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**BAGGING SETTLEMENT**  
**MEDIATION**  
**PHASE 2 – NEGOTIATING DOCUMENTS & PRELIMINARIES**

**Information for Bagger's Attorney**

You and Delishco's counsel have selected a mediator, who has been approved by your clients. The mediator has scheduled a telephone conference with counsel to discuss issues relating to document exchange and other preliminary matters. Because suit has not been filed, there has been no discovery. You anticipate that Delishco's counsel may want to set up a "fishing expedition" for free discovery. Your client is very concerned that Delishco may try to use the case to learn more about their bag business. They fear Delishco is developing the in-house bag manufacturing capacity to sell bags to other companies and become a competitor. You do not want to give away any documents that would damage your client's case or enable Delishco to learn your client's business and customer lists. On the other hand, you want to be helpful to the mediation.

As counsel, you have interviewed the people at Bagger who worked on the negotiation of the Bagger-Delishco contract and have worked with Delishco's people as the contract was being performed. You had nothing to do with the original contract. It was drafted by businesspeople, primarily B. Borman. The language was hastily (carelessly) reviewed by another lawyer who no longer works for Bagger.

You believe the contract language is sufficiently ambiguous to admit parole evidence as to its meaning (you know Delishco's counsel will disagree, and you are unlikely to convince each other). The CFO of the company, son of the founder, is adamant that there were assurances about a "minimum" of 500 million bags, and that, at one point in the negotiations, he asked: "What if you sell off the orange harvesting? Then what happens to the contract? Are there any plans for a sale?" He claims Delishco's in-house lawyer specifically denied plans for a sale. It will be important to find out when Delishco's people knew a sale of the orange harvesting operation was just over the horizon. If they knew a sale was planned, then their contract was a fraud - they would have known they wouldn't be buying bags for 8, or even 5 years.

Your clients, particularly the Bagger family members, are VERY concerned about the possibility that the "Grains and Nuts" division of Delishco is aiming to compete in the food bag market. Delishco Grain and Nuts recently acquired a small bag business, gave all of its bag suppliers notice that their contracts would not be renewed, and began manufacturing bags in-house. Bagger will refuse to provide any information to Delishco about their business operations, customer lists, or marketing plans that would end up helping Delishco make and sell bags.

B. Borman is angry and bitter. He is adamant that they told Delishco the 10¢ per bag price was a 25% discount BECAUSE of the guaranteed minimum of 500 million bags. The time was extended to 8 years to get the 500 million bag order. He and the CFO both made notes to that effect.



The interpersonal dynamics are tricky. Most directly involved were B. Borman, who has a hot temper, and his best friend, the CFO, each expressing equal anger and feelings of betrayal. The CEO is the CFO's older sister, who seems cool and logical. The founder and Chairman, at age 70 indirectly runs the place, as the son and daughter respect him tremendously. He is hard to read. Very smart but reserved. If he has a temper, it's well masked. He is a man of principle, with a long life of business experience. You are not sure who should be present at the mediation.

Work with the mediator and opposing counsel to discuss and agree upon preliminary items such as documents to be exchanged, documents to be provided to the mediator, any other information gathering, and any other issues that should be resolved prior to the mediation. Your goal is to set up a successful process - and a process that works to your client's advantage, if possible.