

CASE NO. S216305

IN THE SUPREME COURT OF CALIFORNIA

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**MICHELLE QUESADA,**  
*Plaintiff-Petitioner and Appellant,*

v.

**HERB THYME FARMS, INC.,**  
*Defendant and Respondent.*

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SUPREME COURT  
FILED

JAN 30 2015

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

Frank A. McGuire Clerk  
Deputy

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(subsequently transferred to Honorable Kenneth Freeman)

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**PETITIONER'S RESPONSE TO RESPONDENT'S  
SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY**

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In Respondent's Supplemental Brief Regarding New Authority, Respondent Herb Thyme Farms, Inc. argues that *Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.App.4th 1291 supports a finding of preemption in this case. Appellant Michelle Quesada submits this response to briefly explain why *Solus* does not support Herb Thyme's arguments.

The question in *Solus* was whether the federal Occupational Safety and Health Act ("OSHA") preempts state-law claims brought by a state district attorney under the Unfair Competition Law ("UCL"), Business and Professions Code §§ 17200 *et seq.* The district attorney's UCL claims were premised on alleged misconduct within the ambit of a state-law workplace safety plan that had been developed and federally approved under OSHA. The district attorney argued that an employer should be required to pay civil penalties under the UCL *for violating various provisions of the federally approved plan.*

The Court of Appeal found that OSHA expressly preempts the district attorney's UCL claims on the ground that the UCL's civil penalties were not part of the federally approved workplace safety plan. More specifically, the court found that: (1) because the district attorney was attempting to use the UCL to enforce the state's federally approved workplace plan; and (2) because the UCL was not an approved component

of that plan; then (3) the district attorney's claims were expressly preempted by OSHA.

Contrary to Herb Thyme's argument, *Solus* does not support a finding of preemption in this case. First, the *Solus* court began its preemption assessment with the observation that the UCL was enacted years *after* Congress passed OSHA and years *after* California's workplace safety plan received federal approval. (*Solus, supra*, 229 Cal.App.4th at pp. 1302-1303.) Moreover, in *Solus*, there was no record that the UCL's predecessor statute had ever been relied upon by prosecutors to penalize workplace safety violations. (*Ibid.*) In sharp contrast, the legislative history of the Organic Foods Production Act of 1990 ("OFPA") (7 U.S.C. §§ 6501 *et seq.*), and the preamble to the final OFPA regulations (65 Fed.Reg. at 80663, 80668), acknowledge a lengthy history (and contemplate continued use) of state consumer fraud actions like Ms. Quesada's. (See Petitioner's Opening Brief on the Merits, at pp. 6-9, 21-22; Petitioner's Reply Brief on the Merits, at pp. 18-21.) This long, recognized history of private enforcement—a history not present in *Solus*—is a substantial factor weighing against preemption of Ms. Quesada's claims. (*Bates v. Dow AgroSciences LLC* (2005) 544 U.S. 431, 449).

Second, unlike in *Solus*, Ms. Quesada is *not* using the UCL to enforce a federally approved state plan. As explained at length in Petitioner's Reply Brief on the Merits (at pp. 2-6), OFPA merely prohibits

the states from establishing their own “organic certification programs” without federal approval. (See 7 U.S.C. §§ 6503, 6507.) The OSHA statute at issue in *Solus*, however, broadly required federal approval of *any* state program establishing or enforcing *any* safety standards involving the workplace. Under OFPA, the *only* type of state program that needs approval is one that governs the narrow area of organic *certification*. As a result, the only state enforcement mechanisms that even arguably must be approved as part of the state organic certification program are those that relate to “organic certification.”

Herb Thyme cannot rely on *Solus* because Ms. Quesada is *not* attempting to enforce the state organic certification program. As previously explained (*see* Petitioner’s Reply Brief on the Merits at pp. 10-12), Ms. Quesada is not arguing that Herb Thyme’s certification was issued in error; nor is she attempting to enforce the state’s certified organic program by arguing that that Herb Thyme’s certification should be revoked. To the contrary, she is simply attempting to hold Herb Thyme liable under state consumer protection laws for covertly mixing its organic herbs with conventional herbs and then labeling the contents 100% organic. In the wake of a jury verdict in Quesada’s favor, 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 *itself* took action to revoke that certification).

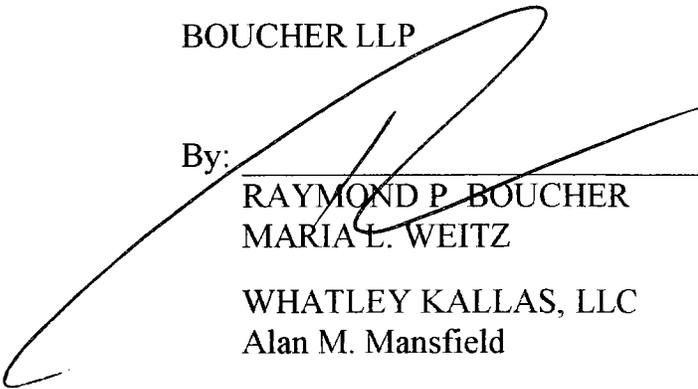
In short, because this action does not seek to enforce the state organic certification program, the fact that the state's program does not specifically incorporate the UCL as an enforcement mechanism is simply irrelevant. *Sohus*, therefore, has no bearing here.

DATED: January 29, 2015

Respectfully submitted,

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By:



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**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 21600 Oxnard Street, Suite 600, Woodland Hills, California 91367.

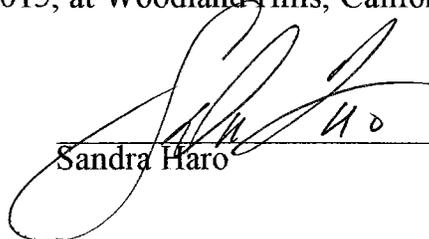
On January 29, 2015, I served true copies of the following document(s) described as **PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

     **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 January 29, 2015, at Woodland Hills, California.

  
\_\_\_\_\_  
Sandra Haro

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