BAGGING SETTLEMENT
MEDIATION
PHASE 2 – NEGOTIATING DOCUMENTS & PRELIMINARIES

BEFORE THE CONFERENCE CALL WITH COUNSEL

Information for the Mediator

A few days after an initial conversation with one of the attorneys in the Bagger-Delishco case, you learned that you had been selected as mediator. The parties have agreed to have the mediation in your offices.

You suggested a conference call with both attorneys, to learn more about the case and get enough information to make recommendations about the process, documents to be provided or exchanged, managing any difficult dynamics, and ensuring that the optimal decision makers will be present.

Based upon your earlier call with one of the lawyers, you learned that the parties are Bagger Inc., a distributor and manufacturer of woven polypropylene bags, based outside of Philadelphia, and Delishco Inc., a multinational Cincinnati-based food company. Less than two years ago, Delishco entered into a contract with Bagger to supply all the bags used in its orange harvesting operations. The contract provided that Delishco would pay 10 cents per bag for up to 500 million bags, over a five-year period, and that Bagger would be Delishco's exclusive supplier during that period. Bagger reads the contract to state that if Delishco had not purchased 500 million bags within 5 years, the contract would extend out to 8 years. According to Bagger (and stated in the contract), the price of 10 cents per bag represented a 25% discount under normal prices, in consideration for Bagger's being named the exclusive supplier. For 18 months, Bagger supplied Delishco with bags: a total of 150 million bags were purchased during that period, for a total of $15 million.

Six months ago, as part of a corporate reorganization, Delishco spun off its orange harvesting operations and sold them to a separate company. The Delishco/Bagger contract made no mention of the contractual obligations continuing to a successor. Delishco notified Bagger that it would not be purchasing any more bags under the contract.

Bagger and its attorney interpret the contract language as intended to mean that Delishco was obliged to buy 500 million bags - if not in 5 years, then within 8 years. Delishco and its attorney interpret the language of the supply contract to mean that if Delishco doesn't need any supply, it doesn't have to buy any bags.

No lawsuit has yet been filed. However, Bagger's lawyer's demand letter stated that Bagger will demand its lost profits on the balance of $35 million it would have received under the contract, if Delishco doesn't buy the remaining 350 million bags. Delishco's lawyer suggested mediation to try to reach a resolution of the dispute without litigation and Bagger's lawyer (and Bagger) agreed.

You understand that Delishco is quite formal and hierarchical in nature. The attorney you spoke with didn't know who Delishco's decision-maker would be or whether marching orders would be coming from inside counsel or the business decision-makers.

You understand that Bagger is a remarkably successful, family-owned owned closely held company. The founder's two children are the CFO and the CEO. The founder remains Chairman of the Board and is still actively involved, though probably past 70 years of age. The attorney didn't know whether any of the family members were directly involved in the negotiation of the contract with Delishco. He indicated that B. Borman, one of Bagger's more senior salespeople, was responsible for the Delishco account.

Prepare for your conference call with both attorneys.