



BAGGING SETTLEMENT MEDIATION PHASE 2A – NEGOTIATING DOCUMENTS & PRELIMINARIES

CONFERENCE CALL WITH COUNSEL - SECOND TAKE RESOLVING DISPUTES BEFORE THE MEDIATION SESSION

Information for the Mediator

Largely because no suit has yet been filed and thus no discovery has occurred, your telephone conference with both attorneys revealed several thorny issues relating to the exchange of information and preparation for the mediation. It became clear that the call would require more time than anyone had anticipated. One of the attorneys stated that he would have to leave the call for a scheduled court hearing. All agreed to “reconvene” to work out these issues.¹

The disputed issues that surfaced in that first conference call are as follows:

Delishco’s counsel suspects that Bagger’s counsel may be trying to go on a “fishing expedition” for free discovery. He does not want to give away any documents that would damage his client’s case. On the other hand, he states that he does want to be helpful to the mediation.

Delishco’s counsel did not negotiate or approve the language of the original contract. While he acknowledges having interviewed people at Delishco involved in the contract negotiations and in working with Bagger’s people during its performance, he notes that these interviews are protected by the attorney-client privilege.

Delishco’s position is that the contract language should be sufficient: it does not SAY that Delishco had to purchase 500 million bags within an 8-year period. Thus, from Delishco’s perspective, conversations during, before, or after the negotiations are irrelevant. 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. He believes he would prevail on the argument that the contract language is unambiguous.

Of course, Bagger’s lawyer maintains that it *is* ambiguous and extrinsic information is admissible. They are unlikely to be able to convince each other.

On the subject of damages, Delishco’s attorney wants to see Bagger’s information regarding profit margins. He claims that, even under Bagger’s theory, they would be limited to actual

¹Should this second discussion occur in person or over the telephone, if either were possible? Should the mediator simply make a second call at an arranged date and time, or should the mediator talk to each attorney confidentially, prior to a second call. If you are one of the attorneys, which approach would be preferable?



lost profits. He thinks all bag businesses operate with relatively low-profit margins. He also seeks information on Bagger's efforts to mitigate, arguing that while Bagger can handle a lot of bags, its capacity to produce is not infinite. Delishco wants to know Bagger's capacity, and what new customers they have approached or signed to fill it up. Bagger's attorney is VERY much opposed to providing Delishco with information about his client's business operations or customer contacts.

Try to obtain agreement on issues such as documents to be exchanged, documents to be provided to you, any other information gathering, and any other issues that should be resolved prior to the mediation. Your goal is a successful process.