

7 September 2023

Gold Rock Limited
[REDACTED]
[REDACTED]
[REDACTED]

By email only: [REDACTED]
[REDACTED]

Attention: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning for unsubstantiated or false or misleading representations about a surface treatment product

1. The Commerce Commission (**Commission**) has been investigating Gold Rock Limited (**Gold Rock**) under the Fair Trading Act 1986 (**FT Act**). We have now completed our investigation and are writing to inform you about our views.
2. The Commission considers that Gold Rock is likely to have breached the FT Act by making representations about the Nano Silver hand and surface disinfectant spray (**Nano Silver**), which Gold Rock did not have reasonable grounds for, and for making a representation that was false or misleading.
3. We are issuing you with this warning letter because in our view, Gold Rock's conduct is likely to have breached s 12A and s 13(a) of the FT Act. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.¹
4. We note that Gold Rock has now ceased making representations about Nano Silver and has removed the product from its website. We recommend that Gold Rock takes legal advice and puts policies in place to ensure ongoing compliance with the FT Act.

¹ Commission's published *Enforcement Response Guidelines* at [41].

How this conduct can break the law

5. Section 12A of the FT Act prohibits persons in trade from making unsubstantiated representations, i.e. where the person making the representation does not have reasonable grounds to support their claims, at the time the claim was made.
6. The making of representations as to efficacy without testing performance in real world or real world simulated conditions is likely to be a breach of s 12A of the FT Act.
7. Section 13(a) of the FT Act prohibits persons in trade from making false or misleading representations about goods being of a particular kind.
8. By representing that a product is cruelty free when it has been tested on animals is likely to be a false or misleading representation, in breach of s 13(a) of the FT Act.

The investigation

9. Gold Rock sold a product called Nano Silver which is a hand and surface disinfectant spray and is intended to kill/inactivate organisms such as viruses and bacteria.
10. Gold Rock made representations on its website², Facebook page and product packaging about Nano Silver including that it:
 - 10.1 lasted for up to 30 days on hard surfaces and for up to 96 hours on skin (together **duration claims**); and that
 - 10.2 the product was cruelty free.
11. Examples of the Nano Silver advertising are included as **Attachment A**.
12. In June 2022 Gold Rock was asked by the Commission to provide the information that it relied on to substantiate the representations at the time the claims were made. Gold Rock supplied:
 - 12.1 documents and test reports that it had been provided by the manufacturer;
 - 12.2 tests it had commissioned itself;
 - 12.3 documents relating to the Ministry for Primary Industries³ approval for Nano Silver; and
 - 12.4 documents relating to the use of nano silver technology more generally, but not specifically relating to the testing of Gold Rock's Nano Silver product.

² <https://nanosilver.co.nz/>

³ Nano Silver has been approved for use in premises registered under the Animal Products Act regime by the Ministry for Primary Industries.

13. The documents supplied included a test report Gold Rock had commissioned from a New Zealand laboratory to the standard JIS Z 2801:2010 (**JIS test**). The test was carried out on a pre-treated plastic sample supplied by Gold Rock and testing was carried out more than 30 days after the sample was submitted.
14. Gold Rock supplied further information to the Commission in June 2023. One document supplied was from the manufacturer and was related to testing it had carried out for the 96 hours duration claim on silicone hands (**silicone hands test**). The other documents related to other products containing nano silver particles or nano silver technology generally.
15. The documents and test reports supplied by Gold Rock were reviewed by an expert microbiologist instructed by the Commission who provided his opinion that the duration claims were, in his view, not supported by the test reports provided. In summary, the Commission's expert concluded that:
 - 15.1 "The tests do not subject the treated surface to reasonable (or any) cleaning or other weathering and so do not support the claims for protection of a surface in frequent use that is routinely disinfected (unless disinfected by the product). If a product claims protection for 30 days, or indeed any timescale, I think it is reasonable to qualify that claim if there are scenarios where that protection may be lost".
 - 15.2 "The claims that Nano Silver is protective of hands (99.9% kill after 96 hours) are not supported. No tests relating to the durability of skin were supplied originally." In relation to the silicone hands test, there are a number of deficiencies with the document, such as the lack of reviewable and verifiable scientific content and the testing methodology. "The results also say without washing and wiping, so are not really relevant to real life where washing and wiping are a feature of the challenges a hand sanitiser with residual activity will face."
 - 15.3 Considering the documents that referred to nano silver technology generally: "If tests or literature of another product is relied upon, the supplier should clearly demonstrate why those data relate to their surface sanitiser product beyond sharing silver or silver nanoparticles as an active ingredient."
16. In relation to the cruelty free claim, one of the reports supplied by Gold Rock to the Commission referred to a skin irritability test that had been carried out on rabbits. The manufacturer also published this skin irritability test carried out on rabbits on its website.

Gold Rock's response

17. Gold Rock told the Commission that it did not intend to mislead consumers by making the representations about the Nano Silver product.

18. Gold Rock believed that the JIS test carried out on hard surfaces for 30 days was sufficient to substantiate the duration claim in respect of hard surfaces based on what it considered was a recommendation of the testing laboratory.
19. Gold Rock relied on the manufacturer's declaration document about the silicone hands testing as well as articles about other silver technology based products.
20. Gold Rock accepted that Nano Silver had been tested on animals and that the cruelty free representation was a mistake.
21. Gold Rock ceased advertising and supplying Nano Silver during the course of the investigation.

The Commission's view

22. In this case, and having fully considered the information received, the Commission's view is that it is likely that Gold Rock's conduct breached s 12A and s 13(a) of the FT Act.
23. In relation to s 12A of the FT Act, we have reached this view because we do not consider that Gold Rock had reasonable grounds to make the representations about the duration Nano Silver remained effective for at the time that they were made. Factors that we considered include:
 - 23.1 the JIS test did not replicate how the product would be used in real life conditions as it did not include any testing with abrasion or washing of the surface;
 - 23.2 Gold Rock continued to rely on the JIS test after being made aware of the Commission's concerns as to the limitations of the test and its ability to demonstrate the effectiveness of Nano Silver when used in the real world in real life conditions; and
 - 23.3 Gold Rock did not have any testing information at the time it started to make the 96 hour duration claim for use on skin. The manufacturer's document about testing on silicone hands was dated after the representation was originally made, did not contain reviewable scientific content and did not include the impact of washing and drying hands.
24. Where representations made by traders relate to the performance of products in the real world, they must ensure that that these claims are backed up by testing that demonstrates the benefits can be achieved in real world conditions.
25. Additionally, we do not consider that the reliance placed on the testing laboratory was reasonable in these circumstances. The New Zealand laboratory advised Gold Rock from the outset that it could not help with making claims about products but could perform testing to give Gold Rock some information.

26. In relation to s 13(a) of the FT Act and the 'cruelty free' claim, we have reached our view because we think the claim 'cruelty free' is fundamentally understood by consumers to denote a product that has not been tested on animals. In the Commission's view the skin irritability test on rabbits makes this claim false and therefore misleading. In addition, Gold Rock was in possession of the skin irritability test at the time it made the cruelty free claim and so should have been aware it was inaccurate to make the claim.

Warning

27. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.
28. This warning represents our opinion that the conduct in which Gold Rock has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in the future if the conduct is repeated or further unsubstantiated, false or misleading representations are made.
29. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Gold Rock.
30. This warning letter is public information and will be published on the case register on our website in due course. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

31. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FT Act. The FT Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the FT Act

32. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
33. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

34. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies. You should ensure that you are able to substantiate (prove) your claims by holding evidence to support them at the time

you make them. You should also ensure that any claims are accurate and are not false or misleading.

35. We have published a series of fact sheets and other resources to help businesses comply with the FT Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
36. Our website page "Making Accurate Claims" includes information and a short video to help traders understand their obligations to not make unsubstantiated claims or claims that are false or misleading. You can view this webpage at <https://comcom.govt.nz/business/dealing-with-typical-situations/making-accurate-claims>.
37. You can also view the FT Act and other legislation at www.legislation.co.nz.
38. Thank you for your assistance with this investigation. Please contact the investigator, [REDACTED], on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

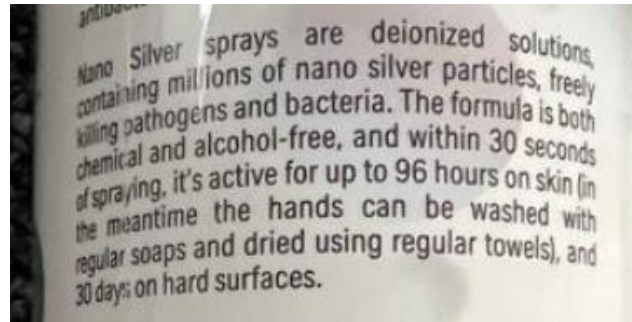
Yours sincerely



Rachael Manttan
Investigation and Compliance Manager
Fair Trading Branch

Encl.

Attachment A: Nano Silver advertising



SKIN

apply to skin via spray and allow to dry, one spray stays active for up to 96 hours.

SURFACES

apply to hard surfaces, fabric, soft furnishings, rooms, one spray stays active for 30 days

NANO SILVER Nano Silver Hand & Surface Sanitiser ...
 28 April 2022 · 🌐

Silver ion disinfectants are widely used in a variety of industries and have spurred interest in a wide range of applications. Nanosilver ions have antibacterial and antiviral properties. Nano Spray protects you from germ spread on any hard surfaces for 30 days.

source:<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7127744/>

NANO SILVER Nano Silver Hand & Surface Sanitiser ...
 6 December 2021 · 🌐

With Nano Protection, you can protect your employees and customers.

Nano Silver Hand & Surface Disinfectant

- 🕒 30 days protection
- 🔬 kills 99.9% of germs
- 🚫 alcohol & chemical free
- 🌿 naturally organic
- 🏥 clinically tested by Eurofins/AsureQuality
- 📜 MPI Approved / Dairy Approved

Shop now at www.nanosilver.co #Nano #nano #alcoholfree #chemicalfree #organic #businessowner #MPI See less