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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM WEISNER,
Petitioner,
v.
M. S. EVANS, warden,
Respondent.

No. C 07-5509 SI (pr)

**ORDER DENYING MOTION TO
DISMISS AND SETTING BRIEFING
SCHEDULE**

United States District Court
For the Northern District of California

Respondent has moved to dismiss the petition for writ of habeas corpus in this action as untimely filed. Respondent's motion fails to take into account the first state habeas petition filed by petitioner. This error is evident from the fact that respondent's Exhibit 1 (last page) is an order from the Alameda County Superior Court denying a habeas petition on November 29, 2005, which predates the date (i.e., January 20, 2006) on which respondent states that petitioner's first state habeas petition was filed in that court. Because respondent did not take into account that first habeas petition, and because this court has no information about when it was filed so as to be able to determine how many days of tolling to permit based on its pendency, respondent's motion to dismiss is DENIED. (Docket # 6.) This denial is without prejudice to respondent filing a new motion if he believes that, taking into account the first state habeas petition, the federal petition is still untimely. In order to move this case toward resolution, the court now sets the following briefing schedule:

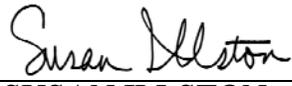
If respondent chooses to file a new motion to dismiss, he must file and serve his motion to dismiss no later than **February 13, 2009**. Petitioner must file and serve his opposition not later than **March 13, 2009**. Respondent must file and serve his reply brief, if any, no later than

1 **March 27, 2009.**

2 If respondent chooses not to file a new motion to dismiss, he must file and serve his
3 answer to the petition for writ of habeas corpus no later than **March 6, 2009**. Petitioner must
4 file and serve his traverse no later than **April 17, 2009**.

5 IT IS SO ORDERED.

6 DATED: January 26, 2009



SUSAN ILLSTON
United States District Judge

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