

NOTICE OF FILING

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File Title: FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Third Respondent's Defence

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

FORTESCUE LIMITED ACN 002 594 872

and others named in the schedule

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081

and others named in the schedule

Respondents

To the Applicants' Further Amended Statement of Claim filed 23 October 2024, the Third Respondent says as follows (adopting, without admission, the headings and defined terms used within the Further Amended Statement of Claim unless otherwise specified):

A Parties

A.1 Applicants

1. The Third Respondent admits paragraph 1.
2. The Third Respondent admits paragraph 2.
3. As to paragraph 3, the Third Respondent:
 - (a) admits paragraph 3(a);
 - (b) admits paragraph 3(b);
 - (c) does not know and cannot admit paragraph 3(c); and
 - (d) admits that FMGPS is the former employer of the Third Respondent but otherwise does not know and cannot admit paragraph 3(d).
4. The Third Respondent does not plead to paragraph 4.

A.2 Respondents

5. As to paragraph 5, the Third Respondent:

(a) admits paragraph 5(a);

Filed on behalf of (name & role of party) Bjorn Winther-Jensen, Third Respondent

Prepared by (name of person/lawyer) Mike Hales

Law firm (if applicable) MinterEllison

Tel (08) 6189 7825

Fax _____

Email mike.hales@minterellison.com

Address for service Level 9, One The Esplanade, PERTH WA 6000
(include state and postcode)

[Form approved 01/08/2011]

- (b) admits paragraph 5(b);
 - (c) admits paragraph 5(c) but says further that the 090 Application has lapsed; and
 - (d) admits paragraph 5(d).
6. The Third Respondent does not plead to paragraph 6.
7. As to paragraph 7, the Third Respondent:
- (a) admits paragraph 7(a);
 - (b) admits paragraph 7(b);
 - (c) does not know and cannot admit paragraph 7(c);
 - (d) does not know and cannot admit paragraph 7(d);
 - (e) admits that since 7 December 2022, Dr Kolodziejczyk has been a director of Element Zero, but otherwise does not know and cannot admit paragraph 7(e); and
 - (f) admits paragraph 7(f).
8. As to paragraph 8, the Third Respondent:
- (a) admits paragraph 8(a);
 - (b) admits paragraph 8(b);
 - (c) as to paragraph 8(c):
 - (i) admits that he was employed by FMGPS from 15 February 2021 to 12 November 2021;
 - (ii) says further that while employed by FMGPS:
 - (A) from 15 February 2021 to about 12 April 2021, he was working from Thailand;
 - (B) from about 12 April 2021 to about 26 April 2021, he was working from a COVID-19 quarantine hotel in Perth, Western Australia;
 - (C) from about 26 April 2021 to about late May 2021, he was working from FFI's office in East Perth, Western Australia; and
 - (D) from about late May 2021 to 12 November 2021, he was working from a laboratory and office rented by FFI at the University of Western Australia in Crawley, Western Australia;
 - (d) admits that during his employment with FMGPS he held the role of FFI's Technology Development Lead;
 - (e) admits paragraph 8(e);
 - (f) admits paragraph 8(f) but says further that he ceased to work at or for Element Zero on about 22 December 2023;
 - (g) admits paragraph 8(g); and
 - (h) otherwise denies paragraph 8.

9. As to paragraph 9, the Third Respondent:
- (a) admits paragraph 9(a);
 - (b) admits paragraph 9(b);
 - (c) does not know and cannot admit paragraph 9(c);
 - (d) does not know and cannot admit paragraph 9(d);
 - (e) admits paragraph 9(e);
 - (f) admits that since 7 December 2022, Mr Masterman has been a director of Element Zero, but otherwise does not know and cannot admit paragraph 9(f);
 - (g) admits paragraph 9(g); and
 - (h) admits paragraph 9(h).

B. Background facts

B.1 Green Iron R&D at Fortescue

10. As to paragraph 10, the Third Respondent:
- (a) admits that during his employment by FMGPS, Fortescue undertook research and development of technologies with the aim to use renewable energy sources to reduce iron ore to metallic iron;
 - (b) admits that iron produced using technologies which use renewable sources to reduce iron ore to metallic iron is commonly referred to in the minerals industry as "Green Iron"; and
 - (c) otherwise does not know and cannot admit paragraph 10.
11. As to paragraph 11, the Third Respondent:
- (a) admits from at least about 15 February 2021 to at least about 12 November 2021, Fortescue undertook research and development in relation to the direct electrochemical reduction of iron oxide in iron ore to create metallic iron; and
 - (b) otherwise does not know and cannot admit paragraph 11.
12. As to paragraph 12, the Third Respondent:
- (a) denies paragraph 12 insofar as it makes allegations against him;
 - (b) otherwise does not know and cannot admit paragraph 12; and
 - (c) says further that his research and development while employed by FMGPS related to the attempted development of an electrochemical flow-cell system with the following features:
 - (i) an electrochemical reduction process;
 - (ii) utilises reduction of iron ore particles in suspension without iron deposition on the cathode, rather than electrowinning;
 - (iii) contains a membrane to separate the anode and cathode sides of the electrochemical cell(s), and so is not membrane free;

- (iv) operates at a temperature below the boiling point of the water-based electrolyte, being 85 – 130 °C (the term 'low temperature' as used in paragraph 12(d) of the Further Amended Statement of Claim being unclear);
 - (v) utilises a common water-based electrolyte which is inexpensive in comparison to an ionic liquid electrolyte;
 - (vi) aims to operate using renewable electricity sources; and
- (d) says further that the provisional patent application filed by FFI in about May 2021 pleaded in paragraph 19(b) reflects the research and development pleaded in paragraph 12(c) of this Defence.
13. As to paragraph 13, the Third Respondent:
- (a) does not know and cannot admit paragraph 13;
 - (b) repeats paragraph 12(a) of this Defence; and
 - (c) denies undertaking, researching and development work into Ionic Liquid R&D or creating any Ionic Liquid R&D Information.
14. As to paragraph 14, the Third Respondent:
- (a) denies paragraph 14 insofar as it makes allegations against him;
 - (b) repeats paragraph 13(c) of this Defence; and
 - (c) otherwise does not know and cannot admit paragraph 14.

B.2 *Dr Kolodziejczyk and Dr Winther-Jensen resign (Oct-Nov 2021)*

15. The Third Respondent does not know and cannot admit paragraph 15.
16. As to paragraph 16, the Third Respondent:
- (a) admits that on 3 November 2021, he gave notice of his intention to cease employment with FMGPS and cease acting in his role with FFI; and
 - (b) otherwise denies paragraph 16.
17. The Third Respondent does not know and cannot admit paragraph 17.
18. As to paragraph 18, the Third Respondent:
- (a) admits that he ceased employment with FMGPS and ceased acting in his role with FFI on about 12 November 2021; and
 - (b) otherwise denies paragraph 18.

B.3 *Allegation that Dr Kolodziejczyk and Dr Winther-Jensen exfiltrated Fortescue material (Oct-Nov 2021)*

19. The Third Respondent does not know and cannot admit paragraph 19.
20. As to paragraph 20, the Third Respondent:
- (a) says that from about 5 to 11 November 2021, he used the email address "bjorn.wintherjensen@fmgl.com.au" to send the documents listed in particular (i)

to paragraph 20 of the amended statement of claim in five emails to his personal email address;

(b) says that:

- (i) following his notice of intention to cease employment on about 3 November 2021, he was asked by FFI Human Resources to cease and hand over all work by 12 November 2021;
- (ii) at that time, he was aware that other employees, being Dr Kolodziejczyk and David Arnall, who had previously resigned from Fortescue, had lost access to the Fortescue IT network and to their Fortescue email account shortly after their resignations; and
- (iii) from about 5 November 2021 to about 11 November 2021, he sent the documents pleaded in paragraph 20(a) of this Defence to his personal email address in order to assist with the hand-over of his work in the event that he lost access to the Fortescue IT network and to his Fortescue email account; and

(c) otherwise denies paragraph 20.

21. The Third Respondent does not know and cannot admit paragraph 21.

22. As to paragraph 22, the Third Respondent:

- (a) repeats paragraph 20(b) of this Defence;
- (b) denies paragraph 22.

23. The Third Respondent does not know and cannot admit paragraph 23.

24. In relation to paragraph 24, the Third Respondent:

- (a) admits that the FFI Green Iron Provisional Application became open for public inspection on 8 December 2022;
- (b) otherwise does not know and cannot admit paragraph 24.

C. Breach of confidence

C.1 Fortescue's confidential information

25. The Third Respondent does not plead to paragraph 25.

26. The Third Respondent does not plead to paragraph 26.

27. The Third Respondent does not plead to paragraph 27.

C.2 Respondents' equitable obligations of confidence

28. As to paragraph 28, the Third Respondent:

- (a) admit that as an employee of FMGPS, he was under an equitable obligations to Fortescue to treat confidential information belonging to Fortescue confidentially, and not to use it for a purpose other than in the course of his employment with FMGPS and for the benefit of Fortescue;
- (b) repeats paragraphs 10 to 14 of this Defence; and
- (c) otherwise denies paragraph 28.

C.3 *Element Zero's process and plant*

29. As to paragraph 29, the Third Respondent:
- (a) admits that between about 7 December 2022 and about 22 December 2023, Element Zero used the features pleaded in paragraphs 29(a), (b), (c) and (f), but says those features are common and well known from electrowinning systems for, for example, copper and gold;
 - (b) denies that between about 7 December 2022 and about 22 December 2023, Element Zero used the feature pleaded in paragraphs 29(d) and says further that the Element Zero process used a temperature of above 250°C;
 - (c) denies that between about 7 December 2022 and about 22 December 2023, Element Zero used the feature pleaded in paragraph 29(e) and says further that the Element Zero process used a molten hydroxide eutectic as electrolyte with a melting temperature above 170°C;
 - (d) otherwise:
 - (i) denies paragraph 29 insofar as it contains allegations in the period from about 7 December 2022 and about 22 December 2023; and
 - (ii) does not know and cannot admit paragraph 29.
30. As to paragraph 30, the Third Respondent:
- (a) says that he ceased to work at or for Element Zero on about 22 December 2023; and
 - (b) otherwise:
 - (i) denies paragraph 30 insofar as it contains allegations in relation to the period before 22 December 2023; and
 - (ii) does not know and cannot admit paragraph 30 insofar as it relates to the period after he ceased to work at or for Element Zero (being about 22 December 2023).

C.4 *Alleged misuse of Fortescue CI*

31. As to paragraph 31, the Third Respondent:
- (a) denies paragraph 31 insofar as it contains allegations against him;
 - (b) repeats paragraphs 20 and 29 of this Defence; and
 - (c) otherwise does not know and cannot admit paragraph 31.
32. The Third Respondent does not know and cannot admit paragraph 32.
33. The Third Respondent does not know and cannot admit paragraph 33.
34. As to paragraph 34, the Third Respondent:
- (a) denies paragraph 34 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 34.
35. The Third Respondent does not know and cannot admit paragraph 35.

36. As to paragraph 36, the Third Respondent:
- (a) denies paragraph 36 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 36.

D. Alleged breach of duties under the general law and the *Corporations Act*

D.1 General law

37. As to paragraph 37, the Third Respondent repeats paragraphs 7(c) and 7(d) of this Defence.
38. As to paragraph 38, the Third Respondent repeats paragraphs 8(c) to 8(e) of this Defence.
39. As to paragraph 39, the Third Respondent repeats paragraphs 9(c) to 9(e) of this Defence.
40. As to paragraph 40, the Third Respondent:
- (a) says that he owed fiduciary duties to Fortescue under the general law but does not admit the pleaded scope of those duties; and
 - (b) otherwise does not know and cannot admit paragraph 40.
41. As to paragraph 41, the Third Respondent repeats paragraphs 19, 20, 31, 33, and 34 of this Defence.
42. As to paragraph 42, the Third Respondent:
- (a) denies paragraph 42 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 42.
43. The Third Respondent does not know and cannot admit paragraph 43.
44. The Third Respondent does not know and cannot admit paragraph 44.
45. As to paragraph 45, the Third Respondent:
- (a) denies paragraph 45 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 45.

D.2 s 183 of the *Corporations Act*

46. The Third Respondent denies paragraph 46.
47. As to paragraph 47, the Third Respondent:
- (a) admits that he owes a statutory duty under s 183(1) of the *Corporations Act 2001* (Cth) to Fortescue; and
 - (b) otherwise denies paragraph 47.
48. As to paragraph 48, the Third Respondent repeats paragraphs 19, 20, 31, 33, and 34 of this Defence.
49. As to paragraph 49, the Third Respondent:
- (a) denies paragraph 49 insofar as it makes allegations against him; and

(b) otherwise does not know and cannot admit paragraph 49.

50. The Third Respondent does not know and cannot admit paragraph 50.

E. Alleged breach of contract

E.1 Respondents' employment agreements

51. The Third Respondent does not know and cannot admit paragraph 51.

52. The Third Respondent does not know and cannot admit paragraph 52.

53. The Third Respondent admits paragraph 53.

54. As to paragraph 54, the Third Respondent:

(a) admits paragraph 54 insofar as it makes allegations against him;

(b) otherwise does not know and cannot admit paragraph 54; and

(c) says further that he will rely on the Winther-Jensen Employment Contract for its full terms and effect.

55. As to paragraph 55, the Third Respondent:

(a) admits paragraph 55 insofar as it makes allegations against him;

(b) otherwise does not know and cannot admit paragraph 55; and

(c) says further that he will rely on the Winther-Jensen Employment Contract for its full terms and effect.

56. As to paragraph 56, the Third Respondent:

(a) admits paragraph 56 insofar as it makes allegations against him;

(b) otherwise does not know and cannot admit paragraph 56; and

(c) says further that he will refer to the Winther-Jensen Employment Contract for its full terms and effect.

57. As to paragraph 57, the Third Respondent:

(a) admits paragraph 57 insofar as it makes allegations against him;

(b) otherwise does not know and cannot admit paragraph 57; and

(c) says further that he will refer to the Winther-Jensen Employment Contract for its full terms and effect.

58. As to paragraph 58, the Third Respondent:

(a) admits paragraph 58 insofar as it makes allegations against him;

(b) otherwise does not know and cannot admit paragraph 58; and

(c) says further that he will refer to the Winther-Jensen Employment Contract for its full terms and effect.

E.2 Dr Kolodziejczyk's separation deed

59. The Third Respondent does not know and cannot admit paragraph 59.

60. The Third Respondent does not know and cannot admit paragraph 60.

E.3 Alleged breach of contract

61. As to paragraph 61, the Third Respondent:

- (a) denies paragraph 61 insofar as it makes allegations against him;
- (b) repeats paragraph 20 of this Defence; and
- (c) otherwise does not know and cannot admit paragraph 61.

62. The Third Respondent does not know and cannot admit paragraph 62.

63. As to paragraph 63, the Third Respondent:

- (a) denies paragraph 63 insofar as it makes allegations against him;
- (b) repeats paragraphs 12, 20, 29 and 31 of this Defence; and
- (c) otherwise does not know and cannot admit paragraph 63.

64. As to paragraph 64, the Third Respondent:

- (a) denies paragraph 64 insofar as it makes allegations against him;
- (b) repeats paragraphs 12, 20, and 29 of this Defence; and
- (c) otherwise does not know and cannot admit paragraph 64.

F. Copyright infringement

F.1 Copyright works and subsistence

65. The Third Respondent does not know and cannot admit paragraph 65.

66. The Third Respondent does not know and cannot admit paragraph 66.

67. The Third Respondent does not know and cannot admit paragraph 67.

68. The Third Respondent does not know and cannot admit paragraph 68.

69. The Third Respondent does not know and cannot admit paragraph 69.

70. The Third Respondent does not know and cannot admit paragraph 70.

F.2 Alleged copyright infringement

71. The Third Respondent does not know and cannot admit paragraph 71.

72. As to paragraph 72, the Third Respondent:

- (a) repeats paragraph 20 of this Defence; and
- (b) otherwise denies paragraph 72.

73. The Third Respondent does not know and cannot admit paragraph 73.

74. As to paragraph 74, the Third Respondent:

- (a) denies paragraph 74 insofar as it makes allegations against him;

- (b) says further that if it is established that an infringement was committed by him (which is denied) at the time of any such infringement he was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of copyright, such that the applicants are not entitled to pursue damages against him, in respect of the infringement pursuant to s 115(3) of the *Copyright Act 1968* (Cth); and
- (c) otherwise does not know and cannot admit paragraph 74.

G. Alleged contraventions of the Australian Consumer Law

G.1 The Representations

- 75. The Third Respondent does not know and cannot admit paragraph 75.
- 76. The Third Respondent does not plead to paragraph 76.

G.2 Alleged misleading or deceptive conduct

- 77. The Third Respondent does not know and cannot admit paragraph 77.
- 78. The Third Respondent does not know and cannot admit paragraph 78.
- 79. The Third Respondent does not know and cannot admit paragraph 79.
- 80. The Third Respondent does not know and cannot admit paragraph 80.
- 81. The Third Respondent does not know and cannot admit paragraph 81.

H. Alleged loss and damage

- 82. As to paragraph 82, the Third Respondent:
 - (a) denies paragraph 82 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 82.
- 83. The Third Respondent denies paragraph 83.
- 84. As to paragraph 84, the Third Respondent:
 - (a) denies paragraph 84 insofar as it makes allegations against him; and
 - (b) otherwise does not know and cannot admit paragraph 84.

85. The Third Respondent denies that the Applicants are entitled to the relief claimed or any relief at all.

Date: 30 October 2024



Signed by Mike Hales
Lawyer for the Third Respondent

This pleading was prepared by Mike Hales and settled by Frances St John of counsel

Certificate of lawyer

I Mike Hales certify to the Court that, in relation to the defence filed on behalf of the Third Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 30 October 2024



Signed by Mike Hales
Lawyer for the Third Respondent

Schedule

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

Applicants

Second Applicant: **FORTESCUE FUTURE INDUSTRIES PTY LTD**
ACN 625 711 373

Third Applicant: **FMG PERSONNEL SERVICES PTY LTD**
ACN 159 057 646

Respondents

Second Respondent: **BARTLOMIEJ PIOTR KOLODZIEJCZYK**

Third Respondent: **BJORN WINTHER-JENSEN**

Fourth Respondent: **MICHAEL GEORGE MASTERMAN**