BAGGING SETTLEMENT
MEDIATION
PHASE 3 – FINALLY, THE MEDIATION

Confidential Information for Bagger's Attorney

Your client is Bagger Inc., Inc., a manufacturer and distributor of woven polypropylene and other synthetic bags for industrial and agricultural applications. While Bagger Inc. is capable of manufacturing and printing a large volume of fairly standard, uncomplicated bags, it also holds a number of patents on specialty bags, with complex seal and valve designs. Your primary client contact, who will attend the mediation as Bagger's representative, is the CEO and daughter [or son] of Bagger's founder.

In preparation for the scheduled mediation session, you reviewed the file to recall the following information:

Two years ago, the CEO and his/her brother (the CFO, (the founder)) and Bagger's top sales representative, B. Borman, teamed up to submit a winning bid on a contract with Delishco to supply 500 million bags over an 8-year period for Delishco's orange harvesting operations.

To get the exclusive supply contract for such a large volume of bags, Bagger's CEO offered Delishco a 25% discount from the lowest price offered to any other customer. Even for reasonably large customers, the price for this type of bag would be 12.5 cents per bag. Smaller customer prices would be in the 13 -14 cent range. Bagger's CEO agreed to sell the bags at 10 cents because Delishco represented its volume as 70 to 100 million bags a year. To reach the 500 million contract target, the CEO negotiated for an exclusivity period of 8 years (instead of the 5 years Delishco originally preferred). With only a 5-year contract, the CEO would have insisted on 11 or 12 cents per bag, and Delishco's negotiators knew that. The CEO wonders if the Delishco people have any notes because his/her brother's and Borman's notes clearly show that the 10 cent per bag price was only offered when the time period and the number of bags increased.

Of course, the CEO NOW also strongly suspects the Delishco people also knew the sale of Delishco's harvesting operations was in the offing at the time. They got the benefit of Bagger's 10 cent price to make their net profits numbers look good - probably driving up the sale price. Of course, it was easy for them to agree to move from 5 to 8 years if they didn't intend to be in the business half that long. All of their resistance over the 8 years was a ruse - a fraud to get Bagger to lower the price.

The CEO's brother, the CFO, and the company's outside lawyer at the time were most directly involved in the contract negotiations. In fact, his/her brother is sure he remembers getting specific assurances of a minimum of 500 million bags. He also remembers asking: "What if you sell off the orange harvesting? Then what happens to the contract? Are there any plans for a sale?" Delishco's in-house lawyer denied any plans for sale. The Bagger people now suspect that Delishco's people knew a sale of the orange harvesting operation was just over the horizon. If they knew that, then their contract was a fraud - they would have known they wouldn't be buying bags for 8, or even 5 years. Of course, it would have been better to have written this into the contract but, according to the CEO, it was implicit. While a future sale is not always knowable, here it was - at least for Delishco. "Never mind you lawyers," the CEO has told you repeatedly, "this is a matter of good faith in business."

When you interviewed B. Borman, he stated that he didn't remember that conversation, or perhaps he wasn't there. But Borman is perhaps most angry and bitter about the mess, adamant that they told Delishco the 10¢ per bag price was a 25% discount BECAUSE of the 500 million bag minimum. The time was extended to 8 years to get the 500 million bag order. Borman and the CFO both made notes to that effect. The CFO thinks Delishco's people took notes too.

When Delishco gave notice of the sale and cancellation of the balance of the order, it was pretty cavalier about the whole matter. The Delishco execs showed no remorse or concern for what this would do to Bagger's business. Bagger will have no time to recover from the loss. The profit margin on the 10-cent price was so low that Bagger hasn't built a rainy-day fund. In fact, because of the longer-term contract, Bagger invested in some additional bag-making machinery to fill the Delishco contract more efficiently. Bagger also invested in some more sophisticated machinery for special seal and valve bags to be marketed to other customers. This new machinery is just about up and running, but Bagger has not yet secured customers to take up the increased capacity. Bagger's cash outlay to purchase the equipment relied upon the Delishco contract. That is why it would be fair for Delishco to pay its lost profits.

In fact, if Delishco had purchased the first 150 million bags at the normal 12.5 cents per bag, Bagger's profits to date would have been $5,250,000, instead of the $1,500,000. By that measure, they owe Bagger the difference of $3,750,000. Even if Bagger might have offered some discount for a 150 million bag order, say to 11 – 11.5 – 12 cents, Bagger's profits would have been $3,000,000 - $3,750,000 million - $4,500,000. That would be $1,500,000 – $2,250,000 - $3,000,000 more than Bagger received.

To make matters worse, the CEO and others at Bagger have heard reliable rumors in the trade that Delishco recently purchased some sophisticated bag manufacturing equipment - from the same equipment designer that Bagger dealt with. The CEO strongly suspects Delishco just found a way to cancel their contract so that they could compete with Bagger - taking other Bagger customers away. That's just bad faith and it's why they don't trust the Delishco people. They may just be out to kill Bagger's business.

At this point, the CFO sees no reason to settle for anything other than what is fair. The CEO (along with the CFO) thinks Delishco should pay Bagger's lost profits, or, at a minimum, the additional profits Bagger would have earned without the 25% price discount, plus something to compensate for the abrupt interruption in Bagger's business. In most instances, the CEO would be open to other business solutions, as long as they meet Bagger's business needs. But they will not agree to any "work out plan" that requires trust, given Bagger's strong suspicions about Delishco's motives and bad faith.

The CEO has Bagger, Inc.'s complete authority to settle this case. While the CEO's father, brother, and Borman are VERY upset by what has happened, they know that s/he is just as angry as they are and that s/he is a tough negotiator. They know that if Delishco's representative or the mediator can convince the CEO that an argument is valid or a perspective is valid, it must be so. If Delishco or the mediator have something to say in the mediation that strikes Bagger's CEO as fair and reasonable, they may be free and willing to work with them.