

# Beth Din of America Reported Decision 2 Delicious Foods vs. Good Chocolates

MAY 21, 2005

The Beth Din of America (“Beth Din”), having been chosen by the parties as arbitrators in an arbitration agreement (attached hereto as Exhibit A) dated February 1, 2005 between Moses Schreider, representing Delicious Foods (“DF”), with an address of 32 Tappan Rd., Baldwinville, Georgia (“Plaintiff”) and Daniel Gold, representing Good Chocolates (“GC”) with an address of 39 Tappan Rd., Baldwinville, Georgia (“Defendant”) to decide the matters described in such arbitration agreement, having given proper notice of the time and the place of meeting, and having also given said matters due consideration, and having heard all parties testify as to the facts of said dispute and differences, does decide and agree as follows:

**BACKGROUND:** Plaintiff, who lives in Baldwinville, purchased DF, a small candy and gift basket store in 2002, and has been operating it since that time. The store sells nuts, dried fruits, candy and chocolate, in bulk and as part of gift baskets. DF does not produce any of its own inventory, and is solely a retail outlet. The premises are certified kosher under the supervision of the Vaad Hakashrut of Baldwinville (“Vaad”). The operating hours are from 10AM-5PM on Tuesdays and Wednesdays, 10AM-7PM on Thursdays, 9AM-2:30PM (or later) on Friday, and 10AM-2PM on Sunday. DF is closed on Mondays. DF also operates a web site – [www.baldwinvillefoods.com](http://www.baldwinvillefoods.com). According to the Plaintiff’s documents and testimony, the store has not been profitable, and Mr. Sch-

reider has not drawn a salary since he acquired the business.

In May 2004, Defendant opened a chocolate store across the street with Vaad certification, selling chocolates, specialty desserts, pancakes, fruit glacés, and hot and cold beverages, all with a chocolate motif. In addition, he produced made to order centerpieces for festive occasions. Defendant produces all the chocolate on-site and offers customers a seating area to eat in a restaurant atmosphere as well as to take home. GC's store hours are from 10AM-8PM on Monday through Thursday, 10AM-11PM on Friday, 10AM-1AM on Saturday and 10AM-6PM on Sunday.

In addition to the stores' differences in products, atmosphere and hours, Defendant claims that his chocolate is of an essentially dissimilar nature, without shortening and preservatives, and that this results in a higher quality, better tasting and more expensive chocolate than the chocolate offered by Plaintiff.

Prior to Defendant's opening, the Vaad notified the Plaintiff of Defendant's plans and informed DF that Defendant's store would begin operations serving only dairy chocolate. They explained that DF could challenge the opening in *beit din* if they perceived it as violating the prohibition of *hasagat gevul* (literally "overstepping boundaries," but used generally to refer to ruinous or unfair competition). Plaintiff, in recognition of GC's exclusive use of dairy chocolate and seeing it as an eating establishment and not a retail marketer, refrained at that time from pursuing a claim.

Defendant informed the Vaad sometime around November 2004 that he wished to offer a pareve, or non-dairy, version of his chocolate in both a restaurant and retail venue. When Plaintiff became aware of this intent, they elected to exercise their right to challenge in *beth din* this expansion.

### **CLAIMS AND COUNTERCLAIMS TO THE BETH DIN**

Plaintiff, in letters and presentation to the Beth Din, makes two related claims, both of which are based on the argument that GC's proposed pareve chocolate line represents a direct competitive threat to DF's entire operation since pareve chocolate is the most important aspect of what they offer:

1) The kosher candy market in Baldwinsville is unable to support two outlets, and in the competitive atmosphere, one will succumb. In particular, GC's entry would likely cause DF to become insolvent, given DF's general financial status and its struggles to maintain its business, which was there first.

2) DF deserves to keep its longstanding customers, who were cultivated in the years since the original store opened and who have increased during the three years

that DF has been operated by Mr. Schreider due to his investment of time, energy, and service. GC should be seen as an interloper that would erase and swallow their painstaking work.

Plaintiff has therefore requested that Beth Din protect the entity that began its operations first (DF), and award DF the necessary monopoly to protect its business by enjoining Defendant from receiving kashrut certification from the Vaad to produce pareve chocolate.

### THE DEFENDANT'S COUNTER CLAIMS AND RESPONSES WERE:

1) GC, along with its large investment in the business, has accepted and conformed completely to all the demands the Vaad had placed on it, and while acknowledging DF's previous entry into the market, claims the right to free enterprise and allowing the consumer to choose.

2) The stores are not in direct competition; DF is essentially a multi-candy store, and much of what DF offers (nuts, dried fruit, and candies) is not sold by GC. The incursion in the chocolate line cannot be seen as a threat to the business as a whole.

3) Even granting the Plaintiff's claim that pareve chocolate is the heart of DF's business, GC's proposed pareve chocolate will be a completely different product, manufactured from more expensive ingredients that produce a different taste and appeal to a higher-end customer.

4) Citing the limited hours that DF operates during the week and the customers who arrive at GC's store during the times that DF is closed, the market is not being served adequately by DF, and there exists no necessary monopoly to protect.<sup>1</sup>

In an attempt to mediate the dispute, the Beth Din suggested the possibility that the parties could enter into a business supply arrangement that would take advantage of GC's expertise in manufacturing chocolate and DF's retail establishment. This type of arrangement, which had also been suggested by the Vaad, was rejected by the parties.

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<sup>1</sup> Defendant also claims that he already has unilateral authority to produce pareve chocolate under his contract and certification from the Vaad. The Beth Din rejects this reading of the contract, noting the passage dealing with pareve production limits this only to wholesale manufacture. See Vaad Contract, Clauses H and I. The contract also recognizes the possible challenge GC could face from a competitor bringing a *hassagat gevul* conflict to *beth din*. See Vaad Contract, Clause U. Over and above these points, the Vaad's contract provides it with the right to withdraw its certification on any grounds. See Vaad Contract, Clause P. As a result, even if the Beth Din agreed that the contract provided Defendant with kashrut certification for pareve chocolate, the Vaad could withdraw this right if this Beth Din determined that Defendant's introduction of a pareve chocolate line of products violated *halachab* (generally accepted Jewish Law).

**ANALYSIS:** While the Torah requires businesses to operate honestly, it does not include any explicit limitation on competition. Nonetheless, several passages in the Talmud indicate that certain types of ruinous or unfair business practices are prohibited.

One passage that speaks directly to our litigation is the Talmudic debate regarding an individual who wishes to open a business in close proximity to an existing business (*Bava Batra* 21b). Rav Huna asserts that the owner of the first business may prevent the newcomer from setting up shop, as the newcomer will interfere with the first inhabitant's livelihood. Rav Huna the son of Rav Yehoshua (who is different from the previous Rav Huna) argues that this is permitted as the competitor may claim, "Whoever will come to me, will come to me, and whoever will come to you, will come to you." Virtually all *Rishonim* and *Poskim* follow the view of Rav Huna the son of Rav Yehoshua, as do the *Shulchan Aruch* and most of its commentaries.<sup>2</sup> If these were our sole sources, then even if we accept fully the Plaintiff's claims, it would be relatively easy to conclude that Defendant's first response is sufficient and to decide in favor of the Defendant based upon the opinion of Rav Huna the son of Rav Yehoshua.

The preeminent Halachic authority since World War II, Rabbi Moshe Feinstein, however, has taken the position that new entrants should be enjoined in certain circumstances.<sup>3</sup> Rabbi Feinstein based his decision on the interpretation of the Talmudic passage cited above and subsequent rulings of the greatest jurist of the first half of the 19th Century, Rabbi Moshe Sofer.<sup>4</sup> According to Rabbi Sofer, Rav Huna the son of Rav Yehoshua holds his opinion only if the new store merely decreases the profits of the existing competitor. If the new entry eliminates the profits, thereby preventing the existing competitor from earning a livelihood, then Rabbi Sofer believed that even Rav Huna the son of Rav Yehoshua would agree that such entry is forbidden. Rabbi Sofer supported his understanding of the Talmudic debate in *Bava Batra* by quoting

<sup>2</sup> See *Shulchan Aruch, Choshen Mishpat*, 156:5 and *Aruch Hashulchan, Choshen Mishpat*, 156:6-7.

<sup>3</sup> See R. Moshe Feinstein (1865-1986). *Iggerot Moshe, Choshen Mishpat* I, no. 38.

<sup>4</sup> See R. Moshe Sofer (1762-1839), *Shu"t Chatam Sofer, Choshen Mishpat*, nos. 78 and 118, cited by *Pitchei Teshuvah, Choshen Mishpat*, 156:3.

<sup>5</sup> An alternative interpretation of the braitā is that the first fisherman had taken ownership of the fish that were certain to enter his net, and the second fisherman fish is effectively stealing fish that already belong to someone else. In this interpretation, the braitā protects incumbents from unfair or predatory competition, but would not prohibit a new competitor from attempting to win business that was not certain to go to the incumbent. Thus, in this interpretation, the *Braitā* would have little bearing on our case as the Plaintiff does not allege that Defendant would be engaging in unfair or predatory competition if it began to offer pareve chocolate.

an unchallenged Talmudic *Braita* that prohibits the placement of a fishing net too close to the existing net of another fisherman. Rabbi Sofer understood the injunction on the second fisherman as resulting from the fact that his actions would have a severe impact on the first fisherman's catch, effectively eliminating his income.<sup>5</sup>

Rabbi Feinstein expands the scope of protection to cover situations where the incumbent's earnings are not eliminated, but instead would fall below that of his socioeconomic peer group. Simply put, Rabbi Feinstein rules that a loss of livelihood is not defined by a loss of one's home or his ability to put food on the table, but rather, one has effectively lost his livelihood if he can no longer afford what he used to be able to afford.

While DF's first claim, arguing that GC's entry would cause DF to become insolvent, appears consistent with the position of Rabbi Feinstein, our examining of the facts and financial information presented to us preclude any reliance on Rabbi Feinstein.

1) DF has been operating at a loss since it was taken over by the Plaintiff. As a result, it is not clear, and in any event, Plaintiff has failed to show, that even the total loss of the business would have an impact on Plaintiff's socioeconomic well-being.

2) Rabbi Feinstein's directives specifically concern a situation where the existing, threatened business is the primary income of the incumbent firm, and its diminution is therefore a threat to the owner's complete socioeconomic status. Plaintiff has not presented to us evidence that this is the case, and given that DF has been operating at a loss, it appears unlikely to be true.

3) Rabbi Feinstein's ruling involves cases of competitors that offer virtually identical products (referred to as homogeneous products in the economic literature) so the addition of a new competitor does not affect demand for the relevant product; a customer gained by one competitor reflects the loss of a customer to the other competitors. DF's first claim is that pareve chocolate is their main offering. The facts, however, do not support their contention, and the Beth Din accepts the Defendant's counterclaim of the disparate nature of the two stores. DF's web site offers 47 different products by the pound; only 14 are chocolate. Even the chocolate line's complete dissolution cannot be seen as a threat to the business as a whole, as the same customer who would now frequent GC for chocolates, could still purchase other items from DF.

As to Plaintiff's claim that the candy market cannot brook the entry of a new vendor since the relevant customer base is only sufficient to support DF alone, the business records submitted by the parties suggest the reverse. DF's revenues increased

by \$7,000 in 2004 relative to 2003, when DF did not face competition from GC, suggesting that GC's presence in the kosher sweets market of Baldwinsville has had a positive (or at least not a significantly negative) effect on DF. Furthermore, demand for kosher sweets sold by kosher sweets retailers increased in 2004 over 2003 by both the additional \$7,000 of sales made by DF and the entire amount of sales made by GC. We suggest that the various differences that will always stand between the shops have allowed Defendant to attract a new audience to his store without detracting from Plaintiff's business. It may also be that the presence of two candy shops in close proximity has brought more customers to the area. Either way, it seems clear that the potential pool of candy customers is not fixed and that GC's entry expanded the pool of dessert purchases by kosher conscious consumers. Granting the right to produce *pareve* chocolates may increase that base even wider.

In this regard, the Beth Din accepts Defendant's citation of the significant difference in the hours of operation between the two stores. GC is open more than twice as many hours as DF (76 hours to approximately 33 hours). Plaintiff argues that he occasionally opens his store at other times at the request of customers that call him, but this itself only underscores the salient contrast between the two stores as well as the existence of customers who are eager to purchase products in the hours that DF is not regularly open.

Before dealing with Plaintiff's second claim, it is worth noting that the decisions of Rabbis Sofer and Feinstein that provide the greatest support for Plaintiff's first claim also suggest that the foregoing discussion provides a basis to reject this claim. Specifically, Rabbis Sofer and Feinstein allow new competition when its presence clearly benefits local consumers, notwithstanding the adverse effects it might have on incumbent merchants. While Rabbinic authorities debate whether a lower price could serve as a sufficient benefit, there is unanimity among the authorities to allow new entrants that provide a better quality. The Beth Din recognizes that it is not a confectionery connoisseur, however Defendant's presentation leads us to agree that he is offering a better product that will benefit the kosher consumers.

As noted above, DF's second main claim is that GC's entry would effectively snatch the gains that DF is poised to make. This claim has a distinct Talmudic basis, namely the Talmudic prohibition of *ani mehapekeh bechararah* (literally "a poor person seeking a piece of bread," which refers to a case where a usurper comes in and takes the bread that the poor person was trying to get), which brands the usurper a wicked person (*Kiddushin* 59a). If this injunction applies in our case, it would be difficult

to allow GC to produce their line, despite the reasons enumerated above.

It is clear, however, from the *Shulchan Aruch* and from the discussion of the subject by Rabbi Feinstein, that this principle in a commercial setting applies only when the parties reach agreement regarding price, and the only matter missing is the symbolic act of kinyan on the part of the buyer to make the deal legally binding.<sup>6</sup> The *ani me-hapekb* principle has no application to attempts to lure away future business.

We therefore reject Plaintiff’s claim and find that Defendant’s proposed introduction of a pareve line of chocolate products to be sold as retail items does not violate *halachah*. However, in reaching this decision, we note that we likely would have reached a different conclusion if GC was expanding into nuts, dried fruit and candies, in addition to pareve chocolate.

**RULING:** Plaintiff’s request for an injunction preventing Defendant from introducing pareve chocolate is denied.

The Beth Din shall retain jurisdiction over this dispute and penalties for the violation of any of these clauses shall be set by the Beth Din, in accordance with the rules of the Beth Din and the arbitration agreement.

Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din, and the arbitration agreement of the parties.

Let peace and harmony reign between the parties.

Any provision of this agreement may be modified with the consent of both parties.

All of the provisions of this order shall take effect immediately.

IN WITNESS WHEREOF, we hereby sign and affirm this Order as of the date written above.

By: \_\_\_\_\_  
 Rabbi AA                      Rabbi BB                      CC, Esq.  
 Dayan                              Dayan                              Dayan

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<sup>6</sup> See *Shulchan Aruch, Choshen Mishpat*, 237 and *Iggerot Moshe, Even HaEzer* I, no. 91.