ORAL ARGUMENT NOT YET SCHEDULED

No. 17-13481

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION and
STATE OF FLORIDA,
Defendants-Appellees,
v.
VYLAH TEC, LLC, EXPRESS TECH HELP, LLC, TECH CREW SUPPORT LLC,
ANGELO J. CUPO, ROBERT CUPO, and DENNIS CUPO,
Plaintiffs-Appellants.

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

TIME SENSITIVE MOTION OF ALL APPELLANTS FOR STAY PENDING APPEAL

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August 8, 2017

Counsel for Appellants certifies and makes the following statements.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1 through 26.1-3, the following persons and entities have an interest in the outcome of this review:

Avanquest North America Inc.

Avanquest Software Publishing Ltd.

Bank of America N.A.

Bolinder, Eric R., Esq., Cause of Action Institute

Bonan, Genevieve, Esq., State of Florida, Office of the Attorney General

Bondi, Pamela Jo, Esq., Attorney General, State of Florida

Chappell, Sheri Polster, Hon. (J., Middle District of Florida)

Chriss, Sana C., Esq., Federal Trade Commission

Complete Dealer Services

Crawford, Cynthia Fleming, Esq., Cause of Action Institute

Cupo, Angelo

Cupo, Dennis

Cupo, Olga

Cupo, Robert

EVINE Live, Inc.

Express Tech Help, LLC

First-Citizens Bank & Trust Co.

Geske, Michael R., Esq., Cause of Action Institute

Grant, Joey M, Esq., Marshall Socarras Grant, PL

HSN, Inc.

KapilaMukamal, LLP

Lichtman, Charles, Esq., Berger Singerman LLP

McCoy, Mac R., Hon. (Mag. J., Middle District of Florida)

Mukamal, Barry, CPA, KapilaMukamal, LLP

Nicholson, Robert N. Esq., Nicholson & Eastin, LLP

QVC United Kingdom

Robertson, Lisa, Owner of Complete Dealer Services

Rock, Robin, Esq., Federal Trade Commission

Shonka, David C., Esq., Federal Trade Commission

Socarras, Ruben E., Esq., Marshall, Socarras Grant PL

Tech Crew Support, LLC

Vylah Tec, LLC, also d/b/a Vtec Support

Zuckerman, P. Benjamin, Esq., Berger Singerman LLP

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(a) and Eleventh Circuit Rules 26.1-1 through 26.1-3, and 27.1-1(a)(9), no parent or publicly held corporation other than those listed in the Certificate of Interested Persons, above, owns 10% or more of the stock of any appellant entity.

PRIOR ACTIONS

Pursuant to Eleventh Circuit Rule 27-1(a)(4), there is no prior action of this Court or any other court or judge to which Appellants' Motion, or a substantially similar or related application for relief, has been made.

Date: August 8, 2017

/s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

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INTRODUCTION

Appellants seek a stay pending appeal of a preliminary injunction ("PI") issued by the United States District Court for the Middle District of Florida on June 4, 2017. The Federal Trade Commission ("FTC") and Florida Attorney General (together, "Regulators") brought the underlying action for injunctive relief, alleging unfair and deceptive trade practices under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended ("FTCA"), and its Florida analogue, Fla Stat. § 501.207 et seq. ("Florida Act"). But the only proved, accumulating, and likely consumer harm in this case has arisen pursuant to the PI. Despite three months of possessing Appellants' business records and computers, *See* Liggins Decl., ECF 43-1 at 259; TRO, ECF 9 at 13–19, the Regulators have presented no evidence supporting any relief in this case let alone a punitive injunction and asset freeze. The District Court entered the PI anyway, failing to apply the proper legal standard and misconstruing Appellants' position regarding the proposed injunction. Although Defendants submitted substantial admissible evidence refuting the Regulator's material assertions, the court held no

evidentiary hearing and made clearly erroneous findings upon argument and inappropriate hearsay from Regulators' counsel. Appellants' business has been closed for three months, held by a Receiver who refuses to conduct business but whose bills are rapidly depleting the business's assets. The owners' assets, some held jointly with non-defendants, are frozen, punitively affecting their families and other non-parties with no control of the business. Calls from Appellants' customers to obtain prepaid technical support go unanswered. Other non-parties, such as the sellers of the devices, are suffering substantial harm while the business is closed.

All Defendants timely noticed this appeal.

BACKGROUND

Vylah Tec LLC and two sister entities, Tech Crew Support LLC and Express Tech Help LLC (together "V-Tec"), are Florida start-ups that operated in a single Fort Myers, Florida office. Answer, ECF 63 at 818 ¶ 12. V-Tec is owned and operated by Robert Cupo. ECF 63 at 818 ¶ 13. Angelo Cupo (Robert's son) is CEO of Vylah Tec and manages V-Tec, but has no ownership interest. ECF 63 at 818 ¶12. Dennis Cupo

(brother of Robert Cupo, uncle of Angelo Cupo) (together, "Individual Defendants") has never managed or owned V-Tec. D. Cupo Decl., ECF 32-3 at 215–16 ¶5, 8, 10.[1]

V-Tec has two primary streams of income: (1) servicing pre-paid technical support contracts for buyers of electronic products from Home Shopping Network ("HSN"), QVC-U.K., and Evine Live; and (2) sales of third-party security software, utility software, and data backup services to individual consumers. ECF 32-1 at 207–08 ¶ 8, 11. V-Tec's technical support has generated approximately one thousand positive reviews that satisfied customers posted to Google, Facebook, Yellow Pages, and the Better Business Bureau, and a satisfaction rate over 97% in survey responses. ECF 32-1 at 208 ¶ 9; A. Cupo Decl. II, ¶21; ECF 65 at p. 26, l. 17 – p. 27, l. 11.

[1] In 2015, V-Tec loaned $3,500.00 to Dennis Cupo which was deposited into an account of his employer, Complete Dealer Services, to fund Dennis Cupo's commission draws until he was able to develop his own sales leads. D. Cupo Decl., ECF 32-3 at 216 ¶10; D. Cupo Decl. II at ¶ 6; L. Robertson Decl. at ¶ 4–7. Complete Dealer Services is wholly unrelated to V-Tec. L. Robertson Decl. at ¶ 9; Dennis Cupo Decl. II at ¶ 6.

V-Tec provides technical support only when a purchaser of an electronic device calls the company for prepaid technical support. ECF 32-1 at 206 ¶ 4. The Regulators acknowledge that V-Tec's business is based on incoming, not on outgoing or cold calls. ECF 65, p. 48, l. 11–12. V-Tec's data-security business generates revenue by selling third-party antivirus software and related computer utility software. The Regulators make no allegation that this third-party software is deficient. ECF 32-1 at 206, 208 ¶¶ 5, 11; *see generally* Compl. ECF 2.

STANDARD

Staying a preliminary injunction pending appeal depends upon: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009). Courts must tailor the test to individual cases because "the formula cannot be reduced to a set of rigid rules." *Hilton,* 481 U.S. at 777. When "'the

balance of equities … weighs heavily in favor of granting the stay,'" then "a lesser showing of a 'substantial case on the merits'" of significant legal issues will support a stay. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quoting *Ruiz v. Estelle*, 650 F. 2d 555, 565 (5th Cir. 1981) (*per curiam*), *cert. denied*, 460 U.S. 1042 (1983)).

I. APPELLANTS HAVE COMPLIED WITH APPELLATE RULE 8

Appellants now move this Court to stay the PI pending this appeal pursuant to Federal Rule of Appellate Procedure ("F.R.A.P.") 8(a)(2). Asking the District Court for a stay first was impracticable under F.R.A.P. 8(a)(2)(A)(i). That court first ruled against Appellants on the relevant issues when it entered an *ex parte* temporary restraining order in May. *See* ECF 9 at 2–3. The PI being appealed here is therefore the District Court's second ruling on the Regulators' assertions. *See* ECF 62 at 2–8. The court acknowledged Defendants' evidence in opposition, but did not change its mind on second consideration of the matter.

The chances of that court staying the PI upon a third consideration are small and outweighed by the certain additional irreparable harm Appellants would suffer while that action was

pending. *See Ruiz v. Estelle,* 650 F.2d 555, 567 (5th Cir. 1981) (considering appellate motion for stay without prior motion below on matters where "the district court would not be hearing anything new that would affect its decision" to enter injunction).

Moreover, after the PI froze the Defendants' personal assets and gave the Receiver control of the business assets, they had to search for, educate, and retain new counsel willing to represent them (at the risk of not being paid) in lower court proceedings and with the Receiver, plus appellate counsel willing to undertake this appeal *pro bono*. Appealing the PI now and seeking a stay from this Court first is the only plausible route to obtain relief before the business's assets are fully depleted. *See, e.g., Michael v. INS,* 48 F.3d 657, 663 (2d Cir. 1995) (time sensitivity of obtaining relief and potential risk to appellate jurisdiction demonstrate impracticability under Rule 8).[2] Requesting relief from the District Court first was therefore impracticable, and this motion should not be barred by the conditional terms of F.R.A.P. 8(a)(2)(A)(i). *See Ruiz,* 650 F.2d at 567.

[2] For the same reason, Appellants request that this Court consider their motion for stay pending appeal as "time sensitive" pursuant to 11th Cir. R. 27-1(b).

II. DENIAL OF THE STAY WILL IRREPARABLY HARM APPELLANTS

Under the PI, the assets of V-Tec are held by the Receiver and the individual defendants' assets, including those only partially owned by them, are frozen. ECF 9 at 92–93; ECF 62 at 793–95. Defendants are prohibited from: (1) using credit cards; (2) using the proceeds of any loan; and (3) encumbering any assets, even if held jointly—such as Robert Cupo's home, which he holds jointly with his wife. O. Cupo Decl. at ¶ 24.

The asset freeze left Dennis Cupo, who is 67 years old and has a heart condition, with $250.00 in cash. Angelo Cupo, who has a young daughter, had $40.00 in cash. Robert Cupo, who is 63 years old and supports both his daughters and a grandson, was left with $1,930.00 in cash. ECF 28-1 at 183–85; ECF 32-3 at 215–16 ¶¶ 3, 11. This financial hardship prevents Individual Defendants from covering basic expenses like food, medicine, rent, and mortgage payments.[3] When they told the FTC, its attorney responded that they should get jobs. ECF 28-2 at 187.

[3] On June 21, 2017, the court released $50,000 for Defendants to pay attorney fees and $21,500 for the individual defendants' personal support. ECF 62 at 795; ECF 69. No funds were released for restarting the business.

The day after the PI hearing, the Receiver filed a supplemental report which, without a stay, will deplete the resources of the company before the case is decided on the merits. The Receiver showed initial assets of $670,000 reduced by $100,000 in administrative costs through June 3, 2017, and $75,000–$100,000 through the next two months, plus an initial $25,000 to the Receiver's attorney, and "monitoring costs" of $3,000 per week, to conclude there were inadequate funds to re-open V-Tec. ECF 54-1 at 4. The Receiver acknowledges that the shutdown has caused Avanquest, which contracts technical support to V-Tec, "tens of thousands of dollars" in damage; hence the PI poses an existential risk to V-Tec's entire business. ECF 54-1 at 751–52.

The Receiver's refusal to allow Appellants to operate the business is causing them to lose customers and damaging their reputations; V-Tec will be destroyed absent a stay. This Court and others held such harm to be irreparable injury justifying a stay pending appeal. *See, e.g., Ferrero v. Assoc. Materials, Inc.,* 923 F.2d 1441, 1449 (11th Cir. 1991) ("loss of customers and goodwill is an 'irreparable' injury"); *ABC Charters, Inc. v. Bronson,* 591 F. Supp. 2d 1272, 1308-09 (S.D. Fla. 2008) (destruction of business); *Sci. App. Inc. v. Energy Cons. Corp.,* 436

F. Supp. 354, 361 (N.D. Ga. 1977) (harm to reputation). This is particularly true when damages are unavailable because of sovereign immunity. *See Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable").

III. A STAY WILL NOT HARM THE REGULATORS, BUT DENYING A STAY WILL CAUSE FURTHER CONSUMER HARM AND INJURY TO NON-PARTIES

As the Regulators acknowledge, V-Tec's business is based on incoming, not outgoing or cold calls. ECF 65, p. 48, l. 11–12. Thus, relevant consumers are those who pick up the phone and call V-Tec for support. During the three months V-Tec has been closed, over 100,000 customer calls that V-Tec is contractually obligated to answer have gone unanswered, with calls going into over 6,700 hours of "death hold." A. Cupo Decl. II at ¶ 16. When Angelo Cupo asked when V-Tec could resume operations, the Receiver responded: "Never." A. Cupo Decl. II at ¶ 14. Unless the PI is stayed, those 100,000 calls and more will go unanswered.

Indeed, the only demonstrable sources of consumer harm in this case are the PI itself and the Receiver's inaction while holding V-Tec's assets. V-Tec's customers are suffering rapidly accumulating, cognizable consumer harm whenever they are denied the benefit of their bargained-for lifetime technical service. The FTC has previously argued, and this Court has held, that breach of lifetime service contracts can constitute consumer harm. *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1363–66 (11th Cir. 1988). By preventing Appellants from reopening or otherwise mitigating this injury to their customers, the PI is effectively *guaranteeing* harm to the only consumers relevant in this case, V-Tec's incoming callers.[4]

Interested non-parties are being harmed by the PI too. The customers' contracts for lifetime technical service were bundled with the purchase of electronic devices by HSN, Evine, and QVC–U.K. When

[4] Irony insufficiently describes the reversal of roles here. Appellants, not the Regulators, have identified this consumer harm and raised it before the District Court. Appellants, not the Regulators, have suggested ways to mitigate that harm by preventing incoming callers from going into "death hold." The Receiver has refused to try any mitigation. *See* A. Cupo Decl. II, Exhibits B and C.

purchasers learn that they cannot obtain that service, their frustration naturally falls on the source of the sale. The Regulators acknowledge damage to Avanquest, who was responsible for contracting V-Tec to service the lifetime support contracts. *See* ECF 54-1 at 751–52. Thus, the PI is harming consumers and other interested non-parties, unrelated to V-Tec, and will continue to do so until stayed.

IV. APPELLANTS PRESENT SIGNIFICANT LEGAL QUESTIONS AND HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON APPEAL

Injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). By relying on allegations unsupported by evidence and by misrepresenting evidence that is demonstrably not about V-Tec, the Regulators overreached their legitimate authority under the FTCA and the Florida Act. This appeal therefore presents a substantial case on at least three significant legal issues.

First, the Regulators have presented no evidence that the PI remedies any consumer harm or prevents any likely consumer harm, while Defendants submitted substantial admissible evidence to the

contrary. *Cf. LabMD, Inc. v. F.T.C.,* 678 Fed. App'x 816, 822 (11th Cir. 2016) (staying FTC-issued injunction pending appeal where insufficient showing of likely consumer harm). Second, the PI is causing demonstrable, ongoing consumer harm by preventing V-Tec customers from obtaining services under their lifetime technical support contracts. *Cf. Orkin*, 849 F.2d at 1363–66. Third, the PI punitively affects persons with no control over or participation in V-Tec's activities. *Cf. McGregor v. Chierico,* 206 F.3d 1378, 1385 (11th Cir. 2000); *F.T.C. v. Gem Merch. Corp.,* 87 F.3d 466, 470 (11th Cir. 1996). Appellants therefore present "significant legal issues" because this Court has previously ruled on all three of these issues contrary to the position adopted by the Regulators in this case.

A. The District Court Abused its Discretion and Committed Clear Error

This Court reviews the issuance of a PI for abuse of discretion, with legal determinations reviewed *de novo*. *F.T.C. v. Bishop*, 425 Fed. App'x 796, 797 (11th Cir. 2011) (unpublished) (citing *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008)). Here, the lower court abused its discretion by failing to apply the correct legal standard and making clearly erroneous

findings of fact. *See Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1336 (11th Cir. 2002).

Under the FTCA, a court may grant an injunction if there is "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [granting an injunction] would be in the public interest …." 15 U.S.C. § 53(b); *see Bishop*, 425 F. App'x at 797. The court below recited but failed to apply this standard. Moreover, because the equities of this case weigh heavily in favor of a stay, Appellants need only show their appeal raises "serious legal issues" on which they have a "substantial case on the merits." *See LabMD*, 678 F. App'x at 821. Even if the equities were otherwise, Appellants are nonetheless substantially likely to prevail on the merits. *Hilton,* 481 U.S. at 776.

1. The District Court Erred in Holding that Appellants Agreed to an Injunction Shutting Down Their Business

The District Court not only failed to apply the proper legal standard for entering a PI, it failed to apply any legal standard at all. The court correctly articulated the FTCA's guidelines for issuing a preliminary injunction: 1) FTC's ultimate likelihood of success on the

merits and 2) a balancing of equities. ECF No. 62 at 785. Nevertheless, the court hand-waved any analysis away, stating erroneously:

> At issue before the Court is not whether Plaintiffs have made the requisite showing for a preliminary injunction. That is because Defendants do not object to a limited preliminary injunction. Instead, the parties square off over the terms of a preliminary injunction and asset freeze.

PI, ECF No. 62 at 786. The record shows that Defendants only agreed to a limited preliminary injunction with several conditions:

> Vylah Tec Defendants do not oppose the imposition of a *limited* preliminary injunction, **so long as** the preliminary injunction order entered 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.

ECF No. 32 at 194 (italics in original; emphasis in bold added). The conditions for Defendants' "agreement" to a limited injunction were never met. This Court has held that a district court's failure to consider all PI alternatives proffered in consideration of the public interest is reversible error. *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1338 (11th Cir. 1996).

2. The District Court Should Have Held an Evidentiary Hearing on the Record

The District Court adopted as fact the assertions and arguments of Regulators' counsel, notwithstanding Defendants' substantial admissible evidence to the contrary. That was error. "Where conflicting factual information 'place[s] in serious dispute issues central to [a party's] claims' and 'much depends upon the accurate presentation of numerous facts, the trial court err[s] in not holding an evidentiary hearing ….'" *Four Seasons Hotels & Resorts, B.V. v. Consorcia Barr, S.A.,* 320 F.3d 1205, 1211 (11th Cir. 2003) (quoting *All Care Nursing Serv. v. Bethesda Mem. Hosp. Corp.,* 887 F.2d 1535, 1539 (11th Cir. 1989)). Moreover, such an evidentiary hearing was required, even if not requested by the parties. *Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 324 & n.11 (3d Cir. 2015) ("where the motion [for PI] turns on a disputed factual issue, an evidentiary hearing is ordinarily required" even if unclear whether hearing was requested) (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F. 3d 700, n. 16 (3d Cir. 2004) and cases from D.C., 2nd, 4th, 5th, 6th, 7th, and 11th Cirs.).

The factual disputes below and the Regulators' evidentiary failure began with misrepresentations in the Complaint and carried through

the PI hearing. The Receiver's supplemental filing afterward only confirms why an evidentiary hearing was necessary.

The FTC's Rule 65 Declaration of Counsel offered hearsay and inadmissible character evidence, citing to an unnamed "tech support fraud expert" to support a variety of claims.[5] ECF 5 at 63 ¶¶ 4–6. Defendant's declarations, based on their personal knowledge, disputed those assertions, as set forth throughout this brief.

The Regulators documentary evidence fares no better. Any "reasonable inquiry" by the Regulators under Rule 11 would have revealed exhibits to the Complaint as wholly unrelated to V-Tec or the Individual Defendants. For example, the Complaint includes a screenshot of a pop-up message to support the allegation that V-Tec was using phony warnings. ECF 2 at 12 ¶25. Even a rudimentary Google

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[5] The Florida Act provides certain exceptions to the hearsay rule in cases brought by the State "if the trier of fact determines that: (a) [t]he statement is offered as evidence of a material fact [and] (b) [t]he statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts…." Fla. Stat. § 501.207(7)(a) & (b). The Regulators easily could have procured a non-hearsay declaration by the unnamed tech support expert but did not. Moreover, in light of Defendant's substantial admissible evidence in opposition, hearsay was not an "appropriate" basis for factual findings in support a wide-reaching PI. *See Canal Auth. of Fla. v. Callaway,* 489 F.2d 567, 576 (5th Cir. 1974).

search of the telephone number in the screenshot would have revealed that the number belongs to an unrelated third party.[6]

The Complaint also includes as exhibits 14 declarations of people the Regulators represented as V-Tec customers who "suffered harm." Of the 14 declarations, 4 related to pop-ups—the remaining 10 related to technical support and sales. Of the 4 that related to pop-ups, 2 provided a telephone number from the "misleading" pop-up message that, like the screen-shot in the Complaint, belongs to someone unrelated to any party here—and a basic Google search would have revealed as much to the Regulators.[7] PX 24-1; PX 21-1.

The remaining two declarations, although they provide a valid V-Tec telephone number, describe events that allegedly occurred in August 2014 and February 2015. PX16-1; PX 18-1. These dates are significant, because although V-Tec had briefly used pop-ups as a form of advertising—all different from the one shown in the Complaint

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[6] https://community.spiceworks.com/topic/1461536-fake-tech-support-calls-what-s-your-record (for results of calling the telephone number on the screenshot provided by Plaintiffs) (last accessed 7/14/17).

[7] http://whocallsme.com/Phone-Number.aspx/8883904235; http://forums.timewarnercable.com/t5/Antivirus-Internet-Security/Scam/td-p/70791 (for results of calling telephone numbers provided in declarations) (last accessed 7/14/17).

screenshot—V-Tec ceased using pop-ups by mid-2015 when it changed its focus to technical support and software sales to pre-paid service contract customers. ECF 32-1, at 207 ¶ 8. One declarant received a chargeback on his credit card for his purchase. PX 16-1. The other declarant, relating an August 2014 transaction, provides no information about whether or how that transaction was resolved. Moreover, any claim arising from payment in a transaction on that date is likely time barred under the Florida Act.[8]

The remaining 10 declarations were provided as evidence of misleading sales tactics. Of those, seven customers did not buy anything, two received refunds, and one received a credit from his credit-card company. PX 17-1; PX 19-1; PX 20-1; PX 22-1; PX 23-1; PX 25-1; PX 28-1; PX 29-1 PX 30-1; and PX 31-1. There was not a single complaint from a customer who bought a product, decided he did not want it, and was not subsequently made whole.

At the PI hearing, the Regulators presented one copy of a "sales script," which they claimed to have found on a V-Tec computer following the raid. They provided no evidence that the script was ever used. Nor

[8] *See* Fla. Stat. § 501.207(5).

did they submit any employee statements, customer complaints, refund claims, or evidence of pop-ups. ECF 65 at p. 27, l. 12–24.

Instead, Florida's attorney general played part of a recorded telephone call, which she characterized as "an exemplary call that follows a majority of the scripts that we have found that have been used with the last year, year and a half." ECF 65 at pps. 51–59. The AG could not then confirm the date of the call or provide a transcript. ECF 65 at p.60. A transcript of the call, and a transcript of a second call, were filed after the hearing. These transcripts showed either that the alleged victim made no purchase, or related to the activities of an unaffiliated third party that the Regulators falsely ascribed to V-Tec. That was consistent with the Regulators' poor pleading practice in the Complaint, but the flaws were even more grievous this time. The "exemplary call" transcript showed that the customer did not buy anything and the technician provided appropriate technical support. ECF 51 at 697–710.

The Regulators characterized the second transcript as "[a]nother sales call of a similar nature," a stunning misrepresentation. ECF 51 at 638. Contrary to the FTC's assertion, the transcript is not of a sales

call (no sale took place or was even discussed). An even more critical distortion arises from mislabeling the parties to the call, in which the real V-Tec Technician is mislabeled: "HSN Matthew," and an unknown third party is mislabeled: "Vtec Prasad." ECF 51 at 718. The mislabeling amounted to a fraud on the court as the unrelated third party making the offending comments was labeled by the Regulators as V-Tec!

The misrepresentations are readily discerned for two reasons: (1) the recorded call was retrieved from V-Tec's monitoring system and thus, the person who answered and initiated the recording, Matthew, is clearly the V-Tec employee—not "Prasad" who was already on the call when the recording began; and (2) the transcript expressly states that Matthew is supporting the HSN service contract, whereas Prasad confessed to being from "My Phone Support." ECF 51 at 721–26, 733.

The transcript shows that V-Tec helped the customer disconnect Prasad's remote access to her computer, dispatched Prasad from the call, and assured the customer that she had lifetime support from V-Tec at no cost. ECF 51 at 726–33.

These failures of proof alone are sufficient to rule that entering the PI was an abuse of the District Court's discretion and an unlawful overreach by the Regulators, not only because they are misrepresentations, but also because they have nothing to do with V-Tec's recent operations. *See, e.g., FTC v. Mktg. Response Group, Inc.*, No. 96-111-CV-T-17A, 1996 U.S. Dist. LEXIS 10589, at *6 (M.D. Fla. June 24, 1996) ("Generally, a preliminary injunction under section 53(b) will only issue if the wrongs are ongoing, or are apt to continue.)

The District Court's thus clearly erred by finding that the Regulators had "sufficiently shown" that Defendants "have engaged in and are likely to engage in" violations. ECF 9 at 2 ¶ 2. Although related to the TRO, the District Court must have implicitly adopted that finding to issue the PI. The Receiver also relied upon that unsupported finding (and made his own legal conclusions lacking evidentiary support) to conclude that Defendants' business could not operate lawfully and profitably. ECF 49-1 at 541–42¶¶ 15, 16.[9] It was thus clear error for the District Court to place "great weight" on that report.

[9] In *Haddad v. Rav Bahamas, Ltd.,* 589 F. Supp. 2d 1302 (S.D. Fla. 2008), undisclosed by the Regulators, the court rejected an expert damages report by Barry Mukamal, the Receiver in this case, because it

3. If the District Court Had Done a Proper Analysis, No PI Would Have Issued

As the District Court recited, there is a three-part test to determine liability under FTCA Section 5: "(1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances; and (3) the representation was material." ECF No. 62 at 786. The District Court should have applied this standard to the evidence before gauging the Regulators' "ultimate likelihood of success" on the merits, but it did not.

(a) Below, the Regulators Did Not Show Likelihood of Success or Risk of Future Harm

Under 15 U.S.C. § 53(b)(1), a PI is appropriate if an entity "is violating, or is about to violate, any provision of law enforced by

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relied upon factual assumptions and legal conclusions that did not match the evidence and theories of recovery. The Receiver's Supplemental Report, ECF 54-1, in this case is indisputably flawed. His own calculations show that V-Tec *was* operating profitably. ECF 49-1 at 543 ¶¶21–24. His future projections and conclusion depend upon theories not alleged in the Complaint or not supported by any of the Regulators' evidence. *Id.* at 544–51 ¶¶ 29–50.

the [FTC.]" The Regulators have shown no likelihood of future harm and, in fact, have not shown past harm.

The Complaint concerns three specific allegations: (1) use of pop-up messages; (2) upselling data security software, and (3) misrepresenting V-Tec as an affiliate of Microsoft and some V-Tec employees as Microsoft certified. The Regulators have provided no evidence that: V-Tec has used any type of pop-up message within the last two years, much less any pop-up with a misleading message; that any customer was misled into buying unneeded data security software; or that V-Tec employees claimed any sort of Microsoft certification. The best they could do, from over one million customers, was one declaration suggesting, but not expressly stating, that a customer from three years ago might not have been made whole. PX-18-1.

Moreover, V-Tec's customer support business, the core of its model, is not implicated in any of those three allegations. Continuing to answer phone calls and honor customer service contracts presents no risk of damage to consumers. Nevertheless, V-Tec offered to agree to a limited PI, ***provided*** that it could continue to run its business. The

District Court failed to consider this alternative and misconstrued it as agreement that the PI was acceptable. Therefore, the PI should be vacated. *See SunAmerica Corp.*, 77 F.3d at 1338.

(b) The Balance of Equities Weighed Against a PI

The court should have weighed the likely harms from the Regulators' requested PI. Instead, it weighed the merits of the parties' arguments and got that wrong. Its ruling that "reopening Defendants' business [subject to Defendants' conditional and minimal PI] will result in less money being available to compensate alleged victims of Defendants' activities," ECF 62 at 788, was clearly erroneous given the first month's Receiver bill of nearly a quarter of V-Tec's assets. Allowing V-Tec to operate would have preserved its income stream and increased assets, avoided the consumer and public harm now occurring, and would not have harmed the Regulators' legitimate interests, particularly considering their complete evidentiary failure. *See Canal Auth. of Fla. v. Callaway,* 489 F.2d 567, 576 (5th Cir. 1974) ("focus must be on prevention of injury by a proper order, not merely on preservation of the status quo"). Conservatively projecting $50,000 a month in receivership bills, V-Tec's assets will be depleted in 8 months. Without a

stay, the PI will effectively destroy V-Tec before any merits decision is rendered.

B. The Preliminary Injunction Improperly and Punitively Affects Persons with No Control of V-Tec

The PI's overbreadth strains the private finances and joint accounts of Cupo family members and others. It unjustifiably reaches the accounts of Dennis Cupo and his employer, who have nothing to do with V-Tec's business. The Regulators bore the burden of proving a connection between assets that are frozen and alleged harm. *See U.S. ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 496–497 (4th Cir. 1999) ("nexus between the assets sought to be frozen through an interim order and the ultimate relief requested … is essential … to enter a preliminary injunction freezing assets"). The Regulators have not asserted any nexus between any consumer harm and Dennis Cupo's finances or activities, or the accounts and operations of his employer. *See supra n. 1; Gem Merch. Corp.,* 87 F.3d at 470 ("FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them" and "had some

knowledge of the practices") (quoting *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)).

Assets held jointly by Robert Cupo and his wife should be unfrozen. Olga Cupo is not an owner or controller of V-Tec, and the Regulators make no allegation about her. The freeze punitively threatens her finances and ability to maintain existing property solely because she is the wife of a Defendant. *See, e.g., Chierico,* 202 F.3d at 1385; *United States v. One Single Fam. Residence,* 894 F.2d 1511 (11th Cir. 1990). The PI should be lifted from property jointly held by non-defendants.

CONCLUSION

For the foregoing reasons, this Court should stay the PI pending appeal.

August 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(e)(2)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e)(2)(B) because it contains 5,119 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). I hereby certify that this brief also complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Century Schoolhouse 14-point font.

Date: August 8, 2017

/s/ Cynthia Fleming Crawford
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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons registered with an ECF account.

I hereby certify that on August 8, 2017, I served the counsel for plaintiff-appellees with the foregoing document via e-mail to:

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