

1 WO

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

8

9

10

11

12 B. Spain,

Plaintiff,

No. CIV 07-0308-PHX-RCB

13

vs.

O R D E R

14

EMC Mortgage Company,  
et al.,

Defendants.

15

16

17

18

19

20

21

22

23

24

The primary issue currently before the court is the propriety of entering a pre-filing order against plaintiff *pro se*, B. Spain. In Spain v. EMC Mortgage Co., 2008 WL 752610 (D. Ariz. March 18, 2008) ("Spain I"), the first of four comprehensive orders issued in this case, the court explicitly warned plaintiff that:

25

26

27

Given his numerous filings, most of them wholly without merit, coupled with the tone and form of those filings, [he] [w]as dangerously close to crossing the line from permissible use of the judicial process to flagrant abuse[.]

28

Id. at \*8. Plaintiff Spain did not heed that warning or

1 subsequent ones. Instead, plaintiff's "repeated attempts  
2 . . . to misuse the courts" have resulted in, among other  
3 things, the "needless[] squander[ing]" of judicial and other  
4 resources. See O'Loughlin v. Doe, 920 F.2d 614, 618 (9<sup>th</sup> Cir.  
5 1990). Consequently, as fully discussed below, the court  
6 finds ample justification for the entry of a pre-filing order  
7 against plaintiff Spain.

## 8 Background

### 9 I. The Bankruptcy Case

10 Well before commencing this action, plaintiff Spain had  
11 "extensive involvement" as "a claimant in a District of  
12 Arizona bankruptcy proceeding . . . span[ning] more than a  
13 decade."<sup>1</sup> Spain I, 2008 WL 752610, at \*1. That bankruptcy  
14 had its genesis in a 1978 judgment of dissolution entered by  
15 the Superior Court in Maricopa County. As part of that  
16 judgment, the Superior Court awarded several properties  
17 located in Creede, Colorado ("Colorado properties") to Norma  
18 J. Hurt. See Eagleburger I, Doc. 92 at 1; and Eagleburger  
19 II, 2009 WL 307280, at \*1. In 1985, Ms. Hurt filed for  
20 bankruptcy in the District of Arizona. Eagleburger II, 2009  
21 WL 307280, at \*1.

22 In Eagleburger II, Judge Campbell outlined plaintiff  
23 Spain's involvement as a claimant in that bankruptcy action:

24 On April 3, 1990, the bankruptcy court issued an  
25 \_\_\_\_\_

26 <sup>1</sup> In addition to that bankruptcy action, prior to the commencement of the  
27 present action, plaintiff commenced two other federal district court actions:  
28 Spain v. Eagleburger Group, No. CV 06-0712-PHX-ROS ("Eagleburger I"); and Spain v.  
Eagleburger Group, No. CV-08-1089-PHX-DGC ("Eagleburger II"). Pursuant to Fed. R.  
Evid. 201, this court takes judicial notice of all orders issued in the bankruptcy  
case, and in Eagleburger I, and Eagleburger II.

1 order approving a stipulated settlement agreement  
2 disposing of all claims against the bankruptcy  
estate ("Settlement Agreement"). See *In re Norma*  
3 *Hurt*, No. 85-3802-PHX-RGM, Adv. No. 87-199  
(Bankr.D.Ariz. Apr. 3, 1990). Spain and other  
4 claimants appealed the bankruptcy court's order,  
arguing in part that the Settlement Agreement was  
5 unenforceable due to misrepresentation and fraud.  
The order was affirmed. See *In re Hurt*, BAP No.  
6 AZ-90-1142/AZ-90-1174 RJMe (BAP 9th Cir. June 1,  
1992); *In re Hurt*, No. 92-16538, 1994 WL 224263, 26  
7 F.3d 130 (9th Cir. May 26, 1994), cert. denied sub  
nom., *Kachina Plywood, Inc. v. Hurt*, 513 U.S. 1190,  
8 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995), and *Pace v.*  
*Hurt*, 514 U.S. 1098, 115 S.Ct. 1829, 131 L.Ed.2d 749  
(1995).

9  
10 In January 2003, Bankruptcy Judge James Marlar  
confirmed the bankruptcy estate's sale of the  
11 Colorado Properties to the City of Creede. See *In re*  
*Hurt*, No. B-85-03802-JMM (Bankr.D.Ariz. Jan.  
12 31, 2003). ITNX, Inc., an entity allegedly controlled  
by Spain and Pace, appealed from Judge Marlar's  
13 confirmation order. The order was affirmed. See *In*  
*re Hurt*, BAP No. AZ-98-1532-KPRy (BAP 9th Cir. Sept.  
14 13, 1999); *In re Hurt*, No. 00-15088, 2001 WL 615282,  
15 9 Fed. Appx. 780 (9th Cir. June 5, 2001).

16 Eagleburger II, 2009 WL 307280, at \*1 (footnote omitted).

17 As this court pointed out in Spain I, after finding that  
18 "plaintiff's liens and encumbrances . . . placed upon the  
19 real properties of [the bankrupt estate of Norma J. Hurt]  
20 [were] null and void[,] . . . , the Bankruptcy Court . . .  
21 enjoined [Spain] from bringing any action or filing, or  
22 causing to be filed any lien or claim against the property of  
23 [the bankrupt estate][.]" Spain I, 2008 WL 752610, at \*1  
24 (citations and internal quotation marks omitted). "Plaintiff  
25 also signed a settlement agreement which stated the same, and  
26 additionally stated that '[Spain agrees] that . . . all  
27 objections to the sale of any real properties now pending  
28 . . . are waived and withdrawn.'" Eagleburger I, Doc. 92 at

1 2:5-7.

2 **II. Eagleburger I**

3 Unwilling to concede defeat, "in 2004 plaintiff commenced  
4 a federal court action in Colorado[,] " which eventually was  
5 transferred to this district and assigned to Judge Silver.  
6 See Spain I, 2008 WL 752610, at \*1. Among the defendants in  
7 that case were Bankruptcy Judge Marlar, and counsel who had  
8 represented Ms. Hurt in the bankruptcy proceeding. See  
9 Eagleburger II, 2009 W 307280, at \*1. In Eagleburger I,  
10 plaintiff Spain alleged that defendants violated the  
11 Racketeer Influenced and Corrupt Organizations Act ("RICO").  
12 Eagleburger I, Doc. 92 at 2:21-22. In particular, plaintiff  
13 "alleged that the Colorado Properties were not part of the  
14 Settlement Agreement and that the defendants made  
15 misrepresentations and filed fraudulent documents in the  
16 Bankruptcy Case." Eagleburger II, 2009 WL 307280, at \*1  
17 (citation omitted). Plaintiff "further alleged that Judge  
18 Marlar knowingly approved the fraudulent Settlement Agreement  
19 in confirming the sale of the Colorado Properties." Id.  
20 (citation omitted).

21 Judge Silver dismissed that case for failure to state a  
22 claim "on the ground that Spain's claims could have been  
23 raised in the Bankruptcy Case and were therefore barred by  
24 the doctrine of res judicata." See id. (citation omitted).  
25 Thereafter, plaintiff moved to vacate that order because  
26 supposedly it was "void for lack of jurisdiction."  
27 Eagleburger I, Doc. 96 at 1:28 - 2:1. Because plaintiff did  
28 "not explain how th[at] Court lack[ed] jurisdiction[," Judge

1 Silver denied plaintiff's motion to vacate. Id. at 2:3-6.

2 Plaintiff Spain responded by filing a motion to  
3 disqualify Judge Silver. See id., Doc. 97. Judge Silver  
4 denied that motion, explaining that "[t]he Court has already  
5 entered judgment against Plaintiff, dismissed the action and  
6 complaint, and denied [his] motion to reopen the case and  
7 vacate the dismissal order." Id., Doc. 98 at 1:20-21. Judge  
8 Silver unequivocally stated: "At this point, no further  
9 pleadings or motions in this Court are allowed." Id., at  
10 1:20-22. She therefore denied "as moot" plaintiff's motion,  
11 and directed him to "not file any more motions in th[at]  
12 Court, as the case is closed." Id. at 23-24. Judge Silver  
13 also "ordered . . . the Clerk of the Court . . . not to  
14 accept further motions or pleadings in th[at] case." Id. at  
15 2:3-4 (emphasis omitted).

16 **III. Eagleburger II**

17 The foregoing did not deter plaintiff Spain from  
18 continuing to litigate with respect to the bankruptcy case.  
19 Evidently dissatisfied with the outcome in Eagleburger I,  
20 plaintiff "fil[ed] a complaint against Judge Silver and all  
21 defendant's named in [her] case with the exception of [Ms.]  
22 Hurt." Eagleburger II, 2009 WL 307280, at \*2 (citation  
23 omitted). Plaintiff Spain asserted "RICO claims based on an  
24 alleged conspiracy between Defendants to deprive Spain of his  
25 purported ownership of the Colorado properties[,] which were  
26 the subject of the Hurt bankruptcy. Id. (citation omitted).  
27 Defendants and plaintiffs alike filed a host of motions in  
28 that case.

1 Finding that the complaint before him was "nearly  
2 identical to the second amended complaint [{"SAC"}]" in  
3 Eagleburger I, and that Judge Silver had "dismissed the [SAC]  
4 on the merits, and final judgment was entered in favor of  
5 Defendants and against Spain[,]" Judge Campbell held that res  
6 judicata barred the claims before him. See id. (citations  
7 omitted). Judge Campbell also dismissed the claims against  
8 Judges Silver and Marljar on judicial immunity grounds. See  
9 id. at \*3. Additionally finding that judicial immunity would  
10 bar plaintiff's proposed section 1983 claims against those  
11 two Judges, Judge Campbell also denied plaintiff's motion to  
12 amend his complaint. Id.

13 Moreover, Judge Campbell granted the motion by Judges  
14 Silver and Marljar "enjoin[ing] Spain from filing in th[alt  
15 Court, absent prior permission, any suit against Defendants  
16 concerning the Colorado Properties." Id. at \*4 (citing 28  
17 U.S.C. § 1651). Judge Campbell soundly reasoned:

18 Spain's claims relating to the Colorado Properties  
19 have been repeatedly denied. . . . With each  
20 judicial failure, [Spain] file[s] the next cause of  
21 action, creating a snowballing effect by naming the  
22 same defendants and adding attorneys and judges [he  
holds] responsible for [his] defeat. . . . Spain's  
claims are not only numerous, but patently without  
merit. . .

23 Id. (citations, internal quotation marks and footnote  
24 omitted). Judge Campbell then directed the Clerk of the  
25 Court to terminate that action. Id. at \*5, ¶ 6.

#### 26 **IV. The Present Case**

##### 27 **A. Spain I**

28 "Slightly more than a month" after Judge Silver barred

1 plaintiff from further filings in Eagleburger I, plaintiff  
2 Spain filed the present action. Spain I, 2008 WL 752610, at  
3 \*1 (citation and internal quotation marks omitted). It was  
4 readily apparent to the court that plaintiff's first amended  
5 complaint ("FAC") herein, bore a "striking resemblance" to  
6 his amended complaint in Eagleburger I. Id. "[T]he factual  
7 predicate [did] differ[]" between those two complaints in  
8 that the Colorado properties were at issue in Eagleburger I,  
9 whereas the property at issue here "is located at 2258 East  
10 Alpine Drive, Mesa, Arizona ('the property')[.]" Id. at \*3  
11 (citation omitted). Plaintiff Spain alleged the same legal  
12 theory though as he did in Eagleburger I - alleged RICO  
13 violations." See id. at \*1. Indeed, "many parts [of  
14 plaintiff's FAC] [we]re identical to his amended complaint"  
15 in Eagleburger I. Id. at \*2. This court found that  
16 "similarity" to be "significant because in [Eagleburger I]  
17 the court granted defendants' motion for a more definite  
18 statement . . . , noting that it was 'an understatement[]' to  
19 refer to plaintiff's complaint therein as 'unorganized[.]'"  
20 Id. (citation omitted). This court found "the same" to be  
21 "true here." Id.

22 Despite "plaintiff's scattershot approach to pleading[,]"  
23 and his "lengthy recitations to cases which on their face  
24 appear[ed] largely irrelevant[,]" the court did address  
25 defendants' standing arguments in Spain I. Id. at \*3. The  
26 court addressed those arguments although it had "serious  
27 reservations as to whether the FAC in its current form  
28 "perform[ed] the essential functions of a complaint." Id.

1 (quoting McHenry v. Renne, 84 F.3d 1172, 1180 (9<sup>th</sup> Cir.  
2 1996)). Plaintiff did not address the standing issue in  
3 Spain I. See id. at \*4. Instead, as to one defense motion,  
4 "with no basis," plaintiff simply "respond[ed] that that  
5 motion [wa]s ` . . . a substantive and procedural  
6 nullity[.]'" Id. (citation omitted). "Except for asserting  
7 different names," that was also plaintiff's response to  
8 another defense motion. Id. Plaintiff took "a different but  
9 equally unresponsive approach" to yet another defense motion.  
10 Id. Plaintiff "devote[d] the bulk" of that response "to  
11 arguing that it `[wa]s nothing more and nothing less than a  
12 frivolous demurrer[.]'" Id. (citation omitted).

13 After thoroughly discussing why plaintiff's FAC did not  
14 sufficiently allege standing, the court found that it  
15 "lack[ed] subject matter jurisdiction[,] and so "denie[d] as  
16 moot all remaining pending motions[.]" See id. at \*5 - \*7.  
17 Primarily because of "the Ninth Circuit's general reluctance  
18 to deny *pro se* litigants an opportunity to amend, the court  
19 [did] allow plaintiff to amend his complaint[]" though. Id.  
20 at \*8. The court cautioned plaintiff, however:

21 Before filing any amended complaint, . . . plaintiff  
22 would do well to seriously consider the numerous  
23 apparent defects discussed in defendants' motions,  
24 such as the lack of personal jurisdiction by the  
25 Ruyle defendants and defendant Huston, and the fact  
26 that arguably this action is an impermissible  
27 collateral attack on prior court proceedings. The  
28 court stresses that these are just two of the  
seeming defects, which are too countless to  
enumerate, in the FAC-and two which at first glance  
it does not appear can be cured by amendment.

27 Id. The court further advised plaintiff, among other things,  
28 that if he "has any doubt as to the pleading requirements

1 under the Federal Rules of Civil Procedure, he can consult,  
2 among other sources, the Rule's Appendix of Forms, which are  
3 ``intended to indicate the simplicity and brevity of  
4 statement which the rules contemplate.'" Id. (quoting  
5 Fed.R.Civ.P. 84).

6 At that point, the court gave plaintiff the first of  
7 several warnings pertaining to "the manner" in which he was  
8 "conduct[ing] this litigation[.]" Id. Given his conduct "to  
9 date, as well as his extensive prior litigation involvement  
10 documented in the record, the court caution[ed] him regarding  
11 the use of the courts in a vexatious fashion." Id.

12 Although the court found that "[a]t th[at] juncture the  
13 plaintiff ha[d] not engaged in a 'flagrant abuse of the  
14 judicial process[,]' " it opined that "[g]iven his numerous  
15 filings, most of them wholly without merit, coupled with the  
16 tone and form of those filings, plaintiff [wa]s dangerously  
17 close to crossing the line from permissible use of the  
18 judicial process to flagrant abuse[.]" Id. (quoting Molski,  
19 500 F.3d at 1057). The court further advised plaintiff that  
20 it would "not look favorably upon the filing of an amended  
21 complaint which does not fully comport with the relevant  
22 Federal Rules of Civil Procedure and governing case law."  
23 Id. The Court allowed plaintiff 30 days in which to file and  
24 serve his amended complaint. See id.

### 25 **B. Spain II**

26 Rather than filing and serving an amended complaint as  
27 the court allowed, plaintiff "filed a 'motion to vacate[,]'  
28 asserting that *Spain I* [wa]s 'facially void[.]'" Spain v. EMC

1 Mortg. Co., 2008 WL 2328358, at \*1 (D.Ariz. June 4,  
2 2008)(“Spain II”) (citation omitted). After defendants  
3 promptly responded or joined in responses filed by other  
4 defendants, plaintiff filed three additional motions and  
5 lodged a SAC with the court, but he did not reply to any of  
6 those responses or joinders. That flurry of motion activity  
7 is outlined in Spain II, and incorporated herein by  
8 reference. See id.

9 Partially due to his *pro se* status, this court overlooked  
10 the fact that in moving to vacate plaintiff did not rely upon  
11 the proper Rule. See id. at \*2. The court could not so  
12 easily overlook the “largely incomprehensible” nature of  
13 plaintiff’s motion, however. See id. Nor could the court  
14 overlook the fact that plaintiff “simply disagree[d] with  
15 [this court’s] rulings in *Spain I*. Id. As this court held,  
16 “[p]laintiff’s dissatisfaction [wa]s not a proper basis for  
17 reconsideration[.]” See id. (citing cases). Additionally,  
18 plaintiff did not fully comply with LRCiv. 7.2(g)(1) in  
19 moving to vacate. Id. Accordingly, the court denied  
20 plaintiff’s motion to vacate. Id. at \*5.

21 Although styled differently, plaintiff filed two other  
22 “virtually identical” motions, which the court jointly  
23 considered in Spain II. Basically, plaintiff was seeking an  
24 extension of time in which to file his SAC. In arguing for a  
25 “good cause” extension of time, plaintiff vowed that “if an  
26 extension of time [wa]s not granted, he w[ould] ‘wast[e]  
27 *judicial resources and the Court’s time*[.]’” Id. at \*3  
28 (quoting Resp. (Doc. 136)) (emphasis added). This court

1 found "[p]laintiff's ready willingness to 'wast[e] judicial  
2 resources and the Court's time[]" [to be] troubling to say  
3 the least." Id. (citation omitted). The court conceded that  
4 "[p]erhaps when read in isolation, [it] would be willing to  
5 overlook th[at] statement." Id. But, "[w]hen read in  
6 conjunction with plaintiff's motion to vacate, with its  
7 vituperative tone, the court f[oun]d[] that once again  
8 'plaintiff is dangerously close to crossing the line from  
9 permissible use of the judicial process to flagrant  
10 abuse[.]'" Id. (quoting Spain I, 2008 WL 752610, at \*8).

11 After carefully examining the four factors pertinent to a  
12 finding of excusable neglect, this court held that "because  
13 . . . it appear[ed] that plaintiff Spain's delayed filing did  
14 not result from deviousness or willfulness," it was "willing  
15 to give him some leeway." Id. at \*4 (internal quotation  
16 marks omitted). Thus, "the court, in its discretion,  
17 grant[ed] plaintiff an extension of time in which to file and  
18 serve his SAC." Id. at \*5. Concluding, the court added that  
19 "[d]espite [its] leniency this time, plaintiff is forewarned  
20 that it will not look so favorably upon similar future  
21 motions." Id. (footnote omitted).

### 22 C. Spain III

23 In Spain v. EMC Mortg. Co., 2009 WL 464983 (D.Ariz. Feb.  
24 24, 2009) ("Spain III"), this court had before it plaintiff's  
25 SAC and "various potentially dispositive motions, which  
26 called to mind "the immortal words of baseball sage Yogi  
27 Berra . . . , 'This is deja vu all over again.'" Id. at \*1  
28 (footnote omitted). That comment was prompted by the fact

1 that “[d]espite this court’s admonitions and guidance in  
2 terms of repleading, plaintiff . . . Spain’s SAC b[ore] a  
3 striking resemblance to his . . . FAC[.]” Id. The SAC  
4 “appear[ed] to be a slightly shorter ‘cut and paste version’  
5 of the FAC, suffer[ing] from many of the same infirmities as  
6 the FAC.” Id. Necessarily then, defendants’ reiterated their  
7 dismissal arguments pertaining to the FAC. See id. at \*5.

8 Before resolving the motions to dismiss, given the  
9 numerous and in some instances untimely submissions, the  
10 court had to first “clarify the scope” of what it would  
11 “consider[] on th[os]e motions.” Id. at \*2. The court  
12 refused to consider a number of plaintiff’s filings including  
13 four “replies to a reply,” because they were duplicative,  
14 violative of the Local Rules, or simply irrelevant. See id.  
15 at \*2. In a similar vein, the court denied plaintiff’s  
16 motion for reconsideration because he did not comply with  
17 LRCiv 7.2. Id. at \*3. Plaintiff Spain was well aware of  
18 “the necessity of complying with” that Rule “which the court  
19 discussed at some length in Spain II[.]” Id.

20 Next, the court addressed the parties’ respective  
21 standing arguments. In contrast to Spain I, where plaintiff  
22 claimed that he had standing by virtue of his “ownership  
23 interest in Aurora Management[,]” in Spain III plaintiff  
24 sought to establish that he had “an ownership interest in the  
25 Alpine property itself.” Id. at \*4. Plaintiff  
26 unsuccessfully attempted to allege his ownership interest in  
27 the Alpine property by relying upon a “promissory note, [a]  
28 Warranty Deed,” and copies of 30 checks. Id. at \*6.

1 As to the Warranty Deed, this court explained:

2 Despite what plaintiff might believe, that Deed did  
3 not convey any portion of the Alpine property to him  
4 individually. It is plain from the face of the  
5 Warranty Deed that the property was conveyed to the  
6 "ABS PROPERTY TRUST[,]" and to plaintiff solely in  
7 his capacity as trust "Beneficiary[.]" Doc. 88 at 6.  
8 However, "the beneficiary of a trust generally is  
9 not the real party in interest and may not sue in  
10 the name of the trust." Orff v. United States, 358  
11 F.3d 1137, 1148 (9th Cir. 2004) (internal quotation  
12 marks and citation omitted). Thus, as a trust  
13 beneficiary, plaintiff lacks standing to pursue  
14 claims on behalf of the trust.

9 Id. at \*6. In summarizing its holdings, the court reiterated:

10 The Warranty Deed . . . does not support a finding  
11 that plaintiff has standing here because on its face  
12 that Deed shows that plaintiff is a trust  
13 beneficiary and, as such, is not the real party in  
14 interest. Any rights which that Deed may establish  
15 in the subject property are rights belonging to the  
16 ABS Property Trust-not to plaintiff. To the extent  
17 plaintiff believes that he has been deprived of his  
18 rights as a trust beneficiary, then he has sued the  
19 wrong parties.

16 Id. at \*8. Consequently, this court found that "[a]t the end  
17 of the day, at most, the SAC, *just like the FAC*, alleges  
18 injuries which 'were suffered, if at all, by Aurora, Alpha  
19 Mega and/or Bing Four, not by plaintiff.'" Id. (quoting Spain  
20 I, 2008 WL 752610, at \*5 (internal quotation marks and  
21 citation omitted)) (emphasis added). So, although the SAC  
22 "remain[ed] largely incomprehensible and undeniably  
23 confusing[,]" it was "ascertainable . . . that despite  
24 amendment, plaintiff . . . failed to cure the fundamental  
25 defect of standing." Id. at \*6 (citation and internal  
26 quotation marks omitted).

27 Significantly, in Spain III plaintiff "persisted in . . .  
28 using a vituperative tone," despite this court's earlier

1 caution against such conduct. See id. at \*7 (citation and  
2 internal quotation marks omitted). Plaintiff also “cast[]  
3 disparaging remarks against” one of the defense counsel,  
4 asserting that that particular lawyer was “harass[ing]”  
5 plaintiff. Id. This court found that assertion  
6 “[r]emarkabl[e]” given that “arguably, it [wa]s the other way  
7 around.” Id. Continuing, the court explained that, “[as]  
8 the record amply demonstrates, at this point, plaintiff’s  
9 repetitive and non-responsive filings border on harassment.”  
10 Id. However, in large part because the court was dismissing  
11 the SAC with prejudice and directing entry of judgment in  
12 defendants’ favor, and that the case be terminated, the court  
13 saw no need for a pre-filing order at that time. See id. at  
14 \*9.

15 **D. Spain IV**

16 Following dismissal of this action with prejudice and  
17 entry of judgment in defendants’ favor, plaintiff filed a  
18 wholly baseless “Motion for New Trial, Rehearing, and  
19 Reconsideration[.]” See Spain v. EMC Mortg. Co., 2009 WL  
20 2590100, at \*8 (D.Ariz. Aug. 20, 2009) (“Spain IV”). As  
21 recounted in Spain IV, plaintiff based that motion upon a  
22 “purportedly ‘corrected’ Warranty Deed[:.]”

23 Plaintiff claims that the Warranty Deed upon which  
24 the court focused in Spain III had a ‘typographical  
25 error[,] in that it ‘was erroneously made out to ABS  
26 PROPERTY TRUST & B. Spain Beneficiary [,]’ rather  
27 than to plaintiff as ‘an individual[.]’ . . . Since  
28 the issuance of Spain III, plaintiff asserts that  
that ‘error has . . . been corrected . . . by  
re-recording the original deed.’ . . . Apparently  
plaintiff re-recorded the original deed to ‘correct  
grantee information[,]’ on March 6, 2009—ten days  
after the issuance of Spain III. . . . More

1 particularly, rather than indicating as it did in  
2 the Spain III record that the 'GRANTEE' was 'ABS  
3 PROPERTY TRUST B.Spain, Beneficiary[,] the  
4 Warranty Deed now reads that the 'GRANTEE' is 'ABS  
PROPERTY TRUST B. Spain, Beneficiary  
Individually[.]' . . . Plaintiff readily admits  
that he made this 'alteration[.]' . . .

5 Id. at \*1(citations and footnote omitted).

6 The court denied plaintiff's motion for a new trial for  
7 the patently obvious reason that there had been no trial.  
8 See id. at \*3. Likewise, the court denied plaintiff's motion  
9 for reconsideration. Those reasons are incorporated by  
10 reference herein, but several bear repeating as they are  
11 particularly illustrative of plaintiff's dubious litigation  
12 tactics.

13 First, as discussed in Spain IV, "[t]he court disagrees  
14 with plaintiff's characterization of the original deed as  
15 containing a 'typographical' error." Id. at \*5. As this  
16 court reasoned:

17 This supposed typographical error arises from the  
18 fact that the conveyance there was to plaintiff in  
19 his capacity as a trust 'beneficiary' as opposed to  
20 'individually.' Transposing an entire word,  
21 especially when those words are spelled quite  
22 differently, is not a mere typographical error,  
23 despite how plaintiff tries to portray it. A  
typographical error would be, for example, the  
24 difference between the word 'data' and the word  
'date.' It is easy to see how in transcription those  
two words inadvertently could be interposed one for  
the other. The same is not true, however, of the  
words 'beneficiary and 'individually.'

24 Id. Second, as further explained in Spain I:

25 [T]he timing of plaintiff's 'discovery'  
26 significantly undermines his argument that the  
original deed was 'erroneously made out.' . . . That  
27 'discovery' was not until two and a half years  
after the Warranty Deed is dated, and after  
28 plaintiff reviewed Spain III and realized that his  
trust beneficiary status was disadvantageous to him

1 in terms of pursuing this litigation. . . . Thus,  
2 the court gives no credence to plaintiff's assertion  
3 that the original Warranty Deed had a typographical  
4 error.

5 Regardless of the foregoing, what is abundantly  
6 clear is that the 'corrected' Deed did not surface  
7 until more than a week after the issuance of *Spain*  
8 *III* when apparently plaintiff re-recorded the Deed  
9 to reflect the supposedly new grantee information.

10 Id. at \*6 (citations omitted). As the foregoing readily  
11 shows, in pursuing these claims, plaintiff will go to almost  
12 any length, including altering documents.

13 After finding plaintiff's remaining reconsideration  
14 arguments to be without merit, the court was "compelled to  
15 comment, as it ha[d] previously, upon the manner in which  
16 plaintiff has conducted this litigation." Id. at \*7.  
17 Essentially, the court found that "since *Spain I*" plaintiff  
18 "has done nothing to dispel the court of th[e] view[]" that  
19 he was coming "dangerously close to crossing the line from  
20 permissible use of the judicial process to flagrant abuse[.]"  
21 Id. (citation and internal quotation marks omitted). The  
22 court thus advised the parties that it was "seriously  
23 considering entering a pre-filing order . . . precluding any  
24 further filings by plaintiff in this action." Id. at \*8.  
25 The court suggested that "[s]uch an order also might,  
26 perhaps, preclude plaintiff from any further filings  
27 generally as to the transaction which is the subject of this  
28 lawsuit[.]" Id.

The court allowed plaintiff "15 days from the date of  
entry of th[at] order in which to file and serve a memorandum  
of law and any supporting documentation which he deem[ed]

1 appropriate directed to the issue of the propriety of  
2 entering a pre-filing order[.]” Id. Defendants were given “10  
3 days thereafter to file and serve a response, if any[,]” but  
4 the court plainly stated, “[n]o reply shall be permitted  
5 unless so directed by the court.” Id.

6 The parties timely filed their respective memoranda in  
7 accordance with Spain IV. Blatantly disregarding that order,  
8 plaintiff filed two untimely and unauthorized memoranda - a  
9 “Supplemental Information to Memorandum of Points and  
10 Authorities against the Entry of a pre-filing Order” (Doc.  
11 272), and a “Supplement” entitled “B. Spain’s memorandum of  
12 law objecting to the propriety of Judge Broomfield’s entering  
13 a pre-filing order **and** motion for a pretrial scheduling  
14 conference” (Doc. 273) (bold emphasis added). The court will  
15 not consider the merits of the “Supplemental Information” or  
16 the second memorandum of law as they are in direct  
17 contravention of Spain IV, but it will briefly address  
18 plaintiff’s motion for a pretrial scheduling conference.

19 At the same time, the court recognizes that those two  
20 untimely and unauthorized filings are relevant to the issue  
21 of whether a pre-trial order is necessary in this case.  
22 Those two filings reaffirm plaintiff’s disregard for the  
23 judicial process and, more specifically, orders of this  
24 court. This time instead of waging personal attacks on  
25 defense counsel, plaintiff has elected to attack the court in  
26 a similarly inappropriate manner. Furthermore, plaintiff’s  
27 “Supplemental Information” evinces his declared intent to  
28 “‘wast[e] judicial resources and the Court’s time[.]’” See

1 Spain II, 2008 WL 2328358, at \*3 (citation omitted). That  
2 submission consists of nothing more than plaintiff's 20 page  
3 "Response to Motion to Enjoin Vexatious Litigation" in  
4 Eagleburger II, and Judge Silver's order in Eagleburger I  
5 denying plaintiff's motion to vacate therein.

## 6 Discussion

### 7 I. Pre-filing Order

8 Pursuant to the All Writs Act, 28 U.S.C. § 1651(a),  
9 district courts have "the inherent power to enter pre-filing  
10 orders against vexatious litigants." Molski, 500 F.3d at  
11 1057 (citation omitted). That power is not unfettered  
12 though. In De Long v. Hennessey, 912 F.2d 1144 (9<sup>th</sup> Cir.  
13 1990), the Ninth Circuit "outlined four factors for district  
14 courts to examine before entering pre-filing orders." Id.  
15 (citation omitted). "First, the litigant must be given  
16 notice and a chance to be heard before the order is entered."  
17 Id. (citing De Long, 912 F.2d at 1147). Second, the district  
18 court must compile 'an adequate record for review.'" Id.  
19 (quoting De Long, 912 F.2d at 1148). These two factors "are  
20 procedural considerations - that is, the factors define [a]  
21 specific method or course of action that district courts  
22 should use to assess whether to declare a party a vexatious  
23 litigant and enter a pre-filing order." Id. at 1057-58  
24 (internal quotation marks and citation omitted).

25 The next two factors "are substantive considerations-that  
26 is, the[se] factors help the district court define who is, in  
27 fact, a 'vexatious litigant' and construct a remedy that will  
28 stop the litigant's abusive behavior while not unduly

1 infringing the litigant's right to access the courts." Id.  
2 at 1058. The first of these substantive factors requires the  
3 district court to "make substantive findings about the  
4 frivolous or harassing nature of the plaintiff's litigation."  
5 Id. at 1057 (citation omitted). The next substantive factor  
6 requires that "the vexatious litigant order . . . be narrowly  
7 tailored to closely fit the specific vice encountered.'" Id.  
8 (quoting De Long, 912 F.2d at 1148). The court will consider  
9 these factors seriatim in light of the extensive record  
10 outlined herein regarding plaintiff's litigation tactics.

11 **A. Notice and Opportunity to be Heard**

12 Contemplating the entry of a pre-filing order against  
13 plaintiff, in Spain IV, this court indicated its "[k]een[]  
14 aware[ness] of the ramifications of such an order[.]" Spain  
15 IV, 2009 WL at \*8. Therefore, "in accordance with *De Long v.*  
16 *Hennessey*, . . . , and its progeny," the court g[a]ve[]  
17 plaintiff notice . . . that it is considering entering such  
18 a[] [pre-filing] order." Id. (citation omitted). Further,  
19 the court explicitly advised plaintiff, "[a]s the *Hennessey*  
20 line of cases requires, [he] shall have an opportunity to be  
21 heard in this regard." Id.

22 As plaintiff readily concedes in his "Memorandum of  
23 Points and [A]uthorities [A]gainst the Entry of a [P]re-  
24 filing Order[,] . . . *this obviously is [his] opportunity to*  
25 *be heard[.]*" Memo. (Doc. 270) at 4:21 (emphasis added). The  
26 court thus finds that plaintiff had adequate notice and an  
27 opportunity to be heard, as this Circuit requires prior to  
28 the entry of a pre-filing order.

1           B. Record for Review

2            "An adequate record for review should include a listing  
3 of all the cases and motions that led the district court to  
4 conclude that a vexatious litigant order [i]s needed." De  
5 Long, 912 F.2d at 1147. Here, as just discussed, that record  
6 consists of plaintiffs' litigation activities and resultant  
7 court orders in this action, as well as those in three other  
8 actions. What emerges from that record is a disturbing  
9 pattern by plaintiff of repetitive and baseless filings  
10 against these defendants. The record further shows that  
11 plaintiff's conduct herein is not isolated. The record is  
12 replete with orders by this court and others discussing the  
13 meritless nature of plaintiff's claims, as well as his  
14 numerous problematic filings and questionable litigation  
15 tactics.

16           C. Frivolous or Harassing Nature of Filings

17           The third De Long factor "gets to the heart of the  
18 vexatious litigant analysis[.]" Molski, 500 F.3d at 1059. In  
19 making the necessary "substantive findings as to the  
20 frivolous or harassing nature of the litigant's actions[,]  
21 . . . the district court must look at both the number and  
22 content of the filings as indicia of the frivolousness of the  
23 litigant's claims." Id. (citations and internal quotation  
24 marks omitted) (emphasis added). A showing of litigiousness  
25 is not enough. "The plaintiff's claims must not only be  
26 numerous, but also be patently without merit." Id. (citation  
27 and internal quotation mark omitted). In fact, in Molski the  
28 Ninth Circuit "reemphasize[d] that the simple fact that a

1 plaintiff has filed a large number of complaints, standing  
2 alone, is not a basis for designating a litigant as  
3 vexatious." Id. at 1061 (citations and internal quotation  
4 marks omitted). The Molski Court further "emphasize[d] that  
5 the textual and factual similarity of a plaintiff's  
6 complaints, standing alone, is not a basis for finding a  
7 party to be a vexatious litigant." Id.

8 By the same token though, "[f]rivolous litigation is not  
9 limited to cases in which a legal claim is entirely without  
10 merit." Id. at 1060. "It is also frivolous for a claimant  
11 who has some measure of a legitimate claim to make false  
12 factual assertions." Id. A person "may cross the line into  
13 frivolous litigation by asserting facts that are grossly  
14 exaggerated or totally false." Id. at 1062.

15 The Ninth Circuit has found that "the Second Circuit's  
16 five-factor standard [adopted in Safir v. United States  
17 Lines, Inc., 792 F.2d 19 (2<sup>nd</sup> Cir. 1986)] provides a helpful  
18 framework for applying" this Circuit's two substantive  
19 factors - findings of frivolousness or harassment and  
20 narrowly tailored pre-filing orders. See id. at 1058  
21 (citation omitted). The five Safir factors are:

22 (1) the litigant's history of litigation and in  
23 particular whether it entailed vexatious, harassing,  
24 or duplicative suits; (2) the litigant's motive in  
25 pursuing the litigation, for example, whether the  
26 litigant had a good faith expectation of prevailing;  
27 (3) whether the litigant is represented by counsel;  
28 (4) whether the litigant has caused unnecessary  
expense to the parties or placed a needless burden  
on the courts; and (5) whether other sanctions would  
be adequate to protect the courts and other parties.

Id. (citation omitted). Employing that framework to the

1 record before it, it is easy to see the need for a carefully  
2 circumscribed pre-filing order against plaintiff B. Spain.

3 **1. Plaintiff's Litigation History**

4 Plaintiff Spain's litigation history, as explicated  
5 herein, reveals a persistent litigant who unceasingly  
6 continues to pursue claims against parties, even when those  
7 claims are clearly without merit. Despite being given  
8 considerable leeway by this court, plaintiff did not address  
9 the numerous substantive defects in his complaints. Instead,  
10 when he did not succeed on the merits, plaintiff resorted to  
11 filing numerous motions, some of which were duplicative, many  
12 of which were largely incomprehensible, and all of which had  
13 little or no bearing on the issues.

14 **2. Litigant's Motive**

15 Given the number of defendants, many whom have an  
16 extraordinarily attenuated, if any, relationship to the  
17 events complained of, and the vitriol frequently expressed in  
18 plaintiff's filings, plaintiff Spain's primary motive here  
19 clearly appears to be to harass defendants. See Gabor v.  
20 County of Santa Clara Bd. of Supervisors, 2008 WL 902407, at  
21 \*7 (N.D.Cal. Mar. 31, 2008), aff'd without pub'd opinion, 363  
22 Fed.Appx. 456 (9<sup>th</sup> Cir. 2010) ("It is unclear whether  
23 plaintiffs[] are bringing this action for purposes of  
24 harassing the named defendants, although based on the number  
25 of defendants and the vitriol expressed in the instant  
26 complaint, it would appear that there may be some intent to  
27 harass.); see also Boustred v. Government, 2008 WL 4287570,  
28 at \*2 (N.D.Cal. Sept. 17, 2008) (three actions sufficient to

1 support vexatious litigant order where actions contained  
2 "similar rambling, largely incomprehensible claims" and named  
3 "numerous defendants including ones having no connection" to  
4 conduct alleged).

### 5 **3. Represented by Counsel**

6 Plaintiff is appearing *pro se* here, as he did in  
7 Eagleburger I and Eagleburger II, and at various times during  
8 the bankruptcy proceeding. Generally courts are protective  
9 of *pro se* litigants. As this court first admonished  
10 plaintiff in Spain I, however, "[f]lagrant abuse of the  
11 judicial process cannot be tolerated because it enables one  
12 person to preempt the use of judicial time that properly  
13 could be used to consider meritorious claims of other  
14 litigants.'" Spain I, 2008 WL 752610, at \*8 (quoting Molski,  
15 500 F.3d at 1057). Therefore, plaintiff Spain's *pro se*  
16 status does not excuse his highly questionable and harassing  
17 litigation tactics. Cf. Doran v. Vicorp Restaurants, Inc.,  
18 407 F.Supp.2d 1115, 1118 (C.D.Cal. 2005) ("Since fewer  
19 sanctions are available against a *pro per* litigant, the power  
20 to declare him vexatious becomes an important tool for the  
21 courts to manage their docket and prevent frivolous claims.")

### 22 **4. Unnecessary Expense or Needless Burden**

23 As earlier stressed, plaintiff threateningly declared  
24 that "if an extension of time [wa]s not granted, he w[ould]  
25 'wast[e] judicial resources and the Court's time[.]'" Id. at  
26 \*3 (quoting Resp. (Doc. 136)) (emphasis added). Plaintiff  
27 made good on his word. Plaintiff's modus operandi throughout  
28 this litigation has been one of persistently filing motions

1 and other submissions which are baseless. The court has been  
2 considerably lenient with plaintiff, primarily because of his  
3 *pro se* status. Rather than productively using the  
4 opportunities which the court has accorded him, plaintiff has  
5 "forced defendants to undertake unnecessary expense to defend  
6 themselves from baseless claims[,] and respond to numerous  
7 unwarranted filings. See Gabor, 2008 WL 902407, at \*7. In  
8 the same way, this court has expended considerable time and  
9 effort reviewing and ruling on plaintiff's baseless claims  
10 and motions. See id. For example, as the Poli & Ball  
11 defendants accurately stated, when plaintiff filed his SAC,  
12 which, "bore a 'striking resemblance to his [FAC][,]'" they  
13 and the other defendants were "forced . . . to file an  
14 additional round of motions to dismiss." Resp. (Doc. 274) at  
15 2:18-19 (quoting Spain III, 2009 WL 464983, at \*1). And,  
16 instead of "respond[ing] to the merits of those motions,  
17 plaintiff resorted to personal attacks upon counsel[,] as  
18 mentioned earlier. Id. at 2:19-20 (citation omitted).  
19 Thus, the court finds that plaintiff Spain has "caused  
20 unnecessary expense to the parties and ha[s] placed a  
21 needless burden on the courts." See Gabor, 2008 WL 902407,  
22 at \*7.

### 23 **5. Adequacy of Other Sanctions**

24 When viewed in isolation, plaintiff's filings and  
25 litigation tactics are problematic. When viewed in the  
26 aggregate, however, and in light of the governing legal  
27 principles, their vexatious and harassing nature become  
28 patently obvious. As the record demonstrates, it seems that

1 unless and until a court expressly prohibits plaintiff Spain  
2 from future filings, he will persist in abusing the court's  
3 process by filing meritless claims and motions. Especially  
4 because plaintiff has not heeded any of this court's prior  
5 warnings regarding the manner in which he has conducted this  
6 litigation, the need for a carefully circumscribed pre-filing  
7 order is readily apparent.

8 **D. Narrow Tailoring**

9 "[C]autious[ly] review[ing] . . . the pertinent  
10 circumstances[,]" as this Circuit requires, the court finds  
11 that it is necessary and proper to enter a pre-filing order  
12 in the format set forth below. See Molski, 500 F.3d at 1057.  
13 This is part of this courts "'affirmative obligation to  
14 ensure that judicial resources are not needlessly squandered  
15 on repeated attempts by litigants to misuse the courts.'" See Englerious v. U.S. Government, 2009 WL 1393558, at \*2  
16 (W.D.Wash. May 15, 2009) (quoting O'Loughlin, 920 F.2d at  
17 618.  
18

19 In issuing this pre-filing order, the court stresses the  
20 limited nature of the relief which it is granting. Plaintiff  
21 is enjoined from making any further filings in *this action*,  
22 Spain v. EMC Mortg. Co., et al., CV 07-0308 PHX-RCB.  
23 Plaintiff is further enjoined from filing any further actions  
24 in the United States District Court for the District of  
25 Arizona pertaining to the underlying real property  
26 transaction, *i.e.*, the Alpine property, which is the subject  
27 of this lawsuit, without first following the procedures  
28 outlined below.

1 **II. Motion for Pre-Trial Scheduling Conference**

2 In light of the foregoing, the court hereby DENIES as  
3 moot plaintiff Spain's motion for a pre-trial scheduling  
4 conference (Doc. 273).

5 **Conclusion**

6 For the reasons set forth above, the court finds that  
7 plaintiff B. Spain has engaged in vexatious litigation in the  
8 present action. Therefore, because this action is closed, no  
9 further pleadings or motions are allowed herein, *i.e.*, Spain  
10 v. EMC Mortg. Co., et al., No. CV 07-0308-PHX-RCB. Further,  
11 plaintiff shall not file any other actions in the United  
12 States District Court for the District of Arizona pertaining  
13 to the underlying real property transaction, *i.e.*, the Alpine  
14 property, which is the subject of this lawsuit, without  
15 complying with the following procedure. Plaintiff B. Spain  
16 shall first lodge the proposed complaint with this Court in  
17 accordance with section II(H) of the Electronic Case Filing  
18 Administrative Policies and Procedures Manual for the  
19 District of Arizona. No defendant need initially respond to  
20 that lodged complaint, however.

21 Instead:

22 [this] Court shall review the [lodged] complaint  
23 and determine whether the complaint should be  
24 summarily denied, or whether it should proceed. If  
25 the Court summarily denies the relief requested and  
26 dismisses the complaint, the summary denial and  
27 dismissal order and complaint shall be placed on the  
28 docket. If th[is] Court allows the complaint to  
proceed, th[is] Court will direct the Clerk of Court  
to open a proceeding, assign a case number, and Mr.  
[Spain] may proceed according to the Federal Rules  
of [Civil] Procedure or by other appropriate  
[lawful] means.

1 See In re GTI Holdings, LLC, 420 B.R. 1, 17 (Bankr. D.Ariz.  
2 2009).

3 **IT IS ORDERED:**

4 (1) that plaintiff B. Spain is **ENJOINED** from filing in  
5 this court, subject to the procedures set forth above, any  
6 suit against defendants pertaining to the Alpine Property;  
7 and

8 (2) that plaintiff B. Spain's Motion for a Pretrial  
9 Scheduling Conference is **DENIED** (Doc. 273).

10 DATED this 27th day of September, 2010.

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
\_\_\_\_\_  
Robert C. Broomfield  
Senior United States District Judge

Copies to plaintiff *pro se* and counsel of record