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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

<p>5 In re: ) 6 FIRST STREET HOLDINGS NV, LLC, ) 7 et al., ) 8 Debtors. ) 9 FIRST STREET HOLDINGS NV, LLC; ) 10 LYDIAN SF HOLDINGS, LLC; ) 11 78 FIRST STREET, LLC; 88 FIRST ) 12 STREET, LLC; 518 MISSION, LLC; ) 13 FIRST/JESSIE, LLC; JP CAPITAL, ) 14 LLC; PENINSULA TOWERS, LLC; ) 15 SIXTY-TWO STREET, LLC, ) 16 Appellants, ) 17 v. ) 18 MS MISSION HOLDINGS, LLC, ) 19 Appellee. )</p>	<p>BAP No. NC-11-1729-MkHPa Bk. No. 11-49300 (jointly administered with Bk. Nos. 11-49301, 11-70224, 11-70228, 11-70229, 11-70231, 11-70232, 11-70233 &amp; 11-70234)</p> <p>MEMORANDUM*</p>
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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").<sup>2</sup> The other two First Street Parties  
8 essentially were holding companies (jointly, "Holding  
9 Entities").<sup>3</sup> 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

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25 <sup>2</sup>The 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.

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

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.<sup>7</sup>

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  
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27 <sup>7</sup>As 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 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.<sup>8</sup> 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

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26 <sup>8</sup>The 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 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 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.<sup>10</sup>

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

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22 <sup>10</sup>This 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 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 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.<sup>13</sup>

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

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 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.<sup>15</sup>

10 Furthermore, we are persuaded that the bankruptcy court's  
11 error was not harmless.<sup>16</sup> The proposed testimony of the  
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13 <sup>15</sup>We 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).

<sup>16</sup>In 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).

APPENDIX

NARRATIVE SUMMARY OF EVENTS LEADING TO EXCLUSION  
OF THE FIRST STREET PARTIES' NON-APPRAISER EXPERT TESTIMONY

The bankruptcy court held a preliminary hearing on the relief from stay motion on October 5, 2011. At that preliminary hearing, the court set a status and scheduling conference for October 12, 2011 ("October 12 Conference"). This conference played a pivotal role in this controversy.<sup>17</sup> During the course of the October 12 Conference, the court orally stated that it was going to set the following schedule leading up to and including the final relief from stay hearing or "trial."

October 14, 2011: Mission to file and serve an accounting for its claim and their expert appraisal report;

October 31, 2011: Both Parties to disclose any non-appraiser witnesses for trial (estimated at the time by the parties as one or two other witnesses per side);

November 18, 2011: The First Street Parties to file and serve their expert appraisal report, and both parties to file and serve all other witness declarations;

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<sup>17</sup>The record does not include an official transcript of the October 12 Conference, but it does include an unofficial transcript prepared and offered by the First Street Parties ("October 12 Transcript"). Mission has not objected to the October 12 Transcript or challenged its accuracy, so we will accept it as a generally accurate transcription of the October 12 Conference. While there are apparent omissions and inaccuracies from time to time, the key points and themes are reiterated several times and there can be no reasonable doubt as to what materially transpired.

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  
will be calling?

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

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

25 Macdonald: No, I'm not.

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

27 Macdonald: How about October 31st?

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

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

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 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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