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Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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Important Information

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Form 33
Rule 16.32



Defence of Third Respondent

No. VID 176 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

STUART McCULLAGH and another named in the schedule

Applicants

CUDECO LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 000 317 251 and others named in the schedule

Respondents

Filed on behalf of (name & role of party) Dr Dianmin Chen, Third Respondent
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Terms defined in the Statement of Claim dated 7 April 2022 (**Statement of Claim**) carry the same meaning in this Defence unless otherwise indicated. Headings used in the Statement of Claim are adopted for convenience only and without conveying any admission of their content.

To the Statement of Claim, the Third Respondent (**Dr Chen**) says as follows:

I. THE PARTIES

A. The Applicants and the Group Members

1. As to paragraph 1, he:

1.1. admits that the Applicants have purported to commence this proceeding as a group proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on their own behalf and on behalf of the Group Members;

1.2. denies that the Applicants or any Group Members suffered loss or damage by reason of the conduct of Dr Chen pleaded in the Statement of Claim;
and

1.3. otherwise does not know and therefore cannot admit paragraph 1 of the Statement of Claim.

2. He does not know and therefore cannot admit paragraph 2.

3. He does not know and therefore cannot admit paragraph 3.

4. He does not know and therefore cannot admit paragraph 4.

B. CuDeco

5. As to paragraph 5, he:

5.1. says that the CuDeco Shares were suspended from quotation on 3 February 2020; and

5.2. subject to reference at trial to the full terms and effect of each of the relevant provisions of the ASX Listing Rules, the Corporations Act, the ASIC Act, and the Australian Consumer Law, otherwise admits paragraph 5.

6. As to paragraph 6, he:

6.1. says that CuDeco was taken, by operation of s 446A(1)(b) of the Corporations Act, to have passed a special resolution under s 491 of the Corporations Act to be wound up voluntarily; and

6.2. otherwise admits paragraph 6.

C. The CuDeco Officers

7. He admits paragraph 7.

8. Save to say that Hutchison is the second respondent in this proceeding, he admits paragraph 8.

9. Save to say that he, Dr Chen, is the third respondent in this proceeding, he admits paragraph 9.

9A. In addition to Noel White, Hutchison and himself, the other directors of CuDeco during

the Relevant Period were:

9A.1 Vitie Paul Keran, a director between 2 July 2007 and 4 June 2018;

9A.2 Zhijun Ma, a director between 6 June 2011 and 30 April 2020;

9A.3 Hongwei Liu, a director between 4 April 2012 and 30 April 2020;

9A.4 Zhaohui Wu, a director between 2 July 2013 and 3 April 2019;

9A.5 Mupo Zhu, an alternate director (to Zhijun Ma) between 19 January 2016 and 30 April 2020;

9A.6 Chiwei Wang, a director between 30 January 2017 and 16 July 2018;

9A.7 Min Zhai, a director between 18 May 2017 and 26 November 2018,

(the **Other Directors**).

10. As to paragraph 10:

10.1. save to say that the applicable Listing Rule is rule 19.12, he admits paragraph 10;

10.2. he says further that, at all times during their appointment, each of the Other Directors listed in paragraph 9A above were officers of CuDeco within the meaning of s 9 of the Corporations Act.

D. KPMG

11. As to paragraph 11, he:

11.1. admits paragraph 11.1;

11.2. admits paragraph 11.2;

11.3. as to paragraph 11.3:

(a) does not admit subparagraph (a);

(b) admits subparagraph (b);

11.4. refers to and relies upon the full terms and effect of s 761F of the Corporations Act, and otherwise does not admit paragraph 11.4;

11.5. as to paragraph 11.5:

(a) refers to and relies upon the full terms and effect of the *Partnership Act 1958* (Vic);

(b) says that each partner of KPMG is an agent of the firm for the purposes of the business of the partnership, and is liable jointly

with the other partners for all wrongful acts or omissions of any partner, acting in the ordinary course of the business of KPMG;
and

- (c) otherwise does not admit paragraph 11.5.

II. CUDECO'S BUSINESS AND REGULATORY CONTEXT

A. Rocklands Mine

12. In answer to paragraph 12:

12.1. save to say that Rocklands is an open-pit copper mine located approximately 15km west of Cloncurry, Cloncurry Shire, in North-West Queensland, he admits paragraph 12.1;

12.2. as to paragraph 12.2, he;

- (a) says that throughout the period he was a director of CuDeco (being from 14 December 2015 to 21 February 2017), mining operations were suspended at Rocklands;
- (b) does not plead to paragraph 12.2 insofar as it concerns events outside the period in which he was a director of CuDeco; and
- (c) otherwise denies paragraph 12.2.

Particulars

- (i) CuDeco Annual Report 2016, p.21, stated "As a cost-saving measure mining activities were temporarily suspended in August 2015 and remaining non-essential site infrastructure and pre-strip activities were suspended in early March 2016."
- (ii) CuDeco 2Q17 Quarterly Report dated 31 January 2017, p2 stated "Mining operations remained suspended during this quarter".

- (iii) CuDeco 3Q17 Quarterly Report dated 30 April 2017, p1, stated "Mining operations re-commenced on 15 March 2017".

12.3. as to paragraph 12.3:

- (a) says that in around May 2016, CuDeco commenced commissioning the Processing Plant, initially through a process of "dry" commissioning and then by "wet" commissioning by feeding ore from its existing ore stockpiles through the Processing Plant;
- (b) says that in around June 2016, CuDeco's first successful production of native copper through the Processing Plant occurred, using ore from its existing ore stockpiles;
- (c) says that in around July 2016, CuDeco's first successful production of sulphide copper concentrates through the Processing Plant occurred, using ore from its existing ore stockpiles;
- (d) says that between July 2016 and 21 February 2017, CuDeco operated the Processing Plant, using ore from its existing ore stockpiles;
- (e) does not plead to paragraph 12.3 insofar as it concerns events outside the period in which he was a director of CuDeco; and
- (f) otherwise denies paragraph 12.3.

Particulars

- (i) As to paragraph 12.3(b), he refers to the CuDeco ASX Announcement dated 16 May 2016, table 1.
- (ii) As to paragraph 12.3(b) and (c), he refers to the CuDeco 2016 Annual Report, Project Overview, p2.

- (iii) As to paragraph 12.3(d), he refers to the CuDeco 1Q17 Quarterly Report dated 31 October 2016, and the 2Q17 Quarterly Report dated 30 April 2017.

B. CuDeco reporting requirements

B.1. Corporations Act reporting requirements

13. As to paragraph 13, he:

13.1. admits paragraph 13.1;

13.2. says that pursuant to s 296 of the Corporations Act, CuDeco's financial report for a financial year was required to comply with the accounting standards, and otherwise denies paragraph 13.2;

13.3. says that pursuant to s 297 of the Corporations Act, CuDeco's financial statements and notes for a financial year were required to give a true and fair view of the financial position and performance of the company, and otherwise denies paragraph 13.3; and

13.4. admits paragraph 13.4.

B.2. Accounting Standards

14. Subject to reference at trial to the full terms and effect of each of AASB 101, AASB 110 and AASB 136, he admits paragraph 14.

15. As to paragraph 15, he:

15.1. refers to and relies upon the full terms and effect of AASB 101;

15.2. says that AASB 101 applied to the preparation of CuDeco's financial statements; and

15.3. otherwise denies paragraph 15.

16. As to paragraph 16, he:

- 16.1. refers to and relies upon the full terms and effect of AASB 110;
 - 16.2. says that the stated objective of AASB 110 was to prescribe when an entity should adjust its financial statements for events after the reporting period;
and
 - 16.3. otherwise denies paragraph 16.
17. As to paragraph 17, he:
- 17.1. refers to and relies upon the full terms and effect of AASB 136;
 - 17.2. says that the stated objective of AASB 136 was to prescribe the procedures that an entity applied to ensure that its assets were carried at no more than their recoverable amount (as defined); and
 - 17.3. otherwise denies paragraph 17.
- B.3. ASX Listing Requirements***
18. As to paragraph 18, he:
- 18.1. admits paragraph 18.1;
 - 18.2. admits paragraph 18.2;
 - 18.3. subject to reference at trial to the full terms and effect of the ASX Listing Rules, admits paragraph 18.3; and
 - 18.4. subject to reference at trial to the full terms and effect of the ASX Listing Rules, admits paragraph 18.4.
19. He admits paragraph 19.

III. CASE AGAINST CUDECO AND ITS OFFICERS

A. Ore Reserve Representations

A.1. Maiden ore reserve estimate

20. As to paragraph 20, he:

20.1. admits that on 11 December 2015, CuDeco published and lodged with the ASX an announcement titled “Rocklands Maiden Ore Reserve Estimate” (**2015 Maiden Ore Reserve Announcement**);

20.2. says he was not a director of CuDeco at the time the 2015 Maiden Ore Reserve Announcement was published and lodged with the ASX (being subsequently appointed on 14 December 2015); and

20.3. otherwise denies paragraph 20.

21. As to paragraph 21, he:

21.1. refers to and repeats paragraph 20.2 above;

21.2. subject to reference at trial to the full terms and effect of the 2015 Maiden Ore Reserve Announcement, says that the announcement:

(a) stated that the estimated total ore reserve at Rocklands was 28 million tonnes at 0.9% species copper equivalent, comprising:

(A) a proved ore reserve (as that term is defined by the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves 2012 edition (the **JORC Code**)) of 23 million tonnes, at 1.0% species copper equivalent; and

(B) a probable ore reserve (as defined by the JORC Code) of 5 million tonnes, at 0.6% species copper equivalent;

- (b) stated that within the ore reserve, it was estimated there was:
 - (A) a high-grade ore reserve of 10 million tonnes at 1.61% species copper equivalent; and
 - (B) a low-grade ore reserve of 17 million tonnes at 0.48% species copper equivalent;
- (c) stated that the Rocklands Maiden Ore Reserve Estimate was prepared by Australian Mine Design and Development Pty Ltd (**AMDAD**) and was based on:
 - (A) the November 2013 Mineral Resource Estimate for Rocklands prepared by Mining Associates Pty Ltd; and
 - (B) the Stage-1, 10 year mine plan also prepared by AMDAD, as part of the 2015 Rocklands Feasibility Study that was intended to be released shortly after the 2015 Maiden Ore Reserve Announcement;
- (d) was accompanied by a copy of the Ore Reserves Statement dated 9 December 2015 prepared by AMDAD and signed by a Competent Person (as defined by the JORC Code) (**2015 Ore Reserves Statement**);
- (e) stated that the 2015 Rocklands Feasibility Study indicated that the project was technically and economically viable for the metal prices assumed;

21.3. otherwise denies paragraph 21.

A.2. Announcement of rights issue and publication of Feasibility Study

22. Subject to reference at trial to the full terms and effect of the ASX Announcement dated 5 February 2016, and the Rights Issue Prospectus, he admits paragraph 22.
23. Subject to reference at trial to the full terms and effect of the ASX Announcement dated 12 February 2015, he admits paragraph 23.
24. Subject to reference at trial to the full terms and effect of the ASX Announcement titled "Rocklands Feasibility Study" (**Feasibility Study Announcement**), he admits paragraph 24.
25. As to paragraph 25, he:
- 25.1. subject to reference at trial to the full terms and effect of the Feasibility Study Announcement, says that the announcement:
- (a) stated that:
 - (A) CuDeco was releasing a feasibility study for Rocklands;
 - (B) the Feasibility Study was prepared for CuDeco by Mining Associates Pty Ltd and is referenced by the Rocklands Maiden Ore Reserve Estimate prepared by AMDAD;
 - (C) the Feasibility Study covered the Stage-1, 10 year mine plan which was the initial phase of a multi-stage development and production strategy for Rocklands;
 - (D) the Feasibility Study was based on pit and stockpile survey and audits to end June 2015, as such ore mined subsequent to this period had neither been added to stockpiles nor depleted from reserves;
 - (E) the Feasibility Study estimated:

- (I) project revenue of approximately \$1,930 million;
 - (II) operating costs of approximately \$1,299 million;
 - (III) net free cash-flow from operations of approximately \$631 million; and
 - (IV) net present value (after tax and after remaining capex) of \$405 million;
- (F) Rocklands was approximately 90% complete as of December 2015, and an additional \$64 million was estimated for the project to reach practical construction completion; and
- (G) Hutchison in commenting on the Feasibility Study had said, "The Feasibility Study provides confirmation via independent technical due diligence that our current modelling is appropriate and the project is not only viable but will generate considerable cash flow from this point forward"; and
- (b) was accompanied by a copy of the Feasibility Study which:
- (A) was prepared by Mining Associates Pty Ltd and signed by a Competent Person (as defined by the JORC Code);
 - (B) contained an express disclaimer in respect of the report, relevantly stating that no warranty should be implied as to the accuracy of estimates or other values and all estimates and other values are only valid as at the date of the report and will vary thereafter (**Feasibility Study Disclaimer**); and

25.2. otherwise denies paragraph 25.

Particulars

- (i) As to paragraph 25.1(a), the statements are on pages 1 and 2 of the announcement.
- (ii) As to paragraph 25.1(b)(B), the disclaimer was titled "Caveat Lector" and was contained on page 3 of the Feasibility Study.

26. As to paragraph 26, he:

26.1. refers to and repeats paragraph 25.1; and

26.2. otherwise denies paragraph 26.

A.3. *Replacement Prospectus*

27. As to paragraph 27, he refers to the full terms and effect of the Replacement Prospectus, and:

27.1. admits paragraph 27.1;

27.2. admits paragraph 27.2;

27.3. as to paragraph 27.3:

(a) refers to and repeats paragraph 21; and

(b) otherwise admits paragraph 27.3;

27.4. as to paragraph 27.4:

(a) refers to and repeats paragraph 25.1;

(b) says that the Prospectus attached an extract of the executive summary of the Feasibility Study, which included the Feasibility Study Disclaimer;

(c) otherwise denies paragraph 27.4;

27.5. as to paragraph 27.5:

- (a) says that the Prospectus stated that CuDeco confirmed that it was not aware of any new information or data that materially affected the information included in the original market announcements (including the 2015 Maiden Ore Reserve Announcement) and that all material assumptions and technical parameters underpinning the estimates in the relevant market announcements continued to apply and had not materially changed; and
- (b) otherwise denies paragraph 27.5;

27.6. says further that the Replacement Prospectus contained sections titled “Risk Factors”, which:

- (a) stated that the shares offered by the prospectus should be considered speculative;
- (b) stated that investing in CuDeco involved risk and that there were factors both specific to the company and of a general nature which may affect the operating and financial performance of the company; and
- (c) summarised some of the key risks which included:
 - (A) costs of construction and development;
 - (B) uncertainty of development of projects and exploration risk;
 - (C) future financing;
 - (D) market conditions;
 - (E) product sale risk; and

27.7. otherwise denies paragraph 27.

Particulars

- (i) As to paragraph 27.6, he refers to section 1.13 and section 8 of the Replacement Prospectus.

28. As to paragraph 28, he:

28.1. refers to and repeats paragraphs 21, 25 and 27; and

28.2. denies paragraph 28.

29. Subject to reference at trial to the full terms and effect of the ASX Announcement dated 11 April 2016, he admits paragraph 29.

A.4. Quarterly Reports

30. As to paragraph 30:

30.1. subject to reference at trial to the full terms and effect of the 3Q16 Quarterly Report, he admits paragraph 30; and

30.2. he says further that the 3Q16 Quarterly Report stated that commissioning procedures had commenced as planned and ore commissioning was imminent.

Particulars

3Q16 Quarterly Report at p 1.

31. As to paragraph 31, he:

31.1. refers to and repeats paragraphs 21 and 25; and

31.2. denies paragraph 31.

31A. In May 2016, CuDeco published and released to the ASX the following further announcements:

31A.1 an announcement titled “Rights Issue Closes – Rocklands Funded to Production” on 11 May 2016 (**11 May 2016 Announcement**) which relevantly stated:

- (a) CuDeco announced the closing of its \$63 million Non-Renounceable Rights Issue, with the funds to be used towards completion of the company’s Rocklands project, and to facilitate final commissioning and ramp-up, working capital requirements and subsequent first shipment of copper products;
- (b) initial commissioning activity had been focusing on copper production only, including through the gravity (native copper) and flotation (sulphide copper) circuits; when the copper circuits reach steady-state, it was planned that the pyrite/cobalt and DMS magnetite circuits would be commissioned and those streams also brought online; and
- (c) the staged approach to the commissioning process reduces ramp-up times to reach nameplate throughput and brings forward much anticipated revenue;

31A.2 an announcement titled “Commissioning Status Update” on 16 May 2016 (**16 May 2016 Announcement**) which relevantly stated:

- (a) CuDeco was providing a market update on commissioning activities at Rocklands;
- (b) commissioning activity was currently focused on copper production only, incorporating the jigs (coarse native copper), gravity (fine

native copper) and flotation (sulphide copper) circuits, with ore feed planned at the latest on Monday 30 May;

(c) once the copper circuits reach steady-state, the pyrite/cobalt and DMS magnetite circuits would be commissioned and those streams also brought online;

(d) copper installation construction verification was essentially complete, dry commissioning was nearing completion and the status of wet commissioning was detailed in a table in the announcement.

32. Subject to reference at trial to the full terms and effect of the 4Q16 Quarterly Report, he admits paragraph 32.

33. As to paragraph 33, he:

33.1. refers to and repeats paragraph 21 and 31; and

33.2. denies paragraph 33.

A.5. *Implied representations*

34. As to paragraph 34, he:

34.1. refers to and repeats paragraphs 21 and 25; and

34.2. denies paragraph 34.

35. As to paragraph 35, he:

35.1. refers to and repeats paragraphs 27.3 to 27.6; and

35.2. denies paragraph 35.

36. As to paragraph 36, he:

36.1. refers to and repeats paragraphs 21, 25, 27, 28, 31A, 33, 34 and 35;

36.2. says that he does not plead to paragraph 36 insofar as it concerns events outside the period in which he was a director of CuDeco; and

36.3. otherwise denies paragraph 36.

37. As to paragraph 37, he:

37.1. refers to and repeats paragraph 36; and

37.2. denies paragraph 37.

B. The True Position

38. As to paragraph 38, he:

38.1. as to paragraph 38.1:

- (a) says that on or around 25 April 2011, CuDeco and China Oceanwide International Holdings Co. Ltd entered into an offtake agreement (**2011 Agreement**) in respect of copper/gold concentrates and pyrite/cobalt concentrates from Rocklands;
- (b) says that on or around 21 December 2014, CuDeco and China Oceanwide International Investment Co Ltd entered into a memorandum of understanding (**MOU**) for an offtake arrangement in respect of native copper from Rocklands, in addition to the copper/gold concentrates and pyrite/cobalt concentrates the subject of the 2011 Agreement;
- (c) says that as at 11 April 2016, CuDeco had not entered into an offtake contract with China Oceanwide International Holdings Co. Ltd, China Oceanwide International Investment Co Ltd or any other entity in relation to magnetite deposits;
- (d) otherwise denies paragraph 38.1;

38.2. as to paragraph 38.2:

- (a) says that as at 11 April 2016, the Processing Plant's magnetite and pyrite/cobalt circuits had not been completed;
- (b) says that on 11 May 2016, and on 16 May 2016, CuDeco announced to the ASX that commissioning activity was focused on copper production only;
- (c) otherwise denies 38.2.

Particulars

- (i) As to paragraph 38.1(a), the 2011 Agreement was in writing, dated 25 April 2011, signed on behalf of CuDeco and China Oceanwide International Holdings Co. Ltd.
- (ii) As to paragraph 38.1(b), the MOU was in writing, dated 21 December 2014, signed on behalf of CuDeco and China Oceanwide International Investment Co Ltd.
- (iii) As to paragraph 38.2, paragraph 31A is referred to and repeated.

39. As to paragraph 39, he:

39.1. refers to the full terms and effect of the Rocklands Maiden Ore Reserve Estimate and the Feasibility Study, and says that each was based on the Stage-1, 10 year mine plan;

39.2. refers to and repeats paragraphs 21 and 25; and

39.3. otherwise denies paragraph 39.

40. As to paragraph 40, he:

40.1. says that:

- (a) on or after 29 May 2016, commissioning of the Processing Plant commenced, initially through a process of "dry" commissioning and then by "wet" commissioning by feeding ore from stockpiles

through the Processing Plant to produce native copper and, later, copper concentrate;

- (b) CuDeco experienced issues during the commissioning process in respect of the Processing Plant and associated technical processes and procedures in respect of the native copper processing circuit;
- (c) CuDeco experienced performance and reliability issues associated with the fixed crusher plant; and
- (d) in the usual course of commissioning a processing plant, operational, performance and reliability issues are experienced, and the purpose of commissioning is to identify and address such issues;

40.2. otherwise denies paragraph 40.

41. As to paragraph 41, he

41.1. refers to and repeats paragraphs 38 and 40;

41.2. says that on or before 31 May 2016, CuDeco did not make any changes to the Stage-1, 10 year mine plan, on which the Rocklands Maiden Ore Reserve Estimate and Feasibility Study were based;

41.3. denies paragraph 41.

42. As to paragraph 42, he:

42.1. refers to and repeats paragraphs 38 to 41;

42.2. says the phrases "material risk" and "materially less" are embarrassing and liable to be struck out; and

42.3. denies paragraph 42.

C. Alleged Contraventions from April 2016

C.1. Alleged April 2016 Continuous Disclosure Contraventions

43. As to paragraph 43, he:

43.1. refers to and repeats paragraphs 31A and 38 to 40; and

43.2. denies paragraph 43;

44. As to paragraph 44, he:

44.1. refers to and repeats paragraph 41; and

44.2. denies paragraph 44.

45. As to paragraph

45.1. refers to and repeats paragraph 42; and

45.2. denies paragraph 45.

46. As to paragraph 46, he:

46.1. says that on and after 11 May 2016, CuDeco announced to the market that commissioning activity at Rocklands was focused on copper production only;

46.2. refers to and repeats paragraph 31A; and

46.3. denies paragraph 46.

Particulars

- (i) 11 May 2016 Announcement;
- (ii) May 2016 Commissioning Status Update;
- (iii) ASX Announcement dated 22 September 2016 (**22 September 2016 Announcement**) stated "Rocklands operation reoptimised for copper-gold production – The Company has also reassessed operational budgets following a review of all costs and revenues associated with production from Rocklands. At this stage the

company proposes not to commission to Cobalt and Magnetite circuits and focus on copper and gold production”.

- (iv) 1Q17 Quarterly Report dated 31 October 2016 stated, “The Rocklands operations reassessed operational budgets following a review of costs and revenues associated with production. At this stage the company proposes not to commission the Cobalt and Magnetite circuits as to focus on Copper and Gold production. This review necessitated a re-optimisation of the pits, mine designs and the mine schedule which was completed in Q1 for the four (4) open pits;.

C.2. Alleged misleading or deceptive conduct

47. As to paragraph 47, he:

47.1. refers to and repeats paragraphs 21 and 25;

47.2. denies paragraph 47;

47.3. says further that if (which is denied):

- (a) he made the 2015 Ore Reserves Representation, the 2015 Viability Representation and the 2016 Viability Representation; and
- (b) the representations were as to future matters,

he had reasonable grounds for making those representations.

Particulars

- (i) The 2015 Maiden Ore Reserve Announcement was based upon the Rocklands Maiden Ore Reserve Estimate. That estimate had been prepared by AMDAD, in accordance with the JORC Code, and signed by AMDAD as the Competent Person.
- (ii) The Feasibility Study Announcement was based upon the Feasibility Study. That study had been prepared by Mining Associates in accordance with the JORC Code, and signed by Mining Associates as the Competent Person.
- (iii) Paragraphs 21 and 25 are referred to and repeated.
- (iv) Further particulars may be provided following discovery and evidence.

48. As to paragraph 48, he:

- 48.1. refers to and repeats paragraphs 21 and 25;
- 48.2. denies paragraph 48; and
- 48.3. says further that if (which is denied):
- (a) he made the Rocklands Representations; and
 - (b) the representations were as to future matters,
- he had reasonable grounds for making those representations.

Particulars

- (i) The 2015 Maiden Ore Reserve Announcement was based upon the Rocklands Maiden Ore Reserve Estimate. That estimate had been prepared by AMDAD, in accordance with the JORC Code, and signed by AMDAD as the Competent Person.
 - (ii) The Feasibility Study Announcement was based upon the Feasibility Study. That study had been prepared by Mining Associates in accordance with the JORC Code, and signed by Mining Associates as the Competent Person.
 - (iii) Paragraphs 21 and 25 are referred to and repeated.
 - (iv) Further particulars may be provided following discovery and evidence.
49. As to paragraph 49, he:
- 49.1. refers to and repeats paragraphs 47 and 48; and
 - 49.2. denies paragraph 49.

C.3. Rocklands Representations – alleged false or misleading conduct contraventions

50. As to paragraph 50, he:
- 50.1. refers to and repeats paragraphs 38 to 42; and
 - 50.2. denies paragraph 50.
51. As to paragraph 51, he:

51.1. refers to and repeats paragraphs 38 to 42; and

51.2. denies paragraph 51.

52. He denies paragraph 52.

53. He denies paragraph 53.

54. He denies paragraph 54.

C.4. *Alleged Prospectus Contraventions*

55. As to paragraph 55, he:

55.1. refers to and repeats paragraphs 38, 39, 41 and 42;

55.2. denies paragraph 55; and

55.3. says further that if (which is denied):

(a) he made the Prospectus Representations; and

(b) the representations were as to future matters,

he had reasonable grounds for making those representations.

Particulars

(i) The 2015 Maiden Ore Reserve Announcement was based upon the Rocklands Maiden Ore Reserve Estimate. That estimate had been prepared by AMDAD, in accordance with the JORC Code, and signed by AMDAD as the Competent Person.

(ii) The Feasibility Study Announcement was based upon the Feasibility Study. That study had been prepared by Mining Associates in accordance with the JORC Code, and signed by Mining Associates as the Competent Person.

(iii) Paragraphs 21 and 25 are referred to and repeated.

(iv) Further particulars may be provided following discovery and evidence.

56. As to paragraph 56, he:

56.1. refers to and repeats paragraphs 38, 39, 40 and 42; and

56.2. denies paragraph 56.

D. Alleged market effects of Rocklands Contravening Conduct

57. As to paragraph 57, he:

57.1. says that:

- (a) CuDeco Shares were placed into a trading halt on 4 August 2015 and remained in a trading halt until 11 May 2016;
- (b) CuDeco Shares were suspended from quotation on 30 September 2016 and remained suspended until 17 November 2016; and

57.2. otherwise denies paragraph 57.

Particulars

- (i) CuDeco ASX Announcement dated 4 August 2015;
- (ii) 11 May 2016 Announcement;
- (iii) 30 September 2016 Announcement;
- (iv) CuDeco ASX Announcement dated 17 November 2016.

E. October/November 2016 Representations

E.1. 1Q17 Quarterly Report

58. As to paragraph 58:

58.1. subject to reference at trial to the full terms and effect of the 1Q17 Quarterly Report, he admits paragraph 58; and

58.2. he says further that the 1Q17 Quarterly Report stated that at that stage, the company proposed not to commission the cobalt and magnetite circuits so as to focus on copper and gold production.

Particulars

1Q17 Quarterly Report at p 3.

59. As to paragraph 59, he:

59.1. refers to and repeats paragraph 21; and

59.2. denies paragraph 59.

59A. Further, in September 2016, CuDeco published and released to the ASX the 22 September 2016 Announcement, which relevantly stated:

“Rocklands operation reoptimised for copper-gold production – The Company has also reassessed operational budgets following a review of all costs and revenues associated with production from Rocklands. At this stage the company proposes not to commission to Cobalt and Magnetite circuits and focus on copper and gold production.”

E.2. FY2016 Annual Report

60. As to paragraph 60, he:

60.1. says that:

(a) on 17 November 2016, CuDeco published and released to the ASX the CuDeco FY2016 Annual Report and FY2016 Financial Report;

(b) CuDeco’s FY2016 Annual Report contained a statement from KPMG, CuDeco’s external auditor, that the FY2016 Financial Report had been audited and was in accordance with the Corporations Act including:

(A) giving a true and fair view of the group’s financial position as at 30 June 2016 and its performance for the year ended on that date; and

(B) complying with the Australian Accounting Standards and the Corporations Regulations 2001;

60.2. refers to and relies upon the full terms and effect of the CuDeco FY2016 Annual Report and FY2016 Financial Report;

60.3. refers to and repeats paragraph 21; and

60.4. otherwise denies paragraph 60.

Particulars

CuDeco's FY2016 Annual Report, p 86

E.3. Alleged Implied Representations

61. As to paragraph 61, he:

61.1. refers to and repeats paragraphs 59 and 60; and

61.2. otherwise denies paragraph 61.

62. As to paragraph 62, he:

62.1. refers to and repeats paragraphs 46.1 and 59 to 61; and

62.2. denies paragraph 62.

63. He denies paragraph 63.

F. True position as at October and November 2016

64. As to paragraph 64, he:

64.1. says:

(a) in or around September 2016, revisions to the pit design at Rocklands were drafted:

(A) for the purpose of focusing on copper and gold production at that time; and

(B) as a result of which the cobalt and magnetite reserves were not to be included in that pit design, but would remain as reserves at Rocklands;

(b) in or around September 2016, revisions to a mining plan for Rocklands were drafted:

(A) to incorporate the revisions to the pit design; and

(B) in circumstances where the mining plan was being prepared for the purpose of a proposed tender process for the contract for mining works at Rocklands, with a proposed contract length of two to three years;

(c) says that on or before September 2016, CuDeco did not make any changes to the Stage-1, 10 year mine plan, on which the Rocklands Maiden Ore Reserve Estimate and Feasibility Study were based;

64.2. otherwise denies paragraph 64.

65. As to paragraph 65, he:

65.1. refers to and repeats paragraphs 21, 25, 60.1 and 64;

65.2. otherwise denies paragraph 65.

G. Alleged contraventions from October and November 2016

G.1. Alleged FY2016 Continuous Disclosure Contraventions

66. As to paragraph 66, he:

66.1. refers to and repeats paragraph 64 and 65; and

66.2. otherwise denies paragraph 66.

67. As to paragraph 67, he

67.1. refers to and repeats paragraphs 46.1, 59A, 64 and 65; and

67.2. otherwise denies paragraph 67.

G.2. Alleged FY2016 Representations – misleading or deceptive conduct

68. As to paragraph 68, he:

68.1. refers to and repeats paragraphs 21 and 25;

68.2. otherwise denies paragraph 68;

68.3. says further that if (which is denied):

(a) he made the 1Q17 Ore Reserves Representations and the
FY2016 Annual Report Ore Reserves Representations; and

(b) the representations were as to future matters,

he had reasonable grounds for making and maintaining those
representations.

Particulars

(i) The 2015 Maiden Ore Reserve Announcement was based upon
the Rocklands Maiden Ore Reserve Estimate. That estimate had
been prepared by AMDAD, in accordance with the JORC Code,
and signed by AMDAD as the Competent Person.

(ii) The Feasibility Study Announcement was based upon the
Feasibility Study. That study had been prepared by Mining
Associates in accordance with the JORC Code, and signed by
Mining Associates as the Competent Person.

(iii) Paragraphs 21 and 25 are referred to and repeated.

(iv) Further particulars may be provided following discovery and
evidence.

69. As to paragraph 69, he:

69.1. refers to and repeats paragraph 38 to 42, 60.1, 64 to 65;

69.2. otherwise denies paragraph 69;

69.3. says further that if (which is denied):

(a) he made the FY2016 Financial Report Representations; and

(b) the representations were as to future matters,

he had reasonable grounds for making and maintaining those representations.

Particulars

(i) The 2015 Maiden Ore Reserve Announcement was based upon the Rocklands Maiden Ore Reserve Estimate. That estimate had been prepared by AMDAD, in accordance with the JORC Code, and signed by AMDAD as the Competent Person.

(ii) The Feasibility Study Announcement was based upon the Feasibility Study. That study had been prepared by Mining Associates in accordance with the JORC Code, and signed by Mining Associates as the Competent Person.

(iii) Paragraphs 21 and 25 are referred to and repeated.

(iv) CuDeco's Annual Report contained a statement from KPMG, its external auditor, that the financial report had been audited and was in accordance with the Corporations Act including complying with the Australian Accounting Standards and the Corporations Regulations 2001.

(v) Further particulars may be provided following discovery.

70. He denies paragraph 70.

G.3. Alleged FY2016 representations – false or misleading statement contraventions

71. As to paragraph 71, he:

71.1. refers to and repeats paragraphs 38 to 42 and 64; and

71.2. otherwise denies paragraph 71.

72. As to paragraph 72, he:

72.1. refers to and repeats paragraphs 38 to 42, and 64 to 65; and

72.2. otherwise denies paragraph 72.

73. He denies paragraph 73.

74. He denies paragraph 74.

75. He denies paragraph 75.

H. Alleged market effects of FY2016 Contravening Conduct

76. As to paragraph 76, he:

76.1. says that CuDeco Shares were suspended from quotation on 30 September 2016 and remained suspended until 17 November 2016; and

76.2. otherwise denies 76.

Particulars

(i) 30 September 2016 Announcement;

(ii) CuDeco ASX Announcement dated 17 November 2016.

I. FY2017 Representations

1.1. Quarterly report representations

77. Subject to reference to the full terms and effect of CuDeco's 2Q17 Quarterly Report, he admits paragraph 77.

78. He does not plead to paragraph 78 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

79. As to paragraph 79, he:

79.1. refers to and relies upon the full terms and effect of CuDeco's 2Q17 Quarterly Report;

79.2. does not plead to paragraph 79 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

79.3. otherwise denies paragraph 79.

I.2. FY2017 Annual Report

80. He does not plead to paragraph 80 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

I.3. Alleged Implied Representations

81. As to paragraph 81, he:

81.1. refers to and relies upon the full terms and effect of CuDeco's 2Q17 Quarterly Report;

81.2. does not plead to paragraph 81 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

81.3. otherwise denies paragraph 81.

82. As to paragraph 82, he:

82.1. does not plead to paragraph 82 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

82.2. otherwise denies paragraph 82.

83. As to paragraph 83, he:

83.1. does not plead to paragraph 83 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

83.2. otherwise denies paragraph 83.

J. True position in 2017

84. As to paragraph 84, he:

84.1. does not plead to paragraph 84 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

84.2. otherwise denies paragraph 84.

K. 2017 Contraventions

K.1. Alleged FY2017 Continuous Disclosure Contraventions

85. As to paragraph 85, he:

85.1. does not plead to paragraph 85 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

85.2. otherwise denies paragraph 85.

86. As to paragraph 86, he:

86.1. does not plead to paragraph 86 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

86.2. otherwise denies paragraph 86.

K.2. Alleged FY2017 Representations – misleading or deceptive conduct

87. As to paragraph 87, he:

87.1. refers to and repeats paragraphs 38 to 42 and 64;

87.2. does not plead to paragraph 87 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

87.3. says further that if (which is denied):

(a) he made the 2Q17 Ore Representation and FY2017 Implied Representations; and

(b) the representations were as to future matters,

he had reasonable grounds for making and maintaining those representations.

87.4. otherwise denies paragraph 87.

Particulars

(i) The 2015 Maiden Ore Reserve Announcement was based upon the Rocklands Maiden Ore Reserve Estimate. That estimate had been prepared by AMDAD, in accordance with the JORC Code, and signed by AMDAD as the Competent Person.

(ii) The Feasibility Study Announcement was based upon the Feasibility Study. That study had been prepared by Mining Associates in accordance with the JORC Code, and signed by Mining Associates as the Competent Person.

(iii) Paragraphs 21 and 25 are referred to and repeated.

(iv) Further particulars may be provided following discovery.

88. He does not plead to paragraph 88 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

89. As to paragraph 89, he:

89.1. refers to and repeats paragraphs 87 and 88; and

89.2. otherwise denies paragraph 89.

K.3. Alleged FY2017 Representations – false statement contraventions

90. As to paragraph 90, he:

90.1. refers to and repeats paragraphs 38 to 39, 41 and 64;

90.2. does not plead to paragraph 90 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017

90.3. otherwise denies paragraph 90.

91. As to paragraph 91, he:

91.1. refers to and repeats paragraphs 38, 39, 41, 42, 64, 65 and 84;

91.2. does not plead to paragraph 91 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017;

91.3. otherwise denies paragraph 91.

92. He denies paragraph 92.

93. He denies paragraph 93.

94. He denies paragraph 94.

L. Alleged market effects of FY2017 Contravening Conduct

95. As to paragraph 95, he:

95.1. does not plead to paragraph 91 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017;

95.2. otherwise denies paragraph 95.

IV. CASE AGAINST KPMG

A. KPMG's role

96. As to paragraph 96, he:

- 96.1. admits that CuDeco engaged KPMG to conduct an audit of CuDeco's FY2016 Financial Report;
- 96.2. does not plead to paragraph 96 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017;
- 96.3. otherwise does not admit paragraph 96.

A.1. KPMG's audit obligations

- 97. As to paragraph 97, he:
 - 97.1. refers to and repeats paragraph 96;
 - 97.2. does not plead to paragraph 97 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 97.3. subject to reference at trial to the full terms and effect of the relevant provisions of the Corporations Act and Auditing Standards, he admits paragraph 97 in respect of CuDeco's FY2016 Financial Report.
- 98. As to paragraph 98, he:
 - 98.1. refers to and repeats paragraph 96;
 - 98.2. does not plead to paragraph 98 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 98.3. otherwise admits paragraph 98.

A.2. KPMG Audit team

- 99. He does not know and therefore cannot admit paragraph 99.

100. Subject to reference at trial to the full terms and effect of s 769B of the Corporations Act, he admits paragraph 100.

101. As to paragraph 101, he:

101.1. refers to and repeats paragraphs 99 and 100;

101.2. otherwise admits paragraph 101.

B. Facts relevant to the claim against KPMG

B.1. Matters prior to KPMG's audits

102. As to paragraph 102, he

102.1. refers to and repeats paragraphs 20 and 21; and

102.2. otherwise admits paragraph 102.

103. As to paragraph 103, he

103.1. refers to and repeats paragraphs 24 and 25; and

103.2. otherwise admits paragraph 103.

104. As to paragraph 104, he:

104.1. refers to and repeats paragraphs 38 and 39 above; and

104.2. otherwise denies paragraph 104.

B.2. KPMG's audit of CuDeco's FY2016 financial reports

105. He admits paragraph 105.

106. He admits paragraph 106.

107. Subject to reference to the full terms and effect of the FY2016 Audit Report, he admits paragraph 107.

B.3. Releases of FY2016 financial report

108. As to paragraph 108, he:

108.1. refers to and repeats paragraph 60;

108.2. otherwise admits paragraph 108.

109. As to paragraph 109, he:

109.1. admits paragraph 109.2;

109.2. refers to and repeats paragraph 60;

109.3. otherwise denies paragraph 109.

B.4. KPMG's FY2016 opinion and representation

110. Subject to reference to the full terms and effect of the FY2016 Audit Report, he admits paragraph 110.

B.5. KPMG's audit of CuDeco's FY2017 financial reports

111. He does not plead to paragraph 111 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

112. He does not plead to paragraph 112 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

113. He does not plead to paragraph 113 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

B.6. Release of FY2017 financial report

114. He does not plead to paragraph 114 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

115. He does not plead to paragraph 115 as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017.

B.7. KPMG's FY2017 opinion and representation

116. He does not plead to paragraph 116 as:

116.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

116.2. it contains no allegation against him.

B.8. Events after October 2017

117. As to paragraph 117, he:

117.1. refers to the full terms and effect of the December 2017 Announcement;

117.2. does not plead to paragraph 117 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

117.3. otherwise denies paragraph 117.

118. As to paragraph 118, he:

118.1. refers to the full terms and effect of the March 2018 Announcement;

118.2. does not plead to paragraph 118 insofar as it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

118.3. otherwise denies paragraph 118.

B.9. Alleged FY2016 Misleading or deceptive conduct

119. He does not plead to paragraph 119 as it makes no allegation against him.

120. As to paragraph 120, he:

120.1. refers to and repeats paragraph 65; and

120.2. denies paragraph 120.

121. As to paragraph 121, he:
- 121.1. refers to and repeats paragraph 65; and
 - 121.2. denies paragraph 121.

122. As to paragraph 122, he:
- 122.1. refers to and repeats paragraph 65; and
 - 122.2. denies paragraph 122.

123. He denies paragraph 123.

124. As to paragraph 124, he:
- 124.1. refers to and repeats paragraph 11; and
 - 124.2. otherwise denies paragraph 124.

125. He denies paragraph 125.

126. As to paragraph 126, he:
- 126.1. refers to and repeats paragraph 11; and
 - 126.2. otherwise denies paragraph 126.

B.10. Alleged FY2016 False or misleading conduct

127. He does not admit paragraph 127.

128. He denies paragraph 128.

129. He denies paragraph 129.

130. He denies paragraph 130.

131. He denies paragraph 131.

132. He denies paragraph 132.

133. He does not admit paragraph 133.

134. He denies paragraph 134.

135. He denies paragraph 135.

136. He denies paragraph 136.

137. He denies paragraph 137.

138. He denies paragraph 138.

B.11. Alleged market effect of KPMG FY2017 Contraventions

139. He denies paragraph 139.

C. KPMG's FY2017 Alleged Contravening Conduct

C.1. Alleged FY2017 Misleading or deceptive conduct

140. He does not plead to paragraph 140 as:

140.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

140.2. it makes no allegations against him.

141. As to paragraph 141:

141.1. to the extent the reference to the KPMG FY2016 Opinion ought to be a reference to the KPMG FY2017 Opinion, he does not plead to paragraph 141 as:

(a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

(b) it makes no allegations against him; and

141.2. he otherwise denies paragraph 141.

142. He does not plead to paragraph 142 as:

- 142.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 142.2. it makes no allegations against him.
143. He does not plead to paragraph 143 as:
- 143.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 143.2. it makes no allegations against him.
144. As to paragraph 144, he:
- 144.1. refers to and repeats paragraph 141;
 - 144.2. otherwise does not plead to paragraph 144 as:
 - (a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - (b) it makes no allegations against him.
145. He does not plead to paragraph 145 as:
- 145.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 145.2. it makes no allegations against him.
146. As to paragraph 146, he:
- 146.1. refers to and repeats paragraph 141;
 - 146.2. otherwise does not plead to paragraph 146 as:
 - (a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - (b) it makes no allegations against him.

147. As to paragraph 147, he:

147.1. refers to and repeats paragraph 141;

147.2. otherwise does not plead to paragraph 147 as:

(a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

(b) it makes no allegations against him.

C.2. *Alleged FY2017 false or misleading conduct*

148. He does not plead to paragraph 148 as:

148.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

148.2. it makes no allegations against him.

149. As to paragraph 149, he:

149.1. refers to and repeats paragraph 141;

149.2. otherwise does not plead to paragraph 149 as:

(a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

(b) it makes no allegations against him.

150. He does not plead to paragraph 150 as:

150.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and

150.2. it makes no allegations against him.

151. He does not plead to paragraph 151 as:

- 151.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 151.2. it makes no allegations against him.
152. As to paragraph 152, he:
- 152.1. refers to and repeats paragraph 141;
 - 152.2. otherwise does not plead to paragraph 152 as:
 - (a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - (b) it makes no allegations against him.
153. As to paragraph 153, he:
- 153.1. refers to and repeats paragraph 141;
 - 153.2. otherwise does not plead to paragraph 152 as:
 - (a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - (b) it makes no allegations against him.
154. He does not plead to paragraph 154 as:
- 154.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 154.2. it makes no allegations against him.
155. He does not plead to paragraph 155 as:
- 155.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 155.2. it makes no allegations against him.

156. He does not plead to paragraph 156 as:
- 156.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 156.2. it makes no allegations against him.
157. He does not plead to paragraph 157 as:
- 157.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 157.2. it makes no allegations against him.
158. As to paragraph 158, he:
- 158.1. refers to and repeats paragraph 141;
 - 158.2. otherwise does not plead to paragraph 158 as:
 - (a) it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - (b) it makes no allegations against him.
159. He does not plead to paragraph 159 as:
- 159.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 159.2. it makes no allegations against him.
- C.3. *Alleged Market effect of KPMG FY2017 Contraventions***
160. He does not plead to paragraph 160 as:
- 160.1. it concerns events after the period in which he ceased to be a director of CuDeco, being after 21 February 2017; and
 - 160.2. it makes no allegations against him.

V. ALLEGED LOSS AND DAMAGE**A. Corrective Disclosure*****A.1. December 2017 partial disclosure***

161. As to paragraph 161, he:

161.1. says that at the time of the December 2017 Announcement, he had ceased to be a director of CuDeco;

161.2. refers to the full terms and effect of the December 2017 Announcement;
and

161.3. otherwise denies paragraph 161.

162. As to paragraph 162, he:

162.1. refers to and repeats paragraphs 31A and 59A;

162.2. otherwise denies paragraph 162.

A.2. March 2018 partial disclosure

163. He admits paragraph 163.

164. As to paragraph 164, he:

164.1. says that at the time of the March 2018 Announcement, he had ceased to be a director of CuDeco;

164.2. refers to the full terms and effect of the March 2018 Announcement;

164.3. refers to and repeats paragraphs 31A and 59A;

164.4. otherwise denies paragraph 164.

165. As to paragraph 165, he:

165.1. refers to and repeats paragraphs 31A and 59A;

165.2. otherwise denies paragraph 165.

166. He admits paragraph 166.

167. Subject to reference to the full terms and effect of the ASX announcement dated 31 August 2018, he admits paragraph 167.

168. He admits paragraph 168.

169. He admits paragraph 169.

170. He admits paragraph 170.

171. He admits paragraph 171.

172. He admits paragraph 172.

173. He admits paragraph 173.

B. Alleged contravening conduct caused Group Members' loss

174. He does not know and so cannot admit paragraph 174.

B.1. Market Conditions

175. As to paragraph 175, he:

175.1. says that to the extent the Applicants and any Group Members acquired their interests in CuDeco Shares on the ASX's financial market:

- (a) that was a market of investors or potential investors in CuDeco Shares which was operated by the ASX and regulated by the ASX Listing Rules and s 674(2) of the Corporations Act; and
- (b) the price at which CuDeco Shares were trading would reasonably be expected to have been informed or affected by material information disclosed to the ASX and other publicly available information, amongst other factors;

175.2. otherwise denies paragraph 175.

B.2. Market-based causation – market-based acquisitions

176. He denies paragraph 176.

177. He denies paragraph 177.

B.3. Market based causation – Rights issue

178. Subject to reference to the full terms and effect of the Replacement Prospectus, he admits paragraph 178.

179. He denies paragraph 179.

B.4. Reliance

180. As to paragraph 180, he:

180.1. says that the price at which CuDeco Shares were trading would reasonably be expected to have been informed or affected by material information disclosed to the ASX and other publicly available information, amongst other factors; and

180.2. otherwise denies paragraph 180.

181. He denies paragraph 181.

B.5. Alleged loss and damage

182. As to paragraph 182, he:

182.1. denies that the Applicants or any Group Members suffered loss or damage by reason of his conduct pleaded in the Statement of Claim or at all; and

182.2. otherwise denies paragraph 182.

VI. ENTITLEMENT TO RELIEF

183. He denies paragraph 183.

184. As to paragraph 184, he:

184.1. denies that by his conduct he contravened sections 1041H and 1041E of the Corporations Act, s 12DA of the ASIC Act or s 18 of the ACL;

184.2. denies that he is liable to compensate the Applicants and each of the Group Members for loss and damage as alleged or at all; and

184.3. otherwise denies paragraph 184.

185. As to paragraph 185, he:

185.1. denies that by his conduct he contravened s 728 of the Corporations Act;

185.2. denies that he is liable to compensate the Applicants and each of the Group Members for loss and damage as alleged or at all;

185.3. otherwise denies paragraph 185.

VII. RELIEF FROM LIABILITY

186. Further, and alternatively, if (which is denied) he is liable to the Applicants or any Group Member in the manner alleged, then he ought to be wholly or partly relieved from that liability pursuant to s 1317S and/or s 1318 of the Corporations Act on the basis that:

186.1. he acted honestly at all times; and

186.2. having regard to the circumstances of the case, he ought fairly to be excused for the contravention.

Particulars

- (i) He will rely on all of the circumstances of the case as determined at trial, including the matters pleaded at paragraphs 21, 25, 31A and 59A above.
- (ii) Further particulars may be provided following discovery and evidence.

VIII. PROPORTIONATE LIABILITY

187. In respect of the alleged contraventions by Dr Chen of s 12DA of the ASIC Act, s 18 of the ACL, s 1041E and 1041H of the Corporations Act (**Claims**), if (which is denied) he is liable to the Applicants and/or Group Members for loss or damage that is the subject of the Claims (**Claimed Loss**), the Claims are apportionable pursuant to the following provisions:

187.1. Claims in respect of alleged contraventions of s 12DA of the ASIC Act are apportionable pursuant to Subdivision GA of Division 2 of Part 2 of the ASIC Act; and

187.2. Claims in respect of alleged contraventions of s 18 of the ACL are relevantly apportionable pursuant to:

(a) Part VIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
and

(b) Part IVAA of the *Wrongs Act 1958* (Vic) (**Wrongs Act (Vic)**);

187.3. Claims in respect of alleged contraventions of s 1041H of the Corporations Act are apportionable pursuant to Division 2A of Part 7.10 of the Corporations Act;

187.4. Claims in respect of alleged contraventions of s 1041E of the Corporations Act are apportionable pursuant to Part IVAA of the *Wrongs Act* (Vic) as applied by s 79 of the *Judiciary Act 1903* (Cth),

(Proportionate Liability Legislation).

188. In respect of the:

188.1. Rocklands Misleading Conduct Contraventions;

188.2. Rocklands False Statement Contraventions;

- 188.3. FY2016 Misleading Conduct Contraventions;
- 188.4. FY2016 False Statement Contraventions;
- 188.5. FY2017 Misleading Conduct Contraventions; and
- 188.6. FY17 False Statement Contraventions (together, the **Director Contraventions**),

Hutchison, White and the Other Directors are to be considered concurrent wrongdoers within the meaning of and for the purposes of the Proportionate Liability Legislation, along with Dr Chen, by reason of:

- 188.7. the matters pleaded in paragraphs 7 to 89 and 161 to 182 of the Statement of Claim;
 - 188.8. the matters pleaded in paragraphs 9A and 10 of this Defence; and
 - 188.9. Hutchinson, White and the Other Directors being persons whose acts or omissions caused or also caused the Claimed Loss.
189. In the premises, the liability (if any) of Dr Chen to the Applicants and Group Members in respect of the Director Contraventions is limited by the Proportionate Liability Legislation to an amount reflecting that proportion of the Claimed Loss that the Court considers is just having regard to the extent of any responsibility of Dr Chen, and Hutchinson, White and the Other Directors, for that Claimed Loss.
190. In respect of the:
- 190.1. FY2016 Misleading Conduct Contraventions; and
 - 190.2. FY2016 False Statement Contraventions (together, the **Annual Report Contraventions**),

KPMG is to be considered a concurrent wrongdoer within the meaning of and for the purposes of the Proportionate Liability Legislation, along with Dr Chen, by reason of:

- 190.3. the matters pleaded in paragraphs 11, 96 to 110, 119 to 139 and 161 to 182 of the Statement of Claim;
- 190.4. the matters pleaded in paragraph 60 of this Defence; and
- 190.5. KPMG being a person whose acts or omissions caused or also caused the Claimed Loss.
191. In the premises, the liability (if any) of Dr Chen to the Applicants and Group Members in respect of the Annual Report Contraventions is limited by the Proportionate Liability Legislation to an amount reflecting that proportion of the Claimed Loss that the Court considers is just having regard to the extent of any responsibility of Dr Chen, and KPMG, for that Claimed Loss.
192. If:
- 192.1. the Applicants or any Group Members were advised by an adviser (**Adviser**) in relation to purchases of the CuDeco Shares for which claims are now made; and
- 192.2. the advice was negligent and caused or contributed to those purchases, that Adviser is a person whose acts or omissions caused the Claimed Loss in respect of that Applicant or Group Member.

Particulars

- (i) In relation to the Applicants, further particulars may be provided following discovery and evidence.
- (ii) In relation to Group Members, further particulars may be provided prior to trial of each Group Members' claims.
193. In the premises, the liability of Dr Chen (if any) to the Applicants and Group Members in respect of (all contraventions) is limited by the Proportionate Liability Legislation to an amount reflecting that proportion of the Claimed Loss that the

Court considers is just having regard to the extent of any responsibility of Dr Chen, and the Advisers, for that Claimed Loss.

IX. CONTRIBUTORY NEGLIGENCE

194. Insofar as the Applicants and Group Members make claims pursuant to:

194.1. s 12GF of the ASIC Act in respect of economic loss allegedly caused by Dr Chen's conduct which was allegedly in contravention of s 12DA of the ASIC Act;

194.2. s 236 of the ACL in respect of economic loss allegedly caused by Dr Chen's conduct which was allegedly in contravention of s 18 of the ACL;

194.3. s 1041I of the Corporations Act in respect of economic loss allegedly caused by Dr Chen's conduct which was allegedly in contravention of s 1041H of the Corporations Act;

194.4. s 1041I of the Corporations Act in respect of economic loss allegedly caused by Dr Chen's conduct which was allegedly in contravention of s 1041E of the Corporations Act;

he says as follows:

194.5. if and to the extent that the Applicants or any Group Members:

- (a) failed to have adequate regard to any of CuDeco's announcements and publications to the ASX (as pleaded in the Statement of Claim and this Defence) in full, then if (which is denied) the Applicants and Group Members suffered the loss claimed or any loss at all, the Applicants and Group Members did so as a result wholly or partly of the Applicants' or Group Member's (as applicable) failure to take reasonable care; or

- (b) otherwise failed to take reasonable care in connection with their decision to purchase CuDeco Shares; and
- 194.6. Dr Chen did not intend to cause the loss claimed by the Applicants or any Group Members or any loss at all, and if (which is denied) Dr Chen caused that loss, he did not do so fraudulently;
- 194.7. in the premises, if (which is denied) the Applicants or any Group Member suffered the loss claims or any loss at all, the damages which the Applicants or Group Member may recover in relation to the loss is to be reduced to the extent to which the Court thinks is just and equitable having regard to the Applicant's or Group Member's share in the responsibility for the loss.

Particulars

- (i) s 12GF of the ASIC Act in respect of the alleged contraventions of s 12DA of the ASIC Act;
- (ii) s 137B of the CCA in respect of the alleged contraventions of s 18 of the ACL;
- (iii) alternatively to (b), s 26 of the Wrongs Act (Vic) insofar as s 18 of the ACL is applied in Victoria by s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
- (iv) s 1041I of the Corporations Act in respect of the alleged contraventions of s 1041H of the Corporations Act; and
- (v) s 26 of the Wrongs Act (Vic) as applied by s 79 of the Judiciary Act in respect of the alleged contravention of s 1041E of the Corporations Act.

Date: 28 March 2023

A handwritten signature in blue ink, appearing to read 'George Alexander Croft', written over a horizontal line.

Signed by George Alexander Croft
Lawyer for the Third Respondent


This pleading was prepared by Alexandra Folie of counsel.

Certificate of lawyer

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

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

Date: 28 March 2023


Signed by _____
Lawyer for the Third Respondent

Schedule of Parties

Leo Toner	Second Applicant
Peter Robert Hutchison	Second Respondent
Dianmin Chen	Third Respondent
KPMG (A Firm) ABN 51 194 660 183	Fourth Respondent