

No. 21-90011

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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BRINKER INTERNATIONAL, INC.,  
*Defendant-Petitioner,*

v.

ERIC STEINMETZ, MICHAEL FRANKLIN, AND SHENIKA THEUS,  
*Individually and on behalf of all others similarly situated,*  
*Plaintiffs-Respondents.*

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ON PETITION FOR PERMISSION TO APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA  
CASE No. 3:18-cv-00686-TJC-MCR  
CHIEF JUDGE TIMOTHY J. CORRIGAN

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**PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO  
MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*  
RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER,  
INC., and NATIONAL RETAIL FEDERATION**

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ERIC STEINMETZ, ET AL.

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-2(c), Plaintiffs-Respondents Eric Steinmetz, Michael Franklin and Shenika Theus hereby certify that upon information and belief, the Petitioner's Certificate of Interested Persons is correct. The following persons and entities also have an interest in the outcome of this case.

1. Kasdan Turner Thomson Booth LLP (former counsel for Plaintiffs-Respondents)
2. Reddy, Kenya (counsel for Plaintiffs/Respondents)

Dated: May 17, 2021

/s/ John A. Yanchunis  
John A. Yanchunis

Counsel for Plaintiffs-Respondents

**PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION  
TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*  
RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER,  
INC., and NATIONAL RETAIL FEDERATION**

On May 5, 2021, the Restaurant Law Center (“Law Center”), the Retail Litigation Center, Inc. (“RLC”), and the National Retail Federation (“NRF”) (collectively, “Proposed Amici”) filed a Motion for Leave to File Brief of Amici Curiae (“Motion”) in support of Defendant-Petitioner Brinker International, Inc.’s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) (“Petition”). The proposed amicus brief (“Proposed Amicus Brief”) is premature, having been offered before the Court has even decided whether to grant the Petition; does not bring attention to any new, relevant matter; and is otherwise an unhelpful distraction for the Court. This Court should deny the Motion.

1. First, the Proposed Amici cite no authority allowing the filing of an amicus brief in support of a Rule 23(f) Petition for Permission to Appeal. Mot. at 2–4. They point to just four cases in which amicus briefs were submitted in response to a Rule 23(f) petition. *Id.* at 2. Each case is distinguishable. *See DirectTV, LLC v. Cordoba*, No. 17-190020 (11th Cir. May 21, 2018) (allowing filing of amicus brief with consent of both parties); *Brown v. Electrolux Home Prods., Inc. d/b/a/ Frigidaire*, No. 15-11455 (11th Cir. Nov. 1, 2013) (same); *Reyes v. NetDeposit, LLC*, No. 13-8086 (3d Cir. Nov. 1, 2013) (allowing amicus briefs to be filed in support of plaintiffs facing death knell of denied class certification); and *In re*

*ComScore, Inc.*, No. 13-8007 (7th Cir. May 28, 2013) (allowing filing of amicus brief but denying petition for leave to appeal soon thereafter). Both the Federal Rules of Appellate Procedure and this Court’s rules are silent on the filing of amicus briefs in response to a Rule 23(f) Petition and address such briefing only at the merits stage of an appeal and on petitions for rehearing. FED. R. APP. P. 29; 11TH CIR. R. 29-3–29-4.

Federal Rule of Appellate Procedure 29 “governs amicus filings during a court’s initial consideration of a case *on the merits*.” FED. R. APP. P. 29(a) (emphasis added). But the Rule 23(f) Petition is not a presentation of the full facts and evidence that the parties would present if this Court grants the Petition and a merits appeal follows. Moreover, the rules do not require a response to the Petition, demonstrating that the Court is not yet considering the merits of the case. Any amicus brief pertaining to the Petition is, therefore, premature, and this Court should deny the Motion.

2. Second, the Proposed Amicus Brief is repetitive of Petitioner’s arguments, offering no new, relevant matter. Proposed Amici devote considerable space to discussing the same issues of Article III standing presented in the Petition, including considerations of impending future harm. *See* Brief at 8–9; Petition at 11–18. However, the Court “should not be overloaded or distracted with repetitive amicus curiae briefs, even if they squarely address an issue on appeal.” P. Stephen

Gidiere III, *The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals*, 5 Seton Hall Cir. Rev., 7 (2008). An amicus brief which does not serve the purpose of bringing “relevant matter to the attention of the Court that has not already been brought to its attention by the parties” “simply burdens the staff and facilities of the Court and its filing is not favored.” FED. R. APP. P. 29 advisory committee’s notes to 1998 amendment.

Proposed Amici and Petitioner rely on the same case law in making their same arguments that the certified classes will include persons who would otherwise lack Article III standing: *Spokeo*, *Tsao*, and *Cordoba*. Brief at 4, 8–9 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *Cordoba v. DirectTV, LLC*, 942 F.3d 1259 (2019), and *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021)); Petition at 3, 11–18 (same). The Proposed Amici and Petitioner offer the same arguments as to how they contend the district court misapplied and contravened the holdings articulated in *Tsao* and *Cordoba*. Brief at 4, 6, 9–11; Petition at 11–18. And the Proposed Amici and Petitioner each invoke the Rules Enabling Act, arguing that the district court improperly accepted an “‘averages calculation’” or “‘an ‘average’ damages analysis regardless of individual injury.’” Brief at 4, 11; Petition at 19.

The Proposed Amicus Brief does not add anything new and relevant for the Court’s consideration and merely repeats the Petition’s arguments. This Court should deny the Motion.

3. Third, the Proposed Amicus Brief is not helpful to the Court. Proposed Amici mischaracterize the underlying case as a “no-injury class action” (Brief at 4–5) when, in fact, the district court ensured that only individuals harmed by the Data Breach would be included in the classes by refining the class definitions to include only those consumers whose card data was accessed by cybercriminals and who spent time dealing with the Data Breach. *See* Answer to Petition at 2, 6. Such mischaracterization serves only to distract the Court from the issues, rendering the amicus brief unhelpful to the Court. In addition, Proposed Amici claim, “[t]he district court failed to analyze the actual risk of identity theft or fraud that might follow the posting of an individual’s information to the ‘dark web,’ which cannot be assumed,” but Proposed Amici do not offer any new information about how posting payment card data for sale on the dark web could be considered anything other than misuse or about why it cannot be assumed that the risk of fraud is imminent after such data is posted for sale on the dark web. As noted in Respondents’ Answer to Petition, courts have routinely recognized that the appearance of stolen customer information for sale on the dark web after a data breach raises the risk of identity theft from “speculative” to “credible” because “it certainly supports an argument that cyber attackers committed the data breach and stole Plaintiffs’ information . . . for nefarious reasons and to commit identity fraud.” *Fero v. Excellus Health Plan, Inc.*, 304 F. Supp. 3d 333, 344 (W.D.N.Y. 2018).

Proposed Amici further claim to provide “background on the no-injury class actions that are routinely filed” against their members, yet also claim that the underlying class certification order will “encourage the filing of abusive no-injury class actions against *Amici*’s members that conduct business in this Circuit.” Mot. at 3. However, this is not a “no-injury” class action, so Proposed Amici seek to weigh in with information that is irrelevant to the issues presented by the Petition. In addition, according to Proposed Amici, so-called “no-injury” class actions are already routinely filed, and they offer no data or other information to support the speculation that more such cases will be filed. Here, each named Plaintiff claims actual lost time and funds from the Data Breach, and the district court’s Order limits the Classes to customers who suffered similar, actual harm. In addition, the stolen information of 4.5 million payment credit cards was posted for sale on the dark web, establishing misuse of all of the data exposed in the Data Breach. Proposed Amici fail to show that other data breach cases with similar data misuse and harm are just waiting in the wings to overwhelm the courts.

The Proposed Amicus Brief is premature and does not offer the Court relevant facts or argument the parties have not already presented. This Court should deny the Motion.

Dated: May 17, 2021

Respectfully Submitted,

/s/ John A. Yanchunis

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## CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because this document contains 1,255 words.

Further, this document is proportionally spaced, has a typeface of 14 points and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

*/s/ John A. Yanchunis* \_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 17, 2021.

Pursuant to 11th Cir. R. 25, I further certify that on May 17, 2021, I caused the foregoing document to be served via the appellate CM/ECF system on all participants in the case who are registered CM/ECF users, and via email on the following:

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