Case No. S216305

IN THE SUPREME COURT OF CALIFORNIA

MICHELLE QUESADA,

Plaintiff and Petitioner

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 County Superior Court
(Court Of Appeal No. B239602)

Case No. BC436557
Honorable Carl West, Judge, Presiding
(transferred to Honorable Kenneth Freeman after this appeal was filed)

RESPONSE TO PETITION FOR REVIEW

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Defendant and Respondent Herb Thyme Farms, Inc. ("Herb Thyme" or "Respondent") hereby responds to Petitioner Michelle Quesada's ("Petitioner") Petition for Review.

I. SUMMARY OF REASONS WHY REVIEW IS NOT WARRANTED

This case presents no issue warranting this Court's review. First, there is no important issue of law for this Court to resolve or settle. As the Petitioner and Court of Appeal both note, this case presents an issue of first impression for the courts of this State – albeit one on which the federal courts have weighed in, with the same holding as the Court of Appeal here. Second, although Petitioner suggests that the Decision in this case ("the Decision") conflicts with this Court's prior precedent, (i) Petitioner is wrong, but (ii) a conflict with this Court's prior precedent would provide no grounds for review anyway. Third, even if there were a basis for review here – and there is none – this case presents a uniquely inappropriate vehicle for review because (i) as to the first issue presented, the Petitioner here has shifted theories time and time again, creating a circumstance where it is difficult even to discern the proper question, and (ii) as to the second issue presented, although Petitioner suggests some "error" in the Decision's analysis, even Petitioner later must admit that the Court of Appeal never even reached the second question. Fourth, against this backdrop, the Decision is correct. Simply, Congress plainly intended for there to be a single "umpire" calling "balls and strikes" in the area of organic food labeling (the federal regulators, not juries throughout the country). It created a system by which states could, as California has done, create a federally approved program for implementing the Organic Foods Production Act of 1990 ("OFPA"). However, the OFPA expressly provides that any state enforcement mechanisms must first be approved by Congress – a point wholly ignored by Petitioner throughout these proceedings as

noted in the Court of Appeal's its Decision,[1] and again ignored in her current Petition.[2] And it is undisputed that none of the claims brought by Petitioner, or proposed to be brought by Petitioner, have ever been submitted by the State of California as part of its SOP for approval by the Secretary of Agriculture, much less approved by the Secretary of Agriculture pursuant to the OFPA. And though the state Legislature could not alter federal preemption analysis in any event, it too has expressly adopted the federal enforcement mechanism only[3] which permits only a

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[1] *Quesada v. Herb Thyme Farms, Inc.* (2013) 222 Cal.App.4th 642, 658 ["Congress permitted states to enact a state organic certification program if it met the requirements of the Act, and was *federally approved.* ([7 U.S.C.] § 6507(a).) Quesada ignores this distinction."] [emphasis added, footnote omitted]; see also 65 Fed. Reg. 80,548 at 80,548, 80,682 [state are "preempted under [7 U.S.C. §§ 6503-07] from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA."]; 7 C.F.R. § 205.621 [the State Organic Program "and any amendments to such program must be approved by the [USDA] prior to being implemented by the State"].

[2] Petitioner continues to feign ignorance stating, for example, that "the OFPA contains no express indication whatsoever that Congress intended to restrict how a state may choose to enforce its approved SOP [State Organic Plan]." (Petition at 15.) It does; Petitioner just chooses to ignore it.

[3] "The complaint process in this state shall also meet all the complaint processes outlined in regulations promulgated by the NOP." (Food & Agr. Code, § 46016.1(e); Health & Safety Code, § 110940(e).) Indeed, "[t]he adoption of the NOP regulations ... placed California's 1990 Organic Foods Act out of compliance with recently established federal standards," and the California Organic Products Act of 2003 ("COPA") (Health and Safety Code §§110810-110959.) Food & Agr. Code §§46000-46029 ("COPA") was therefore adopted "to conform California law to the national regulations and codify existing state law provisions regarding the enforcement of state and federal requirements regarding organic products." (Sen. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823 (2001-2002 regular session) as amended June 11, 2002, 1st and 2d para. of Background and Discussion, and p. 4.)

private action via complaint to the accredited third party certifier, the State Organic Program, or USDA followed by a potential appeal to United States District Court. (7 C.F.R. § 205.668(b); see also Cal. Code Regs., tit. 3, §§ 1391.3, 1391.5). That is not the action that Petitioner has filed, or has proposed to file.

The Decision is correct, but it also presents no issue for this Court's review under well-settled principles governing the function of this Court's review. The Petition should be denied.

II. PROCEDURAL AND FACTUAL BACKGROUND

Respondent Herb Thyme is an organic producer registered and certified pursuant to the federal Organic Foods Production Act of 1990 ("OFPA"). Petitioner's Second Amended Complaint, filed December 1, 2010, alleged that Herb Thyme impermissibly commingled conventional product with organic product, and then labeled and marketed the blend under the "USDA Organic" seal, thereby misrepresenting the "source, approval or certification" of its "Fresh Organic" herb products. (AA Tab 1 at 007 [SAC ¶ 22], 012 [SAC ¶ 40(a)].) Petitioner sought to pursue state law claims for false advertising (Bus. & Prof. Code § 17500 et seq.), deceptive trade practices in violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), and unlawful conduct in violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), based entirely on her contention that Herb Thyme mislabeled its product as "organic," and used the "USDA Organic" seal on its product labels, when, as alleged, the contents did not comply with the standards set forth in the OFPA and its implementing regulations, the National Organic Program ("NOP"). (AA Tab 1, at 006-018.) Specifically, Petitioner alleged that Herb Thyme "trucked in conventionally grown herb crops to its organic farm," then "added" and "blended" the conventional herbs with its organic herbs grown on its certified organic farm, the "Oceanside" farm, and mislabeled the

"combined" mixture as "USDA Organic" and "Fresh Organic." (AA Tab 1, at 008, 011, 013 [SAC ¶¶ 24-25, 29, 42]; *id.* at 006 (¶¶ 17(a), 17(c)) [Herb Thyme "blended" conventional product with organic product].) As a result, Petitioner alleged, "all" of Herb Thyme's organic herbs were allegedly mixed with conventional herbs and "labeled and sent out as 'Fresh Organic.'" (*Id.* at 008 [SAC ¶ 25].)[4]

Petitioner alleged that "consumers rely on product packaging, including the USDA organic food graphic," and Herb Thyme "misrepresented the source, approval or certification of their [sic] non-organic fresh herb products, *i.e.*, their [sic] 'Fresh Organic' herb products." (AA Tab 1 at 011-12 [SAC ¶¶ 29, 33, 40(a)].) Petitioner contended that, though certified and authorized to sell these products under the "USDA Organic," a California jury could conclude under a "reasonable consumer" standard[5] that they were not in fact "organic" as advertised.

Petitioner sought not only restitution and compensatory damages, but an order permanently enjoining Herb Thyme from further engaging in the sale of such product. (*Id.* at 014-017 [SAC ¶¶ 46, 53, 61, 70, 74, and Prayer for Relief].)

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[4] As Petitioner put it to the trial court: "It is Plaintiff's position that she purchased organic product which was mixed with conventional product and that all of the organic product sold by them over a period of time contained conventional product, without exception." (AA Tab 4, at 079, lines 21-26.) And again: "The Court: But your claim is based on an allegation that the product that is coming from the Camarillo and Thermal non-organic farms is trucked to Oceanside and then blended with the [organic] product that is grown at the [organic] Oceanside Farm, and then sold out of Oceanside as organic. Isn't that the essence of your claim? Mr. Weitz: Yes. Yes Your Honor." (Reporter's Transcript on Appeal ("RT"), p. B-18, at 12:13-19.)

[5] *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506-507, 129 Cal.Rptr.2d 486 ["[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer." (citation omitted)].

Herb Thyme moved for judgment on the pleadings, which motion the trial court granted, concluding that a superior court judge and/or jury could not, employing state consumer laws, enjoin or award damages for the "packaging, labeling, and marketing of [Respondent's] products without directly defeating the goals of the OFPA." (AA Tab 8, at 200, lines 8-9.) It concluded that Petitioner's claims and the relief sought "amount to a frontal assault on the organic certification process." (AA Tab 8, at 197, lines 7-8.)

Petitioner appealed. Among other things, Herb Thyme argued that having multiple "umpire" juries or state law judges each employing what it perceived to be a the reasonable "strike zone" for use of the term "organic," would defeat the animating purpose of the OFPA (to have a public decision-maker applying a federally approved standard for organic make such calls). As the Decision later would note, Petitioner shifted her theories in her Reply Brief on appeal to something she had not pled. As the Court of Appeal explained, though Petitioner's "complaint does not cite either the OFPA or COPA"[6] (and Petitioner had expressly disavowed that she was challenging Herb Thyme's compliance with its certification[7]), "[d]uring the course of briefing on appeal, Quesada changed positions and now contends this action is based on violations of COPA." (*Quesada*, 222 Cal.App.4th at 649.)[8] Petitioner first suggested in her Reply that she might amend her pleading to "bring[] state law claims for organic labeling violations in the State of California based on the State's organic labeling laws," approved by the federal government under the OFPA. (*Ibid.*) In short, though Herb

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[6] *Quesada v. Herb Thyme Farms, Inc.* (2013) 222 Cal.App.4th 642, 649.

[7] AA, Tab 1, at 007, SAC ¶22.

[8] See also Petitioner's Appellate Reply Brief, at 21 ("The question whether the misstatements and omissions of material fact cited in the operative complaint are misleading is based on a reasonable consumer standard, not solely on the regulations cited by HerbThyme.")

Thyme was certified to use the "USDA Organic" label by the State pursuant to the OFPA, and though the State has never concluded that its certification was in error or that Herb Thyme had engaged in any unlawful conduct, Petitioner now contended that Herb Thyme was not compliant with that certification. On that previously disavowed assertion, Petitioner argued that she could bring consumer claims for "false" advertising of her certification, as well as newly-suggested and never pled claims under Health and Safety Code section 111910 (which is not part of COPA of 2003 and has never been submitted to, much less approved by, the Secretary of Agriculture as a permissible enforcement mechanism for the COPA), and seek to enjoin Herb Thyme's use of the "USDA Organic" label on these products.[9]

After an extended discussion of (1) the conflict between Petitioner's claims and the relief sought and the structure of the OFPA and the state program enacted under it (including its provisions that no consumer may seek to enjoin the sale of a product and the exclusive appeal process for any complaints about a certification for which the United States District Court has exclusive jurisdiction),[10] and (2) the fact that Health and Safety Code section 111910 has never been submitted to, let alone approved by, the federal Secretary of Agriculture as expressly required by the federal act (and moreover, directly conflicts with the NOP and COPA),[11] the Court of

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[9] *Compare* 65 Fed.Reg. 80,548, 80,627 ("Citizens have no authority under the NOP to investigate complaints alleging violation of the Act or these regulations."); *id.* at 80,627 ("Citizens have no authority under the NOP to stop the sale of a product."); 7 U.S.C. § 6520(a); § 6506(a)(3) & in 7 CFR 205.668 (providing that an appeal to the United States District Court is the exclusive private remedy concerning a certification decision, or a claim of non-compliance with a certification).

[10] *Quesada*, 222 Cal.App.4th at pp. 654-658.

[11] *Id.* at 650, 658; see also 7 U.S.C. § 6502(20).

Appeal correctly held that even Petitioner's new theories were preempted by federal law. In doing so, the Court of Appeal noted – as had the trial court before it – that:

> 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* [*Corp. Organic Milk Mktg. & Sales Practices Litig. v. Aurora Organic Dairy* (8th Cir. 2010) 621 F.3d 781] 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.
>
> * * *
>
> 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.

(*Quesada*, 222 Cal.App.4th at p. 660.) This Petition for Review followed.

III. DISCUSSION

A. Review Is Not Warranted Here Because There Is No Lack Of Uniformity Or Important Question To Settle

The grounds for review are prescribed by California Rules of Court, rule 8.500 and are limited to: "(1) When necessary to secure uniformity of decision or to settle an important question of law; (2) When the Court of Appeal lacked jurisdiction; (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." The only possible ground implicated here is the first, and the Petition itself makes clear that there is no basis for review of this case.

This Court does not exist to correct error, and its primary purpose is to secure uniformity of decisions throughout the State. (See *People v. Davis* (1905) 147 Cal. 346, 348.) Yet, as is made clear in Petitioner's Petition for Review to this Court, there is no lack of uniformity before our Courts of Appeal on the issues presented and no issue to "settle." First, the Petition argues that the Court of Appeal Decision here is in conflict with precedent from this Court. Not only is Petitioner flatly wrong about that purported conflict, but also, an erroneous decision alleged to conflict with this Court's precedent does not provide grounds for review. Second, although the Petition strains to create a conflict with one recent Court of Appeal decision on the first issue, the Petition simultaneously admits that this is a case of "first impression" in the California Courts of Appeal (*Quesada*, 222 Cal.App.4th at 647; Petition at 1). The Decision does not conflict with any Court of Appeal decision, and the federal courts to have addressed the issue have agreed with the Court of Appeal here. Third, on the second issue, although Petitioner assures the Court that there is a question of whether the Court of Appeal "erred in finding the primary jurisdiction doctrine provides

an alternative basis for dismissal," the Petition goes on to accurately explain that the Court of Appeal did not even reach this second question. (See Petition at 8-9.) Thus, on the second issue presented, there is nothing to review. (Cal. Rules of Court, rule 8.500(c)(2); *Marriage of Goddard* (2004) 33 Cal.4th 49 53, fn. 2; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2.)

1. There Is No Conflict With This Court's Precedent, But Any Such Conflict Would Provide No Grounds For Review.

Petitioner suggests that the Decision conflicts with two cases from this Court. Initially, a conflict with this Court's precedent would provide no grounds for review, as this Court does not exist to correct mere errors. Moreover, Petitioner is simply wrong about the two cases she cites. Initially, Petitioner makes the remarkable assertion that "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, 322 ('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.').)" (Pet. at p. 7.) *Kwikset* did no such thing. In *Kwikset*, this Court decided that a "Made in the USA" plaintiff had standing to proceed even in the wake of Proposition 64's elimination of standing requirements for those who have not engaged in business dealings with would-be defendants. (*Id.* at p. 316-317.) Organic food labeling was not issue; the OFPA and COPA were not even relevant; not even a question of federal preemption was at issue. In deciding that consumers have standing to proceed on UCL claims for false "Made in the USA advertising," all this Court did was give some examples of circumstances it thought would give rise to standing. *Kwikset* is entirely irrelevant. (See, e.g., *People v.*

McKinnon (2011) 52 Cal.4th 610, 639 [cases are "not authority for issues neither considered nor decided therein"].)

Further, the suggestion that this case conflicts with this Court's decision in *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 ("*Farm Raised Salmon*") is wrong. As discussed at length in the Decision, the statutory scheme at issue in *Farm Raised Salmon* – the National Labeling and Education Act ("NLEA") – differs significantly from the OFPA at issue here. (See *Quesada*, 222 Cal.App.4th at pp. 656-659.)[12]

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[12] The Court of Appeal is exactly correct. *Compare:* NLEA, *Farm Raised Salmon*, 42 Cal. 4th at pp. 121-23 (NLEA section 343-1 "clearly and unmistakably evidence Congress' intent to authorize states to establish laws that are 'identical' to federal law"; NLEA section 6(c)(1) provides that "the NLEA shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 343-1"; author of the NLEA noted that the NLEA "may be enforced in State court"; NLEA says "absolutely nothing about proscribing the range of available remedies states might choose to provide for the violation of those laws, such as private actions.")

with:

OFPA, 65 Fed.Reg. at 80,547, 80682, 80,557 ("OFPA and these regulations do preempt State statutes and regulations related to organic agriculture. OFPA establishes national standards regarding the marketing of agricultural products as organically produced, assures consumers that organically produced products meet a consistent standard, and facilitates interstate commerce in fresh and processed food that is organically produced."); 65 Fed. Reg. 80,548 at 80,548, 80,682 (12/21/00) (codified at 7 C.F.R. part 205), NOP Final Rule ("States also are preempted under [7 U.S.C. §§ 6503-07] from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA."); 65 Fed.Reg. 80,548, 80,627 ("Citizens have no authority under the NOP to investigate complaints alleging violation of the Act or these regulations."); *id.* at 80,627 ("Citizens have no authority under the NOP to stop the sale of a product."); 7 U.S.C. 6507 any "additional requirements must "(B) not be inconsistent with this title; ... (D) not become effective until approved by the Secretary."); 7 U.S.C. § 6520(a); § 6506(a)(3) & in 7 CFR 205.668 (appeal to the United States District Court

2. There Is No Conflict Among The State Courts Of Appeal On The First Issue Presented.

There is no need to secure uniformity of decision or to settle an important question of law in the lower courts as to whether the federal Organic Foods Production Act of 1990 ("OFPA") preempts state law. Initially, as to that specific question, Petitioner, the Court of Appeal, and Respondent all agree that the issue is one of first impression for our State Courts of Appeal. There is nothing to "settle" or "make uniform."

Nor does the decision in *Coleman v. Medtronic, Inc.* (2014) 223 Cal.App.4th 413 – which was issued by the same Appellate District that issued the *Quesada* decision – present a conflict, even within that single District. *Coleman* involved a question whether claims for common law negligence, failure to warn, and manufacturing defect were preempted under the Medical Device Amendments of 1976 ("MDA") to the Federal Food, Drug, and Cosmetics Act of 1938. Importantly, the state law consumer claims that Petitioner seeks to pursue here – false advertising (Bus. & Prof. Code § 17500 et seq.), deceptive trade practices in violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), and unlawful conduct in violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) – all were dismissed with prejudice in *Coleman*, and were not at issue on the appeal. (*Coleman*, 223 Cal.App.4th at 421, fn. 2, 436.) Even then, to the extent that the claims in *Coleman* were premised on a claim that the product should have been labeled differently than had been approved by the FDA, the court in *Coleman* found that the claims were preempted. (*Id.* at 427 ["Coleman's state law claim for failure to warn is

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is the exclusive private remedy concerning a decision to certify or not to certify a grower); Cal. Code Regs., tit. 3, §§ 1391.3, 1391.5 (appeal to the United States District Court is the exclusive private remedy concerning a decision to certify or not to certify a grower under COPA).

expressly preempted to the extent it is based on the theory that Medtronic should have given warnings different than those approved by the FDA. Allowing Coleman to proceed on such a claim would impose requirements "different from, or in addition to" federal requirements."].) There is no conflict, even on those distinct facts and claims.

Moreover, the OFPA is replete with limitations on both the substantive standards for labeling a product as "USDA organic" and with limitations on the enforcement mechanisms that may be utilized, each of which must first be approved by the federal government. None of the state law statutes under which Petitioner proceeded here, or proposed to proceed here, have been submitted to the Secretary of Agriculture for approval in California's COPA, much less approved by the Secretary of Agriculture. In fact, the MDA and analysis in *Coleman* is so remote from that in *Quesada*, this same District did not even discuss or cite to *Quesada* in rendering its decision. *Coleman* presents no important "conflict," even within that single District.

Not only is there no conflict among our State courts, but also every federal court to have addressed the question of OFPA preemption of consumer state law claims for mislabeling of product as "organic," has agreed with the Court of Appeal here. For example, the federal circuit court decision in *Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig. v. Aurora Organic Dairy* (8th Cir. 2010) 621 F.3d 781 ("*Aurora Dairy*") addresses precisely the question presented here, and reaches precisely the same result reached here. There, the plaintiff sought to use state consumer laws to argue that, despite the defendants' certification under the OFPA, its labeling of milk as "organic" was false and misleading. The Eighth Circuit easily concluded that such claims are preempted by the OFPA because otherwise defendant's organic:

> certifications, valid under federal law, would nevertheless be subject to challenge under the statutes and common laws of all fifty states. Any claimant merely suspecting that part of a producer's operation was in any way out of organic compliance, or motivated to interfere with a compliant certified operation, could bring a lawsuit such as this. [As recognized by the lower court here,] permitting such suits would pose a clear obstacle to the accomplishment of congressional objectives.

(*Aurora Dairy*, 621 F. 3d at p. 794 [internal quotations and citations omitted].) Importantly, the Eighth Circuit in *Aurora Dairy*, like the Court of Appeal here, held that this preemption goes not only to claims concerning whether organic certification was proper in the first instance, but also to whether the operator thereafter complied with that certification in the subsequent labeling of its products and in the handling of its production. As the court explained in *Aurora Dairy*:

> Viewed in light of the OFPA's structure and purpose, compliance and certification cannot be separate requirements. Compliance with the regulations may lead to certification, and failure to comply with the regulations may lead to nonapproval, suspension, or revocation of certification, see 7 C.F.R. §§ 205.405, 205.660, but compliance with the regulations is not a separate requirement independently enforceable via state law.

(*Id.* at p. 796.) Finally, the Eighth Circuit concluded that:

> [A]ny attempt to hold Aurora or the retailers liable under state law based upon its products supposedly not being organic directly conflicts with the role of the certifying agent as set forth in § 6503(d). To the extent the class plaintiffs, relying on state consumer protection or tort law ... seek damages from any party for Aurora's milk being labeled as organic in accordance with the certification, we hold that state law conflicts with federal law and should be preempted. Accordingly, we affirm the district court's dismissal of the class plaintiffs' claims based upon Aurora's and the retailers' marketing, representing, and selling milk as organic when, allegedly, it was not.

(*Id.* at p. 797 [emphasis added]; see also *id.* at p. 799 ["Many of the claims against Aurora seek to hold it accountable for representing its products as organic when in fact the products were [allegedly] not. As discussed above, all of these claims are preempted by the OFPA"; "the class plaintiffs' claims that the retailers sold milk product as organic when in fact it was not organic are preempted"].)[13]

In a similar vein, the same reasoning was applied in *All One God Faith, Inc. v. The Hain Celestial Group, Inc., et al.* (N.D. Cal. Aug. 8, 2012) No. C 09-3517 SI, 2012 WL 3257660 ("*All One God*"). There, the Northern District of California held that a Lanham Act claim was barred because the court would be required to "interpret and apply federal standards regarding what constitutes an 'organic'" under the OFPA. (*Id.* at *9.) Instead, "the labeling and marketing of 'organic' products falls within the *exclusive* jurisdiction of the USDA" and "[t]he USDA has indicated that it accepts all consumer and business complaints regarding alleged misuse of the word 'organic,' *and it has rejected private enforcement actions*." (*Id.* *3, *8) Thus, because "Plaintiff's challenge to defendants' labeling would inevitably require the court to interpret and intrude upon the

[13] Contrary to Petitioner's attempt to distinguish *Aurora Dairy* from the instant action, oversight of an entity such as Herb Thyme is not limited to certification of a particular field or a particular location. Instead, the producer's entire operation – both production and handling – is examined and subject to review, inspection, and continued monitoring. (7 C.F.R. §§ 205.300, 205.303, 205.402, 205.403, and 205.406.) And notably, "split" operators, which produce both conventional and organic products, are expressly and fully regulated by the OFPA to preclude and prevent the "comingling" of product. (7 C.F.R. §§ 205.201, 205.272; 65 Fed.Reg. at 80,559 [pertaining the elements of the organic systems plan relating to split operations], 80,641 ["split operation defined].) We also note that Petitioners' contention that "100% of the milk" at issue in *Aurora Dairy* "originated" from certified dairies (Pet. at 14) is not supported by the citation she provides.

USDA's authority to determine how organic products should be produced, handled, processed and labeled," the claims in *All One God Faith* were preempted, precisely as the Decision holds here. (*Id.* at *11.)

Against these many consistent authorities, including the Court of Appeal's decision here, Petitioner points to another federal District Court decision – the cursory and poorly reasoned dicta in *Jones v. ConAgra* (N.D. Cal. Dec. 17, 2012) 912 F.Supp.2d 889 – as somehow warranting this Court's review. Initially, this Court does not exist to resolve disputes in federal OFPA preemption case law, but instead exists to resolve such conflicts among our state courts – of which there are none.

Further, in stark contrast to the *Quesada* and *Aurora Dairy* decisions, the District Court in *ConAgra* offered a mere half-page discussion of OFPA preemption, and does not even squarely conflict with *Quesada*. The *ConAgra* court concluded in dicta only that "Plaintiff's organic claims are not preempted *to the extent that the state claims do not conflict with the OFPA*." (*ConAgra*, 912 F.Supp.2d at 895 [emphasis added].) Yet, the *ConAgra* defendant was not even a certified grower or distributer under the OFPA, subject to its oversight. And, these deficiencies aside, to the extent that the *ConAgra* court offered any basis for its statement, it relied exclusively on *Brown v. The Hain Celestial Group* (N.D. Cal. Aug.1, 2012) No. C 11-03082 LB, 2012 WL 3138013, which held that claims based on organic labeling of cosmetic products were not preempted "where the claims do not conflict with OFPA's provisions." (*ConAgra*, *supra*, at *895.) *ConAgra* fails to note, as the *Brown* court expressly held, that unlike production handling and labeling of food products, the "USDA had placed cosmetics, body care products and dietary supplements ... outside the scope" of the OFPA. (*Brown*, 2012 WL 3138013 at *3, *4.) Further, the *Brown* court fully embraced the holding of *Aurora Dairy* (the same holding reached here in *Quesada*) in the context of

food products, finding that "unlike the facts in *In re Aurora*, the court cannot discern an obvious substantive conflict between the state and federal definitions of the term 'organic' as was at issue" here. (*Brown*, at *9.) On top of all this, the cursory dicta in *ConAgra* somehow concludes, with no analysis whatsoever, that the Eighth Circuit's decision in *Aurora Dairy* did not find preemption – though plainly the *Aurora Dairy* court did find preemption. (*ConAgra*, 912 F.Supp.2d at p. 894.) Finally, having misunderstood *Aurora Dairy*, the *ConAgra* decision fails even to mention *All One God,* decided in that same Court five months earlier, which held that: "the labeling and marketing of 'organic' products falls within the exclusive jurisdiction of the USDA." (*All One God, supra*, 2012 WL 3257660, *8.) Plainly *ConAgra* – a federal district court decision offering poorly reasoned dicta – offers no "conflict" on OFCA preemption as to which this Court should even consider taking review.

The Decision here, as well as the federal court decisions in *Aurora Dairy* and *All One God*, are correct for reasons discussed more fully below. Regardless, there is no conflict in state authorities to be resolved or settled here.

3. There Is No Issue To Review On The Question Of Primary Jurisdiction.

As noted above, although the Petition suggests an important "question" about whether the Court of Appeal erred on the issue of primary jurisdiction, the Petition later admits that the Court of Appeal did not even reach this question. As such, there is nothing to review here, much less an important or unsettled question for review.

B. Review Would Be Uniquely Inappropriate Here Given The Shifting Theories Petitioner Has Presented To Each Court Throughout These Proceedings.

Even if this Court were to conclude that there is some lurking important question that might one day merit this Court's input were the state appellate courts to ultimately conflict, this case is uniquely unsuited as a vehicle for providing such review in any event. Here, as discussed above, and as the Court of Appeal noted, the Petitioner's theory about what law she is proceeding under has constantly moved. Indeed, having alleged and argued to the trial court that her consumer law claims in no way challenged Herb Thyme certification to use the "USDA organic" label (AA Tab 1, at 007, SAC ¶22[14]), and that "no federal question is involved" on her claims (*id.* at 004, SAC ¶12), in her Reply Brief on appeal, Petitioner did an about face, and argued that she would like to amend her action to challenge the legitimacy and propriety of that very certification under the COPA approved pursuant to the federal OFPA. (*Quesada*, 222 Cal.App.4th at p. 649.) Apart from the fact that pursuit of such claims in state court would run afoul of the exclusive jurisdiction afforded to the United States District Court over such actions by both the OFPA and the federally approved COPA (*id.*, at 651-52; 7 C.F.R. § 205.681; Final Rule, 65 Fed.Reg. 80624; Cal. Code Regs., tit. 3, §§ 1391.3, 1391.5), such claims when pled would present a federal question, subjecting the entire action to removal to the federal courts. Given all the foregoing, this action is a uniquely unsuitable vehicle for review, even were there a conflict on this question (though there is none).

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[14] *Id.* ("This action does not concern or challenge the organic certification issued to this farm, the OSP of this farm, or Defendant's compliance with either the certification issued to this farm or [the] OSP under which it operates").

C. Review Is Unwarranted Because The Decision Is Correct.

In light of the foregoing, this Court should deny the Petition out of hand. But, there is yet another reason to deny review: the Court of Appeal Decision is correct and the courts of appeal need no resolution at all. As the Decision so aptly puts it:

> Here, a private right of action under the UCL 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, but under the NOP, which has been adopted as the regulations of this state, a private citizen cannot stop the sale of a product.

(*Quesada*, 222 Cal.App.4th at p. 659 [citations omitted].)

All agree that Congress's purpose in creating the OFPA was to replace multiple "umpires" and "strike zones" concerning use of the term "organic," in connection with the labeling of foods, with a single umpire charged with defining the strike zone for use of that term. As Congress found, the prior patchwork of standards for, and regulators of, use of that term had hampered the development of a national organic product marketplace. (See Sen. Rep. No. 101-357, 1990 U.S.C.C.A.N., p. 4656, 4943, 4949.) Congress' purpose was to "facilitate interstate commerce" by establishing "[n]ational standards governing the marketing...agricultural products as organically produced products...." (7 U.S.C. § 6501.) Producers of organic product need to be able to rely on an approval given,

without having that approval and oversight second-guessed by consumers, including those who would employ different understandings of the term "organic" in actions for damages. (See also *Quesada*, *supra*, 222 Cal.App.4th at p. 656 ("if permitted to proceed, to proceed, state consumer lawsuits would have the opposite result, creating consumer confusion and troubled interstate commerce" [internal quotations and citation omitted].)

1. Petitioner's Claims Are Preempted.

Petitioner's claims sought to unwind the very purpose of the OFPA. She sought to change the standards from that set forth in the OFPA, by bringing state law consumer claims for alleged "false" use of the term "organic," to be judged under an "average reasonable consumer's" understanding of that term, applied by a state court jury, and thereby replace the judgment of the USDA that Respondent may use the term "organic." And in doing so, Petitioner failed to invoke the sole and limited opportunity for citizens to become involved in such labeling decisions – *i.e.*, a complaint to the USDA, an approved State Organic Program, or an accredited third party certifier,[15] followed by an appeal from the final decision to the United States District Court if he/she does not like the outcome of his/her complaint to the USDA.[16] In short, what Petitioner sought to do is exactly what the OFPA replaces. There must be one umpire, who alone defines the strike zone. If individual consumers are permitted to second-guess that umpire's "organic" call (as was made here[17]) through

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[15] Cal. Food & Agr. Code, §§ 46004(a), 46016.1; Cal. Health & Saf. Code, § 110940(a); 65 Fed.Reg. 80,548, 80,627 (Dec. 21, 2000), an appeal through the administrative process); Food & Agr. Code, § 46016.5; Health & Saf. Code, § 110875(l); 7 U.S.C. § 6506; 7 C.F.R. § 205.681.

[16] Cal. Health and Safety Code, § 110940; Cal. Food and Agricultural Code, § 46002; 7 U.S.C. § 6520(b); 7 CFR § 205.668.

[17] AA Tab 1, at 007 (SAC ¶22) [HerbThyme "certified organic by a registered certifying agent"].

individual consumer actions, no batter would step up to the plate and the purpose of having one nationwide unifying organic standard would be eviscerated.

Moreover, apart from second guessing the certifiers, Petitioner sought relief expressly proscribed by the OFPA – an injunction against sale of the product[18] – and to sought this outside the exclusive jurisdiction of the District Court. Because Petitioner attempted to replace the OFPA standards with a reasonable consumer standard, attempted to replace its umpire with a California state court jury, and even sought to enjoin precisely that which Congress stated she cannot enjoin, she attempted exactly what the OFPA guards against. The OFPA preempts such claims. (See *Aurora Dairy Corp.*, *supra*, 621 F.3d at pp. 796-797.)

2. Petitioner's Unpled Claim First Suggested In Her Reply On Appeal, Also Is Preempted.

Petitioner fares no better if the Court considers new suggested amendment that would base her consumer claims on an alleged violation of the COPA, or to add an entirely new claims under Health and Safety Code section 111910. Each of those claims is preempted on additional grounds. Most notably, neither has been approved by the federal government for inclusion in the COPA. In this regard, states are:

> preempted under [7 U.S.C. §§ 6503-07] from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to,

[18] See 65 Fed.Reg. at 80,627 ["Citizens have no authority under the NOP to stop the sale of a product."]; see also 65 Fed.Reg. at 80,547, 80,548, 80,682, 80,557 ["OFPA and these regulations do preempt State statutes and regulations related to organic agriculture"; "States also are preempted under [7 U.S.C. §§ 6503-07] from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA."]

> and approved by, the Secretary as meeting the requirements of the OFPA.

(65 Fed. Reg. 80,548 at 80,548, 80,682; see also *id.* [the "OFPA and these regulations do preempt State statutes and regulations related to organic agriculture"].) Pursuant to the OFPA, "[a] State organic program and any amendments to such program must be approved by the Secretary prior to being implemented by the State." (7 C.F.R. § 205.620(e).) Importantly, the required submission to, and approval by, the USDA is not limited to the substantive standards for "organic" products, but includes any proposed state's enforcement and appeal procedures. (7 C.F.R. § 205.681 ["when the applicant or certified operation is subject to an approved State organic program the appeal must be made to the State organic program which will carry out the appeal *pursuant to the State organic program's appeal procedures approved by the [USDA].*"] [emphasis added].)

California's Legislature likewise acknowledges the preemptive effect of the OFPA and NOP wherein it provided that "[t]he complaint process in this state shall also meet all the complaint processes outlined in regulations promulgated by the NOP." (Food & Agr. Code, § 46016.1(e); Health & Safety Code, § 110940(e).) Indeed, in enacting the COPA of 2003, the Legislature stated: "The adoption of the NOP regulations has placed California's 1990 Organic Foods Act out of compliance with recently established federal standards," and the 2003 COPA was therefore adopted "to conform California law to the national regulations and codify existing state law provisions regarding the enforcement of state and federal requirements regarding organic products." (Sen. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823 (2001-2002

regular session) as amended June 11, 2002, 1st and 2d para. of Background and Discussion, and p. 4.)[19]

As all agree, California has never submitted its consumer laws, or Health and Safety Code section 111910 – let alone private suits under them – as part of its COPA for approval by the Secretary of Agricultural. As such, any efforts to "enforce" California's State Organic Program by such means remains unapproved and thus, preempted.

Moreover, even the federal actor – the federal Secretary of Agriculture – is limited by his Congressional delegation of authority. Congress did not authorize the Secretary of Agriculture to authorize any expansion of enforcement mechanisms to be used by the State. Rather, Congress stated that the Secretary's ability to approve a State Organic Program that differs from the NOP is limited to differences concerning more restrictive requirements. Congress gave no delegation to the USDA to allow States to alter procedures governing the enforcement of compliance with the organic regulations (let alone to permit individual consumers to bring private consumer actions under consumer state laws in state courts). Thus, Congress set forth an exclusive mechanism for consumer input—via complaint to the accredited third party certifier, the State Organic Program, or USDA followed by a potential appeal to United States District Court. (7 C.F.R. § 205.668(b).)

Apart from these limitations, an action for injunctive relief pursuant to Section 111910 for alleged violations of the State Organic Program (the COPA) and/or the NOP would stand as an obstacle to the purposes and objective of the federal OFPA, for all the reasons discussed above. In addition, by well-established principles of statutory construction, Section

[19] Even if approved, State enforcement activities continue to be closely monitored and controlled by the USDA. (See 7 CFR 205.668.)

111910 may not be used to enforce violations of the COPA of 2003. In particular, "where a reference to another law is specific, the reference is to that law as it then existed and not as subsequently modified, but where the reference is general, 'such as ... to a system or body of laws or to the general law relating to the subject in hand,' the reference is to the law as it may be changed from time to time." (*People v. Anderson* (2002) 28 Cal. 4th 767, [citing *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59, 195 P.2d 1; also citing *In re Jovan B.* (1993) 6 Cal.4th 801, 816, 25 Cal.Rptr.2d 428].) Under this principle, Section 111910 only permits private injunctive relief actions against any person violating any provision of the California Organic Foods Act of 1990 (added by Stats. 1995, c. 415 (S.B. 1360) § 6 ["COFA of 1990"]) in its 1995 form previously located at "Article 7 (commencing with Section 110810) of Chapter 5" – not the COPA of 2003 subsequently enacted in 2002. (See *People v. Anderson,* 28 Cal. 4th at 779.)

Here, Section 111910 refers to one specific article (Article 7) of one specific chapter (Chapter 5) of California's Sherman Food, Drug, and Cosmetic Laws. Therefore, Section 111910 must be construed to allow private actions for injunctive relief for the sections referenced as they were enacted in 1995, *i.e.*, the COFA of 1990.[20] It cannot be construed to refer to violations of Acts enacted seven (7) years later in 2002, *i.e.*, the COPA of 2003. Under the *Palermo* rule, Section 111910 refers only to the Act found at "Article 7 (commencing with Section 110810) of Chapter 5" in 1995 (*i.e.*, the COFA of 1990, not the COPA of 2003).

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[20] Section 111910 was originally enacted at Health & Safety Code § 26850.5 in 1979 by Stats. 1979,c. 914, § 9.5. In 1995, the California Legislature enacted the California Organic Foods Act of 1990 (Stats 1995, c. 415 (S.B. 1360) § 6.) In the process, the Health and Safety Code was reorganized and Section 26850.5 was moved to Section 111910. Section 111910 has not been amended since that time.

As a result of the enactment of the federal OFPA, California's Legislature significantly revised the sections contained within the COFA of 1990 and replaced the earlier Act with the COPA of 2003. (Stats 2002, c. 533 (A.B. 2823) § 22.) During the enactment process, the California Senate acknowledged:

> The adoption of the NOP regulations has placed California's 1990 Organic Foods Act out of compliance with recently established federal standards. The recently developed NOP regulations were the subject of significant debate at the federal level. The regulations establish a series of requirements organically produced agricultural products must meet to assure consumers that agricultural products marketed as organic meet consistent, uniform standards....
>
> This bill revises the Health and Safety Code statutes enacted through the 1990 Organic Foods Act 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. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823 (2001-2002 regular session) as amended June 11, 2002, 1st and 2d para. of Background and Discussion.) Notably, in the enactment of the COPA of 2003, the Legislature made no reference to the enforcement mechanism contained Section 111910. The Legislature did, however, acknowledge that the complaint and enforcement requirements of California's new Organic Program, COPA of 2003, "must meet all the complaint process outlined in regulations adopted by the NOP." (Food & Agr. Code, § 46016.1; Health & Saf. Code, § 110940(e).)

Further still, even if Section 111910 had been included in the 2002 amendments, and had been submitted to the USDA for approval (though, all agree it was not), as discussed *supra*, the USDA has no Congressional delegation of authority to increase the scope of enforcement mechanisms set forth by the federal Congress. And, even were that hurdle cleared, the

USDA certainly would have no authority to approve such a new enforcement procedure where Congress has provided that "Citizens have no authority under the NOP to stop the sale of a product."[21] Section 111910 directly conflicts with that federal directive.

More broadly, we return to the very purpose of the OFPA. The entire point of the Act was to unify the regulation of the term "organic," and have one expert umpire on these questions, or its agents who are constantly reporting to, and are monitored, by that one umpire. If state court judges and juries may now step in to override and enjoin the certification decisions of that umpire, the entire structure – and purpose – of the OFPA fails. This is the inescapable logic of the Decision here, and of the federal decision in *Aurora Dairy*. (*Quesada*, 222 Cal.App.4th at p. 660; *Aurora Dairy*, 621 F. 3d at p. 794.) The Decision is correctly decided.

IV. CONCLUSION

For each of these reasons, Respondent requests that this Court decline Petitioner's Petition for Review.

Dated: February 24, 2014

Respectfully submitted,

GREENBERG TRAURIG LLP

By: _____
Mark D. Kemple

Attorneys for Defendant and Respondent
HERB THYME FARMS, INC

[21] 65 Fed.Reg. at 80,627; see also *id.* ["Citizens have no authority ... to investigate complaints alleging violation of the Act or these regulations."].

CERTIFICATE OF WORD COUNT

I, Mark D. Kemple, hereby certify pursuant to Rule of Court 8.204(c) that this Response to Petition for Review was produced on a computer, and that it contains 7,972 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.

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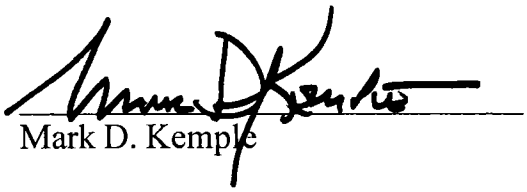

Mark D. Kemple

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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 1840 Century Park East, Suite 1900, Los Angeles, California 90067.

On February 24, 2014, I served true copies of the following document(s) described as **RESPONSE TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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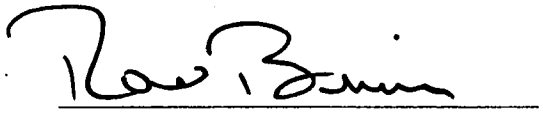

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