**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:21-cv-23472-RNS

Ryan Birmingham, Roman Leonov, Steven Hansen, Mitchell Parent, and Jonathan Zarley,

Plaintiffs,

v.

Alex Doe, *et al.*,

Defendants.
_____ /

**PLAINTIFFS' SUPPLEMENTAL BRIEF**
**REGARDING SUBJECT MATTER JURISDICTION**

The Court invited Plaintiffs to provide supplemental briefing explaining the Court's subject matter jurisdiction over the captioned action (the "**Order**") [ECF No. 246].[1] Plaintiffs demonstrate that the Court continues to have CAFA subject matter jurisdiction, which is unaffected by Plaintiffs' subsequent strategic decisions in this case—as explained more fully herein.

## BACKGROUND

On February 14, 2022, Plaintiffs filed their Amended Complaint alleging this Court has jurisdiction under 28 U.S.C. §1331 and the Class Action Fairness Act §1332(d)(2) ("**CAFA**"). Am. Compl. [ECF No. 64] ¶ 6. The Amended Complaint was the product of hundreds of hours of investigation, which revealed RoFx to be a fictitious entity and multi-tiered international fraud and money laundering scheme run by criminals principally based in Ukraine—who established a

[1] The Court required Plaintiffs to brief four questions in their supplemental brief: (1) whether Plaintiffs adequately pled CAFA in their Amended Complaint [ECF No. 64]; (2) whether their CAFA-related claims meet the two *Wright* factors cited in the Order; (3) if the answer to points number (1) or (2) is "no", then whether this Court should permit Plaintiffs to amend their Complaint again; and (4) whether Plaintiffs can rely on supplemental jurisdiction even though it was not specifically asserted, and, if so, how and why it applies. *See* ECF No. 246 at 11–12.

complex network of shell and intermediary companies in the United States and other jurisdictions. The investigation also revealed the vast majority of cash and bitcoin stolen from RoFx victims had already been exfiltrated—to the Ukrainian RoFx Operators' control—outside the United States.

Ten days later, on Feb. 24, 2022, Russia invaded Ukraine—the country out of which the RoFx scheme operated and the likely location of the operators holding the vast majority of stolen assets. On March 24, 2022, this Court denied Plaintiffs request to alternatively serve any Ukrainian defendant, including the RoFx Operators, unless Plaintiffs' could show the Ukrainian defendants were either not in Ukraine or otherwise impacted by the war. [ECF No. 98]. Plaintiffs could not make this showing as to the Ukrainian defendants. Instead, Plaintiffs secured default judgments—as to liability for certain counts—against the properly served Defendants. [ECF No. 236].

On May 11, 2023, the Court denied without prejudice Plaintiffs' motion for class certification. Class Cert. Order [ECF No. 242]. The Court limited its analysis to Rule 23(b)(3)'s predominance requirement, determining Plaintiffs did not meet their burden to show that common legal issues predominate over individualized ones. Class Cert. Order at 4–6.

Shortly before filing the Amended Complaint, the Commodities Futures Trade Commission ("**CFTC**") investigated the same fraud and brought a separate action against many of the same domestic defendants: *CFTC v. Notus LLC*, No. 22-cv-20291 (S.D. Fla. Jan. 27, 2022). At the time this Court denied Plaintiff's motion for class certification, the CFTC was engaged in discovery and pursuing a preliminary injunction against Timothy Stubbs, *see id.* [ECF No. 85], an accountant Plaintiffs alleged orchestrated a portion of RoFx's domestic money laundering scheme.

In light of the ongoing parallel action by the CFTC against many of the same domestic defendants and the likelihood that any recovery by the CFTC would inure to the benefit of the

putative class of RoFx victims,[2] Plaintiffs declined to continue pursuing class certification. Instead, Plaintiffs elected to focus on foreign recovery efforts via separate process in the jurisdictions most likely hosting RoFx victims' funds—the only practical asset recovery avenue remaining in light of the challenges to serve, in this action, the Ukrainian defendants. However, because the Court had already determined certain defaulted defendants liable under several counts, Plaintiffs decided on June 9, 2023 to resolve this action by moving for default judgment as to damages on the count most amenable to the "sum certain" requirement of Rule 55(b)(1): unjust enrichment.

This Court invited Plaintiffs to brief whether it has subject matter jurisdiction over this action. It does: (I) Plaintiffs adequately pled facts establishing CAFA jurisdiction; (II) Plaintiffs' strategic decision to not pursue class certification does not divest this Court of jurisdiction; (III) the Court also has jurisdiction under 28 U.S.C. §1332(a) because Plaintiffs alleged facts showing complete diversity; and (IV) alternatively, the Court should exercise its discretion to extend supplemental jurisdiction to resolve this action, which jurisdiction need not be specifically pled.

**I. Plaintiffs adequately pled the CAFA requirements in their Amended Complaint.**

A federal court has jurisdiction under CAFA if: (1) the proposed class contains at least 100 members; (2) any member of the plaintiff class is a citizen of a state different from the state of citizenship of any defendant; and (3) the aggregate amount in controversy exceeds $5 million. 2 U.S.C. §1332(d)(2). The Amended Complaint alleges facts showing all three factors.

First, Plaintiffs' Amended Complaint alleges sufficient numerosity—and the factual basis for the allegation. In Section V, titled "Class Action Allegations", Plaintiffs define the potential

[2] On December 18, 2023, the CFTC and defendant Timothy Stubbs jointly moved for the entry of a proposed consent order, which admits to the facts of the RoFx scheme consistent with the Amended Complaint's allegations. *See* Joint Motion, No. 22-cv-20291 [ECF No. 129]; Proposed Consent Order, *id.* [ECF No. 129-1]. Judge Gayles entered the consent order on Dec. 19, 2023. *Id.* [ECF No. 130].

class and specifically allege that Rule 23(a)'s numerosity element is met because "Plaintiffs have received preliminary claim information from approximately 750 potential Class Members." Am. Compl. ¶ 255(a) (emphases added). Second, Plaintiffs allege minimal diversity because Plaintiffs allege that they are citizens of Maine, Florida, Hawaii, and Arizona; and that at least one Plaintiff is diverse from one Defendant, providing the state of each Defendant's citizenship (many of which are foreign). Am. Compl. ¶¶ 6, 12–60. Third, Plaintiffs allege a sufficient amount in controversy, alleging "Plaintiffs and similarly situated customers were victims of a nearly $75 million international scheme that defrauded them of money or cash equivalents." Am. Compl. ¶ 1.

These allegations are sufficient to show CAFA jurisdiction exists in this action. *See Pretka v. Kolter City Plaza II, Inc*., 608 F.3d 744, 754 (11th Cir. 2010) (determining CAFA jurisdiction exists if the requisite facts are clearly stated or deducible by the facts before the court).

**II. Plaintiffs' strategic decisions in this action do not divest the Court of CAFA jurisdiction.**

As the Court explained in its Order, CAFA jurisdiction remains intact even when class certification is denied.[3] This is consistent with Supreme Court precedent that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). Nevertheless, CAFA jurisdiction may not be relied upon in limited circumstances where "[A] those claims contain frivolous attempts to invoke CAFA jurisdiction or [B] lack the expectation that a class may be

[3] *See Wright Transp. Inc. v. Pilot Corp.*, 841 F.3d 1266, 1271 (11th Cir. 2016) (finding "CAFA continue[d] to confer original federal jurisdiction over the remaining state-law claims" after "post-filing action . . . did away with the class claims"); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1305 (11th Cir. 2021) (finding that even if the district court's decision to deny class certification were correct, its decision to dismiss the action for lack of jurisdiction would be incorrect because "a district court retains jurisdiction even after it denies certification"); *see also Coba v. Ford Motor Co.*, 932 F.3d 114, 118–19 (3d Cir. 2019) (concluding "[i]n accordance with every other Circuit Court to address this question" that denial of class certification did not divest the district court of jurisdiction over the remaining claims).

eventually certified." *Wright*, 841 F.3d at 1271. The Eleventh Circuit cabined this exception, cautioning in *Wright* that "CAFA jurisdiction is not easily defeated." *Id.* at 1272. Neither *Wright* factor is present here; the Court continues to have jurisdiction under CAFA.

**A. Plaintiffs invoked CAFA jurisdiction with substantial supporting evidence and reasonable legal theories.**

In *Wright*, the Eleventh Circuit cited *Cunningham v. Learjet*, a Seventh Circuit decision providing an extreme example of a frivolous attempt to invoke federal jurisdiction:

> If a plaintiff sued in state court a seller of fish tanks on behalf of himself and 1,000 goldfish for $5,000,001 and the defendant removed the case to federal district court, that court would have to dismiss the case, as ***it would have been certain from the outset of the litigation that no class could be certified***.

592 F.3d 805, 806 (7th Cir. 2010) (emphasis added). In explaining this first *Wright* factor, another court in this Circuit examined the historical meaning and significance of the term "frivolous." *See Adams v. Boeneman*, 335 F.R.D. 452, 456 (M.D. Fla. 2020) ("explaining that frivolous claims—i.e., those that 'have no reasonable factual basis' or that are 'based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law'—may warrant sanctions under Federal Rule of Civil Procedure 11" (quoting *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993))). The first *Wright* factor appears to combat the most egregious of violations: facially frivolous or obviously defective class claims. *See, e.g.*, *Perisic v. Ashley Furniture Indus.*, No. 16-CV-3255, 2018 WL 8581976, at *6 (M.D. Fla. Nov. 7, 2018) (finding that the plaintiff's deficiencies in simply "regurgitating statutory elements" for jurisdiction and failing "to include <u>any</u> allegations that the proposed class contains at least 100 members" constituted "a frivolous attempt to invoke the Court's CAFA jurisdiction").

Unlike *Perisic*, here the Amended Complaint contains specific, factual allegations in support of each statutory element, including the proposed number of class members and facts

supporting the amount in controversy. *See supra* Section I. Indeed, the Court's invitation for Plaintiffs to address the class certification predominance issue in a renewed motion implies the Court determined the motion not so fatal as to preclude further review. This reinforces the view that Plaintiffs' invocation of CAFA was far from frivolous. *See Cunningham*, 592 F.3d at 807 (noting that "[a]lthough the district court found 'a number of fatal flaws' in the plaintiff's motion for class certification, they are not so obviously fatal as to make the plaintiff's attempt to maintain the suit as a class action frivolous" (emphasis added)); *see also Penton v. Centennial Bank*, No. 18-CV-450, 2021 WL 8014675, at *4 (N.D. Fla. July 30, 2021) (rejecting the defendant's argument that the plaintiff's unjust enrichment claim was frivolous and explaining that the plaintiff "was granted leave to amend and re-plead this claim. If doing so were obviously without merit, then leave to amend would have been denied.").

Plaintiffs had a factual and legal basis for their CAFA jurisdictional allegations at the time of filing. Plaintiffs' subsequent strategic decision, declining to renew their motion for class certification—or their decisions to not expend resources contesting other adverse orders issued by this Court—is irrelevant to the *Wright* analysis.

**B. Plaintiffs filed this action intending to certify it under Rule 23.**

The second *Wright* factor appears to target class claims that were filed with no genuine intent to pursue class certification, potentially as a mechanism for forum-shopping between state and federal courts. *See Wright*, 841 F.3d at 1272 (discussing "concerns about forum manipulation" in the removal context, but explaining that such concerns are not necessarily present for suits originally filed in federal court). The few courts to address this issue found a lack of genuine intent

to certify by focusing on the presence of obvious and numerous individualized issues with respect to the proposed class's claims.[4] No such patent deficiencies are present here.

Plaintiffs allege they are part of a group of similarly situated customers who fell victim to an international fraud, which falsely promised profits via a fake robotically operated foreign exchange trading platform. Am. Compl. ¶¶ 1–4. The nature of this fraud resembles those of Ponzi schemes, which several district courts have determined are appropriate for class treatment.[5] Accordingly, Plaintiffs brought their claims in this putative class action and, together with undersigned counsel, expended substantial time and resources in investigating and collecting information from hundreds of victims of the RoFx scheme. Specifically, in support of Plaintiffs' Motion for Class Certification, Plaintiffs' counsel developed a database for accepting RoFx victim information, received and analyzed several hundred submissions, committed 3,267 hours of attorney time investigating the scheme, and incurred more than $1.7 million in legal costs. *See* ECF No. 241-1, Dennis A. González Decl. ¶¶ 11–13. These quantified efforts show Plaintiffs' good faith attempt and reasonable expectation at the outset of litigation that their proposed class would be certified.

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[4] *See, e.g.*, *Arias-Bonello v. Progressive Select Ins.*, No. 17-CV-60897, 2017 WL 7793885, at *2 (S.D. Fla. Dec. 28, 2017) (explaining the class was unlikely to be certified due to "the myriad of individualized issues"); *Adams*, 335 F.R.D. at 457 (holding that "it is obvious that the class claims involve numerous individualized questions such that there was never an expectation that the class could be certified", including the need to present individualized evidence of varying defects affecting the proposed class members' 275 homes); *Perisic*, 2018 WL 8581976, at *6 ("[T]he uniqueness of each proposed class member's sales representative with [the defendant], it was, from the outset, unlikely that a class would be eventually certified in this case" (emphasis in original)).

[5] *See, e.g.*, *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 321 (S.D. Fla. 1996) (granting class certification to a scam investment which was a Ponzi scheme); *Facciola v. Greenberg Traurig LLP*, 281 F.R.D. 363, 366 (D. Ariz. 2012) (same); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 321, (S.D.N.Y. 2012) (same).

At the start of this litigation, Plaintiffs intended and expected to certify a class. Plaintiffs' subsequent decisions based on changing facts—including a war and a parallel government enforcement action—do not nullify Plaintiffs' original intent.

**III. If the Court determines CAFA jurisdiction does not exist, leave to amend the Amended Complaint is unnecessary because Plaintiffs allege complete diversity.**

Although the foregoing is a sufficient basis for the Court to retain CAFA jurisdiction over their remaining claims, if the Court disagrees, leave to amend would be unnecessary because the Court has diversity jurisdiction under 28 U.S.C. §1332(a). Plaintiffs allege the requisite amount in controversy and complete diversity. *See* Am. Compl. ¶¶ 212, 226–27, 234, 240, 248 (alleging combined losses exceeding $4 million); *id.* ¶¶ 12–60 (alleging all parties' citizenships).

Relatedly, amending is unnecessary to proceed under §1332(a). Pleading a specific jurisdictional basis is not required for the Court to determine it has jurisdiction; it is sufficient that Plaintiffs alleged facts showing the existence of jurisdiction. *See, e.g.*, *Bernath v. Am. Legion*, 704 Fed. App'x 917, 918 (11th Cir. 2017) (analyzing whether the plaintiff's complaint properly met the amount in controversy and citizenship requirements, despite the plaintiff's failure to specifically allege the court had jurisdiction under §1332(a)); *Trs. of Gen. Assembly of Church of Lord Jesus Christ of Apostolic Faith, Inc. v. Patterson*, 300 Fed. App'x 170, 172 (3d Cir. 2008) (same); *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 183 (5th Cir. 1990) (observing the Supreme Court has "recognized that federal courts do possess some inherent authority to look beyond the pleadings in order to protect a litigant's right to diversity jurisdiction").

If the Court determines that CAFA jurisdiction does not exist and that diversity of citizenship is appropriate, Plaintiffs are prepared to file a supporting Rule 7.1 disclosure statement.

**IV. Alternatively, the Court should exercise supplemental jurisdiction over Plaintiff's unjust enrichment claim.**

If the Court is unpersuaded by Plaintiffs' CAFA jurisdictional arguments or that jurisdiction exists under §1332(a), the Court has discretion to exercise supplemental jurisdiction over Plaintiffs' remaining claims pursuant to 28 U.S.C. §1367(a). Plaintiffs' state law unjust enrichment claims arise from the same criminal conduct underlying their federal RICO claims.

Nevertheless, the Court may decline to exercise supplemental jurisdiction over a claim if: (1) the claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. *Id.* §1367(c). If, after examining the factors listed in §1367(c), the Court "decides . . . to decline jurisdiction . . . , it should consider the traditional rationales for pendent jurisdiction, including judicial economy and convenience, in deciding whether or not to exercise that jurisdiction." *Palmer v. Hosp. Auth. of Randolph Cnty.*, 22 F. 3d 1559, 1569 (11th Cir. 1994).

The four factors granting the Court discretion to decline supplemental jurisdiction are not present here. First, claims for unjust enrichment are straightforward tort-based claims that do not raise novel or complex issues of state law. *See Parker v. Scrap Metal Processors, Inc.,* 468 F.3d 733, 743–44 (11th Cir. 2006) ("Generally, state tort claims are not considered especially novel or complex.") (collecting cases). Second, Plaintiffs' federal RICO claims—involving proving a criminal conspiracy and criminal predicates—predominate over the far simpler, but related, unjust enrichment claims. *See, e.g.*, *Regenicin, Inc. v. Lonza Walkersville, Inc.*, 997 F. Supp. 2d 1304, 1312 (N.D. Ga. 2014) (finding that both the federal RICO and unjust enrichment claims, amongst others, "flow[ed] from the same conduct, so the Court cannot say that the state-law claims

predominate"). Third, while the Court denied Plaintiffs' request for default judgment as to Plaintiffs' RICO claims, the Court has not dismissed Plaintiffs' federal RICO claims—over which it has original jurisdiction. Fourth, Plaintiffs' claims are common and thus unexceptional in this context. *See, e.g.*, *U.S. Fire Ins. Co. v. United Limousine Serv.*, 328 F. Supp. 2d 450, 454 (S.D.N.Y. 2004) ("Nothing about the case at bar is 'unusual.' The type of activity that gives rise to RICO claims also frequently gives rise to lesser state law claims, such as fraud or unjust enrichment. This case does not fall within the scope of §1367(c)(4)'s 'exceptional circumstances' provision.").

Nonetheless, even if the Court were to determine it had discretion to consider declining the exercise of supplemental jurisdiction, such a decision is not warranted in the present context. Plaintiffs have litigated this matter for over two years and are on the precipice of a default judgment as to damages and closing this case. Declining to exercise supplemental jurisdiction at this late stage runs contrary to traditional rationales of judicial economy and convenience. The Court should exercise supplemental jurisdiction, if necessary. Finally, as briefed regarding diversity jurisdiction, specifically pleading a jurisdictional basis is not required.

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that the Court retain subject matter jurisdiction over this matter, whether under CAFA, 28 U.S.C. §1332(a), or supplemental jurisdiction.

Dated: December 20, 2023.

Respectfully submitted,

/s/ *Dennis A. González*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on or about December 20, 2023, a true and accurate copy of Plaintiffs' Supplemental Briefing Regarding Subject Matter Jurisdiction was served on counsel of record via the CM/ECF system. A copy of the foregoing document was served upon Defendants at the addresses listed below via mail or as otherwise indicated:

| | |
|---|---|
| **Art Sea Group Ltd.**<br>Via publication on Plaintiffs' website | **Auro Advantages, LLC**<br>Via publication on Plaintiffs' website |
| **Easy Com, LLC**<br>c/o Registered Agent<br>159 Main Street, Unit 100,<br>Nashua, NH 03060 | **Marina Garda**<br>Via publication on Plaintiffs' website |
| **Global E-Advantages LLC**<br>c/o Registered Agent<br>North West Registered Agent LLC<br>8 The Green, Suite B,<br>Dover, DE 19901 | **Grovee, LLC**<br>c/o Registered Agent<br>Delaware Business Incorporators<br>3422 Old Capitol Trail, Suite 700<br>Wilmington, DE 19808 |
| **Ivan Hrechaniuk**<br>Via publication on Plaintiffs' website | **Borys Konovalenko**<br>Via email to<br>borys.konovalenko@gmail.com |
| **Mayon Solutions Ltd**<br>Via email to info@mayon.solutions and sales@mayon.solutions | **Mayon Solutions, LLC**<br>(1) c/o Registered Agents, Inc.<br>159 Main Street, Unit 100, Nashua, NH 03060; and<br><br>(2) Via courtesy email to<br>Mayon.llc@gmail.com |
| **Notus, LLC**<br>c/o Registered Agent<br>Colorado Registered Agent LLC<br>1942 Broadway Street, Suite 314C,<br>Boulder, CO 80302 | **Profit Media Group LP**<br>4 Queen Street, Suite 1,<br>Edinburgh, GB, EH21JE |
| **Shopostar, LLC**<br>c/o Registered Agent<br>Colorado Registered Agent LLC<br>1942 Broadway Street, Suite 314C,<br>Boulder, CO 80302 | **Olga Tielly**<br>3rd Floor 207 Regent Street,<br>London, United Kingdom W1B3HH |
| **Trans-Konsalt MR Ltd.**<br>Via publication on Plaintiffs' website | |

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