

DEC 05 2012

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-11-1729-MkHPa
)		
6	FIRST STREET HOLDINGS NV, LLC,)	Bk. No.	11-49300
	et al.,)	(jointly administered with	
7)	Bk. Nos. 11-49301, 11-70224,	
	Debtors.)	11-70228, 11-70229, 11-70231,	
8	_____)	11-70232, 11-70233 & 11-70234)	
)		
9	FIRST STREET HOLDINGS NV, LLC;)		
	LYDIAN SF HOLDINGS, LLC;)		
10	78 FIRST STREET, LLC; 88 FIRST)		
	STREET, LLC; 518 MISSION, LLC;)		
11	FIRST/JESSIE, LLC; JP CAPITAL,)		
	LLC; PENINSULA TOWERS, LLC;)		
12	SIXTY-TWO STREET, LLC,)		
)		
13	Appellants,)		
)		
14	v.)	MEMORANDUM*	
)		
15	MS MISSION HOLDINGS, LLC,)		
)		
16	Appellee.)		
	_____)		

Argued and Submitted on October 18, 2012
at San Francisco, California

Filed - December 5, 2012

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Robert G. Harris, Esq. of Binder & Malter, LLP
argued for Appellants; Harvey A. Strickon, Esq. of
Paul Hastings LLP argued for Appellee.

Before: MARKELL, HOLLOWELL and PAPPAS, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 the First Street Parties, their prospective development plan was
2 linked to the City and County of San Francisco's Transit Center
3 District Plan.

4 Seven of the nine First Street Parties were borrowers under
5 the Loan. The First Street Parties referred to these seven
6 borrowing entities as the project-level entities (collectively,
7 "Project Entities").² The other two First Street Parties
8 essentially were holding companies (jointly, "Holding
9 Entities").³ Between them, the Holding Entities held all of the
10 membership interests in the Project Entities ("Membership
11 Interests").

12 The Loan was to be made in the principal amount of
13 \$67.1 million, and over \$52 million was immediately funded at the
14 time the Loan transaction closed. At the time of the filing of
15 Mission's first relief from stay motion, Mission claimed that the
16 outstanding Loan balance exceeded \$95 million. For their part,
17 the First Street Parties admitted that roughly \$80 million was
18 owed on the Loan as of the time of their bankruptcy filings.
19 However, the First Street Parties claimed that the amount owed to
20 Mission was subject to a number of different defenses,
21 counterclaims, offsets and an equitable subordination claim, all
22 of which would effectively reduce the net amount owed by a

24
25 ²The seven Project Entities were: (1) Sixty-Two First
26 Street, LLC; (2) 78 First Street, LLC; (3) 88 First Street, LLC;
27 (4) First/Jessie, LLC; (5) 518 Mission, LLC; (6) JP Capital, LLC;
28 and (7) Peninsula Towers, LLC.

³The two Holding Entities were: (1) First Street Holdings
NV, LLC; and (2) Lydian SF Holdings.

1 significant but unknown amount.⁴

2 Among other things, the Loan was secured by deeds of trust
3 covering the Properties and by pledge agreements covering the
4 Membership Interests. Prior to the First Street Parties'
5 bankruptcy filings, foreclosure was imminent on both the
6 Properties and the Membership Interests.⁵

7 **2. The bankruptcy filings and Mission's relief from stay motions**

8 The Holding Entities filed their chapter 11 bankruptcy cases
9 on August 30, 2011, and the Project Entities filed their
10 chapter 11 bankruptcy cases roughly one month later, in September
11 2011.

12 Mission soon filed motions for relief from stay in each of
13 the bankruptcy cases, which the bankruptcy court consolidated for
14 hearing and determination.⁶ Mission asserted that it was
15 entitled to relief from stay on three independent grounds. These

16
17 ⁴The First Street Parties further admitted that they had
18 defaulted on their interest-only payments under the Loan
19 beginning in April 2008 and that the loan had matured in
20 May 2009.

21 ⁵The First Street Parties also claimed that Mission held a
22 security interest in certain transferrable development rights
23 allegedly worth \$8 million ("TDR's"). Mission did not
24 specifically address the TDR's in any of its relief from stay
25 motions, nor did it talk about them in its appeal brief. On the
26 other hand, the language in the order granting Mission's relief
27 from stay motion was broad enough to permit Mission to enforce
28 any liens it had against any and all property of the estate,
including the TDR's. We cannot tell from the briefs of either
side or from the record whether the TDR's have been foreclosed
upon or whether Mission even has tried to foreclose upon the
TDR's.

⁶For ease of reference, we collectively refer to all of
Mission's relief from stay motions in the singular, as Mission's
"relief from stay motion."

1 were: (i) § 362(d)(2), because the First Street Parties had no
2 equity in the Properties and they were not necessary for an
3 effective reorganization; (ii) § 362(d)(1), because cause existed
4 due to a lack of adequate protection of Mission's interest in the
5 Properties; and (iii) § 362(d)(1), because cause existed where
6 the bankruptcy cases had been filed in bad faith.

7 The bankruptcy court held a preliminary hearing on
8 October 5, 2011 and a scheduling conference on October 12, 2011,
9 which produced various scheduling deadlines and a scheduling
10 order. In setting its scheduling deadlines and issuing the
11 scheduling order, the court endeavored to enable the parties to
12 complete all reasonably necessary trial preparation in time for a
13 final hearing to be held on December 1 and 2, 2011. If those
14 dates were not sufficient, the court reserved an additional date
15 of December 16, 2011 to be used if necessary.⁷

16 After the entry of the scheduling order, on November 9,
17 2011, the First Street Parties filed an objection to Mission's
18 proof of claim. In addition, the First Street Parties filed an
19 adversary complaint against CSF, Mission and others. In relevant
20 part, the First Street Parties sought equitable subordination of
21 Mission's claim. Both the equitable subordination complaint and
22 the claim objection, however, were based on the same type of
23 unsubstantiated allegations as were stated in the First Street
24 Parties' opposition to the relief from stay motion.

25 More importantly, to bolster its argument that it had
26

27 ⁷As discussed at length below, the scheduling deadlines and
28 the bankruptcy court's scheduling order became a major source of
contention, and our disposition of this appeal hinges on them.

1 realistic prospects of an effective reorganization, on
2 November 29, 2011, the First Street Parties filed a draft joint
3 disclosure statement and plan of reorganization.

4 The disclosure statement's plan summary identified the
5 following key plan terms:

- 6 ● Substantive Consolidation of the First Street Parties'
7 cases.
- 8 ● Monthly payment of net rents to Mission beginning
9 ninety days after plan confirmation ("Effective Date").
- 10 ● On account of interest payments to be paid under the
11 plan, a lump sum payment to Mission of up to \$3 million
12 at the end of the first year after the Effective Date,
13 and a lump sum payment of up to \$5.5 million at the end
14 of the second year after the Effective Date.
- 15 ● The amount of the lump sum payments to be made under
16 the plan would be based on the difference between the
17 applicable market rate of interest as determined by the
18 court and the net rents paid to Mission.
- 19 ● A final lump sum payment to Mission on the three-year
20 anniversary of the Effective date, which payment would
21 fully pay off the remaining balance owed to Mission,
22 including all remaining interest, fees and charges
23 owed, but also after liquidating and accounting for all
24 defenses, counterclaims and offsets that the First
25 Street Parties claimed to hold against Mission.
- 26 ● Funding of the Plan by renting out all existing and
27 future rental space available in the buildings on the
28 Properties.

1 **3. The final relief from stay hearing**

2 The final hearing on Mission's relief from stay motion was
3 held as scheduled on December 1 and 2, 2011. The tenor of the
4 proceedings shifted significantly, however, when the bankruptcy
5 court granted Mission's motions in limine seeking to exclude all
6 of the testimony of the First Street Parties' non-appraiser
7 expert witnesses. The bankruptcy court excluded this testimony
8 on the basis that the First Street Parties had not timely
9 disclosed their intent to call any non-appraiser experts as
10 witnesses. In holding that the disclosure was untimely, the
11 court relied upon an oral scheduling deadline that was not
12 included in the court's written scheduling order.

13 The court did allow non-expert declarations in lieu of live
14 direct testimony, and heard live testimony on cross-examination
15 and on redirect examination from Mission's percipient witness
16 John Herr and from the First Street Parties' percipient witness
17 David Choo.⁸ The court also heard the expert testimony of
18 Mission's appraiser Robert Farwell ("Farwell") and of the First
19 Street Parties' appraiser Donn Byrne, Jr. ("Byrne"). The court
20 accepted into evidence both expert appraisals.

21 The bankruptcy court stated its ruling on valuation of the
22 Properties at the beginning of the second day of trial, on
23 December 2, 2011. The court found that both appraisers were good
24 expert witnesses and that they had submitted good appraisal

25
26 ⁸The bankruptcy court excluded most of Choo's direct
27 testimony when it granted Mission's motions in limine numbers
28 2 & 3. The First Street Parties challenged these evidentiary
rulings on appeal, but in light of our disposition of this
appeal, we do not need to reach this issue.

1 reports. But the court ultimately held that it would accept
2 Farwell's \$70.7 million valuation of the Properties "as being the
3 best evidence as to what the current value of the subject
4 property at the time this motion for relief from stay was filed
5 and is being determined" Trial Trans. (Dec. 2, 2011) at
6 7:5-8.

7 Critical to this appeal, the bankruptcy court essentially
8 rejected Byrne's \$140 million valuation as being too speculative
9 and hypothetical:

10 [W]hat troubled the Court were the specific assumptions
11 that Mr. [Byrne] was required to make. Specifically, he
12 was to assume that the draft EIR,⁹ which is Exhibit #4,
13 had been [approved], and he was to make specific
14 assumptions about the square footage about the
15 building, effectively, or the -- what could be built
16 upon, which is approximately a seven-fold increase of
17 the existing floor space of existing buildings on the
18 Debtors' properties. And in doing that, he came up with
19 a hypothetical valuation of \$140 million.

20 The problem is, as is also set out in the draft EIR, in
21 the intended uses of the EIR and the approvals
22 required, Mr. [Byrne] acknowledged that there were
23 still 14 points, which are set out at Page 49 of the
24 draft EIR, I believe it's in Chapter 2, the Project
25 Description under Subsection "Intended Use of the EIR,
26 Proof or Requirements" that had not been made. There
27 still needed to be amendments to the general plan, a
28 determination of the consistency of the proposed
general plan amendments and the rezoning of the general
plan and Planning Code Section 1.1.1 of the priority
policies of the Planning Commission, amendments of the
Planning Code to create new height in both districts
greater than the current maximum 550 feet, establish
building set-back, separation of tower requirements to
the buildings taller than 550 feet, and it goes on from
there.

26 ⁹The draft EIR (hereinafter referred to as the "EIR") was
27 issued by the City and County of San Francisco's Planning
28 Department in conjunction with their draft Transit Center
District Plan. Both of these documents are discussed in more
detail in our merits discussion, infra.

1 Trial Trans. (Dec. 2, 2011) at 4:22-5:19; see also id. at 5:20-
2 6:15 (listing numerous other EIR contingencies). However, if the
3 bankruptcy court had admitted the excluded non-appraiser expert
4 testimony, much of Byrne's \$140 million valuation could have been
5 corroborated.

6 For purposes of determining whether the First Street Parties
7 had any equity in the Properties, the bankruptcy court found that
8 the First Street Parties had admitted in a verified complaint
9 they filed in state court that the minimum amount owed to Mission
10 was \$77.9 million.

11 Also critical to this appeal, the bankruptcy court rejected
12 the First Street Parties' argument that the amount of Mission's
13 claim for purposes of determining equity in the Properties should
14 be reduced on account of the First Street Parties alleged
15 defenses, offsets, counterclaims and First Street's equitable
16 subordination claim. The court rejected this argument in part
17 because, having granted the motion in limine excluding the First
18 Street Parties' non-appraiser expert testimony, the First Street
19 Parties had offered no admissible evidence to support their
20 alleged defenses, offsets, counterclaims and equitable
21 subordination claim.

22 The bankruptcy court also found that the First Street
23 Parties had not proven that they had a reasonable possibility of
24 an effective reorganization within a reasonable time. The court
25 noted that the proposed plan likely qualified as a negative
26 amortization plan, which would be difficult to confirm under the
27 best of circumstances. The court also noted that the Properties
28 as of the time of the hearing did not generate enough monthly

1 rents to pay monthly operating expenses and property taxes. The
2 court also doubted that the First Street Parties could raise
3 sufficient plan funding, as they had proposed, by renting out
4 additional available space in the buildings on the Properties.

5 The bankruptcy court also based its reorganization finding
6 on the EIR contingencies and on the speculative nature of the
7 First Street Parties' development plans:

8 Frankly, there are just too many uncertainties that
9 exist at this time. As the Court has noted with
10 respect to the draft EIR, there are still 14 hurdles
11 that need to be overcome before the draft EIR can be
12 confirmed. And there's been argument that the draft
13 EIR might be approved within the next three to four
14 months, but again, there's testimony that it should
15 have been approved over two years ago. And given the
16 present economy in San Francisco and Northern
17 California and the country as a whole, the Court has
18 serious concerns whether it would be serious money that
19 would come in to try to develop such a project within
20 the next three, four or five years, if at all, unless
21 things markedly improve, especially here in the San
22 Francisco Bay Area.

23 Trial Trans. (Dec. 2, 2011) at 113:20-114:7.

24 The bankruptcy court ruled against alternately granting
25 relief from stay on the grounds of bad faith. According to the
26 court, there had been no showing of bad faith by the First Street
27 Parties.

28 But the bankruptcy court did alternately grant relief from
stay under § 362(d)(1) based on lack of adequate protection. The
court explained:

Section 363(e) of the Bankruptcy Code requires that the
Debtors provide adequate protection to Movant as a
condition of the Debtor's use of the property. The
Debtor's revenue stream from the property is
insufficient to even cover operating expenses, as
previously noted, let alone to provide adequate
protection to Movant, and the Debtors have no other
source of income other than the proposed sale of
possibly the 81st property or the TDRs. The Debtors

1 have no assets from which to make postpetition payments
2 to any party, and no equity cushion exists to protect
the Movant.

3 Trial Trans. (Dec. 2, 2011) at 115:3-12.¹⁰

4 The bankruptcy court entered its order granting relief from
5 stay on December 7, 2011, and the First Street Parties timely
6 appealed on December 20, 2011.

7 JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C.
10 § 158, subject to the discussion set forth immediately below.

11 During the course of this appeal, after the First Street
12 Parties advised the Panel that Mission had completed its
13 foreclosure sales of the Properties, the Panel issued an order
14 directing the First Street Parties to explain why the foreclosure
15 sales did not render this appeal moot. After the First Street
16 Parties responded, a motions panel issued an order deeming the
17 mootness issue satisfied.

18 We adopt the motions panel's mootness ruling. Generally
19 speaking, an appeal from an order denying or terminating an
20 injunction becomes moot when the action sought to be enjoined

21
22 ¹⁰This ruling did not seem to be in accord with the facts.
23 As an apparently undersecured creditor, Mission only was entitled
24 to adequate protection payments to the extent its interest in the
25 Properties was depreciating from the petition date. See First
26 Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R. 284,
27 296 (9th Cir. BAP 1998) (citing United Sav. Ass'n of Tex. v.
28 Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 382
(1988)). The bankruptcy court made no finding that the
Properties were depreciating, nor are we aware of any evidence in
the record to that effect. Nonetheless, in light of our
disposition of this appeal, we need not further address the
bankruptcy court's adequate protection ruling.

1 already has occurred. Vegas Diamond Props., LLC v. F.D.I.C.,
2 669 F.3d 933, 936 (9th Cir. 2012); see also Murphy v. Hunt,
3 455 U.S. 478, 481 (1982) (holding that a case typically becomes
4 moot when the issue presented no longer is "live" or when the
5 parties lack a cognizable interest in the case's outcome).

6 Notwithstanding the sale of the Properties here, we have no
7 evidence of the sale of the other collateral securing Mission's
8 claim. No one has advised us that all of the Membership
9 Interests or the TDR's have been sold. As a result, we cannot
10 conclude that this appeal is moot. Cf. Motor Vehicle Cas. Co. v.
11 Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d
12 869, 882 (9th Cir. 2012) (stating that the party seeking
13 dismissal of an appeal based on mootness must demonstrate that
14 the appeal is moot). Accordingly, we will proceed to consider
15 the merits of the appeal.¹¹

16 **ISSUES**

17 1. Did the bankruptcy court abuse its discretion when it
18 granted Mission's relief from stay motion?

19 2. Did the bankruptcy court abuse its discretion when it
20 excluded the expert testimony of the First Street Parties'
21 non-appraiser experts?
22
23

24
25 ¹¹We must acknowledge that our conclusion regarding mootness
26 leaves us with little satisfaction. Given that all of the
27 Properties have been foreclosed upon, the potential that
28 remanding this matter would have any practical or beneficial
impact on any party seems remote. Nonetheless, in light of the
established standard of proof for declaring a matter moot, we see
no alternative to the conclusion we have reached.

1 timely disclosed their intent to call the Non-Appraiser Experts
2 as witnesses. According to the court, this lack of timely
3 disclosure justified the exclusion of all Non-Appraiser Expert
4 testimony.

5 The First Street Parties' Non-Appraiser Experts included:

- 6 1. John Graziano ("Graziano") - a real estate broker who
7 described himself as an expert regarding the servicing
8 of commercial real estate loans and who proposed to
9 testify regarding CSF's allegedly improper servicing of
10 the Loan.
- 11 2. Randy Sugarman ("Sugarman") - who described himself as
12 a Certified Public Accountant, a Certified Fraud
13 Examiner, and a Certified Insolvency and Reorganization
14 Accountant. Sugarman proposed to testify regarding,
15 among other things, Mission's accounting of the amount
16 it claimed was owed under the Loans.
- 17 3. D. Paul Regan ("Regan") - who described himself as a
18 Certified Public Accountant and a Certified Fraud
19 Examiner. Similar to Sugarman, Regan proposed to
20 testify regarding the accounting on which Mission's
21 claim was based.
- 22 4. Michael J. Burke ("Burke") who described himself as a
23 licensed attorney with over thirty years of experience
24 in land use development, zoning, and real estate law in
25 San Francisco.

26 Burke's proposed testimony seemed particularly pertinent to
27 the parties' ongoing dispute over valuation of the Properties,
28 which in turn implicated the court's findings on several key

1 issues, including the First Street Parties' lack of equity in the
2 Properties, the First Street Parties' prospects for an effective
3 reorganization, and whether Mission's interest in the Properties
4 was adequately protected. Burke's proposed expert testimony
5 offered a relatively straightforward explanation of the alleged
6 link between the various draft development plans affecting the
7 Properties and the value of the Properties.

8 More specifically, Burke was prepared to testify regarding
9 what he described as the impending approval of San Francisco's
10 Draft Transit Center District Plan ("TCD Plan") and the impending
11 certification of the EIR accompanying the TCD Plan. According to
12 Burke, "[i]t is inconceivable to me that the [TCD Plan] will not
13 be adopted." Burke Decl. (Nov. 18, 2011) at ¶ 7.

14 Furthermore, Burke predicted that the San Francisco Planning
15 Commission would certify the EIR by February 2012 and that the
16 San Francisco Board of Supervisors would approve the TCD Plan by
17 April or May 2012. Id. at ¶¶ 8, 11. Burke further stated that
18 the approval of the TCD Plan would result in the rezoning of the
19 TCD Plan area, which included the site on which the First Street
20 Parties' Properties were located (referred to in Burke's
21 declaration as the "50 First Street Site"). Id. at ¶ 3. As Burke
22 put it, the rezoning would, in turn, immediately increase the
23 value of the Properties because the rezoning would increase the
24 permitted development density on the Properties by raising both
25 existing height limits and Floor-to-Area Ratio limits, known as
26 "FARs." Id. at ¶¶ 5, 6.

27 We have painstakingly reviewed the record in order to fully
28 understand all of the events leading up to the bankruptcy court's

1 exclusion of the Non-Appraiser Expert testimony. The most
2 significant events included:

- 3 • The status and scheduling conference held on October 12,
4 2011;¹²
- 5 • The scheduling order entered on October 14, 2011;
- 6 • The motion to correct or clarify the October 14 scheduling
7 order filed by Mission on November 7, 2011;
- 8 • The order amending the October 14 scheduling order entered
9 on November 9, 2011;
- 10 • The First Street Parties' November 17, 2011 motion to
11 correct or clarify the amended scheduling order;
- 12 • The order denying the First Street Parties' November 17
13 motion entered on November 18, 2011;
- 14 • The First Street Parties' November 17 and 18, 2011 filing
15 and service of their Non-Appraiser Expert Declarations;
- 16 • Mission's November 29, 2011 motions in limine numbers 5 - 8;
- 17 • The First Street Parties' November 30, 2011 opposition to
18 the motions in limine;
- 19 • The December 1, 2011 hearing on motions in limine numbers
20 5 - 8, held in the midst of the final relief from stay
21 hearing.

22
23 ¹²The record does not include an official transcript of the
24 October 12 Conference, but it does include an unofficial
25 transcript prepared and offered by the First Street Parties
26 ("October 12 Transcript"). Mission has not objected to the
27 October 12 Transcript or challenged its accuracy, so we will
28 accept it as a generally accurate transcription of the October 12
Conference. While there are certain apparent omissions and
inaccuracies, the key points and themes are reiterated several
times and there can be no reasonable doubt as to what materially
transpired.

1 Recounting all of the tortuous facts arising from these
2 events would be unduly lengthy and confusing, so this Panel
3 instead will focus on the key points - those essential facts
4 which are not subject to reasonable dispute and on which our
5 decision hinges.¹³

6 At the October 12 scheduling conference, the bankruptcy
7 court repeatedly expressed concern regarding its duty under
8 § 362(e)(1) to hold the final relief from stay hearing within
9 thirty days of the preliminary hearing. The court was aware of
10 no compelling circumstances that would have permitted it to
11 extend the final hearing beyond December 1, 2 and 16, 2011, which
12 were the first three days available on the bankruptcy court's
13 calendar for the court to hear the matter. The First Street
14 Parties have not challenged the court's determination that it
15 needed to hear the matter on the first dates it had available.

16 With the concern regarding § 362(e)(1) in mind, the
17 bankruptcy court orally stated at the October 12 conference
18 various deadlines for disclosure of witnesses, the exchange of
19 witness declarations, the deposing of witnesses, and so on.

20 The bankruptcy court's October 14, 2011 scheduling order did
21 not track what the court stated on the record on October 12.
22 This scheduling order not only was internally inconsistent but
23 also was inconsistent with the various deadlines the court orally
24 stated on October 12. Despite this, Mission waited until
25 November 7, 2011 to file a motion addressing these problems with
26

27 ¹³A full narrative summary of relevant events and documents
28 is attached to this decision as an Appendix.

1 the October 14 scheduling order. In response, the bankruptcy
2 court revised its October 14 scheduling order on November 9.

3 The First Street Parties waited even longer, until
4 November 17, 2011, to file their motion to correct or clarify the
5 October 14 scheduling order, as amended by the court on
6 November 9, 2011. According to the First Street Parties, they
7 were not concerned about the contents of the October 14
8 scheduling order until the court amended that order on
9 November 9, 2011.

10 Before the First Street Parties filed their Non-Appraiser
11 Expert declarations on November 17 and 18, 2011, they made no
12 attempt to disclose the identity or existence of their
13 Non-Appraiser Experts. This conduct was inconsistent with:
14 (1) the bankruptcy court's oral deadline, stated on October 12,
15 2011, for both parties to disclose their expert and non-expert
16 witnesses by no later than October 31, 2011; and (2) the general
17 intent of the court to have both parties avoid unnecessary
18 surprises and delay by disclosing the identity of all of their
19 witnesses, expert and non-expert, as soon as practicable.

20 In excluding all of the First Street Parties' Non-Appraiser
21 Expert testimony, the bankruptcy court in essence relied upon and
22 enforced its oral deadline, stated on October 12, 2011, for both
23 parties to disclose their expert and non-expert witnesses by no
24 later than October 31, 2011. But there was nothing on the face
25 of the October 14 scheduling order providing any deadline for
26 disclosing the identity of non-appraiser experts. When the court
27 amended the October 14 scheduling order on November 9, 2011, it
28 sua sponte deleted any provision that would have permitted either

1 side to identify any non-appraiser expert witness. This too
2 amounted to enforcement of the October 12 oral scheduling
3 deadlines. As far as the court was concerned, the parties had in
4 essence waived their right to call any non-appraiser expert
5 witnesses by not disclosing them by October 31, 2011.

6 With these facts and circumstances in mind, we must hold
7 that the court erred as a matter of law when it excluded the
8 First Street Parties' Non-Appraiser Expert testimony. We know of
9 no rule or case authority that permits a court to exclude a
10 significant portion of a party's evidence as a means of enforcing
11 an oral scheduling deadline when the court did not include that
12 deadline in its subsequent written scheduling order. As a matter
13 of law, a formal written order controls over an inconsistent oral
14 ruling. See Cashco Fin. Servs., Inc. v. McGee (In re McGee),
15 359 B.R. 764, 774 n.9 (9th Cir. BAP 2006); see also Rule 9021
16 (stating that judgments and orders are effective when entered on
17 the docket by the clerk).

18 The October 14 scheduling order contained a provision,
19 paragraph 10(b), which permitted the parties to file and serve
20 non-appraiser expert declarations by no later than November 29,
21 2011. But the same order did not contain any deadline for either
22 side to disclose the identities of the non-appraiser expert
23 witnesses who would provide these declarations. Thus, by
24 omitting the disclosure deadline, the October 14 scheduling order
25 was inconsistent with the bankruptcy court's October 12 oral
26 scheduling deadlines.

27 Neither side has cited us to any rule or case authority that
28 would permit the type of deadline enforcement the bankruptcy

1 court employed here. The Rules, Civil Rules and cases the
2 parties cite are inapposite because they all involve deadlines,
3 requirements or restrictions written into the rules themselves or
4 contained in a written order of court. See, e.g., Rules 7016,
5 7026 and 7037 (incorporating Civil Rules 16, 26 and 37); Price v.
6 Syedel, 961 F.2d 1470, 1474 (9th Cir. 1992).¹⁴

7 While the First Street Parties did not specifically couch
8 their challenge to the bankruptcy court's evidentiary ruling in
9 due process terms, the issue raised is fundamentally one of a
10 lack of due process.

11 Due process requires reasonable notice and a meaningful
12 opportunity to be heard. See Mullane v. Cent. Hanover Bank &
13 Trust Co., 339 U.S. 306, 314 (1950); see also Mathews v.
14 Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement
15 of due process is the opportunity to be heard at a meaningful
16 time and in a meaningful manner."); Berry v. U.S. Tr. (In re
17 Sustaita), 438 B.R. 198, 210 (9th Cir. BAP 2010), aff'd, 460 Fed.
18 Appx. 627 (9th Cir. 2011) ("prior to sanctioning a party, the
19 court must provide the party to be sanctioned with particularized
20 notice to comport with due process.").

22 ¹⁴We note the additional problem that the most relevant
23 rule cited, Rule 7016, only applies in Rule 9014 contested
24 matters when the court explicitly directs that it will apply.
25 See Rule 9014(c). There was no such explicit direction here.
26 Nonetheless, if the October 12 oral scheduling deadline had been
27 included in the October 14 scheduling order, we suspect that the
28 bankruptcy court properly could have enforced that deadline under
Rule 7016 even if the court had not explicitly designated Rule
7016 for application in this contested matter. See Adams v.
Dorsie's Steak House, Inc. (In re Dorsie's Steak House, Inc.),
130 B.R. 363, 365-66 (D. Mass. 1991).

1 In light of all of the circumstances set forth above, we
2 cannot conclude that the First Street Parties had reasonable or
3 particularized notice of the bankruptcy court's intention to
4 enforce the October 12 oral scheduling deadline as if it had been
5 included in the October 14 scheduling order. Nor can we conclude
6 that the First Street Parties had a meaningful opportunity to be
7 heard when the court excluded all of their Non-Appraiser Expert
8 testimony based on their noncompliance with the oral scheduling
9 deadline.¹⁵

10 Furthermore, we are persuaded that the bankruptcy court's
11 error was not harmless.¹⁶ The proposed testimony of the
12

13 ¹⁵We further note that, in their November 17, 2011 motion to
14 correct or clarify the amended version of the October 14
15 scheduling order, the First Street parties suggested that a brief
16 extension of the deadline to depose their Non-Appraiser Experts
17 would remedy any prejudice to Mission. However, the bankruptcy
18 court's November 18, 2011 order denying the First Street Parties'
19 November 17, 2011 motion indicates that the bankruptcy court
20 refused to consider the extent of prejudice to Mission, whether
21 that prejudice could have been remedied by a brief extension of
22 the discovery deadline, or whether any sanction less than the
23 exclusion of all Non-Appraiser Expert testimony would have
24 sufficed under the circumstances to enable the court to maintain
25 control over its docket and to ensure the timely and fair
26 resolution of Mission's relief from stay motion. Even if the
27 October 12 oral scheduling deadline had been enforceable under
28 Rule 7016, it would have been appropriate for the bankruptcy
court to consider these types of issues before excluding all of
the Non-Appraiser Expert testimony. See generally Price,
961 F.2d at 1474 (listing factors the trial court must consider
before excluding unlisted witnesses).

¹⁶In order to reverse based on either an erroneous
evidentiary ruling or on a due process violation, we must
conclude that the appellant was prejudiced. See Rosson v.
Fitzgerald (In re Rosson), 545 F.3d 764, 776 (9th Cir. 2008);
Harper v. City of Los Angeles, 533 F.3d 1010, 1030 (9th Cir.
2008).

1 Non-Appraiser Experts, particularly Burke's expert testimony,
2 likely could have influenced a number of key determinations of
3 the bankruptcy court, including its determinations: (1) that the
4 First Street Parties had no equity in the Properties, (2) that
5 the First Street Parties did not have a realistic prospect for an
6 effective reorganization, and (3) that Mission did not have
7 adequate protection of its interest in the Properties.

8 We acknowledge that Mission also sought to exclude
9 significant portions of the Non-Appraiser expert testimony on
10 alternate grounds, such as hearsay, lack of foundation and
11 relevance. However, the bankruptcy court did not rule on these
12 alternate grounds for exclusion, and this Panel declines to do so
13 in the first instance on appeal. On remand, the bankruptcy court
14 remains free to make its own determinations on these alternate
15 grounds for exclusion, and we express no opinion on their proper
16 disposition.

17 **CONCLUSION**

18 For all of the reasons set forth above, we VACATE the order
19 granting relief from the automatic stay and REMAND this matter to
20 the bankruptcy court for further proceedings.

21
22 Appendix Follows
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1 **November 21-25, 2011:** Witness depositions
2 **November 25, 2011:** Discovery cutoff
3 **December 1 & 2, 2011:** Trial (with an additional day of
4 December 16, 2011, held in reserve)
5 See October 12 Transcript at pp. 7-10.

6 Significantly, at the time of the October 12 Conference, the
7 court clearly intended disclosure of all witnesses by no later
8 than October 31, 2011. For their part, the First Street Parties
9 represented that, as of the time of the October 12 Conference,
10 they had no idea as yet what other witnesses besides their
11 appraiser they would call. They proposed a deadline for
12 disclosing all witnesses of one week before trial, but the
13 bankruptcy court explicitly rejected that deadline and instead
14 orally stated that it would set an October 31 deadline:

15 Judge: So, Mr. Macdonald, I know you may or may not
16 have an appraisal done but as far as other parties who
17 do you . . . do you have an idea at this point who you
18 will be calling?

19 Macdonald [the First Street Parties's Counsel]: No I
20 don't. Usually the scheduling order with the courts of
21 this district witnesses are disclosed a week before.

22 Judge: I'm just trying to have no surprises as far as
23 if they are going to depose Mr. Choo or Mr. Graham. I
24 didn't know if there was anybody else. I'm just trying
25 to get this down to expedite the discovery process and
26 so there is no surprises and give you as much time as I
27 can to get an appraisal and so you can take the
28 appraiser deposition. If you aren't in a position to
say, simply just say today and then set a date at this
point.

Macdonald: No, I'm not.

Judge: I would guess an early date for the designation
of witnesses.

Macdonald: How about October 31st?

Strickon [Mission's counsel]: I'm not saying we have

1 to designate a specific appraiser, but whoever the
2 debtors' appraiser.

3 Judge: No, I think that is more than fair. The 31st.
4 So Mr. Macdonald would designate -- both sides would
5 designate any witnesses -- expert and

6 Macdonald: No.

7 * * *

8 Judge: I'm just going to say that you have until
9 October 31 to identify any witness, the witness who
10 will testify and it's not to give a whole laundry list,
11 it's simply who you intend on calling

12 October 12 Transcript at p. 7.

13 Moreover, the bankruptcy court repeatedly expressed its
14 overarching concerns that Mission was entitled by law¹⁸ to an
15 expeditious final hearing as soon as practicable and that the
16 court needed to nail down as much as possible as quickly as
17 possible in order to avoid unnecessary surprises and delay in the
18 discovery and pretrial process. The following statement is
19 typical of the court's commentary:

20 Judge: The expected problem is that we are looking at
21 the property is appreciating. I don't know if it is or
22 isn't. There is nothing being paid as adequate
23 protection to its creditors. The situation technically
24 they're entitled to have a hearing within 30 days of
25 their initial preliminary hearing and set forth
26 compelling reason to the court. The only one that I
27 have is basically my schedule and those are the initial
28 dates that I have [December 1 and 2, 2011]. That's the
earliest I can get the parties into it. The debtor has
to realize that they filed the bankruptcy and they were
going to be faced with a relief from stay motion that
may not have gotten formal appraisals.

October 12 Transcript at p. 5.¹⁹

¹⁸See § 362(e)(1).

¹⁹The First Street Parties have not challenged the
bankruptcy court's interpretation of § 362(e)(1), nor have they
(continued...)

1 On October 14, 2011, the bankruptcy court entered its
 2 scheduling order based on the October 12 Conference.
 3 Unfortunately, the October 14 scheduling order contained a number
 4 of deadlines that created internal inconsistencies in the
 5 document and that were inconsistent with what the court orally
 6 ruled at October 12 Conference. The most pertinent and
 7 problematic paragraphs were paragraphs 4 and 10(b)(i). The
 8 following chart summarizes the key differences between the
 9 bankruptcy court's October 12 oral ruling, paragraph 4 of the
 10 October 14 scheduling order and paragraph 10(b)(i) of the
 11 October 14 scheduling order:

	OCTOBER 12 ORAL RULING	OCTOBER 14 ORDER, ¶ 4	OCTOBER 14 ORDER, ¶ 10(b)(i)
10/31/11	Parties to disclose all <u>non-appraiser</u> witnesses, both expert and non-expert	Parties to disclose all <u>non-expert</u> witnesses and to exchange <u>non-expert</u> decls. and exhibit lists	N/A
11/18/11	Parties to file and serve all non-appraiser witness decls.	N/A	N/A
11/29/11	N/A	N/A	Parties to file and serve <u>all witness decls.</u> , both expert and non-expert

23 In accordance with the October 14 scheduling order, the
 24 First Street Parties filed and served on October 31, 2011, a non-
 25 expert witness list naming three percipient witnesses. Mission

26 _____
 27 ¹⁹(...continued)
 28 argued that there were other compelling reasons why the court should have delayed the final hearing from December 1 & 2, 2011.

1 did not file anything on October 31, 2011. The next thing
2 Mission filed was a motion, on November 7, 2011, seeking
3 correction under Civil Rule 60(a) of "clerical errors" in the
4 October 14 scheduling order. The bankruptcy court entered an
5 order on November 9 only partially granting Mission's motion.²⁰
6 The court acknowledged that corrections were necessary, and
7 apparently concluded that some extension of the deadlines with
8 respect to non-expert witnesses was necessary in order to remedy
9 any confusion caused by internal inconsistencies in the
10 October 14 scheduling order. Accordingly, the court's November 9
11 order extended the deadline in paragraph 4 for both disclosure
12 and declarations of non-expert witnesses from October 31, 2011 to
13 November 15, 2011. In addition, the November 9 order deleted
14 paragraphs 10(b) and 10(c) essentially for two reasons:
15 (1) because these provisions were inconsistent with its
16 October 12 oral ruling and (2) because the court was still
17 committed to completing the discovery and pretrial process in an
18 expedited fashion that would allow trial to proceed on December 1
19 and 2, 2011.

20 The net effect of the bankruptcy court's November 9, 2011
21 amendments to the October 14 scheduling order was to sua sponte
22 omit any and all provisions for disclosure of non-appraiser
23 expert witnesses. Apparently, with respect to non-appraiser
24 experts, the bankruptcy court intended to hold the parties to the
25 deadline it had stated in its October 12 oral ruling, requiring

26
27 ²⁰Contrary to the bankruptcy court's October 12 rulings,
28 Mission advocated in its November 7 motion that paragraph 10 was
"right" and paragraph 4 was "wrong."

1 both parties to disclose all non-appraiser experts by October 31,
2 2011, even though no such deadline had been set forth in the
3 October 14 scheduling order. The court apparently concluded
4 that, since no party had disclosed any non-appraiser experts by
5 October 31, 2011, no provision for them was necessary in the
6 amended scheduling order.

7 The First Street Parties did not offer any immediate
8 response either to Mission's November 7, 2011 motion to clarify
9 or to the bankruptcy court's November 9, 2011 order. Moreover,
10 the First Street Parties never disclosed the identities of their
11 Non-Appraiser Experts before they filed and served their
12 Non-Appraiser Expert declarations on November 17 and 18, 2011.

13 Instead, on November 17, 2011, the First Street Parties
14 filed their own motion to correct or clarify the amended
15 scheduling order. According to the First Street Parties, the
16 amended scheduling order erroneously omitted any provision for
17 Non-Appraiser Experts, and they requested, among other things, a
18 new deadline of November 18, 2011 for filing and serving their
19 Non-Appraiser Expert declarations, as well as a brief extension
20 of the discovery cutoff in order to give Mission an opportunity
21 to depose their Non-Appraiser Experts. Notably, the First Street
22 Parties still did not disclose at this late date the identities
23 of their Non-Appraiser Experts, for whom it intended to file and
24 serve declarations the very next day.

25 The bankruptcy court entered an order on November 18, 2011
26 denying the First Street Parties' November 17, 2011 motion to
27 correct. The court based this denial on the following factors:

28 1. The First Street Parties represented to the court at the

1 October 12, 2011 Conference that it had no non-appraiser
2 experts to designate as witnesses;²¹

3 2. The court relied on the First Street Parties' supposed
4 representation in issuing its October 14, 2011 scheduling
5 order (but as noted above, there was no indication in that
6 order or in the November 9, 2011 amendments thereto of any
7 deadline for designating non-appraiser experts);

8 3. During the next month after the issuance of the October 14
9 scheduling order, the First Street Parties neither sought
10 amendment of the scheduling order nor disclosed the
11 existence or identities of their Non-Appraiser Experts.

12 The First Street Parties went ahead and filed and served one
13 of their Non-Appraiser Expert declarations on November 17, 2011,
14 and the rest on November 18, 2011.

15 Mission never deposed the Non-Appraiser Experts. Instead,
16 on November 29, 2011, Mission filed its motions in limine numbers
17 5 - 8, seeking to exclude all testimony of the Non-Appraiser
18 Experts on the ground that the submission of their testimony
19 contravened the October 14 scheduling order and the November 18,
20 2011 order denying the First Street Parties' November 17, 2011
21 motion to correct.²² The First Street Parties filed an
22

23 ²¹This is a misstatement of the record. Both the unofficial
24 October 12 Transcript and the bankruptcy court's later comments
25 at trial reflect that the First Street Parties actually
26 represented on October 12 that they did not know yet whether they
would seek to call any non-appraiser experts.

27 ²²Mission also argued that portions of the Non-Appraiser
28 Expert declaration testimony should be excluded on hearsay,
relevance and foundation grounds. But the bankruptcy court never
ruled on these grounds.

1 opposition to the motions in limine on November 30, 2011.

2 During trial, the bankruptcy court granted Mission's motions
3 in limine numbers 5 - 8, and excluded all of the Non-Appraiser
4 Expert Testimony. The court noted that, starting with the
5 issuance of the October 14 scheduling order and through the
6 amendment of that order on November 9, 2011, and up to the filing
7 of the First Street Parties' November 17 motion to correct, the
8 First Street Parties were content to not disclose whether they
9 would be offering any non-appraiser expert testimony, even though
10 the dates on their Non-Appraiser Expert declarations reflect that
11 they knew at least by early November that they would be using at
12 least some non-appraiser expert testimony. The court also
13 expressed concern that, even after the court amended the
14 scheduling order on November 9, 2011, omitting any provision for
15 non-appraiser expert testimony, it still took the First Street
16 Parties eight days to address the issue by filing their
17 November 17, 2011 motion to correct.

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