S216305

22

CRC 8.25(b)

SUPREME COURT
FILED

FEB - 4 2014

Frank A. McGuire Clerk

Deputy

CASE NO. S_____

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)

PETITION FOR REVIEW

LAW OFFICE OF RAYMOND P. BOUCHER
Raymond P. Boucher (SBN 115364)
444 S. Flower Street, 33rd Floor
Los Angeles, CA 90071
Telephone: 213-596-6000
Facsimile: 213-596-6010

KIESEL LAW LLP
Helen Zukin (SBN 117933)
8648 Wilshire Boulevard
Beverly Hills, CA 90211
Telephone: 310-854-4444
Facsimile: 310-854-0812

WHATLEY KALLAS, LLC
Alan M. Mansfield (SBN 125998)
10200 Willow Creek Road, Suite 160
San Diego, CA 92131
Telephone: 619-308-5034
Facsimile: 855-274-1888

JOHNSON & JOHNSON LLP
Neville Johnson (SBN 66329)
439 N. Canon Drive, Suite 200
Beverly Hills, CA 90210
Telephone: 310-975-1080
Facsimile: 310-975-1095

Counsel for Plaintiff-Petitioner and Appellant, MICHELLE QUESADA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

CALIFORNIA STATUTES

REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

ISSUES FOR REVIEW

1. Whether the Court of Appeal erroneously concluded the federal Organic Foods Production Act of 1990 ("OFPA") (7 U.S.C. § 6501 et seq.), which governs certain labeling of agricultural products as "organic" and "USDA Organic" but permits states to adopt more restrictive organic requirements, preempts state consumer lawsuits alleging that a food product was falsely labeled as "100% Organic" when, in fact, it contained ingredients that were not "certified organic" under California's federally-approved State Organic Program ("SOP"), codified as the California Organic Products Act of 2003 ("COPA") (Food & Agr. Code § 46000 et seq.; Health & Saf. Code § 110810 et seq.).

2. Whether the Court of Appeal erred in finding the primary jurisdiction doctrine provides an alternative basis for dismissal, as compared to a stay, of consumer lawsuits alleging that a food product was falsely labeled as "100% Organic" in violation of state law.

WHY REVIEW SHOULD BE GRANTED

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") at 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.*) Consumers must rely solely on a product's packaging to truthfully indicate whether a particular food came from a certified organic operation. (*Ibid.*)

In this case of first impression, the Second District Court of Appeal, Division Three, dealt a crippling blow to consumers on this important question of law by concluding that "[a] state consumer lawsuit based on

COPA violations, or violations of the OFPA, 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 [Exh. "A"] ("Opn."), at p. 2.) Such a decision is directly at odds with *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 ("*Farm Raised Salmon Cases*"), in which this Court reversed a similar preemption-based decision issued by the same Division Three of the Second District Court of Appeal, and conflicts with Division Five of the Second District Court of Appeal's recent interpretation of *Farm Raised Salmon Cases* in *Coleman v. Medtronic, Inc.* (Cal. App. 2d Dist. Jan. 27, 2014) 2014 Cal.App.LEXIS 70 (Case No. B243609). The decision also contradicts several California federal district court cases holding that organic labeling claims like Ms. Quesada's are not preempted, including *Jones v. ConAgra Foods, Inc.* (N.D. Cal. Dec. 17, 2012) 2012 U.S. Dist. LEXIS 178352. This radical result also 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.

Pursuant to California Rule of Court 8.500(b)(1), Petitioner respectfully requests review in order to secure uniformity of decisions on this issue, and in particular with *Farm Raised Salmon Cases, supra,* 42 Cal.4th 1077, and *Coleman, supra,* 2014 Cal.App.LEXIS 70, and to settle an important question of law affecting the millions of Californians who purchase organic products believing them to be an investment in their health and future.

The labeling and sale of "organic" food is a major trend and a multi-billion dollar business. Unscrupulous vendors, like Respondent Herb Thyme Farms, Inc. ("Herb Thyme"), see the organic label as a marketing

strategy to make greater profits—a gimmick to trick consumers into paying premium prices for conventional product. If the Second District Division Three's preemption analysis stands, there will be no remedy for consumers who purchase an overpriced lie dressed in a "certified organic" label, since they would have no direct redress for compensation at either the state or federal level.

FACTUAL AND PROCEDURAL BACKGROUND

A. The OFPA Establishes a National Definition of "Organic" While Preserving Traditional State Police Powers Through State Organic Programs.

California has been actively regulating organic food production since 1979. In 2003, COPA was enacted as Article 7 of the Sherman Food, Drug and Cosmetic Law (Health & Saf. Code § 109875 et seq.), 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.) Thereafter, California became the first state to establish a USDA-approved State Organic Program ("SOP"). California's exercise of its independent police powers through local enforcement of its SOP is not surprising considering that California is the nation's "largest producer of agricultural products and the top exporting State," with annual farm receipts totaling $36.1 billion in 2008. (U.S. Dept. of Agriculture, Trade and Agriculture: What's at Stake in California? (Sept. 2009) at p. 1.) By establishing its own approved SOP, California retained its ability—as Congress intended—to protect its unique local agricultural interests by continuing the established practice of enforcing the state's Sherman Law through private consumer-protection actions.

California's SOP expressly incorporates federal standards. 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.) In this case, Ms. Quesada expressly alleges that the products in question were not grown on certified organic farms. (AA, p. 8.) In addition to being a *per se* unlawful business practice actionable under the UCL, COPA expressly provides for a private claim by consumers for such a violation. (Health & Safety Code § 111910.)

By 1990, 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"[1]. 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. S1109 (Feb. 8, 1990).) To balance these interests, the OFPA established a national organic standard, but also expressly provided states the flexibility to serve their own interests through additional regulations and enforcement provisions and by including an express savings provision in 7 U.S.C. § 6507 ("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

[1] S. Rep. No. 357, 101st Cong., 2d Sess. 289 (1990).

organically produced under [the OFPA] than are contained in the [NOP].").
(*See* S. Rep. No. 357, 101st Cong., 2d Sess. 289, 295 (1990).)

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.) In fact, Congress was careful to limit the preemptive reach of the OFPA and preserve state involvement: "In establishing the [NOP], the Secretary *shall* permit each State to implement a State organic certification program." (7 U.S.C. § 6503(b) (italics added).)

B. 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. (AA, 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 by a registered certifying agent as an organic production facility, 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.)

Plaintiff alleged 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 percent organic products when they were not, a direct violation of COPA, Health & Saf. Code § 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. (AA, 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.*)

To accomplish this scheme, Herb Thyme transported by truck its conventionally grown herb crops from Camarillo and Thermal to its organic farm in Oceanside. (*Ibid.*) 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. (*Id.* at p. 8.) 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 organic prices without providing premium organic product. (*Ibid.*) 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 ("The . . . the 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.").)

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 Consumers Legal Remedies Act ("CLRA"), Civil Code section 1750 et seq.; (2) Violation of the False Advertising Law ("FAL"), Business & Professions Code section 17500; (3) Violation of the Unfair Competition Law ("UCL"), Business & Professions Code section 17200, based on Unlawful Conduct; (4) UCL Violations based on Unfair and Fraudulent Conduct; and (5) Unjust Enrichment. (AA, pp. 1-19.)

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

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 Plaintiff 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.

D. The Second District Court of Appeal, Division Three, Incorrectly Finds Implied Conflict Preemption and Affirms 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. In its decision, certified for publication, while correctly finding in light of the above 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, finding "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. The Second District's decision became final on January 22, 2014.

LEGAL ARGUMENTS

I. Review is Necessary to Address Important Questions Regarding Private Enforcement of California's Organic Food-Labeling Laws in Light of Long-Standing UCL Precedent.

In affirming the dismissal of this action at the pleadings stage, the Court of Appeal refused to follow precedent from this Court, the United States Supreme Court, and the Ninth Circuit Court of Appeals. The Court of Appeal's analysis calls into question prior case law finding that, absent a clear and manifest statement from Congress, federal preemption will not stop the assertion of consumer claims premised on state laws that are identical to federal requirements.

The Court of Appeal only 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 first made available when California adopted its original organic standards in 1979 despite both the limited preemption and savings clauses in the OFPA. However, California's existing organic regulations included a private right of action at the time Congress adopted the OFPA, and the OFPA's savings clause does not expressly preempt such laws or claims. As such, the savings clause should have ended the inquiry, necessitating reversal of the Trial Court. (*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at 1092; *Cippolone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517 ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that

reach are not pre-empted.").)[2] Instead, the Court of Appeal crafted a new implied preemption framework and created a significant lack of uniformity of decision with the precedent of this Court, including *Farm Raised Salmon.*

First, the Court of Appeal *inferred* congressional intent to preempt consumer claims from OFPA's administrative enforcement provisions. (Opn. at p. 15.) But 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 (italics added).) Moreover, this Court has "long recognized that the existence of a separate statutory enforcement scheme does not preclude a parallel action under the UCL." (*Id.* citing *Stop Youth Addition, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 572-573.) This Court has repeatedly affirmed that 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.) Yet, the Court of Appeal's flawed reasoning eliminates a crucial method of enforcement that has historically been recognized permitted in this state: private consumer claims based on violations of state laws that parallel federal regulations. (*See, e.g., Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 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.).)

---

[2] Indeed, this same panel committed the same error in *Farm Raised Salmon Cases*, *supra,* 42 Cal.4th 1077, a fact they recognized during oral argument in this matter.

The second articulated basis underlying the "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 under which numerous forms of relief are sought by a consumer. (*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 (Dec. 21, 2000) (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. (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 144.) Accordingly, the California Legislature exercised its discretion to provide a direct right of relief by codifying COPA as part of the Sherman Food, Drug, and Cosmetic Law ("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.)

The Court of Appeal's attempt to distinguish and avoid the same error it committed in *Farm Raised Salmon Cases, supra,* 42 Cal.4th 1077, is unavailing. 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 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).

Here, the Court of Appeal tried to distinguish *Farm Raised Salmon Cases* on the grounds that the NLEA somehow affords the state 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," except in limited circumstances where states may take action. (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 Second District, Division Three's reading of *Farm Raised Salmon Cases* is dramatically different from a recent case from the Second District, Division Five, *Coleman, supra,* 2014 Cal.App.LEXIS 70. The *Coleman* court read *Farm Raised Salmon Cases* to hold that "states are free to provide for private remedies under state law, so long as state law requirements are identical to federal law requirements." (*Coleman, supra,* 2014 Cal.App.LEXIS 70 at p. *13.) The court explained that "to survive both express and implied preemption, a state law cause of action 'must be premised on conduct that both (1) violates the [federal law] and (2) would give rise to recovery under state law even in the absence of the [federal law].'" (*Id.* at pp. *20-21, quoting *Riley v. Cordis Corp* (2009) 625 F.Supp.2d 769, 777.) Under *Coleman,* express and implied preemption would not apply to claims that are, like Ms. Quesada's, based on conduct that would be unlawful in California even in the absence of the federal law. Thus, if the Court of Appeal's holding in this case is allowed to stand there would be a troubling lack of uniformity in the law on this critical point.

This lack of uniformity is clear for several reasons. First, just as with COPA and federal organic regulations, California adopted the federal NLEA regulations (in their entirety) as part of the Sherman Law, a statutory scheme with a long history of private consumer enforcement through UCL, FAL, and CLRA causes of action. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1084, fn. 5.) Second, because California adopted the federal NLEA regulations as its own, just as with the federal organic regulations, there were no requirements "in addition to" and, therefore in conflict with, federal law. (*Id.* at p. 1090.) Finally, even though a private right of action was clearly barred under the federal NLEA, this Court found Congressional

silence (not an out-of-context reference to the Federal Register) on how states could enforce corresponding regulations left the door open for actions under the UCL, FAL, and CLRA, the traditional means of enforcing the Sherman Law. (*Id.*)

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.

While the OFPA contains a federal administrative process for evaluating complaints, the OFPA contains no express 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 a SOP. 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. In fact, 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.").)

II. Review is Necessary to Resolve Conflicts and to Ensure Consistency Between State and Federal Case Law.

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. Review is therefore necessary to unify state and federal case law on this important issue of law.

The only other court to apply California organic labeling laws to a food product found claims like Ms. Quesada's were not preempted by the OFPA. (*Jones v. ConAgra Foods, Inc.* ("*Jones*") (N.D. Cal. Dec. 17, 2012) 2012 U.S. Dist. LEXIS 178352.) 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 *2.) Plaintiffs asserted the labels of certain food products were misleading customers by falsely using the words "organic" or "certified organic." (*Id.* at *3-4.) 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 *5-6.)

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.'" (*Id.* at *6 (quoting *Aurora Dairy, supra*, 621 F.3d 781.) The *Jones* Court rejected this reading of *Aurora Dairy*, explaining that, just as Herb Thyme and the Court of Appeal did here, ConAgra was "tak[ing] this quote out of context." (*Id.* at *7.) 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.'" (*Id.* at *7 (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 implied or 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." (*Id.* at *8 (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 *9-10.) 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*, 2012 U.S. Dist. LEXIS 178352 at *10.) 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 *10 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, however, is outside the scope of these regulations.").) On this basis, numerous federal courts have held that consumer claims for COPA violations brought under Health & Safety Code section 111910 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.)

As a result of these inconsistencies, a consumer could assert a claim in federal court and it would not be preempted by the OFPA, but it would be preempted in state court if the Court of Appeal's decision remains intact. This is precisely the type of situation this Court should resolve now. (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329 (Court answered certified question determining constitutionality of state statute because Courts of Appeal found the statute was unconstitutional while federal courts disagreed, resulting in a lack of uniformity of decision).) The law on this critical issue is non-uniform in a way only this Court can clarify.

III. Review is Necessary to Clarify that the Primary Jurisdiction Doctrine Does Not Offer an Alternative Basis for Dismissal of Consumer Claims for Misleading Advertising.

Finally, the Court of Appeal did not address the Trial Court's ruling that the primary jurisdiction doctrine offered an alternative basis for dismissal of Ms. Quesada's claims. The Court should also take this matter to clarify two issues with respect to primary jurisdiction.

First, the Court should clarify that under California law primary jurisdiction is not a basis for dismissal, but rather only for a motion to stay an action pending ongoing administrative proceedings. (*See Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1412 ("The latter doctrine does not preclude judicial consideration of the case, but rather suspends judicial action pending the administrative agency's views."); *Wise v. PG&E* (1999) 77 Cal.App.4th 287, 295-96.) Dismissal of this action pending administrative review is not a valid application of the primary jurisdiction doctrine.

Second, the Court should clarify that primary jurisdiction doctrine does not apply to food misbranding claims based primarily on whether advertisements and labels are misleading, and involving issues of statutory interpretation. In resolving UCL claims, courts routinely are called upon to decide whether an alleged business practice is unlawful based on the violation of an underlying statute, even where there is an administrative agency designated to address such issues, since violation of an underlying statute is a *per se* violation of the UCL. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 181; *Reno v. Baird* (1998) 18 Cal.4th 640, 660 ("ultimately statutory interpretation is a question of law the courts must resolve").) False and misleading advertising claims such as those brought in this action are "within the conventional competence of the courts" and do not require the application of any expertise unique to that administrative agency. (*Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1412.) Thus, the Court should also grant review to clarify this important question of law regarding application of the primary jurisdiction doctrine to consumer claims based on misleading advertising./ /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for Review.

DATED: February 3, 2014

Respectfully submitted,

LAW OFFICE OF RAYMOND P. BOUCHER

By: _____
RAYMOND P. BOUCHER

WHATLEY KALLAS, LLC
Alan M. Mansfield

KIESEL + LARSON LLP
Helen Zukin

JOHNSON & JOHNSON LLP
Neville Johnson

Counsel for Plaintiff-Appellant and Petitioner, MICHELLE QUESADA

CERTIFICATE OF WORD COURT

I, Raymond P. Boucher, hereby certify pursuant to Rule of Court 8.504(d)(1) that this Petition for Review was produced on a computer, and that it contains 5,696 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 February 3, 2014, at Los Angeles, California.

Raymond P. Boucher

EXHIBIT A

Filed 12/23/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHELLE QUESADA, Plaintiff and Appellant, v. HERB THYME FARMS, INC., Defendant and Respondent.	B239602 (Los Angeles County Super. Ct. No. BC436557)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carl West, Judge. Affirmed.

Law Office of Raymond P. Boucher, Raymond P. Boucher; Whatley Kallas, Edith M. Kallas, Alan M. Mansfield; Kiesel + Larson, Helen Zukin, Maria L. Weitz; Johnson & Johnson and Neville Johnson for Plaintiff and Appellant.

Greenberg Traurig, Mark D. Kemple and Angela L. Diesch for Defendant and Respondent.

In this case of first impression, we address whether the federal Organic Foods Production Act of 1990 (OFPA or the Act) (7 U.S.C. § 6501 et seq.),[1] which governs the labeling of agricultural products as "organic" and "USDA Organic," preempts state consumer lawsuits alleging violations of the Act or violations of California's federally-approved state organic program (SOP), which is codified as the California Organic Products Act of 2003 (COPA) (Food & Agr. Code, § 46000 et seq.; Health & Saf. Code, § 110810 et seq.). Given this state-federal regulatory scheme, the resolution of this issue requires us to consider what, if any impact, *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 has on our preemption analysis.

We conclude that in enacting the OFPA, Congress made clear its intention to preclude private enforcement through state consumer lawsuits in order to achieve its objective of establishing a national standard for the use of "organic" and "USDA Organic" in labeling agricultural products. Unlike *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, where Congress did not intend to alter the status quo in which residents may choose to file unfair competition claims or other claims based on violations of identical state laws, in enacting the OFPA, Congress did intend to alter the status quo. Congress mandated federal approval and oversight of state organic programs to ensure consistent federal and state government enforcement for violations of the Act. COPA, California's federally-approved SOP, has a remedial scheme that does not include private enforcement. A state consumer lawsuit based on COPA violations, or violations of the OFPA, would frustrate the congressional purpose of exclusive federal and state government prosecution and erode the enforcement methods by which the Act was designed to create a national organic standard. Accordingly, this lawsuit poses a clear obstacle to the accomplishment of the congressional objectives in enacting the OFPA and so it is preempted. Therefore, we affirm the trial court's judgment dismissing this class

---

[1] All further undesignated statutory references are to title 7 of the United States Code.

and representative action filed by plaintiff Michelle Quesada against Herb Thyme Farms, Inc. (Herb Thyme).

FACTUAL AND PROCEDURAL BACKGROUND

Herb Thyme is a certified grower with federal approval to label its organically grown herbs as "USDA Organic." Herb Thyme allegedly mislabeled its product as "Fresh Organic" and used the "USDA Organic" graphic on its product packaging, when the contents contained a mix of organically grown herbs and conventionally grown herbs. Quesada alleges Herb Thyme "misrepresented the source, approval or certification of their non-organic fresh herb products," as "Fresh Organic" products.[2]

Quesada, on behalf of others similarly situated, filed a class and representative action against Herb Thyme. The second amended class action complaint (complaint) alleges causes of action for (1) unfair and deceptive trade practices in violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.); (2) violation of the false advertising law (Bus. & Prof. Code, § 17500 et seq.); (3) unlawful conduct in violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.); and (4) unfair and fraudulent conduct in violation of the UCL.[3] The laws alleged to be violated as a predicate for the "unlawful" prong of the UCL claim include provisions of the CLRA, and the false advertising law.[4] The complaint does not cite either the OFPA or COPA.

---

[2] There is a dispute between the parties regarding Herb Thyme's certification as a split operation. Herb Thyme has requested judicial notice of the USDA's guidelines related to commingling and contamination prevention in organic production and handling. We deny that request because the issue is not relevant to the resolution of this appeal.

[3] The court previously sustained a demurrer without leave to amend to the fifth cause of action for unjust enrichment.

[4] The UCL proscribes any "unlawful business activity," which includes " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112-113.)

Herb Thyme moved for judgment on the pleadings on two grounds – Quesada's claims are preempted by federal law, and the United States Department of Agriculture (USDA) has primary jurisdiction. Relying on the express language in various provisions of the OFPA, and a federal appellate case interpreting the OFPA, *Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig. v. Aurora Organic Dairy* (8th Cir. 2010) 621 F.3d 781 (*Aurora Dairy*), Herb Thyme argued the state consumer law claims alleging noncompliance with organic labeling laws were expressly preempted because these claims implicated the certification process under the OFPA. Herb Thyme also argued these state consumer law claims were impliedly preempted because a resolution of this action would conflict with regulation and enforcement of the OFPA by the federal government. The trial court agreed with Herb Thyme's preemption analysis, granted the motion, and entered judgment of dismissal. Quesada timely appeals.

During the course of the briefing on appeal, Quesada changed positions and now contends this action is based solely on violations of COPA. The reply brief states: "Ms. Quesada is not enforcing federal regulations; she brings state law claims for organic labeling violations in the State of California based on the State's organic labeling laws. Such labeling in California is regulated by the California SOP, not the NOP . . . ."[5] In asserting this new theory of liability, Quesada contends that *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, is controlling as the California Supreme Court addressed federal preemption under a similar state-federal regulatory scheme.

After oral argument, this court requested the parties brief questions related to Quesada's new theory of liability, specifically, whether a state consumer lawsuit based upon violations of COPA is preempted. Although the trial court did not consider the

---

[5] This appears to be a proffered amendment to the complaint. On appeal from a judgment on the pleadings, we accept as true the allegations in the complaint. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516.) We independently determine whether the facts as alleged support a valid cause of action or, if they do not, whether amendment could cure the defect. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347.) "Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment." (*Id.* at p. 1348.)

preemption question under COPA, we address the preemption issue under both the state and federal regulatory scheme because preemption is purely a legal issue, which we review de novo. (See *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at pp. 1089-1090, fn. 11.)

DISCUSSION

1. *Statutory Framework*

a. *The OFPA and the National Organic Program (NOP)*

(1). *Organic Labeling of Agricultural Products*

As noted, the OFPA establishes national standards for the sale and labeling of organically produced agricultural products, assures consumers that organically produced products meet consistent standards, and facilitates interstate commerce in organically grown fresh and processed food. (§ 6501; *Harvey v. Veneman* (1st Cir. 2005) 396 F.3d 28, 31-32.) "The Act furthers these purposes by establishing a national certification program for producers and handlers of organic products and by regulating the labeling of organic products. . . . §§ 6503(a), 6504, 6505(a)(1)(A)." (*Harvey v. Veneman*, *supra*, at p. 32; see also 7 C.F.R. §§ 205.1-205.681 (2012).) The USDA has promulgated regulations, known as the NOP, regulating which products can be labeled and sold as organic.

(2). *The OFPA Permits States to Establish State Organic Certification Programs*

Congress expressly permits states to establish a state organic certification program.[6] (§ 6507; 7 C.F.R. § 205.620 (2012).) A state organic certification program

---

[6] The final rule establishing the NOP clarifies the distinction between the statutory term "state organic certification program" and "state organic program." (Final Rule, Department of Agriculture, Agricultural Marketing Service, National Organic Program, 65 Fed.Reg. 80548-01, 80617 (Dec. 21, 2000) (hereafter, Final Rule).) "[W]hile certification is one component of the requirements, it does not define the extent of evaluation of State programs that will be conducted by the NOP. SOP's [*sic*] can choose not to conduct certification activities under their existing organic program. State programs whose provisions fall within the scope of the eleven general provisions described in the Act (7 U.S.C. § 6506) will require Departmental review." (*Ibid.*)

must meet the requirements of the OFPA, be approved by the federal Secretary of Agriculture, and ensure products that are sold or labeled as "organic" are produced and handled using organic methods. (§ 6502(20).) After initial approval, the USDA has oversight of a state's organic certification program, which includes a mandatory review not less than once during each five-year period. (§ 6507(c); 7 C.F.R. § 205.622 (2012).)

(3). *Enforcement of the OFPA*

Congress did not create a private right of action to enforce the OFPA or its implementing regulations. (§ 6519; Final Rule, 65 Fed.Reg. 80627 (Dec. 21, 2000).)

Any agricultural producer or operation, whether certified or not, that knowingly sells or labels a product as organic, except in accordance with the Act, is subject to a civil penalty. (§ 6519(a); 7 C.F.R. § 205.100(c)(1) (2012).) Congress directed the USDA to establish an "expedited administrative appeals procedure" that allows a person to appeal any action taken under the federal program by the USDA, the applicable governing state official, or a certifying agent if that action "(1) adversely affects such person; or [¶] (2) is inconsistent with the organic certification program established under this chapter." (§ 6520(a); 7 C.F.R § 205.681 (2012).) The only judicial remedy is an appeal of a final agency decision to the United States District Court. (§ 6520(b).)

For certified operations, the USDA administratively enforces noncompliance, revocation, or suspension of certification. (7 C.F.R. §§ 205.662, 205.681 (2012).) The governing state official is responsible for administrative enforcement in states with SOPs. (7 C.F.R. § 205.620(d) (2012).) An SOP's governing state official must notify the federal Secretary of Agriculture upon commencement of any noncompliance proceeding against a certified operation. (7 C.F.R. § 205.668(a) (2012).) "In States with approved SOP's [*sic*], the SOP will oversee certification compliance proceedings and handle appeals from certified operations in the State. An SOP's appeal procedures and rules of procedure must be approved by the Secretary and must be equivalent to those of the NOP and USDA. The final decision on an appeal under the SOP may be appealed by the appellant to the United States District Court for the district in which the appellant is

located." (Final Rule, 65 Fed.Reg. 80634-80635 (Dec. 21, 2000); 7 C.F.R. § 205.668(b) (2012).)

b. *COPA*

As noted, COPA is California's federally-approved SOP, which is codified in both the Food and Agricultural Code (§§ 46000-46029), and in the Sherman Food, Drug & Cosmetic Law (Sherman Law) at Health and Safety Code sections 110810 through 110959. In enacting COPA, the Legislature adopted the federal regulations as the organic food and product regulations of this state. (Food & Agr. Code, § 46002, subd. (a); Health & Saf. Code, § 110956, subd. (a).)

Any person may file a complaint against an agricultural producer or operation whether certified or not, with the state Secretary of Food and Agriculture or the state Director of the Department of Health concerning noncompliance with COPA. (Food & Agr. Code, § 46016.1, subd. (a); Health & Saf. Code, § 110940, subd. (a).) In lieu of prosecution, civil penalties may be levied against any person who violates COPA or any regulation adopted by the NOP. (Food & Agr. Code, § 46017, subd. (a); Health & Saf. Code, § 110915, subd. (a).) COPA has a codified appeals procedure, entitling an aggrieved party to an administrative hearing and a limited judicial remedy. (Food & Agr. Code, § 46017, subds. (d), (e); Health & Saf. Code, § 110915, subds. (d), (e).)

For certified operations, the state Secretary of Food and Agriculture and the state Director of the Department of Health enforce noncompliance, revocation, or suspension of certification. (Food & Agr. Code, § 46016.1, subds. (b), (e); Health & Saf. Code, § 110940, subds. (b), (e); Final Rule, 65 Fed.Reg. 80624 (Dec. 21, 2000).) The process for handling complaints and appeals from the denial, suspension, or revocation of organic certification incorporates the federal regulations. (Cal. Code Regs., tit. 3, §§ 1391.3, 1391.5.) Final decisions may be appealed to the United States District Court for the district in which such certified operation is located. (Final Rule, 65 Fed.Reg. 80624 (Dec. 21, 2000).)

With this state-federal statutory framework in mind, we turn to the preemption question, that is, whether Quesada's state consumer lawsuit against a certified organic

grower based on mislabeling its product as "organic," in violation of the OFPA or COPA is preempted.

2. *General Preemption Principles*

The supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2) makes federal law paramount and vests Congress with the power to preempt state law. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) Federal regulations have the same preemptive effect as the statutes under which they are promulgated. (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 137-138.) " 'Congress may exercise that power by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption.' [Citation.]" (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1048; see *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1087.) Herb Thyme asserts both express preemption and the implied preemption doctrine of obstacle preemption.

"[E]xpress preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, *supra*, 41 Cal.4th at p. 936.) In the first instance, we focus on the plain wording of the statute, which is the best evidence of congressional preemptive intent. (*W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist.* (2012) 207 Cal.App.4th 406, 423.)

Obstacle preemption arises when the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, *supra*, 41 Cal.4th at p. 936.) A state action constitutes a barrier to the accomplishment of a federal goal if the action interferes with the application of federal law. (See *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 873.) Whether a state law is a sufficient obstacle is a matter of judgment, to be determined in the context of the federal

statute as a whole, its purposes, and its intended effects. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.) If the federal act's operation would be "frustrated and its provisions refused their natural effect" by the operation of the state or local law, the state law must yield. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 760.) Like express preemption, congressional intent determines whether obstacle preemption will be found in any given case. (*Jankey v. Lee*, *supra*, 55 Cal.4th at p. 1048.)

There is a presumption against preemption of state laws that operate in traditional state domains. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1088.) The presumption applies with particular force here because " '[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption.' " (*Ibid.*) As the party asserting preemption, Herb Thyme has the burden of overcoming that presumption. (See *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, *supra*, 41 Cal.4th at p. 936.)

3. *The OFPA Expressly Preempts State Organic Certification Laws, not State Consumer Lawsuits*

Herb Thyme has not met its burden to show Congress intended to expressly preempt state consumer lawsuits. Section 6507 of the OFPA expressly preempts state organic certification laws. States are expressly preempted from creating certification programs to certify organic farms or handling operations unless the state programs have been submitted to, and approved by the federal Secretary of Agriculture as meeting the requirements of the OFPA. (§ 6507(a).) Unless federally approved, a state organic certification program will not become effective. (§ 6507(a), (b); Food & Agr. Code, § 46014.2, subd. (a) ["All products sold as organic in California shall be certified by a federally accredited certifying agent, if they are required to be certified under the federal act."]; Health & Saf. Code, § 110850, subd. (a) ["Following initial United States Department of Agriculture accreditation of certifying agents as provided in Section 6514 of Title 7 of the United States Code and upon implementation of the federal organic

certification requirement pursuant to the federal Organic Foods Production Act of 1990 . . . , all products sold as organic in California shall be certified by a federally accredited certifying agent, if they are required to be certified under the federal act."].) Thus, any state organic certification program that existed before passage of the OFPA or that has not been federally approved is expressly preempted. Congress, however, did not expressly preempt state consumer law claims alleging violations of the OFPA. (See *Aurora Dairy*, *supra*, 621 F.3d at p. 792.)

Congress's express preemption of state organic certification programs informs our analysis of the implied preemption doctrine of obstacle preemption. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, *supra*, 41 Cal.4th at pp. 944-945.) "In *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280 . . . , the court clarified the relation between express preemption clauses and implied preemption doctrines, explaining that 'an express definition of the pre-emptive reach of a statute "implies"—*i.e.,* supports a reasonable inference—that Congress did not intend to pre-empt other matters,' but the express clause does not 'entirely foreclose[ ] any possibility of implied pre-emption.' [Citations.] This inference is a simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.' [Citation.]" (*Ibid.*)

4. *The Implied Preemption Doctrine of Obstacle Preemption Bars State Consumer Lawsuits Based on Product Mislabeling in Violation of the OFPA*

Herb Thyme contends the preemption analysis in *Aurora Dairy*, *supra*, 621 F.3d 781, applies here and bars state consumer lawsuits against a certified grower for mislabeling its product as "USDA Organic." In *Aurora Dairy*, the Eighth Circuit concluded state consumer law claims against a certified milk producer for mislabeling non-organic milk as organic were impliedly preempted because the lawsuit conflicted with federal law establishing national organic labeling standards. (*Id.* at p. 796.) The Eighth Circuit reasoned that based upon the OFPA's purpose and structure, compliance

with the Act and certification, which permitted the dairy to label its product as "organic," were not separate requirements. Because the certified operations were authorized to label and sell organic products, state law claims challenging violations of the Act implicated federal certification and were not independently enforceable in a state consumer lawsuit. (*Ibid.*)

The *Aurora Dairy* court explained the purpose articulated in the OFPA, that is, " 'to establish national standards governing the marketing of certain agricultural products as organically produced products,' would be deeply undermined by the inevitable divergence in applicable state laws as numerous court systems adopt possibly conflicting interpretations of the same provisions of the OFPA and NOP." (*Aurora Dairy*, *supra*, 621 F.3d at p. 796.) Rather than achieving the congressional purpose to " 'assur[e] consumers that organically produced products meet a consistent standard,' " if permitted to proceed, state consumer lawsuits would have the opposite result, creating " 'consumer confusion and troubled interstate commerce.' " (*Id.* at pp. 796-797.) The court acknowledged that state lawsuits might assure consumers they are buying organic, an argument advanced by Quesada, but such assurances actually undermine Congress's purpose to establish national standards. (*Ibid.*)

The remedial scheme of the OFPA also supported the Eighth Circuit's conclusion that state consumer lawsuits alleging product mislabeling by a certified operation are preempted. (*Aurora Dairy*, *supra*, 621 F.3d at p. 797.) The OFPA permits an agricultural product to be sold by the certified grower as organic if the product is produced and handled in accordance with the Act. The penalty for noncompliance with the Act is a civil penalty. (*Ibid.*) Because the milk producer was federally certified to label its product as "organic," state consumer law claims alleging the products were mislabeled conflicted with this remedial scheme. We agree with the reasons articulated by the Eighth Circuit in *Aurora Dairy* that the purpose of the OFPA and the statutory remedial scheme demonstrate Congress's intent to preempt state consumer lawsuits. Thus, state consumer law claims against a certified organic producer seeking to hold it

accountable for representing its products as organic when in fact the products were not, are preempted.

Quesada attempts to distinguish *Aurora Dairy* by narrowly reading the case to apply only to certification challenges. *Aurora Dairy* holds state consumer law claims against a certified grower alleging mislabeling are preempted if these claims rely on proof of facts that, if found by the certification agent, would have precluded certification, or would have caused a revocation or suspension of certification. (*Aurora Dairy*, *supra*, 621 F.3d at pp. 798-799.)

Here, the state consumer law claims alleged in the complaint seek to hold Herb Thyme, a certified grower, accountable for mislabeling its product as organically grown. These claims require proof of facts that, if found by the certification agent, would have precluded federal certification or would have caused a revocation or suspension of certification. Under these circumstances, just as in *Aurora Dairy*, certification and compliance are inter-related. To hold otherwise might lead to the incongruous result in which a state court action might result in a finding that the certified grower mislabeled its product as "organic," but the certified grower's federal certification had not been revoked or suspended. Such a result would "come[] at the cost of the diminution of consistent standards . . . ." (*Aurora Dairy*, *supra*, 621 F.3d at pp. 796-797.)

Quesada notes that *Aurora Dairy* did not hold all state consumer claims are preempted. For example, the Eighth Circuit concluded state deceptive advertising claims alleging that " '[o]ur milk comes from healthy cows,' " " ' "Cows First," ' " or " 'We believe that animal welfare and cow comfort are the most important measures in organic dairy,' " were not preempted. (*Aurora Dairy*, *supra*, 621 F.3d at pp. 789-790, 799-800.) The facts necessary to support these causes of action had no bearing on whether the product met the national standard to be labeled as "organic." No similar allegations against Herb Thyme are present here. Accordingly, the trial court did not err in relying on *Aurora Dairy* to conclude the state consumer law claims alleged against Herb Thyme, a certified grower, based upon violations of the OFPA are preempted.

5. *The Implied Preemption Doctrine of Obstacle Preemption Bars State Consumer Lawsuits Based on Product Mislabeling in Violation of COPA*

If given leave to amend, Quesada contends no federal law would be implicated because this lawsuit would allege violations of the unfair competition law, the CLRA, and the false advertising law based on COPA. In support of this proposed amendment, Quesada shifts the focus from distinguishing the Eighth Circuit's preemption analysis in *Aurora Dairy* to the California Supreme Court's preemption analysis in *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, which she contends supports her new position.

a. *Farm Raised Salmon Cases*

In *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, the California Supreme Court considered and rejected the argument that because Congress expressly precluded private enforcement of the Federal Food, Drug and Cosmetic Act (FDCA) (21 U.S.C. § 337), the federal law also impliedly barred consumer lawsuits predicated on identical state laws. (*Farm Raised Salmon Cases*, *supra*, at p. 1086.) Congress amended the FDCA with the Nutritional Labeling and Education Act of 1990 (NLEA), which by negative implication permitted states to establish their own requirements pertaining to the labeling of artificially colored food so long as their requirements were identical to those contained in the FDCA. (*Ibid.*)

The court in *Farm Raised Salmon Cases* concluded that state consumer lawsuits alleging violations of the identical state laws were not preempted because there was no indication that Congress "intended a sweeping preemption of private actions predicated on requirements contained in state laws." (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1090.) The legislative history further indicated the importance of the state role in enforcing the parallel state laws and there was no indication that Congress intended to alter the status quo, that is, "states may choose to permit their residents to file unfair competition or other claims based on the violation of state laws . . . ." (*Id.* at pp. 1090-1091.)

Congress passed an express savings clause in an uncodified provision of the NLEA, providing additional support that it did not intend to preclude private enforcement

of parallel and identical state laws. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1091.) "In NLEA section 6(c)(1) . . . , Congress provided that '[t]he [NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [section 343-1] of the [FDCA].' [Citation.]" (*Ibid.*) This language was significant because it "evidences an intent to allow state and federal regulation to coexist," and because it informed the court's analysis of "the existence of any implied preemption." (*Id.* at pp. 1091-1092.) Citing other specific express preemption provisions in the FDCA, the *Farm Raised Salmon Cases* court drew the inference that Congress, "in light of the history of dual state-federal cooperation in this area, did not intend to limit states' options in a broad fashion." (*Id.* at p. 1092.)

b. *Farm Raised Salmon Cases is Unavailing to Quesada*

Just as the California Supreme Court did in *Farm Raised Salmon Cases*, our preemption analysis focuses on whether Congress intended to bar state consumer lawsuits predicated on violations of COPA, a federally-approved SOP. We are mindful that because Congress established a dual state-federal regulatory regime, our preemption analysis must be " ' "applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." [Citations.]' " (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1091-1092, fn. omitted.) The coordinated state-federal regulatory scheme, the legislative history, and Congressional intent in enacting the OFPA, readily distinguish the preemption analysis here from *Farm Raised Salmon Cases*.

Unlike the state-federal regulatory scheme in *Farm Raised Salmon Cases*, Congress permitted states to enact a state organic certification program if it met the requirements of the Act, and was *federally approved.*[7] (§ 6507(a).) Quesada ignores this

---

[7] There are various levels of state involvement in the national organic program. States may choose to (1) seek approval of a state organic program and become accredited to certify operations; (2) establish an SOP and use private accredited certification agents; (3) become accredited to certify; (4) operate under the national organic program as implemented by the federal Secretary of Agriculture; or (5) not play an active role in the NOP. (Exec. Order No. 13132, 65 Fed.Reg. 80682 (Dec. 21, 2000).)

distinction. COPA is California's federally-approved SOP. California, through COPA, effectively administers and enforces the federal Act within the state.[8] (§ 6507(b).) COPA conforms California law to the national organic program – it is not a state organic standard, it is the national organic program administered and enforced through state agencies. (See Assem. Com. on Agriculture, com. on Assem. Bill No. 2823 (2002 Reg. Sess.) Apr. 11, 2002, p. 1.) Because a state may or may not seek approval of an SOP, Congress did not intend to permit states with a federally-approved SOP to privately enforce the national organic standards, but bar private enforcement of the national organic standards in states without SOPs. This might lead to conflicting interpretations of the national organic standards in states with SOPs, which would affect interstate commerce and defeat Congress's purpose in establishing federal and state government oversight to ensure a national organic standard.

Moreover, unlike *Farm Raised Salmon Cases*, the legislative history of the OFPA reveals Congress intended enforcement responsibilities would be shared by the federal Secretary of Agriculture, the governing state officials in states with SOPs, and the certifying agents. (See Sen.Rep. No. 101-357, 2d Sess. (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4958; see also § 6520(a).) This is in stark contrast to the quoted legislative history in *Farm Raised Salmon Cases* in which Congress envisioned private enforcement based on state laws identical to those contained in the FDCA.

Quesada contends, however, that COPA can be privately enforced under the Sherman Law. Health and Safety Code section 111910, codified as part of the Sherman Law, permits a party to bring an action in superior court to seek injunctive relief. Health and Safety Code section 111910 specifically references Health and Safety Code section 110810 et seq., which codifies COPA. Health and Safety Code section 111910 has not

---

[8] Quesada contends that because Congress permits states to enact more restrictive requirements in an SOP (§ 6507(b)), states may choose how to enforce those state laws. Congress, however, mandates federal approval of the additional requirements so as not to interfere with the purpose and intent of the OFPA in establishing national organic standards. (§ 6507(b)(2).)

been amended since the passage of COPA to conform California statutes to the national organic program. " 'Where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified.' " (*Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 58-59.) Moreover, private enforcement seeking injunctive relief is inconsistent with the NOP and other provisions of COPA. (See Health & Saf. Code, § 110811 ["This article shall be interpreted in conjunction with Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code and the regulations promulgated by the National Organic Program (NOP) (Section 6517 of the federal Organic Foods Production Act of 1990."].) Citizens have no authority under the NOP to stop the sale of a product. (Final Rule, 65 Fed.Reg. 80627 (Dec. 21, 2000).) Thus, we conclude there is no private enforcement of COPA.

The mere absence of a private right of action, however, does not preclude an unfair competition claim based on a violation of the predicate statute. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1091.) In *Farm Raised Salmon Cases*, the court noted Congress's presumed awareness that " '[v]irtually every state in the nation permits one or more nongovernmental parties to enforce state . . . laws of general applicability prohibiting deceptive or unfair acts and practices in the marketplace.' [Citation.]" (*Ibid.*) Any unlawful business practice, including violations of the Sherman Law, may be redressed in a UCL action. (*Id.* at p. 1091, fn. 13.)

Here, 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 the national organic standards. Any such action would interfere with the exclusive federal and state government enforcement. Limiting private enforcement furthers the congressional purpose and objective to nationalize organic labeling standards and to avoid the inevitable divergence of applicable state laws and enforcement strategies. A state court, for example, might determine a certified organic grower did not comply with COPA (which has been federally approved and meets the requirements of

the OFPA) when there has been no revocation of the federal certification that permits the grower to label its products "organic." Likewise, injunctive relief is available for a UCL violation (Bus. & Prof. Code, § 17203), but 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)). These examples show that state consumer lawsuits even in states with a federally-approved SOP would undermine Congress's purpose of establishing national standards governing the marketing of certain agricultural products as "organic."

If Quesada were given leave to amend, she would base her state consumer law claims on allegations that Herb Thyme, a certified grower, mislabeled its herbs as "organic." To recover under any theory, Quesada would necessarily have to prove facts that Herb Thyme did not comply with the national organic labeling standards, which are codified in COPA as the standards of this state (Food & Agr. Code, § 46002, subd. (a); Health & Saf. Code, § 110956, subd. (a)). As *Aurora Dairy* notes, compliance and certification are inter-related. Quesada's proposed state consumer law claims based on violations of COPA require proof of facts, which if found by the certification agent, would have precluded federal certification, or would have led to revocation or suspension of Herb Thyme's certification. Such claims are impliedly preempted because state consumer lawsuits based on violations of COPA stand as an obstacle to the accomplishment and execution of the Congress's purpose and objective to establish national standards for organic production and labeling of agricultural products.

As Quesada points out, *Jones v. ConAgra Foods, Inc.* (N.D.Cal. 2012) 912 F.Supp.2d 889, reached the opposite conclusion. We are not bound by federal district court decisions. (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1074.) We also reject *Jones v. ConAgra Foods, Inc.* on its merits. In *Jones v. ConAgra Foods, Inc.*, the court concluded the implied preemption doctrine of conflict preemption did not bar the action because COPA does not impose any relevant additional requirements than those under the OFPA. (*Jones v. ConAgra Foods, Inc.*, *supra*, at pp. 895-896.) In reaching this conclusion, the *Jones* court did not discuss

federal approval and oversight of the state organic program or the federally approved remedial scheme in COPA that limits private enforcement to ensure national organic labeling standards.

In sum, we conclude that Quesada's state consumer lawsuit is preempted by Congress's mandate precluding private enforcement of the national organic standards to ensure national consistency in the production and labeling of agricultural products as "organic." Accordingly, we do not reach or consider the primary jurisdiction doctrine as an alternative ground to affirm the judgment.

DISPOSITION

The judgment is affirmed. Herb Thyme's request for judicial notice is denied, and its request for judicial notice in support of its supplemental briefing is granted only as to Exhibits E-G. Quesada's request for judicial notice is granted only as to Exhibits 7-10. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.

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 February 3, 2014, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

___ **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.

___ **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed in the Service List and placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

Executed on February 3, 2014, at Los Angeles, California.

Sandra Haro

SERVICE LIST

Neville Johnson, Esq.
JOHNSON & JOHNSON LLP
439 N. Canon Drive, Suite 200
Beverly Hills, CA 90210
Tel: 310-975-1080
Fax: 310-975-1095
Email: njohnson@jjllplaw.com

1 Copy

Mark D. Kemple, Esq.
GREENBERG & TRAURIG, LLP
1840 Century Park East, 19th Floor
Los Angeles, CA 90067
Tel: 310-586-7700
Fax: 310-586-7800
Email: kemplem@gtlaw.com

1 Copy

Alan M. Mansfield, Esq.
WHATLEY KALLAS, LLC
10200 Willow Creek Road
Suite 160
San Diego, CA 92131
Tel: 619-308-5034
Fax; 855-274-1888
Email: alan@clgca.com

1 Copy

Angela L. Diesch, Esq.
GREENBERG TRAURIG, LLP
1201 K Street, Suite 1100
Sacramento, CA 95814
Tel: 916-442-1111
Fax: 916-448-1709
Email: diescha@gtlaw.com

1 Copy

Helen Zukin, Esq.
KIESEL LAW LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211
Tel: 310-854-4444
Fax: 310-854-0812
Email: zukin@kbla.com

1 Copy

Hon. Kenneth R. Freeman
Los Angeles Superior Court
Central Civil West District
Department 322
600 S. Commonwealth Avenue
Los Angeles, CA 90005

1 Copy

Second District Court of Appeal
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

By Electronic Document Submission

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, CA 90013-1230

1 Copy