

## NOTICE OF FILING

### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
Date of Lodgment: 30/10/2024 5:01:58 PM AEDT  
Date Accepted for Filing: 30/10/2024 5:02:04 PM AEDT  
File Number: NSD527/2024  
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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## 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 Further Amended Statement of Claim dated 23 October 2024, the First, Second and Fourth Respondents (the **Element Zero Respondents**) say as follows (adopting, without admission, the headings and defined terms used therein unless otherwise specified):

### A. Parties

1. The Element Zero Respondents admit paragraph 1.
2. The Element Zero Respondents admit paragraph 2.
3. In relation to paragraph 3, the Element Zero Respondents:
  - a. do not know and cannot admit the matters alleged at paragraph (c); and
  - b. otherwise admit the paragraph.
4. The Element Zero Respondents do not plead to paragraph 4 as it contains no allegation.
5. The Element Zero Respondents admit paragraph 5.
6. The Element Zero Respondents do not plead to paragraph 6 as it contains no allegation.
7. In relation to paragraph 7, the Element Zero Respondents:
  - a. say that the Second Respondent was employed by FMGPS from about 25 March 2019 to about 5 November or 14 December 2021;
  - b. say that during the Second Respondent's employment with FMGPS, he held the following roles:

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Filed on behalf of (name & role of party)	The First, Second and Fourth Respondents		
Prepared by (name of person/lawyer)	Michael John Williams, Partner		
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- i. from about 1 July 2020 to about 30 June 2021 – Fortescue Metals Group Ltd's Chief Scientist;
    - ii. from about 1 July 2021 to about 5 November 2021 – FFI's Chief Scientist;
  - c. say that the Second Respondent has been the Chief Technology Officer of the First Respondent since 10 September 2023; and
  - d. otherwise admit the paragraph.
8. The Element Zero Respondents admit paragraph 8.
9. In relation to paragraph 9, the Element Zero Respondents:
- a. say that the Fourth Respondent has been the Chief Executive Officer of the First Respondent since 21 August 2023; and
  - b. otherwise admit the paragraph.

## **B. Background Facts**

10. In relation to paragraph 10, the Element Zero Respondents:
- a. admit that the Applicants (collectively, **Fortescue**) (through FFI) have, since at least in or around February or March 2021, undertaken research into and development of a technology for reducing iron ore to metallic iron using renewable energy sources referred to below as the LTE Process;
  - b. admit that iron produced through new processing pathways for reducing (irrespective of the nature of the process, i.e., electrochemical or pyrometallurgical) iron ore to metallic iron using renewable energy sources and resulting in zero or low carbon emissions is commonly referred to in the minerals and steel industry as "Green Iron";
  - c. further, say that Fortescue's technology involves the electrochemical reduction of iron ore with at least the following features:
    - i. involves the suspension of solid iron ore particles in an electrolyte slurry using a flow cell;
    - ii. utilises a fluid bed reactor or flow reactor;
    - iii. utilises an aqueous solution as the electrolyte;
    - iv. utilises a membrane;
    - v. preferably operates at a temperature of between 85 – 130 °C; and
    - vi. is capable of operating using renewable energy sources.

(the **LTE Process**);

- d. otherwise deny the paragraph.
11. In relation to paragraph 11, the Element Zero Respondents:
- a. refer to and repeat paragraph 10 above;
  - b. admit that the LTE Process is a type of Green Iron technology;
  - c. admit the LTE Process involves the direct electrochemical reduction of iron oxide in iron ore to create metallic iron (**Direct Electrochemical Reduction**); and
  - d. otherwise deny the paragraph.
12. In relation to paragraph 12, the Element Zero Respondents:
- a. refer to and repeat paragraphs 10 to 11 above;
  - b. admit that from in or around January 2021 to November 2021, Dr Kolodziejczyk undertook, and caused other employees of FMGPS and/or FFI to undertake, research and development work into the LTE Process;
  - c. admit that from in or around February 2021 to November 2021, Dr Winther-Jensen undertook, and caused other employees of FMGPS and/or FFI to undertake, research and development work into the LTE Process;
  - d. say that the LTE Process:
    - i. does not utilise electrowinning;
    - ii. is not membrane free; and
    - iii. does not utilise an ionic liquid electrolyte;
  - e. further say that the term Ionic Liquid R&D is defined in paragraph 12 without specificity and precision, and is embarrassing;
  - f. under cover of that objection, deny that Dr Kolodziejczyk and Dr Winther-Jensen undertook, and caused other employees of FMGPS to undertake, research and development work into Ionic Liquid R&D (as defined in paragraph 12); and
  - g. otherwise deny the paragraph.
13. In relation to paragraph 13, the Element Zero Respondents:
- a. refer to and repeat paragraphs 10 to 12 above;
  - b. in the premises of paragraphs 10 to 12 above, and under the cover of the objection in paragraph 12(e) above, deny that:
    - i. any Ionic Liquid R&D was undertaken;
    - ii. there was any Ionic Liquid R&D Information (as defined in paragraph 13); and

- c. otherwise deny the paragraph.
14. In relation to paragraph 14, the Element Zero Respondents:
- a. say the paragraph is unclear and embarrassing;
  - b. under cover of that objection:
    - i. refer to and repeat paragraphs 10 to 13 above;
    - ii. deny the paragraph; and
    - iii. say further that the inference to be drawn from Fortescue's inability to locate documents recording Ionic Liquid R&D Information is that no such documents exist or have existed.
15. The Element Zero Respondents admit paragraph 15.
16. The Element Zero Respondents admit paragraph 16.
17. The Element Zero Respondents admit paragraph 17.
18. The Element Zero Respondents admit paragraph 18.
19. In relation to paragraph 19, the Element Zero Respondents:
- a. say that during the period from September 2021 to October 2021, Dr Kolodziejczyk had access to the documents identified at particular (i) 1-4 to paragraph 19 for the purpose of completing his work; and
  - b. otherwise deny the paragraph.
20. The Element Zero Respondents do not know and cannot admit paragraph 20.
21. The Element Zero Respondents deny paragraph 21.
22. In relation to paragraph 22, the Element Zero Respondents:
- a. refer to and repeat paragraph 20 above; and
  - b. otherwise do not know and therefore do not admit the paragraph.
23. The Element Zero Respondents deny paragraph 23.
24. In relation to paragraph 24, the Element Zero Respondents:
- a. admit that FFI filed a provisional patent application, Australian application no. 2021215184;
  - b. say that the application referred to in (a) related to the LTE Process; and
  - c. otherwise deny the paragraph.

**C. Breach of confidence**

25. In relation to paragraph 25, the Element Zero Respondents:
- a. say that each paragraph which responds to an allegation concerning the Fortescue Process CI (which is defined in paragraph 25 as referring to the Ionic Liquid R&D Information) should be read in the context of the Ionic Liquid R&D Information having not been defined with specificity and precision and as being embarrassing as alleged in paragraph 12(e) above, and the denial in paragraph 13 above that there was any Ionic Liquid R&D Information; and
  - b. otherwise do not plead to paragraph 25 as it contains no allegation.
26. The Element Zero Respondents do not plead to paragraph 26 as it contains no allegation.
27. In relation to paragraph 27, the Element Zero Respondents:
- a. say that each paragraph which responds to an allegation concerning the Fortescue CI (which includes the Fortescue Process CI, and which according to paragraph 25 refers to the Ionic Liquid R&D Information) should be read in the context of the Ionic Liquid R&D Information having not been defined with specificity and precision and as being embarrassing as alleged in paragraph 12(e) above, and the denial in paragraph 13 above that there was any Ionic Liquid R&D Information; and
  - b. otherwise do not plead to paragraph 27 as it contains no allegation.
28. In relation to paragraph 28, the Element Zero Respondents:
- a. admit that as employees of Fortescue, Dr Kolodziejczyk and Dr Winther-Jensen were under 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 their employment with FMGPS and for the benefit of Fortescue;
  - b. refer to and repeat paragraphs 10 to 14, and 19 to 27 above; and
  - c. otherwise deny the paragraph.
29. In relation to paragraph 29, the Element Zero Respondents:
- a. say that since around July 2022, Dr Kolodziejczyk and Dr Winther-Jensen have researched and developed a Green Iron technology process, having the following features:
    - i. dissolves iron ore in a hydroxide alkali melt or eutectic melt;
    - ii. utilises an electrowinning tank;
    - iii. utilises a non-aqueous alkali metal base;

- iv. does not use a membrane;
  - v. operates at a temperature of between 250 and 350 degrees Celsius; and
  - vi. may be operated using renewable energy sources,  
(the **Element Zero Process**);
- b. say that since around December 2022, Element Zero has researched and developed the Element Zero Process;
  - c. say that Dr Winther-Jensen's involvement in the Element Zero Process ceased upon his resignation from Element Zero in December 2023; and
  - d. otherwise deny the paragraph.
30. In relation to paragraph 30, the Element Zero Respondents:
- a. say that from on or around 30 June 2023, Element Zero has commenced design and construction of a trial plant (the **Element Zero Trial Plant**);
  - b. say that from in or around February 2024, Element Zero has operated the Element Zero Trial Plant;
  - c. say that the Element Zero Process is performed at the Element Zero Trial Plant;
  - d. say that Dr Winther-Jensen's involvement in the Element Zero Trial Plant ceased upon his resignation from Element Zero in December 2023; and
  - e. otherwise deny the paragraph.
31. The Element Zero Respondents deny paragraph 31.
32. The Element Zero Respondents deny paragraph 32.
33. The Element Zero Respondents deny paragraph 33.
34. The Element Zero Respondents deny paragraph 34.
35. The Element Zero Respondents deny paragraph 35.
36. The Element Zero Respondents deny paragraph 36.

#### **D. Breach of duties under the general law and the *Corporations Act***

##### ***D.1 General law***

- 37. The Element Zero Respondents refer to and repeat paragraph 7 above.
- 38. The Element Zero Respondents refer to and repeat paragraph 8 above.
- 39. The Element Zero Respondents refer to and repeat paragraph 9 above.
- 40. In relation to paragraph 40, the Element Zero Respondents:

- a. say that Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman owed fiduciary duties to Fortescue to:
  - i. treat Fortescue's confidential information as such, and not to use it for the benefit of a competitor, and
  - ii. not to profit from Fortescue's confidential information; and
- b. otherwise deny the paragraph.

41. The Element Zero Respondents refer to and repeat paragraphs 19, 20, 31, 33 and 34 above.
42. The Element Zero Respondents deny paragraph 42.
43. The Element Zero Respondents deny paragraph 43.
44. The Element Zero Respondents deny paragraph 44.
45. The Element Zero Respondents deny paragraph 45.

#### ***D.2 s 183 of the Corporations Act***

46. The Element Zero Respondents deny paragraph 46.
47. In relation to paragraph 47, the Element Zero Respondents:
  - a. admit that Dr Kolodziejczyk and Dr Winther-Jensen owed statutory duties to Fortescue under s 183(1) of the *Corporations Act 2001* (Cth), including obligations not to use confidential information of Fortescue obtained by them as employees of Fortescue to gain an advantage for themselves or someone else, or to cause detriment to Fortescue; and
  - b. otherwise deny the paragraph.
48. The Element Zero Respondents refer to and repeat paragraphs 19, 20, 31, 33 and 34 above.
49. The Element Zero Respondents deny paragraph 49.
50. The Element Zero Respondents deny paragraph 50.

#### **E. Breach of contract**

##### ***E.1 Respondents' employment agreements***

51. The Element Zero Respondents admit paragraph 51.
52. The Element Zero Respondents admit paragraph 52.
53. The Element Zero Respondents admit paragraph 53.
54. The Element Zero Respondents admit paragraph 54.



55. The Element Zero Respondents admit paragraph 55.

56. The Element Zero Respondents admit paragraph 56.

57. The Element Zero Respondents admit paragraph 57.

58. The Element Zero Respondents admit paragraph 58.

***E.2 Dr Kolodziejczyk's separation deed***

59. The Element Zero Respondents admit paragraph 59.

60. The Element Zero Respondents admit paragraph 60.

***E.3 Breach of contract***

61. The Element Zero Respondents deny paragraph 61.

62. The Element Zero Respondents deny paragraph 62.

63. The Element Zero Respondents deny paragraph 63.

64. The Element Zero Respondents deny paragraph 64.

**F. Copyright infringement**

***F.1 Copyright works and subsistence***

65. The Element Zero Respondents deny paragraph 65.

66. The Element Zero Respondents deny paragraph 66.

67. In relation to paragraph 67, the Element Zero Respondents:

- a. say that no author(s) have been identified; and
- b. deny the paragraph.

68. In relation to paragraph 68, the Element Zero Respondents:

- a. refer to and repeat paragraph 67 above; and
- b. deny the paragraph.

69. The Element Zero Respondents deny paragraph 69.

70. The Element Zero Respondents deny paragraph 70.

***F.2 Copyright infringement***

71. The Element Zero Respondents deny paragraph 71.

72. The Element Zero Respondents deny paragraph 72.

73. In relation to paragraph 73, the Element Zero Respondents:

- a. refer to and repeat paragraphs 19 to 22 and 65 to 72 above;

- b. say further that to the extent Dr Kolodziejczyk has reproduced the whole or substantial part of the documents referred to in the Particulars to paragraph 19 of the Statement of Claim (which is denied) he was authorised by one or more of the Applicants to do so; and
  - c. otherwise deny the paragraph.
74. In relation to paragraph 74, the Element Zero Respondents:
- a. deny paragraph 74; and
  - b. say further that if it is established that an infringement was committed by Dr Kolodziejczyk (which is denied) at the time of any such infringement Dr Kolodziejczyk 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 damages against Dr Kolodziejczyk in respect of the infringement pursuant to s 115(3) of the *Copyright Act 1968* (Cth).

## **G. Contraventions of the Australian Consumer Law**

### ***G.1 The Representations***

75. In relation to paragraph 75, the Element Zero Respondents:
- a. admit paragraph 75(a) and 75(b); and
  - b. deny the representation alleged in paragraph 75(c) was conveyed.
76. The Element Zero Respondents do not plead to paragraph 76 as it contains no allegation.

### ***G.2 Misleading or deceptive conduct***

77. The Element Zero Respondents deny paragraph 77.
78. The Element Zero Respondents deny paragraph 78.
79. The Element Zero Respondents deny paragraph 79.
80. The Element Zero Respondents deny paragraph 80.
81. The Element Zero Respondents deny paragraph 81.

## **H. Loss and damage**

82. The Element Zero Respondents deny paragraph 82.
83. The Element Zero Respondents deny paragraph 83.

84. The Element Zero Respondents deny paragraph 84.

Date: 30 October 2024



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Signed by Michael John Williams  
Lawyer for the First, Second and Fourth  
Respondents

This pleading was prepared by Michael John Williams and Rebecca Mary Dunn and settled by John Michael Hennessy SC and Christopher McMeniman of counsel

### **Certificate of lawyer**

I Michael John Williams certify to the Court that, in relation to the defence filed on behalf of the First, Second and Fourth Respondents, 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



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Signed by Michael John Williams  
Lawyer for the First, Second and Fourth  
Respondents

**Schedule of Parties**

No. NSD527 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Applicant FORTESCUE FUTURE INDUSTRIES PTY LTD ACN 625 711 373

Third Applicant FMG PERSONNEL SERVICES PTY LTD ACN 159 057 646

Second Respondent BARTLOMIEJ PIOTR KOLODZIEJCZYK

Third Respondent BJORN WINTHER-JENSEN

Fourth Respondent MICHAEL GEORGE MASTERMAN