

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: WAD177/2021
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
HOLISTA COLLTECH ACN 094 515 992 & ANOR
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 4/08/2021 9:28:45 AM AWST

Registrar

Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



CONCISE STATEMENT

Federal Court of Australia

No WAD

of 2021

District Registry: Western Australia

Division: General

IN THE MATTER OF HOLISTA COLLTECH LTD

ACN: 094 515 992

Australian Securities and Investments Commission

Plaintiff

and

Holista Colltech Ltd (ACN 094 515 992)

First Defendant

Dr Rajendran Marnickavasagar

Second Defendant

A. INTRODUCTION

1. These proceedings concern the conduct of Holista Colltech Ltd (**Holista**) and its Managing Director and Chief Executive Officer (**CEO**), Dr Rajendran Marnickavasagar, in connection with misleading or deceptive announcements submitted to the Australian Securities Exchange (**ASX**) with respect to sales of sanitiser products which were marketed in the context of the COVID-19 (SARS-CoV-2) pandemic and a YouTube Video in which Dr Marnickavasagar claimed that a sanitiser was effective against the coronavirus “involved in the current Wuhan outbreak” before there were test results to support this claim.
2. ASIC alleges that Holista contravened ss 674(2) and 1041H(1) of the *Corporations Act 2001* (Cth) (**Act**). ASIC also alleges that Dr Marnickavasagar made available, authorised and/or permitted the announcements and other responses to the ASX containing false or misleading information contrary to s 1309(2) of the Act. Further, ASIC alleges that Dr Marnickavasagar exposed Holista to the risk of declarations of contraventions of the law and civil pecuniary penalties and thereby failed to exercise his powers and discharge his duties with the degree of care and diligence required by s 180(1) of the Act.

B IMPORTANT FACTS GIVING RISE TO THE CLAIMS

3. Holista is a biotechnology company, which is listed on the ASX. During 1 January 2020 to 9 July 2020 (**Relevant Period**), it marketed sanitising products under the brand “NatShield”, which utilise an ingredient known as “Path-Away”. At all material times, Holista’s business involved research, development, manufacturing and marketing of “health style” products. In

Filed on behalf of (name & role of party) Australian Securities & Investments Commission, Plaintiff

Prepared by (name of person/lawyer) Ingrid McCormick, Litigation Counsel

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Attention: Ingrid McCormick

the year ending 31 December 2019, Holista generated revenues of \$7,257,778 and other income of \$147,131.

4. Dr Marnickavasagar has been a director of Holista since 10 July 2009 and was the founder of the company. He has been the CEO and Managing Director of Holista since July 2009. During the Relevant Period, Dr Marnickavasagar was an officer of Holista within the meaning of s 9 of the Act.

B1 7 February 2020 YouTube Representation regarding COVID-19 efficacy

6. On 29 January 2020, Holista published an ASX announcement in which it stated that there had been a spike in demand in Malaysia for its NatShield disinfectant spray following the outbreak of COVID-19 in Wuhan. The announcement stated that NatShield contained the Path-Away anti-microbial compound which was developed by Global Infection Control Consultants LLC (**GICC**). It also stated that Holista was the exclusive distributor of Path-Away for the ASEAN region.
7. On 7 February 2020, Dr Marnickavasagar participated in an interview regarding NatShield which was posted by Holista on YouTube. In the video, he said "*I want to talk to you about a remarkable sanitiser that kills more than 170 different pathogens including the coronavirus which is what is involved in the current Wuhan outbreak*" (**YouTube Representation**).
8. At the time Dr Marnickavasagar made the YouTube Representation, Holista had not received the results of tests to confirm Path-Away's effectiveness in killing the coronavirus which was involved in the Wuhan outbreak. Holista, in collaboration with GICC, only commenced testing Path-Away on 12 March 2020 to determine its efficacy as a sanitiser against COVID-19. On 20 April 2020, Holista announced that Path-Away had been tested by a UK laboratory to be 99.99% effective against the feline coronavirus, which was said to be a *surrogate* of COVID-19.
9. The YouTube Representation was misleading or deceptive or likely to mislead or deceive because at the time Holista made the YouTube Representation, it did not possess evidence which confirmed that NatShield killed the COVID-19 (SARS-CoV-2) virus. On 22 April 2020 at 10.32 am Holista published an ASX announcement in which it stated that "*the YouTube video contains misleading and incorrect statements with respect to the Wuhan Coronavirus*".

B2 9 April 2020 Orders Representation and Revenue Representation

10. On 19 March 2020 at around 9.48 am (AEDT), Holista published an ASX announcement in which it stated that it had appointed Health Therapies LLC as its exclusive distributor of NatShield for the United States. It stated that Health Therapies LLC had exclusivity for the US market for 3 years and had committed to a minimum order of at least A\$3.0 million per year.
11. On 9 April 2020 at around 9.25 am (AEST), Holista published an announcement headed "*Holista's U.S. Distributor Increases Orders of NatShield™ Amounting to A\$3.8M*" (**9 April 2020 Announcement**). The announcement stated that "*Health Therapies has placed additional orders of 415,000 bottles totalling A\$3.8 million for delivery between April and June 2020*" (**Orders Representation**). It further stated that "*Holista expects to record revenue of A\$3.8 million from combined total orders of 424,558 bottles of NatShield™ received in the United States of America to date from Health Therapies*" (**Revenue Representation**).
12. The Orders Representation and the Revenue Representation were false, misleading or deceptive or likely to mislead or deceive because at the time Holista made the representations, Health Therapies LLC had not placed additional orders for 415,000 bottles of NatShield totalling A\$3.8 million. In circumstances where Health Therapies LLC had not

placed additional orders for 415,000 bottles totalling A\$3.8 million, Holista did not have reasonable grounds for making the Revenue Representation within s 769C of the Act.

13. Between April 2020 and July 2020, Mr Morrell Maison (of Health Therapies LLC) and officers of Holista including Mr Edward Tan (Chief Financial Officer) and Dr Marnickavasagar corresponded regarding Health Therapies LLC's orders for NatShield.
14. On 22 April 2020 at 11.34 am (AWST), Mr Maison sent an email to Mr Tan, copying Dr Marnickavasagar, regarding a purchase order for NatShield. Mr Maison stated: *"I never agreed to prepay for stock and hold it in the USA, I am still selling the original order I had, and have more sales coming in this week"* and *"Dr Rajen and I agreed the stock would be sent so we had stock in the USA available as we sold to distributors, not that I pay in advance for stock"*.
15. Between 29 June 2020 and 8 July 2020, drafts of an ASX Announcement providing an update on sales of NatShield were circulated between Mr Tan and members of the Holista board. On 8 July 2020, after Mr Tan provided the board of Holista with copies of purchase orders from Health Therapies LLC, Mr Jonathan Pager, a non-executive Director at the time, observed: *"These are largely forward dated and don't reconcile to \$2.3m. Why? What supported the original \$3.8m?"* Mr Tan replied: *"The initial 3.8 was forecast from Health LLC without any confirmed PO [Purchase Orders] from them"*.
16. On 9 July 2020 at around 10.40 am (AEST), Holista published an announcement headed **"Update on Sales and Distribution Agreements for NatShield™ Sanitiser" (9 July 2020 Announcement)**. It stated that *"targeted sales of \$A3.8 million from Health Therapies LLC by 30 June 2020 (as announced on 9 April 2020) have been scaled back and/or delayed by the purchasing parties"*. It also stated that: *"for the six months ended 30 June 2020, Holista now expects to record revenue of A\$0.5m for the sale of Natshield™ hand sanitisers globally, of which approximately a third is from Health Therapies LLC."*

B3 Failure to disclose absence of placed orders, and order and revenue shortfalls

17. Holista was aware on 9 April 2020 (or alternatively by at least 22 April 2020), but did not disclose to the ASX until 9 July 2020 Announcement that:
 - (a) Health Therapies LLC had not placed orders for 415,000 bottles of NatShield totalling A\$3.8million for delivery between April and June 2020 (**Placed Orders Information**);
 - (b) Holista was unlikely to receive orders of 415,000 bottles of NatShield totalling A\$3.8million from Health Therapies LLC for delivery between April and June 2020 (**Orders Shortfall Information**); and
 - (c) Holista was unlikely to record revenue of A\$3.8 million from orders of 415,000 or 424,558 bottles of NatShield placed by Health Therapies LLC for delivery between April and June 2020 (**Revenue Shortfall Information**).

B4 9 April 2020 ASX Aware Query regarding GICC partnership

18. On 20 February 2020 at around 5.09 pm (AEDT), Holista published an ASX announcement in which it stated that it had partnered with GICC to co-develop a nasal sanitising balm using Path-Away. It stated that GICC had agreed to extend Holista's distribution and marketing rights to include the UK and Europe (**20 February 2020 Announcement**).
19. On 9 April 2020 at 12.53 pm (AEST), the ASX sent Holista an ASX Aware Query concerning the 20 February 2020 Announcement (**9 April 2020 ASX Query**). The ASX requested a response from Holista which addressed, among other matters, when Holista had become

aware of certain information disclosed in the announcement regarding its announced partnership with GICC.

20. On 17 April 2020 at 11.13 am (AEST), Holista provided the ASX with a response to the 9 April 2020 ASX Aware Query (**17 April 2020 ASX Response**). In that response, Holista stated (among other matters) that: "*[i]t was at 1.47PM AWST [on 20 February 2020], prior to the press conference being held that final negotiations were concluded, board approval of the Announcement was received, with a Binding Collaboration Term Sheet being executed, for the co-development of the Nasal Sanitising Balm for Global Markets*".
21. On 20 April 2020 at 10.26 am (AEST), Holista released an amended version of its response to the 9 April 2020 ASX Aware Query as an ASX announcement (**20 April 2020 ASX Response**). In that response, Holista again stated (among other matters) that: "*It was at 1.47PM AWST [on 20 February 2020], that final negotiations were concluded, board approval of the Announcement was received, with a Binding Collaboration Term Sheet being executed, for the co-development of the Nasal Sanitising Balm for Global Markets...*"
22. The information provided to the ASX in the 17 April 2020 ASX Response and the 20 April 2020 ASX Response was false and misleading in a material particular because the term sheet had been executed on or around 13 or 14 April 2020, and not at 1.47 pm (AWST) on 20 February 2020. The signing of the term sheet by the parties and the timing of its execution were significant in the context of the business of Holista for reasons including :
 - (a) Holista claimed in the 20 February 2020 Announcement the parties had partnered to co-develop a new nasal sanitising balm for global markets, being the world's first nasal sanitising balm using Path-Away®, "*that has proven to kill all previously tested corona-type viruses*"; and
 - (b) Holista claimed in the 20 February 2020 Announcement GICC "*extends Holista's distribution and marketing rights for Path-Away® to include the UK and Europe, focussing on nasal sanitising balm and hand-held NatShield™ Sanitiser*".

B5 Dr Marnickavasagar

23. Dr Marnickavasagar as Managing Director and CEO of Holista:
 - (a) made the representation set out in paragraph 7 on behalf of Holista;
 - (b) made available, gave, authorised or permitted the 9 April 2020 Announcement referred to in paragraph 11 to be made to the ASX; and
 - (c) made available, gave, authorised or permitted the responses made to the ASX set out in paragraphs 20 and 21.

C. RELIEF SOUGHT FROM THE COURT

24. ASIC seeks declarations, pecuniary penalties and costs against Holista and Dr Marnickavasagar as set out in the Originating Process accompanying this Concise Statement. It also seeks a disqualification order against Dr Marnickavasagar.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

25. Misleading or Deceptive Conduct by Holista: By reason of the matters set out in paragraphs 7 to 9 and 11 to 12, Holista engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive in contravention of s 1041H(1) of the Act by making each of:

- (a) the YouTube Representation;
 - (b) the Orders Representation; and
 - (c) the Revenue Representation.
26. Breach of continuous disclosure obligations by Holista: The Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information (both individually and collectively) satisfied the criteria for disclosure under ss 674 of the Act (when read with s 677). Holista was therefore obliged to disclose each of those matters to ASX immediately upon becoming aware of those matters. Between 9 April 2020 (or alternatively 22 April 2020) and 9 July 2020, in contravention of s 674(2) of the Act, Holista failed to notify the ASX of:
- (a) the Placed Orders Information,
 - (b) the Orders Shortfall Information; and/or
 - (c) the Revenue Shortfall Information.
27. With respect to the period from 26 May 2020 to 9 July 2020, while the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) was in force, Holista knew that or alternatively was reckless or negligent with respect to whether the Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information would, if it were generally available, have a material effect on the price or value of shares in Holista.
28. Breach of directors' duties by Dr Marnickavasagar: ASIC alleges that Dr Marnickavasagar breached s 180(1) of the Act by causing and/or permitting Holista to breach s 1041H(1) and/or s 674(2) of the Act, in that he failed to:
- (a) take all necessary steps to ensure that any representation made by him on behalf of Holista was not misleading or deceptive or likely to mislead or deceive;
 - (b) take all necessary steps to ensure that any announcement or other document he approved for submission to the ASX was not misleading or deceptive or likely to mislead or deceive; and
 - (c) take all necessary steps to qualify, withdraw or correct any existing announcement or document made to the ASX so that it was not misleading or deceptive or likely to mislead or deceive,
- and thereby exposed Holista to the risk of proceedings for contraventions of the Act, legal costs and penalties.
29. Provision of false information to a market operator and members by Dr Marnickavasagar: ASIC alleges that Dr Marnickavasagar breached s 1309(2)/(12) of the Act by making available or giving, or alternatively authorising or permitting the making available or giving of:
- (a) the 9 April 2020 Announcement, to the ASX and to members of Holista, containing the Orders Representation and the Revenue Representation;
 - (b) the 17 April 2020 ASX Response to the ASX, in which Holista represented that a Binding Term Sheet was executed between Holista and GICC on 20 February 2020 at around 1.47 pm;

- (c) the 20 April 2020 ASX Response to the ASX and to members of Holista, in which Holista represented that a Binding Term Sheet was executed between Holista and GICC on 20 February 2020 at around 1.47 pm,

being information that was false or misleading in a material particular without having taken reasonable steps to ensure that the information was not false or misleading in a material particular.

E. THE ALLEGED HARM SUFFERED FROM THE CONDUCT

30. As a result of Holista's misleading or deceptive conduct and its failure to make continuous disclosure, and Dr Marnickavasagar's making available or giving, or alternatively authorising or permitting the making available of false or misleading information, the market traded on a materially uninformed or misinformed basis at various times during the Relevant Period. In the period from 9 April 2020 and 9 July 2020, 292,680,680 Holista shares with a total value of \$48,166,765 were traded.

This Concise Statement was prepared by Dr Sarah Pritchard SC and Matthew Sherman of Counsel.

Certificate of lawyer

I, Ingrid McCormick, certify to the Court that, in relation to the statement of claim 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 pleading.

Date 4 August 2021



Signed by Ingrid McCormick

Lawyer for the Plaintiff