CASE NO. S216305

IN THE SUPREME COURT OF CALIFORNIA

MICHELLE QUESADA,

Plaintiff-Petitioner and Appellant,

v.

HERB THYME FARMS, INC.,

Defendant and Respondent.

After a Decision of the
Second District Court of Appeal, Division Three
On Appeal From the Los Angeles Superior Court
Case No. BC436557
Honorable Carl West
(subsequently transferred to Honorable Kenneth Freeman)

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Congress passed the Organic Foods Production Act of 1990 ("OFPA") (7 U.S.C. § 6501 et seq.) to ensure "organic" foods meet a consistent, minimum standard necessary to justify its premium price tag. And California opted to create its own federally approved organic program to facilitate strict enforcement of organic standards in this state. (See Food & Agr. Code, § 46000 et seq.; Health & Saf. Code, § 110810 et seq.) The OFPA was never intended to deny consumers the ability to seek redress for "organic fraud" through state consumer protection laws like the Consumers Legal Remedies Act ("CLRA"), Civil Code section 1750 et seq., the False Advertising Law ("FAL"), Business and Professions Code section 17500, and the Unfair Competition Law ("UCL"), Business and Professions Code section 17200 et seq.

Defendant-Respondent Herb Thyme Farms, Inc.'s arguments to the contrary conflict with the text and purpose of OFPA, ignore the interpretation of the agency charged with implementing the statute (the U.S. Department of Agriculture (USDA)), and run contrary to the preemption case law of this Court and the United States Supreme Court. Herb Thyme also fails to show any justification for its argument that the primary jurisdiction doctrine affords an alternate basis for dismissal. Accordingly, allowing Plaintiff-Petitioner and Appellant Michelle Quesada's claims to go forward is the only legally correct and equitable result in this case.

LEGAL ARGUMENTS

Contrary to Herb Thyme's contention, this lawsuit is neither expressly nor impliedly preempted by OFPA. Both the United States Supreme Court and this Court have held that a "federal statute" only preempts state law where "such an intention [is] clear and manifest." (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449; accord *In re Farm Raised Salmon Cases* (*"Farm Raised Salmon"*) (2008) 42 Cal.4th 1077, 1098.) Both courts have refused to find preemption in situations just like this case, where the duties under state and federal law are the same; state but not federal law provides a remedy for violation of these duties; and the federal statute does not explicitly foreclose states from providing such a remedy. (See, e.g., *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 495; *Bates*, *supra*, at p. 447; *Farm Raised Salmon*, *supra*, at p. 1098.) None of Herb Thyme's arguments to the contrary withstands scrutiny.

I. THE OFPA DOES NOT EXPRESSLY PREEMPT CALIFORNIA'S CONSUMER PROTECTION LAWS.

Herb Thyme's argument that OFPA expressly preempts state consumer protection laws conflicts with OFPA's text and is contrary to the preemption case law of this Court and the U.S. Supreme Court.

First, there is no language in OFPA that preempts—or even references—state consumer protection statutes. The only preemptive language found anywhere in the statute applies exclusively to state "*organic*

certification program[s]." (7 U.S.C. § 6507, italics added.) OFPA specifically provides that each state may establish its own "organic certification program for producers and handlers of agricultural products," provided that the state program is approved by the Secretary of Agriculture. (*Id.* at §§ 6503, 6507.)[1] There is, however, no language preempting any other state laws anywhere in the entire statute.

On its face, then, OFPA merely preempts states from establishing their "own organic certification programs" without the Secretary's approval; it clearly does *not* preempt state consumer protection statutes (or, for that matter, any other state law that is not an "organic certification program"). And there is, of course, no suggestion that California's state consumer protection statutes are themselves an organic certification program.[2]

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[1] Section 6503 provides that "[i]n establishing the [federal organic] program under subsection (a) of this section, the Secretary shall permit each State to implement a State organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter." (7 U.S.C. § 6503.) Section 6507 provides that "[t]he governing State official may prepare and submit a plan for the establishment of a *State organic certification program* to the Secretary for approval. *A State organic certification program must meet the requirements of this chapter to be approved by the Secretary*." (*Id.* at § 6507, italics added.)

[2] It has never been asserted that the Secretary of Agriculture approved California's consumer protection laws as part of the state's organic certification program because OFPA does not require such approval. Herb Thyme's contention to the contrary, (see Resp. Br. at p. 5, fn. 9), is based on

The conclusion that OFPA does not expressly preempt state consumer protection claims follows directly from the U.S. Supreme Court's preemption jurisprudence. In a case directly on point, the Court considered the preemptive effect of a provision of the Occupational Safety and Health Act of 1970 (OSHA) requiring states which "desire[] to 'assume responsibility' for 'development and enforcement . . . of occupational safety and health standards'" to submit a plan to do so to the federal government for approval. (*Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 99, quoting 29 U.S.C. § 667(b).) OSHA's language, the Court explained, preempts only state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." (*Id.* at p. 107, internal quotation marks omitted.) Laws of "general applicability," on the other

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a misreading of Petitioner's Opening Brief, which stated that "OFPA expressly preempts state law relating to organic certification and labeling unless, as in the case in California, the laws are part of an approved State Organic Plan." (Pet'r Br. at p. 20.) The reference to "state law relating to organic certification and labeling" was intended to refer to state statutes and regulations specifically governing organic certification and labeling, not state consumer protection laws of general applicability. Nor is it "concede[d] [that] all State activity is preempted *unless* it is submitted to, and *approved by*, the federal government." (Resp. Br. at p. 26, italics original.) Rather, the *only* "State activity" arguably within reach of OFPA's express preemption language would be state statutes and regulations specifically relating to organic production, handling, or certification that have not been approved as part of a State Organic Program. In other words, state consumer protection laws are never expressly preempted by OFPA; the only possible way for such laws to be preempted is if they directly conflict with federal purposes. As explained, *infra* at II, no such conflict exists in this case.

hand, are not preempted. (*Ibid.*) Indeed, *Gade* went on to clarify that generally applicable laws are not preempted even if they may have a "direct and substantial effect" on the federally regulated subject matter. (*Ibid.*) Thus, in the OSHA context, laws that "regulate workers simply as members of the general public" are not preempted despite potentially having a direct effect on worker safety. (*Ibid.*)

Like OSHA in *Gade*, *supra*, 505 U.S. at page 107, OFPA authorizes states to assume responsibility for enforcement of a federally regulated area, subject to federal approval of the state plan, and does not preempt state laws "of general applicability." And as this Court has recognized, California's consumer protection statutes are laws of "general applicability." (See *Farm Raised Salmon*, *supra*, 42 Cal.4th at p. 1098; *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 783 (2014).) As such, California's consumer protection laws are not "organic product standards" (Resp. Br. at p. 25). In fact, they do not mention organic agriculture, "or any other industry for that matter," at all. (*Pac Anchor*, *supra,* at p. 783.) Rather, California's consumer protection laws prohibit deceptive labeling on *all* "goods or services," (see, e.g., Civ. Code, § 1770), and therefore are not subject to express preemption. (See *Gade*, *supra,* at p. 107; see also *Pac Anchor, supra,* at p. 783 [UCL does not mention motor carriers and is therefore not preempted by Federal Aviation Administration Authorization Act of 1994]; *In re Tobacco Cases II* (2007)

41 Cal.4th 1257, 1272 [UCL, as a law of general application, falls outside preemptive reach of Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.)].)[3]

Herb Thyme's arguments to the contrary cannot be squared with the plain language of OFPA. Herb Thyme interprets Section 6507 to mean "anything not approved by the federal government remains preempted." (Resp. Br. at p. 3.) But that is not what the statute says. OFPA's *sole* preemption clause (7 U.S.C. § 6507) merely requires states to obtain federal authorization for state *organic certification programs*; it says nothing about state consumer protection statutes. Herb Thyme is thus reading words into the statute that Congress never wrote, in violation of core principles of preemption analysis. (See *Farmed Raised Salmon*, *supra*, 42 Cal.4th at p. 1092 ["[an] express definition of the preemptive reach of a statute 'implies' – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters . . ."], quoting *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288.)

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[3] Contrary to Herb Thyme's contention, it is not at all clear that OFPA expressly preempts even state laws that *directly* regulate organic food. OFPA's approval requirement applies only to state organic *certification* programs. The Act says nothing about other state organic regulations. To be sure, such regulations would be preempted if they conflict with OFPA, but they would be impliedly, not expressly, preempted.

Herb Thyme's suggestion that California's consumer protection statutes could have been submitted to the federal government for approval as part of a State Organic Program ("SOP") (Resp. Br. at pp. 4, 18) is also wrong. OFPA merely invites states to seek federal approval of organic "certification programs." (7 U.S.C. § 6507.) State consumer protection laws of general applicability are not "certification programs"; they have nothing to do with certification at all. As a result, it is doubtful that California could have submitted its consumer laws to the federal government as part of its SOP even if the state had wanted to. Herb Thyme's argument to the contrary only serves to underscore its misreading of the statute.

Nor is Herb Thyme correct in asserting that the administrative enforcement provisions in the OFPA and the National Organic Program ("NOP") reveal Congressional intent to expressly preempt any state laws relating to organic enforcement. Reading OFPA in this manner would lead to an absurd result, *i.e.*, that Congress intended to occupy the field of enforcement while expressly permitting states to adopt more restrictive production and handling requirements. (See 7 U.S.C. § 6507.) Moreover, nothing in the text of the OFPA contradicts the accepted legal axiom that where Congress has authorized states to adopt parallel requirements, it also authorized states "to provide for private remedies for violations of those requirements." (*Farm Raised Salmon, supra,* 42 Cal.4th at p. 1094, citing *Lohr, supra,* 518 U.S. at p. 495.) While OFPA contains a federal

administrative process for evaluating complaints, there is no indication whatsoever that Congress intended to restrict how a state may choose to enforce its approved SOP, or that administrative review was intended to be the *only* means for enforcing an SOP.

Herb Thyme's "everything-not-approved-is-preempted" argument is also directly contradicted by the USDA's own views on the matter. Contrary to Herb Thyme's contention (*see* Resp. Br. at p. 25), OFPA's regulatory history *supports* the conclusion that the statute does not preempt state consumer protection laws. In the preamble accompanying the final OFPA regulations, the USDA stated that the implementing regulations expressly preempt state "statutes and regulations *related to organic agriculture*" and forbid states from "creating *certification programs* to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary." (65 Fed.Reg. 80548, 80557, 80682 (Dec. 21, 2000), italics added). In making those statements, the USDA was referring to the "32 states [that had] organic statutes on their books" at the time OFPA was passed. (*Id.*) At that time, as now, *all* states had consumer protection statutes of general applicability—*i.e.*, not specifically related to organic agriculture—the USDA could not have viewed those laws as "statutes and regulations related to organic agriculture" under the OFPA (7 U.S.C. § 6507). (See *Farm Raised Salmon*, *supra*, 42 Cal.4th at p. 1091 [noting "Congress's presumed awareness that

'virtually every state in the nation permits one or more nongovernmental parties to enforce state . . . laws of general applicability prohibiting deceptive acts and practices in the marketplace"].)

This interpretation is confirmed by the agency's statement that, because OFPA provides a standardized definition of organic, the Act "may reduce the cost associated with enforcement actions in consumer fraud cases." (65 Fed.Reg. at 80663, 80668; see also *id.* at 80668 [observing that, "[o]nly about half of the States have any organic legislation, and few of those states have laws with enough teeth to permit prosecution of organic fraud. In states without similar laws, the costs associated with remedies via the tort system may be high. The [National Organic Program] established in this final rule is expected to fill in important State and regional gaps in enforcement in organic fraud cases."].) These statements make clear that the USDA did not interpret OFPA to displace consumer litigation or to eradicate "State enforcement" in the area; rather, the USDA expected OFPA to impose a uniform standard of law under which such litigation could proceed more efficiently.

Put simply, OFPA says nothing about state consumer protection statutes. Its requirement that the Secretary of Agriculture approve state organic certification programs cannot be read to apply to—let alone expressly preempt—generally applicable state laws that have nothing to do with organic products at all. Under the jurisprudence of this Court as well

as that of the U.S. Supreme Court, Herb Thyme's express preemption argument must therefore fail.

II. THE CLAIMS IN THIS CASE ARE NOT IMPLIEDLY PREEMPTED BY OFPA.

The lower court also erred in finding this lawsuit impliedly preempted by federal law. If anything, this lawsuit affirmatively supports and reinforces OFPA by fostering consumer confidence in organic produce. Without lawsuits like this one, consumers would have no recourse against unscrupulous producers who lie about the contents of their allegedly organic products. This would inevitably erode consumer confidence in the organic marketplace, which is exactly what Congress sought to prevent when passing OFPA in the first place.

A. Ms. Quesada's Claims Mirror Governing OFPA Standards and Reinforce Statutory Goals.

As a threshold matter, Herb Thyme's implied preemption argument is based on a flawed premise: that this lawsuit undermines OFPA's purposes because it "directly attacks" Herb Thyme's certification; in reality, this lawsuit directly *mirrors*, and thus positively reinforces, OFPA's standards. As a result, just as this Court concluded in *Farm Raised Salmon, supra*, 42 Cal.4th at page 1093, this lawsuit cannot possibly undermine any federal purposes.

First, a jury verdict in favor of injured consumers would not affect Herb Thyme's certification in the least; all such a verdict would do is

require Herb Thyme to stop its illegal, dishonest practices and compensate consumers who paid premium prices for conventionally farmed product. In the wake of such a verdict, Herb Thyme would remain free to produce and market its organic product as "Fresh Organic" pursuant to its organic certification (unless, of course, the government revoked that certification); the only thing Herb Thyme would not be able to do is covertly mix its organic herbs with conventional herbs and then lie about the contents on the product's label.[4] Such a result does not undermine federal goals; it advances them.

As Herb Thyme acknowledges, in enacting OFPA, Congress sought to establish national standards for organic products in order to assure consumers that organic products meet minimum standards. (See 7 U.S.C. § 6501; S. Rep. No. 357, 101st Cong., 2d Sess. 289, p. 570 (1990) [the OFPA "establishes the minimum standards that must be met in order for a product

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[4] On this point, it is worth noting that OFPA and its regulations make a clear distinction between organic "operations," which must be certified, and individual organic products, which are not subject to any certification requirements. (See 65 Fed.Reg. 80548, 80587 (Dec. 21, 2000) ["certification is to an organic process, not organic product"].) An operation can be properly certified and yet produce products that are mislabeled. This distinction is underscored by the fact that there are some operations (mostly small ones) that are exempt from certification under OFPA. Exempt operators may still label their products "100% organic," but must still comply with all OFPA requirements (besides certification). (See 65 Fed.Reg. 80548.) As applied to these exempt operations, state laws that mirror federal requirements cannot possibly undermine certification because the operations are not certified.

to be labeled as organically produced"].) If producers like Herb Thyme are able to lie with impunity about whether their products are actually "organic" (rather than co-mingled), then consumers would lose faith in the organic marketplace and refuse to pay the premium prices associated with organic goods. (See *Brown v. Hain Celestial Group, Inc.* (N.D.Cal. Aug. 1, 2012, No. C. 11-03082 LB) 2012 WL 313801 at p. *10 ["adopting Defendant's interpretation [of OFPA] would mean that a consumer would have no protection against the deceptive or fraudulent labeling based on the use of the term organic"].) Such erosion of consumer faith in the organic market would undermine OFPA's goal of "assur[ing] consumers that organically produced products meet a consistent standard." (7 U.S.C. § 6501.)

Nor is Herb Thyme correct in arguing that this lawsuit undermines OFPA by seeking to substitute a "reasonable consumer" standard that is at odds with OFPA because this standard is not based on whatever a consumer thinks the law *should* be. Rather, Ms. Quesada must prove a "reasonable consumer" would expect a product labeled "100% Organic" would actually *be* organic within the meaning of the relevant law. The relevant law here is California's Organic Products Act of 2003, Health and Safety Code section

110810 et seq. ("COPA"), which *incorporates by reference the federal organic standards promulgated pursuant to OFPA*.[5]

Because the COPA standards directly incorporate OFPA's requirements, there is no divergence between the "reasonable consumer" standard applicable in this case and the federal organic standards; they are, for all intents and purposes, one and the same. Thus, although this lawsuit does not directly seek to enforce federal law, the "reasonable consumer" standard directly reinforces OFPA itself. Any finding of implied conflict preemption would be in error. (See e.g., *Farm Raised Salmon, supra,* 42 Cal.4th at p.1093 [rejecting federal preemption of consumer protection claims alleging violation of state laws imposing requirements identical to federal regulations]; *Bates, supra,* 544 U.S. at p. 451 ["[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of [the Act]"]; *Lohr*, *supra*, 518 U.S. at p. 495 ["[n]othing in [federal law] denies [a state] the right to provide a traditional

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[5] See Health & Saf. Code, § 110820 ("no product shall be sold as organic pursuant to this article *unless it is produced according to regulations promulgated by the [National Organic Program]*"); *id.* at § 110830 ("[n]o product handled, processed, sold, advertised, or offered for sale in this state, shall be sold as organic *unless it also is prominently labeled and invoiced with similar terminology as set forth by regulations promulgated by the NOP*" [italics added]); *id.* at §110956, subd. (a) ("[a]ll organic product regulations and any amendments to those regulations *adopted pursuant to the NOP*, that are in effect on the date this bill is enacted or that are adopted after that date *shall be the organic product regulations of this state*" [italics added]).

damages remedy for violations of common-law duties that parallel federal requirements"].)[6]

Farm Raised Salmon, supra, 42 Cal.4th at page 1084, which rejected federal preemption of claims that mirrored federal law, further rebuts Herb Thyme's "reasonable-consumer" argument. There, the complaint asserted four state-law causes of action, including a UCL violation. The laws alleged to be violated as a predicate for the "unlawful" prong of plaintiffs' UCL claim included provisions of the Sherman Food, Drug, and Cosmetic Law that mirrored federal labeling requirements. (*Id.* at pp. 1173-74.) There, as here, prevailing on the UCL claim would require a finding that a "reasonable consumer" would not have purchased the product if it had been properly labeled, (see, e.g., *Lavie v. Procter & Gamble Co.* (2003) 105

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[6] *Bates, supra,* 544 U.S. 431, also forecloses any argument that state consumer lawsuits are preempted because they will incentivize producers to do more than OFPA requires. *Bates* considered a preemption clause that, in part, required a pesticide manufacturer to submit its label to the EPA for approval. The statute further prohibited states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." (*Id.* at pp. 442-43.) The court of appeal had held that state causes of action based on violations of an express warranty violated this provision because the *effect* of permitting such causes of action might be that manufacturers would change their labels. The U.S. Supreme Court explicitly rejected this "effects-based test" for conflict preemption, holding that "[a] requirement . . . is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement." (*Ibid.*)

Cal.App.4th 496, 507-08), yet this Court concluded such claims would not undermine federal purposes.

Finally, it is important to note that just because federal law permits a certain label does not mean that it also preempts state-law claims for injuries based on that label. For example, in *Wyeth v. Levine* (2009) 555 U.S. 555, the U.S. Supreme Court held that state failure-to-warn claims alleging a drug label's inadequacy did not obstruct federal regulation, even though the drug label, by law, had been approved by the Food and Drug Administration ("FDA"). The Court rejected the drug company's argument that "[o]nce the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate," noting that "Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs, [which evidently] determined that widely available state rights of action provided appropriate relief for injured consumers." (*Id.* at p. 574.) Likewise, Congress did not provide a remedy for consumers misled by "organic" on labels into believing that food meets the national organic handling and production requirements. Just as allowing state-law claims for drug labeling does not interfere with the FDA's role in approving drug labels, allowing state-law claims for labeling of food made in violation of

organic production requirements does not interfere with the USDA's role in certifying operations as organic.[7]

B. Ms. Quesada's Claims are Consistent with OFPA's Enforcement Regime.

Nor does the fact that OFPA "rejected private actions to enforce the [OFPA] regulations" (Resp. Br. at p. 20) render this lawsuit in conflict with federal purposes. To begin with, this argument is definitively rebutted by this Court's ruling in *Farm Raised Salmon*, *supra*, 42 Cal.4th 1077, which rejected federal preemption of state claims predicated on state-law requirements that directly mirrored the federal Food Drug and Cosmetic Act ("FDCA") despite the FDCA's express rejection of private enforcement actions. (*Id.* at p. 1176.) This Court found that the FDCA's exclusive enforcement provision did not impliedly bar the state lawsuit because "Plaintiffs do not seek to enforce the FDCA; rather, their deceptive marketing claims are predicated on violations of obligations imposed by the

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[7] Similarly, OFPA does not preempt the private right to injunctive relief found in Health and Safety Code section 111910. Herb Thyme's alternative argument – that Section 111910 was not intended to apply to COPA because it was enacted as part of COPA's predecessor statute – also fails. Courts have severely limited the rule Herb Thyme relies on in *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53. Under *People v. Fong* (2013) 217 Cal.App.4th 263, for example, Herb Thyme's nullification argument would succeed only if the legislature intended a time-specific limitation on Section 111910. Since there is no evidence of such a limitation, this remedy remains viable.

Sherman Law, something that state law undisputedly allows." (*Id.* at p. 1095.)

The *Farm Raised Salmon* holding applies here in full force. Just as in *Farm Raised Salmon, supra,* 42 Cal.4th 1077, Ms. Quesada seeks compensation for violations of state law that directly mirrors federal law requirements. And just as in *Farm Raised Salmon*, Herb Thyme argues that because federal standards cannot be enforced private lawsuits, state lawsuits seeking to enforce the parallel state requirements are necessarily in conflict with, and impliedly preempted by, the federal statute. *Farm Raised Salmon* definitively rejected this position; the exact same conclusion is warranted here. (See also *Bates, supra,* 544 U.S. at p. 448 [holding FIFRA "does not preclude States from imposing different or additional *remedies,* but only different or additional *requirements*. Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in [the preemption clause] precludes States from providing such a remedy" (italics in original)].)[8]

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[8] Herb Thyme argues that *Farmed Raised Salmon* has no bearing here because the law at issue there, unlike OFPA, contains an uncodified provision that appears to limit the statute's preemptive reach. (Resp. Br. at p. 44.) This argument ignores that the FDCA is substantially *more* restrictive than OFPA because (1) the FDCA *expressly forbids in the statute itself* any private enforcement of federal law (see 21 U.S.C. § 337), whereas OFPA contains no such prohibition; and (2) the FDCA expressly forbids

Second, OFPA's implementing regulations confirm that the absence of a private right of action in OFPA does not render this lawsuit in conflict with federal law. The preamble to the final OFPA regulations explains that Congress declined to impose an exclusive federal enforcement regime on SOPs precisely *because* "[m]any States currently have organic programs with the kind of comprehensive enforcement and compliance mechanisms necessary for implementing any State regulatory program." (65 Fed.Reg. 80548, 80618 (Dec. 21, 2000).) Thus Congress based its decision not to create a private right of action under OFPA on the fact that many states (including California) *already* possessed ample authority to "enforce" compliance with an SOP. One such "mechanism," of course, is a lawsuit like this one.

Other aspects of OFPA's regulatory history confirm that Congress had no intention of eliminating state consumer protection laws when it

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any state law that is "not identical" to federal law, (*id.* at § 343(1)(a)), whereas OFPA allows state organic plans to establish more restrictive requirements than federal law, subject to federal approval. (See 7 U.S.C. § 6507.) Nor can *Farm Raised Salmon* be distinguished on the ground that the claims at issue here are premised on a "reasonable consumer" standard that "in no way involves federal law." (Resp. Br. at p. 45.) This argument fails because, as explained above, although this action is not based on federal law, it directly *mirrors* federal law – just as in *Farm Raised Salmon.* Finally, as noted above, the claims at issue in *Farmed Raised Salmon* were based on California's consumer protection statutes, and thus involved the "reasonable consumer" standard (*Farm Raised Salmon, supra,* 42 Cal.4th at pp. 1173-74) – a fact that did not trouble this Court in the least.

passed OFPA. The Regulatory Impact Assessment accompanying OFPA's final regulations makes this point with striking clarity. There, the USDA observed that the "primary benefits from implementation of USDA's National Organic Program are standardizing the definitions and the manner in which organic product information is presented to consumers, *which may reduce the cost associated with enforcement actions in consumer fraud cases* . . . ." (65 Fed.Reg. 80548-01, 80663 (Dec. 21, 2000), italics added.)

Even more telling, the USDA went on to observe that, "[o]nly about half of the States have any organic legislation, and a few of those states have laws with enough teeth to permit prosecution of organic fraud. *In states without similar laws, the costs associated with remedies via the tort system may be high. The [National Organic Program] established in this final rule is expected to fill in important State and regional gaps in enforcement in organic fraud cases*." (65 Fed.Reg. 80668 (Dec. 21, 2000), italics added.) The italicized language reveals that OFPA was intended to "fill in" state and regional enforcement "*gaps,*" not to supplant state laws entirely. The language further reveals that, at the time of OFPA's passage, the federal government well understood that "the tort system" played a role in enforcing organic standards pre-dating OFPA – a role that needed shoring up, not eradication. The USDA's view that OFPA intended to supplement—not supplant—state enforcement regimes provides yet another reason to reject implied conflict preemption here. (See, e.g., *Geier v.*

American Honda Motor Co. (2000) 529 U.S. 861, 883 [according "some weight" to federal agency's views about the impact of tort law on federal objectives where "the subject matter is technica[l] and the relevant history and background are complex and extensive"].)

In the face of these views, Herb Thyme does not cite any contrary evidence that Congress affirmatively intended to wipe out state consumer laws when it passed OFPA. Instead, Herb Thyme merely asserts that "permitting Appellants *[sic]* to proceed with these claims would require state courts to usurp the role of the 'governing State official' who is authorized by USDA" to implement and enforce OFPA. (Resp. Br. at p. 28.) This assertion defies common sense because permitting this lawsuit to proceed would not in any way prevent the "governing State official" from investigating and enforcing Herb Thyme's compliance with OFPA or from taking whatever action the official deems appropriate under the law.

In short: for Herb Thyme's theory to prevail, this Court must ignore the USDA's views and simply assume that Congress intended for OFPA to eradicate all preexisting consumer remedies—but somehow neglected to say so. As the U.S. Supreme Court once cogently observed, it would be "spectacularly odd" for Congress to eradicate all state law remedies without even "hint[ing] at" such an intent, particularly where, as here, there is evidence that the federal government was aware of state enforcement activity in the area. (*Lohr, supra,* 518 U.S. at p. 491.) This Court should

decline Herb Thyme's invitation to adopt such a "spectacularly odd" interpretation of OFPA. (*Ibid.*; see also *Wyeth, supra,* 555 U.S. at p. 575 [noting Congress's "silence on the [preemption] issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness"]; *Farm Raised Salmon, supra,* 42 Cal.4th at p. 1178 ["If Congress intended to permit states to enact identical laws on the one hand, but preclude states from providing remedies for violations those laws on the other, 'its failure to even to hint at it is spectacularly odd.'" (citing *Lohr*, *supra,* at p. 491)].)

C. Ms. Quesada's Claims Are Consistent with OFPA's Regulation of "Split Operations"

Herb Thyme fares no better by arguing this lawsuit undermines federal purposes because OFPA addresses "precisely the co-mingling issues" raised in this case. (Resp. Br. at pp. 14-15, 33-34.) Herb Thyme has not identified a single way in which a jury verdict in favor of injured consumers would undermine OFPA's comingling regulations. This is not surprising because the regulations cited by Herb Thyme ban *precisely the activity at issue in this lawsuit* – the mixing of organic and nonorganic products.

Thus, for example, NOP regulations require each organic producer to develop "an organic system plan" that, among other things, describes "the

management practices and physical barriers established *to prevent co-mingling of organic and non-organic products on a split operation . . . .*" (7 C.F.R. § 205.201(5), italics added.) NOP regulations also require "an organic handling operation [to] implement measures *necessary to prevent the co-mingling of organic and nonorganic products . . . .*" (*Id.* at § 205.272(a), italics added.) And the NOP provides for annual inspections of organic facilities to determine their compliance with federal standards, *including the prohibition on co-mingling of organic and nonorganic foods.* (*Id.* at § 205.403, italics added.) This lawsuit affirmatively supports these provisions by seeking to hold Herb Thyme liable for conduct expressly prohibited by OFPA.

If anything, lawsuits like this one strongly complement and reinforce this federal regime by creating an additional incentive for producers to comply with OFPA's dictates. There is no conflict here of any sort, let alone one sufficient to overcome the strong presumption against preemption of state laws that applies here, where "Congress has legislated in a field traditionally occupied by the states." (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 77; *see also Farmed Raised Salmon*, *supra*, 42 Cal.4th at p. 1077; *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Litig.* (8th Cir. 2010) 621 F.3d 781, 794 [presumption against preemption applies in case involving OFPA].)

Because there is no actual conflict here, Herb Thyme makes one up out of whole cloth. After reciting the comingling regulations, Herb Thyme insists that because "[a] certified operator's *entire* operation is subject to review and inspection," (Resp. Br. at p. 33, italics in original), this lawsuit necessarily conflicts with OFPA. This argument fails because there is nothing in this lawsuit that would interfere with the "review and inspection" of organic facilities like Herb Thyme. It is worth repeating that a jury verdict finding Herb Thyme liable in this case would not nullify its organic certification or prevent it from selling organic goods to the public. Nor would such a verdict stop organic inspectors from inspecting and reviewing Herb Thyme's facility. The only thing that would change as a result of this lawsuit is that Herb Thyme would rightfully be forced to compensate consumers who purchased its fraudulently mislabeled product.

D. Herb Thyme Misreads Existing OFPA Preemption Cases.

Herb Thyme is also wrong in claiming that existing case law regarding OFPA's preemptive scope supports its position. In reality, case law supports the conclusion that there is no conflict between this lawsuit and OFPA.

1. *Aurora Dairy* is distinguishable because it involved a direct attack on the dairies' organic certification.

Herb Thyme insists incorrectly that this case is "on all fours with" the Eight Circuit's conflict-preemption ruling in *Aurora Dairy, supra,* 621

F.3d 781. (Resp. Br. at p. 29.) Unlike this case, the *Aurora Dairy* plaintiffs *were* directly attacking the federal certification of the organic dairies at issue – a fact that made all the difference in the Eighth Circuit's view.

The *Aurora Dairy* plaintiffs alleged that the milk, though it all came from certified organic producers, was not "organic enough" and did not meet federal standards. Importantly, prior to the suit being filed, the USDA had "proposed revoking Aurora's organic certification," but ultimately decided *not* to after working out a consent agreement with Aurora that resolved the agency's concerns. (*Aurora Dairy, supra,* 621 F.3d at p. 789.) The class action lawsuit in that case directly challenged the USDA's decision by arguing the certifications should have been revoked and that Aurora should not have been permitted to label its milk as organic. The Eighth Circuit found conflict preemption because the suit directly "attack[ed] Aurora's certification," and would therefore undermine "the role of the certifying agent" and "deeply undermine" OFPA's goal of establishing national standards for consumer products. (*Id.* at p. 797.)

This case is different. In stark contrast to *Aurora Dairy,* the claims in this case do not attack the "organic-ness" of the *organic* herbs grown by Herb Thyme; rather, this case challenges Herb Thyme's practice of mixing those organic herbs with *non*organic herbs and then selling the mixture as "100% Organic." These blends were *not* "being labeled as organic *in accordance with the certification*," as was the milk in *Aurora Dairy*, *supra,*

631 F.3d at p. 797 (italics added). This key distinction strips *Aurora Dairy* of its relevance here. This lawsuit cannot "undermine the role of the certifying agent" (*id.* at p. 797) because it is not challenging Herb Thyme's certification at all. Instead, this case merely challenges Herb Thyme's practice of covertly comingling organic and nonorganic herbs. Herb Thyme's certification will not be affected by this lawsuit regardless of the outcome.

Nor does this lawsuit "come[] at the cost of the diminution of consistent [organic] standards" (*Aurora Dairy*, *supra,* 631 F.3d at p. 796) because, unlike in *Aurora Dairy*, a victory for consumers in this case would not prevent Herb Thyme from labeling its *organic* herbs as "100% Organic"; rather, this lawsuit merely challenges Herb Thyme's practice of labeling *comingled* herbs as "100% Organic."

Finally, unlike in *Aurora Dairy*, this lawsuit will not result in an "increase in consumer confusion and troubled interstate commerce." (*Aurora Dairy*, *supra,* 631 F.3d at p. 796.) To the contrary, this lawsuit will, if anything, increase consumer confidence in the organic marketplace by stopping unscrupulous organic producers from using federal preemption as a shield against their obligation to compensate defrauded customers. For all

of these reasons, *Aurora Dairy* cannot bear the weight placed on it by Herb Thyme.[9]

2. Herb Thyme's reliance on *All One God* and *Brown* is misplaced.

Herb Thyme argues its interpretation of *Aurora Dairy* is supported by two "well reasoned authorities interpreting OFPA preemption." (Resp. Br. at p. 32.) The cases cited by Herb Thyme, however—*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*"), and *Brown v. Hain Celestial Group*, *supra,* 2012 WL 3138013—do not support its position.

First, *All One God* has no bearing on this case because the product at issue, unlike here, *complied with the relevant federal organic standard.* (See *All One God, supra,* 2012 WL 3257660 at p. *11.) The *All One God* plaintiffs alleged the "organic" product at issue violated the "reasonable consumer" standard because "consumers expect that organic products have

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[9] Herb Thyme oversimplifies the bases upon which Ms. Quesada has distinguished *Aurora Dairy* by focusing on the "split" operation aspect of this case. (Resp. Br. at p. 33.) This misses the point, which is that this case, unlike *Aurora Dairy*, does not challenge Herb Thyme's ability to sell its certified organic herbs in accordance with its organic certification and, as a result, does not run afoul of OFPA. Nor does it matter that some of the illegal handling activities may have "actually occurred *on [Herb Thyme's] organic farm.*" (Resp. Br. at p. 34, italics in original.) It does not matter whether the illegal activities occurred on an organic farm or a conventional farm; either way, this lawsuit does not offend federal purposes because it neither "attacks" Herb Thyme's organic certification nor seeks to disrupt OFPA standards.

no 'synthetic' ingredients or 'petrochemical compounds.'" (*Ibid.*) The relevant OFPA regulations, however, "acknowledged that 'petrochemicals,' like other synthetics, are eligible for use in organic products if the material appears on the National List [of approved ingredients." (*Id.*) In other words, plaintiffs challenged the use of an "organic" label on products that met OFPA's organic standards. In light of this conflict with OFPA regulations, the court declined to exercise jurisdiction because "[p]laintiffs' challenge to defendants' labeling would . . . potentially creat[e] a conflict with [federal organic] standards . . . ." (*Id.*) But this holding has no bearing here because, unlike *All One God*'s products, Herb Thyme's herbs are *not* "organic" within the meaning of OFPA. Because the claims in this case exactly mirror federal requirements, the conflict that concerned the court in *All One God* is not present here.[10]

Herb Thyme's reliance on *Brown*, *supra,* 2012 WL 3138013, is even more obviously misplaced. According to Herb Thyme, *Brown* "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." (Resp. Br. at p. 32, quoting

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[10] Herb Thyme's reliance on *All One God* is also misplaced because the district court relied on the Ninth Circuit's decision in *POM Wonderful LLC v. Coca-Cola Co.*, which has been reversed by the U.S. Supreme Court. (*POM Wonderful LLC v. Coca-Cola Co.* (2014) 134 S.Ct. 2228.)

Brown, *supra*, at p. *17].) However, the *Brown* court actually *rejected* the argument that OFPA preempts claims like Ms. Quesada's, finding that OFPA did not "creat[e] a regulatory vacuum that guts state consumer protection laws." (*Id.* at p. *17; accord *id.* at p. *9 [analyzing *Aurora Dairy* at length and holding that OFPA "did *not* expressly preempt state tort claims, consumer protection statutes, or common law claims" (italics added)].)[11]

3. *Jones v. ConAgra Foods Inc.* is squarely on point.

Herb Thyme also fails in its attempt to discredit *Jones v. ConAgra Foods, Inc*. (N.D.Cal. 2012) 912 F.Supp.2d 889, the only case to address the relationship between OFPA and COPA. Herb Thyme attacks *Jones* for its "remarkabl[e]" misreading of *Aurora Dairy* and its apparently "backwards" reasoning. (Resp. Br. at p. 32.) But it is Herb Thyme that gets it backwards by completely mischaracterizing the *Jones* holding.

The *Jones* court quite correctly interpreted *Aurora Dairy* as having "upheld the dismissal of claims involving the organic *certification* of the dairy farm." (*Jones, supra,* 912 F.Supp.2d at p. 894, italics in original, quoting *Aurora Dairy, supra,* 621 F.3d at p. 796.) *Jones* also held, however,

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[11] The court did not reach the issue of implied conflict preemption because it had not been raised by the parties. *See also id.* at * 12 (noting that "the court already has determined that OFPA does not preempt Plaintiff's claims.").

that the same conclusion did not apply to claims for labeling food products as "organic" when they contain "disqualifying ingredients" and therefore do not comply with federal regulations. This holding—that *Aurora* is limited to cases where the claims at issue are directly attacking an organic certification—is exactly right.

To support its argument, Herb Thyme incorrectly cites a section in *Brown* that discusses the *defendant's* arguments, not the court's actual holding. (Resp. Br. at p. 32, citing *Brown, supra*, 2012 WL 3138013 at p. *8.) The actual holding in *Brown* rejected express preemption of any state consumer protection claims, even for organic food products. (See *Brown, supra,* at p. *9 ["OFPA expressly preempts state certification requirements but does not expressly bar state law claims . . . . [s]o long as the compositional requirements at issue did not conflict with those set forth in OFPA"].)

* * *

In short, Herb Thyme's characterization of the most relevant case law lacks any persuasive authority. Its primary case—*Aurora Dairy*—merely stands for the proposition that claims directly attacking an organic certification are impliedly preempted by OFPA. Here, however, the claims do not attack certification and merely seek to enforce state law requirements mirroring federal law. There is no basis for finding implied conflict preemption.

III. THE PRIMARY JURISDICTION DOCTRINE DOES NOT FORM AN ALTERNATE BASIS FOR AFFIRMING DISMISSAL

Herb Thyme alternatively asks this Court to affirm dismissal of this action on primary jurisdiction grounds.[12] This argument fails for two independent reasons: (1) primary jurisdiction is not a basis for dismissal under California law (*South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 Cal.App.4th 1068, 1081); and (2) even if it were, dismissal would be inappropriate because resolution of this case does not require agency expertise.

Regarding the former, the primary jurisdiction doctrine "is a 'prudential' one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry, rather than by the judicial branch." (*Clark v. Time Warner Cable* (9th Cir. 2008) 523 F.3d 1110, 1114.) Under California law, primary jurisdiction is not a proper basis to dismiss an action, but only for a

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[12] In the Court of Appeal, Herb Thyme argued issues of abstention, exhaustion of administrative remedies, and primary jurisdiction as if they are interchangeable. But these are fundamentally different doctrines with fundamentally different results. (*General American Tank Car Corp. v. El Dorado Terminal Co.* (1940) 308 U.S. 422, 433.) As the record below demonstrates, Herb Thyme did not raise abstention or exhaustion issues before the Trial Court. (AA at pp. 056-058, 182-83.) Abstention and exhaustion are not purely legal issues and, therefore, these alternative doctrines are not properly raised for the first time on appeal. (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 829.)

motion to stay pending ongoing administrative proceedings. (See *Miller v. Superior Ct.* (1996) 50 Cal.App.4th 1665, 1677 ["A stay of proceedings, with the trial court directed to retain the matter in its docket" is the appropriate remedy under California's primary jurisdiction doctrine], citing *Farmers Ins. Exchange v. Super. Ct.* (1992) 2 Cal.4th 377, 401; *Cundiff v. GTE California, Inc*. (2002) 101 Cal.App.4th 1395, 1412 ["The [primary jurisdiction] doctrine does not preclude judicial consideration of the case, but rather suspends judicial action pending the administrative agency's views"]; *Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal.App.4th 287, 295-96.)

Herb Thyme cites nothing in the record to show that such an on-going administrative proceeding exists, or has ever existed, nor did Herb Thyme file a motion for stay. Thus, the relief Herb Thyme requests from this Court—dismissal, presumably without prejudice, pending administrative review—is unavailable under California law.

Moreover, the primary jurisdiction doctrine is inapplicable to this case because resolution of Ms. Quesada's claims will not require specialized agency expertise. Primary jurisdiction "is to be used only if a claim involves an issue of first impression or a particularly complicated issue Congress has committed to a regulatory agency." (*Clark, supra,* 523 F.3d at p. 1114.)

This case involves no such issue. Petitioners allege that Herb Thyme misled consumers by mixing conventionally-grown herbs with its certified

organic herbs and then labeling the mixture "100% Organic." False and misleading advertising claims such as these 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, supra*, 101 Cal.App.4th at p. 1413 ["The subject of this suit . . . is deception--defendants' alleged intentional or negligent misrepresentation about the true nature of their equipment rental charges. This is not a topic about which the commission would have more expertise than the trial court, or even as much expertise"]; see also *Nader v. Allegheny Airlines* (1976) 426 U.S. 290, 305 ["The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case"].)

Resolution of this lawsuit does not present a novel or complicated issue, but merely enforces what OFPA and California law already require: that 100% of herbs labeled "100% Organic" be grown on a certified organic farm. Absent a novel, specific issue that must be resolved by an administrative agency, even the most comprehensive regulatory scheme and robust administrative oversight will not compel application of the primary jurisdiction doctrine. (See *Prospect Medical Group, Inc. v. Northridge Emergency Med. Group* (2009) 45 Cal.4th 497 [permitting a private right of action without reference to administrative agency even though claim was

based upon a specifically regulated practice within the agency's jurisdiction]; *Ticconi v. Blue Shield of California* (2008) 160 Cal.App.4th 528 ["reject[ing] any suggestion that a private party cannot sue to enforce underlying laws when those laws provide for enforcement by a public officer"]; *Arce v. Kaiser Foundation* (2010) 181 Cal.App.4th 471 [reversing dismissal of class action where the underlying claim was based on a violation of the Mental Health Parity Act, even where the regulatory agency had a mechanism in place for challenging coverage disputes].)

Indeed, Herb Thyme's same arguments for application of the primary jurisdiction doctrine to false "organic" claims was considered and promptly rejected in *Jones*, *supra*, 912 F.Supp.2d at pages 898-899: "Notwithstanding Defendant's discussion at the motion hearing of preservatives and firming agents, the Court concludes that this case is far less about science than it is about whether a label is misleading." The same conclusion applies with equal force here.

Lastly, while judicial economy is an important factor in considering whether to refer claims to an administrative body, (*South Bay Creditors Trust, supra,* 69 Cal.App.4th at p. 1083), the Trial Court's referral of this case to the USDA will waste considerable time and resources and offers no recourse for injured consumers like Ms. Quesada. Any primary jurisdiction analysis requires careful consideration of "the extent to which a referral would delay rather than expedite resolution of the case, and the adequacy of

[administrative] remedies for the claims at issue." (*Ibid.*) While Ms. Quesada seeks restitution and injunctive relief, an administrative proceeding could result in a possible revocation of Herb Thyme's organic certification and a *maximum* civil penalty of $10,000. (7 U.S.C. § 6519.) Accordingly, prior resort to an administrative agency will provide no relief for Californians who purchased Herb Thyme's counterfeit products and will only delay Ms. Quesada's right to a jury trial at needless cost to all parties.

For all of these reasons, the Court should reject Herb Thyme's alternate grounds for affirming dismissal of this action.

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CONCLUSION

For the foregoing reasons, this Court should find that Plaintiff-Petitioner and Appellant Michelle Quesada's claims against Defendant-Respondent Herb Thyme Farms, Inc. are neither preempted nor subject to primary jurisdiction.

DATED: October 14, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COURT

I, Maria L. Weitz, hereby certify pursuant to Rule of Court 8.520(c)(1) that this Petitioner's Reply Brief on the Merits was produced on a computer, and that it contains 8,241 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 October 14, 2014, at Los Angeles, California.

Maria L. Weitz

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 October 14, 2014, I served true copies of the following document(s) described as **PETITIONER'S REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

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___ **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 October 14, 2014, at Los Angeles, California.

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