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2 UNITED STATES DISTRICT COURT  
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
4 OAKLAND DIVISION  
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6 JOSE TIJERO,

7 Plaintiff,

8 vs.

9 AARON BROTHERS, INC., et al.,

10 Defendants.  
11

Case No: C 10-01089-SBA

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS PURSUANT  
TO FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(5)**

[Docket No. 13]

12 The parties are presently before the Court on Defendants' Motion to Dismiss Pursuant  
13 to Federal Rule of Civil Procedure 12(b)(5). (Docket No. 13.) Having read and considered  
14 the papers filed in connection with this matter and being fully informed, the Court hereby  
15 DENIES the motion for the reasons set forth below. The Court, in its discretion, finds this  
16 matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b).

17 This action was initially filed on May 7, 2009 in state court. Plaintiff did not serve the  
18 Defendants until February 12, 2010, more than nine months later. On March 15, 2010,  
19 Defendants removed this action to this Court solely on diversity grounds. By this motion,  
20 Defendants move to dismiss under Fed. R. Civ. P. 12(b)(5) for insufficiency of service process,  
21 on the grounds that Plaintiff failed to serve Defendants within 60 days from filing, as  
22 Defendants assert is required under California law.

23 The parties are correct that California law governs here because service of process  
24 preceded removal to federal court. See Anderson v. Allstate Ins. Co., 630 F.2d 677, 682 (9th  
25 Cir. 1980). California Rule of Court 3.110 ("Rule 3.110") provides "[t]he complaint must be  
26 served on all named defendants and proofs of service on those defendants must be filed with  
27 the court within 60 days after the filing of the complaint." Cal. R. Ct. 3.110(b). Rule 3.110  
28 further provides "[i]f a party fails to serve and file pleadings as required under this rule, and

1 has not obtained an order extending time to serve its pleadings, the court may issue an order to  
2 show cause why sanctions shall not be imposed.” Cal. R. Ct. 3.110(f) (emphasis added) (no  
3 extension is at issue here).

4           It should be noted that even though Plaintiff was approximately seven months late under  
5 Rule 3.110 in serving his complaint, the court in the state action never issued an order to show  
6 cause under Rule 3.110. Moreover, this Court observes that, despite over a month passing  
7 between Plaintiff’s service and Defendants’ notice of removal, Defendants in that time never  
8 moved for an order to show cause or for dismissal in state court action. This Court further  
9 notes that the parties have not set forth any arguments regarding prejudice that may, or may not  
10 have, resulted from Plaintiff’s delay in service. Instead, their arguments relate solely to their  
11 respective interpretations of Rule 3.110, none of which has merit. Accordingly,

12           IT IS HEREBY ORDERED THAT:

13           1.       Defendants’ Motion to Dismiss Pursuant to Federal Rule of Civil Procedure  
14 12(b)(5) (Docket No. 13) is DENIED.

15           2.       The July 21, 2010 hearing date on Defendants’ Motion to Dismiss Pursuant to  
16 Federal Rule of Civil Procedure 12(b)(5) is VACATED.

17           2.       The Case Management Conference currently scheduled for July 21, 2010 at 2:00  
18 p.m. is CONTINUED to **October 14, 2010 at 3:00 p.m.** The parties shall meet and confer  
19 prior to the conference and shall prepare a joint Case Management Conference Statement  
20 which shall be filed no later than ten (10) days prior to the Case Management Conference that  
21 complies with the Standing Order for All Judges of the Northern District of California and the  
22 Standing Order of this Court. Plaintiff shall be responsible for filing the statement as well as  
23 for arranging the conference call. All parties shall be on the line and shall call (510) 637-3559  
24 at the above indicated date and time.

25           This order terminates Docket No. 13.

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IT IS SO ORDERED.

Dated: July 19, 2010



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SAUNDRA BROWN ARMSTRONG  
United States District Judge