Case No. S216305

IN THE SUPREME COURT OF CALIFORNIA

MICHELLE QUESADA
Plaintiff and Appellant

v.

HERB THYME FARMS, INC.
Defendant and Respondent.

After a Decision of the Court of Appeal of the State of California, Second Appellate District, Division Three, Appeal No. B239602, on Appeal from the Los Angeles County Superior Court, Case No. BC436557, Honorable Carl West, Judge, Presiding

RESPONDENT'S BRIEF ON THE MERITS

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I. QUESTION PRESENTED

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

II. SUMMARY

Appellant asks this Court to permit a lay jury, applying a "reasonable consumer" standard, to enjoin and hold Respondent liable for damages for doing exactly what the USDA, applying its expertise and investigatory oversight, has authorized Respondent to do – to use the terms "USDA Organic" and "Fresh Organic" on its label. Appellant seeks:

- to apply a "reasonable consumer" standard to "USDA Organic" labeling, in conflict with the standards set forth by the OFPA;
- to have that different standard applied by a lay jury, in conflict with the OFPA, which empowers USDA or its delegate to make such decisions;
- to enjoin the sale of the product labeled "USDA Organic," in conflict with the OFPA, which states that citizens may not seek such relief; and
- to pursue such claims in state court, in conflict with the OFPA and the federally approved COPA, each of which require such claims to be submitted to the certifying agent, followed by a right of appeal to federal District Court.

Moreover:

- Appellant cannot prevail on her state law consumer claims without contradicting and countermanding the USDA's certification and entitlement given Respondent to use the "USDA Organic" label.

Appellant's claims are preempted.

In 1990 Congress enacted the Organic Foods Production Act ("OFPA") to eliminate the patchwork of state and private organic product standards that hampered the development of a national organic product marketplace.[1] The core purpose of the OFPA is to "facilitate interstate commerce" by establishing "[n]ational standards governing the marketing of certain agricultural products as organically produced products," with elimination of inconsistent state definitions of organic processes standards being Congress's primary concern.[2] In 2002, after extensive notice and comment spanning 12 years, the USDA implemented the comprehensive National Organic Program ("NOP").[3]

The OFPA and NOP promulgated under it form a comprehensive regulatory framework, which governs the production, handling, processing and labeling of organic agricultural products, specifically including "cases of fraudulent or misleading labeling."[4]

The OPFA and NOP vest the USDA with exclusive authority in this area. A State may get involved in such regulation and oversight of organic

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[1] Sen.Rep. No. 101-357, 1990 U.S.C.C.A.N., p. 4943 [national standards adopted against a backdrop where "[22] states now regulate organic food"].

[2] 7 U.S.C. §6501; Sen.Rep. No. 547, at pp. 4656, 4949.

[3] 7 U.S.C. § 6503; Final Rule, 80,548 (Dec. 21, 2000).

[4] See 65 Fed.Reg. at 80,557. See also *Harvey v. Veneman* (1st Cir. 2005) 396 F. 3d 28, p. 36 [NOP is a "comprehensive labeling and certification scheme"].

labeling only by:

(1) the State's "governing State official"[5] submitting a State Organic Program ("SOP") to the federal government for approval, and

(2) gaining approval of that SOP from the federal government (who, thereafter, rigorously oversees, audits, and regulates such state activities, and all unapproved activities).

This requirement for submission and federal approval specifically includes enforcement procedures. Activity in this area, including non-federally-approved enforcement procedures, is expressly "*preempted.*"[6]

Given this, what Appellant characterizes as a "savings clause" simply reconfirms that anything not approved by the federal government remains preempted. Appellant's imagined "savings clause" provides that "[a] State organic certification program *established under subsection (a) of this section* may contain more restrictive requirements governing the

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[5] The governing State official is defined as "the chief executive of a State" or elected executive officer that runs the "agricultural operations of the State." (7 U.S.C. § 6502.)

[6] E.g., 65 Fed.Reg. at 80547, 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 [of Agriculture] as meeting the requirements of the OFPA."][emphasis added]; 7 C.F.R. § 205.620(e) ["[a] State organic program and any amendments to such program *must be approved* by the Secretary *prior to being implemented* by the State."] [emphasis added]; 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]."].

organic certification of farms and handling operations and the production of agricultural products that are to be sold and labeled as organically produced under the [OFPA] than are contained in the [NOP]." (7 U.S.C. § 6507(b)(1) [emphasis added].) Appellant edits out "subsection (a)" from the reference above. The omitted subsection (a) provides: "The governing State official may prepare and submit a plan for the establishment of a State organic certification program *to the Secretary for approval.*" (*Id.* § 6507(a) [emphasis added].) Likewise, subsection (b)(2) – also ignored by Appellant – states that a submitted state program is not effective unless "approved by the Secretary." (*Id.* § 6507 (b)(2) [emphasis added]; 7 C.F.R. § 205.620(e) ["[a] State organic program and any amendments to such program must be approved by the Secretary prior to being implemented by the State"].)[7] State activity is preempted *unless* it is submitted to, and *approved* by, the federal government. Appellant concedes this point.[8]

At no time has California's governing State official *requested* that consumer laws – such as the Consumer Legal Remedy Act ("CLRA"), UCL, and False Advertising Laws – be approved as a means to enforce "organic" marketing and labeling, and no approval has been given by the federal government. Appellant's unsupported assertion that this has

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[7] Compare Sen. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 295 (1990) ["The Committee, however, is most concerned that State action not disrupt interstate commerce. To this end, the [OFPA] limits state action in three ways. First, the Secretary must approve State Organic Certification Programs to ensure that such programs are consistent with the goals of the [OFPA]."].

[8] See Appellant's Brief at p. 20: "the OFPA expressly preempts state law relating to organic certification and labeling *unless* ... the laws are part of an approved State Organic Plan ('SOP')."

occurred, is simply inaccurate.[9] As such, the use of any such laws in this area remains preempted.

Further, OFPA expressly and strictly limits an *individual's* ability to litigate such labeling questions. Both the OFPA, and the California SOP approved under it (California's Organic Products Act of 2003, or "COPA"), provide for a single opportunity for citizens to get involved in enforcement proceedings. Specifically, they permit only:

(A) a complaint to USDA, an approved State Organic Program, or an accredited third party certifier;[10]

(B) followed by an "expedited administrative appeals procedure" that allows a "person" to appeal "any action" taken under the OFPA or SOP if the action: (1) adversely affects such person; or (2) is inconsistent with the organic

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[9] At page 20 of her Brief, Appellant argues, "OFPA does not expressly preempt California's consumer protection laws. Instead, the OFPA expressly preempts state law relating to organic certification and labeling *unless*, *as is the case in California*, the laws are part of an approved State Organic Plan ('SOP')." [Emphasis added in part.] In fact, these consumer laws have never been submitted for approval as a part of California's SOP, and have never been approved by the federal government as an enforcement mechanism. (See PM 11-8 CA SOP Add'l Reqs Granted Rev 02103111 (Jan. 21, 2011) <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5088953> [as of August 20, 2014].)

[10] 7 U.S.C. § 6520(a); 65 Fed.Reg. at 80627 ["Anyone may file a complaint, with USDA, an SOP's governing State official, or certifying agent, alleging violation of the Act or these regulations"]; *id.* at 80667 ["Certifying agents, state organic programs' governing State officials, and USDA will receive complaints alleging violations of the Act or these regulations. In States where there is no State organic program, USDA will investigate allegations of violations of the Act.]; Cal. Food & Agr. Code, §§ 46004(a), 46016.1; Cal. Health & Saf. Code, § 110940(a).

certification program established under this chapter"[11];

(C) followed by an appeal from a final decision to the *United States District Court* if he/she does not like the outcome of his/her complaint.[12]

Were more needed, the OFPA expressly provides that "[c]itizens have no authority under NOP to investigate complaints alleging violation of the Act or these regulations" and that "[c]itizens have no authority under NOP to stop the sale of a product."[13]

What claims does Appellant pursue here? Does she follow the OFPA's/COPA's carefully articulated protocol to address any grievance to the certifying entity, with an ultimate right of appeal to the federal District Court? No. Though Appellant alleges Respondent is a "certified organic" operation, certified by "a registered certifying agent" under OFPA and COPA, and that Respondent operates under its approved Organic System

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[11] 7 U.S.C. § 6520(a).

[12] 7 U.S.C. § 6520(a)-(b); 7 CFR § 205.668 [final decisions of noncompliance proceedings under a State Organic Program are "appealable to the United States District Court for the district in which such certified operation is located"]; 3 Cal.Code.Reg. §§ 1391.1, 1391.3, 1391.5; Cal. Food & Agr. Code § 46016.5 [same]. See also 65 Fed.Reg. at 80684 ["Regarding section 205.668(b), several State commenters want appeals from SOP's to go to State district court rather than Federal district court. AMS disagrees. The Act provides that a final decision of the Secretary may be appealed to the U.S. District Court for the district in which the person is located. AMS considers an approved SOP to be NOP for that State. As such, AMS considers the governing State official of such State program to be the equivalent of a representative of the Secretary for the purpose of the appeals procedures under NOP. Because the final decision of the governing State official is considered the final decision of the Secretary, under the Act it is then appealable to the U.S. District Court, not the State district court."].

[13] 65 Fed.Reg. at 80,627.

Plan ("OSP"),[14] Appellant does not follow the complaint and appeal provisions set forth by the OFPA and California's approved SOP (i.e., COPA).

Instead, Appellant brings claims under consumer law statutes never authorized (or proposed to be authorized) as an enforcement mechanism, and seeks to apply a different standard for "organic" labeling than set forth in these Acts, by a different decision-maker, in the wrong court. Appellant seeks to second-guess the OFPA certification given Respondent to use the organic label, and to second-guess it under a different "reasonable consumer standard" (not a federally approved organics standard) to be applied by a jury of lay persons (not by the national certifying expert agency), and in state court (not federal District Court).[15] Further, Appellant seeks an injunction to stop sale of product she claims was mislabeled as "USDA Organic" and "Fresh Organic" – exactly what the OFPA says she cannot obtain. Such claims and relief are expressly preempted.

Moreover, Appellant's claims are a direct attack on the certification Respondent received and maintained to use the "USDA Organic" label. They address the very activity Respondent is regulated and certified to do pursuant to the OFPA. Contrary to Appellant's assertions, the OFPA expressly governs the precise "commingling" issues Appellant raises here, specifically including all operations of "split" operators engaged in the

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[14] AA 007, SAC ¶22.

[15] See *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, pp. 506-07, 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."]. As discussed herein, Appellant's Section 17200 claim is premised on violation of the statutes underlying her other consumer claims, not the standards set forth in the OFPA or COPA.

production, handling and labeling of both organic and conventional agricultural products.[16] And though the *situs* of any certified grower's alleged commingling does not define the scope of the OFPA's reach here (see Section II.A.2., *infra*), Appellant nevertheless alleges that this certified grower[17] "trucked in conventionally grown herb crops" *to its "organic farm,"* "blended them," mislabeled the "combined" mixture as "USDA Organic" and "Fresh Organic," and thereby "misrepresented the source, approval or certification of their [sic] non-organic fresh herb products, *i.e.*, their 'Fresh Organic' herb products."[18] Simply, there is no question that Appellant challenges alleged activity that falls directly within the methods and processes USDA certified as organic – indeed, on the organic farm itself.[19]

As such, Appellant cannot win her action *without* contradicting and countermanding Respondent's USDA certification and entitlement to use the "USDA Organic" label. To prevail, Appellant must undermine OFPA's very purpose – a single national organic standard to be administered and certified by experts, on whose certification the grower and consumers may rely. That is conflict preemption. As the federal Eighth Circuit Court of Appeals held, addressing precisely this same question, were a court to rule otherwise:

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[16] 7 C.F.R. § 205.2; *id.* §§ 205.201, 205.272; 65 Fed.Reg. at 80,559, 80,641, 7 C.F.R. § 205.201, subd. (a)(5).

[17] AA 007, SAC ¶22.

[18] AA Tab 1, at 006, 007, 012, 008, 011, 013 [SAC ¶¶ 17(a), 17(c)), 22, 24-25, 29, 42].

[19] As such, Appellant's attempt to distinguish *In Re Aurora Dairy Corp.* (8th Cir. 2010) 621 F. 3d 781, on such grounds is entirely misplaced, false and misleading.

> 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. *Permitting such suits would pose a clear obstacle to the accomplishment of congressional objectives' of the OFPA.* [...]
>
> [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.

(*In Re Aurora Dairy Corp.* (8th Cir. 2010) 621 F. 3d 781, 794, 797 [emphasis added].) The Court of Appeal's decision below is in complete accord. Indeed, every court to look at this preemption question, as applied to a certified "organic" operation, has found that these type of state consumer law claims are preempted.

Absent these prior, consistent, well-reasoned and on point decisions,[20] the organic market will be severely hampered. If a lone consumer can second-guess the USDA's certification, and a grower cannot rely on its federal authorization to use the term, the already high cost of production of such products will skyrocket or, more likely, there will be no

[20] This is not a case of first impression in federal courts. As discussed herein, one federal Circuit Court and two federal District Courts have found that state law consumer claims based on "organic" labelling are preempted by the OFPA. So too did the Trial Court and Court of Appeal here.

organic products to enjoy. Put another way, if the appointed expert-umpire's call in its defined strike zone can be challenged by any consumer in the stands based on whatever mechanism and strike zone that consumer deems appropriate, no one will step up to that plate. That is the whole point of the OFPA – one expert umpire vested with enormous tools of observation to which the industry and consumer can look, and on whose calls they can rely. Appellant's claims are in direct conflict with the OFPA. Indeed, they are a direct assault on its purpose. They are preempted. The Court of Appeal's decision should be affirmed.

III. THE REGULATORY FRAMEWORK FOR CERTIFICATION TO USE THE "ORGANIC" LABEL

Appellant alleges Respondent is a federally "certified organic" operation, that operates under its approved Organic Systems Plan (or "OSP").[21]

OFPA was enacted "to establish national standards governing the marketing of certain agricultural products as organically produced products," "to assure consumers that organically produced products meet a consistent standard," and "to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. These aims were pursued by the establishment of "an organic certification program for producers and handlers of agricultural products that have been produced using organic methods." *Id.* § 6503(a). USDA was vested with exclusive authority to implement the NOP.

After extensive notice and comment spanning 12 years, USDA implemented the NOP – a comprehensive regulatory framework, setting

[21] AA 007, SAC ¶22.

forth detailed requirements for production, handling, processing, and labeling requirements for organic products. (7 U.S.C. §6503; Final Rule, 65 Fed.Reg.80,548 (Dec. 21, 2000).)

As described below, besides giving the USDA exclusive authority over organic standards, Congress ensured that organic standards would be truly national by creating extensive regulatory processes including, but not limited to: (A) expressly preempting all existing state organic product standards; (B) vesting exclusive authority to enforce the OFPA in the federal government or its approved delegates who may act only pursuant to an SOP *that is expressly approved by the federal government*, and is continuously monitored by the federal government; (C) creating robust enforcement mechanisms; and (D) establishing an exclusive federal procedure for challenging agency decisions while declining to create a private cause of action for violation of the OFPA, its regulations, or an SOP.

A. Congress Preempted All State Organic Labeling Standards that Existed as of October 1, 1993, and USDA Implemented an Exclusive Federal Labeling Regime for Organic Food Methods and Labeling.

In the OFPA, Congress preempted all existing state organic standards and labeling regimes. (7 U.S.C. § 6505(a)(1).) Pursuant to the OFPA:

> (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this title; and (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except accordance with this title.

(*Ibid.*) USDA implemented NOP as the exclusive federal labeling regime

envisioned by Congress that establishes the USDA's express and absolute control over labeling of organic products. (See 7 C.F.R. §§ 205.2, 205.300-305.) In fact, organic labels are regulated down to the footnotes. (*Id.* § 205.305.)

The USDA defined the term "claim" to include point of sale and other marketing information. (*Id.* § 205.2; 7 U.S.C. § 6505(a)(1)(B) [establishing exclusive federal jurisdiction not only over the word "organic," but also over any market information that "implies, directly or indirectly" that the product is certified under federal organic protocols]; see also AA Tab 4 at pp. 093-096 [USDA Product Labeling Chart].) The USDA clarified that to the extent there is a question whether a label is confusing, it implicates only federal enforcement jurisdiction. (65 Fed.Reg. at 80,584 ["USDA will monitor use of the term, 'organic,' in company names and will work with the FTC to take action against such misuse of the term. These determinations must be made on a case-by-case basis."].)

1. *The Nature of "Organic" Certification Of Agricultural Product – A Method of Production, Not a Mere Ingredient, Plant or Growing Field.*

"Organic" does not pertain to an ingredient, a plant, or even a field. It pertains to an entity's operation and methods of production, and labeling of product produced through those methods. (7 U.S.C. § 6503(a) ["The Secretary shall establish an organic certification program for producers and handlers of agricultural products *that have been produced using organic methods as provided for in this chapter*." (emphasis added)].) Unlike other food regulatory programs, "[t]he 'organically produced' label authorized under this bill...pertains to the production methods used to produce the food rather than to the content of the food." (Sen. Rep. No. 101-357, 1990 U.S.S.C.C.A.N. at p. 4946.) In short, "organically produced food is food

produced using certain defined materials and production methods." (*Id.* at p. 4947.) USDA referred to this approach as "process verification," and echoed Congress by saying that "the national organic standards...are based on the method of production, not the content of the product." (Final Rule, 65 Fed. Reg. at 80,631.) Congress recognized the unique nature of the organic program it was creating, noting that "much of this title breaks new ground for the Federal government and will require the development of a unique regulatory scheme." (S. Rep. No. 101-357, 1990 U.S.S.C.C.A.N. at p. 4947.)

The unique nature of the federal organic regulatory program has significant implications for this case. First, as discussed in more detail below, organic certification results from a comprehensive initial and ongoing review process regarding the production and processing protocols used by the certified operation. All organic operations are run according to specialized and technical practice standards set forth in that operation's comprehensive organic system plan, or OSP. See 7 U.S.C. §§ 6513, 6506(a)(2). The OSP is operation-specific and highly individualized; not only are no two exactly alike, but no single factor or set of factors governs evaluation of every operation. Under this approach, a great number of on-the-ground factors are assessed, no one of which conclusively answers the question of whether an operation is capable of implementing the federal management protocols that underpin its entitlement to receive federal certification and authorization to use the "USDA Organic" seal.

Second, based on the approach taken by Congress and the USDA, an agricultural product bearing the organic seal or one of USDA's approved marketing claims is not a widget that can be measured simply with a set of calipers. Unlike typical fruit and vegetable grading standards that establish

designations based on product standards of identity, e.g., Grade A or No. 1, the "organic" product designation is not primarily a statement about the final product itself. (See USDA, Organic Production and Handling Standards, <http://www.ams.usda.gov/AMSv1.0/getfile? dDocName=STELDEV3004445&acct=nopgeninfo> [as of August 20, 2014].)

2. *The OFPA Regulates "Split" Operations, Which Include Conventional Organic Operations, And The Certification Process Addresses Any Commingling Of The Two.*

Organic certification, and maintenance of that certification, involves intrusive and ongoing investigation into all that is done by a certified operation. (See 7 C.F.R. §§ 205.403(c)(1) [providing for on-site inspections to verify information]; 205.406[establishing continuing responsibilities relating to maintenance of certification].)

Such inspection and oversight includes what is done in any *conventional* field owned or operated by that grower. Such "split" operations, which produce both conventional and organic products, are expressly and fully regulated by the OFPA to preclude and prevent the "comingling" of product. NOP has authority over "split operations," such as Respondent, where the "operation...produces or handles both organic and nonorganic agricultural products." (7 C.F.R. § 205.2; *id.* §§ 205.201, 205.272; 65 Fed.Reg. at 80,559 [addressing the elements of the OSP relating to split operations], 80,641 ["split" operation defined].) In its OSP, a "split operation" must provide, *inter alia*, "[a] description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products ... to prevent contact of organic production and handling operations and products with prohibited substances." (7 C.F.R. § 205.201(a)(5); see also USDA NOP 5025

Guidance Commingling and Contamination Prevention in Organic Production and Handling, July 22, 2011, http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5090759> [as of August 20, 2014] ["NOP Commingling Guidance"].)

Simply a producer's entire operation – both production and handling – is examined and subject to review, inspection, and continued monitoring, in connection with its "organic" certification. (7 C.F.R. §§ 205.300, 205.303, 205.402, 205.403, and 205.406; 3 Cal.Code.Reg. § 1391.1.)

For example, where a grower has both conventional and organic fields, a certifying agent inspects all pesticide purchase receipts, and all spray records for conventional fields, to ensure that all purchased and used pesticide is attributed to the conventional farming (and was not used, for example, in connection with an organic fields and methods and labeled "organic.")[22] The production and handling of the operator's organically produced and conventionally produced products must be clearly described in the operator's OSP, which must be "implemented to prevent loss of organic integrity through commingling or contamination of organic products with nonorganic products or prohibited substances." (NOP Commingling Guidance, *supra* at p. 1; 7 C.F.R. §§ 205.201, 205.272.) In addition, "[a]ll certifying agents are responsible for verifying that certified operations have sufficient management practices in place to prevent the commingling and contamination of organic products with non-organic products...." (*Id.*)

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[22] 7 C.F.R. §§ 205.201, 205.272; 65 Fed.Reg. at 80,559 [discussing elements of OSP relating to split operations], 80,641 ["split" operation defined].

Certified operators, are continually monitored by their third party certifying agent for compliance with the OSP. An OSP "is a detailed description of how an operation will achieve, document, and sustain compliance with all applicable provisions in the OFPA and these regulations." (65 Fed.Reg. at 80,558-80,559.) They must update their OSP at least once every year and submit to periodic inspections by their certifying agent. (See, *id.*; 7 C.F.R. § 205.403, 406; 3 C.F.R. § 1391.3.)

The OSP is a "living" document and as partial condition for continued certification, certifying agents may require an operation to correct minor incidents of noncompliance with the OFPA and NOP or amend portions of its OSP. (See 7 C.F.R. § 205.404; 65 Fed.Reg. at 80,593.) Moreover, certified operations must immediately notify their certifying agents of *any* changes to any aspect of their operation that may affect their OSP, and producers and handlers may not deviate from their OSPs without prior approval from their certifier. (7 C.F.R. § 205.400; 65 Fed.Reg. at 80,558, 80,588.) Once approved, the OSP becomes the template by which the certifying agent evaluates an operation for continuing compliance with the OFPA, such that a producer or handler complying with its OSP is in compliance with the OFPA and NOP. (7 U.S.C. § 6504, 6513; 7 C.F.R. § 205.201.)

B. Pursuant to the OFPA, the Federal Government May Approve State Regulators to Act with an SOP, But Only as Its Delegates Acting Pursuant To Federally Approved Certification and Enforcement Protocols.

States may get in on the regulation of use of the term "organic," but *only if* the "governing State official" submits its plan to USDA and the plan would: "(A) further the purpose of [OFPA]; (B) not be inconsistent with [OFPA]; (C) not be discriminatory towards [organic products] produced in

other states in accordance with [OFPA]; and (D) not become effective until approved by [USDA]." (7 U.S.C. § 6507(b)(2)(A)-(D); 65 Fed.Reg. at 80,682.) Only the "governing State official" (7 U.S.C. § 6502) may submit such a plan.

The "OFPA and these regulations *do preempt* State statutes and regulations related to organic agriculture," and "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." (See, e.g., 65 Fed.Reg. at 80547, 80,548, 80,682, 80,557.) "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).)

These express limits on State action include a State's enforcement and appeal procedures. Specifically, "when the applicant or certified operation is subject to an approved State SOP the appeal must be made to the [SOP] which will carry out the appeal pursuant to the [SOP's] appeal procedures approved by the [USDA]." (7 C.F.R. § 205.681.)

If the SOP is approved, USDA must review the SOP not less than once during each 5-year period, and the SOP, prior to implementing any substantive changes to the program, must submit proposed changes to USDA for further approval. (7 U.S.C. § 6507 (c)(1)-(2).)

California proposed a SOP – COPA[23] – with only a handful of additional requirements that were approved by USDA – which notably did not include California's consumer protection statutes. (See PM 11-8 CA

[23] See Health & Saf. Code, §§ 110811, 110812, 110890, 110956.

SOP Additional Reqs Granted Rev02103111 (Jan. 21, 2011) at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5088953> [as of August 20, 2014]; AA Tab 4 at p. 123 [letter approving California's SOP].) Further, California adopted in its entirety the federal enforcement mechanisms, including the complaint and appeal procedure described herein.

Importantly, California did *not* request nor receive approval from USDA to apply its consumer protection laws to such activities, let alone to permit Appellant to replace the California Department of Food and Agriculture ("CDFA") as the enforcement arm concerning organic production and labeling in California. (*Id.*)

In proposing its SOP, even California's Legislature acknowledges the preemptive effect of the OFPA and NOP: "[t]he complaint process in this state shall also meet all the complaint processes outlined in regulations promulgated by NOP." (Food & Agr. Code, § 46016.1(e); Health & Saf. Code, § 110940(e).) Indeed, it recognized that "[t]he adoption of NOP regulations has placed California's 1990 Organic Foods Act out of compliance with recently established federal standards."[24]

Under COPA, every person engaged in California in the processing or handling of processed products for human consumption sold as organic, as defined by NOP, and every person engaged in the processing or handling of animal food sold as organic, must register with California's SOP if the expected organic gross sales exceed $5,000 annually. (*Id.* § 110875.) Respondent is a federally certified organic operation, registered with the

[24] Sen. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823 [2001-2002 Reg. Sess.] as amended June 11, 2002, 1st and 2d para. of Background and Discussion.

California SOP. (AA Tab 1 at p. 007 [SAC ¶ 22].)

C. The Enforcement and Reporting Protocols of the OFPA and California's SOP (COPA).

The federal government (or its State regulator delegate) is authorized by the OFPA to enforce the statute. In this regard, "[t]he NOP is ultimately responsible for the oversight and enforcement of the program, including ... cases of fraudulent or misleading labeling." (65 Fed.Reg. at 80,557.) "[A]ny person who knowingly sells or labels a product as organic, except in accordance with this chapter, shall be subject to a civil penalty of not more than $10,000," and may even shut down all organic operations. (7 U.S.C. § 6519(a).

Likewise, pursuant to COPA, the CDFA (and only the CDFA) may levy a civil penalty against any person who violates COPA, or any COPA, OFPA, or NOP regulations. (Health & Saf. Code § 110915.) As noted, California, through its proposed SOP, did *not* request nor receive approval from USDA to apply its consumer protection laws to such activities, let alone to permit Appellant to replace CDFA with a jury of lay persons as the enforcement arm concerning organic production and labeling in California.

Even when a State acts within its circumscribed enforcement procedures, that State's activities are continually monitored by the USDA. As provided in 7 CFR 205.668, the State SOP "must promptly notify [the USDA] of commencement of any noncompliance proceeding against a certified operation and forward to the Secretary a copy of each notice issued." (7 C.F.R § 205.668(a).) And at least every five years, USDA must review each SOP. (7 U.S.C. § 6507 (c)(1)-(2).)

D. The Limited Role of the Consumer.

From the time of NOP's publication, USDA has noted its "authority to take action against misuse of the term 'organic'" (AA Tab 4 at pp. 098-121 [Labeling—Preamble]) and has consistently asserted that it welcomes all citizen complaints regarding alleged misuse of the word "organic." It has, however, rejected private actions to enforce the regulations or the provisions of OFPA.

"Anyone may file a complaint, with USDA, a [SOP's] governing State official, or certifying agent, alleging violation of the Act or these regulations. Certifying agents, SOP's governing State officials, and USDA will receive, review, and investigate complaints alleging violations of the Act or these regulations." (65 Fed.Reg. at 80,627; 3 Cal.Code.Reg. § 1391.3.) In this regard, Congress created an exclusive federal mechanism for evaluating whether agricultural products properly may be labeled and marketed as "organic" and mandated USDA operate an "expedited administrative appeals procedure" that allows a "person" to appeal "any action" taken under the federal program by USDA, its certifying agents or a State Organic Program ("SOP") under the federal umbrella, if the action: (1) adversely affects such person; or (2) is inconsistent with the organic certification program established under this chapter. (7 U.S.C. §§ 6520(a), 6506(a)(3).) Further, Congress created a federal remedy authorizing an aggrieved person to seek review in federal District Court. (*Ibid.*) However, "[c]itizens have no authority under NOP to investigate complaints alleging violation of the Act or these regulations. Only USDA may bring an action under 7 U.S.C. § 6519" and "[c]itizens have no authority under NOP to

stop the sale of a product." (65 Fed.Reg. at 80,627.) In promulgating NOP, the notion of appeal to state courts was specifically rejected.[25]

Likewise, under California's approved SOP, any person may file a complaint with CDFA concerning suspected noncompliance of the OFPA, NOP, or COPA. (See CDFA Organic Complaints <https://organic.cdfa.ca.gov/Complaints/> [as of August 20, 2014]; 3 Cal.Code.Reg. § 1391.3; Health & Saf. Code § 110940.) That complaint process meets all the complaint processes outlined in NOP. (*Id.*, subd. (e).) Accordingly, any person may file a complaint with CDFA. (*Id.*) Also, "[a]s provided for in regulations adopted by NOP, the action proposed by a NOP accredited certifier against a client may be appealed to the [CFDA] for mediation. (Cal. Food & Agr. Code § 46016.5) CDFA must investigate and respond to the complainant within 60 days. (3 Cal.Code.Reg. § 1391.1; see also 3 Cal.Code.Reg. 1391.3["If an accredited certifying agent fails to initiate appropriate action, the complaint and the agent's actions or inactions shall be referred to the [NOP]."].) If CDFA's final decision is inconsistent with the OFPA or NOP, the aggrieved person may seek judicial review of CDFA's decision by filing a complaint with the appropriate federal district court. (7 C.F.R. § 205.668(b); 3 Cal.Code.Reg. § 1391.5.)

Thus, under both the OFPA and COPA, there is an administrative procedure to address all materials, labeling and enforcement issues and, upon the exhaustion of administrative remedies, a federal District Court is authorized to remedy any challenged decision that is inconsistent with the OFPA and/or NOP. (*Id.*) Appellant has not utilized these procedures.

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[25] 65 Fed.Reg. at 80684.

IV. APPELLANT'S CLAIMS

Having conceded that Respondent is a certified organic grower, Appellant alleges that, contrary to USDA's certification of its processes and methods, Respondent "trucked in conventionally grown herb crops *to its organic farm*," which she identifies as the "Oceanside farm," and there "added" and "blended" (i.e., commingled) the conventional herbs with herbs grown on the "Oceanside farm", and mislabeled the "combined" mixture as "USDA Organic" and "Fresh Organic."[26] In this way, Appellant alleges, "all" of Respondent's "Fresh Organic" labeled herbs were actually a mixture of herbs from the Oceanside farm and conventional herbs.[27] As Appellant put it to the trial court, she claims 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." (Reporter's Transcript on Appeal, p. B-18, at p. 12:13-19.) She alleges that Respondent thereby "misrepresented the source, *approval* or *certification* of their [sic] non-organic fresh herb products, *i.e.*, their [sic] 'Fresh Organic' herb products."[28]

To be clear, and as discussed above, while investigation of all aspects of a "split" operation is necessary to certify a grower in any event, here, Appellant *alleges that the supposed activity underlying her private*

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[26] AA Tab 1, at pp. 006, 008, 011, 013 [SAC ¶¶ 17(a), 17(c)), 24-25, 29, 42][emphasis added].

[27] *Id.* at 008, SAC ¶ 25; *id.* ¶¶ 17(a), 17 (c), 29; AA Tab 4, at 079, lines 21-26 ["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."].)

[28] AA at 007, 012 [SAC ¶¶ 22, 40(a)].

claims occurred on the "organic farm" and "sold out of [that organic farm] as organic." As such, there is simply no question that her challenge is to alleged activity squarely within the methods and processes that USDA certified as organic. Her challenge is at the very core of the certification question.

Yet Appellant makes no claim as authorized under the OFPA, and no claim as authorized under the federally approved (and overseen) COPA, let alone in federal District Court. Rather, Appellant contests Respondent's ability to use the organic label pursuant to the state consumer laws – none of which has ever been submitted by the State to the federal government for approval as an enforcement mechanism under the OFPA or the state SOP. Indeed, each of the statutes on which Appellant's claims are based, including her Section 17200 claim, applies a "reasonable consumer" standard[29] to be applied by a jury of lay consumers[30] in state court, and permits injunctive relief (for which Appellant prays) – each and all of which the OFPA rejects.

V. EACH OF APPELLANT'S CAUSES OF ACTION IS PREEMPTED.

Article VI of the United States Constitution makes "the Laws of the United States ... the supreme Law of the Land." U.S. Const. Art. VI, cl.

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[29] Appellant's Section 17200 claim is based only on her false advertising and CLRA claims, which rely on a reasonable consumer standard. Appellant has not brought a Section 17200 claim premised on a violation of a federally approved SOP (nor could she, as discussed herein). Appellant expressly alleges that her claims in no way involve federal law, and in no way challenge Respondent's organic certifications. (AA, Tab 1, at 004 (SAC ¶12) [no federal question]; AA, Tab 1, at 007-08 (SAC ¶22) [no challenge to certification].)

[30] See authority cited in fn. 15, *supra*.

"[S]tate law that conflicts with federal law is without effect." (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.) The United States Supreme Court has explained that "[p]re[]emption may be either expressed or implied," meaning the dominating federal "command" displacing state law may be either "'explicitly stated in the [federal] statute's language or implicitly contained in its structure and purpose.'" (*Gade v. Nat'l Solid Waste Mgmt. Ass'n* (1992) 505 U.S. 88, 98 [quoting *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525].)

In this case, both express preemption and implied "conflict" preemption bar Appellant's attempt to use these state consumer laws to attack Respondent's certification to label its products "organic."

A. The OFPA and NOP Expressly Preempt Appellant's State Law Claims Based on the Labeling of Respondent's Products as "Fresh Organic."

"Express preemption occurs when Congress enacts a statute that expressly commands that state law on a particular subject is displaced." (*Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, 944.) The United States Supreme Court has repeatedly held that federal law can preempt not only a state statute or regulation, but also a court ruling imposing liability under common law. (E.g., *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 348 [holding state tort claims challenging manufacturer's fraudulent misrepresentations to FDA were preempted]; *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, p. 443; *accord Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, p. 881; *Cipollone*, *supra*, 505 U.S. at p. 521 [holding that term "requirement or prohibition" included common law duties].)

When express preemptive language establishes Congress's intent to preempt state law, it is still necessary to "identify the domain" expressly preempted by the statutory language, by determining the scope of the federal statute. (*S. Cal. Gas. Co. v. Occupational Saf. & Health Appeals Bd.* (1997) 58 Cal.App.4th 200, 204.) A finding of express preemption is appropriate if the gravamen of a complaint is within "the domain expressly pre-empted" by the statutory language. (See *Bates*, *supra*, 544 U.S. at 443.)

Here, the OFPA expressly preempts Appellant's attempt to use state consumer laws as a means to second-guess Respondent's certification to market its products as organic, through a private cause of action, which the OFPA prohibits. (65 Fed.Reg. at 80,554, 80,555, 80,627.) As discussed *supra*, the OFPA is a comprehensive legal regime that statutorily supplanted all state organic product standards and labeling regimes. A state may not impose organic standards unless (1) the "governing State official" proposes the standards and (2) receives pre-approval from the Secretary of Agriculture. (See 7 U.S.C. § 6507.) In this way, the OFPA expressly "*preempt[s]* State statutes and regulations related to organic agriculture." (65 Fed.Reg. at 80548, 80,682, 80,557 [emphasis added].) States remain expressly "*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." (*Id.* [emphasis added]; 7 C.F.R. § 205.620(e) [same].)

To be clear, these limits and preemption on State action specifically include a 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]."].)

Further, what Appellant characterizes as a "savings clause" actually reconfirms that anything not approved by the federal government remains preempted. Title 7 U.S.C. § 6507 (b)(1), to which Appellant's points, provides that "[a] State organic certification program *established under subsection (a) of this section* may contain more restrictive requirements governing the organic certification of farms and handling operations and the production of agricultural products that are to be sold and labeled as organically produced under the [OFPA] than are contained in the [NOP]." (*Id.* [emphasis added].) Though Appellant edits out the reference above to "subsection (a)," that omitted subsection provides: "The governing State official may prepare and submit a plan for the establishment of a State organic certification program to the Secretary for approval." (Id. § 6507 (a).) Likewise, subsection (b)(2) states that a submitted state program is not effective unless "approved by the Secretary." (*Id.* § 6507 (b)(2); see also 7 C.F.R. § 205.620(e) ["[a] State organic program and any amendments to such program must be approved by the Secretary prior to being implemented by the State"].) In short, and as Appellant concedes, all State activity is preempted *unless* it is submitted to, and *approved by*, the federal government. Indeed, Appellant concedes the point (but infers falsely that California submitted its consumer laws for approval as part of its SOP, and that the federal government approved them): "the OFPA expressly preempts state law relating to organic certification and labeling *unless* ... the laws are part of an approved State Organic Plan [sic] ('SOP')." (Appellant's Brief at p. 20 [emphasis in original].)

Thus, the OFPA displaced existing state organic standards and

labeling rules, and established the exclusive manner by which a State may impose such standards in the future. This makes eminent sense, as "the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements." (*Bates*, *supra*, 541 U.S. at p. 455 [Breyer, J. concurring].)

Here, Appellant alleges the methods and processes used by Respondent – methods and processes conducted on the "organic farm" itself – are contrary to certification standards, and do not permit it to use the "organic" label it was certified to use under the OFPA. As discussed *supra*, Appellant (1) is in the wrong court (state court, not federal District Court), (2) seeks to apply the wrong standard (a reasonable consumer standard) (3) to be evaluated by the wrong decision maker (a jury of lay persons), and (4) seeks injunctive relief. Each of these aspects of her claims is expressly rejected by the OFPA and NOP. As such, her claims are preempted by federal law (and also are inconsistent with the state COPA, which also requires that any challenge by filed with the certifying agent, with a right of appeal to the federal District Court).

B. Appellant's Claims Also Are Preempted Because Her Challenge To a Certified Grower's Labeling of Food Product As "Organic" and Compliance With Its Certification, Would Obstruct OFPA's Purposes and Objectives.

Appellant's claims also are preempted under the doctrine of conflict preemption. "[T]he Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." (*Rose v. Arkansas State Police* (1986) 479 U.S. 1, p. 3 (per curiam).) "[N]either an express pre[]emption provision nor a saving clause 'bars the ordinary working of

conflict pre[]emption principles.'" (*Buckman*, *supra*, 531 U.S. at p. 352 [quoting *Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 869].) Such a conflict arises when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or of a federal agency acting within the scope of its congressionally delegated authority. (*Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, pp. 698-99.) Conflict preemption "fundamentally is a question of congressional intent." (*Geier, supra,* 529 U.S. at p. 884 [quotation marks and citation omitted].) Here, as the Court of Appeal held, Appellant's claims present just such an obstacle to Congressional and agency objectives and is, therefore, subject to conflict preemption.

Appellant seeks to enforce her view of the standards imposed by the OFPA and NOP in a manner that is inconsistent with the federal organic regime's express provisions. Permitting Appellant to proceed with these claims would require state courts – more precisely, lay jurors, applying a different standard – to usurp the role of the "governing State official" who is authorized by USDA to develop additional state organic standards for submission to USDA, as well as CDFA and Respondent's third party certifying agent who is responsible under NOP to investigate complaints relating to Respondent's organic practices and its "split" operation.

Moreover, a state consumer claim imposing a financial penalty on a certified organic entity would achieve indirectly what Congress has directly foreclosed, particularly where the predicate unlawful activity of the claims involve selling products as "organic" when those products are allegedly not organically produced. (7 U.S.C. § 6519(a) [penalty for knowingly selling or labeling a product as organic without certification]; *id.* § 6520(a) [decision to certify, suspend, or revoke rests with the certification agent, the SOP, or

NOP].) Further, NOP provides an administrative procedure for appeals of the certifying agent's decisions – a procedure Appellant has not attempted to invoke. (*Id.*)

As Appellant concedes, and does not contest, Respondent holds valid organic certifications issued by USDA-accredited third party certifying agents which have not been suspended or revoked. Thus, Respondent has been entitled under federal law to use the USDA Organic seal and to market, label and sell its herbs as "USDA organic" and "Fresh Organic."

Appellant's attempt nevertheless to preclude Respondent (by seeking monetary damages as well as injunctive relief) from doing the very thing its organic certification under federal law allows Respondent to do, necessarily conflicts with USDA and CDFA's control – through the OFPA, NOP and COPA – over the labeling, marketing and sale of organic product. As such, her claims seek to second guess and interfere with the certification process, as well as the production and handling methods of Respondent's split operation under its OSP. Her claims are an obstacle to the accomplishment and execution of the full purpose and objectives of Congress – namely, the establishment of a national organic standard. (*Aurora*, 621 F. 3d at p. 796.)

Exactly as the Court of Appeal here, the federal Eighth Circuit Court of Appeal held in *Aurora* – a case on all fours with the instant action – that state law consumer claims based on "organic" labeling are preempted. Otherwise::

> 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 the Court of Appeals recognized here,] permitting such suits would pose a clear obstacle to the accomplishment of congressional objectives.

(*Aurora*, *supra*, 621 F. 3d at p. 794 [internal quotations and citations omitted]. Such claims would come "at the cost of diminution of consistent standards, as not only different legal interpretations, but also different enforcement strategies and priorities could further fragment the uniform requirements." (*Id.* at pp. 796-797; see also *id.* at p. 794 ["[C]laims against [the grower] seek to hold it accountable for representing its products as organic when in fact the products were not. As discussed above, all of these claims are preempted by the OFPA."; *id.* at p. 796 ["the class plaintiffs' claims that the retailers sold milk product as organic when in fact it was not organic are preempted"].)

Importantly, 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 handling of its production. As the court explained:

> 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.) The court 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].)

Here, the Court of Appeal correctly agreed with the Eighth Circuit's careful analysis of the OFPA's preemptive nature and holding that "any attempt to hold [the defendant] 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 [7 U.S.C.] § 6503 (d)." (*Aurora*, 621 F. 3d at p. 797.)

In addition to *Aurora*, the court 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*"), applied the same reasoning as used in *Aurora*, and held that a private federal Lanham Act claim for false advertising for use of the term "organic" by the defendants (multiple cosmetic companies) was "barred" by the OFPA. The court concluded that "the labeling and marketing of 'organic' products falls within the exclusive jurisdiction of USDA." (*All One God*, *supra*, at *8.) It held that "[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.) As such, the court concluded, "Plaintiff's challenge to defendants' labeling would inevitably require the court to interpret ... and intrude upon and undermine USDA's authority to determine how organic products should be produced, handled, processed and labeled." (*Id.* at *11.)

Likewise, in *Brown v. Hain Celestial Group* (N.D. Cal. Aug.1, 2012, No. C 11–03082 LB) 2012 WL 3138013, at *9, *17 ("*Brown*"), the court embraced *Aurora's* preemption argument as correct, and ruled that "on its face, OFPA's preemption provision bars ... state organic certification requirements" concerning food products. (*Brown, supra,* at *17.) At issue in *Brown*, however, was labeling of personal care/cosmetic products. In contrast to food products, the "OFPA does not extend to personal care products 'over which USDA has no regulatory authority.'" (*Id.* at *4.) Indeed, "organic" cosmetic labeling may even be defended on the basis of foreign and private certifications. (*Id.* at *10.)

Against these well-reasoned authorities interpreting OFPA preemption, Appellant cites *Jones v. ConAgra* (N.D. Cal. Dec. 17, 2012, No. C 12-01633 CRB) 2012 U.S. Dist. LEXIS 178352. As an initial matter, the defendant in *Jones* was not even a certified grower or distributer under the OFPA, SOP, or any private or foreign standard. Further, in finding that consumer claims involving cooking spray were not preempted by the OFPA, the *Jones* court offered a mere half-page discussion of the OFPA. Even then, it relied on the holding in *Brown*, but utterly failed to recognize that *Brown* involved personal care products that are not covered by the OFPA, and failed to note that *Brown* found preemption as to *food* products – the issue actually before the *Jones* court. (*Id.* at *8.) Perhaps most remarkably, the *Jones* court somehow erroneously concluded that Eighth Circuit Court of Appeals' decision in *Aurora* did not find preemption of state consumer law claims founded on non-compliance with certification production, handling, and labeling requirements of food product, when *Aurora* plainly found and held exactly that. The court in *Jones* got it exactly backward from the courts it cites as "support" for its

holding. Further still, the *Jones* court did not even cite *All One God, supra,* 2012 WL 3257660, which was decided in the same court five months earlier, and which held: "the labeling and marketing of 'organic' products falls within the *exclusive* jurisdiction of USDA." (*Id.* at *8.) Moreover, in the end the *Jones* court merely held that "Plaintiff's organic claims are not preempted *to the extent that* the state claims do not conflict with the OFPA." (*Id.* at *8 [emphasis added].) We submit that the *Jones* decision is off-point, inconsequential, and wholly unpersuasive.

Under the reasoning of *Aurora*, *All One God*, and *Brown*, Appellant's claims are preempted.

C. Appellant's Attempt to Distinguish *Aurora* (and All Other Cases to Address OFPA Preemption) on the Grounds Respondent is a "Split" Operation Fails.

Appellant attempts to distinguish *Aurora* on the grounds that, while the operation of the large dairy producers in *Aurora* was regulated by the OFPA because that dairy operation "only" produced organic product (a "red-herring" contention for which Appellant offers no support), Respondent's conduct is not regulated because it is a "split" operation. The assertion is false.

As discussed *supra* (Section II.A.2.), alleged commingling by a split operation is expressly regulated by the OFPA and NOP. A certified operator's *entire* operation is subject to review and inspection including, for example, comparison of all pesticides purchased with spray records on conventional fields, to ensure that no such purchased chemicals were used in organic production and handling methods. (7 C.F.R. § 205.403; 3 Cal.Code.Reg. § 1391.1.)

Moreover, Appellant alleges that the handling activities she challenges actually occurred *on Respondent's organic farm.*

Further, as held in *Aurora*, "compliance with the regulations is not a separate requirement independently enforceable via state law." *Aurora*, 621 F. 3d at p. 796; *id.* [preempting state law consumer claims premised on an assertion that any "part of a producer's operation was in any way out of organic compliance"; "Permitting such suits would pose a clear obstacle to the accomplishment of congressional objectives' of the OFPA."). *Aurora* is directly on point.

Notably, though Appellant does not repeat the argument here, Appellant argued to the Court of Appeal that the alleged representations at issue here fall within categories *Aurora* found were not preempted from challenge those pertaining to ancillary facts. Specifically, the court in *Aurora* distinguished state law consumer claims premised on representations pertaining to a product being "organic" (which it found were preempted), from state law consumer claims premised on representations pertaining to other qualities of the product, ancillary to the organic representation. For example, the court in *Aurora* held that state law consumer claims directed to representations that the defendants' dairy cows "enjoy a healthy mix of fresh air, plenty of exercise, [and] clean drinking water," and "farmers are committed to the humane treatment of animals" were permitted, because whether such statements are true or false have no bearing on whether the product meets the federal organic definition. (*Aurora*, 621 F. 3d at pp. 790, 799.) Thus, for example, if Respondent falsely represented that its pickers enjoyed air conditioned facilities, those claims would not be preempted because such standards are not required to be certified organic. Those, however, are not Appellant's claims. Appellant

challenges whether Respondent's products, which are labeled as "USDA organic," in fact meet that federal definition. Such claims are preempted.

Appellant also attempted to distinguish the *Aurora* holding – that Colorado consumer laws as applied to organic labeling are preempted by the OFPA – on the ground that Colorado had not submitted an SOP for approval. That "distinction" only underscores the preemption here. Unless a state seeks and gains federal approval *to use its consumer laws to enforce the OFPA or an SOP*, such claims are preempted. Like Colorado, California has not obtained such approval. Further, as in *Aurora*, Appellant cannot prevail on her claims without contradicting and countermanding the OFPA certification given Respondent to use the term "USDA Organic." *Aurora* is directly on point.

Finally, Appellants argued to the Court of Appeal that because she had alleged significant commingling by this certified grower, it may be presumed that a jury applying a "reasonable consumer" would reach the same conclusion that the USDA or the CDFA would reach applying the standards of the OFPA and COPA, and therefore that the OFPA did not preempt consumer state laws in this area. Apart from this assertion in no way distinguishing *Aurora*, it is without merit. Congressional intent to preempt does not turn on facts pled in a specific case two decades later. Moreover, a preemption analysis does not turn on the end result of a jury trial (which, depending on the outcome, may or may not have been preempted), let alone on a presumption that the expert agency would have agreed with that result. Further, Appellant's theory presumes a fraud on the agency, which Appellant has no standing to pursue. (*Buckman,* 531 U.S. at p. 348 [finding that "state-law fraud-on-the-FDA claims" are preempted;

"[t]he conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration"].)

D. Appellant's Proposed Policy Response to a "Current Fiscal Crises" Does Not Trump Federal Preemption.

Appellant advances a new argument – not made to the trial court or Court of Appeal – that "California's current fiscal crisis" of 2014 somehow empowers courts to disregard doctrines and rules of federal preemption and statutory construction, and do what Appellant thinks is "right" to promote the organic industry (rather than what Congress thought was right when it enacted the OFPA). Appellant offers no legal authority for her assertion.

Moreover, her proposed policy choice has the concern exactly backward. The OFPA's purpose was to create an expert agency umpire who alone defines the national "organic" strike zone, and whose calls cannot be second-guessed by individual consumers applying a different "reasonable consumer" standard. That is what Congress determined the organic market needs and requires. And it is precisely under that construct of the law – which bars second-guessing consumer lawsuits, as all courts to look at this issue have found the law to be – that the organics industry has thrived. Appellant now seeks to undo exactly what is necessary – and, more importantly, what *Congress* thought was necessary – to promote a vibrant organic market, and instead seeks to allow any consumer to second-guess that call, in the wrong court, and with its own standards. In short, Appellant's alternate policy preference not only is irrelevant, it also is bad policy.

Appellant also is factually wrong as to a supposed fiscal crises in this area. "California's state organic program is funded entirely by industry registration fees, a portion of which is used to support County enforcement

activities." (<http://www.cdfa.ca.gov/is/i_%26_c/organic. html> [as of August 8, 2014].) As Appellant trumpets, the organic market is increasingly *vibrant* under these current enforcement protocols (which Appellant now seeks to undo). Moreover, that the director of California's SOP is to carry out enforcement activities "to the extent funds are available" (Health & Saf. Code § 110940), does not alter the fact that complaints may also be submitted to USDA, as well as to the federal accredited third party certifier who is obligated to investigate and issue a notice of non-compliance and enforce compliance with the OFPA in every instance. Further, as required by Section 110940, California's SOP has established an expeditious procedure to investigate and resolve any complaints it receives from citizens (precisely what Appellant did not do) (see <https://organic.cdfa.ca.gov/Complaints> [as of August 8, 2014]) and may levy a stern civil penalty against any person who violates COPA. (*Id.* § 110915.)

In short, Appellant's "California's current fiscal crisis" argument lacks legal effect, reflects the wrong policy judgment, by the wrong decider, and is without factual foundation.

E. Any Reliance on Section 111910 Is Misplaced.

Before the Court of Appeal, Appellant argued for the first time that all her claims were not preempted because she had brought – not consumer law claims as plainly stated in her pleading – but claims under supposedly "California's SOP" and Health & Safety Code § 111910. Though Appellant seems to have abandoned much of this argument, and it may be outside the scope of the issues identified for review, given Appellant's references to the statute, in an abundance of caution we address it here.

1. *Appellant Does Not Assert A Section 111910 Claim.*

Initially, Appellant did not bring a Section 111910 claim in the trial court. Rather, Appellant disavowed that her claims "concern or challenge the organic certification" of Respondent. (AA, Tab 1, at 007 [SAC ¶ 22].) She reaffirmed this position on appeal. (Appellant's Court of Appeal Reply at p. 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 [Respondent]."].) Further, Section 111910 does not provide for restitution, an award of compensatory damages, disgorgement of profits, benefits, and other compensation to a consumer or class of consumers from Respondent from alleged wrongful conduct – the relief sought by Appellant in her pleading. Simply, Appellant did not bring a Section 111910 claim, and may not overturn the trial court's ruling, and now the Court of Appeal's ruling, based on claims she did not assert. (*North Coast Bus. Park v. Nielson Construction Co.* (1993) 17 Cal.App.4th 22, 28; *Brunson v. Depart. of Motor Veh.* (1999) 72 Cal.App.4th 1251, p. 1257.)

2. *Any Section 111910 Claim Is Preempted.*

Further, even if Appellant had brought this action under Section 111910 and sought to enjoin a violation under that Section, such a claim is preempted because it was not proposed by the State as an enforcement mechanism within its SOP (i.e., COPA) and approved by the federal government, as would be required. (See discussion at pp. 24-27, *supra.*)[31] Indeed, and though it is the federal intent – not State intent – that controls a

[31] E.g., 65 Fed.Reg. at 80547, 80,548, 80,682, 80,557; 7 C.F.R. § 205.620(e); 7 C.F.R. § 205.681.

preemption analysis,[32] as discussed above, the State of California's intent is also clear in this regard.

Section 111910 was originally enacted in 1979, and codified at Health & Safety Code § 26850.5 in 1979.[33] When California enacted the California Organic Foods Act of 1990 ("COFA of 1990"),[34] the Health and Safety Code was reorganized and Section 26850.5 was moved to Section 111910. After enactment of the federal OFPA and NOP – the COFA of 1990 was repealed and replaced by COPA, expressly *because* the COFA of 1990 was not compliant with the subsequent OFPA and NOP. As the California Legislature recognized at that time, "[t]he adoption of NOP regulations has placed California's COFA of 1990 with its COPA or 2003 out of compliance with recently established federal standards,"[35] and in recognition that *"[t]he complaint process in this state shall also meet all the complaint processes outlined in regulations promulgated by NOP."* (Food & Agr. Code, § 46016.1(e); Health & Safety Code, § 110940(e) [emphasis added].)[36] As the California Legislature also recognized, Section

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[32] The question is not whether the California Legislature intended to overcome the preemptive effect of the federal law at issue, but is whether the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or of a federal agency acting within the scope of its congressionally delegated authority. (*Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at pp. 698-99; *Crosby v. Nat'l Foreign Trade Council* (2000) 530 U.S. 363 at p. 372).

[33] Stats. 1979,c. 914, § 9.5.

[34] Stats. 1995, c. 415 (S.B. 1360) § 6.

[35] Sen. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823 [2001-2002 Reg. Sess.] as amended June 11, 2002, 1st and 2d para. of Background and Discussion.

[36] Appellant provides no authority, and Respondent has found none, in support of Appellant's argument that the California State Legislature's

111910 does not comport with those procedures. Moreover, it was not proposed by the State for inclusion in its resulting SOP (COPA), and was never approved by the federal government. As such, Section 111910 is preempted.

Further still, even if Section 111910 had been included in COPA, and had been submitted to USDA for approval (though it was not), USDA would have no authority to approve such a new enforcement procedure where Congress has provided that "Citizens have no authority under NOP to stop the sale of a product." (65 Fed.Reg. at 80,627 [also declaring "Citizens have no authority ... to investigate complaints alleging violation of the Act or these regulations."].) Section 111910 directly conflicts with that directive.

The very purpose of the OFPA 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 step in to override and enjoin the certification decisions of that umpire, the entire structure – and purpose – of the OFPA fails. Providers of organic products – and consumers – need to be able to rely on the expert approval given by the agency that scrutinizes all aspects of the producer's business, and which, using that

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codification of COPA within the Sherman Law is an indication that Appellant's claims are a federally approved method of enforcing the OFPA or SOP. Appellant's argument disregards the basics of preemption analysis, whether express or implied. The question is not whether the California Legislature intended to overcome the preemptive effect of the federal law at issue, but is instead whether the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or of a federal agency acting within the scope of its congressionally delegated authority. (*Capital,* 467 U.S. at pp. 698-99.)

expertise and information, permits use of the term "USDA Organic." If individual consumers may rush to court to have individual judges and juries overturn and enjoin certification decisions by that expert on "organic" food, the whole purpose of the OFPA is frustrated. It is, perhaps, this reason the State legislature never submitted Section 111910 as part of its SOP for approval by the federal government.

3. *Principles Of Statutory Construction Confirm That Section 111910 May Not Be Used To Enforce Violations Of COPA.*

Finally, well-established principles of statutory construction confirm that Section 111910 may not be used to enforce violations of COPA. 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." (cf. *People v. Anderson* (2002) 28 Cal. 4th 767, 122 Cal.Rptr.2d 587, p. 597 [citing *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59; also citing *In re Jovan B.* (1993) 6 Cal.4th 801, 816].)

Under this principle, Section 111910 only permits private injunctive relief actions against any person violating any provision of the COFA of 1990 in its 1995 form previously located at "Article 7 (commencing with Section 110810) of Chapter 5" – not COPA subsequently enacted in 2002. (See *Anderson, supra*, 28 Cal. 4th at p. 779.)

In *Palermo*, this Court held the phrase "any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject" to the California Alien Land Act (Stats.1921, p. lxxxiii) as amended in 1923 (Stats.1923, p. 1021) was a

specific reference to the treaties between the U.S. and Japan as they existed at the date of enactment. Therefore, the court in 1948 construed the Alien Land Act to govern the real property rights of Japanese nationals according to treaties existing before the Second World War. (*Palermo,* 32 Cal. 2d at p. 55.)

Applying the *Palermo* rule, the court in *People v. Domagalski* (4th Dist. 1989) 214 Cal. App. 3d 1380, pp. 1385-87, held that a reference in the California Vehicle Code was specific because the incorporating statute referred to subdivisions (a) through (f) of California Penal Code section 853.6, omitting subdivisions (g) through (i). The court noted:

> A review of each of the cases which have followed *Palermo* is instructive on this issue. Without exception, in each case where a statute, or some portion of it, was incorporated by reference to its section designation, the court found the reference to be specific and the effect was the same as if the adopted statute had been set out verbatim in the adopting statute, so that repeal or subsequent modification of the statute referred to did not affect the adopting statute.

(*Id.* at p. 1385-86.) The court therefore declined to incorporate subsequent amendments to Penal Code section 853.6. (*Id.* at p. 1387.) In contrast, the court in *Firemen's Benevolent Ass'n v. City Council* (4th Dist. 1959) 168 Cal.App.2d 765, pp. 766-67, 770, held an incorporation to be general because it referred to "all provisions of the State Employees' Retirement Law," and therefore referred to the whole statute as subsequently amended.

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 that earlier Act with COPA. (Stats 2002, c. 533 (A.B. 2823) § 22.) During the enactment process, the California Senate acknowledged, "[t]he adoption of NOP regulations has placed California's

1990 Organic Foods Act out of compliance with recently established federal standards...." (Sen. Health & Human Serv. Com. Analysis, 3d reading analysis of Assem. Bill No. 2823, *supra*, 1st and 2d para. of Background and Discussion.) Notably, in the enactment of COPA, the Legislature made no reference to the enforcement mechanism contained in Section 111910. The Legislature did, however, acknowledge that the complaint and enforcement requirements of California's new Organic Program, COPA, "must meet all the complaint process outlined in regulations adopted by NOP." (Food & Agr. Code, § 46016.1; Health & Saf. Code, § 110940(e).)

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. It cannot be construed to refer to violations of Acts enacted seven (7) years later in 2002, *i.e.*, COPA. 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* COPA).

F. Appellant's Reliance On Authorities Interpreting Other Statutes Is Misplaced.

Appellant relies on *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 ("*Farm Raised Salmon*"), but disregards the difference between the Nutrition Labeling and Education Act (the "NLEA"), Pub.L. No. 101-535 (Nov. 8, 1990) 104 Stat. 2353, and the OFPA and NOP. While the NLEA specifically permits states to adopt labeling requirements "identical to" those in the NLEA (*Farm Raised Salmon*, 42 Cal.4th at p. 1086), it

specifically provided that the NLEA "shall *not* be construed to preempt any provision of State law, unless such provision is expressly preempted under section 343-1". (*Id.* at pp. 122-123 [quoting Pub, L. No. 101-535, section 6c1, 104 Stat. 2364] [emphasis added].) As such, the NLEA specifically authorized the utilization of state law procedures to enforce its requirements, and to enforce those procedures in state courts. Indeed, this Court quoted Representative Henry Waxman, who originally introduced the NLEA in the House of Representatives, for the proposition that:

> The NLEA recognizes the importance of the State role: by allowing State to adopt standards that are identical to the Federal standard, which may be enforced in State court; and by allowing the States to enforce the Federal standard in Federal court.

(*Id.* at p.122.) In so doing, this Court noted, Congress "said absolutely nothing about proscribing the range of available remedies states might choose to provide for the violation of those laws, such as private actions." (*Id.*)

For these very reasons, the NLEA stands in stark contrast to the OFPA and NOP, which provide the "OFPA and these regulations do preempt State statutes and regulations related to organic agriculture," and provide that any *proposed* state standards and enforcement procedures must be submitted in an SOP to federal government, and approved by the federal government, before the may be utilized. (65 Fed.Reg. at 80547, 80,548, 80,682, 80,557; 7 C.F.R. § 205.620(e); 7 C.F.R. § 205.681.)

Furthermore, unlike *Farm Raised Salmon*, where the plaintiff's claims were premised on a violation of the state analogue to the NLEA, here Appellant has not brought her claims based upon the COPA, which is, in essence, adopted in its entirety NOP with a handful of additional

requirements pertaining to registration that were specifically approved by USDA. This includes Appellant's Section 17200 claim, which is based on her false advertising and CLRA claims, which in turn rely on a reasonable consumer standard. To be clear, Appellant has not brought a Section 17200 claim premised on a violation of the OFPA or COPA, which claim would still be preempted as this was not submitted to and approved by the federal government – but would at least be premised on the *governing standard* of OFPA and COPA (though still addressed to the wrong decision-maker in the wrong court). In fact, Appellant's pleading expressly alleges that her claim in no way involves federal law, and in no way challenges Respondent's organic certifications. (AA, Tab 1, at 004 [SAC ¶12] [no federal question]; AA, Tab 1, at 007-08 [SAC ¶22] ["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"].) Instead, Appellant's claims effectively concede and do not challenge OFPA and COPA compliance, but would seek to find liability and enjoin Respondent under other and different standards. Such claims are preempted for all the reasons discussed herein, as found by the Court of Appeal.

For each of these reasons, and as the Court of Appeal's decision discussed at length, the NLEA and the decision in *Farm Raised Salmon* do not assist Appellant's arguments against preemption here.

Appellant also cites the recent United States Supreme Court ruling in *POM Wonderful LLC v. The Coca-Cola Co.* (2014) 134 S. Ct. 2228. The *POM* case, however, is wholly inapposite. First, *POM* is not a preemption case. As Justice Kennedy explained, it is a case about preclusion, because preemption comes into play only when determining whether a state law is

preempted by a federal statute or agency action. The Court ruled that the Food, Drug, and Cosmetic Act ("FDCA"), "by its terms, does not preclude Lanham Act suits." (*POM*, *supra*, 134 S.Ct. at p. 2237.) "Nothing in the text, history, or structure of the FDCA or Lanham Act shows the congressional purpose or design to forbid these suits. Quite to the contrary, the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels." (*Id.* at p. 2233.)

Second, the FDCA is an entirely different type of statutory scheme enacted for a very different purpose than the OFPA. As the Court noted, "the FDCA statutory scheme is designed to primarily to protect the health and safety of the public at large," including through the prohibition of selling misbranded food, drinks, and cosmetics. (*Id.* at p. 2234.) The OFPA, however, is a statutory scheme designed to foster the development of a national organic foods market with uniform protocols and enforcement. Unlike the OFPA, and as the Court found noteworthy, the FDA does not pre-approve food and beverage labels, and instead relies on after-the-fact enforcement actions, warning letters and other measures. The OFPA, however, requires pre-market organic certification, on-going certification renewal and inspection, and provides a robust administrative review and appeal process any person may take advantage of.

Third, as the Court found, allowing Lanham Act claims to co-exist with FDA enforcement for violations of the FDCA would not disrupt the national uniformity of food and beverage labeling. Indeed, the two federal statutes have co-existed for almost 70-years. (*Id.* at p. 2231.) Thus, while the application of the Lanham Act may differ among judges and juries throughout the country, "this is the means Congress chose to enforce a national policy to ensure fair competition. It is quite different from the

disuniformity that would arise from the multitude of state laws, state regulations, state administrative agency rulings, and state-court decisions that are partially forbidden by the FDCA's pre-emption provision." (*Id.* at p. 2239.) Here, on the other hand, permitting consumers to bring state consumer law actions under different standards, thereby second-guessing the certified producer's organic certification, and thus, the third party certifier, the SOP and NOP, would stand as a direct obstacle to the goal and purpose of the OFPA and result in "dis-uniformity."

Fourth, unlike the FDCA which, the federal OFPA sets a "ceiling" over that which it governs. The OFPA permits states to enact an organic program, but *only* upon approval by USDA including subsequent audits of the program at least once every five years. Even enforcement actions against certified operations must be reported to the federal program. Although states may enact more restrictive requirements in an SOP, Congress mandates USDA approval of the additional requirements so as not to interfere with the purpose and intent of the OFPA in establishing notional organic standards. Further, as Appellant concedes, California proposed the adoption of – and the federal government approved its adoption of – the enforcement mechanisms of NOP in their entirety including the administrative complaint and appeal process. They do not include the claims made here.

Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, *Holk v. Snapple Bev. Corp.* (3d Cir. 2009) 575 F.3d 329, 339, *Bates v. Dow AgroSciences, supra,* 544 U.S. 431, and *Kroske v. US Bank Corp.* (9th Cir. 2005) 432 F. 3d 976, are distinguishable. Appellant suggests that the federal statutes in those cases (the FDCA, FDCA, the Federal Insecticide, Fungicide, and Rodenticide Act, and the National Bank Act, respectively) do not preempt

states from providing additional damages remedies for violations of "state rules that merely duplicate some or all of the federal requirements" and that "states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products." But for the same reasons as *Farm Raised Salmon* and *POM*, these very different analyses do not apply here.[37]

Finally, Appellant relies on *Goodyear Atomic Corp. v Miller* (1988) 486 U.S. 174 , in which the Court examined whether the Supremacy Clause barred the State of Ohio from subjecting a private contractor operating a federally owned nuclear production facility to a state-law workers' compensation provision providing for an increased award for injuries resulting from an employer's violation of a state safety regulation. In that case, the federal statute, the Supremacy Clause, ch. 822, 49 Stat. 1938, 40 U. S. C. § 290, expressly provided the requisite clear congressional authorization for the application of states' workers' compensation laws to workers at federal facilities. As the Court noted, "Congress appears to have recognized the diversity of workers' compensation schemes when it provided that workers' compensation would be awarded to workers on federal premises 'in the same way and to the same extent' as provided by state law." (*Id.* at p.185.) In other words, the federal statute addressed the specific state laws at issue for which it was "presume[d] that Congress is knowledgeable about."

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[37] Appellant cites dicta from *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 332. *Kwikset* did not address, nor reference, the OFPA nor its preemption of state law. The issue before the Court was the plaintiff's Article III standing, and whether she had alleged sufficient facts to establish an injury in fact. (*Id.*) Such issues are not presented here.

In this case, however, the existence of a multitude of varying state organic standards and enforcement schemes was the driving force behind the goal and purpose of enacting the OFPA and its implementing regulations, NOP, as the national uniform standard for organic agricultural products. Appellant disregards and ignores that Congress, as well as California in adopting the federal enforcement scheme of NOP, declined to provide a private right of action under the OFPA, but instead provided a robust administrative complaint and appeal process.

VI. EVEN IF APPELLANT'S CLAIMS WERE NOT PREEMPTED, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DISMISSAL UNDER THE PRIMARY JURISDICTION DOCTRINE.[38]

Though fully briefed by the parties, the Court of Appeal did not address the doctrine of primary jurisdiction. The trial court, on the other hand, stated that but for preemption, it would dismiss these claims on this basis. In the event this Court does not find preemption, Respondent requests that the Court affirm dismissal based on the doctrine of primary jurisdiction, as such dismissal was not an abuse of the trial court's discretion. (E.g., *All One God, supra,* 2012 WL 3257660 [dismissing challenge to cosmetic labeling based on the doctrine of primary jurisdiction]; *Farmers Ins. Exchange v. Sup. Ct* (1992) 2 Cal.4th 377, 391 [dismissal of action under doctrine of primary jurisdiction is reviewed for abuse of discretion].)

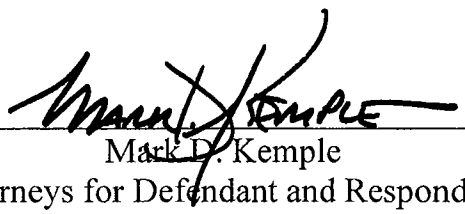
[38] Although not expressly part of the question on which review was granted, Respondent believes these questions are fairly encompassed within the question identified.

VII. CONCLUSION

Appellant's claims are preempted. Respondent respectfully requests that this Court affirm the Court of Appeal's ruling.

Dated: August 22, 2014

GREENBERG TRAURIG, LLP

By: 

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CERTIFICATE OF WORD COUNT

I, Mark D. Kemple, hereby certify pursuant to Rule of Court 8.204(c) that this Respondent's Brief on the Merits was produced on a computer, and that it contains 13,888 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 August 22, 2014, at Los Angeles, California.

Mark D. Kemple

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

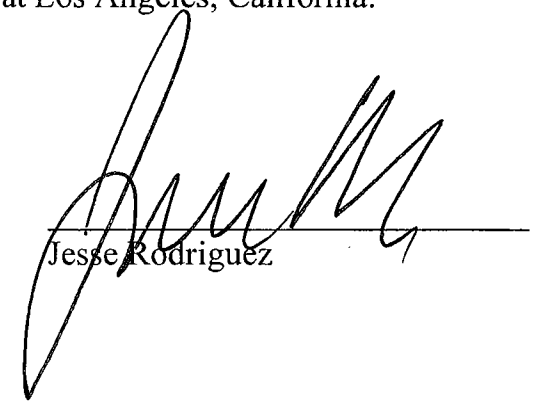
On August 22, 2014, I served true copies of the following document(s) described as **RESPONDENT'S BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Greenberg Traurig's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 22, 2014, at Los Angeles, California.



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