

United States District Court
For the Northern District of California

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E-FILED on 03/23/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL EWERT,
Plaintiff,
v.
EBAY, INC., DOES 1 to 100, inclusive,
Defendants.

No. C-07-02198 RMW

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR FAILURE TO
PROSECUTE AND GRANTING
PLAINTIFFS MOTION FOR LEAVE TO
FILE A SECOND AMENDED COMPLAINT
[Re Docket No. 46, 49]

Defendant eBay, Inc. ("eBay") moves to dismiss plaintiff Michael Ewert's ("Ewert") complaint for failure to prosecute. Ewert opposes the motion, and moves for leave to file a second amended complaint. eBay's motion to dismiss for lack of prosecution is denied. Although ten months without action is not a desirable delay, it is not sufficient to justify dismissal without more prejudice than eBay has demonstrated. Plaintiff's motion for leave to file a second amended complaint is granted. The proposed amended complaint appears only to remove the claims on which the court sustained a motion to dismiss and add a claim for false advertising, which is also a result of the court's dismissal of the Auction Act claims.

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The hearing scheduled for Friday, March 27, 2009 on the present motions is hereby vacated.
The parties shall appear for a case management conference on April 24, 2009 at 10:30 a.m..

DATED: 03/23/09



RONALD M. WHYTE
United States District Judge

1 **Notice of this document has been electronically sent to:**

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10 Counsel are responsible for distributing copies of this document to co-counsel that have not
11 registered for e-filing under the court's CM/ECF program.

12 **Dated:** 03/23/09

13 JAS
14 **Chambers of Judge Whyte**