No. 17-13481

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION

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.

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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

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

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-reec.

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,

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

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: c

"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

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.

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 problemat-0.004 T(a)3.5(t-0.004 T(a)3.eT(a)3.o)8.3(n)3.eT(a)3en3(006 Tw 4)3.eT .9(

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 unlik

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.

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

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.

5. Appellate Proceedings

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.

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

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-defe(e)12c -0.0(e)3.6(so76.

injunction stating that “

> 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

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 MicrosofTc 0.0 Tc 0.004 Tw 5M9 A U06 Tw 2l004 Tc12(nc)3

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

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.

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; t

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. 44 0T.5(e)3.6(")3.5( )656(vi)8.5(t)8.4(.2(li)8(06.7(a)3.TJ 0 Tc 3.5nof)3.6(C)1[(

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 "pt ( )Tj (le)12.i a3(ic)12(h12. -4.607 -2.2T3)-4.607 0 Tat

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

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

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

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

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*]

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).

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 und-0.e6(r)3.7(a6(3.5(s)80.61(r)3o2(le).3(s)]Tt2.2(e)3u.61(r)3t.5(d)]v.5( )8.7(un)t.7(a

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 D

products.

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

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

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

CONCLUSION

The district court's Preliminary Injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE