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IN RE FAIRPOINT COMMUNICATIONS, INC.

Bankr. S.D.N.Y. (No. 09-16335)

PATRICK GRIFFIN AERTS* AND TODD BLAKELEY SKELTON**

APRIL 25, 2014

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I. INTRODUCTION

FairPoint Communications, Inc. (the “Company”) and its subsidiaries (collectively, “FairPoint”) provide communications services to rural and small business customers in eighteen states.¹ As of December 2009, FairPoint had approximately 1.7 million “access line equivalents (including voice access lines and high-speed data lines, which include digital subscriber lines, or DSL, wireless broadband and cable modem) in service.”² Challenges presented by industry competition and innovation, the integration of acquired operations, adverse economic conditions, and changes in customer usage and spending habits contributed to FairPoint and its subsidiaries and affiliates’ filing a voluntary Chapter 11 bankruptcy petition on October 26, 2009 (the “Petition Date”).³ United States Bankruptcy Judge Burton Lifland confirmed the Company’s plan of reorganization on January 13, 2011.⁴ FairPoint continues to operate today as a public company.⁵

This paper is divided into several parts. Parts II and III provide background on FairPoint and the events leading into its filing bankruptcy, respectively. The information in Part II refers to FairPoint as of the Petition Date, unless indicated otherwise. Part IV discusses the various “first-day motions” filed in FairPoint’s bankruptcy case.⁶ Next, Part V highlights selected events during the middle portion of FairPoint’s bankruptcy case. Part VI then details FairPoint’s plan of reorganization before providing a snapshot of FairPoint post-bankruptcy in Part VII. Finally, Part VIII briefly concludes.

¹ Declaration of Alfred C. Giammarino ¶ 4, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Declaration of Alfred C. Giammarino”). Post-bankruptcy, FairPoint operated in seventeen states as of December 2013. FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014). Not that citations are hyperlinked to source documents, and a modified Bluebook format as been used for certain Internet sources as a result.

² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 4; see also FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 17.

³ Voluntary Petition at 3, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Voluntary Petition”).

⁴ Order Confirming Debtors’ Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated as of December 29, 2010, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009).

⁵ FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014).

⁶ “First day orders” are typically filed to allow debtors to do the “things that debtors commonly need or want to do at the outset of a case [that] do not fit the definition of ordinary and cannot be done without court approval.” MICHAEL A. GERBER & GEORGE W. KUNEY, BUSINESS REORGANIZATIONS 107 (3d ed. 2013).

II. FAIRPOINT COMMUNICATIONS OVERVIEW

A. *Industry-in-Brief*

The telecommunications industry plays a critical role in the United States, as individuals, residential homes, and businesses rely on companies in this industry to provide and operate wired, wireless, and satellite communications networks.⁷ Large players in this industry include Verizon Communications, Inc. and AT&T, who benefit from economies of scale and widespread brand recognition, down to regional players like FairPoint.⁸ The industry has substantial regulatory oversight, on both state and federal levels.⁹ The Federal Communications Commission (“FCC”) regulates certain interstate services and facilities, while public utility commissions have jurisdiction to the extent that various services and facilities are used to provide communications within a particular state.¹⁰ Regulators may impose price/rate restrictions, and constraints imposed by regulators typically reflect the company’s structure and the nature of the services provided.¹¹ Competition for market share in this capital-intensive industry is fierce, and companies are challenged to innovate and meet changing customer demands.¹²

⁷ Wired Telecommunications Carriers in the US, Report No. 51711c, IBIS World (Dec. 2013), <https://www.ibisworld.com/>; Wireless Telecommunications Carriers in the US, Report No. 51332, IBIS World (Feb. 2014), <https://www.ibisworld.com/>.

⁸ See e.g., AT&T Inc., Annual Report (Form 10-K) (Feb. 21, 2014); Verizon Communications Inc., Annual Report (Form 10-K) (Feb. 27, 2014); FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014).

⁹ See, e.g., 17 C.F.R. pts. 0-199 (2014) (codifying Federal Communications Commission regulations); Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 22-23; FEDERAL COMMS. COMMISSION, WHAT WE DO, <http://www.fcc.gov/what-we-do> (last visited Mar. 30, 2014).

¹⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 22; FEDERAL COMMS. COMMISSION, WHAT WE DO, <http://www.fcc.gov/what-we-do> (last visited Mar. 30, 2014).

¹¹ See Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 45; Ryan Knutson, *When the Phone Company Cuts the Cord*, WALL ST. J., Apr. 7, 2014, at A1 (discussing carrier obligations and FCC oversight over telecomm company strategies).

¹² See Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 7, 11; Ryan Knutson, *When the Phone Company Cuts the Cord*, WALL ST. J., Apr. 7, 2014, at A1 (discussing emphasis on providing wireless and high-speed internet-based services).

B. Company Structure

FairPoint Communications, Inc. was founded as MJD Communications Inc. in 1991.¹³ Publicly traded on the New York Stock Exchange (“NYSE”), the Company is incorporated in Delaware and maintains its headquarters in Charlotte, North Carolina.¹⁴

David Hauser served as Chairman of the Board of Directors and Chief Executive Officer (“CEO”) of FairPoint as of the Petition Date.¹⁵ Mr. Hauser was formerly the chief financial officer (“CFO”) for Duke Energy Corporation and became CEO of FairPoint in July 2009.¹⁶

1. Subsidiaries & Employees

Created to operate local telephone companies in rural markets, the Company is the parent company of numerous subsidiaries and affiliates (collectively, “FairPoint”).¹⁷ The Company owned and operated thirty-three local exchange carriers (“LECs”), which provided television, telephone, and other services to customers in their respective markets.¹⁸ The Company had a least seventy-eight direct and indirect affiliates.¹⁹ FairPoint had 4,140 employees as of the date of its bankruptcy petition, approximately 65.2% of which were represented by labor unions.²⁰

2. Acquisition of Certain Verizon Operations

In March 2008, the Company acquired from Verizon Communications, Inc. (“Verizon”) its wireline operations in Maine, New Hampshire, and Vermont (collectively, the “NNE

¹³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 16.

¹⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 5, 16, Exhibit C; *see also* FairPoint Communications, Inc. Business Corporation Annual Report, North Carolina Sec’y of State (Jan. 13, 2014). The Company trades on the NYSE under the ticker symbol “FRP.” FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54.

¹⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at Schedule 9.

¹⁶ John Downy, *FairPoint CEO Surprised by Request to Step Down*, CHARLOTTE BUS. J. (Aug. 24, 2010, 7:40 AM), <http://www.bizjournals.com/charlotte/stories/2010/08/23/story7.html?page=all>.

¹⁷ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 5, 16; Voluntary Petition, *supra* note 3, at Schedule 1 (listing pending bankruptcy cases filed by affiliates).

¹⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 5.

¹⁹ Voluntary Petition, *supra* note 3, at Schedule 1 (listing pending bankruptcy cases filed by affiliates).

²⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 16.

Operations”) (in total, the “Verizon Acquisition”).²¹ To accomplish this transaction, the Company, Verizon, and Verizon subsidiary Northern New England Spinco Inc. (“Spinco”) entered into an agreement pursuant to which Verizon would contribute certain assets and liabilities to Spinco before the merger of Spinco and the Company, with the Company being the surviving entity of the merger.²² The agreement was dated January 15, 2007, but the merger was not completed until March 31, 2008 due to an extensive regulatory review and approval process.²³

To accomplish the Verizon Acquisition, the Company and Spinco entered into a \$2.03 billion secured credit facility and also issued \$551 million in 13½% senior unsecured notes due 2018.²⁴ Verizon received a \$1.16 billion cash payment, \$551 million from the proceeds of the notes, and 54 million shares of FairPoint Communications’ common stock—or 60.2% equity ownership at that time.²⁵

C. *Business Operations*

As of December 2009, FairPoint had approximately 1.7 million “access line equivalents (including voice access lines and high-speed data lines, which include digital subscriber lines, or DSL, wireless broadband and cable modem) in service.”²⁶ An “access line” is “the portion of a telephone line between the end user's location and the telephone service provider's central office,” or, more simply, connects customers to their provider.²⁷ Specifically, FairPoint provided

²¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 6, 20-21; FairPoint Communications, Inc., Current Report (Form 8-K) (Jan. 15, 2007).

²² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 20-21; FairPoint Communications, Inc., Current Report (Form 8-K) (Jan. 15, 2007).

²³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 21; *see FairPoint Vows to do Better*, BRATTLEBORO REFORMER (Apr. 9, 2010, 1:34 PM) (noting the Vermont Public Service Board’s initial rejection of the Verizon Acquisition).

²⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 6, 21; FairPoint Communications, Inc., Current Report (Form 8-K) (Mar. 6, 2008).

²⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 6, 21; FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 2-3.

²⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 4; FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 17.

²⁷ VERIZON, GLOSSARY OF TELECOM TERMS, <http://www22.verizon.com/wholesale/glossary/Glossary-of-Telecom-Terms-a.html> (last visited Mar. 30, 2014). There is some controversy as to the reliability of counting access lines given the expansion of data ports and networking technology. Vincent Ryan,

the following services: local and long distance telephone, enhanced telephone services (e.g., call waiting, caller identification, etc.), wholesale communications, data and internet (DSL, T-1, dial-up, and broadband), cable television, billing and collection, and telephone directory services.²⁸

The majority of FairPoint's access lines served residential customers, with the remainder serving business customers and a small number of wholesale customers.²⁹ Further, as of June 30, 2009, the majority of FairPoint's customers resided in Maine and New Hampshire—together, the states accounted for 67.1% of FairPoint's access line equivalents.³⁰ Vermont had the next highest percentage—19.5%—of access line equivalents.³¹

D. Capital Structure

FairPoint was highly leveraged as a result of the Verizon Acquisition, with approximately \$2.7 billion of total debt outstanding as of the Petition Date.³² FairPoint's debt consisted primarily of \$2.0 billion owed under a credit facility, notes in the aggregate amount of \$551 million plus capitalized interest, and \$88 million plus accrued interest owed under interest rate swap agreements.³³

1. Credit Facility

In connection with the Verizon Acquisition, FairPoint and Spinco entered into a \$2.03 billion senior secured credit facility with a syndicate of banks on March 31, 2008 (the "Credit Facility").³⁴ The Credit Facility consisted of a \$200 million revolving credit facility (a

Measuring CLEC Success: The Trouble with Counting Access Lines, Connected Planet (Jun. 19, 2000, 12:00 PM), http://connectedplanetonline.com/mag/telecom_measuring_clec_success/#.

²⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 18.

²⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 17.

³⁰ See Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 16 (table).

³¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 16 (table). Other states in which FairPoint had operations included, from most to least access line equivalents: Florida, New York, Washington, Missouri, Ohio, Virginia, Kansas, Illinois, Idaho, Pennsylvania, Oklahoma, Colorado, Massachusetts, Georgia, and Alabama. FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 20.

³² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 26-27.

³³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 26-37.

³⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 27.

“revolver”),³⁵ a \$500 million term loan A facility³⁶ with a March 2014 maturity, a \$1.13 billion term loan B facility³⁷ with a March 2015 maturity, and a \$200 million delayed draw term loan³⁸ also with a March 2015 maturity.³⁹ The Credit Facility also included a \$10 million swingline subfacility⁴⁰ and a \$30 million letter of credit subfacility that allowed FairPoint to issue standby letters of credit.⁴¹ All of FairPoint’s “wholly-owned first-tier domestic subsidiaries . . . that are holding companies” jointly and severally guaranteed the Credit Facility.⁴² The LECs and NNE Operations were operating companies and were not required to guarantee the Credit Facility.⁴³

Because of the October 5, 2008 bankruptcy filing of Lehman Commercial Paper, Inc., the administrative agent under the Credit Facility, the funds available under the revolver were

³⁵ A revolving credit facility, also called a “revolver,” is “a line of credit extended by a bank or group of banks that permits the borrower to draw varying amounts up to a specified aggregate limit for a specified period of time.” JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 207 (2d ed. 2013). Because it can be “repaid and reborrowed during the term of the facility, . . . [many] companies utilize a revolver . . . to provide ongoing liquidity for seasonal working capital needs, capital expenditures, letters of credit, and other general corporate purposes.” *Id.* at 207-08.

³⁶ A term loan “is a loan with a specified maturity that requires principal repayment according to a defined schedule.” JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 209 (2d ed. 2013). Term loans cannot be reborrowed after principal has been repaid and are “classified by an identifying letter such as “A,” “B,” “C,” etc. in accordance with their lender base, amortization schedule, maturity date, and other terms.” *Id.* Because “A” term loans, or amortizing term loans, “require substantial principal repayment throughout the life of the loan,” as opposed to at maturity, such loans are “perceived by lenders as less risky.” JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 210 (2d ed. 2013).

³⁷ “B” term loans, or institutional term loans, usually are larger than “A” term loans and have longer maturities and lower amortization rates. JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 210 (2d ed. 2013).

³⁸ Delayed draw term loans may be draw on during “a given period to purchase specified assets or equipment or to make acquisitions.” A Guide to the Loan Market, STANDARD & POOR’S 19 (Sept. 2011), <https://www.lcdcomps.com/d/pdf/LoanMarketguide.pdf>.

³⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 27, 32.

⁴⁰ A “swingline subfacility” facilitates a borrower’s short-term cash needs and allows the lending of smaller amounts on shorter notice usually with higher interest rates. *See, e.g.*, “Swingline Loan,” PRACTICAL LAW CO., <http://us.practicallaw.com/8-382-3859> (last visited Mar. 30, 2014).

⁴¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 29. Letters of credit are “issued to a specific beneficiary that guarantees payment by an ‘issuing lender’ under the credit agreement.” JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 208 (2d ed. 2013). Stated more generally, letters of credit are a guarantee by a bank(s) to pay if the borrower cannot.

⁴² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 33.

⁴³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 33.

reduced to an aggregate of \$170.3 million.⁴⁴ Bank of America, N.A. (“Bank of America”) was substituted as administrative agent pursuant to an amendment to the Credit Facility on January 21, 2009.⁴⁵

After Spinco drew \$1.16 billion from the term loans immediately before its spin-off from Verizon, FairPoint drew \$470 million under the term loans and \$5.5 million under the delayed draw term loan at the merger closing.⁴⁶ FairPoint then drew the remaining \$194.5 million under the delayed draw term loan.⁴⁷ Funds were drawn for capital expenditures, expenses, and consideration in connection with Verizon Acquisition.⁴⁸ Surely, however, a portion of such funds was drawn as a consequence of shrinking liquidity in the market, as explained below.⁴⁹

FairPoint could also enter into interest rate and currency exchange swaps with lenders under the Credit Facility.⁵⁰ FairPoint used swaps to attempt to reduce its interest rate risk, as swaps contracts allow two parties to exchange fixed payments for floating, or variable, payments.⁵¹ Under the Credit Facility swaps, “the company makes a payment if the variable rate is below the fixed rate, or it receives a payment if the variable rate is above the fixed rate.”⁵² However, as explained below, the swaps turned against FairPoint’s favor when interest rates dropped during the 2008 economic downturn (the “Financial Crisis”) to create a large, unanticipated liability.⁵³

⁴⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 28, 49.

⁴⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 28, 49.

⁴⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 27.

⁴⁷ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 27.

⁴⁸ See FairPoint Communications, Inc., Current Report (Form 8-K) (Mar. 3, 2008).

⁴⁹ See Liz Moyer, *Revolver at Their Heads*, FORBES (Oct. 8, 2008, 6:00 AM) (listing FairPoint among companies drawing on revolving credit facilities in late 2008).

⁵⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 30.

⁵¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 30; see, e.g., *What are Interest Rate Swaps and How Do They Work?*, PIMCO, <http://www.pimco.com/EN/Education/Pages/InterestRateswapsBasics1-08.aspx> (last visited Mar. 30, 2014).

⁵² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 30.

⁵³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 30; see Markus K. Brunnermeier, *Deciphering the Liquidity and Credit Crunch 2007-2008*, 23 J. ECON. PERSP. 77, 97-98 (2009) (discussing network and counterparty credit risk in the context of interest rate swaps); Michael McDonald et al., *Harvard Swaps Are So Toxic Even Summers Won't Explain*, BLOOMBERG (Dec. 18, 2009) (providing example of losing money on interest rate swaps).

2. Senior Notes

FairPoint assumed all obligations under the notes issued by Spinco in connection with the Verizon Acquisition (the “Old Notes”).⁵⁴ The Old Notes were issued on March 31, 2008 and had an aggregate principal amount of \$551 million, a maturity of April 1, 2018, a fixed interest rate of 13.125%, and were not redeemable at FairPoint’s option before April 1, 2013.⁵⁵ The Old Notes had a carrying value of \$539.8 million because they had been issued at a discount.⁵⁶

FairPoint executed an exchange offer on July 29, 2009 for a portion—\$439.6 million aggregate principal amount—of the Old Notes for \$439.6 million in new notes with a maturity of April 2, 2018 (the “New Notes,” and, collectively with the Old Notes, the “Notes,” with the transaction being the “Exchange Offer”).⁵⁷ \$18.9 million in aggregate principal of New Notes was also issued to noteholders who tendered Old Notes as payment for accrued and unpaid interest up to the date of the Exchange Offer.⁵⁸ The New Notes have a fixed interest rate of 13½%, except for a 17% interest rate from July 29, 2009 through September 20, 2009.⁵⁹

3. Equity

As of December 31, 2007, FairPoint had 53.8 million shares of common stock outstanding, which grew to 88.9 million common shares outstanding by December 31, 2008 as a result of the Verizon Acquisition.⁶⁰ The Company’s common shares were its sole equity class.⁶¹ FairPoint declared a \$0.399 per share quarterly dividend on March 5, 2008 and subsequently

⁵⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 34.

⁵⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 34.

⁵⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 34.

⁵⁷ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 35. An “exchange offer” occurs when a debtor, attempting to restructure out-of-court, “offers to exchange new securities with different payment terms for the old securities.” MICHAEL A. GERBER & GEORGE W. KUNEY, *BUSINESS REORGANIZATIONS* 948 (3d ed. 2013) (discussing exchange offers in the context of “prepackaged” Chapter 11 cases).

⁵⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 35.

⁵⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 36. The portion of interest payable at 17% could be paid “in the form of cash, by capitalizing such interest and adding it to the principal amount of the Notes or a combination of both cash and such capitalization of interest, at the Company’s option.”

Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 36.

⁶⁰ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 87.

⁶¹ See FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 85.

reduced the dividend to \$0.258 per share for the remaining three quarters of 2008.⁶² FairPoint's Board of Directors suspended the quarterly dividend on March 4, 2009, so no dividends were declared or paid in 2009.⁶³

III. LEAD-UP TO BANKRUPTCY

Several factors contributed to the decline in FairPoint's performance in the late 2000s. As described below, this included increased competition, the economic downturn, and challenges related to the Verizon Acquisition. Consequently, the Company attempted to negotiate an out-of-court restructuring with creditors before it ultimately filed for protection under Chapter 11 of the Bankruptcy Code.⁶⁴

A. *Economy & Competitive Environment*

Fierce competition in the industry and changing customer preferences adversely affected FairPoint. Its reliance on wireline customers posed a challenge as customers switched to wireless carriers and internet-based services.⁶⁵ Additionally, voice services provided by cable providers and the rise of voice over internet protocol ("VoIP") services further detracted from FairPoint's business.⁶⁶ In particular, bundled packages—cable, internet, voice⁶⁷—offered by cable companies were problematic for FairPoint.⁶⁸ Not only did new, competitive product offerings exist, VoIP could be "sold to end users at a lower price than traditional telephone

⁶² FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54. The quarterly dividend was paid for all four quarters in 2008. *Id.*

⁶³ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54.

⁶⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 10-12.

⁶⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 8; John McDuling, *Meet the "Corders": The People Who Aren't Ready to Cut Just Yet*, QUARTZ (Apr. 18, 2014), <http://qz.com/196811/meet-the-corders-the-people-who-arent-ready-to-cut-just-yet/> (reporting that "[m]illions of Americans are abandoning cable subscriptions and landline phones in favor of internet television and mobiles" but noting that some customers prefer wireline services because they do not need high-speed internet and worry about higher bills).

⁶⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 8; *see also* Giles Parkinson, *Can Utilities Avoid Same Fate as Telecom Companies?*, RENEWECONOMY (Mar. 28, 2014) (documenting declining wireline usage since 2000 and customer behavior in telecomm industry).

⁶⁷ *See, e.g.*, COMCAST, <http://www.comcast.com/Corporate/Learn/Bundles/bundles.html> (last visited Mar. 30, 2014) (promoting the XFINITY® Triple Play bundle offering).

⁶⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 7-8.

services.”⁶⁹ In 2008, the number of voice access lines declined 8.5% and 12.3% for FairPoint and the NNE Operations, respectively.⁷⁰ Decreased revenues resulted from the decline in the number of access lines.⁷¹

Further, the lingering effects of the Financial Crisis affected FairPoint through limited access to capital and reductions in customer spending due to high unemployment and lower disposable income.⁷² As the economy worsened, the number of delinquent and overdue customer accounts grew, and customers added fewer access lines or switched to competitors.⁷³ Additionally, the sudden decline in interest rates during the Financial Crisis created a net liability of \$88 million under the swaps under the Credit Facility as of the Petition Date.⁷⁴ The Financial Crisis exacerbated FairPoint’s already limited opportunities to refinance debt and attract investors.⁷⁵

B. *Verizon Acquisition Challenges*

Further complicating the overall market conditions, FairPoint experienced difficulties integrating the NNE Operations.⁷⁶ The Verizon Acquisition had significantly increased FairPoint’s size, which, in itself, often presents challenges.⁷⁷ Moreover, FairPoint was faced with repairing and upgrading the legacy network in the NNE Operations while “simultaneously building a new state-of-the-art next generation IP based network.”⁷⁸ Further, high interest costs, explained below, impaired FairPoint’s ability to build this network.⁷⁹ FairPoint transitioned certain back-office functions to new FairPoint systems in January 2009, a deadline that had been

⁶⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 48.

⁷⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 9.

⁷¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 9, Victor Godinez, *As Land-line Use Falls, Phone Companies Aren’t Ready to Pull the Plug*, DALLAS MORNING NEWS (May 7, 2009, 4:30 AM) (discussing declining profitability of landline telephone services and mitigation strategies).

⁷² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 8, 11.

⁷³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 8, 38.

⁷⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 30.

⁷⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 38; see Markus K. Brunnermeier, *Deciphering the Liquidity and Credit Crunch 2007-2008*, 23 J. ECON. PERSP. 77, 92 (2009).

⁷⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 6-8.

⁷⁷ See Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 7; FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 3.

⁷⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 7.

⁷⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 38.

extended several times (the “Cutover”).⁸⁰ The Cutover resulted in higher than anticipated incremental costs.⁸¹ Additionally, increased processing time by customer service representatives and longer time for processing customer invoices adversely affected customer satisfaction and generated large customer call volumes.⁸² FairPoint lost a large number of customers as a result of such problems.⁸³ Moreover, as part of the state-level approval process for the Verizon Acquisition with regulators in Maine, New Hampshire, and Vermont, FairPoint was required to achieve certain service targets within specified time frames.⁸⁴ Failure to meet these targets would create financial penalties exceeding \$20 million.⁸⁵ FairPoint also had limited rate flexibility due to agreements inherited from Verizon.⁸⁶ Ultimately, FairPoint was not “able to attain the performance projections made at the time it acquired the NNE Operations.”⁸⁷

Not surprisingly, competitors “took advantage of both the lengthy approval period for the Verizon merger as well as the delayed Cutover and operating issues experienced as a consequence of Cutover by offering aggressive pricing on bundled packages of services and claiming to offer more reliable service.”⁸⁸

As noted above, FairPoint was highly leveraged with nearly \$2.7 billion in total debt after the Verizon Acquisition, an amount the Company called “unsustainable.”⁸⁹

⁸⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 7, 40. FairPoint engaged Capgemini U.S. LLC to migrate these systems. Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 7, 40.

⁸¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 8, 41-42.

⁸² *E.g.*, Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 8, 41-42; *FairPoint Vows to do Better*, BRATTLEBORO REFORMER (Apr. 9, 2010, 1:34 PM) (reporting “sluggish” billing and work order processes and call centers “swamped with complaints”); *FairPoint has Backlog for Landlines: Customers Frustrated at Waits*, BANGOR DAILY NEWS (Mar. 7, 2009, 6:50 PM) (reporting backlog of landline orders and customer complaints regarding service wait and problems with e-mail services).

⁸³ *Fleeing Customers Haunt Phone Co. in New England*, Associated Press (Mar. 12, 2009, 3:44 PM).

⁸⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 45.

⁸⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 45.

⁸⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 45.

⁸⁷ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 38.

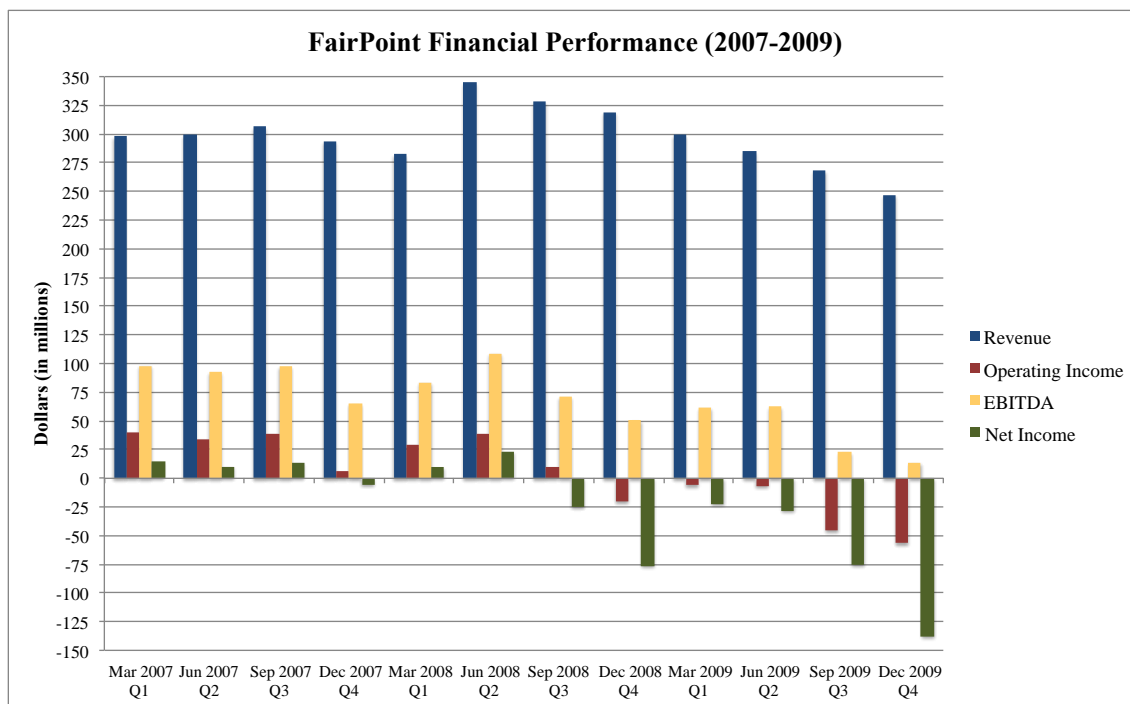
⁸⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 48; *see FairPoint Vows to do Better*, BRATTLEBORO REFORMER (Apr. 9, 2010, 1:34 PM) (noting that the company lost customers).

⁸⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 10-11.

C. Financial & Stock Performance

After two years of negative or only slight revenue growth, FairPoint had consolidated revenues of \$1.27 billion for the year ended December 31, 2008, up 6.44% year-over-year.⁹⁰ Operating income decreased 51.1% year-over-year, to \$58.4 million, for the year ended December 31, 2008.⁹¹ Revenues fell 11.6% to \$1.13 billion, and operating income dropped 252.6% to -\$89.2 million for the year ended December 31, 2009.⁹² Net income was negative for full-year 2008 and 2009, falling 252.3% year-over-year.⁹³ Gross profit margin progressively declined from 10.0% in 2007 to 4.6% and -7.9% in years 2008 and 2009, respectively.⁹⁴ **Figure 1** reports quarterly financial performance during 2007-2009 for selected income statement accounts.⁹⁵

Figure 1



⁹⁰ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 57, 86.

⁹¹ *Id.*

⁹² *Id.*

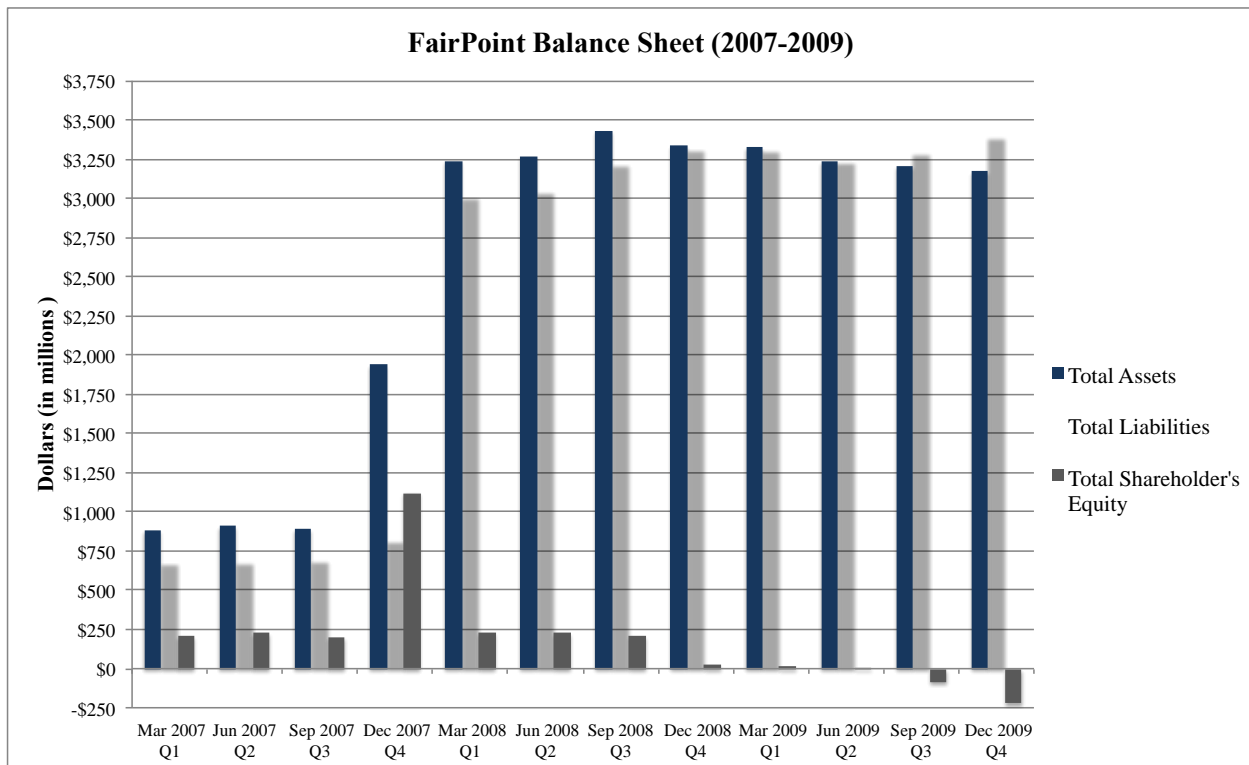
⁹³ *Id.*

⁹⁴ *See id.* Gross profit margin reflects “the percentage of sales remaining after subtracting [cost of goods sold] . . . [and] is driven by a company’s direct cost per unit.” Companies generally seek to increase their gross profit margin. JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 37 (2d ed. 2013).

⁹⁵ Data obtained from Bloomberg Law.

FairPoint’s assets had a total book value of \$3.34 billion, while its liabilities totaled \$3.31 billion, as of December 31, 2008.⁹⁶ Property, plant, and equipment (“PPE”) accounted for the majority of FairPoint’s assets.⁹⁷ PPE decreased 3.1% as total assets decreased 4.9% as of December 31, 2009.⁹⁸ Total liabilities, however, rose 2.3% year-over-year to \$3.39 billion as of December 31, 2009.⁹⁹ **Figure 2** provides a chart of FairPoint’s quarterly balance sheet from 2007-2009,¹⁰⁰ while **Figure 3** tracks FairPoint’s current ratio for the same period.¹⁰¹

Figure 2



⁹⁶ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 85.

⁹⁷ *Id.*

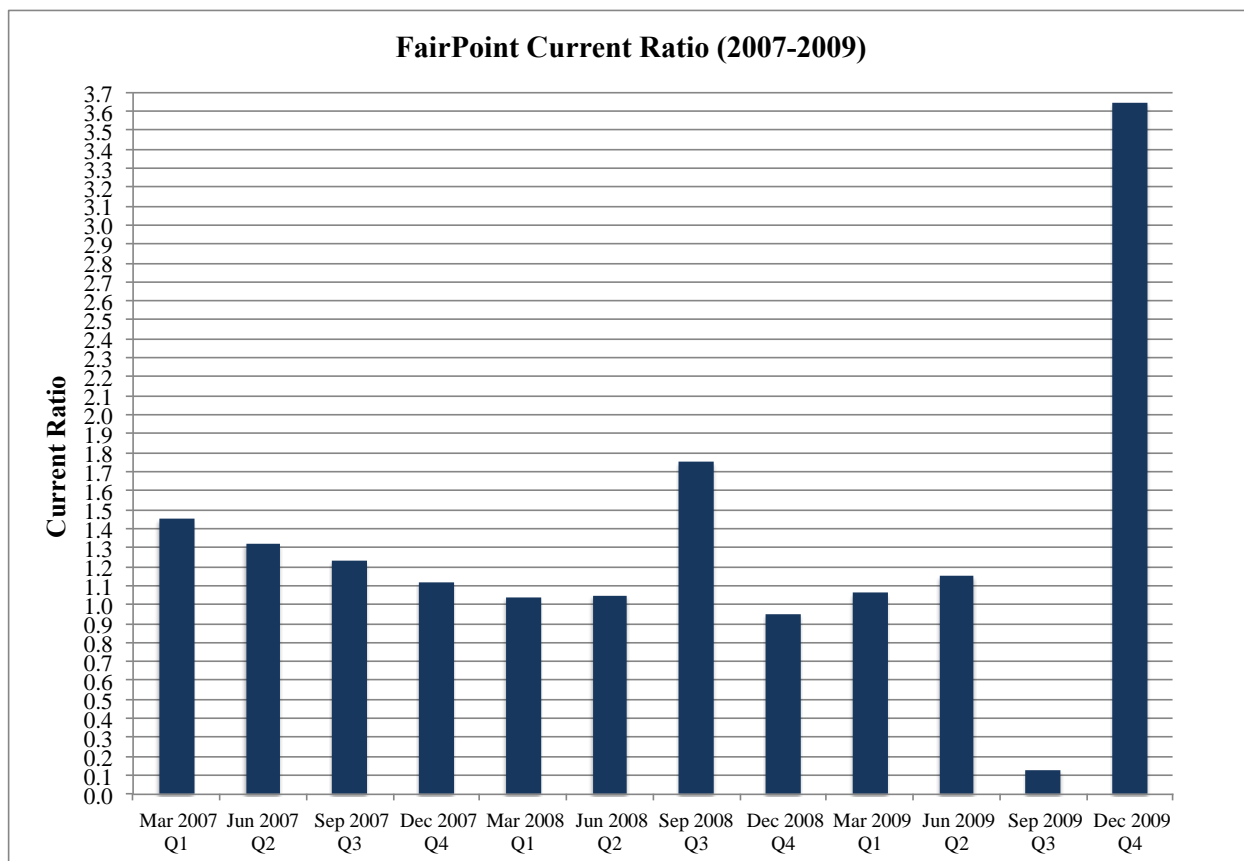
⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Data obtained from Bloomberg Law.

¹⁰¹ Data obtained from Bloomberg Law. The current ratio is a measure of a company’s ability to pay short-term obligations, with a higher value generally being better.

Figure 3



Failure to hit performance projections made it increasingly difficult to service FairPoint’s debt, as interest expense on the income statement ballooned 190.3% from 2007 to 2009.¹⁰² For the year ended December 31, 2009, interest expense totaled \$204.9 million.¹⁰³ The Exchange Offer allowed FairPoint to “maintain compliance with the financial covenants contained in the Credit Facility for the measurement period ended June 30, 2009” but did not provide ongoing benefit for complying with certain ratio covenants under the Credit Facility.¹⁰⁴ The decrease in

¹⁰² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 38; FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 86.

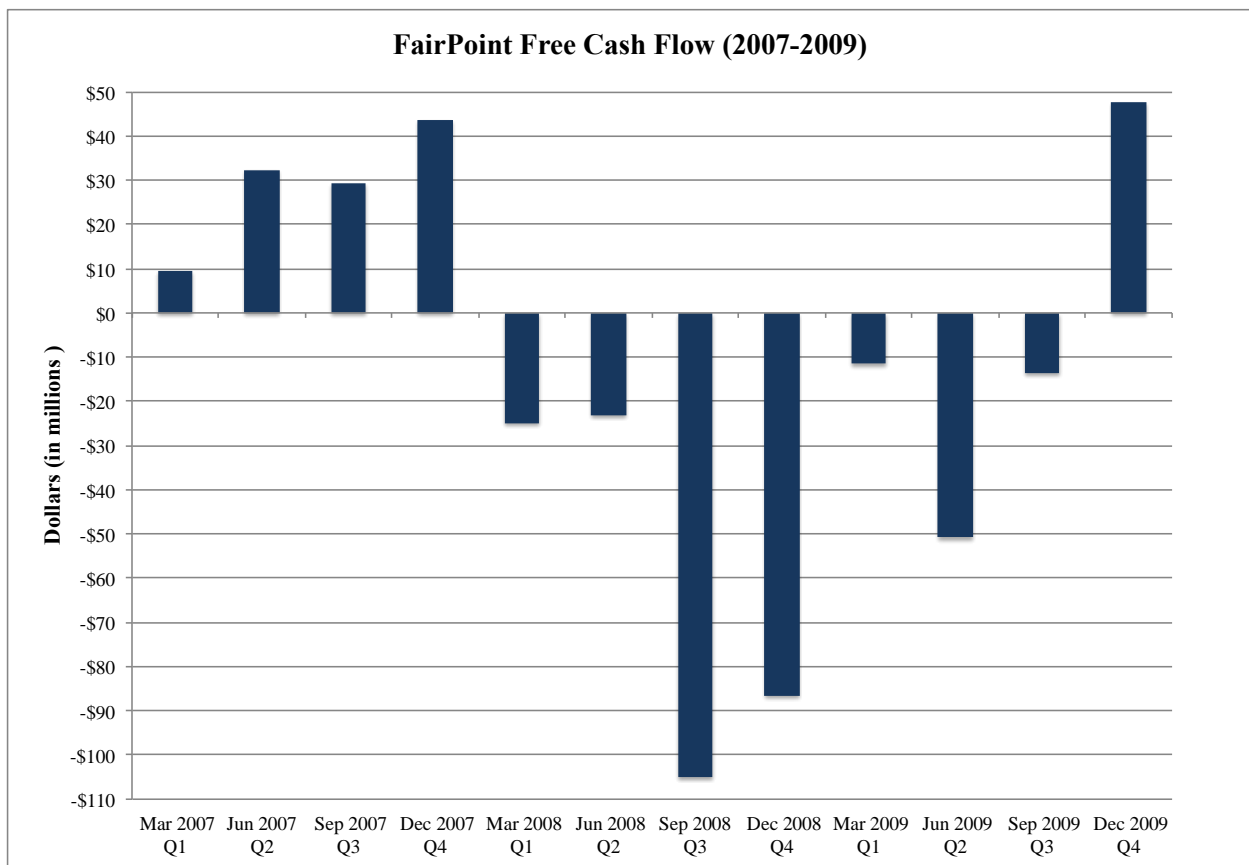
¹⁰³ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 86.

¹⁰⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 50. Breach of financial ratio covenants under the Credit Facility could result in the acceleration of the loans. Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 50. Credit facilities, including revolvers and term loans, typically “require[] the borrower to maintain a certain credit profile through compliance with financial maintenance covenants contained in the credit agreement.” JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS & ACQUISITION 209 (2d ed. 2013).

the Credit Facility’s revolver as a result of Lehman’s bankruptcy further reduced FairPoint’s liquidity.¹⁰⁵

FairPoint’s financial statements indicate that cash flow for the years ended December 31, 2008 and 2009 was positive but decreasing.¹⁰⁶ Net cash flow fell 44.5% year-over-year for the period ending December 31, 2009.¹⁰⁷ Cash flow from operating activities was positive for the full year 2007, 2008, and 2009.¹⁰⁸ Bloomberg, however, reports negative quarterly cash flow for 2007-2008 (*see Figure 4*).¹⁰⁹

Figure 4



¹⁰⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 11.

¹⁰⁶ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 89.

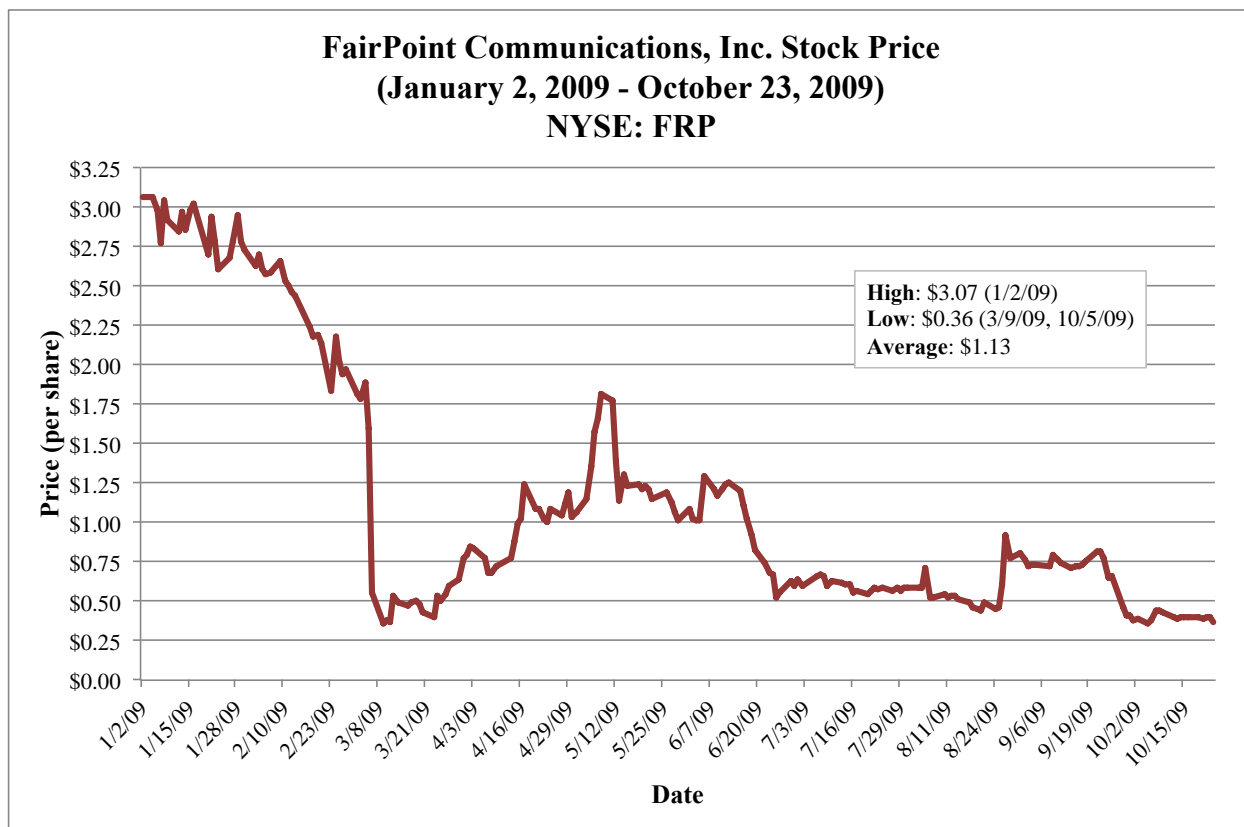
¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Data obtained from Bloomberg Law.

As of September 30, 2009, FairPoint’s stock price was down 87.5% for the year and down 97.2% since January 2, 2008 (see **Figures 5 & 6**).¹¹⁰ FairPoint’s stock dropped 65.0% over a one-day period on March 5-6, 2009 when the company’s quarterly results release announced that FairPoint’s board of directors had suspended the quarterly dividend on the company’s common stock.¹¹¹ The price spiked and subsequently dropped in May 2009 in connection with FairPoint’s first quarter earnings release.¹¹²

Figure 5

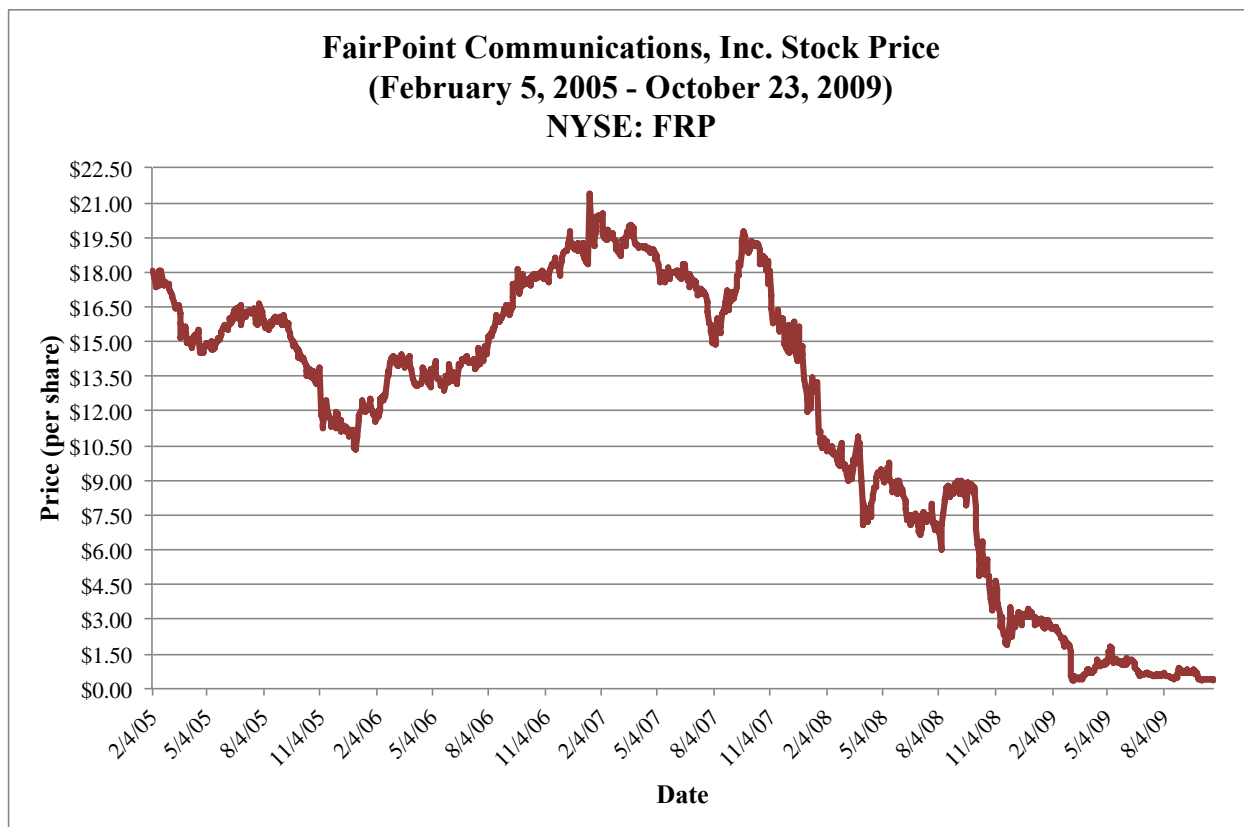


¹¹⁰ FairPoint Communications, Inc., BLOOMBERG LAW (providing historical price data).

¹¹¹ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54; *FairPoint Communications Reports Fourth Quarter 2008 Results*, PRNEWswire (Mar. 5, 2009, 5:00 PM); FairPoint Communications, Inc., BLOOMBERG LAW (providing historical price data).

¹¹² See e.g., FairPoint Communications, Inc., Quarterly Report (Form 10-Q) (May 9, 2009) (reporting negative results from the Cutover).

Figure 6



The credit rating agencies downgraded FairPoint’s credit rating as the company’s financial position deteriorated. In March, Standard & Poor’s Ratings Services lowered its rating to B from BB, citing the “defection of phone customers and the company’s tightening supply of cash.”¹¹³ All three credit rating agencies—Fitch Ratings, Moody’s Investor Services and Standard & Poor’s Ratings Services—further downgraded FairPoint’s credit rating in May 2009 in response to FairPoint’s announcement that it was considering hiring a financial advisor.¹¹⁴

D. Out-of-Court Restructuring Attempt

FairPoint attempted to combat these problems on multiple fronts.¹¹⁵ Namely, FairPoint invested \$85 million in its next-generation IP-based network, suspended common stock dividends, and reduced its interest expense for the second and third quarters of 2009 by

¹¹³ Amy Thomson, *FairPoint Ratings Cut at S&P as Cash Supply Shrinks*, BLOOMBERG (Mar. 23, 2009, 5:46 PM) (noting that a “B” rating is “five levels below investment grade”).

¹¹⁴ *FairPoint’s Credit Ratings Downgraded*, ASSOCIATED PRESS (May 8, 2009, 2:17 PM).

¹¹⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 11.

executing the Exchange Offer for the Notes issued in connection with the Verizon Acquisition.¹¹⁶ These efforts, however, were not enough, so FairPoint began to consider its alternatives for fixing its capital structure.¹¹⁷

In July 2009, FairPoint began working with its noteholders and secured lenders to address the leverage issue.¹¹⁸ FairPoint engaged financial advisor Rothschild Inc. (“Rothschild”) to assist with a restructuring plan (the “Restructuring Plan”).¹¹⁹ The Restructuring Plan would convert the Notes into equity.¹²⁰ The Restructuring Plan was unsuccessful because the noteholder tender threshold of 95% could not be met, and the noteholders would not lend the additional \$25 million requested.¹²¹ The 95% threshold is not uncommon in the exchange offer context.¹²²

Subsequent to the failure of the Restructuring Plan, FairPoint entered into a forbearance agreement with lenders holding 68% of the loans under the Credit Facility, which permitted FairPoint to forgo certain principal and interest payments due on September 30, 2009 (the Forbearance Agreement”).¹²³ FairPoint was also able to enter into a forbearance agreement with Wachovia Bank, N.A. (“Wachovia”) regarding its swap agreement, in which Wachovia would forgo payments of \$51.4 million and would not exercise its remedies for a specified period.¹²⁴ FairPoint also preliminarily reached out to representatives of its labor unions regarding “possible changes to their collective bargaining agreements to reduce operating costs.”¹²⁵ A similar

¹¹⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 11; *see supra* notes 54-59, 102-104 and accompanying text.

¹¹⁷ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 11-12.

¹¹⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 12.

¹¹⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 51.

¹²⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 12.

¹²¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 52.

¹²² See MICHAEL A. GERBER & GEORGE W. KUNEY, BUSINESS REORGANIZATIONS 949 (3d ed. 2013) (explaining that obtaining unanimous or even 95% consent can be difficult).

¹²³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 53. The lenders that entered into the Forbearance Agreement also agreed to forbear from accelerating the amount due under the Credit Facility until October 30, 2009 for failure to meet certain ratio covenants.

¹²⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 54.

¹²⁵ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 12 n.1; Clarke Canfield, *FairPoint Seeks Concessions from Union Workers*, REALCLEARMARKETS (Oct. 23, 2009) (reporting that FairPoint had sought “pay cuts and other concessions” from union employees in New England).

agreement regarding swap payments was entered into with Morgan Stanley Capital Services Inc.¹²⁶

FairPoint then began working with certain secured lenders (the “Steering Committee”) and reached an agreement on a reorganization plan term sheet that would convert \$1.7 billion of debt into equity (the “Plan Term Sheet”).¹²⁷ A plan support agreement, dated October 25, 2009, was executed by the Steering Committee and other secured lenders under the Credit Facility, representing holders of more than half of FairPoint’s outstanding secured debt under the Credit Facility (the “Plan Support Agreement”).¹²⁸ The Plan Term Sheet included a \$75 million debtor-in-possession facility with a \$30 million letter of credit subfacility (the “DIP Facility”).¹²⁹ Claim holders under the Credit Facility would receive *pro rata* shares of \$1 billion in new loans, 98% of the common stock issued by reorganized FairPoint Communications (“New Common Stock”), and certain excess cash after emerging from bankruptcy.¹³⁰ If general unsecured creditors confirmed the plan, they would receive, *pro rata*, 2% of the New Common Stock and warrants for up to 5% of New Common Stock but would receive nothing if they rejected the reorganization plan.¹³¹ The DIP Facility would roll into a revolving credit facility after FairPoint emerged from bankruptcy.¹³²

Ultimately, FairPoint determined that reorganizing pursuant to the Plan Term Sheet under Chapter 11 of the United States Bankruptcy Code was the “most effective and efficient way to de-lever [its] balance sheet to an appropriate level and to ‘right-size’ its cost structure, enabling [FairPoint] to achieve profitability on a long-term basis.”¹³³

¹²⁶ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 55.

¹²⁷ FairPoint Communications, Inc. Plan Term Sheet.

¹²⁸ FairPoint Communications, Inc. Plan Term Sheet.

¹²⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 56, Exhibit B.

¹³⁰ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 57.

¹³¹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 57. Unsecured creditors would call this a “death-trap” mechanism. Objection of the Official Committee of Unsecured Creditors to Debtors’ Motion for Approval of DIP Financing and Form of Final DIP Financing Order, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009)

¹³² Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 57.

¹³³ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶¶ 12, 58-59.

IV. FAIRPOINT COMMUNICATIONS' CHAPTER 11 BANKRUPTCY

Citing its “significant need to de-leverage its balance sheet and to reduce its cost structure,”¹³⁴ FairPoint and its subsidiaries and affiliates’ (collectively, “FairPoint” or “Debtor”) filed voluntary petitions for protection under Chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) on October 26, 2009 (the “Petition Date”).¹³⁵

A. *Selected First-Day Motions*

On October 27, 2009, attorneys for FairPoint met before United States Bankruptcy Judge Burton Lifland (“Judge Lifland,” or, at times, “the Court”) for a hearing to authorize various first-day orders (collectively, the “First Day Motions”) in regard to the FairPoint Communications bankruptcy.¹³⁶ Luc Despins (“Despins”), attorney for the Debtor, began the proceedings by explaining that this was a “classic case of a company unable to support its debt structure.”¹³⁷ FairPoint’s First Day Motions were directed by the following goals: “(a) continuing its operations as debtors in possession with as little disruption and loss of productivity as possible; (b) maintaining the confidence and support of . . . customers, employees, vendors, suppliers, and service providers during FairPoint’s reorganization process; and (c) establishing procedures for the smooth and efficient administration of [the case].”¹³⁸ The following subsections provide an overview of the significant First Day Motions.

1. Motion for Joint Administration of Related Chapter 11 Cases

As is customary with many large bankruptcy cases, FairPoint first sought to consolidate the Chapter 11 filings of its various subsidiaries. In total, seventy-nine entities that were subsidiaries or affiliates of FairPoint Communications filed for protection under Chapter 11 of the Bankruptcy Code.¹³⁹ Normally, separate filings would entail separate estates for each entity. Section 1015(b) of the Federal Rules of Bankruptcy authorizes joint administration for two or

¹³⁴ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 10.

¹³⁵ Voluntary Petition, *supra* note 3.

¹³⁶ Transcript of October 27, 2009 Hearing at 1, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 27, 2009) (hereinafter, “Transcript of October 27, 2009 Hearing”).

¹³⁷ *Id.* at 9. Luc A. Despins was a partner at the law firm Paul Hastings, Janofsky & Walker LLP. Voluntary Petition, *supra* note 3, at 3.

¹³⁸ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 60.

¹³⁹ Transcript of October 27, 2009 Hearing, *supra* note 136, at 7.

more petitions “pending in the same court by or against . . . a debtor and an affiliate.”¹⁴⁰ Separate Chapter 11 cases may be consolidated procedurally or substantively.¹⁴¹ Substantive consolidation occurs when the assets and liabilities of multiple entities are combined and treated as belonging to a single enterprise.¹⁴² Procedural consolidation, on the other hand, “requires the estate of each debtor to be kept separate and distinct.”¹⁴³ Attorneys for FairPoint made clear to Judge Lifland that in this case they were only asking for procedural consolidation.¹⁴⁴ FairPoint’s motion seeking joint administration reasoned that such consolidation of the related Chapter 11 cases would “provide significant administrative convenience without harming the substantive rights of any party-in-interest.”¹⁴⁵ Consolidation, it was argued, would serve the interest of the debtor by reducing fees and court costs.¹⁴⁶ Avoiding such duplicative filings and objections would not only result in substantial savings for the debtor, but it would also relieve the Court of entering such orders and filings.¹⁴⁷ Indeed, joint administration has been called a “creature of procedural convenience” for these reasons.¹⁴⁸ The United States Trustee requested that FairPoint’s consolidated monthly operating reports reflect disbursement on an entity-by-entity basis.¹⁴⁹ The motion was granted, and FairPoint’s related Chapter 11 cases were consolidated under Case No. 09-16335.¹⁵⁰

2. Applications to Retain Professionals

Paramount to a debtor achieving its objectives in bankruptcy is the retention of professional services. Section 327 of the Bankruptcy Code specifically permits a trustee to hire

¹⁴⁰ FED. R. BANKR. P. 1015(b).

¹⁴¹ J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207, 208 (1990).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Transcript of October 27, 2009 Hearing, *supra* note 136, at 16.

¹⁴⁵ See Debtors’ Motion for Entry of An Order Directing Joint Administration of Related Chapter 11 Cases at ¶ 21, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion for Joint Administration”).

¹⁴⁶ The cost of filing of separate petitions alone totaled \$80,000. See Transcript of October 27, 2009 Hearing, *supra* note 136, at 7.

¹⁴⁷ See Motion for Joint Administration, *supra* note 145, at ¶ 13.

¹⁴⁸ Matter of Steury, 94 B.R. 553 (Bankr. N.D. Ind. 1988).

¹⁴⁹ Transcript of October 27, 2009 Hearing, *supra* note 136, at 16.

¹⁵⁰ See Order Directing Joint Administration of Related Chapter 11 Cases Pursuant to Bankruptcy Rule 1015(b) at ¶ 1, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 27, 2009).

professionals to assist in the trustee's duties.¹⁵¹ Section 1107(a) applies this to debtors in possession (the "DIP"), such that the DIP has the same powers as the trustee when no trustee is appointed.¹⁵² Under these sections, FairPoint engaged multiple professional services providers to manage various functions of its bankruptcy.

a. Application to Appoint Paul, Hastings, Janofsky & Walker LLP as Counsel

FairPoint sought to retain Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings") as its counsel "in connection with the commencement and prosecution of their chapter 11 cases."¹⁵³ Paul Hastings is a "leading international law firm that provides . . . legal solutions to many of the world's top financial institutions and Fortune Global 500 Companies."¹⁵⁴ In addition to its size and "extensive bankruptcy and restructuring . . . expertise," FairPoint noted Paul Hastings's familiarity with FairPoint as a previous client.¹⁵⁵ Such familiarity would allow the firm to "effectively and efficiently" provide counsel to FairPoint.¹⁵⁶ Section 327 expressly imposes two requirements: (a) the professional must be a "disinterested person," and (b) the professional must not "hold or represent an interest adverse to the estate."¹⁵⁷ Both requirements "apply at the time of retention and throughout the case."¹⁵⁸ Through Despins' declaration, attached to FairPoint's application, Paul Hastings affirmed its "disinterestedness" and claimed a lack of "interest materially adverse to FairPoint, its estates or any class of creditors or equity security holders."¹⁵⁹ The application was passed with no argument.¹⁶⁰

¹⁵¹ 11 U.S.C.A. § 327 (2013).

¹⁵² 11 U.S.C.A. § 1107 (2013).

¹⁵³ Debtors' Application for Entry of Order Pursuant to Bankruptcy Code Sections 328(a) and 329(a), Bankruptcy Rules 2014(a) and 2016(b), and Local Bankruptcy Rule 2014-1, Authorizing Retention of Paul, Hastings, Janofsky & Walker LLP as Counsel, *Nunc Pro Tunc* as of the Petition Date at ¶ 9, In re FairPoint Comm'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, "Application to Appoint Paul Hastings as Counsel").

¹⁵⁴ Paul Hastings: About Us, <http://www.paulhastings.com/about-us> (last accessed Apr. 17, 2014).

¹⁵⁵ See Application to Appoint Paul Hastings as Counsel, *supra* note 153, at ¶¶ 14-16.

¹⁵⁶ See Application to Appoint Paul Hastings as Counsel, *supra* note 153, at ¶ 16.

¹⁵⁷ 11 U.S.C.A. § 327 (2013).

¹⁵⁸ In re Granite Partners, L.P., 219 B.R. 22, 32-33 (Bankr. S.D.N.Y. 1998).

¹⁵⁹ See Application to Appoint Paul Hastings as Counsel, *supra* note 153, at ¶ 22.

¹⁶⁰ Transcript of October 27, 2009 Hearing, *supra* note 136, at 22.

b. Application to Appoint BMC Group Inc. to Act as Official Claims Agent

The administration of claims is “vital” to Chapter 11 cases.¹⁶¹ In large cases such as FairPoint’s, the handling and processing of claims may pose a “heavy burden” to the Bankruptcy Court.¹⁶² Accordingly, the Bankruptcy Court may require the debtor to retain a claims agent to relieve this burden.¹⁶³

FairPoint anticipated that over 20,000 entities would be required to receive notice of Chapter 11 filings.¹⁶⁴ FairPoint hired BMC Group, Inc. (“BMC Group”) to administer these notices. BMC Group is a Bankruptcy Court-approved claims agent.¹⁶⁵ In its Motion to Retain BMC Group, FairPoint made clear that its selection of BMC Group was the result of a competitive selection process and that BMC Group would not employ any past or present employee of FairPoint for work involving FairPoint’s bankruptcy proceedings.¹⁶⁶ For BMC Group’s claims administration services, FairPoint agreed to pay a retainer of \$50,000.¹⁶⁷ The application was passed with no argument.¹⁶⁸

3. Motions to Continue Debtor’s Business

A Chapter 11 reorganization case “contemplates the continuation of the enterprise while efforts are made to rehabilitate or sell it and to formulate a plan for paying creditors.”¹⁶⁹ Section 363(c)(1) of the Bankruptcy Code permitted FairPoint, as debtor-in-possession, the power to use the property of the estate in the ordinary course of business.¹⁷⁰ Section 363 is “designed to strike

¹⁶¹ Kenneth M. Freda & Craig Johnson, *The Handling of Proofs of Claim in “Claims Agent” Cases*, 3 ABI COMM. NEWS (2007).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Debtors’ Application for an Order Authorizing BMC Group Inc. to Act as Official Claims Agent for Maintenance and Recordation of Claims at ¶ 4, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion to Authorize BMC Group Inc.”).

¹⁶⁵ United States Bankruptcy Court Southern District of New York: Claims Agents, <http://www.nysb.uscourts.gov/claims-agents> (last accessed April 10, 2014).

¹⁶⁶ See Motion to Authorize BMC Group Inc., *supra* note 164, at ¶¶ 6-7.

¹⁶⁷ See Motion to Authorize BMC Group Inc., *supra* note 164, at ¶¶ 6-7.

¹⁶⁸ Transcript of October 27, 2009 Hearing, *supra* note 136, at 22.

¹⁶⁹ MICHAEL GERBER & GEORGE KUNEY, BUSINESS REORGANIZATIONS 291 (3d ed. 2013).

¹⁷⁰ 11 U.S.C.A. § 363(c)(1) (2013). The commencement of a bankruptcy case “creates an estate” into which go the equitable and legal interests of the debtor in property as of the petition date, with certain exceptions. 11 U.S.C. § 541 (2013).

[a] balance, allowing a business to continue its daily operations without excessive court or creditor oversight and protecting secured creditors and others from dissipation of the estate's assets.”¹⁷¹

In addition, section 105(a) of the Bankruptcy Code allows a court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”¹⁷² Section 105, therefore, provides judges a basis for equitable relief that is otherwise not specifically provided for in the Bankruptcy Code.¹⁷³ Pursuant to sections 363 and 105, FairPoint filed the following motions which, collectively, aimed to facilitate the continuation of FairPoint’s business.

*a. Motion to Authorize Debtors to Continue to Use Existing Cash Management System,
and Maintain Existing Bank Accounts*

In the ordinary course of business, FairPoint utilized a cash management system which provided “well-established mechanisms for the collection, concentration, disbursement and investment of funds used in its operations.”¹⁷⁴ FairPoint’s cash management system consisted of over eighty bank accounts that allowed FairPoint to easily keep track of and ensure the availability of approximately \$100 million in monthly cash flows.¹⁷⁵

By its motion, FairPoint sought to continue the use of its cash management system, open new accounts if needed, maintain its existing investment practices, and use its current business forms.¹⁷⁶ FairPoint argued that the existing practices which composed the cash management system represented the most effective mechanisms for running the business.¹⁷⁷

¹⁷¹ In re Crystal Apparel, Inc., 220 B.R. 816, 832 (Bankr. S.D.N.Y. 1998) (quoting Lavigne v. Hirsch, 114 F. 3d, 379, 384 (2d Cir. 1997).

¹⁷² 11 U.S.C.A § 105(a) (2013).

¹⁷³ NANCY C. DREHER, BANKRUPTCY LAW MANUAL § 2:22 (5th ed.).

¹⁷⁴ See Debtors’ Motion for Interim and Final Orders, Pursuant to Bankruptcy Code Section 105(a), 345(b), 363(c) and 364(a) (I) Authorizing Debtors to (A) Continue to Use Existing Cash management System, and (B) Maintain Existing Bank Accounts and Business Forms, and (II) Waiving Requirements of Bankruptcy Code Section 345(b) at ¶ 5, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion to Continue Cash Management System”).

¹⁷⁵ See Motion to Continue Cash Management System, *supra* note 174, at ¶ 9.

¹⁷⁶ See Motion to Continue Cash Management System, *supra* note 174, at ¶ 10.

¹⁷⁷ See Motion to Continue Cash Management System, *supra* note 174, at ¶ 10.

In addition to continuing use of the existing cash management system, FairPoint requested the Court waive the requirements of section 345(b).¹⁷⁸ Section 345(b) sets forth strict requirements for securing money deposited or invested by the debtor-in-possession.¹⁷⁹ Independent of these requirements, section 345(a) allows a debtor-in-possession to “make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on money.”¹⁸⁰ FairPoint successfully argued that the consideration of section 345(a) should outweigh the strict requirements of 345(b).¹⁸¹ According to FairPoint, granting similar relief was common among comparable corporate enterprises in large Chapter 11 cases.¹⁸² Ultimately, an interim and a final order were entered authorizing use of the cash management system and bank accounts.¹⁸³

b. Motion to Authorize Debtors to Pay Employee Compensation and Benefits

FairPoint’s also sought authorization to pay and maintain existing employee compensation and benefits.¹⁸⁴ This motion further sought an order to compel banks to honor prepetition checks issued by FairPoint.¹⁸⁵

At the time of filing, FairPoint employed approximately 4,140 employees. Of course, FairPoint considered its employees “absolutely vital to the reorganization effort.”¹⁸⁶ To this end, the payment of pre-existing employee compensation and benefits was necessary to avoid the harm to employee morale, dedication, and support that would result from a failure to pay wages,

¹⁷⁸ See Motion to Continue Cash Management System, *supra* note 174, at ¶ 11.

¹⁷⁹ 11 U.S.C.A. § 345 (2013).

¹⁸⁰ 11 U.S.C.A. § 345 (2013).

¹⁸¹ 11 U.S.C.A. § 345 (2013).

¹⁸² See Motion to Continue Cash Management System, *supra* note 174, at ¶ 22.

¹⁸³ Final Orders Pursuant to Bankruptcy Code Section 105(a), 345(b), 363(c) and 364(a) (I) Authorizing Debtors to (A) Continue to Use Existing Cash management System, and (B) Maintain Existing Bank Accounts and Business Forms, and (II) Waiving Requirements of Bankruptcy Code Section 345(b), In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 18, 2009).

¹⁸⁴ See Debtors’ Motion for Entry of Interim and Final Orders Pursuant to Bankruptcy Code Sections 105(a), 363, and 507, (I) Authorizing Debtors to (A) Pay Certain Employee Compensation and Benefits and (B) Maintain and Continue Such Benefits and Other Employee-Related Programs and (II) Directing Banks to Honor Prepetition Checks for Payment of Prepetition Employee Obligations at ¶ 4, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion to Continue Employee Compensation and Benefits”).

¹⁸⁵ See Motion to Continue Employee Compensation and Benefits, *supra* note 184, at ¶ 4.

¹⁸⁶ See Motion to Continue Employee Compensation and Benefits, *supra* note 184, at ¶ 2.

salaries, and other benefits.¹⁸⁷ Furthermore, the employee obligations fell under section 507(a) of the Bankruptcy Code as priority claims that must be paid before any general unsecured obligations.¹⁸⁸

Judge Lifland approved the motion in full. The obligations for which FairPoint was authorized to continue payment on included employee wages and commissions, bonus programs, 401(k) plans, and pension plans.¹⁸⁹

c. Motion to Authorize Debtors to Continue Workers Compensation Program

FairPoint next moved for authorization to continue its Workers' Compensation Program and other insurance programs.¹⁹⁰ FairPoint argued that continuing such programs was necessary to the preservation of the estate, mandated by applicable state law, and allowed under certain provisions in the Bankruptcy Code.¹⁹¹ Specifically, FairPoint cited section 502(b)(1), which allows a debtor to pay "the actual, necessary costs and expenses of preserving the estate."¹⁹² Without authorization to continue its existing insurance plans, FairPoint could be unable to obtain replacement insurance and thus exposed to liability. The motion was approved.¹⁹³

4. Other Operational and Administrative Motions

a. Motion to Extend Deadline to File Schedules or Provide Required Information and Waive Requirements to File Equity List

Section 521 of the Bankruptcy Code requires debtors to file schedules of its assets and liabilities, schedules of executory contracts and unexpired leases, and statements of its financial

¹⁸⁷ See Motion to Continue Employee Compensation and Benefits, *supra* note 184, at ¶ 24.

¹⁸⁸ See Motion to Continue Employee Compensation and Benefits, *supra* note 184, at ¶ 24.

¹⁸⁹ See Motion to Continue Employee Compensation and Benefits, *supra* note 184, at ¶¶ 6-21.

¹⁹⁰ See Debtors' Motion for Entry of Interim and Final Orders Pursuant to Bankruptcy Code Sections 363(b), 503(b), 105(a), Bankruptcy Rules 6003 and 6004 (I) Authorizing Debtors to (A) Continue Workers Compensation Program and Liability, Product, Property, and other Insurance Programs and (B) Pay All Obligations in Respect Thereof, and (II) Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Obligations, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, "Motion to Continue Workers' Compensation").

¹⁹¹ See Motion to Continue Workers' Compensation, *supra* note 190, at ¶ 8.

¹⁹² 11 U.S.C.A. § 502 (2013).

¹⁹³ See Motion to Continue Workers' Compensation, *supra* note 190, at ¶ 31.

affairs within fifteen days after filing its Chapter 11 petition.¹⁹⁴ FairPoint requested a forty-five day extension of this deadline due to the “enormous expenditure of time and effort” required to collect the necessary information from their business.¹⁹⁵ The United States Trustee argued a thirty-day extension was more appropriate, and Judge Lifland granted a thirty-day extension to FairPoint.¹⁹⁶

b. Motion to Authorize Establishment of Procedures for Notifying Creditors and Authorizing Filing of List of Debtors’ 50 Largest Unsecured Creditors

Section 521(a)(1) of the Bankruptcy Code requires a debtor to file a list of creditors contemporaneously with its Chapter 11 petition.¹⁹⁷ The Court would use this list to notify creditors of the commencement of the bankruptcy case. Because of the large number of creditors requiring notification, FairPoint opted instead to employ BMC Group to coordinate the claims processes for the case. Therefore, “filing a list of creditors [would] serve no useful purpose” to the Court.¹⁹⁸ In its Motion, FairPoint argued that such procedures served the best interests of FairPoint, its estates, and creditors by providing the requisite notice in a timely and efficient manner.

Furthermore, Bankruptcy Rule 1007(d) requires the debtor in a Chapter 11 case to file a list of “creditors that hold the [twenty] largest unsecured claims, excluding insiders.”¹⁹⁹ Filing separate lists for each of FairPoint’s related entities would cause problems because many unsecured creditors held claims against multiple entities.²⁰⁰ Instead, FairPoint requested to file a

¹⁹⁴ 11 U.S.C.A. § 521 (2013).

¹⁹⁵ See Debtors’ Motion Pursuant to Bankruptcy Rules 1007(c) and 2002(d) for (i) an Extension of Time to File Schedules of Assets and Liabilities, Schedules of Correct Income and Expenditures, Schedules of Executory Contracts and Unexpired Lease, and Statements of Financial Affairs and (ii) a Waiver of Requirements to File Equity List and Provide Notice to Equity Security Holders at ¶ 5, In re FairPoint Comm’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009).

¹⁹⁶ Transcript of October 27, 2009 Hearing, *supra* note 136, at 22.

¹⁹⁷ 11 U.S.C.A. § 521 (2013).

¹⁹⁸ See Debtors’ Motion for Entry of an Order (A) Waiving Requirement for Filing List of Creditors, (B) Authorizing Establishment of Procedures for Notifying Creditors of Commencement of Debtors’ Chapter 11 Cases, and (C) Authorizing Filing of Consolidated List of Debtors’ 50 Largest Unsecured Creditors at ¶ 11, In re FairPoint Comm’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion to Establish Procedures for Notifying Creditors”).

¹⁹⁹ FED. R. BANKR. P. 1007.

²⁰⁰ See Motion to Establish Procedures for Notifying Creditors, *supra* note 198, at ¶ 7.

single list of their fifty largest unsecured, non-insider creditors.²⁰¹ In support of this request, FairPoint mentioned similar relief in comparable Chapter 11 cases.²⁰² FairPoint's motion was granted in all aspects regarding these issues.²⁰³

c. Motion to Approve and Implement Certain Notice and Case Management Procedures

FairPoint also moved for certain notice and case management procedures to be established by the Bankruptcy Court.²⁰⁴ The purpose of these procedures was to help FairPoint manage its time and resources more efficiently.²⁰⁵ The procedures requested would authorize FairPoint to schedule omnibus hearings, establish timelines for requests for relief, and allow electronic service, among other things.²⁰⁶ The motion was granted on an interim basis.²⁰⁷

B. DIP Financing

To remain viable and improve its chances of successfully emerging from bankruptcy, FairPoint would need to arrange for debtor-in-possession financing ("DIP Financing").²⁰⁸ As part of the Plan Term Sheet, FairPoint and certain prepetition lenders had agreed to a \$75 million debtor-in-possession credit facility with a \$30 million letter of credit subfacility (the "DIP Facility").²⁰⁹ FairPoint filed its motion to obtain postpetition financing with the Court on the

²⁰¹ See Motion to Establish Procedures for Notifying Creditors, *supra* note 198, at ¶ 7.

²⁰² See Motion to Establish Procedures for Notifying Creditors, *supra* note 198, at ¶ 7.

²⁰³ Transcript of October 27, 2009 Hearing, *supra* note 136, at 19.

²⁰⁴ See Debtors' Motion for Interim and Final Orders, Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rules 1015(c) and 9007, Implementing Certain Notice and Case Management Procedures, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, "Motion Implementing Certain Notice and Case Management Procedures").

²⁰⁵ See Motion Implementing Certain Notice and Case Management Procedures, *supra* note 204, at ¶ 21.

²⁰⁶ See Motion Implementing Certain Notice and Case Management Procedures, *supra* note 204, at ¶ 10 A.

²⁰⁷ Final order was entered on November 18, 2009. Final Order Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rules 1015(c) and 9007 to Implement Certain Notice and Case Management Procedures, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 18, 2009).

²⁰⁸ See MICHAEL A. GERBER & GEORGE W. KUNEY, BUSINESS REORGANIZATIONS 401-02 (3d ed. 2013).

²⁰⁹ Declaration of Alfred C. Giammarino, *supra* note 1, at ¶ 56; see also *FairPoint, Buyer of Verizon Unit, Files for Bankruptcy Protection*, N.Y. TIMES, Oct. 27, 2009, <http://www.nytimes.com/2009/10/27/technology/companies/27fairpoint.html> (reporting DIP financing agreement).

Petition Date.²¹⁰ It also filed the Debtor-in-Possession Credit Agreement (“DIP Credit Agreement”) evidencing the DIP Facility with the Court on the same date.²¹¹

Section 364 of the Bankruptcy Code governs DIP financing.²¹² Section 364 provides a tiered approach to obtaining financing, first allowing unsecured credit to be incurred in the ordinary course of business as an administrative expense without court approval under subsection (a) and then providing for court approval of unsecured credit other than in the ordinary course as an administrative expense under subsection (b).²¹³ If, however, the debtor cannot obtain credit as an administrative expense, the bankruptcy court—with notice and hearing—may authorize credit with priority over administrative expenses and claims under section 507(b) or credit secured by a first priority lien on unencumbered property or by a junior, or second priority, lien on encumbered property of the estate under subsection (c).²¹⁴ Finally, subsection (d) provides that senior or equal liens on encumbered property of the estate may be granted after a notice and hearing if the debtor cannot otherwise obtain credit and there is adequate protection of the interest of the already existing lienholder with regard to the property on which the senior or equal lien is proposed.²¹⁵

FairPoint’s financial advisor, Rothschild, contacted other lenders and received two DIP financing proposals from lenders other than FairPoint’s prepetition secured lenders.²¹⁶ FairPoint and Rothschild hold that they elected to proceed with the prepetition secured lenders to avoid complications related to satisfying the requirements of section 364(d) of the Bankruptcy Code and because obtaining credit from sources other than the prepetition lenders would be more

²¹⁰ Debtors’ Motion for Entry of Interim and Final Orders Authorizing Debtors to (i) Obtain Postpetition Financing Pursuant to Bankruptcy Code Section 364; (ii) Grant Priming Liens and Superpriority Claims Pursuant to Bankruptcy Code Sections 364(c) and (d); (iii) Provide Adequate Protection to Prepetition Secured Lenders Pursuant to Bankruptcy Code Sections 361, 362, 363, and 364 and (iv) to Schedule Final Hearing Pursuant to Bankruptcy Rule 4001, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Motion for DIP Financing”).

²¹¹ Notice of Filing Debtor-in-Possession Credit Agreement, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “DIP Credit Agreement”).

²¹² 11 U.S.C. § 364 (2013).

²¹³ 11 U.S.C. § 364(a)-(b). Administrative expenses are provided for in section 503 of the Bankruptcy Code.

²¹⁴ 11 U.S.C. § 364(c).

²¹⁵ 11 U.S.C. § 364(d).

²¹⁶ Motion for DIP Financing, *supra* note 210, at ¶ 22.

expensive.²¹⁷ Further, FairPoint wanted to avoid controversy with public utility commission regarding placing postpetition liens on unencumbered assets.²¹⁸ Others saw the arrangement as shielding FairPoint and its prepetition lenders.²¹⁹ FairPoint sought to obtain DIP financing under sections 364(c)(1), (2), (3) and (d) of the Bankruptcy Code.²²⁰

The material terms of the DIP Credit Agreement include a revolving line of credit in the amount of \$75 million, including a \$30 million letter of credit subfacility (collectively, the “DIP Facility”).²²¹ That is, the aggregate amount of letters of credit outstanding could not exceed \$30 million, and the total amount of letters of credit outstanding together with an outstanding loan balance could not exceed \$75 million.²²² Further, letters of credit could not expire more than 364 days after such letter’s issuance, and the issuance of a letter of credit had to comply with various other terms and provisions of the DIP Credit Agreement.²²³ The interest rate would be, at FairPoint’s option, either (i) the Eurodollar Rate plus 4.50% or (ii) the Base Rate plus 3.50%.²²⁴ FairPoint could prepay loans at its option, but would be required to prepay in some instances, such as when the aggregate amount of loans and letters of credit outstanding exceeded the total revolving loan commitment.²²⁵ Lenders under the DIP Credit Agreement also receive the right of setoff if any event of default existed.²²⁶ Certain FairPoint subsidiaries were required to execute guaranties in connection with the DIP Credit Agreement.²²⁷ The maturity date

²¹⁷ Motion for DIP Financing, *supra* note 210, at ¶ 22.

²¹⁸ Motion for DIP Financing, *supra* note 210, at ¶ 23.

²¹⁹ Objection of the Official Committee of Unsecured Creditors to Debtors’ Motion for Approval of DIP Financing and Form of Final DIP Financing Order, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009).

²²⁰ Motion for DIP Financing, *supra* note 210, at ¶ 37.

²²¹ DIP Credit Agreement, *supra* note 211, at 1 (stating recitals of DIP Credit Agreement in Exhibit A). However, the DIP Facility was limited to \$ 20 million until a final order was entered. Motion for DIP Financing, *supra* note 210, at ¶ 3(a).

²²² DIP Credit Agreement, *supra* note 211, at § 1A.01(b).

²²³ DIP Credit Agreement, *supra* note 211, at §§ 1A.01(b)-1A.07.

²²⁴ Motion for DIP Financing, *supra* note 210, at ¶ 3(b). Should an event of default occur, the lenders may elect to increase the interest rate to 2.00% over the applicable rate. DIP Credit Agreement, *supra* note 211, at § 1.03(b).

²²⁵ DIP Credit Agreement, *supra* note 211, at § 3.02.

²²⁶ DIP Credit Agreement, *supra* note 211, at § 11.02. “Setoff” means that a lender can apply deposits or other indebtedness against the borrower. *Id.*

²²⁷ DIP Credit Agreement, *supra* note 211, at § 4.01(a)(iv).

contemplated under the DIP Credit Agreement was June 2010, with extensions available if necessary.²²⁸

The DIP Credit Agreement imposed a 0.5% fee on FairPoint for the unutilized revolving commitments of each lender.²²⁹ FairPoint would also pay fees on outstanding letters of credit, as well as an upfront fee of \$1.5 million payable in two installments on the dates of the interim order and the final order with respect to the DIP Financing Agreement.²³⁰

Among various other requirements and conditions regarding the use of funds and ability to incur obligations and undertake actions such as creating or acquiring subsidiaries, the DIP Credit Agreement imposed negative covenants on FairPoint including limitations on the maximum amount of capital expenditures from November 1, 2009 until October 31, 2010.²³¹ Absent lender approval, funds could only be used in the ordinary course of business and could not be used to pay prepetition public utility commission fines or management bonuses other than in the key employee incentive plan (the “KEIP”) included in the Plan Support Agreement.²³²

The DIP Credit Agreement also prevented FairPoint from creating claims or liens *pari passu* with or senior to the administrative agent.²³³ Bank of America served as the administrative agent under the DIP Credit Agreement.²³⁴ Bank of America received other protections under the DIP Credit Agreement, including indemnification by both the borrowers and lenders.²³⁵ Bank of America could, however, be removed if it defaulted in its obligations as a lender, filed for bankruptcy protection, or entered into a receivership.²³⁶

Events of default included the usual events, such as missing principal or interest payments, making untrue representations, default in the performance of certain covenants, and

²²⁸ DIP Credit Agreement, *supra* note 211, at § 9 (defining “Maturity Date”); Motion for DIP Financing, *supra* note 210, Exhibit A (DIP Term Sheet), at 3.

²²⁹ DIP Credit Agreement, *supra* note 211, at § 2.01(a).

²³⁰ DIP Credit Agreement, *supra* note 211, at § 2.01(b)-(e).

²³¹ DIP Credit Agreement, *supra* note 211, at § 7.05. For instance, FairPoint would also be required under the DIP Credit Agreement to provide weekly or monthly budgets, depending on the aggregate outstanding loan balance. *Id.* at § 6.01(d).

²³² DIP Credit Agreement, *supra* note 211, at § 7.13.

²³³ DIP Credit Agreement, *supra* note 211, at § 7.14. “*Pari passu*” means equal treatment.

²³⁴ DIP Credit Agreement, *supra* note 211, at § 10.01(a).

²³⁵ DIP Credit Agreement, *supra* note 211, at § 10.07.

²³⁶ DIP Credit Agreement, *supra* note 211, at § 10.13.

default under any other indebtedness.²³⁷ Events of default also included, among others, judgments in excess of \$20 million; changes in control; liquidation of the Company or any subsidiary party to the DIP Credit Agreement; failure to obtain a final order from the Court regarding the DIP Credit Agreement; failing to file a plan of reorganization within forty-five days of the Petition Date; filing a plan of reorganization that does not (i) terminate the DIP Credit Agreement before the effective date of the plan and (ii) provide for the continuation of liens and priorities under the DIP Credit Agreement until the effective date; and orders modifying DIP Financing without the lenders' consent or granting relief from the automatic stay to any person(s) in excess of \$10 million.²³⁸

The DIP Credit Agreement created first priority liens for the lenders on all owned or after-acquired unencumbered property of FairPoint as of the Petition Date.²³⁹ Bank of America, on behalf of the prepetition secured lenders, received a “replacement security interest in and lien on the collateral upon which there exists liens granted pursuant to the Prepetition Credit Agreement”—i.e., priming liens—as well as adequate protection liens.²⁴⁰ The adequate protection liens received superpriority under section 507(b) of the Bankruptcy Code.²⁴¹ The DIP Credit Agreement did not include a cross-collateralization provision converting prepetition debt to administrative expense status.²⁴²

On the effective date of FairPoint's plan of reorganization, the DIP Credit Facility would roll into a revolving credit facility (the “New Revolving Facility”).²⁴³ The material terms of the New Revolving Facility included a five-year maturity, interest at LIBOR + 4.5%, and continuation of the \$30 million letter of credit subfacility.²⁴⁴ Relatedly, the Plan Support

²³⁷ DIP Credit Agreement, *supra* note 211, at §§ 8.01-8.04.

²³⁸ DIP Credit Agreement, *supra* note 211, at §§ 8.05-8.22.

²³⁹ Motion for DIP Financing, *supra* note 210, at ¶ 3(e).

²⁴⁰ Motion for DIP Financing, *supra* note 210, at ¶ 31.

²⁴¹ Motion for DIP Financing, *supra* note 210, at ¶ 31.

²⁴² Motion for DIP Financing, *supra* note 210, at ¶ 2(a).

²⁴³ FairPoint Communications, Inc. Plan Support Agreement (Oct. 25, 2009) § 5(a); *see also FairPoint, Buyer of Verizon Unit, Files for Bankruptcy Protection*, N.Y. TIMES, Oct. 27, 2009, <http://www.nytimes.com/2009/10/27/technology/companies/27fairpoint.html> (reporting conversion of DIP credit line into revolving credit facility after exiting bankruptcy).

²⁴⁴ FairPoint Communications, Inc. Plan Support Agreement (Oct. 25, 2009) § 5(a). The acronym LIBOR means the London Interbank Offering Rate, which is a benchmark short-term interest rate.

Agreement also provided that FairPoint would enter into a new \$1 billion secured term loan agreement.²⁴⁵

The Court issued an Interim Order authorizing DIP financing and adequate protection on October 28, 2009 (the “Interim DIP Financing Order”).²⁴⁶ The Interim DIP Financing Order allowed FairPoint to borrow up to \$20 million pending entry of a final order.²⁴⁷

The Official Committee of Unsecured Creditors (the “Committee”) objected to approval of the final DIP financing order, arguing that such financing was not “necessary.”²⁴⁸ In particular, the Committee pointed out that “the Debtors testified that there was no current need for post-petition financing” at an October 27, 2009 hearing and that such financing was merely to placate trade creditors and customers.²⁴⁹ The Committee argued that FairPoint had sufficient cash on hand, but that even if cash was needed, the DIP financing terms were not “fair, reasonable [or] adequate” because the proposed DIP Credit Agreement served “the purpose of protecting, benefiting and further entrenching” FairPoint and its prepetition secured lenders.²⁵⁰

Ultimately, after a hearing, the final order regarding DIP financing was entered on March 11, 2010 (the “Final DIP Financing Order”).²⁵¹ Changes to the final version of the DIP Credit

²⁴⁵ FairPoint Communications, Inc. Plan Support Agreement (Oct. 25, 2009) § 5(b) (listing other material terms).

²⁴⁶ Interim Order under Bankruptcy Code Sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and Bankruptcy Rules 2002, 4001 and 9014 (i) Authorizing Debtors to Obtain Postpetition Financing, (ii) Authorizing Debtors to use Prepetition Collateral, (iii) Granting Adequate Protection to Prepetition Secured Parties and (iv) Scheduling Final Hearing, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 28, 2009) (hereinafter, “Interim DIP Financing Order”).

²⁴⁷ Interim DIP Financing Order, *supra* note 246, at ¶ 5(a).

²⁴⁸ Objection of the Official Committee of Unsecured Creditors to Debtors’ Motion for Approval of DIP Financing and Form of Final DIP Financing Order, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009) (hereinafter, “DIP Financing Objection”); *see also* Tiffany Kary, *FairPoint’s Creditors Object to \$1 Billion Loan*, BLOOMBERG (Dec. 4, 2009, 2:48 PM) (reporting the Committee’s objection to FairPoint’s DIP financing agreement); Brendan Pierson, *Creditors Fight Approval of FairPoint DIP Loan*, LAW360 (Dec. 7, 2009, 7:44 PM), <http://www.law360.com/articles/137800/creditors-fight-approval-of-fairpoint-dip-loan> (reporting creditors comments opposing the DIP financing loan because the terms limited FairPoint’s ability to restructure in a value-maximizing manner).

²⁴⁹ DIP Financing Objection, *supra* note 248, at ¶ 3.

²⁵⁰ DIP Financing Objection, *supra* note 248, at ¶ 3.

²⁵¹ Final Order under Bankruptcy Code Sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and Bankruptcy Rules 2002, 4001 and 9014 (i) Authorizing Debtors to Obtain Postpetition Financing, (ii) Authorizing Debtors to use Prepetition Collateral, and (iii) Granting Adequate

Agreement in connection with the Final DIP Financing Order “were made to . . . reflect the passage of time.”²⁵² Noting that the Committee was “trying to be very practical and very noncontroversial,” counsel to the Committee agreed that it had no objection outstanding because the Committee retained the right to contest adequate protection.²⁵³

C. *Delisting from NYSE*

FairPoint’s common stock, which traded under the ticker symbol FRP, was suspended from trading on the NYSE as a result of the bankruptcy filing.²⁵⁴ The last day of trading on the NYSE was October 23, 2009, after which it traded under the ticker FRCMQ on the Pink Sheets.²⁵⁵ The NYSE delisted FairPoint’s common stock on November 16, 2009.²⁵⁶

Relatedly, credit rating agency Fitch Ratings withdrew its ratings for FairPoint’s loans and notes on December 1, 2009, indicated that “the withdrawal reflects the company’s October 26, 2011 filing for reorganization under Chapter 11 of the U.S. Bankruptcy Code.”²⁵⁷

V. SELECTED ISSUES DURING BANKRUPTCY

Despite having negotiated the Plan Term Sheet to facilitate the plan of reorganization and a quick emergence from bankruptcy, FairPoint’s time in bankruptcy was not without challenge. This Part examines several significant issues that occurred during the pendency of the case.

Protection to Prepetition Secured Parties, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 11, 2010).

²⁵² Transcript of March 11, 2010 Hearing at 7, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 11, 2010).

²⁵³ Transcript of March 11, 2010 Hearing at 8, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 11, 2010); Don Jeffrey, *FairPoint Reorganization Outline Approved by Court*, BLOOMBERG (Mar. 11, 2010, 12:36 PM) (noting that the Committee’s objection was no longer outstanding).

²⁵⁴ FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54.

²⁵⁵ *Id.* The Pink Sheets is an over-the-counter market for “all types of companies that are there by reasons of default, distress or design.” OTC MARKETS, <http://www.otcmarkets.com/marketplaces/otc-pink> (last visited Mar. 31, 2014).

²⁵⁶ FairPoint Communications, Inc., Notification of Removal From Listing and/or Registration under Section 12(b) of the Securities Exchange Act of 1934 (Form 25-NSE/A) (Nov. 16, 2009).

²⁵⁷ *Fitch Affirms and Withdraws FairPoint Communications Inc.’s Ratings*, BUSINESS WIRE (Dec. 1, 2009).

A. *Challenges to the Automatic Stay*

Under section 362 of the Bankruptcy Code, the filing of the bankruptcy petition triggers the automatic stay for the debtor-in-possession.²⁵⁸ The automatic stay, with certain exceptions, “prohibits creditors from engaging in almost all acts to collect or enforce their claims against the debtor, the debtor’s property, and property of the bankruptcy estate.”²⁵⁹ Thus, the automatic stay provides debtors in bankruptcy with a “breathing spell from collection efforts of creditors.”²⁶⁰ The automatic stay also has the effect of protecting creditors’ claims by “insuring that the assets of the estate will not be dissipated in a number of different proceedings.”²⁶¹ Creditors may, however, seek relief from the automatic stay.²⁶² During FairPoint’s bankruptcy proceedings, several entities challenged the automatic stay in connection with their claims against the estate.

1. Biddeford Internet Corp. d/b/a Great Works Internet

Biddeford Internet Corp. d/b/a Great Works Internet (“GWI”) is a competitive local exchange carrier operating in the state of Maine.²⁶³ GWI and FairPoint had been involved in a longstanding dispute regarding FairPoint’s obligations under an interconnection agreement between the parties.²⁶⁴ GWI’s action, filed in the United States District Court of Maine, sought a referral from the District Court to the FCC for a determination of these issues.²⁶⁵ Because the automatic stay operates to preclude “judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title,” the litigation between GWI and FairPoint was put on hold.²⁶⁶

On October 30, 2009—4 days after FairPoint filed its bankruptcy petition—GWI filed a motion seeking relief from the automatic stay.²⁶⁷ Under Bankruptcy Code section 362(d)(1),

²⁵⁸ 11 U.S.C. § 362(a) (2013).

²⁵⁹ 2 MICHAEL BACCUS & HOWARD J. STEINBERG, BANKRUPTCY LITIGATION § 12:1 (2013).

²⁶⁰ *See id.*

²⁶¹ *Id.*

²⁶² 11 U.S.C. § 362(d)-(g).

²⁶³ Motion for Relief from the Automatic Stay, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 30, 2009) (hereinafter, “Biddeford Motion for Relief from Stay”).

²⁶⁴ *See* Biddeford Motion for Relief from Stay, *supra* note 263, at ¶¶ 4-17.

²⁶⁵ *See* Biddeford Motion for Relief from Stay, *supra* note 263, at ¶ 17.

²⁶⁶ 11 U.S.C. § 362(a).

²⁶⁷ *See* Biddeford Motion for Relief from Stay, *supra* note 263, at ¶ 1.

relief from the automatic stay may be granted “for cause.”²⁶⁸ In deciding what constitutes “cause” under the statute, the Court often looks to a list of factors outlined in *In re Sonnax* (the “*Sonnax* Factors”).²⁶⁹ The *Sonnax* Factors are as follows:

(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the Debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the Debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the Debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and; (12) impact of the stay on the parties and balance of harms.²⁷⁰

Not surprisingly, each party offered competing analyses of the *Sonnax* Factors as applied to this case. For example, GWI claimed that the seventh factor favored relief from stay because permitting GWI's action against FairPoint to move forward would have no effect on other creditors inside the case.²⁷¹ Additionally, GWI argued that it would be subjected to severe harm if its motion was denied because FairPoint, during the course of the stay, could choose to shut off GWI's access to FairPoint's services.²⁷² In response, FairPoint argued that GWI had failed to show adequate cause for lifting the stay.²⁷³ FairPoint relied on its own analysis of the *Sonnax*

²⁶⁸ 11 U.S.C. § 362(d)(1).

²⁶⁹ *In re Sonnax Indus., Inc.*, 907 F.2d, 1280, 1286 (2d Cir. 1990) (citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984).

²⁷⁰ *Id.*

²⁷¹ See Biddeford Motion for Relief from Stay, *supra* note 263, at ¶ 27.

²⁷² See Biddeford Motion for Relief from Stay, *supra* note 263, at ¶ 29.

²⁷³ Debtors' Objection to Motion of Biddeford Internet Corp. d/b/a Great Works Internet for relief from Automatic Stay and Counter-Motion to Reject Related Agreement ¶ 37, *In re FairPoint Commc'n, Inc.*, No. 09-16335 (Bankr. S.D.N.Y. Nov. 30, 2009) (hereinafter, “FairPoint Objection to Biddeford”).

Factors to show that relief from the stay would, among other things, needlessly interfere with the bankruptcy proceedings.²⁷⁴

A hearing was held on December 2, 2009 regarding GWI's motion for relief.²⁷⁵ After oral arguments and applying the *Sonnax* Factors, Judge Lifland found that GWI had failed to meet its burden of demonstrating cause.²⁷⁶ Ultimately, Judge Lifland described the issue as a billing dispute that could be appropriately addressed in mediation.²⁷⁷

2. DiVasta Estate

On November 12, 2009, Pacita S. DiVasta ("DiVasta"), as Executrix of the Estate of Paul J. DiVasta and Pacita S. Divasta, filed a motion seeking relief from the automatic stay.²⁷⁸ In April 2008, Paul DiVasta was fatally injured in a motorcycle crash in New Hampshire.²⁷⁹ DiVasta filed a wrongful death claim against multiple defendants including FairPoint in October 2008, alleging that FairPoint had acted negligently by "improperly maintaining its licensed utility pole" and allowing its power lines to run across the road causing Paul DiVasta's accident.²⁸⁰

Like GWI, DiVasta relied on Bankruptcy Code section 362(d) to seek relief from the automatic stay "for cause."²⁸¹ DiVasta argued that the automatic stay forced the estate to either wait indefinitely to proceed with the litigation or sever FairPoint as a defendant and then litigate its claims against FairPoint later.²⁸² This plan of action, according to DiVasta, did not favor

²⁷⁴ See FairPoint Objection to Biddeford, *supra* note 273, at ¶ 54.

²⁷⁵ Transcript of December 2, 2009 Hearing, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 3, 2009).

²⁷⁶ Transcript of December 2, 2009 Hearing at 19, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 3, 2009).

²⁷⁷ Transcript of December 2, 2009 Hearing at 19, 23, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 3, 2009).

²⁷⁸ Motion of Pacita S. DiVasta, as Executrix of the Estate of Paul J. DiVasta and Pacita S. DiVasta, Individually for Order Pursuant to Section 362(d) of the Bankruptcy Code, Bankruptcy Rule 4001 and Local Bankruptcy Rule 4001-1 Modifying the Automatic Stay to Allow Continuation of Pre-Petition Litigation Agreement ¶ 1, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 12, 2009) (hereinafter, "DiVasta Motion for Relief from Stay").

²⁷⁹ See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶¶ 6-8.

²⁸⁰ See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 12.

²⁸¹ See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 15.

²⁸² See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 18.

judicial efficiency and economy.²⁸³ DiVasta’s motion for relief from the stay also engaged in an analysis of relevant *Sonnax* Factors.²⁸⁴ In particular, DiVasta pointed out that the Court is barred from liquidating personal injury and wrongful death claims.²⁸⁵ In response to this assertion, FairPoint argued that “[s]uch a conclusion ignores the complexity of these bankruptcy cases and the various options that FairPoint may utilize to resolve prepetition lawsuits outside of the original state courts in which they were filed.”²⁸⁶ FairPoint relied on the fact that the bankruptcy was still in its earliest stages, meaning claims procedures had not yet been established.²⁸⁷ The movants further argued that the automatic stay severely prejudiced DiVasta, and that relief from the automatic stay would not prejudice or burden FairPoint.²⁸⁸ FairPoint argued that DiVasta could not satisfy its “burden to establish sufficient cause to modify FairPoint’s statutorily imposed breathing spell.”²⁸⁹ FairPoint once again invoked a detailed analysis of the *Sonnax* Factors which showed, in sum, that removing the stay would interfere with the bankruptcy proceedings, thus prejudicing FairPoint.²⁹⁰ Lifting the stay would also cause the estate harm “by forcing FairPoint to expend resources litigating the case and similar lift stay motions which [would be] sure to follow.”²⁹¹

A hearing was scheduled for December 10, 2009 regarding the motion to lift the stay.²⁹² Counsel for DiVasta argued that the need to hear the entire wrongful death action with all of its defendants in one judicial proceeding was paramount to avoiding prejudice and judicial inefficiency.²⁹³ Counsel for DiVasta also stressed that discovery had almost been completed and that the wrongful death action was moving at a brisk pace before the stay was imposed.²⁹⁴

²⁸³ See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 18.

²⁸⁴ See DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 20.

²⁸⁵ DiVasta Motion for Relief from Stay, *supra* note 278, at ¶ 22.

²⁸⁶ Debtors’ Objection to Pacita S. DiVasta’s Motion for Order Pursuant to Bankruptcy Code Section 362(d), Bankruptcy Rule 4001 and Local Bankruptcy Rule 4001-1 Modifying Automatic Stay to Allow Continuation of Pre-Petition Litigation ¶ 22, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009) (hereinafter, “FairPoint Objection to DiVasta”).

²⁸⁷ FairPoint Objection to DiVasta, *supra* note 286, at ¶ 22.

²⁸⁸ See DiVasta Motion for Relief from Stay, *supra* note 278, ¶¶ 22-26.

²⁸⁹ FairPoint Objection to DiVasta, *supra* note 286, at ¶ 22.

²⁹⁰ See FairPoint Objection to DiVasta, *supra* note 286, at ¶ 20.

²⁹¹ See FairPoint Objection to DiVasta, *supra* note 286, at ¶ 20.

²⁹² Transcript of December 10, 2009 Hearing at 1, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009) (hereinafter, “Transcript of December 10, 2009 Hearing”).

²⁹³ Transcript of December 10, 2009 Hearing, *supra* note 292, at 6.

²⁹⁴ Transcript of December 10, 2009 Hearing, *supra* note 292, at 9.

Counsel for FairPoint argued that, at this stage in the bankruptcy proceedings, lifting the stay would be premature.²⁹⁵ Before making his ruling, Judge Lifland once again stressed the importance of the *Sonnax* Factors: “you can always find that it all goes to the *Sonnax* factors. And I think that in applying the *Sonnax* factors the case has not been established for modifying the stay at this time.”²⁹⁶ Thus, DiVasta’s action could wait.

3. Global NAPs

Global NAPs (“Global”), like GWI, is a competitive local exchange carrier which provides voice and data services.²⁹⁷ Global entered into an interconnectivity agreement with FairPoint’s predecessor Verizon, which became effective with FairPoint on April 1, 2008.²⁹⁸ According to Global, the traffic that Global delivered to FairPoint under the interconnectivity agreement was exempt from access charges.²⁹⁹ Global alleged that FairPoint—in violation of the express terms of the agreement—announced in April 2009 that Global owed access charges for traffic it delivered to FairPoint.³⁰⁰ Global further alleged that FairPoint ignored the resolution provisions of the agreement and threatened to terminate its interconnection with Global.³⁰¹ In this sense, Global’s dispute with FairPoint almost mirrored GWI’s. Global filed a complaint on June 24, 2009 seeking “an order enjoining FairPoint from suspending or discontinuing its performance under the Interconnection Agreement, or otherwise altering the *status quo* between the parties.”³⁰²

²⁹⁵ Transcript of December 10, 2009 Hearing, *supra* note 292, at 9.

²⁹⁶ Transcript of December 10, 2009 Hearing, *supra* note 292, at 11.

²⁹⁷ Company Overview of Global NAPs Networks, Inc., BUSINESSWEEK <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=6012165> (last visited Apr. 10, 2014).

²⁹⁸ Emergency Motion for Relief from the Automatic Stay or in the Alternative for an Injunction ¶ 4, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009) (hereinafter, “Global Motion for Relief from Stay”). The interconnection agreements that created the disputes between FairPoint, GWI, and Global were statutorily imposed by the Telecommunication Act, which requires each carrier to interconnect directly or indirectly with its local exchange carriers. 47 U.S.C.A. § 251(b)(2)(A).

²⁹⁹ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 5.

³⁰⁰ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 5.

³⁰¹ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 6.

³⁰² Complaint and Petition for Declaratory Judgment and Request for Interim Injunctive Relief of Global NAPs, Inc. against FairPoint Vermont, Inc. for Unauthorized Billing of Switched Access Usage Services for Termination of Voice Over Internet Protocol (“VoIP”) Traffic at 2, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 4, 2009).

On December 4, 2009, Global filed a motion with the Court seeking a relief from the automatic stay with regard to its ongoing litigation with FairPoint.³⁰³ Similar to the previous parties highlighted in this section, Global sought relief via a motion under Bankruptcy Code section 362(d). Global alleged that it would be severely prejudiced if relief was not granted because FairPoint's threat to terminate access substantially impacted Global's business.³⁰⁴ Global also pointed out that the "automatic stay was never intended to preclude a termination of liability and attendant remedies and damages. It was merely intended to prevent a prejudicial dissipation of the debtor's assets."³⁰⁵ Global also proffered its own analysis of the *Sonnax* Factors as they applied to its case. Among other assertions, Global argued that allowing its action against FairPoint to proceed would satisfy the first *Sonnax* Factor because doing so would "result in the complete resolution of the [interconnectivity agreement] dispute" between the parties.³⁰⁶ Global further argued that permitting its litigation to go forward "would have little or no effect on other creditors since [the action] seeks declaratory relief that should have no effect on the assets of the estate."³⁰⁷

Ultimately, Judge Lifland concluded "in balance the cause for modification of the stay does not exist here on facts now extant."³⁰⁸

B. Objection to Rothschild Retention

In the course of retaining professionals, FairPoint looked to hire Rothschild, Inc. ("Rothschild") as its financial advisor.³⁰⁹ Rothschild claims to be "one of the world's largest independent financial advisory groups, employing approximately 2,800 people in 40 countries

³⁰³ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 2.

³⁰⁴ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 11.

³⁰⁵ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 16.

³⁰⁶ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 18.

³⁰⁷ See Global Motion for Relief from Stay, *supra* note 298, at ¶ 21.

³⁰⁸ Transcript of January 13, 2010 Hearing at 14, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Jan. 13, 2010).

³⁰⁹ Debtors' Application for Entry of Order, Under Bankruptcy Code Sections 327(a) and 328(a), Authorizing Employment and Retention of Rothschild, Inc. as Financial Advisor and Investment Banker to Debtors ¶ 1, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 28, 2009) (hereinafter, "Motion to Retain Rothschild").

around the world.”³¹⁰ FairPoint had engaged Rothschild months before the petition date in its efforts to accomplish an out-of-court restructuring of its debts.³¹¹ In rendering these services, Rothschild “became well acquainted with FairPoint’s business operations, capital structure, key stakeholders, financing documents and other material information.”³¹² Due to such prior relationship and expertise, FairPoint chose to retain Rothschild in connection with its bankruptcy proceedings.³¹³

The retention of Rothschild, however, hit an obstacle when the Official Committee of Unsecured Creditors (the “Committee”) objected to the hiring.³¹⁴ The Committee objected to multiple facets of Rothschild’s engagement letter. Chief among these concerns was the provision for an \$8 million “Recapitalization Fee” in the event FairPoint consummated a “Recapitalization Transaction.”³¹⁵ According to the Committee, “Recapitalization Transaction” was defined so broadly it would potentially “encompass practically any type of restructuring transaction, which by implication, could include a transaction where Rothschild does virtually no work and/or makes only a minor contribution.”³¹⁶ Considering the advanced status of FairPoint’s Plan to restructure, there was a high likelihood that Rothschild stood to be heavily compensated for little or no work.³¹⁷ The Committee had other problems with the retention of Rothschild. In addition to the Recapitalization Fee, the engagement letter absolved Rothschild of any liability and contained a statement extinguishing Rothschild’s fiduciary responsibilities.³¹⁸ As a response to these provisions, the Committee requested the power to review compensation for reasonableness under Bankruptcy Code section 330.³¹⁹

³¹⁰ Rothschild: What We Do, <http://www.rothschild.com/careers/what-we-do/> (last accessed April 10, 2014).

³¹¹ See Motion to Retain Rothschild, *supra* note 309, at ¶ 13.

³¹² See Motion to Retain Rothschild, *supra* note 309, at ¶ 14.

³¹³ See Motion to Retain Rothschild, *supra* note 309, at ¶ 15.

³¹⁴ Limited Objection of Official Committee of Unsecured Creditors to Application for Entry of Order, Under Bankruptcy Code Sections 327(a) and 328(a), Authorizing Employment and Retention of Rothschild Inc. as Financial Advisor and Investment Banker to Debtors ¶ 1, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 13, 2009) (hereinafter, “Objection to Retention of Rothschild”).

³¹⁵ See Objection to Retention of Rothschild, *supra* note 314, at ¶ 3.

³¹⁶ Objection to Retention of Rothschild, *supra* note 314, at ¶ 3.

³¹⁷ See Objection to Retention of Rothschild, *supra* note 314, at ¶ 3.

³¹⁸ See Objection to Retention of Rothschild, *supra* note 314, at ¶¶ 5, 7.

³¹⁹ See Objection to Retention of Rothschild, *supra* note 314, at ¶ 2.

Before any hearing was held on the issue, FairPoint managed to settle with the Committee and the United States Trustees Office on most of the issues.³²⁰ The only issue that remained for the hearing was the Committee’s request for the power of review of compensation.³²¹ Counsel for FairPoint argued that, traditionally, only the United States Trustee held this right.³²² Rather, in similar cases the right was specifically refused.³²³ Furthermore, FairPoint voiced concern that the Committee would have this right considering they had a direct economic interest in the estate. The Committee offered little substantive response, instead pleading to Judge Lifland that such a request in the case at hand was “eminently reasonable.”³²⁴ Before making his decision, Judge Lifland made sure to express misgiving for what he believed was a “very aggressive” retention agreement.³²⁵ Judge Lifland sympathized with the Committee’s contention that the \$8 million Recapitalization Fee could be paid out with little or no work from Rothschild.³²⁶ However, Judge Lifland also acknowledged the lack of precedent for the requested relief.³²⁷ Judge Lifland instructed the parties to meet again in the future and denied the motion.³²⁸ On January 11, 2010, an order was signed confirming the retention of Rothschild.³²⁹ The order barred Rothschild’s from collecting its Recapitalization Fee in the event of Chapter 7 liquidation.³³⁰ Furthermore, the order stated that the Committee would retain “all rights to object to Rothschild’s fee applications on all grounds, including but not limited to the reasonableness standard provided for in section 330 of the Bankruptcy Code.”³³¹

³²⁰ Transcript of Hearing on November 18, 2009 at 9, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 13, 2009) (hereinafter, “Transcript of Hearing on November 18, 2009”).

³²¹ Transcript of Hearing on November 18, 2009, *supra* note 320, at 10.

³²² Transcript of Hearing on November 18, 2009, *supra* note 320, at 10.

³²³ Transcript of Hearing on November 18, 2009, *supra* note 320, at 10.

³²⁴ Transcript of Hearing on November 18, 2009, *supra* note 320, at 12.

³²⁵ Transcript of Hearing on November 18, 2009, *supra* note 320, at 13.

³²⁶ Transcript of Hearing on November 18, 2009, *supra* note 320, at 12.

³²⁷ Transcript of Hearing on November 18, 2009, *supra* note 320, at 13.

³²⁸ Transcript of Hearing on November 18, 2009, *supra* note 320, at 14.

³²⁹ Order Under Bankruptcy Code Sections 327(a) and 328(a) Authorizing Employment and Retention of Rothschild Inc. as Financial Advisor and Investment Banker to Debtors, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Jan. 11, 2010) (hereinafter, “Order Authorizing Rothschild”).

³³⁰ Order Authorizing Rothschild, *supra* note 329, at ¶ 3.

³³¹ See Order Authorizing Rothschild, *supra* note 329, at ¶ 5.

C. *Omnibus Objections to Claims*

Many issues were settled via omnibus motions in FairPoint's bankruptcy case.³³² FairPoint's use of omnibus motions provided extraordinary administrative convenience to a debtor seeking to tackle upwards of 20,000 claims.³³³ Under Bankruptcy Code section 502(a), all claims or interests are deemed allowed unless a party in interest objects.³³⁴

In order to avoid repeating the objection process for each claim, FairPoint filed Omnibus Objections to Claims pursuant to Bankruptcy Rule 3007.³³⁵ Rule 3007 provides that "more than one claim may be joined in an omnibus objection if all the claims [are] filed by the same entity," or if the objection to each claim in the motion rests on one of the grounds laid out in Rule 3007(d).³³⁶ For example, FairPoint's First Omnibus Objection to Claims targeted a large group of duplicative claims.³³⁷ FairPoint also used the omnibus motions to object to claims based purely on the claimant's purported status as a shareholder.³³⁸ These claims, FairPoint reasoned, constituted ownership of an equity interest in FairPoint.³³⁹ Ownership of equity interest fails to meet the definition of a valid claim under Bankruptcy Code section 101(5).³⁴⁰ These omnibus motions undoubtedly aided in streamlining the claims process.

D. *Departure of CEO David Hauser*

In late July 2010, FairPoint's secured creditors expressed their desire for David Hauser to resign as CEO and Chairman.³⁴¹ Certain prepetition secured creditors would ultimately be the

³³² See FairPoint's First Omnibus Objection to Claims (Duplicative Claims), In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 23, 2010) (hereinafter, "First Omnibus Objection to Claims"); FairPoint's First Omnibus Motion for Order Authorizing the Assumption of Unexpired Non-Residential Real Property Leases, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. May 24, 2010).

³³³ See Motion to Authorize BMC Group Inc., *supra* note 164, at 11.

³³⁴ 11 U.S.C.A. § 502(a) (2013).

³³⁵ FED. R. BANKR. P. 3007.

³³⁶ FED. R. BANKR. P. 3007.

³³⁷ See First Omnibus Objection to Claims, *supra* note 332, at ¶ 8.

³³⁸ FairPoint's Fourth Omnibus Objection to Claims (Shareholder Claims) at ¶ 8, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. March 23, 2010) (hereinafter, "Fourth Omnibus Objection to Claims").

³³⁹ See Fourth Omnibus Objection to Claims, *supra* note 338, at ¶ 8.

³⁴⁰ See Fourth Omnibus Objection to Claims, *supra* note 338, at ¶ 9.

³⁴¹ John Downy, *FairPoint CEO Surprised by Request to Step Down*, CHARLOTTE BUS. J. (Aug. 24, 2010, 7:40 AM), <http://www.bizjournals.com/charlotte/stories/2010/08/23/story7.html?page=all>; Don Jeffrey,

owners of the reorganized FairPoint, should the plan be confirmed.³⁴² David Hauser was well regarded for his financial expertise, but creditors wanted a CEO with more telecom experience now that the restructuring had been put in motion.³⁴³ Moreover, the lenders may have grown impatient with delays in confirming FairPoint's plan of reorganization, as discussed below.³⁴⁴ David Hauser resigned effective August 24, 2010.³⁴⁵

Paul Sunu would take over as CEO of FairPoint, but Hauser was retained as a consultant.³⁴⁶ The Bankruptcy Court had to approve both the consulting agreement for Mr. Hauser and the appointment of Mr. Sunu as CEO.³⁴⁷ Mr. Hauser's consulting agreement would expire on March 11, 2011 or the effective date of FairPoint's plan of reorganization, and he would receive as compensation \$3.45 million in cash and 133,588 shares of common stock of reorganized FairPoint.³⁴⁸

Mr. Sunu, the newly appointed CEO, had previously served as the CFO for at least three companies in the telecommunications industry and also had experience as a director at two other telecom companies.³⁴⁹ His compensation was comprised of a base salary of \$750,000 and a signing bonus of \$500,000, and he would be eligible to participate in Fairpoint's incentive and performance bonus plans.³⁵⁰ He would also receive 240,000 shares of reorganized FairPoint's

FairPoint Communications Judge Approves Sunu as Chief, Bloomberg (Aug. 24, 2010, 1:56 PM). FairPoint had named Ajay Sabherwal as its new CFO in June. *FairPoint Communications Names Chief Financial Officer*, PRNEWswire (Jun. 29, 2010).

³⁴² Debtors' Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code at ¶ 5.4.2, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 8, 2010).

³⁴³ John Downy, *FairPoint CEO Surprised by Request to Step Down*, CHARLOTTE BUS. J. (Aug. 24, 2010, 7:40 AM), <http://www.bizjournals.com/charlotte/stories/2010/08/23/story7.html?page=all>.

³⁴⁴ John Downy, *FairPoint Communications Adjusts Debt Plan, Eyes Exit from Chapter 11*, CHARLOTTE BUS. J. (Jan 7, 2011, 6:00 AM) (noting that the rejection by Vermont regulators may have contributed to the departure of former CEO David Hauser).

³⁴⁵ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010).

³⁴⁶ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010); John Downy, *FairPoint CEO Surprised by Request to Step Down*, CHARLOTTE BUS. J. (Aug. 24, 2010, 7:40 AM), <http://www.bizjournals.com/charlotte/stories/2010/08/23/story7.html?page=all>.

³⁴⁷ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010).

³⁴⁸ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010).

³⁴⁹ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010). Additionally, Mr. Sunu earned a law degree from the University of Illinois College of Law. Id.

³⁵⁰ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010); John Downy, *FairPoint CEO Surprised by Request to Step Down*, CHARLOTTE BUS. J. (Aug. 24, 2010, 7:40 AM), <http://www.bizjournals.com/charlotte/stories/2010/08/23/story7.html?page=all>.

common stock and options to purchase 250,000 additional shares on the effective date of the plan of reorganization.³⁵¹ Mr. Sunu could be terminated only for cause, but in certain instances would receive a severance package.³⁵²

E. Northern New England Issues

Regulators and other interested parties in Maine, New Hampshire, and Vermont continued to derail and distract FairPoint. Extended negotiations over regulatory settlements, performance targets, customer rebates imposed as a result of service problems, and other issues stemming from the Verizon Acquisition and Cutover would be the source of significant delay and conflict. For instance, FairPoint was obligated to provide broadband service to more than eighty-three percent of customers in its Maine service area, eighty-five percent of its New Hampshire customers, and eighty percent of its Vermont customers by the end of 2010.³⁵³ The performance targets were tiered over several years, such that an increasing number of customers had to receive broadband service by certain deadlines.³⁵⁴ These targets were the subject of ongoing negotiation and created review and concession opportunities for regulators. New England utilities and regulators were the source of numerous objections filed during the case, especially with regard to FairPoint's providing adequate assurance. FairPoint also had to fight the Maine Public Utilities Commission over \$8 million in rebates for poor service.³⁵⁵

VI. FAIRPOINT COMMUNICATIONS' PLAN OF REORGANIZATION

Chapter 11 debtors not engaging in a sale of the business under section 363 of the Bankruptcy Code³⁵⁶ submit a plan of reorganization outlining the plan to rehabilitate the

³⁵¹ FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010).

³⁵² FairPoint Communications, Inc., Current Report (Form 8-K) (Aug. 24, 2010).

³⁵³ *E.g.*, Clarke Canfield, *FairPoint Meets Broadband Commitment in Maine*, ASSOCIATED PRESS (Jan. 27, 2011, 2:11 PM) (noting the FairPoint met Maine's 2010 target).

³⁵⁴ *Id.*

³⁵⁵ Bob Sanders, *FairPoint-Maine Clash has N.H. Ramifications*, 31 NEW HAMPSHIRE BUS. REV. 11 (Dec. 18, 2009). Both the Public Utilities Commission in Maine and the state's Public Advocate hired counsel in connection with FairPoint's bankruptcy case, which sparked some debate over the expense of such representation versus the importance of the case to Maine residents. Ethan Wilensky-Lanford, *FairPoint's Bankruptcy Case Costly*, MORNING SENTINEL (Feb. 3, 2010, 7:50 PM).

³⁵⁶ 11 U.S.C. § 363(b) (2013). The practice of engaging in section 363 sales is beyond the scope of this paper.

business.³⁵⁷ Such a plan “determines how much and in what form creditors will be paid, whether stockholders will continue to retain any interests, and in what form the business will continue.”³⁵⁸ Section 1123 of the Bankruptcy Code describes what information and treatment the plan must provide in addition to designating what else is permissible under a plan.³⁵⁹ Stated broadly, a debtor must gain acceptance of the plan from creditors and interest holders and have the plan confirmed by the court.³⁶⁰ Confirmation of the plan is binding on the debtor and its creditors and interest holders, and it modifies the debtor’s obligations by discharging prepetition debt except as provided for in the plan.³⁶¹

As discussed above, FairPoint had outlined its plan of reorganization in the form of the Plan Term Sheet. Not uncommonly, Chapter 11 debtors pursue the use of “prepackaged plans,” for which acceptances are solicited prior to filing the bankruptcy petition.³⁶² An alternative is the pre-negotiated plan, which is a plan “that is supported but not officially accepted by the debtor’s creditors and equity security holders prior to a bankruptcy petition filing.”³⁶³ In theory, pre-negotiated plans can facilitate quick acceptance of the plan and reduce costs for the debtor.³⁶⁴

Section 1121 of the Bankruptcy Code afforded FairPoint an exclusive 120-day period during which only FairPoint could file a plan.³⁶⁵ The Plan Support Agreement and DIP Credit Agreement called for FairPoint to file its plan of reorganization within forty-five days of the

³⁵⁷ 11 U.S.C. § 1106(a)(5) (2013) (requiring that “a [debtor] shall . . . as soon as practicable, file a plan under section 1121 of this title”).

³⁵⁸ *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983).

³⁵⁹ *Compare* 11 U.S.C. § 1123(a) (2013) (stating that “a plan shall . . .”), *with* 11 U.S.C. § 1123(b) (2013) (stating that “a plan may . . .”).

³⁶⁰ 11 U.S.C. §§ 1126, 1129 (2013).

³⁶¹ 11 U.S.C. § 1141(a), (d)(1) (2013).

³⁶² Bryant B. Edwards & Robert A. Klyman, *Prepackaged Bankruptcies: Alternative to Traditional Chapter 11*, Andrews Leveraged Buyouts & Acquisitions Litig. Rep. 17 (1997) (comparing prenegotiated and prepackaged plans); MICHAEL A. GERBER & GEORGE W. KUNEY, BUSINESS REORGANIZATIONS 948-51 (3d ed. 2013) (discussing prepackaged plans).

³⁶³ Bryant B. Edwards & Robert A. Klyman, *Prepackaged Bankruptcies: Alternative to Traditional Chapter 11*, Andrews Leveraged Buyouts & Acquisitions Litig. Rep. 17 (1997)

³⁶⁴ *Id.*

³⁶⁵ 11 U.S.C. § 1121 (2013).

Petition Date.³⁶⁶ However, FairPoint extended the deadline for filing the plan multiple times in order to “finalize settlements with lenders, unions and other parties.”³⁶⁷

A. *Proposed Plan of Reorganization*

1. Summary of the Initial Plan

FairPoint—including its subsidiaries also in bankruptcy—filed a joint plan of reorganization under Chapter 11 of the Bankruptcy Code on February 8, 2010 (the “Initial Plan”).³⁶⁸

A debtor may classify claims and equity interests into separate classes under its plan.³⁶⁹ The Initial Plan described the treatment of various classes of claim and interest holders and explained the means for implementing the plan.³⁷⁰ First, holders of “Allowed Administrative Expense Claim[s]” would be paid in full under the Initial Plan.³⁷¹ Likewise, Adequate Protection Claims—“rights to adequate protection arising under the DIP Order”—held by lenders under the Prepetition Credit Agreement, dated March 31, 2008, would be paid in full.³⁷² Priority Tax Claims, or government claims under sections 502(i) and 507(a)(8) of the Bankruptcy Code, would also be paid in full, either in one cash payment or semi-annual payments with interest over five years.³⁷³ Moreover, the Initial Plan would allow for full payment of professional

³⁶⁶ DIP Credit Agreement, *supra* note 211, at § 8.22.

³⁶⁷ *FairPoint Delays Filing Ch. 11 Reorganization Plan*, ASSOCIATED PRESS (Jan. 14, 2010, 4:26 PM).

³⁶⁸ Debtors’ Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 8, 2010) (hereinafter, “Initial Plan”).

³⁶⁹ 11 U.S.C. § 1122 (2013).

³⁷⁰ *E.g.*, Initial Plan, *supra* note 368, at ¶¶ 3.1-16.16.

³⁷¹ Initial Plan, *supra* note 368, at ¶ 3.1. An “‘Administrative Expense Claim’ means any right to payment constituting a cost or expense of administration of the Chapter 11 Cases Allowed under sections 330, 503(b), 507(a)(2) and 507(b) of the Bankruptcy Code (other than Adequate Protection Claims).” Initial Plan, *supra* note 368, at ¶ 1.3

³⁷² Initial Plan, *supra* note 368, at ¶¶ 1.2, 1.98-1.101, 3.2. Generally, adequate protection provided for in the form of cash payments, replacement liens, or some other relief that is the “indubitable equivalent” of the interest—kind of a “know it when you see it” provision that provides flexibility to debtors and the court. 11 U.S.C. § 361 (2013).

³⁷³ Initial Plan, *supra* note 368, at ¶¶ 1.102, 3.3.

compensation claims allowed by the Bankruptcy Court.³⁷⁴ Further, FairPoint provided the following classification and treatment in the Initial Plan (**Figure 7**):

Figure 7 – FairPoint’s Classification of Claims & Interests under Initial Plan

Class	Designation	Impairment	Entitled to Vote
1	Other Priority Claims	Unimpaired	No (deemed to accept)
2	Secured Tax Claims	Unimpaired	No (deemed to accept)
3	Other Secured Claims	Unimpaired	No (deemed to accept)
4	Allowed Prepetition Credit Agreement Claims	Impaired	Yes
5	Legacy Subsidiary Unsecured Claims	Unimpaired	No (deemed to accept)
6	NNE Subsidiary Unsecured Claims	To be determined	To be determined
7	FairPoint Communications Unsecured Claims	Impaired	Yes
8	Convenience Claims	Unimpaired	No (deemed to accept)
9	Subordinated Securities Claims	Impaired	No (deemed to reject)
10	Subsidiary Equity Interests	Unimpaired	No (deemed to accept)
11	Old FairPoint Equity Interests	Impaired	No (deemed to reject)

Generally speaking, impairment means that a claim or interest against the debtor is unaltered by the plan.³⁷⁵ Whether or not a claim or interest is impaired under the plan determines if the holder of such claim or interest may vote on the plan.³⁷⁶ More specifically, if holders of at least two-thirds in amount and one-half in number of a particular class accept a plan, then the entire class is treated as accepting the plan.³⁷⁷ However, classes unimpaired by the plan are “conclusively presumed to have accepted the plan.”³⁷⁸ Similarly, classes impaired by the plan—those not receiving or retaining any property under the plan—are “deemed not to have accepted [the] plan.”³⁷⁹ Thus, as shown in **Figure 7**, only two classes were entitled to vote on the Initial Plan. However, the Initial Plan had not yet determined the treatment for Class 6, the NNE

³⁷⁴ Initial Plan, *supra* note 368, at ¶ 3.4.

³⁷⁵ 11 U.S.C. § 1124(1) (2013).

³⁷⁶ 11 U.S.C. § 1126 (2013).

³⁷⁷ 11 U.S.C. § 1126(c), (d) (2013).

³⁷⁸ 11 U.S.C. § 1126(f) (2013).

³⁷⁹ 11 U.S.C. § 1126(g) (2013).

Subsidiary Unsecured Claims.³⁸⁰ Class 6 was comprised of unsecured claims against four specific subsidiaries.³⁸¹

FairPoint’s distribution to these classes under the Initial are summarized in **Figure 8**, as follows:

Figure 8

Class	Designation	Distribution
1	Other Priority Claims	Paid in full (cash)
2	Secured Tax Claims	Paid in full (1 cash payment <i>or</i> semi-annual payments with interest over 5 years)
3	Other Secured Claims	Either, at FairPoint’s option, (i) re-instated, (ii) full cash payment, or (iii) collateral in satisfaction
4	Prepetition Credit Agreement Claims	Paid in full, ratable portion of (i) new term loan, (ii) new common stock, and (iii) certain excess cash
5	Legacy Subsidiary Unsecured Claims	Paid in full (cash)
6	NNE Subsidiary Unsecured Claims	To be determined
7	FairPoint Communications Unsecured Claims	If accept Plan, paid in full pro rata with new common stock and warrants. If reject, no distribution.
8	Convenience Claims	Paid in full (cash)
9	Subordinated Securities Claims	No distribution or interest retained
10	Subsidiary Equity Interests	Interests re-instated
11	Old FairPoint Equity Interests	Cancelled; no distribution

It is worth noting the “carrot and stick” scheme to incentivize Class 7 to accept the plan—either accept the plan and receive new stock, or reject it and receive nothing.³⁸² This negotiating tactic is not uncommon in connection with bankruptcy plans.³⁸³ The acceptance or rejection of the plan by Class 7 affects the amount of the distribution of new common stock and warrants to

³⁸⁰ Initial Plan, *supra* note 368, at ¶ 5.6.

³⁸¹ Initial Plan, *supra* note 368, at ¶¶ 1.87, 1.88, 5.6.

³⁸² Initial Plan, *supra* note 368, at ¶ 5.7.2.

³⁸³ See, e.g., Karen Pierog & Tom Hals, *Detroit Uses Stick and Carrot to Sell Bankruptcy Plan*, REUTERS (Feb. 27, 2014, 9:45 AM), <http://www.reuters.com/article/2014/02/27/us-usa-detroit-bankruptcy-analysisidUSBREA1Q1DX20140227> (commenting on incentives to accept the city of Detroit’s plan of reorganization in its Chapter 9 bankruptcy case); cf. David T. Brown, *Claimholder Incentive Conflicts in Reorganization: The Role of Bankruptcy Law*, 2 REV. FIN. STUD. 109 (1989) (discussing incentives of claimholders and game theory in reorganizations).

Class 4.³⁸⁴ The Initial Plan established distribution procedures for implementing the above-described scheme.

Next, the Initial Plan included filing an Amended Certificate of Incorporation of Reorganized FairPoint that would authorize the issuance of seventy-five million shares of common stock, par value \$0.01 (“New Common Stock”).³⁸⁵ All prepetition equity interests in FairPoint would be “extinguished.”³⁸⁶ The New Common Stock would be issued or reserved (i) for allowed claims, with the amount determined by the acceptance or rejection of the Initial Plan by Class 7, (ii) in connection with warrants to be issued for Class 7 under the Initial Plan (the “New Warrants”), and (iii) in connection with FairPoint’s long term incentive plan for senior management and selected employees of FairPoint, which provides compensation in the form of stock options and restricted stock awards (the “Long Term Incentive Plan”).³⁸⁷

The New Common Stock and New Warrants are exempt from registration under the Securities Act of 1933 (the “Securities Act”).³⁸⁸ Section 5 of the Securities Act prohibits the offer or sale of securities, absent registration or an exemption.³⁸⁹ Similar registration requirements are included in various states’ securities laws, commonly referred to as “blue sky laws.”³⁹⁰ However, section 1145 of the Bankruptcy Code exempts securities offered or sold under a plan of reorganization from registration under state and federal securities laws.³⁹¹ Further, restrictions on subsequent sales, resales, and transfers would also not be applicable.³⁹² The Initial Plan did, however, provide for a registration rights agreement for holders of greater than ten percent, on a fully diluted basis, of the New Common Stock, under which such holders

³⁸⁴ Initial Plan, *supra* note 368, at ¶¶ 6.1.1(c), (d).

³⁸⁵ Initial Plan, *supra* note 368, at ¶¶ 6.1.1(a), 6.1.2.

³⁸⁶ Initial Plan, *supra* note 368, at ¶¶ 8.2, 8.13.

³⁸⁷ Initial Plan, *supra* note 368, at ¶¶ 1.76, 5.7.2, 6.1.1, 6.2. The Initial Plan also provided for “Success Bonuses,” which were cash bonuses payable as incentive compensation. Initial Plan, *supra* note 368, at ¶¶ 1.123, 8.15.

³⁸⁸ Compare 15 U.S.C. § 77e (2013), with 11 U.S.C. § 1145 (2013); see also Initial Plan, *supra* note 368, at ¶¶ 6.3.1 (invoking section 1145 for securities issued under FairPoint’s plan).

³⁸⁹ 15 U.S.C. § 77e (2013).

³⁹⁰ E.g., TENN. CODE ANN. § 48-1-104 (West 2013); *Blue Sky Laws*, SEC. & EXCH. COMM’N, <http://www.sec.gov/answers/bluesky.htm>.

³⁹¹ 11 U.S.C. § 1145 (2013).

³⁹² *Id.*; Initial Plan, *supra* note 368, at ¶ 6.3.1 (imposing restrictions, however, if the securities are sold outside “ordinary trading transactions” under section 1145(b)(1)).

could request registration.³⁹³ Finally, the Initial Plan called for FairPoint to use its “reasonable best efforts” to list its securities on a national securities exchange.³⁹⁴

Next, the Initial Plan also specified that any court order confirming the plan would approve the NHPUC Regulatory Settlement and the VDPS Regulatory Settlement (collectively, the Regulatory Settlements’).³⁹⁵ Further, any such order would also include findings that the Regulatory Settlements were “made in good faith” and are in the “best interest of FairPoint.”³⁹⁶

Presumably evidencing FairPoint’s desire to rehabilitate, the Initial Plan specified that the Company and its subsidiaries would “continue to engage in [their] respective businesses” after the plan became effective.³⁹⁷ Other, related provisions regarding implementation of the Initial Plan were also delineated, including, for instance, executing “all instruments and documents necessary to effectuate the Plan,” resolving claims, and making required distributions.³⁹⁸

The Initial Plan also described the process for forming the board of directors of reorganized FairPoint.³⁹⁹ More specifically, the members of the board on the effective date of Initial Plan would resign, and a new, nine-director board would be formed (the “New Board”).⁴⁰⁰ Two methods for determining the initial composition of the New Board were included, the method being determined by the acceptance or rejection of the Initial Plan by Class 7.⁴⁰¹ In the event of acceptance, the New Board would be comprised of FairPoint’s chief executive officer, seven members nominated by the Lender Steering Committee, and one member nominated by the steering committee of the Ad Hoc Committee of Senior Noteholders.⁴⁰² Conversely, in the

³⁹³ Initial Plan, *supra* note 368, at ¶ 6.3.2.

³⁹⁴ Initial Plan, *supra* note 368, at ¶ 6.3.3.

³⁹⁵ Initial Plan, *supra* note 368, at ¶¶ 8.1.

³⁹⁶ Initial Plan, *supra* note 368, at ¶¶ 8.1.

³⁹⁷ Initial Plan, *supra* note 368, at ¶ 8.3.

³⁹⁸ Initial Plan, *supra* note 368, at ¶ 8.4.

³⁹⁹ Initial Plan, *supra* note 368, at ¶ 8.6.

⁴⁰⁰ Initial Plan, *supra* note 368, at ¶ 8.6.1-8.6.2.

⁴⁰¹ Initial Plan, *supra* note 368, at ¶ 8.6.2(b).

⁴⁰² Initial Plan, *supra* note 368, at ¶ 8.6.2(b)(i). However, if the steering committee of the Ad Hoc Committee of Senior Noteholders failed to meet the nomination deadline, the Lender Steering Committee could nominate an additional director or the New Board would be reduced to eight. Initial Plan, *supra* note 368, at ¶ 8.6.2(b)(i). For clarification, the Lender Steering Committee was comprised of Bank of America, N.A., Angelo Gordon & Co., Paulson & Co., Inc., Lehman Brothers Holdings, Inc., CoBank, ACB and Wachovia Bank, N.A. Initial Plan, *supra* note 368, at ¶ 1.72. It is worth nothing here that FairPoint’s executive officers would remain the same. Initial Plan, *supra* note 368, at ¶ 8.7.1.

event that Class 7 rejects the Initial Plan, the New Board would be comprised of FairPoint’s chief executive officer and eight members nominated by the Lender Steering Committee, thus freezing out the FairPoint Communications Unsecured Claims class.⁴⁰³ With either option, however, the Lender Steering Committee was required to nominate at least one member who is a resident of northern New England—likely a nod to the large number of customers in that area and, even more likely, to the Maine, New Hampshire, and Vermont regulators.⁴⁰⁴ Note further that that Lender Steering Committee could reduce the New Board to five members, and the nomination procedures would change accordingly.⁴⁰⁵ Interestingly, the New Board would be classified into three classes, which is a questionable governance tactic but reflects a desire to protect—or entrench, depending on the perspective—reorganized FairPoint.⁴⁰⁶

Next, any of FairPoint’s executory contracts and unexpired leases not assumed or rejected prior to the effective date of the plan would be deemed assumed.⁴⁰⁷ The term executory contract is not defined in the Bankruptcy Code, but the generally accepted definition—the “Countryman definition”—is “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”⁴⁰⁸

Finally, the Initial Plan included a few other noteworthy provisions. It provided for FairPoint and its affiliates to be released from any and all claims, causes of action, and liabilities that arose prepetition in connection with the bankruptcy case.⁴⁰⁹ The Initial Plan also included a “retention of jurisdiction” provision under which the Bankruptcy Court would retain jurisdiction for all matters arising from the bankruptcy case and plan.⁴¹⁰

⁴⁰³ Initial Plan, *supra* note 368, at ¶ 8.6.2(b)(ii). Again, the Lender Steering Committee would have the option to reduce the New Board to eight members. Initial Plan, *supra* note 368, at ¶ 8.6.2(b)(ii).

⁴⁰⁴ Initial Plan, *supra* note 368, at ¶ 8.6.2(b)(ii).

⁴⁰⁵ Initial Plan, *supra* note 368, at ¶ 8.6.3.

⁴⁰⁶ Initial Plan, *supra* note 368, at ¶ 8.6.5. A classified board has staggered terms of office with directors serving different term lengths depending on their classification, which is a defensive measure against take-over attempts. John Mark Zeberkiewicz & Blake Rohrbacher, *Winning the Class Struggle: Acquirer Strategies for Declassifying Classified Boards*, 16 Corp. Governance Advisor 21 (Jan./Feb. 2008).

⁴⁰⁷ Initial Plan, *supra* note 368, at ¶ 11.1.1.

⁴⁰⁸ Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

⁴⁰⁹ Initial Plan, *supra* note 368, at ¶ 14.2.

⁴¹⁰ Initial Plan, *supra* note 368, at Section XV.

2. Disclosure Statement

FairPoint filed a disclosure statement in connection with the Initial Plan (the “Initial Disclosure Statement”).⁴¹¹ Before a debtor can solicit votes on a plan, the court must approve a disclosure statement that is used to inform claim and interest holders.⁴¹² The Initial Disclosure Statement—which spanned 270 pages—discussed FairPoint’s business and risk factors, FairPoint’s bankruptcy case and related negotiations, details of the Initial Plan, voting procedures, and special factors to consider.⁴¹³ It contained the following exhibits: Initial Plan, projections, liquidation analysis, valuation analysis, and new term loan financial covenants.⁴¹⁴

B. First Amended Plan of Reorganization

On February 11, 2010, FairPoint filed an amended plan of reorganization (the “First Amended Plan”).⁴¹⁵ Among definitional changes and minor textual edits and clarifications, the First Amended Plan adjusted the Distributions by decreasing the shares of New Common Stock by 34,349 available for Allowed Prepetition Credit Agreement Claims (Class 4), increasing the shares of New Common Stock for FairPoint Communications Unsecured Claims (Class 7) by 12,701, and increasing the number of New Warrants by 21,648.⁴¹⁶ The First Amended Plan also adjusted the number of shares of New Common Stock that would be issued or reserved on the Effective Date for Allowed Claims and the Long Term Incentive Plan—still dependent upon Class 7’s acceptance or rejection of the First Amended Plan.⁴¹⁷

Further, the First Amended Plan indicated that FairPoint had determined that NEE Subsidiary Unsecured Claims (Class 6) was unimpaired by the Second Plan and was thus

⁴¹¹ Disclosure Statement for Debtors’ Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 8, 2010) (the “Initial Disclosure Statement”).

⁴¹² 11 U.S.C. § 1125 (2013).

⁴¹³ Initial Disclosure Statement, *supra* note 411, at 1-117.

⁴¹⁴ Initial Disclosure Statement, *supra* note 411, at Exhibits A-E.

⁴¹⁵ Debtors’ First Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 8, 2010) (hereinafter, “First Amended Plan”). To accompany the Second Plan, FairPoint filed a version with the track-changes function enabled to show the changes that had been made to the First Plan.

⁴¹⁶ *See, e.g.*, First Amended Plan, *supra* note 415, at §§ 1.85, 5.4.2(b), 5.7.2(b). The associated changes were also made to the New Warrants Term Sheet. First Amended Plan, *supra* note 415, at Exhibit C.

⁴¹⁷ First Amended Plan, *supra* note 415, at § 6.1(a)-(b).

deemed to accept it (see **Figure 9**).⁴¹⁸ This class would be paid cash in full and complete satisfaction of the respective claims on the Distribution Date.⁴¹⁹

Figure 9 – Amended Classification of Claims and Interests

Class	Designation	Impairment	Entitled to Vote
1	Other Priority Claims	Unimpaired	No (deemed to accept)
2	Secured Tax Claims	Unimpaired	No (deemed to accept)
3	Other Secured Claims	Unimpaired	No (deemed to accept)
4	Allowed Prepetition Credit Agreement Claims	Impaired	Yes
5	Legacy Subsidiary Unsecured Claims	Unimpaired	No (deemed to accept)
6	NNE Subsidiary Unsecured Claims	Unimpaired	No (deemed to accept)
7	FairPoint Communications Unsecured Claims	Impaired	Yes
8	Convenience Claims	Unimpaired	No (deemed to accept)
9	Subordinated Securities Claims	Impaired	No (deemed to reject)
10	Subsidiary Equity Interests	Unimpaired	No (deemed to accept)
11	Old FairPoint Equity Interests	Impaired	No (deemed to reject)

The First Amended Plan also added a provision to reimburse Consenting Lenders and the Prepetition Credit Agreement Agent—Bank of America—for “reasonable out-of-pocket fees and expenses (including reasonable fees and expenses of counsel) to the extent that such fees and expenses are incurred in connection with the Plan Support Agreement, the Plan, the Chapter 11 Cases, and [related] transactions.”⁴²⁰

An amended disclosure statement was also filed in connection with the First Amended Plan (the “First Amended Disclosure Statement”).⁴²¹ The First Amended Disclosure Statement tracked the changes made to the First Amended Plan and provided additional details regarding

⁴¹⁸ First Amended Plan, *supra* note 415, at §§ IV (table), 5.6.

⁴¹⁹ First Amended Plan, *supra* note 415, at § IV (table).

⁴²⁰ First Amended Plan, *supra* note 415, at §§ 3.4, 5.4.2(c).

⁴²¹ Amended Disclosure Statement for Debtors’ First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 11, 2010) (the “First Amended Disclosure Statement”).

FairPoint's negotiations with unions and regarding the Regulatory Settlements.⁴²² Several parties objected to the First Amended Disclosure Statement. Two Comcast subsidiaries out of Vermont and New Hampshire sought additional disclosure regarding the Regulatory Settlements with those two states.⁴²³ Not to be outdone, several Vermont utility companies also joined to file an objection for lack of "adequate information" regarding utility poles and tariffs and assurance that funds exist to pay claims in full.⁴²⁴ Ace American Insurance, which had provided several policies to FairPoint, objected more broadly and desired language protecting its interests be inserted into the disclosure statement.⁴²⁵ The Pension Benefit Guaranty Corporation also filed a limited objection seeking greater disclosure regarding FairPoint's pension plans and the obligations thereunder.⁴²⁶

C. *Second Amended Plan of Reorganization*

1. Changes to the Plan

On March 11, 2010 FairPoint filed an amended version of the plan of reorganization (the "Second Amended Plan").⁴²⁷ In addition to various clarifications and other minor revisions—e.g., table of contents page references and similar changes—, the Second Amended Plan provided for reimbursement of reasonable out-of-pocket expenses of the State of New Hampshire, the Vermont Department of Public Service, the Vermont Public Service Board, and, so long as the Regulatory Settlement remains in effect in Maine on the Effective Date, the Maine

⁴²² First Amended Disclosure Statement, *supra* note 421, at v, 43.

⁴²³ Limited Objection of Comcast Phone of Vermont, LLC, and Comcast Phone of New Hampshire, LLC, to Debtors' Amended Disclosure Statement for Debtors' First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code at 5, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 4, 2010).

⁴²⁴ Objection to the Debtors' Amended Disclosure Statement, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 4, 2010).

⁴²⁵ Objection of Ace American Insurance Company to Debtors' Amended Disclosure Statement and First Amended Plan of Reorganization, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 4, 2010).

⁴²⁶ Limited Objection of the Pension Benefit Guaranty Corporation to the Debtors' Amended Disclosure Statement, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 4, 2010).

⁴²⁷ Debtors' Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Feb. 8, 2010) (hereinafter, "Second Amended Plan"). FairPoint also filed a mark-up version of the Amended Plan.

Public Utilities Commission and Maine Public Advocate incurred in connection with FairPoint’s bankruptcy.⁴²⁸

The Second Amended Plan also changed the Allowed Prepetition Credit Agreement Claims’ Distribution, in that such class will receive a larger *pro rata* share of New Common Stock should the FairPoint Communications Unsecured Claims class not receive a Distribution—as opposed to if the class rejected the plan, as previously designed.⁴²⁹ Relatedly, the Second Amended Plan expanded when the FairPoint Communications Unsecured Claims class would not receive any Distributions to also include any objection of the Creditors’ Committee or its counsel to the Second Amended Plan or Disclosure Statement as they relate to the class’ treatment or Distribution.⁴³⁰

The Second Amended Plan also added to the “plan implementation” provisions a clause providing that the New Board would be “installed without any further action.”⁴³¹ No changes were made to other provisions relating to the New Board.⁴³²

Further, the Second Amended Plan added to the exceptions to exculpation any act or omission that constitutes “fraud, gross negligence, criminal conduct, breach of fiduciary duty (to the extent applicable) and ultra vires acts.”⁴³³ Formerly, the exculpation provision only carved out acts or omissions “determined by a [final order or judgment of the Bankruptcy Court] to have

⁴²⁸ Second Amended Plan, *supra* note 427, at § 3.4. Recall that both the Public Utilities Commission in Maine and the state’s Public Advocate had hired counsel in connection with FairPoint’s bankruptcy case. *See supra* note 352.

⁴²⁹ Second Amended Plan, *supra* note 427, at §§ 5.4.2(b), 6.1.1(b)(ii), (iv).

⁴³⁰ Second Amended Plan, *supra* note 427, at § 5.7.2(b). The revision, however, made it clear that the FairPoint Communications Unsecured Claims class, Ad Hoc Committee of Senior Noteholders, and members and counsel of the Creditors’ Committee could seek to:

share with the holders of other Allowed Claims the proceeds, if any, of: (i) any cause of action . . . against Verizon . . . arising from the agreement and plan of merger dated January 15, 2007 . . . ; and (ii) any cause of action . . . against CapGemini U.S. LLC . . . arising out of or related to the: (a) Master Services Agreement dated as of January 15, 2007, (b) Master Purchasing Agreement effective as of March 29, 2007, and/or (c) Information Technology Services Agreement effective as of January 30, 2009.

Second Amended Plan, *supra* note 427, at § 5.7.2(b).

⁴³¹ Second Amended Plan, *supra* note 427, at § 8.2(a)(v).

⁴³² *Compare* Second Amended Plan, *supra* note 427, at § 8.26, with First Amended Plan, *supra* note 415, at § 8.6.

⁴³³ Second Amended Plan, *supra* note 427, at § 14.1.

constituted willful misconduct.”⁴³⁴ A parallel revision was also made to the release of the Released Parties, and the Second Amended Plan also clarified that neither the release nor the injunction against the continuation or commencement of claims and interests released by the Second Amended Plan limited the Regulatory Settlement.⁴³⁵ A similar section was added to provide that neither the Second Amended Plan nor an order of the Bankruptcy Court confirming the Second Amended Plan would release any government claims arising under the Internal Revenue Code or federal environmental and criminal laws.⁴³⁶

Finally, a “Post Confirmation Reporting” section was added to mandate FairPoint’s filing quarterly reports regarding its activities and financial affairs with the Bankruptcy Court.⁴³⁷ This obligation would terminate upon the closing of FairPoint’s—including its subsidiaries—case.⁴³⁸

2. Related Filings

On April 21, 2010 FairPoint filed the Warrant Agreement to be executed in connection with the Second Amended Plan (the “Warrant Agreement”).⁴³⁹ The Warrant Agreement provided the terms for the New Warrants to be issued under FairPoint’s plan of reorganization.⁴⁴⁰ The Bank of New York Mellon was designated as the warrant agent, and material terms such as the exercise price were not yet determined.⁴⁴¹

An amended disclosure statement was also filed on March 11, 2010 (the “Second Amended Disclosure Statement”).⁴⁴² The Second Amended Disclosure Statement identified the changes made in the Second Amended Plan and also disclosed an accounting error that had been made in connection with the Exchange Offer that had necessitated restating financials and that

⁴³⁴ Second Amended Plan, *supra* note 427, at § 14.1.

⁴³⁵ Second Amended Plan, *supra* note 427, at §§ 14.2, 14.4.

⁴³⁶ Second Amended Plan, *supra* note 427, at § 14.5.

⁴³⁷ Second Amended Plan, *supra* note 427, at § 16.6.

⁴³⁸ Second Amended Plan, *supra* note 427, at § 16.6.

⁴³⁹ Notice of Filing of Warrant Agreement Pursuant to Section 6.2 of Debtors’ Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, Dated March 10, 2010, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Apr. 21, 2010).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at Recitals.

⁴⁴² Second Amended Disclosure Statement for Debtors’ Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 11, 2010) (hereinafter, “Second Amended Disclosure Statement”).

had caused a breach of certain financial covenants under the Prepetition Credit Agreement for the June 30, 2009 measurement period.⁴⁴³ The Second Amended Disclosure Statement also disclosed that the merger of FairPoint and Spinco in connection with the Verizon Acquisition may give rise to fraudulent transfer claims.⁴⁴⁴

The Bankruptcy Court entered an order approving the Second Amended Disclosure Statement on March 11, 2010, finding that it contained “adequate information” required by section 1125 of the Bankruptcy Code (the “Disclosure Statement Order”).⁴⁴⁵ The Disclosure Statement Order set the voting record date for March 18, 2010 and provided that solicitation packages would be sent by March 25, 2010.⁴⁴⁶ Ballots were to be received by April 28, 2010, and a confirmation hearing was set for May 11, 2010.⁴⁴⁷ A final version of the disclosure statement was filed on March 25, 2010. Judge Lifland approved the Second Amended Disclosure Statement over the objections of Verizon and Comcast Corporation alleging inadequate disclosure, after other objections had been withdrawn before the hearing.⁴⁴⁸

3. Voting on the Plan of Reorganization

Classes 4 and 7—the prepetition credit agreement claims and the unsecured claims, respectively—voted to approve the plan.⁴⁴⁹ However, several factors contributed to a delay in confirming the plan, including, most notably, extensive negotiations with regulators in New England.⁴⁵⁰ Maine’s Public Utilities Commission approved the Second Amended Plan in June 2010 and also approved changes to its regulatory settlement with FairPoint, including a six-month delay for meeting broadband expansion targets and the ability to offer different pricing

⁴⁴³ Second Amended Disclosure Statement, *supra* note 442, at 16, 47-48.

⁴⁴⁴ Second Amended Disclosure Statement, *supra* note 442, at 37.

⁴⁴⁵ Order Approving Debtors’ Amended Disclosure Statement, In re FairPoint Commc’n, Inc., No. 160393-5 (Bankr. S.D.N.Y. Mar. 11, 2010); Don Jeffrey, *FairPoint Reorganization Outline Approved by Court*, BLOOMBERG (Mar. 11, 2010, 12:36 PM).

⁴⁴⁶ Order Approving Debtors’ Amended Disclosure Statement at ¶¶ 5, 7, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 11, 2010).

⁴⁴⁷ *Id.* at ¶¶ 21, 28.

⁴⁴⁸ Don Jeffrey, *FairPoint Reorganization Outline Approved by Court*, BLOOMBERG (Mar. 11, 2010, 12:36 PM).

⁴⁴⁹ Transcript of January 13, 2011 Hearing at 54, In re FairPoint Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Jan. 13, 2011).

⁴⁵⁰ Don Jeffrey, *FairPoint Reorganization Plan Approval Delayed*, BLOOMBERG (May 11, 2010, 2:19 PM).

plans in different areas of the state.⁴⁵¹ New Hampshire soon followed in approving the plan in July 2009.⁴⁵²

Vermont's Public Services Board (the "VPSB") first rejected the Second Amended Plan in June 2009 but voted to approve it on December 23 after additional negotiations.⁴⁵³ The VPSB was concerned with FairPoint's ability to meet its revenue projections.⁴⁵⁴

D. *Third Amended Plan of Reorganization*

On December 29, 2010, nine months after approval of the disclosure statement, FairPoint filed its third amended joint plan of reorganization (the "Third Amended Plan").⁴⁵⁵ Attached to the Third Amended Plan was: (i) a ninth amended and restated certificate of incorporation; (ii) second amended and restated by-laws; (iii) a warrant agreement; (iv) a registration rights agreement; (v) the FairPoint Communications, Inc. 2010 Long Term Incentive Plan; (vi) the FairPoint Communications, Inc. 2010 Success Bonus Plan; (vii) the FairPoint Litigation Trust Agreement; and (viii) a senior secured credit facility to be provided to the Company and FairPoint Logistics, Inc. by Bank of America, N.A., Banc of America Securities LLC and a syndicate of lenders.

The Litigation Trust Agreement established a litigation trust in connection with the Third Amended Plan for the purpose of (i) holding claims that comprise all causes of action which may be asserted, by or on behalf of FairPoint against Verizon arising from the merger in connection with the Verizon Acquisition and (ii) distributing assets to certain beneficiaries.⁴⁵⁶

⁴⁵¹ *Regulators Approve FairPoint Reorganization*, KENNEBEC JOURNAL (Jun. 25, 2010, 3:43 PM).

⁴⁵² See Ashley Smith, *Vermont Deal Could Help FairPoint Recover From Bankruptcy*, NASHUA TELEGRAPH (Jan. 11, 2011, 11:16 AM).

⁴⁵³ John Downey, *FairPoint Communications Adjusts Debt Plan, Eyes Exit from Chapter 11*, CHARLOTTE BUS. J. (Jan 7. 2011, 6:00 AM); see also Kevin Kelley, *FairPoint Bankruptcy Plan Gains Supporters*, 38 VERMONT BUS. MAG. 40 (Oct. 2010) (providing background information on FairPoint negotiations in Vermont).

⁴⁵⁴ John Downey, *FairPoint Communications Adjusts Debt Plan, Eyes Exit from Chapter 11*, CHARLOTTE BUS. J. (Jan 7. 2011, 6:00 AM).

⁴⁵⁵ Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Dec. 29, 2010) (hereinafter, "Third Amended Plan").

⁴⁵⁶ Third Amended Plan, *supra* note 455, at Exhibit H.

The material terms of the Third Amended Plan were largely unchanged. However, reflecting negotiations with New England regulators, the Third Amended Plan “lowers [FairPoint’s] revenue projections for the next three years . . . and provides new concessions from lenders to make it easier for FairPoint to meet its new debt obligation. And regulators have agreed to forgo some fines they had levied against FairPoint for service failures as it struggled financially in 2008 and 2009.”⁴⁵⁷ In addition to adjusted revenue projections, the estimate for capital spending was increased.⁴⁵⁸

The final Distributions are summarized in **Figure 10**:

After FairPoint’s bankruptcy, the Litigation Trust filed fraudulent transfer actions against Verizon and certain of its subsidiaries in November 2011, alleging that FairPoint was deceived into purchasing inferior assets. Clarke Canfield, *FairPoint Trust Suit Blames Verizon for Bankruptcy*, BANGOR DAILY NEWS (Nov. 1, 2011, 3:41 PM); Abigail Rubenstein, *Creditors Sue Verizon for \$2B over FairPoint Deal*, LAW360 (Nov. 1, 2011, 8:08 PM). The case was removed from the Superior Court of North Carolina for Mecklenberg County to the United States District Court for the Western District of North Carolina in late November 2011. Notice of Removal, *The FairPoint Communications, Inc. Litigation Trust v. Verizon Communications, Inc.*, No. 3:11-cv-00597-MOC-DCK (W.D. N.C. Nov. 23, 2011). A bench trial was held in December 2013, and the Litigation Trust and Verizon have submitted post-trial briefs and responses. See Plaintiff’s Post-Trial Brief Regarding the Judgment Amount Against Verizon, *The FairPoint Communications, Inc. Litigation Trust v. Verizon Communications, Inc.*, No. 3:11-cv-00597-MOC-DCK (W.D. N.C. Jan. 15, 2014); Verizon’s Post-Trial Brief, *The FairPoint Communications, Inc. Litigation Trust v. Verizon Communications, Inc.*, No. 3:11-cv-00597-MOC-DCK (W.D. N.C. Jan. 15, 2014).

⁴⁵⁷ John Downey, *FairPoint Communications Adjusts Debt Plan, Eyes Exit from Chapter 11*, CHARLOTTE BUS. J. (Jan 7. 2011, 6:00 AM); see also Transcript of January 13, 2011 Hearing at 11, *In re FairPoint Commc’n, Inc.*, No. 09-16335 (Bankr. S.D.N.Y. Jan. 13, 2011).

⁴⁵⁸ John Downey, *FairPoint Communications Adjusts Debt Plan, Eyes Exit from Chapter 11*, CHARLOTTE BUS. J. (Jan 7. 2011, 6:00 AM).

Figure 10

Class	Designation	Distribution
1	Other Priority Claims	Paid in full (cash)
2	Secured Tax Claims	Paid in full (1 cash payment <i>or</i> semi-annual payments with interest over 5 years)
3	Other Secured Claims	Either, at FairPoint's option, (i) re-instated, (ii) full cash payment, or (iii) collateral in satisfaction
4	Prepetition Credit Agreement Claims	Paid in full, ratable portion of (i) new term loan, (ii) new common stock, and (iii) certain excess cash
5	Legacy Subsidiary Unsecured Claims	Paid in full (cash)
6	NNE Subsidiary Unsecured Claims	Paid in full (cash)
7	FairPoint Communications Unsecured Claims	If accept Plan, paid in full pro rata with new common stock and warrants. If reject, no distribution.
8	Convenience Claims	Paid in full (cash)
9	Subordinated Securities Claims	No distribution or interest retained
10	Subsidiary Equity Interests	Interests re-instated
11	Old FairPoint Equity Interests	Cancelled; no distribution

E. Plan Confirmation

FairPoint's Third Amended Plan was confirmed by the Bankruptcy Court under section 1129 of the Bankruptcy Code on January 13, 2011 (the "Confirmation Order").⁴⁵⁹ The Confirmation Order included eighty-five paragraphs providing modifications to the Third Amended Plan and other findings of fact and conclusions of law.⁴⁶⁰ Obtaining binding findings of fact and conclusions law from a federal court is a beneficial and desirable result from the debtors' perspective. Interestingly, the Third Amended Plan was confirmed over the objection of Verizon, which was concerned that it would lose its ability to pursue its causes of action against Capgemini, the entity FairPoint hired in connection with the Cutover.⁴⁶¹

⁴⁵⁹ Order Confirming Debtors' Third Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code Dated as of December 29, 2010, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Jan. 13, 2011) (hereinafter, "Confirmation Order"); see FairPoint Communications, Inc., Current Report (Form 8-K) (Jan. 13, 2011).

⁴⁶⁰ Confirmation Order, *supra* note 459, at ¶¶ 1-85.

⁴⁶¹ Compare Confirmation Order, *supra* note 459, at ¶¶ 63-65, with Don Jeffrey, *Verizon Appeals FairPoint's Chapter 11 Plan Approval*, BLOOMBERG (Jan. 14, 2011, 5:23 PM). Verizon's appeal of the confirmation of FairPoint's plan was unsuccessful. *E.g.*, Eric Morath, *Verizon Appeal of FairPoint*

In sum, certain prepetition secured creditors would receive 92% of the company, while unsecured creditors would receive the remaining 8% and prepetition shareholders would be wiped out.⁴⁶² FairPoint would exit bankruptcy with a \$1.075 billion senior secured credit facility, comprised of a \$75 million first lien revolving loan and \$1 billion second lien term loan facility.⁴⁶³ The law firm Paul Hastings sought \$15,136,930 in compensation for the period October 26, 2009 through January 24, 2011.⁴⁶⁴

VII. FAIRPOINT COMMUNICATIONS POST-BANKRUPTCY

FairPoint continues to operate as of the time of this writing.⁴⁶⁵ Final decrees⁴⁶⁶ were entered on June 30, 2011 and November 7, 2012, leaving only one subsidiary—Northern New England Telephone (No. 09-16365)—in bankruptcy.⁴⁶⁷

FairPoint now operates in seventeen states, after having sold its operations in Idaho in January 2013.⁴⁶⁸ As of December 31, 2013, FairPoint had 3,171 employees, 64% of which had union representation.⁴⁶⁹ FairPoint's access line equivalents decreased approximately 29%, to 1.2 million, between its bankruptcy filing and the end of 2013.⁴⁷⁰ In its recent SEC filings, FairPoint

Bankruptcy Exit Fails, MARKET WATCH (Apr. 21, 2011, 6:24 PM), <http://www.marketwatch.com/story/verizon-appeal-of-fairpoint-bank...-fails-2011-04-21/print?guid=738184E6-01A8-4F76-8DA0-93BE7261BC9F>.

⁴⁶² Alex Sherman, *FairPoint Communications Emerges from Bankruptcy*, BLOOMBERG (Jan. 24, 2011, 5:37 PM); see FairPoint Communications, Inc., Current Report (Form 8-K) (Jan. 13, 2011) (noting certain convenience claims would be paid in full as well).

⁴⁶³ FairPoint Communications, Inc., Current Report (Form 8-K) (Jan. 13, 2011) (attaching the Exit Facility loan agreement).

⁴⁶⁴ Summary Sheets Pursuant to United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Mar. 10, 2011). The firm reported 23,042.4 total hours billed by its partners and associates. *Id.*

⁴⁶⁵ See, e.g., FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014).

⁴⁶⁶ A "final decree" is entered in a chapter 11 reorganization case when the case has been "fully administered." FED. R. BANKR. P. 3022.

⁴⁶⁷ Final Decree Closing Certain Chapter 11 Cases Pursuant to Bankruptcy Code Section 350(a) and Bankruptcy Rule 3022, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. June 30, 2011); Final Decree Closing All But One of the Remaining Chapter 11 Cases Pursuant to Bankruptcy Code Section 350(a) and Bankruptcy Rule 3022, In re FairPoint Commc'n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Nov. 7, 2012).

⁴⁶⁸ FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 39.

⁴⁶⁹ FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 27.

⁴⁷⁰ Compare FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 4, with FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), 17.

reports that it is “transforming” its business “to meet changing customer preferences and communications requirements.”⁴⁷¹ Based on the belief that high-speed broadband and wireless services are high-value areas, FairPoint touts and continues to expand its years-in-the-making next-generation fiber network in Maine, New Hampshire, and Vermont and has used its fiber network to serve over 1,000 cell towers.⁴⁷²

However, revenue dropped 3.5% year-over-year, to \$939.5 million for the year ended December 31, 2013.⁴⁷³ Operating income remains negative but improved 37.8% to (\$113.2 million) for the year ended December 31, 2013.⁴⁷⁴ For further comparison, FairPoint’s operating loss was (\$406.2 million) for the period ended December 31, 2011.⁴⁷⁵ FairPoint’s total liabilities totaled \$1.9 billion on December 31, 2013, down 6.8% from a year prior.⁴⁷⁶ Long-term debt accounted for \$911.7 million, while accrued post-retirement health obligations comprised another \$584.7 million of such liabilities.⁴⁷⁷ According to Bloomberg, FairPoint’s debt-to-capital ratio was 150.6 for 2013, as opposed to 149.5 and 111.8 in 2012 and 2011, respectively. The current ratio—a measure of a company’s ability to pay short-term obligations, with higher being better—was 1.23 at the end of 2013, according to Bloomberg. According to Morningstar’s calculations, FairPoint was below market average in terms of return on assets and operating margin.⁴⁷⁸

Standard & Poor's Ratings Services and Moody's Investor Services issued “stable” outlooks for FairPoint effective February 2013 and January 2013, respectively.⁴⁷⁹ This revised Standard & Poor’s “negative” outlook issued in February 2012 as result of FairPoint’s low

⁴⁷¹ FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 4.

⁴⁷² FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 4-5; *see also* Press Release, *FairPoint Communications Continues to Bring More Broadband to Maine*, WALL ST. J. (Jan. 28, 2014, 1:31 PM) (stating that “high-speed Internet is now available for the first time to eligible customers living in [certain] communities”); *FairPoint Investing Heavily in Maine Company*, BANGOR DAILY NEWS (Aug. 11, 2010, 6:52 PM) (reporting FairPoint’s hopes for its fiber-optic network).

⁴⁷³ *See* FairPoint Communications, Inc., Annual Report (Form 10-K) (Mar. 5, 2014), 60.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* (using 341 day period, rather than full year).

⁴⁷⁶ *Id.* at 59.

⁴⁷⁷ *Id.*

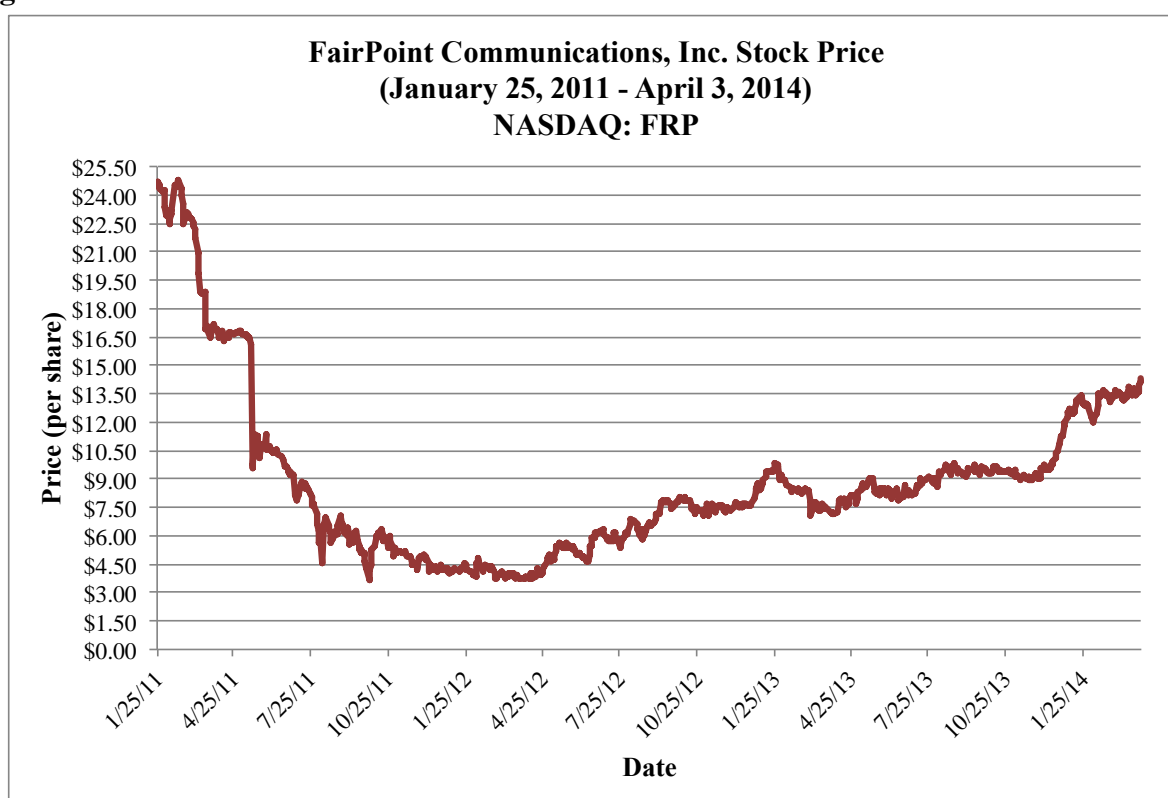
⁴⁷⁸ FairPoint Communications, Inc., Morningstar (Oct. 3, 2013).

⁴⁷⁹ FairPoint Communications, Inc., Issuer Credit Ratings, Bloomberg.

EBIDTA margins and high leverage relative to its peers.⁴⁸⁰ Not surprisingly, FairPoint’s debt ratings remained below investment grade at B (Standard & Poor’s) and B2 (Moody’s).⁴⁸¹

Since FairPoint’s common stock resumed trading on the Nasdaq—as opposed to the NYSE, before bankruptcy—in early 2011,⁴⁸² it has returned -41.5% as of April 3, 2014, according to data from Bloomberg (see **Figure 11**). The steep drop in FairPoint’s share price in March 2011 was a result of announcements regarding poor first quarter financial performance and that the company would be restating its unaudited quarterly financial statements for the quarters ended March 31, 2010, June 30, 2010, and September 30, 2010.⁴⁸³ However, FairPoint’s share price appreciated 42.33% during 2013 and was up 20.3% for the first quarter of 2014 (see **Figure 12**).

Figure 11



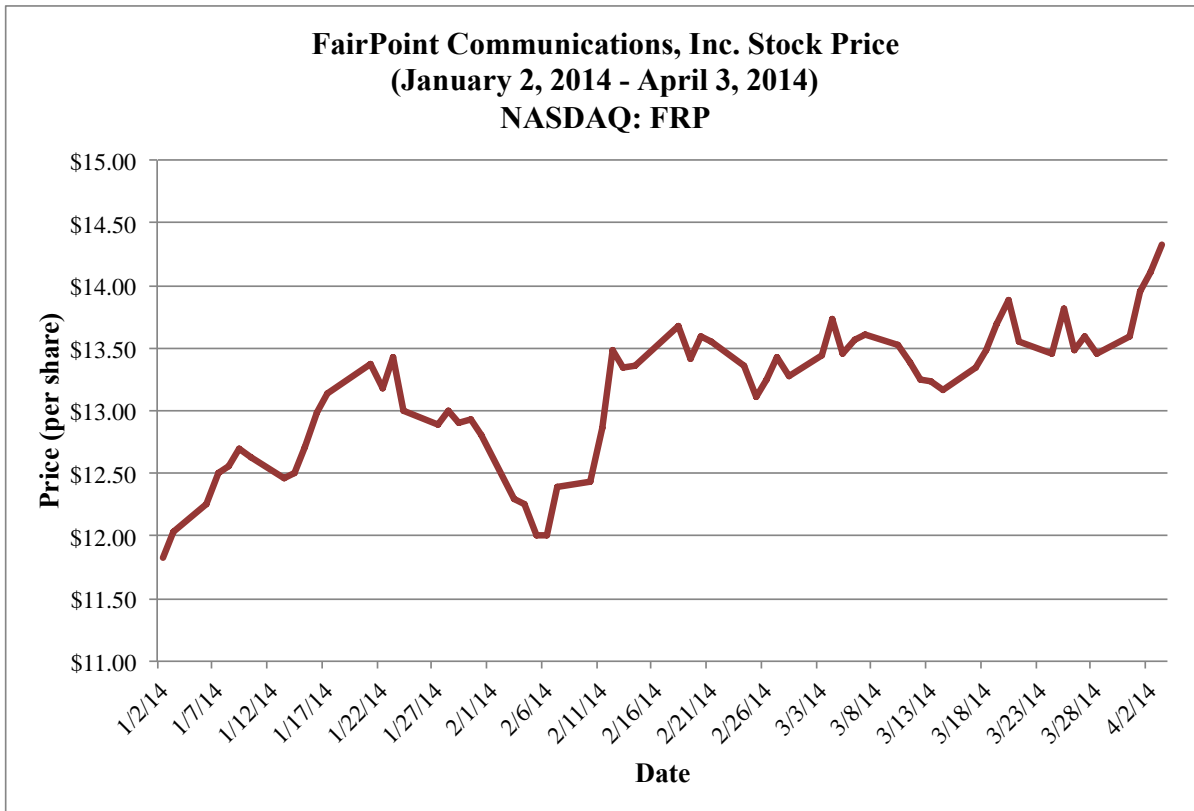
⁴⁸⁰ *S&P Revises FairPoint Outlook to Negative*, REUTERS (Feb. 24, 2012).

⁴⁸¹ FairPoint Communications, Inc., Issuer Credit Ratings, Bloomberg.

⁴⁸² See Alex Sherman, *FairPoint Communications Emerges from Bankruptcy*, BLOOMBERG (Jan. 24, 2011, 5:37 PM).

⁴⁸³ FairPoint Communications, Inc., Current Report (Form 8-K) (Mar. 22, 2011); e.g., FairPoint Communications, Inc. Under Investigation Over Possible Violations of Securities Laws, Shareholders Foundation.

Figure 12



Interestingly, there is a significant amount of short seller interest in FairPoint’s stock—14.5% of float, according to Morningstar.⁴⁸⁴ This indicates that certain investors are betting on the stock price to fall as a result of poor future prospects and performance—i.e., a “melting ice cube” reliant on landline voice traffic and suffering from declining sales and heavy debt.⁴⁸⁵ Other investors, however, find hope in FairPoint’s restructuring and the company’s investment in fiber-optic broadband service.⁴⁸⁶

⁴⁸⁴ FairPoint Communications, Inc., Morningstar (Apr. 11, 2014); see also Daniel Fisher, *Shorts Battle The Longs Over Rural FairPoint Communications*, FORBES (Feb. 19, 2013, 11:12 AM), <http://www.forbes.com/sites/danielfisher/2013/02/19/shorts-battle-the-longs-over-rural-fairpointcommunications/print/> (discussing case for and against FairPoint).

⁴⁸⁵ Daniel Fisher, *Shorts Battle The Longs Over Rural FairPoint Communications*, FORBES (Feb. 19, 2013, 11:12 AM), <http://www.forbes.com/sites/danielfisher/2013/02/19/shorts-battle-the-longs-over-rural-fairpointcommunications/print/> (noting that the lack of a dividend on FairPoint’s common stock makes it less expensive to short the stock because short sellers are obligated to cover dividend payments).

⁴⁸⁶ *Id.*

To end on a more personal note, Judge Burton Lifland, who presided over FairPoint's case, passed away on January 12, 2014.⁴⁸⁷

VIII. CONCLUSION

The future landscape of the rapidly evolving telecommunications industry is difficult to predict. Landlines are becoming a thing of the past,⁴⁸⁸ and FairPoint must continue to innovate to remain competitive. This paper provided an interesting case study of a company that, in part from its own mistakes and in part from circumstances created by the Financial Crisis, went to the brink of collapse before rehabilitating itself under the protection and oversight of the United States Bankruptcy Court. The FairPoint case demonstrated how the Bankruptcy Code could be used to shed debt and restructure while continuing to operate the business. The FairPoint case was modest with regard to the terms DIP financing and the plan of reorganization, but it showed how significant various regulatory bodies can be in navigating a restructuring or reorganization in a highly regulated industry.

⁴⁸⁷ Douglas Martin, Burton R. Lifland, *Bankruptcy Judge in Big Cases, Dies at 84*, N.Y. TIMES, Jan. 15, 2014, at B10.

⁴⁸⁸ See, e.g., Thomas Gryta, *AT&T to Build Out Ultrafast Internet in North Carolina*, WALL ST. J., Apr. 10, 2014 (discussing expansion of fiber optic networks and customer preferences regarding video streaming); Ryan Knutson, *When the Phone Company Cuts the Cord*, WALL ST. J., Apr. 7, 2014, at A1 (noting AT&T's plan to move customers to wireless or high-speed service and no longer offer landline-based service).

EXHIBIT A
PowerPoint Slides from April 4, 2014 Class Presentation

FAIRPOINT COMMUNICATIONS, INC.

Bankr. S.D.N.Y. Oct. 26, 2009 (No. 09-16335)

Griffin Aerts
Todd Skelton

April 4, 2014



2

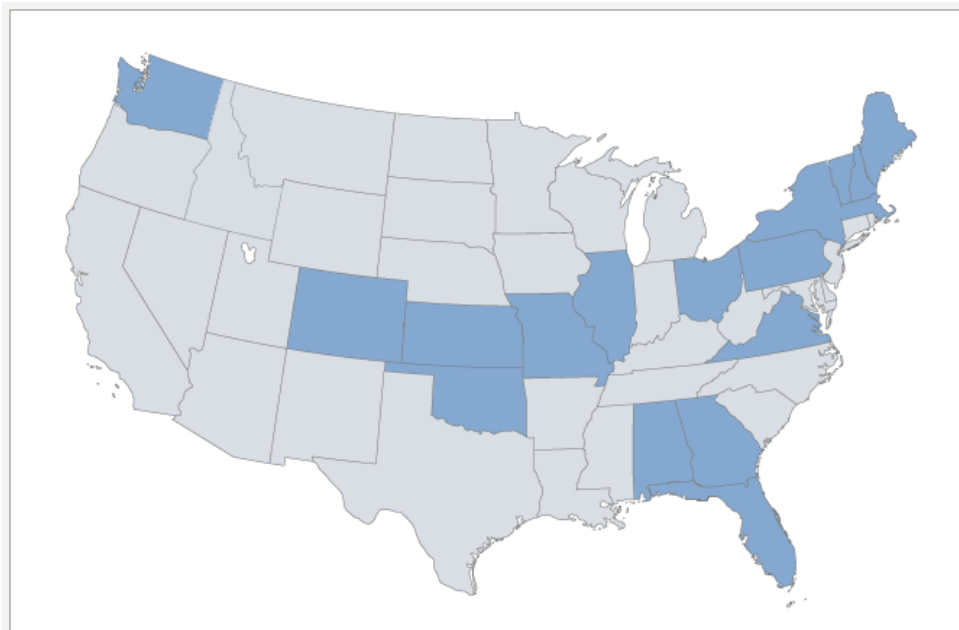
Agenda

- Company Background
- Factors Leading up to Bankruptcy
- Chapter 11 Reorganization
 - First Day Motions
 - Selected Events & Issues
 - Plan of Reorganization & Confirmation
- FairPoint Post-Bankruptcy

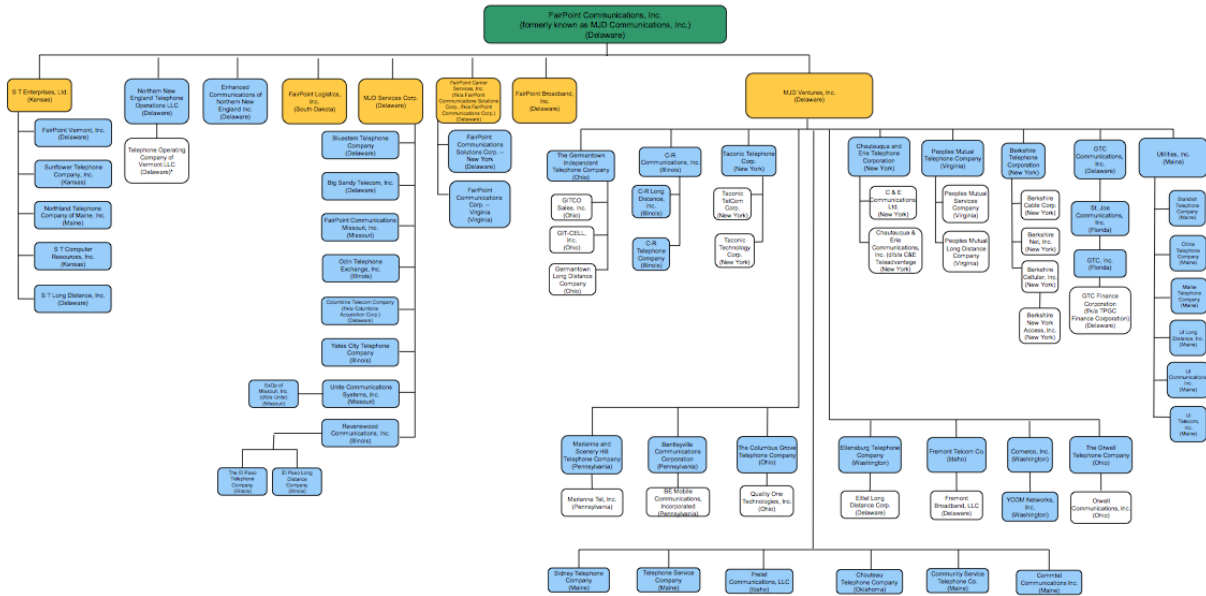
FairPoint Communications, Inc.

- Communications provider to rural residents and small businesses
- Founded 1991 (MJD Communications)
- Headquarters: Charlotte, NC
- Publicly traded
 - NYSE: Feb. 2005-Oct. 2011; NASDAQ: Jan. 2011-present
 - Ticker symbol: FRP
- 4,140 employees (as of Oct. 2009) (65% union)
- 1.7 million access line equivalents (“ALE”)

Coverage Map



Corporate Structure



Verizon Deal

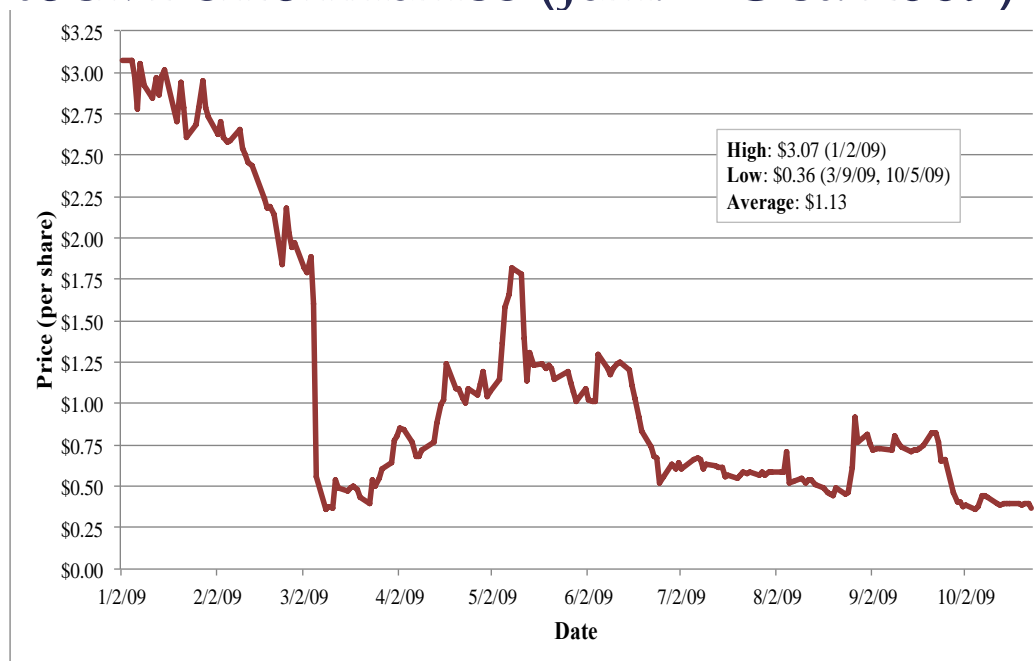
- \$2.3 billion
- Agreement: January 7, 2007
- Completed: March 31, 2008
- Acquired wireline operations from Verizon
 - Maine, New Hampshire, Vermont



Factors Leading up to Bankruptcy

- High leverage (\$2.7 billion debt)
- Integration of acquired Verizon operations
- Competition & customers
- Financial Crisis
 - Delinquent accounts
 - Swap agreements
 - Limited ability to refinance
- Poor financial performance

Stock Performance (Jan. – Oct. 2009)

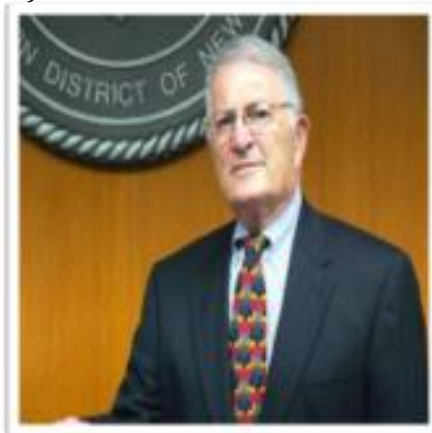


Attempted Restructuring

- Attempted out-of-court restructuring
- Plan Term Sheet & Plan Support Agreement
- Voluntary petition filed October 26, 2009
 - Chapter 11 protection under U.S. Bankruptcy Code

FairPoint Files Bankruptcy

- Voluntary Petition
- Subsidiaries
- Major Actors in the Case



Hon. Burton R. Lifland



Luc A. Despins, Esq.

First Day Motions

- Motion for Joint Administration
- Applications to Retain Professionals
 - BMC Group, Inc.
 - Paul, Hastings, Janofsky & Walker LLP
- Motions to Continue Debtor's Business
 - Continue Using Cash Management System; Maintain Bank Accounts
 - Pay Employee Compensation and Benefits; Other Ee-related Programs
 - Continue Workers' Compensation Program and Insurance Programs
- Motions to Pay Prepetition Obligations
 - Authorization to Pay Prepetition Taxes and Fees
 - Authorization to Honor Prepetition Obligations to Customers
 - Authorization to Pay Prepetition Shipping and Delivery Charges for Goods in Transit

Early Issues

- Objection to Rothschild Employment
- Relief from Automatic Stay
 - Biddeford
 - Divasta Estate
- Omnibus Objections

Sonnax Factors

- (1) Whether relief would result in partial or complete issue resolution;
- (2) Lack of connection with or interference with bankruptcy case;
- (3) Whether other proceeding involves debtor as fiduciary;
- (4) Whether specialized tribunal with necessary expertise has been established to hear cause of action;
- (5) Whether debtor's insurer has assumed full defense responsibility;
- (6) Whether the action primarily involves third parties;
- (7) Whether litigation in another forum would prejudice interests of other creditors;
- (8) Whether judgment claim arising from other action is subject to equitable subordination;
- (9) Whether movant's success in other proceeding would result in a judicial lien avoidable by debtor;
- (10) Interests of judicial economy and expeditious and economical resolution of litigation;
- (11) Whether parties are ready for trial in other proceeding;
- (12) Impact of stay on parties and balance of harms.

- *In Re Sonnax Indus.*, 907 F.2d 1280 (2d Cir. Vt. 1990)

Selected Events & Issues

- Debtor-in-possession financing
- State regulator involvement
 - ME, NH, and VT
- CEO departure



Chapter 11 Plan of Reorganization

Timeline:

- Initial Plan – Feb. 8, 2010
- 1st Amended Plan – Feb. 11, 2010
- 2nd Amended Plan – Mar. 10, 2010
- Modified 2nd Amended Plan – May 5, 2010
- 3rd Amended Plan – Dec. 29, 2010
- Plan Confirmed – Jan. 13, 2011

Plan Components

- Administrative expenses & professional compensation
- Existing shareholders wiped out
- Secured creditors will own 92% of company (unsecured: 8%)
 - Issue new common stock and warrants
- DIP financing “rollover” into new Credit Facility
- \$1 billion debt

Classification of Claims & Interests

Class	Designation	Impairment	Entitled to Vote
1	Other Priority Claims	Unimpaired	No (deemed to accept)
2	Secured Tax Claims	Unimpaired	No (deemed to accept)
3	Other Secured Claims	Unimpaired	No (deemed to accept)
4	Allowed Prepetition Credit Agreement Claims	Impaired	Yes
5	Legacy Subsidiary Unsecured Claims	Unimpaired	No (deemed to accept)
6	NNE Subsidiary Unsecured Claims	Unimpaired	No (deemed to accept)
7	FairPoint Communications Unsecured Claims	Impaired	Yes
8	Convenience Claims	Unimpaired	No (deemed to accept)
9	Subordinated Securities Claims	Impaired	No (deemed to reject)
10	Subsidiary Equity Interests	Unimpaired	No (deemed to accept)
11	Old FairPoint Equity Interests	Impaired	No (deemed to reject)

Distributions Under the Final Plan

Class	Designation	Distribution
1	Other Priority Claims	Paid in full (cash)
2	Secured Tax Claims	Paid in full (1 cash payment <i>or</i> semi-annual payments with interest over 5 years)
3	Other Secured Claims	Either, at FairPoint's option, (i) re-instated, (ii) full cash payment, or (iii) collateral in satisfaction
4	Prepetition Credit Agreement Claims	Paid in full, ratable portion of (i) new term loan, (ii) new common stock, and (iii) certain excess cash
5	Legacy Subsidiary Unsecured Claims	Paid in full (cash)
6	NNE Subsidiary Unsecured Claims	Paid in full (cash)
7	FairPoint Communications Unsecured Claims	If accept Plan, paid in full pro rata with new common stock and warrants. If reject, no distribution.
8	Convenience Claims	Paid in full (cash)
9	Subordinated Securities Claims	No distribution or interest retained
10	Subsidiary Equity Interests	Interests re-instated
11	Old FairPoint Equity Interests	Cancelled; no distribution

Post-Bankruptcy

- Continues to operate today
 - 17 states (left Idaho)
 - 3,171 employees
 - 1.2 million ALE's
 - Broadband & fiber optic
- Stock up 20.3% for Q1'2014
 - High short interest
- Final decree
 - Except 1



FairPoint
communications