

ספירם

ANHEUSER-BUSCH BEER PRODUCTS

The Concern

Mott's, a division of Dr Pepper/Snapple Group, sells a beverage called Clamato, which contains clam powder, and Anheuser-Busch recently introduced a beverage called Chelada which is a mixture of Budweiser beer and Clamato. In recent months, *Kashrus Magazine* wrote that since Chelada is tunnel pasteurized¹ on the same equipment as other beer products, the public should avoid all Budweiser products until the process is "inspected by a competent kashrus expert".

This statement caused quite a tumult, and at the beginning of October 2008 Rabbi Yechezkel Auerbach connected us with Steve Michalak (Brewmaster, New Products at Anheuser-Busch), who agreed to allow the cRc to visit the plant so as to put this issue to rest. Rabbi Auerbach found us particularly suited for this job because we certify the products at the company which produces Clamato (Dr Pepper/Snapple Group) and would therefore have access to the formulation of that product.

The Resolution

Our research of this issue included a review of the Clamato formula by Rabbi Benjamin Shandalov during a visit to the Dr Pepper facility, inspection of the production procedures at Anheuser-Busch by Rabbi Dovid Cohen, and collection of information on the clam powder from the manufacturer and independent sources. During the plant visits and in the subsequent weeks, Dr Pepper and Anheuser-Busch graciously allowed us access to numerous plant personnel who were exceedingly cooperative in answering our questions and helping us understand the details of this issue.

At this point we have concluded our investigation and have come to the following conclusions:

- Anheuser-Busch beers sold in bottles are free and clear of any concerns.

At Anheuser-Busch, pasteurizers used for cans are never used for bottles (and vice versa), and therefore since Chelada is currently only packaged in cans, there is no way that beer packaged in bottles could be compromised by the clam in Chelada. [The dedication of pasteurizers at this company is due to the difference in the filling equipment associated with these pasteurizers, and not due to any difference in the pasteurizers themselves].

- Dr Pepper has already made changes to the production of the Clamato used in Chelada, without changing its basic recipe, so that Anheuser-Busch beers sold in cans will also be acceptable.

Some equipment used for both Chelada and other beers poses more of a concern than others. To focus on the primary question, we will first discuss the equipment which poses less of a concern.

The tanks and hoses used for Chelada are never used for any other product. The filler and most pipes which are used for Chelada are also used for other beverages, but the products are all cold when they pass through this equipment, and Anheuser-Busch does a thorough cleaning of the equipment between products such that there is no concern of any Chelada residue contaminating any subsequent product.

After Chelada is put into the can and the can is sealed, the Chelada is pasteurized hot in a tunnel pasteurizer which had previously been used for other beverages (in sealed cans), and the procedure for separating between products most definitely does **not** qualify as a *kashering*. However, due to the infinitesimal amount of clam in Clamato, we believe the kashrus of the other products are not affected. [Other than the clam powder, all ingredients – including flavors – used in Clamato are kosher].

We believe that it is impossible for the clam to be **עומן** into the variety of Clamato used in this product. Our rationale is as follows:

¹ Tunnel pasteurizers were discussed in *Sappirim* 5. In brief, after the beer is put into the bottle or can, the sealed container goes through a 50 foot long tunnel pasteurizer where hot water rains down on the bottles until the beer is heated to about 140° F, thereby destroying all harmful microorganisms. The same water is reused again and again for thousands of bottles, which means that the water could potentially carry non-kosher *ta'am* from one beer to an otherwise kosher beer.



- A. The clam powder comprises such a small part of the Clamato formula that it is **בטל בששים** many times over.
- B. However, the clam powder is not just ground clams but rather a concentrated clam broth, such that each spoonful of clam powder is able to be **טעם** into much more than **ששים** spoonfuls of **היתר**. After carefully calculating the concentration level of the clam powder, we were able to compute that in its reconstituted form it would be borderline **בטל בששים**. Based on these calculations alone, we would **היה** be able to comfortably state that the clam powder is **בטל בששים**.
- C. Nonetheless, just as we have considered the concentration level of the clam powder in determining if it is **טעם**, **נותן טעם**, we must also consider the concentration level of the **היתר** ingredients. For just as concentrates can be **טעם** into more than **ששים** of their concentrated forms, so too concentrated ingredients can "absorb" the **טעם** of more than **ששים** of their concentrated forms. In fact, in our case, most of those **היתר** ingredients are also concentrates – some of them to similar concentration levels as the clam powder, and others less concentrated.
- D. We therefore conclude that the concentrated clam is **בטל בששים** and is not **נותן טעם** into the concentrate Clamato formula into which it is mixed.

The above determinations (1) were made specifically for the formulation of Clamato used in Chelada and may not be true of other formulations, (2) took into consideration the order in which the clam powder is added to the Clamato so as to make sure there are no issues of **חני"ג**, and (3) compared the volume of the different ingredients (as opposed to their weights) in calculating **בטול**, as per **פתחי תשובה צ"ח ב' ב**.

We were not able to meet these standards (as relates to #2) without asking Dr Pepper to change part of the way they formulate the Clamato for Anheuser-Busch, and they have agreed to make that change effective immediately. Even without this change, there is halachic basis to consider permitting the canned beer based on **ספקו של הפמ"ג** (סימן צ"ח ש"ד ס"ק ל"ב) **דאולי אין להחמיר לומר חני"ג בשאר איסורים במקרה כזה שיש ששים של היתר נגד האיסור ומה שהאיסור אינו בטל הוא רק משום שהוא עבידא לטעמא**.

- The kosher status of Anheuser-Busch beers are not affected by the Bud Light Lime beverage bottled on shared equipment.

While investigating the issue of Chelada, we became aware of the related issue that Anheuser-

Busch produces a flavored beer product called "Bud Light Lime" which shares a tunnel pasteurizer with other non-flavored beer products. [Bud Light Lime is sold in cans and bottles]. We do not believe this raises a *kashrus* concern for other Anheuser-Busch beers because:

- E. There are halachic rationales as to why a flavor of unknown status does not affect other beverages produced on the same equipment. The basis of that position is beyond the scope of this document, but it is noteworthy that this position is accepted by many of the leading American hashgachos.
- F. The "flavor" used to impart the lime flavor bears the certification of a reputable *hashgachah*. There is no guarantee that this will not change in the future, and therefore we cannot recommend consumption of Bud Light Lime itself, but nonetheless this does play a contributing role in our position regarding other items produced on the same equipment as Bud Light Lime.



DAIRY CROISSANTS, DOUGHNUTS AND MUFFINS

Rabbi Ari Senter
Kashrus Administrator, Kof-K

The following is a transcript of Rabbi Senter's presentation at the AKO General Membership Conference on November 13, 2008. Parenthetical comments or discussions which came up during the presentation can be found in the footnotes

It is well known that one may not produce *pas*² which is dairy (or *fleishig*), and the *hashgachos* scrupulously adhere to that requirement. The reason for the *issur* is that *Chazal* were concerned that since *pas* is always assumed to be pareve, if in fact the *pas* was dairy someone might come to eat it together with meat.³ As such, if a given form of *pas* is regularly⁴ dairy there is no concern that someone will make this mistake, and it is therefore permitted to create that form of dairy *pas*.

Seemingly, the application of this leniency will change depending on the time and place, such that

² The term *pas* will be used as it is more inclusive than the term "bread" and as relates to these halachos it is more appropriate to use the broader term. There was a bit of discussion as to which foods qualify as "*pas*" as relates to this halacha, and whether the prohibition against producing dairy *pas* also encompasses other foods which are commonly eaten with meat (e.g. ketchup). It was also noted that even if the halacha does not specifically forbid the creation of dairy non-*pas* items, in some cases it is inappropriate to certify such items as they present a clear *michshol* (e.g. dairy barbecue sauce).

³ Eating milk (e.g. dairy bread) with meat is only forbidden *mid'rabannan*, so why it is not it a *גזירה לגזירה* to forbid the creation of dairy bread? Rabbi Senter cited *Kaf HaChaim* 97:1 who answers that it is not considered a *גזירה לגזירה* because it is *קרוב לודאי* that the dairy bread will end up being eaten with meat.

⁴ Some reference was made to a question in the *Poskim* as to whether (a) one may produce dairy *pas* in a community where some people are unaware that that form of *pas* is dairy, and (b) the baker must be concerned about visitors to the community who are unaware that in this area that form of *pas* is dairy.

if in one era and area a certain *pas* is always pareve then it will be forbidden to create a dairy version, but if in a different time or place it is regularly dairy then it would be permitted. This raises an interesting contemporary issue:

Rabbi Senter took an informal survey as to whether people thought croissants,⁵ doughnuts, and muffins⁶ were commonly dairy or pareve. He was surprised to find that all those who ate *chalav stam* responded that these items are dairy, but those who only eat *chalav Yisroel* responded that these items are always pareve! The reason for this disparity is obvious: those who eat *chalav stam* are used to eating Entenmanns doughnuts, Thomas' English Muffins, and similar items, while those who eat only *chalav Yisroel* have more limited choices and only eat the pareve varieties of these baked goods.

Thus, it seems that even within one neighborhood there may, in fact, be two different "communities" as relates to the halacha of dairy *pas*. One group would be permitted to produce dairy croissants, doughnuts and muffins, while the other would be forbidden.

This suggestion would also appear to be relevant to the *hashgachos* in deciding whether to allow a bakery to produce these items as dairy. One could argue that in a commercial bakery which services a wide variety of consumers it should be forbidden to create/certify such dairy *pas* since it is forbidden for some of the consumers.⁷ At a retail bakery it may be that it would be permitted in Teaneck (where most people eat *chalav stam*) and forbidden in Lakewood (where most people do not).



PEPPERS

Peppers come in many varieties from the mild common bell pepper to the very hottest pepper, known as the habanero pepper. Some of the most common varieties are Arbol, Bell, Cayenne, Green Chile, Habanero, Jalapeno, Manzano, Malagueta, Poblano,⁸ Serrano,

⁵ Croissants themselves are actually a more particular issue, as the original term "croissant" referred to an item made of pastry dough smeared with butter, so until recently (when pareve margarine and butter flavors became available, companies wanted to save money and certain consumers did not want dairy products) no one would have dreamt that it would be forbidden to create dairy croissants.

⁶ A number of suggestions were given as to why the OU certifies Thomas' English Muffins as OU-D. The first was for the reason noted in the text, when Thomas' was the only/dominant brand everyone "knew" that muffins are dairy. Other reasons suggested were that small packages of muffins can be finished within one meal and that the dairy is *batel b'shishim*. [In fact, the OU's rationale is based on *bitul b'shishim*, and there is no issue of *bitul issur l'chatchilah* since the packages are labeled OU-D].

⁷ On the other hand, one must consider that those consumers who only eat *chalav Yisroel* would never purchase *chalav stam* items, such that in a sense the items are kosher for all of the "consumers" who rely on this *hashgachah* (Editor's note).

⁸ Dried Poblans are called ancho or mulato chilies.

and Tabasco.⁹ They are Group 1 when they are sold fresh, dried, or powdered, but require *hashgachah* when they are canned or pickled.¹⁰

"Chipotle Peppers" are not the name of a variety of peppers, but rather are Jalapeno peppers which have been smoked and dried (and are often sold in a ground, powder form), and require *hashgachah* to guarantee that the smoking equipment is not used for non-kosher items.¹¹

Although certain peppers are also referred to as "chili peppers", chili powder is often not plain ground peppers, but may be a blend of spices which could include kosher-sensitive ingredients.¹² Therefore, chili powder requires *hashgachah*.



PROTECTING YOUR KASHRUS LOGO

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Attorney, Bingham McCutchen

The following is a transcript of Mr. Scherr's presentation at the AKO General Membership Conference on November 13, 2008. Bingham McCutchen has represented the OU for decades and Mr. Scherr has been assigned to this account for 5 years.

Note: The following are the author's notes of Mr. Scherr's presentation and do not purport to be an article drafted by Mr. Scherr or Bingham McCutchen. Any legal questions should be addressed to a qualified attorney.

Consumers rely on the *kashrus* symbol to identify food as kosher, and it is therefore the obligation of the *hashgachah* to protect the use of that symbol in the best way possible.

A trademark is defined as a distinctive mark, symbol, or color scheme which identifies and distinguishes a product from others on the market. For example, the triangular Nabisco logo used on the packages of Oreo cookies lets consumers know that the cookies in this container will meet certain expectations which might not be true of other cookies available. The trademark is legally considered to be the property of the trademark owner, and no one else may use it without his permission.

⁹ The "heat" of a pepper is measured in "Scoville units", and the ratings for some of the peppers listed are as follows: Arbol - 15,000-30,000; Bell - 0; Green Chile - 1,000-2,000; Habanero - 200,000-300,000; Jalapeno - 2,500-8,000; Manzano - 30,000-50,000; Poblano - 1,000-2,000; Serrano - 8,000-22,000. This information can be found at <http://phoenix.about.com/od/foodanddrink/ss/chilepepper.htm>.

¹⁰ Canned peppers may be produced on equipment used for non-kosher products, and the pickling agent used for pickled peppers may be non-kosher (e.g. wine vinegar).

¹¹ Some have experimented with creating Chipotle peppers by adding liquid smoke to dried jalapeno peppers (and this would raise its own *kashrus* concerns), but it seems that these efforts have not yet been successful.

¹² This is similar to the way "curry powder" refers to different spice blends which might contain kosher-sensitive ingredients, and does not always refer to mere ground curry.

[Descriptive terms such as “kosher” cannot be trademarked and cannot become the property of any one entity.¹³ In some states there are fraud laws which dictate requirements for those who use the term “kosher”, but those statutory requirements are not the same thing as trademark rights].

The term “trademark” is used to refer to a group of similar items, such as trademarks, trade-names, trade-dress, and service-marks, and the trademark law provides similar protection for all of them. However, the law views those items as very different from certification marks. A trademark is something which identifies the item that your company produces or markets (and a service mark identifies the service you are providing) while a certification mark indicates that the item produced by someone else meets the given criteria indicated by your certification mark. For example, juice produced by members of the Florida Citrus Growers Association (FCGA), can bear the trademarked logo of that organization, but if the FCGA approves of a non-member’s products as meeting their criteria of purity etc., they must use a different symbol which indicates that this is a certified item.

The law is very strict in this regard, and if a group uses their certification mark to identify items which it actually produces or markets, then they may lose the protection given to that certification mark! For this reason, the OU recently developed a new logo which they use to identify their different programs (i.e. their trademark) so that the well-known OU logo could remain protected as a certification mark to be used to identify kosher foods.

This is quite relevant to *hashgachos* who commonly use their certification mark (i.e. their logo) to identify other services that they offer to the community, and if they do so they stand a chance of losing the rights to their certification mark.

Some possible exceptions to this rule are:

- The *hashgachah* may use the logo on their stationery. [Placing the logo on the door into the building or in other locations may not be permitted].
- The *hashgachah* may be allowed to use the logo to advertise a *kashrus* seminar which is being held, as the seminar relates to your qualification to offer such certification.

- The *hashgachah* is permitted to use modified versions of its logo to differentiate between its certifications and services. For example, the FCGA logo might be their trademark and the same logo with the word “approved” could be used as a certification mark. The change of the logo has to be apparent to the point that consumers are not confused by the two marks.

Another feature of a certification mark is the law of “forced licensure” which requires one to grant certification (and the rights to use the symbol) to anyone who meets the given standard. Someone who fails to follow this requirement risks losing the rights to their symbol. At first glance, this would appear to mean that a *hashgachah* cannot withhold certification from someone who they consider unsavory, but there are a number of reasons or situations where this might not be true:

- If the stated standards exclude people who have been convicted of a crime or some other measure of honesty etc. and that standard is applied to all clients, then the person can be turned down for certification since they do not meet the “standard”.
- If certification requires the *hashgachah* to rely on the reporting of the licensee, they may be entitled to withhold certification from a person who they believe cannot be trusted to fulfill those obligations.
- Since kosher certification means that someone meets a religious standard, it may be implicit that people who do not meet certain ethical qualifications cannot be granted certification.

In a sense, the latter two cases may merely be examples of the first exception.

Similarly, it would seem that a *hashgachah* cannot withhold certification from a retail bakery merely because it is too close to another retail bakery, unless the requirement to be a given distance from another establishment was part of the stated standard and was enforced in practice.

A requirement of all trademarks and certification marks is that the owner must make reasonable efforts to protect the use of his mark or else he risks losing the rights to it. This does not mean that a *hashgachah* has to prosecute everyone who makes unauthorized use of their symbol, but it does mean that they have to show a pattern of reasonably responding to such uses. Such response may involve issuing a cease and desist letter, suing the person in court, asking a judge for an injunction or other methods which show that one protests the unauthorized use of the mark.

¹³ In addition, trademarks are meant to protect symbols and other identities, and a different set of laws protects creative items (copyrights and patents). In a sense, American law encourages people to copy people’s non-creative products, and gives trademark protection so that consumers can identify the purveyor of the specific “version/copy” they see in the store.