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A handwritten signature in blue ink that reads "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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Form 59
Rule 29.02(1)

Affidavit

No. 527 of 2024

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

FORTESCUE LIMITED ACN 002 594 872 (currently described in the proceeding by the pseudonym QFM1) and another
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 (currently described in the proceeding by the pseudonym RAB1) and others
Respondents

Affidavit of: **Michael John Williams**
Address: Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000
Occupation: Solicitor
Date: 29 May 2024

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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
 Law firm (if applicable) Gilbert + Tobin
 Tel (02) 9263 4271 Fax (02) 9263 4111
 Email mwilliams@gtlaw.com.au

Address for service Level 35, International Tower Two
 (include state and postcode) 200 Barangaroo Avenue, Barangaroo NSW 2000

I **Michael John Williams** of Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000, Solicitor, say on oath:

Introduction

1. I am the solicitor on record for the First, Second and Fourth Respondents. This is my first affidavit sworn in these proceedings.
2. I make this affidavit in support of First, Second and Fourth Respondents' proposed short minutes of order (**Proposed Orders**).
3. I have over 28 years' experience conducting complex litigation before the Federal Court of Australia, the Supreme Court of New South Wales and the High Court of Australia, including matters that have involved claims of infringement of copyright, breach of confidence, breach of fiduciary duties, contraventions of the *Corporations Act 2001* (Cth) and breach of contract. A number of these matters have involved the analysis of electronic records and the forensic investigation of electronic records.
4. I have also executed or been involved in the execution of (including as applicant's solicitor and Independent Lawyer), numerous *Anton Piller* / search orders over the last 25 years in cases of suspected breaches of confidence and infringement of intellectual property rights in Australia. I am familiar with the Federal Court of Australia's Search Orders Practice Note (**GPN-SRCH**) in relation to the guidelines that apply to *Anton Piller* orders, which came into operation changing the practice of search orders in the Court.
5. Where I refer to my experience in this affidavit, I intend to refer to my experience in relation to matters such as this one including as described above.
6. I have prepared this affidavit and have made enquiries with the First, Second and Fourth Respondents on an urgent basis in the time available. The contents of this affidavit are based on my own knowledge or, where otherwise indicated, on information from the sources identified, which I believe to be true. The sources of the information include Mr Masterman (CEO of the First Respondent and the Fourth Respondent) and Dr Kolodziejczyk (the Second Respondent), who have provided me with instructions to the best of their knowledge and belief at this stage of the proceedings.
7. By referring in this affidavit to any information or instructions I received or obtained, I do not waive or intend to waive – nor am I authorised to waive – any privilege attaching to those instructions or any work I performed as a result of those instructions, other than where expressly referred to in this affidavit.



Exhibits


8. Exhibited to me at the time of swearing this affidavit a bundle of documents to which I refer in this affidavit marked "**Exhibit MJW-1**". A reference to a page number of **Exhibit MJW-1** is a reference to the document on the corresponding page of **Exhibit MJW-1**.
9. Also exhibited to me at the time of swearing this affidavit are confidential documents marked "**Confidential Exhibit MJW-2**" to which I refer below. The First Respondent claims confidentiality over the document marked **Confidential Exhibit MJW-2**.

Background

10. These proceedings were commenced by the Applicants (collectively, **Fortescue**) by way of urgent application for *ex parte* relief on 30 April 2024.
11. On 14 May 2024, Justice Perry made search orders pursuant against the First, Second and Third Respondents (**Search Orders**). A copy of the Search Orders appears at pages 2 to 30 of **Exhibit MJW-1**.
12. I am informed by Mr Masterman (the Fourth Respondent and Chief Executive Officer of the First Respondent) and Dr Kolodziejczyk that the Search Orders were executed on 15 May 2024 at the following premises (**the Premises**):
 - (a) Unit 2, **30 Oxleigh Drive**, Malaga, Western Australia, 6090;
 - (b) Unit 1, **19 Oxleigh Drive**, Malaga, Western Australia, 6090; and
 - (c) **5A Volga Street**, Hadfield, Victoria 3046 (**Dr Kolodziejczyk's residence**).
13. I was instructed to act for the First, Second and Fourth Respondents in these proceedings on 20 May 2024. On the same date, I filed a Notice of Acting – Appointment of Solicitor.
14. Senior and junior counsel have been briefed for the Respondents, along with an experienced computer forensic expert, Mr Nigel Carson of Digital Trace Australia (formerly head of computer forensics at KordaMentha). A copy of Mr Carson's CV is reproduced on page 31 of **Exhibit MJW-1**.

Status of investigations

15. In the week following my appointment, I (along with other members of Gilbert + Tobin) have been urgently undertaking a review of the affidavit evidence relied on by Fortescue in support of the Search Orders (some 12 affidavits, which together with their annexures comprise approximately 4 lever arch folders of material), the submissions relied on, transcript of the hearing and information concerning the execution of the Search Orders and obtaining instructions.



16. The reports of the Independent Lawyer and the Independent Computer Expert were served on Gilbert + Tobin at approximately 7pm on the date of swearing this affidavit. As at the time of swearing this affidavit, I have not had the opportunity to review those reports.
17. As at the time of making this affidavit, Gilbert + Tobin has not had access to the following confidential information and exhibits relied on by Fortescue:
- (a) Confidential information in boxed text in the body of Mr Huber's affidavit and in annexures AH 11, AH 21 and AH 26 attachment (row 127 onwards);
 - (b) Confidential information in boxed text in the body of Dr Bhatt's affidavit and in annexures AIB 5, AIB 6, AIB 9, AIB 10, AIB 14, AIB 15, AIB 30, AIB 31, AIB 32 and AIB 33;
 - (c) Confidential information in boxed text in the body of Mr McFaul's affidavit and in annexures WM 2 and WM 3;
 - (d) Confidential information in boxed text in the body of Ms Hantos' affidavit and in annexure SMH 3;
 - (e) Confidential information in boxed text in the body of Mr Olivier's affidavit and in annexures JPO 03 and JPO 04;
 - (f) Confidential information in boxed text in annexures NM 2 and NM 3 to Mr Marrast's affidavit; and
 - (g) Confidential Attachment 1-7 to annexure AH 21 to Mr Huber's affidavit.

Copies of email requests for this material, including as late as today, are reproduced at pages 32 to 37 of **Exhibit MJW-1**.

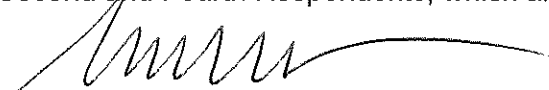
18. In addition, the computer forensic images which were taken by the Independent Computer Expert (Mr McKemish) of computers, electronic devices and cloud storage of the First and Second Respondents have only just been received by Gilbert + Tobin's Perth office today from the Independent Lawyer. Arrangements have been made to have the forensic images couriered to Sydney but these are not expected to arrive until tomorrow.
19. I am informed by Mr Carson, and believe, that the forensic images will take 1-2 weeks for him to process to enable the individual documents to be reviewed by the First and Second Respondents and approximately 2 days to prepare a list of files which are contained within forensic images.
20. Without having access to the documents contained in the forensic image, I am unable to provide an accurate estimate of the time that will be required to review it. However,



based on previous experience in comparable cases, I estimate that the process of reviewing the documents extracted from the forensic image by Mr Carson will take weeks if not months to undertake, even using advanced document review technology. This review process would be considerably reduced if the volume of data was reduced, such as if categories of irrelevant material was first excised.

Summary of position

21. Although Gilbert + Tobin's review of the material and information referred to in paragraph 15 is not complete, at this stage I consider that there are grounds for the Respondents to apply to vary or set aside the Search Orders based on:
- (a) Material non-disclosure by Fortescue at the time the orders were sought. I have serious concerns about the material that was relied on by Fortescue which omitted key information about the relationship between Fortescue and the First, Second and Fourth Respondents in the preceding 6-month period;
 - (b) The form of the search orders which were sought by Fortescue, which departed from and exceeded in a number of respects the model orders under **GPN-SRCH**. Instead of being tied to identified relevant material to be copied by the forensic expert from computers and electronic devices, the Search Orders extended to whole computers and devices, which greatly extended their reach; and
 - (c) The manner in which the search orders were executed which resulted in an extraordinarily large volume of electronic material (over 3 terabytes), being virtually the entirety of the documents and emails of the First Respondent in its business, together with highly confidential and privileged material and the indiscriminate capture of material entirely unrelated to Fortescue's pleaded claim.
 - (d) The apparent extraordinary invasion of the privacy of the respondents of a kind which exceeds what is usually contemplated in proceedings such as these, both prior to the application for the Search Orders and in the execution of the orders.
22. I intend to provide further evidence in relation to some of these matters in my second affidavit sworn in these proceedings.
23. The First, Second and Fourth Respondents intend to file such an application (the **Proposed Application**) and have provided for this to occur under the Proposed Orders. Pending the hearing of the Proposed Application the Respondents seek to maintain the status quo, in terms of access to the forensic images and non-publication.
24. I am informed by Mr Masterman, and believe, that the First Respondent is a start-up company that would be significantly damaged if Fortescue was to publicise the Search Orders and its allegations against the First, Second and Fourth Respondents, which are

denied. The damage to the First Respondent caused by such publicity could not be readily quantified if the Search Orders were subsequently varied or set aside.

Material seized as a result of the Search Orders

25. Dr Kolodziejczyk has informed me of his understanding of at least some of the material that was removed from the Premises as a result of the execution of the Search Orders, as set out below.

From 19 Oxleigh Drive

26. The entire email server of the First Respondent was imaged, including the contents of all its email accounts (i.e., of all staff), dating back to the inception of its business.
27. The entire contents of the personal Google account belonging to Dr Kolodziejczyk linked to the following email addresses: kolodziejczykbartlomiej@gmail.com and kolodziejczyk.bartlomiej@gmail.com were copied. These addresses are connected to a Google account used by Dr Kolodziejczyk for personal emails and the storage of personal documents using the Google Drive service, dating back to 2008 were copied.
28. The entire contents of the bart@kolodziejczyk.com email account were copied, which is another personal email address used by Dr Kolodziejczyk since around 2022.
29. The entire contents of Dr Kolodziejczyk's personal mobile phone was copied.
30. The entire contents of Dr Kolodziejczyk's HP laptop were copied.
31. No electronic devices were physically removed from the premises for the purposes of executing the Search Orders and no hard copy documents were removed.

From 30 Oxleigh Drive

32. A Lenovo Think Sensor desktop computer was removed from these premises. This computer is used in the Element Zero laboratory to operate a potentiostat (a piece of hardware required to run electroanalytical experiments). The desktop computer contains electrochemical measurements resulting from experiments run by the First Respondent. The Lenovo Think Sensor desktop computer has since been returned.
33. Five hard copy documents were removed. Four of the five documents removed were staff notepads. The notepads have not been returned to the First Respondent.

From 5A Volga Street:

34. Three hard copy documents were removed. Two of the three hard copy documents removed contained confidential information belonging to a third party. The three hard copy documents have not been returned to the First Respondent.



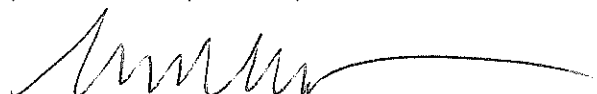
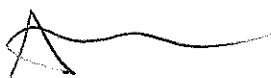
35. A laptop belonging to Dr Kolodziejczyk's wife was accessed, but I understand no records were copied from that device, and the device was not removed from the premises.

Element Zero Google Drive

36. In addition to material removed from the Premises during the execution of the Search Orders, I am informed by Mr Masterman and Dr Kolodziejczyk that during the weekend of Saturday 18 and Sunday 19 May, the Element Zero Google Drive cloud storage account was accessed remotely by the Independent Computer Expert, and the entire contents of that Google Drive cloud storage account was copied.
37. No representatives of First Respondent were present (and as far as Mr Masterman and Dr Kolodziejczyk are aware, the Independent Lawyer was not present) with the Independent Computer Expert at the time of this access and copying, so the First, Second and Fourth Respondents are not aware of where this access occurred. I am instructed that the Element Zero Google Drive account contains some 600GB of data.

Access to things removed from the Premises

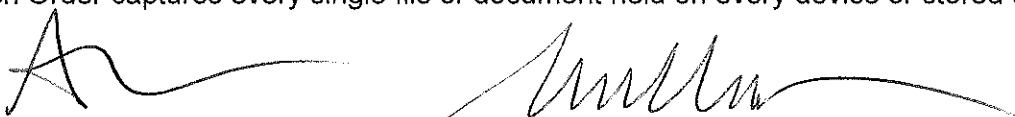
38. Since I began acting for the First, Second and Fourth Respondents, Gilbert + Tobin has made requests to gain access to copies of things removed from the Premises.
39. On 21 May 2024, Gilbert + Tobin sent an email to the Independent Lawyer, Hall & Wilcox, requesting copies of all things removed from the Premises by no later than 5pm 22 May 2024. A copy of this email is reproduced at page 38 of **Exhibit MJW-1**.
40. On 22 May 2024, Hall & Wilcox responded, providing a copy of the 8 hard copy documents removed from the Premises and confirming that the electronic images of all computers and other devices imaged (**Forensic Images**) would be delivered to Gilbert + Tobin via courier once received from the Independent Computer Expert. A copy of these emails without attachments appears at pages 39 to 40 of **Exhibit MJW-1**.
41. On 23 May 2024, Gilbert + Tobin emailed the Independent Lawyer proposing, for expediency and security, to arrange for transfer of the Forensic Images via electronic file transfer, and seeking confirmation that the Independent Computer will not retain copies of the Forensic Images once provided to the Independent Lawyer. A copy of this email is reproduced at pages 41 to 42 of **Exhibit MJW-1**.
42. On 24 May 2024 Gilbert + Tobin partner Rebecca Dunn attempted to call the Independent Lawyer and left a message.
43. On 27 May 2024 the Independent Lawyer called Ms Dunn and informed her that:
- (a) As far as he was aware, Hall & Wilcox still had not at that time received a copy of the Forensic Images from the Independent Computer Expert.



- (b) Approximately 3 terabytes of electronic material was removed from the Unit 2, 30 Oxleigh Drive, Malaga, Western Australia 6090 and Unit 1, 19 Oxleigh Drive, Malaga, Western Australia 6090 premises.
 - (c) Hall & Wilcox does not have access to the Signiant transfer site.
 - (d) Once Hall & Wilcox received the Forensic Images from the Independent Computer Expert, proposed that copies be provided to Gilbert + Tobin by arranging for the delivery of a physical hard drive or hard drives.
44. On 28 May 2024 at 5:22pm, the Independent Lawyer confirmed by email that a hard drive containing the Forensic Images was ready for collection at Hall & Wilcox's office in Perth. A copy of this email is reproduced at page 43 of **Exhibit MJW-1**.
45. This morning a graduate lawyer from Gilbert + Tobin's Perth office collected the hard drive (a Toshiba 4TB portable storage device) from Hall & Wilcox's Perth office. The hard drive was encrypted and could only be accessed using an encryption password.
46. On 29 May 2024 at 12:12pm Gilbert + Tobin received an email from the Independent Lawyer providing the encryption password of the Hard Drive. A copy of that email is not reproduced here for confidentiality reasons.
47. Given the volume of the data on the hard drive it was not feasible, or cost-effective, to transmit it to Sydney. Instead, arrangements have been made for the hard drive to be urgently couriered to Gilbert + Tobin's office in Sydney. The hard drive is not scheduled to arrive in Sydney until tomorrow (Thursday).
48. Access to copies of all material removed from the Premises, including the Forensic Images, is an essential precursor to allow the Respondent to comply with the Search Orders, including at least Orders 22 and 23 which require the Respondents to review the material has been captured by the Search Orders. It is currently not possible for the First, Second and Fourth Respondents to comply with that order.

Concerns about the form of Search Orders

49. Based on my experience, I am concerned that issues with the drafting of the Search Order have caused the Search Order to cover an unduly extensive volume and scope of material (which volume and scope is discussed in more detail in the section below).
50. The first category of Listed Things includes all electronic storage devices and cloud-based storage accounts at or accessible from the Premises as themselves "Listed Things" rather than as the devices to be searched *for* Listed Things. The effect of the inclusion of all devices and accounts as Listed Things, without qualification, is that the Search Order captures every single file or document held on every device or stored on



every cloud-based account at or accessible from the Premises without any limitation for file name, subject matter, key word hits, date range or any other standard limitations.

51. The inclusion of category 1 of the Listed Things appear to me to be inconsistent with other parts of the Search Orders. The orders themselves (see order 20(d1)) contemplate excluding certain devices on the basis that they do not contain material falling into categories 2 to 9 of the Listed Things. If the Listed Things included the devices themselves, then there would be no basis to exclude devices. Categories 2 to 8A of the Listed Things would also appear to me to be unnecessary (except for hard-copy documents) in light of category 1, which captures all documents on all devices and accounts falling within category 1, without limitation. All documents falling within categories 2 to 8A because of file name, subject matter, key word hits, date range or any other characteristics would already be caught by category 1.

Material removed from the Premises

52. I understand from the Independent Lawyer that the Search Orders have captured around **3 terabytes** (that is, 3,000GB) of data, which is in my experience an extremely large volume of material to be caught by an *Anton Piller* search order.
53. Because I do not know the nature of the documents (e.g. types of files, size of individual files), it is difficult to accurately estimate how long it would take to review the data. Based on my experience and the information I have available to me at this stage, I estimate it could take a team of multiple reviewers months to review the documents (for example for confidentiality and privilege for the purposes of order 22(b) of the Search Orders).
54. I am informed by Mr Masterman and believe that, as a result of how the Search Orders are drafted and executed they will have captured a very large amount of information that is confidential, privileged, and not likely to be relevant to these proceedings. Examples of some of these categories of information that will have been captured below. It is not clear to me why documents in these categories would have been at any risk of deletion, warranting preservation.

Whole of business records

55. The files that were imaged by the Independent Computer Expert extend to virtually the entire business records of the First Respondents, including confidential:
- (a) Financial records such as management reports, revenue and profit information, capitalisation tables, budgets and forecasts;
 - (b) Banking and payroll information of the company, its officers and employees;




- (c) Employee information including employment contracts, remuneration information, potentially sensitive personal information such as health data and other personal records, home addresses and phone numbers, performance review information;
- (d) Information about third parties Element Zero deals with such as suppliers, including names, addresses, contact information, contracts, pricing, confidential information about future customers including memoranda of understanding and letters of intent;
- (e) Stakeholder liaison and negotiation including with domestic and international government and other bodies, feasibility studies, applications for grants;
- (f) Investment records for the business including future investment;
- (g) Business strategies, investor negotiations, roadmap documents and pitch decks; and
- (h) Technical data including experimental data, specifications, pilot plant design documents and technical analyses.

Patents

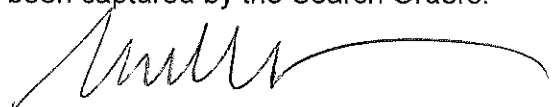
56. The imaged files will include the confidential records relating to the First Respondents' PCT patent application (PCT/AU2023/051041) and its privileged communications with its lawyers and patent attorneys in respect of the patent application.

Third party confidential information

57. I am informed by Mr Masterman and Dr Kolodziejczyk and believe that the Search Orders will have captured material that is unrelated to these proceedings that is highly confidential to third parties including competitors of Fortescue (who would not be aware of the Search Order or the fact that documents concerning their confidential arrangements will have been captured in the wide-ranging orders). The third-party confidential information captured by the Search Order includes information provided to the First Respondent under strict confidentiality regimes and material relating to ongoing third-party projects, the existence, nature and scope of which are highly confidential. Reproduced at page 2 of **Confidential Exhibit MJW-2** is a confidential list of some examples of third parties with non-disclosure and exploratory agreements in place.

Material subject to legal professional privilege

58. Because all emails ever sent or received by any staff member using the First Respondents' email were captured by the Search Orders, all email correspondence between any officer or employee of the First Respondent and its lawyers relating to any legal matter since establishment would have been captured by the Search Orders.

Irrelevant, confidential, and voluminous personal files

59. All personal emails sent or received by Dr Kolodziejczyk from his personal Gmail account since 2008 have been captured by the Search Orders, together with the entire contents of Dr Kolodziejczyk's personal Google Drive storage account, and the entire contents of Dr Kolodziejczyk's other personal email account, linked to the bart@kolodziejczyk.com email address.
60. Dr Kolodziejczyk's personal email accounts contain highly confidential material:
- (a) belonging to third parties for whom Dr Kolodziejczyk has acted as a contractor during his career, including third party information relating to current and ongoing projects, including with commercial parties and government departments;
 - (b) relating to Dr Kolodziejczyk's role as a board member of Proto Axiom;
 - (c) relating to Dr Kolodziejczyk's role as expert consultant to the European Commission (over the past 14 years); and
 - (d) privileged communications between Dr Kolodziejczyk and various legal advisors about many unrelated matters over the years.
61. There are also thousands of Dr Kolodziejczyk's personal emails and photos, and include personal information and possibly sensitive information of hundreds of individuals.
62. The entire contents of Dr Kolodziejczyk's mobile telephone were captured by the Search Orders. His mobile phone contains all personal texts and other communications with his wife, family and friends, many personal files, photographs and videos. Based on my review of the Search Orders, the images taken of Dr Kolodziejczyk's mobile telephone would also have captured data such as his account passwords including for online banking, superannuation and other accounts.

Orders proposed by the parties

63. On 24 May 2024, I received an email from Davies Collison Cave, the solicitors for the Applicants, proposing short minutes of order which, among other orders, contemplate access to the search materials by all parties on or before 6 June 2024 or within 1 week of the next return date. A copy of that email and the Applicants' proposed short minutes of order are reproduced at pages 44 to 47 of **Exhibit MJW-1**.
64. On 28 May 2024, I caused short minutes of order proposed by the First, Second and Fourth Respondents to be circulated to Davies Collison Cave. A copy of that email and the First, Second and Fourth Respondents' proposed short minutes of order are reproduced at pages 48 to 54 of **Exhibit MJW-1**.



- 65. On 29 May 2024 at 12:40pm, Davies Collison Cave circulated a marked up version of the First, Second and Fourth Respondents' proposed short minutes of order. A copy of that email its attachments are reproduced at pages 55 to 66 of **Exhibit MJW-1**.
- 66. On 29 May 2024 at 4:16pm, Gilbert + Tobin circulated a further marked up version of the First, Second and Fourth Respondents' proposed short minutes of order. A copy of that email its attachments are reproduced at pages 67 to 72 of **Exhibit MJW-1**.

Conclusion

- 67. A number of the Proposed Orders are agreed. Those orders include short extensions of time for the provision of the required material by the Independent Lawyer and Independent Computer Expert, as well as procedural orders for the filing of a Defence and a Reply (although there is a difference between the Applicants and Respondents on the timing of the filing of those documents).
- 68. There are a number of orders that are not agreed. The First, Second and Fourth Respondents seek orders extending undertakings about confidentiality (which are not agreed by the Applicants), and the Applicants seek orders requiring the Respondents to take certain steps pursuant to order 23 of the Search Order (which are not agreed for reasons including that the First and Second Respondents would be unable to comply with them, within the timeframe proposed by the Applicants because of the issues identified above including access to and the need to carry out a review of the Forensic Images). The First, Second and Fourth Respondents' position is that orders should be made which preserve the status quo, and enable the matter to be advanced procedurally while the Proposed Application is prepared in parallel.

Sworn by the Deponent
at Barangaroo
in New South Wales
on 29 May 2024
Before me:



Signature of witness

Amelia Cooper, Solicitor
Level 35 200 Barangaroo Avenue,
Barangaroo NSW 2000

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Signature of deponent