UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

Gates Community Chapel of Rochester, Inc., d/b/a Freedom Village, USA, **BK. NO. 90-21729**

Debtor. **A.P. NO. 91-2036**

Gates Community Chapel of Rochester, Inc., **CHAPTER 11**

Plaintiff,

v. **DECISION AND ORDER**

Robert and Janet Graham,

Defendants.

BACKGROUND

This matter is before the Court for a decision on the April 16, 1992 motion of the United States Trustee's office, pursuant to Section 1112(b), to dismiss the Debtor's Chapter 11 case. Although Section 1112(b) provides for dismissal or conversion of a Chapter 11 case, whichever is in the best interests of creditors and the estate, a motion to convert is not proper in this case since the Debtor is an eleemosynary institution.

To dismiss a case pursuant to Section 1112(b) it must be established that there is cause. In this case the United States Trustee's office has alleged that there is cause in that subsections (1), (2) and (3) are applicable. Subsection (1) is that there has been continual loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation. Subsection (2) is that there is an inability of the debtor to effectuate a plan. Subsection (3) is that there has been unreasonable delay by the debtor that is prejudicial to creditors.

This matter was originally returnable and was argued by counsel before the Court on June 1, 1992. The papers of the United States Trustee's office in support of the motion and those of the

Debtor in response and opposition are detailed and extremely well done. Since the June 1, 1992 hearing the Court has received an eight-page letter from Pastor Fletcher Brothers, which I have read and provided a copy of to the United States Trustee's office. This letter was accompanied by a number of brochures about Freedom Village and three video tapes about Freedom Village, one of which I watched. I would like to state clearly for the record, particularly to Pastor Brothers, that **ex parte** communications with the Court are improper. I understand that this is an unusual situation where there is a lot of emotion, however, I am advising you that this Court does not wish to have these **ex parte** communications in the future. The Debtor has extremely competent counsel in this case and that counsel is more than capable of advising the Court as to everything it needs to know in connection with this case and it will do so with copies to all necessary parties such as the United States Trustee's office.

I will also note for the record that on June 5, 1992 the Debtor filed a plan of reorganization with this Court.

The office of the United States Trustee in its moving papers has set forth a number of matters of substantial concern to the office of the United States Trustee. These are also matters of great concern to this Court.

A critical concern is that the Debtor has incurred significant unpaid post-petition liabilities, something which is particularly frowned on by Bankruptcy Courts.

The Debtor's financial statements filed with the Court as of April 30, 1992 which if I am reading them correctly indicate that it has post-petition liabilities of in excess of $357,000 and that in March and April of this year its net revenue exceeded its operating expenses by approximately $30,000. The Court does note, however, that at approximately the same time in 1991, at the end of May, 1991, it has post-petition liabilities of in excess of $364,000 and had losses of in excess of $70,000 for the months of March and April, 1991.

The Debtor's response to the concern of the United States Trustee's office and the Court regarding continuing losses and unpaid post-petition indebtedness is that on a balance sheet basis, because of the reduction of debt during the course of the Chapter 11 and the acquisition or improvement of some of its assets, there has in fact not been a continuing loss or a diminution to the estate.

The United States Trustee's office has further asserted in its motion papers that the Debtor has failed to file a plan of reorganization and a disclosure statement in this case despite the fact that the case has been in this Court for in excess of 21 months and that there have been repeated promises at Section 341 meetings by the Debtor that a plan would be filed first by November 15, 1990 and then by December 1990, then by May 15, 1991 and finally by December 1991. However, as I have noted for the record, the Debtor now has filed a plan with this Court and a draft disclosure statement, and at the hearing on June 1, 1992 indicated that it could file a final disclosure statement within 30 days from that date.

In addition, the office of the United States Trustee in its moving papers has pointed out a failure by the Debtor to follow up on various items recommended by an examiner previously appointed by this Court; asserts that based on the Debtor's financial history in its Chapter 11 there is no reasonable likelihood that it is going to be able to fund any plan of reorganization through its current operation; and lastly asserts that the delay by the Debtor in being in this Court for over 21 months is unreasonable and prejudicial to creditors.

Based upon the Court's review of the papers submitted on this motion and the arguments of counsel on June 1, 1992, at this time the Court does not have sufficient evidence before it to find that although there may have been loss or diminution of the estate since the filing of the Debtor's Chapter 11 case that there is a complete absence of a reasonable likelihood of rehabilitation, which is a necessary finding under Section 1112(b)(1). The Debtor has filed a plan and believes that it can file a disclosure statement in a relatively short period of time. At this point the Court has not reviewed

the plan in enough depth to determine that it is not ultimately confirmable. Therefore the Court also cannot find at this time that there is an inability to effectuate a plan. Further, although there has been significant delay in this case, since the reasonableness of delay must be determined on a case-by-case basis in order to warrant dismissal and must also be prejudicial to creditors, the Court at this time is unable to find that there has been unreasonable delay or that such unreasonable delay has been prejudicial to the creditors given the uniqueness of this particular case.

Based on the foregoing, the Court hereby denies the motion of the United States Trustee's office, joined in by Watertown Savings Bank and the attorneys for Cirillo World Evangelism, Inc., without prejudice to further arguments being made in connection with this matter, and in fact the Court is continuing the motion of the United States Trustee's office without any further notice being necessary to be given to other than the Debtor, the Debtor's attorney, the official creditor's committee, Phillips, Lytle, Hitchcock, Blaine & Huber, as attorneys for Cirillo World Evangelism, Inc. and Watertown Savings Bank, as well as any other parties which hereinafter it may determine should receive such notice.

In connection with this ongoing motion for dismissal, it is the Court's intention to take a 15-minute break and thereupon reconvene in a Rule 7016 hearing whereby we will set forth time frames and guidelines for the future prosecution of this complicated case. Items to be determined will include: (a) a specific time within which a disclosure statement will be filed by the Debtor in connection with its filed plan; (b) a date by which a hearing for the approval of the disclosure statement must take place; and (c) the date by which a hearing on confirmation must be held. If any of these time lines are not met, which time lines can be changed only by further Court order, this case will be dismissed. As a further condition to this case not being dismissed, the Court will require that commencing with the month of June, 1992 and thereafter the Debtor will not increase its post-petition debt. I understand that this is an unusual situation, however, this Court cannot allow an entity to remain under the protection of this Court and continue to lose money.

In addition, at the Rule 7016 hearing to recommence in 15 minutes, we will address how existing post-petition indebtedness is to be paid as this case goes forward and what actions must be taken to accomplish that.

At the Rule 7016 hearing the only people to be in attendance will be representatives of the office of the United States Trustee, the attorney for the Debtor, Pastor Brothers and the Debtor's chief financial officer, and any other interested attorneys who request to be a part of the hearing and are authorized to do so by the Court.

In everything I have read from you, Pastor Brothers and from your supporters about Freedom Village there are strong sentiments of leadership and doing what is right. Today I am telling you that at this time for your organization to stay under the protection of this Court in Chapter 11 you must exercise the leadership to stay on the timetables that we establish and to finally accomplish your reorganization. As this Court has said on a number of occasions all that you get in Chapter 11 is time to reorganize and quite frankly your reorganization has had an extraordinary amount of time in this Court notwithstanding the unique facts and circumstances of your case. But the time has come that we must move forward.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: June 8, 1992