

NOTICE OF FILING

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
MAGNIS ENERGY TECHNOLOGIES LIMITED ACN 115 111 763 & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.

Concise Statement



No. of 2024

Federal Court of Australia
 District Registry: Victoria
 Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

MAGNIS ENERGY TECHNOLOGIES LIMITED (ACN 115 111 763) AND ANOTHER

Defendants

A. INTRODUCTION

- 1 Magnis Energy Technologies Limited (**Magnis**) is a “vertically integrated” lithium-ion battery technology and materials company listed on the Australian Stock Exchange. Magnis’ “flagship project” — so described by its Chairman, Mr Frank Poullas — was a lithium-ion battery manufacturing facility in Endicott, New York (**iM3NY Facility**) that was operated by Magnis’ then indirect subsidiary, Imperium New York, Inc (**iM3NY**).
- 2 In late 2022 and 2023, Magnis failed to disclose to ASX Limited (**ASX**) information about the parlous financial and operating state of the iM3NY Facility. By doing so, Magnis contravened the continuous disclosure requirements of s 674A(2) of the *Corporations Act 2001* (Cth) (**Act**). Magnis also engaged in misleading or deceptive conduct contrary to s 1041H(1) of the Act and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
- 3 By reason of his involvement in Magnis’ s 674A(2) contraventions, Mr Poullas contravened s 674A(3) of the Act. Mr Poullas also engaged in misleading or deceptive conduct, and breached his duties as a Magnis director under s 180(1) of the Act.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 4 In about May 2017, Magnis signed a Joint Manufacturing Establishing Agreement for a 15 gigawatt hour (**GWh**) lithium-ion battery facility in New York State and acquired an approximate 31% share in iM3NY. At about that time, iM3NY was established and commenced activity towards the development of the iM3NY Facility, to commercialise battery cell technology licensed from Charge CCCV LLC (**C4V**). On 23 February 2018, Magnis reported that it held a 41% interest in iM3NY. Magnis’ ownership in iM3NY subsequently increased to 73% by 2023.
- 5 Before 30 November 2023, iM3NY was a subsidiary of Magnis and Magnis filed consolidated financial accounts including, relevantly, the financial accounts for iM3NY and Imperium New York, LLC (**iM3NY LLC**) (which holds a 95.5% interest in iM3NY). Between 2017 and 2023, Magnis made significant capital investments in iM3NY totalling approximately \$95,000,000. The financial performance of iM3NY and the return to Magnis on its significant investment in iM3NY has impacted and will impact Magnis’ financial performance, and its ability to raise funds and provide returns to shareholders.
- 6 Mr Poullas was at all material times a Magnis director, a member of its continuous disclosure committee, and one of Magnis’ appointed directors to the boards of iM3NY and its immediate parent entity, iM3NY LLC.

Fully-Funded Production

- 7 Since 19 April 2021, Magnis represented that: (a) iM3NY was fully funded for Gigawatt scale production of lithium-ion battery cells; and (b) further or alternatively, iM3NY was fully funded

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through to a capacity to generate at least 1 GWh of lithium-ion battery cells per year (together, the **Fully Funded Representations**). It did so by stating or conveying publicly that iM3NY was:¹

- (a) fully funded for Gigawatt scale production — or that the iM3NY Facility was fully funded for either 1 GWh or 1.8 GWh of annual production — in announcements submitted to and released by the ASX, including on 19 April 2021, 3 May 2021 (Mr Poullas), 30 July 2021, 6 October 2021, 1 November 2021 (Mr Poullas) and 19 September 2022. Mr Poullas also repeated these statements in interviews with journalists, including an interview with journalist Alan Kohler held on 22 September 2022; and
 - (b) seeking to secure funding for additional plant capacity or expansion, including on 18 February 2022 (Mr Poullas), 22 February 2022, 3 January 2023, 27 January 2023, 17 March 2023 (Mr Poullas) and 31 March 2023.
 - 8 Since at least August 2022, iM3NY provided updates to senior Magnis officers about its cell production and its financial performance and requirements. These updates were initially provided: (a) in the form of information packs provided for, and presented at, iM3NY board meetings, which Mr Poullas attended; and (b) through communications between Mr Poullas or Mr David Taylor (Magnis' then CEO) and iM3NY personnel. Then, from around January 2023, these updates were also provided through in-person engagement by, among others, Mr Taylor, Mr Poullas and/or Mr Hoshi Daruwalla (a Magnis director) with iM3NY and C4V personnel in the United States of America.
 - 9 By virtue of the iM3NY updates, at least Mr Poullas, and other senior Magnis officers, knew or should have known by no later than 25 January 2023, that:
 - (a) iM3NY was reporting several impediments and delays to its cell production, assembly automation and expectation of revenue, such that what had previously been announced by Magnis in relation to those matters was no longer accurate; and
 - (b) iM3NY would require up to US\$60m further funding for the iM3NY Facility to achieve 1 GWh plant output or production rate by the end of 2023 or at all (the **Further Funding Requirement**).
 - 10 By mid-January 2023, iM3NY forecast to Magnis, and Magnis and Mr Poullas were aware, that iM3NY did not expect revenue until October 2023, would have no money to pay creditors by around March 2023, and required capital expenditure of up to US\$33m to achieve, from 2024 onwards, 0.8 GWh of production or output. This was reported to the Magnis board by no later than 25 January 2023, and was the subject of a presentation to, and discussion by, the board on that date.
 - 11 By continuing to state from about this time, in the “About Magnis” section of public announcements, that iM3NY “operates a gigawatt scale... battery manufacturing plant...”, Magnis represented that iM3NY then operated a gigawatt scale battery manufacturing plant (the **Operates at Scale Representation**).
 - 12 In about early February 2023, Magnis provided US\$3m emergency funding to iM3NY, and iM3NY sought further urgent funding from Magnis to continue to meet operational expenses and to support battery cell production at a rate of less than 1 GWh. On about 31 March 2023, Magnis provided US\$10m further funding for that purpose and to avoid iM3NY's lenders taking action.
 - 13 On 31 March 2023, Magnis announced that it had provided “bridging finance” for the benefit of iM3NY “as it progresses its long-term funding initiatives (currently being advised by HSBC Americas) to increase annual plant capacity”. In doing so, Magnis impliedly represented on 31 March 2023 that it had funded an expansion — from 1 GWh — to the iM3NY Facility's annual production capacity (the **Capacity Increase Funding Representation**).
- Commercial Production**
- 14 Since about May 2021, Magnis published ASX announcements stating that iM3NY had entered “binding offtake agreements” for the sale of cells to be produced at the iM3NY Facility. This included a statement in an announcement dated 6 October 2021 that Magnis “projected (and unaudited) estimate of iM3NY's annual sales” was to be \$1.8 billion by 2027.

¹ A reference to “(Mr Poullas)” indicates that words in the announcement were attributed to Mr Poullas himself.

- 15 Between 4 June 2021 and 22 July 2022, Magnis made numerous statements in ASX announcements, marked as price sensitive, concerning anticipated timelines to the iM3NY Facility commencing “**fully-automated production**” of battery cells. These announcements included visual depictions of “timeline[s] of various production stages” indicating that “Fully Automated Process” would be achieved in “1H 2022”. In the same period, Magnis also published on its website articles by Dr Jawahar Nerkar, its Director of Battery Technologies, about battery production and “fully automated production”.
- 16 On 12 August 2022, Magnis made an announcement to the ASX, marked price sensitive, that the iM3NY Facility had commenced “**commercial production**”, without reference to fully automated production. By that announcement, Magnis represented that:
- (a) initial production of several thousand cells was expected in the next month, with the first few weeks of production to be tested for quality assurance;
 - (b) first revenues were expected in late September;
 - (c) annual battery cell manufacturing levels were expected to increase to 1GWh by the end of 2023 and would continue to ramp up to 1.8 GWh (or 15,000 cells per day), and then double-digit gigawatts over the rest of this decade; and
 - (d) in all the circumstances, the iM3NY Facility could from that time produce battery cells that were reasonably capable of being sold, at scale and without defect, for revenue (**Production Capability Representation**).
- 17 Magnis repeated the Production Capability Representation, including on:
- (a) 19 September 2022, in a corporate presentation published on the ASX which relevantly stated that “Mass Production of Cells has commenced”;
 - (b) 17 October 2022, in its 2022 annual report, which relevantly stated “[c]ommercial production commenced at iM3NY in August with an initial phase allocated for testing and quality assurance before production ramp up and sales start”; and
 - (c) 17 February 2023, in an announcement to the ASX, which relevantly stated that: (i) “[a]s previously reported, commercial cell production commenced at iM3NY in August 2022”; and (ii) “Production of cells continues with those cells being stockpiled on site to ensure delivery can occur in a timely manner...”.
- 18 Further, by making the numerous statements referred to in paragraph 15 anticipating commencement of fully automated production, and by making the ASX announcement referred to in paragraph 16 that the iM3NY Facility had commenced commercial production, Magnis impliedly represented on and from 12 August 2022 that iM3NY had commenced fully-automated production of lithium-ion battery cells at the iM3NY Facility.
- 19 By about 28 September 2022, Magnis’ Chief Executive Officer reported to the board that installation of the final automated cell assembly equipment had been delayed until at least November 2022. By 25 January 2023, Magnis was aware that iM3NY was trying but failing regularly to produce 300 cells per day, and faced ongoing delays to certification. By 25 January 2023, the board of Magnis was informed that 46 cells had been produced by iM3NY in the first two weeks of January, that cell assembly remained “primarily a manual, high cost, and slow process” and that iM3NY’s supplier for automated cell assembly equipment was unable to deliver. Mr Poullas and other directors were aware that the production process used by iM3NY to assemble cells at the iM3NY Facility was not fully-automated and would not be in the near future (**the No Fully-Automated Production Information**).
- 20 On 25 January 2023, the board of Magnis resolved that whilst there were issues at iM3NY, it was not at the point that required disclosure to the ASX unless it was determined by the Chief Executive Officer upon his return from visiting the iM3NY Facility that the situation was “more dire”. Shortly thereafter, the issues at iM3NY became “more dire”. By February 2023, Magnis was aware of “major issues due to cell swelling” that affected the cell assembly process at the iM3NY Facility. By no later than 23 April 2023, the Magnis directors knew that the iM3NY Facility’s manufacturing process was not under control, that iM3NY had made no saleable cells to that point, that cells that had been made to date were “95% scrap”, and that there was no known root cause of iM3NY’s inability to produce safe, saleable cells. Further, despite cells produced by iM3NY receiving UN/DOT38.3 certification on about 15 June 2023, Magnis continued to be informed by persons engaged by it and by iM3NY that production issues and delays at the iM3NY Facility were ongoing, that iM3NY was not producing saleable cells, and that defects such as cell swelling had not been resolved.

21 By reason of the above, at least Mr Poullas, and other senior Magnis officers, knew, by no later than 23 April 2023, that iM3NY: (a) could not, or alternatively did not know whether it could: (i) produce saleable cells at scale; or (ii) alternatively, produce defect-free saleable cells at scale; and (b) could not, or alternatively did not know whether it could, generate non de-minimis revenue from the sale of cells produced at the iM3NY Facility (individually or together, the **No Production at Scale Information**).

Continuous Disclosure Contraventions

22 At all relevant times since at least December 2021, Magnis maintained a continuous disclosure policy (**Policy**). Under the Policy, announcements made or to be made to the ASX, or whether matters should be disclosed to the ASX, were for the approval of either Magnis' board or its continuous disclosure committee. The former maintained a standing item at its meetings to address whether any matters required continuous disclosure. Mr Poullas, from at least December 2021 to December 2023, was Magnis' Information Officer in respect of iM3NY for the purposes of the Policy.

23 In addition to consideration of the Policy's requirements at board meetings, in late November 2022, and into December 2022, Magnis directors including Mr Poullas raised and discussed with one another, and Mr Taylor, and were aware, that adverse updates from iM3NY, including about cell production and timing of revenue, may have a detrimental effect on the market's perception of the value of iM3NY, and accordingly, of Magnis.

24 Since January 2023, Magnis directors raised for discussion with one another, and discussed, concerns that iM3NY was weeks away from bankruptcy and had unsolved production problems, that Magnis had not been clear with its shareholders about these issues, and that if iM3NY's financial or operating situation was made public Magnis' share price may crash.

25 Magnis was required to, but did not disclose to the ASX, immediately or at all, the following information: (a) of which it was aware; (b) that was not generally available; (c) that satisfied the criteria for disclosure to the ASX by Magnis under ss 674A and 677 of the Act; and (d) that Magnis knew comprised information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of Magnis shares (or was reckless or negligent as to whether it comprised information of that kind):

- (a) from 25 January 2023, the Further Funding Requirement;
- (b) from 28 September 2022 or alternatively from 25 January 2023, the No Fully-Automated Production Information; and
- (c) from 23 April 2023, the No Production at Scale Information.

Misleading or Deceptive Conduct

26 Further and alternatively, by making the following representations, Magnis engaged in conduct: (a) in relation to financial products, within the meaning of ss 1041H(1) and 1041H(2)(b) of the Act; (b) further or alternatively, in trade or commerce, in relation to financial services, within the meaning of s 12DA(1) of the ASIC Act:

- (a) from 27 January 2023, the Fully Funded Representations;
- (b) from 27 January 2023, the Operates at Scale Representation;
- (c) on 31 March 2023, the Capacity Increase Funding Representation; and
- (d) from 23 April 2023, the Production Capability Representation.

27 By reason of the matters outlined above, the representations referred to in paragraph 26 were misleading or deceptive, or likely to mislead or deceive.

Contraventions by Mr Poullas

28 Mr Poullas knew: (a) the content and materiality of information referred to in paragraph 25 above; and (b) that this material information had not been, but was required to be, disclosed by Magnis to the ASX, including by reason of his participation at meetings of the directors of the board of Magnis.

29 Mr Poullas contributed to the drafting, approved the contents and/or authorised or directed the transmission to the ASX (for the purpose of publication by the ASX) of the announcements that gave rise to the representations outlined in paragraph 26 above. Mr Poullas also made the statements to journalists outlined in paragraph 7(a) above.

- 30 Mr Poullas knew the matters referred to in paragraphs 28 and 29 above, and failed to ensure that he: (a) took all reasonable steps to mitigate the risk that material information concerning Magnis was not disclosed to ASX; (b) took all reasonable steps to mitigate the risk that any announcement or other document he approved for submission to ASX was inaccurate or misleading; and/or (c) took all reasonable steps to qualify, withdraw or correct any existing announcement or document lodged with ASX to mitigate the risk that any such announcement or document had become inaccurate or misleading.
- 31 Further, Mr Poullas: (a) caused or permitted Magnis to contravene s 674A(2) of the Act, s 1041H(1) of the Act and/or s 12DA of the ASIC Act in circumstances where it was reasonably foreseeable that such conduct might harm the interests of the company; and/or (b) exposed Magnis to the risk of declarations of contraventions of the law, legal costs and civil pecuniary penalties.
- 32 Mr Poullas thereby failed to exercise his powers and discharge his duties with the degree of care and diligence imposed by s 180 of the Act.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

- 33 ASIC seeks the relief set out in the accompanying Originating Process.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 34 By engaging in the conduct described in paragraph 25 above, Magnis contravened s 674A(2). These contraventions of s 674A(2) of the Act: (a) materially prejudiced the interests of acquirers or disposers of shares in Magnis within the meaning of section 1317G(1)(c)(i) of the Act; and/or (b) were "serious" within the meaning of s 1317G(1)(c)(iii) of the Act. Further or alternatively, by engaging in the conduct described in paragraphs 26 and 27 above, Magnis contravened s 1041H(1) of the Act and/or s 12DA(1) of the ASIC Act.
- 35 By reason of the matters set out in paragraphs 28 and 29 above, Mr Poullas contravened s 674A(3) of the Act and s 1041H(1) of the Act and/or s 12DA of the ASIC Act. These contraventions of s 674A(3) of the Act: (a) materially prejudiced the interests of acquirers or disposers of shares in Magnis within the meaning of s 1317G(1)(c)(i) of the Act; and/or (b) were serious within the meaning of s 1317G(1)(c)(iii) of the Act.
- 36 Further, by reason of the matters set out in paragraphs 28 to 32 above, Mr Poullas contravened s 180(1) of the Act. These contraventions of s 180(1) of the Act: (a) materially prejudiced the interests of Magnis within the meaning of s 1317G(1)(b)(i) of the Act; and/or (b) were serious within the meaning of s 1317G(1)(b)(iii) of the Act.

E. ALLEGED HARM

- 37 As a result of Magnis' failure to make continuous disclosure of material information, and its misleading or deceptive conduct, the market traded on a materially uninformed or misinformed basis. Investors rely on listed companies to provide accurate and timely information in relation to the company's affairs when making investment decisions. Magnis' shareholders, including its retail investors, were exposed to the potential to suffer harm and/or be materially prejudiced by reason of Magnis' actions. ASIC alleges Magnis shareholders and the market more broadly remain materially uninformed about the true situation at the iM3NY Facility.

This Concise Statement was prepared by Jason Pizer SC and Lynton Hogan, of counsel.

Certificate of lawyer

I Thomas Litchfield Jarvis certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 29 April 2024



Signed by Thomas Litchfield Jarvis
Lawyer for the Plaintiff