

No. 70751-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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RICHARD AZPITARTE,

Plaintiff-Appellant,

v.

DANIEL SPINO, et. al.,

Defendant-Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Elizabeth Berns, Judge

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RESPONDENT SPINO'S BRIEF

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I.

**REPLY STATEMENT OF THE CASE**

In 2004, the King County Superior Court ordered Richard Azpitarte to remove all but 12 of the 80 vehicles he stored on his two residential lots in violation of King County ordinances within 60 days or face removal of those vehicles by the County. He did not comply, so the County removed all of them from his property. The County lawfully auctioned off the seized vehicles in March and April of 2005. Mr. Spino purchased a 1969 Chevelle at one of these two auctions.

On August 2, 2012, Azpitarte sued Daniel Spino for conversion, fraud, civil conspiracy and replevin. He sought monetary damages and return of the 1969 Chevelle. CP 25-30.

Spino moved for summary judgment and argued that Azpitarte's suit was barred by the three year statute of limitations in RCW 4.16.080. CP 33-38. Spino relied, in part, on this Court's decision in *Azpitarte v. Sauve*, 172 Wash. App. 1050 (2013), a case based upon the same facts and circumstances. CP 40-42.

The trial court held that was no genuine issue of material fact in this case. She found that Azpitarte was on notice that the Chevell was being towed and auctioned in 2005. She also found that Spino was a bona

fide third party purchaser. More than three years had passed since that date. Thus, she concluded that Azpitare's claims were barred by RCW 4.16.080.

Azpitarte's briefing is confusing. However, it appears that that gravamen of his argument is that he did not "discover" the basis of his claims against Spino until 2012 because there were no "real auctions" of his vehicles and the title to the 1969 Chevelle was transferred to Spino via a "forged" document. To the extent that other facts are necessary to explain Spino's response, they will be discussed below.

## **II. ARGUMENT**

### **1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN THIS CASE.**

This Court reviews an order granting summary judgment de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When reviewing a summary judgment order, this Court reviews the evidence in the light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). The burden is on the moving party to show an absence of evidence supporting the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216,

225, 770 P.2d 182 (1989). After the moving party meets this burden, the nonmoving party must set forth specific facts rebutting the moving party's contentions and demonstrating that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party “may not rely on ... having its affidavits considered at face value.” *Seven Gables*, 106 Wn.2d at 13. Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). When reasonable minds could reach only one conclusion from the evidence, questions of fact may be determined as a matter of law. *Rutt v. King County*, 125 Wn.2d 697, 703–04, 887 P.2d 886 (1995).

In his opening brief, Azpitarte admits that he knew in 2006 that his vehicles had been towed and that he actually litigated the issue at that time. Appellant’s Opening Brief at 15. See also *King County v. Azpitarte*, 136 Was. App. 1021 (2006). The only facts about Spino and the 1969 Chevelle are contained in the brief on page 13. Azpitarte does not allege that he did not know that the 1969 Chevell had been towed and auctioned. Instead, he asserts that there was something “suspicious” about the title transfer to Spino after the auction. Relying on *Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163 (1997), Azpitarte claims he was entitled to

application of the discovery rule because this alleged “fraud” prevented him from discovering the factual basis of his allegations until 2007.

First, Azpitarte cites no facts from the record to support his bald claim that Spino participated in any fraud or forgery. In fact, read literally, Azpitarte seems to be alleging that Gayle Sauve forged Spino’s name on an “AVR.” Petitioner’s Brief at 13. Azpitarte goes even further and alleges that “since the titling involved the use of obviously forged documents, there was a strong possibility that the defendant’s had help from someone inside the DOL.” Appellant’s Opening Brief at 44. Assuming that there was actual proof of any of these completely unsupported allegations, then any fraud was committed by Sauve and unnamed persons at the Washington Department of Licensing, not Spino.

Second, Azpitarte fails to identify any evidence to demonstrate that he could not have, through the exercise of due diligence, discovered the factual basis for his claims. The evidence is actually to the contrary. His underlying claim is the injury he suffered through the loss of his vehicles. He had notice of that injury in 2004 when the cars were seized and again in 2005 when the vehicles were auctioned. Moreover, his near constant litigation of the same underlying events since they transpired belies any claim that he could not discover the basis for his claims before the limitations period expired in 2008. See e.g. *Azpitarte v. Sauve*, 67715-2,

*King County v. Azpitarte*, #66558-8-I and *King County v. Azpitarte*, #56320-3-I. See also two cases in the United States District Court for the Western District of Washington, *Azpitarte v. King County*, 07-01998, *Azpitarte v. King County*, 10-01186.

The remainder of Azpitarte's argument appears to reference his allegations against Suave and Cedar Rapids Towing. Those allegations appear to be that Azpitarte was "denied his redemption rights" and his allegation that "there is a reasonable inference that no legal auction" of the vehicles took place. But again, these allegations are not based upon any facts found in the record and have nothing to do with Spino.

Here the trial court correctly determined that, even taking the established facts in a light most favorable to the moving party, there was no genuine issue of material fact that Azpitarte had any claim against Spino and, if he did, any such claims were barred by the statute of limitations.

2. THE TRIAL COURT DID NOT ERR IN DENYING SPINO'S MOTION TO AMEND HIS COMPLAINT TO ALLEGE "CIVIL RICO."

On April 13, 2013, Azpitarte filed a motion asking the court to allow the filing of a second amended complaint. "to add more parties and RICO causes." CP 76. He stated that:

At the time of filing this suit, the plaintiff was unaware, or did not have proof that the additional parties were involved. He also did not know who was responsible for injuring him nor that a pattern of RICO had taken place.

*Id.* Azpitarte fails to cite to any specific order by the trial court denying this motion to amend.

However, to the extent that the order on summary judgment “denied” this motion, the trial judge was correct. Just as with his other claims, Azpitarte’s RICO allegations were based upon the notion that defendant Suave “sold the car to Defendant Spino without title to conceal the fact that they were involved in the theft and they had no obtained the care through a legitimate auction.” CP 62. Again, this allegation is not supported by the record. And, these facts might allege some sort of RICO violation against others but they do not establish such a claim against Spino.

Finally, Azpitarte makes no attempt to show that these additional allegations were brought within the proper statute of limitations. See also Appendix 1, Order in *Azpitarte v. Spinos et. al.*, # 13-1413. Thus, any amendment of the complaint would have been futile.

3. BECAUSE THIS APPEAL IS FRIVOLOUS, THIS COURT SHOULD AWARD THE SPINO’S COMPENSATORY DAMAGES IN THE AMOUNT OF \$5,000 AND THEIR ACTUAL ATTORNEYS FEES AND COSTS IN THIS MATTER. .

In his pleadings in this case Azpitarte alleged without any basis in fact or law that the Spinosa used a “forged” abandoned vehicle report to “fraudulently” obtain one of vehicles removed and sold at auction in order to abate Azpitarte’s code violations. The trial court found this litigation frivolous. This litigation is nearly identical to the litigation Azpitarte brought in *Azpitarte v. Suave*, 67715-2. In that litigation, the trial court granted summary judgment in favor of Suave and this Court affirmed that decision on appeal. Nonetheless, Azpitarte has pursued this nearly identical frivolous litigation after this Court rejected Azpitarte’s claims in *Suave*. Worse yet, on April 14, 2013, just weeks after summary judgment in this case, Azpitarte filed a civil RICO action in the United States District Court for the Western District of Washington, alleging that the Spinosa and others trafficked in stolen vehicles (the same vehicles that were at issue here). *Azpitarte v. Spinosa et. al.*, # 13-1413. That litigation has now been dismissed as well. In dismissing that case, Judge Martinez noted that the courts do

not look fondly on [Azpitarte’s] ever more futile efforts to relitigate a series of events that multiple courts have decided do no amount to any actionable offense. The precious time and resources of the courthouse must be reserved for claimants with viable grievances and guarded against depletion by individuals who already know their efforts to be in vain.

See Appendix I at page 9.

Under RAP 18.9(a), the Court has the discretion to “order a party or counsel ... who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to” the party harmed. RAP 18.9(a). Applying this rule, this Court has held that

[i]n determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

*Streater v. White*, 26 Wn.App. 430, 434–35, 613 P.2d 187 (1980). In light of *Suave*, there is no question that this appeal is frivolous. There are no debatable issues upon which reasonable minds can differ. Azpitarte knew that he had no reasonable possibility of reversal given this Court’s decision in *Azpitarte v. Sauve*, #67715-2. The appeal is brought solely for purposes of delay and to harass and defame the Spinosa. Azpitarte has caused Spino to incur thousands of dollars of attorney’s fees in the trial court, the federal district court and this Court.

Despite the comprehensive order dismissing his RICO claims against Spino in the Western District of Washington, he has filed a motion to set aside Judge Martinez's order. See Appendix 2, Motion to Set Aside Judgment. In that motion he continues to assert, *without proof*, that the basis of his claim against Spino is that "there were no real auctions" of the vehicles and that the title transfers were based upon "forged documents." Thus, in order to dissuade Azpitarte from continuing this frivolous litigation against the Spino's this Court should award the Spino's \$5,000 in compensatory damages and their actual attorney's fees and costs in this defending the judgment in this Court.

### III. CONCLUSION

This Court should affirm the trial court and award the Spino's \$5,000 in compensatory damages and their actual attorney's fees and costs.

DATED this 5<sup>th</sup> day of January, 2015.

Respectfully submitted,

  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Spino

**CERTIFICATE OF SERVICE**

I hereby certify that on the January 5, 2015, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

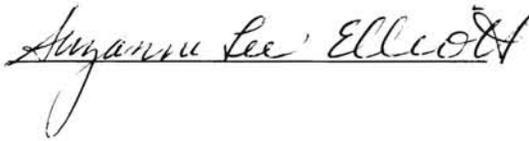
Mr. Richard Azpitarte  
153 South 120th Street  
Seattle WA 98168

Burien Collision Center, Inc.  
243 W. 150th St.  
Burien, WA, 98057

Muscle Cars Northwest Inc.  
109 S. Tillicum Street,  
Renton, WA 98166

Daniel and Bonnie Spino  
20733 SE 276th Street  
Maple Valley WA 98038

Gayle Sauve  
24925 235th Way S.E.  
Maple Valley, WA, 98038



# **APPENDIX 1**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD AZPITARTE,

Petitioner,

v.

GAYLE SAUVE and JANE DOE SAUVE,  
individually and their marital community;  
BURIEN COLLISION CENTER, INC.;  
DANIEL SPINA and JANE DOE SPINO,  
individually and their marital community;  
WILLIAM WESTOVER and JANE DOE  
WESTOVER, individually and their marital  
community; MUSCLE CARS NORTHWEST,  
INC.; and CHARLES LILLARD and JANE  
DOE LILLARD, individually and their marital  
community,

Respondents.

Case No. C13-1413RSM

ORDER OF DISMISSAL

THIS MATTER comes before the Court upon Motions to Dismiss by Defendants Daniel and Jane Doe Spino (Dkt. # 8), Jane Doe and William Westover (Dkt. # 16), and Muscle Cars Northwest, Inc. (Dkt. # 17), as well as Motion to Allow Service of Defendants by Plaintiff Richard Azpitarte (Dkt. # 12). Having considered the parties' memoranda filed in support and

1 opposition as well as the remainder of the record, the Court dismisses Plaintiff's Complaint  
2 without leave to amend for the reasons stated herein.

3 **BACKGROUND**

4 Plaintiff Richard Azpitarte, proceeding *pro se* and *in forma pauperis*, filed the instant  
5 Complaint against ten named and ten Doe Defendants, for alleged violations of the Racketeer  
6 Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*<sup>1</sup> Specifically,  
7 Plaintiff accuses the named Defendants of "conspir[ing] to steal automobiles belonging to [him]"  
8 and of "conspir[ing] to form an enterprise whose purpose is [sic] engage in auto theft through a  
9 series of predicate acts that have taken place over the last ten years." Dkt. # 1 ("Compl."), ¶ 14.  
10

11 Plaintiff's Complaint contains various allegations of fraud related to the purchase, sale,  
12 and titling of two vehicles formerly in the possession of Plaintiff. Plaintiff asserts that on August  
13 26 and 27, 2004, 120 automobiles were towed from his lot in an abatement action by King  
14 County. *Id.* at ¶ 15. Plaintiff alleges that in 2005, he approached Defendant Gayle Sauve about  
15 his possession of the vehicles, which Sauve disclaimed. *Id.* at ¶ 16. The Complaint further asserts  
16 that on February 24, 2005, Defendants Sauve and Burien Collision Center, Inc. ("Burien")  
17 obtained Abandoned Vehicle Reports ("AVR") for a 1969 Chevelle and a 1969 Chevy Nova  
18 through an illegitimate auction, which they thereafter sold to Defendants Spino and Westover. *Id.*  
19 at ¶¶ 23 – 31. Plaintiff claims that the sale of the Chevelle "had not been consummated within  
20 90 days of the creation of the AVR as required by law" and that the AVR was "fraudulently  
21 issued [] in lieu of Title." *Id.* at ¶ 29. As regards the Chevy Nova, Plaintiff asserts that  
22 Defendants forged the AVR to misrepresent the vehicle's identification number ("VIN") in order  
23

24  
25  
26 <sup>1</sup> While Plaintiff states in the introduction to his Complaint that he seeks remedies for "related  
27 state tort claims," Dkt. # 1, p. 1, he has failed to plead any causes of action beyond RICO  
28 violations.

1 to make it appear that they possessed legal title to the car. *Id.* at ¶ 32. In addition, Plaintiff alleges  
2 that on October 19, 2011, Defendants Westover and Muscle Cars Northwest, Inc. (“Muscle  
3 Cars”) “presented the fraudulently obtained title to the Washington State Patrol,” whereby they  
4 “misrepresented to the State Patrol that the wrong VIN number was an accident or mistake in  
5 order to obtain a clean title.” *Id.* at ¶¶ 54-55.  
6

7 Plaintiff asserts two causes of action in violation of the RICO Act stemming from these  
8 activities. First, he asserts that Defendants participated in a pattern of racketeering activity in  
9 violation of 18 U.S.C. §§ 1961(5) & 1962(c). In addition, Plaintiff alleges that Defendants  
10 entered into a conspiracy to engage in a pattern of racketeering activity in violation of 18 U.S.C.  
11 § 1962(d). As predicate acts of racketeering activity, Plaintiff claims that Defendants “have  
12 engaged in trafficking in certain automobiles and parts in violation of 18 USC 2321, mail fraud,  
13 wire fraud and other activities to conceal and then corruptly license a number of vehicles  
14 belonging to the plaintiff.” Compl. at ¶ 59.  
15

16 Defendants Spino, Muscle Cars, and Westover move the Court to dismiss Plaintiff’s  
17 Complaint in its entirety and with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6)  
18 on the grounds that Plaintiff’s claims are barred by the applicable statute of limitations, subject to  
19 collateral estoppel, and insufficiently pled. Plaintiff, in opposition, requests permission to amend  
20 in order to cure any deficiencies and further seeks the Court’s permission to serve Defendants  
21 Sauve and Burien by mail or publication as he has been unable to accomplish service in person.  
22  
23

#### 24 LEGAL STANDARD

25 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient  
26 factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Id.* at 678  
27 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Where the plaintiff fails to  
28

1 “nudge[] [her] claims across the line from conceivable to plausible, [her] complaint must be  
2 dismissed.” *Twombly*, 550 U.S. at 570. A claim is facially plausible if the plaintiff has pled  
3 “factual content that allows the court to draw the reasonable inference that the defendant is liable  
4 for the misconduct alleged.” *Id.* “Threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555).  
6 In making this assessment, the court accepts all facts alleged in the complaint as true, and makes  
7 all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County*  
8 *Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).

9  
10 “The court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P.  
11 15(a)(2). Where claims are dismissed under Rule 12(b)(6), the court “should grant leave to  
12 amend...unless it determines that the pleading could not possibly be cured by the allegation of  
13 other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination,  
14 the Court liberally construes allegations in a complaint brought by a *pro se* plaintiff. *See Haines*  
15 *v. Kerner*, 404 U.S. 519, 520 (1972). This obligation is particularly important where a violation  
16 of civil rights is alleged. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). Nonetheless,  
17 leave to amend need not be granted, and dismissal may be ordered with prejudice, if amendment  
18 would be futile. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998); *see also*  
19 *Lucas v. Dept. of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

20  
21 Ordinarily, consideration of evidence extrinsic to the pleadings converts a Rule 12(b)(6)  
22 motion into a motion for summary judgment pursuant to Rule 56. *See* Fed. R. Civ. P. 12(b)(6);  
23 *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court may, however, take  
24 judicial notice under Fed. R. Evid. 201 of “matters of public record” without converting a motion  
25 to dismiss into one for summary judgment. *Id.* at 689. Matters that are properly the subject of  
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1 judicial notice include proceedings in courts within and without the federal system that are  
2 directly related to issues at hand. *See U.S. ex rel. Robinson Rancheria Citizens Council v.*  
3 *Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). “On a Rule 12(b)(6) motion to dismiss, when a  
4 court takes judicial notice of another court’s opinion, it may do so not for the truth of the facts  
5 recited therein, but for the existence of the opinion, which is not subject to reasonable dispute  
6 over its authenticity.” *Id.* at 690 (internal quotations omitted).  
7

8 With these principles in mind, this Court takes judicial notice of several related  
9 proceedings initiated by Plaintiff against many of the instant Defendants. On June 27, 2013,  
10 King County Superior Court dismissed Plaintiff’s Complaint against Dan Spino, Gayle and Jane  
11 Doe Sauve, Burien, and Muscle Cars for replevin, conversion, and fraud upon finding that “no  
12 genuine issue of material fact exists that Plaintiff’s vehicles were towed pursuant to lawful court  
13 order,” that Spino and Muscle Cars “are bona fide third party purchasers under the law and  
14 Plaintiff has no claim against them,” and that the applicable three-year statute of limitations had  
15 expired as Plaintiff “has now chosen to wait 7 years to bring an action.” *Azpitarte v. Sauve et al.*,  
16 No. 12-2-10511-1KNT (June 27, 2013); *see also* Dkt. # 9, Ex. B. King County Superior Court  
17 dismissed a virtually identical lawsuit against Defendants Sauve and Burien on similar grounds  
18 in 2011. *Azpitarte v. Sauve et al.*, Case No. 10-2-42874-7KNT (Aug. 1, 2011), *aff’d* No.67715-2-  
19 I (Wash.App.Div.1 Jan. 22, 2013); *see also* Dkt. # 9, Ex. D. Plaintiff has also unsuccessfully  
20 attempted to litigate in this court the underlying seizure of the vehicles. *See, e.g., Azpitarte v.*  
21 *King County, et al.*, Case No. 07-cvp-01998-JCC, Dkt. # 78 (Mar. 3, 2009) (dismissing action for  
22 failure to prosecute and to comply with court orders).  
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#### 26 ANALYSIS

27 The Court agrees with Defendants that Plaintiff’s Complaint is subject to dismissal on  
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1 several grounds. First, Plaintiff's stated causes of action are barred by the four-year statute of  
2 limitations applicable to RICO's claims.<sup>2</sup> See *Pincay v. Andrews*, 238 F.3d 1106, 1108 (9th Cir.  
3 2001). Under the "injury discovery" rule, " 'the civil RICO limitations period begins to run when  
4 a plaintiff knows or should have know of the injury that underlies his action.' " *Id.* (quoting  
5 *Grimmet v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996)). The statute of limitations begins to run as  
6 soon as the plaintiff has actual or constructive notice of his injuries, regardless of whether there  
7 is a fiduciary relationship between the injured and the injurer. *Id.*

9 Here, the underlying injury alleged by Plaintiff is the loss of his cars. Plaintiff had actual  
10 and constructive notice of this injury as early as 2004, when the cars were seized in an abatement  
11 action, and by at least 2005, when they were both sold at auction. At the time that the cars were  
12 auctioned, Plaintiff certainly had sufficient information "to warrant an investigation, which, if  
13 reasonably diligent, would have led to the discovery of the fraud." *Beneficial Standard Life Ins.*  
14 *Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988). Indeed, the only act that Plaintiff alleges  
15 transpired after 2005 is contained in his allegation that the Westover Defendants presented the  
16 title for the Chevy Nova to the Washington State Patrol in 2011. Yet even as to this act, Plaintiff  
17 does not allege that he sustained any injury that had not already accrued with the auction of the  
18 vehicles. Plaintiff, in fact, does not deny that the statute of limitations had begun to run by the  
19 time the cars were auctioned in February 2005. See Dkt. # 23, p. 8. Instead he asserts that the  
20 limitations period is subject to equitable tolling.

21 Plaintiff cites to the correct rule that equitable tolling "applies when the plaintiff is  
22 prevented from asserting a claim by wrongful conduct on the part of the defendant, or when

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26 <sup>2</sup> A statute of limitations defense may be appropriately raised in a motion to dismiss "if the  
27 running of the statute is apparent on the face of the complaint." *Jablon v. Dean Witter Co.*, 614  
28 F.2d 677, 682 (9th Cir. 1980).

1 extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on  
2 time." *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999). He does not, however, show that  
3 either of these situations applies in his case to trigger equitable tolling. Plaintiff's near constant  
4 litigation of the same underlying events since they transpired belies any claim that circumstances  
5 beyond his control have disrupted his ability to timely file this action. While he asserts that  
6 Defendants' forgery of documents prevented him from discovering that the 2005 auctions were  
7 illegal, *see* Dkt. # 23, p. 10, Azpitarte has not provided any facts to support the bald assertion of  
8 wrongful conduct on Defendants' parts. He offers no evidence to show that he was somehow  
9 prevented of learning of the alleged fraud until August 2008 (five years before he filed the  
10 instant Complaint). Such conclusory statements are insufficient to raise a genuine issue of  
11 material fact, and the time to bring Plaintiff's RICO claims has clearly expired now that nearly a  
12 decade has passed since his alleged injuries accrued.<sup>3</sup>

15 Even if Plaintiff's claims were timely brought, they would still be subject to dismissal for  
16 failure to state a claim on which relief can be granted. In order to state a civil RICO claim,  
17 Plaintiff must show: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering  
18 activity (known as 'predicate acts') (5) causing injury to the plaintiff's 'business or property.' "

19 *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (citing 18 U.S.C. §§ 1964(c), 1962(c)).  
20 Construing Plaintiff's Complaint liberally and making all inferences in his favor, Plaintiff still  
21 fails to make this showing in several respects.  
22

23  
24 For one, he has failed to adequately plead two predicate acts occurring within ten years as

25 <sup>3</sup> The King County Superior Court came to this same conclusion in dismissing in 2012 Plaintiff's  
26 state law claims, predicated on the same injury, due to his inexcusable seven year delay in  
27 bringing his action. *See* Dkt. # 9, Ex. B. The Washington State Court of Appeals also affirmed  
28 the lower court's rejection of Plaintiff's claim that the statute of limitations for his fraud claim  
was equitably tolled until 2007. *See* Dkt. # 24, pp. 8-10.

1 required to show a pattern of racketeering activity. *See* 18 U.S.C. § 1961(5). Construed liberally,  
2 the Complaint asserts as predicate acts trafficking in automobiles and parts in violation of 18  
3 U.S.C. § 2321, as well as mail and wire fraud in violation of 18 U.S.C. §§ 1314 & 1343.

4 However, Plaintiff fails to provide sufficient facts to bolster these unsupported legal conclusions.

5 While the Complaint does allege that various Defendants misrepresented the VIN for the Chevy  
6 Nova on an AVR in order to make it appear that they possessed legal title, Compl. at ¶ 33, it does  
7 not claim that the VIN was itself removed or altered in plausible violation of 18 U.S.C. § 2321.  
8

9 *See* 18 U.S.C. § 2321 (involving intent to sell or dispose of a vehicle or its part with a removed  
10 or altered VIN). As to mail and wire fraud, Plaintiff has failed entirely to allege the existence of  
11 (1) a scheme or artifice to defraud, (2) that U.S. mails or wires were used in furtherance of such  
12 scheme, and (3) that mails or wires were thereby employed with the specific intent to deceive or  
13 defraud. *Capitol West Appraisals, LLC v. Countrywide Financial Corp.*, 759 F.Supp.2d 1267,  
14 1272-73 (W.D. Wash. 2010). Averments such as Plaintiff's that fail to "state with particularity  
15 the circumstances constituting fraud," Fed. R. Civ. P. 9(b), must be disregarded. *Kearns v. Ford*  
16 *Motor Co.*, 567 F.3d 1120, 1123 (9th Cir. 2009).  
17

18  
19 Further, Plaintiff has not shown that he has standing to bring a RICO cause of action. "To  
20 have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm  
21 qualifies as injury to his business or property; and (2) that his harm was 'by reason of' the RICO  
22 violation, which requires the plaintiff to establish proximate causation." *Canyon County v.*  
23 *Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008). Here, the only injury that Plaintiff  
24 alleges he sustained is the loss of his automobiles. Yet none of the Defendants were alleged to  
25 have been in any way involved in the abatement action or 2005 auctions that deprived Plaintiff of  
26 these automobiles, and accordingly any fraud on their part could not have proximately caused  
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1 Azpitarte's loss. Rather, the instant Defendants all represent third-party purchasers who acquired  
2 the vehicles only after they had left Azpitarte's possession and control.

3 Finally, as to his claim that Defendants conspired to engage in a pattern of racketeering  
4 activity in violation of 18 U.S.C. § 1962(d), Azpitarte has failed to plead facts sufficient to infer  
5 that Defendants entered into the requisite agreement. To establish a RICO conspiracy, a plaintiff  
6 must show that the defendants objectively manifested their agreement to participate in a  
7 racketeering enterprise through the commission of two or more predicate offenses. *Baumer v.*  
8 *Pachl*, 8 F.3d 1341, 1346-47 (9th Cir. 1993). "In a RICO conspiracy, as in all conspiracies,  
9 agreement is essential." *Id.* at 1346. As in *Baumer*, Plaintiff's Complaint is "bereft of any  
10 allegation of 'conspiracy' or 'agreement,'" and lacks facts "sufficient to infer such an  
11 [agreement]." *Id.*

12  
13  
14 As the Court dismisses Plaintiff's Complaint as untimely and insufficiently pled, it does  
15 not reach the additional grounds urged by Defendants that Plaintiff's claims are barred by the  
16 doctrines of *res judicata* or collateral estoppel. The Court does, however, note that a state court  
17 has previously found Defendants Spino and Muscle Cars to be bona fide third party purchasers  
18 and dismissed with prejudice tort claims brought against all but the Westover Defendants. *See*  
19 *Azpitarte v. Sauve et al.*, No. 12-2-10511-1KNT (June 27, 2013); *Azpitarte v. Sauve et al.*, Case  
20 No. 10-2-42874-7KNT (Aug. 1, 2011), *aff'd* No.67715-2-I (Wash.App.Div.1 Jan. 22, 2013). The  
21 Court does not look fondly on Plaintiff's continuing and ever more futile efforts to relitigate a  
22 series of events that multiple courts have decided do not amount to any actionable offense. The  
23 precious time and resources of the courthouse must be reserved for claimants with viable  
24 grievances and guarded against depletion by individuals who already know their efforts to be in  
25 vain.  
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28

1 As Plaintiff's RICO claims are barred by the applicable four-year statute of limitations,  
2 and as he fails to plead facts to show that he is entitled to relief on the merits, Plaintiff's  
3 Complaint shall be dismissed in its entirety. Dismissal shall be without leave to amend, as there  
4 are no facts that Plaintiff could allege consistent with the Complaint that could cure its defects.  
5 The statute of limitations has run, and Plaintiff's consistent attempts to litigate his injury since it  
6 accrued undermines any claim for equitable tolling. Further, Plaintiff's injury – the loss of his  
7 automobiles – stems from actions undertaken by non-parties in 2004 and 2005. Even if Plaintiff  
8 had pled facts sufficient to make out two predicate offenses, he cannot show that his loss was  
9 proximately caused by the asserted RICO violations.  
10

11 Although Plaintiff has not yet perfected service of process on Defendants Sauve and  
12 Burien, his Complaint shall be dismissed with respect to them as well, as these same fatal defects  
13 apply with respect to claims asserted against all of the instant Defendants. *See Neitzke v.*  
14 *Williams*, 490 U.S. 319, 324 (1989) (authorizing dismissal of an in forma pauperis complaint  
15 prior to service of process "if it lacks an arguable basis in law or fact."). Accordingly, Plaintiff's  
16 Motion to serve Defendants by mail or publication shall be dismissed as moot.  
17  
18

19 **CONCLUSION**

20 For the reasons stated herein, the Court hereby ORDERS that Defendants' Motions to  
21 Dismiss (Dkt. ## 8, 16, 17) are GRANTED. The Court further ORDERS that Plaintiff's Motion  
22 to Allow Service of Defendants (Dkt. # 12) is DENIED as MOOT. Plaintiff's Complaint is  
23

24 //

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1 dismissed in its entirety with prejudice and without leave to amend, and this case is closed.

2 Dated this 14<sup>th</sup> day of November 2014.

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5 RICARDO S. MARTINEZ  
6 UNITED STATES DISTRICT JUDGE  
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## **APPENDIX 2**

FILED ENTERED  
LODGED RECEIVED

DEC 12 2014 RE

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY DEPUTY

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RICHARD AZPITARTE,

Plaintiff

vs.

GAYLE SAUVE, JANE DOE SAUVE and the marital community composed thereof and BURIEN COLLISION CENTER, INC. and DANIEL SPINO, JANE DOE SPINO, and the marital community composed thereof, WILLIAM WESTOVER, JANE DOE WESTOVER, and the marital community composed thereof, MUSCLE CARS NORTHWEST INC., and CHARLES LILLARD and JANE DOE LILLARD and the community composed thereof.

JOHN DOE and JANE DOE #1-10

Defendants

No. C -13-1413 RJM

MOTION TO SET ASIDE  
JUDGMENT

NOTED FOR JANUARY 2, 2015



ALLEN, HANSEN & MAYBROWN

DEC 12 2014

COPY RECEIVED

The court, in its order to dismiss this case, made several unwarranted assumptions and misapplied the law. The court erroneously concluded there were no state causes of action, and then dismissed with prejudice, some defendants who had not appeared, without discussing at all why it had done so. It misapplied the injury discovery rule by claiming the plaintiff should have known he lost title to the cars, when they were temporarily towed from his residence. The court

MOTION TO SET ASIDE  
JUDGEMENT - PAGE 1

ORIGINAL

Richard Azpitarte  
153 S. 120 St.  
Seattle, Wash., 98168  
206-6949879

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4 assumed there were auctions in spite of the plaintiff's complaint that never conceded that auctions  
5 actually took place, and only referred to purported auctions. There has been no court findings  
6 anywhere that these auctions actually took place or that the plaintiff had learned of them.

7  
8 **1. THE COURT MISAPPLIED THE INJURY DISCOVERY RULE.**

9 The court claims that the underlying injury that set off the injury discovery rule is "the  
10 loss of his cars" which the court claims was set in motion with the towing of the cars in 2004.  
11 However, the temporary loss of a car due to a temporary tow is a far cry from learning of  
12 permanent possession loss due to theft by falsifying ownership documents. Just because  
13 someone's car is towed, does not give a free license to steal by subsequent "owners". The court  
14 should have taken judicial notice of the simple plain fact that when a car is towed, the owner still  
15 retains ownership and should be able to get possession simply by paying applicable fees. If there  
16 was a dispute over the fees owing, this alone does not cause the plaintiff to lose title to his car  
17 and thus lose permanent possession of it.

18 The court then goes on to conclude that the plaintiff should have known of his injury  
19 because he knew of the "auction." This ignores the straightforward facts that are given in the  
20 plaintiff's complaint, which states there were purported auction and not real auctions. On what  
21 basis does the court make the conclusion that there was an auction? Certainly forged documents  
22 are not evidence of an auction. How can the court attribute knowledge of an auction that never  
23 occurred?

24 **2. THE COURT MISSAPPLIED THE PRINCIPLE OF EQUITABLE TOLLING.**

25 The court appears to acknowledge that equitable tolling doctrine would apply to a RICO  
26 case, but gives no hint as to how it is undisputed that he could have learned earlier, especially  
27 with respect to the Nova. The court speculates that somehow he could have learned in previous  
28 suits. On what basis does the court conclude this on a motion on the pleadings? The court does  
not have before it any kind of record as to what kind of discovery was attempted or even allowed.

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4 There is no attempt by the court to explain, how the plaintiff could have learned of the forgeries  
5 by having a suit against King County, who might not even know about the forgeries. The court  
6 gives no indication how the plaintiff could have possibly gained knowledge of who mis-titled the  
7 Nova, when it was done under the wrong VIN. Does the court seriously expect the plaintiff to  
8 make a public disclosure of all possible VINs in Washington, the country, or even the world, to  
9 see if he could spot the forgery? Especially when these documents are not even public records?

10 As pointed out in his response, a ruling of equitable tolling almost always requires a trial.  
11 Generally, the applicability of equitable tolling depends on matters outside the pleadings, so it is  
12 rarely appropriate to grant a Rule 12(b)(6) motion to dismiss (where review is limited to the  
13 complaint) if equitable tolling is at issue. *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204,  
14 1208, (9th Cir. 1995) ("[A] complaint cannot be dismissed unless it appears beyond doubt that  
15 the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Id.* At  
16 1208).

17 The court offers absolutely no reasoning how it is "beyond doubt" that the plaintiff could  
18 have discovered the information earlier in other suits other than the barest of speculation. The  
19 court has no record before it as to what discovery was allowed, or even asked for. This is  
20 especially true of the Nova. On what basis did the court conclude that the plaintiff could have  
21 somehow discovered the identity of the defendants when they titled it under the wrong VIN  
22 number?

23 **3. THE COURT DISMISSED TWO DEFENDANTS ON A STATE CAUSE OF ACTION**  
24 **WHICH THE COURT APPARENTLY DIDN'T EVEN NOTICE.**

25 In footnote #1, the court claims that there is no state causes of action pleaded. Apparently  
26 the court did not even notice that the first cause of action pleaded was replevin. The only  
27 defendants this could have applied to is the Lillards. But the Lillards have not been served and  
28 no arguments have been raised in their behalf. The court admits that the plaintiff was not bound

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4 by principles of res judicata with respect the conclusion that the defendants are bona-fide third  
5 party purchasers, so if it has not been proven they have good title Thus there is no basis for  
6 dismissing the replevin action with prejudice other than the courts mistaken belief that it was  
7 never pleaded.

8  
9 **4. THE COURT NEVER ANALYZED ANY OF THE PREDICATE ACTS WITH**  
**RESPECT TO OTHER STATUTES GIVEN IN THE PLAINTIFF'S RESPONSE.**

10 When a court grants a motion to dismiss for failure to state a claim, it must  
11 ordinarily permit a plaintiff to amend his complaint if an amendment could cure the  
12 defects that led to the dismissal. *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003).

13 In the ordinary case, moreover, the court grants leave to amend more liberally to  
14 pro se plaintiffs. *Ramirez*, 334 F.3d at 861.

15 The ninth circuit has stated, that 'Dismissal without leave to amend is improper unless it  
16 is clear, upon de novo review, that the complaint could not be saved by any amendment.' "  
17 *Gompper v. VISX, Inc.*, 298 F. 3d 893, 898 (9th Cir. 2002) (quoting *Polich v. Burlington N., Inc.*,  
18 942 F.2d 1467, 1472 (9th Cir. 1991)).

19 In one post Twombly decision, *Alvarez v. Hill*, 518 F.3d 1152 (9th Cir. 03/13/2008) the  
20 ninth circuit still ruled that in federal courts are still governed by notice pleading:

21 Appellees' argument that Alvarez's complaint failed to "state a claim" under  
22 RLUIPA because he did not cite the statute misapprehends the function of  
23 pleadings in federal practice. Notice pleading requires the plaintiff to set forth in  
24 his complaint claims for relief, not causes of action, statutes or legal theories. See  
25 Fed. R. Civ. P. 8(a)(2). "This simplified notice pleading standard relies on liberal  
26 discovery rules and summary judgment motions to define disputed facts and  
27 issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534  
28 U.S. 506, 512 (2002). A complaint need not identify the statutory or constitutional  
source of the claim raised in order to survive a motion to dismiss. See, e.g.,  
*Sagana v. Tenorio*, 384 F.3d 731, 736-37 (9th Cir. 2004); *Austin v. Terhune*, 367  
F.3d 1167, 1171 (9th Cir. 2004); *Cabrera v. Martin*, 973 F.2d 735, 745 (9th Cir.  
1992).

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4 The court only completed its predicate act analysis by only analyzing federal  
5 statutes specifically mentioned in the complaint, without recognizing that if any predicate  
6 acts covered under the RICO statute are violated, then the complaint survives a motion to  
7 dismiss. *Avyarez supra*.

8 The plaintiff included a predicate act analysis using several statutes mentioned in his  
9 response which the court apparently never considered. For example the plaintiff cited to 18 U.S.  
10 Code § 1957 makes it a federal offense to engage in monetary transactions in criminally derived  
11 property of a value greater than \$10,000 and is derived from specified unlawful activity,.

12 This statute could be used in both the Spino vehicle and the Nova which eventually  
13 sold/stolen and titled in the names of other individuals to conceal the persons who stole the cars.

14 In addition, with respect to the Nova, the complaint alleges facts that would be a violation  
15 of 18 U.S. Code § 2312 - Transportation of stolen vehicles across state lines.:

16 Here it is alleged that he defendants caused the Nova to be transported out of state by  
17 selling it to the Lillards.

18 Similarly, the defendants are in violation of 18 USC 2314, Transportation of stolen  
19 goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting. The  
20 court did not mention any of these other statutes in its analysis and should have considered them.

21 Even with respect to the statutes actually considered, the court made unwarranted  
22 assumptions. For example the court concluded that a violation of 18 USC 2321 could not have  
23 occurred because the plaintiff has not alleged that the defendants actually altered or removed the  
24 VINS. However, given the facts as alleged, it is entirely plausible that at some point the  
25 defendants did exactly that.

26 **5. THE COURT ERRED IN CLAIMING THAT THE PLAINTIFF HAS NO STANDING.**

27 The court claims that the plaintiff has no standing because he has not shown the  
28 defendants were involved in either the tow or the supposed auctions. As argued earlier, the fact

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4 that the cars were towed had nothing to do with the illegal actions of the defendants, which  
5 wrested titled away from the plaintiff through supposed auctions and forged documents. Also as  
6 pointed out earlier, the court assumes that there were legitimate auctions that took place. This is  
7 disputed by the plaintiff, who contends that all actions taken with respect to supposed auctions  
8 were part of the forgeries which were designed to prevent the plaintiff from locating who had  
9 actual possession of the cars.

10 The court claims that the plaintiff has not alleged enough facts to show a conspiracy. The  
11 plaintiff contends that he has shown a series of facts which a reasonable factfinder could  
12 plausibly conclude that a conspiracy exists to hide automobiles from the plaintiff so he could not  
13 initiate any legal actions to gain their recovery. These actions include holding phony auctions  
14 followed by putting the title under names that the plaintiff could not trace

15 Conclusion

16 For the reasons given in this response the plaintiff's motion to set aside the judgment  
17 should be granted.

18 Dated this 12 day of December, 2014,

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21 \_\_\_\_\_  
Richard Azpitarte, pro se