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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ORGANIC CONSUMERS ASSOCIATION, Plaintiff and Appellant, v. THE HONEST COMPANY, INC., Defendant and Respondent.	B280836 (Los Angeles County Super. Ct. No. SC125655)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elihu M. Berle, Judge. Affirmed.

The Golan Firm, Yvette Golan; Terrell Marshall Law Group, Beth Ellen Terrell; The Richman Law Group and Jaimie Mak for Plaintiff and Appellant.

Cooley, William P. Donovan, Jr., Christina S. Davis; and Darcie A. Tilly for Defendant and Respondent.

Plaintiff and appellant Organic Consumers Association (Association) filed a complaint asserting a single cause of action under the California Organic Products Act of 2003 (COPA) (Health & Saf. Code, § 110810 et seq.), seeking to prevent defendant and respondent The Honest Company, Inc. (Honest) from labeling its premium infant formula as "organic." The complaint alleges that the formula contains synthetic ingredients that are not allowed in organic products under federal law, specifically, the Organic Food Production Act of 1990 (OFPA) (7 U.S.C. § 6501 et seq.), and therefore the "organic" label is a misrepresentation that violates the COPA. Honest demurred to the complaint on several grounds, including that the action is a direct challenge to the federal organic certification process and is therefore preempted by federal law. The trial court agreed and dismissed the action after Association failed to amend its complaint.

We conclude Association's state law claim that Honest is labeling infant formula as organic when it is not in fact organic stands as an obstacle to the stated congressional objectives of the OFPA and is preempted. We therefore affirm.

BACKGROUND

Association, a self-described nonprofit "focused exclusively on promoting the views and interests of the nation's millions of organic and socially responsible consumers," filed a complaint in the Los Angeles Superior Court, alleging in a single cause of action that Honest was "falsely representing" its premium infant formula as "'Organic.'" According to Association, of the 40 ingredients in the formula, 11 "are synthetic substances that are not allowed in organic products" under the OFPA and its regulations.

Under the COPA, "no product shall be sold as organic . . . unless it is produced according to regulations promulgated by the NOP [National Organic Program], and consists entirely of products manufactured only from raw or processed agricultural products," except that it may include ingredients "produced in a manner consistent with, or which are on the national list adopted by the United States Secretary of Agriculture . . . ." (Health & Saf. Code, § 110820, subd. (b).) The COPA provides that "any person may bring an action in superior court" for injunctive relief for violation of any provision of the COPA. (Health & Saf. Code, § 111910, subd. (a).) Association brought its action "on behalf of the general public, and on behalf of its members." In addition to injunctive relief, the Association sought attorney fees and civil penalties.

Honest demurred to the complaint on five grounds: (1) the single state law claim is preempted by federal law because the formula is certified as "organic" by a certifying agent of the United States Department of Agriculture (USDA); (2) judicial abstention is appropriate given the alternative federal relief and the burden of enforcing the requested injunction; (3) dismissal is proper under the doctrine of primary jurisdiction because the USDA is in the process of formal rulemaking about the ingredients allowable in organic infant formula; (4) Association failed to exhaust its administrative remedies under federal law by failing to challenge the formula's organic certification before the USDA; and (5) Association fails to state a claim under state law because the formula's certification by the USDA agent is evidence that the challenged ingredients are permitted under federal law.

The trial court sustained Honest's demurrer, finding Association's claim was preempted by federal law. The court found that Association's challenge to the use of the term organic "cannot be described in any way other than a direct challenge to the USDA accrediting, certifying agent decision itself." The court concluded that allowing outside parties, like consumers, to interfere with or second-guess the federal certification process via state law would pose an obstacle to accomplishing the stated congressional objectives of the OFPA. The court granted Association leave to amend the complaint to plead any possible allegations of misconduct by Honest in obtaining or using its certification. Association did not file an amended complaint. A judgment of dismissal was entered. This appeal followed.

DISCUSSION

I. Standard of Review

We review de novo a trial court's order sustaining a demurrer, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law, and we also consider matters which may be judicially noticed. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "'"It is the rule that when a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can." [Citations.]'" (*Estate of Pryor* (2009) 177 Cal.App.4th 1466, 1470.)

II. Legislative Overview

To eliminate the patchwork of various state's organic regulations, Congress enacted the OFPA with the express purposes "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; [¶] (2) to assure consumers that organically produced products meet a consistent standard; and [¶] (3) to facilitate interstate commerce in fresh and processed food that is organically produced." (7 U.S.C. § 6501.) To accomplish these objectives, Congress directed the USDA to create a national organic certification program, which is known as the "National Organic Program" (NOP). (7 U.S.C. § 6503(a); *National Organic Program*, 65 Fed.Regs. 80548, 80682 (Dec. 21, 2000) (codified at 7 C.F.R. at pt. 205 (2017).) Under NOP regulations, a product may only be sold as "organic" if it contains "not less than 95 percent organically produced raw or processed agricultural products," and the remaining 5 percent may consist of synthetic ingredients only if those ingredients are on the "National List." (7 C.F.R. § 205.301(b) (2017).) The National List contains a comprehensive "itemization, by specific use or application" of permitted synthetic ingredients. (7 U.S.C. § 6517(b); 7 C.F.R. §§ 205.600-205.607 (2017)(the National List).)

All products labeled as "organic" must be certified by the USDA. (7 U.S.C. § 6503(a); 7 C.F.R. §§ 205.201, 205.404 (2017).) Certifying agents are public and private entities with "expertise in organic farming and handling techniques." (7 U.S.C. § 6514(b).) For a company's operation to be certified to sell a product as "organic," the company must develop an Organic System Plan (Plan), which is a detailed description of how an operation will achieve, document, and sustain compliance with

the OFPA and the NOP. (7 U.S.C. § 6513; 7 C.F.R. § 205.201 (2017); 65 Fed.Reg. 80558 (Dec. 21, 2000).) The Plan must also include a list of each substance to be used with details about its composition and source. (7 C.F.R. § 205.201(a)(2) (2017).) Certifying agents must conduct on-site inspections to determine that the Plan submitted "accurately reflects the practices used or to be used by the applicant," and that "prohibited substances have not been and are not being applied to the operation." (7 C.F.R. § 205.403(c)(2), (3) (2017).) Certification is granted only if the certifying agent determines that "all procedures and activities of the applicant's operation are in compliance" with the OFPA and its regulations. (7 C.F.R. § 205.404(a) (2017).) Noncompliance with the OFPA and its implementing regulations can result in suspension or revocation of a certificate and civil penalties. (7 U.S.C. 6519; 7 C.F.R. §§ 205.660-205.663 (2017).) There is no private right of action under the OFPA.

The OFPA does permit state regulation of organic food products, including more restrictive regulations, but only if the state requirements are consistent with and further the purposes of the OFPA, and have been approved by the USDA. (7 U.S.C. § 6507.) California was the first state to have its organic program approved. The COPA incorporates by reference the federal regulations under the OFPA, and recognizes the primacy of federal law. (See, e.g., Food & Agr. Code, §§ 46001, 46002, subd. (a).)

III. Federal Preemption

As recognized by the California Supreme Court, the Supremacy Clause of the United States Constitution "makes federal law paramount." (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 307 (*Quesada*); U.S. Const., art. VI, § 2, cl.

2.) "Similarly, federal agencies, acting pursuant to authorization from Congress, can issue regulations that override state requirements." (*Quesada, supra*, at p. 308.) The California Supreme Court has "identified several species of preemption," noting that "Congress may expressly preempt state law through an explicit preemption clause, or courts may imply preemption under the field, conflict, or obstacle preemption doctrines." (*Ibid.*) "Obstacle preemption permits courts to strike state law that stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Id.* at p. 312.) "Preemption is foremost a question of congressional intent: did Congress, expressly or implicitly, seek to displace state law?" (*Id.* at p. 308.) Courts are to "begin with the statutory text, necessarily the source of the best evidence concerning the breadth of Congress's preemptive intent." (*Ibid.*)

In *Quesada*, *supra*, 62 Cal.4th 298, the California Supreme Court had occasion to address whether state law claims of false advertising (Bus. & Prof. Code, § 17500 et seq.), unfair competition (Bus. & Prof. Code, § 17200 et seq.), and consumer fraud (Civ. Code, § 1750 et seq.) were preempted by the OFPA. After concluding that the OFPA only expressly preempted two areas—what it means to be "organic" and the process of certification—*Quesada* turned to the doctrine of implied preemption in the form of obstacle preemption. (*Quesada, supra*, at p. 309.) *Quesada* noted the existence of a historical presumption against preemption and that "regulation of food labeling to protect the public is quintessentially a matter of long-standing local concern." (*Id.* at p. 313.) "Accordingly, in this obstacle preemption case, we continue to conduct our analysis from the starting point of a presumption that displacement of

state regulation in areas of traditional state concern was not intended absent clear and manifest evidence of a contrary congressional intent." (*Id*. at p. 315.)

Quesada described the claims before it as alleging that defendant Herb Thyme, Inc. intentionally mixed conventionally grown herbs with organic herbs and substituted orders for organic herbs with conventional herbs. (*Quesada, supra,* 62 Cal.4th at p. 320.) *Quesada* concluded that these claims were not preempted because they posed no obstacle to the congressional purposes and objectives underlying the OFPA. (*Id*. at p. 324.) To the contrary, "[t]o grant immunity against claims of intentional commingling and fraudulent substitution of conventional for organic produce would neither bolster national standards nor enhance consumer confidence." (*Id*. at p. 321.)

Prior to *Quesada*, the only published appellate case to consider the scope of implied preemption under the OFPA was *Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig. v. Aurora Organic Dairy* (8th Cir. 2010) 621 F.3d 781 (*Aurora*). There, the Eighth Circuit considered a consolidated multi-district class action in which the plaintiffs alleged that milk being sold and marketed as organic was being produced in a manner inconsistent with the OFPA and that there were misrepresentations about the actual care of the cows, in violation of various state statutes. The plaintiffs sued the dairy, its certifying agent, and the retailers that packaged and sold the milk. The court rejected the plaintiffs' express and field preemption arguments, and discussed conflict preemption, which it described as existing "'where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional

objectives.'" (*Id*. at p. 794.) The court divided the claims into three categories.

First, the court held that all claims against the certifying agents were preempted because allowing "outside parties, including consumers, to interfere with or second guess the certification process" would be "'an obstacle to the accomplishment of congressional objectives'" of the OFPA. (*Aurora, supra*, 621 F.3d. at p. 795.)

Second, the court held that all claims against the dairy and the retailers alleging they "sold milk as organic when in fact it was not organic are preempted because they conflict with the OFPA." (*Aurora, supra*, 621 F.3d. at p. 796.) The court concluded that "any attempt to hold [the dairy] or the retailers liable under state law based upon its products supposedly not being organic directly conflicts with the role of the certifying agent," because it is the role of the agent to ensure OFPA compliance. (*Aurora, supra*, at p. 797.)

Third, the court held that "state law challenges to the facts underlying certification" were not preempted. (*Aurora, supra*, 621 F.3d. at p. 797.) The court reasoned that claims alleging animal cruelty, for example, are unrelated to the decision to certify, and preempting state laws unrelated to certification would not further the OFPA's purpose of establishing national standards for organic foods. (*Aurora, supra*, at pp. 798–799.)

After *Aurora* was decided, most other courts have followed its reasoning. (See *Organic Consumers Ass'n v. Hain Celestial Grp., Inc.* (D.D.C. 2018) 285 F.Supp.3d 100; *Marentette v. Abbott Labs., Inc.* (E.D.N.Y. 2016) 201 F.Supp.3d 374, 375–377, 381; *Birdsong v. Nurture, Inc.* (E.D.N.Y. 2017) 275 F.Supp.3d 384; cf.

Segedie v. Hain Celestial Grp., Inc. (S.D.N.Y. 2015) 2015 U.S. Dist. Lexis 60739.)

In *Quesada,* our Supreme Court reviewed *Aurora*, which it found "instructive." (*Quesada*, *supra,* 62 Cal.4th at p. 319.) *Quesada* stated: "In *Aurora Dairy*, the Eighth Circuit held preempted only state consumer protection claims asserting the defendant dairy should not have been permitted to sell milk as USDA organic because its production methods were not actually consistent with federal regulations—that is, *claims making a frontal assault on the validity of the organic producer's government certification*. These claims were preempted because they conflicted with the exclusive role of federally certified agents in certifying a producer's methods as organic." (*Quesada, supra,* at p. 319, italics added.) But the "gravamen" of the claims at issue in *Quesada* was different. (*Id*. at p. 320.) "Unlike the complaint at issue in *Aurora Dairy*, the complaint here accepts as valid Herb Thyme's certification and compliance with federal regulations on its certified organic farm. Quesada concedes Herb Thyme can and does grow organic herbs, which it is entitled to package and sell using a USDA Organic label." (*Quesada, supra,* at p. 320.)

Under this framework, we turn to Association's state law claim under the COPA.

IV. Association's Claim is Preempted

Association's complaint does not allege that Honest is selling its premium infant formula without having gone through the organic certification process. Nor are there any allegations of misconduct by Honest in obtaining or using its organic certification. Rather, the gravamen of Association's single cause of action under the COPA is that Honest is labeling as organic

infant formula that is not in fact organic. This claim is identical to the second category of claims in *Aurora*—that the dairy and retailers "sold milk as organic when in fact it was not organic"—that were held to be preempted. (*Quesada, supra,* 621 F.3d at p. 796.) In other words, Association's claim constitutes what *Quesada* called a direct "frontal assault on the validity of the organic producer's government certification." (*Quesada, supra,* at p. 319.) For the same reasons *Aurora* found such claims were preempted, so too is Association's identical claim preempted here.

In reaching its conclusion, *Aurora* rejected the argument that compliance and certification are separate requirements: "[C]ompliance with the regulations is not a separate requirement independently enforceable via state law." (*Aurora, supra,* 621 F.3d. at p. 797.) The court reasoned that to hold otherwise would conflict with the OFPA's structure and purpose: "In arriving at this conclusion, we need look no further than the purposes articulated in the OFPA itself. The first purpose, 'to establish national standards governing the marketing of certain agricultural products as organically produced products,' would be deeply undermined by the inevitable divergence in applicable state laws as numerous court systems adopt possibly conflicting interpretations of the same provisions of the OFPA and NOP. . . . The natural result of these differences in interpretation and enforcement would be an increase in the 'consumer confusion and troubled interstate commerce,'. . . that characterized the period before the OFPA, which stands in direct conflict to the OFPA's third purpose of 'facilitat[ing] interstate commerce in fresh and processed food that is organically produced,' [7 U.S.C.] § 6501(3)." (*Aurora*, *supra*, at p. 797.)

Aurora continued: "The structure of the OFPA, and particularly its remedial scheme, also support our conclusion that to the extent state laws challenge [the dairy's] certification they are preempted. . . . The only penalty for noncompliance with the OFPA subjects persons 'who knowingly sell[] or label[] a product as organic' to a civil penalty of up to $ 10,000. § 6519(a). The role of the certifying agent is to 'certify a farm or handling operation that meets the requirements of' the OFPA [7 U.S.C.] § 6503(d). . . . Therefore, any attempt to hold [the dairy] or the retailers liable under state law based upon its products supposedly not being organic directly conflicts with the role of the certifying agent as set forth in [7 U.S.C.] § 6503(d)." (*Aurora*, *supra*, 621 F.3d. at p. 797.)

If, as Association contends, the COPA permits private plaintiffs to file lawsuits challenging an organic certification issued under federal standards when there are no allegations of intentional fraud, the COPA would undermine the national uniformity provided by Congress in the OFPA and the NOP in several key respects. For example, the NOP provides that an organic certification "continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State organic program's governing State official, or the Administrator." (7 C.F.R. § 205.404(c) (2017).) Allowing lawsuits by private parties that second-guess a certification decision would, in effect, improperly expand this limitation on who can suspend or revoke an organic certification and could result in certifications that are valid in one state but not another. Another problem with such lawsuits is that they could result in a court entering an order that would have the effect of revoking an organic certification that would not otherwise be revocable under

the NOP's procedures. (See 7 C.F.R. §§ 205.660-205.663 (2017).) Additionally, because certification is a conclusion that the organic plan at issue is "in compliance with the requirements" of the OFPA and the NOP (7 C.F.R. § 205.404(a) (2017)), such lawsuits would essentially say that the USDA's organic certification decision is meaningless.

In sum, if Association's claim was not preempted and its interpretation of the National List was adopted by a California court, Honest and other companies would be subject to a different standard for selling its infant formula in California than other states. For instance, states within the Eighth Circuit would be bound by *Aurora* and would recognize and uphold organic certification decisions from the USDA and its certifying agents. But the same company selling the same product could not rely on the exact same certification in California. This type of state-by-state inconsistency is what motivated Congress in the first place to enact the OFPA. Because any added requirements regarding certification that Association essentially seeks to impose under the COPA would not be consistent with or further the purposes of the OFPA, Association's state law claim is preempted. (See also *Brown v. Danone North America, LLC* (May 1, 2018, Case No. 17-cv-07325-JST) 2018 U.S. Dist. Lexis 74692.)

Association makes three counter arguments, none of which references the three stated purposes of the OFPA. (See 7 U.S.C. § 6501).

First, Association argues preemption is not called for because "Congress did not intend to be the only voice in regulating the sale of organic products, or the only player in establishing organic standards." Association points out that Congress explicitly allows more restrictive state law organic

requirements if approved by the USDA. (7 U.S.C. § 6507(b)(1).) But Association ignores that the OFPA permits state requirements that are more restrictive *only if* they are consistent with and further the purposes of the OFPA. (7 U.S.C. § 6507; 7 C.F.R. § 205.620 (2017).) Thus, the OFPA provides *both a floor and a ceiling* for organic regulations. "'Even where concurrent regulation is not totally precluded . . . state and local enactments are nullified to the extent that they actually conflict with federal law.'" (*Aurora, supra*, 621 F.3d at p. 796.) In its reply brief, Association points out that the COPA has been approved by the USDA, and therefore implies that any claim brought under the COPA is valid and not an obstacle to congressional objectives. But if Association were to prevail on its COPA claim, this would mean that the COPA would prohibit the same ingredients that federal law permits.

Second, Association argues that preemption is not called for because "Congress viewed the states as a necessary partner in enforcement." Association points out that the USDA cannot authorize "stop sales" or recall products, only states can do so. (65 Fed.Regs. 80548, 80626 (Dec. 21, 2000).) This same argument by Association was rejected in *Organic Consumers Ass'n v. Hain Celestial Grp., Inc., supra,* 285 F.Supp.3d 100. The court there found this argument "ignores the methods and logic of the NOP's enforcement structure, which never mentions private enforcement via state law." (*Id.* at p. 108.) Certifying agents and the "governing State official" of state organic programs have the authority to investigate "complaints of noncompliance with [OPFA] or [its] regulations" (7 C.F.R. 205.661 (2017)), and carry out appropriate remedies (7 C.F.R. 205.622 (2017)). We agree

that private enforcement via state law is inconsistent with this enforcement scheme.

Third, Association argues that preemption is not called for because "Congress considered the uniform prohibition of synthetic substances to be vital to effective national standards." Association asserts that "Congress ensured that the National List of synthetic ingredients permitted in organic products would not be subject to interpretation by any entity, including certifying agents." But this is precisely what Association is trying to do here—have the trial court adopt Association's interpretation of the National List and what ingredients it does and does not allow in a product labeled "organic." Allowing this lawsuit to proceed will not help establish "uniform" "national" standards. To the contrary, allowing this lawsuit to proceed will do the opposite by creating different standards for terms defined in the NOP that will vary in each state depending upon how its courts interpret the OFPA and the NOP.

Finally, Association complains that in ruling on Honest's demurrer, the trial court improperly reached the merits of its COPA claim. Association claims the trial court erroneously stated that Association conceded Honest's *product* was certified as organic, when the "the only thing that was certified was Honest's organic *plan*." (Bolding omitted.) This is a distinction without a difference in this action. As discussed earlier, certification of an organic plan is the review process that enables a company to use the USDA organic seal and call its product "organic." To certify a product as OFPA-compliant, the agent must determine that "all procedures and activities of the applicant's operation are in compliance" with the OFPA and regulations. (7 C.F.R. § 205.404(a) (2017).) While it is certainly

possible that a company could give false information to the certifier and risk criminal penalties (see 7 C.F.R. § 205.662(g)(2) (2017)), despite an opportunity to amend, Association did not plead any such facts here.

Because Association's lawsuit would stand as an obstacle to accomplishing the congressional objectives of the OFPA to establish uniform national standards that consumers and businesses can rely upon and that promote interstate commerce, Association's state law action is preempted.[1]

DISPOSITION

The judgment is affirmed. Honest is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT

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[1] In light of our conclusion, we need not address Honest's remaining grounds for demurrer.