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

**Information for Delishco's Attorney**

You and Bagger'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 opportunity for discovery. You anticipate that Bagger's counsel may be trying to go on a "fishing expedition" for free discovery. You do not want to give away any documents that would damage your client's case. On the other hand, you do want to be helpful to the mediation.

As counsel, you have interviewed the people at Delishco who worked on the negotiation of the Bagger-Delishco contract and those who have worked with Bagger's people as the contract was being performed. You did not negotiate or approve the language of the original contract. It was done between businesspeople and hastily reviewed by an assistant general counsel who is no longer with the company. No one remembers specifically discussing the question of what would happen under the contract if Delishco's orange harvesting operations were to be sold or cease to operate. It appears that, by the time the contract was signed, some folks in the company (particularly in the legal department) might have been aware of some corporate interest in selling the company within the next year or so. However, no transaction was on track at the time. You have not interviewed corporate management regarding the timing issue.

You think that the contract language should be sufficient: it does not SAY that Delishco had to purchase 500 million bags within an 8-year period. On the other hand, Delishco's business representative for the negotiations does have extensive notes, including a handwritten document titled "Estimated bag orders - High and Low" The figures under "high" show 500 million bags within 5 years. The figures under "low" show 500 million bags within 8 years. There is a circle around 500 million = 8 years, with the notation on the right saying 25% price reduction.

You don't think this document is terribly important, though you recognize that Bagger might not agree. From your perspective, the contract is clear, and Bagger is bound to the "four corners of the contract." No extrinsic documentary or parole evidence should be admissible at a trial. You believe you would prevail on the argument that the contract language is unambiguous. You know that Bagger's lawyer will argue that it *is* ambiguous and extrinsic information is admissible. You are unlikely to be able to convince each other. Clearly, the handwritten document would be discoverable (even if not admissible), but you are not sure about providing it in the mediation. You will have to think about this strategically.

You know that you will want to see Bagger's information regarding profit margins. Even under Bagger's theory, they would be limited to actual lost profits. Delishco's



businesspeople have told you they think that all bag businesses operate with relatively low-profit margins. It is important to learn what the real damages are. Mitigation is also important. While Bagger can handle a lot of bags, its capacity to produce is not infinite. If Bagger has been able to land new customers to fill the capacity left open by Delishco, mitigation would be complete. You want to know their capacity, and what new customers they have approached or signed to fill it up.

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.