**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

MARK J. PATANE *et al.*,
*Plaintiffs*,

v.

NESTLÉ WATERS NORTH AMERICA, INC.,
*Defendant*.

No. 3:17-cv-01381 (JAM)

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs have filed this class action lawsuit alleging that defendant Nestlé Waters North America, Inc. ("Nestlé") fraudulently labels and sells its Poland Spring bottled water product as "spring water" when in fact it is not spring water as defined by law. Nestlé has now moved for summary judgment on all of plaintiffs' claims arising under the laws of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island. For the reasons set forth below, I will deny the motion except as to one of plaintiffs' claims under Rhode Island law.

Nestlé argues for dismissal on the ground that there is no private right of action for the violation of state "spring water" standard laws and, alternatively, that any right of action is foreclosed by safe harbor exemptions under state law and by doctrines that limit collateral attacks on state-issued permits or licenses. Based on my state-by-state evaluation of these arguments, I generally conclude that the lack of a specific right of action for the violation of a state law spring water standard does not foreclose the underlying conduct from being actionable under separate state statutes that prohibit unfair and deceptive trade practices or from being actionable to the extent that they amount to fraud and breach of contract. I further conclude—

with the exception of Rhode Island—that at least a genuine issue of fact remains whether Nestlé is entitled to the benefit of any regulatory safe harbor exemptions or whether plaintiffs' claims amount to an impermissible collateral attack on state-issued licenses or permits.

## BACKGROUND

Nestlé labels and sells its Poland Spring water products as "spring water" in retail, home, and office markets. Doc. #229-1 at 1 (¶ 1). Plaintiffs have purchased Poland Spring water since 2003 and reside in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island. *Ibid.* (¶ 2). Nestlé has packaged its water at bottling facilities in Poland Spring and Hollis, Maine, and Framingham, Massachusetts, since 2003, and since 2009 has also used a fourth facility in Kingfield, Maine. *Id.* at 2 (¶¶ 3-4). From 2003 to 2017, the water packaged at these four facilities came from eight sites in Maine. *Ibid.* (¶ 5).[1]

In 2018, I dismissed plaintiffs' initial complaint because their state law claims as framed were all preempted by the federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-392. Doc. #142; *Patane v. Nestlé Waters N. Am., Inc.*, 314 F. Supp. 3d 375 (D. Conn. 2018). Plaintiffs then filed an amended complaint on behalf of consumers in the eight states listed above as well as Vermont, alleging state common law claims for fraud and breach of contract in addition to state statutory claims for consumer fraud and unfair trade practices. Doc. #160. I dismissed the Vermont law claims and allowed the rest to proceed. Doc. #179; *Patane v. Nestlé Waters N. Am., Inc.*, 369 F. Supp. 3d 382 (D. Conn. 2019). Plaintiffs seek, among other remedies, money damages and a permanent injunction enjoining Nestlé from selling its Poland

[1] Nestlé contends that this is the class period; plaintiffs argue that it extends to the present. Doc. #229-1 at 2 (¶ 5). Plaintiffs have not yet filed their motion for class certification, at which time it would be appropriate for the Court to decide the class period, if any. Nevertheless, the fact that there has been no class certification determination poses no bar to ruling on Nestlé's motion for summary judgment. *See Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998); *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 507 (E.D.N.Y. 2017).

Spring water as "spring water." Doc. #160 at 283-324. Nestlé now moves for summary judgment on all of plaintiffs' claims. Doc. #219.

**DISCUSSION**

The principles governing the Court's review of a motion for summary judgment are well established. Summary judgment may be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the facts in the light most favorable to the party who opposes the motion for summary judgment and then decide if those facts would be enough—if eventually proved at trial—to allow a reasonable jury to decide the case in favor of the opposing party. My role at summary judgment is not to judge the credibility of witnesses or to resolve close contested issues of fact but solely to decide if there are enough facts that remain in dispute to warrant a trial. *See generally Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (*per curiam*); *Benzemann v. Houslanger & Assocs., PLLC*, 924 F.3d 73, 78 (2d Cir. 2019).

This case involves state law claims over which the Court has federal diversity jurisdiction. Absent a controlling decision from a state's highest court on a question of state law, a federal court's role is to carefully predict how the state court would rule on the issue presented. *See Haar v. Nationwide Mut. Fire Ins. Co.*, 918 F.3d 231, 233 (2d Cir. 2019). In so doing, a federal court should give proper regard to the relevant rulings of the state's lower courts and may also consider decisions from other jurisdictions on the same or analogous issues. *See In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013) (subsequent case history omitted).

Nestlé moves for summary judgment on three grounds. First, Nestlé argues that there is *no private right of action* under applicable state law for the claimed violations by Nestlé of state law "spring water" standards. Doc. #219-1 at 18-27. Second, Nestlé argues that applicable state

law recognizes a *safe harbor defense* to foreclose liability against Nestlé in light of alleged state regulatory approvals of Nestlé "spring water" for sale. *Id.* at 27-38. Third, Nestlé argues that this lawsuit functions as an *impermissible collateral attack* on the administrative approvals of state regulators for the sale of Nestlé's product as "spring water." *Id.* at 39-48.

In the discussion below, I will address this trio of arguments with respect to each of the applicable States in alphabetical order. Because the parties' briefing overwhelmingly focuses on plaintiffs' statutory claims, I will address those claims before turning to the common law claims.

***Connecticut***

***1. Private right of action under Connecticut law***

In Count VI of the amended complaint, plaintiffs allege a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a–42-110q, a law which creates a private right of action to recover damages for "[a]ny person who suffers any ascertainable loss of money or property . . . as a result of the use or employment of a method, act or practice" that amounts to "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* §§ 42-110g(a), 42-110b(a). CUTPA is expressly intended to "be remedial and be so construed." *Id.* § 42-110b(d).

As I have previously ruled, Connecticut law adopts the federal "spring water" standard. *See Patane*, 369 F. Supp. 3d at 392-93 (citing Conn. Gen. Stat. §§ 21a-150(14) and 150e(c)). The Connecticut Food, Drug and Cosmetic Act ("CFDCA"), Conn. Gen. Stat. § 21a-91 *et seq.*, provides in turn that "[a] food shall be deemed to be misbranded . . . [i]f its labeling is false or misleading in any particular," *id.* § 21a-102(a), and "food" is defined to include "articles used for . . . drink for humans," *id.* § 21a-92(10). Yet the CFDCA does not provide a private right of

action; instead, it states that "[a]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the state of Connecticut." *Id.* § 21a-99.

Nestlé argues that plaintiffs' CUTPA claim may not proceed on the basis of a statute such as the CFDCA that does not itself provide for a private right of action and allows only for its public enforcement by the State of Connecticut. According to Nestlé, "the Connecticut Supreme Court has repeatedly held private plaintiffs cannot predicate a CUTPA claim on violations of law barring private enforcement actions." Doc. #219-1 at 24. In fact, however, the Connecticut Supreme Court has ruled to the contrary in cases that Nestlé fails to cite or acknowledge. *See Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, 119 A.3d 1139, 1150-51 (Conn. 2015) (allowing CUTPA claim based on violation of the Connecticut Unfair Insurance Practices Act, which itself has no private right of action provision and which allows only for enforcement by the insurance commissioner); *Eder Bros. v. Wine Merchants of Connecticut, Inc.*, 880 A.2d 138, 146-47, 149-50 (Conn. 2005) (allowing CUTPA claim based on violation of the Liquor Control Act, notwithstanding that the Liquor Control Act vests exclusive authority for its enforcement in the department of consumer protection). Thus, as the Connecticut Supreme Court has recently noted, "a plaintiff may predicate a CUTPA claim on violations of statutes or regulations that themselves do not allow for private enforcement." *Cenatiempo v. Bank of Am., N.A.*, 219 A.3d 767, 792 n.16 (Conn. 2019).

Nestlé relies instead on cases that have nothing to do with whether a CUTPA claim may proceed on the basis of a violation of a different statute for which there is no private right of enforcement. Doc. #219-1 at 24 nn.8-9. For example, Nestlé cites *Perez-Dickson v. City of Bridgeport*, 43 A.3d 69 (Conn. 2012), a case that does not mention CUTPA and that stands for the unremarkable proposition that a plaintiff may not sue under a statute unless the legislature

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