Case No. 21-90011

United States Court of Appeals

for the

Eleventh Circuit

BRINKER INTERNATIONAL, INC.,

Petitioner,

versus

ERIC STEINMETZ, MICHAEL FRANKLIN, SHENIKA THEUS,

Respondents.

On Appeal From The United States District Court
for the Middle District Of Florida, Case No. 3:18-cv-00686-TJC-MCR.
The Honorable **Timothy J. Corrigan**, Chief U.S. District Judge and
The Honorable **Monte C. Richardson**, U.S. Magistrate Judge.

BRIEF OF *AMICI CURIAE* RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER, INC., and NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

ANGELO I. AMADOR
RESTAURANT LAW CENTER
2055 L STREET NW, SUITE 700
WASHINGTON, DC 20036
(202) 492-5037

Counsel for Restaurant Law Center

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

Counsel for Retail Litigation Center, Inc.

STEPHANIE A. MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW, Suite 1200
Washington, DC 20005
(202) 783-7971

Counsel for National Retail Federation

MICHAEL W. MCTIGUE JR.
MEREDITH C. SLAWE
MAX E. KAPLAN
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, Pennsylvania 19103
(215) 665-2000

REBECCA A. GIROLAMO
COZEN O'CONNOR
601 South Figueroa Street, Suite 3700
Los Angeles, California 90017
(213) 892-7994

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amici curiae* hereby certify that they are non-profit member organizations with no publicly-traded stock.

Pursuant to Eleventh Circuit Rule 26.1-2(b), *amici curiae* hereby certify that, to the best of their knowledge, the following individuals and entities have an interest in the outcome of this case:

1. Ahdoot & Wolfson, PC – Counsel for Plaintiffs-Respondents
2. Alamillo, Peter – Former Plaintiff
3. Amador, Angelo I. – Counsel for *amicus curiae* Restaurant Law Center
4. Anderson, Jaclyn L. – Counsel for Plaintiffs-Respondents
5. Barthle, Patrick A. – Counsel for Plaintiffs-Respondents
6. Brinker International, Inc.; NYSE:EAT – Defendant-Petitioner
7. Clark, Miles – Counsel for Plaintiffs-Respondents
8. Cornelia, Sarah B. – Counsel for Defendant-Petitioner
9. Corrigan, Hon. Timothy J. – U.S. District Court Chief Judge of originating court
10. Cox, Barton W. – Counsel for Defendant-Petitioner

11. Cozen O'Connor – Counsel for *amici curiae* Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation
12. Fagelman, Jason K. – Counsel for Defendant-Petitioner
13. Federman, William B. – Counsel for Plaintiffs-Respondents
14. Federman & Sherwood – Counsel for Plaintiffs-Respondents
15. Franklin, Jonathan – Counsel for Defendant-Petitioner
16. Franklin, Michael – Plaintiff-Respondent
17. Fuller, Daniel – Counsel for Defendant-Petitioner
18. Girolamo, Rebecca A. – Counsel for *amici curiae* Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation
19. Green, Christopher – Counsel for Defendant-Petitioner
20. Green-Cooper, Marlene – Former Plaintiff
21. Hannon, Kevin S. – Counsel for Plaintiffs-Respondents
22. The Hannon Law Firm, LLC – Counsel for Plaintiffs-Respondents
23. Hendrix, Nicholas – Counsel for Defendant-Petitioner
24. Kaplan, Max E. – Counsel for *amici curiae* Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation
25. Kester, Francesca – Counsel for Plaintiffs-Respondents
26. Knepper & Clark, LLC – Counsel for Plaintiffs-Respondents
27. Lang, Christopher – Former Plaintiff

28. Lawrence, Brian Christopher – Counsel for Defendant-Petitioner
29. LippSmith, Graham B. – Counsel for Plaintiffs-Respondents
30. LippSmith LLP – Counsel for Plaintiffs-Respondents
31. Lowndes, Drosdick, Doster, Kantor & Reed, PA – Counsel for Defendant-Petitioner
32. Martin, Jean Sutton – Counsel for Plaintiffs-Respondents
33. Martz, Stephanie – Counsel for *amicus curiae* National Retail Federation
34. McTigue Jr., Michael W. – Counsel for *amici curiae* Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation
35. Morgan & Morgan, PA – Counsel for Plaintiffs-Respondents
36. National Retail Federation –*amicus curiae*
37. Norton Rose Fulbright US LLP – Counsel for Defendant-Petitioner
38. Restaurant Law Center –*amicus curiae*
39. Retail Litigation Center, Inc. –*amicus curiae*
40. Richardson, Hon. Monte C. – U.S. Magistrate Judge in originating court
41. Sanders, Fred – Former Plaintiff
42. Sauder, Joseph G. – Counsel for Plaintiffs-Respondents
43. Sauder Schelkopf, LLC – Counsel for Plaintiffs-Respondents

44. Siegal, Peter B. – Counsel for Defendant-Petitioner

45. Slawe, Meredith C. – Counsel for *amici curiae* Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation

46. Sorrell, W. Drew II – Counsel for Defendant-Petitioner

47. Steinmetz, Eric – Plaintiff-Respondent

48. Summers, Daniel – Former Plaintiff

49. Theus, Shenika – Plaintiff-Respondent

50. White, Deborah R. – Counsel for *amicus curiae* Retail Litigation Center, Inc.

51. Wolfson, Tina – Counsel for Plaintiffs-Respondents

52. Yanchunis, John Allen – Counsel for Plaintiffs-Respondents

Dated: May 5, 2021

/s/ Meredith C. Slawe
Meredith C. Slawe

Counsel for Amici Curiae

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STATEMENT OF INTEREST

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The foodservice industry comprises over one million restaurants and other outlets that represent a broad and diverse group of owners and operators. The industry employs over 15 million people and is the nation's second-largest private-sector employer.

The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers in Florida and the U.S., provide goods and services to hundreds of millions of consumers, and account for hundreds of billions of dollars in annual sales.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the U.S. and more than 45 countries abroad.

Through regular *amicus* participation, *amici* provide courts with perspectives on issues that have the potential to significantly impact their respective industries. This is one such case.[1]

In this case, the district court certified two classes in connection with claims related to a data breach. The certified classes include millions of individuals who sustained no actual injury and who do not face a substantial risk of imminent injury traceable to Petitioner's alleged actions. The district court assumed standing could be established merely if putative class members' information appeared on the "dark web" and they "incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach." Order ("Order") at 12, 16, *In re Brinker Data Incident Litig.*, No. 18-0686 (M.D. Fla. Apr. 14, 2021), Dkt. No. 167. It concluded that averaging damages across the classes and awarding the average to each class member regardless of any actual injury somehow makes common issues predominate. *Id.* at 32–34. The district court's ruling eliminated the safeguards afforded defendants under Rule 23 and will encourage the filing of no-injury class actions.

[1] No counsel for a party authored this brief in whole or in part, and none of the parties or their counsel nor any other person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF THE ISSUE

Whether Rule 23 permits a damages class to be certified where there is no evidence the vast majority of putative class members suffered either an actual or imminent risk of injury, and individual issues of standing and damages otherwise predominate.

SUMMARY OF ARGUMENT

In appropriate cases, Rule 23 provides a procedural device for litigants to join together to seek redress for injuries while protecting due process rights. "[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (citation omitted). But when defenses such as lack of standing are available as to each unnamed plaintiff, individualized issues overwhelm common ones, thereby precluding certification. In this case, putative class members cannot establish that they meet the requirements of Article III standing with common proof. Aggregate treatment of their claims would deprive the Petitioner of its due process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted).

No-injury class actions lack social value. They are pursued to exert pressure on defendants to settle or risk massive aggregate exposure. *See Cordoba v.*

DirectTV, LLC, 942 F.3d 1259, 1276 (11th Cir. 2019) ("[A] class defined so as to improperly include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits."). The district court's decision will encourage the filing of these actions in this Circuit.

As this Court made clear, a plaintiff cannot rely on the mere increased risk of identity theft or fraud following a breach to establish standing without showing that such harm is "certainly impending." *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1344 (11th Cir. 2021). Further, in *Cordoba*, this Court reaffirmed that, to meet Rule 23(b)(3)'s predominance requirement, a class cannot be certified if standing cannot be established with class-wide proof. 942 F.3d at 1274. In granting class certification, the district court misapplied this precedent to: (a) create a novel test for standing disassociated from Article III's concrete injury requirement; (b) certify classes that will require individualized proof as to each class member's standing; and (c) deprive Petitioner of due process rights by permitting an "average" damages analysis regardless of individual injury. Respectfully, the district court's decision should be reversed.

ARGUMENT

I. No-Injury Class Actions Do Not Serve the Purpose Behind the Class Action Device

Rule 23 was designed, in part, to increase administrative efficiencies through collective actions while ensuring that due process rights are protected. In the appropriate context, the class action device "'saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" *Falcon*, 457 U.S. at 155 (citation omitted).

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013). They do not provide litigants with more substantive rights than they would otherwise have if their claims proceeded individually. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010). Nor may the class action device be used to deprive a defendant of its fundamental due process right to raise individual defenses. *Lindsey*, 405 U.S. at 66. One such defense is lack of standing. *See Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established."). To that end, Rule 23(b)—particularly Rule 23(b)(3)'s predominance requirement—imposes "demanding" safeguards to preclude certification where "class-action treatment is not [] clearly called for." *See Comcast*, 569 U.S. at 34 (citations omitted).

The key purposes behind, and protections of, Rule 23 will be eroded if—contrary to Article III standing requirements—a class can be certified where the vast majority of class members suffered no actual injury. The district court certified two no-injury classes that expose Petitioner to $171 million in potential liability even though it would be administratively impossible for each unnamed class member to prove they suffered a concrete injury. The district court looked past the inherent individual factual issues and defenses relating to standing and damages and Petitioner's due process rights. Its decision eviscerates the protections afforded defendants under Rule 23 and will encourage abusive "*in terrorem*" class actions—particularly their use to enrich counsel at the expense of the classes, defendants, and the courts. *See Cordoba*, 942 F.3d at 1276.

II. The District Court's Decision Will Invite No-Injury Class Actions

Plaintiffs sought to certify classes that included a large number of individuals who could never establish that they suffered any cognizable injury. Indeed, prior to rewriting the class definitions and granting certification, the district court dismissed the claims of two of the named plaintiffs for lack of standing. *In re Brinker Data Incident Litig.*, No. 18-0686, 2019 WL 3502993, at *7 (M.D. Fla. Aug. 1, 2019). Remarkably, those dismissed plaintiffs are now class members under the court's certification ruling.

The district court's refusal to vigorously enforce Article III standing requirements ignores and exacerbates a continuing problem highlighted by the Supreme Court—the failure to adhere to Rule 23's built-in limitations on certification. "In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

If courts ignore the injury-in-fact requirements in their certification analyses, the filing of no-injury class actions will continue unabated. In essence, if the district court's ruling stands, the separate and distinct inquiries of commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) would collapse into one. Plaintiffs could obtain class-wide aggregate damages based on an alleged violation of a duty owed to them without proof of any actual injury. Defendants' due process rights would be violated. *See Lindsey*, 405 U.S. at 66.

In just the first four months of 2021, at least six no-injury data-breach class actions were filed in or removed to district courts in this Circuit. *See, e.g.*, Notice of Removal, *Fischer v. CentralSquare Techs. LLC*, No. 21-60856 (S.D. Fla. Apr. 21, 2021). During this period, Telephone Consumer Protection Act ("TCPA")[2] plaintiffs' lawyers, likely anticipating the Supreme Court's ruling in *Facebook*,

[2] As this Court has recognized, TCPA class actions are frequently pursued even when the named plaintiff suffered no actual injury. *See Salcedo v. Hanna*, 936 F.3d 1162, 1173 (11th Cir. 2019).

Inc. v. Duguid, 141 S. Ct. 1163 (2021), actively solicited claimants to file no-injury "session replay" class actions in Florida. Over the past few months, these attorneys have filed dozens of substantively identical, and equally baseless, cases. The boilerplate complaints seek to miscast routine, expected, and commercially reasonable internet technology—used by many businesses, regulators, courts, and plaintiffs' class action lawyers on websites—as "wiretapping" under the Florida Security of Communications Act, Fla. Stat. Ann. § 934.01 *et seq*.[3] This tactic of flooding the courts with no-injury class actions burdens the judiciary, and harms businesses and consumers. Given this environment, the fundamental safeguards embedded in Rule 23 take on renewed importance.

III. The District Court's Decision Is Inconsistent With Controlling Authority

The district court's ruling is contrary to Supreme Court and this Court's controlling precedent. A plaintiff may seek relief in federal court only if they can establish a concrete injury-in-fact that is traceable to the defendant's illegal activity and redressable by the court. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547

[3] Attempts to pursue similar cases in New York and California have been unsuccessful. *See, e.g.*, *Cohen v. Casper Sleep Inc.*, No. 17-9325 (S.D.N.Y. Nov. 28, 2017); *Cohen v. NaviStone, Inc.*, No. 17-9383 (S.D.N.Y. Nov. 30, 2017); *Cohen v. New Moosejaw, LLC*, No. 17-9391 (S.D.N.Y. Nov. 30, 2017); *Javier v. Assurance IQ, LLC*, No. 20-2860 (N.D. Cal. Apr. 24, 2020); *Graham v. Noom, Inc.*, No. 20-6903 (N.D. Cal. Oct. 2, 2020); *Yale v. Gap, Inc.*, No. 20-7575 (N.D. Cal. Oct. 28, 2020); *Johnson v. Blue Nile, Inc.*, No. 20-8183 (N.D. Cal. Nov. 20, 2020).

(2016). "Where a 'hypothetical future harm' is not 'certainly impending,' plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves.'" *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (en banc) (citation omitted). In the context of breach claims, this Court recently held the elevated risk of identity theft is insufficient to establish Article III standing. In reversing an order granting certification, this Court ruled that a proposed class representative must offer "specific evidence of some misuse of class members' data . . . sufficient to show that the threatened harm of future identity theft was 'certainly impending' [] or that there [is] a 'substantial risk' of such harm." *Tsao*, 986 F.3d at 1344.

The district court erroneously assumed that because, according to Respondents, "all of the payment card information taken in the Data Breach is on the dark web," all class members "have had their data 'misused.'" Order 12, 16. The 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. "[M]ost breaches have not resulted in detected incidents of identity theft . . . [or] detected incidents of fraud on existing accounts." *Tsao*, 986 F.3d at 1342–43 (citations omitted). "[C]onclusory allegations of an 'elevated risk of identity theft' . . . 'are simply not enough' to confer standing." *Id.* at 1343 (quoting *Muransky*, 979 F.3d at 933). Therefore, the district court improperly

swept into the classes millions of individuals who suffered no concrete injury and could never establish standing.

IV. The District Court's Decision Threatens the Safeguards Afforded Defendants Under Rule 23 and Raises Due Process Concerns

The district court's ruling subverts the safeguards built into Rule 23(b)(3). Rule 23(b)(3) is designed to protect a defendant's "due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *Lindsey*, 405 U.S. at 66. For this reason, before certifying a damages class, a court must be assured that "questions of law or fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3); *see also Comcast*, 569 U.S. at 34.

Under the district court's rewritten class definitions, each putative class member will still need to demonstrate "some injury in the form of out-of-pocket expenses or time spent" in mitigation. Order 16. That will require millions of individualized mini-trials on standing. As made clear in *Cordoba*, a damages class is inappropriate if "the district court will have to determine whether each of the absent class members has standing before they could be granted any relief." 942 F.3d at 1274 (decertifying class on Rule 23(f) review). In such cases, standing "is an individualized issue" that predominates, which precludes certification. *Id.*; *see*

also Carriuolo v. GMC, 823 F.3d 977, 985 (11th Cir. 2016) ("[C]ommon issues will not predominate . . . [if] the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.").

The district court circumvented protections afforded defendants under Rule 23(b)(3) by adopting an "averages calculation" for damages. Under this approach each class member would receive the same "standard dollar amount" regardless of any actual injury. Order 7, 32–34.

The Supreme Court has disallowed end-runs around the Rule 23 predominance requirement for certification of a damages class. In *Dukes*, the Court rejected a similar averaging methodology because it deprived the defendant of the right to assert "defenses to individual claims" in violation of the Rules Enabling Act. 564 U.S. at 367 ("[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"). The Court reached a similar conclusion in *Comcast*, as the damages model "failed to measure damages resulting from the particular [] injury on which petitioners' liability in this action is premised." 569 U.S. at 35–36. If all a litigant needed in order to overcome the predominance requirement was "any method of measurement . . . [that] can be applied classwide," then "Rule 23(b)(3)'s predominance requirement [would be] a nullity." *Id.*

The class action device is a procedural vehicle; it does not alleviate each absent class member's obligation to establish their individual right to relief. *See Shady Grove*, 559 U.S. at 406–07. The district court ignored this fundamental requirement by certifying classes that assume—without establishing—that standing and damages can be determined through class-wide proof. Neither can in this case. Individual issues and defenses predominate and, as a result, no damages class can be certified. The implications of the district court's ruling are significant beyond this action.

CONCLUSION

This Court should grant the Petition and reverse.

Respectfully submitted,

/s/ Meredith C. Slawe

Michael W. McTigue Jr.
Meredith C. Slawe
Max E. Kaplan
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, Pennsylvania 19103
(215) 665-2000

Rebecca A. Girolamo
COZEN O'CONNOR
601 S. Figueroa Street, Suite 3700
Los Angeles, California 90017
(213) 892-7994

Counsel for Amici Curiae

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street NW, Suite 700
Washington, DC 20036

Counsel for Restaurant Law Center

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003

Counsel for Retail Litigation Center, Inc.

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW, Suite 1200
Washington, DC 20005

Counsel for National Retail Federation

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document complies with the word limit set forth in Federal Rule of Appellate Procedure 29(a)(5) and Federal Rule of Appellate Procedure 5(c), excluding the parts of the documents exempted by FRAP 32(f) as it contains 2,599 words. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: May 5, 2021

/s/ Meredith C. Slawe
Meredith C. Slawe
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2021, a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System.

/s/ Meredith C. Slawe
Meredith C. Slawe