
BAGGER V. DELISHCO

ARBITRATION

BJ Borman, Bagger's Sales Representative

Witness Statement/Deposition Summary

You have been working in sales at Bagger, Inc. for about six years. Before that, you were the head of wholesale sales at a shoe manufacturing company. You knew Bagger Inc. was a family business, owned by the senior Mr. Kremin and mostly operated by his son/daughter Terry Kremin. When Sam Kremin decided to join the business, his designated area of responsibility included oversight of sales. At first you were concerned about a loss of status, and how you would get along, In fact, however, you work well together. You and Pat both prospect for new customers, though Sam does more traveling. You have more responsibility for service of large customer accounts. The Kremin family includes you on most important meetings related to sales strategy and larger customers.

You first heard of the Delishco contract when Sam came back from a Chamber of Commerce luncheon and said he had sat next to Pat Delahunt, Delishco's VP for Beverage Products. Delahunt told Sam that his purchasing manager had just put out a big RFP for an exclusive bag supply contract for Delishco's orange harvesting operations. Even though the RFP had originally gone to a few multinationals, Pat agreed to give Bagger the opportunity to bid and forwarded the RFP to Sam's cell phone. Sam sent it to you.

Historically, Bagger's customers have been smaller – with average orders between 10,000 and 100,000 bags and just a few larger customers ordering as many as 300,000 or 400,000 bags a year. Competition is fierce. You can never bank on customers' reordering.

Even at that Chamber of Commerce luncheon, Sam said he made it clear that Bagger's lowest price would be conditioned on Delishco ordering 50 million bags. According to Sam, Delahunt said he thought they were then paying 1.20 or 1.30 dollars a bag. Sam said he was overpaying, that the market price for an order larger than 100,000 bags is about \$1.10 - \$1.15 per bag, depending on the size of the order.

Sam explained that Bagger would charge \$1.10 for a very large order and would go significantly lower if it were an exclusive supply contract with a guaranteed minimum. He said Delahunt had specifically stated that he would authorize a guaranteed minimum pegged to past volumes.

When Sam asked what Delishco's annual order would be – minimum and maximum – VP Delahunt estimated it at 10 million to nearly 20 million per year. Sam told him that if a 50 million bag minimum were guaranteed, on a five-year exclusive supply contract, "I bet we'd offer a significant discount off of even the \$1.10 price."



Back at Bagger that afternoon, everyone agreed to go “full throttle” after the Delishco contract, at a sharply reduced price per bag of \$1.00 per bag, if and only if Delishco would agree to purchase a minimum number of bags.

While Bagger’s pricing is often negotiable, as Sam said, the “normal” price for bags of this type in a significant quantity order (say 100,000 or more bags) would be \$1.10 per bag. For small orders, it would be \$1.20 or \$1.30 per bag.

Bagger does realize some efficiencies of scale when sourcing materials and manufacturing these bags, but the actual per unit cost of this type of bag is not lower than 90 cents per bag (a little bit more on smaller orders).

You and Sam worked on Bagger’s formal proposal to Delishco and sent it right away. A week or so later, Sam received an email stating Bagger’s proposal had been accepted, subject to the negotiation of contract terms and conditions.

It was agreed that you and Sam would represent Bagger in the negotiations. After the deal was set, you would handle the Delishco account on a day to day, order to order basis. To save time and money, you all decided not to hire a lawyer to negotiate or draft terms. “After all,” according to the senior Mr. Kremin, “contracts are about common sense and good faith dealing. If you think you need a lawyer to protect yourself from a customer, then you shouldn’t be doing business with that customer. This deal is pretty simple: a guaranteed minimum of 50 million bags, at \$1.00 per bag. All you really need to do is work out the length of exclusivity, a reasonable notice time for a large order to allow for production and shipping, and standard payment terms.”

The negotiations were actually pretty informal, initially involving a few phone conversations and emails with Delishco’s Purchasing Manager, Fran Dalvera. Early on, Sam requested, and Fran provided the schedule of his orange harvesting bag orders over the past five years. While still quite large, the numbers weren’t as high as the VP had estimated. According to Fran’s records, their bag orders ranged from 7 million to 10 million per year.

You and Sam did negotiate final terms in person with Fran and the VP, Pat Delahunt, about a week before the contract was written up and signed. The meeting took place when you both visited Delishco’s orange harvesting facility. In order to fine tune the bag sealing specifications, you wanted to meet there to see first-hand how the oranges would be loaded and what stresses would be put on the bags.

After touring the harvesting facility, sandwiches were brought into the meeting and a young fellow appeared who was introduced as an inside lawyer for Delishco. The VP said it made sense to bring the lawyer in to hear firsthand the business terms of



the deal, since he would be writing up the contract. The lawyer was pretty quiet throughout.

Before that, most of the talk had been about a five-year exclusive supply contract, based on VP's earlier minimum annual number of 10 million. Sam explained that, give the 7 million bag minimum, 5 years wouldn't get you to 50 million bags. Sam specifically stated: "Without a 50 million bag minimum and exclusivity, Bagger can't stick to the \$1.00 per bag price." Sam told them his dad, Bagger's owner, "would never go for that." He asserted that the discount to \$1.00 per bag was "only on the table at 50 million bags. After all, even for pretty large customer orders, but without exclusivity or guaranteed minimums, our price is at \$1.10."

The Delishco folks heard that and clearly got the message. Pat Delahunt then said: "Okay, to be sure the deal will cover 50 million bags, we'll take the contract period out to 8 years." While Sam did most of the talking for Bagger, you took notes on this conversation.

Perhaps because the Delishco lawyer was there, and because he had noticed that the orange harvesting facility was located a few miles from Delishco's main plant, Sam even asked: "What if Delishco sells off its orange harvesting? Then what happens to the contract? Are there any plans for a sale?" You specifically remember that Delishco's lawyer and Pat Delahunt both said: "Delishco is not planning to sell the facility." They even commented that it "might possibly expand to other fruits, which could mean more future business for Bagger."

First thing in the morning about a week later, the Exclusive Supply Contract arrived, attached to an email that stated: "here's the formal contract, incorporating the terms we agreed upon in our meeting. As soon as you've signed it, we'll send you our first order under the contract." Sam said he took a quick look, signed it, scanned it in, and sent it back immediately.

You first learned of this later, after Terry and the senior Mr. Kremin arrived in the office. Sam proudly announced to everyone that the deal was done and circulated a copy of the signed contract. You, Terry, and his father expressed concern that the document didn't contain the words "guarantee" or "minimum". Sam reassured everyone that the idea of a minimum guarantee was understood by all, and implicit, and that in the meeting, the VP extended the contract period to 8 years to insure that Delishco would purchase at least 50 million bags. You confirmed that this was in your meeting notes.

Over the next week, you carefully re-read the contract and you too began to worry about what seemed like a disconnect: why hadn't the contract used the words "minimum" or "guaranteed" when that's what you had talked about? This made you nervous about signing a \$500,000 purchase order for some new high volume bag



manufacturing equipment to service the Delishco order. So, you sent an email to Fran Dalvera that said: “Dear Fran, I am assuming you remember me from our meeting. I’m the Bagger representative working most directly on your account. I just want to make sure we’re on the same page because that young lawyer of yours left it murky in the contract. Before Bagger puts money into equipment, aren’t we agreed that Delishco plans to purchase a minimum of 50 million bags at this price, sometime in the next 8 years?”

Fran replied via email, almost immediately: “On my way out, so short reply. I remember you. No worries - I think we’ll be at the 10 million level this year alone.”

Less than a year later - just about 18 months into the contract, Sam Kremin received an early morning email from Fran Dalvera, stating that Delishco would no longer require any bags under the contract because they had spun off their orange harvesting operations. The orders stopped almost immediately, and you were only about 15 million bags into the 50 million.

You all agreed that Bagger should hire a lawyer and file an arbitration claim against Delishco for their lost profits. The lawyer has assured you that you have a great claim, even if the contract itself is less than crystal clear. But, if Delishco knew and lied about the possibility that they would spin off the harvesting operation then the whole thing was trickery and fraud.

Your lawyer has explained that Delishco may try to argue that Bagger could have or should have replaced the Delishco contract with other business. You know that is bunk. No one could possibly work any harder to bring in sales than you and Sam do. In fact, right after the contract was signed, Bagger hired a new salesman with the idea of expanding the business further. The sad truth is that the salesman is not terrible but not terrific. And he couldn’t work miracles. Business is not exactly booming for Bagger’s customers, mostly in the small to mid-range customers, and competition among bag suppliers keeps profit margins down. Sam kept the salesman on for as long as he could – about 6 months after Delishco pulled the plug – but he couldn’t pull in enough additional business. It’s to Bagger’s credit that its other volume has held steady. No one is happy that the equipment used for the Delishco bags sits idle most of the time.