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**FORTESCUE LIMITED (ACN 002 594 872)** and others

Applicants

**ELEMENT ZERO PTY LIMITED (ACN 664 342 081)** and others

Respondents

## **APPLICANTS' CONFIDENTIAL OUTLINE OF SUBMISSIONS**

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1. This is a case brought by Fortescue Ltd, together with two of its subsidiaries (collectively **Fortescue**) against three former employees and their company for industrial scale misuse of Fortescue's confidential information in its Green (carbon dioxide-free) Iron technology and related causes of action.
2. In 2021, the second and third respondents, **Dr Kolodziejczyk** and **Dr Winther-Jensen**, were employed by Fortescue as the Chief Scientist and Technology Development Lead respectively.<sup>1</sup> From Oct 2020 to Jul 2022, the fourth respondent, **Mr Masterman**, was employed as the Chief Financial Officer of the second applicant, Fortescue Future Industries (**FFI**).<sup>2</sup> In Dec 2022, the first respondent, **Element Zero** Pty Ltd was incorporated.<sup>3</sup> From Dec 2022 to Jan 2024, Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman were directors of Element Zero.<sup>4</sup> Dr Kolodziejczyk and Mr Masterman remain directors and are Element Zero's Chief Technology Officer and Chief Executive Officer respectively.<sup>5</sup> All three remain Element Zero shareholders.<sup>6</sup>
3. While working at Fortescue, Dr Kolodziejczyk and Dr Winther-Jensen undertook and led R&D work, including work on a confidential process of electrochemical reduction of iron oxide to iron using ionic liquid electrolytes (**Ionic Liquid R&D**).<sup>7</sup> Without Fortescue's knowledge or permission, much of that research was taken by Dr Kolodziejczyk and Dr Winther-Jensen when they resigned from Fortescue in late 2021 (**Ionic Liquid R&D Information** or **Fortescue Process CI**).<sup>8</sup> Also without Fortescue's knowledge or permission, when they resigned, Dr Kolodziejczyk and Dr Winther-Jensen copied and

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<sup>1</sup> Statement of Claim (**SOC**) [7](c)-(d), [8](c)-(d); Huber [31], [39] (AB tab 13).

<sup>2</sup> **SOC** [9](c)-(d); Huber [31], [39] (AB tab 13).

<sup>3</sup> **SOC** [5](a); AH-3 (AB tab 16).

<sup>4</sup> **SOC** [7](e), [8](e), [9](d); AH-3 (AB tab 16).

<sup>5</sup> **SOC** [7](e), [9](d); AH-3 (AB tab 16).

<sup>6</sup> **SOC** [7](f), [8](g), [9](g)-(h); AH-3 (AB tab 16). Mr Masterman's shareholding is through a company, Symmall Pty Limited, controlled by him: Huber [80] (AB tab 13) and AH-28 (AB tab 43).

<sup>7</sup> **SOC** [12].

<sup>8</sup> **SOC** [13], [25].

took with them certain confidential documents relevant to designing, engineering, constructing and operating an industrial pilot plant for an electrochemical reduction process (listed in the SOC at [19] and [20]) (collectively, the **Fortescue Plant CI**).

4. In early 2024, Dr Kolodziejczyk and Mr Masterman announced in an article in the *Australian Financial Review* (**AFR**) that their company Element Zero had developed and was commercialising an electrochemical reduction **process** using ionic liquid electrolytes (**EZ Process**)<sup>9</sup> and had built a pilot industrial **plant** that implemented that process (**EZ Plant**).<sup>10</sup> Fortescue has also recently discovered that Element Zero is the named applicant for a number of patent applications (**Patent Applications**),<sup>11</sup> which from their title and the contents of two applications (which has been published)<sup>12</sup> concern the EZ Process and/or EZ Plant.<sup>13</sup>
5. Fortescue alleges that the respondents have used: **(a)** the Fortescue Process CI in using and commercialising the EZ Process;<sup>14</sup> **(b)** the Fortescue Process CI and the Fortescue Plant CI in designing, engineering, constructing and operating the EZ Plant;<sup>15</sup> and **(c)** the Fortescue Process CI and/or Fortescue Plant CI in inventing the invention described or claimed in each Patent Application, in preparing and filing each of them, and in causing them to be published.<sup>16</sup> These acts constitute breaches of equitable duties of confidence.<sup>17</sup> They also constitute contraventions of s 183 of the *Corporations Act 2001* (Cth),<sup>18</sup> which founds the Court's federal jurisdiction.
6. Fortescue applies for a search order at certain premises owned or occupied by Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen to preserve evidence for this proceeding. For the reasons below, Fortescue respectfully submits that the Court ought to make the orders sought by Fortescue.

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<sup>9</sup> SOC [29]; AH-25 p 193 (AB tab 38).

<sup>10</sup> SOC [30]; AH-25 p 195 (AB tab 38).

<sup>11</sup> SOC [5](c)-(d).

<sup>12</sup> Hantos [31], [38] (AB tab 89).

<sup>13</sup> Bhatt [106] (AB tab 44) (“I consider that the matters disclosed by the Element Zero PCT application are consistent with (i) what Element Zero has disclosed on its website and to the media (Part F.1 above)”).

<sup>14</sup> SOC [31](b)(i), [33](a).

<sup>15</sup> SOC [31](b)(ii), [33](b).

<sup>16</sup> SOC [31](b)(iii)-(iv), [34].

<sup>17</sup> SOC [36].

<sup>18</sup> SOC [46]-[50].

7.	These submissions will address the following matters:	
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## **A Factual background**

8. These submissions adopt **red text** when discussing material in the Application Book (**AB**) over which Fortescue makes a claim of confidentiality.

### **A.1 Roadmap of evidence**

9. Fortescue relies on the following affidavits.
10. The affidavit of Paul **Dewar**, Principal at Davies Collison Cave Law (AB tab 7), who provides an overview of the parties and the causes of action on which Fortescue relies, and details relevant to making the search order including the location of the premises and details of the independent lawyers and independent computer experts proposed to be included in the search parties.
11. The affidavit of Adrian **Huber**, Senior Legal Counsel of FFI (AB tab 13), who gives evidence of Dr Kolodziejczyk's and Dr Winther-Jensen's roles at Fortescue (Parts C.2 and C.3), the information security policy that applied to them (Part D), and certain

investigations and correspondence taking place after their departure from the company (Parts E and F). Mr Huber also identifies the confidential information taken and inferred to have been taken by Dr Kolodziejczyk and Dr Winther-Jensen before their departure (Part H). He also gives evidence relevant to the risk of destruction and seriousness of prejudice if a search order is not made.

12. The affidavit of Dr Anand Indravadan **Bhatt**, an Electrochemist and Materials Scientist employed by Fortescue and working at FFI (AB tab 44), who gives evidence about the chemical processes underlying the production of “Green Iron”, particularly the EZ Process (Part C.2 and F) and Fortescue (Part C.3) respectively. Dr Bhatt also analyses information from Dr Kolodziejczyk’s Fortescue email inbox that he has identified as relevant to the EZ Process (Parts D, E, G); identifies a body of information to which Dr Kolodziejczyk and Dr Winther-Jensen had access while at Fortescue (Part H); explains the import of certain technical documents taken from Fortescue by Dr Winther-Jensen (Part I); and identifies another body of information expected to have been created by Dr Winther-Jensen, but which cannot now be located on Fortescue’s systems (Part J).
13. The affidavit of Mr Wayne **McFaull**, a specialised plant engineer and current Manager of Energy Technology Scale-Up at Fortescue (AB tab 82) who gives evidence of research and development timelines for technology involving mineral processing (Part B), and compares the time, money and resources invested by Fortescue in its process and plant (Part C) with the corresponding phases of development of the EZ Process and the EZ Plant (Parts D and E). Mr McFaull then gives his opinion on the usefulness of Fortescue’s confidential information to Element Zero (Parts F, G and H) and how it could have been used by Element Zero to overcome its apparent lack of resources (Part I).
14. The affidavit of Ms Susanne Monica **Hantos**, Registered Patent Attorney and Technology Intelligence Counsel at (AB tab 89), who gives evidence of the patent applications filed by the parties (Parts C and D), identifies the risk that Fortescue’s confidential information has been comingled with the Patent Applications filed by Element Zero (Part E), and sets out the investigations she undertook in April 2024 to review emails of interest in Dr Kolodziejczyk’s Fortescue email inbox (Part G) and the Fortescue SharePoint folder used by Dr Kolodziejczyk and Dr Winther-Jensen (Part H).
15. The affidavit of Mr John Paul William Testaferrata **Olivier**, Director of Innovation & Technology, Fortescue Ltd (AB tab 93) who gives evidence about the nature of a document taken by Dr Winther-Jensen before his departure from Fortescue (Part F). Mr Olivier also gives evidence about Dr Kolodziejczyk’s role in the development of green iron technology (Part E), the value of Fortescue’s green iron developments to the business of Fortescue

(Parts B, C and D), and the likely prejudice to Fortescue if a search order is not made (Part G).

16. The affidavit of Mr Rodney **McKemmish**, Director of CYTER, regarding his ability, and the ability of contractors from Evidence Advisory, to act as independent computer experts in the search parties proposed by the Applicants. This affidavit has been sent to chambers separately to the AB.
17. The affidavit of Mr Adrian **Chai** of Ashurst Australia, regarding his ability, and the ability of other Ashurst solicitors Catherine Pedler, Sam Mengler, Angus Ross and Lucinda Hill, to act as independent lawyers in the search parties proposed by the Applicants. It is intended that this affidavit will be provided to chambers on the afternoon of 8 May 2024.

## A.2 Green Iron Technology

18. **Green iron technology** is technology for processing iron ore into metallic iron without burning fossil fuels which produce carbon dioxide.<sup>19</sup> Although there are different technologies for making “green” iron, this proceeding is concerned with a subset of that technology which involves the **electrochemical reduction** of the iron oxides found in iron ore to produce metallic iron.
19. Such processes are “electrochemical” because the iron ore is placed into a solution (an electrolyte), to which an external voltage is applied.<sup>20</sup> This causes a “reduction” of the iron oxide compound (the removal of oxygen atoms), to produce iron.<sup>21</sup>
20. At a high level, among other Green Iron technology, participants in the global iron-making industry are involved in developing proprietary processes that fall within the two approaches of electrochemical reduction: **(1)** dissolving the iron ore into an electrolyte solution (for example, an **ionic liquid**);<sup>22</sup> or **(2)** suspending solid iron ore particles in the electrolyte.<sup>23</sup>
21. Fortescue currently operates a pilot plant implementing the second approach, the reduction of solid ore particles, which it implements at pilot scale.<sup>24</sup> Element Zero has announced that it has commercialised and used the EZ Process, being a process

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<sup>19</sup> Olivier, [8] (AB tab 93); Bhatt [22] (AB tab 44).

<sup>20</sup> Bhatt [24] (AB tab 44).

<sup>21</sup> Bhatt [20], [25] (AB tab 44).

<sup>22</sup> Bhatt [33(a)], [35]-[45] (AB tab 44).

<sup>23</sup> Bhatt [33(b)], [46]-[53] (AB tab 44).

<sup>24</sup> McFaul [64(a)] (AB tab 82).

implementing the first approach, using an ionic liquid, which it implements at pilot plant scale.<sup>25</sup>

22. As discussed below, Dr Kolodziejczyk and Dr Winther-Jensen had been developing proprietary processes falling within each of the first and second approaches when they worked at Fortescue.

### A.3 The Respondents

#### A.3.1 Early research into ionic liquids

23. Dr Kolodziejczyk was involved in the development of Green Iron technology on behalf of Fortescue since the commencement of his employment in Mar 2019.<sup>26</sup>
24. By mid-2020, Dr Kolodziejczyk was investigating opportunities for Fortescue to develop Green Iron technology that used electrochemical reduction *with an ionic liquid*. This is evidenced by Dr Kolodziejczyk's emails with Fortescue management, Fortescue's legal counsel, and external research partners in the period from Sep 2020 to Jan 2021, which Dr Bhatt has summarised.<sup>27</sup>
25. For example, in one email on 22 Dec 2020 attaching a 'patent assessment form', Dr Kolodziejczyk stated he had already tested "*in a laboratory setting*" an invention for the "*use of ionic solvents and electrochemical devices for the low-temperature reduction of ores and oxides*".<sup>28</sup> Dr Bhatt's evidence is that, to have developed such an invention and undertaken such laboratory testing by Dec 2020, Dr Kolodziejczyk would need to have started preliminary work on ionic liquids at Fortescue from as early as Jun 2020.<sup>29</sup>
26. On 7 Dec 2020, Dr Kolodziejczyk recruited his former PhD supervisor, Dr Winther-Jensen, to work as an electrochemist on the development of "*low temperature processing from ionic liquids*".<sup>30</sup> By Jan and Feb 2021, Dr Kolodziejczyk and Dr Winther-Jensen exchanged emails about possible forms of Green Iron technology to be developed by Fortescue.<sup>31</sup> On 29 Jan 2021, Dr Kolodziejczyk told Dr Winther-Jensen that he had already "*looked at water, ionic liquids and molten carbonate*" for dissolving ore.<sup>32</sup>

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<sup>25</sup> McFaul [81] (AB tab 82).

<sup>26</sup> Olivier [18] (AB tab 93)

<sup>27</sup> Bhatt [54]-[78] (AB tab 44), see also Hantos [55] (AB tab 89).

<sup>28</sup> Bhatt [69]-[72] (AB tab 44); AIB-13 (AB tab 57).

<sup>29</sup> Bhatt [85] (AB tab 44).

<sup>30</sup> SMH-3 pp 50, 52 (AB tab 92)

<sup>31</sup> Bhatt [79]-[83] (AB tab 44).

<sup>32</sup> AIB-19 (AB tab 63).

27. On 23 Feb 2021, Dr Winther-Jensen prepared and provided a research plan to Dr Kolodziejczyk. In that document, he identified that the technology involving an ionic liquid would require a “*longer lead time*” when compared with technology involving solid-state reduction.<sup>33</sup> Accordingly, Dr Winther-Jensen recommended that research into dissolving iron ore (including with an “*ionic liquid*”) should be investigated “*in parallel*” to the priority workstream of using solid state reduction.<sup>34</sup>
28. From that point onwards, there are no records of electrochemical reduction using an ionic liquid in Dr Kolodziejczyk’s Fortescue email account.<sup>35</sup> There is also a lack of records of Dr Winther-Jensen’s work product while at Fortescue.<sup>36</sup>

### ***Resignations and investigation into Dr Kolodziejczyk and Dr Winther-Jensen***

29. On 27 Oct 2021, Dr Kolodziejczyk resigned from Fortescue. His last day was 5 Nov 2021.<sup>37</sup>
30. **Between his resignation and his last day at Fortescue**, FFI conducted an internal investigation into Dr Kolodziejczyk **in response to a whistleblower complaint**. As part of that investigation, Deloitte Financial Advisory Pty Ltd (**Deloitte**) was engaged to forensically analyse Dr Kolodziejczyk’s work-issued laptop for signs of IP theft.<sup>38</sup> The findings of the investigation included that Dr Kolodziejczyk had **(i)** made material misrepresentations in his CV,<sup>39</sup> **(ii)** deleted a folder named “Temp SD” (including its subfolder ‘To Save\ Fortescue IP’) from his work-issued computer on the day of his resignation,<sup>40</sup> and **(iii)** accessed the same files on a USB connected to his work-issued laptop on 5, 18 and 22 Oct 2021.<sup>41</sup> At the time, however, Deloitte did not identify “*information that may suggest the Employee had removed or attempted to remove commercially sensitive intellectual property from the FFI network*”.<sup>42</sup>
31. In preparing its report, Deloitte took a forensic image of Dr Kolodziejczyk’s work-issued laptop. For reasons to which these submissions will come, this forensic image was

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<sup>33</sup> AIB-20 p 130 (AB tab 64).

<sup>34</sup> Bhatt [82] (AB tab 44), see also AIB-20 p 132 (AB tab 64).

<sup>35</sup> Bhatt [84] (AB tab 44), Hantos [56] (AB tab 89).

<sup>36</sup> Bhatt [156]-[159] (AB tab 44).

<sup>37</sup> Huber [57] (AB tab 13).

<sup>38</sup> AH-22, item 1.3 (AB tab 35).

<sup>39</sup> Huber [61(a)] (AB tab 13), Confidential AH-21 items 2.1 and 2.3 - 2.7 (AB tab 34).

<sup>40</sup> AH-22, item 4.3 (AB tab 35).

<sup>41</sup> Huber [61(b)] (AB tab 13); AH-22, item 4.5 (AB tab 35).

<sup>42</sup> AH-22, item 4.6 (AB tab 35).



- re-examined in Apr 2024 by Mr McKemmish, whose detailed analysis reveals that Dr Kolodziejczyk used Toshiba and Kingston USB drives and accessed various files containing Fortescue’s confidential information in the days before his exit from Fortescue.
32. On 4 Nov 2021 (the day before Dr Kolodziejczyk’s last day), Dr Winther-Jensen also resigned from Fortescue. His last day was on 12 Nov 2021.<sup>43</sup> No investigations into possible IP theft by Dr Winther-Jensen were carried out at the time.
  33. Eight months later, on 31 Jul 2022, Mr Masterman left his role as CFO of FFI.<sup>44</sup> He maintained contact with Fortescue’s Metals Technology Department, who provided him with iron ore samples for “testing” in May 2023.<sup>45</sup> This relationship continued until Aug 2023, when the Technical Director of Fortescue’s Metals Technology Department raised concerns about the samples and “support” being supplied to Mr Masterman.<sup>46</sup> This in turn led to Fortescue’s Chief General Counsel, Mr Phil McKeiver, identifying potential intellectual property infringement in connection with Mr Masterman’s activities.<sup>47</sup> When Mr McKeiver raised these concerns with Mr Masterman on a telephone call, Mr Masterman assured him there was “nothing to worry about”.<sup>48</sup>
  34. But it became apparent in around Aug or Sep 2023 that Mr Masterman was collaborating with Dr Kolodziejczyk and Dr Winther-Jensen, and that they had caused Element Zero to be incorporated. On 11 Sep 2023, Mr Huber wrote to Dr Kolodziejczyk to inform him he had recently become aware that: **(i)** he (Dr Kolodziejczyk), Dr Winther-Jensen and Mr Masterman had incorporated Element Zero; **(ii)** Element Zero was “*potentially developing technology that is similar to technology you developed for Fortescue*”; and **(iii)** Element Zero had been “*seeking the supply of iron ore samples from Fortescue to help test [Element Zero’s] technology*”; and **(iv)** recent searches by Fortescue revealed two patents for “ore processing” filed by Element Zero.<sup>49</sup>
  35. On 17 Jan 2024, Dr Kolodziejczyk and Mr Masterman participated in an interview with the AFR, which launched the public profile of Element Zero.<sup>50</sup> The first sentence that Dr Kolodziejczyk is quoted as saying is:

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<sup>43</sup> Huber [62] (AB tab 13).

<sup>44</sup> Huber [47] (AB tab 13).

<sup>45</sup> Huber [67] (AB tab 13).

<sup>46</sup> Huber [67] (AB tab 13).

<sup>47</sup> Huber [68] (AB tab 13).

<sup>48</sup> Huber [68] (AB tab 13).

<sup>49</sup> Huber [65] and [69] (AB tab 13); AH-24 (AB tab 37).

<sup>50</sup> AH-25 (AB tab 38).

*“Everything we do was developed after Fortescue and doesn’t bring anything from Fortescue”.*

36. Dr Kolodziejczyk also told the AFR that the idea to pursue Element Zero’s electroreduction method had not previously occurred to him: *“You actually had to step out of Fortescue to brainstorm, ideate and develop a pathway”.*
37. With these statements, the AFR article set in train a line of enquiry at Fortescue, which involved reviewing the projects that Dr Kolodziejczyk and Dr Winther-Jensen had been working on, and investigating their Fortescue email inboxes,<sup>51</sup> group SharePoint folder,<sup>52</sup> and two laptops,<sup>53</sup> on suspicion of IP leakage.
38. Those suspicions proved correct when:
- (a) On 19 Jan 2024, Dr Bhatt identified that Dr Winther-Jensen had sent five emails before his departure from Fortescue from his work email address to his personal email address, containing the confidential information as set out in SOC 20 and below:<sup>54</sup>
    - (i) the **Leaching Report**, being the document identified in SOC 20(a);<sup>55</sup>
    - (ii) **Leaching Data**, being the documents identified in SOC 20(b)-(c);<sup>56</sup>
    - (iii) documents filed in support of Fortescue’s provisional application no. 2021901547, being the documents identified at SOC 20(d) and 19(b);<sup>57</sup> and
    - (iv) the **Technical Evaluation Email** and **Technical Evaluation Sheet**; being the documents identified at SOC 20(e)-(f);<sup>58</sup> and
    - (v) the **Green Iron Update**, being the document identified at SOC 20(g).<sup>59</sup>

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<sup>51</sup> The review of Dr Kolodziejczyk’s inbox: Hantos [50]-[65] (AB tab 89). The review of Dr Winther-Jensen’s inbox: Bhatt [119]-[150] (AB tab 44), Confidential AIB-30 to AIB-33, (AB tabs 74 to 77); AIB-34 (AB tab 78); and Olivier [19]-[24] (AB tab 93), Confidential JPO-4 (AB tab 97).

<sup>52</sup> Bhatt [156]-[159]; Hantos [66]-[68].

<sup>53</sup> One laptop being Dr Kolodziejczyk’s work-issued laptop: Huber [77] (AB tab 13), AH-27 (AB tab 41), the other being the Fortescue laptop used by members of the Green Iron team based at a laboratory at the University of Western Australia: Huber [76] (AB tab 13), AH-26 (AB tab 39).

<sup>54</sup> Bhatt [121] (AB tab 44).

<sup>55</sup> Bhatt [127]-[134] (AB tab 44), Confidential AIB-30 pp 191-210 (AB tab 74).

<sup>56</sup> Bhatt [135]-[141] (AB tab 44), Confidential AIB-32 pp 218-222 (AB tab 76).

<sup>57</sup> Bhatt [150]-[155] (AB tab 44), Confidential Annexure AIB-34 pp 229-253 (AB tab 78).

<sup>58</sup> Bhatt [142]-[149] (AB tab 44), Confidential Annexure AIB-33 pp 226-227 (AB tab 77).

<sup>59</sup> Olivier [19]-[25] (AB tab 93), Confidential Annexure JPO-04 pp 211-219 (AB tab 97).

- (b) On 24 Apr 2024, Mr McKemmish identified that Dr Kolodziejczyk had: (i) accessed the following documents on his work-issued laptop using a USB; and (ii) deleted a local file with corresponding folder paths and file names, before his final day at Fortescue, containing the confidential information as set out in SOC 19 and below:
- (i) “Green Iron Update (02.08.2021).pdf”, being the document identified at SOC 19(a);<sup>60</sup>
  - (ii) documents filed in support of Fortescue’s provisional application no. 2021901547, being the documents identified at SOC 20(d) and 19(b);
  - (iii) “FFI0302-10000-00-EG-BOD-0001\_A (002) (BK).docx” being a Basis of Design document for the “Chameleon Pilot Plant”, identified at SOC 19(c);<sup>61</sup>
  - (iv) “Bumblebee PID markups 26\_10\_21.pdf”, being the document identified at SOC 19(d).<sup>62</sup>
- (c) In around Apr 2024, Dr Bhatt identified that Dr Winther-Jensen had only produced and saved five R&D documents in the Fortescue Green Iron team’s SharePoint, notwithstanding that he was the “Technology Development Lead”, he was supervising a team of four scientists, and he should have produced and saved a significantly greater amount of R&D work to the SharePoint site.<sup>63</sup>
- (d) On 25 Apr 2024, one of Element Zero’s patent applications became public as a PCT Application.<sup>64</sup> The PCT Application is consistent with the previous information published about the EZ Process and the EZ Plant,<sup>65</sup> and the temperature window described in the PCT Application falls within the window of temperatures tested and analysed in the Leaching Report.<sup>66</sup>

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<sup>60</sup> Huber [77(f)] (AB tab 13), AH-27 attachment (AB tab 42) “Master Chronology” sheet, rows 66270-66304 and 124479-124494.

<sup>61</sup> Huber [77(d)] (AB tab 13), AH-27 attachment (AB tab 42) “Master Chronology” sheet, rows 66305-66333 (access time 22 Oct 2021). See also rows 56133-56137 (access time 18 Oct 2021) and 69505 (accessed 25 Oct 2021).

<sup>62</sup> Huber [77(e)] (AB tab 13), AH-27 attachment (AB tab 42) “Master Chronology” sheet, rows 70016-70035 and 70805-70816 (access date 26 Oct 2021), and 74560, 74564, 74569, 74577, 74586, 74590 (access date 1 Nov 2021).

<sup>63</sup> Bhatt [157]-[158] (AB tab 44).

<sup>64</sup> Bhatt [105] (AB tab 44).

<sup>65</sup> Bhatt [105]-[106],[134] (AB tab 44); Hantos [41]-[49] (AB tab 89).

<sup>66</sup> Bhatt [134] (AB tab 44).

- (e) Having reviewed Fortescue’s expenditure on its pilot plant, the documents taken by, and the documents available to, Dr Kolodziejczyk and Dr Winther-Jensen at Fortescue, on 1 May 2024, Mr McFaul reached a concluded view that the EZ Process and the EZ Plant could only have been achieved with the modest resources available to Element Zero *if* Dr Kolodziejczyk, Dr Winther-Jensen and Element Zero had used a substantial amount of the information from the documents referred to in paragraphs 38(a) and 38(b) above, together with other Fortescue confidential information.<sup>67</sup>

39. It is against the above factual background that Fortescue makes the following application for a search order.

## **B Principles**

40. The Court has the power to make a search order under s 23 of the *Federal Court of Australia Act 1976* (Cth)<sup>68</sup> and rule 7.42 of the *Federal Court Rules 2011* (Cth) (**FCR**).

41. FCR **7.42** provides:

*The Court may make an order (a **search order**), in any proceeding ... in the Court, with or without notice to the respondent, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence that is, or may be, relevant to an issue in the proceeding or anticipated proceeding.*

42. FCR **7.43** provides:

*The Court may make a search order if the Court is satisfied that:*

- (a) *an applicant seeking the order has a strong prima facie case on an accrued cause of action; and*
- (b) *the potential or actual loss or damage to the applicant will be serious if the search order is not made; and*
- (c) *there is sufficient evidence in relation to a respondent that:*
  - (i) *the respondent possesses important evidentiary material; and*

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<sup>67</sup> McFaul [120]-[121] (AB tab 82).

<sup>68</sup> *Chandrasekaran v Commonwealth* [2019] FCA 1169 at [26] (Wigney J); *Central Equity v Chua* [1999] FCA 1067 at [3] (Weinberg J); *Microsoft v Goodview Electronics* [1999] FCA 754; 46 IPR 159 at [10] (Branson J); *Television Broadcasts v Nguyen* (1988) 21 FCR 34 at 34, 38 (Lee J).

- (ii) *there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the Court.*

43. The use of search orders is not limited to “counterfeiting” scenarios; they have also been used where former employees or competitors are alleged to have misused the applicant’s confidential information.<sup>69</sup>

## **C Strong prima facie case on accrued causes of action: FCR 7.43(a)**

### **C.1 Causes of action**

44. Fortescue pleads six causes of action against the various respondents: **(1)** breach of confidence (SOC 31-36); **(2)** breach of fiduciary duties (SOC 37-45); **(3)** contravention of *Corporations Act*, s 183 (SOC 46-50); **(4)** breach of contract (SOC 51-64); **(5)** copyright infringement (SOC 65-74); and **(6)** misleading conduct (SOC 75-81).

45. For this application, Fortescue relies on two causes of action: **(1)** breach of equitable obligations of confidence; and **(2)** contravention of *Corporations Act*, s 183 (to satisfy Federal jurisdiction).

### **C.2 Breach of equitable obligations of confidence: principles**

46. The Full Court (Finn, Sundberg and Jacobson JJ) identified the elements for a breach of equitable obligations of confidence in *Optus Networks v Telstra Corporation Ltd* [2010] FCAFC 21; 265 ALR 281 at [39]:

- (a) the information in question must be identified with specificity;
- (b) it must have the necessary quality of confidence;
- (c) it must have been received by the defendant in circumstances importing an obligation of confidence; and
- (d) there must be an actual or threatened misuse of the information without the plaintiff’s consent.

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<sup>69</sup> For example, *Anton Piller v Manufacturing Processes* [1976] Ch 55 at 58G-59F; *Metso Minerals v Kalra* [2007] FCA 2093 at [4]-[11], [21], [31]-[35] (Flick J); *Rauland Australia v Johnson (No 2)* [2019] FCA 1175 at [8]-[16] (Stewart J); *Clover Corporation v Tobias (No 2)* [2020] FCA 1710 at [3]-[5] (O’Callaghan J); *Eltrak International and Staff v Collins* [2021] FCA 484 at [1]-[4] (Rangiah J); *Skytraders v Meyer* [2021] NSWSC 1670 at [2]-[4] (Rein J); *Showcase Realty v Circosta* [2022] NSWSC 336 at [4]-[6] (Ward CJ in Eq); *Sundarjee Bros (Aust) v Sundarjee* [2022] NSWSC 1722 at [1]-[4] (Ball J).

47. The second element (quality of confidence) is a question of fact having regard to various factors, including those in *Wright v Gasweld* (1991) 22 NSWLR 317 at 334 (Kirby P); ***Del Casale v Artedomus (Aust)*** [2007] NSWCA 172; (2007) 165 IR 148 at [40] (Hodgson JA, McColl JA agreeing). The factors commonly arising in an employment context include (e.g., ***Gold Titan v Lopez*** [2021] FCA 918 at [86](1)-(6) (Abraham J)):
- (a) the extent to which the information is known outside the business;
  - (b) the skill and effort expended to collect the information;
  - (c) the extent to which the information is treated as confidential by, for example, the employer;
  - (d) the value of the information to the applicant and its competitors;
  - (e) the ease or difficulty with which the information can be duplicated by others;
  - (f) whether it was made known, for example, to the employee that the information was confidential.
48. The third element (circumstances importing confidentiality obligation) is tested by asking whether a reasonable person in the defendant's position "would have realised that upon reasonable grounds the information was being given to him in confidence": *Coco v AN Clark* [1969] RPC 41 at 47-48; *Del Casale* at [104]; *Gold Titan* at [87].

### C.3 Breach of equitable obligations of confidence: application

49. Fortescue submits that it has a strong prima facie case against each of Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen for breach of an equitable duty of confidence, for the following reasons.
50. **First**, Fortescue has specifically identified two bodies of information:
51. The first body of information is "**Ionic Liquid R&D Information**"/"Fortescue Process CI": SOC 25.
- (a) This is information created by Dr Kolodziejczyk, Dr Winther-Jensen and other FMGPS employees in undertaking research and development work into electrochemical reduction of iron oxide to create iron, having defined features including the use of ionic liquid electrolytes (**Ionic Liquid R&D**): SOC 12, 13.
  - (b) Although Fortescue now cannot locate documents recording the Ionic Liquid R&D Information,<sup>70</sup> these documents *must have existed* because Dr Kolodziejczyk

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<sup>70</sup> See SOC [14]; Hantos [50]-[68] (AB tab 89); Bhatt [84], [87] (AB tab 44).

referred to the Ionic Liquid R&D in multiple internal and external communications, in the period at least from Sep 2020 to Jan 2021.<sup>71</sup> Dr Kolodziejczyk described the Ionic Liquid R&D in (among other things): a patent assessment form (AIB-13 (AB tab 57)); an email to FFI's then-CEO (AIB-14 (AB tab 58)); a draft board paper (SMH-3 pp 77, 82 (AB tab 82)); and to Dr Winther-Jensen (AIB-19 (AB tab 63)). In Feb 2021, Dr Winther-Jensen proposed that the Ionic Liquid R&D work be undertaken as “[p]arallel research with longer lead-time”.<sup>72</sup>

52. The second body of information is “**Fortescue Plant CI**”: SOC 26. This refers to information in specific documents Fortescue alleges Dr Kolodziejczyk and Dr Winther-Jensen took in their final days at Fortescue: SOC 19 and 20 (referred to in paragraphs 38(a) and 38(b) above).
53. **Secondly**, the information in the two bodies has the necessary quality of confidence, having regard to the following matters:
- (a) **Nature of the information.** The Ionic Liquid R&D Information and Fortescue Plant CI are information resulting from Fortescue's R&D efforts into Green Iron technology and attempts to commercialise that technology. This information by its nature is confidential.
  - (b) **Not known outside Fortescue.** The Ionic Liquid R&D Information is not known outside Fortescue. This was admitted by Dr Kolodziejczyk in the patent assessment form (AIB-13 p 99 (AB tab 57): “No, [the] invention has not been publicly disclosed. All information related to this invention is kept internally within [FFI]”) and in an email to a public relations colleague (AIB-17 p 112 (AB tab 61)): “The selection of electrolyte, electrode material, and other materials used in the process is proprietary, and at this point, Fortescue's trade secret”.
  - (c) The Fortescue Plant CI is also not known outside Fortescue. The documents in SOC 19 were accessed on Dr Kolodziejczyk's Fortescue laptop,<sup>73</sup> which (as with other Fortescue IT systems) was protected by a password.<sup>74</sup> The documents in SOC 20 were internal emails or their attachments, in which all parties have

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<sup>71</sup> Bhatt [60]-[81], [85]-[86] (AB tab 44); Hantos [55] (AB tab 89).

<sup>72</sup> AIB-20 pp 130, 132-133 at [1](c)-(d) (AB tab 64).

<sup>73</sup> Huber [77](a)-(g) (AB tab 13); AH-27 p 328 (AB tab 41); AH-27 attachment (AB tab 42), “TempSD” sheet, items 29118 and 29120; AH-27 attachment (AB tab 42), “Master Chronology” sheet, rows 70016-70035, 70805-70816, 74560, 74564, 74569, 74577, 74586, 74590.

<sup>74</sup> Huber [52](a), (b) and (e) (AB tab 13).

addresses in Fortescue's domain [@fmgl.com.au](mailto:@fmgl.com.au).<sup>75</sup> The Green Iron Update document (SOC 20(g)) is specifically marked "Strictly private and confidential" on every page.<sup>76</sup>

- (d) **Access controls.** Employees generally stored electronic documents in their Fortescue department SharePoint site, on on-site servers and file-shares, or on their company-issued computer.<sup>77</sup> These were protected by passwords.<sup>78</sup>
- (e) **Value of the information.** The value of the Ionic Liquid R&D Information is not precisely known. Mr McFaul estimates that Fortescue's research and development and concept testing phases took place in Feb to Sep 2021<sup>79</sup> and during that period, Fortescue cumulatively spent just under ██████████ on its project. Green Iron could sell for as high as \$900 per tonne,<sup>80</sup> which means hundreds of millions in revenue per year for Fortescue.<sup>81</sup>
- (f) As for Fortescue Plant CI, Mr McFaul estimates that the documents "*would have saved months of testing work*" on leaching tests<sup>82</sup> and generated "*significant savings in development time and costs*" in Element Zero's project of building a pilot plant.<sup>83</sup>
- (g) **Confidentiality obligations on employees.** Each of Dr Kolodziejczyk and Dr Winther-Jensen executed employment agreements with terms that contained contractual confidentiality obligations.<sup>84</sup> Moreover, each of Dr Kolodziejczyk and Dr Winther-Jensen agreed not to access and use Fortescue's IT systems "*without authorisation or in excess of authorisation*" or "*for private commercial intentions, personal monetary acquisition or for conducting personal business*".<sup>85</sup>

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<sup>75</sup> Bhatt [127]-[155] (AB tab 44); AIB-30 p 190 (AB tab 74); AIB-32 p 215 (AB tab 76); AIB-33 p 224 (AB tab 77); AIB-34 p 229 (AB tab 78) (external sender is Fortescue's patent attorney); Olivier [19]-[25] (AB tab 93); JPO-04 p 209 (AB tab 97).

<sup>76</sup> JPO-04 pp 211-218 (AB tab 97).

<sup>77</sup> Huber [52](a), (b) (AB tab 13).

<sup>78</sup> Huber [52](e) (AB tab 13).

<sup>79</sup> WM-4 p 43, "1 Program Setup and Testing" and "2 Electrolyser Concept Testing" (AB tab 86).

<sup>80</sup> Olivier [15] (AB tab 93).

<sup>81</sup> Fortescue produce 190 million tonnes of iron ore in FY23: Olivier [15] (AB tab 93).

<sup>82</sup> McFaul [113] (AB tab 82).

<sup>83</sup> McFaul [116] (AB tab 82).

<sup>84</sup> (Dr Kolodziejczyk) AH-7 p 69, "Confidentiality" (AB tab 20); (Dr Winther-Jensen) AH-13 p 101, "Confidentiality" (AB tab 26).

<sup>85</sup> (Dr Kolodziejczyk) AH-7 p 70, "Use of Information Technology" (AB tab 20); (Dr Winther-Jensen) AH-13 p 102, "Use of Information Technology" (AB tab 26).



54. **Third**, the Ionic Liquid R&D Information and the Fortescue Plant CI were obtained by each of Dr Kolodziejczyk and Dr Winther-Jensen in circumstances where a reasonable person in his position would have realised the information was obtained in confidence. Fortescue relies on the matters in each of paragraphs 53(a) to 53(g) above. It matters not that Dr Kolodziejczyk and Dr Winther-Jensen created some of the Ionic Liquid R&D Information; each of them was not free to deal with the information as his own.<sup>86</sup>
55. Element Zero is subject to the same confidentiality obligation because its controlling minds, Dr Kolodziejczyk and Dr Winther-Jensen, were subject to that obligation.
56. **Fourthly**, there is strong evidence of misuse:
- (a) **Dr Kolodziejczyk** accessed the documents in SOC 19 on his Fortescue laptop while connected to a USB device.<sup>87</sup> This occurred on or after 22 Oct 2021,<sup>88</sup> the day he resigned.<sup>89</sup> Both devices had a folder named “TempSD” with a similar folder structure, which suggests the files in the laptop folder were copied to the USB device’s folder.<sup>90</sup> One subfolder in “TempSD” on both devices is in the path “To save” > “Fortescue IP”,<sup>91</sup> from which it may be inferred that Dr Kolodziejczyk intended to copy Fortescue’s intellectual property. The “TempSD” laptop folder was deleted on 22 Oct 2021,<sup>92</sup> the day he resigned.<sup>93</sup>
- (b) **Dr Winther-Jensen** sent the documents in SOC 20 to his personal email address “bjornwj@gmail.com” from 5 to 11 Nov 2021,<sup>94</sup> in the days after his resignation on 4 Nov 2021.<sup>95</sup> There was no text in each forwarding email.<sup>96</sup> Fortescue’s Dr Bhatt

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<sup>86</sup> *IPC Global v Pavetest (No 3)* [2017] FCA 82; 122 IPR 445 at [210] (Moshinsky J).

<sup>87</sup> Huber [77](a)-(g) (AB tab 13); AH-27 p 328 (AB tab 41); AH-27 attachment (AB tab 42), “TempSD” sheet, items 29118 and 29120; AH-27 attachment (AB tab 42), “Master Chronology” sheet, rows 70016-70035, 70805-70816, 74560, 74564, 74569, 74577, 74586, 74590.

<sup>88</sup> *Ibid.*

<sup>89</sup> Huber [57] (AB tab 13); AH-20 (AB tab 33).

<sup>90</sup> Huber [77](c) (AB tab 13); AH-27 pp 332-334 [40]-[45], finding 8 (AB tab 41).

<sup>91</sup> AH-27 pp 332-333 [40], [43], [44] (AB tab 41).

<sup>92</sup> AH-27 p 332 [40] (AB tab 41).

<sup>93</sup> Huber [57] (AH tab 13); AH-20 (AB tab 33).

<sup>94</sup> Bhatt [127]-[155] (AB tab 44); AIB-30 p 190 (AB tab 74); AIB-32 p 215 (AB tab 76); AIB-33 pp 224 (AB tab 77); AIB-34 p 229 (AB tab 78); Olivier [19]-[25] (AB tab 93); JPO-04 p 209 (AB tab 97).

<sup>95</sup> Huber [62] (AB tab 13); AH-23 (AB tab 36).

<sup>96</sup> AIB-30 p 190 (AB tab 74); AIB-32 p 215 (AB tab 76); AIB-33 pp 224 (AB tab 77); AIB-34 p 229 (AB tab 78); JPO-04 p 209 (AB tab 97).

is unaware of any legitimate reason why Dr Winther-Jensen would send those emails to himself.<sup>97</sup>

- (c) Fortescue cannot locate documents recording the **Ionic Liquid R&D Information** after Dr Kolodziejczyk's and Dr Winther-Jensen's departure.<sup>98</sup> There is a lack of records of Dr Winther-Jensen's work product while at Fortescue.<sup>99</sup> It may be inferred from these matters that Dr Kolodziejczyk and Dr Winther-Jensen took the documents.
- (d) Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman incorporated Element Zero in Dec 2022.<sup>100</sup> In Jan 2024, Element Zero publicly announced its electrochemical reduction process that uses an ionic liquid electrolyte.<sup>101</sup>
- (e) There are strong similarities between the features of Ionic Liquid R&D (described by Dr Kolodziejczyk while he was at Fortescue) and of Element Zero's process (described publicly) — see summary table in Bhatt [110] (AB tab 44) (reproduced below).

	<b>Feature</b>	<b>Reference to Dr Kolodziejczyk's work at Fortescue</b>	<b>Reference to Element Zero Process</b>
(a)	electrochemical reduction process	paras [56]-[65], [67], [69]-[72], [74]-[77], [82] above	paras [92], [97], [105]-[106] above
(b)	utilises electrowinning	paras [65]-[66] above	paras [92], [94], [105]-[106] above
(c)	membrane free	paras [65]-[66] above	para [92] above
(d)	operates at low temperature	paras [60]-[67], [69]-[72], [74]-[76] above	paras [92], [97], [105]-[106] above
(e)	utilises an ionic liquid electrolyte	paras [63]-[65], [67], [69]-[72], [74]-[77], [81]-[82] above	paras [94], [100]-[104], [105]-[106] above
(f)	capable of operating using renewable electricity sources.	paras [57], [65], [77] above	paras [92], [94], [97] above

- (f) Dr Kolodziejczyk's public statements in the AFR article that *"Everything we do was developed after Fortescue and doesn't bring anything from Fortescue"*, and the

<sup>97</sup> Bhatt [123] (AB tab 44).

<sup>98</sup> Hantos [50]-[68] (AB tab 89); Bhatt [84], [87] (AB tab 44).

<sup>99</sup> Bhatt [156]-[159] (AB tab 44).

<sup>100</sup> AH-3 p 35 (AB tab 16).

<sup>101</sup> Bhatt [92], [94], [97]-[98] (AB tab 44).

ideas in Element Zero's process did not dawn on him until later,<sup>102</sup> conflict with the documents he wrote about Ionic Liquid R&D while he was at Fortescue (paragraph 51(b) above).

- (g) That Element Zero developed and operated a pilot plant within two years after Dr Kolodziejczyk's and Dr Winther-Jensen's departure,<sup>103</sup> despite having a substantial resource deficit of approximately [REDACTED] in the first 20 months.<sup>104</sup> This deficit was estimated by Mr McFaul as follows:
- (i) Fortescue's and Element Zero's respective pilot plants are quite similar.<sup>105</sup> The plants took about the same time to develop, about two years.<sup>106</sup>
  - (ii) This two-year timeline is only achievable if the respondents had access to the same level of resources and cashflow as Fortescue did in developing its pilot plant. In the first 20 months of its project, Fortescue spent [REDACTED]<sup>107</sup>
  - (iii) In the first 20 months, the respondents had access to **\$3.8 million** provided by Symmall Pty Ltd,<sup>108</sup> Mr Masterman's company.<sup>109</sup> Element Zero did not obtain \$11.4 million venture capital funding until the 21st month (Aug 2023).<sup>110</sup>
  - (iv) In the circumstances, there is a resource deficit of approximately [REDACTED] in the first 20 months.<sup>111</sup>
- (h) Element Zero's [REDACTED] resource deficit can be explained if Dr Kolodziejczyk and Dr Winther-Jensen started Element Zero's project already armed with a substantial amount of information about how the project should progress, including

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<sup>102</sup> AIB-23 pp 146, 149 (AB tab 67).

<sup>103</sup> McFaul [94] (AB tab 82).

<sup>104</sup> McFaul [101] (AB tab 82).

<sup>105</sup> McFaul [78], [86], [88] (AB tab 82).

<sup>106</sup> McFaul [62](a)-(b), [93] (AB tab 82).

<sup>107</sup> McFaul [100] (AB tab 82).

<sup>108</sup> Huber [79](a) (AB tab 13); AH-3 pp 35-36 (AB tab 16). Symmall's 320 NCRP shares are worth \$3.8 million ((320/1268) × \$15,205,778 = \$3,837,420.32).

<sup>109</sup> Huber [80] (AB tab 13); AH-28 (AB tab 43).

<sup>110</sup> Huber [79](b), [82] (AB tab 13).

<sup>111</sup> McFaul [101] (AB tab 82).

research and development, the documents in SOC 19 and 20, basis of design documents and Fortescue's procedures and specifications.<sup>112</sup>

- (i) Element Zero's PCT Application is consistent with previous information published about the EZ Process and the EZ Plant,<sup>113</sup> and is also consistent with the use of the Leaching Report (SOC 20(a)) in inventing the invention described.<sup>114</sup> The titles of Element Zero's unpublished patent applications<sup>115</sup> also suggest they related to the EZ Process and the EZ Plant ("metal recovery";<sup>116</sup> "electrowinning"<sup>117</sup> from molten salt").<sup>118</sup>

57. For these reasons, Fortescue respectfully submits that the Court ought to find that it has established a strong prima facie case against Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen for breach of equitable obligations of confidence.

#### **C.4 Corporations Act, s 183: principles**

58. Section 183 of the **Corporations Act 2001** (Cth) provides:

***Use of information—directors, other officers and employees***

- (1) *A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:*
- (a) *gain an advantage for themselves or someone else; or*
- (b) *cause detriment to the corporation.*
- (2) *A person who is involved in a contravention of subsection (1) contravenes this subsection.*

59. There are six elements to establish a contravention of s 183(1). The defendant:

- (a) was, at the relevant time, an employee of the plaintiff;

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<sup>112</sup> McFaull [118]-[122] (AB tab 82).

<sup>113</sup> Bhatt [106] (AB tab 44).

<sup>114</sup> Bhatt [133] (AB tab 44).

<sup>115</sup> Hantos [32] (AB tab 89).

<sup>116</sup> Dr Bhatt describes metallic iron as being "recovered" in electroplating by scraping or peeling it off the cathode in a batch process: Bhatt [35] (AB tab 44).

<sup>117</sup> 'Electrowinning' is the same as 'electroplating': Bhatt [35] (AB tab 44). 'Electroplating' is feature (b) of the EZ Process as summarised by Dr Bhatt: Bhatt [110] (AB tab 44).

<sup>118</sup> The meanings of 'molten salt' and 'ionic liquid' significantly overlap: Bhatt [37]-[43] (AB tab 44). 'Ionic liquid' is feature (e) of the EZ Process as summarised by Dr Bhatt: Bhatt [110] (AB tab 44).

- (b) acquired the relevant information;
- (c) acquired that information by virtue of his or her position as an employee of the plaintiff;
- (d) made improper use of that information;
- (e) made that improper use to gain directly or indirectly an advantage;
- (f) gained that advantage either for himself, herself, or for some other person(s); and
- (g) (alternatively to (f)) made that improper use to cause detriment to the plaintiff:

*Smart EV Solutions v Guy* [2023] FCA 1580 at [69] (Derrington J) and the authorities cited there.

60. As stated above, this cause of action founds the Court's federal jurisdiction.

61. Section 79 of the *Corporations Act* defines 'involved':

***Involvement in contraventions***

*A person is involved in a contravention if, and only if, the person:*

- (a) *has aided, abetted, counselled or procured the contravention; or*
- (b) *has induced, whether by threats or promises or otherwise, the contravention; or*
- (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or*
- (d) *has conspired with others to effect the contravention.*

62. Involvement requires intentional participation and knowledge of each of the essential elements of the contravention: *Native Extracts v Plant Extracts (No 2)* [2024] FCA 106 at [121], [124] (Downes J).

**C.5 Corporations Act, s 183: application**

63. Fortescue has established a strong prima facie case against each of Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen for contravention of s 183, for the following reasons.

64. As to the six elements in paragraph 59 above, each of Dr Kolodziejczyk and Dr Winther-Jensen:

- (a) was, at the relevant time, an employee of FMGPS<sup>119</sup> and respectively working in FFI as “Chief Scientist” and “Technology Development Lead”;<sup>120</sup>
  - (b) acquired the relevant information — Fortescue relies on paragraphs 51(a), 56(a), 56(b) above;
  - (c) acquired that information by virtue of his position as an employee of FMGPS — Fortescue relies on their roles in FFI,<sup>121</sup> the matters in paragraphs 51(a), 56(a), 56(b) above, and inferences from the emails Dr Winther-Jensen forwarded;<sup>122</sup>
  - (d) made improper use of that information — Fortescue relies on the matters in paragraphs 56(a) to 56(i) above;
  - (e) made that improper use to gain directly or indirectly an advantage — Fortescue relies on the matters in paragraphs 56(a) to 56(i) above, particularly the advantages in overcoming Element Zero’s resource deficit and in allowing it to develop the EZ Process and/or the EZ Plant to a point where it was able to attract venture capital funding (paragraphs 56(g), 56(h) above);
  - (f) gained that advantage either for himself or for some other person/s — Fortescue relies on the matters in the previous subparagraph. The advantages were for Element Zero and themselves as shareholders of that company.<sup>123</sup>
65. As to Element Zero’s involvement (SOC 50), Fortescue relies on Element Zero’s role as the corporate vehicle through which Dr Kolodziejczyk and Dr Winther-Jensen was commercialising the EZ Process and the EZ Plant, and that their knowledge of the essential elements of their contravention can be imputed to Element Zero.
66. For these reasons, the Court ought to find that Fortescue has established a strong prima facie case against Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen for contravention of s 183.

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<sup>119</sup> (Dr Kolodziejczyk) Huber [31], [35] (AB tab 13); AH-6 p 59 (AB tab 19); (Dr Winther-Jensen) Huber [39], [43] (AB tab 13); AH-12 p 91 (AB tab 25).

<sup>120</sup> (Dr Kolodziejczyk) Huber [31] (AB tab 13); (Dr Winther-Jensen) Huber [39] (AB tab 13).

<sup>121</sup> (Dr Kolodziejczyk) Huber [31] (AB tab 13); (Dr Winther-Jensen) Huber [39] (AB tab 13).

<sup>122</sup> AIB-30 p 190 (AB tab 74); AIB-32 p 215 (AB tab 76); AIB-33 pp 224 (AB tab 77); AIB-34 p 229 (AB tab 78); JPO-04 p 209 (AB tab 97).

<sup>123</sup> AH-3 p 36 (AB tab 16).

**D Respondents possess important evidentiary material: FCR 7.43(c)(i)**

67. Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen possess important evidentiary information, for the following reasons:
- (a) Fortescue cannot now locate the Ionic Liquid R&D Information, which it may be inferred is in the possession of Element Zero, Dr Kolodziejczyk and/or Dr Winther-Jensen — paragraph 51(b) above;
  - (b) Dr Kolodziejczyk is likely to possess the two USB devices he connected to his Fortescue laptop,<sup>124</sup> at least one of which he used to copy Fortescue material — paragraph 56(a) above;
  - (c) Dr Winther-Jensen is likely to have control over his personal email address to which he sent Fortescue material — paragraph 56(b) above; and
  - (d) each of Element Zero, Dr Kolodziejczyk and Dr Winther-Jensen is likely to have documents evidencing their subsequent uses of Ionic Liquid R&D Information and Fortescue Plant CI in developing the EZ Process and the EZ Plant and in inventing the inventions described or claimed in the Patent Applications — paragraph 56(a) to 56(i) above.

**E Real risk of destruction: FCR 7.43(c)(ii)**

68. The risk of destruction is typically inferred “*where it is clearly established ... that the defendant has engaged in nefarious activity which renders it likely that he is an untrustworthy person*”.<sup>125</sup> The risk must be “real” because the Court does not presume that most people would destroy incriminating evidence.<sup>126</sup>
69. Fortescue relies on the following matters in support of the real risk of destruction:
- (a) Dr Kolodziejczyk deleted the “TempSD” folder on his Fortescue laptop, and it can be inferred that he did so to hide the fact that he had copied Fortescue material in his final days at Fortescue — paragraph 56(a) above;
  - (b) Dr Winther-Jensen sent the SOC 20 documents to his personal email address. There was no text in each forwarding email,<sup>127</sup> which text would have made them

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<sup>124</sup> See also AH-27 p 316 [25] (AB tab 41).

<sup>125</sup> *Indicii Salus v Chandrasekaran* [2007] EWHC 406 (Ch) at [15] (Warren J), quoting *Dunlop Holdings v Staravia* [1982] Comm LR 3 at 3 (Oliver LJ).

<sup>126</sup> *Addison Wesley Longman Australia v Kopystop* [2004] FCA 1518 at [12] (Stone J).

<sup>127</sup> AIB-30 p 190 (AB tab 74); AIB-32 p 215 (AB tab 76); AIB-33 pp 224 (AB tab 77); AIB-34 p 229 (AB tab 78); JPO-04 p 209 (AB tab 97).

- easier to find. They were only discovered by Dr Bhatt's review of Dr Winther-Jensen's Fortescue email inbox (a thousand emails)<sup>128</sup> — paragraph 56(b) above;
- (c) Fortescue cannot locate the documents recording Ionic R&D Information which should exist, from which it may be inferred Dr Kolodziejczyk and Dr Winther-Jensen took them or caused them to be unavailable — paragraphs 51(b), 56(c) above;
  - (d) Dr Kolodziejczyk and Dr Winther-Jensen took Fortescue material electronically (via USB and email) — paragraphs 56(a), 56(b), 67(b) above.
  - (e) Dr Kolodziejczyk's public statements in the AFR article ("*Everything we do was developed after Fortescue and doesn't bring anything from Fortescue*", and the ideas in Element Zero's process did not dawn on him until later)<sup>129</sup> conflict with the documents he wrote about Ionic Liquid R&D while he was at Fortescue — paragraphs 51(b), 56(f) above;
  - (f) An investigation by Fortescue into Dr Kolodziejczyk after his employment found that Dr Kolodziejczyk had materially misrepresented his qualifications and experience when applying for his position at Fortescue — paragraph 30 above.

**F Serious prejudice, loss or damage if search order not made: FCR 7.43(b)**

70. Fortescue will suffer serious prejudice, loss or damage if the search order sought is not made. The prejudice includes:
- (a) inability to find out the true extent of Dr Kolodziejczyk's and Dr Winther-Jensen's exfiltration and misuses of Fortescue material;
  - (b) if evidence is destroyed, Fortescue may be unable to prove its confidential information was used in, and prove its title to or interest in, the EZ Process and/or the EZ Plant, such that Fortescue would be deprived of the benefit of the confidential information, patent rights, or licence to patent rights,<sup>130</sup> and
  - (c) consequently, Fortescue will suffer significant commercial prejudice in the form of loss of opportunity to license or sell the technology to third parties, or (if Element Zero's process is licensed to a competitor) loss of competitive advantage.<sup>131</sup>

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<sup>128</sup> Bhatt [120]-[121] (AB tab 44).

<sup>129</sup> AIB-23 pp 146, 149 (AB tab 67).

<sup>130</sup> Olivier [26](a)-(c) (AB tab 93).

<sup>131</sup> Olivier [27] (AB tab 93).



## G Discretionary matters

71. Even though Dr Kolodziejczyk and Dr Winther-Jensen left Fortescue some time ago, the relevant facts about misappropriation of confidential information were only unearthed recently, in the period Jan to Apr 2024.
72. The preliminary investigations into Dr Kolodziejczyk undertaken by Fortescue in Nov 2021 were inconclusive and revealed little copying of IP.<sup>132</sup> There was no investigation into Dr Winther-Jensen.
73. Further information emerged in Jul-Aug 2023 in a piecemeal fashion:
- (a) In Jul-Aug 2023, Dr Kolodziejczyk refused Fortescue's requests for a confirmatory assignment of the inventions for which he was co-inventor;<sup>133</sup>
  - (b) In Jul 2023, Fortescue identified Element Zero's patent applications;<sup>134</sup>
  - (c) In mid-Aug 2023, Fortescue personnel expressed concerns about continuing to provide iron ore samples to Mr Masterman and "his team";<sup>135</sup>
  - (d) In Aug 2023, Fortescue's general counsel spoke to Mr Masterman (FFI's former CFO and Element Zero's CEO) about Fortescue's concerns of intellectual property infringement and Element Zero's activities. Mr Masterman said there was nothing to worry about.<sup>136</sup>
74. But it was only in Jan to Apr 2024, after the AFR article about Element Zero was published, that the true picture of the misappropriation emerged. It was in that period that Fortescue undertook further investigations into Dr Kolodziejczyk and Dr Winther-Jensen,<sup>137</sup> that included:
- (a) Dr Bhatt's review of a thousand emails in Dr Winther-Jensen's Fortescue inbox — which uncovered the five emails in SOC 20 by which Dr Winther-Jensen sent Fortescue's confidential information to his personal email;<sup>138</sup>
  - (b) Dr Bhatt's review of the Green Iron team's SharePoint folder — which led to Dr Bhatt identifying that: **(i)** Dr Winther-Jensen had only produced and saved five

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<sup>132</sup> AH-21 p 158 (AB tab 34); AH-22 p 169 [4.5]-[4.6] (AB tab 35).

<sup>133</sup> Huber [65] (AB tab 13); AH-24 pp 183-189 (AB tab 37).

<sup>134</sup> Huber [66] (AB tab 13).

<sup>135</sup> Huber [67] (AB tab 13).

<sup>136</sup> Huber [68] (AB tab 13).

<sup>137</sup> Huber [72]-[77] (AB tab 13).

<sup>138</sup> Bhatt [120]-[121] (AB tab 44).

documents in the Fortescue SharePoint folder, giving rise to the concern that much of his R&D work output had not been saved to Fortescue's systems;<sup>139</sup> and (ii) other documents in SharePoint — to which Dr Winther-Jensen and Dr Kolodziejczyk had access — would be valuable in progressing a competing R&D project for the electrochemical reduction of iron ore);<sup>140</sup>

- (c) Ms Hantos' review of more than three thousand emails in Dr Kolodziejczyk's Fortescue inbox — which revealed that the body of Ionic Liquid R&D Information, which must have been created by Dr Kolodziejczyk and Dr Winther-Jensen, cannot now be located;<sup>141</sup> and
- (d) Mr McKemmish's more detailed forensic IT analysis of an image of Dr Kolodziejczyk's Fortescue laptop — which revealed that Dr Kolodziejczyk likely copied documents from his work issued laptop onto a USB device, including the documents in SOC 19.<sup>142</sup>

75. In the circumstances, Fortescue submits that there has been no culpable delay in bringing this proceeding.

#### **H Search order sought; requirements in GPN-SRCH**

76. The search order sought is in Annex I to Fortescue's interlocutory application (AB tab 1). A version marked up against the exemplar order in GPN-SRCH, is in AB tab 2. The following submissions address the changes made.

77. **Service time.** Paragraph 4 specifies the search order may be served only between 9am and 2pm (AWST) on a business day. The reason for nominating the AWST time zone is that three of the premises are in Western Australia: paragraphs 80(a), 80(c) below.

78. **Computer-related amendments.** Paragraphs 9(d), 9(e), 9(g), 20(b), 20(c), 20(d) and 20(e) have been amended to cover a wider range of computer, personal electronic devices and information storage systems and access means used in the present day, compared to when the exemplar order was introduced in 2006-2007.<sup>143</sup>

79. **Exceptions to prohibition against communication.** Paragraph 19 has been amended to introduce two expedient exceptions to the prohibition against communicating to

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<sup>139</sup> Bhatt [156]-[159] (AB tab 44).

<sup>140</sup> Bhatt [113]-[118] (AB tab 44).

<sup>141</sup> Hantos [50]-[65] (AB tab 89).

<sup>142</sup> AH-27 (AB tab 41).

<sup>143</sup> Biscoe, *Freezing and Search Orders* (3rd ed, LexisNexis Australia, 2023), Ch 6, p 340 [6.42].

Fortescue about the contents of, or anything observed at, the Premises. The first exception is to obtain instructions if it is not safe or practicable to proceed or continue with the execution of the search order. The second exception is to obtain instructions for the hearing on the Return Date. There is a consequential amendment to paragraph 7 of the Applicant's lawyer's undertakings (Sch B, Part B.2).

80. **Premises.** It is intended that execution happen simultaneously across all four premises:
- (a) Element Zero's two business premises: **Unit 2, 30 Oxleigh Drive**<sup>144</sup> and **Unit 1, 19 Oxleigh Drive**, Malaga WA 6090.<sup>145</sup> Dr Kolodziejczyk was observed at both premises in the period 22-26 April 2024, before returning to Melbourne (next).<sup>146</sup>
  - (b) Dr Kolodziejczyk's residence: **5A Volga Street**, Hadfield VIC 3046.<sup>147</sup> A title search showed the property is owned by Dr Kolodziejczyk and a person believed to be his wife.<sup>148</sup> Dr Kolodziejczyk was observed at his residence on 27-28 April 2024.<sup>149</sup> He and his wife appear to have a small child.<sup>150</sup> The search party for this residence includes a female lawyer.
  - (c) Dr Winther-Jensen's residence: **Unit 4, 213 Gildercliffe Street**, Scarborough, WA 6019.<sup>151</sup> This premises was also Element Zero's *former* principal place of business.<sup>152</sup> A title search showed the property is owned by Dr Winther-Jensen and a person believed to be his wife.<sup>153</sup> Dr Winther-Jensen was observed at his residence in the period 23-28 April 2024.<sup>154</sup> He and his wife appear to have a teenage daughter.<sup>155</sup> The search party for this residence includes a female lawyer.

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<sup>144</sup> AH-3 p 35, "Principal Place of Business" (AB tab 16).

<sup>145</sup> PAD-2 pp 154, 155, 159, 160, 164, 187, 191, 194, 201, 203, 219, 220, 227 (AB tab 9).

<sup>146</sup> PAD-2 pp 127, 128, 132-133, 157-160, 191, 194, 219, 220, 227, 228 (AB tab 9).

<sup>147</sup> AH-3 p 35, "Organisation Officers" (AB tab 16).

<sup>148</sup> PAD-2 p 51 (AB tab 9).

<sup>149</sup> PAD-2 pp 255-256, 257-260 (AB tab 9).

<sup>150</sup> PAD-2 pp 258-259 (AB tab 9).

<sup>151</sup> AH-3 p 35, "Organisation Officers" (AB tab 16).

<sup>152</sup> AH-3 p 35, "Former Principal Place of Business" (AB tab 16).

<sup>153</sup> PAD-2 p 78 (AB tab 9).

<sup>154</sup> PAD-2 pp 168, 185, 241, 246-247, 248 (AB tab 9).

<sup>155</sup> PAD-2 pp 117, 247 (AB tab 9).

81. **Listed Things.** It is not the practice of this Court to limit the Listed Things to documents and material directly related to the precise cause of action then known, because that limitation would make the utility of a search order doubtful.<sup>156</sup>
82. As to the following Listed Things:
- (a) **1(a), 1(b)** — these are the specific USB devices referred to in Mr McKemmish’s report as having connected to Dr Kolodziejczyk’s Fortescue laptop.<sup>157</sup>
  - (b) **2** — this is intended to capture all documents containing the word “Fortescue” or abbreviations for its relevant subsidiaries.
  - (c) **3** — this is intended to capture evidentiary material recording Ionic Liquid R&D Information which in Dr Bhatt’s opinion reasonably must exist.<sup>158</sup> It is also intended to capture evidentiary material that shows subsequent misuse of Ionic Liquid R&D Information.
  - (d) **4** — this is intended to capture evidentiary material that shows subsequent misuse of Fortescue Plant CI in Element Zero’s developing etc its pilot plant.
  - (e) **5** — this is intended to capture evidentiary material that shows exfiltration of specific Fortescue documents. The documents are listed in Annex 1 to Sch A.
  - (f) **6–8** — these are intended to capture communications by or involving the Respondents. The date ranges in **7** and **8** are from the beginning of Dr Kolodziejczyk’s and Dr Winther-Jensen’s employment to when Element Zero made its statements in the AFR article (paragraph 56(f) above).
83. **Independent lawyers.** The proposed independent lawyers are lawyers from Ashurst, which Davies Collison Cave Law has engaged. An affidavit from Mr Adrian Chai of Ashurst is intended to be provided to chambers on the afternoon of 8 May 2024 addressing his ability, and the ability of solicitors in Ashurst’s employ — Ms Catherine Pedler, Mr Sam Mengler, Ms Lucinda Hill and Mr Angus Ross — to act as independent solicitors.
84. **Independent computer experts.** The proposed independent computer experts are forensic computer experts from CYTER and Evidence Advisory. Each independent lawyer has agreed to give the undertakings in Sch B, Part B.4.<sup>159</sup> The lead independent computer

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<sup>156</sup> *Aristocrat Technologies Australia v Global Gaming* [2006] FCA 862 at [7] (Allsop J); *Metso Minerals (Australia) v Kalra (No 3)* [2008] FCA 1201 at [28](d) (Flick J).

<sup>157</sup> AH-27 p 316 (AB tab 41).

<sup>158</sup> Bhatt [86] (AB tab 44).

<sup>159</sup> Dewar [45] (AB tab 7).

expert Mr McKemmish has confirmed CYTER and Evidence Advisory have no conflict in acting as independent computer experts.<sup>160</sup> Mr McKemmish prepared reports on Dr Kolodziejczyk's Fortescue laptop<sup>161</sup> and another Fortescue laptop,<sup>162</sup> but the preparation of these reports do not affect his independence or ability to act.<sup>163</sup>

#### **I Interim suppression orders**

85. Fortescue seeks interim suppression and pseudonym orders to preserve the secrecy of the proceeding until the execution of the search order. It also seeks an interim suppression order to preserve the secrecy of confidential evidence until the Return Date. Fortescue will provide the Court with a short minute of order containing the interim suppression and pseudonym orders it seeks.

#### **J Costs**

86. Fortescue also seeks an order that the costs are reserved as per paragraph 27 of the search order.

#### **K Conclusion**

87. For all these reasons, Fortescue respectfully submits that the Court ought to make the search order sought in Annex I to Fortescue's interlocutory application (AB tab 1).

**JS Cooke SC**

**WH Wu**

**SK Yates**

**Counsel for the Applicants**

8 May 2024

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<sup>160</sup> McKemmish [9], [11].

<sup>161</sup> AH-27 (AB tab 41).

<sup>162</sup> AH-26 (AB tab 39).

<sup>163</sup> See McKemmish [10], [13].