

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FIVE STAR PACKING, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-2495A  
 )  
 WILLIAM G. ROE & SONS, INC., )  
 AND UNITED STATES FIDELITY & )  
 GUARANTY COMPANY, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )  
 )  
 WILLIAM G. ROE & SONS, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-2496A  
 )  
 FIVE STAR PACKING AND AUTO )  
 OWNERS INSURANCE COMPANY, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in these matters on November 7, 2001, in Winter Haven, Florida.

APPEARANCES

Case No. 01-2495A

For Petitioner: H. Christopher Tompkins, II, Esquire  
1706 South Kings Avenue  
Brandon, Florida 33509-6216

For Respondent: Douglas A. Lockwood, III, Esquire  
W. G. Roe & Peterson & Myers, P.A.  
Sons, Inc. 141 5th Street, Northwest  
Post Office Drawer 7608  
Winter Haven, Florida 33883

For Respondent: No appearance  
United States  
Fidelity &  
Guaranty Co.

Case No. 01-2496A

For Petitioner: Douglas A. Lockwood, III, Esquire  
W. G. Roe & Peterson & Myers, P.A.  
Sons, Inc. 141 5th Street, Northwest  
Post Office Drawer 7608  
Winter Haven, Florida 33883

For Respondent: H. Christopher Tompkins, II, Esquire  
Five Star 1706 South Kings Avenue  
Packing Brandon, Florida 33509-6216

For Respondent: Jack P. James, Esquire  
Auto Owners Post Office Box 3  
Insurance Co. Lakeland, Florida 33802

STATEMENT OF THE ISSUES

Case No. 01-2495A

Does Respondent, William. G. Roe & Sons, Inc. (Roe & Sons) owe Five Star Packing (Five Star) monies as alleged in the Complaint for citrus contracted for under various written contracts entered into by the parties?

Case No. 01-2496A

Does Respondent Five Star owe Roe & Sons monies as alleged in the Complaint for damages sustained by Roe & Sons as a result

of the breach of alleged oral contracts between the parties by Five Star?

PRELIMINARY STATEMENT

Case No. 01-2495A

By a Complaint dated August 22, 2000, and filed with the Office of Citrus License and Bond, Florida Department of Agriculture and Consumer Services (Department) on September 12, 2000, and a First Amended Complaint dated January 5, 2001, and filed with the Department on January 10, 2001, Five Star seeks payment of an alleged balance due from Roe & Sons under various written contracts between the parties for the sale of tangerines, white grapefruit, and temple oranges. Roe & Sons denied the allegations within the Complaint and alleged the affirmative defenses of settlement, breach of a written contract, and breach of oral contract. Additionally, Roe & Sons filed a counterclaim in the amount of \$97,000.00 for breach of contract in Five Star's failure to purchase a certain quantity of ruby red grapefruit under alleged oral contracts.

Case No. 01-2496A

By a Complaint dated November 10, 2000, and filed with the Department on November 15, 2000, Roe & Sons seeks payment from Five Star for alleged damages suffered due to the failure of Five Star to perform under two alleged oral contracts with Roe &

Sons for the purchase of a certain quantity of ruby red grapefruit.

By letter dated June 25, 2001, the Department referred these matters to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a formal hearing. The cases were consolidated for hearing on July 17, 2001.

At the hearing, Five Star presented the testimony of Larry Thompson. Five Star's Exhibits 1-4 were admitted in evidence. Roe & Sons presented the testimony of W. A. Alford, Morgan Roe, and William Roe. Roe & Sons' Exhibits 1-12 were admitted in evidence.

A Transcript of this proceeding was filed with the Division on November 28, 2001. The parties filed their Proposed Recommended Orders under an extended time frame with the understanding that any time constraint imposed under Rule 28-106 (1), Florida Administrative Code, was waived in accordance with Rule 28-106(2), Florida Administrative Code.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times pertinent to this proceeding, Five Star was a citrus fruit dealer as that term is defined in Subsection

601.03(8), Florida Statutes, and was licensed and bonded in accordance with Chapter 601, Florida Statutes.

2. At all times pertinent to this proceeding, Roe & Sons was a citrus fruit dealer as that term is defined in Subsection 601.03(8), Florida Statutes, and was licensed and bonded in accordance with Chapter 601, Florida Statutes.

3. At all times pertinent to this proceeding, both Five Star and Roe & Sons were subject to the provisions of Chapter 601, Florida Statutes.

4. Five Star bought, sold, and delivered citrus fruit to various citrus processing facilities and packing houses in Central Florida during the 1999-2000 citrus fruit season.

5. During the 1999-2000 citrus fruit season, Roe & Sons operated a packing house in Winter Haven, Florida, and regularly purchased citrus fruit for the fresh fruit market, and sold citrus fruit that it had purchased to other citrus fruit dealers such as Five Star.

6. The Complaint in Case No. 01-2495A was filed with the Department by Five Star on September 12, 2000, and was timely filed in accordance with Subsection 601.66(1), Florida Statutes. On January 5, 2001, before the Department referred this matter to the Division, Five Star filed its First Amended Complaint with the Department.

7. The Complaint in Case No. 01-2496A was filed with the Department by Roe & Sons on November 10, 2000, and was timely filed in accordance with Subsection 601.66(1), Florida Statutes.

8. On December 6, 1999, Roe & Sons and Five Star entered into a Participation Marketing Agreement, Contract No. B233Q, for tangerines wherein Roe & Sons was to purchase Sunburst Tangerines from Five Star. Roe & Sons purchased 2,124 boxes of Sunburst Tangerines from Five Star for which Roe & Sons paid Five Star \$23,534.84. There is no disagreement as to these tangerines. However, Five Star contends that the tangerines supported by Trip Ticket Nos. 225488, 225489, 225490, 225491, and 225492 were delivered to Roe & Sons but that Five Star did not receive payment. Roe & Sons has no Trip Ticket receipts or any other record indicating that these tangerines were delivered to Roe & Sons. However, Larry Thompson of Five Star testified that Trip Ticket Nos. 225488, 225489, and 225490 were filled out by the harvester and that he was present when the tangerines represented by those Trip Tickets were delivered to Roe & Sons. Thompson also testified that he filled out Trip Ticket Nos. 225491 and 225492 and was present when the tangerines represented by those Trip Tickets were delivered to Roe & Sons. The Trip Tickets indicate that the tangerines were being delivered to Roe & Sons under Contract No. B233Q. Copies of the Trip Tickets along with the testimony of Larry Thompson, which

is credible, is sufficient to show that the tangerines represented by Trip Tickets Nos. 225488, 225489, 225490, 225491, and 225492 were delivered to Roe & Sons, notwithstanding that Roe & Sons has no records of these tangerines being delivered to Roe & Sons by Five Star. Therefore, Roe & Sons owes Five Star \$8,645.67 for the tangerines represented by Trip Ticket Nos. 225488, 225489, 225490, 225491, and 225492. However, Five Star stipulated that it owed Roe & Sons \$2,667.60 for 684 boxes of tangerines delivered to Five Star by Roe & Sons on January 13, 2000. The adjusted amount owed Five Star by Roe & Sons for tangerines is \$5,978.07.

9. On February 11, 2000, Roe & Sons and Five Star entered into a Fresh Cash Purchase Agreement, Contract No. B333S, wherein Roe & Sons agreed to purchase an estimated 25,000 boxes of Marsh white grapefruit from Five Star for an agreed price of \$1.35 Per Pound Solids (PPS) Gross. Contract No. B333S contained the following Special Clauses: "FRUIT MUST BE A MINIMUM 10.00 BRIX AND 9.00 RATIO. PRICE FOR FRUIT NOT MEETING THIS MINIMUM SCORE WILL BE NEGOTIATED AS THE LOADS ARE RECEIVED." The "Movement Date" under Contract No. B333S was to be "SEASONAL," which the parties stipulated meant that there was no specified date for delivery, only that the grapefruit was to be delivered during the 1999/2000 season. Contract No. B333S also contained the following clause: "Fruit not meeting

contract ratio or brix requirements but otherwise suitable to BUYER will be discounted by .10 per unit measure P/S or returned to SELLER at BUYER's sole discretion."

10. On March 31, 2000, Roe & Sons entered into a second Agreement, Contract No. B376B, wherein Roe & Sons agreed to purchase an estimated 7,000 boxes of Marsh white grapefruit from Five Star for an agreed price of \$1.50 PPS Gross. Contract No. B376B contained the following special clause: "Must be 10 Brix and 9 Ratio minimum or \$0.15 PPS Penalty." Although Contract No. B376B contained no Movement Date, the parties agreed that the grapefruit was to be delivered during the 1999/2000 season.

11. Morgan Roe testified that when Roe & Sons entered into multiple contracts with the same party to furnish citrus fruit during same season, Roe & Sons had an unwritten internal policy, which required the other party to the multiple contracts with Roe & Sons to fulfill the requirements of the first contract before Roe & Sons would accept citrus fruit under any subsequent contract. Roe & Sons did not make Five Star aware of this unwritten internal policy at the time that either the first or second contract was executed by Five Star. Likewise, neither the first nor the second contract contained any language which would require Five Star to fulfill the first contract before Roe & Sons would be required to accept grapefruit under the second contract.



12. Between March 28, 2000 and May 9, 2000, Five Star delivered 7,649 boxes of white grapefruit to Roe & Sons. Five Star contends that Roe & Sons owes Five Star \$43,614.77 after adjustments for unloading charges and research and advertising taxes for the grapefruit delivered. Roe & Sons contends that it owes Five Star \$40,106.96 after adjustments for unloading charges and research and advertising taxes for the grapefruit Five Star delivered. Five Star contends that the majority of the grapefruit was delivered under Contract No. B376B and that Five Star should have been paid \$1.50 PPS for the grapefruit delivered under Contract No. B376B. However, only Trip Ticket Nos. 48433, 48434, 77569, 77570, 77571, 77572, and 77573 were specifically marked as being delivered under Contract No. B376B, which Five Star contends it should have been paid \$1.50 per pound solids since this grapefruit met all the specifications of the contract. However, Roe & Sons contends that since Five Star's commitment under Contract No. B333S had not been totally fulfilled, Roe & Sons was only required to pay Five Star \$1.35 per pound solids for all of the grapefruit delivered between March 28, 2000 and May 9, 2000, notwithstanding that some of the Trip Tickets indicated that the grapefruit was being delivered under Contract B376B. Roe & Sons' contention was based on its internal policy that the first contract, Contract No. B333S, had to be fulfilled before Roe & Sons was required to honor the

second contract, Contract No. B376B. There is insufficient evidence to support Roe & Sons' contention that its internal policy is an industry standard, notwithstanding the testimony of W. A. Alford to the contrary, which lacks credibility. Roe & Sons has failed to show that Five Star was required to fulfill Contract No. B333S before Roe & Sons was required to accept fruit under Contract No. B376B. Roe & Sons should have allowed Five Star \$1.50 PPS for the grapefruit delivered under Contract No. B376B. Five Star conceded that none of the other Trip Tickets indicated that the grapefruit was being delivered under Contract No. B376B. Therefore, Roe & Sons' Net Return amount should be adjusted upwards to account for the difference (\$0.15) in the price PPS for the above listed Trip Tickets. After adjustment (13,497.78 PS x \$0.15 PPS = \$2,024.67), Roe & Sons owes Five Star the sum of \$42,131.63 (\$40,106.96 + \$2,024.67) for the grapefruit delivered under Contract Nos. B333S and B376B. Other than the adjustment for the difference in PPS, Roe & Sons Net Return amount is correct. Five Star's Net Return amount incorrectly takes credit for grapefruit at \$1.50 PPS that was not delivered under Contract B376B and fails to take credit for grapefruit delivered to Roe & Sons on May 9, 2000, under Trip Ticket Nos. 4134 and 212720.

13. Five Star contends that Roe & Sons' cull adjustment was excessive and that Roe & Sons owed Five Star \$1,688.52 for

excessive cull adjustment. Five Star's contracts with Roe & Sons provides that Roe & Sons has the right to reject unsuitable fruit. Although Five Star presented testimony as to what might constitute "excessive cull adjustment," it failed to present sufficient evidence to show that the "culled fruit" was suitable and that Roe & Sons' "cull adjustment" was excessive.

Therefore, Five Star is not entitled to any adjustment for cull adjustment.

14. Roe & Sons contends that sometime around April 11, 2000, Larry Thompson for Five Star and William Roe for Roe & Sons entered into an oral contract wherein Five Star was to purchase 30,000 boxes of field run ruby red grapefruit with a 9.00 ratio at a price of \$1.20 PPS. Roe & Sons reduced these terms to writing and designated it as Contract S2057. Roe & Sons also contends that sometime around April 14, 2000, Larry Thompson for Five Star and William Roe for Roe & Sons entered into an oral contract wherein Five Star was to purchase 15,000 boxes of elimination red grapefruit at a price of \$1.10 PPS. Roe & Sons reduced these terms to writing and designated it as Contract S2060. Larry Thompson testified that he refused to agree to, or to sign, either of these alleged contracts on the basis that he did not agree to handle any specific quantity (number of boxes) of red grapefruit for Roe & Sons. Larry Thompson testified that he agreed to handle some (no specific

quantity) of red grapefruit for Roe & Sons at the price and specifications stated. Based on Larry Thompson's testimony, which is credible, there was never any valid contract, oral or otherwise, wherein Five Star agreed to purchase a specific quantity (boxes) of red grapefruit from Roe & Sons, notwithstanding William Roe's testimony to the contrary, which lacks credibility in this regard, or the fact that Five Star did purchase a number of boxes of red grapefruit from Roe & Sons, for which Five Star agrees that it owes Roe & Sons.

15. Between April 12, 2000 and April 20, 2000, Five Star purchased some 2,760 boxes of red grapefruit at a price of \$1.10 PPS, represented by ticket nos. 71146, 71149, 64019, 64024, and 64585. The total PPS of the boxes was 13,094.44 for a gross price of \$14,403.88 (13,094.44 PS x \$1.10 PPS = \$14,403.88). After adjusting the gross price for hauling and unloading charges and advertising tax, the total amount owed Roe & Sons by Five Star was \$10,972.86.

16. Between April 12, 2000 and April 20, 2000, Five Star purchased some 4,355 boxes of red grapefruit at a price of \$1.20 PPS, represented by ticket nos. 214720, 214721, 71147, 71148, 71150, 214722, 214723, 214724, and 214725. The total PPS of the boxes was 21,387.92 for a gross price of \$25,665.50 (21,387.92 PS x \$1.20 PPS = \$25,665.50). After adjusting the gross price for hauling and unloading charges and research and advertising

tax, the total amount owed Roe & Sons by Five Star was \$21,621.11.

17. Five Star alleged that it owed Roe & Sons the sum of \$32,593.97. However, Five Star stipulated that Roe & Sons should be given credit for \$4,336.37 in hauling charges paid by Roe & Sons, which brings the total owed to Roe & Sons for red grapefruit by Five Star to \$36,930.34.

18. Subsequent to the purchase of the above red grapefruit by Five Star from Roe & Sons, Five Star advised Roe & Sons that Five Star would not be purchasing any more red grapefruit from Roe & Sons. As a result of this decision by Five Star, Roe & Sons advised Five Star that Five Star could continue to deliver white grapefruit under Contract Nos. B333S and B376B, but that any monies due Five Star for grapefruit delivered on these contracts would be applied against any damages suffered by Roe & Sons for Five Star's failure to honor the alleged oral contracts to purchase red grapefruit from Roe & Sons.

19. As a result of Roe & Sons' position concerning the alleged oral contracts, Five Star made no further deliveries of white grapefruit to Roe & Sons under Contract Nos. B333S and B376B. Instead, Five Star sold the white grapefruit that was to be delivered to Roe & Sons under Contract Nos. B333S and B376B to Silver Springs Citrus at a much reduced rate PPS due to the decline in the grapefruit market in what Five Star described as

an attempt to mitigate damages under Contract Nos. B333S and B376B.

20. Five Star alleged that Roe & Sons owed Five Star \$4,822.31 for 840 boxes of temple oranges purchased by Roe & Sons. However, Five Star stipulated that Roe & Sons was entitled to a credit of \$355.58 due to an accounting error by Five Star. The adjusted amount owed to Five Star for temple oranges by Roe & Sons is \$4,466,73.

21. Roe & Sons alleged in its First Affirmative Defense to Five Star's Complaint that the parties had reached a settlement of their respective claims. However, based on the testimony of Larry Thompson denying that a settlement had been reached, which is credible in this regard, and the fact that the check for the amount of the alleged settlement was never received or negotiated by Five Star, supports Five Star's position that the parties had not reached a settlement.

22. In its Second Affirmative Defense, Roe & Sons alleged that Five Star breached Contract No. B333S by failing to deliver white grapefruit in accordance with the specifications set forth in the contract. Roe & Sons failed to present sufficient evidence to support this affirmative defense.

23. Roe & Sons' Third Affirmative Defense, Setoff, and Counterclaim to Five Star's Complaint is based on Five Star's breach of the alleged oral red grapefruit contracts. Roe & Sons

failed to present sufficient evidence to show that the alleged oral red grapefruit contracts were in fact valid contracts.

24. Roe & Sons alleges in its Complaint filed in Case No. 01-2496A that Five Star breached the alleged oral contracts for red grapefruit. Roe & Sons failed to present sufficient evidence to show that the alleged oral red grapefruit contracts were in fact valid contracts.

#### CONCLUSIONS OF LAW

25. The Division has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

26. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). Therefore, Five Star must prove by a preponderance of the evidence the allegations contained in its First Amended Complaint. Likewise, Roe & Sons must prove by a preponderance of the evidence the allegations contained in its Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996), and Subsection 120.57(1)(j), Florida Statutes.

27. There was no mutual agreement as to the material terms of the alleged red grapefruit contracts between Five Star and

Roe & Sons. Particularly, there was no agreement as to the quantity of red grapefruit that Five Star was to purchase under the alleged contract. Therefore, there was no valid enforceable contract as to the red grapefruit. See Winter Haven Citrus Growers Association v. Campbell & Sons Fruit Company, 773 So. 2d 96 (Fla. 2d DCA 2000). Without a valid contract, Roe & Sons' request for a Setoff or Counterclaim claimed in its answer to Five Star's First Amended Complaint fails. Likewise, Roe & Sons' Complaint alleging damages due to Five Star's breach of the red grapefruit contract for its failure to purchase a certain quantity of red grapefruit fails.

28. Five Star has met its burden to show that it is entitled to payment from Roe & Sons as follows:

Tangerines	\$ 5,978.07
White Grapefruit	\$42,131.63
Temple Oranges	<u>\$ 4,466,73</u>
Total	\$52,576.43
Minus Amount Owed Roe & Sons for red grapefruit	<u>\$36,930.34</u>
Net owed to Five Star by Roe & Sons	<u>\$15,646.09</u>

29. Five Star claims that it is entitled to damages due to the breach of Contract Nos. B333S and B376B for the purchase of a certain number of boxes of white grapefruit by Roe & Sons. However, assuming arguendo that Roe & Sons breached the above referenced contracts, Five Star's attempt to mitigate damages was inappropriate. Since Roe & Sons agreed to continue



accepting the white grapefruit from Five Star under Contract Nos. B333S and B376B with the account showing a credit to Five Star for damages under the alleged red grapefruit contracts, the more appropriate approach would have been to continue delivery of the white grapefruit and receive a credit for the full price under the contracts, and negotiate or litigate the validity of the alleged red grapefruit contracts and Roe & Sons alleged breach of the white grapefruit contracts. Due to a declining red grapefruit market, Five Star's approach to mitigation of damages resulted in damages being created rather than mitigated.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Agriculture and Consumer Services enter a final order requiring Roe & Sons to pay Five Star the sum of \$15,646.09 and denying Five Star any damages in regard to Contract Nos. B333S and B376B. It is further recommended that Roe & Sons be denied any relief in regards to the alleged red grapefruit contracts.

DONE AND ENTERED this 5th day of March, 2002, in  
Tallahassee, Leon County, Florida.

---

WILLIAM R. CAVE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6947  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of March, 2002.

COPIES FURNISHED:

Hank B. Campbell, Esquire  
Gray, Harris, Robinson, Lane, Trohn  
Post Office Box 3  
Lakeland, Florida 33802

United States Fidelity & Guaranty Company  
4311 West Waters Avenue, Suite 401  
Tampa, Florida 33614

Brenda D. Hyatt, Bureau Chief  
Bureau of License and Bond  
Department of Agriculture  
and Consumer Services  
541 East Tennessee Street  
India Building  
Tallahassee, Florida 32308

Richard D. Tritschler, General Counsel  
Department of Agriculture  
and Consumer Services  
The Capitol, Plaza Level 10  
Tallahassee, Florida 32399-0810

Douglas A. Lockwood, III, Esquire  
Peterson & Myers, P.A.  
141 5th Street, Northwest  
Post Office Drawer 7608  
Winter Haven, Florida 33883

H. Christopher Thompkins, II, Esquire  
1706 South Kings Avenue  
Brandon, Florida 33509-6216

Jack P. James, Esquire  
Post Office Box 3  
Lakeland, Florida 33802

Honorable Charles H. Bronson  
Commissioner of Agriculture  
Department of Agriculture  
and Consumer Services  
The Capitol, Plaza Level 10  
Tallahassee, Florida 32399-0810

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.