In re Fairpoint Communications, Inc.

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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.

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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.
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.\(^12\)

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\(^8\) 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).


\(^11\) 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.\(^\text{13}\) Publicly traded on the New York Stock Exchange (“NYSE”), the Company is incorporated in Delaware and maintains its headquarters in Charlotte, North Carolina.\(^\text{14}\)

David Hauser served as Chairman of the Board of Directors and Chief Executive Officer (“CEO”) of FairPoint as of the Petition Date.\(^\text{15}\) Mr. Hauser was formerly the chief financial officer (“CFO”) for Duke Energy Corporation and became CEO of FairPoint in July 2009.\(^\text{16}\)

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

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, \textit{supra} note 1, at ¶ 16.

\(^{14}\) Declaration of Alfred C. Giammarino, \textit{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, \textit{supra} note 1, at Schedule 9.


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

\(^{18}\) Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 5.

\(^{19}\) Voluntary Petition, \textit{supra} note 3, at Schedule 1 (listing pending bankruptcy cases filed by affiliates).

\(^{20}\) Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 16.
Operations") (in total, the “Verizon Acquisition”).

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. 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.

To accomplish the Verizon Acquisition, the Company and Spinco entered into a $2.03 billion secured credit facility and also issued $551 million in 13⅛% senior unsecured notes due 2018. 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.

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.” 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. 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.\textsuperscript{28} The majority of FairPoint’s access lines served residential customers, with the remainder serving business customers and a small number of wholesale customers.\textsuperscript{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.\textsuperscript{30} Vermont had the next highest percentage—19.5\%—of access line equivalents.\textsuperscript{31}

\textit{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.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{34} The Credit Facility consisted of a $200 million revolving credit facility (a

\textsuperscript{28} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 18.
\textsuperscript{29} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 17.
\textsuperscript{30} See Declaration of Alfred C. Giammarino, supra note 1, at ¶ 16 (table).
\textsuperscript{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.
\textsuperscript{32} Declaration of Alfred C. Giammarino, supra note 1, at ¶¶ 26-27.
\textsuperscript{33} Declaration of Alfred C. Giammarino, supra note 1, at ¶¶ 26-37.
\textsuperscript{34} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 27.
“revolver”), a $500 million term loan A facility with a March 2014 maturity, a $1.13 billion term loan B facility with a March 2015 maturity, and a $200 million delayed draw term loan also with a March 2015 maturity. The Credit Facility also included a $10 million swingline subfacility and a $30 million letter of credit subfacility that allowed FairPoint to issue standby letters of credit. All of FairPoint’s “wholly-owned first-tier domestic subsidiaries . . . that are holding companies” jointly and severally guaranteed the Credit Facility. The LECs and NNE Operations were operating companies and were not required to guarantee the Credit Facility.

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.


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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶¶ 28, 49.} 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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶¶ 28, 49.}

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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 27.} FairPoint then drew the remaining $194.5 million under the delayed draw term loan.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 27.} Funds were drawn for capital expenditures, expenses, and consideration in connection with Verizon Acquisition.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 27.} Surely, however, a portion of such funds was drawn as a consequence of shrinking liquidity in the market, as explained below.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 27.}

FairPoint could also enter into interest rate and currency exchange swaps with lenders under the Credit Facility.\footnote{See FairPoint Communications, Inc., Current Report (Form 8-K) (Mar. 3, 2008).} 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.\footnote{See Liz Moyer, \textit{Revolver at Their Heads}, FORBES (Oct. 8, 2008, 6:00 AM) (listing FairPoint among companies drawing on revolving credit facilities in late 2008).} 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."\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 30; see, e.g., \textit{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).} 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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 30; see Markus K. Brunnermeier, \textit{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., \textit{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”). 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. The Old Notes had a carrying value of $539.8 million because they had been issued at a discount.

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”). $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. The New Notes have a fixed interest rate of 13 7/8%, except for a 17% interest rate from July 29, 2009 through September 20, 2009.

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. The Company’s common shares were its sole equity class. 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. FairPoint’s Board of Directors suspended the quarterly dividend on March 4, 2009, so no dividends were declared or paid in 2009.

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.

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. Additionally, voice services provided by cable providers and the rise of voice over internet protocol (“VoIP”) services further detracted from FairPoint’s business. In particular, bundled packages—cable, internet, voice—offered by cable companies were problematic for FairPoint. Not only did new, competitive product offerings exist, VoIP could be “sold to end users at a lower price than traditional telephone

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62 FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54. The quarterly divided 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).
68 Declaration of Alfred C. Giammarino, supra note 1, at ¶¶ 7-8.
services.” In 2008, the number of voice access lines declined 8.5% and 12.3% for FairPoint and the NNE Operations, respectively. Decreased revenues resulted from the decline in the number of access lines.

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. As the economy worsened, the number of delinquent and overdue customer accounts grew, and customers added fewer access lines or switched to competitors. 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. The Financial Crisis exacerbated FairPoint’s already limited opportunities to refinance debt and attract investors.

B. Verizon Acquisition Challenges

Further complicating the overall market conditions, FairPoint experienced difficulties integrating the NNE Operations. The Verizon Acquisition had significantly increased FairPoint’s size, which, in itself, often presents challenges. 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.” Further, high interest costs, explained below, impaired FairPoint’s ability to build this network. FairPoint transitioned certain back-office functions to new FairPoint systems in January 2009, a deadline that had been

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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”).\textsuperscript{80} The Cutover resulted in higher than anticipated incremental costs.\textsuperscript{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.\textsuperscript{82} FairPoint lost a large number of customers as a result of such problems.\textsuperscript{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.\textsuperscript{84} Failure to meet these targets would create financial penalties exceeding $20 million.\textsuperscript{85} FairPoint also had limited rate flexibility due to agreements inherited from Verizon.\textsuperscript{86} Ultimately, FairPoint was not “able to attain the performance projections made at the time it acquired the NNE Operations.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{89}

\textsuperscript{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.
\textsuperscript{81} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 8, 41-42.
\textsuperscript{82} E.g., Declaration of Alfred C. Giammarino, supra note 1, at ¶ 8, 41-42; \textit{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”). \textit{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).
\textsuperscript{83} Fleeing Customers Haunt Phone Co. in New England, Associated Press (Mar. 12, 2009, 3:44 PM).
\textsuperscript{84} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 45.
\textsuperscript{85} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 45.
\textsuperscript{86} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 45.
\textsuperscript{87} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 38.
\textsuperscript{88} Declaration of Alfred C. Giammarino, supra note 1, at ¶ 48; see \textit{FairPoint Vows to do Better, BRATTLEBORO REFORMER} (Apr. 9, 2010, 1:34 PM) (noting that the company lost customers).
\textsuperscript{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.\textsuperscript{90} Operating income decreased 51.1% year-over-year, to $58.4 million, for the year ended December 31, 2008.\textsuperscript{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.\textsuperscript{92} Net income was negative for full-year 2008 and 2009, falling 252.3% year-over-year.\textsuperscript{93} Gross profit margin progressively declined from 10.0% in 2007 to 4.6% and -7.9% in years 2008 and 2009, respectively.\textsuperscript{94} Figure 1 reports quarterly financial performance during 2007-2009 for selected income statement accounts.\textsuperscript{95}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{FairPoint_Financial_Performance.png}
\caption{FairPoint Financial Performance (2007-2009)}
\end{figure}

\textsuperscript{90} FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 57, 86.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{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).
\textsuperscript{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. Property, plant, and equipment (“PPE”) accounted for the majority of FairPoint’s assets. PPE decreased 3.1% as total assets decreased 4.9% as of December 31, 2009. Total liabilities, however, rose 2.3% year-over-year to $3.39 billion as of December 31, 2009. Figure 2 provides a chart of FairPoint’s quarterly balance sheet from 2007-2009, while Figure 3 tracks FairPoint’s current ratio for the same period.

Figure 2
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. For the year ended December 31, 2009, interest expense totaled $204.9 million. 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. 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 & Acquisitions 209 (2d ed. 2013).
the Credit Facility’s revolver as a result of Lehman’s bankruptcy further reduced FairPoint’s liquidity.\textsuperscript{105}

FairPoint’s financial statements indicate that cash flow for the years ended December 31, 2008 and 2009 was positive but decreasing.\textsuperscript{106} Net cash flow fell 44.5\% year-over-year for the period ending December 31, 2009.\textsuperscript{107} Cash flow from operating activities was positive for the full year 2007, 2008, and 2009.\textsuperscript{108} Bloomberg, however, reports negative quarterly cash flow for 2007-2008 (\textit{see Figure 4}).\textsuperscript{109}

**Figure 4**

![FairPoint Free Cash Flow (2007-2009)](image)

\textsuperscript{105} Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 11.
\textsuperscript{106} FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 89.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{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). 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. The price spiked and subsequently dropped in May 2009 in connection with FairPoint’s first quarter earnings release.

Figure 5

FairPoint Communications, Inc. Stock Price  
(January 2, 2009 - October 23, 2009)  
NYSE: FRP

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).
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.” 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.

D. Out-of-Court Restructuring Attempt

FairPoint attempted to combat these problems on multiple fronts. 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

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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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 11; see \textit{supra} notes 54-59, 102-104 and accompanying text.} These efforts, however, were not enough, so FairPoint began to consider its alternatives for fixing its capital structure.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 11.}

In July 2009, FairPoint began working with its noteholders and secured lenders to address the leverage issue.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 12.} FairPoint engaged financial advisor Rothschild Inc. ("Rothschild") to assist with a restructuring plan (the "Restructuring Plan").\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 51.} The Restructuring Plan would convert the Notes into equity.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 12.} 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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 52.} The 95\% threshold is not uncommon in the exchange offer context.\footnote{See \textit{Michael A. Gerber \\& George W. Kuney}, \textit{Business Reorganizations} 949 (3d ed. 2013) (explaining that obtaining unanimous or even 95\% consent can be difficult).}

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").\footnote{Declaration of Alfred C. Giammarino, \textit{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.} 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.\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 54.} FairPoint also preliminarily reached out to representatives of its labor unions regarding "possible changes to their collective bargaining agreements to reduce operating costs."\footnote{Declaration of Alfred C. Giammarino, \textit{supra} note 1, at ¶ 12 n.1; Clarke Canfield, \textit{FairPoint Seeks Concessions from Union Workers}, \textit{REALCLEARMARKETS} (Oct. 23, 2009) (reporting that FairPoint had sought “pay cuts and other concessions” from union employees in New England).} A similar
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

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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,” 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”).

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. 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.” 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].” 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. 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

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134 Declaration of Alfred C. Giammarino, supra note 1, at ¶ 10.
135 Voluntary Petition, supra note 3.
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.” Separate Chapter 11 cases may be consolidated procedurally or substantively. Substantive consolidation occurs when the assets and liabilities of multiple entities are combined and treated as belonging to a single enterprise. Procedural consolidation, on the other hand, “requires the estate of each debtor to be kept separate and distinct.” Attorneys for FairPoint made clear to Judge Lifland that in this case they were only asking for procedural consolidation. 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.” Consolidation, it was argued, would serve the interest of the debtor by reducing fees and court costs. 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. Indeed, joint administration has been called a “creature of procedural convenience” for these reasons. The United States Trustee requested that FairPoint’s consolidated monthly operating reports reflect disbursement on an entity-by-entity basis. The motion was granted, and FairPoint’s related Chapter 11 cases were consolidated under Case No. 09-16335.

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

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142 Id.
143 Id.
144 Transcript of October 27, 2009 Hearing, supra note 136, at 16.
149 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. 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. 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.” 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.” In addition to its size and “extensive bankruptcy and restructuring . . . expertise,” FairPoint noted Paul Hastings’s familiarity with FairPoint as a previous client. Such familiarity would allow the firm to “effectively and efficiently” provide counsel to FairPoint. 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.” Both requirements “apply at the time of retention and throughout the case.” 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.” The application was passed with no argument.

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 Commc’n, Inc., No. 09-16335 (Bankr. S.D.N.Y. Oct. 26, 2009) (hereinafter, “Application to Appoint Paul Hastings as Counsel”).
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.
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. In large cases such as FairPoint’s, the handling and processing of claims may pose a “heavy burden” to the Bankruptcy Court. Accordingly, the Bankruptcy Court may require the debtor to retain a claims agent to relieve this burden.

FairPoint anticipated that over 20,000 entities would be required to receive notice of Chapter 11 filings. FairPoint hired BMC Group, Inc. (“BMC Group”) to administer these notices. BMC Group is a Bankruptcy Court-approved claims agent. 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. For BMC Group’s claims administration services, FairPoint agreed to pay a retainer of $50,000. The application was passed with no argument.

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.” 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. Section 363 is “designed to strike

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162 Id.
163 Id.
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.
[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.”

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.” Section 105, therefore, provides judges a basis for equitable relief that is otherwise not specifically provided for in the Bankruptcy Code. 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.” 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.

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. FairPoint argued that the existing practices which composed the cash management system represented the most effective mechanisms for running the business.

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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).\textsuperscript{178} Section 345(b) sets forth strict requirements for securing money deposited or invested by the debtor-in-possession.\textsuperscript{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.”\textsuperscript{180} FairPoint successfully argued that the consideration of section 345(a) should outweigh the strict requirements of 345(b).\textsuperscript{181} According to FairPoint, granting similar relief was common among comparable corporate enterprises in large Chapter 11 cases.\textsuperscript{182} Ultimately, an interim and a final order were entered authorizing use of the cash management system and bank accounts.\textsuperscript{183}

\textit{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.\textsuperscript{184} This motion further sought an order to compel banks to honor prepetition checks issued by FairPoint.\textsuperscript{185}

At the time of filing, FairPoint employed approximately 4,140 employees. Of course, FairPoint considered its employees “absolutely vital to the reorganization effort.”\textsuperscript{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,
salaries, and other benefits. 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.

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.

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. 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. Specifically, FairPoint cited section 502(b)(1), which allows a debtor to pay “the actual, necessary costs and expenses of preserving the estate.” 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.

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.
193 See Motion to Continue Workers’ Compensation, supra note 190, at ¶ 31.
affairs within fifteen days after filing its Chapter 11 petition. 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. The United States Trustee argued a thirty-day extension was more appropriate, and Judge Lifland granted a thirty-day extension to FairPoint.

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. 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. 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.” Filing separate lists for each of FairPoint’s related entities would cause problems because many unsecured creditors held claims against multiple entities. Instead, FairPoint requested to file a

196 Transcript of October 27, 2009 Hearing, supra note 136, at 22.
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. In support of this request, FairPoint mentioned similar relief in comparable Chapter 11 cases. FairPoint’s motion was granted in all aspects regarding these issues.

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. The purpose of these procedures was to help FairPoint manage its time and resources more efficiently. The procedures requested would authorize FairPoint to schedule omnibus hearings, establish timelines for requests for relief, and allow electronic service, among other things. The motion was granted on an interim basis.

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”). 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”). FairPoint filed its motion to obtain postpetition financing with the Court on the

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

Section 364 of the Bankruptcy Code governs DIP financing. 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). 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). 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.

FairPoint’s financial advisor, Rothschild, contacted other lenders and received two DIP financing proposals from lenders other than FairPoint’s prepetition secured lenders. 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

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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”).


216 Motion for DIP Financing, supra note 210, at ¶ 22.
expensive.\textsuperscript{217} Further, FairPoint wanted to avoid controversy with public utility commission regarding placing postpetition liens on unencumbered assets.\textsuperscript{218} Others saw the arrangement as shielding FairPoint and its prepetition lenders.\textsuperscript{219} FairPoint sought to obtain DIP financing under sections 364(c)(1), (2), (3) and (d) of the Bankruptcy Code.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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%.\textsuperscript{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.\textsuperscript{225} Lenders under the DIP Credit Agreement also receive the right of setoff if any event of default existed.\textsuperscript{226} Certain FairPoint subsidiaries were required to execute guaranties in connection with the DIP Credit Agreement.\textsuperscript{227} The maturity date

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\textsuperscript{217} Motion for DIP Financing, \textit{supra} note 210, at ¶ 22.
\textsuperscript{218} Motion for DIP Financing, \textit{supra} note 210, at ¶ 23.
\textsuperscript{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).
\textsuperscript{220} Motion for DIP Financing, \textit{supra} note 210, at ¶ 37.
\textsuperscript{221} DIP Credit Agreement, \textit{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).
\textsuperscript{222} DIP Credit Agreement, \textit{supra} note 211, at § 1A.01(b).
\textsuperscript{223} DIP Credit Agreement, \textit{supra} note 211, at §§ 1A.01(b)-1A.07.
\textsuperscript{224} Motion for DIP Financing, \textit{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, \textit{supra} note 211, at § 1.03(b).
\textsuperscript{225} DIP Credit Agreement, \textit{supra} note 211, at § 3.02.
\textsuperscript{226} DIP Credit Agreement, \textit{supra} note 211, at § 11.02. “Setoff” means that a lender can apply deposits or other indebtedness against the borrower. Id.
\textsuperscript{227} DIP Credit Agreement, \textit{supra} note 211, at § 4.01(a)(iv).
contemplated under the DIP Credit Agreement was June 2010, with extensions available if necessary.\textsuperscript{228}

The DIP Credit Agreement imposed a 0.5\% fee on FairPoint for the unutilized revolving commitments of each lender.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{232}

The DIP Credit Agreement also prevented FairPoint from creating claims or liens \textit{pari passu} with or senior to the administrative agent.\textsuperscript{233} Bank of America served as the administrative agent under the DIP Credit Agreement.\textsuperscript{234} Bank of America received other protections under the DIP Credit Agreement, including indemnification by both the borrowers and lenders.\textsuperscript{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.\textsuperscript{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

\footnotesize{\textsuperscript{228} DIP Credit Agreement, \textit{supra} note 211, at § 9 (defining “Maturity Date”); Motion for DIP Financing, \textit{supra} note 210, Exhibit A (DIP Term Sheet), at 3.
\textsuperscript{229} DIP Credit Agreement, \textit{supra} note 211, at § 2.01(a).
\textsuperscript{230} DIP Credit Agreement, \textit{supra} note 211, at § 2.01(b)-(e).
\textsuperscript{231} DIP Credit Agreement, \textit{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. \textit{Id.} at § 6.01(d).
\textsuperscript{232} DIP Credit Agreement, \textit{supra} note 211, at § 7.13.
\textsuperscript{234} DIP Credit Agreement, \textit{supra} note 211, at § 10.01(a).
\textsuperscript{235} DIP Credit Agreement, \textit{supra} note 211, at § 10.07.
\textsuperscript{236} DIP Credit Agreement, \textit{supra} note 211, at § 10.13.}
default under any other indebtedness. 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.

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. 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. The adequate protection liens received superpriority under section 507(b) of the Bankruptcy Code. The DIP Credit Agreement did not include a cross-collateralization provision converting prepetition debt to administrative expense status.

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”). 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. Relatedly, the Plan Support

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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).
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.\textsuperscript{245}

The Court issued an Interim Order authorizing DIP financing and adequate protection on October 28, 2009 (the “Interim DIP Financing Order”).\textsuperscript{246} The Interim DIP Financing Order allowed FairPoint to borrow up to $20 million pending entry of a final order.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{250}

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

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


\textsuperscript{247} Interim DIP Financing Order, supra note 246, at ¶ 5(a).

\textsuperscript{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).

\textsuperscript{249} DIP Financing Objection, supra note 248, at ¶ 3.

\textsuperscript{250} DIP Financing Objection, supra note 248, at ¶ 3.

\textsuperscript{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.”\textsuperscript{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.\textsuperscript{253}

\textit{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.\textsuperscript{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.\textsuperscript{255} The NYSE delisted FairPoint’s common stock on November 16, 2009.\textsuperscript{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.”\textsuperscript{257}

\textit{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.

\textsuperscript{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).
\textsuperscript{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, \textit{FairPoint Reorganization Outline Approved by Court}, BLOOMBERG (Mar. 11, 2010, 12:36 PM) (noting that the Committee’s objection was no longer outstanding).
\textsuperscript{254} FairPoint Communications, Inc., Annual Report (Form 10-K/A) (Sept. 29, 2010), at 54.
\textsuperscript{255} \textit{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).
\textsuperscript{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).
\textsuperscript{257} \textit{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.\textsuperscript{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.”\textsuperscript{259} Thus, the automatic stay provides debtors in bankruptcy with a “breathing spell from collection efforts of creditors.”\textsuperscript{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.”\textsuperscript{261} Creditors may, however, seek relief from the automatic stay.\textsuperscript{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.\textsuperscript{263} GWI and FairPoint had been involved in a longstanding dispute regarding FairPoint’s obligations under an interconnection agreement between the parties.\textsuperscript{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.\textsuperscript{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.\textsuperscript{266}

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

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\textsuperscript{259} 2 MICHAEL BACCUS & HOWARD J. STEINBERG, BANKRUPTCY LITIGATION § 12:1 (2013).
\textsuperscript{260} See id.
\textsuperscript{261} Id.
\textsuperscript{262} 11 U.S.C. § 362(d)-(g).
\textsuperscript{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”).
\textsuperscript{264} See Biddeford Motion for Relief from Stay, supra note 263, at ¶¶ 4-17.
\textsuperscript{265} See Biddeford Motion for Relief from Stay, supra note 263, at ¶ 17.
\textsuperscript{266} 11 U.S.C. § 362(a).
\textsuperscript{267} See Biddeford Motion for Relief from Stay, supra note 263, at ¶ 1.
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relief from the automatic stay may be granted “for cause.” 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”). 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.

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. 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. In response, FairPoint argued that GWI had failed to show adequate cause for lifting the stay. FairPoint relied on its own analysis of the Sonnax

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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.\textsuperscript{274}

A hearing was held on December 2, 2009 regarding GWI’s motion for relief.\textsuperscript{275} After oral arguments and applying the Sonnax Factors, Judge Lifland found that GWI had failed to meet its burden of demonstrating cause.\textsuperscript{276} Ultimately, Judge Lifland described the issue as a billing dispute that could be appropriately addressed in mediation.\textsuperscript{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.\textsuperscript{278} In April 2008, Paul DiVasta was fatally injured in a motorcycle crash in New Hampshire.\textsuperscript{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.\textsuperscript{280}

Like GWI, DiVasta relied on Bankruptcy Code section 362(d) to seek relief from the automatic stay “for cause.”\textsuperscript{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.\textsuperscript{282} This plan of action, according to DiVasta, did not favor

\textsuperscript{274} See FairPoint Objection to Biddeford, supra note 273, at ¶ 54.
\textsuperscript{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”).
\textsuperscript{279} See DiVasta Motion for Relief from Stay, supra note 278, at ¶¶ 6-8.
\textsuperscript{280} See DiVasta Motion for Relief from Stay, supra note 278, at ¶ 12.
\textsuperscript{281} See DiVasta Motion for Relief from Stay, supra note 278, at ¶ 15.
\textsuperscript{282} See DiVasta Motion for Relief from Stay, supra note 278, at ¶ 18.
judicial efficiency and economy. DiVasta’s motion for relief from the stay also engaged in an analysis of relevant Sonnax Factors. In particular, DiVasta pointed out that the Court is barred from liquidating personal injury and wrongful death claims. 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.” FairPoint relied on the fact that the bankruptcy was still in its earliest stages, meaning claims procedures had not yet been established. The movants further argued that the automatic stay severely prejudiced DiVasta, and that relief from the automatic stay would not prejudice or burden FairPoint. FairPoint argued that DiVasta could not satisfy its “burden to establish sufficient cause to modify FairPoint’s statutorily imposed breathing spell.” 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. 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.”

A hearing was scheduled for December 10, 2009 regarding the motion to lift the stay. 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. 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.

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.
293 Transcript of December 10, 2009 Hearing, supra note 292, at 6.
Counsel for FairPoint argued that, at this stage in the bankruptcy proceedings, lifting the stay would be premature. 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.” 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. Global entered into an interconnectivity agreement with FairPoint’s predecessor Verizon, which became effective with FairPoint on April 1, 2008. According to Global, the traffic that Global delivered to FairPoint under the interconnectivity agreement was exempt from access charges. 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. Global further alleged that FairPoint ignored the resolution provisions of the agreement and threatened to terminate its interconnection with Global. 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.”

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


\(^{309}\) 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

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.
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.\textsuperscript{320} The only issue that remained for the hearing was the Committee’s request for the power of review of compensation.\textsuperscript{321} Counsel for FairPoint argued that, traditionally, only the United States Trustee held this right.\textsuperscript{322} Rather, in similar cases the right was specifically refused.\textsuperscript{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.”\textsuperscript{324} Before making his decision, Judge Lifland made sure to express misgiving for what he believed was a “very aggressive” retention agreement.\textsuperscript{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.\textsuperscript{326} However, Judge Lifland also acknowledged the lack of precedent for the requested relief.\textsuperscript{327} Judge Lifland instructed the parties to meet again in the future and denied the motion.\textsuperscript{328} On January 11, 2010, an order was signed confirming the retention of Rothschild.\textsuperscript{329} The order barred Rothschild’s from collecting its Recapitalization Fee in the event of Chapter 7 liquidation.\textsuperscript{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.”\textsuperscript{331}

\textsuperscript{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”).
\textsuperscript{321} Transcript of Hearing on November 18, 2009, supra note 320, at 10.
\textsuperscript{322} Transcript of Hearing on November 18, 2009, supra note 320, at 10.
\textsuperscript{323} Transcript of Hearing on November 18, 2009, supra note 320, at 10.
\textsuperscript{324} Transcript of Hearing on November 18, 2009, supra note 320, at 10.
\textsuperscript{325} Transcript of Hearing on November 18, 2009, supra note 320, at 12.
\textsuperscript{326} Transcript of Hearing on November 18, 2009, supra note 320, at 13.
\textsuperscript{327} Transcript of Hearing on November 18, 2009, supra note 320, at 13.
\textsuperscript{328} Transcript of Hearing on November 18, 2009, supra note 320, at 14.
\textsuperscript{330} Order Authorizing Rothschild, supra note 329, at ¶ 3.
\textsuperscript{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


\(^{333}\) See Motion to Authorize BMC Group Inc., supra note 164, at 11.


\(^{335}\) FED. R. BANKR. P. 3007.

\(^{336}\) FED. R. BANKR. P. 3007.

\(^{337}\) See First Omnibus Objection to Claims, supra note 332, at ¶ 8.


\(^{339}\) See Fourth Omnibus Objection to Claims, supra note 338, at ¶ 8.

\(^{340}\) See Fourth Omnibus Objection to Claims, supra note 338, at ¶ 9.

owners of the reorganized FairPoint, should the plan be confirmed. 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. Moreover, the lenders may have grown impatient with delays in confirming FairPoint’s plan of reorganization, as discussed below. David Hauser resigned effective August 24, 2010.

Paul Sunu would take over as CEO of FairPoint, but Hauser was retained as a consultant. The Bankruptcy Court had to approve both the consulting agreement for Mr. Hauser and the appointment of Mr. Sunu as CEO. 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.

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. 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. He would also receive 240,000 shares of reorganized FairPoint’s

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FairPoint had named Ajay Sabherwal as its new CFO in June. FairPoint Communications Names Chief Financial Officer, PRNEWswire (Jun. 29, 2010).


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).


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

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. The performance targets were tiered over several years, such that an increasing number of customers had to receive broadband service by certain deadlines. 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.

VI. FairPoint Communications’ Plan of Reorganization

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

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. 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.” 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. Stated broadly, a debtor must gain acceptance of the plan from creditors and interest holders and have the plan confirmed by the court. 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.

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. 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.” In theory, pre-negotiated plans can facilitate quick acceptance of the plan and reduce costs for the debtor.

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

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358 In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983).
364 Id.
Petition Date. However, FairPoint extended the deadline for filing the plan multiple times in order to “finalize settlements with lenders, unions and other parties.”

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”).

A debtor may classify claims and equity interests into separate classes under its plan. The Initial Plan described the treatment of various classes of claim and interest holders and explained the means for implementing the plan. First, holders of “Allowed Administrative Expense Claim[s]” would be paid in full under the Initial Plan. 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. 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. Moreover, the Initial Plan would allow for full payment of professional

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

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

Generally speaking, impairment means that a claim or interest against the debtor is unaltered by the plan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{377} However, classes unimpaired by the plan are “conclusively presumed to have accepted the plan.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{374} Initial Plan, supra note 368, at ¶ 3.4.
\textsuperscript{377} 11 U.S.C. § 1126(c), (d) (2013).
\textsuperscript{379} 11 U.S.C. § 1126(g) (2013).
Subsidiary Unsecured Claims.\textsuperscript{380} Class 6 was comprised of unsecured claims against four specific subsidiaries.\textsuperscript{381}

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

**Figure 8**

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

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.\textsuperscript{382} This negotiating tactic is not uncommon in connection with bankruptcy plans.\textsuperscript{383} The acceptance or rejection of the plan by Class 7 affects the amount of the distribution of new common stock and warrants to

\textsuperscript{380} Initial Plan, supra note 368, at ¶ 5.6.
\textsuperscript{381} Initial Plan, supra note 368, at ¶¶ 1.87, 1.88, 5.6.
\textsuperscript{382} Initial Plan, supra note 368, at ¶ 5.7.2.
Class 4. 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"). All prepetition equity interests in FairPoint would be "extinguished." 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”).

The New Common Stock and New Warrants are exempt from registration under the Securities Act of 1933 (the “Securities Act”). Section 5 of the Securities Act prohibits the offer or sale of securities, absent registration or an exemption. Similar registration requirements are included in various states’ securities laws, commonly referred to as “blue sky laws.” 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. Further, restrictions on subsequent sales, resales, and transfers would also not be applicable. 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

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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.
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.\textsuperscript{393} Finally, the Initial Plan called for FairPoint to use its “reasonable best efforts” to list its securities on a national securities exchange.\textsuperscript{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”).\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{398}

The Initial Plan also described the process for forming the board of directors of reorganized FairPoint.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{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.\textsuperscript{402} Conversely, in the

\textsuperscript{393} Initial Plan, supra note 368, at ¶ 6.3.2.
\textsuperscript{394} Initial Plan, supra note 368, at ¶ 6.3.3.
\textsuperscript{395} Initial Plan, supra note 368, at ¶¶ 8.1.
\textsuperscript{396} Initial Plan, supra note 368, at ¶¶ 8.1.
\textsuperscript{397} Initial Plan, supra note 368, at ¶ 8.3.
\textsuperscript{398} Initial Plan, supra note 368, at ¶ 8.4.
\textsuperscript{399} Initial Plan, supra note 368, at ¶ 8.6.
\textsuperscript{400} Initial Plan, supra note 368, at ¶ 8.6.1-8.6.2.
\textsuperscript{401} Initial Plan, supra note 368, at ¶ 8.6.2(b).
\textsuperscript{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.\footnote{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.\footnote{404} Note further
that that Lender Steering Committee could reduce the New Board to five members, and the
nomination procedures would change accordingly.\footnote{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.\footnote{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.\footnote{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.”\footnote{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.\footnote{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.\footnote{410}

\footnote{403}{Initial Plan, \textit{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, \textit{supra} note 368, at ¶ 8.6.2(b)(ii).}
\footnote{404}{Initial Plan, \textit{supra} note 368, at ¶ 8.6.2(b)(ii).}
\footnote{405}{Initial Plan, \textit{supra} note 368, at ¶ 8.6.3.}
\footnote{406}{Initial Plan, \textit{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, \textit{Winning the Class Struggle: Acquirer
Strategies for Declassifying Classified Boards}, 16 Corp. Governance Advisor 21 (Jan./Feb. 2008).}
\footnote{407}{Initial Plan, \textit{supra} note 368, at ¶ 11.1.1.}
\footnote{408}{Vern Countryman, \textit{Executory Contracts in Bankruptcy: Part I}, 57 \textit{Minn. L. Rev.} 439, 460 (1973).}
\footnote{409}{Initial Plan, \textit{supra} note 368, at ¶ 14.2.}
\footnote{410}{Initial Plan, \textit{supra} note 368, at Section XV.}
2. Disclosure Statement

FairPoint filed a disclosure statement in connection with the Initial Plan (the “Initial Disclosure Statement”). 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. 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. It contained the following exhibits: Initial Plan, projections, liquidation analysis, valuation analysis, and new term loan financial covenants.

B. First Amended Plan of Reorganization

On February 11, 2010, FairPoint filed an amended plan of reorganization (the “First Amended Plan”). 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. 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.

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

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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). This class would be paid cash in full and complete satisfaction of the respective claims on the Distribution Date.

**Figure 9 – Amended Classification of Claims and Interests**

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

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.”

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

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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).
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.
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 \textit{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

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\(^{428}\) Second Amended Plan, \textit{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. \textit{See supra} note 352.

\(^{429}\) Second Amended Plan, \textit{supra} note 427, at §§ 5.4.2(b), 6.1.1(b)(i), (iv).

\(^{430}\) Second Amended Plan, \textit{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.

- \textit{Compare} Second Amended Plan, \textit{supra} note 427, at § 8.2(a)(v).

- Second Amended Plan, \textit{supra} note 427, at § 8.26, with First Amended Plan, \textit{supra} note 415, at § 8.6.

constituted willful misconduct.” 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. 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.

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. This obligation would terminate upon the closing of FairPoint’s—including its subsidiaries—case.

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”). The Warrant Agreement provided the terms for the New Warrants to be issued under FairPoint’s plan of reorganization. The Bank of New York Mellon was designated as the warrant agent, and material terms such as the exercise price were not yet determined.

An amended disclosure statement was also filed on March 11, 2010 (the “Second Amended Disclosure Statement”). 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.
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.
440 Id.
441 Id. at Recitals.
had caused a breach of certain financial covenants under the Prepetition Credit Agreement for the June 30, 2009 measurement period. 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.

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”). 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. Ballots were to be received by April 28, 2010, and a confirmation hearing was set for May 11, 2010. 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.

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. However, several factors contributed to a delay in confirming the plan, including, most notably, extensive negotiations with regulators in New England. 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

444 Second Amended Disclosure Statement, supra note 442, at 37.
447 Id. at ¶¶ 21, 28.
448 Don Jeffrey, FairPoint Reorganization Outline Approved by Court, BLOOMBERG (Mar. 11, 2010, 12:36 PM).
plans in different areas of the state. New Hampshire soon followed in approving the plan in July 2009.

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. The VPSB was concerned with FairPoint’s ability to meet its revenue projections.

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”). 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.

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).
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:

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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).
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”). The Confirmation Order included eighty-five paragraphs providing modifications to the Third Amended Plan and other findings of fact and conclusions of law. Obtaining binding findings of fact and conclusions of 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.

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”). The Confirmation Order included eighty-five paragraphs providing modifications to the Third Amended Plan and other findings of fact and conclusions of law. Obtaining binding findings of fact and conclusions of 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.

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<td>Other Secured Claims</td>
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<td>Prepetition Credit Agreement Claims</td>
<td>Paid in full, ratable portion of (i) new term loan, (ii) new common stock, and (iii) certain excess cash</td>
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<td>Legacy Subsidiary Unsecured Claims</td>
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<td>If accept Plan, paid in full pro rata with new common stock and warrants. If reject, no distribution.</td>
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<td>Paid in full (cash)</td>
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<tr>
<td>9</td>
<td>Subordinated Securities Claims</td>
<td>No distribution or interest retained</td>
</tr>
<tr>
<td>10</td>
<td>Subsidiary Equity Interests</td>
<td>Interests re-instated</td>
</tr>
<tr>
<td>11</td>
<td>Old FairPoint Equity Interests</td>
<td>Cancelled; no distribution</td>
</tr>
</tbody>
</table>

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. 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. The law firm Paul Hastings sought $15,136,930 in compensation for the period October 26, 2009 though January 24, 2011.

VII. FAIRPOINT COMMUNICATIONS POST-BANKRUPTCY

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

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

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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).


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).


reports that it is “transforming” its business “to meet changing customer preferences and communications requirements.” 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.

However, revenue dropped 3.5% year-over-year, to $939.5 million for the year ended December 31, 2013. Operating income remains negative but improved 37.8% to ($113.2 million) for the year ended December 31, 2013. For further comparison, FairPoint’s operating loss was ($406.2 million) for the period ended December 31, 2011. FairPoint’s total liabilities totaled $1.9 billion on December 31, 2013, down 6.8% from a year prior. Long-term debt accounted for $911.7 million, while accrued post-retirement health obligations comprised another $584.7 million of such liabilities. 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.

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

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474 Id.
475 Id. (using 341 day period, rather than full year).
476 Id. at 59.
477 Id.
479 FairPoint Communications, Inc., Issuer Credit Ratings, Bloomberg.
EBITDA margins and high leverage relative to its peers.\textsuperscript{480} Not surprisingly, FairPoint’s debt ratings remained below investment grade at B (Standard & Poor’s) and B2 (Moody’s).\textsuperscript{481}

Since FairPoint’s common stock resumed trading on the Nasdaq—as opposed to the NYSE, before bankruptcy—in early 2011,\textsuperscript{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.\textsuperscript{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**

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{fairpoint-stock-price.png}
\caption{FairPoint Communications, Inc. Stock Price (January 25, 2011 - April 3, 2014) NASDAQ: FRP}
\end{figure}

\textsuperscript{480} S&P Revises FairPoint Outlook to Negative, REUTERS (Feb. 24, 2012).
\textsuperscript{481} FairPoint Communications, Inc., Issuer Credit Ratings, Bloomberg.
\textsuperscript{482} See Alex Sherman, FairPoint Communications Emerges from Bankruptcy, BLOOMBERG (Jan. 24, 2011, 5:37 PM).
\textsuperscript{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.
Interestingly, there is a significant amount of short seller interest in FairPoint’s stock—14.5% of float, according to Morningstar. 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. Other investors, however, find hope in FairPoint’s restructuring and the company’s investment in fiber-optic broadband service.

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-longsover-rural-fairpointcommunications/print/ (noting that the lack of a divided 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.

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).
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
  - Ticker symbol: FRP
- 4,140 employees (as of Oct. 2009) (65% union)
- 1.7 million access line equivalents (“ALE”)

Coverage Map
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)

High: $3.07 (1/2/09)
Low: $0.36 (3/9/09, 10/5/09)
Average: $1.13
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)

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**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

<table>
<thead>
<tr>
<th>Class</th>
<th>Designation</th>
<th>Impairment</th>
<th>Entitled to Vote</th>
</tr>
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<tr>
<td>1</td>
<td>Other Priority Claims</td>
<td>Unimpaired</td>
<td>No (deemed to accept)</td>
</tr>
<tr>
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<td>Unimpaired</td>
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<td>Unimpaired</td>
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<tr>
<td>4</td>
<td>Allowed Prepetition Credit Agreement Claims</td>
<td>Impaired</td>
<td>Yes</td>
</tr>
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<td>5</td>
<td>Legacy Subsidiary Unsecured Claims</td>
<td>Unimpaired</td>
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### Distributions Under the Final Plan

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<td>8</td>
<td>Convenience Claims</td>
<td>Paid in full (cash)</td>
</tr>
<tr>
<td>9</td>
<td>Subordinated Securities Claims</td>
<td>No distribution or interest retained</td>
</tr>
<tr>
<td>10</td>
<td>Subsidiary Equity Interests</td>
<td>Interests re-instated</td>
</tr>
<tr>
<td>11</td>
<td>Old FairPoint Equity Interests</td>
<td>Cancelled; no distribution</td>
</tr>
</tbody>
</table>
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 . . .