

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2016-004-012802  
[2017] NZDC 9221**

UNDER	THE FAIR TRADING ACT 1986
BETWEEN	COMMERCE COMMISSION Prosecutor
AND	TOPLINE INTERNATIONAL LIMITED First Defendant
AND	JEFFREY BERNARD COOK Second Defendant

Hearing: 12 May 2017

Appearances: Ms A McClintock and Mr A Watt for the Prosecutor  
Mr I Denton and Ms C Brighton for the First and Second  
Defendants

Judgment: 18 May 2017

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**SENTENCE DECISION OF JUDGE N R DAWSON**

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[1] The defendants face 22 charges each under s 10 of the Fair Trading Act 1986 (FTA) brought by the Commerce Commission (Commission). Section 10 says:

**10. Misleading conduct in relation to goods**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

[2] The charges relate to representations made by Topline International (Topline) and its director Mr Cook that Topline's product NatureBee Potentiated Bee Pollen (NatureBee) was made in New Zealand and/or a New Zealand sourced product, when in fact:

(a) The bee pollen was sourced from China;

- (b) The substantial transformation of the bee pollen into potentiated bee pollen also took place in China;
- (c) The Chinese bee pollen was encapsulated in China, and subsequently imported into New Zealand; and
- (d) The capsules of bee pollen were then bottled in New Zealand and the bottle labelled for sale.

[3] The representations were made on the product's labelling, Topline's website, in a number of different promotional materials, and in an infomercial. The representations were made over the period of 31 May 2011 to June 2015.

[4] The offending spans the period of time during which the maximum penalty under the FTA was increased and this took effect on 17 June 2014. For bodies corporate, this increased the penalties from \$200,000 per offence to \$600,000 per offence. For individuals it increased the penalty from \$60,000 per offence to \$200,000 per offence. A total of 10 of the 22 charges faced by each defendant are subject to the increased maximum penalty. The offending committed for the period when the higher penalties applied were for approximately 25 percent of the total offending period.

[5] Topline is an Auckland based direct marketing company that predominantly sells bee-related health supplement and cosmetics.

[6] Mr Cook is one of the directors of Topline and its principal shareholder. He approved all marketing material. He has been charged as a party to the offending by Topline, and as a principal in relation to two representations he made.

[7] From December 2000 Topline sold its flagship product, NatureBee, which contained New Zealand sourced and potentiated bee pollen. The bottle labels, and all related advertising material, correctly stated that NatureBee was from New Zealand.

[8] Topline sourced all of its bee pollen from the New Zealand Health Food Company Limited (NZHFC) from 2003. Initially NZHFC sourced New Zealand bee pollen for use in NatureBee. In or around 2005, NZHFC became and remained unable to supply sufficient New Zealand pollen. As a result, Topline instructed NZHFC to begin sourcing bee pollen from China for use in NatureBee.

[9] At the time of the change to Chinese bee pollen, Topline changed its bottle labelling and marketing to reflect that the bee pollen being used in the NatureBee product was not sourced from New Zealand. Topline did not then state a country of origin on the labelling or marketing material. In or about May 2011 the NatureBee bottle labelling was changed to state "Made in New Zealand" and later advertising material followed suit with similar false or misleading representations.

[10] NatureBee is a natural health supplement that is marketed by Topline both domestically and internationally, including via its website and through its New Zealand based call centres. The product was developed by Mr Cook in conjunction with others. NatureBee is Topline's flagship product and accounts for the majority of its revenue of between \$3.4 million and \$4.9 million annually.

[11] The majority of NatureBee is exported. Chinese sourced bee pollen was exported to Australia, the United States of America and other countries. New Zealand sourced bee pollen was exported to China in compliance with the Ministry of Primary Industries' requirements. This Court was unable to be informed whether those same requirements applied to the other product recipient countries.

[12] Topline marketed NatureBee as a superior bee pollen supplement due to its "potentiated" quality and, for the period between May 2011 and June 2015, marketed their use of New Zealand sourced bee pollen.

[13] Bee pollen is collected by honey bees in the process of nectar foraging and is high in protein and consumed for its nutrient benefits. Potentiation is a process that Topline and others claim makes the bee pollen more digestible for humans than unpotentiated pollen, and therefore they claim it is superior. Potentiation is the key

step, in a substantial transformation process, thereby producing NatureBee from bee pollen.

[14] At some time after 2005 and before 2011, NZHFC commenced supplying Topline with Chinese bee pollen that had been micro-milled and encapsulated in China before being imported into New Zealand. Topline was aware of the change in origin of the pollen.

[15] Each NatureBee capsule contained 500 mg of potentiated bee pollen encased in a gelatine (or vegetarian alternative) casing and was sold in bottles. Since 2001 Topline designed its own labels in-house, which were sent to NZHFC for affixing to the NatureBee bottles.

[16] At all material times Mr Cook was a shareholder and a hands-on director, actively involved in all aspects of Topline's business. He was ultimately responsible for, made, and authorised or approved all material decisions affecting NatureBee promotional campaigns, running NatureBee's promotional calendar and liaising with suppliers and advertisers.

[17] Mr Cook had ultimate responsibility for advertising decisions, including the decision to label NatureBee as New Zealand made, knowing at relevant times that in fact the pollen used in NatureBee was sourced from, and potentiated in, China. Specifically:

- (a) Mr Cook was ultimately responsible for the NatureBee label.
- (b) All of Topline's employees reported to Mr Cook and none had authority to make meaningful decisions without his consent.

[18] Between 21 May 2011 and 26 June 2015 Topline offered its NatureBee product for sale bearing a label that stated "MADE IN NEW ZEALAND", when the product was made from Chinese bee pollen that had also been potentiated in China. As executive director of Topline, Mr Cook was ultimately responsible for the labels

making the 'MADE IN NEW ZEALAND' representation being affixed to the NatureBee product.

[19] Between 21 February 2012 and 19 May 2015 Topline made representations on its website that NatureBee was sourced from and/or made in New Zealand when it was not. As executive director of Topline, Mr Cook was ultimately responsible for the content of the website.

[20] There are five charges against each defendant, covering the following representations:

- (a) "This proprietary process was later to be named the 'potentiation process' and is continually used only by NATUREBEE on their New Zealand bee pollen", which was made on the website between 21 February 2012 and 29 March 2015.
- (b) "NATUREBEE strives to make premium New Zealand made health food products for the whole family", which was made on the website between 21 February 2012 and 29 March 2015;
- (c) "Made from 100% natural ingredients, the bee pollen we use is harvested by those who know it best, the hardworking bees of New Zealand's pristine wilderness", which was made on the website between 19 October 2014 and 19 May 2015;
- (d) "Jeff [Cook] was convinced that the clean, untouched environment of New Zealand provided the world's cleanest, multi floral bee pollen", which was made on the website between 29 March 2015 and 19 May 2015; and
- (e) "New Zealand's clean, green and sustainable environment is home to the best quality, wild sourced, raw, potentiated bee pollen available", which was made on the website between 29 March 2015 and 19 May 2015.

[21] Between January 2012 and May 2015 Topline made various representations in three different promotional materials that NatureBee was made in New Zealand when it was not: the NatureBee newsletter, the Topline *Healthy Decisions* magazine and the Topline *Wake up your health* pamphlet. Mr Cook was ultimately responsible for the content of the promotional material.

[22] There are seven charges against each defendant covering the following representations:

- (a) The NatureBee newsletters of January 2012 and February 2012 featured a blue and red kiwi logo with ‘NEW ZEALAND MADE’ printed beneath it.
- (b) The October 2014 newsletter contained the representation that “New Zealand bee pollen is the best quality you can buy, and with our unique proprietary method of cracking open the hard cells, NatureBee Potentiated pollen is more bio-available than any pollen in the world”.
- (c) The January 2015 Topline *Healthy Decisions* magazine contained an image of a NatureBee bottle with a blue and red kiwi “NEW ZEALAND MADE” logo at the bottom right corner. The magazine also contained a promotional feature which said: “Undisputedly, the best pollen in the world comes from New Zealand, so do your homework, and don’t settle for low quality substitutes”. The magazine was distributed over the period February to June 2015.
- (d) Between February 2014 and May 2015, NatureBee distributed a pamphlet that contained the blue and red kiwi “NEW ZEALAND MADE” logo on the back page.

[23] Between February and March 2015 an infomercial screened on HiTV, a New Zealand-wide Korean language television service accessible through Freeview, about NatureBee. Mr Cook appeared in the infomercial as a representative of Topline. He was introduced as its founder, referred to as a “knowledgeable expert” and gave a

“money back guarantee” on the NatureBee product. In the infomercial he made the following representations that NatureBee was made and/or sourced in New Zealand:

- (a) “our pollen is collected from the wilderness of New Zealand’s pristine South Island, hundreds of miles away from any people, any civilisation, away from spraying, away from fertilisers, and away from, well we don’t have smokestacks because we don’t have any heavy industry so we know that it is the most pure, clean environment that the pollen’s coming from and that’s very important because you’re going to eat it! So you want to be sure that it’s good” [sic].
- (b) Presenter: “But I have heard that most of bee pollen in the market is coming from the Northern Hemisphere” [sic]

Mr Cook: “Well, I think you’re right. I think that what I do know is that ours [pollen] is from the South Island of New Zealand.”

[24] In April 2015 the NatureBee monthly newsletter contained the following representation:

- (a) “This wild, multi-floral pollen from the pristine New Zealand environment has the potential to change your health – and change your life! – Jeff Cook”.

[25] Both Topline and Mr Cook are charged as principals for the making of these representations.

[26] The defendants need to be held accountable for their blatantly misleading and knowingly untruthful promotion of their product. Deterrence must be a principal sentencing factor and consequences need to be imposed to discourage commercially unethical behaviour. Denunciation is also required for the potential damage to the “MADE IN NEW ZEALAND” brand.

[27] The aggravating factors include the scale of the offending which is substantial. It has taken place over a number of years and has involved large

amounts of money with a very large number of ultimate consumers of the product being misled. The purposes of the FTA are to ensure that consumers know what product they are buying because they cannot check the quality and source of the product themselves. The defendants' actions fly in the face of the purposes of the FTA.

[28] The untrue statements are blatant fabrications and lies. They cannot be downplayed to a mistake or to any confusion. The promotion of the untrue information has been substantial and ongoing over some years.

[29] The untrue information about the product would not have been promulgated by the defendants unless there was some perceived commercial advantage and profit from doing so. The defendants would not have had a business without the pollen imported from China. The pollen from China was also cheaper. It is estimated that by using the Chinese based pollen instead of the unavailable New Zealand pollen the defendants made a saving of \$683,857.61 on what the pollen would have cost if it could have been sourced in New Zealand. The defendants' New Zealand based business competitors were disadvantaged by not being on a level playing field.

[30] By mislabelling the product as "MADE IN NEW ZEALAND" there was a potential biosecurity risk when it was exported to other countries and if it was used in New Zealand.

[31] Consumers thought they were buying a New Zealand made and sourced product and the incorrect labelling was a breach of their trust in the "MADE IN NEW ZEALAND" label. If the "MADE IN NEW ZEALAND" label was important to the consumers then their lack of knowledge as to the true origin of the product deprived them of the choice to not use it or to instead use other products. As it is an ingestible product it is likely that the source of origin of that product would be important to many of the consumers. This breach has the potential to damage all other exporters using the "MADE IN NEW ZEALAND" label and also damage this country's image for its products sold overseas, resulting in increased scrutiny of New Zealand made products and a lack of consumer confidence in these products. There



but also to the export of any New Zealand made products. The offending did not stop until the Commission commenced its investigations.

[32] The gravity of the defendants' offending and Mr Cook's culpability in it are both at a high level.

[33] In mitigation:

- (a) The defendants have co-operated with the Commission's investigations, Mr Cook consented to a voluntary interview and admitted breaching the FTA, provided the Commission with all requested information and consented to Topline employees being made available for interview by the Commission.
- (b) Neither defendant has any previous convictions.
- (c) Early guilty pleas were entered. Apologies and retractions of the misleading information were made on the first defendant's website.

[34] It has been submitted for the defendants that this is a "composition" case and not a "country of origin" case. The defendants submit that it was the potentiation of the pollen that drove the price in sales and not the marketing of the pollen as a New Zealand made product. The Commission submits that both are relevant.

[35] This Court is unable to see any merit in the defendants' submissions on this point which are disingenuous given the marketing of their product. It is entirely apparent that both "composition" and "country of origin" were major marketing factors for the defendants. The reference is made by the defendants to the product's country of origin, as set out in this decision in paras 20(c), (d) and (e), 22(c), 23(a) and 24(a) make it abundantly clear that the country of origin with pollen being collected from a clean natural environment is seen by the defendants to be a major marketing factor. It would be an artificial exercise to attempt an apportionment of culpability between composition and country of origin when both of these factors have together been at the forefront of the defendants' marketing strategy.

[36] In imposing sentences, I take into account all the cases that have been referred to the Court by counsel for the Commission and by counsel for the defendants. I also need to take into account the change in the maximum sentence enacted during the period of offending covered by the 44 charges. Ten offences were committed by each defendant since 17 June 2014 when Parliament increased the penalties for body corporates by three times and for individuals by over three times the previous maximum fines.

[37] For each of the 10 offences by Topline carrying a maximum sentence of a fine of \$600,000 a fine of \$200,000 could be imposed. For each of the 12 offences carrying a maximum sentence of \$200,000 a fine of \$60,000 could be imposed. For each of the 10 offences by Mr Cook carrying a maximum sentence of a fine of \$200,000 a fine of \$75,000 could be imposed. For each of the 12 offences carrying a maximum sentence of \$60,000 a fine of \$25,000 could be imposed.

[38] However this offending requires the Court to make an evaluation of all of the offending in the round, to consider the totality of the offending and the appropriate portion to be attributed to each defendant. The culpability of Mr Cook is relatively high given his high level of involvement in the management of the first defendant and in the marketing of the product.

[39] In my view, the appropriate starting point for sentencing for:

(a) Topline is:

Fine	\$600,000
Discount 10% - no previous convictions/co-operation	\$ <u>60,000</u>
	\$540,000
Discount 25% - early guilty plea	\$ <u>135,000</u>
	<b>\$405,000</b>

(2) Mr Cook is:

Fine	\$180,000
Discount 10% - no previous convictions/co-operation	\$ <u>18,000</u>
	\$162,000
Discount 25% - early guilty plea	\$ <u>40,500</u>
	<b>\$121,500</b>

[40] With respect to the first defendant, for each of the 10 offences which have a maximum penalty of \$600,000 a fine of \$30,000 is imposed. For each of the 12 offences which have a maximum penalty of \$200,000 a fine of \$8,750 is imposed. This amounts to a total fine of \$405,000 to be paid by Topline.

[41] With respect to the second defendant, for each of the 10 offences which have a maximum penalty of \$200,000 a fine of \$8,000 is imposed. For each of the 12 offences which have a maximum penalty of \$60,000 a fine of \$3,458.33 is imposed. This amounts to a total fine of \$121,500 payable by Mr Cook.

[42] It has been submitted for the defendants that in the course of their co-operation with the Commission's investigations, they have supplied confidential business information to the Commission, some of which appears in the Commission's submissions, the defendants' submissions and the Caption Summary. They have supplied copies of each document to the Court showing the redactions they want to remain confidential.

[43] It is accepted that the defendants have fully co-operated with the Commission during the investigation and provided to the Commission information that would be disadvantageous to the defendants' business if made public. To allow all of this information to be publicly available would possibly amount to a further penalty upon the defendants. However, some of the information is included in this decision as it is necessary to include it to reflect the scale of the offending. The reasoning behind the sentences imposed would not be understandable if it was not included. The majority of the redactions can be allowed without any detracting of the public's right to know.

[44] A direction is therefore made pursuant to r 6.4(2) of the Criminal Procedure Rules that only the redacted versions of the Commission's submissions, defendants' submissions and the Caption summary as supplied to this Court may be accessed without the permission of this Court. This Sentence Decision will not be redacted.



N R Dawson  
District Court Judge