

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Holiday's General Service Corporation,  
Claimant,

v.

No. 96-00351

Henry O. Franck, and  
Prudential Securities, Inc.,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimant Holiday's General Service Corporation ("Claimant") was represented by Michael E. Goldstein, Esq. of Hanover Walsh, Jalenak & Blair, Memphis, Tennessee.

Respondents Henry O. Franck ("Franck"), and Prudential Securities, Inc. ("PSI") (jointly referred to as "Respondents") were represented by Robert S. Getman, Esq. of Prudential Securities, Inc., New York, New York.

### **CASE INFORMATION**

Claimant's Statement of Claim was filed on or about January 23, 1996. Claimant's Submission Agreement was signed on January 19, 1996.

Respondents' joint Answer to the Statement of Claim was filed on or about March 15, 1996. The NASD Regulation, Inc. Office of Dispute Resolution does not have a record of either Respondent having filed a Submission Agreement.

### **HEARING INFORMATION**

A telephonic hearing was held on September 10, 1996.

The hearing on the merits was held on: October 23, 1996 for three (3) sessions.

The hearing was held in Memphis, Tennessee.

### **CASE SUMMARY**

Claimant alleged that : Franck recommended the purchase of Harrah's Jazz Co./Harrah's Jazz Fin. Corp. 1st MTG RO MN bonds (the "Bonds") stating that payment of the Bonds was unconditionally guaranteed by the parent company, Harrah's Entertainment, which representations Claimant relied on and would not have purchased the Bonds without such guarantee; it only received the client confirmation of the purchase and received nothing else from Respondents; in early November, 1995, Harrah's Jazz Company and Harrah's Jazz Finance Corp. filed Chapter 11 bankruptcy petitions; during several conversations with Respondents, after the bankruptcy filing, Respondents continued to assure Claimant of the existence and effectiveness of the Harrah's Entertainment guarantee of the Bonds; and it was not until the Claimant made its own investigation that it discovered the false and misleading nature of Franck's statements.

Respondents generally and specifically deny each and every substantive allegation in the Statement of Claim which referred to them. Respondents also asserted the following affirmative defenses: At all times relevant, Claimant's accounts were handled properly and in accordance with the "Know your Customer" Rule of the New York Stock Exchange ("NYSE") and the "Suitability" Rule of the National Association of Securities Dealers ("NASD") as well as with other applicable rules and regulations; there is no private right of action allowing damage awards for violations of NASD Rules; Claimant failed to mitigate its damages; Claimant is not justified in relying on any alleged statements about a payment guarantee contradicted by the prospectus; any loss sustained by Claimant was attributable to market conditions and to its own investment decisions, and any action or inaction on PSI's part was not the proximate cause of any loss; at all material times and in all material matters, Respondents acted in good faith, with no intent to deceive or act recklessly with respect to the Claimant; Respondents did not conspire or scheme to defraud Claimant, or aid and abet any other persons to make any untrue statement of material fact, employ any device, scheme or artifice to defraud or engage in any deception, manipulation, act, practice or course of business which operated as a fraud in connection with the transactions alleged in the Statement of Claim; Claimant's claims are barred by Claimant's own contributory negligence in connection with the investments; even if Claimant is entitled to any damages, such damages must be mitigated and reduced by the proportion which Claimant's own negligence and culpable conduct caused the damages; attorney's fees may not legally be awarded herein; Claimant bears the special burden of proving alleged fraud not just by a preponderance of evidence but by satisfying the higher proof standard of "clear and convincing" evidence; and Claimant failed to state a claim upon which relief can be granted.

### **RELIEF REQUESTED**

Claimant requested an award of the following: Requiring Franck and PSI to repurchase the Bonds from him in an amount equal to their costs plus interest from the date of purchase or, alternatively, for monetary damages in an amount equal to the difference between the cost of the Bonds and the fair market value thereof, to be determined either on the date of the award or upon subsequent sale

of the Bonds by Claimant, plus interest; and other damages, without limitation, including costs, expenses and attorneys' fees.

Respondents requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

On or about September 4, 1996, Respondents filed a Motion to Dismiss the Statement of Claim pursuant to Rule 10301 (d) (2) of the Code of Arbitration Procedure (the "Code") (formerly §12(d)(2) of the Code). After receipt of the parties' responses, the NASD Regulation, Inc. Office of Dispute Resolution sent notice of the existence of a dispute under Rule 10301 of the Code, and notice of the parties' available election to assert the dispute before the Court with jurisdiction over the class action at issue. The parties elected to present the matter to the undersigned arbitrators. A telephonic hearing was held on September 10, 1996 on Respondents' Motion to Dismiss. After review of the parties materials, hearing oral argument, and deliberation, the arbitrators denied the motion.

Respondents did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but are required to submit to arbitration pursuant to §10301 of the Code and having answered the claim, appeared and testified at the hearing and are bound by the determination of the arbitration panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

(1) Respondents Henry O. Franck, and Prudential Securities, Inc. are jointly and severally liable for, and shall pay to the Claimant, Holiday's General Service Corporation, the sum of \$44,000 as satisfaction of its claims herein.

(2) That other than forum fees, which are to be paid by the parties 25% by Holiday's General Service Corporation and 75% by Prudential Securities, Inc. and addressed more fully below, all other claims and requests for relief not specifically awarded here are, and each of them, denied with prejudice.

**FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session. There were four (4) sessions x \$750 = \$3,000 in forum fees. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Prudential Securities, Inc shall pay to NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$350.

Additional forum fees in the amount of \$2,250 are assessed by the arbitrators against the Prudential Securities, Inc.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Dated:

Thomas L. Maschmeyer, Jr.  
Thomas L. Maschmeyer, Jr.  
Public Arbitrator, Presiding Chair

/s/

December 4, 1996

David N. Burn  
David N. Burn  
Public Arbitrator

/s/

December 4, 1996

**Dissenting Arbitrator**

While agreeing that both parties had responsibility, the allocation between the parties should be on a 50%-50% basis.

Thomas C. Moxley  
Thomas C. Moxley  
Industry Arbitrator

/s/

December 4, 1996