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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**SHANE D. MODERIE and
SHELLEY H. MODERIE,**

Debtors.

Case No. **19-60800-7**

ORDER

At Butte in said District this 18th day of February, 2020.

The Debtors commenced this case under Chapter 13 of the Bankruptcy Code on August 8, 2019.¹ Debtors filed a Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (“Form 122C-1”). ECF No. 16. Debtors’ Form 122C-1 reflected that Debtors’ current monthly income was \$9,974.06, and they have no dependents. Debtors voluntarily converted their case to Chapter 7 of the Bankruptcy Code on December 31, 2019. The Clerk entered a Deficiency Notice on January 2, 2020, advising Debtors that if the following item was not filed within 14 days, the case may be dismissed:

- Chapter 7 Statement of Currently Monthly Income and Means-Test Calculation – (Official Form B122A-1).

After Debtors failed to comply with the Court’s Deficiency Notice by either filing a Chapter 7 Statement of Currently Monthly Income and Means-Test Calculation or a motion to strike such requirement, as the debtors did in *In re Kellett*, 379 B.R. 332 (Bankr. D.Or. 2007), the Court entered an Order to Show Cause on January 22, 2020, directing Debtors to appear before the Court on February 13, 2020, and show cause why this case should not be dismissed for Debtors’

¹ Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all “Rule” references are to the Federal Rules of Bankruptcy Procedure.

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failure to comply with the Deficiency Notice. Debtors' counsel appeared before the Court on February 13, 2020, as directed. Debtors also filed a brief at ECF No. 61. That brief does not address, in the first instance, Debtors' failure to comply with the Deficiency Notice. No response or position was taken by either the Chapter 7 trustee or the United States Trustee ("UST").

The Deficiency Notice raises an issue, whether the means test applies in cases converted from Chapter 13 to Chapter 7. As of Spring 2019, at least 23 courts have addressed whether the means test applies to bankruptcy cases voluntarily converted from Chapter 13 to Chapter 7. *See* 3 Bus. Entrepreneurship & Tax L. Rev. 36, Harmonizing Conversion and the Means Test in Bankruptcy. According to the article:

These courts are divided, with a majority holding, for a variety of reasons that the means test applies to a converted case. A robust minority of courts have held, however, that the means test does not apply.

Id. This article's analysis highlights the problems with adopting either the majority or minority view.

The authors explain:

Courts adopting the view that the means test applies in converted cases uniformly concluded that, when a case is converted to another chapter, it is deemed filed under the destination chapter. As a result, each court found that treating the case as filed under Chapter 7 required it to apply the means test to determine whether the filing constituted abuse of the bankruptcy system.

Id. *See In re Perfetto*, 361 B.R. 27 (Bankr. D.R.I. 2007), *In re Kerr*, 2007 Bankr. WL 2119291 (Bankr. W.D. Wash. July 18, 2007), *In re Willis*, 408 B.R. 803 (Bankr. W.D. Mo. 2009) and *Pollitzer v. Gebhardt*, 860 F.3d 1334 (11th Cir. 2017). However, this view is difficult to reconcile with the clerk of court's duty under § 342(d) to give notice to creditors within ten days after the filing of the petition if a presumption of abuse had arisen. Conversion often occurs

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outside this ten day window.

Other courts employing a different rationale have concluded the means test does not apply when a case converts from 13 to 7. Generally, these courts:

. . . stress the inability of courts to apply the means test fairly when the debtor converts from Chapter 13 to Chapter 7 years after the initial bankruptcy filing. These cases point out that a calculation would require debtors to use outdated income figures in calculating their current monthly income and it would make it impossible for court clerks to timely comply with their obligations under § 342(d).

Id. Like the majority view, this view creates other interpretive problems, and is at odds with §§ 704(b)(1)(A), 707(b) and Rule 1019(2).

In this case, the Order to Show Cause is discharged and absent the UST, Chapter 7 Trustee or other party making this an issue, the Court will direct the Clerk's Office not to file a deficiency notice when a case converts from Chapter 13 to Chapter 7 and Form B122A is not included or completed.

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana