No. 17-13481

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION AND
STATE OF FLORIDA,
Plaintiffs-Appellees,

v.

VYLAH TEC, LLC, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
No. 2:17-cv-228-FtM-99MRM
Hon. Sheri Polster Chappell

BRIEF OF THE FEDERAL TRADE COMMISSION AND STATE OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-2 to 26.1-3, the Federal Trade Commission and State of Florida certify that all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal are listed in the Certificate of Interested Persons filed by Appellants on September 25, 2017.

ORAL ARGUMENT STATEMENT

The Federal Trade Commission and State of Florida believe the Court may affirm the district court decision without oral argument. The case involves the straightforward application of binding Circuit precedent to core facts that Appellants did not challenge below.

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QUESTIONS PRESENTED

The district court entered a preliminary injunction that prohibited Appellants from deceptively selling computer clean-up services and software, froze their assets to preserve money that could be used for consumer redress, and appointed a receiver to prevent the dissipation of those assets and ensure that Appellants did not resume unlawful activities. Appellants had agreed to these actions, although they asked the court to freeze fewer assets than it ultimately chose to. The questions presented are:

1. Whether the preliminary injunction's conduct prohibitions were proper exercises of the district court's discretion;

2. Whether the asset freeze was a proper exercise of the district court's discretion;

3. Whether the appointment of a receiver was a proper exercise of the district court's discretion; and

4. Whether the district court held a proper hearing prior to entering the preliminary injunction.

STATEMENT OF THE CASE

This appeal challenges a preliminary injunction and related asset freeze entered by the district court in a case brought by the Federal Trade Commission and the State of Florida alleging that Appellants' deceptive sale of computer clean-

up services and security software violated the FTC Act, 15 U.S.C. § 45(a), and Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. § 501.204. The Complaint seeks temporary, preliminary, and permanent injunctive relief and equitable monetary relief. Following a hearing at which Appellants agreed to both an injunction and an asset freeze, the district court entered the preliminary injunction now under review and preserved in place a previously granted asset freeze and the appointment of a Receiver. AV3/Dkt62/P564.[1] The court released more than $70,000 to Appellants for living expenses and legal fees. *Id.*; AV4/Dkt69/P678.

1. The Vtec Businesses

Appellants are three interrelated Florida companies—Vylah Tec LLC d/b/a Vtec Support, Express Tech Help LLC, and Tech Crew Support LLC—and their owners/managers, who are also related. We refer to them collectively as "Vtec" except as needed for clarity. The companies share offices and employees in Fort Myers, Florida. As described further below, Vtec purported to provide computer technical support services to individuals, but in reality depended on deceptive sales of computer clean-up services and security software to unsuspecting consumers to turn a profit.

[1] Record citations are to the appendix volume (AV#), appendix tab (Dkt#), and appendix page (P#). The appendix volumes prepared by the FTC and Florida—Volumes Five and Six—continue the pagination begun in the appendix volumes prepared by Appellants.

Appellant Angelo Cupo operates Vtec Support and has claimed to be its owner and CEO. AV/5/Dkt4/PP1066, 1068. He is also the managing member of Tech Crew and runs the day-to-day operations of all three companies. AV5/Dkt4/PP896, 919; AV1/Dkt4/P127. Angelo is a signatory on financial accounts for all three corporate defendants. AV5/Dkt4/PP1090-92, 1094, 1110, 1119. He applied for and obtained a credit card processing account for Vtec. AV5/Dkt4/PP1064-67. He wrote sales scripts, which he required sales agents to follow. AV1/Dkt4/PP129, 130-31. He trained Vtec's sales agents and encouraged them to misrepresent to consumers that Vtec was affiliated with well-known tech companies, such as Microsoft, or that Vtec employees were Microsoft-certified technicians. AV1/Dkt4/PP130, 131-32. In addition to managing the operation, Angelo, using the alias "Daniel Peters," directly sold Vtec computer technical support services and security software to consumers. AV1/Dkt4/PP5, 166-67. Angelo also responded to consumers' credit card charge disputes and reviewed related sales call recordings. AV1/Dkt4/P132.

Appellant Robert Cupo, Angelo's father, is a manager and member of Vtec Support, AV5/Dkt4/PP895, 903-08, 1109, 1120, an owner, manager, member, director, and officer of Tech Crew, AV5/Dkt4/PP896, 921-22, 1105-09, 1140-41, 1144-45, and a manager of Express Tech. AV5/Dkt4/PP896, 912-16, 1083-84. (In his response to the TRO he claimed to own all of the Vtec businesses, AV2/Dkt

32-1/P340.) Robert helped run the day-to-day operations of the tech support scheme, supervised the employees, handled sales calls with consumers, and regularly conferred with Angelo about the business. AV1/Dkt4/PP127, 131-32. Robert also had signatory authority for many of the financial accounts of the Vtec companies. AV5/Dkt4/PP1073-1108, 1116-19, 1131. Additionally, he helped obtain credit-card processing accounts for Vtec and personally guaranteed them. AV5/Dkt4/PP1084, 1093-1106, 1140-45.

Appellant Dennis Cupo, Robert's brother, is a managing member of Express Tech, AV5/Dkt4/PP895, 912-13, and directs, manages, and owns 100 percent of the equity of Tech Crew. AV5/Dkt4/PP1034, 1036, 1038, 1083. He is also listed as treasurer of Tech Crew. AV5/Dkt4/P1145. Dennis obtained credit card processing accounts for Express Tech Help and Tech Crew Support, AV5/Dkt4/P1083, 1140, 1145, for which he also provided personal guaranties, AV5/Dkt4/PP1072, 1145.

Although not a named defendant, Robert's wife Olga Cupo had significant responsibilities for the Vtec companies. She was listed as a "Managing Member" and "Registered Agent" of Tech Crew, was a signatory on Vtec bank accounts, and held a credit card issued to Vylah Tec. AV5/Dkt4/PP918, 1088, 1115, 1118, 1130-31. She received at least $33,000 from Vtec. AV5/Dkt4/P1012.

Angelo and Robert are no strangers to tech support scams. Both previously worked for Inbound Call Experts, AV5/Dkt4/PP993, 1006-07, a fraudulent tech

support company that was shut down in 2014 after a lawsuit brought by the FTC and the State of Florida.[2]

2. The Tech Support Scam

a. Lead generation via pop-up ads and HSN contracts

Vtec lured consumers to contact its call center in two different ways.

First, Vtec used pop-up messages with ominous security warnings (such as "registry failure of operating system" and "contact Microsoft technicians") that appeared on consumers' computer screens while web browsing. AV1/Dkt4/PP128, 142, 190, 192, 203, 208. These messages appeared to be generated by the computers' operating systems, but they were in fact bogus and designed to mislead consumers into believing their computers had serious technical problems that could be solved only by calling a provided phone number. AV1/Dkt4/PP68-72. The pop-ups could not easily be ignored because they often could not be deleted or they locked the screen. AV1/Dkt4/P70. Vtec paid third-party "lead generators" to cause the pop-ups to appear. AV1/Dkt4/P128. When consumers called the phone numbers in the pop-ups, the lead generators would forward the calls to Vtec. AV3/Dkt65/P628 (describing lead generators). Thus, the telephone numbers are not associated directly with Vtec itself.

[2] *FTC and State of Florida v. Inbound Call Experts*, 14-81395-civ-Marra, Stipulated Permanent Injunction ($10 million judgment) (S.D. Fla. Dec. 19, 2016).

Vtec says that at some point it stopped using pop-ups and attracted consumer calls through arrangements with Home Shopping Network and similar shopping channels. AV1/Dkt4/PP128, 163, 181, 186-87, 196, 213, 219, 223. Vtec contracted through a company called Avanquest to provide "lifetime" technical support for computers bought through the shopping channels. AV2/Dkt49-1/P353. The computers came with instructions that consumers call Vtec for technical support. AV2/Dkt49-7/PP389-90. As discussed further below, Vtec's technical support operation was not a viable stand-alone business: it received only a few dollars per customer for lifetime help, well below the cost of providing the service. AV3/Dkt49-1/PP356-57; AV3/Dkt65/P628. Vtec made up the difference through deceptive sales of computer clean-up services and software, as described immediately below.

b. Deceptive sales pitches involved unskilled agents falsely diagnosing security risks

When consumers called Vtec for technical support, they spoke to Vtec employees, the vast majority of whom were not trained computer technicians but merely sales agents who were paid far less than qualified, trained computer technicians. AV1/Dkt4/P127. Despite their lack of qualifications, they often falsely told consumers that they were affiliated with Microsoft or were Microsoft-certified technicians. AV1/Dkt4/P132. Vtec's websites also touted the company's technical skills and expertise and falsely claimed titles, such as "Microsoft Gold Partner,"

"Microsoft Technology Associate," "Microsoft Certified Professional," and "Certified Macintosh Technician." AV5/Dkt4/PP897-98, 929, 947, 1027, 1029, 1135. In fact, neither Vtec nor its employees were certified or authorized by either Microsoft or Apple. *Id.*

Once a customer called, Vtec's sales agents used pre-written sales scripts to diagnose phony technical problems or security deficiencies which sales agents claimed could be cured by purchasing computer clean-up services or software from Vtec. The "lifetime tech support" thus was intended not to diagnose actual computer problems, but to pitch Vtec's services and products. AV1/Dkt4/PP81, 129; AV6/Dkt 43-1/PP1263-78. Typically, the agent directed a consumer to access a website, such as *www.LogMeIn.com*, that allowed the agent to gain remote access to the consumer's computer. AV1/Dkt4/PP129, 196. From there, the agent could view the consumer's screen and control the mouse; enabling him to begin the fake diagnosis by opening up various windows, programs, and folders. AV1/Dkt4/PP81, 129, 134-40, 163-64, 196. Whether or not there was a problem, and regardless of whether the computer had antivirus software installed, the script instructed agents to make it seem like there was a problem, such as the absence of sufficient security software or a "systems malfunction" purportedly caused by the absence of such software. AV1/Dkt4/PP129, 134-40. Emphasizing the dire need for immediate action, AV1/Dkt4/PP78-81, 137-38, the sales agent suggested that the consumer

needed to have a Vtec technician clean-up the computer or install additional software to ensure the computer's security. AV1/Dkt4/PP134-40; AV6/Dkt43-1/PP1212-20, 1228-45. The sales pitch did not vary based on the consumer's reasons for calling or the actual condition of her computer. AV1/Dkt4/PP78, 130, 142-43, 163-64, 167, 182, 196, 200-01, 204, 210, 213, 216-17, 219-20, 223. Some consumers reported that Vtec's software would not function or caused their computers to crash. AV1/Dkt4/PP167-68, 181-82.

Vtec's sales script also instructed agents to secure good reviews from callers; agents received monetary rewards for each good review obtained. AV2/Dkt49-1/P433. To obtain these reviews, agents sometimes remained on the phone and maintained a remote connection with a caller's computer while instructing the caller on how to leave a positive review. AV3/Dkt51/PP520-22.

Vtec's scheme generated between 600 and 1200 calls per day. AV3/Dkt49-1/P355. Although Vtec says that it did not pitch software to most callers, Br. 38, the ones who received the pitch fell for the ruse to the tune of at least $1.8 million. AV5/Dkt4/P1011.

3. District Court Proceedings and Reports of the Receiver

On May 1, 2017, the FTC and Florida sued all the Vtec Appellants for violating the FTC Act and FDUTPA. Dkt 2 at 1-17, AV1 at 15-31. They also sought an *ex parte* TRO, the appointment of a receiver, authorization for the

Receiver's immediate access to Vtec's business premises, and a freeze of Vtec's and the Cupos' assets. *Id.* at 15, AV1 at 29. The FTC and Florida supported the motion with certified business records as well as declarations from investigators, a forensic accountant, a technical support fraud expert, employees from Microsoft Corporation and Apple, Inc., a former Vtec employee, and 14 consumers. AV/1Dkt4/PP32-224; AV5/Dkt4/PP893-1153.

The district court granted the TRO and related relief on May 2, 2017, and directed Vtec to show cause why the court should not issue a preliminary injunction. AV2/Dkt9/PP242-73. In a provision entitled "Motion for Live Testimony; Witness Identification," the TRO informed Vtec that the district court would rule on the PI motion based on "pleadings, declarations, exhibits and memoranda filed by, and oral argument of, the parties" and that "[l]ive testimony shall be heard only on further order of this Court or on motion filed with the Court … ." AV2/Dkt9/PP272-73.[3] In a subsequent status conference hearing, the district court reiterated that Vtec could file a motion to cross-examine witnesses during the PI hearing. AV6/Dkt115/PP1352.

[3] The local rules provide that PI motions will be decided without live testimony, unless a party requests it before the hearing. M.D. Fla. Rule. 4.06(b).

Vtec responded to the TRO's show cause order with declarations from Angelo, Robert, and Dennis Cupo, AV2/Dkt32/PP322-44.[4] Vtec did not request live testimony or cross-examination. With respect to the preliminary injunction, Vtec opposed the specific terms of the PI proposed by the FTC and Florida and requested instead that the district court "impose a more limited preliminary injunction as proposed by [Vtec]." AV2/Dkt32/P331. Vtec's proposal included the same conduct restrictions as the PI proposed by the FTC and Florida, but had a more limited asset freeze. AV6/Dkt42/P1161-62 (FTC/Florida), 1191 (Vtec). Whereas the FTC and Florida sought continuation of the freeze on *all* of Vtec's and the Cupos' assets (which at the time totaled about $620,000), AV6/Dkt42/P1164, Vtec sought to limit the freeze to $500,000 of assets, AV6/Dkt42/PP1193.

In support of its requested alternative, Vtec argued that the balance of equities favored a more limited injunction and that they had discontinued the allegedly problematic practices. AV2/Dkt32/PP328-31. It did not dispute, however, that the FTC and Florida had accurately described Vtec's sales practices, and it did not contend that the FTC and Florida had not shown a likelihood of

[4] Vtec submitted a few other documents, such as screen shots of customer reviews left on Vtec's Facebook page, Dkt. 48-1, but did not include these materials in the Appendix.

success on the merits. Nor did Vtec address the appointment of a Receiver or the district court's granting him immediate access to Vtec's premises.

On May 26, 2017, the Receiver provided a preliminary report to the district court. The Receiver explained that the vast majority of Vtec's revenue, and all of its profit, came from software sales, not tech support services. AV2/Dkt49-1/P357. Indeed, the tech support operation lost money, generating only about 35 percent of the revenue needed to operate the call center. *Id.* The technical support business was simply a "loss leader" used to attract customers. Software sales, garnered through the bogus diagnoses described above, generated the profit, at a margin of nearly 95 percent. AV2/Dkt49-1/P356. The Receiver concluded that "it is unlikely" that Vtec "can be operated lawfully as it is presently structured." AV2/Dkt49-1/P355.

The Receiver also reported that none of the call center staff had technical support credentials. AV2/Dkt49-1/P358. That was unsurprising—Vtec paid its workers a maximum of $26,000 per year, compared to the national average for (legitimate) tech support workers of $54,000. *Id*. Vtec also did not regularly conduct background checks on its personnel, many of whom had criminal records, including charges for theft and fraud. AV2/Dkt49-1/P360. The Receiver expressed "serious concerns" about allowing such persons to gain access to unsuspecting consumers' computers. AV2/Dkt49-1/PP358-59. At bottom, the Receiver

determined, "Vtec is not a technical support provider but rather a retail distributor of various software who also provides technical support by low-paid technical support personnel, possessing what appears to be insufficient training and qualifications." AV2/Dkt49-1/P362.

On May 31, 2017, the Receiver submitted a supplemental report to the district court assessing Vtec's and the Cupos' proposed partial asset freeze and their *pro forma* business plan. AV3/Dkt54-1/P552. The supplemental report reiterated the numerous flaws in Vtec's business model, and it faulted the proposed plan for relying on speculative information, overstating revenues, and understating operating expenses required to operate a legitimate support center. AV3/Dkt54-1/PP553-56. The Receiver concluded that Vtec had not shown a "reasonable probability of profitability" and that any use of the frozen assets for restarting the business would pose a "significant risk of loss." AV3/Dkt54-1/P556.

The district court held a PI hearing on May 30, 2017, at which the parties presented their arguments and supporting evidence. AV3/Dkt65/P605. At no point did Vtec or its counsel raise concerns that the FTC's and Florida's evidence did not satisfy Rule 11. Rather, Vtec reiterated its agreement to a preliminary injunction with a more limited monetary freeze than the one proposed by the Government. AV3/Dkt65/P621.

At the hearing, Vtec addressed several ancillary factual matters. It claimed that it was no longer relying on pop-ups to generate calls and disputed that the phone numbers in the pop-ups belonged to Vtec. AV3/Dkt65/P624. (In fact, the FTC and Florida had not alleged that the phone numbers belonged to Vtec.) Vtec maintained that, just because the FTC and Florida found sales scripts in its offices, that did not mean Vtec actually used them. AV3/Dkt65/P631. Vtec did not, however, otherwise dispute the sales methods identified by the FTC and Florida nor did it deny that Vtec had made software sales based on these scripts. Although it maintained that the software was good, AV3/Dkt65/P629, it did not address evidence that the software caused consumers' computers to crash, AV1/Dkt4/PP167-68, 181-82. Vtec also maintained that it had low credit-card chargeback rates, AV3/Dkt65/P634, but did not explain evidence that credit card processors were concerned about Vtec's business model and its high chargebacks, AV5/Dkt4/P1148, or that its processing accounts were terminated due to excessive chargebacks and disputed charges, AV5/Dkt4/PP1031, 1138.

4. The PI Order and Asset Freeze

On June 4, 2017, the district court issued the PI now before this Court. AV/Dkt62/P564. After setting forth the standard for preliminary equitable relief, the court stated: "Because the parties have effectively stipulated to a preliminary injunction, the Court focuses on the terms of the order." AV3/Dkt62/P569. The

only question was whether (as the Government requested) to retain the freeze on all of Vtec's assets, which would prevent it from restarting its business, or whether (as Vtec requested) to unfreeze $100,000 to allow Vtec to resume operations. AV3/Dkt62/PP568-69.

As the court described it, retaining the total asset freeze would keep Vtec shuttered. But allowing Vtec to resume operations risked squandering assets that could be used to provide consumer redress in the event of a final monetary judgment. AV3/Dkt62/P569. In resolving the dilemma, the court placed substantial weight on the Receiver's reports, crediting his findings that he "cannot recommend, in good faith, recommencement of operations," that "it is unlikely the business can operate lawfully as presently structured," and that "the costs of the restart and continued operations would deplete [Vtec] assets available for possible restitution." AV3/Dkt62/P569 (citations to Receiver's report omitted). The court thus "weigh[ed] the equities in favor of not allowing [Appellants'] business to reopen." AV3/Dkt62/P570. "Adding operational costs to a business that will not run profitably will only further siphon from the existing assets." AV3/Dkt62/P571. The court nevertheless unfroze $21,500 for the Cupos living expenses, AV3/Dkt62/PP575-76, and later released an additional $50,000 for legal fees, AV4/Dkt69/PP678-79.

The PI's continuation of the court-appointed Receiver directs and authorizes him to preserve assets during the pendency of the proceeding, AV3/Dkt62/P581, including instructions to "[c]onserve, hold, and manage all Receivership assets, and perform all acts necessary and advisable to preserve the value of those assets, in order to prevent any irreparable loss, damage, or injury to consumers or to creditors of the Receivership Defendants, including, but not limited to, obtaining an accounting of the assets and prevent transfer, withdrawal, or misapplication of assets," AV3/Dkt62/P583. To fulfill these obligations, the PI provides the Receiver authority and discretion to "[l]iquidate any and all assets owned by or for the benefit of the Receivership Defendants," "[e]nter into or break contracts," and engage in various forms of litigation as the Receiver "deems necessary and advisable to preserve and recover" assets. AV3/Dkt62/PP582-83, 584, 585.

The PI also directs and authorizes the Receiver to "[c]ontinue and conduct the business of the Receivership Defendants in such manner, to such extent, and for such duration as the Receiver may in good faith deem to be necessary or appropriate to operate the business profitably and lawfully, if at all." AV3/Dkt62/P585. The PI, however, imposes strict conditions on such business operations: "the continuation and conduct of the business, if done at all, shall be conditioned upon the Receiver's good faith determination that the business can be lawfully operated at a profit using the assets of the receivership estate." *Id.*

5. Appellate Proceedings

Vtec now appeals the preliminary injunction. On August 8, 2017, it moved for a stay pending appeal, which this Court denied on September 28, 2017.

SUMMARY OF ARGUMENT

Before the district court, the dispute in this case consisted of the single question whether the court should freeze *all* of Vtec's assets or only *some* of them. Beyond that narrow matter, Vtec agreed to the entry of a preliminary injunction that both restricted its unlawful sales tactics and appointed a Receiver to manage the business and conserve assets for possible consumer redress.

Before this Court, Vtec reverses course. It now claims that it never agreed to the entry of an injunction, but submitted a proposed injunction only because it was forced to by the district court. The record firmly refutes that contention. In fact, the district court directed the parties to submit their proposals only after Vtec announced its support for an injunction. On the actual facts, the preliminary injunction on review was a reasonable exercise of the district court's broad discretion.

1. Vtec is incorrect in claiming that the court failed to apply the correct legal standard for preliminary injunctions. Because both sides had agreed that an injunction was appropriate, the court had no need to apply the full PI standard, but properly assessed only the equities bearing on the scope of the injunction. Besides,

the court had already analyzed all the PI factors at the TRO stage, where it properly found that the Government was likely to succeed on its claim that Vtec had engaged in deceptive conduct.

Again, before the district court, Vtec effectively conceded that the Government was likely to succeed in proving illegal conduct. It did not contest its misrepresentations about Vtec's affiliations with well-known tech companies; its use of misleading pop-up ads; its false claims that consumers' computers contained viruses, malware, and similar problems; or its use of one-size-fits-all scripts that diagnosed the same problems for every caller—indeed, it agreed to stop using those tactics.

By failing to challenge the Government's core evidence below, Vtec waived any challenge to the evidence here. But its newly minted factual disputes show no error in any event. The new challenges mostly concern isolated pieces of evidence that would not undermine the core of the Government's case even if they were well founded. For example, Vtec's claim that the phone numbers used in pop-up ads were not registered to it is immaterial in the light of its admission that it used misleading pop-up ads to lure consumer calls. Vtec also does not dispute that it engaged third-parties to place the ads and transfer calls to Vtec. The insulting claim that the Government lied to the district court about the phone numbers is totally unfounded because we never contended that the numbers belonged to Vtec.

The same goes for Vtec's inflammatory accusation that a mistakenly transcribed telephone conversation amounts to a fraud on the court. The accurate transcript makes things *worse* for Vtec than the original: it reveals a Vtec employee making the directly false claim that Vtec was partnered with Microsoft.

It is of no moment that Vtec may have deceptively pitched its products and services to only some of its callers and that the products may not have been entirely without value. At least some consumers were subject to the phony sales tactics, and that alone justifies an injunction. And the law is clear that when sales are procured through misrepresentation, it does not matter whether the product has some value.

2. The asset freeze represents a quintessential exercise of the district court's equitable discretion. Vtec's and the Cupos's potential liability for monetary equitable relief outweighs threefold the sum of the frozen assets. All the Cupos have direct connections to the deceptive conduct at issue and would easily meet the standard for personal liability. Moreover, the district court properly took steps to preserve assets needed for potential consumer redress and restricted the Cupos's ability to waste additional money by restarting their unprofitable business.

3. The district court also acted well within its discretion in directing the Receiver to ensure that Vtec's assets are not dissipated or diverted. The PI provides the Receiver with authority necessary to carry out its obligations to protect those

assets and with discretion to restart the business only if can be done both lawfully and profitably. Vtec's complaints about the Receiver's conduct are unfounded, and in any event are properly heard in the first instance by the district court (where Vtec has not raised them) rather than this Court.

4. Finally, Vtec's argument that the district court failed to hold an evidentiary hearing is meritless. The court held a proper hearing, and Vtec failed to take the steps necessary—and about which they had clear notice—to request live cross-examination.

STANDARD OF REVIEW

The scope of review of an order granting preliminary injunctive relief, including an asset freeze and appointment of a receiver, is particularly narrow. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 425 F.3d 964, 968 (11th Cir. 2005). Because judgments "about the viability of a plaintiff's claims and the balancing of equities and the public interest[] are the district court's to make," this Court "will not set them aside unless the district court has abused its discretion in making them." *Cumulus Media, Inc. v. Clear Channel Commc'ns., Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 731 (11th Cir. 2005); *Sterling v. Stewart*, 158 F.3d 1199, 1202 (11th Cir. 1998). Moreover, "[p]reliminary injunctions are, by their nature, products of an expedited process often based upon an underdeveloped and incomplete evidentiary

record," and "the trial court is in a far better position … to evaluate that evidence." *Cumulus Media*, 304 F.3d at 1171. Accordingly, this Court "will not disturb its factual findings unless they are clearly erroneous." *Id.* The district court's legal determinations are reviewed *de novo*. *Id.* at 1172; *ETS Payphones, Inc.*, 408 F.3d at 737.

Under the clearly erroneous standard, so long as "'the district court's account of the evidence is plausible in light of the record viewed in its entirety,'" the court of appeals "'may not reverse'" even if it "'would have weighed the evidence differently.'" *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 69 (11th Cir. 2013) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985)). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Id.* (quoting *Anderson*, 470 U.S. at 574).

This Court will review only those issues that the appellant has preserved for appeal. "An issue not raised in the district court and raised for the first time in an appeal will not be considered." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (quotations and citations omitted). This rule applies particularly to the kind of fact-bound issues that, as discussed below, Vtec raises here for the first time. Appellate review of "fact-bound issues" that the district court "never had a chance to examine" would "waste . . . resources" and "deviate

from the essential nature, purpose, and competence of an appellate court." *Id. See Knight Through Kerr v. Miami-Dade Cty.*, 856 F.3d 795, 818 (11th Cir. 2017).

ARGUMENT

The district court took three actions under review: it preliminarily enjoined Vtec from using deceptive sales techniques; froze Vtec's assets to preserve them for possible consumer redress; and appointed a receiver to manage Vtec's affairs while the parties litigate the merits. All of those actions were proper exercises of the court's discretion.

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ENTERING A PRELIMINARY INJUNCTION

Vtec's principal claim is that the district court abused its discretion because it "failed to apply any legal standard" in analyzing the FTC and Florida's request for a PI. Instead of applying the correct standard, Vtec claims, the court incorrectly concluded that Vtec stipulated to a PI and agreed to be shut down. Br. 27-28. In fact, the district court had no need to apply the full PI standard because Vtec clearly and repeatedly expressed its willingness to be subject to a PI with the restrictions on its conduct adopted by the district court. The parties disputed only the amount of money subject to the asset freeze. In any event, the court had made all the requisite findings at the TRO stage, which in the circumstances here was sufficient. The district court's decision was a quintessential exercise of discretion that rested on a solid evidentiary record.

The injunction at issue was issued under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). There, Congress authorized district courts to grant a permanent injunction where the FTC shows "that, weighing the equities and considering the likelihood of ultimate success, [granting the injunction] would be in the public interest." *Id*. As this Court has recognized, that grant of permanent injunctive authority also includes "the power to order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible." *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984). "To obtain a preliminary injunction . . . the FTC need not satisfy the traditional equity standard that courts impose on private litigants;" for example, "the FTC need not prove irreparable harm." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991). Instead, the FTC Act requires only that the district court "(1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *Id*. at 1217. The district court satisfied that analysis.

A. Vtec Agreed to the Terms of the Preliminary Injunction

The court determined that "the parties have effectively stipulated to a preliminary injunction." AV3/Dkt62/P564. Vtec disputes that conclusion and denies that it agreed to the entry of the PI. It contends instead that it submitted a proposed PI only because the district court ordered it to do so. Br. 27-28. That

position is fatally undercut by the record, which shows Vtec's repeated, stated willingness to be subject to a PI.

In response to the court's order to show cause, Vtec asked the district court to "deny the preliminary injunction sought by the Federal Trade Commission and the State of Florida, and *impose a limited preliminary injunction as proposed by the Defendants*." AV2/Dkt32/P331 (emphasis added). In describing its requested "limited preliminary injunction," Vtec said that it supported an injunction that "preserves the business's ability to return to operations as a going concern in a compliant fashion; modifies the asset freeze to provide for the capital needs of the companies and the personal needs of the individual defendants; and is otherwise reasonable and appropriate." AV2/Dkt32/P322. Angelo Cupo, in his declaration accompanying the TRO response, stated explicitly that he and his co-defendants "are agreeable to an injunction not to violate the law; not to use pop-up ads, not to use misleading call scripts and sales tactics; and to the continued appointment of the receiver for a limited time to act as a monitor of the business going forward." AV2/Dkt32-1/P337.

It was only *after* Vtec had agreed to the entry of a PI that the district court directed the parties to submit their proposals. AV6/Dkt42/P1154. Once again, although the parties did not agree on all the terms, the proposals were identical on the key term of what conduct the PI would prohibit. Both sides proposed an

injunction stating that "Defendants … are restrained and enjoined from directly or indirectly misrepresenting, expressly or by implication, any material facts, including that (1) they are part of or affiliated with well-known U.S. technology companies, such as Microsoft, or are certified or authorized by these companies to service their product; and (2) they have detected security or performance issues on consumers' computers, including system errors, viruses, spyware, malware, or the presence of hackers." AV6/Dkt42/PP1161-62 (FTC/Florida), 1191 (Vtec).

Vtec confirmed yet again at the hearing that it was willing to be subject to a PI that addressed the concerns of the FTC and Florida:

> [FTC counsel] told the Court that … their concerns were twofold, misrepresentations regarding the affiliation with, quote, well-known technical companies, or technology companies, re, Microsoft, Apple. We actually did have a relationship with them, but we're fine, we won't represent that.

AV3/Dkt65/P645. It continued:

> Misreps regarding computer issues. We're fine with the Court saying, hey, don't misrepresent anything regarding computer issues. Don't go in and use some script that says that you found something you didn't find; that's fine.

AV3/Dkt64/P646. Then it concluded:

> So their principal concerns are easily resolved, and, in fact, the language proposed to the Court resolves them.

Id.

On the basis of that entire course of conduct, the district court appropriately found:

> Defendants do not object to a limited injunction. Instead the parties square off over the terms of a preliminary injunction and asset freeze. The Government wants the status quo—convert the terms of the TRO to the preliminary injunction. Those terms include the total asset freeze and complete shutdown of Defendants' business. However, Defendants want to restart their business operations in order to meet their contractual obligations. And to facilitate the restart and to support operations, they request $100,000 to be released from the asset freeze. Defendants also seek additional funds to be unfrozen in order to pay for the living expenses. Because the parties effectively stipulated to a preliminary injunction, the Court focuses on the terms of the Order.

AV3/Dkt62/P569.

The district court's conclusion plainly does not amount to a "finding that Defendants agreed to any injunction" as Vtec wrongly contends. Br. 29. Rather, the district court adopted the very conduct prohibitions that the parties had proposed. *Compare* AV3/Dkt62/P574 *with* AV6/Dkt42/PP1161-62, 1191. As shown below, it then resolved the disputed terms based on the evidence and the law, providing neither side with everything it asked for.

B. The District Court Correctly Concluded that the FTC and Florida Are Likely to Succeed on the Merits

Because both sides agreed that a PI was appropriate, the district court had no need to analyze the Government's likelihood of success at the preliminary injunction stage of the proceeding. But at the earlier TRO stage, the court had reviewed the Government's evidence and concluded that the FTC and the State of Florida had "sufficiently shown that [Appellants] have engaged in and are likely to

engage in acts and practices that violate" the FTC Act and FDUTPA and thus were likely to prevail on the merits of the lawsuit. AV2/Dkt9/P243. The evidence at the PI stage was largely the same, so the court's reasoning applies equally there.[5]

1. Before the District Court, Vtec did not challenge the FTC and Florida's showing that it engaged in deceptive conduct

The FTC provided the district court with a significant amount of evidence showing that Vtec violated the FTC Act and FDUTPA. In response, Vtec did not seriously challenge any of that evidence; instead, Vtec argued only that the equities favored limited relief.

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. 15 U.S.C. § 45(a). An act or practice is deceptive if (1) there is a representation that (2) is likely to mislead consumers acting reasonably under the circumstances and (3) is material. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). In determining whether a practice is likely to mislead, the fact finder must consider the overall, common sense, net impression of the practice on a reasonable consumer. *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1273 (M.D. Fla. 2012). A misrepresentation or practice is material if it involves facts that a reasonable

[5] Vtec's brief also argues that the district court should not have issued the TRO. Br. 48. The TRO, however, is not the subject of this appeal, nor could it be. 28 U.S.C. § 1292(a). Accordingly, the FTC and Florida construe Vtec's arguments against the TRO as applying to the PI.

person would consider important in choosing a course of action. *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008), *aff'd* 356 Fed. Appx. 358 (11th Cir. 2009); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007). The FTC need not prove reliance by each consumer misled by a defendant. *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1275 (S.D. Fla. 1999); *FTC v. Figgie Int'l, Inc.*, 944 F.2d 595, 605 (9th Cir. 1993).[6]

The Government's evidence showed that Vtec violated the statutes in two ways. First, it falsely represented an affiliation with well-known U.S. technology companies. For example, it used Microsoft and Apple logos on its websites, connoting relationships with or certifications by those companies. AV5/Dkt4/PP897-98, 929, 947. The evidence from both Microsoft and Apple, however, showed that no such relationships or certifications existed. AV5/Dkt4/PP1027, 1029, 1135. Similarly, the pop-up ads used by Vtec to generate calls from consumers falsely implied that the listed phone numbers would connect consumers with Microsoft-certified technicians or Norton technical support. AV1/Dkt4/PP192, 208. Indeed, evidence from Microsoft showed that the "Windows operating system is not designed to use pop-up windows to advise consumers to phone Microsoft related to corrupted or infected PCs."

[6] FDUTPA states the Florida legislature's intent that courts construing the State statute give "due consideration and great weight" to FTC and judicial interpretation of the FTC Act. Fla. Stat. § 501.204(2).

AV5/Dkt4/P0129. And when customers contacted Vtec, Angelo and Robert Cupo instructed the sales force to misrepresent that they were Microsoft-certified technicians. AV1/Dkt4/P132.

Second, Vtec violated Section 5 of the FTC Act and FDUPTA when it falsely claimed to have detected security or performance issues on consumers' computers. For example, the pop-up messages used the consumers' web browsers to mislead consumers to believe that they had viruses, malware, or other potentially fatal issues with their computers. AV1/Dkt4/PP68, 72, 142-43, 166-67, 190. In fact, the Government showed through the declaration of computer expert Dr. Nicholas Nikiforakis that web browsers cannot detect such problems. AV1/Dkt4/PP69-72. But the pop-ups were sufficiently convincing to actually mislead consumers, thus prompting them to contact Vtec. AV1/Dkt4/PP142-43, 166-67, 190.

The Government also provided the court with Vtec sales scripts under which consumers were told that their computers had security or performance issues that required them to purchase computer clean-up services or software products from Vtec. A former employee testified via declaration that Vtec directed sales people to

use approved scripts on all sales calls. AV1/Dkt4/P129, 134-40.[7] Dr. Nikiforakis analyzed one such script that purported to diagnose a computer-security issue using the Microsoft Event Viewer. But, the expert showed, that is not a legitimate way to diagnose a virus infection on a computer. AV1/Dkt4/PP78, 81. "The script lacked common approaches to diagnosing Windows systems (e.g., looking at start-up programs, running antivirus scanners, and looking for evidence of malware activity in a user's browser)." AV1/Dkt4/P81. Consumer declarations showed that Vtec sales agents told them they had security or performance issues or that their computers were not adequately protected from infection. AV1/Dkt4/PP142, 163-64, 166-67, 182, 186, 196, 200, 204, 210, 213, 216-17, 219-20, 223.

That evidence amply supported the district court's finding that the FTC and Florida had "sufficiently shown that Defendants … have engaged in and are likely to engage in acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 501.204 of the FDUPTA, and thus are likely to prevail on the merits of this action." AV2/Dkt9/P243.

In its response to the show cause order proposing to turn the TRO into a PI, Vtec did not contest this finding. Quite to the contrary, it effectively conceded the

[7] Vtec asserts that the declaration of the former employee misstated his tenure with Vtec and failed to state that he was fired for cause. Br. 16. The FTC/Florida stand by the employment dates in the declaration, which also states that the employee was fired, AV1/Dkt4/P132. Tellingly, Vtec does not refute the substance of the employee's description of Vtec's operations.

point that it had violated the law by agreeing to the PI and stating that it had "voluntarily ceased the bulk of the allegedly problematic practices," was "in the process of modifying [its] operations to address any lingering concerns," and "will judiciously monitor [its] business practices going forward to ensure compliance with all governing laws, rules, and regulations." AV2/Dkt32/P330. Thus, instead of contesting its violation of the law, Vtec focused its response on the balance of equities and the question of whether its unlawful conduct would continue. AV2/Dkt32/P328.

2. Vtec waived its challenges to the Government's evidence, which are meritless in any event

As just discussed, before the district court, Vtec did not challenge the FTC and Florida's showing of likelihood of success on the merits. Now, it raises for the first time on appeal a slew of evidentiary disputes over the district court's finding. Because Vtec failed to raise its challenges below, it has waived them. *See Knight Through Kerr*, 856 F.3d at 818. Nonetheless, if the Court considers Vtec's newly raised claims, they show no error, let alone clear error, in the court's holding that the FTC and Florida would likely succeed in demonstrating that Vtec engaged in deceptive conduct.

As shown at pages 26-30 above, the FTC and Florida demonstrated that Vtec violated the law when it misrepresented affiliation with well-known companies like Apple and Microsoft and when it falsely told consumers that it had detected

security or performance issues on their computers. Importantly, Vtec engaged in deception as a way to sell services and products; the FTC and Florida do not contend that the services or products were themselves fraudulent.

Even if the Court were to accept all of Vtec's challenges to the Government's evidence, it would not undermine the district court's conclusion. Nothing in Vtec's brief refutes the core charges of deception. At most, Vtec attacks isolated and insubstantial pieces of background evidence. But the attacks miss their target in any event; some of them actually corroborate the district court's findings.

First, Vtec claims that the evidence of pop-up ads is "false" because the telephone numbers in two of the pop-ups were not registered to Vtec. Br. 49-50. The argument is insubstantial because the FTC and Florida never claimed that the phone numbers *belonged* to Vtec. The Government claimed—and proved—that consumers who called the numbers in the pop-up were connected to Vtec—and Vtec does not deny that it used pop-up ads in precisely the way the Government has alleged. AV1/Dkt4/PP191-92, 204, 208. The numbers belonged to third-party lead generators who created the pop-ups and forwarded the resulting calls to Vtec, AV1/Dkt4/P128, and Vtec explained at the PI hearing that lead generators use "some sort of misleading advertisement, a pop-up, or the like to direct traffic." AV3/Dkt65/P628. Thus, contrary to Vtec's assertion, Br. 3, 50, the fact that the phone numbers did not belong to Vtec does not show that the Government's

evidence was "false." Vtec's scurrilous accusation (Br. 50) that the Government knowingly presented "false evidence" is utterly baseless.[8]

Second, Vtec attacks consumer declarations prior to 2016 as stale. Vtec claims that it stopped using pop-ups after that point, so evidence of its earlier practices are not relevant. Br. 9-11; *see also* AV3/Dkt65/P621-23. But pop-ups were mostly a way to get consumers to call the company. However they reached Vtec, the ensuing deception used to peddle computer clean-up services and security software remained the same—misrepresentation about the company's affiliations and the presence of performance or security problems. The declarations from 2016 and before, which also discuss those unlawful sales techniques, document that Vtec's basic business model has remained consistent.

Third, Vtec suggests that the sales scripts submitted to the district court were not even used by Vtec. Br. 17-18. But the scripts were found *on Vtec's own computers* in May 2017, which strongly suggests that Vtec in fact used them. AV6/Dkt43-1/PP1209, 1211-45. And the scripts are highly similar to transcripts of

[8] Vtec also makes the inflammatory argument that the FTC and Florida's reliance on this supposed "false evidence" violated obligations under Federal Rule of Civil Procedure 11. Br. 48-56. We have just debunked the contention that the evidence was "false," thus refuting the Rule 11 claim. Moreover, Vtec never raised Rule 11 concerns before the district court, so the argument should not even be considered by this Court. *See Access Now, Inc.*, 385 F.3d at 1331; *Knight Through Kerr*, 856 F.3d at 818.

actual phone calls with Vtec consumers, further supporting that conclusion. *Compare id. with* AV6/Dkt43-1/PP1209, 1263-78; AV3/Dkt51/PP449-527.

Fourth, Vtec attacks the two call transcripts submitted by the State of Florida after the PI hearing. AV3/Dkt51/P440. The first is a full transcript of a consumer call to Vtec, excerpts of which the State played at the PI hearing. Vtec claims that the call exonerates the company because the consumer did not buy any software. Br. 58. It does no such thing. For starters, no sale is necessary to prove a violation of the FTC Act. *See McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000). Moreover, the call proves Vtec's use of deceptive sales tactics. The sales agent states in the call that the software he urged the consumer to buy, Stopzilla, was from a "Microsoft Silver Certified Partner." AV3/Dkt51/P470. Shortly thereafter, the agent refers to Stopzilla as "our program" and again notes that it is a "Microsoft Silver certified partner." AV3/Dkt51/P472. Those statements support the "net impression" that Vtec itself was affiliated with Microsoft. *See Removatron Int'l Corp.*, 884 F.2d at 1497; *see also Tashman*, 318 F.3d at 1283 (Vinson, J., dissenting) (describing "net impression" standard).

The State of Florida has determined that its vendor incorrectly transcribed the second transcript and misidentified speakers. The speaker identified as "Matthew" was incorrectly described as working for HSN, while the speaker identified as "Prasad" was described as working for Vtec. In fact, Matthew worked

for Vtec, while Prasad worked for another tech support company. The State is in the process of preparing a corrected transcript. But the error was immaterial—and the corrected transcript only makes things worse for Vtec. It shows that "Matthew," the Vtec sales agent, told the caller: "We are not Microsoft. *We are a Microsoft partnered company, VTEC.* We are contracted by HSN to give 24/7 Lifetime Technical Support to Home Shopping Network computers." AV3/Dkt51/P535 (emphasis added). Vtec has confirmed that Vtec employee Matthew made the statement. AV6/Dkt53/P1280. Far from undercutting the Government's case, the transcript firmly supports the Government's case and the district court's decision. Vtec's overblown accusations (Br. 19) that the transcript amounted to a "fraud on the court" are utterly wrong.

In sum, none of Vtec's attacks on the evidence before the district court casts doubts on the court's conclusion that the FTC and Florida are likely to succeed on the merits.

3. Vtec's deception involved sales methods, not the value of the products sold

Vtec also argues that the PI was improper because (1) Vtec sold legitimate services and software (Br. 17), (2) it provided refunds to unsatisfied purchasers of software (Br. 8), (3) most callers neither purchased software nor heard the sales pitch (Br. 38), and (4) many callers positively reviewed their experiences with

Vtec (Br. 7). But those excuses do not overcome the fact that Vtec's sales methods were deceptive—and illegal—in the first place.

Specifically, the Government has shown that Vtec used deceptive methods to sell at least $1.8 million of services and software. It is the deceptive sales methods that violate the law, whether or not the products and services deceptively sold have any value. When sales are procured by misrepresentations, it does not matter whether consumers "received a useful product," or even "received the product at a competitive price." *McGregor*, 206 F.3d at 1388. "[L]iability for deceptive sales practices does not require that the underlying product be worthless." *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014). Rather, "the salient issue in fraudulent-misrepresentation cases is whether the seller's misrepresentations tainted the customer's purchasing decisions, not the value (if any) of the items sold." *Id.* at 1235 (citing *McGregor*, 206 F.3d at 1388). Had Vtec's customers known the truth, they might not have purchased the services or software from the company in the first place. *See FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993).[9]

[9] In any event, the evidence suggests that the software itself did not have the value Vtec claims. Some consumers report that the software crashed their computers. AV1/Dkt4/PP167-68, 181-82. Other consumers demanded refunds or chargebacks on the credit cards, presumably because the software did not perform as promised. AV1/Dkt4/PP183, 214, 221.

Nor do refunds to unsatisfied customers purge the tainted inducement. *See, e.g.*, *FTC v. Cyberspace, LLC*, 453 F.3d 1196, 1201-09 (9th Cir. 2006); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002). Refunds may offset any ultimate monetary judgment, but they do not affect the underlying illegality or the availability of equitable relief. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1101 (9th Cir. 1994).

Vtec makes much of its claim that it pitched only 6 percent of its callers and made sales only to some of them. Br. 38-39. It provides no support for that claim—it is merely an unsubstantied assertion by Angelo Cupo (AV2/Dkt32-1/P335)—but even if it is true, it makes no difference. Whether or not *every* caller was subject to bogus diagnoses, there is no serious question that *some* were—and those callers were taken in for at least $1.8 million. AV5/Dkt4/P1011.

Finally, positive customer reviews do not show that Vtec sales methods were lawful, *see* Br. 17,[10] because the reviews themselves have no probative value. Vtec itself claims that it made sales pitches to only some of the callers. For the reviews to mean anything at all, Vtec would have to show that customers supposedly

[10] Curiously, Vtec does not support the positive customer-review claim by citing customer-review screen shots that it submitted to the district court. (The screens shots are found at Dkt. 48-1 to 48-4, and Vtec did not even include these reviews in the Appendix.) Instead, Vtec relies on an extra-record survey of unknown origins that it included as part of the "Addendum" to its opening brief. Addendum at A-41 to A-110.

quoted were the subjects of Vtec's sales pitches. Furthermore, many customers may have had no idea that they were being deceived, but rather reacted to a polite interaction with an agent the customer thought had an affiliation with Microsoft. Moreover, positive reviews are inherently suspect because Vtec instructed its sales agents to obtain good reviews and even rewarded them for doing so. AV6/Dkt43-1/PP1220, 1227, 1242; AV2/Dkt49-15/P433. For example, one of the call scripts found on the Vtec premises directs agent to tell consumers: "OK Great – Our goal is to get a really good review and we don't mind helping you write it." AV6/Dkt43-1/P1220. The script then instructs the agent: "Write the review!! Make $5.00, which is as good as a $50.00 deal!!" *Id.* As the transcript of an actual call confirms, sometimes the agents directed the consumer to write a review with the agent still on the line and connected to the customer's computer. AV3/Dkt51/PP520-21. The reviews thus hardly show the district court was wrong when it found that Vtec likely engaged in deceptive conduct.

C. The District Court Correctly Weighed the Equities

The district court properly concluded that the public interest in enjoining likely deceptive conduct and preserving assets for possible equitable monetary relief outweighs Vtec's private interests in continuing its business as usual. In the equitable balance, public equities, such as keeping the public safe from deceptive practices, far outweigh private equities. *FTC v. World Travel Vacation Brokers*

861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) (citations omitted); *FTC v. Home Assure, LLC*, No. 8:09-cv-547, 2009 U.S. Dist. LEXIS 32053, at *4 (M.D. Fla. Apr. 8, 2009) (following *World Travel Vacation Brokers*); *FTC v. USA Beverages, Inc.*, No. 05-61682-civ, 2005 U.S. Dist. LEXIS 39075, at *15 (S.D. Fla. Dec. 6, 2005). Here, the private equities are especially weak. Vtec has "no vested interest in a business activity found to be illegal." *U.S. v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972). And Vtec's assertion that allowing it to remain in operation "would have preserved its income stream and increased assets, avoided the consumer and public harm now occurring, and would not have harmed the Government's legitimate interests," Br. 43, cannot be squared with the Receiver's determination that Vtec could not be operated profitably as a legitimate business. AV2/Dkt49-1/PP356-57.

On the public equities side of the ledger, the district court concluded that an injunction would prevent further harm to a public that had already been swindled out of nearly $2 million and would prevent the squandering of assets that ultimately could be used to provide redress to consumers. Such concerns are entitled to substantial weight in the equitable analysis. *See FTC v. Gem Merch.*, 87 F.3d 466, 468-69 (11th Cir. 1996) (court "may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible").

Vtec argues that the district court failed to consider the harm to consumers who expected to receive lifetime technical support for computers purchased from HSN but who are now deprived of that service. Br. 24, 33, 40-41. In fact, the district court explicitly considered this potential harm, but concluded that it did not justify the continuation of money-losing (and deceptive) operations by Vtec. AV3/Dkt62/P570. That was an appropriate exercise of discretion.

At bottom, the district court reasonably credited the Receiver's determination that Vtec operated not as a true tech support service but as a software sales operation that used tech support as a loss-leader come-on to attract customers. The Receiver reported that "it is unlikely the business can operate lawfully as presently structured," and that "the costs of the restart and continued operations would deplete [Vtec] assets available for possible restitution." He could not "recommend . . . recommencement of operations." *See* AV3/Dkt62/P569. Thus, the district court made the measured and reasonable decision to prohibit Vtec from resuming operations.

Nevertheless, the district court provided a path forward for Vtec under the oversight of the Receiver that reflected Vtec's expressed preferences. Specifically, Vtec told the court that it sought a PI that "preserves the business's ability to return to operations as a going concern in a compliant fashion; modifies the asset freeze to provide for the capital needs of the companies and the personal needs of the

individual defendants; and is otherwise reasonable and appropriate." AV2/Dkt32/P322. The PI entered by the court does much of that. It allows the Receiver to re-open the business if it "can be lawfully operated at a profit using the assets of the receivership estate." Dkt 62 at 22, AV3 at 585. The district court released $21,500 for the Cupos' living expenses and another $50,000 for attorney's fees. The fact that Vtec has not shown that it can resume its business in a manner that is both lawful and profitable does not mean the district court did not properly weigh the equities.

Finally, Vtec argues that, because it no longer relies on pop-ups to generate calls and does not plan to resume using them, the court had no need to enjoin its conduct. Br. 41-42. As explained above, however, the bogus impressions left by the pop-ups merely served as a means to attract callers. Vtec's misrepresentations also occurred *during* the call to Vtec made by consumers. Even after Vtec switched to calls generated by the HSN arranagements, the deception during the phone calls continued unabated. That deception was ongoing until it was stopped by the TRO, as shown by the evidence the Receiver found at Vtec's offices. AV6/Dkt43/P1199.

Moreover, a "court's power to grant injunctive relief survives discontinuance of the illegal conduct" so long as there is a possibility that the conduct could resume, which it plainly could here. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see United States v. Realty Multi-List, Inc.*, 629

F.2d 1351, 1387-88 (5th Cir. 1980);[11] *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999). Vtec has not shown that it can profitably provide tech support services in the absence of deceptive sales practices. Any resumption of tech support operations would require deceptive sales tactics to turn a profit.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN FREEZING VTEC AND CUPO ASSETS

In the district court Vtec did not dispute the need for an asset freeze, and before this Court it makes no serious claim that the freeze was improper. The only dispute in either forum concerns the amount of the freeze: Vtec proposed that $500,000 be frozen, with the remainder made available to re-start the business, AV6/Dkt42/P1193, while the Government sought to freeze all of Vtec's and the Cupos' assets, AV6/Dkt42/1164. The district court decided to freeze most of the assets, but released about $70,000 for living expenses and attorney's fees. AV3/Dkt62/P577; AV4/Dkt69/PP678-79. That choice was a reasonable exercise of the court's broad discretion.

Although Vtec sought in the district court to draw an analogy between this case and the asset freeze entered in *FTC v. Inbound Call Experts, LLC*, No. 14-81395-civ, 2014 WL 8105107 (S.D. Fla. Dec. 23, 2014), the district court correctly refused to follow that approach. In that case, the district court froze less than all of

[11] Fifth Circuit cases decided before October 1, 1981, are binding precedent in this Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

the assets of the tech scam company. In refusing to do the same here, the district court correctly pointed out that "there is one distinguishing fact that makes a difference—the defendants' assets [in *Inbound Call*] more than covered the amount of damages at issue," which "meant that the court was able to allow the business to reopen without concern that there would be money available for a potential recovery." AV3/Dkt62/P571. In contrast, the district court "[did] not have that assurance here." *Id.* In refusing to release funds to Vtec to resume operations, the court explained that "[a]dding operational costs to a business that will not run profitably will only further siphon from the existing assets." *Id.*

For the first time on appeal, Vtec also appear to argue that the amount of assets frozen was not reasonably related to the harms alleged in the Complaint. Br. 46-47 (citing *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 496-97 (4th Cir. 1999)). Where the FTC has shown a likelihood of success, it bears only a "light" burden in justifying the amount of assets subject to the freeze, based on a "reasonable approximation" of liability. *ETS Payphones*, 408 F.3d at 735 (quoting *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004)). "'Exactitude is not a requirement.'" *Id.* In light of evidence that Vtec's unjust enrichment exceeded $1.8 million, while the total assets equaled about a third of that figure, the freeze was plainly not an abuse of the district court's discretion.

Vtec also contends that the district court improperly froze Dennis Cupo's and Olga Cupo's assets. Br. 46-47. The district court reasonably froze those assets. Regarding Dennis, if the Vtec companies are ultimately found liable, he can be held personally liable for any monetary judgment should the court find that he had knowledge of, participated in, and controlled Vtec's activities. *See IAB Mktg.*, 745 F.3d at 1233; *Gem Merch.*, 87 F.3d at 470.[12] Authority to control can be shown by "active involvement in business affairs and the making of corporate policy" or evidence that "the individual had some knowledge of the practices." *IAB Mktg*, 746 F.3d at 1233 (quotations and citations omitted). Bank signatory authority or acquiring services on behalf of a corporation also shows authority to control. *See FTC v. USA Fin., LLC*, 415 Fed. Appx. 970, 974-75 (11th Cir. 2011).

On that standard, it is highly likely that Dennis Cupo will be held personally liable for any judgment against Vtec. Dennis had ownership interests in and managerial responsibilities for the Vtec companies. AV5/Dkt4/PP896, 912-13, 1034, 1036, 1083. He was listed as treasurer for one of them. AV5/Dkt4/1145. He secured credit card processing services on the companies' behalf and personally guaranteed Vtec accounts. AV5/Dkt4/PP1072, 1083, 1140, 1145. Given his level of involvement, Dennis would have been aware of Vtec's deceptive activities. At a minimum, Vtec's inability to obtain credit card processing services due to

[12] Vtec does not challenge the freeze as applied to Angelo and Robert Cupo.

excessive chargebacks and disputed charges put him on notice that Vtec's operations were suspect. *See FTC v. Affordable Media, LLC*, 179 F.3d at 1234) (personal liability for corporate wrongdoing can rest on actual knowledge; reckless indifference to the truth or falsity of representations; or an awareness of a high probability of fraud, coupled with the intentional avoidance of the truth); *see also FTC v. Atlantex Assoc.*, No. 87-cv-0045, 1987 U.S. Dist. LEXIS 10911, at *25-26 (S.D. Fla. Nov. 25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989).

As for Olga Cupo, the freeze also properly covers assets she holds jointly with Robert. *See* Br. 47. The evidence shows that Vtec paid over $33,000 to or on her behalf. AV5/Dkt4/P1012. At a minimum, Olga's interest in the joint assets are reachable under a constructive trust, which can "reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder." *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 251 (2000) (internal quotations omitted). "[T]hat a transferee was not the original wrongdoer does not insulate him from liability for restitution." *Id.* Moreover, there is evidence that Olga helped to manage Vtec, which would have given her knowledge of its deceptive activities. AV5/Dkt4/PP918, 1115, 1118, 1130-31. A court's equitable power extends to ordering an asset freeze on non-parties in active concert or participation with parties. *FTC v. Lalonde*, 545 Fed. App'x 824, 830 (11th Cir.

2013). Unlike the spouse in *McGregor*, 206 F.3d at 1385, on which Vtec relies (Br. 47), Olga is no innocent bystander.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO APPOINT A RECEIVER

Vtec does not assert directly that the district court abused its discretion in appointing the Receiver, but it sprinkles throughout its brief criticisms about the Receiver and his conduct. To the degree Vtec is attempting a back-door challenge to the Receiver's appointment, it fails.

To begin with, Vtec waived any challenge by failing to oppose appointment of a receiver below. In fact, Vtec stated that it supported the appointment. AV2/Dkt32-1/P337. Moreover, Vtec's criticisms of the Receiver are matters that also should be addressed by the district court in its administration of the PI, not reasons to reverse the injunction on appeal.

As for the complaints themselves, they mostly concern "who said what to whom and when," but "an appellate court with no fact finding mechanism" should not consider such matters. *Access Now, Inc.*, 385 F.3d at 1331. For example, Vtec complains that the Receiver has improperly required specific actions Vtec must take to operate lawfully and profitably, such has vetting, training, and monitoring employees. The argument is that such things are not legally required and go beyond the Complaint. Br. 63. But the requirements are obviously related to the charges against Vtec. The Complaint (¶ 44) alleges deceptive sale of services and

products. AV1/Dkt2/P26. Vetting and training of employees will help prevent future deceptive tactics. Moreover, the requirements are well within the Receiver's authority under the PI, which directs him to "[m]anage and administer the business until further order of this Court by performing all incidental acts that the *Receiver deems to be advisable or necessary*." AV3/Dkt62/P584 (emphasis added).

Vtec also complains that the Receiver has "rendered V-Tec unprofitable" by canceling its main service contract. Br. 64. It conceded, however, that the contract "[does] not generate enough revenue to make the company profitable." AV3/Dkt65/P628. Moreover, the PI gives the Receiver authority and discretion to "break contracts" as he "deems to be advisable or necessary." AV3/Dkt62/P583.

Vtec also complains that the Receiver's "open hostility" has prevented it from resuming business. Br. 44. The complaint rings hollow given that Vtec and the Cupos themselves have been unable produce a workable proposal to re-open the business. AV4/Dkt105-1/PP732-33. In fact, the Receiver has worked with them to determine whether the proposals are viable, as shown by the Receiver's unchallenged billing records that contain multiple entries for time spent working with Vtec's and the Cupos's proposals. AV4/Dkt99-2, 99-3/PP690-714.

Vtec also criticizes the way in which the Receiver carried out the TRO's authorization for immediate access to Vtec's premises, such as involving police officers and instructing employees to stand clear of their desks. Br. 11-14. But the

TRO required Vtec to provide access to the company's premises and authorized the Receiver to obtain the assistance of law enforcement officers to help effect service and keep the peace. AV2/Dkt9/P261. The TRO also authorized the Receiver to exclude the Cupos from the premises and prohibited employees from interfering with the inspection. *Id.* Instructing employees to leave their computers and step away from their desks is an obvious way to preserve evidence.

Vtec also complains about the Receiver's fees. But Vtec did not respond to the first fee application and thus gave the district court no opportunity consider any of its concerns. When the Receiver filed his final report, AV4/Dkt105/P727, and sought the district court's permission to discontinue fruitless efforts to reopen Vtec, AV6/Dkt106/P1331-34,[13] Vtec did not raise the concerns about the Receiver's conduct that it now asks this Court to address. Rather, in opposing the request, Vtec acknowledged that fees going forward should be "modest" because "fees and expenses [for] performing the Receiver's analysis have already been incurred." AV6/Dkt114/P1339. Any remaining concerns are properly addressed by the district court.

[13] The Receiver also moved to permanently close Vtec, which both Vtec and the Government opposed. AV6/Dkt117/P1356. The district court denied that request. AV6/Dkt117/P1358.

IV. VTEC WAIVED ITS CHALLENGE TO THE ADEQUACY OF THE PI HEARING, AND ITS ARGUMENT LACKS MERIT IN ANY EVENT

Vtec argues that the district court improperly failed to hold an evidentiary hearing. Br. 30-37. Once again, because Vtec never raised concerns about the PI hearing's structure or content before the district court, this Court should not consider them. *See Access Now, Inc.*, 385 F.3d at 1331; *Knight Through Kerr*, 856 F.3d at 818.

In any event, the claim is meritless because the district court held a proper PI hearing that entailed examination of evidence, introduction of exhibits, and arguments of counsel. This is reflected in the PI order, which states that the court considered the "argument of counsel, the Receiver's reports, the Complaint, declarations, exhibits, and the memorandum of law in support thereof." AV3/Dkt62/P571.[14]

Vtec implies that its actual claim is that the hearing should have included live testimony. The complaint is unfounded because both the district court's local rules and the TRO itself informed Vtec that no live testimony would be taken without a specific request. M.D. Fla. Rule 4.06(b); AV2/Dkt9/PP272-73. Indeed, in

[14] Vtec also suggests that the district court erroneously relied on the Receiver's Supplemental Report, which he filed on June 1, 2017, two days after the May 30th PI hearing, because it was not subject to cross-examination. Br. 62. As shown here, the district court was not required to permit cross-examination as part of the PI hearing, especially since Vtec never asked for it. In any event, Vtec responded to the Supplemental Report on June 2, 2017, AV6/Dkt55/PP1283-85, before the district court issued the PI on June 4, 2017.

a status conference two weeks before the PI hearing, the district court reminded counsel for Vtec that he would have to file a motion to cross-examine witnesses during the PI Hearing. AV6/Dkt115/P1352. Having failed to heed those repeated warnings, Vtec has only itself to blame for the lack of live testimony.

The cases cited by Vtec do not establish that a PI hearing must include live testimony, but rather address the amount of notice required before a hearing. Br. 31-32. The district court gave Vtec a month's notice, which was more than adequate. *See Levi Straus & Co. v. Sunrise Intern. Trading, Inc.*, 51 F.3d 982, 986 (11th Cir. 1995) (weekend notice of PI hearing not insufficient).

Vtec also contends that the district court inappropriately relied on hearsay evidence to support the PI order. Br. 32. The objection is again waived for failure to raise it below. It is also wrong. "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction if the evidence is appropriate given the character and objectives of the injunctive proceedings." *Levi Straus & Co.*, 51 F.3d at 985. Vtec's contention is also ironic given the hundreds of hearsay statements from alleged consumers attached to Vtec's brief. Addendum at A-41 to A-110.

CONCLUSION

The district court's Preliminary Injunction should be affirmed.

Respectfully submitted,

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November 7, 2017

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7) in that it contains 11,397 words.

I further certify that on November 7, 2017, I filed the electronic version of this brief using the Court's CM/ECF system and served the brief on counsel for the Appellants using that system. I also caused seven copies of this brief to be sent to the Court.

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