

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
NORTHERN DIVISION

Benjamin Wood, individually and on behalf of
all others similarly situated,

Plaintiff,

- against -

Blue Diamond Growers,

Defendant

1:23-cv-01363

Resident of Harford County

Class Action Complaint

Jury Trial Demanded

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

1. Blue Diamond Growers (“Defendant”) sells almonds described and represented as made in a smokehouse across a red ribbon with glowing orange borders, coloring evocative of fire (“Product”).



I. SMOKING PROCESS

2. Smoking is a method of preparing and preserving food by cooking over a fire of hardwoods, exposing it to smoke.

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

4. Ancient records tell how early nomadic peoples exposed their raw foods to fire, recognizing the beneficial effects this caused.

5. More recent origins point to cheese and nut shops, situated adjacent to bakers in the *macella*, who noticed how their foods were impacted by the different types of woods used in making bread.¹

6. While hickory is the most commonly used hardwood for smoking foods because it imparts intense smoky, nutty and sweet flavors, other woods provide different flavors based on their natural sugar and oil content.

7. A “smokehouse” is a noun that describes a physical structure where food is prepared through the process of smoke generated by burning hardwoods.

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

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

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

11. Google Dictionary, based on its leading search engine which is designed to deliver

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

the most relevant and accurate results, defines a smokehouse as “a shed or room for curing food by exposure to smoke.”

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

13. 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.

14. The popularity of smokehouses and real smoke to smoke foods decreased in the mid-twentieth century due to the introduction of chemical preservatives and artificial liquid smoke flavorings.²

15. However, adding liquid smoke flavor is not the same as if a food were smoked.

16. Scientists concluded that there are at least 400 flavor compounds created from the smoking process, including pyrazines, aromatic hydrocarbons, organic acids, esters, furans, carbonyl compounds and phenols.

17. Added smoke flavoring lacks a delicate balance of key phenolic compounds, such as 2,3-Butanedione, 2,3-Pentanedione, 3-Butanoic acid, 3-Methylbutanoic acid, 4-Ethylguaiacol, 4-Propylguaiacol and/or 4-Vinylguaiacol.

18. This is because the smoke generation process dramatically influences the wood-smoke chemical composition, generating compounds that are not capable of being included in condensed liquid smoke like trans-isoeugenol and 4-methylsyringol.

19. Moreover, added liquid smoke only includes certain identified volatile compounds, even though nonvolatile compounds significantly contribute to smoke flavor.

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

20. 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 smokehouse and with real smoke, without advanced chemistry and synthetic ingredients.

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

22. This is especially true in the context of foods promoted as smoked, because the European Food Safety Authority (“EFSA”) confirmed that liquid smoke flavorings can contain potentially high levels of toxic compounds.

23. Almonds smoked in a smokehouse or from being smoked over hardwoods are not uncommon.

24. One competitor to Defendant’s Product sells hickory smoked almonds with an image of a smokehouse, which is how its almonds are smoked.



25. Devotees of smoked almonds describe the simple process of preparing smoked almonds with a home smoker.

26. These steps include (1) soaking in a brine solution, (2) roasting in oils, (3) placement into a smoker for several hours and (4) dusting the almonds with a seasoning including salt and other seasonings like garlic or chili powder.

27. Instead of using real smoke from a smokehouse or hardwoods to smoke foods, companies will often add liquid smoke flavor.

II. SMOKEHOUSE IS MISLEADING BECAUSE PRODUCT NOT SUBJECTED TO SMOKING

28. Federal and identical state regulations require that whenever a food makes “direct or indirect representations” about its primary or “characterizing” flavor, the source of that taste is required to be disclosed to consumers. 21 C.F.R. § 101.22(i).

29. According to regulatory expert Robert 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.”³

30. 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.

31. Where almonds get their smoked taste not from a smokehouse or from being smoked over hardwoods, but due to added smoke flavor, other competitor brands truthfully disclose these facts so consumers can make informed decisions.

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



32. Though Planters and the Walmart Great Value brand prominently disclose they are “Naturally Flavored” and “Natural Smoke Flavored Almonds With Other Natural Flavors,” Defendant’s labeling lacks any required similar statement about the source of its smoked taste besides the unqualified term “Smokehouse.” 21 C.F.R. § 101.22(i)(1)(i); 21 C.F.R. § 101.22(i)(1)(iii).

33. 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.

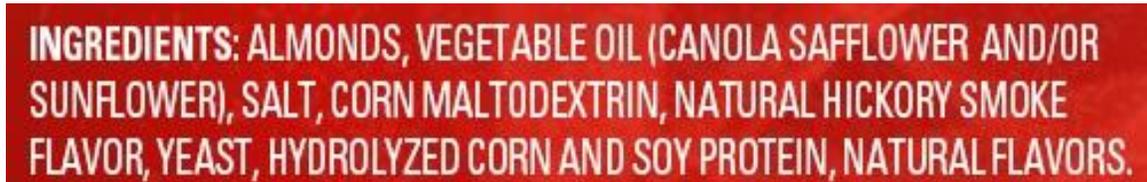
34. When the FDA enacted the regulations for flavoring, they considered it misleading to describe foods as “smoked” when “true smoke is absorbed in a liquid or other medium, and that medium is added to a food to provide a smoke flavor” instead of from being smoked.

35. The FDA even warned companies that not disclosing the source of a food's smoked taste is misleading to consumer:

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.⁴

36. Though "Smokehouse" is followed by a small trademark designation, this fails to tell buyers the almonds are neither made in a smokehouse nor subjected to any smoking over hardwoods.

37. The ingredients reveal that the Product's smoke taste is exclusively from "NATURAL HICKORY SMOKE FLAVOR," a form of liquid smoke with no connection to a smokehouse or smoking over hardwoods.



INGREDIENTS: ALMONDS, VEGETABLE OIL (CANOLA SAFFLOWER AND/OR SUNFLOWER), SALT, CORN MALTODEXTRIN, NATURAL HICKORY SMOKE FLAVOR, YEAST, HYDROLYZED CORN AND SOY PROTEIN, NATURAL FLAVORS.

INGREDIENTS: ALMONDS, VEGETABLE OIL (CANOLA, SAFFLOWER AND/OR SUNFLOWER), SALT, CORN MALTODEXTRIN, NATURAL HICKORY SMOKE FLAVOR, YEAST, HYDROLYZED CORN AND SOY PROTEIN, NATURAL FLAVORS.

38. The Product uses "NATURAL HICKORY SMOKE FLAVOR" to try and make the almonds taste like they were made in a smokehouse, even though they were not.

39. Even if consumers viewed the ingredient list, they would have no reason to know

⁴ 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.

that listing “natural hickory smoke flavor” forecloses the possibility the Product was also subject to smoking in a smokehouse or over hardwoods, even though it was not.

Jurisdiction and Venue

40. Jurisdiction is based on the Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1332(d)(2).

41. The aggregate amount in controversy exceeds \$5 million, including any statutory and punitive damages, exclusive of interest and costs.

42. Plaintiff Benjamin Wood is a citizen of Maryland.

43. Defendant Blue Diamond Growers is a California agricultural cooperative with a principal place of business in Sacramento, Sacramento County, California.

44. The class of persons Plaintiff seeks to represent includes persons who are citizens of different states from which Defendant is a citizen.

45. The members of the class Plaintiff seeks to represent are more than 100, because the Product has been sold for several years, with the representations described here, in thousands of locations in this State.

46. The Product is sold in numerous sizes such as individual smaller pouches, large pouches, and tins, with identical representations.

47. The Product is available to consumers from third-parties, which includes grocery stores, dollar stores, warehouse club stores, drug stores, convenience stores, big box stores, and online across this State.

48. Venue is in this District, with assignment to the Northern Division, because Plaintiff resides in Harford County and a substantial part of the events or omissions giving rise to these claims occurred in Harford County, including Plaintiff’s purchase, transactions, consumption

and/or use of the Product and exposure to, awareness and/or experiences of and with the issues described here.

Parties

49. Plaintiff Benjamin Wood is a citizen of Abingdon, Maryland, Harford County.

50. Defendant Blue Diamond Growers is a California agricultural cooperative with a principal place of business in Sacramento, California, Sacramento County.

51. Defendant is the largest cooperative of almond growers in the world.

52. Consumers value Blue Diamond almond snacks over competitors, because they know Blue Diamond is responsible for its almonds, which assures them of quality.

53. Plaintiff purchased the Product on one or more occasions within the statutes of limitations for each cause of action alleged, at locations including Walmart in Aberdeen, Maryland, between 2021 and May 2023, and/or among other times.

54. Plaintiff believed and expected the Product was made in a smokehouse and/or from being smoked over hardwoods instead of getting its smoked taste only from added liquid smoke flavor.

55. Plaintiff relied on the words, terms coloring, descriptions, layout, packaging, and/or images on the Product, on the labeling, statements, omissions, claims, statements, and instructions, made by Defendant or at its directions, in digital, print and/or social media, which accompanied the Product and separately, through in-store, digital, audio, and print marketing.

56. As a result of the false and misleading representations, the Product is sold at a premium price, approximately no less than no less than \$3.48 per 6 oz, excluding tax and sales, higher than similar products, represented in a non-misleading way, and higher than it would be sold for absent the misleading representations and omissions.

57. Plaintiff bought the Product at or exceeding the above-referenced price.

58. Plaintiff paid more for the Product than he would have had he known it was not made in a smokehouse or with any real smoke, would have paid less or not purchased it.

59. Plaintiff chose between Defendant's Product and products represented similarly, but which did not misrepresent their attributes, requirements, features, and/or components.

60. The Product was worth less than what Plaintiff paid, and he would not have paid as much absent Defendant's false and misleading statements and omissions.

61. Plaintiff intends to, seeks to, and will purchase the Product again when he can do so with the assurance the Product's representations are consistent with its abilities, attributes, and/or composition.

62. Plaintiff is unable to rely on the labeling and representations not only of this Product, but other similar almonds represented as smoked, because he is unsure whether those representations are truthful.

63. Plaintiff is unable to rely on the labeling and representations not only of this Product, but other nuts represented as being smoked because he is unsure whether those representations are truthful.

64. If Defendant's labeling were to be truthful, Plaintiff could rely on the labeling of other nuts represented as being smoked.

Class Allegations

65. Plaintiff seeks certification under Fed. R. Civ. P. 23 of the following class:

Maryland Class: All persons in the State of Maryland who purchased the Product during the statutes of limitations for each cause of action alleged.

66. Common questions of issues, law, and fact predominate and include whether

Defendant's representations were and are misleading and if Plaintiff and class members are entitled to damages.

67. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair, misleading, and deceptive representations, omissions, and actions.

68. Plaintiff is an adequate representative because his interests do not conflict with other members.

69. No individual inquiry is necessary since the focus is only on Defendant's practices and the class is definable and ascertainable.

70. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

71. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

72. Plaintiff seeks class-wide injunctive relief because the practices continue.

Maryland Consumer Protection Act ("MCPA"),
Commercial Law Art., Md. Code, § 13-101, et seq.

73. Plaintiff incorporates by reference all preceding paragraphs.

74. Plaintiff believed the Product's smoked taste was from being smoked in a smokehouse and/or from being smoked over hardwoods.

75. Plaintiff read and relied on the label which said "Smokehouse" without any qualifying terms which caused him to believe this.

76. Plaintiff was familiar with how foods with added flavoring would disclose this fact on their front label and because the Product lacked such a disclosure, it told him its taste was not from added flavoring.

77. Plaintiff paid more for the Product, would not have purchased it or paid as much if

he had known it had no connection to a smokehouse and being smoked over hardwoods and got its taste entirely from added liquid smoke, suffering monetary damages.

78. Plaintiff desired to purchase a product with the attributes highlighted by the labeling – a smoked taste from being smoked in a smokehouse and over hardwoods and not from added smoke flavoring.

79. Defendant’s false and deceptive representations and omissions are material in that they are likely to influence consumer purchasing decisions.

80. Plaintiff relied on the representations and omissions to believe the Product was made in a smokehouse instead of having added liquid smoke flavor

Breaches of Express Warranty,
Implied Warranty of Merchantability/Fitness for a Particular Purpose and
Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

81. The Product was manufactured, identified, marketed, and sold by Defendant and expressly and impliedly warranted to Plaintiff and class members that it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse or from being smoked over hardwoods.

82. Defendant directly marketed the Product to Plaintiff and consumers through its advertisements and marketing, through various forms of media, on the packaging, in print circulars, direct mail, and targeted digital advertising.

83. Defendant knew the product attributes that potential customers like Plaintiff were seeking and developed its marketing and labeling to directly meet those needs and desires.

84. Defendant’s representations about the Product were conveyed in writing and promised it would be defect-free, and Plaintiff understood this meant that it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a

smokehouse.

85. Defendant's representations affirmed and promised that the Product was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse.

86. Defendant described the Product so Plaintiff and consumers believed it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse, which became part of the basis of the bargain that it would conform to its affirmations and promises.

87. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Product.

88. This duty is based on Defendant's outsized role in the market for this type of Product, the leading name in almonds, trusted by consumers to make and sell almond products truthfully.

89. Plaintiff recently became aware of Defendant's breach of the Product's warranties.

90. Plaintiff provided or will provide notice to Defendant, its agents, representatives, retailers, and their employees.

91. Plaintiff hereby provides notice to Defendant that it breached the Product's express and implied warranties.

92. Defendant received notice and should have been aware of these issues due to complaints by third-parties, including regulators, competitors, and consumers, to its main offices, and by consumers through online forums.

93. The Product did not conform to its affirmations of fact and promises due to Defendant's actions.

94. The Product was not merchantable because it was not fit to pass in the trade as

advertised, not fit for the ordinary purpose for which it was intended and did not conform to the promises or affirmations of fact made on the packaging, container or label, because it was marketed as if it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse.

95. The Product was not merchantable because Defendant had reason to know the particular purpose for which the Product was bought by Plaintiff, because he expected it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse, and he relied on Defendant's skill and judgment to select or furnish such a suitable product.

96. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Fraud

97. Defendant misrepresented and/or omitted the attributes and qualities of the Product, that it was made in a smokehouse instead of having added liquid smoke flavor, even though it was not made in a smokehouse or from being smoked over hardwoods.

98. Moreover, the records Defendant is required to maintain, and/or the information inconspicuously disclosed to consumers, provided it with actual and constructive knowledge of the falsity and deception, through statements and omissions.

99. Defendant knew of the issues described here yet did not address them.

100. Defendant's fraudulent intent is evinced by its knowledge that the Product was not consistent with its representations.

Unjust Enrichment

101. Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of Plaintiff and class members, who seek

restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying Plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing Defendant to correct the challenged practices to comply with the law;
3. Awarding monetary damages, statutory and/or punitive damages pursuant to any statutory claims and interest pursuant to the common law and other statutory claims;
4. Awarding costs and expenses, including reasonable fees for Plaintiff's attorneys and experts; and
5. Other and further relief as the Court deems just and proper.

Dated: May 22, 2023

Respectfully submitted,

/s/Spencer Sheehan

Sheehan & Associates, P.C.

60 Cuttermill Rd Ste 412

Great Neck NY 11021

(516) 268-7080

spencer@spencersheehan.com

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Benjamin Wood, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff Harford (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Sheehan & Associates, P.C., 60 Cuttermill Rd Ste 412 Great Neck NY 11021 (516) 268-7080

DEFENDANTS

Blue Diamond Growers

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions .

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, PERSONAL INJURY, PERSONAL INJURY, LABOR, IMMIGRATION, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, INTELLECTUAL PROPERTY RIGHTS, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332. Brief description of cause: False advertising

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE May 22, 2023 SIGNATURE OF ATTORNEY OF RECORD /s/Spencer Sheehan

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT

for the
District of Maryland

Benjamin Wood, individually and on behalf of all
others similarly situated,

Plaintiff(s)

v.

Blue Diamond Growers,

Defendant(s)

Civil Action No. 1:23-cv-01363

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Blue Diamond Growers
c/o C T Corporation System
330 N Brand Blvd Ste 700
Glendale CA 91203-2336

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Sheehan & Associates, P.C., 60 Cuttermill Rd Ste 412 Great Neck NY 11021
(516) 268-7080

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. 1:23-cv-01363

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: