UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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November 30, 1999

Bruce J. Gering,
Assistant U.S. Trustee
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Sioux Falls, South Dakota 57102

James E. Carlon, Esq.
Counsel for Debtor
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Pierre, South Dakota 57501

Subject: *In re Richard M. Maier,*
Chapter 12; Bankr. No. 99-10177

Dear Counsel:

The matter before the Court is the United States Trustee's motion to dismiss this case on the grounds that Debtor does not qualify for Chapter 12 relief. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and attending orders shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor is not eligible for Chapter 12 relief. The case will be dismissed if Debtor does not voluntarily convert his case to a chapter under which he is eligible for relief.

FACTS. The parties have stipulated to the material facts. They will not be restated herein.

DISCUSSION. Debtor has the burden of proving he is eligible for relief under Chapter 12. *Tim Wargo & Sons, Inc. v. Equitable Life Assurance Society (In re Tim Wargo & Sons, Inc.)*, 869 F.2d 1128, 1130 (8th Cir. 1989). Several statutes combine to define a "family farmer" and a "farming operation." *See* 11 U.S.C. §§ 101(18), 101(19),101(21), and 109(f). Since 82% of Debtor's income derives from custom combining, the issue presented is whether Debtor is a "family farmer" "engaged in a farming operation" where the majority of his income is derived from custom harvesting and where Debtor is paid a fixed rate for these services.

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While various courts have reached differing conclusions on related issues, *see In re Van Air Flying Service, Inc.*, 146 B.R. 816, 817-18 (Bankr. E.D. Ark. 1992)(review of cases therein), the leading case in this Circuit is *Otoe County National Bank v. Easton (In re Easton)*, 883 F.2d 630 (8th Cir. 1989).

In *Easton*, the Court of Appeals held the debtors could not include certain rent payments they received from crop ground rented to another as income from a farming operation. *Easton*, 883 at 636. The test gleaned from *Easton*, as applied here, is whether Debtor, as a custom harvester, has "some significant degree of engagement in, played some significant operational role, or had an ownership interest" in the farming operations for which he harvested. *Id.* Stated in other words, as a custom harvester, is there "some indicia of involvement" by Debtor "in the farming activity which generates the income he seeks to have credited toward satisfaction of the income requirement" of § 101(18)(A)?[1] *Id.* at 635.

While Debtor may have had "some indicia of involvement" with the tenant to whom he rented his own land, *see State Bank of Towner v. Edwards (In re Edwards)*, 924 F.2d 798, 799 and 799 n.4 (8th Cir. 1991)(*very* brief discussion on "significant role" on land rented to another), there is no evidence that Debtor had any such involvement with all the farmers for whom he and his partner harvested grain. He was not cooperatively engaged in farming with these farmers, he did not have any operational or controlling role, and he had no ownership interest in their farms. Debtor and his partner received a flat, pre-set rate from the farmers for their services. Debtor's income from custom harvesting is no different from the non farm income generated by other service and product providers utilized by the farmer, such as the crop sprayer, seed dealer, and tire repairman. Thus, Debtor's $63,555.47 in custom harvesting income does not qualify as income from a farming operation owned or operated by him. *Van Air Flying Service*, 146 B.R. at 818. Since less than 50%, if any, of his total income of $77,107.97 in 1998 was from a farming operation, Debtor does not qualify for relief under Chapter 12.

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[1] Since the *Easton* decision, § 101(17)(A) has been renumbered to § 101(18)(A).

Debtor will be given ten days to convert to Chapter 11 or 13 if he is so eligible. Otherwise, the case will be dismissed.

The confirmation hearing set for December 7, 1999 will be canceled. If Debtor converts to a Chapter 11, a disclosure statement to accompany a plan will be needed. If Debtor converts to a Chapter 13, a different case trustee will need an opportunity to review the plan.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

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Total notices mailed: 7

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