

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 ALBERT C. BURGESS, JR.,

No. C 11-01898 SBA (PR)

4 Plaintiff,

**ORDER DENYING MOTION TO  
SET ASIDE JUDGMENT**

5 v.

6 EBAY, INC., PAYPAL, INC., GOOGLE, INC.,  
7 VISA INTERNATIONAL, INC.,  
8 MASTERCARD, INC., CHARLOTTE  
OBSERVER PUBLISHING CO., INC.,  
DANNY L. DURHAM,

(Docket No. 74)

9 Defendants.  
\_\_\_\_\_ /

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11 This is a pro se civil rights complaint filed by Plaintiff Albert C. Burgess, Jr., an  
12 inmate incarcerated in the Low Security Correctional Institution in Butner, North Carolina.  
13 On December 21, 2012, the Court issued an Order granting Defendants' motion to dismiss  
14 Plaintiff's First Amended Complaint and granted Plaintiff twenty-one days from the date of  
15 the Order to file a Second Amended Complaint. Dkt. 62. In the Order, the Court warned  
16 Plaintiff that "[T]he failure to file a Second Amended Complaint within the timeframe  
17 specified by the Court will result in the dismissal of the action." Id. at 10. Plaintiff did not  
18 file a Second Amended Complaint and, in an Order dated February 20, 2013, the Court  
19 dismissed the action pursuant to Federal Rule of Civil Procedure 41(b) for failure to comply  
20 with an Order of the Court. Dkt. 72. Plaintiff now moves to set aside the judgment under  
21 Federal Rule of Civil Procedure 60(a), (b). Dkt. 74.

22 A motion for reconsideration of a final judgment is appropriately brought under  
23 Federal Rule of Civil Procedure 59(e) or 60(b). Backlund v. Barnhart, 778 F.2d 1386, 1388  
24 (9th Cir. 1985). A motion under Rule 60(b) may be granted "if the moving party can show:  
25 (1) mistake, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud or  
26 misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other  
27 reason justifying relief." Id.

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1           Ostensibly relying on Rule 60(b)(1), Plaintiff argues that the Court mistakenly found  
2 that this action should be dismissed based on his failure to comply with its December 21,  
3 2012 Order to file a Second Amended Complaint. Notwithstanding the fact that the Second  
4 Amended Complaint does not appear on the docket, Plaintiff argues that he “did in fact  
5 submit the Second Amended Complaint.” Dkt. 74 at 1. Plaintiff points out that, on February  
6 19, 2013, one of the Defendants, the Charlotte Observer Publishing Co., Inc. (“Charlotte  
7 Observer”), filed “an extensive reply to the Second Amended Complaint submitted by the  
8 Plaintiff.” *Id.* Plaintiff argues that the Charlotte Observer could only have received notice of  
9 the Second Amended Complaint from the Court’s electronic docket because he did not send  
10 a hard copy to this Defendant. *Id.* at 1-2.

11           Plaintiff’s arguments are without merit. The Charlotte Observer’s filing -- which is a  
12 motion to dismiss -- was not filed in response to a Second Amended Complaint. Dkt. 68. It  
13 was directed at Plaintiff’s “purported ” Second Amended Complaint. *Id.* at 7. In fact, the  
14 Charlotte Observer points out that Plaintiff did not file a Second Amended Complaint in  
15 compliance with the Court’s December 21, 2012 Order and argues that this action should be  
16 dismissed, stating:

17           This Court, in two subsequent orders, gave plaintiff until February 8,  
18 2013 to file a Second Amended Complaint. Plaintiff has not done so. Rather,  
19 on February 4, 2013 he filed what he called a “Reply to Order of This Court;  
20 Motion to Add Additional Defendants.” (Document 67.) This pleading is not  
21 a Second Amended Complaint and doesn’t comply with this Court’s  
[December 21, 2012] Order. It is, rather, a rambling narrative in which  
plaintiff primarily blames other people for his lifetime of child molestation.  
One thing plaintiff does not do, however, is to come anywhere close to stating  
a claim against *The Observer*.

22 Dkt. 68 at 9.

23           Therefore, Plaintiff has failed to submit any evidence supporting his contention that  
24 the Court mistakenly dismissed this action upon finding that he failed to comply with the  
25 Court’s December 21, 2012 Order to file a Second Amended Complaint. Furthermore,  
26 Plaintiff fails to present evidence or argument supporting any other factor that would warrant  
27 setting aside the judgment under Rule 60. Accordingly, Plaintiff’s motion to set aside the  
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1 judgment (Dkt. 74) is DENIED.

2 **CONCLUSION**

3 In light of the foregoing, the Court orders as follows:

- 4 1. Plaintiff's motion to set aside the judgment (Dkt. 74) is DENIED.  
5 2. This Order terminates Docket no. 74.

6 IT IS SO ORDERED.

7 DATED: 7/26/13

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9 SAUNDRA BROWN ARMSTRONG  
10 United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ALBERT C. BURGESS, JR.,

Plaintiff,

v.

EBAY INC. et al,

Defendant.

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Case Number: CV11-01898 SBA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 29, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Albert C. Burgess 88539-071  
Federal Correctional Institution 2  
P.O. Box 1500  
Butner, NC 27509

Danny L Durham  
2350 Washington Road  
Augusta, GA 30904

Dated: July 29, 2013

Richard W. Wieking, Clerk  
By: Lisa Clark, Deputy Clerk