

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**February 4, 2015**

**IN RE:**

**SHOW CAUSE PROCEEDING AGAINST  
NOACH PALATNIK DBA PURE AIR, INC.  
DBA AIR DUCT CLEANING FOR  
ALLEGED VIOLATIONS OF  
TENN. CODE ANN. § 65-4-401 *et seq.***

**DOCKET NO.  
14-00031**

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**ORDER DENYING SETTLEMENT AGREEMENT**

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This matter came before Chairman Herbert H. Hilliard, Director Kenneth C. Hill and Director Robin Bennett of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on December 1, 2014, for consideration of the proposed *Settlement Agreement* filed by Noach Palatnik d/b/a Pure Air, Inc. d/b/a Air Duct Cleaning (“Air Duct Cleaning” or “Respondent”) and the Staff of the Compliance Division of the TRA (“Compliance Division”) on November 20, 2014.

**BACKGROUND**

On March 24, 2014, the Compliance Division filed a request for consideration of the appointment of a Hearing Officer. In the request, the Compliance Division states that the Investigative Staff of the Consumer Services Division (“CSD”) alleges that during the period of July 1, 2013 to July 17, 2013, Air Duct Cleaning made or caused to be made eight (8) telephone sales or marketing calls to Tennessee consumers on the Tennessee Do-Not-Call registry in

violation of Tenn. Code Ann. § 65-4-401 *et seq.* (the “Do-Not-Call law”) and that Air Duct Cleaning is not registered as a telephone solicitor with the Authority.

At a regularly scheduled Authority Conference held on April 14, 2014, the Directors voted unanimously to appoint General Counsel or her designee to act as Hearing Officer (1) to determine whether a Show Cause Order should be issued against Air Duct Cleaning for alleged violations of Tenn. Code Ann. § 65-4-401, *et seq.*, and Authority rules; and (2) if a Show Cause Order was issued, to prepare this matter for hearing before the panel.

The Compliance Division submitted a *Petition* on July 31, 2014, setting forth the specific allegations against Air Duct Cleaning along with documents related to the investigation.<sup>1</sup>

On August 1, 2014, the Hearing Officer appointed in this matter issued an *Order Requiring Noach Palatnik d/b/a Pure Air, Inc. d/b/a Air Duct Cleaning to Appear and Show Cause Why the TRA Should Not Issue a Cease and Desist Order, Impose Civil Penalties, and Seek Additional Relief for Violations of State Law and TRA Rules* (“Show Cause Order”). In the *Show Cause Order*, the Hearing Officer recites the following relevant facts:

1. Air Duct is not registered as a telephone solicitor with the Authority.
2. Between July 1, 2013 and July 17, 2013, Air Duct made or caused to be made at least eight (8) telephone calls to at least eight (8) Tennessee residential subscribers of telephone service soliciting the purchase of goods and/or services.
3. Each complaining Tennessee residential subscriber objects to receiving telephone solicitations, is listed in the Tennessee Do-Not-Call Register, and did not give permission or consent for the solicitation.
4. As to each complaint, a Notice of Alleged Violations was issued by the CSD and sent by certified mail to Air Duct.

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<sup>1</sup> In support of the facts alleged in its *Petition*, the Compliance Division had previously filed a notice with the affidavit of Slayde Warren of the CSD. See *Tennessee Code Annotated Section 4-5-313 Notice, Affidavit of Slayde Warren in Support of Allegations of Violations of Tenn. Code Ann. § 65-4-401 et seq. Pursuant to a Proceeding Requiring Pure Air Inc. d/b/a Air Duct Cleaning to Show Cause Why a Cease and Desist Order and/or Fine Should Not Be Imposed* (April 28, 2014) (“Warren Affidavit”).

5. Returned certified mail receipts show that the Notices of Alleged Violations were acknowledged and received by someone authorized to do so at the addresses obtained for Air Duct.<sup>2</sup>

In the *Show Cause Order*, the Hearing Officer states that upon this information, as demonstrated in the *Petition* and the supporting *Affidavit of Slayde Warren*, Air Duct Cleaning should be required to appear and show cause why it should not be found in violation of state law and TRA Rules.<sup>3</sup> Count 1 alleges Air Duct Cleaning violated Tenn. Code Ann. § 65-4-404 and TRA Rule 1220-04-11-.07(1) by making or causing to be made telephone solicitations for goods or services to at least eight (8) Tennessee residential subscribers listed in the Do-Not-Call Register. Count 2 alleges Air Duct Cleaning violated Tenn. Code Ann. § 65-4-405(d)(1) and TRA Rule 1220-04-11-.04(1) and (4) by engaging in telephone solicitations to Tennessee residential subscribers without registering with the Authority as a telephone solicitor.<sup>4</sup> The Hearing Officer notes that upon finding a violation of the statutes and rules noted in Counts 1 and 2, the Authority is empowered to issue a cease and desist order, impose civil penalties up to \$2,000 for each violation, and to seek additional relief to the extent allowed under law.<sup>5</sup> In addition, on August 1, 2014, the Hearing Officer issued a *Notice to Appear for Hearing* directing Air Duct Cleaning to appear at 1:00 p.m. CDT on September 15, 2014 and show cause why the Authority should not find Air Duct Cleaning in violation of Tenn. Code Ann. §§ 65-4-401 *et seq.* and Tenn. Comp. R. & Regs. 1220-04-11.

On August 14, 2014, a letter was received by the Authority from the counsel for Pure Air, Inc., Mr. Bryan Kaemmerer, Esq. of McCarty, Leonard & Kaemmerer, L.C., in response to the *Notice to Appear for Hearing* dated August 1, 2014. Mr. Kaemmerer requested that all future correspondence be directed to him and asked for a continuance for the hearing date after

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<sup>2</sup> *Order Requiring Noach Palatnik d/b/a Pure Air, Inc. d/b/a Air Duct Cleaning to Appear and Show Cause Why the TRA Should Not Issue a Cease and Desist Order, Impose Civil Penalties, and Seek Additional Relief for Violations of State Law and TRA Rules*, p. 2 (August 1, 2014).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> *Id.* at 4.

September 21, 2014. Mr. Kaemmerer stated that his client neither made, nor directed to be made, the telemarketing calls in question, and had no knowledge of the responsible party.<sup>6</sup>

On August 15, 2014, the Compliance Division notified the Hearing Officer via email it had no objection to the request for a continuance as long as a motion to appear *pro hac vice* for Mr. Kaemmerer was forthcoming.<sup>7</sup> Also, on August 15, 2014, Mr. Kaemmerer notified the Hearing Officer via email that his client was unavailable until after October 7, 2014, and would likely obtain local counsel.<sup>8</sup>

On September 25, 2014, the Hearing Officer issued a *Re-Notice to Appear for Hearing* directing Air Duct Cleaning to appear for a Show Cause proceeding at 9:00 a.m. CST on November 3, 2014. On October 21, 2014, a *Re-Notice to Appear for Hearing—New Date & Time* was issued, rescheduling the Show Cause proceeding for 1:00 p.m. CST on November 4, 2014.

At the Authority Conference on November 4, 2014, Mr. Palatnik of Air Duct Cleaning appeared personally before the panel for the Show Cause hearing.<sup>9</sup> During his opening statement, Mr. Palatnik attempted to introduce an affidavit into evidence, to which the Compliance Division objected on the basis that the introduction of the affidavit did not comply with Tenn. Code Ann. § 4-5-313. After the Chairman sustained the objection, the hearing was continued until the next Authority Conference scheduled for December 1, 2014.<sup>10</sup>

#### **THE PROPOSED SETTLEMENT AGREEMENT**

On November 20, 2014, Air Duct Cleaning and the Compliance Division filed a proposed *Settlement Agreement*. The proposed *Settlement Agreement* set forth certain Statements of Fact, including acknowledgements by the Respondent that “he or his agents did place calls to the eight

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<sup>6</sup> Letter from Bryan M. Kaemmerer (August 14, 2014).

<sup>7</sup> Email from Shiva Bozarth to Kelly Grams and Bryan Kaemmerer (August 15, 2014).

<sup>8</sup> Email from Bryan Kaemmerer to Kelly Grams and Shiva Bozarth (August 15, 2014).

<sup>9</sup> Mr. Palatnik represented himself and indicated he had been unable to afford local counsel. *See* Transcript of Proceedings, p. 7 (November 4, 2014).

<sup>10</sup> *Id.* at 8-11.

(8) consumer phone numbers identified in the consumer complaints” and that he “failed to register as a solicitor pursuant to Tenn. Code Ann. § 65-4-405(d).”<sup>11</sup> The Compliance Division states that the factors listed in Tenn. Code Ann. § 65-4-116(b) were considered during the negotiations that resulted in the proposed Settlement Agreement, including the size of the Respondent’s business and the gravity of the violations.<sup>12</sup> Under the terms of the proposed *Settlement Agreement*, the Respondent agrees that neither he nor any of his employees, agents or affiliates over whom he exerts control shall telemarket or cause another to telemarket to Tennessee residents.<sup>13</sup> The Respondent further agrees to pay a civil penalty in the amount of \$18,000 to the TRA; however, the civil penalty will be stayed for a period of ten (10) years, at which time the penalties shall be dismissed. If Air Duct Cleaning commits any future violation of Tennessee’s Do-Not-Call or Do-Not-Fax laws within ten (10) years, the Respondent agrees to pay the entire \$18,000 civil penalty in full.<sup>14</sup> Air Duct Cleaning also agrees to remain in compliance with all the statutory and regulatory requirements of the TRA. If the Respondent fails to comply with the terms of the proposed Settlement Agreement, the TRA reserves the right to re-open the investigation and Air Duct Cleaning agrees to pay all costs incurred by the TRA to enforce the Agreement.<sup>15</sup>

### **FINDINGS AND CONCLUSIONS**

At the regularly scheduled Authority Conference held on December 1, 2014, the hearing in this matter was resumed.<sup>16</sup> Mr. Palatnik appeared telephonically at the Hearing. The

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<sup>11</sup> *Settlement Agreement*, p. 1 (November 20, 2014).

<sup>12</sup> *Id.* at 2. Tenn. Code Ann. § 65-4-116(b) states that in determining the amount of a civil penalty, “the appropriateness of the penalty to the size of the business of the person, firm or corporation charged, the gravity of the violation and the good faith of the person, firm or corporation charged in attempting to achieve compliance, after notification of a violation, shall be considered.”

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2-3. Tennessee’s “Do-Not-Fax” law is codified at Tenn. Code Ann. § 65-4-501, *et seq.*

<sup>15</sup> *Id.* at 3.

<sup>16</sup> The Hearing Officer issued a *Re-Notice to Appear for Hearing* on November 6, 2014, which directed Air Duct Cleaning to appear for the Show Cause hearing on December 1, 2014 at 1:00 p.m. CST.

Compliance Division presented the terms of the proposed *Settlement Agreement*. No member of the public sought to comment at the hearing.

The panel considered the proposed *Settlement Agreement*. Upon taking into account the guidance provided in Tenn. Code Ann. § 65-4-116(b) to determine the amount of a civil penalty, the panel found that the gravity of the violation, including the number of admitted violations of the Do-Not-Call law and the admitted failure of the Respondent to register as a telephone solicitor, along with the failure of Air Duct Cleaning to show good faith after receiving notices of violation from the CSD, weighed against the proposed suspension of all monetary penalties. Therefore, the panel voted unanimously to reject the proposed *Settlement Agreement*. The panel noted, however, that rejection of the proposed *Settlement Agreement* does not preclude consideration of any future settlement entered into by the parties that takes into account the factors provided by Tenn. Code Ann. § 65-4-116(b).<sup>17</sup>

**IT IS THEREFORE ORDERED THAT:**

The proposed *Settlement Agreement* filed by Noach Palatnik d/b/a Pure Air, Inc. d/b/a Air Duct Cleaning and the Staff of the Compliance Division on November 20, 2014, is denied.

**Chairman Herbert H. Hilliard, Director Kenneth C. Hill and Director Robin Bennett concur.**

**ATTEST:**



**Earl R. Taylor, Executive Director**

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<sup>17</sup> Director Hill voted with the majority to reject the proposed *Settlement Agreement*, but noted that he would support a small penalty being paid and a shorter term for the stay, if the Respondent registers properly as a telephone solicitor prior to doing business in Tennessee.