**UNITED STATES DISTRICT COURT FOR THE**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

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**FEDERAL TRADE COMMISSION,**

**Plaintiff,**

**v.** **Case No. 10-0060CV-W-FJG**

**REAL WEALTH, INC., a corporation, also d/b/a American Financial Publications, Emerald Press, Financial Research, National Mail Order Press, Pacific Press, United Financial Publications, Wealth Research Marketing Group, and Wealth Research Publications, and**

**LANCE MURKIN, individually and as an officer of REAL WEALTH, INC.,**

**Defendants.**

**FTC'S SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE OR, IN THE ALTERNATIVE, TO MODIFY THE FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES, ACTS & RULES:**

## INTRODUCTION

The Court should deny Defendants' Motion to Set Aside or, in the Alternative, to Modify the Final Judgment and Order for Permanent Injunction because it is simply an attempt to end run the judicial process and re-litigate this case. Defendants raise no arguments that they did not—or could not have—raised before judgment, and they fail to make any showing of manifest error of law or fact justifying relief under Federal Rule of Civil Procedure 59(e), or any exceptional circumstances justifying relief under Federal Rule of Civil Procedure 60(b)(6). In nearly 16 months of active litigation, Defendants repeatedly failed to meet deadlines and otherwise delayed this Court's adjudication of this case, and now, following issuance of a final judgment, they seek to re-litigate it. Enough is enough—the Court's final judgment was properly issued to accomplish justice for consumers injured by Defendants' various work-at-home and grant schemes, and the sanctity of that judgment should be preserved.

## BACKGROUND AND PROCEDURAL POSTURE

The Federal Trade Commission ("FTC" or "Commission") filed this action on January 21, 2010, alleging that Defendants deceptively marketed work-at-home and grant-related products and services to thousands of consumers nationwide in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). [*See* Doc. No. 1 at 1-3.] On January 26, 2010, the Court issued a temporary restraining order ("TRO") [Doc. No. 13], which included, among other things, a freeze on Defendants' assets. Neither the TRO nor the subsequently entered preliminary injunction [Doc. No. 70] froze after-acquired assets, such as income derived from employment.

Defendants moved for the release of frozen funds on December 20, 2010.[1] [*See* Doc. No. 98.] They sought, among other things, $63,805 to satisfy Defendant Murkin's outstanding tax liabilities, and $9,000 to obtain transcripts of the depositions conducted in this case. [*See* Doc. No. 98 at 2.] Defendants provided no support for the estimated cost of deposition transcripts. As Defendants now admit, the total cost for obtaining the transcripts of the four depositions conducted in this case was approximately $4,000—less than half the amount they requested. [*See* Doc. No. 145-1 at 1; *see also* Doc. No. 103 at 11; Doc. No. 103-2 at 37.]

The FTC opposed Defendants' December 20, 2010 request for the release of frozen funds in its entirety, arguing, among other things, that Defendants did not rightfully own the frozen assets but merely held those assets in constructive trust for Defendants' consumer victims, and further that the amount Defendants requested for deposition transcripts was exaggerated and not supported by sufficient documentation. [*See* Doc No. 103 at 7-11.] Defendants filed a reply brief [Doc. No. 108] in support of their December 20, 2010 request for the release of frozen funds, in which they contended that the frozen assets rightfully belonged to Defendants. They did not reduce the amount that they requested for deposition transcripts.

On February 28, 2011, the Court denied, in large part, Defendants' December 20, 2010 request for the release of frozen funds. [*See* Doc. No. 115 at 2-3.][2] In doing so, the Court

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[1] This was Defendants' second request to release frozen funds. Nearly a year prior, the Court denied Defendants' initial request to release frozen funds on February 24, 2010, in part to preserve assets for consumers because the requested release of funds "would be unjust in light of the Federal Trade Commission Act's mandate that the Court impose the necessary equitable relief 'to accomplish complete justice.'" [Doc. No. 49 at 3-4 (quoting *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991)).] The Court also explained that Defendants likely had access to other sources of income or assistance. [Doc. No. 49 at 4.]

[2] The Court released only $2,000 per month for a period of three months directly to Mr. Murkin's ex-wife for child support, which the FTC did not oppose, and the residence of Mr.

suggested preliminarily that the frozen assets had been held in constructive trust for the benefit of Defendants' consumer victims by agreeing with the FTC's "thorough legal and factual analysis" and adopting the FTC's "analysis and conclusions as its own." [*Id.* at 2.] The Court also noted that Defendants did not support their request with "adequate documentation or invoices reflecting the requested amounts," and encouraged Defendant Murkin to continue participating in available government assistance programs and pursuing lawful employment opportunities. [*Id.* at 3.]

On February 28, 2011, the FTC filed its motion for summary judgment [Doc. No. 116], and Defendants filed a motion in limine arguing that a three-year statute of limitations applies to this action [Doc. No. 114].[3] Defendants failed to file a timely response to the FTC's summary judgment motion and also failed to comply with the Court's scheduling order [Doc No. 109] requiring that witness lists be filed by March 21, 2011. Instead, on March 25, 2011—the day after Defendants' response to the FTC's motion for summary judgment was due—Defendant Murkin filed for bankruptcy. Defendants concurrently filed a suggestion of bankruptcy in this Court contending that this action was stayed pursuant to the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a). [*See* Doc. No. 124.] The FTC opposed Defendants' suggestion and requested that the Court grant its unopposed summary judgment motion. [*See* Doc. Nos. 127, 131.]

On April 7, 2011, the Court ruled that (i) this action was excepted from the automatic stay under the police and regulatory power exception, 11 U.S.C. § 362(b)(4), and (ii) the

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Murkin's ex-wife and children, which was encumbered by a mortgage exceeding the appraised value of the property. [*See* Doc. No. 115 at 2.]

[3] Defendants did not raise a statute of limitations affirmative defense in their Answer [Doc. No. 28] or at any other point during the first year of these proceedings.

Preliminary Injunction, including the injunction freezing Defendants' assets, remained in effect. [Doc. No. 132.] The Court also provided Defendants additional time to respond to the FTC's motion for summary judgment, and Defendants filed their opposition [Doc. No. 133] on April 15, 2011.[4] In that opposition, Defendants reiterated their argument that the Court should apply a three-year statute of limitations, and contended that they were disabled in responding to the FTC's motion for summary judgment by their lack of "income or funds available to them to obtain copies of the depositions taken in this case." [*See id.* at 2, incorporating Doc. No. 114.] Ten days later, Defendants filed a second opposition [Doc. No. 134], this one styled as Suggestions in Opposition to the Plaintiff's Application for Order Granting Plaintiff's Unopposed Motion for Summary Judgment.

On May 2, 2011, the FTC replied to the arguments Defendants made in their initial opposition. [*See* Doc. No. 140.] At that time, the FTC submitted a Revised Proposed Order, and explained that it incorporated as a finding the Court's preliminary conclusion that the funds frozen in this action are held in constructive trust for consumers Defendants injured. [*See id.* at 24-25.] This Revised Proposed Order was necessary because the Proposed Order that the FTC submitted concurrently with its motion for summary judgment—and before Defendant Murkin filed for bankruptcy—would have required turnover of Defendants' assets, and thus would have violated the automatic stay provision of the bankruptcy code.

The FTC elaborated further on the constructive trust argument in its reply [Doc. No. 141] to Defendants' second opposition. Although Defendants had not sought leave to address the

[4] Defendants failed to file a witness or exhibit list in compliance with the Court's additional directive that they "comply immediately with all outstanding deadlines set forth in the" Court's scheduling order. [Doc. No. 132 at 2.]

constructive trust issue following the filing of the FTC's May 2 brief, the FTC nevertheless noted that it did "not object to Defendants filing a surreply on this limited point." [*See id.* at 2 n.5.] Defendants did not seek leave to file a surreply, and on May 17, 2011, the Court issued the Final Judgment and Order for Permanent Injunction [Doc. No. 142], granting summary judgment and awarding the full scope of equitable relief that the FTC requested.

Defendants now move to set aside or amend that Final Judgment under Federal Rules of Civil Procedure 59(e) and 60(b)(6), making four arguments, none of which justifies relief.

## ARGUMENT

### I. Defendants Have Not Met the High Standard for Relief Under Rule 59(e) or Rule 60(b)(6)

Motions to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) serve "the limited purpose of correcting manifest errors of law or fact or presenting newly discovered evidence." *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 174 F.R.D. 444, 446 (E.D. Mo. 1997) (citing *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)). A Rule 59(e) motion "cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quotation marks and citation omitted). It also "is not appropriate to use a Rule 59(e) motion to repeat arguments" that the Court previously has considered and rejected. *In re Gen. Motors Corp.*, 174 F.R.D. at 446 (internal quotation marks and citation omitted). Thus, a motion made pursuant to Rule 59(e) "is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Dale & Selby Superette & Deli v. U.S. Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993).

Relief under Federal Rule of Civil Procedure 60(b)(6) "is exceedingly rare as relief requires an 'intrusion into the sanctity of a final judgment.'" *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 868 (8th Cir. 2007) (quoting *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999). Rule 60(b)(6) "is not a vehicle for simple reargument on the merits." *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999). The Rule authorizes relief "only when exceptional circumstances prevented the moving party from seeking redress through the usual channels." *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989). "'Exceptional circumstances' are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. Rather, exceptional circumstances are relevant only where they bar adequate redress." *Atkinson v. Prudential Prop. Co., Inc.*, 43 F.3d 367, 373 (8th Cir. 1994).

None of the four arguments that Defendants make in support of their motion to set aside or alter the Court's Final Judgment and Order for Permanent Injunction meets the high standard for relief under Rule 59(e) or Rule 60(b)(6). First, Defendants made—or could have made—each of those arguments before the Court entered judgment. Second, none of those arguments demonstrates any manifest error of law or fact justifying relief under Rule 59(e), or any exceptional circumstances justifying relief under Rule 60(b)(6).

## II. The Court Properly Denied Defendants' Request to Release Funds for the Purchase of Deposition Transcripts and Did Not Deny Defendants Due Process of Law

Defendants first argue that the Final Judgment should be set aside because, by denying Defendants' December 20, 2010 request for the release of frozen funds to purchase the transcript of Defendant Murkin's deposition [Doc. No. 98 at 2], the Court denied Defendants the "right to be heard in opposing Plaintiff's Motion" for Summary Judgment, which denied them due process

of law. [Doc. No. 145 at 4.] This argument provides no basis for the Court to reconsider the Final Judgment under Rules 59(e) or 60(b)(6) because Defendants have shown nothing new in law or fact that would prompt the Court to re-adjudicate this issue of whether funds should have been released to pay for deposition transcripts. Indeed, Defendants have raised the issue twice—the second time in their opposition to the FTC's motion for summary judgment. [*See* Doc. No. 98 at 2; Doc. No. 99 at 5-6; Doc. No. 133 at 2.] To the extent the new argument adds a "denial of due process" element, such an argument could have been raised prior to judgment.

In addition, Defendants would not be entitled to relief in any event because the Court's denial of Defendants' request to use frozen assets to purchase deposition transcripts did not deny Defendants due process of law. The Supreme Court has established that denying a defendant the use of frozen assets for payment of attorney's fees does not violate the Due Process Clause of the Fifth Amendment, even in criminal proceedings, where a defendant has a constitutional right to counsel. *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-35 (1989). It follows that denying a defendant in a civil action the use of frozen assets that rightfully belong to victimized consumers to obtain a transcript of his own deposition testimony also does not violate the Due Process Clause of the Fifth Amendment because, as the Supreme Court explained in *Caplin & Drysdale*, "[t]here is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right." 491 U.S. at 628.

Defendants cite no authority to the contrary because there is no such authority. In support of their position, they cite only to *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), which does not address the constitutionality of denying a defendant the use of frozen funds for civil litigation

expenses, but rather addresses the constitutionality of state prejudgment replevin statutes that denied individuals any opportunity to be heard before property was taken from their possession in litigation between private parties. *See id.* at 69-70. By contrast, Defendants in this case have been given every opportunity to be heard, even after they failed to meet the court's deadline for responding to the FTC's summary judgment motion.

The Court provided Defendants an extension of time to respond, and indeed, Defendants filed an opposition. Defendants had more than ample opportunity to be heard, and this is the "root requirement" of the Due Process Clause.[5] Therefore, there is neither a manifest error of law or fact warranting relief under Rule 59(e), nor any exceptional circumstances warranting relief under Rule 60(b)(6), and the Final Judgment should stand.

## III. No Statute of Limitations is Applicable to this Action

Defendants next contend that a three-year statute of limitations should apply to this action, and that the "Final Judgment should be modified to apply a determination of damages only for the period of years encompassed by the statute of limitations." [Doc. No. 145 at 6.] This argument does not justify relief under Rules 59(e) or 60(b)(6) because Defendants have already argued this point twice, and they offer nothing new in law or fact to justify a different result. [*See* Doc. No. 114; Doc. No. 133 at 2.] To the extent their recycled argument now relies

[5] *See Fuentes*, 407 U.S. at 82 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)) (noting that the "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event").

on different law than they originally raised, it is based on a statute enacted more than two decades ago,[6] and moreover, the argument has no merit.

As the FTC noted in its Opposition [Doc. No. 119] to Defendants' Motion in Limine Regarding Three Year Statute of Limitations [Doc. No. 114], the Commission brought this action under Section 13(b) of the FTC Act, which contains no statute of limitations, and there is no other statute of limitations applicable to claims brought under Section 13(b). *See* 15 U.S.C. § 53(b); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998); *United States v. Bldg. Inspector of Am., Inc.*, 894 F. Supp. 507, 513-14 (D. Mass. 1995); *FTC v. Inc21.Com Corp.*, No. C 10-00022 WHA, 2010 WL 4071664, at *5 (N.D. Cal. Oct. 18, 2010). Defendants' rehashed argument that the Court should apply the three-year statute of limitations in Section 19(d) of the FTC Act, 15 U.S.C. §57b(d), fails because "[i]t has always been the rule that statutes of limitation do not apply to the United States in the absence of a clear and manifest congressional intent that they shall apply," *United States v. De Queen & E. R.R. Co.*, 271 F.2d 597, 600 (8th Cir. 1959), and Congress has not clearly manifested an intention that the three-year statute of limitations in Section 19 of the FTC Act should apply to actions brought under Section 13(b). To the contrary, as the Eighth Circuit explained in *FTC v. Security Rare Coin & Bullion Corp.*:

> [S]ection 19(e) [of the FTC Act] provides: 'Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.' There can be no inference from this language that Congress intended in section 19

[6] *See* Doc. No. 145 at 6 (citing 28 U.S.C. § 1658). Congress enacted 28 U.S.C. § 1658 on December 1, 1990. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313, 104 Stat 5089, 5114 (1990).

> to restrict the broad equitable jurisdiction granted to the district court by section 13(b).

931 F.2d 1312, 1315 (8th Cir. 1991) (quoting 15 U.S.C. § 57b(e)).[7]

Defendants' new argument is that the Court should alternatively apply the four-year statute of limitations in 28 U.S.C. § 1658. [*See* Doc. No. 145 at 6.] This statute was enacted on December 1, 1990[8]—nearly two decades after Congress enacted Section 13(b) of the FTC Act on November 16, 1973[9]—and applies only to "civil action[s] arising under an Act of Congress enacted after the date of the enactment of this section." 28 U.S.C. § 1658(a).

Defendants have failed to demonstrate any manifest error of law or fact warranting relief under Rule 59(e), or any exceptional circumstances warranting relief under Rule 60(b).[10] The full monetary judgment of $10,400,397.10 should stand.

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[7] Contrary to Defendants' suggestion [*see* Doc. No. 145 at 5], it also is "well settled that the United States is not bound by state statutes of limitation," regardless whether it "brings its suit in its own courts or in a state court." *United States v. Summerlin*, 310 U.S. 414, 416 (1940).

[8] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313, 104 Stat. 5089, 5114 (1990).

[9] *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 592 (1973).

[10] In addition, Defendants would not be entitled to relief even if a statute of limitations had been applicable to this action because they waived any possible statute of limitations affirmative defense by not raising it in their Answer [Doc. No. 28], as Federal Rule of Civil Procedure 8(c) requires. *See United States v. Big D Enters., Inc.*, 184 F.3d 924, 935 (8th Cir. 1999) ("Appellants offer no plausible justification for their failure to raise the statute of limitations defense in a responsive pleading. Accordingly, we agree with the district court's conclusion that appellants waived any statute of limitations defense they may have had."); *Myers v. John Deere Ltd.*, 683 F.2d 270, 273 (8th Cir. 1982) ("[W]e conclude that [the defendant] waived the defense of limitations by its failure to raise it in its responsive pleadings in compliance with Fed. R. Civ. P. 8(c).").

## IV. The Court Properly Imposed a Constructive Trust over the Frozen Assets and Did Not Deny Defendants Due Process of Law

Defendants' third argument is that the constructive trust provisions of the Final Judgment should be stricken, and the FTC should be required to file a new motion seeking the imposition of a constructive trust, because "Defendants have been denied due process of law by having been denied the opportunity to be heard on the issue of whether or not Missouri state law of constructive trusts should be applied in this case." [Doc. No. 145 at 8.] Notably, Defendants present no reason why the constructive trust was not properly imposed, and there is none.

The Court should deny Defendants' request to invoke Rule 59(e) or Rule 60(b)(6) to re-open briefing on the propriety of the constructive trust provisions of the Final Judgment because Defendants had an opportunity to be heard on the issue before judgment. First, they could have—and did—address the issue in their reply [Doc. No. 108] in support of their December 20, 2010 request for the release of frozen funds. Second, they had 15 days to seek leave to file a surreply to the FTC's motion for summary judgment to address the issue and chose not to take advantage of that opportunity—even after the FTC noted that it would not oppose such a request [*see* Doc. No. 141 at 2 n.5].[11] Defendants were not deprived due process of law. Rather, they chose not to take advantage of the process available to them. *See Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) ("[Plaintiff's] claim that he was denied due process must fail because he did not take advantage of the process that was available to him" by

[11] Defendants had approximately as much time to prepare and file a motion for leave to file a surreply as Local Rule 7.0 allows for parties to prepare and file substantive suggestions in opposition to a motion or reply suggestions in support of a motion. *See* Local Rule 7.0(d)-(e) (allowing 14 days for the filing of suggestions in opposition or reply suggestions).

"moving for leave to file a sur-reply" to rebut evidence raised for the first time in defendant's reply in support of summary judgment.)

The Court properly established a constructive trust over the frozen assets because: (i) those assets rightfully belong to Defendants' consumer victims; (ii) the trust is necessary to prevent Murkin's unjust enrichment and to ensure that the frozen assets can be returned to their rightful owners—Defendants' consumer victims; and (iii) the FTC established each of the elements required for the imposition of a constructive trust under the governing state law. [*See* Doc. No. 141.] Defendants had opportunity to rebut the FTC's arguments and did not do so. Even in the instant motion, Defendants have failed to provide any support for their position that a constructive trust should not be imposed. Therefore, the constructive trust provisions of the Final Judgment should stand.

## V. Defendants Have Not Established that Murkin's Life Insurance Annuity Policy Should be Released from the Constructive Trust

Finally, Defendants argue that one of Defendant Murkin's frozen life insurance annuity policies (Farmers Insurance Annuity Policy # [redacted]166R) should be released from the constructive trust because it was purchased "on February 19, 2002 which is several years prior to the date of inception of the constructive trust." [Doc. No. 145 at 7.] Despite the fact that Defendants made two motions to release assets from the asset freeze, they never took the opportunity to argue that this policy should be released from the freeze on the ground that it was unrelated to the conduct the FTC alleged. This is the first time the argument has been raised, but Defendants are not entitled to relief under Rules 59(e) or 60(b)(6) because they could have presented this argument before the Court rendered judgment.

Relief would not be warranted in any event because Defendants have failed to establish any manifest error of law or fact underlying the Final Judgment, or any other exceptional circumstances barring them from adequate redress. The "Policy Specifications" and "Policyholder's Annuity Annual Report for 2002" that Defendants present in support of their argument [*see* Doc. No. 145-1 at 5-6] do not prove that the current value of the subject annuity policy was generated solely by the premium paid in 2002 rather than by funds that Murkin obtained through his unlawful conduct between 2004 and 2009. Therefore, Defendants have not proven that the Court improperly imposed a constructive trust over some or all of the value of Farmers Insurance Annuity Policy #[redacted]166R. The policy should continue to be held in constructive trust for Defendants' consumer victims.

## CONCLUSION

For the foregoing reasons, Defendants' Motion to Set Aside or, in the Alternative, to Modify the Final Judgment and Order for Permanent Injunction [Doc. No. 144] should be denied.

Dated: June 30, 2011

Respectfully submitted,

By: ***/s/ Margaret L. Lassack***

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 30th day of June, 2011.

/s/ Margaret L. Lassack

Attorney for Plaintiff