

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.

EXCLUSIVE SUPPLIER AGREEMENT

This Exclusive Supplier Agreement (“Agreement”), effective as of October 1, 2013 (“Effective Date”), is between Bagger, Inc., an Ohio corporation (“Supplier”), and Delishco Beverage Products Division of Delishco, Inc., a Massachusetts corporation (“Customer”) (collectively, “the parties”).

BACKGROUND

- A. Customer is in the business of producing beverage products for wholesale and retail purchasers. These beverage products frequently require juice from oranges.
- B. Supplier is in the business of producing and distributing bags and related products to manufacturing, retail, and other businesses in support of their end product production process.
- C. Customer desires to purchase from Supplier all bags it uses to harvest oranges for orange juice for its beverage products. Based on five year historical averages, Customer’s orange bag supply needs average between 7 and 10 million bags per year, and single month orders are sometimes up to 1.5 million bags.

Accordingly, the parties agree as follows:

1. **Sale and Purchase.** Customer and Supplier agree that Supplier shall sell to Customer orange harvesting bags that conform to the specifications listed in Schedule 1 (“Bags”) in quantities necessary to meet all of Customer’s orange harvesting bag needs.
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).
6. **Prices Exclusive of Taxes.** All prices are exclusive of sales, use, excise, and other taxes, duties or charges. Unless Customer provides evidence of tax exempt status, Customer shall pay, or upon receipt of invoice from Supplier shall reimburse, Supplier for all such taxes or charges levied or imposed on Customer, or required to be collected by Supplier, resulting from this transaction or any part thereof.
7. **FOB and Insurance.** All prices are FOB unless instructed otherwise. Supplier may arrange for insurance and standard commercial shipping, the costs of which will be invoiced to Customer.

8. **Payment/Financing.** Unless otherwise agreed, invoice payment terms for all purchases made under this Agreement shall be net 10 calendar days on a per order basis and are subject to credit review by Supplier. All payments shall be made to Supplier not later than the agreed number of days from date of invoice. Late payments shall result in the assessment of a late charge equal to 1 1/2% per month on any outstanding balance, or the maximum amount of interest chargeable by law, whichever is less.

9. **Title and Risk of Loss.**

a. **Date of Delivery.** Delivery of any item of Bags shall be deemed complete when Customer acknowledges receipt of the Bags by signature at time of delivery. Title to, and risk of loss for, the Bags sold or licensed under this Agreement shall pass to Customer upon delivery as defined herein.

b. **Security Interest.** As security for the full and prompt payment and performance then due of all obligations of Customer to Supplier under this Agreement, Customer hereby grants to Supplier a security interest in all Bags supplied to Customer hereunder. Customer shall execute any notice or other documentation as may be reasonably requested by Supplier at any time in order to accomplish the intentions of this section. This obligation shall include an obligation to execute any and all necessary financing statements to perfect the security interest herein granted to Supplier as well as its ownership interest, if any, herein evidenced in order to perfect Supplier's interest in the Equipment and Software and its rights to payment and performance by Customer under this Agreement. Supplier shall pay all expenses of filing any necessary financial statements and documents with the appropriate public offices.

10. **Excusable Delay.** Supplier shall be excused from performance under the purchase order and not be liable to Customer for delay in performance attributable in whole or in part to any cause beyond its reasonable control, including but not limited to, action or inaction of any government, war, civil disturbance, insurrection, sabotage, act of public enemy, labor strike, difficulty or dispute, unpredictable failure or delay in delivery by Supplier's suppliers or subcontractors, transportation difficulties, shortage of energy, materials, accident, fire, flood, storm or other act of God, or Customer's fault or negligence. In the event of an excusable delay, Supplier shall make reasonable efforts to notify Customer of the nature and extent of such a delay and Supplier will be entitled to a reasonable schedule extension. In the event a delay results from Customer's fault or negligence, Supplier will also be entitled to an equitable adjustment calculated on a time and materials basis which shall be mutually agreed upon.

11. **Change, Cancellation, and Termination.**

a. **Cancellation of Purchase Order.** If Customer cancels a purchase order within 15 days prior to scheduled shipment date, Customer shall pay to Supplier a restocking fee of 20% of the canceled purchase order. Supplier shall not assess any cancellation charges if Supplier cancels an order.

b. **Breach of Agreement.** In the event that either Party breaches any provision of this Agreement, and fails to cure such breach within 30 days after written notice from the other Party, the breaching Party shall be in default. Supplier's failure to supply quantities of Bags ordered by the Customer or to meet specified quality and weight specifications shall constitute breach of this agreement.

13. **Assignment.** Neither party may assign this Agreement in whole or in part without the prior written consent of the other party. (It shall not be considered an "assignment" if either party applies the contract to wholly owned subsidiaries, or, to other ventures in which they remain the controlling entity.)

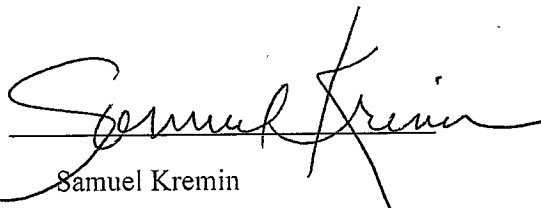
14. **Cooperation.** The parties acknowledge and agree that successful completion of this Agreement shall require the full and mutual good faith cooperation of each of the Parties.

15. **Dispute Resolution.** The parties agree that all disputes arising under or relating to this Agreement will be resolved by arbitration through the American Arbitration Association (AAA) and conducted in accordance with the AAA Commercial Arbitration Rules.

16. **Governing Law, Jurisdiction and Venue.** This Agreement shall be governed in all respects by the laws of the Commonwealth of Massachusetts without regard to its conflict of laws provisions.

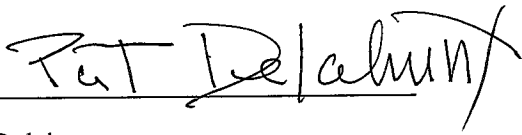
Intending to be legally bound, the parties have entered this Agreement as of the Effective Date.

BAGGER, INC.

By: 
Samuel Kremin

Vice President, Bagger, Inc.

DELISCHO BEVERAGE PRODUCTS
DIVISION OF DELISHCO, INC.

By: 
Pat Delahunt

Delishco Vice President of Beverage Products
Division

Date: September 21, 2013

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Excerpts from Delishco's RFP and Bagger's Proposal in Response

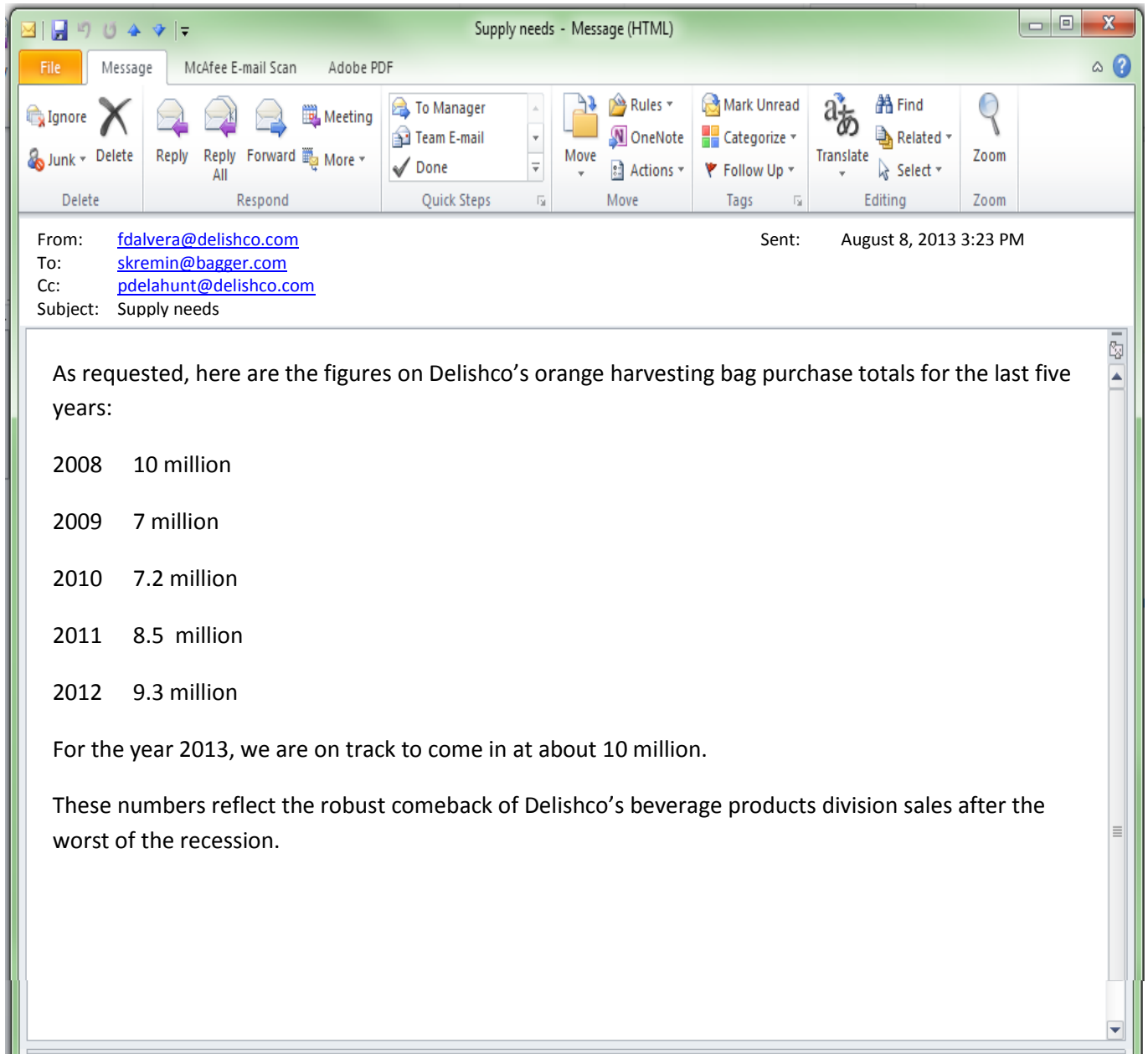
Delishco's RFP was their standard form and much longer than this paragraph. It contained the following specific language with respect to the order and this dispute:

Five year exclusive Supply of orange harvesting bags to designated Delishco facility, meeting weight, size and other design specification set forth in the attached schedule, up to 1.5 million bags per month, to be delivered within 30 days of order.

Bid proposals to include FOB price and payment terms.

Bagger's bid proposal in response to the RFP was also quite a bit longer than this paragraph. It contained the following specific language relevant to the order and this dispute:

For five year exclusive supply contract for orange harvesting bags to designated Delishco facility, meeting specifications set forth in the attached schedule, up to 1.5 million bags for month (delivered within 30 days of order), 10 million bag annual minimum, F.O.B price - \$1.00 per bag. Payment within ten days of delivery.



Supply needs - Message (HTML)

From: fdalvera@delishco.com Sent: August 8, 2013 3:23 PM
To: skremin@bagger.com
Cc: pdelahunt@delishco.com
Subject: Supply needs

As requested, here are the figures on Delishco's orange harvesting bag purchase totals for the last five years:

2008	10 million
2009	7 million
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For the year 2013, we are on track to come in at about 10 million.

These numbers reflect the robust comeback of Delishco's beverage products division sales after the worst of the recession.

BAGGER
Exhibit 2

mtg w/
Delishco

10M - 20 ¢ real

10M = Best year

7m x 5 = 35m only \$1.10

Pat: OK Excl → 8 years

Guaranteed

min-50 m \$1.00

Check SANDWICH ORDER

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EXHIBIT 3

MTG w/ BAGGER - KREMIN + BORMAN

UP?

B - DISAPPOINTED ACTUAL ~~XX~~'S

EXCLUSIVITY = KEY + \$1.00 per

TIME HORIZON —

SMALL BUS - BUT CAN HANDLE VOLUME
BAG FACIL NEAR TRANSIT

OH = CENTRAL FOR TRUCKS

B WANTS 30m GTESD MIN

OFFER - 8 YRS @ 1m = 5.6m OK
mts
MIN

(up to 1.5m a month = OK)

~~\$1.00
OK FOR 1.00~~

BAGGER

Exhibit __4__

Quantities under exclusive supply contract - Message (HTML)

File Message McAfee E-mail Scan Adobe PDF

Ignore X Reply Reply Forward Meeting
Junk Delete Reply All Forward More
Delete Respond Quick Steps Move Move Tags Editing Zoom

To Manager Rules Mark Unread Find
Team E-mail OneNote Categorize Related
Done Actions Follow Up Translate Select Zoom

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Subject: Quantities under exclusive supply contract

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?

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Strategic Brainstorming
for
Delishco Consideration and Decision
March 17, 2013

Just a start for brainstorming

- Rebranding for millenials
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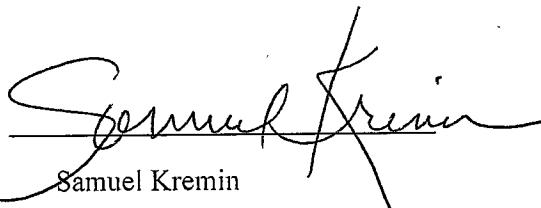
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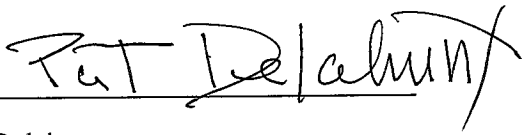
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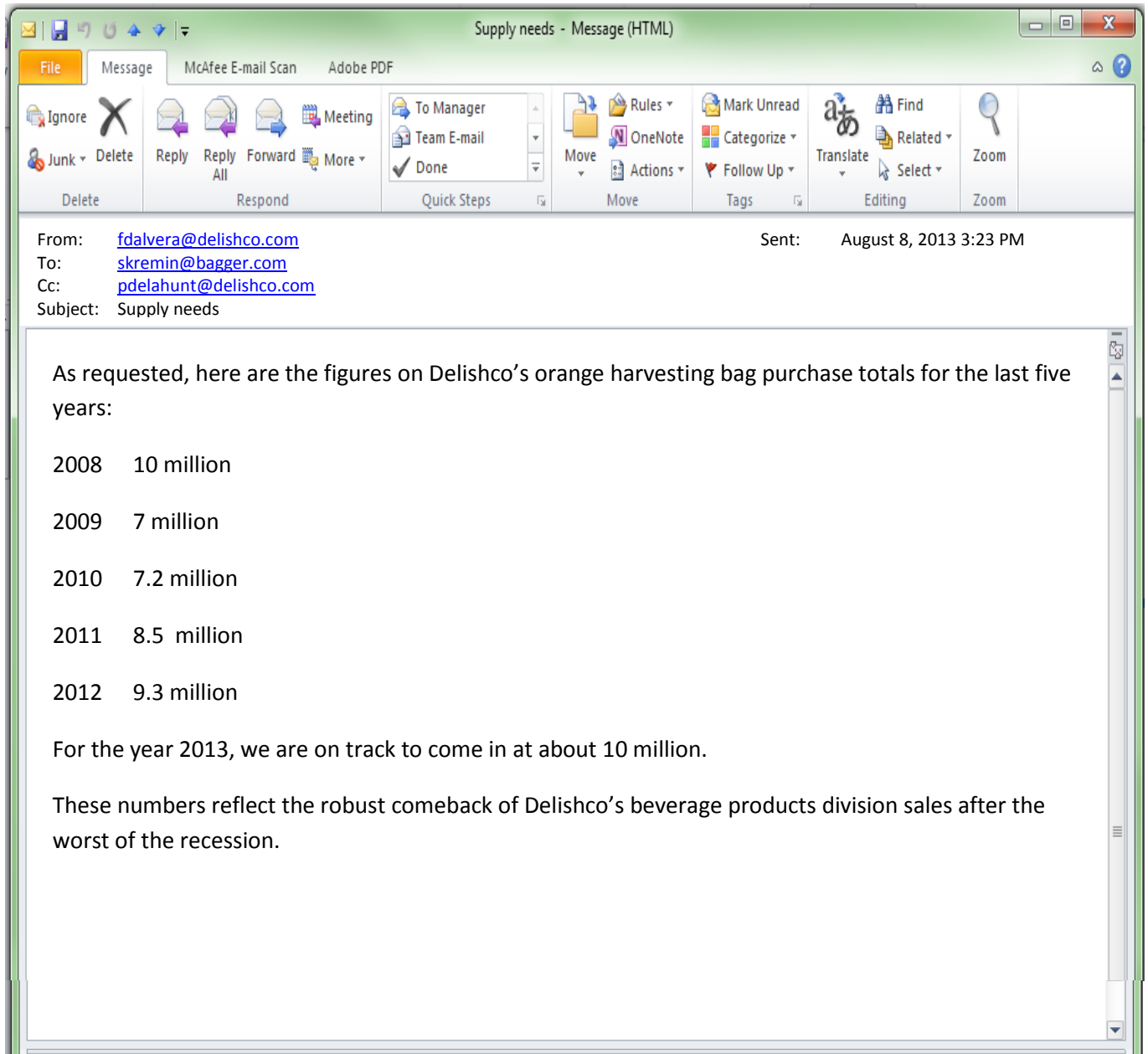
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mts
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OK FOR 1.00~~

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Delete Respond Quick Steps Move Move Tags Editing Zoom

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