QUESADA v. HERB THYME FARMS, INC.

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Supreme Court of California
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MICHELLE QUESADA, Plaintiff-Petitioner and Appellant, v. HERB THYME FARMS, INC., Defendant and Respondent.

Type: Petition for Appeal

Prior History: After a Decision of the Second District Court of Appeal, Division Three On Appeal From the Los Angeles Superior Court. Honorable Carl West. (subsequently transferred to Honorable Kenneth Freeman).

Counsel

[*1] LAW OFFICE OF RAYMOND P. BOUCHER, Raymond P. Boucher (SBN 115364), Los Angeles, CA, WHATLEY KALLAS, LLC, Alan M. Mansfield (SBN 125998), San Diego, CA, KIESEL LAW LLP, Helen Zukin (SBN 117933), Beverly Hills, CA, JOHNSON & JOHNSON LLP, Neville Johnson (SBN 66329), Beverly Hills, CA, Counsel for Plaintiff-Petitioner and Appellant, MICHELLE QUESADA.

Title

Petition For Review

Text

ISSUES FOR REVIEW

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

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

WHY REVIEW SHOULD BE GRANTED

In grocery aisles across the state, people are increasingly willing to pay a 20- to 100-percent markup for organically grown produce. (Appellant's Appendix (″AA″) at p. 11.) Consumers make the decision to pay a considerable premium for the material ″100% Organic″ designation because organically grown food is widely considered to be safer, healthier, and better for the environment than its conventionally grown counterparts. (*Ibid.*) Consumers must rely solely on a product's packaging to truthfully indicate whether a particular food came from a certified organic operation. (*Ibid.*)

In this case of first impression, the Second District Court of Appeal, Division Three, dealt a crippling blow to consumers on this important question of law by concluding that ″[a] state consumer lawsuit based on COPA violations, or violations of the OFPA, would frustrate the congressional purpose of exclusive federal and state government prosecution and erode the enforcement methods by which **[*3]** the [OFPA] was designed to create a national organic standard.″ (Opinion of the Second District Court of Appeal, Division Three [Exh. ″A″] (″Opn.″), at p. 2.) Such a

decision is directly at odds with *In re Farm Raised Salmon Cases (2008) 42 Cal.4th 1077* (″*Farm Raised Salmon Cases*″), in which this Court reversed a similar preemption-based decision issued by the same Division Three of the Second District Court of Appeal, and conflicts with Division Five of the Second District Court of Appeal's recent interpretation of *Farm Raised Salmon Cases* in *Coleman v. Medtronic, Inc. (Cal. App. 2d Dist. Jan. 27, 2014) 2014 Cal.App.LEXIS 70 (Case No. B243609).* The decision also contradicts several California federal district court cases holding that organic labeling claims like Ms. Quesada's are not preempted, including *Jones v. ConAgra Foods, Inc. (N.D. Cal. Dec. 17, 2012) 2012 U.S. Dist. LEXIS 178352.* This radical result also defies Congress's stated purpose in enacting the OFPA and creates harmful new preemption rules that will undermine California's strong consumer protections against misbranded products in general.

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

The labeling and sale of ″organic″ food is a major trend and a multi-billion dollar business. Unscrupulous vendors, like Respondent Herb Thyme Farms, Inc. (″Herb Thyme″), see the organic label as a marketing strategy to make greater profits-a gimmick to trick consumers into paying premium prices for conventional product. If the Second District Division Three's preemption analysis stands, there will be no remedy for consumers who purchase an overpriced lie dressed in a ″certified organic″ label, since they would have no direct redress for compensation at either the state or federal level.

FACTUAL AND PROCEDURAL BACKGROUND

A. The OFPA Establishes a National Definition of ″Organic″ While Preserving Traditional State Police Powers Through [*5] State Organic Programs.

California has been actively regulating organic food production since 1979. In 2003, COPA was enacted as Article 7 of the Sherman Food, Drug and Cosmetic Law (*Health & Saf. Code § 109875* et seq.), to ″conform California law to the national regulations and codify existing state provisions regarding enforcement of the state and federal requirements regarding organic products.″ (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2823 (2001-2002 Reg. Sess.) as amended Aug. 20, 2002, p. 4.) Thereafter, California became the first state to establish a USDA-approved State Organic Program (″SOP″). California's exercise of its independent police powers through local enforcement of its SOP is not surprising considering that California is the nation's ″largest producer of agricultural products and the top exporting State,″ with annual farm receipts totaling $ 36.1 billion in 2008. (U.S. Dept. of Agriculture, Trade and Agriculture: What's at Stake in California? (Sept. 2009) at p. 1.) By establishing its own approved SOP, California retained its ability-as Congress intended-to protect its unique local agricultural interests by continuing **[*6]** the established practice of enforcing the state's Sherman Law through private consumer-protection actions.

California's SOP expressly incorporates federal standards. Hence, ″to be sold or labeled as organically produced [a product] must (A) be produced *only* on certified organic farms and handled only through certified organic handling operations.″ (*7 U.S.C. § 6506*, italics added.) In this case, Ms. Quesada expressly alleges that the products in question were not grown on certified organic farms. (AA, p. 8.) In addition to being a *per se* unlawful business practice actionable under the UCL, COPA expressly provides for a private claim by consumers for such a violation. (*Health & Safety Code § 111910*.)

By 1990, twenty-two states (including California) had implemented their own requirements for organic food production and labeling, some based on the California model and others not. Each of these twenty-two states had different definitions of ″organic″ [1]. The remaining states were a free-for-all for unscrupulous farmers seeking to cash in on the organic movement. As expressed by Senator Leahy when he introduced the OFPA, ″anyone [could] label anything **[*7]** as organic or natural regardless of how it was produced. Temptation for mislabeling is great because organic foods often sell at premium prices and some are deliberately mislabeled.″ (101 Cong. Rec. S1109 (Feb. 8, 1990).) To balance these interests, the OFPA established a national organic standard, but also expressly provided states

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

the flexibility to serve their own interests through additional regulations and enforcement provisions and by including an express savings provision in *7 U.S.C. § 6507* (″A State organic certification program established under [this section] may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold and labeled as organically produced under [the OFPA] than are contained in the [NOP].″). (*See* S. Rep. No. 357, 101st Cong., 2d Sess. 289, 295 (1990).)

Being that California **[*8]** and other states had already been independently regulating organic labeling for over a decade, the OFPA's savings provision demonstrates Congress' clear and unequivocal intent to provide a floor, not a ceiling, for state regulations such as COPA, and to allow for complementary state action through additional enforcement mechanisms. This is particularly true because regulation of food products has traditionally and historically been left to the states. (*Florida Lime & Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 144.)* In fact, Congress was careful to limit the preemptive reach of the OFPA and preserve state involvement: ″In establishing the [NOP], the Secretary *shall* permit each State to implement a State organic certification program.″ (*7 U.S.C. § 6503(b)* (italics added).)

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

Herb Thyme is the largest grower, shipper, and marketer of herbs in California. (AA, p. 2.) Herb Thyme owns and operates two types of farms. (AA, p. 7.) First, Herb Thyme owns and operates a number of large farms **[*9]** located throughout Central and Southern California where it grows conventional herb crops. (*Ibid*.) These farms include Herb Thyme's Camarillo and Thermal farms. (*Ibid*.) Second, Herb Thyme separately owns and operates one relatively small farm in Oceanside where it grows organic herbs. (*Ibid*.) Only the small Oceanside farm has been certified by a registered certifying agent as an organic production facility, and it produces a very small percentage of the products Herb Thyme sells to the consuming public. (*Ibid*.) This case does not concern or challenge the organic certification issued to the Oceanside farm or Herb Thyme's compliance with organic production methods at that location. (*Id*. at pp. 7-8.)

Plaintiff alleged that Herb Thyme lied about the nature of its ″Fresh Organic″ line of herbs. (AA, p. 11.) Herb Thyme affirmatively represented to consumers that its ″Fresh Organic″ products were 100 percent organic products when they were not, a direct violation of COPA, Health & Saf. Code § 118820, and the OFPA, *7 U.S.C. § 6506*. (*Ibid*.) To increase profits and to keep pace with growing demand, Herb Thyme devised and carried out a scheme to **[*10]** take advantage of the popularity of the organic food movement by labeling and selling its non-organic products under its ″100% Organic″ label. Herb Thyme took organic herb orders that were substantially in excess of the organic production capacity at its Oceanside location. (AA, p. 8.) To fill these orders, and to make as much money as it could, Herb Thyme simply substituted or mixed in conventionally grown herbs and sold them as 100% organic. (*Ibid*.)

To accomplish this scheme, Herb Thyme transported by truck its conventionally grown herb crops from Camarillo and Thermal to its organic farm in Oceanside. (*Ibid*.) There, the conventional and organic herbs were all put in identical purple buckets (Herb Thyme's designation that a product is organic) and sent together to Herb Thyme's processing facility in Compton. (*Ibid*.) Herb Thyme removed the conventional and the organic herbs from the buckets and processed all the fresh herbs together. (*Id*. at p. 8.) These blends of organic and conventional herbs were packaged, labeled, and sent out as 100% ″Fresh Organic″ products, another direct violation of COPA, Health & Saf. Code § 118820, and the OFPA, *7 U.S.C. § 6506*. **[*11]** (*Ibid*.) In fact, Herb Thyme took orders for some particular organic herbs that Herb Thyme never grew organically at the Oceanside location and filled the orders with solely conventional, non-organic herbs. (*Ibid*.) As to these orders, Herb Thyme packaged and sold 100% conventionally grown herbs under its ″Fresh Organic″ label. (*Ibid*.) As a result, Herb Thyme demanded premium organic prices without providing premium organic product. (*Ibid*.) This Court has expressly found this type of false advertising claim **to be** actionable under the UCL. (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 332* (″The … the parent who purchases food for his or her child represented to be, but not in fact, organic, has in each instance not received the benefit of his or her bargain.″).)

Ms. Quesada filed a Second Amended Class Action Complaint asserting five causes of action premised on California's consumer protection laws: (1) Violation of the Consumers Legal Remedies Act (″CLRA″), *Civil Code section 1750*

et seq.; (2) Violation of the False Advertising Law (″FAL″), *Business & Professions Code section 17500*; (3) Violation of the Unfair Competition Law (″UCL″), **[*12]** *Business & Professions Code section 17200*, based on Unlawful Conduct; (4) UCL Violations based on Unfair and Fraudulent Conduct; and (5) Unjust Enrichment. (AA, pp. 1-19.)

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

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

In denying the motion to strike, the Trial Court explained, ″The common question at the heart of the litigation is, in essence, whether the alleged practice by [Herb Thyme] of selling packages of its organic and non-organic herb product mixture, and labeling those packages 'Organic' or 'USDA Organic,' is lawful.″ (AA, p. 35.) The Trial Court found restitutionary relief appropriate because consumers ″did *not* get what they paid for - 100% organic herbs.″ (**[*13]** *Id*. at p. 37, original italics.)

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

D. The Second District Court of Appeal, Division Three, Incorrectly Finds Implied Conflict Preemption and Affirms the Trial Court's Dismissal.

After close to two years (and six months after taking the matter under submission following oral argument), on December 23, 2013, the Second District Court of Appeal, Division Three (Aldrich, J., with Croskey, Acting P.J. and Kitching, J. concurring) issued a decision affirming the Trial Court's ruling granting the motion for judgment on the pleadings. In its decision, certified for publication, **[*14]** while correctly finding in light of the above savings provision that the OFPA did not expressly preempt consumer claims enforcing parallel state laws, the Court of Appeal nonetheless held that the doctrine of implied preemption foreclosed such claims, finding ″a private right of action under the unfair competition law based on violations of COPA would conflict with the clear congressional intent to preclude private enforcement of national organic standards.″ (Opn. at p. 16.) The opinion did not address the primary jurisdiction doctrine, the Trial Court's alternative grounds for dismissal. The Second District's decision became final on January 22, 2014.

LEGAL ARGUMENTS

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

In affirming the dismissal of this action at the pleadings stage, the Court of Appeal refused to follow precedent from this Court, the United States Supreme Court, and the Ninth Circuit Court of Appeals. The Court of Appeal's analysis calls into question prior case law finding that, absent a clear and manifest statement from Congress, **[*15]** federal preemption will not stop the assertion of consumer claims premised on state laws that are identical to federal requirements.

The Court of Appeal only cited two features of the OFPA-its lack of an express private right of action and its administrative enforcement scheme-as evidence of the purportedly ″clear″ congressional intent to eviscerate the private remedies first made available when California adopted its original organic standards in 1979 despite both the limited preemption and savings clauses in the OFPA. However, California's existing organic regulations included a private right of action at the time Congress adopted the OFPA, and the OFPA's savings clause does not expressly

preempt such laws or claims. As such, the savings clause should have ended the inquiry, necessitating reversal of the Trial Court. (Farm Raised Salmon Cases, supra, 42 Cal.4th at 1092;*Cippolone v. Liggett Group, Inc. (1992) 505 U.S. 504, 517* (″Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.″).) [2] Instead, the Court of Appeal crafted a new implied preemption framework and **[*16]** created a significant lack of uniformity of decision with the precedent of this Court, including *Farm Raised Salmon*.

First, the Court of Appeal *inferred* congressional intent to preempt consumer claims from OFPA's administrative enforcement provisions. (Opn. at p. 15.) But the UCL ″is meant to provide remedies *cumulative* to those established by other laws, *absent express provision to the contrary*.″ (*Rose v. Bank of America, N.A. (2013) 57 Cal.4th 390, 398-399* (italics added).) Moreover, this Court has ″long recognized that the existence of a separate statutory enforcement scheme does not preclude a parallel action under the UCL.″ (*Id*. citing *Stop Youth Addition, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 572-573.)* This Court has repeatedly affirmed that claims for false **[*17]** and misleading labeling ″supplement the effort of law enforcement and regulatory agencies″ and ″serve important roles in the enforcement of consumers' rights.″ (*In Re Tobacco II Cases (2009) 46 Cal.4th 298, 313,* quoting *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126,* footnote omitted.) Yet, the Court of Appeal's flawed reasoning eliminates a crucial method of enforcement that has historically been recognized permitted in this state: private consumer claims based on violations of state laws that parallel federal regulations. (*See, e.g., Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 210-211;Smith v. Wells Fargo Bank N.A. (2005) 135 Cal.App.4th 1463, 1482* (UCL claim based on violation of federal regulation does not impose any additional state-law requirement, even where there is no express private right of action under that regulation.).)

The second articulated basis underlying the ″clear″ congressional intent to preclude private enforcement is that ″under the NOP, which has been adopted as the regulations of this state, a private citizen cannot stop the **[*18]** sale of a product (Final Rule, 65 Fed.Reg. 80627 (Dec. 21, 2000)).″ (Opn. at p. 17.) This facially-flawed argument, which addresses but one of several independent remedies, cannot support a motion for judgment on pleadings under which numerous forms of relief are sought by a consumer. (*Quelimane Company, Inc. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 46.)* Moreover, properly read in context, the language of the cited Final Rule does not support the Court of Appeal's conclusion: ″States may, at their discretion, be able to provide for stop sale or recall of misbranded or fraudulently produced products within their State. Citizens have no authority *under the NOP* to stop the sale of a product.″ (65 Fed. Reg. 80627 (Dec. 21, 2000) (italics added).) In other words, consumers may seek such a remedy under state law, but may not cite the NOP as a basis for doing so. Protecting consumers from adulterated food has also always been a matter of health, safety, and welfare that falls within the state's historic police powers. (*Florida Lime & Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 144.)* Accordingly, the California **[*19]** Legislature exercised its discretion to provide a direct right of relief by codifying COPA as part of the Sherman Food, Drug, and Cosmetic Law (″Sherman Law″) (*Health & Safety Code § 109875* et seq.), which has a long history of private enforcement through consumer claims. (Farm Raised Salmon Cases, supra, 42 Cal.4th at 1084, fn. 5, citing *Children's Television, Inc., supra, 35 Cal.3d at pp. 210-211.)*

The Court of Appeal's attempt to distinguish and avoid the same error it committed in *Farm Raised Salmon Cases, supra, 42 Cal.4th 1077,* is unavailing. In *Farm Raised Salmon Cases*, plaintiffs asserted UCL, FAL, and CLRA claims premised on the unlawful sale of artificially-colored farmed salmon in packages that did not disclose the use of color additives. (*Id. at pp. 1082-83.)* The defendants moved to dismiss on the grounds that consumer-protection claims were preempted by the Nutrition Labeling and Education Act (″NLEA″) (Pub. L. No. 101-535, *104 Stat. 2353 (1990)).* This Court reversed the trial court's dismissal (sustained by the Court of Appeal) and held plaintiffs' state law claims were not preempted **[*20]** because they were premised on state laws identical to and authorized by federal regulations. (*Farm Raised Salmon Cases, supra, 42 Cal.4th at p. 1099).*

Here, the Court of Appeal tried to distinguish *Farm Raised Salmon Cases* on the grounds that the NLEA somehow affords the state more room to regulate than does the OFPA. Relying on an uncodified provision of the NLEA that appeared to limit its preemptive reach, the appellate court determined that ″Congress did not intend [for the NLEA] to alter the status quo in which residents may choose to file unfair competition claims or other clams based on violations of identical state laws.″ (Opn. at 2.) The OFPA, it reasoned, altered the status quo and eliminated

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

consumer claims by ″mandat[ing] federal approval and oversight of state organic programs to ensure consistent federal and state government enforcement for violations of the [OFPA].″ (*Ibid*.) Yet in fact, the NLEA is substantially more restrictive than the OFPA because it *expressly forbids in the statute itself* (not in a reference to the Federal Register) any private enforcement of NLEA regulations by specifying that ″*all* proceedings for the enforcement, **[*21]** or to restrain violations, of [the NLEA] shall be brought in the name of the United States,″ except in limited circumstances where states may take action. (*21 U.S.C. § 337*, italics added.) The OFPA does not contain a similar provision. This Court in *Farm Raised Salmon Cases,* while recognizing the same uncodified provision of the NLEA identified by the Court of Appeal in this case, looked instead to the plain language of the final law and the Supreme Court's interpretation of similar federal laws. (*Farm Raised Salmon Cases, supra, 42 Cal.4th at p. 1093.)* In the end, this Court allowed California plaintiffs to proceed with a consumer protection action for violation of state laws identical to the federal NLEA regulations. (*Ibid*.)

The Second District, Division Three's reading of *Farm Raised Salmon Cases* is dramatically different from a recent case from the Second District, Division Five, *Coleman, supra, 2014 Cal.App.LEXIS 70.* The *Coleman* court read *Farm Raised Salmon Cases* to hold that ″states are free to provide for private remedies under state law, so long as state law requirements are identical to federal **[*22]** law requirements.″ (*Coleman, supra, 2014 Cal.App.LEXIS 70* at p. *13.) The court explained that ″to survive both express and implied preemption, a state law cause of action 'must be premised on conduct that both (1) violates the [federal law] and (2) would give rise to recovery under state law even in the absence of the [federal law].'″ (*Id*. at pp. *20-21, quoting *Riley v. Cordis Corp (2009) 625 F.Supp.2d 769, 777.)* Under *Coleman,* express and implied preemption would not apply to claims that are, like Ms. Quesada's, based on conduct that would be unlawful in California even in the absence of the federal law. Thus, if the Court of Appeal's holding in this case is allowed to stand there would be a troubling lack of uniformity in the law on this critical point.

This lack of uniformity is clear for several reasons. First, just as with COPA and federal organic regulations, California adopted the federal NLEA regulations (in their entirety) as part of the Sherman Law, a statutory scheme with a long history of private consumer enforcement through UCL, FAL, and CLRA causes of action. (*Farm Raised Salmon Cases, supra, 42 Cal.4th at p. 1084, fn. 5.)* **[*23]** Second, because California adopted the federal NLEA regulations as its own, just as with the federal organic regulations, there were no requirements ″in addition to″ and, therefore in conflict with, federal law. (*Id. at p. 1090.)* Finally, even though a private right of action was clearly barred under the federal NLEA, this Court found Congressional silence (not an out-of-context reference to the Federal Register) on how states could enforce corresponding regulations left the door open for actions under the UCL, FAL, and CLRA, the traditional means of enforcing the Sherman Law. (*Id*.)

Departing from this Court's decision in *Farm Raised Salmon Cases,* the Court of Appeal borrowed from the Eighth Circuit's preemption analysis in *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation (8th Cir. 2010) 621 F.3d 781* (″*Aurora Dairy*″). While the Court of Appeal recognized that *Aurora Diary* did not involve state organic laws, it overlooked a fundamental distinction affecting the conflict preemption analysis in *Aurora Dairy* that is not present here. That is, 100% of the milk in the containers purchased by the *Aurora* **[*24]** *Dairy* plaintiffs originated from dairy facilities that continuously maintained valid organic certifications. (*Id. at p. 788.)*

The *Aurora Dairy* plaintiffs complained that the milk, though it all came from a certified organic operation, was not ″organic enough″ because the dairies did not strictly adhere to organic standards at all times. *(Ibid.)* Challenges of this kind may stand as an obstacle to the OFPA because ″to be sold or labeled as organically produced [a product] must (A) be produced only on certified organic farms and handled only through certified organic handling operations.″ (*7 U.S.C. § 6506*.) Here, Ms. Quesada does not challenge the ″organic-ness″ of herbs produced on Herb Thyme's one certified organic farm in Oceanside. (AA, pp. 7-8.) Rather, she alleges Herb Thyme trucked in herbs from conventional farms hundreds of miles away from its certified organic operation, mixed those conventional herbs with those grown on the certified organic farm, and sold the mixture as ″100% Organic.″ (*Ibid*.) These blends of conventional and organic herbs were not ″being labeled as organic *in accordance with the certification*″ as **[*25]** was the milk in *Aurora Dairy*. (*Aurora Diary, supra, 621 F.3d at p. 797,* italics added.) Thus, unlike the milk in *Aurora Dairy*, Herb Thyme's herbs did not comply with the OFPA requirement that ″organic″ food products ″be produced only on certified organic farms and handled only through certified organic handling operations.″ (*7 U.S.C. § 6506*, italics added.) Claims like these do not impose any relevant requirements ″in addition to″ the OFPA.

While the OFPA contains a federal administrative process for evaluating complaints, the OFPA contains no express indication whatsoever that Congress intended to restrict how a state may choose to enforce its approved SOP. Nor does

the OFPA state that administrative review was intended to be the *only* means for enforcing a SOP. Nothing in COPA or the OFPA modifies the long-standing notion that Sherman Law violations are directly actionable by consumers under California's consumer protection laws, which as stated in *Committee on Children's Television* was the law of this state when the OFPA and its savings provision was enacted by Congress. In fact, based on the substantial body of law to the **[*26]** contrary at the time of its enactment, it must be presumed that Congress envisioned such state action. (*Goodyear Atomic Corp. v. Miller (1988) 486 U.S. 174, 184-85* (Absent affirmative evidence to the contrary, it is ″presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts.″).)

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

Other federal courts that have looked at the interrelationship between the California organic labeling laws and the OFPA reached the opposite conclusion of the Court of Appeal, finding instead that the OFPA does not preempt UCL, FAL, and CLRA claims based on falsely labeling a product as organic. Review is therefore necessary to unify state and federal case law on this important issue of law.

The only other court to apply California organic labeling laws to a food product found claims like Ms. Quesada's were not preempted by the OFPA. (*Jones v. ConAgra Foods, Inc. (″Jones″) (N.D. Cal. Dec. 17, 2012) 2012 U.S. Dist. LEXIS 178352.)* In *Jones*, consumer-plaintiffs brought an action against ConAgra Foods alleging **[*27]** a number of ConAgra's food products ″contain deceptive and misleading labeling information.″ (*Id*. at *2.) Plaintiffs asserted the labels of certain food products were misleading customers by falsely using the words ″organic″ or ″certified organic.″ (*Id*. at *3-4.) Plaintiffs brought claims for violation of, *inter alia*, the UCL and CLRA based on ConAgra's practice of ″labeling food products as 'organic' or 'certified organic,' when they contain disqualifying ingredients.″ (*Ibid*.) Like Ms. Quesada, the consumer-plaintiffs alleged that they ″paid an 'unwarranted premium' for . . . mislabeled products.″ (*Ibid*.) ConAgra filed a motion to dismiss claiming, like Herb Thyme, that the consumer-plaintiffs' claims were preempted by the OFPA. (*Id*. at *5-6.)

ConAgra argued unsuccessfully that the consumer-plaintiffs' UCL, FAL, and CLRA claims should be dismissed because '″claims that [manufacturers and retailers] sold [a product] as organic when in fact it was not organic are preempted because they conflict with the OFPA.'″ (*Id*. at *6 (quoting *Aurora Dairy, supra, 621 F.3d 781.)* The *Jones* Court rejected this reading of *Aurora Dairy*, explaining **[*28]** that, just as Herb Thyme and the Court of Appeal did here, ConAgra was ″tak[ing] this quote out of context.″ (*Id*. at *7.) The court correctly observed that, ″The Eighth Circuit held that 'Congress *did not* expressly preempt state tort claims, consumer protection statutes, or common law claims' involving the OFPA.'″ (*Id*. at *7 (quoting *Aurora Dairy, 621 F.3d at p. 792),* italics added.)

The *Jones* Court, having foreclosed express preemption as grounds for dismissal of consumer-plaintiffs' organic labeling claims, went on to reject ConAgra's implied or conflict preemption arguments as well. The court acknowledged that the OFPA and the NOP were created ″to establish national standards for organic products″ and that such standards ″govern the use of the term 'organic' in labeling and marketing agricultural products.″ (*Id*. at *8 (citing 7 C.F.R. §§ 205, 205.300).) However, the court recognized that California, pursuant to the OFPA, enacted its own SOP to govern organic production and labeling within the state. (*Id*. at *9-10.) California's SOP adopts wholesale the federal regulations: ″All organic product regulations and any amendments to those regulations **[*29]** adopted pursuant to the NOP, that are in effect on the date this bill is enacted or that are adopted after that date shall be the organic product regulations of this state.″ (*Health & Saf. Code § 110956*, subd. (a).) As such, ″the California statutes do not impose any relevant additional requirements than those under the OFPA, [and consumer-plaintiffs'] claims are not preempted.″ (*Jones, supra, 2012 U.S. Dist. LEXIS 178352* at *10.) In addition, the *Jones* court rejected the notion ″that a rival enforcement scheme,″ *i.e*., California's consumer protection laws, ″imposes additional requirements that impose a conflict, as that exception would swallow the rule.″ (*Id*. at *10 fn. 1.)

The Court of Appeal's holding that the OFPA preempts the private right of action provided in *Health & Safety Code section 111910* also conflicts with federal court cases regarding other organic labeling claims. For example, while COPA regulates ″organic″ cosmetic labeling, the OFPA does not. (*See65 Fed.Reg. 80548, 80557* (″The ultimate labeling of cosmetics, body care products, and dietary supplements, however, is outside the scope of these regulations.″).) On this **[*30]** basis, numerous federal courts have held that consumer claims for COPA violations brought under *Health & Safety Code section 111910* are viable causes of action not preempted by the OFPA. (*See, e.g., Brown v. Hain Celestial Group, Inc. (N.D.Cal. Aug. 1, 2012) 2012 U.S.Dist.LEXIS 108561.)* The Court of Appeal, in contrast, concluded there is no private enforcement of COPA whatsoever. (Opn. at p. 15.)

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

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

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

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

Second, the Court should clarify that primary jurisdiction doctrine does not apply to food misbranding claims based primarily on whether advertisements and labels are misleading, and involving issues **[*32]** of statutory interpretation. In resolving UCL claims, courts routinely are called upon to decide whether an alleged business practice is unlawful based on the violation of an underlying statute, even where there is an administrative agency designated to address such issues, since violation of an underlying statute is a *per se* violation of the UCL. (See *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 181;Reno v. Baird (1998) 18 Cal.4th 640, 660* (″ultimately statutory interpretation is a question of law the courts must resolve″).) False and misleading advertising claims such as those brought in this action are ″within the conventional competence of the courts″ and do not require the application of any expertise unique to that administrative agency. (*Cundiff v. GTE California Inc. (2002) 101 Cal.App.4th 1395, 1412.)* Thus, the Court should also grant review to clarify this important question of law regarding application of the primary jurisdiction doctrine to consumer claims based on misleading advertising.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this **[*33]** Petition for Review.

DATED: February 3, 2014

Respectfully submitted,
LAW OFFICE OF RAYMOND P.
BOUCHER

By: /s/ Raymond P. Boucher
RAYMOND P. BOUCHER

WHATLEY KALLAS, LLC
Alan M. Mansfield

KIESEL + LARSON LLP
Helen Zukin

JOHNSON & JOHNSON LLP
Neville Johnson

Counsel for Plaintiff-Appellant andPetitioner, MICHELLE QUESADA

CERTIFICATE OF WORD COURT

I, Raymond P. Boucher, hereby certify pursuant to Rule of Court 8.504(d)(1) that this Petition for Review was produced on a computer, and that it contains 5,696 words, exclusive of tables, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

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

/s/ Raymond P. Boucher
Raymond P. Boucher

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On February 3, 2014, I served **[*34]** true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

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

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

/s/ Sandra Haro
Sandra Haro

SERVICE LIST

Neville Johnson, Esq.
JOHNSON & JOHNSON LLP
439 N. Canon Drive, Suite 200
Beverly Hills, CA 90210
Tel: **[*35]** 310-975-1080
Fax: 310-975-1095
Email: njohnson@jjllplaw.com

1 Copy

Alan M. Mansfield, Esq.
WHATLEY KALLAS, LLC
10200 Willow Creek Road
Suite 160
San Diego, CA 92131
Tel: 619-308-5034

Fax; 855-274-1888
Email: alan@clgca.com

1 Copy

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

1 Copy

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

By Electronic Document Submission

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

1 Copy

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

1 Copy

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

1 Copy

Appellate Coordinator
Office **[*36]** of the Attorney General
Consumer Law Section
300 South Spring Street

Los Angeles, CA 90013-1230

1 Copy

[SEE EXHIBIT A IN ORIGINAL]