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16 Attorneys for Plaintiffs and Counterclaim Defendants  
17 Richard G. Krauth and R.M. Wade & Co.

18  
19 IN THE UNITED STATES DISTRICT COURT  
20  
21 FOR THE DISTRICT OF ARIZONA

22 Richard G. Krauth, an individual, and R.M.  
23 Wade & Co., an Oregon corporation,

24 Plaintiffs,

25 vs.

26 Phelps Dodge Corporation, a New York  
27 corporation, Phelps Dodge Bagdad, Inc., a  
28 Delaware corporation, Phelps Dodge Chino,  
Inc., a Delaware corporation, Phelps Dodge  
Morenci, Inc., a Delaware corporation, Phelps  
Dodge Sierrita, Inc., a Delaware corporation,  
Phelps Dodge Tyrone, Inc., a Delaware  
corporation, and Phelps Dodge Miami, Inc., a

No. CV 04-0544 PHX PGR

**FIRST AMENDED COMPLAINT  
FOR PATENT INFRINGEMENT**

**JURY TRIAL DEMANDED**

1 Delaware corporation,  
2  
3 Defendants.

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6 Phelps Dodge Corporation, a New York  
7 corporation, Phelps Dodge Bagdad, Inc., a  
8 Delaware corporation, Phelps Dodge Chino,  
9 Inc., a Delaware corporation, Phelps Dodge  
10 Morenci, Inc., a Delaware corporation, Phelps  
11 Dodge Sierrita, Inc., a Delaware corporation,  
12 Phelps Dodge Tyrone, Inc., a Delaware  
13 corporation, and Phelps Dodge Miami, Inc., a  
14 Delaware corporation,

15 Counterclaim Plaintiffs,

16 vs.

17 Richard G. Krauth, an individual, and R.M.  
18 Wade & Co., an Oregon corporation,

19 Counterclaim Defendants.

20 For their complaint, plaintiffs Richard G. Krauth and R.M. Wade & Co.  
21 (collectively "plaintiffs") allege against defendants Phelps Dodge Corporation  
22 ("Phelps Dodge") and Phelps Dodge Bagdad Inc., Phelps Dodge Chino Inc.,  
23 Phelps Dodge Morenci Inc., Phelps Dodge Sierrita Inc., Phelps Dodge Tyrone Inc.,  
24 and Phelps Dodge Miami (collectively the "Mining Corporations"), as follows:

25 THE PARTIES

26 1. Plaintiff Richard G. Krauth is an individual having an address at  
27 7466 N. Fourth St., Fresno, California 93721. Mr. Krauth is the named inventor  
28 and owner of U.S. Patent No. 5,005,806 entitled Controlled Percolation System  
and Method for Heap Leach Mining ("the '806 Patent") and U.S. Patent No.

1 5,030,279 entitled Controlled Percolation Method for Heap Leach Mining (“the  
2 '279 Patent”).

3 2. Plaintiff R.M. Wade & Co. is a corporation duly organized and  
4 existing under the laws of the State of Oregon, having its principal place of  
5 business at 9995 S.W. Avery Street, Tualatin, Oregon 97062 ("Wade").

6 3. Defendant Phelps Dodge Corporation is, upon information and  
7 belief, a New York corporation having an office at 2600 N. Central Avenue,  
8 Phoenix, AZ 85004, and is a holding company of multiple subsidiaries including  
9 each of the individual Mining Corporations, substantially controls the activities of  
10 each of the Mining Corporations, and through the mines and other held  
11 corporations conducts a substantial amount of business in the State of Arizona  
12 (“Phelps Dodge”).

13 4. Defendant Phelps Dodge Bagdad is, upon information and belief, a  
14 Delaware corporation having an office at 100 Main Street, Bagdad, AZ 86321.

15 5. Defendant Phelps Dodge Chino Inc. is, upon information and belief,  
16 a Delaware corporation having an office at 210 Cortez Ave, Hurley, NM 88043-  
17 9744.

18 6. Defendant Phelps Dodge Morenci Inc. is, upon information and  
19 belief, a Delaware corporation having an office at 4524 US Hwy 191, Morenci, AZ  
20 85540.

21 7. Defendant Phelps Dodge Sierrita Inc. is, upon information and  
22 belief, a Delaware corporation having an office at 6200 W. Duvall Mine Road,  
23 Green Valley AZ 85614.

24 8. Defendant Phelps Dodge Tyrone Inc. is, upon information and belief,  
25 a Delaware corporation having an office at Highway 90 S & Tyrone Mine Road,  
26 Tyrone NM 88065.

1           9.       Defendant Phelps Dodge Miami Inc. is, upon information and belief,  
2 a Delaware corporation having an office at 4342 E. US Highway 60, Claypool AZ  
3 52292.

4                                 JURISDICTION AND VENUE

5           10.       The claim of plaintiffs arises under the laws of the United States  
6 relating to patents, Title 35 of the United States Code. Diversity exists between the  
7 parties and the amount in dispute exceeds seventy five thousand dollars (\$75,000).  
8 Therefore, this Court has jurisdiction of this action under 28 USC §§ 1331, 1332  
9 and 1338(a).

10          11.       Venue is proper in this district pursuant to 28 USC § 1391(b)(2) and  
11 (c) because a substantial part of the events giving rise to the claim occurred here.

12                                 BACKGROUND

13          12.       Wade has, for many years, been in the business of designing fluid  
14 distribution equipment. On a date prior to July 30, 1990, Mr. Krauth conceived  
15 and reduced to practice an invention disclosed in the '806 Patent. On  
16 approximately the same date Mr. Krauth conceived and reduced to practice an  
17 invention disclosed in the '279 Patent. A patent application was filed on these  
18 inventions in the United States Patent and Trademark Office. The application was  
19 fully examined and the two patents were duly and legally issued. One patent was  
20 issued on April 9, 1991 and was assigned U.S. Patent No. 5,005,806. A copy of  
21 this patent is appended hereto as Exhibit A. A second patent issued on July 9, 1991  
22 and was assigned U.S. Patent No. 5,030,279. A copy of the '279 Patent is  
23 appended hereto as Exhibit B. The '806 Patent and '279 Patent will sometimes  
24 collectively be referred to as "the Krauth Patents."

25          13.       The Krauth Patents were exclusively licensed to Wade, which has  
26 been operating under the Krauth Patents ever since.

27          14.       Products used in the system covered by the '806 Patent have been  
28 sold by Wade and are now being sold by Wade. Such products have been marked

1 with U.S. Patent No. 5,005,806 since shortly after the issuance of the '806 Patent.  
2 Products used in the method covered by the '279 Patent have been sold by Wade  
3 and are now being sold by Wade. Such products have been marked with U.S.  
4 Patent No. 5,030,279 since shortly after issuance of the '279 Patent.

5 15. On August 16, 2004, the Court ordered that this case be stayed or  
6 suspended, pending reexamination proceedings in the United States Patent and  
7 Trademark Office. In those proceedings, plaintiffs presented prior art that had  
8 been uncovered by defendants so that the United States Patent and Trademark  
9 Office could reconsider the patentability of the inventions in view of this new prior  
10 art. Along with that prior art, plaintiffs also presented the arguments of patent  
11 invalidity that had been presented to them by defendants. In Office actions dated  
12 October 5, 2005, the United States Patent and Trademark Office reaffirmed the  
13 patentability of the claimed inventions in view of the prior art previously of record,  
14 as well of that new prior art presented by defendants.

#### 15 INFRINGEMENT OF THE '806 PATENT

16 16. Upon information and belief, each of the Mining Corporations  
17 purchased products used in the system covered by the '806 Patent from a source  
18 other than Wade. The Mining Corporations then used these products to copy the  
19 system covered by the '806 Patent. The Mining Corporations have been and are  
20 practicing the patented system in the United States without authorization from  
21 either of the plaintiffs and thereby have infringed and are infringing the '806  
22 Patent.

23 17. Defendant Phelps Dodge infringes the '806 Patent by holding itself  
24 out to others that it owns the Mining Corporations where the direct infringement is  
25 taking place. Defendant Phelps Dodge further infringes the patent by acting as the  
26 alter ego and the agent of the Mining Corporations. Phelps Dodge further  
27 infringes the '806 Patent, on information and belief, by inducing the direct  
28 infringement by the Mining Corporations, in violation of 35 USC § 271(b).

1           18. Defendants Phelps Dodge and the Mining Corporations have been  
2 unjustly enriched by obtaining the benefit of the '806 Patent without paying for  
3 same. Due to this unjust enrichment, plaintiffs should be awarded an allocation  
4 from Phelps Dodge and the Mining Corporations of a reasonable portion of  
5 increased profitability achieved as a result of their infringement of the '806 Patent.  
6 In any event, plaintiffs should pursuant to 35 USC § 284 be awarded an amount  
7 adequate to compensate for the infringement.

8   INFRINGEMENT OF THE '279 PATENT

9           19. Upon information and belief, each of the Mining Corporations  
10 purchased products used in the method covered by the '279 Patent from a source  
11 other than Wade. The Mining Corporations then used these products to copy the  
12 method covered by the '279 Patent. The Mining Corporations have been and are  
13 practicing the patented method in the United States without authorization from  
14 either of the plaintiffs and thereby have infringed and are infringing the '279  
15 Patent.

16           20. Defendant Phelps Dodge infringes the '279 Patent by holding itself  
17 out to others that it owns the Mining Corporations where the direct infringement is  
18 taking place. Defendant Phelps Dodge further infringes the patent by acting as the  
19 alter ego and the agent of the Mining Corporations. Phelps Dodge further  
20 infringes the '279 Patent, on information and belief, by inducing the direct  
21 infringement by the Mining Corporations, in violation of 35 USC § 271(b).

22           21. Defendants Phelps Dodge and the Mining Corporations have been  
23 unjustly enriched by obtaining the benefit of the '279 Patent without paying for  
24 same. Due to this unjust enrichment, plaintiffs should be awarded an allocation  
25 from Phelps Dodge and the Mining Corporations of a reasonable portion of  
26 increased profitability achieved as a result of their infringement of the '279 Patent.  
27 In any event, plaintiffs should pursuant to 35 USC § 284 be awarded an amount  
28 adequate to compensate for the infringement.

1                   WILLFUL INFRINGEMENT OF BOTH THE '806 AND '279 PATENTS

2                   22.     On March 2, 2002 Wade informed Phelps Dodge of the Krauth  
3 Patents. Despite this knowledge, Phelps Dodge and its subsidiary Mining  
4 Corporations continued their infringement of the Krauth Patents, thus rendering  
5 the infringement willful and making the case exceptional. This entitles plaintiffs to  
6 treble damages and attorney fees pursuant to 35 USC §§ 284 and 285.

7                   23.     On December 20, 2002 Wade followed up and provided Phelps  
8 Dodge another notice of the Krauth Patents. Despite this second notice, Phelps  
9 Dodge and its subsidiary Mining Corporations continued their willful infringement  
10 of the Krauth Patents, thus further entitling plaintiffs to treble damages and  
11 attorney fees pursuant to §§ 284 and 285.

12                  24.     Wade subsequently requested a meeting with Phelps Dodge  
13 personnel so on May 2, 2003 plaintiffs met with Phelps Dodge personnel. Despite  
14 this meeting where Phelps Dodge's and the Mining Corporations' infringement of  
15 the Krauth Patents were discussed, the willful infringement continued. As a result,  
16 plaintiffs were forced to file this action.

17   PRAYER FOR RELIEF

18                  WHEREFORE, Plaintiffs demand judgment:

19                  1.     For a decree that Phelps Dodge and the Mining Corporations have  
20 infringed the '806 Patent;

21                  2.     For a preliminary and permanent injunction restraining and enjoining  
22 Phelps Dodge, the Mining Corporations, their agents, servants, employees,  
23 officers, and those persons in active concert or participation with Phelps Dodge or  
24 the Mining Corporations, from further infringement of the '806 Patent pursuant to  
25 35 USC § 283.

26                  3.     For an accounting against Phelps Dodge and the Mining Corporation  
27 for an amount adequate to compensate for the infringement of the '806 Patent,  
28 including a reasonable percentage of the increase in profitability resulting from

1 infringement of the '806 Patent, pursuant to 35 USC § 284; in any event plaintiffs  
2 shall be awarded no less than a reasonable royalty for the unauthorized use of the  
3 patented system by Phelps Dodge and the Mining Corporations.

4 4. For damages in an amount equal to three times the amount of  
5 damages found or assessed, to compensate plaintiffs for the willful infringement of  
6 the '806 Patent by Phelps Dodge and the Mining Corporations, pursuant to 35 USC  
7 § 284.

8 5. For a decree that Phelps Dodge and the Mining Corporations have  
9 infringed the '279 Patent;

10 6. For a preliminary and permanent injunction restraining and enjoining  
11 Phelps Dodge, the Mining Corporations, their agents, servants, employees,  
12 officers, and those persons in active concert or participation with Phelps Dodge or  
13 the Mining Corporations, from further infringement of the '279 Patent pursuant to  
14 35 USC § 283.

15 7. For an accounting against Phelps Dodge and the Mining  
16 Corporations for an amount adequate to compensate for the infringement of the  
17 '279 Patent, including a reasonable percentage of the increase in profitability  
18 resulting from infringement of the '279 Patent, pursuant to 35 USC § 284; in any  
19 event plaintiffs shall be awarded no less than a reasonable royalty for the  
20 unauthorized use of the patented process by Phelps Dodge and the Mining  
21 Corporations.

22 8. For damages in an amount equal to three times the amount of  
23 damages found or assessed, to compensate plaintiffs for the willful infringement of  
24 the '279 Patent by Phelps Dodge and the Mining Corporations, pursuant to 35 USC  
25 § 284.

26 9. For an award of reasonable attorney fees against Phelps Dodge and  
27 the Mining Corporations pursuant to 35 USC § 285; and

28 10. For such other and further relief as may be just and proper.



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JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated this 22nd day of December, 2005.

Respectfully submitted,

KOLISCH HARTWELL, P.C.

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Attorneys for Plaintiffs and Counterclaim  
Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2005, I electronically transmitted the foregoing FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT to the Clerk's office using the CM/ECF system for the filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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