

**STIPULATIONS TO THE ARBITRATORS**  
**Bagger, Inc. v. Delishco, Inc. Arbitration**

**Stipulations as to Timeline and Key Facts**

As a result of a conversation between Sam Kremin, VP of Bagger, Inc. (“Bagger”) and Pat Delahunt, VP of Delishco, Inc. (“Delishco”) in the summer of 2013, Delishco forwarded an RFP for an exclusive supply contract for orange harvesting bags to Bagger.

Bagger’s bid in response to the RFP was accepted by Delishco, subject to negotiation. In early to mid-September, 2013, representatives of Bagger and Delishco met to negotiate contract terms.

Delishco’s in-house counsel prepared the written Exclusive Supplier Agreement (“the Contract”). Pat Delahunt signed it on September 20, 2013 and sent it as an email attachment to Bagger on September 21, 2013. Bagger’s Sam Kremin signed the Contract that day, and sent it back via email to Delishco.

The parties agree that relevant terms of the Contract include the following:

- 2. Purchase Price.** The price paid by Customer to Supplier shall be \$1.0 per Bag (“Discount Price”) which represents at least a ten (10) cent discount from its regular pricing of \$1.10 - \$1.15 for large company customers.
- 3. Quantity and Delivery.** Supplier warrants that it has the capacity to supply up to 1.5 million bags in a month, but recognizes that Customer’s bag needs vary from month to month. Supplier will deliver quantities ordered by Customer within 30 days after order placement.
- 4. Exclusivity.** The parties acknowledge and agree that the Discount Price described in Section 2 reflect the parties’ intent that Supplier shall be the sole and exclusive provider of Bags to Customer during the Term of this Agreement.
- 5. Term.** This Agreement will begin on the Effective Date and continue for a period of 5 years. However, if the customer has not purchased 50 million bags by the end of 5 years, the term will be extended up to 3 more years (a total of 8 years).

(Bagger maintains that certain other provisions of the Contract are also relevant.)

Bagger’s description of its pricing policies (in the Contract) is accurate.

During the 18 months between October 2013 and the end of April 2015, Delishco ordered and Bagger supplied 15 million bags under the Contract. There have been no disputes and no complaints regarding the quality of the bags delivered, timeliness of delivery, or payments.

Bagger spent a total \$500,000 on bag manufacturing and printing equipment in order to service the Delishco Contract. This equipment is adaptable for other orders as well. However, Bagger

has not used the equipment in any significant way since it used the equipment for Delishco. (While the parties do not dispute this fact, Delishco disputes its relevance.)

Bagger spent a total of \$500,000 for the salary of a new salesman, a website, marketing, building and business upgrades shortly after the effective date of the Contract. (While the parties do not dispute this fact, Delishco disputes its relevance.)

Approximately 18 months after the beginning of the contract term, Delishco informed Bagger that it would no longer require any bags under the contract because they had spun off their orange harvesting operations. The orders stopped almost immediately.

Representatives of the parties did participate in various email exchanges and conversations regarding the Contract terms, both prior to and after its execution, and prior to Delishco's notifying Bagger that it would no longer require any bags under the Contract. (Bagger will offer evidence of that communication at the arbitration hearing as evidence of the Contract's meaning and modification. However, Delishco does not agree that evidence of such communication is relevant or admissible for interpretation of the Contract or as constituting modification.)

Delishco did sell its orange harvesting operation to a fruit harvesting company, which thereafter supplied the ingredients from oranges needed for Delishco beverages.

The parties do not agree upon when Delishco first considered or planned to sell its orange harvesting operation or upon the degree to which that may or may not be relevant in this case.

### **Stipulations of Law**

Massachusetts law applies in this case, specifically the following statutes:

Under **Massachusetts Business Fraud Act, M.G. L. c. 93A §11**, a finding of liability for "unfair" or "deceptive" acts or practices requires an award of reasonable **attorney's fees and costs** plus the amount of actual damages; or **up to three, but not less than two, times such amount if it is found that the unfair or deceptive act or practice was "a willful or knowing violation"**.

### **Massachusetts General Laws. Article 2, Section 2-202 provides:**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

*[Clause (a) applicable as provided by 2013, 30, Sec. 116.]*

(a) by course of performance, course of dealing or usage of trade, in section 1-303; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

**Otherwise, general contract principles should apply to your reasoning in this case.**

**Exhibits:**

Both parties stipulate as to these exhibits' authenticity, but not as to their admissibility.

Joint Exhibit A – Exclusive Supplier Agreement

Joint Exhibit B - Excerpts from Delishco's RFP and Bagger's Proposal in Response

Bagger Exhibit 1 - Delishco email about supply needs

Bagger Exhibit 2 – Notes re Meeting with Delishco

Bagger Exhibit 3 – Notes re meeting with Bagger (incl. ref to “sandwich order”)

Bagger Exhibit 4 - Bagger Email, Borman@Bagger to Dalvera@Delishco.com

Bagger Exhibit 5 - Delishco PowerPoints

**Legal and Factual Issues in dispute:**

Whether or not the Contract is unambiguous as written and the proper application of the Contract to the facts in this case.

Whether or not parole evidence regarding interpretation of the Contract should be admitted or considered by the arbitrators in this case.

Whether or not any communications between the parties constituted modifications of the Contract or subsequent agreements.

Whether or not Delishco's cessation of bag purchases within the Contract period and without purchasing a total of 50 million bags constitutes a breach of the Contract.

Whether the circumstances and timing of Delishco's knowledge or consideration of a plan to spin off its orange harvesting operation gives rise to a fraud claim under Mass. General Laws, Ch. 93A, Section 11.