CASE NO. S216305

IN THE SUPREME COURT OF CALIFORNIA

MICHELLE QUESADA,

Plaintiff-Petitioner and Appellant,

v.

HERB THYME FARMS, INC.,

Defendant and Respondent.

After a Decision of the
Second District Court of Appeal, Division Three
On Appeal From the Los Angeles Superior Court
Case No. BC436557
Honorable Carl West
(subsequently transferred to Honorable Kenneth Freeman)

PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the Organic Foods Production Act of 1990 (7 U.S.C. § 6501 et seq.) preempts state consumer lawsuits alleging that a food product was falsely labeled "100% Organic" when it contained ingredients that were not certified organic under the California Organic Products Act of 2003 (Food & Agr. Code, § 46000 et seq.; Health & Safe Code, § 110810 et seq.).

INTRODUCTION

In grocery aisles across the state, people are increasingly willing to pay a 20- to 100-percent markup for organically grown produce. (Appellant's Appendix ("AA"), p. 11.) Consumers make the decision to pay a considerable premium for the material "100% Organic" designation because organically grown food is widely considered to be safer, healthier, and better for the environment than its conventionally grown counterparts. (*Ibid*.) And when choosing to pay premium prices for organic food, consumers must rely solely on a product's labeling to truthfully indicate whether a particular food came from a certified organic operation. (*Ibid*.) Unscrupulous vendors like Defendant and Respondent Herb Thyme Farms, Inc., however, see the organic label as a marketing strategy to make greater profits—a gimmick to trick consumers into paying premium prices for conventional product. In this case, Herb Thyme took advantage of consumers' trust by falsely labeling its overwhelmingly conventionally-grown products—a mixture of a small amount of organically-grown herbs with a larger amount of herbs produced at non-organic facilities—as "100% organic." (*Id.* at p. 2.) As the federal statute governing organic labeling makes clear, however, a product may only be sold or labeled as organic if it was "produced only on certified organic farms." (7 U.S.C. § 6506.) Plaintiff and Appellant Michelle Quesada, along with thousands of class members,

fell victim to Herb Thyme's scheme to mislead consumers into paying premium prices for imposter products. (*Ibid.*)

But what is the remedy for the aggrieved consumer who purchases an overpriced lie dressed in a "certified organic" label? Historically, victims of such corporate malfeasance have found refuge and redress in California's strong consumer protection laws: the Consumers Legal Remedies Act ("CLRA"), Civil Code section 1750 et seq., the False Advertising Law ("FAL"), Business & Professions Code section 17500, and the Unfair Competition Law ("UCL"), Business & Professions Code section 17200. In this case of first impression, however, the Second District Court of Appeal, Division Three, dealt a crippling blow to consumers by concluding that "[a] state consumer lawsuit based on COPA [California Organic Products Act of 2003 (Food & Agr. Code, § 46000 et seq.; Health & Saf. Code, § 110810 et seq.)] violations, or violations of the OFPA [Organic Foods Production Act of 1990 (7 U.S.C. § 6501 et seq.)], would frustrate the congressional purpose of exclusive federal and state government prosecution and erode the enforcement methods by which the [OFPA] was designed to create a national organic standard." (Opinion of the Second District Court of Appeal, Division Three ("Opn."), p. 2.) This radical result defies Congress's stated purpose in enacting the OFPA and creates harmful new preemption rules that will undermine California's strong consumer protections against misbranded products in general.

FACTUAL AND PROCEDURAL HISTORY

A. Herb Thyme Deliberately Defrauds California Consumers By Filling Packages Labeled "100% Organic" with Herbs Grown at its Conventional Farms.

Herb Thyme is the largest grower, shipper, and marketer of herbs in California. (AA, p. 2.) Herb Thyme owns and operates two types of farms. (*Id.* at p. 7.) First, Herb Thyme owns and operates a number of large farms

located throughout Central and Southern California where it grows conventional herb crops. (*Ibid.*) These farms include Herb Thyme's Camarillo and Thermal farms. (*Ibid.*) Second, Herb Thyme separately owns and operates one relatively small farm in Oceanside where it grows organic herbs. (*Ibid.*) Only the small Oceanside farm has been certified as an organic production facility by a registered certifying agent, and it produces a very small percentage of the products Herb Thyme sells to the consuming public. (*Ibid.*) This case does not concern or challenge the organic certification issued to the Oceanside farm or Herb Thyme's compliance with organic production methods at that location. (*Id.* at pp. 7-8.)

Ms. Quesada alleges that Herb Thyme lied about the nature of its "Fresh Organic" line of herbs. (AA, p. 11.) Herb Thyme affirmatively represented to consumers that its "Fresh Organic" products were 100% organic products when they were not, a direct violation of COPA, Health & Safety Code section 118820, and the OFPA, 7 U.S.C. § 6506. (*Ibid.*) To increase profits and to keep pace with growing demand, Herb Thyme devised and carried out a scheme to take advantage of the popularity of the organic food movement by labeling and selling its non-organic products under its "100% Organic" label. Herb Thyme took organic herb orders that were substantially in excess of the organic production capacity at its Oceanside location. (*Id.* at p. 8.) To fill these orders, and to make as much money as it could, Herb Thyme simply substituted or mixed in conventionally-grown herbs and sold them as 100% organic. (*Ibid.*) By definition, a mixture of a small amount of produce from a certified organic facility and a larger amount of produce from non-organic facilities is not, in total, "100% Organic."

To accomplish this scheme, Herb Thyme transported its conventionally-grown herb crops by truck from Camarillo and Thermal to its organic farm in Oceanside. (AA, p. 8.) There, the conventional and

organic herbs were all put in identical purple buckets (Herb Thyme's designation that a product is organic) and sent together to Herb Thyme's processing facility in Compton. (*Ibid.*) Herb Thyme removed the conventional and the organic herbs from the buckets and processed all the fresh herbs together. (*Ibid.*) These blends of organic and conventional herbs were packaged, labeled, and sent out as 100% "Fresh Organic" products, another direct violation of COPA, Health & Saf. Code, § 118820, and the OFPA, 7 U.S.C. § 6506. (*Ibid.*) In fact, Herb Thyme took orders for some particular organic herbs that Herb Thyme never grew organically at the Oceanside location and filled the orders with solely conventional, non-organic herbs. (*Ibid.*) As to these orders, Herb Thyme packaged and sold 100% conventionally-grown herbs under its "Fresh Organic" label. (*Ibid.*) As a result, Herb Thyme demanded premium prices for 100% organic produce without providing 100% premium organic product. (*Ibid*.)

B. The Trial Court Erroneously Dismissed Ms. Quesada's Claims on Preemption and Primary Jurisdiction Grounds.

Ms. Quesada filed a Second Amended Class Action Complaint asserting five causes of action premised on California's consumer protection laws: (1) Violation of the CLRA; (2) Violation of the FAL; (3) Violations of the UCL based on Unlawful Conduct; (4) Violations of the UCL based on Unfair and Fraudulent Conduct; and (5) Unjust Enrichment. (AA, pp. 1-19.)

Herb Thyme demurred to all causes of action in the Complaint and moved to strike Ms. Quesada's class allegations and prayer for restitutionary relief. (AA, p. 20.) The Trial Court overruled the demurrer as to Ms. Quesada's claims of CLRA, FAL, and UCL violations, finding "the marketing and sale of the 'Fresh Organic' product line . . . (when, as alleged, it was not) would be likely to deceive the reasonable consumer." (*Id.* at p. 27.)

In denying the motion to strike, the Trial Court explained, "The common question at the heart of the litigation is, in essence, whether the alleged practice by [Herb Thyme] of selling packages of its organic and non-organic herb product mixture, and labeling those packages 'Organic' or 'USDA Organic,' is lawful." (AA, p. 35.) The Trial Court found restitutionary relief appropriate because consumers "did *not* get what they paid for – 100% organic herbs." (*Id.* at p. 37, original italics.)

Thereafter, Herb Thyme brought a motion for judgment on the pleadings, arguing that Ms. Quesada's state law claims are preempted by the OFPA. (AA, pp. 38-58.) On January 4, 2012, judgment was entered against Ms. Quesada following the Trial Court's finding, despite the OFPA's express savings provision and its prior ruling, that the OFPA expressly and impliedly preempted Ms. Quesada's claims. (*Id.* at p. 200.) The Trial Court found that the primary jurisdiction doctrine applied as an alternative basis for dismissal. (*Ibid*.) Ms. Quesada timely appealed to the Second District Court of Appeal, Division Three.

C. The Second District Court of Appeal, Division Three, Incorrectly Found Implied Conflict Preemption and Affirmed the Trial Court's Dismissal.

After close to two years (and six months after taking the matter under submission following oral argument), on December 23, 2013, the Second District Court of Appeal, Division Three (Aldrich, J., with Croskey, Acting P.J. and Kitching, J. concurring) issued a decision affirming the Trial Court's ruling granting the motion for judgment on the pleadings. While correctly finding, in light of a clear savings provision, that the OFPA did not expressly preempt consumer claims enforcing parallel state laws, the Court of Appeal nonetheless held that the doctrine of implied preemption foreclosed such claims. Specifically, the court found that "a private right of action under the unfair competition law based on violations

of COPA would conflict with the clear congressional intent to preclude private enforcement of national organic standards." (Opn. at p. 16.) The opinion did not address the primary jurisdiction doctrine, the Trial Court's alternative grounds for dismissal.

Ms. Quesada timely filed a petition for review. On April 30, 2014, the Court granted Ms. Quesada's petition but confined review to the issue of whether or not the OFPA preempts state consumer lawsuits alleging a food product was falsely labeled "100% Organic" when it contained ingredients that were not certified organic under COPA.

STATUTORY BACKGROUND

California has been actively regulating organic food labeling since 1979. (Former Health & Saf. Code, § 26569.13, Stats. 1979, ch. 914, § 6 [added], Stats. 1982, ch. 1328, § 4 [amended], Stats. 1990, ch. 1262, § 6 [repealed].) California's leadership role in food-related law and policy cannot be understated considering it is the nation's largest agricultural producer and exporter. (*See* Cal. Dept. of Food & Agr., Cal. Agr. Statistics Review 2013-2014, p. 7.) California also leads the country in organic agriculture, producing 62% of all organic produce, including 55% of all organic fruit, 90% of all organic tree nuts, and 66% of all organic vegetables. (Klonsky, *Marketing Issues and Opportunities in Organic Agriculture* (July/Aug. 2012) Agr. and Resource Economics Update, volume 15, no. 6, p. 1.) Indeed, California produces more than 90% of the nation's organic lettuce, grapes, strawberries, broccoli, celery, cauliflower, avocados, almonds, plums, walnuts, dates, lemons, figs, and artichokes. (Klonsky, *A Look at California's Organic Agriculture Production* (Nov./Dec. 2010) Agr. and Resource Economics Update, volume 14, no. 2, p. 9.)

Given its place at the forefront of organic agriculture, California has long-sought to protect consumers and producers by "foster[ing] confidence in the integrity of [organic] food." (Former Health & Saf. Code, § 26569.20 et seq., Stats. 1990, ch. 1262, § 10 [added], Stats. 1995, ch. 415, § 169 [repealed and reenacted as Health & Saf. Code, § 110810], eff. Jan. 1, 1996.) To that end, the Legislature updated California's organic labeling laws in 1990 to clarify and strengthen existing standards and to provide for stricter enforcement. (*Ibid*.)

A. The OFPA Establishes a National Definition of "Organic" While Preserving Traditional State Police Powers Through an Express Savings Clause.

As California was strengthening its existing organic regulations, Congress passed the OFPA to create national standards for organic food. (Pub. L. No. 101-624, § 2102(1), 104 Stat. 3359, 3935.) At the time, twenty-two states (including California) had implemented their own requirements for organic food production and labeling, some based on the California model and others not. Each of these twenty-two states had different definitions of "organic". (S. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 295 (1990).) The remaining states were a free-for-all for unscrupulous farmers seeking to cash in on the organic movement. As expressed by Senator Leahy when he introduced the OFPA, "anyone [could] label anything as organic or natural regardless of how it was produced. Temptation for mislabeling is great because organic foods often sell at premium prices and some are deliberately mislabeled." (101 Cong. Rec. S. 1109.)

To balance competing state and federal interests, the OFPA established a national organic standard but also expressly provided states like California the flexibility to serve their own interests through additional regulations and enforcement provisions. To wit, the express savings

provision in 7 U.S.C. § 6507 specifies: "A State organic certification program established under [this section] may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold and labeled as organically produced under [the OFPA] than are contained in the [NOP]." (*See* S. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 295 (1990).)[1]

The OFPA's savings clause, which allows states to establish "more restrictive requirements," is supported by the legislative history showing Congress clearly intended that states could adopt "additional" regulations. The Senate Committee explained the OFPA's state-federal balance thusly:

- "It is the Committee's intention that States may enact a State Organic Certification Program in addition to the national program." (S. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 295 (1990).)
- "A State Organic Certification Program may have additional standards as well as other regulations pertinent to organic foods." (*Ibid.*)
- "No matter the reason, the Committee clearly intends to preserve the rights of States to develop standards particular to their needs that are additional and complementary to the Federal standards." (*Ibid.*)
- "The Committee, however, is most concerned that State action not disrupt interstate commerce. To this end, the [OFPA] limits state action in [only] three ways." (*Ibid*.)

[1] Where a federal statute provides that states may have more restrictive requirements, this Court has sensibly held that federal law does not preempt state law. (E.g., *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1068.)

- "First, the Secretary must approve State Organic Certification Programs to ensure that such programs are consistent with the goals of the [OFPA]. . . . The Secretary *must* approve any reasonable plan that meets the requirements of [the OFPA]." (*Ibid.*, italics added.)
- "Second, labeling must be consistent." (*Ibid.*)
- "Third, and most importantly, a State is prohibited from discriminating against another State's organic products." (*Ibid.*)
- "The Committee believes that [the OFPA] strikes a delicate balance between a State's right to develop its own organic program and the national need for consistency in labeling and standards." (*Id.* at p. 296.)

The Senate Committee's statements, which are in accord with a reasonable interpretation of the statute, must be presumed to accurately express the intent and meaning of the OFPA. (See *Maben v. Superior Court of Los Angeles County* (1967) 255 Cal.App.2d 708, 713.) It is beyond dispute that the state-law claims at issue here do not conflict with the federal scheme in any of the three ways set forth in the legislative history. For example, the theory that a mixture of a small amount of produce from an organic farm with a large amount of produce from a non-organic farm is not "100% organic" would be true whether the farms were located in California or any other state. And thus the claims at issue here do not "discriminate against another State's organic products."

Stated simply, the Committee's report makes clear that the OFPA "establishes the *minimum* standards that must be met in order for a product to be labeled as organically produced" and expressly leaves room for additional state regulation and enforcement. (S. Rep. No. 357, 101st Cong., 2d Sess. 289, pp. 295-96, 570 (1990), italics added.) Being that California and other states had already been independently regulating organic labeling

for over a decade, the OFPA's savings provision demonstrates Congress' clear and unequivocal intent to provide a floor, not a ceiling, for state regulations such as COPA, and to allow for complementary state action through additional enforcement mechanisms. This is particularly true because regulation of food products has traditionally and historically been left to the states. (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 144.)

B. COPA conformed California law to the national organic standard while maintaining California's independent certification and enforcement mechanisms.

Despite OFPA's passage in 1990, California's existing organic regulations remained in force until the final national organic standard went into effect on April 21, 2001. (7 C.F.R. § 205 et seq., 65 Fed.Reg. 80548, 80638, amended Mar. 20, 2001, 66 Fed.Reg. 15619.) Thereafter, the California Organic Products Act of 2003 ("COPA"), Health & Safety Code sections 110810-110959, was enacted to "conform California law to the national regulations and codify existing state provisions regarding enforcement of the state and federal requirements regarding organic products." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2823 (2001-2002 Reg. Sess.) as amended Aug. 20, 2002, p. 4.) COPA, like its predecessors, prescribes standards for organic products, including the marketing, advertising, and labeling of such products. Also like its predecessors, COPA was enacted as part of the Sherman Food, Drug and Cosmetic Law. (Health & Saf. Code, § 109875 et seq.) Significantly, the Sherman Law has a long history of private enforcement through the UCL, FAL, and CLRA. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, 1084, fn. 5 (citing *Children's Television,*

Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 210-11).)[2] To further ensure vigorous enforcement of the state's organic standards, the Legislature opted to grant specific standing—as it had since California first began regulating organic food in 1979—to "any person" to bring an action in superior court for an "injunction restraining any person from violating any provision of [COPA]." (Health & Saf. Code, § 111910; former Health & Saf. Code § 26850.5, Stats. 1979, ch. 914, § 9.5 [added], Stats. 1982, ch. 1328, § 8 [amended], Stats. 1990, ch. 1262, § 11 [amended], Stats. 1995, ch. 415, § 6 [repealed and reenacted as § 111910].)

On February 6, 2004, the USDA approved COPA as California's State Organic Program ("SOP").[3] An SOP is "[a] State program that meets the requirements of [the OFPA], is approved by the Secretary, and is designed to ensure that a product that is sold or labeled as organically produced under the Act is produced and handled using organic methods." (7 C.F.R. § 205.2.) California was the first and only state to establish a USDA-approved SOP. California's exercise of its independent police powers through local enforcement of its SOP is not surprising considering the state's preeminent role in agricultural production and its long history of independent organic regulation. By establishing its own approved SOP, California retained its ability—as Congress intended—to protect its unique

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[2] A long history of private enforcement is a substantial factor weighing against finding preemption in a case, such as this, where the federal statute does not explicitly preempt the state law at issue. As the U.S. Supreme Court stated in *Bates v. Dow AgroSciences LLC* (2005) 544 U.S. 431, 449, "If Congress had intended to deprive injured parties of a long available form of compensation it surely would have expressed that intent more clearly."

[3] A letter to the Secretary of the California Department of Food & Agriculture from the USDA states: "It is my pleasure to inform you that the State of California is the first State to be granted approval for a State Organic Program (SOP) under the National Organic Program. California's SOP is effective February 6, 2004." (AA, p. 123.)

local agricultural interests by continuing the established practice of enforcing the state's Sherman Law through private consumer-protection actions.

California's SOP incorporates federal regulations by reference but also provides for enforcement of additional state-specific regulations. (Health & Saf. Code, § 110812 ("The director shall enforce regulations promulgated by the National Organic Program . . ., provisions of this article, and [related provisions] of the Food and Agricultural Code.").) An "organic" item in California must be produced in accordance with federal regulations. (Health & Saf. Code, § 110820.) Hence, "to be sold or labeled as organically produced [a product] must (A) be produced *only* on certified organic farms and handled only through certified organic handling operations." (7 U.S.C. § 6506, italics added.) "Sold as organic" under COPA means "any use of the terms 'organic,' 'organically grown,' or grammatical variations of those terms . . . in labeling or advertising of any product." (Health & Saf. Code, § 110815, subd. (k).) In this case, Ms. Quesada alleges that the products in question were labeled as "100% organic" but were not grown on certified organic farms. (AA, p. 8.) This Court has expressly found this type of false advertising claim to be actionable under the UCL. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 332 ("[T]he parent who purchases food for his or her child represented to be, but not in fact, organic, has in each instance not received the benefit of his or her bargain.").) In addition, COPA provides for a private claim by consumers for such a violation. (Health & Safety Code, § 111910.)

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LEGAL ARGUMENTS

I. THERE IS A STRONG PRESUMPTION AGAINST PREEMPTION BECAUSE FOOD LABELING FALLS WITHIN THE STATE'S TRADITIONAL POLICE POWERS.

"States are independent sovereigns in our federal system." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 491.) As such, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." (*Maryland v. Louisiana* (1981) 451 U.S. 725, 746.) Indeed, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons–either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." (*Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317 (quoting *Fla. Lime & Avocado Growers, supra,* 373 U.S. at p. 142).) To that end, Congressional intent is the touchstone of any preemption analysis. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1087.) Preemption can be either express or implied. Implied preemption exists when it is clear Congress left no room for state involvement (field preemption), or when state law stands as an obstacle to the execution of the full purposes and objectives of Congress (conflict preemption). (*Ibid.*)

Courts have "long presumed that Congress does not cavalierly pre-empt state-law causes of action." (*Bates v. Dow AgroSciences LLC* (2005) 544 U.S. 431, 449.) The presumption against preemption applies "with particular force" where, as here, "Congress has legislated in a field traditionally occupied by the States." (*Altria Group, Inc. v. Good* (2008) 550 U.S. 70, 77.) Consumer protection and unfair competition are both "field[s] which the states have traditionally occupied." (*Waters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, 35-36.) And protecting consumers from adulterated food has always been a matter of health, safety, and welfare that

falls within the state's historic police powers. Even though the federal government began regulating food production and labeling in 1906, the United States Supreme Court has repeatedly affirmed the principle that "readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." (*Fla. Lime & Avocado Growers, supra,* 373 U.S. at p. 144.) Indeed, "[i]f there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products." (*Holk v. Snapple Bev. Corp.* (3d Cir. 2009) 575 F.3d 329, 339 (quoting *Plumley v. Massachusetts* (1894) 155 U.S. 461, 472).)

As the party asserting preemption, Herb Thyme has the burden of overcoming the presumption against preemption. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936.) Moreover, any ambiguity as to preemption must be resolved in Ms. Quesada's favor. (See *Altria Group, Inc., supra*, 550 U.S. at p. 77 (citing *Bates, supra*, 544 U.S. at p. 449).) Thus, even if Herb Thyme offers "a plausible alternative reading of [the purportedly preemptive statutory section]—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors preemption." (*Bates, supra,* 544 U.S. at p. 449.) Contrary to the Court of Appeal's reasoning, Herb Thyme has not met its burden to show preemption of Ms. Quesada's consumer protection claims.

II. STATE-LAW CLAIMS BASED ON DUTIES THAT PARALLEL FEDERAL LAW ARE NOT SUBJECT TO EXPRESS OR IMPLIED PREEMPTION ABSENT A CLEAR MESSAGE FROM CONGRESS TO THE CONTRARY.

This Court, the United States Supreme Court, and the Ninth Circuit Court of Appeal have each addressed and rejected the idea that federal law preempts a state tort or consumer claim premised on state-law duties that are identical to federal requirements.

Most binding and instructive is this Court's reasoning in *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077. In *Farm Raised Salmon Cases*, plaintiffs asserted UCL, FAL, and CLRA claims premised on the unlawful sale of artificially-colored farmed salmon in packages that did not disclose the use of color additives. (*Id.* at pp. 1082-83.) The defendants moved to dismiss on the grounds that plaintiffs' consumer protection claims were preempted by the Nutrition Labeling and Education Act ("NLEA") (Pub. L. No. 101-535, 104 Stat. 2353 (1990).) This Court reversed the trial court's dismissal (sustained by the Court of Appeal) and held plaintiffs' state law claims were not preempted because they were premised on state laws identical to and authorized by federal regulations. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1099.)

Like the OFPA, "the NLEA was enacted in 1990 primarily to establish a national uniform labeling standard in place of the patchwork of different state standards that existed at the time." (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1091, fn. 12; see also 7 U.S.C. § 6501, subd. (1).) Also like the OFPA, the NLEA's national standards were created with the goal of solidifying consumer confidence in the truthfulness of food labeling. The NLEA dictates that states may not enact any requirement that is not *identical to* federal law. (21 U.S.C. § 343-1, subd. (a), italics added.). In contrast, the OFPA expressly allows states the freedom to enact their own regulations, even regulations that are *more restrictive* than the national standard, so long as said regulations are part of a USDA-approved SOP. (7 U.S.C. § 6507.) As with COPA, California amended the Sherman Law to "adopt as its own the [NLEA] regulations" regarding disclosure of artificial color additives in farmed salmon. (*Farm Raised Salmon Cases, supra,* at p. 1087.) Despite a provision in the NLEA limiting enforcement to actions in the name of the United States, this Court determined that states could adopt

the federal regulations as their own enforceable state regulations. (*Id.* at p. 1086.)

The Court of Appeal—indeed, the very same panel whose decision this Court reversed in *Farm Raised Salmon Cases*—attempted to distinguish this case on the grounds that the NLEA somehow affords the states more room to regulate than does the OFPA. Relying on an uncodified provision of the NLEA that appeared to limit its preemptive reach, the appellate court determined that "Congress did not intend [for the NLEA] to alter the status quo in which residents may choose to file unfair competition claims or other clams based on violations of identical state laws." (Opn. at 2.) The OFPA, it reasoned, altered the status quo and eliminated consumer claims by "mandat[ing] federal approval and oversight of state organic programs to ensure consistent federal and state government enforcement for violations of the [OFPA]." (*Ibid.*) Yet in fact, the NLEA is substantially more restrictive than the OFPA because it *expressly forbids in the statute itself* (not in a reference to the Federal Register) any private enforcement of NLEA regulations by specifying that "*all* proceedings for the enforcement, or to restrain violations, of [the NLEA] shall be brought in the name of the United States." (21 U.S.C. § 337, italics added.) The OFPA does not contain a similar provision. This Court in *Farm Raised Salmon Cases,* while recognizing the same uncodified provision of the NLEA identified by the Court of Appeal in this case, looked instead to the plain language of the final law and the Supreme Court's interpretation of similar federal laws. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1093.) In the end, this Court allowed California plaintiffs to proceed with a consumer protection action for violation of state laws identical to the federal NLEA regulations. (*Ibid.*)

The U.S. Supreme Court has also repeatedly held that private claims arising out of an independent state-law duty—even if that duty is premised

on violating the substantive provisions of a federal law—are not subject to preemption absent a clear message to the contrary from Congress. In *Lohr,* for example, the high court found that exclusive-enforcement provisions of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., did not preempt states from providing traditional damages remedies for violations of "state rules that merely duplicate some or all of the federal requirements." (*Lohr, supra,* 518 U.S. at p. 492.) Similarly, in *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, the United State Supreme Court held that, "although [the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq.] does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements," states are not precluded from "providing such a remedy." (*Bates, supra,* 544 U.S. at p. 448.) And, illustrating complete uniformity on this point, the Ninth Circuit held in *Kroske v. US Bank Corp.* (9th Cir. 2005) 432 F.3d 976, 988-89, that the provision of the National Bank Act, 12 U.S.C. § 21 et seq., allowing a bank to dismiss an officer "at pleasure" did not preempt a state-law claim for age discrimination where the state-law claim was "consistent with the substantive provisions" of federal anti-discrimination laws.

These consistent holdings make clear that where, as here, Congress authorizes states to adopt parallel requirements, it also authorizes states "to provide for private remedies for violations of those requirements." (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1094 (citing *Lohr, supra,* 518 U.S. at p. 495).) Because the plain language of the OFPA expressly *provides for* state regulation through an approved SOP, COPA and all of its available enforcement mechanisms (including consumer protection causes of action) are not preempted.

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III. THE OFPA DOES NOT PREEMPT CONSUMER PROTECTION CLAIMS BASED ON VIOLATIONS OF CALIFORNIA'S STATE ORGANIC PLAN.

Herb Thyme cannot dispute that consumer protection claims like Ms. Quesada's will not be preempted absent a clear and manifest statement from Congress of its intention to do so. (*Lohr, supra,* 518 U.S. at p. 485.) The OFPA contains no such provision. Indeed, its savings clause evidences an opposite intention. (7 U.S.C. § 6507.) "Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*Viva! Internat. Voice for Animals, supra,* 41 Cal.4th at p. 936.) Accordingly, the preemptive reach of the OFPA's savings clause is determinative of the express and implied preemption issues in this case. (See, e.g., *Spriestma v. Mercury Marine* (2002) 537 U.S. 51, 63 ("the [Boat Safety] Act's savings clause buttresses [the] conclusion" that the statute does not preempt state law tort claims); *UNUM Life Ins. Co. of Am. v. Ward* (1999) 526 U.S. 358, 376 fn. 9 (rejecting a narrow interpretation that would "virtually read the savings clause out of ERISA," noting that disuniform state regulations "are the inevitable result of the congressional decision to save local insurance regulation") (internal quotes and citations omitted).)

The U.S. Supreme Court's recent decision in *POM Wonderful LLC v. The Coca-Cola Co.* (Jun. 12, 2014) 2014 U.S. LEXIS 4165, is instructive on this issue. In *POM Wonderful*, POM sued Coca-Cola alleging unfair competition under the Lanham Act, 15 U.S.C. § 1125. (*Id.* at p. *7.) Specifically, POM alleged the labels and advertising for Coca-Cola's juice-blend drinks were misleading consumers by prominently displaying the words "pomegranate blueberry" on blends that contained less than 1% pomegranate or blueberry juice. (*Ibid.*) POM alleged the labels deceived consumers into believing the product consisted primarily of pomegranate

and blueberry juices when it was mostly apple and grape juices. (*Id.* at p. *15.) Coca-Cola argued POM's Lanham Act claim conflicted with the FDCA, 21 U.S.C. § 301 et seq., because the FDCA expressly permits the form of Coca-Cola's labeling and expressly prohibits private enforcement suits. (*POM Wonderful, supra,* at pp. *8, 11-13, 15.) While not a preemption case—and therefore not subject to any presumption against preemption—the court found preemption principles "instructive insofar as they are designed to assess the interaction of laws that bear on the same subject." (*Id.* at pp. *16-17.)

Holding that POM's Lanham Act claim was not precluded by the FDCA, the court found Congress' failure to expressly address unfair competition claims to be "'powerful evidence that Congress did not intend FDA oversight to be the exclusive means' of ensuring proper food and beverage labeling." (*POM Wonderful, supra,* 2014 U.S. LEXIS 4165 at pp. *20-21, quoting *Wyeth v. Levine* (2009) 555 U.S. 555, 575.) Rather than conflict with one another, the Court held the two statutes *complemented* each other. The FDCA, like the OFPA in this case, "provides detailed prescriptions of its implementing regulations and [its enforcement] is largely committed to [a government agency]." (*Id.* at p. *23.) Lanham Act claims, like Ms. Quesada's consumer protection claims here, complement agency enforcement by "serving a distinct compensatory function that may motivate injured persons to come forward" and "to the extent they touch on the same subject matter as [federal law], provide incentives for manufacturers to behave well." (*Id.* at pp. *23-24.) This synergistic relationship between agency enforcement and unfair competition lawsuits "enhance[s] the protection of competitors and consumers." (*Id.* at p. *24.) To that end, implied preemption of Ms. Quesada's consumer protection claims would actually *conflict* with Congress's goals because "[i]t is unlikely that Congress intended" the OFPA's organic regulations "to result

in less policing of misleading food and beverage labels" than existed prior to its enactment. (*Id.* at p. *25.)

Nothing in COPA or the OFPA modifies the long-standing notion that Sherman Law violations are directly actionable by consumers under California's consumer protection laws, which as stated in *Committee on Children's Television* was the law of this state when the OFPA and its savings provision was enacted by Congress. Based on the substantial body of law to the contrary at the time of its enactment, it must be presumed that Congress envisioned such state action. (*Goodyear Atomic Corp. v. Miller* (1988) 486 U.S. 174, 184-85 (Absent affirmative evidence to the contrary, it is "presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").)

A. The OFPA does not expressly preempt California's consumer protection and unfair competition laws.

"Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." (*Myrick v. Freuhauf Corp.* (7th Cir. 1994) 13 F.3d 1516, 1520.) To that end, "[t]he absence of such an explicit reference to state common law . . . counsels against a finding of express preemption." (*Ibid.*) In this case, the Court of Appeal correctly held that the OFPA does not expressly preempt California's consumer protection and unfair competition laws. Instead, the OFPA expressly preempts state laws relating to organic certification and labeling *unless*, as is the case in California, the laws are part of an approved State Organic Plan ("SOP"). (See 7 U.S.C. § 6506, subd. (d).) The OFPA "further provides that a [SOP] may contain more restrictive requirements for organic products produced and handled within the State than are contained in the National Organic Program." (65 Fed.Reg. 80548, 80616.) While the OFPA itself does not provide a private right of action, there is no language foreclosing application of state consumer protection or unfair competition laws. Nor is

there language limiting how a state may choose to enforce its SOP. Accordingly, Ms. Quesada's consumer protection claims are not expressly preempted by the OFPA.

B. Ms. Quesada's consumer protection claims do not interfere with the application of federal organic laws.

Implied obstacle preemption arises when a state law constitutes a barrier to the accomplishment of the full purposes and objectives of federal law. (*Viva! Internat., supra*, 41 Cal.4th at p. 936.) Obstacle preemption exists in this case only if the OFPA's operation would be "frustrated and its provisions refused their natural effect" by allowing Ms. Quesada to proceed with her consumer protection claims for violation of COPA. (See *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 760.) As the Supreme Court noted in *Cipollone v. Liggett Group* (1992) 505 U.S. 504, 517, "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." Where, as here, "Congress establishes a regime of dual state-federal regulation, 'conflict-pre-emption analysis must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States.'" (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at pp. 1091-92 (quoting *Viva! Internat., supra,* 41 Cal.4th at p. 942).) In light of the OFPA's express view toward positive state involvement, preemption of Ms. Quesada's claims cannot be implied absent a clear and manifest statement from Congress. No such statement exists here.

1. Allowing consumer protection claims to enforce parallel state organic regulations is consistent with the OFPA's pro-consumer purposes.

The cardinal rule in construing any statute is to give effect to the intent of the Legislature. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359.) As stated in 7 U.S.C. § 6501, the OFPA's purpose is "(1) to establish national standards governing the marketing of certain agricultural products

as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically grown." Congress enlisted the states' assistance in accomplishing these goals by *requiring* the Secretary of Agriculture to approve a State Organic Program ("SOP") so long as it is designed to ensure products sold or labeled as "organically produced" have been produced using organic methods set forth in the OFPA and National Organic Program. (7 U.S.C. §§ 6502, 6503, 6507, subd. (a).)

In addition to the plain language of the OFPA, the legislative history reiterates that consumer protection was the driving force behind the legislation. As a means to this end, Congress intended to establish a national standard while allowing states like California to continue to administer and enforce their own organic programs. Allowing consumer protection actions based on violations of state organic laws ensures "organic certification standards [will] be national in scope, tough, and *fully enforced.*" (135 Cong. Rec. S. 15863, italics added.)[4] Recognizing that states like California had long been regulating organic foods, the OFPA "strikes a delicate balance between a State's right to develop its own organic program and the national need for consistency in labeling and standards." (S. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 295 (1990).) "*No matter the reason,* the Committee clearly intends to preserve the rights of States to develop standards particular to their needs that are additional and complementary to Federal standards." (*Ibid.*, italics added.)

[4] *Cf. Washington Mut. Bank, FA v. Superior Court* (1999) 75 Cal. App.4th 773, 783 ("the mere absence of a private right of action in a federal law does not mean that a private right of action under state law is inherently in conflict with the federal law and is preempted").

2. Consumer protection claims are consistent with the OFPA's requirement that California enforce organic regulations within the state.

Once an SOP is approved, the state assumes the obligation of enforcing all organic regulations within its borders. (65 Fed.Reg. 80548, 80617.) "Specifically, the State must ensure compliance with the Act, the [national regulations], and the provisions of the SOP . . . within the State." (*Ibid.*) Tellingly, the statute and its regulations are devoid of any indication that Congress intended to prohibit the use of consumer protection actions to enforce an SOP. While the OFPA contains a federal administrative process for evaluating complaints, the OFPA contains no indication whatsoever that Congress intended to restrict how a state may choose to enforce its approved SOP. Nor does the OFPA state that administrative review was intended to be the *only* means for enforcing an SOP. While an SOP must include compliance and appeals procedures equivalent to those provided at the federal level (*ibid.*), nothing in the text or history of the OFPA *prohibits* a state from allowing *additional* methods of enforcement.

Congressional silence on the availability of consumer remedies demonstrates a considered decision to allow states to choose their own enforcement mechanisms. This principle applies with particular force here because California—the country's agricultural powerhouse and a pioneer of the organic frontier—had included an express private right of action for organic labeling violations for over twenty-two (22) years before the OFPA's standards came into effect. It can therefore be reasonably understood that Congress envisioned such state action. (See *Goodyear Atomic Corp., supra,* 486 U.S. 174, 184-85 (Absent affirmative evidence to the contrary, it is "presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); see also *People v. Licas*

(2007) 41 Cal.4th 362, 367 (Courts presume the legislature was aware of the state of the law at the time it enacted remedial legislation.).)

Nonetheless, the Court of Appeal cited two features of the OFPA—its lack of an express private right of action and its administrative enforcement scheme—as evidence of the purportedly "clear" congressional intent to eviscerate the private remedies that had been available in California since 1979. Such reasoning is a dramatic departure from the established principle that the UCL merely *borrows* violations of other laws and makes them *independently actionable.* (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Thus, the absence of an express private right of action in the OFPA is not determinative because Ms. Quesada's UCL claims arise from an independent state-law duty and not solely from the violation of the OFPA's requirements. (See *Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 352; see also *Merrell Dow Pharm. Inc. v. Thompson* (1986) 478 U.S. 804, 808-812.)

Equally unavailing is the Court of Appeal's inference that the OFPA's administrative enforcement provisions show congressional intent to preempt consumer claims. (Opn. at p. 15.) First, the OFPA's implementing regulations *declined* to extend an exclusive federal enforcement regime to SOPs because "[m]any States currently have organic programs with the kind of comprehensive enforcement and compliance mechanisms necessary for implementing any State regulatory program." (65 Fed.Reg. 80548, 80618.) Second, the UCL "is meant to provide remedies *cumulative* to those established by other laws, *absent express provision to the contrary*." (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 398-399, *petition for cert. filed* (U.S. Nov. 27, 2013) (No. 13-662), italics added; Bus. & Prof. Code, § 17205.) Indeed, this Court has "long recognized that the existence of a separate statutory enforcement

scheme does not preclude a parallel action under the UCL." (*Rose, supra,* 57 Cal.4th at 398, citing *Stop Youth Addition, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 572-573.) To that end, claims for false and misleading labeling "supplement the effort of law enforcement and regulatory agencies" and "serve important roles in the enforcement of consumers' rights." (*In Re Tobacco II Cases* (2009) 46 Cal.4th 298, 313 (quoting *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, footnote omitted).)

The Court of Appeal's third misguided source of a "clear" congressional intent to preclude private enforcement is that "under the NOP, which has been adopted as the regulations of this state, a private citizen cannot stop the sale of a product (Final Rule, 65 Fed.Reg. 80627 (Dec. 21, 2000))." (Opn. at p. 17.) This facially-flawed argument, which addresses but one of several independent remedies, cannot support a motion for judgment on pleadings by which numerous forms of relief are sought. (*Quelimane Company, Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46.) Moreover, properly read in context, the language of the cited Final Rule does not support the Court of Appeal's conclusion: "States may, at their discretion, be able to provide for stop sale or recall of misbranded or fraudulently produced products within their State. Citizens have no authority *under the NOP* to stop the sale of a product." (65 Fed.Reg. 80627, italics added.) In other words, consumers may seek such a remedy under state law, but may not cite the NOP as a basis for doing so.

Protecting consumers from adulterated food has also always been a matter of health, safety, and welfare that falls within the state's historic police powers. (*Fla. Lime & Avocado Growers, Inc., supra,* 373 U.S. at p. 144.) Accordingly, the California Legislature exercised its discretion to provide a direct right of relief by codifying COPA as part of the Sherman Law (Health & Safety Code, § 109875 et seq.), which has a long history of

private enforcement through consumer claims. (*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at 1084, fn. 5, citing *Children's Television, Inc., supra,* 35 Cal.3d at pp. 210-211.) Private consumer claims based on violations of state laws that parallel federal regulations are a crucial method of enforcement that has historically been permitted in this state. (See, e.g., *Children's Television, Inc., supra,* 35 Cal.3d at pp. 210-211; *Smith v. Wells Fargo Bank N.A.* (2005) 135 Cal.App.4th 1463, 1482 (UCL claim based on violation of federal regulation does not impose any additional state-law requirement, even where there is no express private right of action under that regulation.).)

Indeed, the availability of consumer remedies for violations of COPA is especially important to the accomplishment of the OFPA's objectives given California's current fiscal crisis. While "any person may file a complaint with the director concerning suspected noncompliance," the California Department of Food & Agriculture is only required to investigate, enforce, and carry out the functions of COPA "to the extent funds are available." (Food & Agr. Code, § 46004; Health & Saf. Code, § 110940; see also, Food & Agr. Code, § 46016.1, Health & Saf. Code, §§ 110850, 110930.) "Defendants have no right to expect their alleged violations to go unpunished for lack of public funds." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 800.) Thus, private consumer protection actions may be the only reliable means of ensuring compliance with organic regulations, a task required of California under the OFPA, in times of fiscal austerity. The alternative offers "no more than the prospect of 'random and fragmentary enforcement'" of state organic regulations by under-staffed and underfunded state agencies. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 462 (quoting *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715) (favoring class actions, rather than individual actions

before the Labor Relations Board, as a more effective method of ensuring employer compliance with statutory overtime laws).)

3. This case falls outside *Aurora Dairy's* conflict-preemption analysis.

Departing from this Court's decision in *Farm Raised Salmon Cases,* the Court of Appeal borrowed from the Eighth Circuit's preemption analysis in *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation* (8th Cir. 2010) 621 F.3d 781 ("*Aurora Dairy*"). While the Court of Appeal recognized that *Aurora Diary* did not involve state organic laws, it overlooked a fundamental distinction affecting the conflict preemption analysis in *Aurora Dairy* that is not present here. That is, 100% of the milk in the containers purchased by the *Aurora Dairy* plaintiffs originated from dairy facilities that continuously maintained valid organic certifications. (*Id.* at p. 788.)

The *Aurora Dairy* plaintiffs complained that the milk, though it all came from a certified organic operation, was not "organic enough" because the dairies did not strictly adhere to organic standards at all times. (*Ibid*.) Challenges of this kind may stand as an obstacle to the OFPA because "to be sold or labeled as organically produced [a product] must (A) be produced only on certified organic farms and handled only through certified organic handling operations." (7 U.S.C. § 6506.) Here, Ms. Quesada does not challenge the "organic-ness" of herbs produced on Herb Thyme's one certified organic farm in Oceanside. (AA, pp. 7-8.) Rather, she alleges Herb Thyme trucked in herbs from conventional farms hundreds of miles away from its certified organic operation, mixed those conventional herbs with those grown on the certified organic farm, and sold the mixture as "100% Organic." (*Ibid.*) These blends of conventional and organic herbs were not "being labeled as organic *in accordance with the certification*" as was the milk in *Aurora Dairy*. (*Aurora Diary*, *supra*, 621 F.3d at p. 797, italics

added.) Thus, unlike the milk in *Aurora Dairy*, Herb Thyme's herbs did not comply with the OFPA requirement that "organic" food products "be produced *only* on certified organic farms and handled *only* through certified organic handling operations." (7 U.S.C. § 6506, italics added.) Claims like these do not impose any relevant requirements "in addition to" the OFPA.

The Court of Appeal made a fundamental error in relying upon the *Aurora Dairy* case. If all of Herb Thyme's products originated from a facility certified by the federal government as organic, and Ms. Quesada's claim was that the federal certification of the facility had been in error, then the Court of Appeal would have correctly cited the case. But the actual claims in this case bear no relationship to such a hypothetical. *Aurora Dairy* sheds no light on what would have happened if five cups of milk from an organic dairy were mixed with ninety-five cups of milk from a non-organic dairy, and then the one-hundred cups of mixed product were sold as "100% organic." This case and *Aurora Dairy* are not merely as different as apples and oranges, they are instead about as different as frogs and ball bearings.

4. Federal courts have held the OFPA does not preempt consumer protection actions based on California organic labeling laws.

Other federal courts that have looked at the interrelationship between the California organic labeling laws and the OFPA reached the opposite conclusion of the Court of Appeal, finding instead that the OFPA does not preempt UCL, FAL, and CLRA claims based on falsely labeling a product as organic.

Aside from the Court of Appeal in this case, the only other court to apply California organic labeling laws to a food product found that OFPA does not preempt UCL, FAL, and CLRA claims based on falsely labeling a product as organic. (*Jones v. ConAgra Foods, Inc.* ("*Jones*") (N.D.Cal.

2012) 912 F.Supp.2d 889.) In *Jones*, consumer-plaintiffs brought an action against ConAgra Foods alleging a number of ConAgra's food products "contain deceptive and misleading labeling information." (*Id.* at p. 893.) Plaintiffs asserted the labels of certain food products were misleading customers by falsely using the words "organic" or "certified organic." (*Ibid.*) Plaintiffs brought claims for violation of, *inter alia*, the UCL and CLRA based on ConAgra's practice of "labeling food products as 'organic' or 'certified organic,' when they contain disqualifying ingredients." (*Ibid*.) Like Ms. Quesada, the consumer-plaintiffs alleged that they "paid an 'unwarranted premium' for . . . mislabeled products." (*Ibid*.) ConAgra filed a motion to dismiss claiming, like Herb Thyme, that the consumer-plaintiffs' claims were preempted by the OFPA. (*Id.* at p. 895.)

Relying on *Aurora Dairy*, ConAgra argued unsuccessfully that the consumer-plaintiffs' UCL, FAL, and CLRA claims should be dismissed because "'claims that [manufacturers and retailers] sold [a product] as organic when in fact it was not organic are preempted because they conflict with the OFPA.'" (*Jones, supra,* 912 F.Supp.2d at p. 894 (quoting *Aurora Dairy*, *supra*, 621 F.3d at p. 781).) The *Jones* Court rejected this reading of *Aurora Dairy*, explaining that ConAgra was "tak[ing] this quote out of context." (*Id.* at p. 894.) The court correctly observed that, "The Eighth Circuit held that 'Congress *did not* expressly preempt state tort claims, consumer protection statutes, or common law claims' involving the OFPA.'" (*Ibid.* (quoting *Aurora Dairy*, 621 F.3d at p. 792), italics added.)

The *Jones* Court, having foreclosed express preemption as grounds for dismissal of consumer-plaintiffs' organic labeling claims, went on to reject ConAgra's conflict preemption arguments as well. The court acknowledged that the OFPA and the NOP were created "to establish national standards for organic products" and that such standards "govern the use of the term 'organic' in labeling and marketing agricultural

products." (*Jones, supra,* 912 F.Supp.2d at p. 895 (citing 7 C.F.R. §§ 205, 205.300).) However, the court recognized that California, pursuant to the OFPA, enacted its own SOP to govern organic production and labeling within the state. (*Id.* at p. 895.) California's SOP adopts wholesale the federal regulations: "All organic product regulations and any amendments to those regulations adopted pursuant to the NOP, that are in effect on the date this bill is enacted or that are adopted after that date shall be the organic product regulations of this state." (Health & Saf. Code, § 110956, subd. (a).) As such, "the California statutes do not impose any relevant additional requirements than those under the OFPA, [and consumer-plaintiffs'] claims are not preempted." (*Jones*, *supra*, p. 895-96.) In addition, the *Jones* court rejected the notion "that a rival enforcement scheme," *i.e.*, California's consumer protection laws, "imposes additional requirements that impose a conflict, as that exception would swallow the rule." (*Id.* at p. 896, fn. 1.)

The Court of Appeal's holding that the OFPA preempts the private right of action provided in Health & Safety Code section 111910 also conflicts with federal court cases regarding other organic labeling claims. For example, while COPA regulates "organic" cosmetic labeling, the OFPA does not. (*See* 65 Fed.Reg. 80548, 80557 ("The ultimate labeling of cosmetics, body care products, and dietary supplements . . . is outside the scope of these regulations.").) On this basis, federal courts have held that Health & Safety Code section 111910 claims are viable causes of action not preempted by the OFPA. (*See, e.g., Brown v. Hain Celestial Group, Inc.* (N.D.Cal. Aug. 1, 2012) 2012 U.S.Dist.LEXIS 108561.) The Court of Appeal, in contrast, concluded there is no private enforcement of COPA whatsoever. (Opn. at p. 15.)

While not binding on this Court, federal cases are instructive and should form a further basis for reversing the Court of Appeal. (*People v.*

Bradley (1969) 1 Cal.3d 80, 86 (decisions of lower federal courts "are persuasive and entitled to great weight.")

CONCLUSION

Consumer protection claims like Ms. Quesada's are an integral enforcement component of California's federally-approved State Organic Plan. Particularly in times of fiscal austerity, such claims bolster the OFPA and further its key objective, *i.e.,* to strengthen consumer confidence in the "Organic" label. As the above analysis shows, Ms. Quesada's state-law claims are not preempted. Accordingly, Plaintiff-Appellant Michelle-Quesada respectfully requests this Court reverse the order granting Defendant-Respondent Herb Thyme Farms Inc.'s motion for judgment on the pleadings, and remand this matter to the Second District Court of Appeal, Division Three, for further consideration of the Trial Court's alternative basis for granting judgment against Ms. Quesada.

DATED: June 20, 2014

Respectfully submitted,

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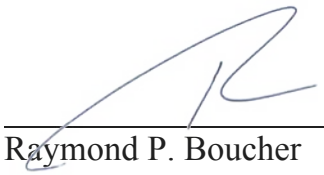
CERTIFICATE OF WORD COURT

I, Raymond P. Boucher, hereby certify pursuant to Rule of Court 8.520(c)(1) that this Petitioner's Opening Brief on the Merits was produced on a computer, and that it contains 9,204 words, exclusive of tables, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

Executed June 20, 2014, at Los Angeles, California.



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 444 S. Flower Street, 33rd Floor, Los Angeles, CA 90071.

On June 20, 2014, I served true copies of the following document(s) described as **PETITIONER'S OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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___ **BY E-MAIL / ELECTRONIC TRANSMISSION:** In accordance with the Court's ruling governing Case No.: BC400279 requiring all documents to be served upon interested parties via Lexis Service system, and pursuant to Second District Court of Appeal local rules regarding electronic service of a Petition for Review.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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