
**BAGGING SETTLEMENT
MEDIATION
PHASE 3 – FINALLY, THE MEDIATION**

Confidential Information for Delishco's Attorney

Your client is Delishco Inc., an enormous multi-national corporation that harvests and/or produces a wide variety of food products and sells them all over the world. Your primary client contact, who will attend the mediation as Delishco's representative, is Delishco's Vice President of Beverage Products ("the VP").

In preparation for the scheduled mediation session, you reviewed the file to recall the information below.

Two years ago, Delishco entered into a contract with Bagger Inc. a manufacturer of woven polypropylene bags, to supply all of the bags used in its orange harvesting operations. At that time, Delishco's Beverage Products Division harvested oranges for use in a line of orange juice and orange juice blend products. Since then, the corporation has reorganized to increase efficiencies across product lines. Delishco realized that several of its divisions were using various orange products - for orange sorbet in the frozen desserts division, for orange rind in muffins, and so on. Rather than duplicate efforts, Delishco decided to spin off orange harvesting to a separate entity, which would sell each division the orange products it needed.

Under the original contract between Bagger and Delishco, Delishco was to pay 10 cents per bag for up to 500 million bags, over a five-year period, and Bagger was to be Delishco's exclusive supplier during that period. The VP was not directly involved in negotiating the contract, but they were aware of it. At the time, the VP's purchasing manager was delighted with the terms, because he knew 10 cents per bag was a considerable discount - perhaps 3 - 4 cents per bag less than what he had been charged by the previous supplier. The VP knew that, under the contract, if Delishco had not purchased 500 million bags in 5 years, the contract would extend to 8 years.

You have expressed concern to the VP because his/her purchasing manager did keep extensive notes about the negotiation, 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.

The VP doesn't seem to understand why you are so concerned about these notes. In the VP's view, Delishco estimated its annual bag needs at 70 to 100 million bags, which would have reached 500 million in 5 - 8 years. But there was NO guarantee written into the contract. The VP would never have permitted that because they (and folks in the legal department) had an inkling at the time that the orange harvesting division might be sold off within the next few years. You have explained to the VP that Bagger may try to call this fraud. "No way," the VP told you. "We didn't KNOW we were going to spin off orange



harvesting, that was just one idea on the table, one among at least half a dozen ideas that were being floated. Some people in the company thought we should bring MORE of the harvesting in-house, instead of spinning off.” In fact, one plan called for “up the line” integration for all fruit products, with Delishco acquiring cranberry, raspberry, and apple harvesting operations. Another plan would have kept orange harvesting, and more aggressively promoted other orange products to its other food divisions. In any event, the Delishco people negotiating with Bagger wouldn’t have known of these ideas until well into the deal.

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.

By six months ago, the idea to sell the orange harvesting operations had been approved and implemented. Delishco notified Bagger that it no longer needs any supply, and thus doesn’t have to buy bags. Bagger is whining for a guarantee, but it wasn’t negotiated.

The inside lawyer - Delishco’s Assistant General Counsel - explained some time ago that Bagger was planning to file a lawsuit. He said that Bagger was demanding its lost profits on the balance of \$35 million it would have received under the contract. When the case was set for mediation, he suggested that the VP attend as a client representative, along with the outside attorney who would be litigating the case. You have met once with the VP and asked him/her to think about the issues raised, the details of the transaction, and the negotiation, and to consider possible creative solutions.

The VP seems adamant that Delishco owes Bagger nothing. They also doubt Bagger’s profit margin is terribly high. After all, the bags were priced at a real discount. What has Bagger done since then to replace this contract? Bagger does not have unlimited capacity. If it finds other large contracts, it will have lost nothing. (If Bagger replaced the Delishco contract with contracts at higher prices, it will have BENEFITTED from the cancellation.)

Delishco does not control the source of bags used by the company that purchased its orange harvesting operation. The VP is quite certain that they work with a different bag supplier, under an exclusive supply contract for a period of years.

Delishco does use different types of bags in its other food operations. For example, the VP’s juice division uses specialty drink bags, fitted with straws and special tear-off seals for children. Delishco’s snack division uses bags for chips and nuts... and so on. The VP believes that Delishco’s “Grain and Nuts” division recently purchased its own bagging and sealing machine for the internal bags in granola cereal boxes, to eliminate the inefficient practice of shipping the product twice, sending it out for bagging and back into the company for boxing. Delishco does not consider itself to be a bag maker for most products. The VP would not be averse to exploring the possibility of Bagger supplying bags to other divisions that need them. However, the VP would have to get approval and learn the status



of the Division's supply contracts. They don't know whether Bagger can make a full range of specialty bags.

While Delishco is known as a somewhat formal, hierarchical company, the VP has a great deal of discretion in reaching a settlement. They are confident that their recommendation will be respected. Now, however, the VP sees no reason to settle for anything but a minimal amount. Let the lawsuit go on. Delishco can afford it. There was no guarantee written into the contract, and Bagger can't write one now. On the other hand, the VP has promised that if Bagger or the mediator say something in the mediation that strikes him/her as fair and reasonable, they will work with them.