America-CV Station Group: Procedural and Substantive Requirements for Pre-Confirmation Modifications in Chapter 11

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INTRODUCTION AND OVERVIEW

The Eleventh Circuit recently observed in *Braun v. America-CV Station Group, Inc. (In re America-CV Station Group, Inc.)*, 56 F.4th 1302 (11th Cir. 2023) ("*America-CV Station Group*"), that preconfirmation modifications to chapter 11 plans are designed to be "relatively easy" under the United States Bankruptcy Code (the "Code").[2] As the Circuit explained, the Code seeks to facilitate negotiation between interested parties by allowing "negotiated outcomes to quickly become part of the plan."[3] However, notwithstanding the relative ease of pre-confirmation plan modifications in chapter 11, the Circuit's *America-CV Station Group* decision illustrates that a proponent of a pre-confirmation plan modification must still satisfy various statutory requirements and overcome certain procedural hurdles to confirm a modified chapter 11 plan, as well as to overcome timely post-confirmation challenges.

In *America-CV Station Group*, the primary issue before the Eleventh Circuit was whether the bankruptcy court (whose decisions were affirmed by the district court) had erred when the court granted an emergency motion to modify two chapter 11 plans—which motion was filed by the chapter 11 debtors (the "Debtors"), proponents of the plans, two days before the confirmation hearing—and proceeded with confirmation of the modified plans, without first requiring the Debtors to file a new disclosure statement and resolicit votes. Under the plans as originally proposed, old equity interests in the Debtors were to be extinguished and new equity interests, representing 100% of the equity in the reorganized entities (the "New Equity"), would issue to four holders of interests in the Debtors (collectively, the "Class 3 Interest Holders") in exchange for a (combined) equity contribution in the amount of $500,000 (the "Equity Contribution") and exit financing in the amount of $1.6 million (the "Exit Financing"). Three of the Class 3 Interest

[2] *America-CV Station Group,* 56 F.4th at 1308.
[3] *Id*.

Holders (the "Excluded Class 3 Interest Holders") were to receive 65.8% of the New Equity under the original plans. The fourth, an entity owned by the Debtors' chief executive officer (the "CEO Owned Class 3 Interest Holder"), was to receive the remaining 34.2% of the New Equity under the original plans.

Although the plans did not require the Class 3 Interested Holders to make the Equity Contribution, or to consummate the Exit Financing, until shortly after finality of the confirmation order, the Debtors (as well as the bankruptcy court and, on appeal, the district court) construed the bankruptcy court's order approving the Debtors' disclosure statement as requiring the Debtors to certify that the Debtors had received the Equity Contribution three days prior to the confirmation hearing (a Monday and federal bank holiday). To comply with this requirement, the Debtors' counsel informed the Class 3 Interest Holders that they would be required to fund the Equity Contribution before the Monday deadline. The Excluded Class 3 Interest Holders attempted to comply, initiating a $329,000.00 wire transfer to the Debtors' operating account for their allocated share of the Equity Contribution on the Friday before the Monday deadline, but, due to the Monday bank holiday, the Debtors did not receive the wired funds until Tuesday. After the Debtors' counsel informed the Excluded Class 3 Interest Holders that the wire transfer was sent to the wrong account, the Excluded Class 3 Interest Holders initiated a second $329,000.00 wire transfer to the trust account of Debtors' counsel the day before the confirmation hearing (Wednesday), which was received by Debtors' counsel the same day.

In the meantime, the CEO Owned Class 3 Interest Holder fully funded the Equity Contribution to the trust account of Debtors' counsel, on the Friday before the Monday deadline (permitting timely certification to the bankruptcy court), and the Debtors moved, on the Tuesday before the Thursday confirmation hearing, to modify the plans to issue the entirety of the New

Equity to the CEO Owned Class 3 Interest Holder. The Debtors had solicited the votes of Class 3 Interest Holders, but no Class 3 Interest Holders voted to accept or reject the original plans. The Debtors did not provide formal notice of the plan modifications to the Excluded Class 3 Interest Holders, nor did the Debtors obtain the Excluded Class 3 Interest Holders' written acceptance of the plan modifications. However, the record reflects that the Excluded Class 3 Interest Holders did receive some notice of the modification—specifically, they were made aware of a contemplated modification on the day before the confirmation hearing (though not the details of the proposed modification) and were told Debtors' counsel would try to resolve the situation.

On the record of the (Thursday) confirmation hearing (for which the Excluded Class 3 Interest Holders failed to appear), the Debtors' counsel informed the bankruptcy court that the Debtors had received the Excluded Class 3 Interest Holders' share of the Equity Contribution, but, given the (earlier) funding of the entire Equity Contribution by the CEO Owned Class 3 Interest Holder, the Debtors intended to return the funds received from the Excluded Class 3 Interest Holders and proceed with the Debtors' motion to modify the plans. The bankruptcy court granted the motion to modify on the record of the confirmation hearing, without objection, and immediately proceeded to consider confirmation of the modified plans. After the conclusion of the confirmation hearing, the bankruptcy court enter an order granting the Debtors' motion to modify and an order confirming the modified plans, wherein the bankruptcy court decided (among other things) that the modified plans satisfied the "cramdown" requirements of Code section 1129(b).

The Excluded Class 3 Interest Holders promptly filed a motion to reconsider, arguing that they had timely performed their fundings obligations under the original plans and that they were entitled to additional disclosure and voting rights under Code section 1127(c). The bankruptcy

court denied the motion to reconsider, deciding that (1) the Class 3 Interest Holders were deemed not to have accepted the original plans, under section 1126(g)[4], because the interests of Class 3 Interest Holders were to be extinguished by the original plans, and (2) under Rule 3019(a) of the Federal Rules of Bankruptcy Procedure (the "Rules"),[5] modifications to a chapter 11 plan require further disclosure and re-solicitation only to those parties who previously accepted the plan, meaning the court need not consider whether the modifications adversely changed the treatment of the Excluded Class 3 Interest Holders. The district court affirmed, agreeing that "a class of creditors or equity interest holders who have not accepted a plan have no say in whether the plan can be modified."[6]

The Eleventh Circuit disagreed with the lower courts, holding that the modification materially and adversely changed the treatment of the Excluded Class 3 Interest Holders by depriving them of the exclusive opportunity to obtain 65.8% of the New Equity[7] and, therefore, that the bankruptcy court "erred in granting the [Debtors'] modification without first requiring that the [Debtors] provide the [Excluded Class 3 Interest Holders] with a revised disclosure statement and second opportunity to cast a ballot."[8] The Circuit reasoned that Class 3 Interest Holders were entitled to property under the original plans in respect of their interests in the Debtors (i.e., the opportunity to obtain the New Equity) and, therefore, the bankruptcy court erred by deeming Class

[4] Code section 1126(g) provides that if the claims or interests of a class do not entitle the holders to "receive any property under the plan on account of such claims or interests" then the class will be "deemed not to have accepted a plan." 11 U.S.C. § 1126(g).

[5] Rule 3019(a) states: "In a…chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan." Fed. R. Bank. P. 3019(a).

[6] *Pegaso Television Corp. v. Am.-CV Station Grp., Inc.,* 2021 WL 5095965 at *4 (S.D. Fla. 2021).

[7] *America-CV Station Group.,* 56 F.4th at 1309.

[8] *Id.* at 1313-1314.

3 Interest Holders not to have accepted the original plans under section 1126(g) (i.e., without a formal rejection, the Circuit concluded that the court had no basis for deciding that the Class 3 Interest Holders had rejected the original plans).[9] Construing the text of Rule 3019(a), and applying prior Circuit precedent, the Court went on to state that, even if the Excluded Class 3 Interest Holders had rejected the original plans, "interest holders that previously rejected (or did not vote for) a reorganization plan are still entitled to additional disclosure and voting if the treatment of their interests is materially and adversely affected by a modification."[10]

The Circuit rejected the Debtors' argument that any error of the bankruptcy court was harmless because, on substantive grounds, confirmation of the modified plans was improper under Code section 1129(a)(1).[11] Specifically, the Circuit opined that the modified plans violated Code section 1123(a)(4) (which requires the same treatment for each claim or interest of a particular class unless a less favorable treatment is agreed) because the modified plans treated the Excluded Class 3 Interest Holders less favorably than the CEO Owned Class 3 Interest Holder.[12] The Circuit stated, "When confirming a plan without the consent of all impaired classes under [Code section] 1129(b)…the bankruptcy court 'must consider' facts relating to the criteria of [section] 1129 'even in the absence of an objection.'"[13] Thus, the Circuit reasoned, the Excluded Class 3 Interest Holders "did not have an obligation to even make an objection—it was the bankruptcy court's independent obligation to insure that the plans did not discriminate within a class."[14]

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[9] *Id.* at 1309-1311 (citing 11 U.S.C. § 1126(g) and *Bank of Am. Nat'l T. v. 203 N. Lasalle St. P'ship*, 526 U.S. 434, 445-45 (1999)). In *203 N. LaSalle St.*, the Supreme Court characterized interest holders' exclusive opportunity to obtain equity in the reorganized entity as property interests received on account of their interests in the pre-petition entity. *See 203 N. LaSalle St.*, 526 U.S at 455-56.

[10] *America-CV Station Group,* 56 F.4th at 1309, 1311.

[11] *Id*. at 1312.

[12] *Id*.

[13] *Id.* (quoting *In re Piper Aircraft Corp*., 244 F.3d 1289, 1299-1300 n.4 (11th Cir. 2001)).

[14] *America-CV Station Group.,* 56 F.4th at 1312.

The Circuit went on to state that the notice the Excluded Class 3 Interest Holders received also did not "insulate" the bankruptcy court's errors as "harmless" because the notice, which "lacked sufficient detail of the terms of the modification and came just hours before the confirmation hearing," did not satisfy the disclosure and notice requirements of the Code and Rules.[15] The Circuit explained, "[e]nsuring that interest holders that are materially and adversely affected by last-minute modifications receive an opportunity to review the modification and consider whether to change their vote or present an objection is a primary benefit of the[se] procedural requirements."[16]

Ultimately, the Eleventh Circuit reversed the bankruptcy court's order granting the Debtors' motion to modify the plans and reversed, in part, the order confirming the plans (to the extent that the confirmation order adopted the modification), remanding to the bankruptcy court to fashion an equitable remedy.[17]

This paper reviews certain procedural and substantive requirements for modifying a chapter 11 plan pre-confirmation, providing further analysis of the *America-CV Station Group* decision and other authoritative decisions. This paper concludes with annotations of exemplar cases pertaining to pre-confirmation plan modification in chapter 11.

I. Procedural Requirements

A. Traditional Chapter 11 Cases

Prior to soliciting votes, a plan proponent must file and obtain approval of a written disclosure statement which contains "adequate information" regarding the proposed plan pursuant

[15] *Id*. at 1313.
[16] *Id*.; *see also id.* at n. 2 (stating that the Circuit declined to reach the Excluded Class 3 Interest Holders' constitutional due process arguments).
[17] *Id*. at 1313. The Circuit assumed that effective judicial relief could be fashioned, substantial confirmation of the plans notwithstanding. *Id.* To date, the bankruptcy court, on remand, has ordered injunctive relief at the behest of the Excluded Class 3 Interest Holders.

to section 1125(b) of the Code.[18] The term "adequate information" is defined under the Code to mean information that is sufficient in detail "as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable" a hypothetical investor to make an informed decision when voting.[19]

To determine whether a disclosure statement contains adequate information, the bankruptcy court must consider the complexity of the case, the benefit of additional information, and the related cost associated with providing any additional information.[20] If the bankruptcy court determines that a disclosure statement contains adequate information as required under section 1125, the court will enter an order approving the disclosure statement, authorizing the solicitation of votes, and fixing the deadline to file ballots accepting or rejecting the plan.[21]

After a bankruptcy court approves a disclosure statement, holders of allowed claims and interests that are impaired under the plan, may vote to accept or reject the plan.[22] Holders of unimpaired claims are conclusively presumed to have accepted the plan under section 1126(f).[23] A class of impaired claims is deemed to have accepted a plan if the plan has been accepted by creditors holding at least two-thirds in amount and more than one-half of the allowed claims in the class.[24] Similarly, a class of equity interest holders is deemed to have accepted the plan if the plan has been accepted by equity holders that hold at least two-thirds in amount of the allowed interests in the class.[25] Under section 1126(g), "a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or

[18] 11 U.S.C. § 1125(b). Pursuant to Code section 1181(b), a disclosure statement is not required in a subchapter V case.
[19] 11 U.S.C. § 1125(a)(1).
[20] *Id.*
[21] Fed. R. Bankr. P. 3017(c).
[22] 11 U.S.C. § 1126(a).
[23] 11 U.S.C. § 1126(f).
[24] 11 U.S.C. § 1126(c).
[25] 11 U.S.C. § 1126(d).

interests to receive or retain any property under the plan on account of such claims or interests."[26] Conversely, if, a plan entitles a class of interest holders to receive or retain property on account of the claims or interest of such class, then section 1126(g) is inapplicable.

Section 1127(c) of the Code requires the proponent of a plan modification to comply with section 1125's disclosure and solicitation requirements.[27] When a modified plan is filed after votes have been cast based on an old disclosure statement, the bankruptcy court must determine whether additional disclosure is required. When a plan modification is "sufficiently minor," the legislative history of section 1127(c) indicates that the court may "determine that additional disclosure [is] not required under the circumstances."[28]

When a modification is filed after a chapter 11 plan has been accepted, Rule 3019(a) states that the proposed modification "shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan," *if* the court finds, after a hearing on notice to the United States Trustee (or Bankruptcy Administrator) and any appointed committee, that the "modification does not adversely change the treatment of the claim of *any* creditor or the interest of *any* equity security holder who has not accepted in writing the modification."[29] Rule 3019(a) is applicable during the limited period when a modification is filed after ballots have been cast accepting a plan, but the plan has not been confirmed.[30]

As discussed above, in *America-CV Station Group*, the Circuit considered whether the Class 3 Interest Holders, who had not voted on the original plans, could be deemed to have rejected the original plans under section 1126(g). To answer the question, the Eleventh Circuit looked to

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[26] 11 U.S.C. § 1126(g).
[27] 11 U.S.C. § 1127(c).
[28] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 411 (1977).
[29] Fed. R. Bankr. P. 3019(a) (emphasis added).
[30] 9 COLLIER ON BANKRUPTCY ¶ 3019.01 (Richard Levin & Henry J. Sommer eds., 16th ed.).

the Supreme Court's decision in *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'Ship.,* 526 U.S. 434, 119 S.Ct. 1411 (1999). In *203 N. LaSalle St.,* a senior creditor invoked the absolute priority rule after the debtor's former partners received an ownership interest in the reorganized debtor in exchange for capital contributions. The Supreme Court "characterized the former partners as having received an exclusive opportunity to obtain equity in the reorganized entity" which "qualified as a property interest received on account of their partnership interest in the pre-petition entity."[31] Like the former partners in *203 N. LaSalle St.,* the Excluded Class 3 Interest Holder were given the opportunity to receive a portion of the New Equity (in exchange for making a share of the Equity Contribution and providing the Exit Financing) based on their status as prepetition equity holders. Accordingly, the Eleventh Circuit concluded that section 1126(g) was inapplicable because the Debtors' original plans entitled the Excluded Class 3 Interest Holders to receive property on account of their prepetition equity interests.[32] The opportunity to obtain an equity interest in the reorganized entities "was not an opportunity offered to the world at large; it was one offered exclusively to [prepetition] shareholders."[33] In addition, the Eleventh Circuit noted that the Class 3 Interest Holders were entitled to vote on the original plans. Interest holders who have their interests extinguished are not entitled to vote under section 1126(g).

The Eleventh Circuit also stated, in *America-CV Station Group*, that "[t]he bankruptcy court improperly narrowed Bankruptcy Rule 3019(a) by construing it to require additional disclosure and voting only when a claim or interest holder materially or adversely affected by a proposed modification had previously voted to accept the plan."[34] The Eleventh Circuit explained

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[31] *America-CV Station Group,* 56 F.4th at 1310 (citing *203 N. LaSalle St. P'Ship,* 526 U.S. 434, 119 S.Ct. 1411 (1999)).
[32] *America-CV Station Group*, 56 F.4th at 1310.
[33] *Id.*
[34] *Id.*

that, in Rule 3019(a), "the repeated use of the word 'any' refers to creditors or equity security holders of whatever kind" and "requires additional disclosure and voting if the modification materially and adversely affects any creditor or interest holder, not just those voting to accept the plan."[35] Relying on its decision in *Enron Corp. v. New Power Co. (In re New Power Co.)*, 438 F.3d 1113 (11th Cir. 2006), the Eleventh Circuit further explained that, consistent with Rule 3019(a), Circuit precedent "make(s) clear that if a modification materially and adversely changes the treatment of any claim or interest holder who has not accepted the modification in writing, then that claim or interest holder is entitled to a new disclosure statement and re-solicitation of votes."[36] In *New Power Co.,* the Eleventh Circuit stated that a bankruptcy court may, after notice and hearing, "deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated. If it does, the claim or interest is entitled to a new disclosure statement and another vote." [37]

In practice, Chapter 11 debtors routinely file modified plans that do not necessitate filing a new disclosure statement even after votes have been cast based on an old disclosure statement. If, however, the bankruptcy court determines, after notice and hearing, "that the modification materially and adversely changes the way that [any] claim or interest holder is treated" the plan proponent must file a new disclosure statement and resolicit votes.[38] Accordingly, when a modified plan is filed after votes have been cast, the proponent of the modification must either: (1) seek court approval of an amended disclosure statement, disclosing and describing the proposed change(s), and re-solicit votes on the modified plan, or (2) obtain a finding from the bankruptcy

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[35] *Id.* at 1311.
[36] *Id.*
[37] *In re New Power Co.,* 438 F.3d 1113, 1117-18 (11th Cir. 2006) (citations omitted).
[38] *Id.* at 1309.

court that additional disclosure(s) and re-solicitation are not required because the modification does not adversely change the treatment of any claim holder or interest holder who has not agreed to the modification in writing.

Notably, Rule 2002(a)(5) provides that at least 21 days' notice must be provided to parties in interest of "the time fixed to accept or reject a proposed modification of a plan[.]"[39] Rule 2002(d)(7) further provides that "notice" must be given to equity interest holders of the time fixed to accept or reject a proposed modification of a plan.[40]

B. Subchapter V Cases

Congress enacted the Small Business Reorganization Act in 2019 ("SBRA"), streamlining the reorganization process for small business debtors under subchapter V of chapter 11 of the Code.[41] A debtor who is a "small business debtor", as defined in section 101(51)(D) of the Code, with aggregate noncontingent liquidated debts less than $7.5 million (excluding debts owed to insiders or affiliates), may elect to proceed under subchapter V of chapter 11.[42]

Congress did not repeal existing provisions under chapter 11 regarding small business debtors. Accordingly, when considering whether a chapter 11 decision applies in a subchapter V case, it is important to understand the differences between traditional chapter 11 cases and cases filed under subchapter V of chapter 11. For example, the SBRA imposes substantially different disclosure requirements on subchapter V debtors than other chapter 11 debtors.

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[39] Fed. R. Bankr. P. 2002(a)(5).
[40] Fed. R. Bankr. P. 2002(d)(7).
[41] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (effective February 19, 2020).
[42] Fed. R. Bankr. P. 1020(a).

Unless the bankruptcy court orders otherwise, a subchapter V debtor is not required to file a disclosure statement under section 1125 of the Code.[43] Instead, section 1190(a)(1) of the Code states that a subchapter V debtor must include the following background information in its plan:

> (A) a brief history of the business operations of the debtor;
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> (B) a liquidation analysis; and
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> (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.[44]

Pursuant to section 1181(a) of the Code, section 1127's modification provisions do not apply in subchapter V cases. Nevertheless, similar to other chapter 11 debtors, a subchapter V debtor may file a modified a plan at any time prior to confirmation. Section 1193(a) of the Code states as follows:

> (a) MODIFICATION BEFORE CONFIRMATION. The debtor may modify a plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. After the modification is filed with the court, the plan as modified becomes the plan.[45]

Section 1193 does not contain a provision similar to section 1127(c). Because a subchapter V debtor generally is not required to file a disclosure statement and is, therefore, not required to comply with section 1125's disclosure requirements, a modified subchapter V plan must include any background information required under section 1190(a)(1) of the Code.

II. Substantive Requirements for Pre-confirmation Modifications

Code section 1127(a) states that "[t]he proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet

[43] 11 U.S.C. § 1181(b).
[44] 11 U.S.C. § 1190(1)(A)-(C).
[45] 11 U.S.C. § 1193(a).

the requirements of sections 1122 and 1123" of the Code,[46] which sections govern the classification of claims and interests and chapter 11 plan contents. Section 1127(a) formalizes the plan negotiation process, allowing proposed plans to be modified at "any time before confirmation" to reflect agreements with committees, creditors, equity holders, and other parties in interest as the debtor develops a plan of reorganization.[47] Pre-confirmation plan negotiations may continue until just before the confirmation hearing to address objections or comments received from a wider swath of parties in interest.[48] The plan may still be modified after the disclosure statement has been approved, or even after confirmation itself.[49] The ease with which plans may be modified reflects a desire to "allow[] negotiated outcomes to quickly become part of the plan."[50]

Pre-confirmation plan modifications are permitted, pursuant to section 1127(a), provided that the revised plan satisfies the requirements of section 1122, regarding the classification of claims and interests, and section 1123, regarding the type and specificity of information contained in the plan.[51] Pre-confirmation, only the plan proponent may propose a modified plan, but the proponent may do so anytime, without leave of the court.[52] Once the modified plan is filed with the court, the revised version becomes the operative plan.[53]

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[46] 11 U.S.C. § 1127(a). Likewise, a debtor in subchapter V case may also file a modified plan at any time prior to confirmation, pursuant to Code section 1193(a), with similar restrictions.
[47] 7 COLLIER ON BANKRUPTCY ¶ 1127.03 (Richard Levin & Henry J. Sommer eds., 16th ed. 2023).
[48] *Id.*
[49] *Id.* at ¶ 1127.03[1][a]; *see* 11 U.S.C. § 1127(b).
[50] *America-CV Station Group.*, 56 F.4th at 1308.
[51] *See* 11 U.S.C. §§ 1122, 1123, 1127(a); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1127.03. Post-confirmation plan modifications are addressed in section 1127(b).
[52] 7 COLLIER ON BANKRUPTCY ¶ 1127.03[1]. The plan proponent's right to modify the plan is not unlimited, however. It does not appear that plan proponents may modify a plan after the bankruptcy court has denied confirmation. *See, e.g.*, *In re Univ. Creek Plaza, Ltd.*, 176 B.R. 1011, 1018 (S.D. Fla. 1995) (Aronovitz, J.).
[53] *See* 11 U.S.C. § 1127(a).

The plan, as modified, may only be confirmed if it "complies with the applicable provisions" of chapter 11.[54] The requirements for pre-confirmation modifications, embodied in sections 1127(a), 1122, and 1123, are designed to prevent a plan proponent from "pulling a bait and switch," or "securing votes of acceptance from creditors and then making a material change in the plan after the votes are in hand."[55]

Section 1122 provides guidance on how plan proponents are to classify certain claims or interests, stating that claims or interests within the same class must be "substantially similar" to the other interests within the class.[56] There may also be a separate class of unsecured claims up to a court-approved threshold "as reasonable and necessary for administrative convenience."[57] To satisfy section 1129 and confirm a proposed plan, the plan proponent must show that at least one impaired class of claimants has voted to accept the proposed plan.[58] Intended to safeguard the rights of creditors, this procedure tries to ensure that the voting process is not manipulated and that similarly situated creditors are treated equally.[59]

In the Eleventh Circuit, a plan proponent has "considerable discretion in delineating claims into classes, but such discretion is curtailed if the plan unfairly creates too many or too few classes, if the classifications are designed to manipulate class voting, or if the classification scheme violates basic priority rights."[60] In other words, if the classification of certain claims or interests is

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[54] *See id.* § 1129(a)(1).
[55] *In re Split Second Towing & Transp. Inc.*, 2010 WL 3385482, at *4 (M.D. Fla. Aug. 26, 2010) (Bucklew, J.).
[56] *See* 11 U.S.C. § 1122(a).
[57] *Id.* § 1122(b).
[58] *See* 7 COLLIER ON BANKRUPTCY ¶ 1122.01. This requirement does not apply in subchapter V cases, where plan proponents may seek to cram down a proposed plan even if all impaired classes reject the plan. *Id.*; *see also* 11 U.S.C. § 1191.
[59] 7 COLLIER ON BANKRUPTCY ¶ 1122.03.
[60] *In re Schroeder*, 2021 WL 5749836, at *9 (Bankr. M.D. Fla. Dec. 1, 2021) (Vaughan, J.) (internal citations omitted).

challenged, the plan proponent must show that the classification is "supported by a legitimate business or economic justification beyond the mere attempt to gerrymander a desired outcome."[61]

For example, if two creditors have secured claims based on loans made for the purchase of vehicles owned by the debtor, they are not properly part of the same class under section 1122(a) because each creditor has "specific rights in different collateral."[62] But in making such determinations, the Eleventh Circuit courts balance a "debtor's ability to obtain a confirmed cramdown plan and the interest of an affected creditor to cast a meaningful vote on the plan relative to other similar claimholders."[63]

Section 1123(a) provides a list of provisions that must be included in chapter 11 plans in order to be confirmed, while section 1123(b) provides a non-exhaustive list of additional provisions that may be included in a plan.[64] Section 1122 works together with section 1123 to ensure that similarly classified claims or interests are treated the same, unless the holder of a specific claim has agreed to less favorable treatment.[65] For instance, while section 1122 "speaks to the classification of a claim or interest, section 1123(a)(4) addresses the treatment of a claim or interest once it has been properly classified."[66] Moreover, in order to designate classes of claims under section 1123(a)(1), the plan proponent must correctly classify those claims using the guidance of section 1122.[67]

As discussed above, section 1123(a)(4)'s requirements were involved by the Eleventh Circuit in *America-CV Station Group*. Section 1123(a)(4) requires a plan to provide "the same

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[61] *In re Akinpelu*, 530 B.R. 822, 824 (Bankr. N.D. Ga. 2015) (Diehl, J.).
[62] *In re New Hope Hardware, LLC*, No. 20-40999-PWB, 2020 WL 6588615, at *3 (Bankr. N.D. Ga. Sept. 9, 2020) (Bonapfel, J.).
[63] *Akinpelu*, 530 B.R. at 826-27.
[64] *Id.* at ¶ 1123.01.
[65] *See* 11 U.S.C. § 1123(a); 7 COLLIER ON BANKRUPTCY ¶ 1122.02.
[66] 7 COLLIER ON BANKRUPTCY ¶ 1122.02 (emphasis omitted).
[67] *Id.*

treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such claim or interest."[68] Although the Code does not expressly state what constitutes "equal treatment" for purposes of section 1123(a)(4), it appears that while there may be differences in the treatment among class members, "all class members [must] receive equal value and pay the same consideration in exchange for their distributions."[69] The treatment of class members may still be considered equal for purposes of section 1123(a)(4) if there are procedural differences, such as a delay in distributions for certain class members.[70]

In *America-CV Station Group*, the Excluded Class 3 Interest Holders were not to receive the same treatment as the CEO Owned Class 3 Interest Holder under the modified plans. Specifically, the proposed modification stripped the Excluded Class 3 Interest Holders of the opportunity to obtain New Equity and reallocated that option solely to the CEO Owned Class 3 Interest Holders, so, within the class, "one member received property under the plan and the others received nothing," thereby violating section 1123(a)(4) and rendering confirmation improper under Code section 1129(a)(1).[71] The Eleventh Circuit, in *America-CV Station Group*, opined that a bankruptcy court has an independent duty—even in the absence of an objection— to ensure that the requirements of section 1129 are met with respect to impaired dissenting classes of creditors in a chapter 11 cramdown.[72]

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[68] 11 U.S.C. § 1123(a)(4).

[69] *See In re Breitburn Energy Partners*, 582 B.R. 321, 357-58 (Bankr. S.D.N.Y. 2018) (Bernstein, J.) ("Section 1123(a)(4) requires equality of treatment, not equality of result. It is satisfied if claimants in the same class have the same opportunity for recovery."); *see also In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) ("Courts are also in agreement that § 1123(a)(4) does not require precise equality, only approximate equality.") (internal citation omitted).

[70] *See W.R. Grace*, 729 F.3d at 327-28.

[71] *America-CV Station Group*, 56 F.4th at 1312.

[72] *Id.*

Big picture, a plan modification that gives rise to a substantive impediment to confirmation renders the plan subject to attack, post-confirmation, even absent an objection to confirmation and even after substantial confirmation of the plan.

III. Other Exemplar Cases

A. *Enron Corp. v. New Power Co. (In re New Power Co.)*, 438 F.3d 1113 (11th Cir. 2006):

On appeal from the order confirmation the debtor's amended plan, a secured creditor and equity security holder argued that the proposed amendments contained in the second plan were less advantageous than the original plan because confirmation of the original plan would have brought finality to the creditor/equity holder's claims and interest in the debtor, whereas confirmation of the amended plan rendered them uncertain. This, according to the creditor/equity holder, entitled it to another disclosure and to re-vote its equity interests. The creditor/equity holder further argued that the plan violated section 1123(a0(4).

The amended plan included two new provisions, a section providing for interim distributions to holders of allowed interests prior to a specified termination date, and a provision delineating the powers of an examiner appointed in the case, specifying that claims or interests subject to investigation by the examiner were not to be allowed without written consent or a final order from the bankruptcy court.

Ruling: The modifications in the amended plan were "not material and adverse, and therefore . . . the bankruptcy court could properly deem [the creditor's] vote in favor of a prior plan to be a vote in favor of the modified plan." ***Id.*** **at 1123. Further, the "interim distribution provision does not violate the equal treatment of the Bankruptcy Code," and so, the bankruptcy court's confirmation of the amended plan was affirmed.** ***Id.*** **The court reasoned:**

- In the disclosure statement on a prior version of plan, there was no mention of a time limitation on the examiner's investigation or the commencement of any recharacterization action, but the objecting creditor voted to accept the prior plan on the basis of that disclosure statement. *Id.* at 1119-21. The addition of the new provision in the modified plan "made absolutely no change to the treatment of [the creditor's] claims or interests." *Id.*at 1119-20. Because the amended plan "did nothing to change the status of those claims or interests, [the modification] has no material or adverse effect thereon." *Id.* at 1121-22.
- "[D]elayed receipt of distributions to members of a class whose claims [or interests] remain disputed does not, in and of itself, violate §1123(a)(4)." Accordingly, the modified plan did not result in unequal treatment of the creditor/equity holder. *Id.* at 1122-23.

B. *In re Concrete Designers, Inc.*, 173 B.R. 354, (Bankr. S.D. Ohio 1994) (Calhoun, J.):

The bankruptcy court approved the debtor-in-possession's disclosure statement and scheduled a confirmation hearing. *Id.* at 355. Due to the unsecured creditors' committee's refusal to support the plan, the debtor requested additional time to file an amended plan. The debtor did not seek or obtain the court's permission to revise its previously approved disclosure statement, but nevertheless served an amended disclosure statement along with the amended plan.

There was a discrepancy between the amended disclosure statement and the amended plan regarding the debtor's payments to unsecured creditors. The amended disclosure statement did not describe the amended plan, but in the amended plan, the proposed dividend to unsecured creditors was changed from 100% over five years or a lump sum payment of 40% (as provided in the original plan) to a dividend of 80% over four years or a lump sum payment of 50%.

Ruling: Although the debtor argued that additional or different disclosure was not necessary, the court found that the debtor was "attempting to use a disclosure statement approved for a prior plan, in conjunction with a substantially amended plan, to solicit acceptances." ***Id.*** **at 357. Because these modifications were "of sufficient materiality that a creditor 'would be apt to reconsider acceptance,'" the court held that modifications were material and adverse and denied confirmation of the amended plan.** ***Id.*** **at 358-59 (internal citation omitted). The court reasoned:**

- Although "a new disclosure statement is not required "in every case where a modification is requested," … "[i]f there is any question concerning adequacy of information previously furnished, the plan proponent must obtain a court order concerning adequate information." *Id.* at 356.
- "[W]hile the [unsecured creditor's committee] may have been aware of the changes and modifications in the Second Amended Plan, and may have approved of those modifications, no party can assure the Court that each voting member of the larger constituency represented by the Committee favored the changes made." *Id.* at 358.
- Because the creditors "may have voted under the auspice that they would be paid a 100% dividend, and would not have accepted anything less, believing the Debtor to be of significant value," the court found the modification to be "far-reaching." *Id.* "Had the modification at issue been a straight and simple improvement of the treatment of unsecured creditors, the Court may have reached a different conclusion. *Id.*

C. *In re 160 Royal Palm, LLC*, No. 18-19441-EPK, 2020 WL 4785543 (Bankr. S.D. Fla. Jan. 14, 2020) (Kimball, J.):

The debtor moved to reset the confirmation hearing without requiring re-solicitation of its recently filed amended plan. The debtor was the owner of a partially reconstructed hotel property

in Palm Beach, Florida, but the individual leading the redevelopment project pled guilty to federal fraud charges relating to solicitation of investments for the hotel project.

The principal modifications in the amended plan were to make the proceeds from the sale of the debtor's property immediately available to the debtor for distributions to creditors upon plan confirmation, and to grant the proposed buyer a senior lien on the hotel in the amount of $41.1 million in the event the sale order was reversed and the hotel was returned to the debtor. Another secured creditor objected to the plan modifications, arguing that the potential lien in favor of the buyer resulted in impairment of its smaller secured claim.

Ruling: The bankruptcy court held that the proposed modifications did not materially or adversely change the treatment of any creditor or interest holder, and as such, the debtor was permitted to move forward with confirmation without needing additional disclosure or solicitation. *Id.* at *7. The court reasoned:

- "No creditor is adversely affected by the [amended plan] removing the delay and risk associated with [an] appeal from the sale order and permitting immediate distribution of the sale proceeds to creditors. This change is an obvious benefit to the Debtor's true creditors." *Id.* at *5.
- "The proposed lien in favor of [the buyer], which arises only if the sale is undone and the hotel returned to the Debtor, has no impact at all on creditors…. The risk of a lien being imposed is so miniscule as to not be material. But even if this remote event were to happen, creditors are fully protected under [the amended plan] as the entirety of the sale proceeds would still be distributed to creditors." *Id.*