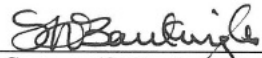




**SO ORDERED.**  
**SIGNED this 17th day of July, 2017**

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.**  
**PLEASE SEE DOCKET FOR ENTRY DATE.**

  
Suzanne H. Bauknicht  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

HAROLD G. NORTH, III  
CHARLENE A. NORTH

Case No. 3:17-bk-30700-SHB  
Chapter 13

Debtors

**MEMORANDUM AND ORDER  
ON CONFIRMATION OF DEBTORS' CHAPTER 13 PLAN  
AND OBJECTION OF RES-FL EIGHT, LLC TO CONFIRMATION**

Before the Court is confirmation of Debtors' proposed Chapter 13 plan and the objection by creditor RES-FL Eight, LLC ("RES-FL"), on which the Court held an evidentiary hearing on June 7, 2017.

**I. INTRODUCTION**

Debtors filed the Voluntary Petition [Doc. 1] commencing this Chapter 13 bankruptcy case on March 10, 2017, together with, *inter alia*, their required statements and schedules and a Chapter 13 Plan proposing sixty monthly payments of \$373.00, payment of tax refunds in excess

of \$1,000.00, and a 1 to 5% dividend to unsecured creditors [Doc. 2] to be funded by Debtors' social security income, a small annuity held by Mrs. North, and Mr. North's small pension.

RES-FL is a creditor of Debtors as evidenced by the Proof of Claim in the amount of \$143,497.97 filed on June 6, 2017, and by virtue of a judgment lien in the amount of \$126,743.74 as of August 26, 2015, plus post-judgment interest. The judgment was recorded on January 29, 2016, against Debtors' residential real property located at 280 Back Nine Drive, Baneberry, Tennessee (the "Property") [Ex. 6; Ex. 9 at ¶¶ 2-3]. With respect to the Property, Debtors' plan proposes a monthly maintenance payment of \$1,027.00 to Wells Fargo Home Mortgage ("Wells Fargo"), which holds a properly perfected first priority lien against the Property in the amount of \$112,577.29 [Ex. 9 at ¶ 4], and the following treatment for RES-FL's judgment lien:

(C) STRIPPED MORTGAGE(S)/JUDGMENT LIEN(S): The debtor(s) own real property located at **280 Back Nine Drive Baneberry, TN 37890** which is subject to a mortgage or judgment lien in favor of **RES-FL EIGHT, LLC**. This lien is not subject to any discharge exception, **but is secured in the amount of \$12,500.00 to be paid in monthly payments of \$250.00 at 5% interest and the remaining balance paid as unsecured and is therefore avoided, stripped down and paid as a non-priority**, unsecured creditor as provided for under this plan; and, the lien shall be released by the creditor not less than 30 days after the completion of the plan and discharge of debtor(s).

[Ex. 1.]

RES-FL timely filed an Objection to Confirmation of Chapter 13 Plan on April 12, 2017, in opposition to the proposed treatment, arguing lack of adequate protection, insufficient Property valuation, insufficient interest rate, failure of the best interests test, failure to propose payment of all disposable income, and failure to provide for lien retention [Doc. 23].<sup>1</sup>

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<sup>1</sup> The Chapter 13 Trustee also filed an objection to confirmation, arguing unfair discrimination/improper classification of creditors [Doc. 27]; however, she withdrew her objection on June 1, 2017 [Doc. 43].

The evidentiary record consists of fourteen exhibits introduced into evidence, including five stipulations of fact [Ex. 9], and the testimony of Debtors and two certified appraisers, George Gantte and Larry Cameron. Pursuant to the Joint Statement of Issues [Doc. 39] filed by the parties on May 30, 2017, the Court must determine whether the proposed plan meets the requirements of 11 U.S.C §§ 506(a)(2); 1322(b)1); 1325(a)(1), (4), and/or (5); and 1325(b)(1); however, resolution of the foregoing issues rests solely on the Court's determination of the Property's valuation.<sup>2</sup>

Debtors argue that the current fair market value of the Property is \$155,000.00, against which the first mortgage holder, Wells Fargo, holds a claim of \$112,577.29 [Ex. 5] and Debtors are entitled to a \$25,000.00 homestead exemption [Ex. 9 at ¶ 5]. Debtors also argue that they are entitled to reduce the Property's value to include costs of liquidation. RES-FL argues that the fair market value is \$175,000.00 and does not dispute the amount of Wells Fargo's first mortgage or that Debtors are entitled to a \$25,000.00 homestead exemption; however, RES-FL does not agree that Debtors may include liquidation costs in the analysis. For the reasons set forth herein, the Court agrees that the Property's fair market value is \$175,000.00 and that Debtors may not include liquidation costs in the computation. Accordingly, because Debtors must propose to pay RES-FL's claim as secured to the extent of \$37,422.71,<sup>3</sup> their plan as proposed cannot be confirmed.

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<sup>2</sup> RES-FL had originally objected in part based on the proposed 5% interest rate proposed by Debtors, arguing that it was entitled to 5.75%; however, at the evidentiary hearing, counsel for RES-FL announced that the creditor was withdrawing that objection and was satisfied with a 5% interest rate.

<sup>3</sup> Deduction of the amount of Wells Fargo's lien (\$112,577.29) and Debtors' homestead exemption (\$25,000.00) from a Property value of \$175,000.00 results in a value of \$37,422.71 to which RES-FL's judgment lien attaches.

In support of its ruling the Court makes the following findings of fact and conclusions of law. This Court has jurisdiction to hear and determine this contested matter under 28 U.S.C. §§ 157(b)(2)(L) and 1334.

## II. FACTS

The Property, which was built nineteen years ago, is located in a subdivision containing a golf course and lake view for some residents. Although the Property itself does not have a lake view, it backs up to and is located on the golf course. When Debtors purchased it in June 2006, the value of the Property, as affirmed on the General Warranty Deed, was \$185,000.00. [Ex. 4.] Debtors moved to Tennessee when they retired and began living in the Property full-time in May 2012. Mr. North testified that he scheduled the Property's value at \$160,000.00 after talking with people in the neighborhood about recent sales in the neighborhood. Debtors filed this Chapter 13 case after learning that a sheriff's sale had been scheduled to sell the Property to execute on RES-FL's judgment.

### *A. George Gantte's Testimony*

Debtor's appraiser, George Gantte, is a certified residential appraiser who has been licensed since 1991. Gantte conducted an in-person appraisal of the Property and its interior. His appraisal included three comparable sales, all located within less than one mile of the Property. To find the comparable properties, Gantte<sup>4</sup> utilized the Lakeway Multiple Listing Service ("MLS"), looked in the White Pine market in Jefferson City, and searched for properties with similar square footage and effective ages, also taking into account the properties' locations and distance from the subject Property and dates of sale, days on the market, and the type of financing obtained by the purchasers. Gantte also testified that he used a market extraction

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<sup>4</sup> Gantte's report reflects that Angie Donahoo gathered data from the courthouse and MLS to assist Gantte.

method to determine the price per square foot shown in the analysis of his report by taking the sales price, the land and site improvement values, and finished basements, garage spaces, and/or sunrooms. With respect to the effective ages of the comparables, he looked at photographs to estimate the condition of the interiors. Gantte testified that he gave more emphasis to the most recent comparable sale in assigning a value to the Property. None of the comparables used are on the lake; however, they are all in the same subdivision as the Property, and the golf course backs up to them.

The first comparable, 612 Harrison Ferry Road, is .66 miles from the Property, sold for \$159,900.00 on March 24, 2017, and was assigned an adjusted sales price of \$155,164.00 by Gantte. At 1,988 square feet versus the Property's 1,820 square feet, the first comparable is larger than but has the same number of bedrooms and bathrooms as the Property. The second comparable, 215 Red Bud Court, is .33 miles from the Property, sold for \$169,000.00 on January 9, 2017, and was assigned an adjusted sales price of \$146,400.00 by Gantte. It has 1,770 square feet<sup>5</sup> but the same number of bedrooms as and one bath more than the Property. Gantte's third comparable, 768 Harrison Ferry Road, is .35 miles from the Property, sold for \$148,050.00 on May 31, 2016, and was assigned an adjusted sales price of \$158,082.00 by Gantte. It has 1,704 square feet and the same number of bedrooms and bathrooms as the Property. Using information from the Courthouse Retrieval System for Jefferson County as a basis for his opinion, Gantte testified that there was a downward trend in property values, as evidenced by the significant

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<sup>5</sup> Although Gantte listed the square footage of Red Bud Court, which was both appraisers' second comparable, as 1,770, Cameron listed it as 1,590, which is likewise shown as the square footage on the Property Record Card from the Jefferson County Property Assessor. [See Ex. 11.] When questioned about the difference, Gantte testified that he took his data from the MLS, which comes from prior appraisals, and according to the MLS, there is a total heated living area of 1,770 square feet. He testified that he believes that the difference between the two is the square footage of the sunroom, which Gantte included in the price per square footage analysis. He did not, however, visit or measure the comparable property for the most accurate square footage, and he did not know if the sunroom was heated and/or cooled, and if so, by what methods.

decreases in sales prices for comparables one and two between their prior sales prices and the most recent.<sup>6</sup>

On cross examination, Gantte acknowledged that both comparables two and three were sold by decedents' estates. [See Ex.13; Ex. 14.] Gantte also acknowledged that he excluded as a comparable for his appraisal a property located only .07 mile from the Property (practically across the street) as well as a property on the same side of the street, located only .14 mile from the Property, both of which sold more recently (June and July 2016, respectively) than Gantte's third comparable (May 2016).

***B. Larry Cameron's Testimony***

RES-FL's appraiser, Larry Cameron, is also a certified residential real estate appraiser, licensed for fifteen years. Cameron's appraisal assigns a fair market value of \$175,000.00 as of March 2, 2017 [Ex. 8]. As requested by RES-FL, Cameron conducted an exterior-only, drive-by appraisal to determine the fair market value. Cameron's appraisal included five comparable sales, including two homes on the same street as the Property. To find the comparable properties, Cameron utilized the same MLS as Gantte and searched for properties with similar ages, gross living areas, locations, numbers of bedrooms and bathrooms, and times of sale, and, as did Gantte, Cameron reviewed photographs of the comparables. Cameron testified that he also pulled the records from the tax assessor for each comparable, a practice that he relies on more than he relies on the MLS approximately 90% of the time because the square footage of the heated or cooled living area is derived from an employee of the tax assessor's office actually

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<sup>6</sup> For example, comparable one sold in December 2005 for \$178,000.00 but sold for only \$159,900.00 in March 2017. [Ex. 12.] Similarly, comparable two sold in June 2003 for \$176,000.00 but sold for only \$169,000.00 in January 2017. [Ex. 11.] Conversely, comparable three sold for \$115,000.00 in July 1999 and for \$148,050.00 in May 2016. [Ex. 10.]

measuring the various properties in order to figure the taxes assessed. Cameron explained that garages and porches should not be included in the square footage calculations because spaces are required to be heated and cooled with a permanent system for them to be counted as heated living space.

The first comparable, 1116 Stoneway Court, is 1.15 miles from the Property, sold for \$169,900.00 in December 2016, and was assigned an adjusted sales price of \$176,920.00 by Cameron. It has 1,612 square feet, the same number of bedrooms as and one-half bath more than the Property. Cameron chose 215 Red Bud Court as his second comparable, and it is .31 miles<sup>7</sup> from the Property, sold for \$169,000.00 in January 2017, and was assigned an adjusted sales price of \$169,790.00. His appraisal report lists square footage of 1,590<sup>8</sup> with the same number of bedrooms as and one more bathroom than the Property. The third comparable, 267 Back Nine Drive, is .07 miles from the Property, sold for \$176,500.00 in June 2016, and was assigned an adjusted sales price of \$179,500.00 by Cameron. It has 1,817 square feet and the same number of bedrooms as but one-half bath less than the Property. The fourth comparable, 248 Back Nine Drive, is .14 miles from the Property, sold for \$199,000.00 in July 2016, and was assigned an adjusted sales price of \$188,675.00 by Cameron. It has 2,079 square feet and the same number of bedrooms and bathrooms as the Property. Cameron's fifth comparable, 612 Harrison Ferry Road, is .58 miles from the Property,<sup>9</sup> was listed for sale at the time of the March 2 appraisal for \$159,900.00, and was assigned an adjusted sales price of \$161,941. It is listed in Cameron's

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<sup>7</sup> Mr. Gante's appraisal shows that the Red Bud Court home is .33 miles from the Property.

<sup>8</sup> See *supra* note 5.

<sup>9</sup> Mr. Gante's appraisal shows that this comparable is .66 miles from the Property.

report as having 1,680 square feet<sup>10</sup> with the same number of bedrooms and bathrooms as the Property. Between the time of the two appraisals and as reflected in Gantte’s appraisal report, 612 Harrison Ferry Road sold for its listing price of \$159,900.00 on March 24, 2017.

### III. ANALYSIS

“Courts disagree as to the proper placement of the burden of proof when the creditor’s interest in property is being valued to determine whether a plan is confirmable.” *Dunson v. Regions Bank (In re Dunson)*, 515 B.R. 387, 390 (Bankr. N.D. Ga. 2014).<sup>11</sup> Compare *In re Allen*, No. 16-11029, 2017 WL 685568, at \*2 (Bankr. W.D. La. Feb. 17, 2017) (concluding that a debtor bears the burden of proof that a proposed Chapter 13 plan meets all of the requirements for confirmation, including valuation) with *In re Sandrin*, 536 B.R. 309, 315 (Bankr. D. Colo. 2015) (“The shifting burden of proof places the initial burden on the party ‘seeking to negate the presumptively valid amount of a secured claim.’ Thereafter, the burden shifts to the holder of the secured claim ‘to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim.’” (quoting *In re Heritage Highgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012))). Under the burden-shifting approach, “[i]f the movant establishes

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<sup>10</sup> Cameron testified that the tax record shows 942 square feet for the bottom level and 738 for the upper level, resulting in 1,680 total square feet for 612 Harrison Ferry Road. [Ex. 12.] He did not include the screened-in porch, marked as EPF on the tax record [Ex. 12], based on his experience that 90% of the screened-in areas are not heated and cooled. Gantte’s comparable one is the same property, but Gantte used square footage totaling 1,988, which includes the EPF. Gantte was not questioned about the differences in the square footage between his report and Cameron’s.

<sup>11</sup> The *Dunson* court string-cited as follows: compare *In re Horner*, No. 11-41012-MGD, 2011 WL 5152290, at \*2 (Bankr. N.D. Ga. July 18, 2011) (Diehl, J.) (placing the burden on the debtor of establishing the value of collateral for purposes of determining whether the plan’s treatment of the secured creditor’s claim meets the requirements of section 1325(a)(5)(B)(ii)); *In re Tucker*, No. 12-53285-JDW, 2013 WL 3230615, at \*3 (Bankr. M.D. Ga. June 25, 2013) (same); *In re Young*, 390 B.R. 480, 486-87 (Bankr. D. Me. 2008) (same); and *In re Johnston*, Adv. No. 12-05066, 2013 WL 1844751, at \*6 (Bankr. W.D. Va. Apr. 12, 2013) (placing the burden of proof under section 506(a) on the debtor because the debtor is the party seeking the relief — a finding that the proposed treatment of the creditor under a plan will satisfy the confirmation requirements of the Bankruptcy Code), with *In re Heritage Highgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012) (applying a burden-shifting analysis that places the initial burden on the debtor to establish that the creditor’s “proof of claim overvalues a creditor’s secured claim,” with the ultimate burden on the creditor to prove the “‘extent of its lien and the value of the collateral securing its claim’”) and *In re Rozinski*, 487 B.R. 549, 554 (Bankr. D. Colo. 2013) (same).



with sufficient evidence that the proof of claim overvalues a creditor's secured claim because the collateral is of insufficient value, the burden shifts. The creditor thereafter bears 'the ultimate burden of persuasion . . . to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim.'" *In re Heritage Highgate, Inc.*, 679 F.3d at 140 (quoting *In re Robertson*, 135 B.R. 350, 352 (Bankr. E.D. Ark. 1992)). The Court finds it unnecessary to choose an approach in this case, however, because even under the burden shifting approach, Debtors failed to provide sufficient evidence to rebut the presumptively valid amount of RES-FL's secured claim.

#### ***A. Valuation***

As it pertains to secured creditors, 11 U.S.C. § 1325(a)(5) provides debtors with three options for dealing with allowed secured claims: (1) obtain approval of the plan from the secured creditor; (2) provide that payment, through equal monthly payments, of "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim"; or (3) surrender the collateral securing the creditor's claim. Section 506(a) provides that a creditor's claim "is secured to the extent of the value of such creditor's interest in the estate's interest in such property . . . , and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim [and the value is] determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a).

Replacement value, the appropriate valuation standard governing § 506(a), is determined by the court, which ascertains "[w]hether replacement value is the equivalent of retail value, wholesale value, or some other value [that depends] on the type of debtor and the nature of the property." *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 965 n.6 (1997). When determining

a § 506(a) value for real property, the comparable arm's length standard "reflects whatever premium the debtor assigned to the property which prompted the debtor's decision to continue using the property rather than surrendering it . . . [and] does not ignore the reality of a market which includes a significant number of distressed real estate sales which include trustee sales, sales of bank owned properties, and short sales." *In re Williams*, 480 B.R. 813, 816 (Bankr. E.D. Tenn. 2012). Courts uniformly ascertain market value based on the sales comparison method of valuation for residential real property that a debtor seeks to retain. *See In re Yildiz*, No. 11-11246-BFK, 2011 WL 6330169, at \*2-3 (Bankr. E.D. Va. Dec. 19, 2011).

Here, valuation of the Property comes down to two competing appraisals, both by certified licensed residential real estate appraisers. The Court finds both appraisers to be credible and knowledgeable; however, Cameron's analysis was slightly more thorough, in the Court's opinion, and the Court agrees that the fair market value of the Property is \$175,000.00. Both appraisers relied on the MLS, but Cameron also included information from the tax assessor's office. Both appraisers based their valuations on comparables and, in fact, used two of the same properties, but Cameron relied on five comparables, while Gantte relied on three. In addition, the comparables utilized by Cameron that were not utilized by Gantte – 248 and 267 Back Nine Drive – appear to be the homes most like the Property with respect to location, square footage, and number of bedrooms and bathrooms. Cameron's third comparable, 267 Back Nine Drive, which sold for \$176,500.00 in June 2016, is located across the street from the Property and is slightly inferior because it does not back up to the golf course and has only one and one-half bathrooms (versus the Property's two full bathrooms), although it is thirty-three square feet larger than the Property. Cameron's fourth comparable, 248 Back Nine Drive, which sold for

\$199,000.00 in July 2016, is located .14 of a mile down the street from the Property and is slightly superior because it has 295 square feet more than the Property.

When Gantte was asked on cross-examination to explain why he did not use the 248 and 267 Back Nine Drive as comparables, notwithstanding that 267 Back Nine Drive is across the street and has almost identical square footage to the Property, Gantte testified, without further explanation, that he had pulled a number of properties that could have been considered and chose the ones he believed were the most comparable to the Property. Based on its analysis, however, the Court finds these two properties to be the most similar to the Property itself and gives the most weight to these two comparables.

With respect to the common comparables between the appraisers – 215 Red Bud Court and 612 Harrison Ferry Road – the appraisals contain differing square footage calculations of the heated living areas. This difference resulted from inconsistent numbers between the MLS and the tax assessor's office based on covered porches. The record is devoid of evidence to either confirm or disprove that the covered or screened-in porch for either comparable is heated and/or cooled such that the square footage of the porch should be included in the total square footage used for computing value. Accordingly, the Court finds that Debtors have not met their burden of proving that the square footage of the comparables should include the covered and/or screened-in porches (which would result in a lower appraisal for the Property). In the absence of contrary evidence, the Court accepts Cameron's assessment that most such enclosures are not heated and/or cooled so that they should not properly be included in the heated living space notwithstanding inclusion of the square footage of such enclosures in the MLS listings. As Cameron explained, the inclusion of the square footage of unheated/uncooled porches in the

MLS results from the fact that realtors sometimes measure the square footage and erroneously include areas that should not be included, such as garages and unheated porches.

Finally, although Gantte testified that there has been a downward trend and decline in values over the last year, this opinion was not supported by the evidence and does not overcome Cameron's testimony to the contrary that since June 2016, he has seen very little change in the market and that interest rates have remained steady. Of the six overall differing comparable properties used between both appraisers, two were sold by decedents' estates, as reflected by Exhibits 13 and 14. Both appraisers testified that even though both types of sales utilize the MLS, sales by estates are usually considered below-market sales and are given less weight in an evaluation and current arms-length sales are preferred over estate or liquidation sales. Gantte testified that he was unaware that 215 Redbud Court and 768 Harrison Ferry Road were estate sales and had he known, he might not have considered them. Similarly, Cameron testified that he was unaware the 215 Redbud Court sale was an estate sale and had he known, he, too, would not have considered it. Furthermore, notwithstanding that it was sold by an estate, 215 Red Bud Court, which has less square footage than the Property but one more bathroom, was still purchased for \$169,000.00 in January 2017, giving some support to Cameron's assessment that the property values, in fact, are not in decline.

***B. Liquidation Costs***

Debtors have also argued that they are entitled to deduct liquidation costs from the Property's valuation; however, as argued by RES-FL, the Sixth Circuit Court of Appeals expressly rejected this argument and held that "whe[n] the debtor proposes to retain the collateral under a reorganization plan, § 506(a) does not require or permit a reduction in the creditor's secured claim to account for purely hypothetical costs of sale." *Huntington Nat'l Bank v. Pees*

*(In re McClurkin)*, 31 F.3d 401, 405 (6th Cir. 1994); *see also In re Jones*, 152 B.R. 155, 187 (Bankr. E.D. Mich. 1993) (“Even if it is appropriate to postulate a sale, § 506(a) does not direct the court to charge the costs of the sale to the creditor’s secured claim.”).

In short, basing the value of a lien on factors other than the collateral’s value (and the amount of senior liens) opens up a Pandora’s box of suppositions and speculations. Restricting the § 506(a) inquiry to the value of the collateral and the amount of liens encumbering the collateral, on the other hand, reduces the likelihood of litigation, and lowers the costs of litigating those disputes which do arise.

*Jones*, 152 B.R. at 188.

### III. CONCLUSION

For the foregoing reasons, the Court directs the following:

1. The fair market value of Debtors’ residential real property located at 280 Back Nine Drive, Baneberry, Tennessee, is \$175,000.00 against which, as of the March 10, 2017 petition date, Wells Fargo held a properly perfected, first priority lien in the amount of \$112,577.29, and Debtors are entitled to a \$25,000.00 homestead exemption. Debtors are not, however, entitled to a credit for any hypothetical liquidation costs.

2. After deducting the mortgage and homestead exemption from the value, RES-FL holds a secured claim against the Property in the amount of \$37,422.71, together with 5% interest, and holds an unsecured claim in the amount of \$106,075.26.

3. Because Debtors’ plan does not propose to pay the value of RES-FL’s secured claim, it does not comply with 11 U.S.C. § 1325(a)(5)(B)(ii), and confirmation is DENIED. Within fourteen days, Debtors may propose a new plan consistent with the findings in this Memorandum and Order. Failure to file a new plan or convert to Chapter 7 within fourteen days may result in dismissal of this case without further notice or hearing.

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