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21 Obelisk, Inc. and Nebulous, Inc.

22 UNITED STATES DISTRICT COURT  
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SHAUN ROBERTS, NICHOLAS  
25 COLLEY, and ALLAN HENRY,  
26 individually and on behalf of all others  
27 similarly situated,

28 Plaintiffs,

v.

OBELISK, INC., a Delaware  
corporation, NEBULOUS, INC., a  
Delaware corporation, DAVID J.  
VORICK, an individual, ZACH  
HERBERT, an individual, and DOES 1  
through 10, inclusive,

Defendants.

Case No. '18CV2898 LAB BGS

**NOTICE OF REMOVAL OF  
ACTION  
(28 U.S.C. §§ 1332, 1441, & 1453)**

1 TO PLAINTIFFS, THEIR ATTORNEYS, AND THE ABOVE-CAPTIONED  
2 COURT:

3 PLEASE TAKE NOTICE that Defendants Nebulous, Inc. and Obelisk, Inc.  
4 (collectively, "Corporate Defendants")<sup>1</sup> by and through their undersigned attorneys,  
5 hereby remove the above-captioned civil action, and all claims and causes of action  
6 therein, from the Superior Court of the State of California for the County of San  
7 Diego, to the United States District Court for the Southern District of California.

8 This civil action is removed on the basis of diversity jurisdiction under 28  
9 U.S.C. §§ 1332, 1441, and 1453. For the reasons set forth below, this Court has  
10 subject matter jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"),  
11 codified in part at 28 U.S.C. §§ 1332 and 1453. Additionally, as required by 28  
12 U.S.C. § 1446(a), all process, pleadings, and orders served on Corporate Defendants  
13 in the action to date are attached hereto as Exhibit A.

14 As the requisite "short and plain statement of the grounds for removal," 28  
15 U.S.C. § 1446(a), Corporate Defendants state as follows:

16 **BACKGROUND**

17 1. On November 19, 2018, Shaun Roberts, Nicholas Colley, and Allan  
18 Henry (collectively, "Plaintiffs") commenced a civil action by filing a complaint in  
19 the Superior Court of the State of California for the County of San Diego.

20 2. Plaintiffs allege that this action arises out of their alleged purchases of  
21 DCR1 and/or SC1 cryptocurrency "miners" from Nebulous, Inc. and Obelisk, Inc.  
22 (Compl. ¶ 1, 9–11.)

23 3. The Complaint is styled as a putative class action. Plaintiffs purport to  
24 sue on their own behalf and on behalf of "[a]ll persons or entities who purchased SC1  
25

26 <sup>1</sup> Plaintiffs have yet to serve a summons and a complaint on Defendants David Vorick  
27 and Zach Herbert. CAFA allows any defendant to remove a qualifying class or mass  
28 action even without the consent of the other defendants. See 28 U.S.C. § 1453(b).  
Accordingly, this notice of removal is currently brought only on behalf of the  
Corporate Defendants.

1 or DCR1 miners from Defendants from June 1, 2017 through the present.” (Compl.  
2 ¶ 73.)

3 4. The Complaint asserts six causes of action against the Corporate  
4 Defendants and David Vorick and Zach Herbert (Vorick and Herbert collectively,  
5 “Individual Defendants”). Plaintiffs assert claims for violations of Massachusetts  
6 law for (1) unfair and deceptive practices, (2) unregistered offer and sale of securities,  
7 and (3) control person liability for unregistered offer and sale of securities. (Compl.  
8 ¶¶ 83–103.) In addition, the Complaint also asserts violations of California law for  
9 (1) unfair competition, (2) unregistered offer and sale of securities, and (3) control  
10 person liability for unregistered offer and sale of securities.

11 5. Plaintiffs seek, among other things, rescission of all SC1 and DCR1  
12 miner purchases and/or compensatory damages (Compl. ¶ VII.4), a constructive trust  
13 over the proceeds of Corporate Defendants’ alleged sales of SC1 and DCR1 miners  
14 (Compl. ¶ VII.6), and punitive damages (Compl. ¶ VII.7.)

15 **PROCEDURAL HISTORY AND TIMELINESS OF REMOVAL**

16 6. Plaintiffs mailed the Summons and the Complaint to Corporate  
17 Defendants by certified on November 20, 2018. (Exhibit A at 33, 36.) Under Section  
18 415.40 of the California Code of Civil Procedure, the provision under which  
19 Plaintiffs purport to have completed mail service (Exhibit A at 33, 36), “[s]ervice of  
20 a summons by this form of mail is deemed complete on the 10th day after such  
21 mailing.”

22 7. The San Diego Superior Court has calendared a case management  
23 conference for June 14, 2019. (Exhibit A at 41.)

24 8. On information and belief, Plaintiff has neither modified the Complaint  
25 to identify fictitious defendants (Does 1-10), nor served a copy of the Summons and  
26 Complaint on them.

27 8. This Notice of Removal is timely because Corporate Defendants filed it  
28 within thirty days of when Plaintiffs’ service on them with the Summons and

1 Complaint was deemed complete pursuant to Cal. Code Civ. Pro. § 415.40. *See* 28  
2 U.S.C. § 1446(b); *Murphy Bros., Inc. v. Mitchetti Pipe Stringing, Inc.*, 526 U.S. 344,  
3 347–48 (1999) (stating that formal service of process is measured according to state  
4 law, and service under state law is a prerequisite for triggering the 30-day removal  
5 period because it “assures defendants adequate time to decide whether to remove an  
6 action to federal court”); *Jimena v. Standish*, 504 F. App’x 632, 634 (9th Cir. 2013).

7 9. In accordance with 28 U.S.C. § 1446(d), Corporate Defendants will  
8 provide Plaintiffs written notice by serving Plaintiffs, through their counsel of record,  
9 with this Notice of Removal and all documents filed in support thereof and  
10 concurrently.

### 11 SUBJECT MATTER JURISDICTION

12 10. Pursuant to CAFA, a putative class action may be removed to the  
13 appropriate federal district court if (1) the action purports to be a “class” action  
14 brought on behalf of 100 or more members; (2) any member of a class of plaintiffs is  
15 a citizen of a state different from any defendant; and (3) the amount in controversy  
16 exceeds \$5 million. *See* 28 U.S.C. §§ 1332(d)(2), (2)(A), (5)(B), 1453(b). This  
17 action meets each of those three requirements.

### 18 **PLAINTIFFS’ PURPORTED CLASS EXCEEDS 100 MEMBERS.**

19 11. According to Plaintiffs, “there are thousands of Class members.”  
20 (Compl. ¶ 76.)

21 12. Without conceding liability, appropriateness of class treatment,  
22 appropriateness of Plaintiffs’ class definition, or the validity of Plaintiffs’ claim for  
23 relief, if the allegations in Plaintiffs’ Complaint are accepted as true, there are far  
24 more than 100 proposed class members. (*Id.*); *see also Kuxhausen v. BMW Fin.*  
25 *Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013) (holding that even “hundreds,”  
26 by definition, means at least 200); *Tompkins v. Basic Research LL*, No. CIV.  
27 S08244LKKDAD, 2008 WL 1808316, at \*3 (E.D. Cal. Apr. 22, 2008) (concluding  
28 the allegations in the plaintiff’s complaint that the class included “thousands of

1 persons” logically implied a minimum of 2,000 class members).

2 **THE PARTIES ARE CITIZENS OF DIFFERENT STATES.**

3 13. In this action, Plaintiff Shaun Roberts is a resident of the State  
4 California. (Compl. ¶ 9.)

5 14. Plaintiff Nicholas Colley is a resident of the State of Oregon. (Compl.  
6 ¶ 10.)

7 15. Plaintiff Allan Henry is a resident of the State of Connecticut. (Compl.  
8 ¶ 11.)

9 16. The Corporate Defendants, however, are both Delaware corporations  
10 with their principal place of business in Massachusetts. (Compl. ¶ 12.)

11 17. Consequently, because none of the Plaintiffs are citizens of Delaware or  
12 Massachusetts—where Corporate Defendants reside—minimal diversity is satisfied  
13 under the second requirement of CAFA, 28 U.S.C. § 1332(d)(2)(A).

14 **THE AMOUNT IN CONTROVERSY EXCEEDS \$5 MILLION.**

15 18. “In measuring the amount in controversy, a court must assume that the  
16 allegations of the complaint are true and that a jury will return a verdict for the  
17 plaintiff on all claims made in the complaint.” *Korn v. Polo Ralph Lauren Corp.*,  
18 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008). “The ultimate inquiry is what amount  
19 is put ‘in controversy’ by the plaintiff’s complaint, not what a defendant will *actually*  
20 owe.” *Id.* (emphasis in original); *see also Deehan v. Amerigas Partners, L.P.*, No.  
21 08-cv-1009 BTM JMA, 2008 WL 4104475, at \*2 (S.D. Cal. Sept. 2, 2008); *Muniz v.*  
22 *Pilot Travel Centers LLC*, No. CIV. S-07-0325 FCD EFB, 2007 WL 1302504, at \*3  
23 (E.D. Cal. May 1, 2007).

24 19. Corporate Defendants’ burden of proof on removal “is not daunting, as  
25 courts recognize that . . . a removing defendant is *not* obligated to research, state, and  
26 prove the plaintiff’s claims for damages.” *Korn*, 536 F. Supp. 2d at 1204–05  
27 (emphasis in original (internal quotation marks removed)). Defendants “need only  
28 include a plausible allegation that the amount in controversy exceeds the

1 jurisdictional threshold, and the defendant's amount in controversy allegation should  
2 be accepted if not contested by the plaintiff or questioned by the court." *Varsam v.*  
3 *Lab. Corp. of Am.*, No. 14CV2719 BTM JMA, 2015 WL 4199287, at \*1 (S.D. Cal.  
4 July 13, 2015).

5 20. Among other things, Plaintiffs seek rescission of Defendants' alleged  
6 sales of cryptocurrency miners to all putative class members. (Compl. ¶ VII.4.)  
7 Plaintiffs claim, "Defendants first presale closed on November 24, 2017 and  
8 Defendants announced that they sold 3,516 SC1s and 2,888 DCR1s for \$2,499 each,  
9 raising over \$16 million." (Compl. ¶ 45.) Plaintiffs also allege, "[a]fter conducting  
10 the first SC1 and DCR1 presale, Defendants conducted a second presale between  
11 December 31, 2017 and January 31, 2018 ("Batch 2"). During the Batch 2 presale,  
12 Defendants sold 3,648 SC1 miners and 3,693 DCR1 miners for \$1,599 each, raising  
13 over \$11.7 million." (Compl. ¶ 46.)

14 21. Without conceding liability, appropriateness of class treatment,  
15 appropriateness of Plaintiffs' class definition, or the validity of Plaintiffs' claim for  
16 relief, as pled by Plaintiffs, if all such sales were rescinded, the amount in controversy  
17 exceeds \$5 million.

18 22. Moreover, Plaintiffs seek a constructive trust over the proceeds of  
19 Defendants' alleged sales of both batches of SC1 and DCR1 miners. (Compl. ¶  
20 VII.6.) This also supports a conclusion that the amount in controversy in this action  
21 exceeds \$5 million. (Compl. ¶ 26); *see Holt v. Noble House Hotels & Resort, Ltd.*,  
22 2018 WL 539176, at \*4 (S.D. Cal. Jan. 23, 2018) (considering amount over which  
23 plaintiff was seeking a constructive trust and disgorgement in assessing amount in  
24 controversy).

### 25 VENUE IS PROPER

26 23. Removal to this judicial district and division is proper under 28 U.S.C.  
27 §§ 1441(a) and 1446(a) because the state court action was originally pending in this  
28


1 judicial district—namely, the Superior Court of the State of California for the County  
2 of San Diego.

3 **NOTICE TO THE SUPERIOR COURT OF SAN DIEGO COUNTY**

4 24. Contemporaneously with the filing of this Notice of Removal,  
5 Corporate Defendants are filing a true and correct copy of this Notice of Removal  
6 and all documents filed in support thereof and concurrently therewith with the clerk  
7 of the Superior Court of the State of California for the County of San Diego, under  
8 28 U.S.C. § 1446(d).

9  
10 Dated: December 28, 2018

COOLEY LLP

11  
12 By:   
13 Darcie A. Tilly (239715)

14 Attorney for Defendants  
15 OBELISK, INC. and NEBULOUS,  
16 INC.

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