No. 19-2204 (L) & 19-2306 (C)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee
v.
Andris Pukke,
Defendant-Appellant

and

Federal Trade Commission,
Plaintiff-Appellee
v.
Peter Baker
Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of Maryland
No. 18-cv-3309
Hon. Peter J. Messitte

FTC's Informal Response Brief

Alden F. Abbott
General Counsel
Joel Marcus
Deputy General Counsel
Theodore (Jack) Metzler
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
WASHINGTON, D.C. 20580
(202) 326-3502
tmetzler@ftc.gov

CONTENTS

Background 1

1. The Sanctuary Belize scam. 1
2. Procedural History 3

Standard of Review 9

Argument 9

I. Pukke's Appeal 9

1. The district court correctly found the Commission was likely to succeed on the merits of the FTC Act claims. 10
2. The district court's findings were not clearly erroneous. 12
3. The district court applied this Court's binding precedent interpreting section 13(b) of the FTC Act. 13
4. The district court properly declined to stay the case pending the resolution of certiorari petitions in other FTC cases. 14
5. The district court was not required to decide Pukke's Telemarketing Sales Rule argument. 15
6. The district court did not abuse its discretion by entering a temporary restraining order and interim preliminary injunction. 17
7. Pukke's venue, res judicata, and collateral estoppel arguments are frivolous. 19

II. Baker's Appeal 23

1. The district court has jurisdiction and venue is proper. 24
2. The district court did not abuse its discretion by extending the terms of the temporary restraining order until the evidentiary hearing. 26
3. The district court correctly found that the Commission is likely to succeed on the merits. 28
4. The district court was authorized to enter an asset freeze. 31
5. The district court correctly found the FTC is likely to successfully establish Baker's personal liability. 31
6. The district court correctly found that the injunction was in the public interest. 34
7. Baker's remaining arguments are frivolous. 35

Conclusion 38

Background

These appeals arise from an FTC enforcement action to halt a real-estate development scam which was run by appellants Andris Pukke and Peter Baker and known as "Sanctuary Belize." Sanctuary Belize duped consumers into spending over $141 million on empty lots in remote southern Belize through promises that they were making a low-risk investment in a luxury resort community that would soon be completed. In fact, the investment was risky, the promised luxury amenities never materialized, and the development was never close to completion.

1. The Sanctuary Belize scam.

Pukke, Baker, and their codefendants lured consumers to buy properties in the phantom Sanctuary Belize resort community through a multi-step process. The pitch began with television ads and internet marketing, followed up with calls from Sanctuary Belize telemarketers. Dkt. 539 at 8. After making sure the marks could afford a substantial down payment, Sanctuary Belize telemarketers pitched lots in the development as a low-risk investment that would quickly appreciate in value. The telemarketers described a host of luxury amenities that would be completed at the resort within 2-5 years, including an airstrip, a championship-caliber golf course, a casino and hotel, a medical center, and high-end boutiques and restaurants. *Id.* at 28-30. The

telemarketers urged consumers to the next phase—attending webinars in which other telemarketers reinforced the same promises. *Id.* at 8. There, telemarketers pressed consumers to purchase an all-inclusive tour of the property for $999, and to purchase a right of first refusal on a particular lot by paying a deposit, typically $2,000 to $10,000. *Id.* at 8-9.

When customers arrived in Belize to tour the lots they had paid to reserve, they were hosted at a resort near the Sanctuary Belize property.[1] Over the course of several days, consumers attended social events, made visits to the property, and attended group and individual sales presentations that reinforced the false promises made by telemarketers. *Id.* at 9-10. Customers reported that almost everyone who attended the tours ultimately purchased from Sanctuary Belize.

Yet the development that Sanctuary Belize promised never came. Many purchasers who tried to build on their lots were unable to do so because the electrical, water, and sewer infrastructure was never installed. And almost none of the promised amenities were ever completed. The promised airstrip was never installed. There is no hotel or casino, no golf course, no medical center, and no boutiques or restaurants. Dkt. 539 at 26-27; 28-31. One early purchaser noted that when she visited the property 2012, "according to the

---

[1] Some consumers purchased lots in Sanctuary Belize without visiting the development. Dkt. 539 at 9.

development timeline we received in 2008 . . . everything in the property should have been complete but almost nothing was complete." Dkt. 124 (Att. 2, Cunningham Decl.) at 4. After visiting two years later, the same purchaser stated that "[t]he only difference on the property that we saw from 2012 and 2014 was that there was a guard at the entrance of Sanctuary Belize and the marina was flooded." *Id.* at 5.

Sanctuary Belize's promises of a robust resale market in which properties would quickly appreciate likewise failed to materialize. Dkt. 539 at 31-33. The few purchasers who were able to sell their properties sold them back to Sanctuary Belize itself, and all but one them did so at a loss. Sanctuary Belize then attempted to resell those same lots to new marks. *Id.* at 11.

2. Procedural History

To bring a halt to the Sanctuary Belize scam, the FTC sued Pukke, Baker, and numerous other individuals and companies involved in the enterprise for a permanent injunction and other equitable relief. Dkt. 1. The complaint charged that Pukke originally purchased the land that became known as Sanctuary Belize in 2003 and has controlled the Sanctuary Belize enterprise ever since; that Baker owned several Sanctuary Belize companies; and that he participated in or controlled its illegal practices. *Id.* at 8-10. The complaint charged that Sanctuary Belize made six core false representations in

marketing properties to consumers: (1) that Sanctuary Belize was being completed without taking on debt, making it a particularly safe investment; (2) that every dollar collected from sales would be reinvested in the development; (3) that the development would be completed within a specific timeframe, usually two to five years; (4) that the development would have numerous deluxe amenities; (5) that Sanctuary Belize lots would rapidly increase in value; and (6) that there was a robust resale market for Sanctuary Belize lots. Dkt. 1 at 26-27.

The Commission charged that those claims were false and material to consumers' purchasing decisions, and therefore violated section 5 of the FTC Act, 15 U.S.C. § 45(a). *Id.* at 34-37. The complaint further charged that Sanctuary Belize's telemarketers' false representations violated the Telemarketing Sales Rule, 16 C.F.R. § 310.2. *Id.* at 38-44.

To prevent the dissipation of assets, the FTC sought an ex-parte temporary restraining order, an asset freeze, and the appointment of a receiver, all of which the district court granted. Dkt. 615 at 2. Rather than scheduling an immediate evidentiary hearing, the district court stated that it believed more time was necessary to prepare for a preliminary injunction hearing and therefore permitted the FTC to file a motion to extend the terms of the TRO as an "interim" preliminary injunction pending a full evidentiary hearing. Dkt. 20;

see Dkt. 23 (FTC Motion). The court set a briefing schedule and held a telephone hearing to hear any objections to that plan. Dkt. 20. Pukke and Baker did not object, nor did they oppose entering an interim preliminary injunction until the evidentiary hearing.[2] *See* Dkt. 25 & 26.

After the hearing (Dkt. 31), the court extended the TRO as an interim PI and scheduled an evidentiary hearing for early 2019. Dkt. 34. That hearing began March 11, 2019 and lasted more than two weeks. After post-hearing briefing, the district court issued an opinion and order granting the Commission's motion for a preliminary injunction. Dkt. 539, 615.

The court found that the Commission was likely to succeed on the merits of the FTC Act claims. Dkt. 539 at 20-33. Specifically, it found that:

(1) Sanctuary Belize "told consumers that Sanctuary Belize had or would have no debt and was therefore a particularly safe investment," but "[t]he evidence strongly suggests those representations were and are false." *Id.* at 20-21;

(2) Sanctuary Belize telemarketers told consumers that the "no debt" model meant "every dollar the developer collected from sales lots

[2] One defendant (Atlantic International Bank) did object, *see* Dkt. 24, 26; Dkt. 27 (FTC response). Baker's brief (p. 30) says that unspecified defendants were not allowed to participate by telephone in certain hearings; that is incorrect. Baker appeared in the preliminary injunction hearing and was allowed to participate by phone in other hearings. *See, e.g.*, Nov. 19, 2018 Tr. at 8; Baker Br. 16.

would go back into the development," a claim that was "incontrovertibly false"—Sanctuary Belize "used only 14% of consumers' money to cover construction costs." *Id.* at 23, 25;

(3) Sanctuary Belize employees told consumers as early as 2008 that the development "would be completed within a specific time frame: within two years, sometimes within five years." *Id.* at 25-26. Yet the development "[m]ost definitely . . . was not finished within two to five years" and still was not complete "more than thirteen years after the first sale occurred." *Id.* Although some amenities have been built, other promised amenities "appeared to have been abandoned altogether." *Id.* at 26-27.

(4) Sanctuary Belize promised "extraordinary amenities comparable to those of a small American city," such as shops, restaurants, condominiums, entertainment venues, a hotel, an American-style supermarket, an American-quality hospital, an 18-hole golf course, an international airport, on-site airstrip, and a "world class" marina. *Id.* at 29-31. Given the "aggressive marketing of all these deluxe amenities" and "the considerably less than promised number of features constructed to date," the court found it "clear that the FTC has shown a

fair and tenable chance of proving at the merits stage that these material representations violated Section 5 of the FTC Act." *Id.* at 31.

(5) Sanctuary Belize employees claimed that lots would rapidly appreciate in value, but the lots "have never begun to appreciate anywhere near as promised, and there was never any basis—none—for [Sanctuary Belize] to have claimed this." *Id.* at 31-32.

(6) Contrary to Sanctuary Belize's representations, "there have been few opportunities for dissatisfied owners to sell their lots at a profit." *Id.* at 32.

The court found that each of the claims above was material to consumers' decisions to purchase and based on its findings, the court was "easily" able to conclude that the Commission had a "fair and tenable" chance of success on the merits. *Id.* at 33.

Because it found that the Commission was likely to succeed on the merits of its FTC Act claims, which independently justified all of the terms of the preliminary injunction, the court found it unnecessary to resolve the defendants' argument that they fell within the exception to the Telemarketing Sales Rule for sales that occur face-to-face. *Id.* at 33-34.

Turning to the individual defendants, the court first found "extensive evidence" that Pukke controlled the Sanctuary Belize enterprise, directed its

marketing strategies, and deceived consumers. *Id.* at 40. The court cited Baker's testimony that "he and Pukke were the original partners in the Sanctuary Belize development," and that "they continued their partnership" after the conclusion of the FTC's earlier enforcement action against Pukke. Dkt. 539 at 35. Baker likewise held numerous positions in Sanctuary Belize companies. *Id.* at 40-41. And although he claimed not to be involved from 2008-2016, the "evidence shows that Baker appears to have been very much involved in the Sanctuary Belize marketing and sales operations during this time." *Id.* at 42. In 2016, moreover, Baker took a more "hands-on role" and "directly control[ed] activities in Belize. *Id.* at 44-45. The court concluded that "the evidence strongly suggests" that Baker had an "intimate and continuous" involvement with Sanctuary Belize marketing efforts since the beginning of the development. *Id.* at 45. Accordingly, the court held that the FTC was likely to succeed on the merits of Pukke and Baker's liability.

After briefing on the form of the injunction, the district court entered the preliminary injunction on October 3, 2019, and these appeals followed. After Pukke and Baker filed separate informal opening briefs, the Court consolidated their appeals.

Standard of Review

The Court reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 213 (4th Cir. 2019). The district court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 171 (4th Cir. 2019), but the court will not reverse "so long as the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Mountain Valley*, 915 F.3d at 213 (cleaned up).

Argument

For the Court's convenience, the Commission addresses the arguments made in Pukke's and Baker's briefs separately.

I. PUKKE'S APPEAL

None of Pukke's seven arguments presents a serious reason to find that the district court abused its discretion in granting the preliminary injunction.

- He argues that the court applied the wrong likelihood-of-success standard without showing how his standard is different or how it should have been applied.
- He argues that the court's findings were clearly erroneous without challenging any of those findings.

- He argues that the court erred by following this Court's binding precedent and that the court should have stayed the case pending the outcome of other FTC matters in other circuits, which it was not bound to do.
- He argues that the court erred by not deciding an issue—whether the Telemarketing Sales Rule applies—that was not necessary to its preliminary injunction decision.
- He challenges non-appealable interlocutory decisions (to enter a temporary restraining order and the time between that order and the preliminary injunction hearing) that he did not challenge below.
- And he makes frivolous arguments that collateral estoppel or res judicata should apply to cases that did not involve the claims or the parties at issue before the district court.

Pukke's arguments are self-evidently meritless. The preliminary injunction against him should be affirmed without further proceedings.

1. The district court correctly found the Commission was likely to succeed on the merits of the FTC Act claims.

Pukke first argues that the district court applied an impermissibly low standard for granting a preliminary injunction by requiring that the Commission demonstrate a "fair and tenable" chance of success on the merits. Br. 23-25. He argues that the court should instead have applied an "abuse of dis-

cretion standard." *Id.* at 24-25. On its face, the argument is nonsensical; "abuse of discretion" is a standard applied by appellate courts, not trial courts.[3] Nor does Pukke explain how his proposed standard differs from the standard applied by the district court, or how the Commission's evidence failed to meet the standard. *See id.*

In any case, the district court acted within its discretion. In an FTC enforcement action, "the district court is required (i) to weigh equities; and (ii) to consider the FTC's likelihood of ultimate success before entering a preliminary injunction." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991) (same). Unlike in a dispute between private parties, "[h]arm to the public interest is presumed." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019).

The district court held that the Commission demonstrates likelihood of success on the merits if it "shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits." Dkt 539 at 17 (citing *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978). The court found that the Commission met that standard after closely

---

[3] See Black's Law Dictionary 12 (10th ed. 2014) (defining "abuse of discretion" as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence").

examining the Commission's evidence that Sanctuary Belize had made six material claims to consumers in the marketing of Sanctuary Belize lots, and determining that the claims were false. Dkt. 539 at 20-33. That is all the law requires for a finding of likely success, whatever the precise verbal formulation.[4] Pukke's bare assertion that the court set the bar too low shows no error on this record.

2. The district court's findings were not clearly erroneous.

Pukke next makes the blanket claim that the district court's factual findings were clearly erroneous, but he does not challenge any of the findings themselves. *See* Br. 25-28; Dkt. 539 at 20-33. Over 13 pages of its opinion, the district court carefully analyzed the extensive evidence showing that Sanctuary Belize made six core deceptive claims, that the claims were false, and that they were material to consumers' purchasing decisions. *See* Dkt. 539 at 20-33. Rather than challenge those findings, Pukke attacks a string-citation relating to a single assertion in the "background" section of the district court's opinion: specifically, that Sanctuary Belize repeated its deceptive claims when consumers visited Belize. Pukke Br. 26. That argument

---

[4] See 11a Wright & Miller, Federal Practice & Procedure 200-201 § 2948.33 ("[V]erbal differences [adopted by different courts on the likelihood of success factor] do not seem to reflect substantive disagreement.").

does not show or even attempt to show that any the district court's findings were clearly erroneous.[5]

3. The district court applied this Court's binding precedent interpreting section 13(b) of the FTC Act.

Pukke's third argument is that the district court erred by entering a preliminary injunction and asset freeze because "the FTC Act does not give the FTC the ability to seek restitution." Br. 28-31, 31. Pukke relies on a Seventh Circuit decision, contrary to the approach of six other courts of appeals, holding that section 13(b) of the FTC Act does not authorize restitution. *Id.* at 28-31; *see FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

As the Seventh Circuit acknowledged, this Court's precedent is to the contrary. *See Credit Bureau Center*, 937 F.3d at 779. In *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014), this Court held that Section 13(b) does authorize monetary relief: "by authorizing the district court to issue a permanent injunction in the Federal Trade Commission Act, Congress presumably authorized the district court to exercise the full measure of its equitable jurisdiction," including by awarding "monetary consumer redress, which is a

[5] Pukke does not show "clear error" on the one factual point he does discuss because his argument rests on his own characterization of the evidence cited—consumers' affidavits and testimony—as "boilerplate accusations," "lies and propaganda," and "talking points." Pukke Br. 27.

form of equitable relief." *Id.* at 891. That same authority permitted the district court to take necessary measures to preserve assets pending a final ruling. The district court did not abuse its discretion by following this Court's binding precedent.

4. The district court properly declined to stay the case pending the resolution of certiorari petitions in other FTC cases.

The Commission has asked the Supreme Court to review the Seventh Circuit's decision in *Credit Bureau Center*, which as mentioned is contrary to the decisions of multiple other courts of appeals (including this one) holding that Section 13(b) of the FTC authorizes the Commission to seek monetary consumer redress. *See Ross*, 743 F.3d at 891-892 (collecting cases); *FTC v. Credit Bureau Center, LLC*, No. 19-825 (petition filed Dec. 19, 2019). Defendants in two other FTC enforcement cases have asked the Supreme Court to resolve same circuit split. *See Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (petition filed Oct. 18, 2019); *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (petition filed Oct. 18, 2019). Pukke argues that the district court should have stayed all proceedings in the case until "a final determination is made, resolving the split in the Circuits." Pukke Br. 32.

But the mere existence of a circuit split and pending petitions for high court review does not suspend the application of the law until it is resolved by the Supreme Court. Courts "apply the law as it stands," not as

it might be interpreted by the Supreme Court in the future. *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999). The district court was bound to follow this Court's precedent in *Ross*, not to await the speculative possibility that the Supreme Court might grant certiorari in a different case, from a different circuit, and come to a different conclusion. Declining to do so was not an abuse of discretion.

5. The district court was not required to decide Pukke's Telemarketing Sales Rule argument.

Pukke's fifth argument[6] is that the district court abused its discretion by declining to rule on whether the misrepresentations charged in the complaint fall within an exception to the Telemarketing Sales Rule. Pukke Br. 37-44. Pukke fails to show an abuse of discretion because the district court's findings on the FTC Act are sufficient to justify the preliminary injunction.

The complaint charges that Sanctuary Belize violated the Telemarketing Sales Rule, 16 C.F.R. §§ 310.2(a)(2)(iii) & 310.2(a)(2)(iv), by making misrepresentations in its telemarketing calls about (a) material aspects of its "goods or services;" and (b) material aspects of "investment opportunities." Dkt. 1 at 39-40, 41-42. Section 310.6(b) of the Rule, however, exempts "telephone calls in which the sale of goods or services or charitable solicitation

[6] This argument is labeled "Issue 6" in Pukke's brief (at 37), but there is no "Issue 5."

is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation." 16 C.F.R. § 310.6(b).

Pukke argues that Sanctuary Belize's misrepresentations are exempt from the Rule because most Sanctuary Belize customers completed their purchase of Sanctuary Belize lots during face-to-face meetings in Belize. Pukke Br. 37-44. The Commission argued below that the "face-to-face" exception did not apply because Sanctuary Belize sold $999 tours of the property without any face-to-face meeting, and also took substantial deposits on Sanctuary Belize lots over the phone. *See* Dkt. 539 at 34. The district court found it unnecessary to resolve whether the exception applied at the preliminary injunction stage, and declined to do so: "It suffices that the Court is about to conclude that the FTC has met is burden sufficient to enter a Preliminary Injunction against Defendants as to their purported violations of Section 5 of the FTC Act." *Id.*

That decision was correct. Section 5 of the FTC Act prohibits, and directs the Commission to prevent, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). It does not contain any exception for face-to-face sales. Because the Commission showed that it was likely to succeed on the merits of its charge that Sanctuary Belize misled consumers in

the marketing of Sanctuary Belize properties, the district court was authorized to enter a preliminary injunction enjoining that conduct and an asset freeze to protect assets for possible consumer redress in the event of a monetary judgment, whether or not the conduct also violated the Telemarketing Sales Rule. 15 U.S.C. § 53(b). The court therefore did not need to resolve whether the conduct also violated the Telemarketing Sales Rule in order to enter the preliminary injunction and did not abuse its discretion in declining to do so.

6. The district court did not abuse its discretion by entering a temporary restraining order and interim preliminary injunction.

Pukke argues that the district court improperly granted the TRO in this case and allowed it to continue in effect for more than six months without an evidentiary hearing. Br. 44-45. Pukke admits that the court held an evidentiary hearing before it entered the preliminary injunction now on appeal. He nevertheless claims that "the damage that the TRO had done to the businesses and defendants had already been inflicted." *Id.* at 45. He complains that he is homeless, cannot afford to bring witnesses to the trial, hire counsel, or travel across the country.[7]

[7] In fact, Pukke has been present at throughout the trial on the merits, which began Jan. 21, 2020, and has indicated that he will call witnesses. The district court allocated $30,000 of the frozen assets for his legal defense as well as $3,000 thousand per month for living expenses. *See* Dkt. 649. Further, at

Pukke's argument presents no genuine challenge to the court's preliminary injunction. To the extent he challenges the temporary restraining order itself, that order is not appealable. *Drudge v. McKernon*, 482 F.2d 1375, 1376 (4th Cir.1973). To the extent he challenges the district court's extension of injunctive relief until the evidentiary hearing, this Court has held that "broad discretion is given to the district court to manage the timing and process for entry of all interlocutory injunctions—both TROs and preliminary injunctions—so long as the opposing party is given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue." *Ciena Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000).

Here, the district court gave the defendants a reasonable opportunity to defend against the entry of a preliminary injunction. Soon after entering the TRO, it accepted briefs and heard argument on whether to enter an interim extension of its terms to allow the parties to prepare for a full evidentiary hearing, *see* Dkt. 20, 31, 34. At that hearing, Pukke's counsel did not make any objection to extending interim injunctive relief or the proposed date for the hearing, even when specifically asked. Nov. 19, 2019 Tr. at 22-23. Nor did Pukke object at any time before the evidentiary hearing. As Pukke ad-

---

the pretrial conference, the receiver agreed to give Pukke and Baker $5,000 from receivership funds to facilitate their participation in the trial.

mits, the court then held a full evidentiary hearing on the merits, Pukke Br. 45, at which Pukke was represented by counsel and had the opportunity to present evidence and legal argument. The court's preliminary injunction was then based on the evidence presented in that hearing. Dkt. 539 at 20-33. Pukke was afforded a fair opportunity to participate and object at every stage. The district court did not abuse its discretion.

7. Pukke's venue, res judicata, and collateral estoppel arguments are frivolous.

Lastly, Pukke argues that venue in Maryland was improper and that the action is barred by res judicata and collateral estoppel. Pukke Br. 46-48.

As an initial matter, the district court's decisions on venue, res judicata, and collateral estoppel are not reviewable on interlocutory appeal. "An order allowing transfer of a matter to another district is committed to the discretion of the district court," and "[t]he denial of a motion to transfer is not an appealable order." *In re Ralston Purina Co.*, 726 F.2d 1002, 1004 (4th Cir. 1984); 28 U.S.C. § 1404(a). Similarly, because collateral estoppel and res judicata are defenses to liability, they are "ineligible for immediate review." *United States v. Whyte*, 918 F.3d 339, 344 n.8 (4th Cir. 2019). Pukke does not explain why the district court's entry of a preliminary injunction permits him to obtain interlocutory review of its venue, res judicata, or collateral es-

toppel decisions. In any case, as shown below, the district court did not abuse its discretion.

Beginning with venue, Pukke does not explain why the district court's reasons for keeping the case amount to an abuse of discretion. District courts within this circuit consider four factors when deciding whether to transfer venue: (1) the weight accorded to plaintiff's choice of venue; (2) witness convenience and access; (3) convenience of the parties; and (4) the interest of justice." *Trs. of the Plumbers & Pipefitters Nat. Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015). The district court considered those factors, noting that the FTC's choice of forum was entitled to some weight, and while Maryland was a less convenient forum for the defendants and some witnesses, it was convenient for the FTC and no less convenient for witnesses who are in neither D.C. nor California. March 1, 2019 Tr. at 36-37. The court stated that the "key component" in its denial of the motion to transfer was the interest of justice, based on the overlap between the Sanctuary Belize case and a related FTC case with which it is consolidated, the court's familiarity with the earlier case, and the interests of judicial economy that would be served by avoiding duplicative trials. *Id.* at 37.

Instead of engaging that reasoning, Pukke simply asserts that "ALL defendants [except one], companies, key witness, records and even the receiver

are located in California," and characterizes the earlier consolidated case as "settled." Br. 47. But as the district court's reasoning shows, the location of the parties is not the only relevant consideration. And although aspects of the earlier enforcement action were settled, the FTC filed three motions to hold Pukke in contempt of the district court's orders that case for conduct that is directly related to the Sanctuary Belize fraud. *See* Dkt. 266, 267, 268. That is no abuse of discretion. Indeed, this Court has already ruled that the district court did not "usurp its judicial power in favoring judicial economy and denying [Pukke's] motion[] to transfer." *In re Pukke*, No. 19-2353 (4th Cir. Jan. 21, 2020) (denying Pukke's petition seeking mandamus on the venue issue). The district court did not abuse its discretion either.

Pukke is likewise incorrect that res judicata or collateral estoppel applies here. He asserts that those doctrines apply because the prior FTC enforcement action was settled and because "practically every one of the FTC's claims in this case had been previously litigated in the Supreme Court of Belize." Br. 47-48.

"Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Pueschel v. United States*, 369 F.3d 345, 354 (4th Cir. 2004). It applies only where there

is "(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Id.* at 354-355.

Pukke's res judicata argument fails because the present case involves different causes of action and different parties than the earlier actions. The earlier FTC enforcement action cannot be res judicata for this case because it concerns conduct that had not yet occurred and thus could not have been litigated in the earlier suit—there is no "identity of the cause of action" between the two cases. Nor does res judicata apply to cases litigated in Belize: the Commission was not a party to those cases and the violations of the FTC Act alleged here were not and could not have been brought there.

Pukke's argument that collateral estoppel should apply fails for similar reasons. Collateral estoppel requires that "(1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). Again, the issues here were not and could not have been

brought in the earlier enforcement case or in the non-FTC cases heard in Belize, and the Commission was not even a party to the Belize cases.

* * *

In sum, Pukke's arguments are wholly without merit. The preliminary injunction against him should be affirmed.

II. BAKER'S APPEAL

Baker's arguments are no more meritorious than Pukke's:

- He argues that the district court did not have subject matter jurisdiction over the FTC's case or personal jurisdiction over the defendants, but this case involves a federal question and the FTC Act's nationwide service of process provision provides personal jurisdiction.
- He argues that the district court's extension of the terms of the TRO as interim injunctive relief was itself a preliminary injunction that required an evidentiary hearing, but Baker had a reasonable opportunity to object to that relief and did not take it.
- He argues that the Telemarketing Sales Rule does not apply, but the district court did not decide that issue.
- He argues that part of one of Sanctuary Belize's "core" misrepresentations was not misleading but ignores the others; he argues that some of the other misrepresentations were "cured" by consumers' in-person

visits to Belize, but that is not the law and those visits did not give consumers any more relevant information.

- Like Pukke, he argues that the FTC Act does not authorize monetary relief, contrary to this Court's decision in *Ross*.
- He argues that the district court incorrectly found the FTC was likely to establish his personal liability, but does not address the evidence that the district court relied on.
- He argues that the district court incorrectly balanced the equities, but ignores the public interest.
- And he litters his brief with a host of incomplete arguments, none of which has any merit.

1. The district court has jurisdiction and venue is proper.

Baker first argues that the district court lacks jurisdiction over the defendants and the subject matter of the Commission's enforcement action, and that as a result, "the venue is wrong." Baker Br. 28-29. That is incorrect.

The district court plainly has federal question jurisdiction over this case. The Commission sued under Section 13(b) of the FTC Act to enjoin unfair or deceptive practices prohibited by the Act. *See* Dkt. 1; 15 U.S.C. § 53(b). The matter thus raises a federal question under 28 U.S.C. § 1331.

The court also has personal jurisdiction over the defendants. Section 13(b) of the FTC Act provides that "process may be served on any person, partnership, or corporation wherever it may be found." 15 U.S.C. § 53. "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1555 (2017). As this Court has held, when a defendant has been served under such a nationwide service of process provision, "a district court has personal jurisdiction over the defendant so long as jurisdiction comports with the Fifth Amendment." *Plumbers & Pipefitters*, 791 F.3d at 443. Jurisdiction does not violate the Fifth Amendment unless it "would result in such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy evidenced by a nationwide service of process provision." *Id.* at 444 (cleaned up). "Normally, when a defendant is a United States resident, it is highly unusual that inconvenience will rise to a level of constitutional concern." *Id.* (cleaned up).

Baker does not show that proceeding in Maryland has resulted in such an extreme inconvenience that it violates due process. He simply argues that the individual defendants and most of the business-entity defendants are in California rather than Maryland. Baker Br. 28-29. But as the district court found, the inconvenience to the defendants of litigating in Maryland was out-

weighed here by the interest of justice, based on the overlap between the Sanctuary Belize case and an earlier FTC enforcement action against Pukke with which it is consolidated, the court's familiarity with the earlier case, and the interests of judicial economy that would be served by avoiding duplicative trials. March 1, 2019 Tr. at 36-37; *see also* Dkt. 539 at 13-16 (analyzing personal jurisdiction over Baker's codefendant Luke Chadwick). This Court has already determined that the district court did not "usurp its judicial power in favoring judicial economy and denying [Pukke's and Baker's] motions to transfer." *In re Pukke*, No. 19-2353 (4th Cir. Jan. 21, 2020) (denying mandamus). Baker has not shown that that same decision violated due process.

2. The district court did not abuse its discretion by extending the terms of the temporary restraining order until the evidentiary hearing.

Baker's second argument is that the district court abused its discretion by entering a preliminary injunction without holding an evidentiary hearing. Baker Br. 32-36. But because the brief acknowledges in multiple places that the court *did* hold an evidentiary hearing before entering the order on appeal (*e.g.*, at 15-16, 17-20, 30, 32), the Commission understands Baker's argument to be that the district court's extension of injunctive relief pending the evidentiary hearing was itself a preliminary injunction which required its

own evidentiary hearing. *See id.* at 32 ("the evidentiary hearing was held more [than] 5 months later, therefore violating the law.").

That argument is incorrect. As noted above, under this Court's precedent, "broad discretion is given to the district court to manage the timing and process for entry of all interlocutory injunctions—both TROs and preliminary injunctions—so long as the opposing party is given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue." *Ciena Corp.* 203 F.3d at 319.

The district court gave the defendants here a reasonable opportunity to object to the interim relief. Within two weeks of entering the TRO, the court accepted briefs and heard argument on whether to enter an interim extension of the TRO's terms to allow the parties to prepare for a full evidentiary hearing, *see* Dkt. 20, 31, 34. For the one defendant who objected, the district court conducted a telephone hearing, analyzed the preliminary injunction factors, and ruled on the FTC's request for a preliminary injunction for that defendant. *See* Nov. 19, 2018 Tr. 56-61. Another defendant, who appeared pro se, objected to the extension of the asset freeze by letter and ultimately reached an agreement with the Commission. *Id.* at 25-27; Dkt. 35, 47, 49.

Baker had the same opportunity to object as the other defendants. Indeed, his counsel was informed of the hearing on extending the terms of the TRO, but he did not appear. Nov. 19, 2018 Tr. at 8. Nor did Baker object to the interim injunction or extending the asset freeze between the November telephone hearing and the March evidentiary hearing. Baker's failure to take advantage of the reasonable opportunities the district court provided to object to the interim injunction does not constitute an abuse of discretion by the district court.

3. The district court correctly found that the Commission is likely to succeed on the merits.

Baker argues that the Commission did not meet its burden to show likelihood of success on the merits in two parts:

First, he argues that there was no violation of the Telemarketing Sales Rule under the "in-person" exception of 16 C.F.R. § 310.6(b). Baker Br. 37-40; 41-43. But the district court has not decided that question. *See* Dkt. 539 at 33-34. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Because the district court did not decide whether the exception applies below, there is no district court decision on the issue for Baker to challenge here.

Second, Baker argues that the Commission failed to show a likelihood of success on the merits of its FTC Act claim because (a) Sanctuary Belize's claims that the resort would feature specific amenities were not likely to mislead "consumers acting reasonably under the circumstances," due to the sophistication of Sanctuary Belize customers; and (b) misrepresentations made by telephone "are not material—or are mitigated and corrected—when buyers have the opportunity to inspect the real estate in person." Baker Br. 44-45. Neither argument shows that the district court abused its discretion.

To begin with, the claim that Sanctuary Belize consumers were too sophisticated to rely on promises to provide particular amenities addresses only one of Sanctuary Belize's deceptive claims. *See* Dkt. 539 20-33. It does not address the claims (a) that investing in Sanctuary Belize was particularly safe because of the "no debt" model; (b) that every dollar would be invested in the development; (c) that the resort would be completed within 2-5 years; (d) that lots would quickly appreciate; or (e) that there would be a robust re-sale market. *See id.* The district court's finding that the Commission is likely to succeed on even one of those claims would be sufficient to sustain the preliminary injunction. Moreover, Baker's argument that consumers could not rely on representations about "things such as airports and hospitals, which are paradigm public work projects" applies to only a few of the prom-

ised amenities. Many others—shops, restaurants, condominiums, entertainment venues, a hotel and golf course— are paradigmatic *resort* amenities that consumers would have no reason to expect Sanctuary Belize could not deliver. Further, a representation may be deceptive if it omits qualifying information necessary to prevent deception. *See* FTC, Policy Statement on Deception, 103 F.T.C. 110, 174 n.4 (1984).[8] But Sanctuary Belize never made any "caveats or disclaimers suggesting some amenities might not be built." Dkt. 539 at 28.

As for Baker's claim that Sanctuary Belize's telephone misrepresentations were cured when consumers visited Belize, that is not the law. As a general matter, later disclosures do not undo a seller's false statements; thus, "[a] court need not look past the first contact with a consumer to determine the net impression from that contact." *FTC v. E.M.A. Nationwide*, 767 F.3d 611, 632 (6th Cir. 2014). In this case, there was not even arguably a subsequent disclosure: visiting the property did not give purchasers any more information about the relative safety of Sanctuary Belize as an investment, whether every dollar would truly be put toward the development, whether Sanctuary Belize would be complete within 2-5 years, whether the amenities would be built, whether lots would appreciate, or whether there would be a

[8] http://bit.ly/FTC-PolicyStmtDeception.

robust resale market. To the contrary, the evidence showed that Sanctuary Belize reinforced those promises when purchasers visited Belize. Dkt. 539 at 9-10. Those representations were material because they were "likely to affect a consumer's decision to buy a product or service." *E.M.A. Nationwide*, 767 F.3d at 631. Visiting the property did not make them less so.

4. The district court was authorized to enter an asset freeze.

Baker argues that the district court should not have ordered an asset freeze because section 13(b) of the FTC Act does not authorize monetary relief, and thus an asset freeze intended to preserve funds for monetary relief is inappropriate. Baker Br. 46-49. As with Pukke's version of that argument, *see supra* p. 13, Baker's is foreclosed by the Court's controlling decision in *Ross*, holding that the FTC Act authorizes "monetary consumer redress." 743 F.3d at 891. The district court did not abuse its discretion by following *Ross*.

5. The district court correctly found the FTC is likely to successfully establish Baker's personal liability.

Baker next argues that there was insufficient evidence to find that the FTC is likely to succeed in establishing his personal liability for Sanctuary Belize's misrepresentations. Baker Br. 49-51.

This Court established in *Ross* that an individual may be liable under the FTC Act if he "(1) participated directly in the deceptive practices *or* had au-

thority to control those practices, and (2) had or should have had knowledge of the deceptive practices." 743 F.3d at 892. Here, the district court found that, in addition to his ownership of and control positions in numerous Sanctuary Belize companies, "the evidence strongly suggests" that Baker was "intimate[ly] and continuous[ly]" involved in Sanctuary Belize's marketing efforts. Dkt. 539 at 45. For example, Baker "was involved in reviewing marketing claims," "participated in sales tours," and "work[ed] to close sales." *Id.* at 46. The court further found it "hard to conclude" that Baker did not know about Sanctuary Belize's representations. Indeed, he admitted knowing that the "every dollar" claim was false, and testified himself "that owners had difficulty selling lots," contrary to Sanctuary Belize's promise of a robust resale market. *Id.* at 47. Moreover, Baker admits that for the two years preceding the FTC's enforcement action, he was the general manager of the Belize development company, and that as a result, he had "direct knowledge of the current information." Baker Br. 22, 18.

The district court's finding that the Commission is likely to succeed in establishing Baker's liability is reviewed for clear error. "A factual finding is clearly erroneous when [the court is] 'left with the definite and firm conviction that a mistake has been committed.'" *TFWS, Inc. v. Franchot*, 572 F.3d 186, 196 (4th Cir. 2009) (quoting *Anderson v. Bessemer City*, 470 U.S.

564, 573 (1985)). The Court will not reverse so long as "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* (quoting *Anderson*, 470 U.S. at 573-574). "Thus, when there are two permissible views of the evidence, the district court's choice between them cannot be clearly erroneous." *Id.* (cleaned up).

Baker asserts that he was not "engaged in the alleged misconduct" and did not "gain[] anything from the unlawful practices." Baker Br. 49. He describes numerous ways in which he says he did not participate in or control Sanctuary Belize's marketing, and while he admits creating Sanctuary Belize's marketing and sales company, he claims he was not actually involved and that his signature was forged on documents showing his ownership and control positions in other Sanctuary Belize companies. *Id.* at 49-50.

Other than his forgery claim (for which the district court found there was a "welter of contrary evidence in the record"), Baker does not address the district court's careful examination of the evidence establishing that the Commission is likely to succeed in establishing his liability. *See id.* Much less does he show that the district court's finding was not "plausible in light of the record viewed in its entirety" and therefore amounted to clear error. *Anderson*, 470 U.S. at 573-574.

6. The district court correctly found that the injunction was in the public interest.

The district court's preliminary injunction is supported by the strong public interest embodied in Section 5 of the FTC Act, which outlaws deceptive acts and practices and directs the Commission to prevent them. 15 U.S.C. § 45(a). The district court found that the Commission was likely to succeed in showing that Sanctuary Belize lied consumers into spending more than $141 million on its phantom resort community. The preliminary injunction and asset freeze serves the public interest by halting the scam and preserving the district court's ability to order redress to consumers harmed by the conduct. *See* Dkt. 539 at 55-56. In granting the preliminary injunction, the district court correctly gave "greater weight" to the public interest than to the "private equities" involved. *Id.* at 16-17, 55-57; *see also* Dkt. 615 at 6-7; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988).

Without acknowledging the public interest in enforcing the law or protecting consumers from deceptive practices, or the likelihood that assets would be dissipated absent a freeze, Baker argues that the injunction "has caused damage and irreparable harm to defendants and [the] public at large." Br. 53. He argues that the defendant companies have been shut down and their employees put out of work, that the individual defendants have been harmed by the asset freeze, that the development has been harmed by ceas-

ing further development, and that owners' lots have lost value. *See id.* at 53-54; 25-26, 21. But all of those alleged harms stem from stopping illegal practices that the district court found the Commission was likely to prove. The defendant companies' (and their employees') harm comes from not allowing them to continue to make money by deceiving consumers. The burdens of the asset freeze and the supposed harm from stopping further spending on the development come from keeping defendants from spending ill gotten gains that could redress the harm they caused. And any loss in the value of Sanctuary Belize lots likely stems more from exposing the lies and false promises behind the scam than from the preliminary injunction. Indeed, the district court found that absent an injunction, the defendants would continue to harm consumers and lot owners would continue to lose money. Dkt. 539 at 55. The court further found that the court-appointed receiver had "done a credible job maintaining the stability of the development," and would "keep the development on an even keel until the merits hearing." *Id.* at 56. In short, it was within the district court's discretion to find that the private harms that Baker asserts were outweighed by the public interest.

7. Baker's remaining arguments are frivolous.

Baker's brief often digresses to make fragmentary arguments within its other arguments. As explained below, none of those arguments has merit.

A. In his statement of the issues and throughout the brief, Baker alleges that Sanctuary Belize owners were satisfied and wanted the Commission's action to stop. Br. 5, 8, 18, 39-40. But customer satisfaction does not make Sanctuary Belize's false or misleading representations true. *See, e.g.*, *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) (describing standard for deceptive acts or practices).

B. Baker's statement of the issues also asks whether the district court abused its discretion by appointing certain Sanctuary Belize property owners to a "Managing Board of Owners" to run the development during these proceedings. Baker Br. 6; *see also Id.* at 22-25 (discussing proceedings on an interim development management plan). Whatever Baker's complaint with those proceedings, the district court did not decide them in its preliminary injunction order and they are not properly considered in this appeal.

C. At various points, Baker's brief mentions collateral estoppel, res judicata, and the statute of limitations (Br. 5-6, 8-9, 17-18), but does not develop any argument that they apply. As explained above, res judicata and collateral estoppel do not apply here. Baker does not identify any statute of limitations that he claims applies.

D. Baker argues that a preliminary injunction may only be granted "if the wrongs are ongoing or apt to continue." Baker Br. 35-36. But the conduct

alleged in the complaint was ongoing when it was filed, and Baker does not explain why it would not be likely to continue absent an injunction. In any case, the "cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," and the "court's power to grant injunctive relief survives the discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009).

E. Baker argues that temporary restraining order is "invasive to the point of appearing punitive" and "should have been denied for lack of evidentiary support." Baker Br. 45-46. But the TRO was not an appealable order. *Drudge*, 482 F.2d at 1376.

F. Baker argues that the district court improperly declined to hold a jury trial because the FTC is effectively seeking civil penalties. Baker Br. 48. But in *Ross*, this Court held that "monetary consumer redress," which the FTC seeks here, "is a form of equitable relief." 743 F.3d at 891. Jury trials are required only in "Suits at common law," not equity. U.S. Const. Amd. VII.

G. Baker argues that his wife's assets should be unfrozen, *see* Baker Br. 27, 51-52, but Baker's wife did not appeal the preliminary injunction and because he is not an attorney, Baker cannot represent her.

Conclusion

The preliminary injunction should be affirmed without further proceedings.

Feb. 3, 2020

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

s/Theodore (Jack) Metzler
THEODORE (JACK) METZLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3502
tmetzler@ftc.gov

CERTIFICATE OF SERVICE

I certify that on February 3, 2020, I filed this motion using the Court's appellate CM-ECF system, and served appellants by U.S. mail at the following addresses:

Andris Pukke
3334 East Coast Highway
Corona Del Mar, CA 92625

Peter Baker
100 Lido Park Dr. #32
Newport Beach, CA 92663

February 3, 2019

s/Theodore (Jack) Metzler
THEODORE (JACK) METZLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3502