No. 21-13146

IN THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

ERIC STEINMETZ; MICHAEL FRANKLIN; AND SHENIKA THEUS,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

BRINKER INTERNATIONAL, INC.,

Defendant-Appellant.

On Fed. R. Civ. P. 23(f) Appeal from the
United States District Court for the Middle District of Florida
in Case No. 3:18-cv-00686-TJC-MCR (Corrigan, J.)

RESTAURANT LAW CENTER'S MOTION FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR PANEL OR *EN BANC* REHEARING

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August 22, 2023

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, *Amicus Curiae* hereby certifies that it is a non-profit member organization with no publicly-traded stock.

Pursuant to Eleventh Circuit Rule 26.1, *Amicus Curiae* adopts the Certificate of Interested Parties filed by Appellant Brinker International, Inc.

Dated: August 22, 2023

/s/ Anthony G. Hopp
Anthony G. Hopp

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

As required by this Court's Rule 35-8, *Amicus Curiae* Restaurant Law Center submits this motion for leave to file an *amicus* brief in connection with the Court's panel or *en banc* rehearing in this case. Appellant consented to Restaurant Law Center's filing of the proposed *amicus* brief, which is being submitted herewith as Exhibit 1.

Restaurant Law Center seeks to file this *amicus* brief for the following reasons:

1. The Restaurant Law Center ("RLC") is the only independent public policy organization dedicated specifically to representing the interests of the food service industry in the courts. The RLC provides courts with perspectives on issues that have the potential to significantly impact the food service industry.

2. The panel's decision threatens to establish a new standard for class certification that will limit businesses' ability to mount meaningful defenses in future class action litigation.

3. This limitation amounts to an erosion of procedural safeguards afforded defendants under the Fifth and Fourteenth Amendments.

CONCLUSION

Restaurant Law Center respectfully requests that the Court grant leave for the filing of its proposed *amicus* brief.

August 22, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Motion for Leave to File *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 185 words excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this Motion 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), and all requirements of the 11th Circuit Rules, because it has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14-point Times New Roman font.

/s/ Anthony G. Hopp
Anthony G. Hopp

August 22, 2023

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2023, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Anthony G. Hopp*
Anthony G. Hopp

EXHIBIT 1

No. 21-13146

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BRIEF OF AMICUS CURIAE RESTAURANT LAW CENTER IN SUPPORT OF APPELLANT'S PETITION FOR PANEL OR *EN BANC* REHEARING

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Pursuant to Eleventh Circuit Rule 26.1, *Amicus Curiae* adopts the Certificate of Interested Parties filed by Appellant Brinker International, Inc.

Dated: August 22, 2023

/s/ Anthony G. Hopp
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The Restaurant Law Center respectfully submit this brief as *amicus curiae* in support of Appellant Brinker International, Inc. ("Brinker").[1]

STATEMENT OF INTEREST

The Restaurant Law Center ("RLC" or "*Amicus*") is the only independent public policy organization dedicated specifically to representing the interests of the food service industry in the courts. It is affiliated with the National Restaurant Association, the world's largest food service trade association. The food service industry is comprised of over one million restaurants and other food-service outlets and includes independently owned restaurants in addition to restaurant franchises and/or chains. The industry employs over 15 million people and is the nation's second-largest private-sector employer. The RLC's *amicus* briefs have been cited favorably by this Circuit. *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n.15 (11th Cir. 2019) (*en banc*). Through regular amicus participation, the RLC provides courts with perspectives on issues that have the potential to significantly impact the food service industry. This is one such case.

The panel's decision lays the groundwork for the district court to certify two classes composed of many individuals who sustained no damages. This decision

[1] None of the parties or their counsel nor any other person or entity other than amicus or its counsel authored the brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

threatens to establish a new standard for class certification that will limit businesses' ability to mount meaningful defenses in future litigation. The panel remanded for further proceedings regarding whether ascertaining the plaintiffs' standing would defeat the predominance requirement of Rule 23(b). But the panel also affirmed that plaintiffs' proposed damages methodology satisfied predominance because their expert assumed that each putative class member had incurred an "average" of $38.00 in out-of-pocket damages despite the panel's conclusion that the damages methodology "does not purport … to determine *actual* damages for each plaintiff sustained as a result of the misuse of their personal information," which the panel held "would surely be an individual inquiry." Op. at 19 n.14 (emphasis added). This decision is untethered from traditional procedural safeguards. It is undisputed that many class members have not "incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach" as the class is defined. Op. at 5. But because plaintiffs' expert's methodology provided an undisputedly fictional or hypothetical accounting of class members' expenses, appellant will not have a meaningful opportunity to assert individual defenses to class members' claims.

The panel's ruling violates the Rules Enabling Act and reduces Rule 23(b)(3)'s predominance requirement to a nullity. This ruling would eliminate the procedural safeguards afforded defendants under the Fifth and Fourteenth Amendments and will encourage the filing of additional no-injury class actions.

Certification of such classes will place enormous pressure on defendants to settle, despite viable defenses that would defeat many or most claims if brought by individual plaintiffs.

Amicus's members have been targets of actions, like this case, where class members are subject to individualized defenses. The Law Center has a strong interest in ensuring the due process protections built into Rule 23 are followed by the courts in order to curtail socially harmful and abusive class action practices in this and other similar cases.

STATEMENT OF THE ISSUE ASSERTED TO MERIT PANEL OR EN BANC REHEARING

Amicus adopts and incorporates Brinker's statement of the issues. *See* Brinker Br. 1.

STATEMENT OF FACTS

Amicus adopts and incorporates Brinker's state of the course of proceedings and disposition of the case. *See* Brinker Br. 1.

ARGUMENT

I. The Panel's Decision Deprives Defendant of Its Right to Litigate Every Available Defense.

Rule 23(a) and Rule 23(b)(3) were carefully crafted 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 v. Normet*, 405 U.S. 56, 66 (1972). Moreover, the Rules Enabling Act expressly prohibits interpreting Rule 23 in such a way as to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Here, it is beyond dispute that not all members of the putative class incurred the same categories or amounts of damages, and some putative class members incurred no damages at all for some categories. For example, some class members allegedly lost credit card rewards points, while others indisputably did not because they did not have credit cards which issued rewards points. Yet, the panel accepted Plaintiff's damages model which awarded each class member "a standard dollar amount for lost opportunities to accrue rewards"[2] as sufficient to satisfy Rule 23(b)(3)'s requirement that common issues predominate over individualized ones. Op. at 18. The Supreme Court has repeatedly disallowed such end-runs around Rule 23(b)(3) as inconsistent with the Rules Enabling Act and as violating defendants' fundamental due process rights.

[2] The expert's model also purported to assign an average amount of damages to each class member for "the value of cardholder time (*whether or not* they spent any time addressing the breach), and out-of-pocket damages (*whether or not* they incurred any out-of-pocket damages)." Op. at 18 (emphasis added).

In *Dukes*, for example, the Supreme Court rejected a similarly flawed averaging methodology, citing the Rules Enabling Act. 564 U.S. at 367. The Supreme Court reached the same conclusion in *Comcast Corp. v. Behrend*, as the damages model there "failed to measure damages resulting from the particular [] injury on which petitioners' liability in this action is premised." 569 U.S. 27, 36 (2013). If all a litigant needed to overcome the predominance hurdle was "**any** method of measurement . . . [that] can be applied classwide," then "Rule 23(b)(3)'s predominance requirement [would be] a nullity." *Id.* at 35-36

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016) does not support the majority's decision. *Tyson Foods* was a wage and hour class action in which each putative class member had a claim for uncompensated wages for time spent "donning and doffing" the protective gear they were required to wear. *Id*. at 446. Neither party had records of the time spent by each employee class member, and plaintiff presented the results of a research study that identified the average amount of time it took to "don and doff" the required gear. The Supreme Court held that a representative sample is appropriate where "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id*. at 455. Critically, each putative class member in *Tyson Foods* indisputably experienced the same type of damages: uncompensated "don and doff" time. Only the individual amounts of uncompensated time *might* have differed among class members. But the

evidence of those specific amounts was unavailable due entirely to the defendant's violation of its statutory duty to keep appropriate records, and there was evidence that any differences were minimal, if they existed at all. 577 U.S. at 459 (explaining that "the experiences of a subset of employees" could sustain a verdict in an individual case, because "each employee worked in the same facility, did similar work, and was paid under the same policy"). Such is not the case here. Plaintiffs do not deny, and the Panel expressly recognized, that many class members did not actually suffer the types of damages for which their experts' model seeks to compensate them, and the evidence is uniquely within the class members' possession. *Tyson Foods* does not apply because each class member in this case could not have relied on the expert's damages model had they elected to sue individually.

The panel ignored the fundamental requirement to prove that each absent class member is entitled to relief by assuming that class members' damages can be determined through class-wide proof even in the face of irrefutable evidence that they cannot. This court's decision to affirm deprives Defendant of its right to assert individual defenses and test each class member's claims. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019) ("a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the

hands of the defendant.") The class action device may not be used this way. The implications of the panel's decision extend far beyond this particular case.

II. The Panel's Decision Will Invite and Embolden No-Injury Class Actions, which are Prejudicial to Businesses and Consumers

Decisive action in this case can help curb class actions that are increasingly burdening federal courts across the country.[3] Like Plaintiffs here, plaintiffs in those cases, purport to seek redress for time and money spent mitigating the supposed increased risk of identity theft following a data breach. If this case is any indication, however, few of the putative class members in those cases suffered such supposed harms. This tactic of flooding the courts with no-injury class actions burdens the judiciary, and harms businesses, their employees, and the consumers they serve. These cases create enormous risks of aggregate exposure for businesses and deprive them of a meaningful opportunity to raise defenses. Adherence to the fundamental due process safeguards embedded in Rule 23 and the due process clause is not only mandated by controlling precedent, it is necessary to ensure fundamental fairness to class action defendants, including restaurants and retailers, in this case and all others.

The class action device serves as a vehicle by which an individual who suffered an actual injury can vindicate their rights and obtain relief for others who

[3] Michael Mora, *Data-Breach Class Actions Surge Across U.S. Federal Courts in Prior 12 Months*, LAW.COM (July 12, 2023 at 3:54 p.m.), https://www.law.com/dailybusinessreview/2023/07/12/data-breach-class-actions-surge-across-us-federal-courts-in-prior-12-months/.

suffered the same injury, have the same claim, and are otherwise similarly situated. But when large numbers of class members suffered no actual injury, this model is inappropriate and harmful. Instead, the class action device is stretched beyond its intended purpose, and its invocation—along with the accompanying threat of litigation costs and aggregate exposure—serves only to compel unjustified settlements and windfall attorneys' fees. These cases further incentivize the exploitation of the class action device. No-injury class actions undermine the legitimate purpose behind class litigation and lack social value.

The harm that no-injury class actions inflict on businesses is undeniable. "Given the '*in terrorem* character of a class action,' 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." *Cordoba*, 942 F.3d at 1276 (citation omitted). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of '*in terrorem*' settlements that class actions entail"). The pressure to settle without "testing of the plaintiffs' case" only increases following class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (citation omitted); *see also*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (noting "the stakes [are] so large, that settlement becomes almost inevitable–

and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2002) (Lee, J., dissenting) ("If trials these days are rare, class action trials are almost extinct . . . If a court certifies a class, the potential liability . . . maybe even catastrophic, forcing companies to settle even if they have meritorious defenses").

Such "*in terrorem*" settlements lack social value. Indeed, class action settlements typically result in astronomical attorneys' fees for class counsel with a correspondingly minimal recovery for each member of the class. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 659–60 (2010). The disconnect between the purpose underlying Rule 23 (aggregating small but valid claims by individual class members) and the actual impact of Rule 23 in these cases (enriching class counsel without materially benefitting class members) is reason enough for this court to take a strict approach to evaluating plaintiffs' damages models at the class certification stage.

Data breach class actions are particularly susceptible to this type of abuse. A settlement class in a major data breach case can include millions of individuals, many or most of whom likely suffered no actual damage, and could never have filed an individual claim. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No.

16-MD-2752=LHK, 2020 WL 4212811, at *24 (N.D. Cal. July 22, 2020) (surveying cases). These settlements can result in "megafunds" and, in turn, millions of dollars in attorneys' fees. *Id.*; *see also, e.g.*, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1281 (11th Cir. 2021) (affirming attorneys' fee award of $77.5 million). Class counsel benefit from this windfall even though the "size of the settlement fund is largely a function of the size of the settlement class, and 'not entirely attributable to class counsel's skill.'" *In re Yahoo! Inc.*, 2020 WL 4212811, at *24 (approving nearly $23 million in attorneys' fees after reducing award nearly a third). *See also*, *Perdue v. Hy-Vee, Inc.*, 550 F. Supp. 3d 572, 573 (C.D. Ill. 2021) (wherein attorneys' fees provided for in settlement of data breach claims *exceeded* the total payments to the class). This court should use this case to send a signal that businesses in this Circuit are entitled to have their due process rights protected and should not be burdened with "no-injury" class actions.

CONCLUSION

Allowing the panel's decision to stand will only encourage additional cases in which plaintiffs' attempt to paper over insurmountable differences among class members by "averaging" their alleged damages. The result will eviscerate Constitutional due process protections and procedural safeguards embedded in Rule 23, leading to additional, unwarranted burdens on the restaurant industry and similar

retailers. For the foregoing reasons, and those set forth in Appellant's brief, the Court should grant rehearing or rehearing *en banc*.

Respectfully Submitted,

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The undersigned certifies that the foregoing Brief of *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and Fed. R. App. P. 32(a) because it contains 2,381 words excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

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/s/ Anthony G. Hopp
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/s/ Anthony G. Hopp
Anthony G. Hopp

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