STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

M. E. STEPHENS AND SONS FRUIT COMPANY, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 06-2508
GEORGE MASON CITRUS, INC., AND WESTERN SURETY COMPANY, AS SURETY,	)	
Respondents.	)	

RECOMMENDED ORDER

The Administrative Law Judge (ALJ) assigned to this case by the Division of Administrative Hearings (DOAH) conducted the final hearing on April 10, 2007, in Sebring, Florida.

APPEARANCES

For Petitioner: Thomas V. Infantino, Esquire
Infantino & Berman
180 South Knowles Avenue, Suite 7
Winter Park, Florida 32789

For Respondent George Mason Citrus, Inc.:

Bert J. Harris, III, Esquire
Swaine, Harris, Sheehan & McClure, P.A.
401 Dal Hall Boulevard
Lake Placid, Florida 33852

For Respondent Western Surety Company:

(No appearance)

STATEMENT OF THE ISSUES

The issues presented are whether Respondent, George Mason Citrus, Inc. (Mason), owes Petitioner $10,000 for citrus fruit that Mason purchased from Petitioner and, if so, whether the surety is liable for any deficiency in payment from Mason.

PRELIMINARY STATEMENT

On March 30, 2006, Petitioner filed a Dealer Complaint with the Department of Agriculture and Consumer Services (Department). On June 1, 2006, Petitioner filed an Amended Dealer Complaint with the Department. By letter dated July 13, 2006, the Department referred the matter to DOAH to conduct an administrative hearing.

After the Department referred the matter to DOAH, Petitioner filed a Second Amended Dealer Complaint (the Complaint). The issues presented in this case are framed in the Complaint filed by Petitioner; the Answer, Amended Answer, and Affirmative Defenses filed by Mason; and cross motions for attorney's fees filed by Petitioner and Mason. The parties agree that DOAH has no authority to award attorney's fees.

Respondent, Western Surety Company (Western), did not appear at the hearing. Petitioner and Mason submitted nine joint exhibits for admission into evidence. Petitioner presented the testimony of one witness and either identified or submitted three exhibits. Mason submitted 36 exhibits. The

identity of the witness and exhibits and any attendant rulings are set forth in the Transcript of the hearing filed with DOAH on June 19, 2007.

Petitioner timely filed its Proposed Recommended Order (PRO) on July 10, 2007. Mason timely filed its PRO on July 13, 2007. Western did not file a PRO.

FINDINGS OF FACT

1. Petitioner is a Florida corporation licensed by the Department as a "citrus fruit dealer," within the meaning of Subsection 601.03(8), Florida Statutes (2005) (dealer).[1] The business address for Petitioner is 1103 Southeast Lakeview Drive, Sebring, Florida 33870.

2. Mason is a Florida corporation licensed by the Department as a citrus fruit dealer. The business address for Mason is 140 Holmes Avenue, Lake Placid, Florida 33852.

3. Western is the surety for Mason pursuant to bond number 42292005 issued in the amount of $100,000 (the bond). The term of the bond is August 1, 2004, through July 31, 2005.

4. Petitioner conducts business in Highlands County, Florida, as a dealer and as a "broker" defined in Subsection 601.03(3). In relevant part, Petitioner purchases white grapefruit (grapefruit) for resale to others, including Mason.

5. Mason conducts business in Highlands County as either an "agent," "broker," or "handler" defined in Subsections

601.03(2), (3), and (23). On January 31, 2003, Mason contracted with Petitioner to purchase grapefruit from Petitioner pursuant to Fruit Contract number 03-307 (the contract).

6. Mason drafted the contract. The terms of the contract require Petitioner to sell grapefruit to Mason for the 2003, 2004, and 2005 "crop years." The 2003 crop year began in the fall of 2002 and ended at the conclusion of the spring harvest in 2003. The 2004 and 2005 crop years began in the fall of 2003 and 2004 and ended in the spring of 2004 and 2005, respectively. Only the 2005 crop year is at issue in this proceeding.

7. The contract required Petitioner to deliver grapefruit to a person designated by Mason. Mason designated Peace River Citrus Products, Inc. (Peace River), in Arcadia, Florida, for delivery of the grapefruit at issue.

8. Mason was required by the terms of a Participation Agreement with Peace River to deliver 30,000 boxes of grapefruit to Peace River during the 2005 crop year. In an effort to satisfy its obligation to Peace River, Mason entered into the contract with Petitioner for an amount of grapefruit described in the contract as an "Approximate Number of Boxes" that ranged between 12,000 and 14,000.

9. Petitioner delivered only 2,128 boxes of grapefruit to Peace River. The production of grapefruit was significantly

decreased by three hurricanes that impacted the area during the 2005 crop year.

10. The parties agree that Mason owed Petitioner $19,070.03 for the delivered boxes of grapefruit. The amount due included a portion of the rise in value over the base purchase price in the contract caused by increases due to market conditions and participation pay out after the parties executed the contract (the rise).[2]

11. On or about October 26, 2005, Mason mailed Petitioner a check for $9,070.03. The transmittal letter for the check explained the difference between the payment of $9,070.03 and the amount due of $19,070.03.

12. Mason deducted $10,000 from the $19,070.03 due Petitioner, in part, to cover the cost of grapefruit Mason purchased from other dealers or growers to make up the deficiency in grapefruit delivered by Petitioner (cover). The $10,000 sum also includes interest Mason claims for the cost of cover and Mason's claim for lost profits.

13. Petitioner claims that Mason is not entitled to deduct lost profits and interest from the amount due Petitioner. If Mason were entitled to deduct interest, Petitioner alleges that Mason calculated the interest incorrectly.

14. The larger issue between the parties is whether Mason is entitled to deduct cover charges from the amount due

Petitioner. If Mason were not entitled to cover the deficiency in delivered boxes of grapefruit, Mason would not be entitled to interest on the cost of cover and lost profits attributable to the deficiency.

15. The parties agree that resolution of the issue of whether Mason is entitled to cover the deficiency in delivered boxes of grapefruit turns on a determination of whether the contract was a box contract or a production contract. A box contract generally requires a selling dealer such as Petitioner to deliver a specific number of boxes, regardless of the source of grapefruit, and industry practice permits the purchasing dealer to cover any deficiency. A production contract generally requires the selling dealer to deliver an amount of grapefruit produced by a specific source, and industry practice does not permit the purchasing dealer to cover any deficiency.

16. The contract is an ambiguous written agreement. The contract expressly provides that it is a "Fruit Purchase Contract" and a "delivered in" contract but contains no provision that it is either a box or production contract. The contract is silent with respect to the right to cover.

17. Relevant terms in the contract evidence both a box contract and a production contract. Like the typical box contract, the contract between Mason and Petitioner prescribes a number of boxes, specifically no less than 12,000, that are to

be delivered pursuant to the contract. However, the typical box contract does not identify the number of boxes to be delivered as "Approximate No. of Boxes" that ranges between 12,000 and 14,000 boxes.

18. Unlike a production contract, the contract does not identify a specific grove as the source of the required grapefruit. Best practice in the industry calls for a production contract to designate the grove by name as well as the number of acres and blocks. However, industry practice does not require a production contract to identify a specific grove as the source of grapefruit. In practice, Mason treated another contract that Mason drafted with a party other than Petitioner as a production contract even though the contract did not identify a specific grove as the source of grapefruit.

19. The absence of a force majure clause in the contract may evidence either type of contract.[3] A box contract typically requires the selling dealer to deliver the agreed boxes of grapefruit regardless of weather events, unless stated otherwise in the contract. However, the absence of such a clause may also be consistent with a production contract because "acts of God" are inherent in a production contract. Such acts, including hurricanes, necessarily limit grapefruit production, and a production contract obligates the selling dealer to deliver only the amount of grapefruit produced.

20. The contract between Petitioner and Mason did not contain a penalty provision for failure to deliver the prescribed boxes of grapefruit (box penalty). The absence of a box penalty in the contract evidences a production contract.

21. The contract identifies Petitioner as the "Grower." A grower typically enters into a production contract.

22. A box contract does not limit the source of grapefruit to be delivered, and the selling dealer in a box contract may obtain grapefruit from anywhere in the state. The contract between Petitioner and Mason limits the source of grapefruit to grapefruit grown in Highlands County, Florida.

23. Mason knew that Petitioner sold only grapefruit from groves in Highlands County, Florida, identified in the record as the Clagget Taylor groves. During the 2003 and 2004 crop years, Petitioner sold only grapefruit from the Clagget Taylor groves. Mason received trip tickets and other documentation related to the delivery of no less than 24,000 boxes of grapefruit, all from the Clagget Taylor groves.

24. The boxes of grapefruit delivered during the 2005 crop year came only from the Clagget Taylor groves. Mason received documentation showing the grapefruit came from the Clagget Taylor groves.

25. Ambiguous written agreements are required by judicial decisions discussed in the Conclusions of Law to be construed

against the person who drafted the agreement. Mason drafted an ambiguous agreement with Petitioner. The agreement must be construed against Mason as a production contract.

26. Mason owes Petitioner $10,000 for the delivered grapefruit during the 2005 crop year. The terms of the bond make Western liable for any deficiency in payment from Mason.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties with adequate notice of the hearing. Western did not appear at the hearing.

28. The burden of proof is on Petitioner. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). Petitioner must show by a preponderance of the evidence that Petitioner is entitled to the remedy claimed in the Complaint.

29. Petitioner satisfied its burden of proof. Petitioner showed that the contract Mason drafted is an ambiguous written agreement that should be construed against Mason as a production contract and that Petitioner satisfied the requirements of the production contract.

30. The contract between Petitioner and Mason is an ambiguous written agreement drawn by Mason. An ambiguous written agreement must be construed against the party that drew

the contract. Travelers Insurance Company v. Bartoszewicz, 404 So. 2d 1053, 1054 (Fla. 1981). See also Terminix International Company, LP, v. Palmer Ranch Limited Partnership, 432 F. 3d 1327, 1329 (11th Cir. 2005); City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000).

31. The parties agree that Florida's Uniform Commercial Code applies in this proceeding. In relevant part, Subsection 671.205(4), Florida Statutes (2003 through 2005), provides that the express terms of an agreement should be construed in a manner that is consistent with a course of dealing whenever such a construction is reasonable.

32. It is reasonable to construe the terms of the contract at issue in a manner that is consistent with the course of dealing between Petitioner and Mason over the three-year term of the contract. During the three crop years covered by the term of the contract, Petitioner delivered grapefruit to Mason solely from the Clagget Taylor groves. That course of dealing may be fairly regarded as a common basis of understanding for interpreting the expressions of Petitioner and Mason in their contract. See § 671.205(1) (defining a "course of dealing" as previous conduct between the parties which is fairly to be regarded as establishing a common basis of understanding for their expressions).

33. A course of dealing between parties also supplements or qualifies the terms of an agreement. § 671.205(3). The course of dealing over three crop years, in which Petitioner delivered grapefruit solely from Clagget Taylor groves located in Highlands County, Florida, supplemented and qualified the terms of the contract.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order directing Mason to pay $10,000 to Petitioner, and, in accordance with Subsections 601.61 and 601.65, requiring Western to pay over to the Department any deficiency in payment by Mason.

DONE AND ENTERED this 22nd day of August, 2007, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2007.

ENDNOTES

[1/] All subsection, section, and chapter references are to Florida Statutes (2006), unless otherwise stated.

[2/] The amount of rise to which Mason was entitled is unclear from the terms of the contract. One part of the contract provides that the "Dealer and Buyer will split" the first nickel in rise based on the Peace River participation payoff. Mason's Exhibit 2 at 1. Another part of the contract provides that the, "Grower gets all the rise less the first $.05 based on Peace River Citrus Products, Inc. final . . . payout." Mason's Exhibit 2 at 2. The pre-hearing stipulation states that Mason was entitled to keep the first nickel of the rise. See Joint Exhibit 9, para. 4.19 at 9.

[3/] The contract includes a unilateral force majure clause that entitles only Mason to cancel the contract.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written 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.