No. 23-____

IN THE

Supreme Court of the United States

BRINKER INTERNATIONAL, INC.,

Petitioner,

v.

ERIC STEINMETZ; MICHAEL FRANKLIN; AND SHENIKA THEUS,

individually and on behalf of all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JASON K. FAGELMAN
BARTON W. COX
SARAH CORNELIA
NORTON ROSE FULBRIGHT US LLP
220 Ross Avenue, Suite 3600
Dallas, TX 75201
(214) 855-8000

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW
Washington, DC 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Petitioner

QUESTION PRESENTED

This case is a putative class action arising out of a consumer credit card security incident in which the class members' purported injuries, if they exist at all, vary materially in kind and amount and are thus inherently individualized. Transparently attempting to circumvent the predominance requirement of Federal Rule of Civil Procedure 23(b)(3), and threatening to undermine the very core of class action law, the district court and court of appeals approved a plan to ignore these individualized issues of injury and damages by awarding the same "standard dollar amount"—allegedly representing "average" damage amounts for multiple categories of alleged injuries—to every class member "***whether or not***" that class member even suffered the corresponding injury. App. 16a, 37a (emphasis added).

The question presented is whether, under the Rules Enabling Act, Federal Rule of Civil Procedure 23, and this Court's precedents, a class can be certified by ignoring individualized issues of damages and injury and instead proposing to award every class member the same "average" amount for alleged injuries even if they did not suffer those injuries at all.

RULE 29.6 STATEMENT

Petitioner Brinker International, Inc. ("Brinker"), is a publicly traded corporation (NYSE: EAT). Brinker has no parent company, and no publicly held corporation owns 10% or more of Brinker's stock.

STATEMENT OF RELATED PROCEEDINGS

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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In this putative class action, the existence and nature of class members' injuries and damages vary materially from person to person. Yet the Eleventh Circuit—contravening this Court's precedents and departing from the holdings of every other circuit that has decided the issue—held that the "predominance" requirement of Federal Rule of Civil Procedure 23(b)(3) can be met by ignoring those individualized issues and instead awarding each class member the same "average" amount for various categories of damages, ***even when the person did not suffer the corresponding harm.*** Certiorari is warranted to

correct this clear legal error, which (1) allows plaintiffs to recover in a class action amounts they could never have recovered in individual actions, and (2) threatens to eviscerate the predominance requirement in vast numbers of cases.

Respondents are customers who alleged that their payment card information was compromised in a data incident at "Chili's" restaurants owned by petitioner Brinker International ("Brinker").[1] They brought a putative class action, on behalf of all allegedly affected cardholders, seeking compensation for various types of supposed harms purportedly caused when an unknown number of customers elected to replace their cards after the incident. Whether a customer suffered any such harms, and, if so, in what amount, differs greatly from person to person. Yet plaintiffs proposed to certify a class by avoiding adjudication of these inherently individualized issues and instead compensating every class member in ***the exact same amount*** for multiple categories of supposed damages, allegedly representing "average" damages across all class members. App. 16a-17a, 37a. As both courts below openly admitted, however, the compensation would be awarded "***whether or not***" a given class member actually suffered—or even claimed to have suffered—the alleged injuries in question. App. 16a, 37a (emphasis added). Thus, for example, each class member would receive the same "average" amount allegedly attributable to lost opportunities to accrue "rewards card" points, ***even if the person did not have a rewards card,*** and the same "average" amount for time spent mitigating the consequences of

[1] The Eleventh Circuit held that the only respondent who could have standing to sue is plaintiff Shenika Theus. App. 10a-12a. The other plaintiffs are respondents under Sup. Ct. R. 12.6.

the data incident, ***even if the person spent no such time*** or was entirely unaware that their card was even compromised in the incident and thus could not have spent such time. *Id.*

The Eleventh Circuit, misinterpreting this Court's decision in *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016), blessed the district court's approval of respondents' proposal. For reasons Judge Branch explained extensively in dissent, however, that decision effectively nullifies Rule 23's stringent predominance requirement. As this Court has repeatedly held, a class cannot be certified on the premise that the unique realities of each individual claim will simply be ignored. *See*, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011) (citing 28 U.S.C. § 2072(b)). Ignoring that fundamental precept, the Eleventh Circuit held that courts can certify classes involving claims that are overwhelmingly distinct and individualized by awarding "average" amounts for injuries people never suffered. If allowed to stand, that holding threatens to significantly lower, if not obliterate, the high bar for class certification. *See Am. Exp. Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013) ("[Rule 23] imposes stringent requirements for certification that in practice exclude most claims."); *see also, e.g.*, *Tyson Foods*, 577 U.S. at 453; *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013).

The issue warrants this Court's immediate review. The district court certified the first-ever consumer damages class in a payment card data breach case, which are increasingly clogging the lower courts and which will proliferate even more if the Eleventh Circuit's improper ruling is allowed to stand.[2] Nor is

[2] *Cf., e.g.*, *Beck* v. *McDonald*, 848 F.3d 262, 270-78 (4th Cir. 2017) (affirming dismissal of similar claims for lack of standing);

the issue limited to such cases, since any plaintiff could employ the Eleventh Circuit's "averaging" tactic to avoid almost any individualized issue and thereby compensate class members collectively without having to adjudicate their actual, individual and particularized claims. And if the Court does not review this important issue now, it may not get another opportunity. The question presented was squarely decided by both lower courts and is subject to this Court's review because the class certification order was accepted for appellate review under Fed. R. Civ. P. 23(f). But the possibility of this Court's review of the issue in the future is highly uncertain.

The court of appeals' precedential ruling, issued over Judge Branch's detailed and well-reasoned dissent, thus warrants certiorari. Under the Eleventh Circuit's analysis, disparately situated plaintiffs can be treated identically—and compensated for injuries "whether or not" they actually suffered them—to certify class actions that do not satisfy Rule 23. The decision below misconstrues this Court's precedents, fundamentally departs from the holdings of eight other circuits, and threatens to result in a vast and potentially limitless expansion of the class action device. The Court should grant certiorari and reject

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McGlenn v. *Driveline Retail Merch., Inc.*, No. 18-cv-2097, 2021 WL 165121, at *8-11 (C.D. Ill. Jan. 19, 2021) (denying certification); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 30-33 (D. Me. 2013) (same). *See generally* Amy B. Doolittle & Kristin L. Bryan, *Say It Isn't So—Court Certifies Rule 23(b)(3) Damages Class in Data Breach Litigation*, Nat L. Rev. (Apr. 15, 2021) (https://tinyurl.com/2mdr73k7) (describing district court's certification as "a potential game changer"); *see infra* at 23-24 (noting increasing prevalence of such class actions).

the Eleventh Circuit's rule, either summarily or after plenary review.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 73 F.4th 883 and reproduced at App. 1a-30a. The district court's opinion is unreported and reproduced at App. 31a-65a.

JURISDICTION

The Eleventh Circuit denied Brinker's timely petition for rehearing and rehearing en banc on September 15, 2023. App. 66a-67a. The Eleventh Circuit's decision granting appellate review under Fed. R. Civ. P. 23(f) is unreported and reproduced at App. 68a-69a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE

The Rules Enabling Act provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

Federal Rule of Civil Procedure 23(b)(3) provides in pertinent part that a damages class may be certified only where "the questions of law or fact common to class members predominate over any questions affecting only individual members."

STATEMENT OF THE CASE

A. Proceedings In The District Court.

In 2018, criminal hackers targeted Brinker's data systems and may have accessed payment-card information of some patrons at certain Brinker-owned Chili's locations. App. 2a. A few Chili's patrons filed this putative class action later that year. Doc.1.[3] The

[3] "Doc." refers to entries on the district court's docket.

operative complaint, filed in 2020, asserts jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and brings claims for, *inter alia*, state-law negligence, purportedly on behalf of a nationwide class and a California class. Doc.95:5, 39-69.

In April 2021, the district court certified a nationwide class for the negligence claims. The class was defined as:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach.

App. 63a-64a.[4] The certified class was thus defined to include only those Chili's patrons who "incurred reasonable expenses or time spent in mitigation of the consequences" of the data incident. *Id.*

It is indisputable that determining who among the approximately 4.5 million potentially affected cardholders incurred reasonable expenses or time spent in mitigation of the consequences of the breach, and in what type and amount, would require extensive individualized adjudication of each

[4] The district court also certified a materially identical California-law class, App. 64a, but the court of appeals held that the named plaintiff for that class, respondent Michael Franklin, lacked Article III standing, App. 10a-11a. The court of appeals also found that a second named plaintiff, Eric Steinmetz, lacked Article III standing. App. 11a-12a. Thus, as the case comes to this Court the only remaining named plaintiff is respondent Shenika, who is not a California resident, such that there is no longer a representative of the putative California class. App. 15a.

cardholder's circumstances.[5] Nevertheless, in an effort to sidestep these inescapably individualized issues, respondents proffered an expert, Daniel Korczyk. Korczyk proposed to "employ[] an averages method" that awards to every class member the exact same amount for each of three supposed injuries—opportunities to accrue rewards points, the value of time spent addressing the breach, and out-of-pocket costs—without regard to whether any of the class members actually suffered them or in those amounts. App. 37a, 16a-17a. As the Eleventh Circuit expressly stated, "plaintiffs' expert provided the District Court with a common methodology for calculating damages based on 'a standard dollar amount for lost opportunities to accrue rewards points (***whether or not they used a rewards card***), 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***).'" App. 16a (quoting App. 37a) (emphases added).

For example, based on Korczyk's unsupported estimate that 76% of class members would have lost opportunities to accrue rewards points while replacing a rewards card, respondents propose to award a flat sum to every class member for lost rewards points, expressly including those who ***did not even have a rewards card***, much less cancel one because of the incident. *See* Doc.132-1:15-17. The "lost reward point" damages that would be awarded to all class members—which Korczyk conceded "might [be] a windfall" for those who did not experience that

[5] Indeed, as the Eleventh Circuit's decision noted, individualized discovery conducted during the trial court proceedings disproved most of the named plaintiffs' allegations of injury, causation, and damages. App. 12a.

supposed injury—would amount to 76% of Korczyk's estimate of the average loss experienced by those who did suffer the injury. Doc.146, Ex. A-13 at 206:11-207:17; Doc.132-1:17. Thus, the damages otherwise available to anyone who actually experienced the injury would be reduced to pay for awards to those who did not and could not have experienced it. Doc.146, Ex. A-13 at 206:11-207:17; Doc.132-1:17.

The district court acknowledged that Korczyk's proposed method ignores material differences among individual class members, compensates people for injuries suffered only by others, and pays for it by reducing the awards to which some class members would otherwise be entitled. *See* App. 36a-37a (recognizing that "all class members" would receive "standard dollar amount[s]" for various categories of injuries "***whether or not***" they actually suffered those injuries.") (emphasis added). Yet, stating only that this Court's decision in *Tyson Foods* "approved the use of averages methods to calculate damages," the district court deemed Korczyk's methodology sufficient to satisfy predominance and certified the class. App. 37a, 58a-60a (citing *Tyson Foods*, 577 U.S. at 459-61).

B. Proceedings In The Court Of Appeals.

The Eleventh Circuit granted review of the certification order under Rule 23(f). App. 68a-69a. A divided merits panel then affirmed the district court's holding that Korczyk's methodology satisfied the predominance requirement of Rule 23(b)(3), while vacating and remanding on other grounds.[6] Over

[6] The court remanded for a determination as to whether ascertaining the standing of absent class members would require individualized inquiries that would defeat predominance. App. 14a-15a. That remand proceeding, however, would be wholly

Judge Branch's dissent, the majority reasoned that "[a]t the class certification stage, all that the named plaintiffs had to prove was that a reliable damages methodology existed, not the actual damages plaintiffs sustained." App. 16a. And despite repeating the district court's damning admission that Korczyk's model would award each class member a "standard" amount for multiple categories of damages "whether or not" that person suffered them, the majority approved Korczyk's methodology, stating that it was permissible under *Tyson Foods* because Korczyk claimed to "believe[] the 'delta between class members' damages is minimal irrespective of the type of card used or time spent.'" App. 16a-17a. The court did not, however, examine whether Korczyk had any basis for his *ipse dixit* belief.

The majority furthermore made clear that without Korczyk's methodology, the proposed class would not meet Rule 23(b)(3)'s predominance requirement for certification. Noting that plaintiffs never attempted to measure damages actually stemming directly from the purported "misuse" of payment card data, the majority explained that "[s]uch inquiry into actual damages would surely be an individual inquiry." App. 16a n.14. But the majority approved the district court's finding that Korczyk's "averaging" methodology satisfied Rule 23(b)(3) only because "[a]ny individual inquiry into particularized damages resulting from the data breach * * * does not predominate over the three categories of common damages inquiries analyzed by [Korczyk]." App. 17a-18a. Thus, the

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unnecessary if this Court reverses the Eleventh Circuit, rejects Korczyk's irredeemably flawed model, and holds that individualized issues of injury and damages defeat predominance and preclude certification under Rule 23(b)(3).

majority held—as common sense dictates—that if respondents could not rely on Korczyk's "averaging" methodology to establish "common damages inquiries," *id.*, the "particularized" and "individual" inquiries otherwise required to establish "actual" injury and damages would necessarily predominate over common issues and thereby defeat certification.

Judge Branch dissented from the majority's interpretation of *Tyson Foods* for two fundamental reasons. App. 19a-30a. First, she explained, the majority's assertion that each "'customer fitting within the class definitions experienced a similar injury' * * * cannot be true." App. 27a (quoting App. 17a). Instead, "[a]s the district court acknowledged, Plaintiffs' damages methodology could allow a plaintiff to be compensated for opportunities to accrue rewards points, the value of their time spent addressing the breach, and out-of-pocket damages," ***whether or not*** that plaintiff suffered each of those "separate and distinct injuries." App. 27a-28a. By treating differently situated claimants alike, such a facially defective model would allow claimants to "impermissibly recover damages that they otherwise would not be entitled to in an individual action." App. 28a (citing *Comcast*, 569 U.S. at 35).

Second, Judge Branch explained that the issue in this case is nothing like the one this Court addressed in *Tyson Foods*, where the realities of each individual class member's case were unknowable from direct evidence. App. 28a. "Far from categorically 'approv[ing] the use of averages methods to calculate damages,'" she recognized, *Tyson Foods* "was careful to reject any request to 'establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases.'" *Id.*

(quoting 577 U.S. at 455) (alteration original). Instead, "[t]he Court noted that plaintiffs in [*Tyson Foods*] 'sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records.'" App. 28a-29a (quoting 577 U.S. at 456) (alteration and emphasis added). "And the Court concluded that reliance on this representative evidence 'did not deprive [the employer] of its ability to litigate individual defenses,' reasoning that '[s]ince there were no alternative means for the employees to establish their hours worked,' the employer was left to attack the representative evidence itself." App. 29a (quoting *Tyson Foods*, 577 U.S. at 457) (alterations original).

"The justifications for using representative evidence that were present in *Tyson Foods*," Judge Branch continued, "***are simply not present here***." App. 29a (emphasis added). Determining whether a class member possessed and canceled a rewards card, spent time addressing the breach, and suffered out-of-pocket losses would depend on evidence that "is not inaccessible or controlled by Brinker," but is instead "known and controlled by the plaintiffs or * * * at least readily available through individualized examination" that due process entitles Brinker to conduct. *Id.* Thus, "unlike *Tyson Foods*, here, the use of damages averages would deprive Brinker of its ability to litigate individual defenses where a class member's individual damages are discoverable." *Id.*

Brinker timely sought panel and en banc rehearing, which was denied. App. 66a-67a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND CREATES A CIRCUIT SPLIT ON A FOUNDATIONAL AND RECURRING LEGAL QUESTION.

A. The Eleventh Circuit's Decision Contravenes This Court's Precedents.

As Judge Branch explained in her dissent, this Court has repeatedly reaffirmed that Rule 23 does not allow courts to ignore the realities of individual litigants' claims in order to certify a class. *See, e.g.*, App. 27a-28a. In *Wal-Mart*, 564 U.S. at 367, the Court expressly rejected a proposed "Trial by Formula" for reasons that apply equally here. The proposal in *Wal-Mart* was to (1) try a representative subset of claims, thereby establishing what percentage of claims were supposedly valid; (2) multiply that percentage "by the average [damages] award in the sample set to arrive at the entire class recovery;" and (3) distribute that amount evenly to every class member. *Id.* The Court held that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" a class could not be certified "on the premise" that the defendant could not litigate "defenses to individual claims." *Id.* (quoting 28 U.S.C. § 2072(b)). Accordingly, because a defendant is entitled to present individualized defenses and require individualized proof of damages, the Court held that the "class could not be certified." *Id.*

Here, Korczyk proposed to substitute *Wal-Mart*'s allegedly representative minitrials with his own arbitrary guesses from unverified, non-peer-reviewed

internet sources to derive purported "standard" dollar figures for multiple, distinct categories of damages to be awarded to every class member. *See*, *e.g.*, Doc.132-1:15-16. None of these guesses could accurately be characterized as an actual average across the class, since they were not based on actual evidence regarding the Brinker data incident. But regardless of how arbitrarily Korczyk derived his "averages," *Wal-Mart*'s rule forecloses use of his flawed methodology. Class action or not, no federal court can order Brinker to compensate a plaintiff for an injury that the plaintiff did not in fact suffer. *Wal-Mart*, 564 U.S. at 367; *see also, e.g.*, *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring); *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Nor is *Wal-Mart* the only case that reveals the Eleventh Circuit's error. The Court reiterated *Wal-Mart*'s holding in *Comcast*, specifically rejecting an expert's model that "failed to measure damages resulting from" the particular injury alleged. 569 U.S. at 36. A failure to tie damages to a plaintiff's actual injury "would reduce Rule 23(b)(3)'s predominance requirement to a nullity" by rendering "***any*** method of measurement * * * acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* at 35-36 (quoted at App. 27a) (emphasis original). Few methodologies could be more arbitrary than Korczyk's approach, which both lower courts expressly admitted would compensate people for supposed injuries "whether or not" those people actually suffered them.

The Eleventh Circuit's error is also confirmed by *Tyson Foods* itself. Following the district court's lead, the panel majority wrongly interpreted *Tyson Foods* to establish that plaintiffs have carte blanche to seek

"damages * * * based on averages" in a near-limitless range of circumstances. App. 16a-17a; *see also* App. 37a, 59a-60a. But as Judge Branch correctly observed, *Tyson Foods* expressly refutes that notion. App. 28a-29a. In accord with *Wal-Mart* and *Comcast*—which it did not limit or disagree with in any way—*Tyson Foods* explained that the use of representative evidence in a class action is permissible ***only*** if that evidence "could have been used to establish liability in an individual [case]," ***and*** its use would "not deprive [the defendant] of its ability to litigate individual defenses." 577 U.S. at 457-58. Otherwise, *Tyson Foods* explains, the use of averages "violate[s] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id.* at 458. Moreover, the methodology was allowed in *Tyson Foods* only "to fill an evidentiary gap created by the [defendant's own] failure to keep adequate records." *Id.* at 456.

The Eleventh Circuit's decision misinterprets *Tyson Foods* and thereby contravenes *Wal-Mart* and *Comcast*. As Judge Branch explained, an individual plaintiff who ***concededly did not suffer*** a particular injury could never be compensated for that injury in an individual case. App. 27a-28a. Under the reasoning of *Tyson Foods* itself, it follows that such a plaintiff cannot be so compensated in a class action. Yet as both courts below expressly conceded, such improper compensation is the entire rationale and effect of Korczyk's "averages" method. *See* App. 16a-17a.

Tyson Foods also distinguished *Wal-Mart* because while the employees in *Tyson Foods* were all similarly situated, "the experiences of the employees in *Wal-Mart* bore little relationship to one another." 577 U.S.

at 459. For the reasons Judge Branch set forth, this case falls under *Wal-Mart* because it is undisputed that class members suffered disparate injuries. App. 27a-28a. For example, some had rewards cards while others did not; some had out-of-pocket expenses while others did not; and some spent time addressing the breach while others did not. The majority nevertheless blindly accepted Korczyk's purported "belie[f]" that all class members suffered similar types and amounts of damages. App. 16a-17a. But that belief—among other fundamental and fatal flaws—is entirely unsupported and therefore irrelevant. *See, e.g.*, *Wal-Mart*, 564 U.S. at 350-51 (Rule 23 "does not set forth a mere pleading standard," and instead requires "rigorous analysis" of prerequisites to certification). The only way Korczyk could possibly conclude there was little variation across the class would be to examine every class member's circumstances individually, which is precisely what he did ***not*** do or even attempt to do. Moreover, his own estimates reveal that his "belief" in classwide homogeneity is a fiction. He valued out-of-pocket expenses at $38 per class member, but lost rewards points at only $2.44. *See* Brinker 11th Cir. Br. at 18 n.7. Even accepting these baseless estimates, without Korczyk's "averaging," a class member who had only out-of-pocket expenses would recover a large multiple of what a plaintiff who only lost rewards points would recover. And when these amounts are multiplied across a class with as many as 4.5 million members, the differences are anything but "minimal." App. 17a.

Moreover, even assuming *arguendo* Korczyk's model could establish a prima facie case in an individual action (and it cannot), it still would not satisfy Rule 23's stringent predominance requirement. As *Wal-*

Mart and *Tyson Foods* hold, Brinker is still entitled to exercise its due process right to defend against each individual claim by inquiring into what injury (if any) each individual claimant actually suffered. *Tyson Foods*, 577 U.S. at 458; *Wal-Mart*, 564 U.S. at 367; *see also TransUnion*, 141 S. Ct. at 2208 (facts supporting standing must be supported "by the evidence adduced at trial") (citation omitted). And the proceedings to date illustrate why: by examining the named plaintiffs' individualized allegations in discovery, Brinker affirmatively disproved most of their allegations, such that all but one named plaintiff's claims have been dismissed on the merits. Unlike in *Tyson Foods*, the evidence here—whether claimants took specific mitigation actions and, if so, why and in what amounts—is uniquely within class members', not Brinker's, possession and readily ascertainable through individualized inquiries. *See* App. 29a (Branch, J., dissenting).[7] Brinker's fundamental due process right to conduct those inquiries independently defeats predominance. Yet the majority never even addressed the issues of individualized defenses or Brinker's right to present them.

Furthermore, in addition to violating Brinker's rights, Korczyk's "averaging" methodology abridges the substantive rights of absent class members and contravenes the Rules Enabling Act for that reason as well. As Korczyk readily admits, *see supra* at 7-8, the

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[7] These issues, in turn, would require other individualized inquiries, including whether a claimant even knew about the Brinker data incident and whether any mitigation actions, if taken, were due to that incident or something else. *See*, *e.g.*, App. 12a (Eleventh Circuit's holding that former named plaintiff Steinmetz "cannot fairly trace any alleged injury to Brinker's challenged action").

methodology takes money from class members who allegedly suffered a given injury in order to award that money to other class members who concededly did not. As this Court has repeatedly made clear, that is a quintessential Rules Enabling Act violation. *See, e.g.*, *Wal-Mart*, 564 U.S. at 367.

Korczyk's methodology is thus impermissible as a matter of law. In an individual action, a person who never had, or never canceled, a rewards card could never receive damages for "lost opportunities to accrue rewards points." App. 16a. Likewise, a person who spent no time addressing the breach could not recover damages for time spent addressing the breach, and a person who incurred no out-of-pocket costs could not recover damages for out-of-pocket costs. *Id.* Because that is true of an individual action, it is just as true of a class action. Nor could any plaintiff rely on collective evidence (which is non-existent) to prove that any of those supposed harms was incurred as a result of this particular data incident, instead of for some other reason. Determining who among the 4.5 million people allegedly affected by the incident actually suffered the supposed injuries, and to what extent, as well as whether the supposed injuries were actually traceable to the Brinker data incident, would necessarily involve individualized inquiries into the circumstances of each claim based on evidence that would be readily available to each class member.

Because those myriad mini-trials would unavoidably and necessarily predominate over any common issues, respondents did not—and could not possibly—satisfy their burden of proving that Rule 23 was satisfied. *See Wal-Mart*, 564 U.S. at 367.

B. The Decision Below Conflicts With Holdings of Eight Other Circuits.

The Eleventh Circuit's misapplication of *Tyson Foods* also creates a stark circuit split on the foundational question of law this petition presents. Every one of the eight other circuits to have considered the issue has adopted rules that are consistent with this Court's precedents and would have required Korczyk's model to be rejected.

1. The First, Third, and Fourth Circuits have expressly rejected models that, while more sophisticated than Korczyk's, suffered the same fatal flaw. The First Circuit's decision in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), which echoes Judge Branch's dissent, exemplifies their reasoning. In *Asacol*, the court correctly explained that "[t]he aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not 'inefficient or unfair.'" *Id.* at 51 (quotation omitted). Impermissible inefficiency, the court explained, "can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues." *Id.* Impermissible "[u]nfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id.* at 51-52.

Based on that analysis, the *Asacol* court rejected an expert model purporting to demonstrate commonality by showing that 90% of class members were injured, reasoning that the model could not possibly show that any given ***individual*** class member was injured. *Id.* at 54-55. The court further explained that the problem could not be avoided by the Korczyk-style

maneuver of spreading out the damages evenly across the class. *Id*. at 55-56. As the court put it, lumping together differently situated claimants in that manner "fl[ies] in the face of the core principle that class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims." *Id*. at 56.

The Third Circuit has held similarly. In *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184, 192-93 (3d Cir. 2020), the plaintiffs sought to show antitrust injury by positing a single, supposedly "average" overpayment amount across a proposed class. But the court rejected that model, noting that the real-world market was "characterized by individual negotiations" and discounting, such that many class members "likely paid no more, or even ***less***" for the product than they would have if the alleged wrongdoing had not occurred. *Id.* (emphasis original). In such circumstances, the use of a single classwide figure would impermissibly "mask[] the fact" that the claims within the class were heterogeneous and thus unsuitable for collective resolution. *Id.*; *see also, e.g.*, *Ferreras* v. *Am. Airlines, Inc.*, 946 F.3d 178, 186-87 (3d Cir. 2019) (explaining that *Tyson Foods* does not permit the use of representative evidence to falsely homogenize dissimilar class members' claims). Here, "masking" material differences among class members is the entire point of Korczyk's purported model.

The Fourth Circuit has been just as clear. In *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998), that court categorically rejected a plaintiff's attempt to cobble together in a class "a hodgepodge of factually as well as legally different plaintiffs" by using "averages" of

lost profits to treat each as a "fictional typical" litigant. As the court explained—in terms equally applicable here—the mere fact that such a "shortcut was necessary in order for th[e] suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id*. The same is true here.[8]

2. Other circuits, while not confronting efforts quite as brazen as Korczyk's, have issued holdings that equally foreclose the "averaging" method he employed. In *Castillo* v. *Bank of America, NA*, 980 F.3d 723, 732 (9th Cir. 2020), for example, the Ninth Circuit categorically rejected the notion that *Tyson Foods* applies to classes whose members are differently situated. The D.C. and Second Circuits have likewise held that proffered collective evidence must be accurate "for individual class members" to be employed in a class action. *In re Petrobras Sec.*, 862 F.3d 250, 272-74 (2d Cir. 2017) (holding that a proper "predominance analysis must account" for "individual questions, particularly when they go to the viability of each class member's claims"); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 627 (D.C. Cir. 2019) (representative evidence must be accurate as to class members "individually"). As noted, Korczyk's proposed evidence concededly is not.

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[8] In a case devoid of substantive analysis, the Fourth Circuit later permitted antitrust plaintiffs to achieve predominance by using industry- and class-wide averages, among other evidence, to prove injury. *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 237-38 (4th Cir. 2021). But the court never suggested that anyone would or could be compensated for an injury they concededly did not suffer. As *Broussard* makes clear, Fourth Circuit law squarely holds otherwise.

The Fifth, Seventh, and Eighth Circuits would have rejected Korczyk's methodology for yet another reason Judge Branch noted. As those courts have held, a class cannot be certified based solely on a plaintiff's supposedly common evidence when, as here, that evidence would be susceptible to individualized rebuttal. *See, e.g.*, *Johannessohn* v. *Polaris Indus. Inc.*, 9 F.4th 981, 986 (8th Cir. 2021) ("Cases are not tried on the evidence of one party."); *Gorss Motels, Inc.* v. *Brigadoon Fitness, Inc.*, 29 F.4th 839, 844-45 (7th Cir. 2022) (citing *Gene & Gene LLC* v. *BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008)); *Robinson* v. *Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423-24 (5th Cir. 2004) (regardless of whether plaintiff could hypothesize a single classwide overpayment, defendant's ability to invoke "divergent negotiating histories" for each claimant defeated predominance).

As Judge Branch explained, that principle should have required denial of certification in this case. Even assuming *arguendo* that respondents could permissibly rely on Korczyk's "averages" in their case-in-chief, Brinker would have no obligation to sit idly by as they did so. *See* App. 29a ("[U]nlike *Tyson Foods*, here, the use of damages averages would deprive Brinker of its ability to litigate individual defenses where a class member['s] individual damages are discoverable."). Instead, due process requires that Brinker be permitted to call to the witness stand every single class member to probe such issues as whether that individual possessed a rewards card, whether they canceled that card, why they canceled it, whether they knew about the breach and, if so, spent any time or money addressing it, and in what amounts they did so. S*ee also, e.g.*, *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an

opportunity to present every available defense.") (quotation omitted). Such individualized inquiries are archetypically predominance-defeating and independently show why Korczyk's model cannot support class certification.

Accordingly, all eight other circuits to have confronted the issue have squarely rejected the notion that a methodology like Korczyk's could satisfy Rule 23's requirements or pass constitutional muster. Thus, it is not surprising that even respondents were reluctant to defend that methodology on appeal. After the district court characterized Korczyk's proposal as involving awards to litigants for injuries they did not suffer, respondents derided as "false," "woefully inaccurate," and reliant on "out-of-context quotes" any reference to the district court's description. 11th Cir. Rule 23(f) Opp. 16-17; *see also* Appellees' 11th Cir. Br. 45 (similar). But the court of appeals endorsed the exact approach respondents were too ashamed to defend. In so doing, the Eleventh Circuit became an extreme outlier among the courts of appeals, which have otherwise understood and followed this Court's foundational holdings in this area of the law.

II. THIS CASE IS A RARE OPPORTUNITY TO ADDRESS A CRITICALLY IMPORTANT AND SQUARELY PRESENTED QUESTION OF CLASS ACTION LAW.

The question presented is of overriding importance. To begin, the Eleventh Circuit's outlier ruling undermines the very core of class action law. Under Rule 23, a court must examine in detail "the factual and legal issues comprising the plaintiff's cause of action" and, based on those issues, determine whether the prerequisites to certification "have been satisfied." *Comcast*, 569 U.S. at 33-34 (quotations omitted).

Such inquiries necessarily require an honest accounting of what issues each individual claim would raise. *See, e.g.*, *id.* at 35-38; *see also, e.g.*, *Tyson Foods*, 577 U.S. at 453 (predominance requirement "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case"). Even the Eleventh Circuit has held that "[i]ndividual damages defeat predominance if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable" or if "they are accompanied by significant individualized questions going to liability." *Brown* v. *Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (quotations omitted); App. 15a. But as other circuits have held, a plan to ignore the realities of each individual claim makes a sham of that entire inquiry. *See supra* at 18-22. If Korczyk's methodology were permissible—and plaintiffs could establish predominance simply by using averages to mask real-world differences among putative class members—Rule 23(b)(3)'s predominance requirement would be no limitation at all. In cases involving predominant individualized issues—such as *Wal-Mart*, *Asacol*, this case, and the others discussed above—the only way to prove each claim is to line up "thousands of class members waiting their turn to offer testimony," which is exactly what Rule 23 forbids. *Asacol*, 907 F.3d at 51; *Wal-Mart*, 564 U.S. at 367 (holding that because the proposed "Trial by Formula" was impermissible, the "class could not be certified").

The issue, moreover, is particularly important given the increasing proliferation of data breach class actions in federal courts. In 2022-23 alone, there was a 154% increase in federal data breach class actions, with an average of 33 cases being filed each month.

See Sharon D. Nelson, John W. Simek, & Michael C. Maschke, *Law Firm Data Breaches Surge in 2023*, Md. State Bar Ass'n (Aug. 14, 2023) (https://www.msba.org/law-firm-data-breaches-surge-in-2023/).

And this has occurred even though data breaches rarely result in actual out-of-pocket costs to consumers and, as here, any harm that may occur is highly individualized.[9] If allowed to stand, the Eleventh Circuit's new rule would only escalate this disturbing trend, as plaintiffs would be able to avoid the predominance of those individualized issues through the simple expedient of having an expert propose to award every class member the same "average" damages figure regardless of their actual individual circumstances. And given that, as here, those average amounts will generally be small on an individual basis but potentially massive on a classwide basis, the only real beneficiaries will be class counsel seeking to extract unjustified settlements. For example, if Korczyk's methodology is allowed and a class is certified, plaintiffs' asserted damages could exceed $1 billion. *See* Brinker 11th Cir. Br. 18-19 n.7.

Nor is there any apparent reason why respondents' end-run would be limited to issues of injury and damages. For example, when individual reliance is an element of a fraud claim, it generally precludes class certification because whether a claimant relied on a

[9] *Cf. Anderson* v. *Hannaford Bros. Co.*, 659 F.3d 151, 155-56 (1st Cir. 2011) (noting that only one out of 1,800 fraudulent charges from payment card data breach was not reimbursed); *In re Practicefirst Data Breach Litig.*, No. 1:21-CV-790, 2022 WL 354544, at *5 (W.D.N.Y. Feb. 2, 2022) (noting that complaint "fail[ed] to allege that ***any*** of the over 1.2 million people affected by the data breach have experienced attempted or actual identity theft, or a similar type of fraud or attempted fraud, in over a year following [a] ransomware attack") (emphasis original).

statement or omission requires examining that individual's specific circumstances. *See, e.g., Tershakovec* v. *Ford Motor Co., Inc.*, 79 F.4th 1299, 1307-08 (11th Cir. 2023). But under the opinion below, a named plaintiff could achieve certification merely by having an expert calculate an "average" reliance rate—even using the sort of non-case-specific internet research Korczyk used here—and propose to award the same "average" damages amount to every class member regardless of whether they could actually prove reliance. As the First Circuit observed in *Asacol*, the same is true for virtually any other individualized issue also. If approaches like Korczyk's were permitted, "there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately." *Asacol*, 907 F.3d at 56.

If permitted to stand, the Eleventh Circuit's precedential decision will thus dramatically transform class action jurisprudence and make that circuit a hotbed for improper class actions, which often involve nationwide claims that could be filed anywhere and are thus uniquely susceptible to forum shopping. Class-action litigation and settlements impose enormous costs on American businesses—and thus consumers—that often bear little or no relation to the merits of any underlying claims. *See, e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). And given the "risk of 'in terrorem'

settlements that class actions entail," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011), the majority's ruling will likely cause the payment of millions or billions in unjustifiable litigation and settlement costs that will ultimately be borne by consumers.

This case is also an excellent vehicle for addressing the issue. As both lower courts candidly acknowledged, the plan they approved would compensate class members for supposed injuries "whether or not" they actually suffered those injuries. App. 16a, 37a. The lower courts' candor puts the question presented in the starkest possible relief. Indeed, the clarity of the lower courts' error invites summary resolution in the event the Court deems plenary briefing and argument unnecessary.

Furthermore, although the Eleventh Circuit remanded for further proceedings on different issues, even the majority made clear that it would be impossible for plaintiffs to establish predominance without Korczyk's "averaging" methodology. *See supra* at 9-10. As in *Wal-Mart*, a holding from this Court to that effect, and rejecting the use of Korczyk's flawed methodology, would eliminate the need for any further litigation regarding Rule 23 issues.

Moreover, if this Court does not grant certiorari now, it is far from certain that any additional chance to review the court of appeals' error will be forthcoming—either in this case or any future one. Absent a final judgment—which is unlikely in a large class action such as this one, *see, e.g.*, *AT&T Mobility*, 563 U.S. at 350—the only realistic avenue for appellate review of a future certification decision would be another petition under Rule 23(f). Any such petition would be reviewed under a discretionary standard by an appellate motions panel subject to

little or no further oversight from either an *en banc* court of appeals or this Court. *See, e.g.*, Fed. R. Civ. P. 23(f); *Prado-Steiman ex rel. Prado* v. *Bush*, 221 F.3d 1266, 1272-77 (11th Cir. 2000) (describing Eleventh Circuit's multifactor analysis, while noting that "there are too many class actions filed each year for federal appeals courts practicably to adjudicate class certification decisions on an interlocutory basis as a matter of course"). And since the Eleventh Circuit has already resolved the question presented in a precedential opinion and denied rehearing, another Rule 23(f) petition raising only that specific question would face an additional hurdle.

Thus, if this Court does not review the Eleventh Circuit's error now, it may never have another chance to do so. Appellate review of certification decisions in other cases would be subject to similar uncertainties, and given the precedents discussed above, few litigants outside the Eleventh Circuit could even attempt a maneuver like Korczyk's. It could therefore be years or decades before the question presented arises again in this Court, if it ever does. In the meantime, millions or billions of dollars could improperly change hands in large numbers of cases due to the Eleventh Circuit's fundamental mistake.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and hold—either summarily or on plenary review—that no class can be certified in this case.

Respectfully submitted,

JASON K. FAGELMAN
BARTON W. COX
NORTON ROSE FULBRIGHT US LLP
220 Ross Avenue, Suite 3600
Dallas, TX 75201
(214) 855-8000

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW
Washington, DC 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Petitioner

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APPENDIX

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APPENDIX A

USCA11 Case: 21-13146 Document: 69-1
Date Filed: 07/11/2023

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13146

MARLENE GREEN-COOPER,
individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

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

Plaintiffs-Appellees,

versus

BRINKER INTERNATIONAL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida
D.C. Docket No. 3:18-cv-00686-TJC-MCR

Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

Brinker International, Inc. ("Brinker"), the owner of Chili's restaurants, faced a cyber-attack in which customers' credit and debit cards were compromised. Chili's customers have brought a class action because their information was accessed (and in some cases used) and disseminated by cybercriminals. Below, the District Court certified the class, and Brinker appeals that decision. We vacate in part and remand for further proceedings.

I.

Between March and April 2018, hackers targeted the Chili's restaurant systems and stole both customer card data and personally identifiable information.[1] Plaintiffs explain that hackers then took that data and posted it on Joker Stash, an online marketplace for stolen payment data. The plaintiffs explain that, based on Brinker's internal reporting, the information for all 4.5 million cards the hackers

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[1] Different locations were affected at different periods within this timeframe.

accessed in the Brinker system were found on Joker Stash.

There are three named plaintiffs in this case: Shenika Theus, Michael Franklin, and Eric Steinmetz.[2] Theus is a Texas resident who used her card at Chili's in Texas on or about March 31, 2018. She experienced five unauthorized charges on the card she had used at Chili's and canceled the card as a result, disputing the charges that were not hers. She now spends time monitoring her account to make sure there is no further misuse.

Franklin is a California resident who made two Chili's purchases in the relevant timeframe, one on or about March 17, 2018, and one on or about April 22, 2018. Franklin experienced two unauthorized charges on his account, so he canceled that credit card, spoke for hours on the phone with bank representatives, and went to the Chili's locations he had visited to collect receipts for his transactions.[3] His bank canceled the affected card.

Steinmetz is a Nevada resident who used his credit card at a Nevada Chili's on or about April 2, 2018. Steinmetz called the Chili's national office, the local Chili's chain, credit reporting agencies, and his bank as a result of the data breach. He canceled the card he

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[2] These plaintiffs, originally filing individual actions, moved to consolidate their cases. The District Court granted that motion.

[3] The locations Franklin visited were affected by the data breach between March 30, 2018—April 22, 2018, and March 22, 2018—April 21, 2018, respectively. Franklin visited the first Chili's on or about March 17, 2018, 13 days before the affected period, and he visited the second Chili's on or about April 22, 2018, one day after the affected period for the second Chili's. His card had also previously been compromised in a Whole Foods data breach in 2017.

used at Chili's but never experienced fraudulent charges.

Pertinent to this appeal,[4] these three plaintiffs moved to certify two classes under Federal Rules of Civil Procedure 23(a) and 23(b)(3),[5] seeking both injunctive and monetary relief: 1) a nationwide class (or alternatively a statewide class) for negligence and 2) a California statewide class for California consumer protection claims based on its unfair business practices state laws. They were defined as follows:

1. All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (the "Nationwide Class").
2. All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (the "California Statewide Class").

The district court then certified the following nationwide class for the negligence claim as follows:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").

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[4] Plaintiffs originally brought a variety of other claims that are not before us. We do not address them here.

[5] Plaintiffs proffered a declaration from a damages expert to establish that a common methodology for calculating damages for individual class members existed.

The District Court also certified a separate California class under the state unfair competition laws:

> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

We then permitted Brinker to appeal these class certifications pursuant to Federal Rule of Civil Procedure 23(f).

II.

We review a district court's certification of a class under Federal Rule of Civil Procedure 23 for abuse of discretion. *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003). A district court abuses its discretion when it certifies a class that does not meet the requirements of Rule 23. *See id.* ("In order to certify a class under the FRCP, all of the requirements of Rule 23(a) must be met, as well as one requirement of Rule 23(b).").

Class certification under Rule 23(b)(3), like in this case, is only appropriate if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied" and that "the questions of law or fact common to class members predominate over any questions affecting only individual members" through "evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks and citations omitted). Rule 23 is more than "a mere pleading standard. A party seeking class certification

must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove [the existence of the elements of Rule 23]." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011).

At the same time, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," so a district court does not have a free-ranging "authority to conduct a preliminary inquiry into the merits of a suit" at the class certification stage "unless it is necessary to determine the propriety of certification." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 1195 (2013) (internal quotation marks and citations omitted).

III.

On appeal, Brinker mounts three arguments: 1) the District Court's class certification order violates our precedent on Article III standing for class actions; 2) the District Court improvidently granted certification because the class will eventually require individualized mini-trials on class members' injuries; and 3) the District Court erred by finding that a common damages methodology existed for the class. We will address each in turn.

IV.

A.

We start from the basic principle that at the class certification stage only the named plaintiffs need have standing.[6] *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259,

[6] We may review both the allegations in the complaint and evidence in the record so far to determine whether the named plaintiffs in this case have established Article III standing for

1264 (11th Cir. 2019). Article III standing requires that 1) the plaintiff has experienced an injury that is concrete and particularized and actual or imminent, 2) the defendant's conduct is the cause of the plaintiff's injury, and 3) a decision by the court would likely redress the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992). As we'll explain, only Theus satisfies *Lujan*'s standing analysis.

We begin with the concrete injury analysis. For purposes of the concrete injury analysis under Article III, we have recognized three kinds of harm: 1) tangible harms, like "physical or monetary harms"; 2) intangible harms, like "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts";[7] and, finally, 3) a "material risk of future harm" when a plaintiff is seeking injunctive relief. *TransUnion*

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class certification purposes. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264, 1271 (11th Cir. 2019) (looking at the allegations of named plaintiff to determine whether he had standing); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280–81 (11th Cir. 2000) (evaluating both named plaintiffs' allegations and the lack of evidence of injury in the record for some claims while analyzing Article III standing); *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987) ("Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury.").

[7] Constitutional harms, like violations of the First Amendment, and reputational harms, neither of which is at issue here, are examples of traditional harms for purposes of Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Stigmatic harm is another example of intangible injury giving rise to Article III standing. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273 (11th Cir. 2022). Informational injuries can also give rise to Article III standing as intangible harms. *TransUnion*, 141 S. Ct. at 2214.

LLC v. Ramirez, 141 S. Ct. 2190, 2204, 2210 (2021). And the Supreme Court most recently clarified in *TransUnion* that a mere risk of future harm, without more, does not give rise to Article III standing for recovery of damages, even if it might give rise to Article III standing for purposes of injunctive relief. *Id.* at 2210. We will take each of the named plaintiff's standing analysis in turn.

While each plaintiff puts forth a variety of allegations of harm in an effort to establish Article III standing, we need only address one: hackers took these individuals' data and posted it on Joker Stash.

We said in *Tsao* that a plaintiff whose personal information is subject to a data breach can establish a concrete injury for purposes of Article III standing if, as a result of the breach, he experiences "misuse" of his data in some way. *See Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021). We typically require misuse of the data cybercriminals acquire from a data breach because such misuse constitutes both a "present" injury and a "substantial risk" of harm in the future. *Id.* at 1343, 1344 ("[W]ithout specific evidence of *some* misuse of class members' data, a named plaintiff's burden to plausibly plead factual allegations sufficient to show that the threatened harm of future identity theft was 'certainly impending'—or that there was a 'substantial risk' of such harm—will be difficult to meet." (emphasis in original and citation omitted)).

All three plaintiffs maintain that their credit card and personal information was "exposed for theft and sale on the dark web." That allegation is critical. The fact that hackers took credit card data and corresponding personal information from the Chili's restaurant systems and affirmatively posted that

information for sale on Joker Stash is the misuse for standing purposes that we said was missing in *Tsao*.[8] And it establishes both a present injury—credit card data and personal information floating around on the dark web—and a substantial risk of future injury—future misuse of personal information associated with the hacked credit card. We hold that this is a concrete injury that is sufficient to establish Article III standing.[9]

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[8] In *Tsao*, we said that a plaintiff had not established standing based on a state common-law negligence claim after a data breach where he alleged only that he had canceled his credit card and faced an increased risk of identity theft because the credit card system at a restaurant he visited had been hacked. *Tsao*, 986 F.3d at 1344. We said that because Tsao had not accompanied his allegations of increased risk of identity theft with allegations of misuse of any credit card data taken by the hackers in the restaurant breach, he could not meet Article III standing requirements. *Id.*

[9] We decided *Tsao* before *TransUnion* was published, but we see the two as consistent. *TransUnion* established that a common-law analogue analysis is required when plaintiffs allege a statutory violation. We did not conduct that analysis in *Tsao* in the context of a state common-law negligence claim. *See TransUnion*, 141 S. Ct. at 2208. But we think that the common-law analogue analysis is *sui generis* to legislature-made statutory violations because the Supreme Court has not applied it to any other kind of intangible harm. For instance, constitutional harms, reputational harms, informational harms, and stigmatic harms are all intangible injuries that give rise to Article III standing, and the Supreme Court has never conducted the common-law analogue analysis in determining whether these kinds of harms establish Article III standing. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 2225 (1993) (infringement of free exercise); *Meese v. Keene*, 481 U.S. 465, 473, 107 S. Ct. 1862, 1867 (1987) (reputational harms); *TransUnion*, 141 S. Ct. at 2214 (identifying informational injuries as intangible harms); *Laufer*, 29 F.4th at 1272–73 (recognizing that under Supreme Court

B.

Although all three plaintiffs adequately allege a concrete injury sufficient for Article III standing, Franklin and Steinmetz's allegations face a fatal causation issue, even at this stage of litigation.[10]

The Third Amended Complaint alleged that Franklin visited two Chili's restaurants during March and April of 2018; one in Carson, California, and one in Lakewood, California. The at-risk timeframe for the Chili's in Carson was subsequently determined to be March 30, 2018, to April 22, 2018. Franklin visited the Carson Chili's on March 17, 2018—well outside the affected period. The District Court correctly concluded that "Franklin's first transaction would not qualify him for the class without additional evidence, as he dined several days outside the affected time range."

The at-risk timeframe for the Chili's in Lakewood was March 22, 2018, to April 21, 2018. Franklin visited the Lakewood Chili's on April 22, 2018—a day shy of the affected period. Falling outside the affected period poses a traceability problem for Franklin's allegations. Without any allegation that he dined at a Chili's during the time that *that* Chili's was compromised in the data breach, Franklin fails to allege that his injury was "fairly . . . trace[able] to the challenged action of the defendant." *Lujan*, 504 U.S.

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precedent both stigmatic and emotional harms have sufficed to establish Article III standing). So, we adhere to the reasoning of *Tsao* today. *See United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (explaining the prior panel precedent rule).

[10] Theus visited a Chili's location during the breach period for that location. As such, her alleged injuries are fairly traceable to the Chili's data breach.

at 560, 112 S. Ct. at 2136 (alterations in original) (internal quotation marks and citation omitted).[11]

The Third Amended Complaint also alleged that Steinmetz dined at the North Las Vegas Chili's on April 4, 2018. The at-risk time frame for the North Las Vegas Chili's was subsequently determined to be April 4, 2018, to April 21, 2018. Therefore, if Steinmetz's alleged dining date is true, he falls within the affected period. The record, however, shows that the allegation was slightly—but importantly—off the mark. Steinmetz stated in response to an interrogatory and in his deposition that he dined at the North Las Vegas Chili's on April 2, 2018.[12]

Much like with Franklin, therefore, Steinmetz does not have standing because the date he dined at Chili's is right outside of the affected date range for that Chili's. The proof required for a plaintiff to establish standing varies depending on the stage of litigation. *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136 ("Since [the standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the

[11] The District Court found that "while [Franklin's Lakewood Chili's transaction was] one day outside the [affected] range," Brinker's chart indicating the affected time periods for various Chili's locations indicated that the end date of the affected period "could not [be] validate[d]." Therefore, the District Court included Franklin as part of the class due to that wiggle room in the affected date range. But this was error. Although the Brinker chart included a "[c]ould not validate date" disclaimer for its April 22, 2018, end date for the Carson Chili's, the chart did not include such a disclaimer for the Lakewood Chili's.

[12] Steinmetz initially stated in his deposition that he dined at the Chili's on April 3, 2018, but later corrected himself when faced with documentation to the contrary that he dined there on April 2.

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). At the class certification stage, "it may be necessary for the court to probe behind the pleadings" to assess standing. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372 (1982).

Where, as here, the facts developed in discovery firmly contradict the allegation in the complaint, the District Court cannot rely on the complaint's factual allegation. Plaintiffs make no argument and provide no additional facts to cast doubt on Steinmetz's discovery admissions that he dined at Chili's *outside* of the at-risk time period. He therefore cannot fairly trace any alleged injury to Brinker's challenged action. *See Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

C.

Having determined that one named plaintiff has standing, we turn to the class definitions because Rule 23(b)(3)'s predominance analysis implicates Article III standing. *Cordoba*, 942 F.3d at 1272–73 ("In some cases, whether absent class members can establish standing may be exceedingly relevant to the class certification analysis required by Federal Rule of Civil Procedure 23."). The predominance inquiry is especially important in light of *TransUnion*'s (and *Cordoba*'s) reminder that "every class member must have Article III standing in order to recover individual damages" because a district court must ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class. *TransUnion*, 141 S. Ct. at 2208; *Cordoba*, 942 F.3d at 1264 ("At some point before it may order any form of relief to the putative class members, the court will

have to sort out those plaintiffs who were actually injured from those who were not.").

Turning to the class definitions the District Court certified, we have the following:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").
>
> . . .
>
> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cyber-criminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

The District Court explained that its class definitions "avoid later predominance issues regarding standing and the inclusion of uninjured individuals because now individuals are not in the class unless they have had their data 'misused' per the Eleventh Circuit's *Tsao* decision, either through experiencing fraudulent charges or it being posted on the dark web." So, under the class definitions, the District Court thought that the phrase "data accessed by cybercriminals" meant either that an individual had experienced fraudulent charges or that the hacked credit card information had been posted on the dark web. And, to make sure to clear any standing bar

imposed by *Tsao*, the District Court added an additional requirement that the individuals in the class must have tried to mitigate the consequences of the data breach.

While the District Court's interpretation of the class definitions surely meets the standing analysis we have outlined above for named plaintiff Theus, we note that the phrase in the class definitions "accessed by cybercriminals" is broader than the two delineated categories the District Court gave, which were limited to cases of fraudulent charges or posting of credit card information on the dark web. Therefore, we think it wise to remand this case to give the District Court the opportunity to clarify its predominance finding. It may either refine the class definitions to only include those two categories and then conduct a more thorough predominance analysis,[13] or the District Court may instead conduct a predominance analysis anew under Rule 23 with the existing class definitions based on the understanding that the class definitions as they now stand may include uninjured individuals under *Tsao*, who have simply had their data accessed

[13] The District Court centered its predominance analysis around the fact that it thought it had created class definitions in which all members of the class had standing. And, while that calculus is part of the predominance inquiry, *Cordoba*, 942 F.3d at 1276, refining the class definitions is not necessary or sufficient to satisfy the predominance inquiry as to standing under *Cordoba*. In the predominance analysis, a district court must determine whether "each plaintiff will likely have to provide some individualized proof that they have standing." *Id.* at 1275. The District Court here did not determine whether its class definitions would require individualized proof of standing, especially as to time or effort expended to mitigate the consequences of the data breach. So, remand is appropriate to afford the District Court the opportunity to perform that analysis.

by cybercriminals and canceled their cards as a result. *See Cordoba*, 942 F.3d at 1274 ("The essential point, however, is that at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief.").

On remand, the District Court should also determine the viability of the California class afresh. As discussed *supra* part IV.B, Franklin does not have standing to bring the alleged causes of action against Brinker, including the causes of action based in California state law. Without a named plaintiff with standing to bring the California claims, the California class cannot survive.

V.

With standing sorted out, we are left with Brinker's final claim that individualized damages claims will predominate over the issues common to the class under Rule 23(b)(3). As a starting point, "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003). Individualized damages issues predominate if "computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable" or if "significant individualized questions go[] to liability." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (internal quotation marks omitted) (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008)). And "[i]ndividualized damages issues are of course least likely to defeat predominance where damages can be

computed according to some formula, statistical analysis, or other easy or essentially mechanical methods." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010) (internal quotation marks and citation omitted).

At the class certification stage, all that the named plaintiffs had to prove was that a reliable damages methodology existed, not the actual damages plaintiffs sustained. Plaintiffs must demonstrate that a "model purporting to serve as evidence of damages in this class action . . . measure[s] only those damages attributable to that theory." *Comcast*, 569 U.S. at 35, 133 S. Ct. at 1433. And "[t]he first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Id.* at 38, 133 S. Ct. at 1435 (emphasis in original and citation omitted). Here, plaintiffs' expert provided the District Court with a common methodology for calculating damages based on "a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), the value of card-holder 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)."[14] The plaintiffs' expert

[14] Plaintiffs' expert does not purport to provide a damages methodology based on averages to determine actual damages for each plaintiff sustained as a result of the misuse of their personal information. Such inquiry into actual damages would surely be an individual inquiry. Rather, according to the expert, the out-of-pocket damages category includes:

> such items as penalties paid by cardholders in connection with not being able to use their cards to pay bills on time, gasoline to go back to the retail establishment where the breach occurred or to the cardholder's bank or local police

used a damages methodology based on averages because the expert believed the "delta between class members' damages is minimal irrespective of the type of card used or time spent."

In our analysis of a damages methodology based on averages, the focus is on "whether the sample at issue could have been used to establish liability in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458, 136 S. Ct. 1036, 1048 (2016). In this case, each Chili's customer fitting within the class definitions experienced a similar injury of a compromised card combined with some effort to mitigate the harm caused by the compromise. So, the damages methodology is not "enlarg[ing] the class members' substantive rights" by giving class members an award for an injury they could not otherwise prove in an individual action. *Id.* (internal alterations, quotation marks, and citation omitted). Through the District Court's rigorous analysis, it found that at the class certification stage the damages model was sufficient, and it would be a "matter for the jury" to decide actual damages at trial. *Id.* at 459, 136 S. Ct. at 1049. Any individual inquiry into particularized damages resulting from the data breach, such as damages recoverable due to uncompensated loss caused by compromised personal information, does not predominate over the three categories of common

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> station, postage and stationary, overnight replacement card shipping fees, bank charges to replace cards (while unusual this cost does occur on occasion), ATM fees to get access to cash, and hiring a third party to assist cardholder recovery and security efforts.

The expert stated that data breaches typically yield damages attributable to this category somewhere in the ballpark of $38 per plaintiff.

damages inquiries analyzed by the plaintiffs' expert. We do not think, therefore, that the District Court's determination on this point was an abuse of discretion, so we do not disturb it here.

VACATED IN PART AND REMANDED.

BRANCH, J., Specially Concurring in Part and Dissenting in Part:

I write separately to address two issues discussed in the Majority Opinion: standing and damages. First, while I agree with the Majority that Shenika Theus is the only named Plaintiff with standing, I disagree with the Majority's concrete injury analysis. Second, I dissent from the Majority's approval of Plaintiffs' damages methodology. I address each of these issues in turn.

I. STANDING

Beginning with standing, the Majority and I agree on several points. First, I agree that two of the three named Plaintiffs do not have standing. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019) (explaining that only named plaintiffs need to demonstrate standing at the class certification stage). Specifically, I agree that Michael Franklin and Eric Steinmetz lack standing because they failed to establish that their alleged injuries were "fairly . . . trace[able] to the challenged action of the defendant." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted). Second, with respect to Shenika Theus, the remaining named Plaintiff, I agree that Theus can establish standing—but I arrive at that conclusion for different reasons than the Majority articulates. Accordingly, my standing discussion proceeds in two parts. I first explain why I part ways with the Majority's approach and then address why Theus nonetheless establishes a concrete injury.

A.

To begin, I turn to my disagreement with the Majority's concrete injury analysis, which rests on two erroneous conclusions about what Plaintiffs have

alleged in their third amended consolidated class action complaint ("TAC") (the operative complaint in this case). The Majority's first conclusion rests on an allegation that is simply not contained in the TAC, and the Majority's second conclusion rests on an allegation that, when viewed in light of all the TAC's allegations, does not establish a concrete injury.

The Majority first concludes that Plaintiffs have alleged that the "hackers took [their] data and posted it on Joker Stash" (an online marketplace for stolen payment data).[1] Plaintiffs' TAC, however, contains no such allegation. Instead, Plaintiffs' allegations concern only the risk of "potential fraud and identity theft" based on "expos[ure]" of Plaintiffs' data due to the data breach—*i.e.*, the risk of future harm. Accordingly, I respectfully disagree with the Majority's conclusion that the named Plaintiffs have alleged that their credit card information was posted on the dark web.

As to its second conclusion, the Majority points to Plaintiffs' TAC allegation that their personal information was "exposed for theft and sale on the dark web" as "critical" to establishing a concrete injury. Because Plaintiffs' allegations about mere "exposure" to the theft and sale of their information simply point to an increased risk of identity theft and risk of future harm, however, I disagree that this

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[1] The Majority concludes that the posting of one's credit card information on the dark web is sufficient to establish a concrete injury for all three named Plaintiffs. To be clear, my dissent does not address whether an allegation that hackers stole Plaintiffs' data and posted it for sale on the dark web sufficiently establishes a concrete injury. I write separately because, even assuming such an allegation was sufficient for concreteness, Plaintiffs have simply not made that allegation in this case.

concern establishes a concrete injury. I address the TAC,[2] the motion for class certification, and the class certification hearing in turn.[3]

Starting with the TAC, Plaintiffs' allegations concern only the risk of future harm. Plaintiffs describe their injury as "imminent and certainly impending" (*i.e.*, futuristic) and fraud and identity theft as "potential" (*i.e.*, a mere risk). And allegations relating to the risk of future harm are insufficient to establish a concrete injury under Article III. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210–11 (2021) (explaining that mere risk of future harm without more does not give rise to Article III standing for recovery of damages); *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1339 (11th Cir. 2021) ("[A] plaintiff alleging a threat of harm does not have Article III standing . . . ."); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 927–28 (11th Cir. 2020). Indeed, we have held that "[e]vidence of a mere data breach does not, standing alone, satisfy the requirements of Article III standing" and that allegations of an "increased risk" of identity theft based on a data breach are likewise insufficient. *Tsao*, 986 F.3d at 1344; *Muransky*, 979 F.3d at 933 (explaining that the allegation that the plaintiff "and members of the class continue to be exposed to an elevated risk of identity theft" is the "kind of conclusory allegation [that] is simply not enough" for an Article III injury). Thus, because the Majority rests

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[2] The Majority confines its concrete injury analysis to the TAC.

[3] The district court and the parties on appeal rely on post-pleading litigation developments—like the motion for class certification and the class certification hearing—for their standing arguments.

its concrete injury analysis on an allegation that amounts to the mere risk of future harm, I cannot join the Majority's concrete injury analysis.

The motion for class certification and the class certification hearing do not help Plaintiffs in establishing a concrete injury either. Plaintiffs' motion for class certification largely echoes the TAC's allegations, stating that "Plaintiffs . . . experienced the . . . harm of having their Customer Data exposed to fraudulent use" and that the "evidence will establish that [Brinker's] conduct exposed [their customer data] to unauthorized third parties." The motion makes no reference to Joker Stash—or any other site on the dark web—and states only once in passing that Plaintiffs' customer data "ha[d] been exposed and found for sale on the dark web," without any allegation of which of the Plaintiffs' data was exposed or where such data was "found." But, as I explain below, this passing statement does not pass muster in light of Plaintiffs' admissions at the class certification hearing.

During the hearing on class certification, Plaintiffs stated that they had "uncontroverted evidence that the data that was taken from Brinker's system was posted for sale and sold on the dark web." According to Plaintiffs, at least 4.5 million cards were affected by the data breach and, according to documents they obtained from Fiserv (Brinker's processor), those 4.5 million cards—*i.e.*, one hundred percent of the cards used at Brinker's locations during the affected time period—were posted on Joker Stash. Despite these assertions at the hearing, however, when the district court asked Plaintiffs' counsel whether she knew if any of the three named Plaintiffs' cards were actually on the dark web, Plaintiffs' counsel responded: "[*W*]*e*

do not know that at this point." Accordingly, by counsel's own admission, the record fails to support the conclusion that the named Plaintiffs' credit card information was either posted or sold on the dark web as a result of the data breach. To the contrary, Plaintiffs admitted that they did not know if their credit card information was on the dark web.

In sum, considering Plaintiffs' admission that they do not know whether their data was posted or sold on the dark web, I cannot join the Majority's concrete injury analysis—which rests on conclusions that are simply unsupported by the record. *See Lujan*, 504 U.S. at 561 (explaining that the proof required for standing varies "with the manner and degree of evidence required at the successive stages of the litigation"); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (explaining that "it may be necessary for the court to probe behind the pleadings" to assess standing at the class certification stage).

B.

Although I disagree with the Majority's concrete injury analysis, I nonetheless agree that Theus has suffered a concrete injury (and therefore has standing) for a different reason: she has established financial harm. In her deposition, Theus explained that her transactions at Chili's, which occurred during the restaurant's at-risk time frame,[4] caused her to incur unauthorized charges on her account that led to an overdraft fee and a bank-imposed card replacement fee. These unreimbursed, out-of-pocket expenses that Theus incurred are the type of "pocketbook injur[ies] [that are] . . . prototypical

[4] As the Majority points out, Theus does not suffer the same traceability problem that Franklin and Steinmetz do.

form[s] of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021); *TransUnion*, 141 S. Ct. at 2204 (explaining that "traditional tangible harms, such as . . . monetary harms" are "obvious" harms that "readily qualify as concrete injuries under Article III"). Accordingly, I conclude—for different reasons than the Majority—that Theus has alleged a concrete harm sufficient for standing.

II. Damages Methodology

I now turn to the damages issue and conclude that the district court erred by accepting the damages methodology offered by Plaintiffs' expert for two reasons. First, the methodology fails to tie a damages amount to an injury actually suffered by a plaintiff. And second, the district court improperly relied on *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459–61 (2016).

In support of their motion for class certification, Plaintiffs offered an expert declaration to explain their damages methodology. Plaintiffs' expert set forth a "damages methodology applicable on a class-wide basis" by calculating four "damages elements": (1) the value of any lost opportunity to accrue rewards points; (2) the value of stolen payment card data; (3) the value of cardholder time; and (4) out-of-pocket damages.

The district court rejected Brinker's argument that the expert's methodology was overinclusive and not accurately tailored to the facts. It explained that "[u]nder [the expert's] damages methodology, all class members would receive a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), the value of cardholder time (whether or not they spent time

addressing the breach), and out-of-pocket damages (whether or not they incurred any out-of-pocket damages)." The court continued: "[Plaintiffs' expert] employs an averages method to compute damages, reasoning that the delta between class members' damages is minimal[,] irrespective of the type of card used or time spent." It explained that "[a]s with any averages calculation, over or under inclusivity is going to be a risk," and noted that "the Supreme Court" in *Tyson Foods* "has approved the use of averages methods to calculate damages." The district court concluded that "at this point [the expert's] testimony [was] offered to show that a reliable damages calculation methodology exists, not to calculate class members' damages."

Applying Rule 23(a)'s predominance requirement, the district court determined that Plaintiffs' damages expert offered a common method of calculating damages that, despite including "payment cards that may have been breached prior to the Data Breach," "shows for class certification purposes that a common method of addressing causation and damages exists." The court opined:

> Most data breaches are very similar to one another, such that a jury may find that a relative average reduction in damages for every class member that has been subjected to other data breaches is appropriate. As discussed above, the Supreme Court has approved the use of averages methods to calculate damages, *see Tyson Foods*, 577 U.S. [at] 459–61, and the same rationale could apply here.

Nevertheless, the district court caveated that "if it becomes obvious at any time that the calculation of damages (including accounting for multiple data

breaches) will be overly burdensome or individualized, the [c]ourt has the option to decertify the class."

Brinker argues that the district court erred by concluding that Plaintiffs' "proposed damages methodology permissibly eliminated individualized issues." Brinker contends that because it is "entitled to scrutinize each individual claim at trial by referring to each individual class member's individual circumstances," Plaintiffs have not met Rule 23's requirement that common issues predominate over individual ones. Plaintiffs argue that the "district court did not abuse its discretion in finding [that they] met this standard."

To certify a class under Rule 23(b)(3), a district court must determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance determination includes questions relating to damages. *See Tyson Foods*, 577 U.S. at 453–54; *Agmen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). As the Majority points out, individual damages issues predominate "if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable" or if "significant individualized questions go[] to liability." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (quotations omitted). Accordingly, in our analysis of a damages methodology based on averages, the focus is on "whether the sample at issue could have been used to establish liability in an individual action." *Tyson Foods*, 577 U.S. at 458.

At the class-certification stage, "a model purporting to serve as evidence of damages . . . must measure only those damages attributable to" plaintiffs' theory of

liability in the case. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). "And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so." *Id.* (quotation omitted). As such, a court must not only evaluate whether a damages calculation "provide[s] a method to measure and quantify damages on a classwide basis," but also whether such a methodology constitutes "a just and reasonable inference" or whether it is "speculative." *Id.* Without this evaluation, "*any* method of measurement [could be] acceptable [at the class-certification stage] so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* at 35–36. And "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 36.

Here, the district court approved a damages methodology that awards to all class members a standard dollar amount "for lost opportunities to accrue rewards points (*whether or not they used a rewards card*), 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*)." In short, this methodology impermissibly permits plaintiffs to receive an award based on damages that they did not suffer—*i.e.*, an award that a plaintiff could not establish in an individual action. *Tyson Foods*, 577 U.S. at 458.

The Majority defends the use of representative evidence by asserting that each "customer fitting within the class definitions experienced a similar injury," but this assertion cannot be true. As the district court acknowledged, Plaintiffs' damages methodology could allow a plaintiff to be compensated for opportunities to accrue rewards points, the value

of their time spent addressing the breach, and out-of-pocket damages, even though the plaintiff suffered *none* of those harms. Each of these damages elements relate to separate and distinct injuries that may not be common to all class members, meaning that certain plaintiffs may impermissibly recover damages that they otherwise would not be entitled to in an individual action. *See Comcast Corp.*, 569 U.S. at 35.

The district court acknowledged that "[a]s with any averages calculation, over or under inclusivity is going to be a risk," but cited *Tyson Foods* to say that "the Supreme Court has approved the use of averages methods to calculate damages." But *Tyson Foods* is inapposite to the facts of this case.

In *Tyson Foods*, the Supreme Court approved the use of "representative evidence" to prove that the amount of time employees spent "donning and doffing" their gear at a chicken plant, when added to their regular work hours, "amounted to more than 40 hours in a given week" in order to be entitled to recovery under the Fair Labor Standards Act. *Tyson Foods*, 577 U.S. at 454. Far from categorically "approv[ing] the use of averages methods to calculate damages," as the district court asserted, the Supreme Court was careful to reject any request to "establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases." *Id.* at 455. Instead, the Court explained that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 460. The Court noted that plaintiffs in that case "sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to

keep adequate records." *Id.* at 456. And the Court concluded that reliance on this representative evidence "did not deprive [the employer] of its ability to litigate individual defenses," reasoning that "[s]ince there were no alternative means for the employees to establish their hours worked," the employer was left to attack the representative evidence itself. *Id.* at 457. The defense was thus "itself common to the claims made by all class members." *Id.*

The justifications for using representative evidence that were present in *Tyson Foods* are simply not present here. In this case, the questions relevant to the damages inquiry include whether a given class member possessed a rewards card, spent time addressing a data breach, and suffered out-of-pocket losses. Unlike *Tyson Foods*, the evidence for the answers to those questions is not inaccessible or controlled by Brinker. To the contrary, that evidence would be known and controlled by the plaintiffs or is at least readily available through individualized examination. And unlike *Tyson Foods*, here, the use of damages averages would deprive Brinker of its ability to litigate individual defenses where a class members' individual damages are discoverable.

Considering that, under Plaintiffs' averages methodology, a plaintiff could be compensated for a harm he did not suffer and that *Tyson Foods* does not justify the use of averages under the facts of this case, I am left to conclude that the district court erred by accepting Plaintiffs' damages methodology when certifying Plaintiffs' proposed classes. Accordingly, I dissent from the Majority's conclusion to the contrary.

* * *

In sum, while I agree with the Majority's bottom line that Theus is the only named Plaintiff with standing, I disagree with the Majority's concrete injury analysis, and I conclude that Theus suffered an injury by establishing financial harm. Additionally, I dissent from the Majority's approval of Plaintiffs' damages methodology.

APPENDIX B

Case 3:18-cv-00686-TJC-MCR Document 167
Filed 04/14/21

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re Brinker Data Incident
Litigation

Case No. 3:18-cv-686-TJC-MCR

O R D E R

This data breach class action is again before the Court, this time in the context of a motion for class certification and a related motion to exclude expert opinions and testimony. Three Named Plaintiffs bring this class action after their payment card and personal information was stolen from Defendant Brinker International, Inc. by hackers.

1. FACTS AND PROCEDURAL POSTURE

A. Facts

The Court has detailed the facts of this case in prior orders (Docs. 65, 92, 122), but several new facts have come to light with additional discovery. In short, Brinker, the parent company that owns Chili's restaurants, experienced a data breach where customers' personal and payment card information was stolen. (Doc. 95 ¶¶ 1–2). Three Named Plaintiffs, Shenika Theus, Michael Franklin, and Eric Steinmetz, seek to represent themselves and those similarly situated in a class action against Brinker.

Id. at 1. Plaintiffs seek compensation for the inability to use payment cards, lost time, and other out-of-pocket expenses associated with the breach. Id. ¶¶ 9–12.

In December 2017, hackers breached Brinker's back office systems through a vulnerable access point earlier identified in an informal risk assessment conducted by Brinker. (Doc. 131-3 ¶ 7). In March 2018, using the previously breached access point, hackers placed malware on Brinker's systems. Id. Between March 2018 and April 2018, hackers stole both customer payment card data and personally identifiable information. (Doc. 131 at 1–2). This will hereafter be referred to as "the Data Breach." Different Chili's restaurants were affected at different times. (Doc. 141 at 13). In May 2018, Brinker was notified that "card data had been leaked from their corporate-owned Chili's restaurants and sold on Joker Stash, a known marketplace for stolen payment card data." (Docs. 95 ¶ 2; 146-6 at 8). Plaintiffs represent that all of the up to 4.5 million cards stolen from Brinker were found on Joker Stash. (Doc. 165 at 26:6–12, 27:4–9).

Shenika Theus is a resident of Texas, where she used her payment card on or about March 31, 2018 at a Chili's in Garland, Texas. (Doc. 95 ¶¶ 17, 31). Theus incurred five unauthorized charges on her account, after which she contacted her bank, cancelled her card, and disputed the charges. Id. ¶ 32. Theus was also charged a fee "when her account had insufficient funds to satisfy a [utility] bill." (Doc. 141 at 16).

Michael Franklin is a resident of California, where he used his payment card to make two separate purchases at Chili's restaurants: once on March 17, 2018 in Carson, California and again on April 22, 2018

in Lakewood, California. (Doc. 95 ¶¶ 18, 36). Franklin incurred two unauthorized charges on his account, after which he cancelled his card, spent between five and six hours speaking to bank representatives, and visited the Chili's locations to request receipts. Id. ¶¶ 37–40.

Eric Steinmetz is a resident of Nevada, where he used his payment card on or about April 4, 2018 at a Chili's in North Las Vegas, Nevada. Id. ¶¶ 19, 42. Steinmetz spent time speaking with the Chili's location, Chili's national office, credit reporting agencies, and his bank. Id. ¶¶ 43–44.

B. Procedural Posture

Plaintiffs filed suit on May 24, 2018 (Doc. 1), after which the Court consolidated two related cases on October 30, 2018 (Doc. 31). Plaintiffs filed a Second Amended Consolidated Class Action Complaint (Doc. 39), which Brinker moved to dismiss (Doc. 48). The Court issued an order holding that all Plaintiffs had standing except those alleging only future injuries. (Doc. 65 at 15–18). The Court also requested briefing on choice of law and deferred ruling on Brinker's Rule 12(b)(6) motion. Id. at 19–20. The parties submitted a Joint Notice of Choice of Law Briefing Preference, but the parties were unable to agree on what law governed. (Doc. 68). The Court then issued an order granting in part and denying in part Brinker's Rule 12(b)(6) motion to dismiss. (Doc. 92).

Plaintiffs filed a Third Amended Complaint (Doc. 95), and Brinker moved to dismiss the new claims and Plaintiffs' requests for injunctive relief (Doc. 99). The Court dismissed the new claims and again affirmed that Plaintiffs had standing but held that any future injuries were too speculative; thus, the Court

dismissed any requests for injunctive relief. (Doc. 122 at 10–11). The surviving claims include (1) breach of implied contract, (2) negligence, (3) violation of California's Unfair Competition Law ("UCL") Unlawful Business Practices (for alleged violations of the FTC Act and California Civil Code § 1798.81.5), and (4) violation of California's UCL Unfair Business Practices. (Doc. 92 at 6–7, 59–60).

This case is now before the Court on Plaintiffs' Motion for Class Certification (Doc. 131) and Brinker's Motion to Exclude Expert Opinions and Testimony of Daniel J. Korczyk (Doc. 142). On February 25, 2021, the Court held a hearing on the motions, the record of which is incorporated herein. (Doc. 165). Plaintiffs seek to certify two classes: (1) a Nationwide Class for the breach of implied contract and negligence claims and (2) a California Statewide Class for the California consumer protection claims. (Doc. 131 at 1). Because Brinker's Motion to Exclude Expert Opinions and Testimony is critical to Plaintiffs' Motion for Class Certification, the Court will begin its discussion there.

II. DAUBERT MOTION

Plaintiffs' expert, Daniel J. Korczyk, is offered to show that a common method of calculating class members' damages exists for purposes of predominance under Federal Rule of Civil Procedure 23(b)(3). (Doc. 132-1 ¶ 16). Brinker filed a Daubert motion to exclude Korczyk's testimony (Doc. 142), to which Plaintiffs responded (Doc. 152), and Brinker replied (Doc. 154).

Under Federal Rule of Evidence 702, an expert witness may testify if (1) the expert's "specialized knowledge will help the trier of fact to understand the

evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods;" and, (4) "the expert has reliably applied the principles and methods to the facts of the case." The party offering the expert witness carries the burden of proof to satisfy the elements by a preponderance of the evidence. Rink v. Cheminova, Inc., 400 F.3d 1286, 1292 (11th Cir. 2005). District courts serve as gatekeepers to ensure juries hear only reliable and relevant information. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993). However, exclusion is not done lightly: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible [expert] evidence." Daubert, 509 U.S. at 596.

Korczyk graduated from Notre Dame and has a Master of Finance from DePaul University. (Doc. 132-1 ¶ 2). Korczyk is a Certified Public Accountant and holds several accreditations including one in business valuations and another in financial forensics from the American Institute of Certified Public Accountants. Id. Korczyk has almost forty years' experience in public accounting, including serving as a lead case analyst[1] in other data breach actions where he was also tasked with finding a common method to calculate damages. (Docs. 132-1 ¶ 2; 152-5 ¶ 43). To create his damages methodology, Korczyk solicited assistance from other professionals at his financial

[1] According to Korczyk, a lead case analyst works under the testifying expert. (Doc. 152-5 at 14 n.52).

advisory services firm, with whom he worked on the other data breach cases. (Doc. 132-1 ¶¶ 1, 3, 14–15).

Brinker argues Korczyk has no expertise in this area because he has only worked on data breach cases involving financial institution plaintiffs (Doc. 142 at 5–6); however, the calculations required in the financial institution cases are similar to those needed here as they also included the valuation of replacing compromised cards and reimbursing fraudulent charges, see In re Sonic Corp. Customer Data Breach Litig., No. 1:17-md-02807-JSG, 2020 WL 6701992, at *7 (N.D. Ohio Nov. 13, 2020) (certifying class in which Korczyk served as a lead case analyst under the damages expert to create a damages model, see (Doc. 152-5 ¶ 43)). Further, Korczyk's expertise would be helpful to a jury because it provides a starting point to decide damages in a context unfamiliar to many. The Court finds that Korczyk possesses "specialized knowledge" that "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; see also Daubert, 509 U.S. at 589–90.

Brinker spends most of its time disputing the reliability of Korczyk's methodology, first arguing that it is not based on sufficient facts or data because it is "predicated on his review of random, unverified, non-peer reviewed internet articles that his staff located through basic Google searches." (Doc. 142 at 13). However, Korczyk sufficiently supports his decisions; many of his online sources are government or other reputable websites. (Doc. 132-1 at 32–33).

Brinker also argues that the methodology is (1) overinclusive and is not based on reliable principles and methods and (2) not accurately applied to the facts here. (Doc. 142 at 6–8). Under Korczyk's

damages methodology, all class members would receive a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), 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). Id. at 12–13. Korczyk employs an averages method to compute damages, reasoning that the delta between class members' damages is minimal irrespective of the type of card used or time spent. (Doc. 152-5 at 7). As with any averages calculation, over or under inclusivity is going to be a risk, but the Supreme Court has approved the use of averages methods to calculate damages. See Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 459–61 (2016) (holding that a damages expert testifying to the average time spent donning and doffing protective equipment was permitted and enough to show predominance, and that the persuasiveness of the average as a reflection of the time actually worked was a matter for a jury). Further, as Korczyk states, at this point his testimony is offered to show that a reliable damages calculation methodology exists, not to calculate class members' damages. (Doc. 152-5 ¶¶ 37–38). Korczyk states he will continue researching and vetting data sources for accurate numbers to use in the final damages calculation. Id. ¶ 38. At the motion for class certification stage, Korczyk's methodology is sufficiently supported by data, reliable, and reliably applied.

III. CLASS CERTIFICATION

Plaintiffs seek certification of two Rule 23(b)(3) damages classes or in the alternative, various Rule 23(c)(4) issues classes. (Doc. 131 at 1, 24). Brinker

responded in opposition (Doc. 141), and Plaintiffs replied (Doc. 148). Plaintiffs' proposed classes are as follows:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (the "Nationwide Class").
>
> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (the "California Statewide Class").

(Doc. 131 at 1).

All class actions must meet the prerequisites found in Federal Rule of Civil Procedure 23(a), which are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation and one of the three requirements in 23(b). Rule 23(c)(4) also allows class certification with respect to particular issues. A district court must conduct a "rigorous analysis" to determine whether the requirements of Rule 23 have been met. Brown v. Electrolux Home Prod., Inc., 817 F.3d 1225, 1234 (11th Cir. 2016) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011)). The party seeking class certification has the burden of proof and must affirmatively show compliance with Rule 23. Wal-Mart, 564 U.S. at 350. A court should only consider the merits of the underlying claim to the extent "that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

A. Standing

Despite the Court addressing standing in this case twice now (Docs. 65, 122), it must engage in the

inquiry again. See Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) ("[A]ny analysis of class certification must begin with the issue of standing . . . ."). Standing requires a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). Plaintiffs bear the burden of establishing the elements of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561. Plaintiffs must "affirmatively demonstrate [their] compliance with [Rule 23];" therefore, Plaintiffs must demonstrate that at least one Plaintiff for both the Nationwide and California Classes possesses standing. Wal-Mart, 564 U.S. at 350; see also Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1273 (11th Cir. 2019); Fla. Pediatric Soc'y/ Fla. Chapter of Am. Acad. of Pediatrics v. Benson, No. 05-23037-CIV-JORDAN, 2009 WL 10668660, at *2 n.3 (S.D. Fla. Sept. 30, 2009) ("At the class certification stage, the plaintiffs need only make an allegation, supported by 'factual proffers' such as affidavits, that a plaintiff has standing." (citing Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000))).

Further, the Eleventh Circuit recently issued a decision regarding standing in the data breach context. See Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332 (11th Cir. 2021). In Tsao, the plaintiff used his payment card at two PDQ restaurants during a time when PDQ was subject to a

data breach by hackers. Id. at 1335. The plaintiff did not allege that he incurred fraudulent charges, but after PDQ announced the breach, he cancelled his payment cards and spent time speaking with his bank. Id. at 1335–36. The Eleventh Circuit first held that any future risk of identity theft was too speculative to confer standing. Id. at 1344. The Eleventh Circuit then held that without evidence or alleged facts showing that there was some misuse of the plaintiff's data, the plaintiff did not have standing because "[t]he mitigation costs [the plaintiff] allege[d] are inextricably tied to his perception of the actual risk of identity theft following the . . . data breach." Id. at 1344–45. The Eleventh Circuit reasoned that the plaintiff could not "conjure standing . . . by inflicting injuries on himself to avoid an insubstantial, non-imminent risk of identity theft." Id. at 1345.

Consistent with the Eleventh Circuit's view, the Court, in previous orders, already dismissed Named Plaintiffs who alleged only future injuries (Doc. 65), but the Court is considering the issue of potential "manufactured injuries" for the first time here. Given the timing of the Tsao decision, the parties did not have an opportunity to address the case in their briefs, but they were able to argue the case at the hearing.

Brinker's primary argument is that Plaintiffs have not met their evidentiary burden to establish standing. (Doc. 141 at 18–20). Plaintiffs state that they have demonstrated standing in their responses to Brinker's Motion to Dismiss. (Doc. 131 at 6). In their Reply in Support of Class Certification, Plaintiffs point to Brinker's evidence to establish standing (Doc. 148 at 3), and at the hearing, Plaintiffs further supported their standing arguments with additional evidence (Doc. 165).

Under Tsao, while Plaintiffs need not show actual misuse of their data, Plaintiffs must show some misuse to justify their injuries. See Tsao, 986 F.3d at 1344. The Eleventh Circuit did not clarify what constitutes "some misuse," but it seemed to acknowledge that non-conclusory specific allegations of unauthorized charges would meet this standard. Id. at 1343. Here, Theus and Franklin have met the Tsao standard because they both allege and testify that they experienced unauthorized charges on their accounts after the Data Breach. (Docs. 95 ¶¶ 32, 39–40; 146-2 at 90:11–25; 146-7 at 91:9–19). Steinmetz does not allege that he experienced any fraudulent charges, and in a deposition, he confirmed he had no unauthorized charges on his account. (Doc. 146-4 at 144:6–14). However, Plaintiffs assert that all of the payment card information taken in the Data Breach is on the dark web. (Doc. 165 at 26:6–12, 27:4–9). Evidence of Plaintiffs' information being posted on the dark web is likely enough to show actual misuse and it certainly meets the standard of some misuse. See Tsao, 986 F.3d at 1344. Because Plaintiffs have shown evidence of some misuse, Plaintiffs' alleged actual injuries as a result of the Data Breach are not manufactured. See id. at 1345.

In addition, all Plaintiffs allege and have testified that they experienced actual injuries including late fees due to insufficient funds or time spent replacing cards and traveling to the bank. (Docs. 146-2 at 42:10–14; 146-4 at 160:20–161:7; 146-7 at 46:5–9; 148 at 3); see also Lujan, 504 U.S. at 560–61. These injuries are fairly traceable to the Data Breach and could be redressed by a favorable judicial decision. See Lujan, 504 U.S. at 560–61. Thus, Plaintiffs have met their burden to establish standing. Cf. In re Checking

Account Overdraft Litig., 275 F.R.D. 666, 670–71 (S.D. Fla. 2011) ("In making the decision, the Court . . . may consider the factual record in deciding whether the requirements of Rule 23 are satisfied." (citing Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1188 n.15 (11th Cir.2003))).

B. Rule 23 Threshold Requirements

Before a district court may grant a motion for class certification, a plaintiff seeking to represent a class must establish two threshold requirements: (1) that the proposed class is "adequately defined and clearly ascertainable," Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012), and (2) that the representative plaintiffs are a part of the class, E. Texas Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). While many courts merge these requirements with other Rule 23(a) requirements, the Court discusses these requirements as a threshold matter to clarify the exact class the Court is certifying.

1. With a few revisions, Plaintiffs' proposed class is adequately defined and clearly ascertainable

A class is ascertainable "if it is adequately defined such that its membership is capable of determination." Cherry v. Dometic Corp., 986 F.3d 1296, 1304 (11th Cir. 2021). Plaintiffs can rely on a defendant's records, but the records should be "useful for identification purposes," and identification should be "administratively feasible." Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 948 (11th Cir. 2015). However, the Eleventh Circuit has held that ascertainability does not require administrative feasibility. Cherry, 986 F.3d at 1304. Further, the class definition must be adequately defined. The Eleventh Circuit has

refused to adopt a rule regarding whether a class definition is overbroad if it includes uninjured plaintiffs. See Cordoba, 942 F.3d at 1275–76 (noting the Seventh Circuit's rule that a class is properly defined so long as it is apparent that the class does not contain a "great many" uninjured persons (quoting Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009))). Instead, the Eleventh Circuit has instructed district courts to address the issue of potential individualized issues of standing with respect to the class as a whole in the predominance analysis. Id. at 1277.

Brinker argues that the class is not ascertainable because Plaintiffs' method of identifying class members relies on an individualized self-identification process and that the definition is overbroad because it includes possibly many uninjured class members. (Doc. 141 at 21–25). Plaintiffs argue the class is ascertainable because it does not rely on self-identification, instead it relies on Brinker's transaction records and Fiserv's, the processor of the cards, records of the cards pulled off the dark web. (Docs. 148 at 4; 165 at 50:1–10). Brinker and Fiserv's records are useful for identification purposes and identification is administratively feasible because Plaintiffs can use Brinker's records to identify individuals who used payment cards at affected locations during affected times and Fiserv's records to show which cards were on the dark web. See Karhu, 621 F. App'x at 948. While some individuals identified through these records may be in the proposed class despite not having experienced any injuries (overdraft fees, time spent, etc.), a simple modification to the class definition remedies this issue.

While the class is ascertainable as written, the Court finds that the class definition should be narrowed to prevent both the definition from being overbroad, and to prevent predominance issues regarding standing. 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. 2020) ("[A Court] has discretion to limit or redefine the class in an appropriate manner to bring the action within Rule 23."). The Court clarifies that class members' data must have been "accessed by cybercriminals" and that class members must have "incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach," such that the new definitions are as follows:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").
>
> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

These clarifiers avoid later predominance issues regarding standing and the inclusion of uninjured individuals because now individuals are not in the class unless they have had their data "misused" per

the Eleventh Circuit's Tsao decision, either through experiencing fraudulent charges or it being posted on the dark web. See Tsao, 986 F.3d at 1344. Further, under the revised definition, individuals must have some injury in the form of out-of-pocket expenses or time spent to be a part of the class. While these clarifiers might make ascertaining the class more difficult as some self-identification may be required, it does not make it impossible; thus, ascertainability continues to be satisfied under the new class definition. See Cherry, 986 F.3d at 1304.

2. Named Plaintiffs are in the class.

Another threshold requirement of Rule 23 is that the representative plaintiffs be a part of the class. E. Texas Motor Freight Sys. Inc., 431 U.S. at 403 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quotation marks omitted)). Here, Plaintiffs offer as evidence a report conducted by an independent data investigator which details when each Chili's restaurant around the nation was affected by the breach. (Docs. 146-1; 155-3; 165 at 24:10–15). Individuals who dined at locations within the affected period are likely in the class; however, the report is imperfect as several of the dates could not be validated. (Doc. 146-1 at 32). The following table shows when Plaintiffs allegedly dined at their various restaurants, and the relevant period for those restaurants:

Name	**Location**	**Date Dined**	**Affected Period**
Theus	Chili's Firewheel Garland, TX (Docs. 95 ¶ 30; 146-7 at 76:24–78:7)	On or about March 31, 2018 (Doc. 95 ¶ 31)	March 22, 2018–April 22, 2018 (Doc. 146-1 at 9)
Franklin	Carson, CA (Doc. 95 ¶¶ 35–36)	On or about March 17, 2018 (Doc. 95 ¶¶ 35–36)	March 30, 2018–April 22, 2018 (Doc. 146-1 at 32)
Franklin	Lakewood, CA (Doc. 95 ¶¶ 35–36)	On or about April 22, 2018 (Doc. 95 ¶¶ 35-36)	March 22, 2018–April 21, 2018 (Doc. 146-1 at 32)
Steinmetz	North Las Vegas, NV (Docs. 95 ¶ 42; 146-4 at 128:17–129:4)	On or about April 4, 2018 (Doc. 95 ¶ 42)	April 4, 2018–April 21, 2018 (Doc. 146-1 at 25)

Franklin's first transaction would not qualify him for the class without additional evidence, as he dined several days outside the affected time range. Franklin's second transaction, while currently one day outside the range, is a "could not validate date"

entry. (Doc. 146-1 at 32). Looking at the totality of the evidence, including the unauthorized charges on Franklin's account after the breach (Doc. 95 ¶ 37), and the proximity of the second transaction to the projected affected period, the Court finds Franklin is a part of the class.

Theus and Steinmetz are in the class because they dined at affected locations during affected periods. Brinker argues Steinmetz is not in the class because there is a question of fact as to the exact date he dined. (Doc. 141 at 10). The date alleged in the Third Amended Complaint is the date reflected in the above chart, but in a deposition, Steinmetz testified that he dined on April 3, 2018, and in an interrogatory, he testified that he dined on April 2, 2018. (Doc. 146-4 at 130:10, 129:21–23). Regardless of the fact question, the Court finds that Steinmetz is in the class because the alleged date is within the affected time frame and the testified-to dates are very close to the affected time frame.[2] If facts showing otherwise arise later, the Court will reevaluate whether any Named Plaintiffs should be dismissed.

C. Rule 23(a) Requirements

Rule 23(a) requires a class (1) be "so numerous that joinder of all members is impracticable;" (2) have "questions of law or fact common to the class;" (3) have representative parties with "claims or defenses" that "are typical of the claims or defenses of the class;" and, (4) have representative parties that "will fairly and adequately protect the interests of the class." These requirements are commonly known as numerosity,

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[2] If evidence later shows that Steinmetz is not in the class, Theus could still represent the Nationwide Class.

commonality, typicality, and adequacy of representation; each are discussed in turn below.

1. Numerosity is satisfied.

"Although mere allegations of numerosity are insufficient to meet this prerequisite, a plaintiff need not show the precise number of members in the class." Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983). Here, numerosity is satisfied because evidence shows that the number of compromised cards could be as high as 4.5 million. (Docs. 131 at 8; 155-2 at 5).

Other district courts have expressed reservations in finding numerosity in data breach cases. See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 26 (D. Me. 2013) ("I am certainly concerned that if this case proceeds as a class action, few class members will ultimately be interested in taking the time to file the paperwork necessary to obtain the very small amount of money that may be available if there is a recovery."). While the court in Hannaford held that numerosity was satisfied, it also expressed its concerns with another data breach case from Texas, In re Heartland Payment Sys., Inc. Customer Sec. Breach Litig., 851 F. Supp. 2d 1040 (S.D. Tex. 2012). In Heartland, there were over 130 million claimants, but after settlement only 290 individuals filed claims, only 11 of which were valid. Hannaford, 293 F.R.D. at 26 (citing Heartland, 851 F. Supp. at 1050). The Hannaford court ultimately held that since there is no precedent regarding the consideration of potential class member disinterest, the court would not consider it in deciding numerosity. Id. The Court agrees that it should not consider how many of the claimants may not be

interested in participating. Thus, the numerosity requirement is met.

2. Commonality is satisfied.

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" Wal-Mart, 564 U.S. at 349–50 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). Plaintiffs must show that a "common contention" exists that is "capable of classwide resolution" such that a "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 350. Further, commonality does not require that every question of law or fact be common, only that common questions exist. Id. at 359 ("We quite agree that for purposes of Rule 23(a)(2) [e]ven a single [common] question will do." (quotation marks omitted) (alterations in original)).

Plaintiffs offer several questions that are common to the class and capable of classwide resolution, including whether Brinker had a duty to protect customer data, whether Brinker knew or should have known its data systems were susceptible, and whether Brinker failed to implement adequate data security measures to protect customers' data. (Doc. 131 at 9). In particular, the final question is common to every claim in both the proposed Nationwide Class and the proposed California Statewide Class. Commonality is satisfied.

3. Typicality is satisfied.

The commonality and typicality analyses often overlap as they are both focused on "whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual

class members to warrant class certification." Prado-Steiman ex rel., 221 F.3d at 1278. "Traditionally, commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class." Id. at 1279. Typicality is satisfied if "the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984). Further, "[d]ifferences in the amount of damages between the class representative and other class members does not affect typicality." Id.

Here, all Plaintiffs' injuries arise out of the same series of events, the Data Breach (Doc. 95 ¶ 9), and all of their stolen information was posted on Joker Stash (Doc. 165 at 26:6–12, 27:4–9). Further, Plaintiffs all allege the same claims (Doc. 95 ¶¶ 39, 42, 57, 63, 67), and like each other class member they must show that Brinker was negligent, breached an implied contract, or violated California's UCL, and that Brinker's conduct caused their damages, which are alleged to be similar. Because the only difference between Named Plaintiffs and putative class members is the amount of damages, typicality is satisfied. See Kornberg, 741 F.2d at 1337.

4. Adequacy of representation is satisfied.

"Adequacy of representation means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel." Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1346 (11th Cir. 2001) (citations and quotation marks omitted). This analysis includes two inquiries: "(1) whether any

substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." Valley Drug Co., 350 F.3d at 1189 (quoting In re HealthSouth Corp. Securities Litigation, 213 F.R.D. 447, 460–461 (N.D. Ala. 2003)). Plaintiffs request that the Court appoint Theus, Franklin, and Steinmetz as Class Representatives, and Federman & Shorewood, Morgan & Morgan Complex Litigation Group, and LippSmith LLP[3] as Class Counsel. (Doc. 131 at 13–14).

Adequacy of representation is satisfied because there is no evidence of any conflicts and the Named Plaintiffs have been actively involved in the litigation, including engaging in both lengthy interrogatories and depositions. (Docs. 146-2, 146-3, 146-4, 146-7, 146-8). Further, class counsel is qualified to prosecute this case. Rule 23(g) requires a court to appoint class counsel that will "fairly and adequately represent the interests of the class." Courts must consider (1) "the work counsel has done in identifying or investigating potential claims;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and, (4) "the resources that counsel will commit to representing the class . . . ." Fed. R. Civ. P. 23(g)(1). Here, class counsel is vigorously prosecuting the case and they all have extensive experience in handling class actions. (Doc. 131-1).

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[3] Two of Plaintiffs' interim class counsel, Graham B. LippSmith and Jaclyn L. Anderson were formerly associated with Kasdan LippSmith Weber Turner LLP. (Doc. 151).

D. Rule 23(b)(3) Damages Class

One of the most compelling justifications for a class action is the possibility of negative value suits; Rule 23(b)(3) class actions allow the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citations and quotation marks omitted); see also Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1240 n.21 (11th Cir. 2000). A Rule 23(b)(3) "damages class" is appropriate if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added).

1. Predominance is satisfied.

"Even if the court can identify common questions of law or fact, . . . [t]he predominance inquiry . . . is far more demanding than Rule 23(a)'s commonality requirement." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009) (citations and quotation marks omitted) (alterations in original). "[W]here . . . plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3) . . . ." Id. (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)). While the Court finds that

predominance is satisfied, several issues warrant discussion.[4]

i. Standing

Whether excessive uninjured persons are included in the class is analyzed under predominance. See Cordoba, 942 F.3d at 1277. If proving class member standing will require individualized proof, predominance is likely not satisfied. See id. at 1277. The Court has narrowed Plaintiffs' class definition to include only those individuals who have had their data "accessed by cybercriminals" and those that have "incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach." These additions eliminate concerns of a lack of predominance as to standing because individuals are not in the class unless they have had both their data misused and incurred reasonable expenses or wasted time. See Tsao, 986 F.3d at 1344. Plaintiffs have also offered a common method of showing misuse through the use of Brinker and Fiserv's records.[5]

ii. Choice of Law

Choice of law is only an issue for the Nationwide Class as California law applies to the California Statewide Class. (Doc. 131 at 1). The application of different states' laws often precludes a finding of predominance. See e.g., Teggerdine v. Speedway,

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[4] In addition to the arguments detailed below, Brinker argues that whether an implied contract existed between Brinker and class members is an individualized inquiry that defeats predominance. (Doc. 141 at 30–33). The cases cited are non-binding and factually dissimilar, and the argument was not further developed at the hearing. The Court finds this argument meritless.

[5] See the Court's discussion on ascertainability above.

LLC, No. 8:16-CV-03280-T-27TGW, 2018 WL 2451248, at *5–6 (M.D. Fla. May 31, 2018); Shepherd v. Vintage Pharm., LLC, 310 F.R.D. 691, 699–700 (N.D. Ga. 2015). However, the Eleventh Circuit has held that while "class certification is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim" if "a claim is based on a principle of law that is uniform among the states, class certification is a realistic possibility." Klay, 382 F.3d at 1261–62. In the data breach context, the financial institution class actions certified have not suffered from choice of law issues. See Smith v. Triad of Alabama, LLC, No. 1:14-CV-324-WKW, 2017 WL 1044692, at *13 (M.D. Ala. Mar. 17, 2017), on reconsideration in part, 2017 WL 3816722 (M.D. Ala. Aug. 31, 2017) (certifying data breach class action, but only Alabama law applied); In re Sonic Corp., 2020 WL 6701992, at *6–8 (certifying data breach class action, but only Oklahoma law applied).

Under Florida choice of law rules, the "most significant relationship" test applies to tort claims. Green Leaf Nursery v. E.I. DuPont De Nemours & Co., 341 F.3d 1292, 1301 (11th Cir. 2003). In applying this test, courts consider "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Id. (citations and quotation marks omitted). For contract claims, Florida courts apply the "lexi loci contractus" rule which states that "issues concerning the validity and substantive obligations of contracts are governed by the law of the place where

the contract is made." Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc., 92 F.3d 1110, 1119 (11th Cir. 1996).

Plaintiffs assert that Florida law applies to the negligence and breach of implied contract claims and Brinker asserts that Texas law applies to the negligence claim and all fifty states' laws apply to the breach of implied contract claim. (Doc. 165 at 34:11–14, 38:7–19). Either Florida or Texas law will apply to the negligence claim under the "most substantial relationship" test, so that claim is not a concern for manageability or predominance.

Plaintiffs base their argument that only Florida law applies to their breach of implied contract claim on dicta from Singer v. AT & T Corp., 185 F.R.D. 681, 691–92 (S.D. Fla. 1998) ("The case upon which AT & T relies merely stands for the proposition that the forum state cannot automatically apply its laws if it materially conflicts with the law of another state and there is no apparent connection to the forum state."), arguing that because state breach of implied contract laws do not materially differ and because Brinker has connections to Florida, Florida law should apply. (Doc. 131 at 18–20). Plaintiffs fail to clarify how this principle interacts with Florida choice of law rules including lexi loci contractus. While the Court is not tasked with deciding choice of law issues at this stage, there is more than a mere a possibility that all fifty states' laws will apply to the breach of implied contract claim, so Plaintiffs must show that the class will be manageable despite the potential application of multiple states' laws.

The possibility that all fifty states' laws will apply to a claim has concerned other courts considering class certification in the data breach context with financial

institution plaintiffs. See S. Indep. Bank v. Fred's, Inc., No. 2:15-CV-799-WKW, 2019 WL 1179396, at *13–19 (M.D. Ala. Mar. 13, 2019). In S. Indep. Bank, the court held that the plaintiffs "must prove through an extensive analysis . . . that there are no material variations among the law of the states for which certification is sought." Id. at *14 (citations and quotation marks omitted); see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1180 (11th Cir. 2010) (stating that in cases where all fifty states' laws might apply, the party seeking class certification must "provide an extensive analysis of state law variations to reveal whether these pose insuperable obstacles" (quotation marks omitted)). The plaintiffs in S. Indep. Bank submitted two tables, one showing that each jurisdiction recognizes the basic elements of negligence and another representing one version of each state's economic loss rule. Id. at *18. The court held that the plaintiffs failed to meet their burden to conduct an extensive analysis and that the variations in negligence law and the economic loss doctrine among the fifty states were unmanageable. Id.

Plaintiffs submitted two charts detailing the differences in states' negligence and breach of implied contract laws. (Docs. 156-1, 156-2). Similar to the lackluster tables in S. Indep. Bank, Plaintiffs' breach of implied contract chart only details what must be pled to allege the existence of an implied contract, not what must be proven to show the breach of an implied contract. See (Doc. 156-1). Plaintiffs have failed to engage in the extensive analysis required by the Eleventh Circuit to show that a class action adjudicating a breach of implied contract claim in this

case is manageable. See Sacred Heart, 601 F.3d at 1180.

Thus, the Court's certification of the Nationwide Class will be limited to Plaintiffs' negligence claim. If Plaintiffs wish to pursue a Nationwide Class claim based on their breach of implied contract theory, they must complete a trial plan detailing how the Court will manage a class action applying all fifty states' laws to the breach of implied contract claim. The trial plan should provide an extensive analysis of all fifty states' laws regarding breach of implied contract claims so the Court may determine whether there are material differences among states' laws. In addition, the trial plan should address the commonalities and differences among the state laws and propose a method of grouping the laws so that the Court may apply the state laws effectively and efficiently if needed. Brinker will be entitled to respond in opposition to the trial plan. Should the Court find that the trial plan is sufficient, the Court can determine whether to amend its class certification to include the breach of implied contract claim.[6]

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[6] On February 2, 2021, five months after the deadline for filing the motion for class certification (Doc. 102), Plaintiffs' counsel filed two exhibits inadvertently left off the initial class certification filing (Doc. 156). The two exhibits are Plaintiffs' charts detailing the differences among states' laws regarding negligence (Doc. 156-2), and breach of implied contract (Doc. 156-1). The charts were cited in Plaintiffs' class certification motion as "Exhibit B" and "Exhibit C" but in the initial filing, other unrelated exhibits were labeled under the same names. Id. Plaintiffs noticed their mistake after providing the Court with other missing documents requested by the Court. Id. at 4. On February 5, 2021, Brinker moved to strike the state law chart exhibits as untimely (Doc. 159), and Plaintiffs responded (Doc. 163).

iii. Causation and Damages

Issues of causation often lead to predominance concerns, see City of St. Petersburg v. Total Containment, Inc., 265 F.R.D. 630, 635–36 (S.D. Fla. 2010), but individual issues of damages typically do not defeat predominance, Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003), aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). However, "there are . . . extreme cases in which computation of each individual's damages will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable . . . ." Klay, 382 F.3d at 1260.

Causation issues arise here because Franklin used his payment card in 2017 at a Whole Foods during a Whole Foods' data incident. [7] (Doc. 141. at 14). Franklin experienced fraudulent charges after using his card at Whole Foods, but he did not cancel the card. Id. at 14–15. The card Franklin used at Whole Foods was the same card Franklin used at Chili's during the Data Breach, calling into question whether the Data Breach caused Franklin's damages. Id. at 14.

In light of the Court's ruling on the state law applicability to the negligence claim, and the requirement that Plaintiffs file a trial plan on state laws as applied to the breach of implied contract claim, the motion to strike is moot. The trial plan will subsume the state law charts so they are now immaterial.

[7] Whether the Data Breach caused Plaintiffs' damages will largely not be a concern for predominance because the important common question will be whether Brinker's conduct led to the posting of putative class members' personal and payment card information on Joker Stash. If it has, class members then just have to show that they took reasonable measures to mitigate the consequences of the breach.

Plaintiffs urge the Court to follow the reasoning of other courts that have categorized this issue not as a causation issue, but as an amount-of-damages issue, lowering the relative amount of damages the plaintiff received. See (Doc. 148 at 6–7); see also S. Indep. Bank, 2019 WL 1179396, at *11, *19–21 (stating that "[d]efendant's causation arguments [regarding plaintiff's data being subject to multiple breaches] are ultimately damages arguments" but denying class certification because the damages issue required individualized proof). The Court is partially persuaded by the S. Indep. Bank court, but it acknowledges that the line between causation and damages in this context is blurry. As hackers become more advanced, the number of data breaches will likely increase, which means the likelihood that customers will be subject to multiple data breaches is also increasing. See 140 AM. JUR. Trials § 327 (February 2021 update) ("Data breaches are an increasing problem for all businesses and a significant concern for consumers and others whose data is in the hands of these companies."). Labeling the multiple breach issue as only a causation issue or only an amount-of-damages issue creates a false dichotomy and "is not a particularly useful method for deciding predominance." See In re Hannaford Bros., 293 F.R.D. at 31. At this stage, the Court finds the multiple breach issue not a disqualifying causation issue, but rather to be determined at the damages phase.

Plaintiffs' expert, Korczyk, offers a common method of calculating damages that allows the Court to determine individual class members' damages in a non-complex and non-burdensome way. See (Doc. 132-1 at 5). In his Rebuttal Declaration, Korczyk states that his damages methodology properly includes

payment cards that may have been breached prior to the Data Breach because "Card-Issuing Financial Institutions, without exception, have told [him that] they work diligently to remove data breach compromised cards from circulation." (Doc 152-5 ¶ 41). While this statement is one that likely would be heavily debated on cross-examination and may be discredited by a jury, it shows for class certification purposes that a common method of addressing causation and damages exists. In addition, if a jury decides that Korczyk's methodology is not an accurate reflection of multiple-breach class members' damages, other common methods of calculating damages exist, including using an average relative reduction in damages. Most data breaches are very similar to one another, such that a jury may find that a relative average reduction in damages for every class member that has been subjected to other data breaches is appropriate. As discussed above, the Supreme Court has approved the use of averages methods to calculate damages, see Tyson Foods, 577 U.S. 459–61, and the same rationale could apply here.

At this stage, causation and damages do not require significant individualized proof such that individual questions predominate over common ones. While the specifics of the damages calculation will be left to later proceedings, if it becomes obvious at any time that the calculation of damages (including accounting for multiple data breaches) will be overly burdensome or individualized, the Court has the option to decertify the class.

2. Superiority is satisfied.

Rule 23(b)(3) provides four factors pertinent to a superiority discussion: (1) "the class members' interests in individually controlling the prosecution or

defense of separate actions;" (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members;" (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (4) "the likely difficulties in managing a class action." The factors create a balancing test such that no one factor is dispositive. See Cherry, 986 F.3d at 1304–05. The manageability inquiry should focus "on whether a class action 'will create relatively more management problems than any of the alternatives,' not whether it will create manageability problems in an absolute sense." Id. at 1304 (quoting Klay, 382 F.3d at 1273). The Eleventh Circuit recently held that whether class members can be identified in an administratively feasible manner should be considered under manageability. See id. "'Administrative feasibility' means 'that identifying class members is a manageable process that does not require much, if any, individual inquiry.'" Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014) (quoting Newberg on Class Actions § 3.3 at 164 (5th ed. 2012)). The Eleventh Circuit has also held that the manageability factor should consider the potential quantum of evidence each unknown class member will need to bring if significant individualized issues exist. See Vega, 564 F.3d at 1278. Further, when weighing the superiority factors, the Eleventh Circuit has considered whether the case is a negative value case. See Carriuolo v. Gen. Motors Co., 823 F.3d 977, 989 (11th Cir. 2016) (finding superiority when over 1,000 individuals had individual cases of low economic value).

Here, the first three factors all weigh in favor of superiority being satisfied because significant

litigation has proceeded, and allowing class members to bring claims as one class will provide an efficient method of adjudication while continuing to move along this almost three-year-old case. Further, manageability is satisfied because identification of class members will be administratively feasible given Brinker and Fiserv's records, and despite that some individual proof may be required to establish causation and damages, the majority of issues will be subject to common proof.[8] This class action will be far easier to manage than individual trials because a class action will allow for the sharing of resources and rendering of uniform decisions that cannot be achieved through individual trials. Most importantly, class members' claims, similar to the claims in Carriuolo, are numerous and of low value. See Carriuolo, 823 F.3d at 989. This case is the classic negative value case; if class certification is denied, class members will likely be precluded from bringing their claims individually because the cost to bring the claim outweighs the potential payout. Thus, not only is a class action a superior method of bringing Plaintiffs' claims, it is likely the only way Plaintiffs and class members will be able to pursue their case. See Smith, 2017 WL 1044692, at *15. Superiority is satisfied.

E. Rule 23(c)(4) Issues Class

In the alternative to a Rule 23(b)(3) certification, Plaintiffs request certification of various Rule 23(c)(4) issues classes. (Doc. 131 at 24–25). Given that the Court is certifying the class under Rule 23(b)(3), a Rule 23(c)(4) class is unnecessary.

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[8] See the Court's discussion regarding predominance above.

V. CONCLUSION

Though this class action is not perfectly composed, on balance, the Court finds it to be an appropriate (and perhaps the only) vehicle for adjudication of the claims of Chili's customers whose personal data was stolen. The Court acknowledges it may be the first to certify a Rule 23(b)(3) class involving individual consumers complaining of a data breach involving payment cards, but it is also one of the first to consider the issue as many individual data breach cases do not reach this point either due to settlement or other disposition. See In re Target Corp. Customer Data Sec. Breach Litig., 309 F.R.D. 482, 485, 490 (D. Minn. 2015) (certifying financial institution data breach case, but noting that the consumer class action settled); Tsao, 986 F.3d at 1345 (dismissing consumer data breach class action for lack of standing). Plaintiffs have satisfied all of the requirements of Rule 23.

Accordingly, it is hereby

ORDERED:

1. The Court **DENIES** Defendant Brinker International Inc.'s Motion to Exclude Expert Opinions and Testimony of Daniel J. Korczyk. (Doc. 142).

2. Plaintiffs' Motion for Class Certification is **GRANTED in part and DEFERRED in part.** (Doc. 131).

a. The Court **CERTIFIES** the following class for Plaintiffs' **negligence claim only**:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's

> location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").

b. The Court **CERTIFIES** the following class for all the California state Unfair Competition Law claims:

> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

c. The Court **DEFERS** ruling on class certification with respect to Plaintiffs' breach of implied contract claim.

d. The Court **GRANTS** Plaintiffs' Motion to Appoint Shenika Theus, Michael Franklin, and Eric Steinmetz as Class Representatives, and Plaintiffs' Motion to Appoint Federman & Sherwood, Morgan & Morgan Complex Litigation Group, and LippSmith LLP as Class Counsel.

3. If Plaintiffs wish to pursue a Nationwide Class claim on their breach of implied contract theory, Plaintiffs shall file a trial plan no later than **May 21, 2021**. The trial plan should provide: (1) an extensive analysis of the commonalities and differences among

state breach of implied contract laws; (2) a proposed method of grouping the laws so that the Court may apply the state laws effectively and efficiently if needed; and (3) an analysis of any other trial management issues associated with Plaintiffs' breach of implied contract claim.

4. No later than **June 21, 2021**, Brinker may file a response to Plaintiffs' trial plan.

5. The Court **DENIES** as moot Brinker's Motion to Strike Late-Filed Exhibits. (Doc. 159).

6. No later than **June 21, 2021**, the parties shall jointly file a Case Management Report detailing how the Court should proceed.

DONE AND ORDERED in Jacksonville, Florida the 14th day of April, 2021.

Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

cm

Copies:

Counsel of record

APPENDIX C

USCA11 Case: 21-13146 Document: 84-2
Date Filed: 09/15/2023

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13146

MARLENE GREEN-COOPER,
individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

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

Plaintiffs-Appellees,

versus

BRINKER INTERNATIONAL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida
D.C. Docket No. 3:18-cv-00686-TJC-MCR

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing is also DENIED. FRAP 40.

APPENDIX D

USCA11 Case: 21-90011 Date Filed: 09/16/2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-90011-D

BRINKER INTERNATIONAL, INC.,

Petitioner,

versus

ERIC STEINMETZ,
MICHAEL FRANKLIN,
SHENIKA THEUS,

Respondents.

Petition for Permission to Appeal from the
United States District Court for the Middle District
of Florida

Before WILSON, GRANT, and LAGOA, Circuit Judges.

BY THE COURT:

The Petition for Permission to Appeal pursuant to Fed. R. Civ. P. 23(f) is GRANTED. The "Motion for

Leave to File Brief for *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)" is GRANTED.