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. B 239602, on Appeal from the Los Angeles County Superior Court, Case No. BC436557, Honorable Carl West, Judge, Presiding

RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY (Cal. Rules of Court, rule 8.520(d))

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Respondent brings to the Court's attention the following supplemental authority, decided on September 22, 2014 (after the filing of Respondent's Brief, but prior to the filing of Appellant's Reply Brief): *Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.App.4th 1291, 1305-1306.

The question presented in *Solus* was whether the federal Occupational Safety and Health Act ("the OSH Act") preempted state law UCL claims (including false representation claims) brought by a district attorney for alleged misconduct conduct covered by the OSH Act, where a state law plan had been developed and approved under the OSH Act. (*Solus*, *supra*, 229 Cal.App.4th at pp. 1297, 1303-1308.) At issue was a workplace explosion resulting from use a residential water heater in a plastics factory that caused the deaths of two workers. (*Id.* at p. 1297.)

Like the OFPA, the OSH Act allows a State to develop and enforce State standards regarding occupational health and safety on the condition that (1) the state submits a proposed a State Plan to do so, and (2) the federal Secretary of Labor approves that State Plan. (*Solus*, 229 Cal.App.4th at pp. 1300-1301 [discussing 29 U.S.C. § 667(b)-(c)].) Like the OFPA, the OSH Act permits a State to propose a plan with *more restrictive* standards than that set forth in the federal act, but such standards may be utilized only if first approved by the Secretary of Labor as part of an approved state plan. (*Id.* at pp. 1303-1304.) And like the OFPA, the OSH Act provides for

continuing oversight by the federal authorities of action taken by a State pursuant to an approved State Plan. (*Id.* at 1300-1301.)

As Appellant argues here, the plaintiff in *Solus* argued that, in additional to the procedures set forth in the State plan authorized by the Secretary of Labor, the plaintiff should be permitted to utilize the UCL (including its false statement provisions) to enforce the purposes of those State laws, of the OSH Act, and of the federally-approved State Plan, despite the fact that the Secretary had not approved use of the UCL as an enforcement mechanism. (*Id.* at pp. 1305-1306.)

The Court of Appeal in *Solus* rejected the plaintiff's contention. The Court held that, because the UCL provisions were not within the State Plan approved by the Secretary of Labor, the plaintiff's UCL claims were preempted by the OSH Act. In doing so, the *Solus* Court rejected many additional arguments advanced by Appellant here. The *Solus* Court rejected the argument that the plaintiff may utilize "whatever legal mechanism" it chooses so long as it is enforcing the approved standard. (*Id.* at pp. 1296-1297.) As the Court of Appeal held, "the approved state plan operates, in effect, as a 'safe harbor' within which the state may exercise its jurisdiction. It is only when the state stays within the terms of its approved plan, that its actions will not be preempted by state law." (*Id.* at p. 1307.)

The *Solus* Court also rejected the argument that the Secretary of Labor should be "presumed" to have known that the State intended to permit use of the UCL (or its forerunner statutes) as an enforcement

mechanism, despite the non-inclusion of them in the proposed State Plan approved by the Secretary. (*Id.* at pp. 1303-1305.) In addition, the *Solus* Court also rejected the argument that the Secretary necessarily would have approved of "enhanced enforcement" mechanisms had they been submitted for to the Secretary for approval as part of the State Plan. (*Id.* at p. 1307.) The Court held that "the standard for assessing whether reliance on the UCL as a tool of enforcing workplace safety laws is preempted is not whether *we believe* it appears 'consistent with the goals' of the OSH Act to do so. It is the Secretary, not this court, which retains the discretion to determine whether changes in the state's already approved enforcement plan are appropriate. Stated simply, avoidance of federal preemption is dependent upon the Secretary's approval, not ours." (*Ibid.*)

Each of these rejected arguments is repeated by the Appellant here. They fail for all the same reasons they failed in *Solus*.

The plaintiff in *Solus* also relied upon *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, as does Appellant here. The *Solus* Court distinguished *Farm Raised Salmon Cases*, as follows:

> As our Supreme Court explained, the federal law at issue in *Farm Raised Salmon Cases* preempted only those state laws that "'establish . . . any requirement for the labeling of food . . . *that is not identical to the requirement* of'" federal law. (*Id.* at p. 1086.) Thus, the

court concluded that to the extent California's laws established requirements which were identical to those established by federal law, its enforcement of those laws was *not preempted.* (*Id.* at p. 1083 ["plaintiffs' claims for deceptive marketing of food products are predicated on state laws establishing independent state disclosure requirements 'identical to' the disclosure requirements imposed by the FDCA, something Congress explicitly approved"].) The same cannot be said here.

By contrast to the federal law at issue *Farm Raised Salmon Cases*, the OSH Act *does not* allow states to *independently establish* workplace safety laws, even if those laws mirror federal law requirements. Instead, the states' authority to establish and enforce any laws in this area is *expressly conditioned* on submission of a proposed state plan to the Secretary – a plan which reflects not only the state's establishment of appropriate workplace safety requirements, but also the manner in which those requirements will be enforced and the remedies provided – and *the Secretary's approval* of that specific plan. In fact, unlike the federal law at issue in *Farm Raised Salmon Cases*, the OSH Act actually contemplates that states *could deviate* from established federal standards, as long as those deviations are approved by the Secretary.

(*Solus*, 229 Cal.App.4th at 1305-1306 [emphasis in the original].) The same distinctions apply here.

Finally, the plaintiff in *Solus* relied upon *Rose v. Bank of America* (2013) 57 Cal.4th 390, as does Appellant here. The *Solus* court distinguished *Rose*, as follows:

> In *Rose*, the issue was whether a private party's cause of action for restitution and injunctive relief under the UCL, based upon the defendant's alleged violations of the federal Truth in Savings Act (TISA) – a law which did not itself authorize any private enforcement – was preempted. The Supreme Court held it was not, because when Congress repealed TISA's provision allowing for private enforcement, it also "explicitly approved the enforcement of state laws 'relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.'" (*Id.* at p. 395.) The court then concluded that a private right of action under the UCL, based on an alleged violation of TISA, was not inconsistent with the provisions of TISA. (*Ibid.*)
>
> In this case, however, freedom from federal preemption hinges not only on whether a state's proposed laws are "'at least as effective'" as those contained in the OSH act – a standard we might be able to assess – but

> also on whether they are "incorporated in a state plan submitted to and approved by the federal Secretary of Labor (the Secretary)." (*California Lab. Federation v. Occupational Safety and Health Stds. Bd., supra*, 221 Cal.App.3d at p. 1551.) That latter requirement is not one we are empowered to dispose of.
>
> Because the OSH Act allows a state to avoid federal preemption only if it obtains federal approval of its own plan, it necessarily follows that a state has no authority to enact and enforce laws governing workplace safety which fall outside of that approved plan.

(*Solus*, 229 Cal.App.4th at p. 1306.) Again, the same distinctions apply here. The UCL was not submitted to the Secretary of Agriculture as an enforcement mechanism for California's proposed SOP. And it was never approved by the Secretary of Agriculture. As such, use of it to attack activity expressly governed by the OFPA is preempted.

Moreover, here, Appellant attempts to utilize not only an unapproved *enforcement mechanism*, but also seeks to apply a *different standard* – that of a reasonable consumer's understanding of the term "organic."[1] As the Court of Appeal held in this action,

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[1] Appellant also seeks to do so in state court, rather than in the United States District Court where both the OFPA and California's SOP require such actions be brought. (7 U.S.C. § 6520(a)-(b); 7 CFR § 205.668; Cal. Food & Agr. Code § 46016.5; 3 Cal.Code.Reg. §§ 1391.1, 1391.3, 1391.5.)

permitting juries across this State and others to second-guess the certification and compliance decisions of the USDA or its state delegates would pose an obvious obstacle to achievement of the goals of the OFPA – namely, the creation of a vibrant organic industry through a uniform national protocol, applied by an expert on whose decisions the industry may rely. Appellant's construct of the law of preemption – which is decided as "a pure question of law" and not on the allegations of a particular case[2] – would directly interfere with the accomplishment of that purpose. Thus Appellant's UCL claims here, like the UCL claims in *Solus*, are preempted.

Dated: December 12, 2014

GREENBERG TRAURIG, LLP

By: _____
Mark D. Kemple
Attorneys for Defendant and Respondent
HERB THYME FARMS, INC.

[2] *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.

CERTIFICATE OF WORD COUNT

I, Mark D. Kemple, hereby certify pursuant to Rule of Court 8.520(d) that this Respondent's Brief on the Merits was produced on a computer, and that it contains 1,540 words, exclusive of tables, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

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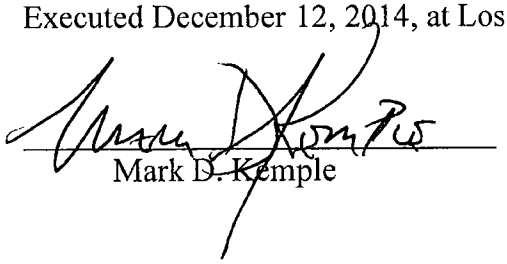

Mark D. Kemple

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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.

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Executed on **December 12, 2014,** at Los Angeles, California

Debbie Gutierrez

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Case Type: Civil

Case Number: S216305

Case Name: Quesada v. Herb Thyme Farms, Inc.

Name of Party: Herb Thyme Farms, Inc.

Type of Document(s):
Supplemental Brief

Name of Attorney or Self-Represented Party Who Prepared Document: Mark Kemple

Bar Number of Attorney: 145219

List of Attachment(s):

S216305_S216305_SB_HerbThymeFarms.pdf