
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.

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE 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)

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**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(c), *amici curiae* hereby certify that, to the best of their knowledge, the Certificate of Interested Persons contained in their Motion for Leave to File Their Brief of *Amici Curiae*, as supplemented by Respondents' Certificate of Interested Persons filed in connection with their Response in Opposition, is complete and correct.

Dated: May 24, 2021

/s/ Meredith C. Slawe
Meredith C. Slawe

Counsel for Amici Curiae

**REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE***

The Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation (collectively, “*Amici*”) respectfully submit this Reply in further support of their Motion for Leave to File Their Brief of *Amici Curiae* (“Motion”) in support of Petitioner Brinker International, Inc.’s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) from the Order Granting Class Certification (“Petition”). The Motion and proposed Brief of *Amicus Curiae* (“Brief”) were filed on May 5, 2021.

In their Response in Opposition to the Motion (“Opposition”), Plaintiffs-Respondents Eric Steinmetz, Michael Franklin, and Shenika Theus (“Respondents”) ask this Court to deny the Motion as (a) premature; (b) duplicative of the Petition; and (c) unnecessary. *Amici* respond briefly to correct Respondents’ misunderstanding of the applicable standards governing the Motion and the arguments made in the Brief.

First, Respondents claim, “*Amici* cite no authority allowing the filing of an amicus brief in support of a Rule 23(f) Petition for Permission to Appeal.” Opposition ¶ 1. The Courts of Appeal have broad discretion to accept a brief from *amici curiae*. See, e.g., *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020) (in its discretion, granting *sua sponte* leave to file brief as *amici curiae*). Contrary to Respondents’ suggestion, *Amici* cite multiple examples from this Circuit and

others permitting *amici curiae* to submit briefs in connection with Rule 23(f) petitions, both on consent and when they were opposed. Motion ¶ 5 (citing, *e.g.*, *Brown v. Electrolux Home Prods., Inc. d/b/a/ Frigidaire*, No. 15-11455 (11th Cir.) (Rule 23(f) petition granted following filing of *amicus curiae* brief)).

Respondents state that this Court granted the U.S. Chamber of Commerce’s motion to file an *amicus* brief in connection with the Rule 23(f) petition in *DirecTV, LLC v. Cordoba* “with consent of both parties.” Opposition ¶ 1. But this Court granted the Chamber’s motion over the respondent’s objection. *See* Resp. Opp’n Mot. Leave File Brief as *Amicus Curiae, Cordoba*, No. 17-90020 (11th Cir. Aug. 9, 2017).

Second, Respondents claim that the “Amicus Brief is repetitive of Petitioner’s arguments,” and “does not add anything new and relevant for the Court’s consideration.” Opposition ¶ 2. *Amici*, however, provide a unique non-party perspective on how the district court’s decision raises due process concerns and how it will serve to encourage the filing of additional no-injury class actions in this Circuit that strain the resources of the courts and businesses, including retailers and restaurants. Brief 6–8, 10–11.

Third, Respondents claim that *Amici’s* Brief is “not helpful” because “Amici mischaracterize the underlying case as a ‘no-injury class action.’” Opposition ¶ 3. *Amici* accurately describe this action. Brief 8–10. Indeed, Respondents do not

dispute that the district court granted certification of a Rule 23(b)(3) class without evidence that standing could be established with class-wide proof. Instead, Respondents seek to shift the burden from Respondents to *Amici* (and Petitioner) to present “information” as to “why it cannot be assumed” that class members suffered a cognizable injury. Opposition ¶ 3. There is no such presumption and the burden of establishing standing lies squarely with Respondents. *See Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1268 (11th Cir. 2019) (“plaintiff bears the burden of establishing each element” of Article III standing); *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (“The party seeking class certification has the burden of proof.”).

Finally, Respondents do not meaningfully respond to the fact that the district court’s class definitions would require mini-trials to determine whether each class member suffered a cognizable injury-in-fact. Individual standing issues must be examined on a case-by-case basis. In its ruling, the district court acknowledged that it had previously “address[ed] standing in this case twice” pre-certification and “dismissed Named Plaintiffs who alleged only future injuries.” Order 9, 11, *In re Brinker Data Incident Litig.*, No. 18-0686 (M.D. Fla. Apr. 14, 2021), Dkt. No. 167. The issue is not capable of being resolved with class-wide proof.

CONCLUSION

For these and the reasons set forth in the Motion, the Restaurant Law Center, Retail Litigation Center, Inc., and National Retail Federation respectfully request that this Court grant them leave to file their brief as *amici curiae*.

Respectfully submitted,

Dated: May 24, 2021

/s/ Meredith C. Slawe

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing motion complies with Fed. R. App. P. 27 and 11th Cir. R. 27-1 and the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 704 words.

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) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14-point Times New Roman font.

Dated: May 24, 2021

/s/Meredith C. Slawe

Meredith C. Slawe

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 24, 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