

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

Margo Clark, individually and on behalf of all  
others similarly situated,

Plaintiff,

- against -

Blue Diamond Growers,

Defendant

1:22-cv-01591

Class Action Complaint

Jury Trial Demanded

Plaintiff alleges upon information and belief, except for allegations pertaining to Plaintiff, which are based on personal knowledge:

1. Blue Diamond Growers (“Defendant”) manufactures, labels, markets, and sells almonds represented as made in a smokehouse under the Blue Diamond brand (“Product”).



2. The relevant front label representations include “Blue Diamond Almonds,” “Smokehouse®,” “2g Net Carbs,” “Smart Eating!,” and “Irresistible Snacking,” in packaging of red and orange, evocative of the colors of fire and a picture of the almonds.

3. Contrary to the front label, the Product is not made in a smokehouse, which misleads consumers.

## I. SMOKING PROCESS

4. Smoking is a method to prepare and preserve food by cooking it over a fire containing various kinds of wood chips, exposing it to smoke.

5. The drying action of the smoke and the different phenol compounds help to preserve protein-rich foods such as meat, cheese, almonds, and fish.

6. The origins of smoking date to prehistory, as nomadic peoples experimented with fire and primitive cheese products.

7. The earliest record of smoked cheese comes from ancient Rome, when an owner of a cheese shop was forced to share space in the *macellum* with a baker.<sup>1</sup>

8. The wood provides unique and powerful flavors, based on the type of wood used.

9. For example, wood chips from deciduous hardwood trees of the genus *Carya*, hickory, provide hearty and sweet flavors to nuts and meat (“hickory”).

10. Pecan wood, a type of hickory, gives cheese a spicy and nutty taste.

11. Oak provides smoked flavors of moderate intensity.

## II. “SMOKEHOUSE” IS A NOUN DESCRIBING A PHYSICAL STRUCTURE

12. The center of the front packaging contains the word “Smokehouse®” in large font.

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<sup>1</sup> *Macellum* is the Italian name for the farmer’s markets of ancient Roman that sold freshly made foods.

13. The word “smokehouse” is a noun that describes a physical structure where food is prepared through the process of using actual smoke.

14. This is confirmed by numerous dictionary definitions.

15. Merriam-Webster defines a smokehouse as “[A] building where meat or fish is cured by means of dense smoke.”

16. The Oxford English Dictionary Online defines it as “[A] house or room used for curing meat, fish, etc., by means of smoke.”

17. Collins Dictionary defines it as “a building, esp. an outbuilding on a farm, where meats, fish, etc. are cured by smoke.”

18. Google Dictionary, based on its leading search engine which is designed to deliver the most relevant and accurate results, defines a smokehouse as “a shed or room for curing food by exposure to smoke.”

19. The Britannica Dictionary defines it as “a shed or room for curing food by exposure to smoke.”

20. In an industrial smoking process, foods, such as almonds, are put on a large tray and slid into an enclosed structure, referred to as a smokehouse.

### **III. CONSUMERS VALUE FOODS MADE THROUGH NATURAL PROCESSES LIKE SMOKING IN A SMOKEHOUSE**

21. The popularity of using smokehouses to smoke foods decreased in the mid-twentieth century due to the introduction of chemical preservatives and artificial smoke flavorings.<sup>2</sup>

22. However, consumer research company Mintel determined that the last two decades have seen a resurgence in consumer demand for foods made through natural processes, like in a

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<sup>2</sup> Matthew Sedacca, Liquid Smoke: The History Behind a Divisive Culinary Shortcut – Barbecue's love/hate relationship with the manufactured flavor, Eater.com, Jun 15, 2016.

smokehouse, without advanced chemistry and synthetic ingredients.

23. This is due to regular media reports of potentially dangerous and environmentally harmful substances in foods, due to the work of non-profits such as the Environmental Working Group (“EWG”).

24. This is especially true in the context of foods promoted as smoked or made in a smokehouse, as the European Food Safety Authority (“EFSA”) confirmed that smoke flavorings contain compounds at levels high enough to pose a toxic risk when consumed.

25. Added smoke flavor is not only an issue of consumer health, but of quality and value.

26. Whether a food has been smoked over hardwoods or contains liquid smoke, prepared by pyrolysis of sawdust, is basic front label information consumers rely on when making quick purchasing decisions at the grocery store.

27. Research by Innova Market Insights confirmed that consumers look to see if the front label has any statement about a product’s flavor, because they prefer foods which get their taste from the natural processes by which the food is prepared, such as in a smokehouse.

#### **IV. BEYOND MISLEADING CONSUMERS, THE LABELING VIOLATES RELEVANT REGULATIONS**

28. Beyond misleading consumers to expect almonds prepared in a smokehouse, the labeling does not comply with federal and identical state regulations.

29. The Product makes “direct or indirect representations” about its primary or “characterizing” flavor of smoke, through the word, “Smokehouse,” a noun, and the red and orange coloring, evocative of fire. 21 C.F.R. § 101.22.

30. According to the well-respected regulatory attorney Bob Holmes, these rules are “premised on the simple notion that consumers value ‘the real thing’ versus a close substitute and should be able to rely on the label to readily distinguish between the two. This consumer protection

objective is relevant to taste claims conveyed in advertising as well.”<sup>3</sup>

31. Where a food’s flavor does not come exclusively from a characterizing ingredient or processing method, but contains natural flavor derived from that ingredient or processing method, this must be disclosed to consumers on the front label, in addition to on the ingredient list. *See* 21 C.F.R. § 101.22(i).

32. As the almonds are represented as made in a smokehouse, even though they are not, and contain added liquid smoke flavoring, this must be disclosed to consumers on the front label.

33. The FDA has repeatedly warned companies that not disclosing the source of a food’s smoked taste is misleading:

If these smoke ingredients [natural smoke flavor] are added flavors, they should be declared in accordance with 21 CFR 101.22 [on the front of the label]; however, if these ingredients describe the smoking process, then they must not be listed as ingredients in the ingredient statement.<sup>4</sup>

34. The FDA has cautioned that a label “should not include the term ‘smoked’” or similar variations which misrepresent whether a food was subject to smoking, such as in a smokehouse.

35. Instead, foods that are not made in a smokehouse should contain a prominent statement such as “‘with added smoke flavor,’ ‘smoke flavored,’ or with ‘natural smoke flavor.’”

## V. “SMOKEHOUSE” IS MISLEADING BECAUSE PRODUCT NOT MADE IN SMOKEHOUSE

36. The sole meaning of “Smokehouse” goes directly to the fire-infused process by which a food is prepared, without any qualifying or clarifying language.

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<sup>3</sup> Steven Steinborn, Hogan & Hartson LLP, Regulations: Making Taste Claims, PreparedFoods.com, August 11, 2006.

<sup>4</sup> FDA, [Warning Letter](#), Smoked Seafood, Inc. dba Little Mermaid Smokehouse, MARCS-CMS 515739, June 27, 2017; FDA, [Warning Letter](#), Walnut Creek Kitchens, Inc., CIN-15-436857-08, Nov. 27, 2014.

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