

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

3 THOMAS EUGENE MOORE,) No. C 06-2150 SBA (PR)
4 Plaintiff,)
5 v.) **ORDER GRANTING DEFENDANTS**
6 BROWN & WILLIAMSON TOBACCO,) **B&W'S AND LL'S MOTION TO**
7 CORPORATION, et al.,) **DISMISS; DISMISSING ALL FEDERAL**
8 Defendants.) **CLAIMS; REMANDING CASE TO**
) **STATE COURT; AND ADDRESSING**
) **ALL PENDING MOTIONS**
) (Docket nos. 47, 57, 76, 79, 80, 83)

9
10 **INTRODUCTION**

11 Plaintiff Thomas Eugene Moore, a state prisoner currently incarcerated at Pelican Bay State
12 Prison, filed this civil action in the Monterey County Superior Court, Moore v. Brown &
13 Williamson Tobacco, Corp., et al., Case No. M76478, alleging various claims, including civil rights
14 violations, arising from Plaintiff's use of tobacco products while incarcerated at Salinas Valley State
15 Prison (SVSP) from June 19, 2001 to July 1, 2005. Plaintiff named as Defendants the following
16 corporations: Brown & Williamson Tobacco Corporation (B&W) and Lane Limited (LL), the
17 alleged tobacco manufacturers; as well as Access SecurePak (Access), the alleged retailer of the
18 tobacco products Plaintiff used. Plaintiff has also named as Defendants various prison officials,
19 who purportedly participated in the supply of tobacco and the denial of Plaintiff's administrative
20 appeal, including: SVSP Warden Mike Evans; SVSP Canteen Manager E. Beza; SVSP
21 Procurement Services Officer B. Schneider; SVSP Chief of Inmate Appeals N. Grannis; SVSP
22 Appeals Coordinator S. Gomez; SVSP Correctional Lieutenant C. Blackstone; SVSP Physicians I.
23 Grillo and R. Gibbs; and California Department of Corrections and Rehabilitation (CDCR) Director
24 Jeanne Woodford. Thereafter, Defendant Evans removed the action to federal court.

25 Before the Court is Defendants B&W's and LL's motion to dismiss pursuant to Federal Rules
26 of Civil Procedure 41(b), 12(b)(4) and 12(b)(5). Also before the Court are Plaintiff's motion for
27 reconsideration as well as his other pending motions. For the reasons discussed below, Defendants
28 B&W's and LL's motion to dismiss is GRANTED; Plaintiff's motion for reconsideration is
GRANTED in part and DENIED in part; and all other pending motions are DENIED.

1 **FACTUAL BACKGROUND**

2 In an Order dated November 10, 2008 Order, the Court summarized the background of this
3 case:

4 The following allegations are taken from Plaintiff's amended complaint:

5 Defendants B&W, LL, and Access provided tobacco products and failed to
6 provide warning labels to inform Plaintiff of the risk of addiction to smoking tobacco.
7 Defendants B&W, LL, Access, Woodford, Evans, Beza and Schneider "provided
8 and/or sold" the tobacco products to him for "financial gain from the Plaintiff's physical
9 and mental addiction to smoking the said Defendants['] tobacco and tobacco products
10 from June 19, 2001 to July 1, 2005" (Am. Compl. at 5.)

11 Defendants Grillo and Gibbs failed to provide him with a "smoking cessation
12 program and/or therapy, or anti-smoking, non-smoking medical therapy, or tobacco
13 patches, or other means to insure a smooth transition to a tobacco-free environment, or
14 to help with the [P]laintiff's tobacco smoking addiction and physical and psychological
15 symptoms of tobacco smoking." (*Id.* at 10.) Defendants Grillo and Gibbs were
16 deliberately indifferent to Plaintiff's serious medical needs and caused him to suffer
17 "headaches, pain, dizziness, nervousness, depression, insomnia, weight loss, emotional
18 distress and other physical and mental damages." (*Id.*) He alleges Defendants'
19 inadequate care was the result of a conspiracy based on racial animus. (*Id.* at 15.)

20 Defendants Grannis, Blackstone and Gomez denied Plaintiff administrative
21 relief after he filed a 602 inmate appeal relating to the claims in this action. (*Id.* at 10.)

22 Plaintiff seeks monetary damages. (*Id.* at 22.)

23 (Nov. 10, 2008 Order at 2.)

24 **PROCEDURAL BACKGROUND**

25 As mentioned above, Plaintiff commenced this action by filing a complaint in the Monterey
26 County Superior Court on October 24, 2005.

27 On March 23, 2006, Defendant Evans removed this case to federal court on the ground that
28 Plaintiff alleged a violation of his civil rights under federal law.

On June 21, 2006, Defendants B&W and LL filed a motion to dismiss for insufficiency of
process and service of process pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5).

On September 15, 2006, Defendant Access moved for dismissal on the same grounds. Plaintiff
opposed the motions, and Defendants B&W, LL and Access filed replies to his oppositions.

The Court summarized the basis for Defendants B&W's, LL's and Access's motions to
dismiss as follows:

Defendants allege that on or about May 21, 2006, Plaintiff attempted to serve a

1 state court summons, an incomplete copy of the complaint, and a state court notice of
2 acknowledgment and receipt on Defendants. (Defs. B&W's and Lane Limited's Mot.
3 Dismiss at 2; Def. Access SecurePak's Mot. Dismiss at 2.) They claim that service was
4 made by mailing these documents in envelopes addressed only to "Access SecurePak,"
5 "Lane Limited," "Brown & Williamson Tobacco Corp." without specifying any officer,
6 agent or other individual authorized to accept service. (Defs. B&W's and Lane
7 Limited's Mot. Dismiss at 2; Def. Access SecurePak's Mot. Dismiss at 2-3.)
8 Defendants argue that "Plaintiff's method of service does not comply with California
9 law or federal service requirements and is therefore invalid." (Defs. B&W's and Lane
10 Limited's Mot. Dismiss at 2; Def. Access SecurePak's Mot. Dismiss at 3.) They further
11 argue that "Plaintiff did not serve a federal summons," that he "provided an incomplete
12 copy of the Complaint," and that "such defects render process insufficient." (Id.)
13 Therefore, Defendants claim that "[t]he Court should dismiss this action as to Moving
14 Defendants based on the fatal defects in process and service." (Id.)

15 (Mar. 30, 2007 Order at 2-3.)

16 In an Order date March 30, 2007, the Court denied the motions to dismiss filed by
17 Defendants LL, B&W and Access. The Court found that Defendants had not been properly served;
18 however, it exercised its discretion under Federal Rule of Civil Procedure 4(m) to extend Plaintiff's
19 time to serve them, stating:

20 Based on the record, the Court finds that Defendants have not been properly served;
21 however, because only a year has passed since this action was removed to federal court,
22 the Court exercises its discretion under Rule 4(m) to extend Plaintiff's time to serve
23 Defendants. Cf. Efaw v. Williams, 473 F.3d 1038, 1040-41 (9th Cir. 2007) (finding
24 that district court abused its discretion in denying motion to dismiss where plaintiff
25 failed to comply with service requirements until more than seven years following filing
26 of complaint).

27 (Mar. 30, 2007 Order at 3-4.)¹ The Court also explained the procedures Plaintiff must follow in
28 order to serve corporate defendants, including:

(1) he could serve the defendants pursuant to Fed. R. Civ. P. 4(a) and 4(h)(1); (2) he
could request that the defendants waive service of process pursuant to Fed. R. Civ. P.
4(d)(2); (3) he could serve the defendants according to state service of process rules
pursuant to Fed. R. Civ. P. 4(e)(1) and Cal. Code Civ. Proc. §§ 415.40, 412.30, 416.10,
and 416.40; or (4) he could apply for in forma pauperis (IFP) status pursuant to 28
U.S.C. § 1915.

(Id. at 3.) The Court also warned Plaintiff that "[i]f service of the summons and complaint is not
made upon a defendant in 120 days after the filing of the complaint, the action must be dismissed
without prejudice as to that defendant absent a showing of 'good cause.'" (Id. citing Fed. R. Civ. P.
4(m).) The further Court noted that Plaintiff had filed a motion for leave to proceed IFP, which

¹ Having determined that service of process was insufficient, the Court did not reach a
decision on insufficiency of process in its March 30, 2007 Order.

1 would be reviewed in a separate written Order. (Id. at 4.) Finally, the Court instructed Plaintiff on
2 how to proceed if his application for IFP status was denied:

3 In the event that the Court denies Plaintiff's motion for leave to proceed IFP, Plaintiff
4 will be responsible for effecting service on Defendants. The Court has mentioned
5 above the procedures Plaintiff must follow in order to serve Defendants properly. No
6 later than **thirty (30) days** of the date his IFP application is denied, Plaintiff is directed
7 to re-serve Defendants with a copy of a properly issued federal summons . . . and a
8 copy of his original complaint as directed above, i.e., (1) pursuant to the Federal Rules
9 of Civil Procedure, (2) by requesting waiver of service of process pursuant to Federal
10 Rule of Civil Procedure 4(d)(2) or (3) according to state service of process rules.

11 (Id. at 5 (emphasis in original).) The Court reminded Plaintiff that the "[f]ailure to take at least one
12 of these actions as to any Defendant will result in dismissal of the action as to that Defendant." (Id.
13 citing Fed. R. Civ. P. 4(m).)

14 On May 14, 2007 Plaintiff filed a motion for leave to file an amended complaint and
15 attached his amended complaint. Thereafter, he filed a motion for the Court to screen the amended
16 complaint under 28 U.S.C. § 1915A.

17 In an Order dated March 26, 2008, the Court granted Plaintiff's motion for leave to file an
18 amended complaint and his motion for the Court to screen the amended complaint.

19 In an Order dated November 10, 2008, the Court reviewed Plaintiff's amended complaint and
20 his application for IFP status. The Court first informed Plaintiff that due to his previous filings, he
21 is "three-strikes" barred under 28 U.S.C. § 1915(g).² (Nov. 10, 2008 Order at 7.) The Court also
22 determined that Plaintiff did not fall under that only exception to this bar because he failed to show
23 that he was seeking relief from a danger of serious physical injury which was "imminent" at the time
24 of filing. (Id. (citing Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (en banc)).) In
25 view of this, Plaintiff's application for IFP status was denied. (Id.) The Court then found Plaintiff's
26 claim against Defendants B&W and LL cognizable because it constituted a claim for product
27 liability against tobacco manufactures. The Court dismissed Plaintiff's claim against Defendants
28

² The Prison Litigation Reform Act of 1995 (PLRA) was enacted, and became effective, on April 26, 1996. It provides that a prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

1 Access relating to Plaintiff's use of tobacco products as well as his claims against Defendants
2 Grannis, Blackstone and Gomez relating to the grievance process. All remaining claims were
3 dismissed with leave to amend. The Court asserted supplemental jurisdiction over Plaintiff's state
4 law claims, but review and service of the state claims was held until Plaintiff filed his amended
5 claims. The Court also found that Plaintiff was responsible for effecting service on Defendants
6 B&W and LL as well as on the remaining prison officials who were named as Defendants because
7 his IFP application had been denied. The Court reiterated the aforementioned procedures Plaintiff
8 must follow in order to serve Defendants properly, and set a deadline for service, stating:

9 No later than **thirty (30) days** of the date of this order, Plaintiff is directed to re-serve
10 Defendants B&W and LL with a copy of a properly issued federal summons on which
11 the signature and seal of the Clerk of the Court, and the name of the issuing court, are
12 visible and a copy of his original complaint as directed above, i.e., (1) pursuant to the
13 Federal Rules of Civil Procedure, (2) by requesting waiver of service of process
pursuant to Federal Rule of Civil Procedure 4(d)(2) or (3) according to state service of
process rules. Failure to take at least one of these actions as to Defendants B&W and
LL will result in dismissal of the claims as to each Defendant. See Fed. R. Civ. P.
4(m).

14 (Nov. 10, 2008 Order at 14 (emphasis in original).) In addition, the Court also outlined Plaintiff's
15 obligations as to the remaining Defendants in this action:

16 No later than **thirty (30) days** from the date of this Order, Plaintiff must file either
17 proofs of service of the remaining Defendants (not including Defendant Evans, who has
18 already been served, and Defendants Grannis, Blackstone and Gomez because
19 Plaintiff's claims against them have been dismissed), a motion seeking additional time
20 to effect service of these Defendants, or a motion to amend any federal summonses
served on these Defendants to correct deficiencies in the summonses. Failure to take at
least one of these actions as to any of these Defendants (again, not including Defendant
Evans, Grannis, Blackstone and Gomez) will result in dismissal of the claims as to that
Defendant. See Fed. R. Civ. P. 4(m).

21 (Id.)

22 Also on November 10, 2008, Plaintiff filed a motion requesting the Clerk to issue summons
23 and the U.S. Marshal to serve the summons and complaint upon all Defendants in this action. In an
24 Order dated November 14, 2008, the Court denied his motion. The Court also directed Plaintiff to
25 "follow the procedures to properly serve the aforementioned Defendants outlined in the Court's
26 November 10, 2008 Order" and to "abide by the deadlines previously set in the Court's November
27 10, 2008 Order." (Nov. 14, 2008 Order at 2.)

28 On November 24, 2008, Plaintiff filed a "Motion for Additional 60-Day Extension of Time

1 to Effect Service of Summons and Complaint on Remaining Defendants." He also filed a motion
2 entitled "Plaintiff's Motion to Amend Federal Summons to Serve Process on Remaining
3 Defendants," which the Court later construed as a motion requesting the Clerk to send a copy of a
4 blank federal summons to Plaintiff.

5 Also on November 24, 2008, Defendant Access filed a Motion for Entry of Judgment
6 because "the Court ordered that Plaintiff's claim against Access be dismissed" in its November 10,
7 2008 Order. (Mot. for Entry of J. at 1.)

8 In an Order dated December 4, 2008, the Court granted Plaintiff's request for an extension of
9 time up to and including January 12, 2009 to serve the "remaining" Defendants, specifically the
10 prison officials who were named as Defendants.³ The Court also granted Plaintiff's motion
11 requesting the Clerk to send a copy of the federal summons to Plaintiff and directed the Clerk to
12 send Plaintiff a copy of a blank federal summons.

13 On December 5, 2008, Plaintiff filed the following motions: a "Motion for First Extension
14 of Time to File Amended Civil Complaint," a "Motion for Court Order to Photocopy Plaintiff's
15 Motions, Amended Complaint, and Process Service Documents," and a motion entitled, "Amended
16 Plaintiff's Motion for Clerk of the Court to Stamp the Seal of Clerk of the Court and the Issuing
17 Court's Name on the Federal Summons."

18 In an Order dated December 12, 2008, the Court granted Plaintiff's motion for an extension
19 of time to file amended deliberate indifference, supervisory liability, and equal protection claims up
20 to and including January 5, 2009. His motion requesting the Court to order the PBSP law librarian

21
22 ³ The Court did not grant Plaintiff an extension of time to serve the two corporate
23 defendants, Defendants B&W and LL, in its December 4, 2008 Order. As mentioned above, in the
24 portion of the Court's November 10, 2008 Order outlining Plaintiff's service obligations as to the
25 prison officials named as Defendants in this action, the Court indicated that Plaintiff could file "a
26 motion seeking additional time to effect service on these Defendants." (Nov. 10, 2008 Order at
27 14.) The Court stressed in its November 14, 2008 Order that Plaintiff was to "abide by the
28 deadlines previously set in the Court's November 10, 2008 Order." (Nov. 14, 2008 Order at 2.)
These deadlines included the December 10, 2008 deadline for Plaintiff to serve Defendants B&W
and LL. As mentioned below, in its February 13, 2009 Order denying Plaintiff's motion for an
extension of time to serve Defendant LL, the Court stated, "[t]he record shows that Plaintiff only
began to seek help from the prison librarian on **December 10, 2008, the deadline for serving
Defendant LL.**" (Feb. 13, 2009 Order at 3 (emphasis added).) Therefore, the record is clear that
Plaintiff was only granted an extension of time to serve the prison officials named as Defendants
up to and until January 12, 2009.

1 to photocopy certain documents for him was denied because Plaintiff had not shown a need for the
2 photocopying services "based on [his] ability to file numerous documents in his other pending
3 cases." (Dec. 12, 2008 Order at 2 (citing Case Nos. C 06-02105 SBA (PR) and C 06-02357 SBA
4 (PR).) The Court further noted that if Plaintiff was unable to obtain photocopying services in order
5 to meet the required deadlines in this case, "he may handwrite duplicates of any document he files."
6 (Id. at 2-3.) Finally, the Court also denied the "Amended Plaintiff's Motion for Clerk of the Court to
7 Stamp the Seal of Clerk of the Court and the Issuing Court's Name on the Federal Summons"
8 because the attached summons to the motion did not contain Defendants' names and addresses. The
9 Court further stated:

10 [T]he attached summons submitted by Plaintiff is not proper, and he must provide the
11 Clerk with the names and addresses of the Defendants he wishes to serve. Plaintiff
12 must abide by the deadline previously set in the Court's December 4, 2008 Order, and
he must serve the summons and complaint upon the Defendants he wishes to serve no
later than January 12, 2009.

13 (Id. at 3.)

14 On December 22, 2008, Plaintiff filed a "Notice of Process Service of Summons and
15 Complaint upon Defendants Brown & Williamson, J. Woodford, E. Beza, B. Schnieder and R.
16 Gibbs." According to this notice, Plaintiff attempted to serve Defendant B&W by having the
17 Forsyth County Sheriff in North Carolina deliver to R. J. Reynolds Tobacco Company⁴ the original
18 state court summons and original complaint in this action. (Dec. 22, 2008 Notice at 2.) The record
19 shows that Keith Lazarus, Senior Paralegal at R. J. Reynolds Tobacco Company Law Department,
20 received the summons and complaint on December 16, 2008. (Lazarus Decl. ¶¶ 2-3, Ex. A.)

21 On January 2, 2009, Plaintiff filed his "Amendment to the Complaint," which included his
22 amended deliberate indifference, supervisory liability, and equal protection claims.

23 On January 5, 2009, Defendants B&W and LL filed the instant motion to dismiss on
24 grounds of Plaintiff's "failure to comply with the directives set forth in the Court's November 10
25

26
27 ⁴ In this notice and other filings, Plaintiff refers to this corporation as "R. J. Reynolds
28 American, Inc." (Dec. 22, 2008 Notice at 2.) However, the record shows that the correct name of
this corporation is R. J. Reynolds Tobacco Company. (Lazarus Decl. ¶ 1; Clemo Decl. ¶ 1.)

1 Order," or in the alternative, they move for dismissal "for insufficient service of process and
2 insufficient process." (Jan. 5, 2009 Mot. to Dismiss at 4-5.)

3 On January 7, 2009, Plaintiff filed another motion for leave to proceed IFP. He then filed
4 two amended applications for IFP status on March 10, 2009, as well as a request for the Court to
5 order the U.S. Marshal to serve process upon Defendants B&W and LL.

6 Also on January 7, 2009, Plaintiff filed a "Notice of Process of Service and Summons and
7 Complaint Upon Defendant E. Beza."

8 On January 16, 2009, Plaintiff filed a "Motion for an Extension of Time to Serve Summons
9 and Complaint upon Defendant Lane Limited." Thereafter, Defendants B&W and LL filed their
10 opposition to Plaintiff's request for an extension of time to serve Defendant LL.

11 In an Order dated January 22, 2009, the Court reviewed Plaintiff's amendment to the
12 complaint. The Court dismissed Plaintiff's amended deliberate indifference, supervisory liability,
13 and equal protection claims because the allegations in his amendment to the complaint did not
14 amount to cognizable federal claims against the prison officials named as Defendants. These claims
15 were dismissed without leave to amend. Thus, the Court stated that the "only remaining Defendants
16 in this case, Lane Limited and Brown & Williamson Tobacco Corporation, have filed a motion to
17 dismiss pursuant to Federal Rules of Civil Procedure 41(b), 12(b)(4) and 12(b)(5)." (Jan. 22, 2009
18 Order at 6.) The Court set a briefing schedule for the opposition to the pending motion to dismiss as
19 well as the reply. Plaintiff was ordered to file his opposition on or by February 6, 2009, and
20 Defendants B&W's and LL's reply was due no later than fifteen days after Plaintiff filed his
21 opposition.

22 On February 6, 2009, Plaintiff filed a motion for an extension of time to file an opposition to
23 the motion to dismiss.

24 In an Order dated February 13, 2009, the Court denied Plaintiff's motion for an extension of
25 time to serve Defendant LL. The Court also granted in part Plaintiff's motion for an extension of
26 time to file an opposition to the motion to dismiss. He was ordered to file his opposition no later
27 than February 20, 2009.

28 On February 23, 2009, Plaintiff filed a motion for reconsideration of the Court's January 22,

1 2009 Order dismissing his claims against the prison officials named as Defendants.

2 On February 26, 2009, Plaintiff filed a motion to file under seal documents related to his
3 February 23, 2009 motion for reconsideration.

4 On March 2, 2009, Plaintiff filed a motion for a second extension of time to file his
5 opposition up to and until March 3, 2009.

6 On March 6, 2009, Plaintiff filed his opposition to Defendants B&W's and LL's motion to
7 dismiss. Because Plaintiff filed his opposition prior to the Court ruling on his March 2, 2009 motion
8 for a second extension of time, the Clerk terminated that motion as moot.

9 In an Order dated March 6, 2009, the Court granted Plaintiff's motion to file under seal
10 documents related to his February 23, 2009 motion for reconsideration.

11 On March 10, 2009, Plaintiff filed an "amended" opposition to Defendants B&W and LL's
12 motion to dismiss, which is identical to his opposition filed on March 6, 2009. However, Plaintiff
13 has attached exhibits to his "amended" opposition that were not previously attached to his
14 opposition.

15 Also on March 10, 2009, Plaintiff filed a motion for reconsideration and an "amended"
16 motion for reconsideration of the Court's February 13, 2009 Order denying Plaintiff's motion for an
17 extension of time to serve Defendant LL.

18 On March 16, 2009, Plaintiff filed a "Notice of Process Service Upon Defendant Lane
19 Limited." Four days later, Plaintiff filed an "Amended Notice of Process Service Upon and Current
20 Address of Defendant Lane Limited." According to the amended notice, Plaintiff attempted to serve
21 Defendant LL by having the Forsyth County Sheriff in North Carolina deliver to R. J. Reynolds
22 Tobacco Company the original state court summons and original complaint in this action. (Mar. 20,
23 2009 Am. Notice at 1.) The record shows that Tanya L. Clemo, Paralegal at R. J. Reynolds Tobacco
24 Company's Law Department, received the summons and complaint on February 10, 2009. (Clemo
25 Decl. ¶¶ 2-3, Ex. A.)

26 Defendants B&W and LL filed a reply to Plaintiff's opposition on March 23, 2009.

27 The Court now reviews the pending motions in this action.

28 **DISCUSSION**

1 **I. Defendants B&W's and LL's Motion to Dismiss**

2 **A. Background**

3 Defendants B&W and LL have filed a motion to dismiss. They first argue that the Court
4 should dismiss the instant action because Plaintiff has failed to comply with the Court's November
5 10, 2008 Order directing Plaintiff to "re-serve" them "(1) pursuant to the Federal Rules of Civil
6 Procedure, (2) by requesting waiver of service . . . or (3) according to state service of process rules."
7 (Jan. 5, 2009 Mot. to Dismiss at 5 (citing Nov. 10, 2008 Order at 14).) They point out that the Court
8 further stated that the "failure to take at least one of these actions . . . [would] result in dismissal of
9 the claims" against Defendants B&W and LL. (Id.) The deadline for Plaintiff to properly "re-serve"
10 Defendants B&W and LL was thirty days after the Court's November 10, 2008 Order, which was on
11 December 10, 2008. (Id.) Defendants B&W and LL allege that Plaintiff failed to properly serve
12 them prior to the December 10, 2008 deadline; therefore, they argue that the failure by Plaintiff to
13 comply with the Court's November 10, 2008 Order warrants dismissal pursuant to Federal Rule of
14 Civil Procedure 41(b). (Id. at 5-6.)

15 In the alternative, Defendants B&W and LL argue that the Court should grant their motion to
16 dismiss because they establish that no Defendant was served in compliance with applicable service
17 statutes. They rely on their arguments contained in the previously-filed June 21, 2006 "Motion to
18 Dismiss for Insufficiency of Service and Process." In that motion, they first argued that Plaintiff's
19 action should be dismissed for insufficiency of service of process under Federal Rule of Civil
20 Procedure 12(b)(5) because:

21 (1) On or about May 21, 2006, "Plaintiff attempted to serve a state court summons, an
22 incomplete copy of the Complaint, and a state court notice of acknowledgment and receipt on
23 [Defendants B&W and LL]." (June 21, 2006 Mot. to Dismiss at 2.)

24 (2) Plaintiff failed to comply with any of the approved delivery methods under Federal
25 Rule of Civil Procedure 4(h)(1), which states that a corporation may be served by delivering a copy
26 of the summons and complaint to an officer, a managing or general agent, or to any other agent
27 authorized by appointment or by law to receive service of process. (Id. at 3.)
28

1 (3) Plaintiff "merely addressed one envelope to 'Brown & Williamson Tobacco Corp.,
2 401 S. 4th Street, Louisville, Kentucky 40202' and the other to 'Lane Limited, Legal Department,
3 P.O. Box 1289, Tucker, Georgia 30085-1289.'" (Id.)

4 Defendants B&W and LL also argued that Plaintiff's action should also be dismissed for
5 insufficiency of process under Federal Rule of Civil Procedure 12(b)(4) because:

6 (1) Plaintiff's purported service upon Defendants B&W and LL "contained a state court
7 summons and an incomplete copy of the complaint." (Id. at 4.)

8 (2) "Because the action had been removed to federal court, a state court summons was
9 invalid." (Id.)

10 (3) Plaintiff did not serve a summons that complies with Federal Rule of Civil Procedure
11 4(a) because neither the name of this Court, where the action was pending, nor the seal of the Clerk
12 appeared on the state court summons. (Id.)

13 (4) The state court summons "did not state the correct time [Defendants B&W and LL]
14 had to appear and defend themselves in the federal court litigation."⁵ (Id. at 4-5.)

15 (5) Plaintiff failed to serve a complete copy of the complaint upon Defendants B&W and
16 LL because "Exhibit A" was missing. (Id.)

17 **B. Plaintiff's Opposition and Related Pending Requests**

18 Although it is untimely, the Court will consider Plaintiff's belated opposition to the motion
19 to dismiss. Plaintiff has also filed a request for the Court to reconsider its February 13, 2009 Order
20 denying his motion for an extension of time to serve Defendant LL.

21 In opposing the motion to dismiss, Plaintiff does not directly address any of the improper
22 service allegations raised by Defendants B&W and LL. Rather, he asserts that he has provided
23 proof that he "sufficiently served defendant B&W by serving the company corporation that had
24 merged with Defendant B&W, the R. J. [Reynolds Tobacco Company], and its agent Keith Lazarus
25 by the Forsyth Sheriff." (Mar. 10, 2009 Opp'n at 4.) Plaintiff also seems to ask the Court for an
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27 ⁵ Defendants B&W and LL further claim that "[t]he documents served on [them] did not
28 reveal that this action had been removed to federal court." (June 21, 2006 Mot. to Dismiss at 2
n.2.) They "learned of the current jurisdiction of this matter only after viewing the state court file
on June 16, 2006." (Id.)

1 extension of time to serve Defendant LL. He claims that "Defendant LL has also merged with R. J.
2 [Reynolds Tobacco Company]." (Id.) Plaintiff further alleges that "[o]n February 1, 2009, [he]
3 mailed the process service to the Forsyth Sheriff in order to serve process on R. J. [Reynolds
4 Tobacco Company] on behalf of [Defendant] LL, and [he] has not received a response from the
5 Forsyth Sheriff or the R. J. [Reynolds Tobacco Company] nor from . . . Defendant LL." (Id.)

6 Plaintiff's request for an extension of time to serve Defendant LL is more apparent in his
7 "Amended Motion for Reconsideration of the Court's February 13, 2009 Order Denying Plaintiff's
8 Motion for Extension of Time to Effect Service of Summons and Complaint on Defendant Lane
9 Limited." In its February 13, 2009 Order, the Court found that Plaintiff had not acted diligently in
10 serving Defendant LL, stating:

11 Plaintiff claims that he "has been diligent in attempting to serve process upon
12 Defendant Lane Limited." (Mot. for EOT to Serve Def. LL at 2.) However, the
13 record shows that Plaintiff only began to seek help from the prison librarian on
14 December 10, 2008, the deadline for serving Defendant LL. Plaintiff claims that on
15 December 10, 2008, he "gave a written request to the prison senior librarian Mrs.
16 McCumsey in order to obtain the name and address of the person who can accept
17 process service of the summons and complaint on behalf of Defendant Lane Limited in
18 this case at hand, . . . but Mrs. McCumsey failed to contact the plaintiff." (Id.)
19 Plaintiff claims he sent Mrs. McCumsey a second request on December 22, 2008.
20 Plaintiff alleges that on January 6, 2009, "Mrs. McCumsey returned the request with a
21 response that she was not able to obtain the process service information." (Id.)
22 Defendant LL argues that Plaintiff "has not acted reasonably in light of the Court's
23 directives of November 10." (Opp'n to Mot. for EOT to Serve Def. LL at 2.) The
24 Court finds that Plaintiff did not act diligently to serve Defendant LL by the Court-
25 ordered deadline of December 10, 2008.
26 (Feb. 13, 2009 Order at 3.) The Court also reminded Plaintiff that he had been warned that "no
27 further extensions of time [would] be granted in this case absent exigent circumstances." (Id.) The
28 Court found that Plaintiff "failed to allege that his failure to serve Defendant LL was due to
excusable neglect or exigent circumstances." (Id.)

Plaintiff asks the Court to reconsider its February 13, 2009 Order; however, the Court
construes his request as a renewed motion for an extension of time to serve Defendant LL. Again,
the Court finds that Plaintiff does not provide any reasons to warrant an extension of time. Plaintiff
repeats the some of the same allegations from his motion for an extension of time filed on January
16, 2009. He also claims that he has only recently discovered that Defendant LL had "merged" with
R. J. Reynolds Tobacco Company. Plaintiff alleges that he received this information from Mrs.

1 McCumsey on January 6, 2009, almost a month after the deadline. In light of this, the Court again
2 finds that Plaintiff did not act diligently to serve Defendant LL by the Court-ordered deadline of
3 December 10, 2008. Accordingly, the Court DENIES Plaintiff's renewed request for an extension of
4 time to serve Defendant LL (docket no. 83). As mentioned above, Plaintiff has since informed the
5 Court that "the Forsyth Sheriff ha[s] served the process upon Defendant Lane Limited by serving
6 [R. J. Reynolds Tobacco Company]" on February 10, 2009. (Mar. 20, 2009 Am. Notice at 1.)

7 Also before the Court are Plaintiff's additional motions for leave to proceed IFP and a
8 request for the U.S. Marshall to serve the processes upon Defendants B&W and LL. The Court has
9 previously denied Plaintiff's motion to proceed IFP pursuant to 28 U.S.C. § 1915(g). (Nov. 10,
10 2008 Order at 7.) Plaintiff was responsible for effecting service on Defendants B&W and LL as
11 well as on the remaining prison officials who were named as Defendants because his IFP application
12 had been denied. (*Id.* at 8.) Accordingly, Plaintiff's additional motions for leave to proceed IFP
13 (docket nos. 60, 79, 80) and his motion requesting the U.S. Marshal to serve the summons and
14 complaint upon Defendants B&W and LL (docket no. 79) are DENIED.

15 **C. Defendants B&W's and LL's Reply**

16 In their reply to the opposition, Defendants B&W and LL argue that Plaintiff's attempt to
17 "re-serve" Defendant B&W is untimely because R. J. Reynolds Tobacco Company received the
18 state summons and complaint addressed to Defendant B&W six days after the December 10, 2008
19 deadline to complete service set by the Court. (Jan. 5, 2009 Mot. to Dismiss at 4.) Further, R. J.
20 Reynolds Tobacco Company received the state summons and complaint addressed to Defendant LL
21 on February 10, 2009, two months after the deadline. (Mar. 23, 2009 Reply at 3.) Even if his
22 attempts were timely, Defendants B&W and LL allege that Plaintiff's attempts at service constituted
23 a "nullity" because he sought to serve R. J. Reynolds Tobacco Company -- a non-party to this action
24 -- with a copy of the original state court summons and the original complaint. (Jan. 5, 2009 Mot. to
25 Dismiss at 4 (citing Lazarus Decl. ¶¶ 2-3).) Defendants B&W and LL assert that they are
26 corporations separate and distinct from R. J. Reynolds Tobacco Company, stating:

27 R. J. Reynolds Tobacco Company is a North Carolina corporation with its principal
28 place of business in North Carolina. Brown and Williamson is, and has always been, a
corporation separate from R. J. Reynolds Tobacco Company; it is incorporated in

1 another state and it has its principal place of business outside North Carolina. Similarly
2 Lane Limited is, and has always been, a corporation separate from R. J. Reynolds
3 Tobacco Company; it is incorporated in another state and it has its principal place of
4 business outside North Carolina.

(Mar. 23, 2009 Reply at 5.)

5 **D. Analysis**

6 In its November 10, 2008 Order, the Court has already determined that the record showed
7 that Plaintiff's past attempts to serve Defendants B&W and LL were defective; therefore, these
8 Defendants had not been "properly served." (Nov. 10, 2008 Order at 3.) Nowhere in his opposition
9 does Plaintiff dispute that his past service attempts were defective. Rather, Plaintiff claims that he
10 has "sufficiently served Defendant B&W by serving the company corporation that had merged with
11 Defendant B&W, the R. J. [Reynolds Tobacco Company], and its agent Keith Lazarus by the
12 Forsyth Sheriff." (Mar. 10, 2009 Opp'n at 4.) He also renewed his request for an extension of time
13 to serve Defendant LL.

14 This action has been pending for more than three years. The Court has previously explained
15 to Plaintiff in great detail the proper ways to effect service and has granted him extended
16 opportunities to do so. All of the defects which Defendants B&W and LL previously raised have
17 been addressed by the Court in its March 30, 2007 and November 10, 2008 Orders, along with the
18 means to cure them. Plaintiff claims that he has "sufficiently" served Defendant B&W by mailing
19 the original state summons and complaint to R. J. Reynolds Tobacco Company. (Mar. 10, 2009
20 Opp'n at 4.) He has attempted to serve Defendant LL in the same manner. However, Defendants
21 B&W and LL argue Plaintiff's attempts to serve them are untimely by six days as to Defendant
22 B&W and by a longer period of almost two months as to Defendant LL. The Court finds Plaintiff's
23 attempts to serve Defendants B&W and LL are untimely based on the December 10, 2008 deadline
24 set in its November 10, 2008 Order; therefore, Defendants B&W and LL motion to dismiss the
25 claim against them pursuant to Federal Rule of Civil Procedure 41(b) is GRANTED.

26 Even if Plaintiff's attempts were timely, the Court finds that his attempts to "re-serve"
27 Defendants B&W and LL are also defective. First, Defendants B&W and LL assert that R. J.
28 Reynolds Tobacco Company is a corporation separate from them. (Mar. 23, 2009 Reply at 5.)

1 However, even if Plaintiff could show that R. J. Tobacco Company was Defendants B&W's and
2 LL's successor or agent, his attempts to serve them by sending a state summons and complaint to R.
3 J. Reynolds Tobacco Company are not proper. First, the state summons do not comply with the
4 requirements of Federal Rule of Civil Procedure 4(a) because the name of the issuing Court is not
5 identified in the summons and the seal of the Clerk does not appear anywhere on the summons.
6 (Lazarus Decl., Ex. A; Clemo Decl., Ex. A.) Further, Plaintiff attempted to serve Defendants B&W
7 and LL with the state complaint instead of the amended federal complaint. Therefore, dismissal is
8 still appropriate pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) because Plaintiff
9 failed to abide by the appropriate procedures for both service of process and contents of the process
10 in his attempts to "re-serve" Defendants B&W and LL.

11 In sum, although Plaintiff has made attempts to serve and "re-serve" Defendants B&W and
12 LL, he has failed to do so properly. This failure cannot be attributed to a lack of adequate time to
13 gather relevant discovery or to a lack of access to information about federal service requirements,
14 because the Court itself has provided both to Plaintiff. Plaintiff initiated this action, and he is
15 responsible for prosecuting it. Defendants B&W and LL were entitled to be served within 120 days
16 of the date the complaint was filed. The Court has already used its discretion to grant Plaintiff an
17 extension of time to properly serve Defendants B&W and LL. (Mar. 30, 2007 Order at 3 (citing
18 Fed. R. Civ. P. 4(m)).) It has been almost two years since the amended complaint was filed and
19 more than three years have passed since Plaintiff filed the original complaint in state court. No
20 further opportunities to perfect service will be granted. See Efav, 473 F.3d at 1040-41. Therefore,
21 Defendants B&W's and LL's motion to dismiss based on alternative grounds of insufficiency of
22 process and service of process pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) is
23 also GRANTED.

24 Accordingly, Defendants B&W's and LL's motion to dismiss (docket no. 57) is GRANTED.
25 Plaintiff's claim for product liability against Defendants B&W and LL is DISMISSED from this
26 action pursuant to Federal Rules of Civil Procedure 41(b), 12(b)(4) and 12(b)(5).

27 **II. Plaintiff's Motion for Reconsideration of the Court's Dismissal of His Amended Claims**
28

1 Plaintiff has filed a "Motion for Reconsideration of the Court's January 23, 2009 [sic]⁶ Order
2 Dismissing Deliberate Indifference, Supervisory Liability Claims" (docket no. 76).

3 In the Northern District of California, Local Rule 7-9 allows for the filing of motions for
4 reconsideration only with respect to interlocutory orders made in a case prior to the entry of final
5 judgment. Civil L.R. 7-9(a). No pre-judgment motion for reconsideration under Local Rule 7-9
6 may be brought without leave of court. Id. The moving party must specifically show: (1) that at the
7 time of the motion for leave, a material difference in fact or law exists from that which was
8 presented to the court before entry of the interlocutory order for which the reconsideration is sought,
9 and that in the exercise of reasonable diligence the party applying for reconsideration did not know
10 such fact or law at the time of the interlocutory order; or (2) the emergence of new material facts or
11 a change of law occurring after the time of such order; or (3) a manifest failure by the court to
12 consider material facts which were presented to the court before such interlocutory order. Civil L.R.
13 7-9(b). Unless otherwise ordered by the court, no response need be filed to a motion under the
14 Local Rule. Civil L.R. 7-9(c).

15 In its January 22, 2009 Order, the Court reviewed Plaintiff's amendment to the complaint,
16 which included his amended deliberate indifference and supervisory liability claims. The Court
17 concluded that Plaintiff's allegations failed to show: (1) that he had a serious medical need; and
18 (2) that Defendants Beza, Schneider, Grillo and Gibbs knew of and disregarded an excessive risk to
19 inmate health or safety, stating:

20 Plaintiff's allegations in his amendment to the complaint relating to the Eighth
21 Amendment violation fails to cure the pleading deficiencies of his original deliberate
22 indifference claim. He argues that the aforementioned Defendants "were informed of
23 and aware of the facts of Assembly Bill No. 384 from which the inference could be
24 drawn that a substantial risk of tobacco smoking addiction by Plaintiff existed and that
25 a smoking addition cessation program was needed by the plaintiff" (Am. to
26 Compl. at 2.) Even if such an inference could be made and Assembly Bill No. 384
27 were violated, a violation of state law is not a cognizable claim for relief under § 1983.

28 Moreover, contrary to Plaintiff's claim, Assembly Bill No. 384 does not require
smoking cessation programs. Assembly Bill No. 384 states:

⁶ The Court notes that the Order was signed on January 22, 2009 and entered into the Court's docket on January 23, 2009; therefore, the Court will refer it as the January 22, 2009 Order.

1
2 This bill would prohibit the possession or use of tobacco products by
3 inmates and wards under the jurisdiction of the Department of
4 Corrections and the Department of the Youth Authority. It would
require the directors of these departments to adopt regulations to
implement this prohibition, and would require that these regulations
include an exemption for departmentally approved religious ceremonies.

5 2004 Cal. Stat. c. 798 (A.B. 384). Thus, it requires prison officials to "adopt
6 regulations to implement" the prohibition of the possession and use of tobacco products
7 by inmates. Id. Therefore, the Court finds unavailing Plaintiff's argument that
Assembly Bill No. 384 requires a smoking cessation program.

8 Equally unavailing is Plaintiff's argument that Defendant Grillo's and Gibb's
9 "medical diagnosis of Plaintiff on December 27, 2004" amounted to deliberate
10 indifference. Plaintiff alleges that Defendant Grillo and Gibbs "wrote a medical report
11 listing the physical damages . . . that plaintiff's tobacco smoking has caused," but that
12 they "continued to allow the plaintiff to smoke tobacco and to be addicted to smoking
13 tobacco." (Am. to Compl. at 3.) Plaintiff claims Defendants Grillo and Gibbs treated
14 him and after they made their "medical diagnosis," they "continued to allow [him] to
15 smoke tobacco and to be addicted to smoking tobacco . . ." (Id.) Plaintiff argues that
Defendants Grillo and Gibbs should have offered him a smoking cessation program.
However, the Court finds that Plaintiff does not have a constitutional right to a smoking
cessation program. Furthermore, "[a] difference of opinion between a prisoner-patient
and prison medical authorities regarding treatment does not give rise to a § 1983
claim." Id. Here, Plaintiff allegations amount to a difference of medical opinion as to
the need to pursue one course of treatment over another, which is insufficient, as a
matter of law, to establish deliberate indifference. See Sanchez v. Vild, 891 F.2d 240,
242 (9th Cir. 1989).

16 (Jan. 23, 2009 Order at 4-5.) Therefore, the Court determined that Plaintiff's allegations in his
17 amendment to the complaint did not amount to deliberate indifference to his serious medical needs
18 against the aforementioned defendants. At most, the Court found that his allegations amount to
19 negligence, which is not constitutionally cognizable. Accordingly, the deliberate indifference claim
20 against Defendants Beza, Schneider, Grillo and Gibbs was dismissed without further leave to
21 amend.

22 The Court also concluded that nothing in the amendment to the complaint was sufficient to
23 overcome the deficiency of his supervisory liability claim against Defendants Woodford and Evans,
24 which gave rise to the dismissal with leave to amend, stating:

25 In the amendment, Plaintiff states that Defendants Woodford and Evans:
26
27 were deliberately indifferent to the plaintiff's serious medical needs by
28 failing to supervise or create a smoking cessation program for the
plaintiff pursuant to Assembly Bill No. 384, when defendants Woodford
and Evans were aware of facts by Assembly Bill No. 384 from which
the inference could be drawn that a substantial risk of serious harm of

1 tobacco smoking addiction exists from the selling of smoking tobacco to
2 the plaintiff.

3 (Am. to Compl. at 5.)

4 Plaintiff claims that because Defendant Woodford is the Director of the
5 California Department of Corrections and Rehabilitation and because Defendant Evans
6 was a former SVSP Warden, they should be liable for the alleged "fail[ure] to provide
7 and supervise the creation and supervision of a tobacco smoking cessation program for
8 the plaintiff" at SVSP. (*Id.*) This is a respondeat superior claim, that is, Plaintiff seeks
9 to hold Defendants Woodford and Evans liable because they are the supervisors of the
10 persons Plaintiff contends violated his rights. This is, however, not a proper basis for
11 liability under 42 U.S.C. § 1983. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
12 1989).

13 (Jan. 23, 2009 Order at 5-6 (footnote omitted).) Accordingly, the supervisory liability claim against
14 Defendants Woodford and Evans was dismissed without further leave to amend. The Court then
15 determined that Defendants B&W and LL were the "only remaining Defendants in this case." (*Id.*)
16 Thus, the Court's January 22, 2009 Order resulted in the dismissal of all claims against Defendants
17 Beza, Schneider, Grillo, Gibbs, Woodford and Evans.

18 The Court finds that the requirements for leave to file a motion for reconsideration are not
19 satisfied as to the dismissal of Plaintiff's federal claims of deliberate indifference and supervisory
20 liability. Plaintiff now claims that he "misconstrued Assembly Bill No. 384 with the 'Message from
21 the Warden' that Defendant Evans had created, and also with the 'Notice of Tobacco Ban' and the
22 'Memorandum' that Defendant Woodford created." (Feb. 23, 2009 Mot. for Recons. at 4.) He
23 argues that this allegation links Defendants Evans and Woodford to the alleged failure to create a
24 smoking cessation program at SVSP. The Court still finds that Plaintiff fails to state a cognizable
25 supervisory liability claim because he does not have a constitutional right to a smoking cessation
26 program. Reconsideration is not warranted as to the dismissal of the federal claims because Plaintiff
27 has not established that there is a material difference in fact or law that exists now as opposed to
28 before, nor has he alleged any new material facts or changes in the law, nor demonstrated a failure
of this Court to consider material facts. *See* Civil L.R. 7-9(b).

However, Plaintiff further contends that the Court was mistaken in dismissing all claims
against Defendants Beza, Schneider, Grillo and Gibbs because some state claims remain, stating:

The cause of action for "negligence" may not be constitutionally cognizable or
give rise to a § 1983 claim, but the plaintiff's original case was removed from the State

1 Superior Court to the Federal District Court while the plaintiff never alleged or made a
2 federal claim of "deliberate indifference" against the defendants in this case at hand, but
3 did, in fact, make a state claim of "negligence," which the plaintiff claims . . . he can
4 prove against defendants in State Superior Court

(Feb. 23, 2009 Mot. for Recons. at 2.)

5 In the Court's November 10, 2008 Order, the Court acknowledged that Plaintiff alleged state
6 law claims in the instant action, stating:

7 In addition to the federal claims discussed above, Plaintiff asserts state law
8 claims against Defendants. Because his state law claims arise out of the same acts and
9 events giving rise to his federal claims, the Court will exercise supplemental
10 jurisdiction over the claims. See 28 U.S.C. § 1367(a).

11 Plaintiff alleges that he is entitled to relief under California state law for
12 Defendants' actions. He asserts supplementary state law claims that the named
13 Defendants' actions constituted general negligence, intentional torts, intentional
14 infliction of emotional distress, medical negligence, conspiracy, intentional fraud, and
15 intentional misrepresentation. For reasons of judicial economy, however, review and
16 service of these claims will be held until Plaintiff files an amended complaint, as
17 directed above. If Plaintiff fails to timely amend his complaint or if the amended
18 claims are dismissed after review, these state law claims will be remanded back to state
19 court.

(Nov. 10, 2008 Order at 11.)

20 Accordingly, in light of Plaintiff's allegations regarding the remaining state law claims in
21 this action, Plaintiff's motion for leave to file a motion for reconsideration of the Court's January 22,
22 2009 Order is GRANTED in part as to the dismissal of the state law claims and DENIED in part as
23 to the dismissal of the federal claims. The Court has already considered Plaintiff's allegations in his
24 February 23, 2009 "Motion for Reconsideration of the Court's January 23, 2009 [sic] Order
25 Dismissing Deliberate Indifference, Supervisory Liability Claims;" therefore, he need not file a
26 separate motion for reconsideration pertaining to the state law claims. For the reasons stated above,
27 the Court VACATES in part its January 22, 2009 Order only as to the dismissal of the state law
28 claims against the prison officials named as Defendants.

As mentioned above, the product liability claim against Defendants B&W, LL and Access as
well as the § 1983 claims against the remaining prison officials named as Defendants have been
dismissed. The Court has also determined that reconsideration is not warranted as to the Court's
determination that Plaintiff failed to state a constitutionally cognizable deliberate indifference and
supervisory liability claims as a matter of law and that leave to amend would be futile. With the

1 dismissal of the aforementioned federal claims, there remains for adjudication several state law
2 claims pled in the amended complaint. The Court declines to exercise supplemental jurisdiction
3 over the remaining state law claims now that the federal question claims have been dismissed. See
4 28 U.S.C. § 1367(c)(3). Plaintiff ought to be allowed to litigate his state law claims in state court
5 where he first asserted those claims. This case therefore will be remanded to state court.⁷ See Swett
6 v. Schenk, 792 F.2d 1447, 1450 (9th Cir. 1986) ("it is within the district court's discretion, once the
7 basis for removal jurisdiction is dropped, whether to hear the rest of the action or remand it to the
8 state court from which it was removed"); Plute v. Roadway Package System, Inc., 141 F. Supp. 2d
9 1005, 1007 (N.D. Cal. 2001) (court may remand sua sponte or on motion of a party).

10 CONCLUSION

11 For the foregoing reasons, the Court orders as follows:

- 12 1. Defendants B&W's and LL's motion to dismiss is GRANTED (docket no. 57). The
13 claim for product liability against Defendants B&W and LL is DISMISSED from this action.
- 14 2. Plaintiff's "Amended Motion for Reconsideration of the Court's February 13, 2009
15 Order Denying Plaintiff's Motion for Extension of Time to Effect Service of Summons and
16 Complaint on Defendant Lane Limited" (docket no. 83), construed as a renewed request for an
17 extension of time to serve Defendant LL, is DENIED.
- 18 3. Plaintiff's additional motions for leave to proceed IFP (docket nos. 60, 79, 80) and his
19 motion requesting the U.S. Marshal to serve the summons and complaint upon Defendants B&W
20 and LL (docket no. 79) are DENIED.
- 21 4. Plaintiff's "Motion for Reconsideration of the Court's January 23, 2009 [sic] Order
22 Dismissing Deliberate Indifference, Supervisory Liability Claims" (docket no. 76) is GRANTED in
23 part as to the dismissed state law claims and DENIED in part as to the dismissed federal law claims.
24 The Court VACATES in part its January 22, 2009 Order (docket no. 63) only as to the dismissal of
25 the state law claims against the prison officials named as Defendants.

26 _____
27 ⁷ Because no federal claims remain and this case is being remanded to state court, the
28 Court need not address whether Plaintiff has properly served the prison officials who were named
as Defendants, as he was directed to do so in the Court's November 10, 2008 Order.

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5. The Court declines to exercise supplemental jurisdiction over the remaining state law claims now that the federal question claims have been dismissed. See 28 U.S.C. § 1367(c)(3). Therefore, this action is remanded to the Monterey County Superior Court for such other and further proceedings as that court deems proper.

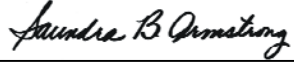
6. The Clerk shall close the file and send the necessary materials to the Monterey County Superior Court for the remand.

7. The Clerk shall terminate all remaining pending motions as moot in light of the remand to state court, including Defendant Access's Motion for Entry of Judgment (docket no. 47).

8. This Order terminates Docket nos. 47, 57, 60, 76, 79, 80 and 83.

IT IS SO ORDERED.

DATED: March 31, 2009


SAUNDRA BROWN ARMSTRONG
United States District Judge