# BAGGER V. DELISHCO
## ARBITRATION

**Pat Delahunt**
**Delishco VP for Beverage Products**

**Witness Statement/Deposition Summary**

You joined Delishco in sales and marketing more than 25 years ago, straight out of college, and have worked your way up the corporate ladder. As Delishco VP for Beverage Products, you oversee all production and sales. You believe in a hands-on approach to the business operation and often become directly involved in negotiation of supply and sales contracts that significantly impact your division's bottom line.

Of course, you do not have complete autonomy over corporate decisions affecting Delishco's beverage division. Delishco is a major international company, with a myriad of product lines from food and snacks to personal care items. The company's CEO and senior management team direct over-all business strategy, set growth and profit targets, and look for synergistic growth and profit opportunities between divisions.

Two years ago, you happened to be seated next to Sam Kremin at a Chamber of Commerce luncheon. When Sam Kremin mentioned that he was with Bagger, inc. a family owned company that manufactures bags, you immediately told him that Delishco had just sent out an RFP for an exclusive bag supply contract on its orange harvesting operation to a few large multinational bag companies who supplied some of Delishco's other division. Sam asked that you give Bagger, Inc. the opportunity to bid.

Sam said: "With a volume that high, "I bet you're paying $1.15 a bag to your current supplier. " You responded "Actually, I'll have to check but I believe we're paying more like $1.20 or $1.30. "

Sam chuckled and said:" Well, you are over paying. I'd say the market price for any order larger than 100,000 bags is about $1.10 - $1.15 per, depending on the size of the order. And, we'd charge you less on a much higher volume and an exclusive supply contract."

You then said: "I imagine Kremin is a relatively small family business. Will you be able to handle our volume?"

Sam replied: "Yes, we are a proud family business with a long history, but we play in the big leagues. We supply some very large companies who value our service approach. Unequivocally yes, we can handle any volume, whatever it is, as long as we have a reasonable reliable estimate of what it will be. So, I have to ask, what is your current annual order?"

You replied: "Off the cuff, I'd guess it ranges from 10 million to nearly 20 million per year but we have the historical numbers back at the office."

Sam responded: "Well, based on those estimates, five years would end up at 50 million bags. I bet we'd go down as low as $1.00 per bag for an exclusive contract on 50 million bags."

"Okay then," you said, and forwarded a copy of the RFP to Sam's smartphone

At that point, the luncheon speaker was about to start. You and Sam agreed that Bagger would respond to the RFP in writing to your Purchasing Manager, Fran Dalvera. If Bagger's bid proved to be most competitive, Bagger more specific terms would be negotiated. You promised to mention to Fran that you had met Sam and had invited Bagger to bid on the RFP.

Within a day or so, Fran informed you that Bagger submitted its formal bid proposal. The multi-national suppliers' lowest price cut was to $1.10 a bag for an exclusive contract. Bagger's bid price was significantly lower at $1.00 a bag. Sam Kremin seemed like a nice straight-up guy, and he said they would handle the volume. For you and Fran, it was a no-brainer: you emailed Sam that Bagger's proposal bid had been accepted, subject to negotiation of supply contract terms and conditions.

The negotiations were actually pretty informal, taking place over a few phone conversations and emails with Sam Kremin. Early on, Sam requested and Fran provided records of Delischco's orange harvesting bag orders over the past five years. The bag numbers ranged from 7 million to 10 million per year - still high, but not quite as high as your estimates at the luncheon.

You and Fran did negotiate the contract terms in person with Sam Kremin and his sales account manager, BJ Borman, about a week before the contract was written up and signed. The meeting took place when Kremin and Borman visited Delishco's orange harvesting facility. In order to fine tune the bag sealing specifications, they had wanted to see how the oranges would be loaded and what stresses would be put on the bags.

After harvesting facility tour, sandwiches were brought into the meeting. You had asked Delishco's general counsel's office to provide one of its inside lawyers for the meeting. As you explained, it made sense for the lawyer to hear firsthand the business terms of the deal, since he would be writing up the contract. The lawyer who came seemed new and was pretty quiet throughout.

Until that meeting, most of the talk and emails had been about a five-year exclusive supply contract. However, Sam explained that using the order history as a way to predict the future, at the low end of million bags a year, 5 years wouldn't add up to 50 million bags.

BJ Borman asserted: "Without a reasonable expectation of 50 million bag and exclusivity, Bagger can't stick to the $1.00 per bag price.

Sam explained that his dad – Bagger's owner - "would never go for that. This discount is only on the table if we can get to 50 million bags. Otherwise, the price would be at $1.10."

You and Fran heard him loud and clear, so you offered to take the exclusivity period out to 8 years, enabling them to reach their magic number of 50 million if the volume averaged 7 million bags a year.

At some point during the conversation, Sam had asked: "What if Delishco sells off its orange harvesting? Then what happens? Are there any plans for a sale?"

You and the lawyer ACCURATELY stated that Delishco was not then planning to sell its orange harvesting operation. You did mention that if Delishco were to expand harvesting to other fruits and vegetables, that could mean more future business for Bagger.

It is true that about 6 months earlier, you attended an upper management meeting convened by Delishco's CFO, Randy Betz, at which there was some discussion of at least half a dozen different strategic plans. One was labeled "Vertical Trim" and involved eliminating the lower end of vertical integration by spinning off operations that dealt with raw produce. But since then, you had heard nothing about it, and there was no mention of Vertical Trim in the Delishco President's quarterly email report that came out a month or so later.

So, at the time of the meeting with Sam, you didn't think that spinning off the orange harvesting operation was still on the table for Delishco. You saw no need and had no desire to mention it. It's possible that the lawyer knew something about Delishco's plans that you did not, but he didn't tell you. You don't remember the CFO saying anything about it in the lead up to the negotiations with Bagger.

You did understand that if Bagger thought there would be a spinoff, they might have insisted on a guarantee or pulled back on the price discount. Then again, they never explicitly said the word "guarantee" had to be in the contract. That was lucky; you knew that, if the corporate strategy folks did resurrect the Vertical Trim idea, they would not be pleased by a guarantee tying Delishco's hands for 8 years. Anything and everything can change in 8 years; Delishco has to be nimble.

About a week later, first thing in the morning, the lawyer sent you his draft of the Exclusive Supply Contract. You took a quick look, noticed that there was no reference to a guarantee, signed it on behalf of Delishco, and then sent it to Sam at Bagger, attached to an email that said: "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 emailed it back, signed, almost immediately.

About a year into the contract with Bagger, you were pulled in to strategic planning sessions at which the Vertical Trim idea was resurrected by Delishco's CFO. Based on some analysis he had done, he concluded that harvests of oranges and crops were unreliable due to changing weather conditions and these operations distracted Delishco from its core strengths. A fruit harvesting company had approached Delishco with an offer for its harvesting operations, and Delishco decided to sell and let them deal with the raw food headaches.

They let you wait about six months until the end of the Florida growing season to inform Bagger. When the spinoff transaction was complete, you asked Fran Dalvera to notify Bagger that Delishco would no longer require any bags as it no longer had any orange harvesting operations.

You received an irate voice mail from Sam Kremin that day, accusing you of "lying to get a discount and then hanging Bagger out to dry, when you knew we only gave you that price for 50 million bags. We trusted you and you played us for suckers. You are not going to get away with this!'

A few months later, you learned that Bagger had filed an arbitration claim.

All in all, Delishco purchased 15 million bags from Bagger and everything worked well under the contract. Bagger's bags were of consistently high quality, delivered on time.