## APPENDIX TABLE OF CONTENTS

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (MARCH 18, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANK KONARSKI, ET AL.,

*Plaintiffs,*

v.

TUCSON, CITY OF, ET AL.,

*Defendants.*

No. CV-14-02264-TUC-JGZ

Before: Jennifer G. ZIPPS, United States District Judge

Pending before the Court is Defendants' Motion for Order Declaring the Konarski Plaintiffs to be Vexatious Litigants ("Vexatious Litigant Motion"). (Doc. 73.) Plaintiffs Frank Konarski, Gabriela Konarski, John F. Konarski, Frank E. Konarski and Patricia Konarski filed a response to the Motion on December 8, 2015 and Defendants timely replied. (Docs. 88, 89.) For the reasons stated herein, the Court will grant Defendants' Vexatious Litigant Motion.

## Factual and Procedural Background

For the past eighteen years, Plaintiffs[1] have repeatedly clogged this Court's docket with meritless and redundant lawsuits in a pattern of litigation driven by personal vendetta and steered by the unprofessional and unethical conduct of Plaintiffs and their attorneys. This is the eleventh lawsuit filed by Plaintiffs in this Court.[2]

### 1. CV-98-528-TUC-CKJ

On November 4, 1998, an action filed by Plaintiff Frank Konarski against the City of Tucson, Tucson Police Department and five TPD officers was removed from Pima County Superior Court to this Court. (Docs. 1, 6.) Mr. Konarski's Amended Complaint alleged claims for excessive force, harassment, assault, battery, negligence and violation of civil rights arising from Mr. Konarski's arrest on June 18, 1997. (*Id.*) Mr. Konarski and his counsel were admonished by the Court on several occasions. Mr. Konarksi's counsel failed to timely file a joint report in advance of the parties' scheduling conference, prompting the Court to issue an Order to Show Cause. (Doc. 6.) On March

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[1] The court uses the term "Plaintiffs" to refer to the plaintiffs in CV-14-2264-TUC-JGZ: Frank Konarski, Gabriela Konarski, John F. Konarski, Frank E. Konarski and Patricia Konarski. Where prior litigation was filed by only some of the plaintiffs that are parties to CV-14-2264-TUC-JGZ, the Court refers to the plaintiffs by name.

[2] Pursuant to Rule 201, Fed. R. Evid., the Court takes judicial notice of the prior cases filed by Plaintiffs in this Court. Plaintiffs have filed additional lawsuits involving similar claims and/or defendants in other courts; the Court has not considered lawsuits outside of its jurisdiction in resolving the pending Motion.

31, 1999, the Court issued an Order prohibiting Mr. Konarski from contacting the Judge or his staff by telephone. (Doc. 25.) The Court also admonished Mr. Konarski for failing to provide opposing counsel with copies of documents filed in the Court. (Doc. 28.)

On August 30, 1999, the Court dismissed CV-98-528-TUC-CKJ for failure to prosecute. (Doc. 46.) In the Order dismissing the action, the Court noted that "Plaintiff has not heeded the Court's repeated prompts and warnings that certain deadlines are to be taken seriously by those who seek the aid of the federal court system." (Doc. 46, pg. 1.) The Court also noted Mr. Konarski's "persistently belligerent behavior" in his contacts with the Court and his counsel. (Doc. 46, pg. 3.) Mr. Konarski appealed the dismissal; the appeal was dismissed because Mr. Konarski failed to perfect the appeal. (Doc. 54.)

On June 1, 2007, Mr. Konarski filed a Motion to Vacate the Court's August 30, 1999 Order dismissing the case, alleging that the Hon. Raner C. Collins, who had presided over the case, had close ties to the defendants[3] and should have recused. (Doc. 57.) Judge Collins, "despite being quite sure that he [could] be fair and impartial," recused himself from the case and any other cases involving Mr. Konarski "out of an abundance of caution." (Doc. 60.) CV-98-528-TUC-CKJ was re-assigned to the undersigned Judge, who recused because she had recently served in an adversarial role to Mr. Konarski prior to her judicial appoint-

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[3] The Court capitalizes "Defendants" to refer to the defendants in CV-14-2264-TUC-JGZ. In summarizing prior litigation, the Court uses the lower case "the defendants" to refer to the defendants in the particular action being discussed.

ment. (Doc. 62.) The matter was reassigned to the Hon. Cynthia K. Jorgenson, who denied Mr. Konarski's Motion to Vacate on October 11, 2007. (Doc. 75.)

### 2. CV-99-582-TUC-ACM

On November 26, 1999, Plaintiff Frank Konarski filed a second action against the same Defendants named in CV-98-528-TUC-CKJ. (Doc. 1.) Mr. Konarski's Complaint alleged claims for wrongful prosecution, false arrest and violation of civil rights arising from his same June 18, 1997 arrest. (Doc. 1.) On April 24, 2001, the Court dismissed Mr. Konarski's state law claims on the ground that Mr. Konarski's statute of limitations had expired and/or he failed to comply with the Arizona notice statute, A.R.S. § 12-821.01. (Doc. 63.) Mr. Konarski's civil rights claim was dismissed on June 25, 2001, after Mr. Konarski failed to comply with a Court order directing him to respond to discovery requests. (Doc. 86.) Defendants were awarded attorneys' fees. (Doc. 89.) On August 10, 2001, the Court denied a motion for reconsideration / new trial filed by Mr. Konarski on the ground that the motion was founded on "false, grossly misleading, immaterial and inadequate" justifications. (Doc. 100.) The Ninth Circuit affirmed dismissal of CV-99-582-TUC-ACM on January 10, 2003. (Doc. 108.) After additional issues regarding Mr. Konarski's failure to pay Defendants' attorneys' fees were resolved, the case was closed on July 8, 2003. (Doc. 123.)

### 3. CV-01-503-TUC-DCB

On September 26, 2001, Plaintiffs filed an action in the District of Columbia against: Inspector General of HUD Susan Gaffney; Administrator of Tucson's

Section 8 Housing Program Adolph Valfire; Senior Community Builder for HUD in Tucson Sharon Atwell; and Tucson City Manager James Keene. (United States District Court, District of Columbia, 01-cv-975-TFH, Doc. 1.) Plaintiffs asserted claims under Title VII and § 1983 stemming from the City of Tucson's decision to terminate Plaintiffs' contracts with the City to provide Section 8 housing. (*Id.*) Plaintiffs alleged generally that their Section 8 housing contracts were terminated in retaliation for Mr. Konarski's prior lawsuits against the City. (*Id.*) On June 11, 2001, the District Court for the District of Columbia transferred the case to this Court based upon improper venue. (Doc. 43, pg. 4.) Defendant Sharon Atwell was subsequently dismissed by stipulation; Defendant Susan Gaffney was dismissed due to Plaintiffs' failure to effect timely service. (Docs. 23, 35.) On July 24, 2002, Plaintiffs' counsel was temporarily barred from participating in the case due to his failure to obtain pro hace vice authorization despite the Court's repeated orders to do so. (Doc. 36, 38.) On August 21, 2002, the Court granted summary judgment in favor of Defendants Adolph Valfire and James Keene. (Doc. 43.) The Court found that the undisputed facts demonstrated that the City of Tucson opted not to renew Plaintiffs' Section 8 housing contracts after the Arizona Attorney General found that Mr. Konarski had created a hostile living environment for Hispanic tenants and the Southern Arizona Housing Center determined that Mr. Konarski had made threats of retaliation against tenants who complained of discrimination. (*Id.*) The Court noted that Plaintiffs' response to the defendants' motion for summary judgment relied on numerous unsubstantiated allegations and failed to comply with the Court's local rules. (*Id.*) The Court held that Plaintiffs had no

protected property interest in the Section 8 housing program and therefore their civil rights claims were without merit. (*Id.*) The Court also concluded that Plaintiffs could not state a claim under Title VII because they were not employed by Defendants. (*Id.*) On August 5, 2003, the Ninth Circuit affirmed the district court's decision to grant summary judgment. (Doc. 48.)

### 4. CV-04-137-TUC-RCC

On March 25, 2004, Plaintiffs Patricia Konarski, John Konarski and Frank Konarski Jr. filed a "Petition for Writ of Mandamus" in this Court against HUD and the City of Tucson. (Doc. 1.) The Petition alleged that HUD and the City of Tucson were acting arbitrarily and capriciously in denying Plaintiffs' applications for Section 8 housing contracts. (*Id.*) Plaintiffs voluntarily withdrew the Petition on May 6, 2004. (Doc. 6.)

### 5. CV-04-260-TUC-FRZ

On May 17, 2004, Plaintiffs John Konarski, Patricia Konarski and Frank Konarski Jr. filed an action against HUD, the City of Tucson, Assistant City of Tucson Attorney Julianne Hughes, City of Tucson Community Services Director Emily Nottingham and City of Tucson Housing & Assistance Program Administrator Peggy Morales. (Doc. 1.) Plaintiff Frank Konarski was added as a Plaintiff in an Amended Complaint filed on November 10, 2004. (Doc. 13.) The complaint generally alleged that Plaintiffs' civil rights were violated by the City's refusal to permit Plaintiffs to participate in the Section 8 housing program. (*Id.*) On September 28, 2005, the Court dismissed Plaintiffs' complaint without prejudice, finding that Plaintiffs

had failed to meet the general pleading requirements of Rule 8, Fed. R. Civ. P., that Plaintiffs did not properly allege standing or jurisdiction, and that Plaintiffs' claims were potentially barred by the doctrine of res judicata. (Doc. 23.) Plaintiffs filed an Amended Complaint and the defendants again moved for dismissal. (Docs. 24-26; 31-32.) The case was dismissed with prejudice on September 29, 2006 after the Court concluded that Plaintiffs had failed to dispute the legal standards or authority alleged in the defendants' motions to dismiss and that Plaintiffs' claims were barred by the doctrine of res judicata. (Doc. 37.) On April 6, 2007, the Ninth Circuit affirmed the district court's order of dismissal. (Doc. 49.)

**6. CV-06-177-TUC-JMR**

On April 7, 2006, Plaintiffs filed a Complaint against numerous City of Tucson city attorneys and various city employees working in the City's housing units. (Doc. 1.) The Complaint alleged violations of RICO, interference with interstate commerce, mail fraud, wire fraud, antitrust violations, and civil rights violations arising from the City's alleged interference with Plaintiffs' development of rental housing projects and the City's alleged intent to prevent Plaintiffs from engaging in business. (*Id.*) The defendants moved to dismiss and Plaintiffs agreed to voluntarily dismiss their antitrust, commerce clause and § 1985 claims. (Doc. 70, pg. 2.) On May 2, 2007, Judge Collins granted the defendants' motion to dismiss, finding that Plaintiffs had failed to plead their RICO claim with particularity and that the Plaintiffs' remaining claims were barred by the doctrine of res judicata. (Doc. 70.) The Court cautioned Plaintiffs that "should the Plaintiffs continue to file the same claims, which have been ruled upon

by three District Court Judges, the Court will consider sanctions." (*Id.*)

On May 14, 2007, Plaintiffs filed a Motion for Reconsideration of the Court's May 2, 2007 Order, arguing that the Hon. Raner C. Collins, who had issued the May 2, 2007 Order, had close ties to the Defendants and should have recused. (Doc. 72.) Judge Collins, "despite being quite sure that he [could] be fair and impartial," recused himself from the case and any other cases involving Mr. Konarski "out of an abundance of caution." (Doc. 73.) The case was re-assigned to the undersigned Judge, who noted that she had recently served in an adversarial role with respect to Plaintiff prior to her judicial appointment and recused herself pursuant to 28 U.S.C. § 455(a). (Doc. 75.) The case was re-assigned to Judge John M. Roll. (Doc. 76.) On March 25, 2008, Judge Roll issued an Order striking the Motion for Reconsideration because it was filed by Plaintiffs pro se while Plaintiffs were represented by counsel, in violation of L. R. Civ. 83.3. (Doc. 86.)

Plaintiffs appealed the Court's May 2, 2007 Order; on October 10, 2008, the Ninth Circuit issued an Amended Mandate, affirming the decision of the district court and denying Plaintiffs' requests for panel rehearing and rehearing en banc. (Doc. 88.) The Ninth Circuit agreed with and reiterated the Court's warning that Plaintiffs could be subject to sanctions if they continued to file the same claims. (*Id.*)

### 7. CV-07-153-TUC-JMR

On March 30, 2007, Plaintiff Frank Konarski, along with two other plaintiffs, filed a "Writ of Mandamus Requests" against the Secretary of HUD and the City of Tucson alleging that the City refused

to grant the Konarskis new Section 8 housing contracts and seeking a court order compelling the City to do so. (Doc. 1.) Judges Collins and Zapata recused from the case. (Docs. 11, 23.) On March 26, 2008, Judge Roll issued an Order granting the defendants' motions to dismiss. (Doc. 24.) The Court noted that it appeared that Frank Konarski had filed the action on behalf of the other named plaintiffs (their tenants) without their permission. (*Id.*). The Court found that Plaintiff Frank Konarski was not entitled to mandamus relief because the challenged actions of the City were discretionary and because Mr. Konarski had previously litigated the same issue without success. (*Id.*)

### 8. CV-07-489-TUC-JMR

On May 16, 2007, Plaintiffs (and their business entity, FGPJ Apartments) filed a complaint in Pima County Superior Court against a City of Tucson city attorney and several city employees involved in the City's Section 8 housing program. (Doc. 1-1.) The complaint alleged that the defendants had refused to approve Plaintiffs' request that a tenant be permitted to apply a Section 8 housing voucher to her tenancy at Plaintiffs' apartment complex. (*Id.*) Plaintiffs alleged claims for tortious interference with business relationship and civil rights violations. (*Id.*) Defendants removed the action to this Court on September 28, 2007. (Doc. 1.) On August 14, 2008, the Court dismissed the action without prejudice for failure to prosecute. (Doc. 21.) The Court noted that Plaintiffs had failed to respond to pending dispositive motions. (*Id.*)

## 9. CV-11-612-TUC-LAB

On June 1, 2011, Plaintiffs filed an action in Pima County Superior Court against the City of Tucson and various City employees; they amended their complaint on August 30, 2011. (Docs. 1-9, 1-6.) The Amended Complaint alleged claims for breach of contract, bad faith, intentional interference with contract, intentional infliction of emotional distress, conspiracy and civil rights violations arising from the City's alleged rescission of three Section 8 housing agreements. (Doc. 1-6.) Defendants removed the case to this Court on September 26, 2011. (Doc. 1.) The case was initially assigned to the Hon. Frank R. Zapata; the parties consented to the assignment of the case to a magistrate judge and the case was re-assigned to Magistrate Judge Hector C. Estrada. (Doc. 7.) Judge Estrada recused due to a conflict and the case was re-assigned to Judge Glenda E. Edmonds. (Doc. 10.) Due to newly-appointed magistrate judges, the case was re-assigned to Magistrate Judge Leslie A. Bowman on June 22, 2012. (Doc. 26.)

On December 4, 2012, after extensive litigation, the Court granted the defendants' motion for partial summary judgment on Plaintiffs' civil rights claims. (Doc. 90.) The Court concluded that Plaintiffs could not establish a liberty interest in Section 8 housing vouchers, and that Plaintiffs' equal protection "class of one" theory was not supported by admissible evidence tending to prove that the City acted without a rational basis. (*Id.*) The Court remanded the remaining state law claims to the Pima County Superior Court. (*Id.*)

Plaintiffs appealed the Court's December 4, 2012 Order and on May 15, 2015, the Ninth Circuit affirmed in part, reversed in part, and remanded. (Doc. 99-1.)

The Ninth Circuit concluded that Plaintiffs had presented a material issue of fact as to their equal protection, "class of one" theory, in the form of video evidence in which a city official told one of Plaintiffs' prospective tenants that there was a "personal vendetta" between the City and the Konarskis. (*Id.*) Following remand, the parties engaged in unsuccessful private and court-provided mediations. (Docs. 113, 151.) The parties are currently litigating discovery disputes. (Doc. 150.)

### 10. CV-13-95-TUC-DCB, CV-13-1145-PHX-DGC, CV-13-999-TUC-DCB

On February 13, 2013, Plaintiffs filed an action in this Court against the City of Tucson, the City of Tucson Attorney's Office, City Attorney Michael Rankin, City of Tucson council members, and the City's Planning and Development Services Office. (CV-13-95-TUC-DCB, Doc. 1.) The complaint alleged claims for civil rights violations and intentional infliction of emotional distress arising out of Rankin's alleged instruction to the City Council not to speak to Plaintiffs and the City's alleged shutdown of Plaintiffs' construction of a multi-residential housing building. (*Id.*) The parties elected assignment of the case to a district judge; the case was eventually assigned to the Hon. David C. Bury after Judge Zapata and the undersigned Judge recused. (CV-13-95-TUC-DCB, Docs. 9-11.) On June 1, 2013, Plaintiffs moved to transfer the case to the Phoenix division, in part because of the number of Tucson judges who had recused from the case. (CV-13-95-TUC-DCB, Doc. 13.) The Court granted Plaintiffs' Motion for Intra-District Transfer on June 6, 2013. (CV-13-95-TUC-DCB, Doc. 15.)

When CV-13-95-TUC-DCB was transferred from the Tucson division to the Phoenix division, it was assigned a new case number: CV-13-1145-PHX-DGC. On August 22, 2013, the Hon. David G. Campbell granted the defendants' motion to transfer the action back to the Tucson Division. (CV-13-1145-TUC-PHX-DGC, Doc. 62.) Judge Campbell noted that Plaintiffs moved to transfer the case to Phoenix before serving the action on the defendants and therefore the defendants had not had an opportunity to brief the transfer issue in CV-13-95. (*Id.*) Judge Campbell further noted that Plaintiffs did not dispute defendants' claim that the action arose in Tucson and all Plaintiffs and defendants were residents of Tucson. (*Id.*) Judge Campbell concluded that Plaintiffs' stated reasons for requesting transfer were insufficient to overcome the presumption that the case should be tried in Tucson. (*Id.*)

Upon transfer, the case was assigned a third case number: CV-13-999-TUC-DCB. On October 21, 2013, the Court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. (CV-13-999-TUC-DCB, Doc. 74.) The Court concluded that Plaintiffs' First Amendment claims failed as a matter of law because Plaintiffs were not engaged in constitutionally-protected activity. (*Id.*) The Court dismissed Plaintiffs' Fifth Amendment "equal protection" claims because the Fifth Amendment does not guarantee equal protection. (*Id.*) The Court dismissed Plaintiffs' racial discrimination claims because Plaintiffs failed to allege a cognizable causal link between the alleged injury and the alleged discrimination. (*Id.*) The Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim. (*Id.*)

Plaintiffs appealed the Court's October 21, 2013 Order and on April 21, 2015, the Ninth Circuit affirmed in part, vacated in part and reversed in part. (Doc. 92.) The Ninth Circuit held that the Court had erred in denying Plaintiffs' equal protection claims on the basis of Plaintiffs' citation to the Fifth Amendment, but nevertheless affirmed dismissal of Plaintiffs' equal protection claims for failure to allege that similarly-situated individuals were treated differently than Plaintiffs. (*Id.*) The Ninth Circuit remanded the matter to this Court in order for Plaintiffs to be afforded an opportunity to amend and correct this pleading deficiency. (*Id.*) The Ninth Circuit affirmed the Court's dismissal of Plaintiffs' state law claim, but reversed with respect to dismissal of that claim with prejudice.

Following remand, the Court granted Plaintiffs leave to file a second amended complaint to properly allege their equal protection claim. (CV-13-999-TUC-DCB, Doc. 93.) Plaintiffs failed to file a second amended complaint. Defendants moved for dismissal on the grounds that Plaintiffs had failed to timely amend; Plaintiffs failed to respond to that motion. (CV-13-999-TUC-DCB, Doc. 94.) On June 29, 2015, the Court dismissed the action with prejudice. (CV-13-999-TUC-DCB, Doc. 95). On July 27, 2015, Plaintiffs moved to set aside the Court's June 29, 2015 Order, alleging that they had failed to timely file a second amended complaint or respond to the defendants' motion to dismiss due to an "email glitch." (CV-13-999-TUC-DCB, Doc. 97.) While the motion to set aside the judgment was pending, the defendants filed a Motion for Order Declaring the Konarski Plaintiffs to be Vexatious Litigants; that motion is nearly identical to the pending

Motion. (CV-13-999-TUC-DCB, Doc. 108.) On October 21, 2015, the Court denied Plaintiffs' motion to set aside the judgment, concluding that Plaintiffs' alleged email glitch did not amount to a showing of excusable neglect justifying Plaintiffs' failure to file their second amended complaint or a response to the defendants' motion to dismiss. (CV-13-999-TUC-DCB, Doc. 112.) The Court denied the vexatious litigant motion as moot. (*Id.*) Plaintiffs have appealed the Court's October 21, 2015 Order; that appeal remains pending. (CV-13-999-TUC-DCB, Docs. 114, 116.)

## 11. CV-14-2264-TUC-JGZ

The instant action was filed by Plaintiffs on August 1, 2014. (Doc. 1.) On April 16, 2015, Plaintiffs filed an Amended Complaint alleging eight claims counts against Defendants: (1) violation of the Sherman Act, 15 U.S.C. § 1; (2) violation of 42 U.S.C. § 1983 arising from Defendants' alleged interference with Plaintiffs' interstate commerce; (3) violation of 42 U.S.C. § 1983 arising from Defendants' alleged deprivation of Plaintiffs' substantive due process; (4) violation of 42 U.S.C. § 1983 arising from Defendants' alleged deprivation of Plaintiffs' procedural due process; (5) violation of 42 U.S.C. § 1983 arising from Defendants' alleged deprivation of Plaintiffs' right to equal protection; (6) intentional interference with contract; (7) intentional infliction of emotional distress; and (8) conspiracy in violation of state law. (Doc. 14.) Each of Plaintiffs' claims arose from the City's alleged scheme to lure Plaintiffs' tenants away from Plaintiffs by granting those tenants vouchers for Section 8 housing in other rental properties. On May 26, 2015, Defendants moved for dismissal of Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. (Doc. 40.)

On June 3, 2015, Plaintiffs moved to recuse the Hon. Rosemary Marquez, alleging she had close ties to Defendants. (Doc. 43.) On September 15, 2015, Judge Marquez granted Plaintiffs' motion for recusal. (Doc. 59.) Judge Marquez noted that none of the allegations in Plaintiffs' motion for recusal were valid ground for recusal, but that Plaintiffs' counsel's "hyperbolic and unprofessional statements, as well as allegations that any reasonably diligent attorney would have investigated and realized to be false" had left the Court with a negative, potentially antagonistic impression of Plaintiffs. (*Id.*) Judge Marquez noted that although she believed she could be fair and impartial, she was recusing "out of an abundance of caution." (*Id.*) The case was reassigned to the undersigned Judge.

On October 5, 2015, the Court received a letter from Plaintiffs, noting that the undersigned Judge had previously recused herself in CV-13-95-TUC-DCB and asking the undersigned Judge to recuse in this case. (Doc. 72.) On October 12, 2015, the Court denied that request, noting that the undersigned Judge recused in CV-13-95-TUC-DCB because, in 2001, the undersigned Judge (then an Assistant United States Attorney) defended Sharon Atwell, senior community builder for the United States Department of Housing and Urban Development, in CV-01-503-TUC-DCB. Out of an abundance of caution and in order to avoid the appearance of impropriety, the undersigned Judge recused herself in CV-13-95-TUC-JGZ. In its October 12, 2015 Order, the Court found that no such impartiality actually existed, and any appearance of impropriety present in April of 2013 had long since dissipated. Accordingly, the undersigned Judge concluded

that she no longer had a duty to recuse herself from this matter under 28 U.S.C. § 455.

On December 31, 2015, Plaintiffs filed a "Motion to Rule on Renewed Request for Recusal of Judge Zipps Separately From and in Advance of Ruling on Any Other Outstanding Motion, and, in the Event of Recusal Denial, Motion for Stay on the Ruling of Any Other Motion." (Doc. 102.) On March 18, 2016, the Court denied that Motion, finding that Plaintiffs have not articulated any specific facts or issues that would prompt this Court to reconsider its denial of Plaintiffs' first motion for recusal. (Doc. 107.) On that same day, the Court granted Defendants' Motion to Dismiss. (Doc. 106.) The Court found that Plaintiffs failed to state a claim with respect to the federal claims alleged in Counts 1-5; the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims alleged in Counts 6-8. The Court denied Plaintiff's Motion for Stay as moot. (Doc. 107.) The Court retained jurisdiction of this matter in order to resolve the pending Vexatious Litigant Motion. (Doc. 106.)

## Analysis

District courts have the inherent power to enter pre-filing orders against vexatious litigants. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts. *Id.* Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *Id.* (*citing De Long v. Hennessey*, 912

F.2d 1144, 1148 (9th Cir. 1990)). Courts consider four factors when determining whether to impose pre-filing restrictions. First, the litigant must be given notice and a chance to be heard before the order is entered. *Id.* (*citing De Long*, 912 F.2d at 1147). Second, the district court must compile "an adequate record for review." *Id.* (*citing DeLong*, 912 F2d. at 1148). Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Id.* Finally, the vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered. *Id.* The latter two factors are "substantive considerations . . . the factors that help the district court define who is, in fact, a vexatious litigant and construct a remedy that will stop the litigant's abusive behavior while not unduly infringing the litigant's right to access the courts." *Id.* at 1058. The Court concludes that analysis of these four factors compels the conclusion that pre-filing restrictions should be imposed upon Plaintiffs.

### a. Plaintiffs Received Notice and an Opportunity to Be Heard

Here, the first factor has been satisfied; Plaintiffs received notice of Defendant's Motion and filed a response thereto. Defendants requested oral argument on the Motion, but Plaintiffs opposed the request.[4]

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[4] In the caption of their response to the Vexatious Litigant Motion, Plaintiffs noted "Opposition to Oral Argument." In addition, in their initial response to the Vexatious Litigant Motion—which was stricken by the Court for unrelated reasons—Plaintiffs stated: "it is respectfully urged that this Court take the time to rule on solely the written record that enables this Court to empirically separate fact from fiction, and apposite case law from inapposite case law (or otherwise the misapplication of

(Doc. 88, pg. 1.) *See Molski*, 500 F.3d at 1058 (notice requirement met where motion filed by the defendants and served on plaintiff's counsel; plaintiff had opportunity to oppose the motion, both in writing and at a hearing).

The Court rejects Plaintiffs' argument that the Court's denial of Plaintiffs' request for a three-month extension of time to respond deprived Plaintiffs of an opportunity to be heard. The Court extended Plaintiffs' response deadline by two weeks. (Doc. 76.) In the Order granting the two-week extension, the Court found that Plaintiffs had not articulated grounds for the requested three-month extension. (*Id.*) In addition, the Court notes that the Vexatious Litigant Motion was probably not a surprise to Plaintiffs; Defendants filed a nearly identical motion on October 9, 2015 in CV-13-999-TUC-DCB. (Doc. 108.)

**b. The Record Before the Court Is Adequate**

An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed. *See Molski*, 500 F.3d at 1059 (concluding that court's record was adequate where district court's review included all the cases filed by the vexatious litigant as well as the complaints from many of those cases). Here, the Court has summarized Plaintiffs' litigation history based on the Court's own review of the dockets, pleadings and motions in every case filed by Plaintiffs in the United States District Court, District

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apposite case law). What is more, oral argument will not further aid this Court beyond what the record already establishes." (Doc. 83, pgs. 41-42.)

of Arizona. The Court has not relied on materials submitted by the parties or the parties' summaries of those materials. Thus Plaintiffs' claim that Defendants' factual summary misstates the record is not relevant to the Court's review. The record before the Court is adequate and complete.

### c. Plaintiffs Have Repeatedly Engaged in Frivolous and Harassing Litigation Against the City and Its Employees

The frivolous and harassing nature of Plaintiffs' litigation against the City of Tucson is evident in the number of times Plaintiffs' claims have been dismissed or abandoned, the number of times Plaintiffs have been admonished by the Court, and the sheer number of cases filed by Plaintiffs. Plaintiffs have repeatedly filed meritless lawsuits in this Court and have failed to prosecute their actions. Plaintiffs offer various alternative explanations as to why their prior lawsuits were dismissed or not prosecuted, such as intimidation by city officials, issues with Plaintiffs' counsel and failed settlement negotiations. The Court need not consider any of these allegations, however, in light of prior district court decisions that Plaintiffs' claims were without merit and subject to dismissal. This Court is not in a position to reconsider why, for reasons outside the record, Plaintiffs' claims may have failed or Plaintiffs may have walked away. Instead, the Court looks only to the prior findings in the prior cases. On nine occasions, Plaintiffs' lawsuits were dismissed in whole or in part for failure to prosecute.[5]

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[5] In CV-98-528-TUC-CKJ, the Court dismissed the action in its entirety for failure to prosecute. (Doc. 46.) In CV-99-582-TUC-ACM, the Court dismissed Mr. Konarski's civil rights claim for

On nine occasions, Plaintiffs lawsuits were dismissed when the Court granted a dispositive motion (typically a motion to dismiss) filed by the defendants; three of those dismissals were based, at least in part, on the doctrine of res judicata.[6] In fact, out of the dozens of claims alleged in the eleven lawsuits that Plaintiffs

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failure to comply with a Court order directing him to respond to discovery requests. (Doc. 86.) In CV-01-503-TUC-DCB, one defendant was dismissed by stipulation and one defendant was dismissed for failure to serve. (Docs. 23, 25.) Plaintiffs voluntarily dismissed CV-04-137-TUC-RCC. (Doc. 6.) In CV-04-260-TUC-FRZ, Plaintiffs' action was dismissed with prejudice in part because Plaintiffs failed to dispute the legal standards or authority alleged in the defendants' motion to dismiss. In CV-06-177-TUC-JMR, Plaintiffs voluntarily dismissed three claims in response to the defendants' motion to dismiss. (Doc. 70, pg. 2.) In CV-07-489-TUC-JMR, the Court dismissed the action in its entirety for failure to prosecute. (Doc. 21.) CV-13-999-TUC-DCB was dismissed after Plaintiffs failed to file a second amended complaint. (Doc. 95)

[6] In CV-99-582-TUC-ACM, the Court dismissed Mr. Konarski's state law claims because the statute of limitations had expired and/or Mr. Konarski failed to comply with the Arizona notice statute. (Doc. 63.) In CV-01-503-TUC-DCB, the defendants who were not voluntarily dismissed prevailed at summary judgment. (Doc. 43.) In CV-04-260-TUC-FRZ, the Court dismissed Plaintiffs' complaint once without prejudice and once with prejudice, in part on res judicata grounds. (Docs. 23, 37.) In CV-06-177-TUC-JMR, the Court granted the defendants' motion to dismiss for failure to adequately plead a RICO claim and on res judicata grounds. (Doc. 70.) In CV-07-153-TUC-JMR, the Court granted the defendants' motion to dismiss in part because the claims were duplicative of prior litigation. (Doc. 24.) In CV-11-612-TUC-LAB, the court granted the defendants' motion for partial summary judgment on Plaintiffs' federal claims and remanded Plaintiffs' state law claims to the state court. (Doc. 90.) In CV-13-999-TUC-DCB, the Court granted the defendants' motion to dismiss. (Doc. 74.) In the pending case, CV-14-2264-TUC-JGZ, the Court granted Defendants motion to dismiss. (Doc. 106.)

have filed in the past eighteen years, none of the claims have survived the district court, and only two claims were deemed potentially viable on appeal.[7] To date, none of Plaintiffs' lawsuits have ended with a judgment in Plaintiffs' favor. Plaintiffs' litigation history supports entry of a vexatious litigant order. *See, e.g.*, *Gray v. People of California*, 2014 WL 1325312, at *6 (C.D. Cal. 2014) ("Not only is Petitioner willing to consume the Court's time and resources with frivolous litigation, he has also demonstrated, through his dilatory conduct, that he is often not committed to prosecuting the cases he initiates.").

During the eighteen years that Plaintiffs have litigated in this Court, the Court has repeatedly cautioned Plaintiffs and their counsel about their unprofessional behavior and the potential for sanctions. Those warnings have been ignored. In CV-98-528-TUC-CKJ, Mr. Konarski failed to timely file a joint report, was barred from contacting the Judge and his staff by telephone, and was admonished for failing to provide opposing counsel with copies of documents filed in Court. Later in that same case, the Court admonished Mr. Konarski for failing to heed the Court's repeated warnings about deadlines and for Mr. Konarski's

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[7] Plaintiffs repeatedly overstate their success on appeal: those victories were minor. In CV-11-612-TUC-LAB, the Ninth Circuit held that Plaintiffs had presented a material issue of fact as to their equal protection claim; it is unknown at this time whether that claim will prevail before a jury. (Doc. 99-1.) In CV-13-999-TUC-DCB, the Ninth Circuit remanded Plaintiffs' equal protection claim in order to afford Plaintiffs an opportunity to correct a pleading deficiency. (Doc. 92.) Following remand, Plaintiffs failed to file a second amended complaint and the case was dismissed. (Doc. 112.) Plaintiffs' five other Ninth Circuit appeals were unsuccessful.

"persistently belligerent behavior" in his contacts with the Court. Plaintiffs refused to pay Court-ordered attorneys' fees in CV-99-582-TUC-ACM. In CV-01-503-TUC-DCB, Plaintiffs' counsel was temporarily barred from participating in the case and Plaintiffs' response to the defendants' motion for summary judgment failed to comply with the Court's local rules. In CV-06-177-TUC-JMR, both this Court and the Ninth Circuit cautioned Plaintiffs that they could face sanctions if they continued to file duplicative claims. Plaintiffs filed CV-07-153-TUC-JMR on behalf of other named plaintiffs without their permission. In addition, on at least three occasions, the Court admonished Plaintiffs for making false statements and unsubstantiated allegations.[8] *See Spain v. EMC Mortgage Co.*, 2010 WL 3940987, at *11 (D. Ariz. 2010), *aff'd sub nom. Spain v. EMC Mortgage Corp.*, 487 F. App'x 411 (9th Cir. 2012) ("[a] person may cross the line into frivolous litigation by asserting facts that are grossly exaggerated or totally false"). The Court further notes that Plaintiffs have not hesitated to direct improper and inaccurate allegations toward the Court itself, compelling the recusal of two judges who recused themselves on Plaintiffs' motions "out of an abundance of caution" despite being sure that they could be fair and impartial.[9] (CV-98-528-

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[8] In CV-99-582-TUC-ACM, the Court denied Mr. Konarski's motion for new trial on the ground that it was based on "grossly misleading" justifications. (Doc. 100.) In CV-01-503-TUC-DCB, the Court noted that Plaintiffs' response to the defendants' motion for summary judgment relied on unsubstantiated allegations. In CV-14-2264-TUC-JGZ, Judge Marquez noted that Plaintiffs' motion for recusal was based on allegations that any reasonably diligent attorney would have realized to be false. (Doc. 59.)

[9] Plaintiffs also moved repeatedly and unsuccessfully for the recusal of the undersigned Judge; in total, judges in the Tucson

TUC-CKJ, Doc. 60; CV-06-177-TUC-JMR, Doc. 73; CV-14-2264, Doc. 59.) In sum, in seven of Plaintiffs' eleven cases, the Court has taken umbrage with the manner in which Plaintiffs conduct themselves in court.

Plaintiffs contend that they have not filed enough lawsuits to be considered vexatious litigants, citing to cases in which litigants filed hundreds of lawsuits before being declared vexatious. However, "there is no threshold number of cases or motions that a litigant must file before a court may enter an order restricting his ability to file." *Day v. Florida*, 2014 WL 2116083, at *3 (W.D. Wash. 2014) (collecting Ninth Circuit cases). As Defendants point out, district courts in the Ninth Circuit have entered vexatious litigant orders in situations involving fewer lawsuits than the eleven filed by Plaintiffs. *See Kelmar v. Bank of Am. Corp.*, 599 F. App'x 806, 807 (9th Cir. 2015) (unpublished) (affirming district court's vexatious litigant order for plaintiff who sued three times in four years); *Spain*, 2010 WL 3940987 at *11 (finding six baseless lawsuits to be grounds for vexatious litigant order); *Stoller ex rel. Stoller v. Bank of New York Mellon Trust Co.*, 2013 WL 5328052, at *1 (D. Ariz. 2013), *aff'd sub nom. Stoller v. Bank of New York Mellon Trust Co.*, 588 F. App'x 677 (9th Cir. 2014) (entering vexatious litigant order after eight lawsuits); *Derringer v. Sewell*, 2009 WL 1578292, at *4 (D. Ariz. June 3, 2009) (entering vexatious litigant order after four separate lawsuits arising from the same facts). In addition, the Court notes that Plaintiffs often engage in aggressive and unwarranted motions practice, seeking to extend deadlines and page limitations while opposing similar requests from

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division of the United States Court, District of Arizona have recused from Plaintiffs' cases on ten occasions.

defense counsel, frequently seeking reconsideration of Court Orders, moving to vacate or set aside prior decisions of the Court and filing appeals. This papering of the docket imposes a greater-than-normal burden on those forced to defend Plaintiffs' meritless actions.

The litigation history in this case illustrates a disturbing pattern on the part of Plaintiffs: the impulsive filing of frivolous claims against city employees to alleviate Plaintiffs' anger and frustration with city decisions with which Plaintiffs disagree. It appears that the filing of the lawsuit scratches the itch for Plaintiffs, at least initially: on nine occasions, Plaintiffs' lawsuits were dismissed in whole or in part for failure to prosecute. Each lawsuit filed by Plaintiffs launches this Court and the defendants into expensive, time-consuming litigation. The consequences of Plaintiffs' actions have real-world implications, and Plaintiffs have consistently demonstrated that they do not care. The judicial system is not a toy, on hand to soothe a fussy child.

### d. The Vexatious Litigant Order Is Narrowly Tailored

A vexatious litigant order is narrowly tailored where it permits the Court to screen a plaintiff's lodged complaint to determine if the complaint involves the type of claim that the plaintiff has previously filed and if those complaints name as defendants the parties previously targeted by the plaintiff. *See Molski*, 500 F.3d at 1061. Thus, the Court's vexatious litigant order must be informed by the Plaintiffs' prior litigation. Here, Defendants seek an Order mandating that Plaintiffs obtain leave of Court before filing further complaints against the City or its officials concerning the administration of the Section 8 housing program,

or any actions taken by the City or its officials related to the business operations or real estate development activities of the Konarski Plaintiffs. Defendants' proposed language is based on the claims and parties involved in Plaintiffs' prior litigation. Seven of Plaintiffs' lawsuits present or presented claims related to Plaintiffs' alleged inability to participate in the Section 8 housing program. Four of Plaintiffs' lawsuits challenged other actions by the City: Plaintiffs first two lawsuits stemmed from Mr. Konarski's arrest by TPD on June 18, 1997; CV-06-177-TUC-JMR stemmed from the City's alleged interference with Plaintiffs' development of rental housing projects and the City's alleged intent to prevent Plaintiffs from engaging in business; and CV-13-999-TUC-DCB (formerly CV-13-95-TUC-DCB and CV-13-1145-PHX-DGC) arose out of Rankin's alleged instruction to the City Council not to speak to Plaintiffs and the City's alleged shutdown of Plaintiffs' construction of a multi-residential housing building. Accordingly, the Court concludes that Defendants' proposed language is narrowly tailored.[10]

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[10] Plaintiffs argue that the Court should deny the pending Vexatious Litigant Motion because the next two lawsuits that Plaintiffs intend to file will allege "unconstitutional harm" related to invasion of privacy, false-character profiling and criminal endangerment by city officials. This argument does not provide grounds for denial of the pending Motion. The Court has narrowly tailored this Order to apply to the types of claims that Plaintiffs have historically filed. Whether future filings by Plaintiffs fall within the scope of that Order may be litigated another day, if and when Plaintiffs attempt to file those actions.

## Conclusion

Therefore, IT IS ORDERED THAT Defendants' Motion for Order Declaring the Konarski Plaintiffs to be Vexatious Litigants (Doc. 73) is GRANTED.

IT IS FURTHER ORDERED THAT Plaintiffs Frank Konarski, Gabriela Konarski, John F. Konarski, Frank E. Konarski and Patricia Konarski are vexatious litigants, and the Clerk of the Court shall designate Plaintiffs as such for the purpose of tracking any future filings by Plaintiffs in this Court.

IT IS FURTHER ORDERED:

1. Plaintiffs are enjoined from filing, absent leave of Court, any Complaints against the City of Tucson or its employees concerning the administration of the Section 8 housing program, or any actions taken by the City or its employees related to the business operations or real estate development activities of the Konarski Plaintiffs.

2. If Plaintiffs wish to file a complaint in this Court, they shall lodge a motion for leave to file captioned as an "Application Pursuant to Court Order Seeking Leave to File" in accordance with the Electronic Case Filing Administrative Policies and Procedures Manual for the District of Arizona. In the Application,

    a. Plaintiffs must file an affidavit certifying that the claim or claims presented are new and have never been raised and disposed of on the merits by any court;

    b. Plaintiffs must certify that, to the best of their knowledge, the claim or claims pre-

sented are not frivolous or taken in bad faith;

c. Plaintiffs must affix to the Application a copy of this Order, a list of all cases previously filed involving similar or related causes of action, and the proposed complaint;

3. The failure to certify, or upon false certification, that the claims have not been previously raised and disposed of, may subject Plaintiffs to sanctions.

4. No defendant need initially respond the Application. Instead, this Court shall review the Application and proposed complaint and determine whether the complaint should be summarily denied, or whether it should proceed. If the Court summarily denies the relief requested and dismisses the complaint, the summary denial and dismissal order and complaint shall be placed on the docket. If this Court allows the complaint to proceed, this Court will direct the Clerk of Court to open a proceeding, assign a case number, and Plaintiffs may proceed according to the Federal Rules of Civil Procedure.

5. The procedures set forth in this Order apply to cases filed by Plaintiffs in other courts that are removed to this Court. In the event that an action filed by Plaintiffs in another court is removed to this Court, the case will be stayed pending Plaintiffs' filing of the Application required by this Order.

Dated this 18th day of March, 2016.

/s/ Jennifer G. Zipps
United States District Judge