVENTH JUDICIAL CIRCUIT**
Daniel Lee Davis, individual and on behalf of all those similarly situated,	)	Case No.:
Plaintiff,	)	
vs.	)	**SUMMONS** (Jury Trial Demanded)
ISCO Industries, Inc.,	)	
Defendant.	)	

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is attached hereto and herewith served upon you, and to serve a copy of your Answer to same upon the subscribers at the addresses shown below within thirty (30) days after the service of same, exclusive of the day of such service. If you fail to answer the Complaint within the thirty-day period, the Plaintiff will apply to the Court for the relief demanded therein and judgment by default will be rendered against you for the relief demanded in the Complaint.

(Signature Page Follows)

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September 13, 2017

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SPARTANBURG	)	**FOR THE SEVENTH JUDICIAL CIRCUIT**
Daniel Lee Davis, individual and on behalf of all those similarly situated,	)	Case No.:
Plaintiff,	)	
vs.	)	**COMPLAINT** (Jury Trial Demanded)
ISCO Industries, Inc.,	)	
Defendant.	)	

The Plaintiff, Daniel Lee Davis, individually and on behalf of all those similarly situated, by and through his undersigned counsel will respectfully show unto this Honorable Court:

PARTIES

1. Plaintiff Daniel Lee Davis is, and was at all times material to this action, a resident of the County of Spartanburg, State of South Carolina.

2. Upon information and belief, Defendant ISCO Industries, Inc. is a foreign corporation with its principal place of business in Kentucky. Defendant is, and was at all time material to this action, doing business within the County of Spartanburg, State of South Carolina and carrying on in the ordinary course of business the sale and maintenance of custom piping solutions.

JURISDICTION AND VENUE

3. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

4. The most substantial part of the acts or omissions giving rise to the causes of action stated herein occurred in Spartanburg County, South Carolina.

5. The jurisdiction of this Court is founded upon S.C. Const. Ann. art. V, § 11, which grants the Circuit Court general jurisdiction over civil actions.

6. Venue is appropriate under South Carolina Code Ann. § 15-7-30.

GENERAL ALLEGATIONS AND FACTUAL BACKGROUND

7. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

8. Plaintiff began working for Defendant as a mechanic and fusion technician on or about March 2007.

9. As a requirement of his employment, Plaintiff was required to provide Defendant with personal identifying information ("PII"), such as his name, address, and social security number, for, *inter alia*, administrative, bookkeeping, and tax purposes.

10. Plaintiff's employment with Defendant ended on or about March 2015.

11. "On March 2, 2016, an employee in [Defendant's] human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data." (*See* Notice of Data Breach, attached as Ex. A).

12. "Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email." (Ex. A).

13. A short time later, upon information and belief, someone in Defendant's employ realized that "an outside third party had fraudulently disguised his email address as that of an ISCO senior executive," and the PII of many employees, including Plaintiff, was sent to an outside third party ("the Data Breach"). (Ex. A).

14. "The compromised information include[d] employee social security numbers, addresses, and 2015 compensation and tax withholding information." (Ex. A).

15. Upon information and belief, on March 4, 2016, Defendant sent a Notice of Data Breach to affected employees, alerting them to Defendant's release of their PII to an outside third party. (*See* Ex. A).

16. Upon information and belief, Defendant retained LifeLock, Inc. to provide one year of identity theft protection services.

17. However, upon information and belief, the LifeLock service Defendant purchased was "passive" and merely alerted individuals when it determined that someone was opening a credit card in the individual's name.

18. On or about August 2016, Plaintiff began receiving notices from LifeLock that someone was attempting to take out loans and open credit cards in his name.

19. For example, on August 17, 2016, a third party opened a Citibank credit card in Plaintiff's name.

20. Plaintiff filed an incident report with the Spartanburg County Sheriff's Department to report this identity theft.

21. After Plaintiff's one year of LifeLock expired, he had to purchase a better credit monitoring service because third parties were still opening credit cards in his name. This service costs approximately $12 per month.

22. Plaintiff has spent countless hours monitoring his credit report, closing accounts opened by third parties, and ensuring that his credit is not damaged.

CLASS ACTION ALLEGATIONS

23. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

24. 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.

25. Plaintiff reserves the right to amend the Class definition if further investigation and discovery indicates that the Class definition should be narrowed, expanded, or otherwise modified.

26. Upon information and belief, the exact number of Class members is unknown and is not available to Plaintiff at this time as this information is within the exclusive control of the Defendant, but Plaintiff believes that the Class likely consists of hundreds or thousands of individuals. The sheer size of the Class makes individual joinder in this case impracticable, if not impossible.

27. In addition to the large number of individuals who are members of the Class, there are several questions of law and fact common to the claims of Plaintiff and members of the Class. Those questions predominate over any questions that may affect individual Class members. Common questions include, but are not limited to, the following:

a. Whether and to what extent Defendant had a duty to protect the Class members' PII;

b. Whether Defendant breached its duty to protect the Class members' PII;

c. Whether Defendant provided sufficient assistance to Class members after the breach;

d. Whether Defendant breached an implied contract with Plaintiff and Class members;

e. Whether Class members are entitled to injunctive relief; and

f. Whether Class members are entitled to damages.

28. Plaintiff's claims are typical of the claims of the Class members. All are based on the same legal and factual issues. Plaintiff and each of the Class members entrusted Defendant with their PII, which was later released by Defendant to cybercriminals.

29. Plaintiff, as named representative, has common interests with members of the Class and will vigorously prosecute the interests of the Class through qualified legal counsel, and does not have any identifiable legal conflicts with any potential Class member, and thus, the Plaintiff will fairly and adequately represent and protect the interests of the whole Class.

30. To the extent damages are sought, the amount in controversy exceeds one hundred dollars for each member of the Class.

31. Plaintiff has retained competent legal counsel who have extensive experience with class action litigation and are experienced attorneys well versed in South Carolina constitutional, statutory, and common law.

32. Class action treatment of the matters in issue in this controversy is superior to the alternatives, if any, for the fair and efficient adjudication of such issues, because such treatment will permit a larger number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would entail. Class action treatment in this case will have the added virtue of permitting the adjudication of relatively small claims by certain members of the Class, for whom it would otherwise not be financially feasible to litigate their claims as individual actions against Defendant.

33. Plaintiff is aware of no difficulty in the management of this action that would preclude it from being maintained as a class action.

FOR A FIRST CAUSE OF ACTION
(Negligence)

34. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

35. By virtue of their employment, Plaintiff and Class members were required to provide Defendant with their PII.

36. Defendant had knowledge of the sensitivity of this PII and the types of harm that Plaintiff and Class members would suffer if this PII was wrongfully disclosed.

37. Indeed, Defendant had a duty to Plaintiff and each Class member to exercise reasonable care in holding, securing, and protecting that PII.

38. It was foreseeable that Plaintiff and the Class members would suffer substantial harm if Defendant employed inadequate safety practices for securing PII.

39. As a result of Defendant's negligence, Plaintiff and the Class members have suffered and will continue to suffer damages and injury, including, but not limited to, out of pocket expenses and the loss of productivity and enjoyment as a result of spending time monitoring and correcting consequences of the Data Breach.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Contract)

40. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

41. Plaintiff and Class members provided their PII in connection with their employment with Defendant for, *inter alia*, administrative, bookkeeping, and tax purposes.

42. Indeed, providing this PII was a condition precedent to Plaintiff and the Class member's employment with Defendant.

43. In light of the sensitive nature of this PII, Defendant implicitly promised Plaintiff and Class members that it would take adequate security measures to safely store the PII.

44. This implied promise was material to Plaintiff and the Class member's decision to accept employment with Defendant, and Plaintiff and the Class members would not have disclosed their PII without implied assurances that it would be safeguarded.

45. Plaintiff and the Class members performed their obligations by providing Defendant with their PII.

46. Defendant, however, failed to safeguard and protect the PII. This breach of its obligations, directly caused Plaintiff and the Class members to suffer injuries and damages.

WHEREFORE, Plaintiff and all those similarly situated pray:

A. That this Court certify the Class;

B. Judgment against Defendant;

C. Actual damages;

D. Punitive damages;

E. Costs and disbursements of this action

F. Attorneys' fees; and

G. That the Court grant such other and further relief as shall be just and proper, including but not limited to prejudgment and postjudgment interest.

(Signature Page Follows)

Respectfully Submitted,

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September 13, 2017

March 4, 2016

Notice of Data Breach

Dear Former ISCO Employee:

On March 3, 2016, ISCO Industries, Inc. ("ISCO") discovered that certain sensitive ISCO 2015 employee information was compromised as a result of a criminal act. We take the privacy and security of your personal information very seriously. This notice is intended to provide you with important information so you can take appropriate action to protect your interests.

What Happened

On March 2, 2016, an employee in our human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data. A W-2 is the form that ISCO distributes to all of its employees and income taxing authorities at the end of each January. Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email. Shortly thereafter, we realized that an outside third party had fraudulently disguised his email address as that of an ISCO senior executive, and that our employees' W-2 data had been unwittingly sent to that outside third party.

Compromised Information

The compromised information includes employee social security numbers, addresses, and 2015 compensation and tax withholding information. ISCO has no reason to believe employee credit card, banking, birthdate, telephone, driver's license, health insurance, or medical information was obtained.

As soon as ISCO discovered this security breach, it acted to notify and cooperate with the FBI, the IRS, and the Louisville Metro Police Department. ISCO learned that this criminal act is part of a larger scam attempting to file false tax returns with the hope of diverting employee tax refunds. If you have already filed your tax returns, there is a likelihood that the IRS would reject any duplicate, fraudulent return. If you have not yet filed your tax returns, we recommend completing the attached IRS Form 14039 Identity Theft Affidavit and faxing it to the IRS (fax instructions are included on the form).

Identity Protection Services

ISCO has retained LifeLock, Inc. (www.lifelock.com) to provide identity theft protection services for each individual affected free of charge. Lifelock will provide individual email or text notifications if it detects someone is trying to open a fraudulent credit card or borrow money in your name. We have purchased a 12-month membership for all U.S. employees. Information on how to set up an individual account is attached to this notice.

Fraud Prevention Tips

ISCO wants to make you aware of steps you may take to guard against identity theft or fraud.

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you

should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected identity theft to proper law enforcement authorities, your state attorney general, the Internal Revenue Service, and the Federal Trade Commission. To file a complaint with the FTC, go to www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338).

You should also notify your accountant or tax preparation agency (H&R Block, Jackson Hewitt, etc.) of this security breach and ask them about ways to prevent fraudulent submission of information to the IRS and state and local governments. The IRS has internal security measures in place, so refund wiring instructions which do not include your address or the address of your financial institution, or contain an address which differs from the one on your W-2 form may cause the IRS to send you clarifying correspondence before processing a refund. Please pay attention to any correspondence from the IRS and respond promptly to any inquiry.

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting http://www.annualcreditreport.com, calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at https://www.annualcreditreport.com/cra/requestformfinal.pdf. Or you can elect to purchase a copy of your credit report by contacting one of the tree national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111/Fraud Division: (800) 525-6285
www.equifax.com
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742/Fraud Division: (888) 397-3742
www.experian.com
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 916-8800/Fraud Division: (800) 680-7289
www.transunion.com
P.O. Box 6790
Fullerton, CA 92834

You may want to consider placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at http://www.annualcreditreport.com.

In some U.S. states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from

March 4, 2016

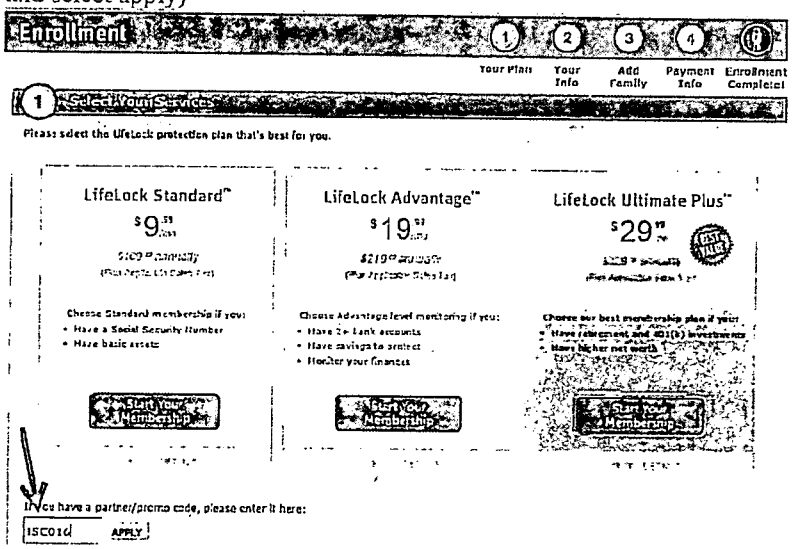
Notice of Data Breach

LifeLock Enrollment

ISCO Industries has initiated a LifeLock account for your use. You can either call (800)899-0180, or go to https://www.lifelock.com/ to get enrolled. You will have until April 16th, 2016 to enroll into the ISCO LifeLock account before this code expires.

You will need both a promo code and membership ID to get enrolled.
The promo code is [redacted]
Your membership ID should be your [redacted] (Example: [redacted]

Enroll online at https://www.lifelock.com/ website.
Select the **Start Your Membership** button.
On the next screen, enter the promo code [redacted] in the bottom left corner. Then select **apply**.
(NOTE: There is no need on this screen to select a particular LifeLock service. Just enter ISCO16 and select apply)



A new box requesting your **membership ID** will appear. (Again this is your [redacted]
Select the red button titled **Start your Membership.**
You will then be asked to enter your personal information.
Next select the **enroll button.**
You will then receive a welcome email with a login and password to be able to access your account online.

If you choose to enroll by phone, agents will be available 24 hours a day, 7 days a week.

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 MOTION TO DISMISS AND COMPEL ARBITRATION

COMES NOW Defendant, ISCO Industries, Inc., by and through its undersigned counsel, pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act ("FAA"), 9 U.S.C § 1 *et seq.*, and hereby moves for an order dismissing Plaintiff's Complaint and compelling arbitration of Plaintiff's claim.

The Motion is supported by Plaintiff's Complaint and the following exhibits:

1. Defendant's Memorandum of Law in Support of its Motion to Dismiss and Compel Arbitration;

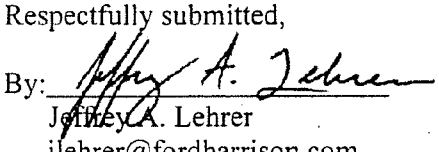
2. Affidavit of Christopher Feger, Chief Administrative Officer for Defendant.

3. Arbitration Agreement signed by Plaintiff on May 30, 2007;

Plaintiff's lawsuit arises out of and in connection with his employment with Defendant. The Arbitration Agreement between the parties contains a mandatory arbitration provision for all actions arising out of or related to the employment relationship. Therefore, Plaintiff's Complaint should be dismissed and Plaintiff must be compelled to proceed with his claims in arbitration.

Dated this the 16th day October, 2017.

Respectfully submitted,

By: 

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Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 1

(Defendant's Memorandum of Law in Support of its Motion to Dismiss and Compel Arbitration)

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

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND COMPEL ARBITRATION

COMES NOW Defendant, ISCO Industries, Inc., ("ISCO"), by and through its undersigned counsel, and pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act ("FAA"), 9 U.S.C § 1 *et seq.*, hereby submits this Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint and Compel Arbitration.

I. FACTUAL BACKGROUND

ISCO is a Kentucky Corporation with its principal place of business in Kentucky. (Exhibit 2.[1]) Plaintiff Daniel Lee Davis ("Plaintiff") is a citizen and resident of South Carolina. (Complaint ¶ 1.)

ISCO is a Kentucky Corporation with its principal place of business in Louisville, Kentucky. ISCO is a global customized piping solutions provider. It maintains employees, manufacturing facilities and distribution sites in over 35 states. (Exhibit 2.)

[1] Exhibit 2 is the Affidavit of Christopher Feger, Chief Administrative Officer of ISCO. This Exhibit is attached to ISCO's Motion to Dismiss and Compel Arbitration. Exhibit 1 is this Memorandum.

ISCO hired Plaintiff to work at its South Carolina facility on May 30, 2007. At the initiation of employment, Plaintiff signed an Arbitration Agreement with ISCO. (See Exhibits 2 and 3.[2]) Plaintiff worked for ISCO in South Carolina. His employment records were maintained at the Company's corporate office in Kentucky. (Exhibit 2.)

Plaintiff worked for ISCO as a mechanic and a field technician. As a field technician, Plaintiff assisted on work-related calls with individuals outside of South Carolina. (*Id.*) During his employment with ISCO, Plaintiff attended annual sales meetings and safety meetings outside of South Carolina. (*Id.*)

The data breach that is the subject of Plaintiff's Complaint occurred on March 2, 2016. (*Id.*) It affected 449 current and former employees throughout 35 states. (*Id.*)

On March 4, 2016, ISCO sent these employees a letter providing notice of the data breach. (*Id.*) ISCO provided these employees with free identity theft protection services through LifeLock. (*Id.*) On March 29, 2017, ISCO informed these employees that it had again retained LifeLock for an additional year of free identity theft monitoring. (*Id.*) Following the data breach, the affected employees have currently been provided with two years of free identity theft protection services through LifeLock. (*Id.*)

The Arbitration Agreement signed by Plaintiff at the initiation of his employment with ISCO contains a mandatory arbitration clause for "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment" with ISCO. (Exhibit 3, ¶1.) Plaintiff's Complaint arises out of and is related to his employment with ISCO.

[2] Exhibit 3 is the Arbitration Agreement between Plaintiff and ISCO. This Exhibit is attached to ISCO's Motion to Dismiss and Compel Arbitration.

ISCO seeks to compel arbitration of Plaintiff's sole claims for negligence and breach of implied contract. Therefore, ISCO respectfully requests that the Court grant its Motion to Dismiss Plaintiff's Complaint and Compel Arbitration.

II. LEGAL ANALYSIS

A. Applicability of FAA And Strong Policy Favoring Arbitration

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

The FAA applies in this case because the relationship between ISCO and Plaintiff involved interstate commerce. For example,

1. ISCO is a Kentucky corporation with its principle place of business in Lousville, Kentucky;

2. ISCO's human resources department and personnel files are kept in Kentucky;

3. Plaintiff is a South Carolina resident;

4. Plaintiff worked for ISCO in South Carolina;

5. Plaintiff worked for ISCO in areas outside of South Carolina. Plaintiff worked for ISCO as a mechanic and a field technician. As a field technician, Plaintiff assisted on work-related calls with individuals outside of South Carolina.

6. During his employment with ISCO, Plaintiff attended annual sales meetings and safety meetings outside of South Carolina.

(*See* Exhibit 2.)

The legal standard for establishing interstate commerce is very low. Unless the parties contract otherwise, the FAA applies to any arbitration agreement involving interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" *Thornton v. Trident *134 Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). The South Carolina Supreme Court has consistently interpreted interstate commerce broadly. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); *Soil Remediation Co. v. Nu–Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977); *Blanton v. Stathos.* 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002).

The South Carolina Court of Appeals ruling in *Towles v. United Healthcare Corp.* is most persuasive here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United, like ISCO, is a national company headquartered outside of South Carolina. *Id.* at 33, 524 S.E.2d at 841. United hired Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. *Id.* at 33–34, 524 S.E.2d at 841–42. Towles, like Plaintiff, was required to attend out-of-state meetings and participate in telephone conferences with out-of-state corporate officials. *Id.* at 36, 524 S.E.2d at 843. Similar to the Court

in *Towles*, this Court should rule that the relationship between Plaintiff and ISCO involved "sufficient evidence of interstate commerce to invoke the FAA." *Id.*

The FAA and well-established case law interpreting the FAA strongly favor the enforcement of agreements to arbitrate. Section 2 of the FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013).

The Supreme Court repeatedly has stated that the FAA represents '"a liberal federal policy favoring arbitration agreements.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). As the Fourth Circuit has explained, "Pursuant to that liberal policy, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-74 (4th Cir. 1997). Moreover, the strong federal policy favoring arbitration applies with equal force to claims created by contract or by statute. *Id.* at 274.

It is well settled that agreements to arbitrate claims in the employment context are valid and enforceable. *See, e.g. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (stating, "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context . . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.") (Internal citations omitted). A litigant may not refuse to arbitrate a dispute within the scope of a valid argument to arbitrate. Indeed, in such circumstances, a judicial order compelling arbitration is mandatory: "[t]he (FAA) leaves no place for the exercise of discretion by a district

court, but instead mandates that the district court *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Further, the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

South Carolina courts, the Fourth Circuit, and other state courts routinely and consistently enforce agreements to arbitrate employment disputes. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (holding that the arbitration agreement covered a former employee's claims and noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *O'Neil,* 115 F.3d at 276.

B. Plaintiff Is Required To Arbitrate His Claims.

In light of the strong federal and state policies favoring arbitration, Plaintiff must be compelled to arbitrate his employment related claim in this case. When adjudicating a motion to compel arbitration under the FAA, courts engage in a two-step inquiry. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). First, the Court must determine whether the parties agreed to arbitrate the dispute. *Id.* Second, the Court must decide whether "any legal constraints external to the parties' agreement foreclose arbitration." *Id.* In making these determinations, the Court must keep in mind the strong presumption in favor of arbitration. *E.g., IntegraMed America, Inc. v. Patton,* 2013 WL 1768694 at *4 (D.S.C. April 24, 2013) (granting defendant's motion to compel arbitration in a lawsuit pending for two months and noting, "South Carolina favors arbitration") (*citing Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 556 (Ct. App. 2001) (compelling arbitration in a lawsuit pending for approximately eight months and stating that "it is the policy of this state to favor arbitration of disputes")).

1. Plaintiff And ISCO Agreed To Arbitrate All Of The Claims In This Case.

In the instant case, it is indisputable that ISCO offered, and Plaintiff accepted, the terms of the Arbitration Agreement. Plaintiff worked for ISCO for approximately 8 years after signing the Arbitration Agreement. (Exhibit 2, Complaint ¶ 10.)

The claims asserted by Plaintiff are subject to arbitration under the Arbitration Agreement because they arises out of and relate to the employment relationship. "The heavy presumption of arbitrability requires that[,] when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603–04 (2010). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.*

The arbitration provision at issue in this case provides, "I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment" with ISCO "exclusively by final and binding arbitration before a single, neutral Arbitrator." (Exhibit 3, ¶ 1). The body of law in this state, as well as the Fourth

Circuit, makes clear that arbitration provisions like the one at issue in this case should be broadly construed to cover all the claims asserted in this case. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 110, 739 S.E.2d 209, 214 (2013)(finding employment claims for slander and outrage subject to "arising out of" arbitration provision); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988).

Plaintiff's Complaint alleges that ISCO improperly disclosed personal identifying information ("PII") to a third party who fraudulently disguised his e-mail address as that of an ISCO senior executive. (Complaint ¶ 13.) Plaintiff has not sued this third party who committed a criminal offense upon ISCO. Plaintiff alleges that he was required to provide this PII information to ISCO as part of his employment. (Complaint ¶¶ 9 & 35.) The ISCO employee who Plaintiff alleges improperly disclosed PII was acting within the course and scope of her employment with ISCO in allegedly mishandling the PII. (Complaint ¶¶ 11-14.) Clearly, Plaintiff's allegations arise out of and relate to his employment with ISCO.

2. There Are No Legal Constraints External To The Parties' Agreement To Foreclose Arbitration.

"Under the FAA, the party seeking arbitration must first show a written agreement for arbitration; then, the court must assess whether there are "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.; *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 606 (D.S.C. 1998), *aff'd and remanded,* 173 F.3d 933 (4th Cir. 1999).

a. Consideration

Plaintiff received consideration because he signed the Arbitration Agreement at the initiation of employment with ISCO. (Exhibits 2 and 3.) South Carolina law is clear that initial

employment is valid consideration. *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001).

Furthermore, the mutual agreement to arbitration is binding regardless of when it was signed. Under South Carolina law, a mutual promise to arbitrate - alone - is sufficient consideration to support an agreement to arbitrate. *E.g., O'Neil,* 115 F.3d at 275 (finding, "A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement"); *Johnson v. Circuit City Stores,* 148 F.3d 373, 378 (4th Cir. 1998) (finding, "Because [the employer] agreed to be mutually bound by the terms of the Dispute Resolution Agreement, it was not necessary that it agree to incur any *additional* detriment in exchange for the [applicant's] agreement to arbitrate her employment-related claims . . . ."); *Cox v. Assisted Living Concepts, Inc.*, 2014 WL 1094394 at *13 (D.S.C. March 18, 2014) (granting the employer's motion to compel arbitration and finding "an arbitration agreement is supported by adequate consideration when the parties mutually agree to be bound by the arbitration process and the agreement does not permit the employer to ignore the results of arbitration").

Significantly, in *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999), the Court ruled that an arbitration agreement in a handbook acknowledgment signed after the employment relationship began was binding and enforceable:

> We find the Acknowledgment constituted a specific communication of an offer which conditioned Towles's continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract. *See Prescott, supra,* (noting a unilateral contract requires a specific offer communicated to the employee). Towles accepted the offer by continuing in his employment.[4] *See Small,* 292 S.C. at 484, 357 S.E.2d at 454 (finding an employee accepted employer's offer "by performing the act on which the promise was impliedly or expressly based"). Therefore, we find the evidence leaves room for only one inference: the Acknowledgment constituted a binding arbitration agreement. *See Small* 292 S.C. at 483, 357 S.E.2d at 454 (noting "a trial court should submit to the

> jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference").

Id.

One reason that a mutual agreement to arbitrate is by itself consideration is that there are benefits to both parties to arbitrate their claims. Employees also benefit from the reduced cost and shorter time scales provided by arbitration. Employees also benefit by reduced motion practice and the ability to have their case heard without the pre-trial motions that are normally involved in litigation. Therefore, the arbitration provision in the Arbitration Agreement is clearly supported by consideration.

b. Coercion and Duress

Plaintiff was not coerced to sign the Arbitration Agreement. He could have declined to accept employment under these terms. In *Towles, supra,* the Court ruled that an arbitration agreement in a handbook that was a condition of employment was binding and enforceable. An argument that the agreement to arbitrate was a condition of employment is not sufficient to establish duress or coercion. Similarly, in *Phillips*, *supra*, 39 F. Supp. 2d at 608, the court ruled that an employee who had to forgo future promotions if he refused to sign an arbitration agreement, was not subject to a wrongful act of coercion in the absence of other evidence showing a destruction of the employee's free agency.

The Arbitration Agreement is only two pages and the arbitration provision is very conspicuous. It is written in plain language that should be easily understandable by a non-lawyer. There was no reason for Plaintiff not to read and be aware of the full requirements of the arbitration provision in the Arbitration Agreement. There are no facts to support an argument of coercion or duress.

c. Waiver

ISCO has not waived its right to arbitrate. ISCO was served with the Complaint on September 14, 2017, and is demanding arbitration within 30 days of such service. ISCO requested that Plaintiff voluntarily submit to arbitration and as of the date of this filing he has not agreed to arbitration.

In sum, the undisputable facts here establish the existence of a valid contract between Plaintiff and ISCO to arbitrate the claims in this action. There are no legal constraints external to the parties' agreement to foreclose arbitration. If Plaintiff intends to continue to pursue his claims, he must do so in arbitration.

3. The Terms of The Arbitration Agreement Are Not Unconscionability

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

The parties' agreement to arbitrate is not unconscionable. It does not limit Plaintiff's damages or remedies in any way. Plaintiff may argue that the shortened statute of limitations in Paragraph 2 of the Agreement is not reasonable or enfroceable. However, this provision is clearly severable and distinct from Plaintiff's agreement to arbitrate. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013). In *Carlson*, the agreement contained an arbitration clause and in a separate paragraph of the agreement there was an agreement to reduce the statute of limitations. The Court ruled that the reduction in the statute of limitations was separate and distinct from the agreement to arbitrate and was not relevant to a determination of whether the arbitration clause was unconscionable. *Id.* South Carolina law clearly provides that "arbitration clauses are severable from the contracts in which they are

embedded." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 125, 713 S.E.2d 799, 804, (Ct. App 2011) *citing S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993); *The Hous. Auth. of City of Columbia v. Cornerstone Housing, L.L.C.*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003).

Plaintiff's commitment to arbitration is contained in Paragraph 1 of the Agreement. (Exhibit 3, ¶ 1.) The statute of limitations language is in Paragraph 2. (Exhibit 3, ¶ 4.) ISCO's agreement to arbitrate is contained in Paragraph 3. (Exhibit 3, ¶ 3.) Paragraph 4 of the Agreement contains a severability clause. (Exhibit 3, ¶ 4.) Therefore, the issue of Plaintiff's agreement to arbitrate is distinct from the substantive validity of the other portions of the Agreement. *See Davis*, 713 S.E.2d at 804. "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal*, 312 S.C. at 562-63, 437 S.E.2d at 24.

ISCO respectfully submits that the agreement to arbitrate is not unconscionable and should be enforced.

III. CONCLUSION

Plaintiff agreed in writing to arbitrate claims arising out of and relating to his employment. All of the allegations in this action arise out of and relate to Plaintiff's employment with ISCO. For the reasons set forth herein and in its Motion to Dismiss and Compel Arbitration, ISCO respectfully requests this Court enter an Order GRANTING its Motion to Dismiss Plaintiff's Complaint and Compel Arbitration.

Dated this the 16th day October, 2017.

Respectfully submitted,

By:_____

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ISCO Industries, Inc.

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Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 2

(Affidavit of Christopher Feger)

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

AFFIDAVIT OF CHRISTOPHER FEGER

I, Christopher Feger, being duly sworn, state that I am over the age of twenty-one and give this statement of my own free will, based on personal knowledge, and for use in any judicial proceeding involving any of the parties listed above. If called to testify as a witness in this case, I am competent to testify and would testify to the following facts:

1. I am the Chief Administrative Officer of ISCO Industries, Inc. ("ISCO"). As the highest ranking human resources officer for the company, I am aware of the facts surrounding Daniel Lee Davis' employment with ISCO, his signing of pre-hire documents, and his separation from employment.

2. I am also personally aware of the disclosure of personal identifying information (PII) that is the subject of this lawsuit filed by Mr. Davis.

3. ISCO is a Kentucky Corporation with its principal place of business in Louisville, Kentucky. ISCO is a global customized piping solutions provider. It maintains employees, manufacturing facilities and distribution sites in over 35 states.

4. ISCO hired Mr. Davis to work at its South Carolina facility on May 30, 2007. At the initiation of employment, Mr. Davis signed an Arbitration Agreement with ISCO. (Attached as Attachment 1.)

5. Mr. Davis worked for ISCO in South Carolina. His employment records were maintained at the Company's corporate office in Kentucky.

6. Mr. Davis worked for ISCO as a mechanic and a field technician. As a field technician, Mr. Davis assisted on work related calls with individuals outside of South Carolina.

7. During his employment with ISCO, Mr. Davis attended annual sales meetings and safety meetings outside of South Carolina.

8. I am aware that the data breach that is the subject of Mr. Davis' Complaint occurred on March 2, 2016. It affected 449 current and former employees throughout 35 states.

9. On March 4, 2016, ISCO sent these employees a letter providing notice of the data breach. This letter is attached as Attachment 2. ISCO provided these employees with free identity theft protection services through LifeLock.

10. On March 29, 2017, ISCO informed these employees that it had again retained LifeLock for an additional year of free identity theft monitoring. (Attached as Attachment 3.)

11. Following the data breach, the affected employees have currently been provided with two years of free identity theft protection services through LifeLock.

12. I am not aware of any identity theft actually occurring with regard to Mr. Davis.

13. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT

Christopher Feger

STATE OF KENTUCKY)
COUNTY OF JEFFERSON)

BEFORE ME, the undersigned authority, this day personally appeared Christopher Feger, who is known by me or has provided valid identification and says that the above statements are true and correct to the best of his knowledge, information and belief and that he has read the above affidavit and knows the contents thereof.

SWORN TO AND SUBSCRIBED BEFORE ME this 12th day of October, 2017.

Notary Public
State of Kentucky

My Commission Expires: July 15, 2018

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

AFFIDAVIT OF CHRISTOPHER FEGER

ATTACHMENT 1

ARBITRATION AGREEMENT

1. Employee Agrees to Arbitrate. In exchange for employment and/or continued employment, I ("Employee") agree that I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO INDUSTRIES, LLC, its successors, assigns, principals, agents and employees ("the Company") *exclusively* by final and binding *arbitration* before a single, neutral Arbitrator. The arbitration shall be conducted under the rules and procedures of the American Arbitration Association relating to the selection of arbitrators for the determination of issues. The arbitrator may issue written directions as to the scope and timetable for discovery, and may make a summary dismissal of any claims submitted to arbitration. The arbitrator shall be charged to render a written opinion reciting the facts and the applicable law. By way of example only, claims submitted to arbitration include, but are not limited to, claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort. I agree that I will pay half of the arbitration expenses, but no greater than an amount equal to two weeks' gross wages. Unless otherwise agreed with the Company, I agree that any arbitration will be held in the county and state of the Company's principal location, Louisville, Kentucky.

2. Arbitration brought by Employee within six months. I further agree not to commence any action or suit relating to my employment by the Company more than six (6) months after the date of cessation of such employment, and to waive any statute of limitations to the contrary.

3. Company Agrees to Arbitrate. As additional consideration to this Agreement, excluding claims to enforce restrictive covenants (non-competition, non-solicitation, confidentiality, non-pirating, e.g.) with the Employee, the Company agrees to submit any and all claims against the Employee to arbitration under the terms contained in Paragraph 1 above.

4. Miscellaneous. The Federal Arbitration Act shall govern this Agreement and the applicability/construction of any arbitration decision. The provisions of this Agreement shall be severable. If any portion of this Agreement is held to be invalid or unenforceable, it shall not be affect the remaining portions of this Agreement. This Agreement may be modified by a court or an arbitrator to render it enforceable. This Agreement represents the entire understanding of the parties with respect to its subject matter. There are no oral understandings about the subject matter of this Agreement other than contained herein. The Company may assign this Agreement. No amendment to this Agreement shall be effective unless in writing and signed by all parties. The headings in this Agreement are for convenience only, and do not govern. This Agreement does not change the at-will status of employment, and does not limit the Company's equitable remedies with regard to any restrictive covenants with the undersigned Employee.

Daniel Davis 251-13-2134 5-30-07

EMPLOYEE SS# DATE

ISCO INDUSTRIES, LLC.

By: Beverly Earney

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

AFFIDAVIT OF CHRISTOPHER FEGER

ATTACHMENT 2

March 4, 2016

Notice of Data Breach

Dear Former ISCO Employee:

On March 3, 2016, ISCO Industries, Inc. ("ISCO") discovered that certain sensitive ISCO 2015 employee information was compromised as a result of a criminal act. We take the privacy and security of your personal information very seriously. This notice is intended to provide you with important information so you can take appropriate action to protect your interests.

What Happened

On March 2, 2016, an employee in our human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data. A W-2 is the form that ISCO distributes to all of its employees and income taxing authorities at the end of each January. Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email. Shortly thereafter, we realized that an outside third party had fraudulently disguised his email address as that of an ISCO senior executive, and that our employees' W-2 data had been unwittingly sent to that outside third party.

Compromised Information

The compromised information includes employee social security numbers, addresses, and 2015 compensation and tax withholding information. ISCO has no reason to believe employee credit card, banking, birthdate, telephone, driver's license, health insurance, or medical information was obtained

As soon as ISCO discovered this security breach, it acted to notify and cooperate with the FBI, the IRS, and the Louisville Metro Police Department. ISCO learned that this criminal act is part of a larger scam attempting to file false tax returns with the hope of diverting employee tax refunds. If you have already filed your tax returns, there is a likelihood that the IRS would reject any duplicate, fraudulent return. If you have not yet filed your tax returns, we recommend completing the attached IRS Form 14039 Identity Theft Affidavit and faxing it to the IRS (fax instructions are included on the form).

Identity Protection Services

ISCO has retained LifeLock, Inc. ([illegible]) to provide identity theft protection services for each individual affected free of charge. Lifelock will provide individual email or text notifications if it detects someone is trying to open a fraudulent credit card or borrow money in your name. We have purchased a 12-month membership for all U.S. employees. Information on how to set up an individual account is attached to this notice.

Fraud Prevention Tips

ISCO wants to make you aware of steps you may take to guard against identity theft or fraud.

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you

should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected identity theft to proper law enforcement authorities, your state attorney general, the Internal Revenue Service, and the Federal Trade Commission. To file a complaint with the FTC, go to [illegible] or call 1-877-ID-THEFT (877-438-4338).

You should also notify your accountant or tax preparation agency (H&R Block, Jackson Hewitt, etc.) of this security breach and ask them about ways to prevent fraudulent submission of information to the IRS and state and local governments. The IRS has internal security measures in place, so refund wiring instructions which do not include your address or the address of your financial institution, or contain an address which differs from the one on your W-2 form may cause the IRS to send you clarifying correspondence before processing a refund. Please pay attention to any correspondence from the IRS and respond promptly to any inquiry.

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting [illegible], calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at [illegible]. Or you can elect to purchase a copy of your credit report by contacting one of the three national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111/Fraud Division: (800) 525-6285
[illegible]
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742/Fraud Division: (888) 397-3742
[illegible]
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 916-8800/Fraud Division: (800) 680-7289
[illegible]
P.O. Box 6790
Fullerton, CA 92834

You may want to consider placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at [illegible].

In some U.S. states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from

March 4, 2016

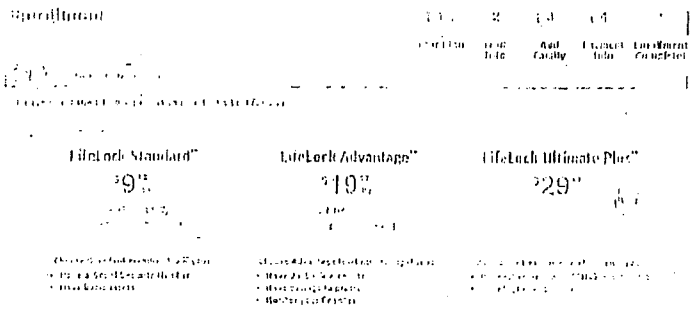
Notice of Data Breach

LifeLock Enrollment

ISCO Industries has initiated a LifeLock account for your use. You can either call (800)899-0180, or go to [illegible] to get enrolled. You will have until April 16th, 2016 to enroll into the ISCO LifeLock account before this code expires.

You will need both a promo code and membership ID to get enrolled.
The promo code is [illegible]
Your membership ID should be your [illegible] (Example: [illegible])

Enroll online at [illegible] website.
Select the **Start Your Membership** button.
On the next screen, enter the promo code [illegible] in the bottom left corner. Then select apply.
(NOTE: There is no need on this screen to select a particular LifeLock service. Just enter ISCO16 and select apply)



A new box requesting your membership ID will appear. (Again this is your [illegible])
Select the red button titled **Start your Membership**.
You will then be asked to enter your personal information.
Next select the enroll button.
You will then receive a welcome email with a login and password to be able to access your account online.

If you choose to enroll by phone, agents will be available 24 hours a day, 7 days a week.

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

AFFIDAVIT OF CHRISTOPHER FEGER

ATTACHMENT 3

March 29, 2017

Dear Former ISCO Employee,

As a follow up to ISCO Industries, Inc. ("ISCO") Data Breach Notification letter sent to you last year in March 2016, ISCO wanted to inform you that we have once again retained LifeLock (www.lifelock.com) to provide identity theft protection services for one more year. Upon opting-into the service, ISCO will purchase another 12-month membership, free of charge for you. Information on how to opt-into an individual account is attached to this notice.

As a reminder, LifeLock is an agency that will provide individual email or text notifications if it detects someone trying to open a fraudulent credit card or borrow money in your name. LifeLock will not detect if you have been a victim of fraudulent tax filings. However, they do provide restoration services for anybody affected. To find out if you are a victim of a fraudulent tax filing, we recommend that you follow these steps:

1. Contact the IRS (1-800-908-4490) AND your State Revenue Office (numbers vary by state).
2. If you were a victim, call your local police department and ask to file an identity theft report. Obtain a copy of the report.
3. The IRS will then likely ask you to complete and file IRS Form 14039 (Identity Theft Affidavit), provide a case number from your police report, and file your taxes by paper.
4. Request a Personal Identification Number (PIN) from the IRS, which will likely be sent by mail.
5. Keep that PIN on file. You should be able to file your taxes electronically next year with that IRS issued PIN. It is likely the PIN will change every year, so keep watch for future mailings.
6. If needed, you can call LifeLock's Restoration Services at 1-800-607-9174 for assistance. You will be assigned a representative that will help get your case resolved as soon as possible with the IRS.

Questions About This Notice

For further information or assistance, please contact ISCO at 800-345-4726 or email us at: HR@isco-pipe.com between the hours of 8:00am and 5:00pm Eastern, Monday through Friday.

Sincerely,

Troy M. Landoch
Chief Human Resources Officer
ISCO Industries, Inc.

LIFELOCK® ENROLLMENT FORM

ISCO has retained LifeLock® to provide one (1) year of complimentary identity theft protection for another year.

To get protection immediately at no cost to you:

1. Call 1-800-543-3562 to continue service for another year.
2. Use the promotion code: **ISCO2017** when prompted as well as your Member ID.
3. Your Member ID is your first name last name plus 5-digit zip code.
4. Ex. JOHNNORTON12345

LifeLock's specialized team of telephone representatives is available 24 hours a day, seven days a week to help you enroll in LifeLock after the recent data breach.

You will have until May 20th, 2017 to enroll in this service. If you fail to do so then your account will be cancelled June 1st.

Once you have completed the LifeLock enrollment process, the services will be in effect immediately. Your LifeLock Standard™ membership includes:

- ✓ LifeLock Identity Alert® System†
- ✓ LifeLock Privacy Monitor
- ✓ Live, U.S.-based Member Service Support
- ✓ Identity Restoration Support
- ✓ Priority Live Member Service Support
- ✓ Dollar for Dollar Stolen Funds Reimbursement up to $25,000 for LifeLock Standard™‡

LifeLock backs up its services with its $1 Million Service Guarantee‡.

No one can prevent all identity theft.
† LifeLock does not monitor all transactions at all businesses.
‡ Stolen Funds Reimbursement benefits and Service Guarantee benefits for State of New York members are provided under a Master Insurance Policy underwritten by State National Insurance Company. Benefits for all other members are provided under a Master Insurance Policy underwritten by United Specialty Insurance Company. Under the Stolen Funds Reimbursement, LifeLock will reimburse stolen funds up to $25,000 for Standard membership, up to $100,000 for Advantage membership and up to $1 million for Ultimate Plus membership. Under the Service Guarantee LifeLock will spend up to $1 million to hire experts to help your recovery. Please see the policy for terms, conditions and exclusions at LifeLock.com/legal.

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 3

(Arbitration Agreement signed by Plaintiff on May 30, 2007)

ARBITRATION AGREEMENT

1. Employee Agrees to Arbitrate. In exchange for employment and/or continued employment, I ("Employee") agree that I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO INDUSTRIES, LLC, its successors, assigns, principals, agents and employees ("the Company") *exclusively* by final and binding *arbitration* before a single, neutral Arbitrator. The arbitration shall be conducted under the rules and procedures of the American Arbitration Association relating to the selection of arbitrators for the determination of issues. The arbitrator may issue written directions as to the scope and timetable for discovery, and may make a summary dismissal of any claims submitted to arbitration. The arbitrator shall be charged to render a written opinion reciting the facts and the applicable law. By way of example only, claims submitted to arbitration include, but are not limited to, claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort. I agree that I will pay half of the arbitration expenses, but no greater than an amount equal to two weeks' gross wages. Unless otherwise agreed with the Company, I agree that any arbitration will be held in the county and state of the Company's principal location, Louisville, Kentucky.

2. Arbitration brought by Employee within six months. I further agree not to commence any action or suit relating to my employment by the Company more than six (6) months after the date of cessation of such employment, and to waive any statute of limitations to the contrary.

3. Company Agrees to Arbitrate. As additional consideration to this Agreement, excluding claims to enforce restrictive covenants (non-competition, non-solicitation, confidentiality, non-pirating, e.g.) with the Employee, the Company agrees to submit any and all claims against the Employee to arbitration under the terms contained in Paragraph 1 above.

4. Miscellaneous. The Federal Arbitration Act shall govern this Agreement and the applicability/construction of any arbitration decision. The provisions of this Agreement shall be severable. If any portion of this Agreement is held to be invalid or unenforceable, it shall not be affect the remaining portions of this Agreement. This Agreement may be modified by a court or an arbitrator to render it enforceable. This Agreement represents the entire understanding of the parties with respect to its subject matter. There are no oral understandings about the subject matter of this Agreement other than contained herein. The Company may assign this Agreement. No amendment to this Agreement shall be effective unless in writing and signed by all parties. The headings in this Agreement are for convenience only, and do not govern. This Agreement does not change the at-will status of employment, and does not limit the Company's equitable remedies with regard to any restrictive covenants with the undersigned Employee.

Daniel Davis 251-13-2134 5-30-07

EMPLOYEE SS# DATE

ISCO INDUSTRIES, LLC.

By: Beverly Earney

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF SPARTANBURG)	**FOR THE SEVENTH JUDICIAL CIRCUIT**
Daniel Lee Davis, individual and on behalf of all those similarly situated,)	Case No.: 2017-CP-42-03283
Plaintiff,)	**AMENDED COMPLAINT** (Jury Trial Demanded)
vs.)	
ISCO Industries, Inc.,)	
Defendant.)	

The Plaintiff, Daniel Lee Davis, individually and on behalf of all those similarly situated, by and through his undersigned counsel will respectfully show unto this Honorable Court:

PARTIES

1. Plaintiff Daniel Lee Davis is, and was at all times material to this action, a resident of the County of Spartanburg, State of South Carolina.

2. Upon information and belief, Defendant ISCO Industries, Inc. is a foreign corporation with its principal place of business in Kentucky. Defendant is, and was at all time material to this action, doing business within the County of Spartanburg, State of South Carolina and carrying on in the ordinary course of business the sale and maintenance of custom piping solutions.

JURISDICTION AND VENUE

3. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

4. The most substantial part of the acts or omissions giving rise to the causes of action stated herein occurred in Spartanburg County, South Carolina.

5. The jurisdiction of this Court is founded upon S.C. Const. Ann. art. V, § 11, which grants the Circuit Court general jurisdiction over civil actions.

6. Venue is appropriate under South Carolina Code Ann. § 15-7-30.

GENERAL ALLEGATIONS AND FACTUAL BACKGROUND

7. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

8. Plaintiff has been married since June 2015 and has two children, one aged 19 and one aged 16.

9. Plaintiff began working for Defendant as a mechanic and fusion technician on or about March 2007.

10. As a requirement of his employment, Plaintiff was required to provide Defendant with personal identifying information ("PII"), such as his name, address, and social security number, for, *inter alia*, administrative, bookkeeping, and tax purposes.

11. Plaintiff's employment with Defendant ended on or about March 2015.

12. Although Plaintiff allegedly had an arbitration clause in his initial hiring agreement, his claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause.

13. "On March 2, 2016, an employee in [Defendant's] human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data." (*See* Notice of Data Breach, attached as Ex. A).

14. "Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email." (Ex. A).

15. These Form W-2s included sensitive PII, including, names, addresses, salaries, and social security numbers.

16. A short time later, upon information and belief, someone in Defendant's employ realized that "an outside third party had fraudulently disguised his email address as that of an ISCO senior executive," and the PII of many employees, including Plaintiff, was sent to an outside third party ("the Data Breach"). (Ex. A).

17. "The compromised information include[d] employee social security numbers, addresses, and 2015 compensation and tax withholding information." (Ex. A).

18. Upon information and belief, on March 4, 2016, Defendant sent a Notice of Data Breach to affected employees, alerting them to Defendant's release of their PII to an outside third party. (*See* Ex. A).

19. Upon information and belief, Defendant retained LifeLock, Inc. to provide one year of identity theft protection services.

20. However, upon information and belief, the LifeLock service Defendant purchased was "passive" and merely alerted individuals when it determined that someone was opening a credit card in the individual's name.

21. Upon information and belief, almost immediately after the Data Breach, cybercriminals began to exploit the employees' PII by engaging in identity theft.

22. These cybercriminals can pair the PII with other available information to, *inter alia*, obtain employment, obtain a loan, apply for credit cards or spending money, file false tax returns, obtain medical care, steal Social Security and other government benefits, and apply for a driver's license or other government documents.

23. Additionally, cybercriminals can pair the PII with other available information about an employees' family in order to commit identity theft that affects the employees' family.

24. For the rest of their lives, Plaintiff and the class members will bear an immediate and heightened risk of all manners of identity theft.

25. On or about August 2016, Plaintiff began receiving notices from LifeLock that someone was attempting to take out loans and open credit cards in his name.

26. For example, on August 17, 2016, a third party opened a Citibank credit card in Plaintiff's name.

27. Plaintiff filed an incident report with the Spartanburg County Sheriff's Department to report this identity theft.

28. After Plaintiff's one year of LifeLock expired, he had to purchase a better credit monitoring service because third parties were still opening credit cards in his name. This service costs approximately $12 per month.

29. Plaintiff has spent countless hours monitoring his credit report, closing accounts opened by third parties, and ensuring that his credit is not damaged.

CLASS ACTION ALLEGATIONS

30. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

31. 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.

32. Plaintiff reserves the right to amend the Class definition if further investigation and discovery indicates that the Class definition should be narrowed, expanded, or otherwise modified.

33. Upon information and belief, the exact number of Class members is unknown and is not available to Plaintiff at this time as this information is within the exclusive control of the Defendant, but Plaintiff believes that the Class likely consists of hundreds or thousands of individuals. The sheer size of the Class makes individual joinder in this case impracticable, if not impossible.

34. In addition to the large number of individuals who are members of the Class, there are several questions of law and fact common to the claims of Plaintiff and members of the Class. Those questions predominate over any questions that may affect individual Class members. Common questions include, but are not limited to, the following:

a. Whether and to what extent Defendant had a duty to protect the Class members' PII;

b. Whether Defendant breached its duty to protect the Class members' PII;

c. Whether Defendant provided sufficient assistance to Class members after the breach; and

d. Whether Class members are entitled to damages.

35. Plaintiff's claims are typical of the claims of the Class members. All are based on the same legal and factual issues. Plaintiff and each of the Class members entrusted Defendant with their PII, which was later released by Defendant to cybercriminals.

36. Plaintiff, as named representative, has common interests with members of the Class and will vigorously prosecute the interests of the Class through qualified legal counsel, and does not

have any identifiable legal conflicts with any potential Class member, and thus, the Plaintiff will fairly and adequately represent and protect the interests of the whole Class.

37. To the extent damages are sought, the amount in controversy exceeds one hundred dollars for each member of the Class.

38. Plaintiff has retained competent legal counsel who have extensive experience with class action litigation and are experienced attorneys well versed in South Carolina constitutional, statutory, and common law.

39. Class action treatment of the matters in issue in this controversy is superior to the alternatives, if any, for the fair and efficient adjudication of such issues, because such treatment will permit a larger number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would entail. Class action treatment in this case will have the added virtue of permitting the adjudication of relatively small claims by certain members of the Class, for whom it would otherwise not be financially feasible to litigate their claims as individual actions against Defendant.

40. Plaintiff is aware of no difficulty in the management of this action that would preclude it from being maintained as a class action.

FOR A FIRST CAUSE OF ACTION
(Negligence)

41. Plaintiff incorporates herein by reference each and every allegation set forth hereinabove as if repeated verbatim.

42. Plaintiff and Class members were required to provide Defendant with their PII.

43. Defendant had knowledge of the sensitivity of this PII and the types of harm that Plaintiff and Class members would suffer if this PII was wrongfully disclosed.

44. Indeed, Defendant had a duty to Plaintiff and each Class member to exercise reasonable care in holding, securing, and protecting that PII.

45. It was foreseeable that Plaintiff and the Class members would suffer substantial harm if Defendant employed inadequate safety practices for securing PII.

46. As a result of Defendant's negligence, wilfulness, wantonness, carelessness, gross negligence, and recklessness, Plaintiff and the Class members have suffered and will continue to suffer damages and injury, including, but not limited to, out of pocket expenses and the loss of productivity and enjoyment as a result of spending time monitoring and correcting consequences of the Data Breach.

WHEREFORE, Plaintiff and all those similarly situated pray:

A. That this Court certify the Class;

B. Judgment against Defendant;

C. Actual damages;

D. Punitive damages;

E. Costs and disbursements of this action

F. Attorneys' fees; and

G. That the Court grant such other and further relief as shall be just and proper, including but not limited to prejudgment and postjudgment interest.

(Signature Page Follows)

Respectfully Submitted,

HARRISON, WHITE, SMITH & COGGINS, P.C.

s/John B. White, Jr.
S.C. Bar No. 5996
s/Marghretta Shisko
S.C. Bar No. 100106
s/Ryan F. McCarty
S.C. Bar No. 74198
P.O. Box 3547
Spartanburg, SC 29304
Tel: (864) 585-5100
Fax: (864) 542-2994

SIMMONS LAW FIRM, LLC

s/John S. Simmons
S.C. Bar No. 10260
s/Derek Shoemake
S.C. Bar No. 78398
s/John L. Warren III
S.C. Bar No. 101414
1711 Pickens St.
Columbia, SC 29201
Tel: (803) 779-4600
Fax: (803) 254-8874

November 15, 2017

March 4, 2016

Notice of Data Breach

Dear Former ISCO Employee:

On March 3, 2016, ISCO Industries, Inc. ("ISCO") discovered that certain sensitive ISCO 2015 employee information was compromised as a result of a criminal act. We take the privacy and security of your personal information very seriously. This notice is intended to provide you with important information so you can take appropriate action to protect your interests.

What Happened

On March 2, 2016, an employee in our human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data. A W-2 is the form that ISCO distributes to all of its employees and income taxing authorities at the end of each January. Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email. Shortly thereafter, we realized that an outside third party had fraudulently disguised his email address as that of an ISCO senior executive, and that our employees' W-2 data had been unwittingly sent to that outside third party.

Compromised Information

The compromised information includes employee social security numbers, addresses, and 2015 compensation and tax withholding information. ISCO has no reason to believe employee credit card, banking, birthdate, telephone, driver's license, health insurance, or medical information was obtained.

As soon as ISCO discovered this security breach, it acted to notify and cooperate with the FBI, the IRS, and the Louisville Metro Police Department. ISCO learned that this criminal act is part of a larger scam attempting to file false tax returns with the hope of diverting employee tax refunds. If you have already filed your tax returns, there is a likelihood that the IRS would reject any duplicate, fraudulent return. If you have not yet filed your tax returns, we recommend completing the attached IRS Form 14039 Identity Theft Affidavit and faxing it to the IRS (fax instructions are included on the form).

Identity Protection Services

ISCO has retained LifeLock, Inc. (www.lifelock.com) to provide identity theft protection services for each individual affected free of charge. Lifelock will provide individual email or text notifications if it detects someone is trying to open a fraudulent credit card or borrow money in your name. We have purchased a 12-month membership for all U.S. employees. Information on how to set up an individual account is attached to this notice.

Fraud Prevention Tips

ISCO wants to make you aware of steps you may take to guard against identity theft or fraud.

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you

should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected identity theft to proper law enforcement authorities, your state attorney general, the Internal Revenue Service, and the Federal Trade Commission. To file a complaint with the FTC, go to www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338).

You should also notify your accountant or tax preparation agency (H&R Block, Jackson Hewitt, etc.) of this security breach and ask them about ways to prevent fraudulent submission of information to the IRS and state and local governments. The IRS has internal security measures in place, so refund wiring instructions which do not include your address or the address of your financial institution, or contain an address which differs from the one on your W-2 form may cause the IRS to send you clarifying correspondence before processing a refund. Please pay attention to any correspondence from the IRS and respond promptly to any inquiry.

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting http://www.annualcreditreport.com, calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at https://www.annualcreditreport.com/cra/requestformfinal.pdf. Or you can elect to purchase a copy of your credit report by contacting one of the tree national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111/Fraud Division: (800) 525-6285
www.equifax.com
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742/Fraud Division: (888) 397-3742
www.experian.com
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 916-8800/Fraud Division: (800) 680-7289
www.transunion.com
P.O. Box 6790
Fullerton, CA 92834

You may want to consider placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at http://www.annualcreditreport.com.

In some U.S. states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from

March 4, 2016

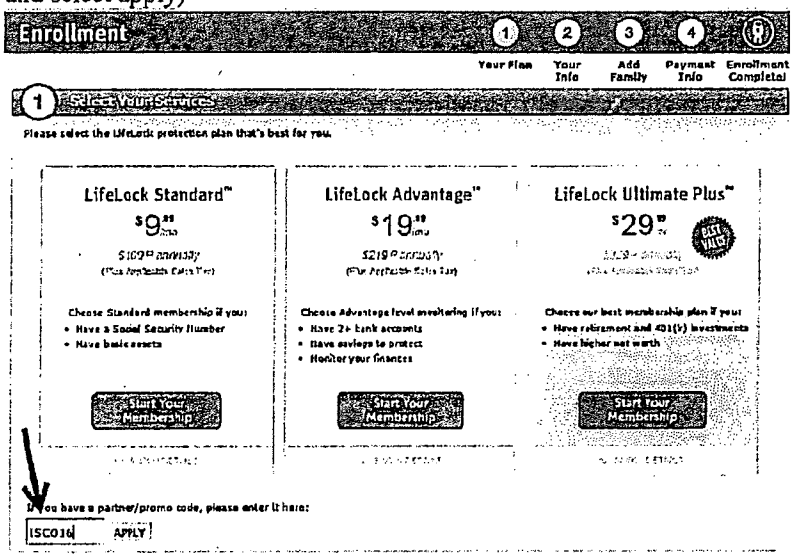
Notice of Data Breach

LifeLock Enrollment

ISCO Industries has initiated a LifeLock account for your use. You can either call (800)899-0180, or go to https://www.lifelock.com/ to get enrolled. You will have until April 16th, 2016 to enroll into the ISCO LifeLock account before this code expires.

You will need both a promo code and membership ID to get enrolled.
The promo code is [redacted]
Your membership ID should be your [redacted] (Example: [redacted]

Enroll online at https://www.lifelock.com/ website.
Select the **Start Your Membership** button.
On the next screen, enter the promo code [redacted] in the bottom left corner. Then select **apply**.
(NOTE: There is no need on this screen to select a particular LifeLock service. Just enter ISCO16 and select apply)



A new box requesting your **membership ID** will appear. (Again this is your [redacted]
Select the red button titled **Start your Membership**.
You will then be asked to enter your personal information.
Next select the **enroll button.**
You will then receive a welcome email with a login and password to be able to access your account online.

If you choose to enroll by phone, agents will be available 24 hours a day, 7 days a week.

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 MOTION TO DISMISS

COMES NOW Defendant, ISCO Industries, Inc., by and through its undersigned counsel, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, and hereby moves for an order dismissing Plaintiff's Amended Complaint. Defendant has also filed a motion to dismiss and compel arbitration. This Motion is filed in the event the Court does not compel arbitration of this case.

Defendant seeks to dismiss Plaintiff's Amended Complaint based on the following grounds:

1. Plaintiff lacks standing because he has failed to allege a sufficient injury in fact.
2. Plaintiff has failed to state facts sufficient to establish a negligence claim.
4. Plaintiff has failed to state facts sufficient to justify a claim for punitive damages.
5. Plaintiff has failed to state facts sufficient to justify a claim for attorney's fees.

The Motion is supported by Plaintiff's Complaint, Amended Complaint, the arguments below and the following exhibits:

A. Affidavit of Christopher Feger, Chief Administrative Officer for Defendant.

B. Defendant's Memorandum of Law in Support of its Motion to Dismiss to supplement this Motion which will be filed at a later date.

A. FACTS

Plaintiff's Amended Complaint alleges that he was required to provide personal identifying information (PII) to Defendant as a condition of his employment. Plaintiff alleges that his PII was stolen as a result of a criminal act of a third party. Plaintiff claims that Defendant was negligent in failing to prevent the criminal theft of his PII.

Plaintiff has failed to allege a sufficient injury in fact to have standing to support his claim. Plaintiff claims that someone attempted to take out loans and open credit cards in his name. (Amended Complaint ¶¶ 25-29.) However, Plaintiff fails to allege any such attempts were successful and resulted in charges that caused Plaintiff damages. Plaintiff alleges as his monetary damages that he purchased additional credit monitoring service and spent countless hours monitoring his credit report. (Amended Complaint ¶¶ 28-29.) However, Defendant has provided Plaintiff and all others affected with two years of LifeLock protection that is ongoing. (Feger Affidavit.) It is clear that this service has been effective because Plaintiff admits that LifeLock has notified Plaintiff of attempts to open loans and credit cards. (Amended Complaint ¶ 25-26.) Plaintiff has not alleged any damages related to an actual use of his PII, such as damages caused by the use of an actual loan or credit card in his name. Therefore, Plaintiff's claim is based on the threat of harm and not actual harm.

B. LEGAL ANALYSIS

1. Plaintiff's Lack of Standing

"Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

South Carolina courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "Justiciability encompasses . . . ripeness . . . and standing." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). There are requirements that must be met to establish standing. *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'." *Id. quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* "The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

Plaintiff's Amended Complaint fails to establish the necessary elements of standing. South Carolina has not recognized a claim based on this type of criminal data breach and subsequent

"attempted" identity theft. However, multiple federal courts, including the United States Court of Appeals for the Fourth Circuit, have ruled that failed attempts at identity theft and an increased risk of identity theft do not constitute an "injury in fact" upon which a plaintiff can file a claim. *See Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017); *Reilly v. Ceridian*, 664 F.3d 38 (3d Cir 2011); *Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 530 (D. Md. 2016). Moreover, Plaintiff's allegations that he chose to purchase better credit monitoring service or spent hours himself monitoring are not sufficient to seek damages. *See Beck*, 848 F.3d at 276-277 ("Simply put, these self-imposed harms cannot confer standing.")

Furthermore, Defendant complied with S.C. Code Ann § 39-1-90 in providing notice to those affected the date after the data breach. (Feger Affidavit.) Defendant also paid for two years of LifeLock protection which is ongoing. (*Id.*) Plaintiff and all other individuals affected by this data breach have received free LifeLock protection which has continued through the date of the filing of the Amended Complaint. (*Id.*) This service has prevented damages from attempted identity theft as admitted by Plaintiff in the Amended Complaint.

In addition, Plaintiff cannot establish causal connection between the alleged injury and the data breach involving Defendant. It is impossible to determine if Plaintiff's information is being or will be used from the data breach involving Defendant rather than the numerous other data breaches that have occurred throughout the country. For example, the recent Equifax data breach impacted approximately 145.5 million consumers in the United States.

Finally, there is no allegation to suggest that the potential for identity theft in the future will be redressed by a favorable ruling against Defendant in this case. The PII was stolen and will still be in the possession of the criminals who took it. The risk of identity theft will not change as a result of any ruling against Defendant.

Therefore, Plaintiff cannot establish an "injury in fact" to support the jurisdiction of this Court in this case.

2. Plaintiff's Negligence Claim

Plaintiff has failed to allege facts that support a claim for negligence. South Carolina has not recognized a duty to prevent criminal activity related to PII maintained in employment. Rather, South Carolina has addressed this issue by statute and only created a duty to notify individuals of the criminal conduct as soon as possible. S.C. Code Ann § 39-1-90. Defendant complied with this requirement. Therefore, Plaintiff's negligence claim should be dismissed.

3. Motion to Dismiss Plaintiff's Claim for Punitive Damages

Plaintiff's Amended Complaint has failed to allege conduct by Defendant that was reckless, willful, wanton or malicious to support a claim for punitive damages. Therefore, his claim for punitive damages should be dismissed or stricken from the Amended Complaint.

4. Motion to Dismiss Plaintiff's Claim for Attorney's Fees

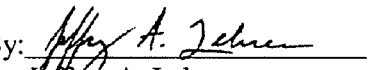
Plaintiff's Amended Complaint fails to allege any claim that would entitle him to an award of attorney's fees. Plaintiff does not have a right to any statutory attorney's fees in this case. Therefore, his claim for attorney's fees should be dismissed or stricken from the Amended Complaint.

C. CONCLUSION

Plaintiff has failed to establish standing and failed to state facts sufficient to constitute a cause of action. Plaintiff has failed to allege facts or claims to support an award of punitive damages or attorney's fees. Therefore, Defendant respectfully requests that Plaintiff's Amended Complaint be dismissed in whole or in part.

Dated this the 30th day November, 2017.

Respectfully submitted,

By: 

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Attorneys for Defendant
ISCO Industries, Inc.

WSACTIVELLP:9403424.1

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 1

(Defendant's Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint and Compel Arbitration)

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

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND COMPEL ARBITRATION

COMES NOW Defendant, ISCO Industries, Inc., ("ISCO"), by and through its undersigned counsel, and pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act ("FAA"), 9 U.S.C § 1 *et seq.*, hereby submits this Memorandum in Support of its Motion to Dismiss Plaintiff's Amended Complaint and Compel Arbitration.

I. FACTUAL BACKGROUND

ISCO is a Kentucky Corporation with its principal place of business in Kentucky. (Exhibit 2.[1]) Plaintiff Daniel Lee Davis ("Plaintiff") is a citizen and resident of South Carolina. (Amended Complaint ¶ 1.)

ISCO is a Kentucky Corporation with its principal place of business in Louisville, Kentucky. ISCO is a global customized piping solutions provider. It maintains employees, manufacturing facilities and distribution sites in over 35 states. (Exhibit 2.)

[1] Exhibit 2 is the Affidavit of Christopher Feger, Chief Administrative Officer of ISCO. This Exhibit is attached to ISCO's Motion to Dismiss and Compel Arbitration. Exhibit 1 is this Memorandum.

ISCO hired Plaintiff to work at its South Carolina facility on May 30, 2007. At the initiation of employment, Plaintiff signed an Arbitration Agreement with ISCO. (See Exhibits 2 and 3.[2]) Plaintiff worked for ISCO in South Carolina. His employment records were maintained at the Company's corporate office in Kentucky. (Exhibit 2.)

Plaintiff worked for ISCO as a mechanic and a field technician. As a field technician, Plaintiff assisted on work-related calls with individuals outside of South Carolina. (*Id.*) During his employment with ISCO, Plaintiff attended annual sales meetings and safety meetings outside of South Carolina. (*Id.*)

The data breach that is the subject of Plaintiff's Amended Complaint occurred on March 2, 2016. (*Id.*) It affected 449 current and former employees throughout 35 states. (*Id.*)

On March 4, 2016, ISCO sent these employees a letter providing notice of the data breach. (*Id.*) ISCO provided these employees with free identity theft protection services through LifeLock. (*Id.*) On March 29, 2017, ISCO informed these employees that it had again retained LifeLock for an additional year of free identity theft monitoring. (*Id.*) Following the data breach, the affected employees have currently been provided with two years of free identity theft protection services through LifeLock. (*Id.*)

The Arbitration Agreement signed by Plaintiff at the initiation of his employment with ISCO contains a mandatory arbitration clause for "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment" with ISCO. (Exhibit 3, ¶1.) Plaintiff's Amended Complaint arises out of and is related to his employment with ISCO.

[2] Exhibit 3 is the Arbitration Agreement between Plaintiff and ISCO. This Exhibit is attached to ISCO's Motion to Dismiss and Compel Arbitration.

ISCO seeks to compel arbitration of Plaintiff's sole claim for negligence. Therefore, ISCO respectfully requests that the Court grant its Motion to Dismiss Plaintiff's Amended Complaint and Compel Arbitration.

II. LEGAL ANALYSIS

A. Applicability of FAA And Strong Policy Favoring Arbitration

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

The FAA applies in this case because the relationship between ISCO and Plaintiff involved interstate commerce. For example,

1. ISCO is a Kentucky corporation with its principle place of business in Lousville, Kentucky;

2. ISCO's human resources department and personnel files are kept in Kentucky;

3. Plaintiff is a South Carolina resident;

4. Plaintiff worked for ISCO in South Carolina;

5. Plaintiff worked for ISCO in areas outside of South Carolina. Plaintiff worked for ISCO as a mechanic and a field technician. As a field technician, Plaintiff assisted on work-related calls with individuals outside of South Carolina.

6. During his employment with ISCO, Plaintiff attended annual sales meetings and safety meetings outside of South Carolina.

(*See* Exhibit 2.)

The legal standard for establishing interstate commerce is very low. Unless the parties contract otherwise, the FAA applies to any arbitration agreement involving interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" *Thornton v. Trident *134 Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). The South Carolina Supreme Court has consistently interpreted interstate commerce broadly. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); *Soil Remediation Co. v. Nu–Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977); *Blanton v. Stathos,* 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002).

The South Carolina Court of Appeals ruling in *Towles v. United Healthcare Corp.* is most persuasive here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United, like ISCO, is a national company headquartered outside of South Carolina. *Id.* at 33, 524 S.E.2d at 841. United hired Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. *Id.* at 33–34, 524 S.E.2d at 841–42. Towles, like Plaintiff, was required to attend out-of-state meetings and participate in telephone conferences with out-of-state corporate officials. *Id.* at 36, 524 S.E.2d at 843. Similar to the Court

in *Towles*, this Court should rule that the relationship between Plaintiff and ISCO involved "sufficient evidence of interstate commerce to invoke the FAA." *Id.*

The FAA and well-established case law interpreting the FAA strongly favor the enforcement of agreements to arbitrate. Section 2 of the FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013).

The Supreme Court repeatedly has stated that the FAA represents '"a liberal federal policy favoring arbitration agreements.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). As the Fourth Circuit has explained, "Pursuant to that liberal policy, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-74 (4th Cir. 1997). Moreover, the strong federal policy favoring arbitration applies with equal force to claims created by contract or by statute. *Id.* at 274.

It is well settled that agreements to arbitrate claims in the employment context are valid and enforceable. *See, e.g. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (stating, "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.") (Internal citations omitted). A litigant may not refuse to arbitrate a dispute within the scope of a valid argument to arbitrate. Indeed, in such circumstances, a judicial order compelling arbitration is mandatory: "[t]he (FAA) leaves no place for the exercise of discretion by a district

court, but instead mandates that the district court *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Further, the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

South Carolina courts, the Fourth Circuit, and other state courts routinely and consistently enforce agreements to arbitrate employment disputes. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (holding that the arbitration agreement covered a former employee's claims and noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *O'Neil*, 115 F.3d at 276.

B. <u>Plaintiff Is Required To Arbitrate His Claims.</u>

In light of the strong federal and state policies favoring arbitration, Plaintiff must be compelled to arbitrate his employment related claim in this case. When adjudicating a motion to compel arbitration under the FAA, courts engage in a two-step inquiry. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). First, the Court must determine whether the parties agreed to arbitrate the dispute. *Id.* Second, the Court must decide whether "any legal constraints external to the parties' agreement foreclose arbitration." *Id.* In making these determinations, the Court must keep in mind the strong presumption in favor of arbitration. *E.g., IntegraMed America, Inc. v. Patton*, 2013 WL 1768694 at *4 (D.S.C. April 24, 2013) (granting defendant's motion to compel arbitration in a lawsuit pending for two months and noting, "South Carolina favors arbitration") (*citing Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 556 (Ct. App. 2001) (compelling arbitration in a lawsuit pending for approximately eight months and stating that "it is the policy of this state to favor arbitration of disputes")).

1. Plaintiff And ISCO Agreed To Arbitrate All Of The Claims In This Case.

In the instant case, it is indisputable that ISCO offered, and Plaintiff accepted, the terms of the Arbitration Agreement. Plaintiff worked for ISCO for approximately 8 years after signing the Arbitration Agreement. (Exhibit 2, Amended Complaint ¶ 10.)

The claim asserted by Plaintiff is subject to arbitration under the Arbitration Agreement because it arises out of and relates to the employment relationship. "The heavy presumption of arbitrability requires that[,] when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603–04 (2010). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.*

The arbitration provision at issue in this case provides, "I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment" with ISCO "exclusively by final and binding arbitration before a single, neutral Arbitrator." (Exhibit 3, ¶ 1). The body of law in this state, as well as the Fourth

Circuit, makes clear that arbitration provisions like the one at issue in this case should be broadly construed to cover all the claims asserted in this case. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 110, 739 S.E.2d 209, 214 (2013)(finding employment claims for slander and outrage subject to "arising out of" arbitration provision); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988).

Plaintiff's Amended Complaint alleges that ISCO improperly disclosed personal identifying information ("PII") to a third party who fraudulently disguised his e-mail address as that of an ISCO senior executive. (Amended Complaint ¶ 16.) Plaintiff has not sued this third party who committed a criminal offense upon ISCO. Plaintiff alleges that he was required to provide this PII information to ISCO as part of his employment. (Amended Complaint ¶10.) The ISCO employee who Plaintiff alleges improperly disclosed PII was acting within the course and scope of her employment with ISCO in allegedly mishandling the PII. (Amended Complaint ¶¶ 12-16.) Clearly, Plaintiff's allegations arise out of and relate to his employment with ISCO.

2. There Are No Legal Constraints External To The Parties' Agreement To Foreclose Arbitration.

"Under the FAA, the party seeking arbitration must first show a written agreement for arbitration; then, the court must assess whether there are "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.; *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 606 (D.S.C. 1998), *aff'd and remanded,* 173 F.3d 933 (4th Cir. 1999).

a. Consideration

Plaintiff received consideration because he signed the Arbitration Agreement at the initiation of employment with ISCO. (Exhibits 2 and 3.) South Carolina law is clear that initial

employment is valid consideration. *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001).

Furthermore, the mutual agreement to arbitration is binding regardless of when it was signed. Under South Carolina law, a mutual promise to arbitrate - alone - is sufficient consideration to support an agreement to arbitrate. *E.g., O'Neil,* 115 F.3d at 275 (finding, "A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement"); *Johnson v. Circuit City Stores,* 148 F.3d 373, 378 (4th Cir. 1998) (finding, "Because [the employer] agreed to be mutually bound by the terms of the Dispute Resolution Agreement, it was not necessary that it agree to incur any *additional* detriment in exchange for the [applicant's] agreement to arbitrate her employment-related claims . . . ."); *Cox v. Assisted Living Concepts, Inc.,* 2014 WL 1094394 at *13 (D.S.C. March 18, 2014) (granting the employer's motion to compel arbitration and finding "an arbitration agreement is supported by adequate consideration when the parties mutually agree to be bound by the arbitration process and the agreement does not permit the employer to ignore the results of arbitration").

Significantly, in *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999), the Court ruled that an arbitration agreement in a handbook acknowledgment signed after the employment relationship began was binding and enforceable:

> We find the Acknowledgment constituted a specific communication of an offer which conditioned Towles's continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract. *See Prescott, supra,* (noting a unilateral contract requires a specific offer communicated to the employee). Towles accepted the offer by continuing in his employment.[4] *See Small,* 292 S.C. at 484, 357 S.E.2d at 454 (finding an employee accepted employer's offer "by performing the act on which the promise was impliedly or expressly based"). Therefore, we find the evidence leaves room for only one inference: the Acknowledgment constituted a binding arbitration agreement. *See Small* 292 S.C. at 483, 357 S.E.2d at 454 (noting "a trial court should submit to the

> jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference").

Id.

One reason that a mutual agreement to arbitrate is by itself consideration is that there are benefits to both parties to arbitrate their claims. Employees also benefit from the reduced cost and shorter time scales provided by arbitration. Employees also benefit by reduced motion practice and the ability to have their case heard without the pre-trial motions that are normally involved in litigation. Therefore, the arbitration provision in the Arbitration Agreement is clearly supported by consideration.

b. Coercion and Duress

Plaintiff was not coerced to sign the Arbitration Agreement. He could have declined to accept employment under these terms. In *Towles, supra,* the Court ruled that an arbitration agreement in a handbook that was a condition of employment was binding and enforceable. An argument that the agreement to arbitrate was a condition of employment is not sufficient to establish duress or coercion. Similarly, in *Phillips*, *supra*, 39 F. Supp. 2d at 608, the court ruled that an employee who had to forgo future promotions if he refused to sign an arbitration agreement, was not subject to a wrongful act of coercion in the absence of other evidence showing a destruction of the employee's free agency.

The Arbitration Agreement is only two pages and the arbitration provision is very conspicuous. It is written in plain language that should be easily understandable by a non-lawyer. There was no reason for Plaintiff not to read and be aware of the full requirements of the arbitration provision in the Arbitration Agreement. There are no facts to support an argument of coercion or duress.

c. Waiver

ISCO has not waived its right to arbitrate. ISCO was served with the initial Complaint on September 14, 2017, and is demanding arbitration within 30 days of such service. Plaintiff filed an Amended Complaint on November 15, 2017 and ISCO re-filed its Motion within 30 days of this amendment. Prior to filing this Motion, ISCO requested that Plaintiff voluntarily submit to arbitration and as of the date of this filing he has not agreed to arbitration.

In sum, the undisputable facts here establish the existence of a valid contract between Plaintiff and ISCO to arbitrate the claims in this action. There are no legal constraints external to the parties' agreement to foreclose arbitration. If Plaintiff intends to continue to pursue his claims, he must do so in arbitration.

3. The Terms of The Arbitration Agreement Are Not Unconscionability

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

The parties' agreement to arbitrate is not unconscionable. It does not limit Plaintiff's damages or remedies in any way. Plaintiff may argue that the shortened statute of limitations in Paragraph 2 of the Agreement is not reasonable or enfroceable. However, this provision is clearly severable and distinct from Plaintiff's agreement to arbitrate. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013). In *Carlson*, the agreement contained an arbitration clause and in a separate paragraph of the agreement there was an agreement to reduce the statute of limitations. The Court ruled that the reduction in the statute of limitations was separate and distinct from the agreement to arbitrate and was not relevant to a determination of whether the arbitration clause was unconscionable. *Id.* South Carolina law

clearly provides that "arbitration clauses are severable from the contracts in which they are embedded." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 125, 713 S.E.2d 799, 804, (Ct. App 2011) *citing S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993); *The Hous. Auth. of City of Columbia v. Cornerstone Housing, L.L.C.*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003).

Plaintiff's commitment to arbitration is contained in Paragraph 1 of the Agreement. (Exhibit 3, ¶ 1.) The statute of limitations language is in Paragraph 2. (Exhibit 3, ¶ 4.) ISCO's agreement to arbitrate is contained in Paragraph 3. (Exhibit 3, ¶ 3.) Paragraph 4 of the Agreement contains a severability clause. (Exhibit 3, ¶ 4.) Therefore, the issue of Plaintiff's agreement to arbitrate is distinct from the substantive validity of the other portions of the Agreement. *See Davis*, 713 S.E.2d at 804. "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal*, 312 S.C. at 562-63, 437 S.E.2d at 24.

ISCO respectfully submits that the agreement to arbitrate is not unconscionable and should be enforced.

III. CONCLUSION

Plaintiff agreed in writing to arbitrate claims arising out of and relating to his employment. All of the allegations in this action arise out of and relate to Plaintiff's employment with ISCO. For the reasons set forth herein and in its Motion to Dismiss and Compel Arbitration, ISCO respectfully requests this Court enter an Order GRANTING its Motion to Dismiss Plaintiff's Amended Complaint and Compel Arbitration.

Dated this the 30th day November, 2017.

Respectfully submitted,

By: _____

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Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 2

(Affidavit of Christopher Feger)

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

AFFIDAVIT OF CHRISTOPHER FEGER

I, Christopher Feger, being duly sworn, state that I am over the age of twenty-one and give this statement of my own free will, based on personal knowledge, and for use in any judicial proceeding involving any of the parties listed above. If called to testify as a witness in this case, I am competent to testify and would testify to the following facts:

1. I am the Chief Administrative Officer of ISCO Industries, Inc. ("ISCO"). As the highest ranking human resources officer for the company, I am aware of the facts surrounding Daniel Lee Davis' employment with ISCO, his signing of pre-hire documents, and his separation from employment.

2. I am also personally aware of the disclosure of personal identifying information (PII) that is the subject of this lawsuit filed by Mr. Davis.

3. ISCO is a Kentucky Corporation with its principal place of business in Louisville, Kentucky. ISCO is a global customized piping solutions provider. It maintains employees, manufacturing facilities and distribution sites in over 35 states.

4. ISCO hired Mr. Davis to work at its South Carolina facility on May 30, 2007. At the initiation of employment, Mr. Davis signed an Arbitration Agreement with ISCO. (Attached as Attachment 1.)

5. Mr. Davis worked for ISCO in South Carolina. His employment records were maintained at the Company's corporate office in Kentucky.

6. Mr. Davis worked for ISCO as a mechanic and a field technician. As a field technician, Mr. Davis assisted on work related calls with individuals outside of South Carolina.

7. During his employment with ISCO, Mr. Davis attended annual sales meetings and safety meetings outside of South Carolina.

8. I am aware that the data breach that is the subject of Mr. Davis' Complaint occurred on March 2, 2016. It affected 449 current and former employees throughout 35 states.

9. On March 4, 2016, ISCO sent these employees a letter providing notice of the data breach. This letter is attached as Attachment 2. ISCO provided these employees with free identity theft protection services through LifeLock.

10. On March 29, 2017, ISCO informed these employees that it had again retained LifeLock for an additional year of free identity theft monitoring. (Attached as Attachment 3.)

11. Following the data breach, the affected employees have currently been provided with two years of free identity theft protection services through LifeLock.

12. I am not aware of any identity theft actually occurring with regard to Mr. Davis.

13. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Christopher Feger

STATE OF KENTUCKY)
COUNTY OF JEFFERSON)

BEFORE ME, the undersigned authority, this day personally appeared Christopher Feger, who is known by me or has provided valid identification and says that the above statements are true and correct to the best of his knowledge, information and belief and that he has read the above affidavit and knows the contents thereof.

SWORN TO AND SUBSCRIBED BEFORE ME this 12th day of October, 2017.

Notary Public
State of Kentucky

My Commission Expires: July 15, 2021

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

AFFIDAVIT OF CHRISTOPHER FEGER

ATTACHMENT 1

ARBITRATION AGREEMENT

1. Employee Agrees to Arbitrate. In exchange for employment and/or continued employment, I ("Employee") agree that I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO INDUSTRIES, LLC, its successors, assigns, principals, agents and employees ("the Company") *exclusively* by final and binding *arbitration* before a single, neutral Arbitrator. The arbitration shall be conducted under the rules and procedures of the American Arbitration Association relating to the selection of arbitrators for the determination of issues. The arbitrator may issue written directions as to the scope and timetable for discovery, and may make a summary dismissal of any claims submitted to arbitration. The arbitrator shall be charged to render a written opinion reciting the facts and the applicable law. By way of example only, claims submitted to arbitration include, but are not limited to, claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort. I agree that I will pay half of the arbitration expenses, but no greater than an amount equal to two weeks' gross wages. Unless otherwise agreed with the Company, I agree that any arbitration will be held in the county and state of the Company's principal location, Louisville, Kentucky.

2. Arbitration brought by Employee within six months. I further agree not to commence any action or suit relating to my employment by the Company more than six (6) months after the date of cessation of such employment, and to waive any statute of limitations to the contrary.

3. Company Agrees to Arbitrate. As additional consideration to this Agreement, excluding claims to enforce restrictive covenants (non-competition, non-solicitation, confidentiality, non-pirating, e.g.) with the Employee, the Company agrees to submit any and all claims against the Employee to arbitration under the terms contained in Paragraph 1 above.

4. Miscellaneous. The Federal Arbitration Act shall govern this Agreement and the applicability/construction of any arbitration decision. The provisions of this Agreement shall be severable. If any portion of this Agreement is held to be invalid or unenforceable, it shall not be affect the remaining portions of this Agreement. This Agreement may be modified by a court or an arbitrator to render it enforceable. This Agreement represents the entire understanding of the parties with respect to its subject matter. There are no oral understandings about the subject matter of this Agreement other than contained herein. The Company may assign this Agreement. No amendment to this Agreement shall be effective unless in writing and signed by all parties. The headings in this Agreement are for convenience only, and do not govern. This Agreement does not change the at-will status of employment, and does not limit the Company's equitable remedies with regard to any restrictive covenants with the undersigned Employee.

David Davis 251-13-2134 5-30-07

EMPLOYEE SS# DATE

ISCO INDUSTRIES, LLC.

By: Beverly Earney

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

AFFIDAVIT OF CHRISTOPHER FEGER

ATTACHMENT 2

March 4, 2016

"Notice of Data Breach"

Dear Former ISCO Employee:

On March 3, 2016, ISCO Industries, Inc. ("ISCO") discovered that certain sensitive ISCO 2015 employee information was compromised as a result of a criminal act. We take the privacy and security of your personal information very seriously. This notice is intended to provide you with important information so you can take appropriate action to protect your interests.

What Happened

On March 2, 2016, an employee in our human resources department received an email from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data. A W-2 is the form that ISCO distributes to all of its employees and income taxing authorities at the end of each January. Because the email appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return email. Shortly thereafter, we realized that an outside third party had fraudulently disguised his email address as that of an ISCO senior executive, and that our employees' W-2 data had been unwittingly sent to that outside third party.

Compromised Information

The compromised information includes employee social security numbers, addresses, and 2015 compensation and tax withholding information. ISCO has no reason to believe employee credit card, banking, birthdate, telephone, driver's license, health insurance, or medical information was obtained.

As soon as ISCO discovered this security breach, it acted to notify and cooperate with the FBI, the IRS, and the Louisville Metro Police Department. ISCO learned that this criminal act is part of a larger scam attempting to file false tax returns with the hope of diverting employee tax refunds. If you have already filed your tax returns, there is a likelihood that the IRS would reject any duplicate, fraudulent return. If you have not yet filed your tax returns, we recommend completing the attached IRS Form 14039 Identity Theft Affidavit and faxing it to the IRS (fax instructions are included on the form).

Identity Protection Services

ISCO has retained LifeLock, Inc. ([illegible]) to provide identity theft protection services for each individual affected free of charge. Lifelock will provide individual email or text notifications if it detects someone is trying to open a fraudulent credit card or borrow money in your name. We have purchased a 12-month membership for all U.S. employees. Information on how to set up an individual account is attached to this notice.

Fraud Prevention Tips

ISCO wants to make you aware of steps you may take to guard against identity theft or fraud.

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you

should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected identity theft to proper law enforcement authorities, your state attorney general, the Internal Revenue Service, and the Federal Trade Commission. To file a complaint with the FTC, go to [illegible] or call 1-877-ID-THEFT (877-438-4338).

You should also notify you accountant or tax preparation agency (H&R Block, Jackson Hewitt, etc.) of this security breach and ask them about ways to prevent fraudulent submission of information to the IRS and state and local governments. The IRS has internal security measures in place, so refund wiring instructions which do not include your address or the address of your financial institution, or contain an address which differs from the one on your W-2 form may cause the IRS to send you clarifying correspondence before processing a refund. Please pay attention to any correspondence from the IRS and respond promptly to any inquiry.

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting [illegible], calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at [illegible]. Or you can elect to purchase a copy of your credit report by contacting one of the free national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111/Fraud Division: (800) 525-6285
[illegible]
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742/Fraud Division: (888) 397-3742
[illegible]
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 916-8800/Fraud Division: (800) 680-7289
[illegible]
P.O. Box 6790
Fullerton, CA 92834

You may want to consider placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at [illegible].

In some U.S. states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from

March 4, 2016

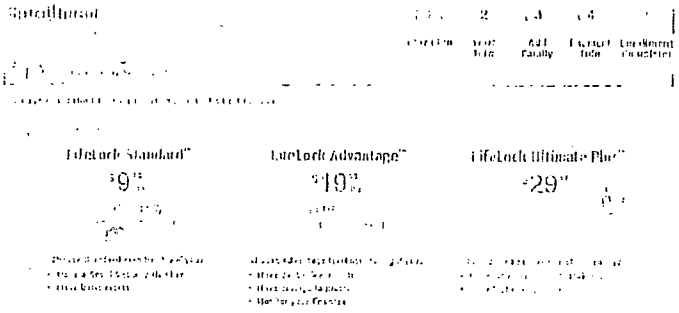
Notice of Data Breach

LifeLock Enrollment

ISCO Industries has initiated a LifeLock account for your use. You can either call (800)899-0180, or go to [illegible] to get enrolled. You will have until April 16th, 2016 to enroll into the ISCO LifeLock account before this code expires.

You will need both a promo code and membership ID to get enrolled.
The promo code is [illegible]
Your membership ID should be your [illegible] Example: [illegible]

Enroll online at [illegible] website.
Select the **Start Your Membership** button.
On the next screen, enter the promo code [illegible] in the bottom left corner. Then select apply.
(NOTE: There is no need on this screen to select a particular LifeLock service. Just enter ISCO16 and select apply)



A new box requesting your membership ID will appear. (Again this is your [illegible])
Select the red button titled **Start your Membership**.
You will then be asked to enter your personal information.
Next select the enroll button.
You will then receive a welcome email with a login and password to be able to access your account online.

If you choose to enroll by phone, agents will be available 24 hours a day, 7 days a week.

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

ISCO

March 29, 2017

Dear Former ISCO Employee,

As a follow up to ISCO Industries, Inc. ("ISCO") Data Breach Notification letter sent to you last year in March 2016, ISCO wanted to inform you that we have once again retained LifeLock (www.lifelock.com) to provide identity theft protection services for one more year. Upon opting-into the service, ISCO will purchase another 12-month membership, free of charge for you. Information on how to opt-into an individual account is attached to this notice.

As a reminder, LifeLock is an agency that will provide individual email or text notifications if it detects someone trying to open a fraudulent credit card or borrow money in your name. LifeLock will not detect if you have been a victim of fraudulent tax filings. However, they do provide restoration services for anybody affected. To find out if you are a victim of a fraudulent tax filing, we recommend that you follow these steps:

1. Contact the IRS (1-800-908-4490) AND your State Revenue Office (numbers vary by state).
2. If you were a victim, call your local police department and ask to file an identity theft report. Obtain a copy of the report.
3. The IRS will then likely ask you to complete and file IRS Form 14039 (Identity Theft Affidavit), provide a case number from your police report, and file your taxes by paper.
4. Request a Personal Identification Number (PIN) from the IRS, which will likely be sent by mail.
5. Keep that PIN on file. You should be able to file your taxes electronically next year with that IRS issued PIN. It is likely the PIN will change every year, so keep watch for future mailings.
6. If needed, you can call LifeLock's Restoration Services at 1-800-607-9174 for assistance. You will be assigned a representative that will help get your case resolved as soon as possible with the IRS.

Questions About This Notice

For further information or assistance, please contact ISCO at 800-345-4726 or email us at: HR@isco-pipe.com between the hours of 8:00am and 5:00pm Eastern, Monday through Friday.

Sincerely,

Troy M. Landoch
Chief Human Resources Officer
ISCO Industries, Inc.

LIFELOCK® ENROLLMENT FORM

ISCO has retained LIfeLock® to provide one (1) year of complimentary identity theft protection for another year.

To get protection immediately at no cost to you:

1. Call 1-800-543-3562 to continue service for another year.
2. Use the promotion code: **ISCO2017** when prompted as well as your Member ID.
3. Your Member ID is your first name last name plus 5-digit zip code.
4. Ex. JOHNNORTON12345

LifeLock's specialized team of telephone representatives is available 24 hours a day, seven days a week to help you enroll in LifeLock after the recent data breach.

You will have until May 20th, 2017 to enroll in this service. If you fail to do so then your account will be cancelled June 1st.

Once you have completed the LifeLock enrollment process, the services will be in effect immediately. Your LifeLock Standard™ membership includes:

- ✓ LifeLock Identity Alert® System†
- ✓ LifeLock Privacy Monitor
- ✓ Live, U.S.-based Member Service Support
- ✓ Identity Restoration Support
- ✓ Priority Live Member Service Support
- ✓ Dollar for Dollar Stolen Funds Reimbursement up to $25,000 for LifeLock Standard™‡

LifeLock backs up its services with its $1 Million Service Guarantee‡.

No one can prevent all identity theft.
† LifeLock does not monitor all transactions at all businesses.
‡ Stolen Funds Reimbursement benefits and Service Guarantee benefits for State of New York members are provided under a Master Insurance Policy underwritten by State National Insurance Company. Benefits for all other members are provided under a Master Insurance Policy underwritten by United Specialty Insurance Company. Under the Stolen Funds Reimbursement, LifeLock will reimburse stolen funds up to $25,000 for Standard membership, up to $100,000 for Advantage membership and up to $1 million for Ultimate Plus membership. Under the Service Guarantee LifeLock will spend up to $1 million to hire experts to help your recovery. Please see the policy for terms, conditions and exclusions at LifeLock.com/legal.

Daniel Lee Davis, et al., v. ISCO Industries, Inc.
C.A. No. 2017-CP-4203283

DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

EXHIBIT 3

(Arbitration Agreement signed by Plaintiff on May 30, 2007)

ARBITRATION AGREEMENT

1. Employee Agrees to Arbitrate. In exchange for employment and/or continued employment, I ("Employee") agree that I will settle any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO INDUSTRIES, LLC, its successors, assigns, principals, agents and employees ("the Company") *exclusively* by final and binding *arbitration* before a single, neutral Arbitrator. The arbitration shall be conducted under the rules and procedures of the American Arbitration Association relating to the selection of arbitrators for the determination of issues. The arbitrator may issue written directions as to the scope and timetable for discovery, and may make a summary dismissal of any claims submitted to arbitration. The arbitrator shall be charged to render a written opinion reciting the facts and the applicable law. By way of example only, claims submitted to arbitration include, but are not limited to, claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort. I agree that I will pay half of the arbitration expenses, but no greater than an amount equal to two weeks' gross wages. Unless otherwise agreed with the Company, I agree that any arbitration will be held in the county and state of the Company's principal location, Louisville, Kentucky.

2. Arbitration brought by Employee within six months. I further agree not to commence any action or suit relating to my employment by the Company more than six (6) months after the date of cessation of such employment, and to waive any statute of limitations to the contrary.

3. Company Agrees to Arbitrate. As additional consideration to this Agreement, excluding claims to enforce restrictive covenants (non-competition, non-solicitation, confidentiality, non-pirating, e.g.) with the Employee, the Company agrees to submit any and all claims against the Employee to arbitration under the terms contained in Paragraph 1 above.

4. Miscellaneous. The Federal Arbitration Act shall govern this Agreement and the applicability/construction of any arbitration decision. The provisions of this Agreement shall be severable. If any portion of this Agreement is held to be invalid or unenforceable, it shall not be affect the remaining portions of this Agreement. This Agreement may be modified by a court or an arbitrator to render it enforceable. This Agreement represents the entire understanding of the parties with respect to its subject matter. There are no oral understandings about the subject matter of this Agreement other than contained herein. The Company may assign this Agreement. No amendment to this Agreement shall be effective unless in writing and signed by all parties. The headings in this Agreement are for convenience only, and do not govern. This Agreement does not change the at-will status of employment, and does not limit the Company's equitable remedies with regard to any restrictive covenants with the undersigned Employee.

Daniel Davis 251-13-2134 5-30-07

EMPLOYEE SS# DATE

ISCO INDUSTRIES, LLC.

By: Beverly Earney

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
Daniel Lee Davis, individually and on behalf of all those similarly situated, Plaintiff, v. ISCO Industries, Defendant.	C.A. No. 2017-CP-42-03283 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS**

Plaintiff Daniel Lee Davis (hereinafter "Plaintiff" or "Mr. Davis"), individually and on behalf of all those similarly situated, respectfully submits this Response in Opposition to the Motion to Compel Arbitration and the Motion to Dismiss filed by Defendant ISCO Industries, Inc. (hereinafter, "Defendant" or "ISCO"). For the reasons discussed herein, the Court should deny Defendant's Motions.

I. Factual Background

The facts of this case are relatively straightforward. Mr. Davis worked for Defendant as a mechanic and fusion technician from March 2007 until he departed the company in March 2015. (Am. Compl. at ¶¶ 9, 11). When he was hired by Defendant, he was required to provide them with personal identifying information (hereinafter "PII"), including, but not limited to, his Social Security number. (*Id.* at ¶ 10).

In March 2016, Defendant's employees gave PII regarding Mr. Davis and others to identity thieves. (*Id.* at ¶¶ 13–17). An unauthorized third party, posing as an ISCO senior executive, sent an email to Defendant's human resources department requesting ISCO's 2015 IRS Form W-2 data. (*Id.* ¶ 13). An ISCO employee gathered the requested data and transmitted

the information to the hacker by email. (*Id.* ¶ 14). The compromised information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. (*Id.* ¶ 15, 17). Although Defendant purchased some passive coverage for the harmed consumers, the coverage was temporary and it did not stop the identity thieves from attempting to take out loans, successfully obtaining credit cards for Mr. Davis and others, and causing other damages. (*Id.* at ¶¶ 21–28). For example, about five months after the ISCO data breach, a third party actually opened a fraudulent credit card in Mr. Davis's name and Mr. Davis filed an incident report with the Spartanburg County Sheriff's Department. (*Id.* at ¶¶ 26–27). Additionally, Mr. Davis has incurred out-of-pocket expenses, such as purchasing additional credit monitoring protection, and has spent countless hours responding to attempts to steal his identity and attempting to protect his credit. (*Id.* ¶¶ 28–29).

Mr. Davis brought the putative class action at issue on behalf of himself and others impacted by Defendant's negligence, gross negligence, and recklessness. (*Id.* at ¶¶ 30–40). Defendant now seeks to compel enforcement of an arbitration agreement not applicable to this matter and to dismiss the case. As discussed more thoroughly below, both motions should be denied.

II. Defendant's Motion to Compel Arbitration is Meritless

A. Standard of Review

It may be true that, in some cases, both state and federal policy favor arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001). However, regardless of the law applicable to a case, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118; *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144,

149, 644 S.E.2d 705, 708 (2007). Courts hold that even the most broadly-worded arbitration agreements apply only to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001), *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010)).

Furthermore, "[w]hen the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter—which, in the labor context, will always be against the employer and in favor of the employee." *Weckesser v. Knight Enterprises S.E., LLC*, 228 F. Supp. 3d 561, 565 (D.S.C. 2017) (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006)). "While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement." *Id.*

B. There is no Valid Arbitration Agreement for the Claim at Issue

As an initial matter, there is no valid arbitration agreement applicable to this case.

First, the claim alleged here is not within the ambit of arbitration. The Arbitration Agreement here states that it governs claims "arising out of or relating to . . . employment[.]" (*See* Arbitration Agreement, previously attached to Defendant's Motion as Exhibit 3). The gravamen of the claim at issue is that Defendant recklessly, and with gross negligence, gave identify thieves the PII of Mr. Davis and several others. (*See* Am. Compl. at ¶ 16). Although Defendant collected Plaintiff's PII upon employment, and thus had a duty to protect it as the information's custodian, it is a stretch to say that Defendant wrongfully handing over personal information "arises out of or relates to" Plaintiff's employment.

In *Smith v. Captain D's, LLC*, 963 So. 2d 1116 (Miss. 2007), the Supreme Court of Mississippi denied arbitration using similar reasoning. In that case, an employee sued her

employer for negligently hiring a manager who subsequently assaulted her. *Id.* at 1118. The court rejected the employer's argument that the claim at issue fell within the parties' arbitration agreement for claims "arising out of or relating to" the plaintiff's employment.

The Supreme Court of Mississippi recently reaffirmed and expounded on the logic behind this holding. In *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052, 1056 (Miss. 2017), *reh'g denied* (Aug. 10, 2017), a tenant sued her landlord for negligent security practices after she was assaulted at her apartment complex. The court rejected the landlord's argument that the claim at issue fell within the parties' arbitration agreement:

> Notably, Jane's complaint does not allege lease-based or contract-based claims. In other words, Jane does not suggest her claims "arise out of" her "occupancy and leasing of [her apartment]." Rather, she seeks recovery based on her status as an invitee of the apartment complex and the common-law duties Hallmark and SEI owed to lessees and non-lessees alike.

Id. at 1056. Thus, while Jane Doe may have been in the position to be attacked as a result of signing a lease with her landlord, the allegations against the landlord stemmed from the landlord's failure to protect those on their property. Here, while Mr. Davis may have been in the position to have his information stolen as a result of giving that information to his employer, the allegations stem from the duty Defendant would owe to anyone for whom it possesses PII as the result of specific requests for collection. Additionally, like the situation in *Hallmark Partners,* Mr. Davis does not suggest the claims arise out of employment. Instead, the Complaint here specifically notes that the "claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause." (Am. Compl. at ¶ 12).[1]

[1] At a minimum, Defendant's expansive reading of its arbitration agreement, along with the provisions limiting the statute of limitations, renders it unconscionable. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 29, 644 S.E.2d 663, 671 (2007) (noting that "oppressive and one-sided" arbitration clauses are unconscionable).

Second, the Arbitration Agreement is unenforceable because it is unconscionable. The Arbitration Agreement specifically shortens the statute of limitations window to six months after employment. This is in direct contravention to South Carolina law, which prohibits contractual shortening of statutes of limitation. *See* S.C. Code Ann. § 15–3–140. This is substantively oppressive and thus unconscionable. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Defendant appears to concede the unconscionability of this language, but wrongly claims that this language may be severed. The cases cited by the Defendant deal with language that is "separate and distinct" from the agreement to arbitrate. Here, the offending provision is part and parcel of the actual Arbitration Agreement and not a distinct contractual provision. Thus, the language should invalidate the entire Arbitration Agreement.

This result is supported by the applicable law:

> [L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C.Code Ann. § 36–2–302(1) (2003).
>
> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Simpson, 373 S.C. at 34, 644 S.E.2d at 673–74. Here, Defendant chose to include its offending provision within the agreement to arbitrate rather than include it in within an employment contract. And in that agreement to arbitrate, Defendant chose to completely disregard express

South Carolina law. *Id.* (refusing to apply severability where offending provision contravened consumer protection law). Moreover, adopting Defendant's severability argument would have the impact of rewriting the applicable arbitration provision at issue. Instead, the Court should hold that the Arbitration Agreement is inapplicable to this case.

C. There is No Relationship Between the Arbitration Agreement and the Claim

Even if the Arbitration Agreement were otherwise valid, there is no "significant relationship" between the asserted claims and the Arbitration Agreement. *See Zabinski,* S.C. 580 at 596, 553 S.E.2d at 118; (*see also* Am. Compl. at ¶ 12 (alleging the "claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause").

The South Carolina Supreme Court has specifically held that identity theft is an outrageous act that bears little relationship with an arbitration agreement. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149–50, 644 S.E.2d 705, 708 (2007). In *Aiken*, in order to apply for a loan, a plaintiff was required to provide PII to a lender. *Id.* at 147, 644 S.E.2d at 706. In exchange for the loan, the plaintiff entered into an arbitration agreement covering any claims related to the loan. *Id.* Various employees of the lender used the plaintiff's personal information, and the plaintiff brought a complaint in South Carolina court against the lender. *Id.* The South Carolina Supreme Court rejected the argument that the arbitration clause had a substantial relationship with plaintiff's identity theft:

> In this case, we find the theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken's claims for unanticipated and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance.

Id. at 151, 644 S.E.2d at 709. Similarly, here, neither Mr. Davis nor any current or former employee of Defendant could have foreseen that Defendant's employees would give away their information to identity thieves. Certainly, such action could not have been anticipated as stemming from the employer/employee relationship. Thus, the motion to compel arbitration should be denied as to "interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with" the goal of arbitration. *Id.* at 144, 152, 644 S.E.2d at 710.

III. Defendant's Motion to Dismiss Should be Denied

A. Standard of Review

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). "'A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.' 'The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.'" *Patterson v. Witter*, 418 S.C. 66, 74, 791 S.E.2d 294, 300 (Ct. App. 2016) (citations omitted) (quoting *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003); *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011)). When a case raises a novel question of law, dismissal under SCRCP 12(b)(6) is improper. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015) (reversing dismissal of a negligence claim that raised the novel issue of "stigma damages").

B. Plaintiff Has Standing

Defendant focuses most of its Motion to Dismiss on the issue of standing. Citing to *Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001), Defendant argues Plaintiff has not alleged an "injury in fact," a causal connection, or an injury that could be redressed by a favorable decision. (Def.'s Mot. to Dismiss 3–4). Plaintiff respectfully submits that this Court should reject Defendant's argument and find that Plaintiff has standing to assert a claim for negligence arising out of Defendant's release of PII.

In *Sea Pines*, the South Carolina Supreme Court considered whether a wildlife organization had standing to challenge permits issued by the Department of Natural Resources. *See Sea Pines*, 345 S.C. at 599–600, 550 S.E.2d at 290–91. The Court explained that "[t]o have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Id.* at 600, 550 S.E.2d at 291 (citing *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)). "'A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.'" *Id.* (quoting *Charleston Cty. Sch. Dist.*, 336 S.C. at 181, 519 S.E.2d at 571). Generally, a private person does not have standing to challenge governmental action unless that person "has sustained or is in immediate danger of sustaining, prejudice from an executive or legislative action." *Id.* (citing *Baird v. Charleston Cty.*, 333 S.C. 519, 511 S.E.2d 69 (1999)).

Here, in contrast to *Sea Pines* and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Plaintiff is not an organization challenging government action. Instead, Plaintiff is an individual seeking to bring a negligence claim on his own behalf and on behalf of others affected against ISCO, a corporate entity. Plaintiff alleges that he and others were aggrieved by Defendant's release of their PII to unauthorized third party and that Defendant owed a duty to directly to him

and others. (*See* Am. Compl. ¶¶ 21–29, 42–46). Thus, Plaintiff and the proposed class members have "a real, material, [and] substantial interest in the subject matter of the action."

Defendant relies on the Fourth Circuit's decision in *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017), for the propositions that: (1) "failed attempts at identity theft and in increased risk of identity theft do not constitute an 'injury in fact'"; and (2) allegations that Plaintiff purchased credit monitoring and himself spent time monitoring his credit are not sufficient to seek damages. (Def.'s Mot. to Dismiss 4). For one, *Beck* is not controlling authority. Additionally, the facts of this case are distinguishable. In *Beck*, the plaintiffs were veterans who received medical treatment at a Veterans Affairs facility and whose personal information was put at risk in two separate breaches. *Beck*, 848 F.3d at 266. The first breach case involved a missing laptop, which was presumed to have been stolen, containing, among other data, "unencrypted personal information of approximately 7,400 patients, including names, birth dates, the last four digits of social security numbers, and physical descriptors." *Id.* at 267. The second breach case involved missing boxes of pathology reports containing "identifying information of over 2,000 patients, including names, social security numbers, and medical diagnoses." *Id.* at 268. The district court dismissed the first case at the summary judgment stage and dismissed the second case on the pleadings. *Id.* at 270. The plaintiffs in both cases alleged harm based on a threat of future identity theft and misuse of their personal information—they sought to establish Article III standing based solely "on the harm from the increased risk of future identity theft and the cost of measures to protect against it." *Id.* at 266–68. Importantly, none of the plaintiffs alleged actual or attempted misuse of their personal information, and it was unclear in both instances whether the patients' personal information had been specifically targeted. *See id.* at 266–69.

Defendant also relies on *Reilly v. Ceridian*, 664 F.3d 38 (3d Cir. 2011), and *Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524 (D. Md. 2016), in support of its argument that Plaintiff lacks standing. In *Reilly*, the plaintiffs alleged "hypothetical, future injury," and did not allege any actual misuse or attempted misuse. *Id.* at 41–42. Additionally, although a hacker infiltrated the defendant's system and "potentially gained access to personal and financial information," it was not "known whether the hacker read, copied, or understood the data." *Id.* at 40. In *Khan*, the plaintiff's personal information may have been compromised when hackers accessed information contained in the defendant's email accounts, but she did not allege that anyone affected by the data breach had learned of any misuse of their information. *Khan*, 188 F. Supp. 3d at 527. The district court concluded that the plaintiff's allegation that the data breach placed her at an increased risk of future identity theft was insufficient, without more, to give her Article III standing, reasoning that "in the data breach context, plaintiffs have properly alleged an injury in fact arising from increased risk of identity theft if they put forth facts that provide either (1) actual examples of the use of the fruits of the data breach for identity theft, even if involving other victims; or (2) a clear indication that the data breach was for the purpose of using the plaintiffs' personal data to engage in identity fraud." *Id.* at 529–32. The court in *Khan* also noted that, unlike in other cases, the circumstances of the breach did not "clearly indicate that the hackers' purpose was to use patients' personal data to engage in identity fraud." *Id.* at 532.

This case is distinguishable from the facts of *Beck*, *Reilly*, and *Khan* because Plaintiff has specifically alleged that his personal information has *already been misused.* For example, the Amended Complaint alleges "almost immediately after the Data Breach, cybercriminals began to exploit the employees' PII by engaging in identity theft." (Am. Compl. ¶ 21). Additionally, just a few months after the data breach, "Plaintiff began receiving notices from LifeLock that

someone was attempting to take out loans and open credit cards in his name," and one of those attempts was successful—an unauthorized third party actually opened a Citibank credit card in Plaintiff's name. (*Id.* ¶¶ 25–26). Rather than merely alleging that the ISCO data breach exposed him to potential identity theft and misuse in future like the plaintiffs in the *Beck* cases, Plaintiff's allegations go beyond so-called "speculation" and allege actual misuse and identity theft attempts.

The ISCO data breach is also distinguishable from the cases cited by Defendant because the thieves in this case specifically targeted and obtained the PII through a "phishing" attack.[2] (*See* Am. Compl. ¶¶ 13–17). In *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016), the Sixth Circuit recognized that "[t]here is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned criminals. . . . Where a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for the fraudulent purposes alleged in Plaintiffs' complaints." *Id.* at 388. After all, why else would the hackers have targeted that data in the first place? *Cf. Sackin v. TransPerfect Global, Inc.*, _ F. Supp.3d _, 2017 WL 4444624, at *2 (S.D.N.Y. Oct. 4, 2017) ("The allegations that Defendant has provided Plaintiffs' names, addresses, dates of birth, Social Security numbers and bank account information directly to cyber-criminals creates a risk of identity theft sufficiently acute so as to fall comfortably into the category of 'certainly impending.' The most likely and obvious motivation for the hacking is to use Plaintiffs' PII nefariously or sell it to someone who would.").

Defendant seems to recognize as much, given the fact that, after the breach, it offered to provide credit monitoring services to those affected. (Am. Compl. ¶ 19). Similar to the

[2] "Electronic solicitation of personally identifying information by deceptive means is informally known as 'phishing.'" *Hoffman v. One Techs., LLC*, 2017 WL 176222, at *2 (W.D. Wash. Jan. 17, 2017) (citing *Gragg v. Orange Cab Co., Inc.*, 145 F. Supp. 3d 1046, 1051 n.2 (W.D. Wash. 2015)).

Plaintiffs in *Galaria*, in this case, Plaintiff alleges the risk of harm is continuing and he has incurred costs and efforts to obtain protection beyond what ISCO covered. (*See id.* ¶¶ 20, 29, 46). This is sufficient to provide Plaintiff with standing. *Cf. Galaria*, 663 F. App'x at 389 ("This is not a case where Plaintiffs seek to 'manufacture standing by incurring costs in anticipation of non-imminent harm.' Rather, these costs are a concrete injury suffered to mitigate an imminent harm, and satisfy the injury requirement of Article III standing." (citation omitted)); *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015) ("Here, the complaint alleges that everyone's personal data has already been stolen; it alleges that the 9,200 who already have incurred fraudulent charges have experienced harm. Those victims have suffered the aggravation and loss of value of the time needed to set things straight, to reset payment associations after credit card numbers are changed, and to pursue relief for unauthorized charges."); *In re SuperValu, Inc.*, 870 F.3d 763, 773 (8th Cir. 2017) (concluding that the plaintiff's "allegations of misuse of his Card Information were sufficient to demonstrate that he had standing").

Additionally, whether or not Defendant complied with S.C. Code Ann. § 39-1-90 in providing notice to those affected by its release of PII is irrelevant to the question of whether Plaintiff and others were injured as a result of the breach itself. That statute provides:

> A person conducting business in this State, and owning or licensing computerized data or other data that includes personal identifying information, shall disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of this State whose personal identifying information that as not rendered unusable through encryption, redaction, or other methods was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (C), or with measures necessary to

> determine the scope of the breach and restore the reasonable integrity of the data system.

S.C. Code Ann. § 39-1-90(A). Although the statute creates an affirmative legal duty to disclose a data breach "without unreasonable delay," there is nothing in the statute that immunizes a party responsible for a breach from liability simply because that party provided notice. *See id.* § 39-1-90(A)–(K). Instead, the statute provides a civil cause of action to anyone "who is injured by a violation of this section, *in addition to and cumulative of all other rights and remedies available at law*." *Id.* § 39-1-90(G). The General Assembly therefore recognized that a person affected by a data breach could have rights and remedies in addition to those provided in Section 39-1-90—i.e., a common law cause of action for negligent, grossly negligent, and/or reckless disclosure.

Defendant's argument that it is impossible to draw a connection between its data breach and Plaintiff's injury is likewise disingenuous. Plaintiff alleged that, almost immediately after the ISCO breach, cybercriminals began to exploit the stolen PII by engaging in identity theft. (Am. Compl. ¶ 21). And, the fact that someone opened an unauthorized credit card account in Plaintiff's name soon after the breach (*see id.* ¶¶ 25–26), raises the inference that the account was opened using information obtained from the ISCO breach. *Cf. Castillo v. Seagate Tech., LLC*, 2016 WL 9280242, at *4 (N.D. Cal. Sept. 14, 2016) ("After learning about the phishing attack, each named plaintiff discovered that tax returns had been filed using his or her personal identifying information. This raises the reasonable inference the person who filed the fraudulent return obtained plaintiffs' personal identifying information from the Seagate phisher—information obtained allegedly due to Seagate's lax security measures."). Additionally, the ISCO data breach occurred on March 2, 2016, and the Equifax data breach cited by Defendant occurred much later, from about Mid-May to July 2017. *See* Weise, Elizabeth, "A timeline of events surrounding the Equifax data breach," *USA Today* (published Sept. 26, 2017), *available at*

www.usatoday.com/story/tech/2017/09/26/timeline-events-surrounding-equifax-data-breach/703691001/. In any event, at this stage of the litigation, Plaintiff has alleged a causal connection between the ISCO breach and the misuse of his and others' PII, and that is sufficient. *See, e.g., Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 696 (7th Cir. 2015) (rejecting Neiman Marcus's argument that the plaintiffs "cannot show that their injuries are traceable to the data incursion at the company rather than to one of several other large-scale breaches that took place around the same time" and explaining that "[t]he fact that Target or some other store *might* have caused the plaintiffs' private information to be exposed does nothing to negate the plaintiffs' standing to sue").

Defendant's final argument with respect to standing is that Plaintiff's injuries cannot be redressed by a favorable decision because "[t]he PII was stolen and will still be in the possession of the criminals who took it," such that "[t]he risk of identity theft will not change." (Def.'s Mot. to Dismiss 4). This argument should also be rejected because, as explained above, Plaintiff's alleged harm in this case is not based solely on a future risk of identity theft. Plaintiff has already spent time and money responding to and dealing with actual attempts to misuse his PII. In any event, where, as here, "a future harm is sufficiently imminent to support standing, a plaintiff's expenses in taking reasonable measures to prevent the harm's fruition also may be viewed as an injury in fact." *Sackin v. TransPerfect Global, Inc.*, _ F. Supp. 3d _, 2017 WL 4444624, at *3 (S.D.N.Y. Oct. 4, 2017).

C. Plaintiff Has Sufficiently Alleged a Claim for Negligence; Defendant Owed a Duty of Care to Protect Personal Identifying Information in Their Possession

Under South Carolina law, a plaintiff asserting negligence must plead four elements: duty, breach, proximate cause, and damages. *Chestnut v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015); *see also Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747

S.E.2d 468, 481 (2013) ("To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages."). Here, although Plaintiff has alleged each of the four elements of a negligence claim, Defendant argues it did not owe Plaintiff or the proposed class members a duty of care with respect to their PII that it collected and had custody of.

"An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006). "Duty is generally defined as 'the obligation to conform to a particular standard of conduct toward another.' Duty arises from the relationship between the alleged tortfeasor and the injured party." *Higgins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003) (citations omitted) (quoting *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (2000)) (citing *S.C. Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986)). This Court should recognize that ISCO owed its formers and current employees a duty of care with respect to the PII in ISCO's custody which ISCO specifically requested. Although neither the South Carolina Court of Appeals nor the South Carolina Supreme Court has directly recognized a negligence claim based on a criminal data breach, in *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003), the South Carolina Supreme Court did state, "We are greatly concerned about the rampant growth of identity theft and financial fraud in this country." *Id.* at 334, 585 S.E.2d at 277.[3] In *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007), the Supreme Court also recognized that the

[3] In *Huggins*, the South Carolina Supreme Court agreed to answer a certified question from the U.S. District Court for the District of South Carolina: "Does South Carolina recognize the tort of negligent enablement of imposter fraud and, if so, what are the elements of the tort and does plaintiff's complaint state an actionable claim for the tort?" *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). The Court concluded "there is no duty on the part of credit card issuers to protect potential victims of identity theft," finding that "[t]he relationship, if any, between credit card issuers and potential victims of identity theft is far too attenuated to rise to the level of a duty between them." *Id.* at 334, 585 S.E.2d at 277 (noting that the case involved "simply" a creditor debtor relationship).

theft of personal information was outrageous, tortious conduct, which is consistent with recognizing a duty on the part of a custodian of such information to reasonably protect it from unauthorized release. *See id.* at 150, 644 S.E.2d at 709. Additionally, Section 39-1-90 recognizes that persons affected by the release of their PII may have additional rights any remedies available at law. S.C. Code Ann. § 39-1-90(G). Finally, Defendant's former and current employees and society in general expect that the custodians of PII—especially employers who collect that information as a condition of employment—will protect and safeguard that information against unauthorized release.

Recently, the Southern District of New York denied an employer's motion to dismiss employees' negligence claim arising out of a data breach nearly identical to the one in this case. In *Sackin v. TransPerfect Global, Inc.*, _ F. Supp. 3d _, 2017 WL 4444624 (S.D.N.Y. Oct. 4, 2017), cybercriminals sent a "phishing" email to TransPerfect employees requesting W-2 forms and payroll information for all current and former employees. *Id.* at *1. "Because TransPerfect's cyber-security was not up to industry par, at least one TransPerfect employee sent the information to the hackers in an unencrypted format. As a result, cyber-criminals obtained Plaintiffs' names, addresses, dates of birth, Social Security numbers, direct deposit bank account numbers, and routing numbers." *Id.* On Defendant's Motion to Dismiss, the district court recognized that "[t]he Complaint alleges a cognizable legal duty—that Defendants had a duty to safeguard Plaintiffs' and class members' PII." *Id.* at *4. The district court explained:

> [E]mployers have a duty to take reasonable precautions to protect the PII that they require from employees. Employees ordinarily have no means to protect that information in the hands of the employer, nor is withholding their PII a realistic option. The employer is 'best positioned to avoid the harm in question . . . .' Employees—much more than employers—suffer the harmful consequences of a data breach of the employer. Potential liability in the absence of reasonable care provides employers with an economic incentive to act reasonably in protecting employee PII from the threat of cyberattack.

Id. (ellipsis in original) (citations omitted); *see also Castillo v. Seagate Tech., LLC*, 2016 WL 9280242, at *3 (N.D. Cal. Sept. 14, 2016) ("Seagate does not challenge the employee and former-employee plaintiffs' contentions that it owed them a duty to protect their personal identifying information, perhaps because there is no good reason to conclude otherwise. As a condition of employment, employees disclosed the sort of information reasonable people guard closely. They did so with the understanding their employer would guard that information and use it for limited purposes.").

Similarly, in this case, Plaintiff has stated a claim for negligence based on Defendant's breach of its "duty to take reasonable precautions" to safeguard the PII that it required its employees to provide at the outset of their employment. Defendant, not Plaintiff, was in the best position to protect that information and thereby avoid the harm in question. To the extent Defendant failed to exercise reasonable care, Defendant may be liable for negligence.

D. Plaintiff Has Adequately Pleaded a Claim for Punitive Damages

This Court should reject Defendant's argument that Plaintiff has not stated a claim for punitive damages. The Amended Complaint, "construed in the light most favorable to the plaintiff and with every doubt resolved in his behalf," *Patterson v. Witter*, 418 S.C. 66, 74, 791 S.E.2d 294, 300 (Ct. App. 2016), pleads conduct on the part of Defendant that is reckless, willful, and wanton, which, if proven would support an award of punitive damages. *See, e.g.*, *Marcum v. Bowden*, 372 S.C. 452, 458 n.5, 643 S.E.2d 85, 88 n.5 (2007) ("[T]he terms 'willful' and 'wanton' when plead in a negligence case are synonymous with 'reckless,' and import a greater degree of culpability than mere negligence. Evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages." (citation omitted)).

IV. Conclusion

Based upon the foregoing, this Court should deny both Defendant's Motion to Compel Arbitration and Defendant's Motion to Dismiss in this case.

Respectfully submitted,

s/ Marghretta H. Shisko

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February 21, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
	)	OF THE SEVENTH
COUNTY OF SPARTANBURG	)	JUDICIAL CIRCUIT
	)	
	)	
	)	
DANIEL LEE DAVIS,	)	
	)	
Plaintiff,	)	TRANSCRIPT OF RECORD
	)	2017-CP-42-03283
vs.	)	
	)	
ISCO INDUSTRIES, INC.,	)	
	)	
Defendant.	)	
	)	

February 23, 2018
Columbia, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S

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I N D E X

EXHIBITS

	MARKED	ENTERED

NO EXHIBITS PROFFERED

DANIEL LEE DAVIS VERSUS ISCO INDUSTRIES, INC.

THE COURT: Okay. We're to Daniel Lee Davis versus ISCO or ISCO. How do you pronounce that?

MR. LEHRER: It's I-S-C-O.

THE COURT: I-S-C-O, Okay. Yes, sir.

MR. LEHRER: All right. Your Honor, Jeff Lehrer from Ford Harrison representing the defendant, ISCO. ISCO is a piping solution provider. They provide piping on a national basis and for -- the interest I had was that I found out they do a lot of golf course irrigation piping, so that was, that was kind of neat, but they do all kinds of things.

This case is related to an underlying cyber crime. You know, we're now in the age of cyber crimes. A full background, there were 174 million related cyber crime incidents in the world last year, so this is, this is something that's ongoing.

I suspect that most of the people in this room have had their personal identifying information stolen. I know I have. I was part of that Equifax theft last year. And, you know, when we're talking about personal identifying information, which is what this case really is about, I mean, we're talking about name, address, Social Security number, date of birth, that type of thing.

So in this case, Your Honor, Mr. Davis was hired back in 2007. He signed an arbitration agreement at this time. We have two motions before you. One is to compel arbitration. The other is kind of an alternative motion to dismiss for failure to state a claim.

And I'd like to address the arbitration first and then, you know, it would before the alternative Motion to Dismiss which is obviously not -- would be mooted by the granting of the arbitration.

So Mr. Davis was hired in '07. In 2016, March of 2016, we had a cyber incident at ISCO. Basically what happened was there was an e-mail sent to the HR lady that had the name of a senior executive. The e-mail looked like his e-mail. It said send me W-2 information of all these people. It was like -- it was something like 400-some-odd people.

Well, she didn't realize it was a cyber criminal who had changed just a small part of the e-mail and she responded. She thought it was an officer telling her what to do, so she responded. Okay, so we had a breach. That information went out and it included personal identifying information that was basically W-2 type information.

I'll tell you that I've seen a lot of these issues and we've helped clients with this. I think that

ISCO has probably done the best job I've ever seen on handling this. Within two days they had letters out to every employee who was effected. They told them they were effected. And they told them the steps they could do to take to protect their information.

They also immediately paid for LifeLock protection to, to help them gain protection from any identity theft. And so this is monitoring. This is insurance. In fact, LifeLock gives with this protection they have $25,000 reimbursement if your identity is stolen. They'll come in and they'll take care of it.

So it was probably one of the quickest responses I've seen. So that, that protection was initially for one year. And then they decided to extend it for another year. That, that protection was still ongoing. It will run at least through the end of March of this year.

And so, all that protection was free of charge to the employees and Mr. Davis received that. Mr. Davis's claims in this case was that he was damaged because he had to deal with issues. I mean, he had alerts from LifeLock. Hey, somebody's trying to get your information. He had to, he had to spend time on it.

And then he also alleges that there were attempts to steal. It doesn't allege that someone actually got

his identity and caused him harm. He hasn't submitted any claim to LifeLock that he was damaged and sought reimbursement for that. But he's claiming that it was this threat, this ongoing threat, that his information was out there now and he's subject to future, you know, attempts on identity theft.

So as it relates to the arbitration agreement -- and I will go through everything we've got, Your Honor. I think both parties fully briefed this, but I think it boils down to, to two issues. One is, is does this situation arise out of the employment relationship because the arbitration says anything that arises out of it relates to employment is subject to arbitration. So that's kind of question number one.

And number two is, is there a provision in the arbitration agreement that shortens the statute of limitations and is that severable and so that the arbitration agreement should still be enforced.

As to the first issue, the Supreme Court has really, you know, it seems to me a little bit of a development over the years of how they view these arbitration agreements. And it started -- the case that the plaintiff relies on is this *Aiken versus World Finance*, which was Supreme Court 2007. And that was basically involving a loan agreement that had an

arbitration provision in it.

And what happened in that case was that, you know, you had a loan at a company. You give them your information and get the loan. Well, you don't expect that company is gonna use your information to steal it and steal from them. And that's what happened. An employee of that company got the consumer's information and then they opened up an account and they stole it directly from that, from that consumer.

And so basically what the Supreme Court said in that case is that we're not gonna interpret an arbitration agreement to apply to outrageous conduct by a defendant. And here that was the direct comment by the defendant's employees. And I think that's the big differentiating factor in this case is we didn't, we didn't engage in any theft.

This was an outside source. They're claiming we were negligent because we responded to this e-mail. And so that's why that's -- that case is not applicable because in here ISCO did not engage in the alleged outrageous conduct that's underlying this theft.

And so the Supreme Court kind of, you know, continued to develop their stance on arbitration in 2010 in the Partain vs. Upstate Auto, which I call the bait and switch case. They basically, you sell a car --

you're trying to sell a car and you're showing the car and you drive the car. They buy it. They sign an arbitration agreement. And then when they come out and get their car it's a different car.

That's what happened in that case, is that it was a bait and switch. And what the Court said there, no, we didn't sign an arbitration agreement expecting that the defendant was going to do this bait and switch and basically steal from them. And so that was again, you know, another situation where it was the defendant's outrageous conduct.

But then I think the most important case for us is the Landers case, which was a Supreme Court 2013, which was an employment case. And in that case the president was alleging that the CEO was engaged in all this conduct to, to defame him and give him fire and an alleged cause of action for slander and outrage.

And in that case the Supreme Court said it fell within the arbitration agreement, which applied to, you know, relating to employment. And so that is what we would say is the more applicable case.

The plaintiffs have cited in their briefs cases out in Mississippi where an employee was sexually assaulted at work by a co-worker. And in those cases the Court said, you know, that that was not really an

arbitration. Again, I think it goes back to the -- where the defendant's agent is engaged in the outrageous conduct, which we don't have here.

And so, Your Honor, I think it really, it boils down to does this arise out of employment. And you've gotta look at did -- would it be anticipated that the conduct could occur? And you don't necessarily anticipate this type of threat.

But in today's climate, when you give your personal identifying information to somebody, and Mr. Davis did it through his employment, you've got to expect that there's a chance there's gonna be a cyber attack on that information. It's all gonna be stored electronically.

And here he gave the information because he applied for employment. He gave the information each year to do his work and he had to fill out the W-2s. And then the actual information was stolen related to his employment because the cyber criminal said, hey, I need this W-2 information. I need this employment related information.

So all of this relates to his employment with ISCO. And the arbitration agreement specifically said that any claim arising out of or relating to employment is subject to arbitration. So we would say that it

applies. It does arise out of employment and, therefore, arbitration should be compelled.

Just real briefly, Your Honor. The arbitration agreement it's got separate paragraphs. And one of the paragraphs said that the statute of limitation for any claim by the employee would be reduced to six months. And we would admit that's not enforceable in South Carolina.

But what we would say is that there is a severability clause in the actual arbitration agreement and South Carolina recognizes severability. There's a statute, 36-2-302, that gives the Court the discretion to sever. In the Simpson Supreme Court case, the Court looked at something similar, but they said there is just gonna have to be so much severability that it made the agreement where it just doesn't work anymore.

Here we just have a one severability issue. All you have to do is cut that paragraph. We're not seeking to enforce that paragraph. We're not seeking to enforce that paragraph. We're not seeking to shorten the statute of limitation. We would say that's severable.

And we've cited in our brief the Court of Appeals case from 2013, the Carlson case, which is dead on point that there was a shortened statute of limitation in the agreement. There was also an arbitration provision.

And the Court said that this arbitration stands alone and that short statute of limitation could be severed.

So, Your Honor, these are basically the key issues I think you have before you, and we would ask that you compel Mr. Davis to arbitration.

THE COURT: Yes, sir, good morning.

MR. SHOEMAKE: Yes, Your Honor. Derek Shoemake for the Plaintiff. I'll be taking the arbitration and then Ms. Shisko is gonna handle the response to the dismiss, if that's all right, Your Honor.

THE COURT: Yes, sir.

MR. SHOEMAKE: So, you know, again, we have briefed this pretty thoroughly. And just, I would say to the extent the facts that were recited by defense counsel vary from the complaint. I go over the facts in the complaint. I don't think I need to go through any parts of those.

But I would note, as our complaint alleges, we're not dealing here with your typical data hacking negligence case. We're not alleging that the company had bad software or didn't put a proper, you know, physical fire walls and those kind of things. Here you're dealing with someone who affirmatively reached out to a person and a person who responded to an e-mail and gave that stuff up.

They either did so in violation of company policy, which would require him not to send that kind of stuff over e-mail or check the e-mail address, which wasn't the same one, or the company didn't have a policy.

But either way, we are dealing not with an intentional tort per se, at least we don't have that in discovery. Obviously in discovery they reveal the potential act. But we're certainly dealing with an intentional act in that these, these W-2s were sent to someone by someone at the company. It wasn't a passive thing where the company sat back and their systems got breached.

And I put that in context because, Your Honor, I believe that as an initial matter, I do think it's an unconscionable arbitration agreement. And the reason I say that is, one, as we mentioned in our brief, and as they concede, there is that limiting provision, the statute of limitations limiting provision.

And if we look at, if we look at the Simpson case, it talks about the idea that the courts are completely permitted to enforce any agreement to include an arbitration clause that would cause an unconscionable result. We can go and cause an unconscionable result here because, one, they wrote this agreement. They

limited the statute of limitations.

So in theory you may have employees out there that never brought a claim because they said you know what, we only had six months, we're out at six months.

Beyond that, this is an arbitration agreement in total. These cases talk about when you have an arbitration agreement and a noted clause in a contract, we can knock that clause out and you've still got your arbitration agreement. This is the arbitration agreement. This provision that's problematic is part and parcel of the arbitration agreement itself.

Also, if you look at paragraph 3 in the arbitration agreement, the employer does agree to arbitrate, but it specifically cherry picks claims to which it is not subject to arbitration. And that would be claims including breach of confidentiality and some other, you know, violation of non-competes.

And I think that's interesting because you have an arbitration agreement where if the company violates your confidentiality they don't have to go to arbitration. But if you go out and violate the confidentiality you have with the company, they can sue you in open court. And that provision alone, the statute of limitations limiting provision, I think tracks with Simpson makes the whole thing

unconscionable.

In addition, I think the way they're reading this adds to the unconscionability that this very remote attenuated act would fall under it. And that sort of leads to rebutting the next point that it's in relation to the employment.

Your Honor, I think the Aiken case is pretty squarely on point. A guy goes into a loan agreement place and says, hey, here's my information I'd like a loan. In that case, yes, the companies did, the company employees did steal it. But here you've got an employer -- you have an employee that goes to a company and says I want to work for you. They said, well, you've got to give us your data. He says that's fine.

Unlike the loan arrangement, you know when you apply for a loan they're gonna farm out for rates. They're gonna do certain things that your data then puts it out there in a way that when you give information to your employer, when I signed on to my firm, you know, when you came to this court, I'm sure no one thought when they gave this information they are going to affirmatively give it to someone.

And that outrageous conduct is why this is outside the scope. Not only the employment, therefore, not inside the arbitration clause at all, but if the

arbitration clause applies, this type of thing certainly wasn't anticipated by Mr. Davis when he signed up that they were going to affirmatively give away his stuff.

And I would note that the Landers case they cite, you know, there you got a president and CEO sniping about jobs. I mean, that is clear. I would agree with the Landers case. That's, you know, when you're trying to get somebody fired from their job or speaking words that can get him fired, that's pretty, you know, in the scope of employment.

The Mississippi case as well. I understand that's not a binding authority on the court. I just thought it was persuasive. I'd note they think the Mississippi case and the Caponese (phonetic) case where the employee was sexually assaulted.

The second case we cited was actually a negligence claim against an apartment manager. She did get sexually assaulted but the bad act that she's suing over was their negligent supervision. Same thing. They said, look, when you sign an arbitration agreement with your apartment complex you're certainly not thinking, you know what if I get raped I probably can't sue them. Same thing. If you go to work, you're not assuming they are gonna affirmatively give your data away.

So we think it's unconscionable for the reasons I

said and it's also outside of the scope. Thank you, Your Honor.

THE COURT: Hang on one second. Yes, ma'am.

MS. SHISKO: Do you want argument ---

THE COURT: I'll come back to it, yes, ma'am.

MS. SHISKO: Okay. Good morning, Your Honor.

THE COURT: Good morning.

MS. SHISKO: I'm Marghretta Shisko from Harrison White, here on behalf of the Plaintiff. I just wanted to respond to defendant's Motion to Dismiss. With respect to their standing argument, we take the position that the Plaintiff has alleged sufficient facts to support standing at this stage in the proceedings.

Plaintiff is a real party of interest. He's bringing an negligence claim on behalf of himself and others directly affected by the data breach in this case. Plaintiff has alleged actual attempted misuse of his personal information. And I would note that an attempt to open an account, which we've alleged in this case, is an actual misuse of information.

The Plaintiff had somebody open a credit card, you know, in his name. He filed a report with the Spartanburg County Sheriff's Office. That's enough to allege standing or to establish standing.

Also, the nature of the attack in this case is

sufficient to establish standing. We have a phishing attack where somebody directly targeted some personal identifying information through W-2s.

The courts have recognized that over such circumstances the obvious inference is that the hacker intended to either use the PII or sell it to someone who abused it. And then we also allege that Plaintiff has spent money and time responding to attempted misuse, in addition to the proactive measure that was taken to protect himself against identity theft in the future.

On the three elements for standing entry of fact causation and redressability, I'm just gonna briefly address those. Injury in fact is met since the Plaintiff has alleged that a hacker intentionally targeted his PII and there was an actual misuse.

Causation is met because the hackers were only able to access the data because ISCO failed to secure that sensitive information. And then we think the authority is met because the Plaintiff is seeking compensatory damages and a favorable verdict will provide redress.

I'd also note they argue that the notice that -- that they comply with the notice statute and, therefore, are not liable. There's nothing in the statute that denies this company from liability just because they

complied with the notice provision. Thank you, Your Honor.

THE COURT: Thank you. Yes, sir.

MR. LEHRER: Your Honor, just real quickly going back to the arbitration. It's within your discretion to sever that provision. It's in a separate paragraph and there's a case that talks about a contract that's the same thing with the statute of limitation and arbitration. It's in the same agreement. And this is in the same agreement. There's a severability. And that's within your discretion to sever that.

The, as it relates to this paragraph 3 and the company's right to go to court, this is very common. We see this all the time with employment rings because you have to have the ability with a restrictive covenant to come into court and get an injunction. Because otherwise, you know, people are stealing your customers, they're stealing your information.

And if you are waiting on an arbitrator to go through that process, it's too late. We got to be able to come in and get a TRO immediately, so that is a very common provision to keep that out of arbitration just because of that interest of the employer. That is not the type of provision that was in Simpson and so that -- and I would say that that -- I would tell you that that

is, there's no case law that I'm aware of where those type of provisions are unconscionable. And, in fact, I believe they've been routinely enforced.

The thing, I think, that it comes back to is this outrageous conduct. And Plaintiff's counsel a few times referred to ISCO's conduct was outrageous and it's simply not the case. These, these facts are not disputed. It's clear that this lady just made a mistake. She sent something to someone she thought was her senior executive. She didn't engage in outrageous conduct, which is the cases they cite are the defendant engaged in outrageous conduct.

And so we would, we would submit that this is negligence, this is a mistake. It's clearly within the scope of not only her employment, but it's relating to Mr. Davis's employment because it's his W-2 information. I mean, that's what she sent. She thought this was an employment related request.

Now, moving to the Motion to Dismiss, we can spend hours talking about this injury in fact. I mean, the cases are a little bit all over the board. But the Fourth Circuit, which is the closest case I could find that addressed this because South Carolina has really not addressed it.

And they said that this threatened breach is not

enough to have an injury in fact. In here, Mr. Davis is alleging that people, the hackers, tried to open up accounts, but he's not alleging that they actually took his money or that he had an injury related to that. And the procedures were place, even through this LifeLock, that they caught it.

I mean, that's what he alleges, that the LifeLock notified him of these attempted breaches. They handled it. He didn't have an actual injury related to the hacking process. And he's got $25,000 worth of protection if that happened. There's been no actual injury.

What he's talking about is a threat. And that he had to put time into it. And that's just the reality that we all have to deal with that now. That's the reality of the cyber world we live in. We have to monitor our information and that's not an injury in fact.

You know, then there's the issue of can he have a causal connection. How do we know these hackers got this information from the ISCO hacker versus all these other hacks? There's 172 million hacks that have happened in 2017 and before. How do we -- how do you connect those dots? The hackers aren't gonna tell us where they got the information. And so how can you

connect those dots? There's no causal connection.

And then there's no future redress. They've already redressed it, Your Honor. It's admitted. They gave him LifeLock protection which has coverage. There's no future redress to be had.

As to the negligence claim, our legislature has addressed this. They've looked at this and they said what we want to do is we want to establish an obligation on someone that when you receive notice of a breach you have an obligation to notify that person so that they can monitor. That's the duty that the legislature established.

They didn't say you have a duty to prevent. They said when you find out you've got to tell. And so we've addressed it in South Carolina. There's no case that has said you have this duty to protect. The only thing we have is the legislature saying you have a duty to give them notice and they establish a causal acion if you fail to do so.

And then, Your Honor, the other two things that I'd like to point out is that if this case were to stay in court, the complaint, it's either got to be dismissed or some of it has got to be stricken because it's a condition. We've got a claim for punitive damages in it. This is a negligent case. It's clear from the

facts tht this lady made a mistake. There's no allegations to support a claim for punitive damages. And then there's also a claim for attorneys fees. And, again, there's no basis for that.

We have a negligence claim based on a mistake. There's no ability in South Carolina to recover attorneys fees on this type of claim. And we would ask that the request for punitive damages and attorneys fees be at least stricken from the complaint. Thank you, Your Honor.

THE COURT: Do you want come back to that?

MS. SHISKO: Yes, Your Honor. I just want to briefly reply. If you closely read the Beck case, the Fourth Circuit case that the defendant's cite that case as distinguishable on it's facts.

And also in that case the Fourth Circuit noted that in other cases where information was specifically targeted, allegations suffice to push the threats, injury, or future identity theft beyond speculative to the sufficiently imminent. So in a situation like that where the information is specifically targeted, that's sufficient to establish standing.

In addition to that, the causal connection argument, that argument was rejected in the Ramejos (phonetic) case, which was cited on page 14 of our

brief. That involved the Nieman Marcus data breach, which occurred around the same time as the Target data breach. Nieman Marcus tried to make the same argument that the plaintiffs couldn't show that their injuries were traceable and the court said the fact that Target or some other store might have caused the plaintiff's private information to be exposed does nothing to negate the plaintiff's standing to sue in this case.

With respect to the statute, yes, section 39-190 does provide a cause of action for a violation of its provision. That is a notice statute, but the statute expressly recognizes that a resident of this state who was injured in violation of this section in addition to a cumulative of other rights and remedies available may institute a civil action. So the General Assembly recognized that a plaintiff aggrieved by a data breach might have other remedies available at law in addition to the statutory cause of action.

And then the fact that no South Carolina case has recognized a negligence cause of action such as this, well that just is another reason to deny the Motion to Dismiss because ordinarily as a case raises a novel question of law, it should not be dismissed on a 12(b)(6) motion. Thank you, Your Honor.

THE COURT: Anything from anyone?

MR. LEHRER: No, Your Honor.

THE COURT: Okay.

MR. SHOEMAKE: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, watch your e-mail addresses.

MS. SHISKO: Thank you.

MR. LEHRER: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, hearing concluded at 9:55 a.m.)

--- THIS ENDS REQUESTED TRANSCRIPT ---

COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 23rd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 24th, 2018

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