

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Original filed
March 17, 2000

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
) No. 98-32855DM
CONCORD MISSIONARY BAPTIST CHURCH,)
a California non-profit corporation) Chapter 11
)
Debtor.)
_____)

MEMORANDUM DECISION

I. Introduction

Hearings were held on March 1, 2, and 3, 2000, to consider confirmation of a Third Amended Plan Of Reorganization dated January 31, 2000, filed herein by Concord Missionary Baptist Church, a California non-profit corporation, the above-named debtor and debtor in possession ("Concord"). The Third Amended Plan Of Reorganization dated January 31, 2000, as orally amended during the course of the hearing (and as more particularly described below), will be described in this Memorandum Decision as the "Plan."

Concord appeared and was represented by Alfred D. Moore, Esq. Nicholas W. van Aelstyn, Esq. and Dale L. Bratton, Esq. three of its attorneys. Secured creditor Gross Mortgage Corporation

1 ("Gross"), on behalf of beneficiaries on the deeds of trust
2 securing notes secured by first, second and third deeds of trust
3 against Concord's property, and unsecured Leonard A. Gross
4 Professional Corporation, appeared and was represented by Gregory
5 S. Lyons, Esq., their attorney. Class 5 objecting creditors
6 Virginia Harris, Henry Harris, Irene Phillips and Mack Phillips,
7 and objecting Class 6 creditor Hattie Graves (collectively,
8 Harris, Phillips and Graves), appeared and were represented by
9 Darya Druch, Esq., their attorney; Stephen Johnson, Esq. appeared
10 on behalf of the United States Trustee; other appearances of
11 counsel for non-objecting parties were noted on the record.

12 Having heard the testimony and considered the documentary
13 evidence and the arguments of counsel, for the reasons discussed
14 below, the court will deny confirmation of the Plan; provided,
15 however, the court will confirm the Plan if Concord makes certain
16 specific modifications.

17 II. Background¹

18 Concord was founded in 1985. Its principal asset is, and its
19 principal activity takes place in, its church building at 6190
20 Third Street, San Francisco, California (the "Church"). Concord
21 is organized as a non-profit religious corporation under
22 California law, and is governed by its Constitution and By-Laws.
23 Its day to day operations are the responsibility of its pastor, as
24 guided by a Board of Trustees and its congregation.

25 When Concord built the Church, Gross provided some financing.
26 In addition, certain of Concord's members and former members
27 assert that they took out loans on their homes and used the
28 proceeds to support Concord's efforts to complete construction of

1 the Church. Those members and former members (collectively the
2 "Homeowners") contend that they hold secured claims against
3 Concord.²

4 Following defaults on the secured obligations Concord owed
5 Gross, and in response to an imminent threat of foreclosure of the
6 second deed of trust on the Church, Concord commenced this Chapter
7 11 case on June 30, 1998. Since then Concord has continued as
8 debtor and debtor in possession, no trustee having been appointed.
9 The Board of Trustees and Concord's designated representatives
10 continue to govern the affairs of Concord.

11 III. Plan Proceedings

12 On or about July 8, 1999, Concord filed a plan of
13 reorganization. That plan was subsequently amended and the
14 amended plan (the "Initial Plan") was accompanied by a Disclosure
15 Statement for Concord Missionary Baptist Church's Amended Plan Of
16 Reorganization dated September 10, 1999 (the "Initial Disclosure
17 Statement"). The Initial Plan contemplated Concord's merger with
18 Rose Olivet Missionary Baptist Church, a California non-profit
19 corporation ("Rose Olivet"). It further provided that the
20 reorganized entity ("Reorganized Concord") would be governed by a
21 Board of Deacons consisting of four members of the then current
22 Rose Olivet Board of Deacons and three members of the then current
23 Board of Trustees of Concord. The Initial Plan also contemplated
24 payment in full of allowed secured claims of the Homeowners, with
25 payments amortized over thirty years, fully due after ten years,
26 bearing an interest rate of 9% per annum.

27 On September 30, 1999, the court entered an order approving
28 the Initial Disclosure Statement and scheduled a hearing on

1 confirmation of the Initial Plan.

2 Rather than proceed with confirmation of the Initial Plan as
3 amended, Concord afforded other parties an opportunity to file
4 competing plans. Concord agreed that competing plans could be
5 suggested by its former members, regardless of whether they had
6 standing as parties in interest under applicable bankruptcy
7 principles. During the same interval while competing plans were
8 being considered, Concord negotiated with representatives of the
9 Homeowners and resolved the differences raised in the adversary
10 proceeding mentioned above. Some, but not all, of the Homeowners
11 agreed to a treatment of their claims that varied from the terms
12 of the Initial Plan. Concord also negotiated revised merger terms
13 with Rose Olivet, including a change in the composition and manner
14 of selection of the proposed members who would be appointed to the
15 Board of Deacons of Reorganized Concord.

16 After proposed competing plans were excluded from
17 consideration, Concord filed its Concord Missionary Baptist
18 Church's Third Amended Plan Of Reorganization dated January 31,
19 2000, having previously filed its Concord's Supplemental
20 Disclosure Re Second Amendment To Concord's Amended Plan Of
21 Reorganization dated September 10, 1999 and an Augmented Concord's
22 Supplemental Disclosure. On February 3, 2000, the court entered
23 its Order (1) Approving Concord's Supplemental Disclosure For Plan
24 Of Reorganization and (2) Setting Schedule For Confirmation
25 Hearing And Related Deadlines. Under the terms of the Third
26 Amended Plan Of Reorganization dated January 31, 2000, the
27 Homeowners (belonging to Class 5) were to be paid the aggregate
28 sum of \$500,000, with specific amounts proposed to be paid to each

1 member of such class. In addition, the Third Amended Plan Of
2 Reorganization dated January 31, 2000 indicated that the Board of
3 Deacons of Reorganized Concord would consist of three members
4 designated by Rose Olivet, three members designated by Concord,
5 and "... a seventh independent member selected by the six Rose
6 Olivet and Concord designees."

7 IV. Discussion

8 Gross objects to confirmation of the Plan on several grounds:
9 (1) the 9% interest rate proposed to be paid to Classes 1.1, 1.2
10 and 1.3 is not appropriate;³ (2) the thirty year amortization of
11 the claims in Classes 1.1, 1.2 and 1.3 is not fair and equitable,
12 particularly where those loans had originally been short term
13 loans and had matured as of the date of the bankruptcy; and (3)
14 the Plan is not feasible.

15 Phillips, Harris and Graves object, contending, inter alia:
16 (1) the Plan is not feasible financially and because of the
17 selection of the seventh member of the Board of Deacons; (2) there
18 is a disproportionate payment of claims to the Homeowners (Class
19 5); and (3) the Plan has not been accepted and an alternative plan
20 should be considered.⁴

21 **A. The Plan is feasible.**

22 The requirement of feasibility is found in 11 U.S.C.
23 § 1129(a)(11):⁵

24 Confirmation of the plan is not likely to be followed by the
25 liquidation, or the need for further financial
26 reorganization, of the debtor or any successor to the debtor
under the plan, unless such liquidation or reorganization is
proposed in the plan.

27 1. The Board of Deacons is properly constituted.

28 Objectors Harris, Phillips and Graves argue that the

1 selection of Concord's pastor to Reorganized Concord's Board of
2 Deacons violates the provision of Plan ¶6.7(a) which requires a
3 "seventh independent member" on the Board of Deacons of
4 Reorganized Concord. Despite that argument, the objectors
5 presented no evidence that the presence on the Board of Deacons of
6 the employed pastor of the Reorganized Concord impairs performance
7 under the Plan. The Initial Disclosure Statement contemplated
8 four representatives from Rose Olivet and only three from Concord;
9 the final Plan equalized the selection process of the persons who
10 would govern Reorganized Concord, with each merging church
11 selecting three of them. Those six people, during the course of
12 the confirmation hearing, selected as the seventh, Rev. Kenneth
13 Reece, Rose Olivet's present pastor. Representatives of Rose
14 Olivet believe that the Plan is feasible in that Reorganized
15 Concord will have the ability to service the Plan debt and meet
16 future operating expenses and to enhance its membership. They
17 make that competent and confident assertion fully aware of
18 Rev. Reece's role in Reorganized Concord. The insertion of the
19 word "independent" before the word "member" selected by the six
20 Rose Olivet and Concord designees will not doom the Plan.⁶

21 2. Payments to creditors under the Plan are likely to
22 be made.

23 The Plan is also feasible both from a direct financial point
24 of view in that Reorganized Concord will possess a strong balance
25 sheet and further in that the membership in Reorganized Concord is
26 likely to increase, thus enhancing its ability to raise funds in
27 the future through contributions, tithing, fund raisers, and the
28 like.

1 Presently Concord has \$80,000-\$90,000 cash on hand and Rose
2 Olivet has approximately \$700,000 on hand, together with its own
3 real property that is not presently carried on the balance sheet
4 but is worth at least \$360,000. While clearly Reorganized Concord
5 will need working capital and an appropriate reserve for normal
6 church operations, the evidence leads the court to find that, even
7 with a flat membership rate over the near-term, adequate reserves
8 will be maintained and the Plan payments will quite likely - if
9 not certainly - be made. Reorganized Concord will not likely need
10 further financial rehabilitation.

11 More importantly, the financial life-blood of Reorganized
12 Concord will come from a renewed vigor of its restored and
13 increased membership in the future. While it is true that during
14 this Chapter 11 case Concord has suffered a decline in membership
15 and a corresponding decline in revenue, it is the court's
16 considered view that the merger of this beleaguered and internally
17 fractured church-debtor, possessing a substantial equity in its
18 Church, with a healthy, stable church with a solid membership of
19 long-standing contributing members and significant financial
20 resources, is a union with great promise and potential. The
21 merger will likely create a synergy which will bring true the
22 predictions of several of the members of Rose Olivet and Concord's
23 leadership, that the membership will grow, the wounds in the
24 Church will heal, and the Reorganized Concord will not only be
25 able to make its Plan payments but, of equal if not greater
26 importance, will be able to serve the religious and spiritual
27 needs of its members in the future.

28 3. The merger will occur.

1 Rose Olivet is a corporation in good standing with the
2 Secretary of State of the State of California. In their
3 objections, Harris, Phillips and Graves questioned the very
4 existence of Rose Olivet but they have offered nothing to
5 contradict the unequivocal evidence that Rose Olivet exists and
6 possesses the legal ability to merge itself with Concord, with the
7 emerging and surviving entity being a healthy Reorganized Concord.
8 Further, while a proposed merger agreement between the two
9 churches has not been executed, the representations of counsel
10 (also unrebutted by the objectors) were that the merger agreement
11 would be signed once the Plan was confirmed. Based upon those
12 unchallenged representations, the court is completely comfortable
13 in determining that the merger of the two churches will occur.

14 **B. The plan has been accepted by the requisite majorities.**

15 Section 1129(a)(8) requires that all impaired classes accept
16 the plan. Impaired Classes 2, 4 and 4(a) have accepted. Class 3
17 did not vote. Its treatment - payment in full on a thirty year
18 amortization with a ten year balloon payable at 9% - is the same
19 being imposed upon Gross under the Plan and by this Memorandum
20 Decision.⁷ The member of Class 3 did not object and the court is
21 satisfied that the treatment is fair and equitable for the same
22 reason it is for the three sub-classes in Class 1. This is so
23 because of the feasibility of the Plan (see Part IV(A)) and the
24 fact that the merger of Rose Olivet and Concord will provide
25 substantially more assets to protect the member of that class if
26 there is a subsequent default in the payments.

27 Class 6 did not accept the Plan but the treatment is fair and
28 equitable as to it for the same reasons it is fair and equitable

1 as to Class 3, but with an increased interest rate of 1/2% over
2 that offered to Class 3. The feasibility and increased assets the
3 members of that class can look to are the same as pertain to
4 Class 3.

5 In the February 3, 2000 Order (1) Approving Concord's
6 Supplemental Disclosure, etc., the court relieved Concord of any
7 further solicitation of acceptances or rejections from classes of
8 claims and interests, since ballots had been submitted previously
9 in respect of the Initial Plan. Because the members of Class 5
10 had previously voted to reject the Initial Plan, the court
11 directed Concord to file a motion to permit certain of the
12 Homeowners who had rejected the Initial Plan to change their
13 ballots, to acceptances of the Third Amended Plan of
14 Reorganization dated January 31, 2000. Concord's Motion to Change
15 Certain Votes on Concord's Plan, filed as required by Rule
16 3018(a), was granted, without objection, during the confirmation
17 hearing.

18 Because the Third Amended Plan Of Reorganization dated
19 January 31, 2000 contemplated paying precise amounts to members of
20 Class 5, the court requested a modification so that a sum of
21 \$500,000 would be shared pro rata among allowed claims in Class 5.
22 Concord agreed, and as modified, the Third Amended Plan of
23 Reorganization dated January 31, 2000 became the Plan.

24 Although the change in treatment of the Homeowners in Class 5
25 appears to have a minimal impact on affected creditors, the court
26 required the members of Class 5 who had moved to change their
27 prior rejections to acceptances to reaffirm their acceptances of
28 the Plan. During the course of the hearing, counsel for certain

1 members of Class 5⁸ acknowledged on the record that their clients
2 reaffirmed their acceptances of the Plan. Subsequent to the
3 hearing the court was provided with a letter to Concord's counsel
4 from Chester McDuffie and Carrie McDuffie indicating their
5 acceptance of the Plan.⁹ Henry and Virginia Harris and Mack and
6 Irene Phillips, the remaining members of Class 5, reject the Plan.
7 After reconsideration of the foregoing acceptances and rejections,
8 Class 5 has accepted the Plan by a majority in number of votes
9 cast and by at least two-thirds in the dollar amount of claims
10 voting.¹⁰

11 The votes of the members in Class 8 are not necessary for
12 class acceptance.

13 While the court throughout the long history of this Chapter
14 11 case has appreciated the active involvement of the members of
15 Concord in the several hearings that have taken place, and
16 believes that the views of the members are extremely important,
17 the legal question that must be addressed is whether members of a
18 nonprofit religious organization hold an "interest" for purposes
19 of determining whether the plan has been accepted as required by
20 section 1129(a)(8). See, also, section 1126(d) ("a class of
21 interests has accepted a plan if such plan has been accepted by
22 holders of such interest ... that hold at least two-thirds in an
23 amount of the allowed interest...."¹¹

24 In Matter of Wabash Valley Power Association, 72 F.3d 1305
25 (7th Cir.1995), cert. denied, 519 U.S. 965, 117 S.Ct. 389, 136
26 L.Ed.2d 305 (1996) ("Wabash"), the Seventh Circuit held that
27 members of a non-profit debtor cooperative did not hold
28 "interests" in the debtor under the absolute priority rule,

1 because they did not participate in profits. The Chapter 11 debtor
2 in Wabash was a nonprofit cooperative formed for the purpose of
3 generating and transmitting electric power to its members; the
4 members were entitled to vote for the debtor's board of directors,
5 but had no ownership interest in the entity. The Seventh Circuit
6 pointed out that Chapter 11 is "primarily designed" for
7 profit-seeking enterprises, whereas

8 By design, "in a co-operative association the concept of
9 profit is inappropriate, because profit, in its
10 recognized economic sense, is the wage of the
11 entrepreneur, and in a co-operative there is no
12 entrepreneur." Emmanuel S. Tyson, Annotation,
13 Co-operative associations: rights in equity credits or
14 patronage dividends, 50 A.L.R.3d 435, 1973 WL 33833
15 (1995).

16 Wabash, at 1313. Since the members of the debtor in Wabash did
17 not "participate in profits, [they are] not owners in any usual
18 sense of the term." Id. The court noted that "almost the only
19 prerogative [the debtor's] Members share with shareholders in an
20 ordinary business corporation is the right to elect a board of
21 directors", id., and rejected a contention that such right gave
22 rise to or constituted an "interest" within the meaning of the
23 absolute priority rule.

24 The Wabash court concurred with the analysis and outcome of
25 In re Whittaker Memorial Hospital Association, 149 B.R. 812
26 (Bankr.E.D.Va.1993), a case involving a non-profit hospital; the
27 same result was reached for the same reasons in In re Independence
28 Village, Inc., 52 B.R. 715 (Bankr.E.D.Mich.1985), in which the
debtor was a non-profit organization operating a care facility for
the elderly. In re Eastern Maine Electric Cooperative, Inc., 125
B.R. 329 (Bkrtcy.D.Me. 1991), concerning a rural electric

1 cooperative, came to the opposite conclusion, on the basis that
2 the debtor's members had rights to recover patronage capital,
3 which the Court found to constitute an "interest" for purposes of
4 the absolute priority rule. In this district Judge Weissbrodt has
5 followed the reasoning and holding of Wabash in In re General
6 Ateamsters, Warehousemen and Helpers Union Local 890, 225 B.R. 719
7 (Bankr. N.D. Cal. 1998), holding that members and affiliates of
8 the debtor non-profit, unincorporated labor union did not hold any
9 interest in the debtor, as that concept is defined by the
10 Bankruptcy Code and case law.

11 While the foregoing authorities do not involve religious
12 organizations, the analysis is the same. The members of Concord
13 have a spiritual affinity with it and member support for
14 Reorganized Concord is critical to its success. Nevertheless, as
15 a matter of bankruptcy law their votes do not need to be
16 considered.

17 That being said, the court will not ignore the strong
18 feelings about the future of Concord that have been expressed
19 repeatedly by members and former members throughout the history of
20 this case. The court notes that by a slight majority the voting
21 members favor the merger with Rose Olivet. That fact is taken
22 into account in determining whether, as an overall matter, the
23 Plan is fair and equitable to all parties in interest. It is.
24 The debtor's ballot summary was optimistic in intimating that
25 members voted 40 to 30 in favor of the merger. A more careful
26 analysis suggests that at least one of the members whose vote was
27 tallied was inactive and at least three known members who voted to
28 reject the Plan did not have their ballots counted by Concord

1 because those ballots were incomplete. Even with those
2 adjustments, however, the membership has voted in favor of the
3 merger and the court should not frustrate those desires.¹²

4 **C. The interest rate proposed to be paid Classes 1.1, 1.2**
5 **and 1.3, is proper.**

6 Absent the consent of Gross as the agent for the
7 beneficiaries holding the claims in Classes 1.1, 1.2 and 1.3,
8 section 1129(b)(1) requires, inter alia, that as to non-accepting
9 classes the Plan must be "fair and equitable." One of the
10 elements of the fair and equitable standard is that the interest
11 rate payable on a deferred claim satisfy the standards articulated
12 in Farm Credit Bank of Spokane v. Fowler (In re Fowler), 903 F. 2d
13 694 (9th Cir. 1990) and United States v. Camino Real Landscape
14 Maintenance Contractors, Inc. (In re Camino Real Landscape
15 Maintenance Contractors, Inc.), 818 F. 2d 1503 (9th Cir. 1987).
16 Gross and Concord presented competing expert witnesses, Messrs.
17 Brooks and Evert, respectively. Of those two, the court finds Mr.
18 Evert's testimony far more convincing, based upon a number of
19 factors including the methodology applied by him, his experience
20 in providing such expertise in Chapter 11 cases, and his
21 familiarity and compliance with applicable Ninth Circuit
22 standards. Mr. Evert thoroughly examined the marketplace to
23 determine interest rates being charged by lenders specializing in
24 making loans to religious organizations in order to determine a
25 current market rate. Connecticut General Life Ins. Co. v. Hotel
26 Assocs. of Tucson (In re Hotel Assocs. of Tucson), 165 B.R. 470,
27 476 (9th Cir. BAP 1994). He also properly applied the formula
28 approach (Fowler, 903 F. 2d at 697-98) as a reasonable

1 alternative, beginning with a 6.15% base rate extracted from
2 treasury bill quotes, and then building upon that base by taking
3 into account several factors including the quality of the security
4 being afforded Gross, the rehabilitative Chapter 11 process
5 itself, the circumstances of the Church, the loan to value ratio
6 on the Church loans,¹³ and the risk to Gross' beneficiaries over
7 the life of the Plan.

8 In contrast, Mr. Brooks did not demonstrate the expertise
9 necessary to overcome the persuasive evidence presented by Mr.
10 Evert despite Mr. Brooks' own extensive experience as a mortgage
11 loan broker specializing in church loans. He lacked familiarity
12 with Chapter 11 and the standards articulated by the cases cited,
13 and he did not apply a convincing market rate analysis nor did he
14 offer a formula approach to determine the appropriate interest
15 rate for the purposes of section 1129(b)(1). Finally, his
16 testimony that junior secured creditors would charge higher rates
17 of interest, while possibly so in the market place, is belied by
18 the fact that Gross in this case represents three different loans,
19 the senior of which bears the highest interest rate and the junior
20 which bears the lowest interest rate, with the middle loan bearing
21 the mid-range interest rate.

22 From the foregoing the court finds that a 9% interest rate
23 payable to Classes 1.1, 1.2, and 1.3, particularly in view of the
24 low loan to value ratio on the loans secured by the Church, is
25 fair and equitable as that term is defined in section 1129(b)(1).¹⁴

26
27
28

1 D. The amortization of claims in Classes 1.1, 1.2 and 1.3
2 is not fair and equitable.

3 As discussed in Part IV, C above, the Plan's treatment of the
4 Gross entities must be fair and equitable. This is not determined
5 only by the interest rate, but also by the length of the Plan
6 term, particularly in light of the nature of the debt held by the
7 Gross entities to begin with, the loan to value ratio on the
8 Church and the amortization of the non-consenting secured claims.
9 The court acknowledges that these issues must be judged on a case
10 by case basis, and that extension of a debt of this nature
11 requires careful scrutiny Imperial Bank v. Tri-Growth Centre City,
12 Ltd. (In re Tri-Growth Centre City, Ltd.), 136 B.R. 848, 851
13 (Bankr. S.D. Cal. 1992).

14 That careful scrutiny involves consideration of many factors,
15 including the maturity of the Gross loans prior to bankruptcy; the
16 fact that they were very short-term loans at the outset; and the
17 fact that as noted above, Reorganized Concord is likely to
18 prosper.¹⁵ Mr. Evert's inquiry concerning the availability of
19 loans to financial institutions was extremely helpful in fixing a
20 fair interest rate based upon the other factors he considered and
21 the court has noted. However, his testimony did not convince the
22 court that as a general matter, long-term loans to churches are
23 standard or "market". As in In re Miami Center Assocs., Ltd., 144
24 B.R. 937 (S.D. Fla. 1992) (where the court noted the absence of
25 ten year hotel loans and concluded that a ten year payout was not
26 fair and equitable as to a dissenting creditor), the court here
27 believes that although thirty years loans may be available in the
28 religious financing sector of the market, it is equally likely

1 that that market requires maturity dates of a much shorter time.
2 Based upon the totality of the circumstances, including the need
3 to avoid shifting the entire risk of a failed reorganization onto
4 the dissenting creditor, (Tri-Growth, 136 B.R. at 852), the court
5 concludes that a straight thirty year amortization of the Gross
6 loans is inappropriate. It is not fair and equitable to Gross. A
7 thirty year amortization with a ten year maturity constitutes a
8 proper balancing of the interests, rights and risks undertaken by
9 the parties and would be fair and equitable to Gross. It also is
10 more consistent with the realities of the marketplace.

11 **E. The disclosure was and is adequate.**

12 In the revised cash flow projection Concord filed to support
13 feasibility it represented that vacant land owned by Rose Olivet
14 had an estimated land value of \$695,500, and that based upon a
15 wholly unsupported and speculative projection, a "... conservative
16 estimate of \$60,000 per unit (on an estimated thirty residential
17 units) for a land price to a developer, the land would be worth
18 not less than \$1,800,000." This statement is very incorrect.
19 First, as conceded by Concord, the lot presently is zoned for
20 twelve units not thirty. Next, Concord failed to provide
21 competent evidence of any value for Rose Olivet's vacant lot.
22 Gross presented an expert who estimated the value at \$360,000,
23 which the court finds to be the value of that lot for these
24 purposes.

25 An additional flaw in Concord's Supplemental Disclosure was a
26 statement that Concord presently was realizing an annual net
27 income of \$60,704, based upon on experience during the Chapter 11
28 case. This bold statement is undermined by the fact that

1 Concord's January 31, 2000 monthly operating report reflects a
2 cumulative net profit of approximately \$60,000 throughout the
3 Chapter 11 case. On an annualized basis, therefore, Concord's net
4 income is significantly lower than as set forth in its
5 Supplemental Disclosure.

6 Presented with the foregoing discrepancies, counsel for
7 Harris, Phillips and Graves argued that the overall disclosure of
8 Concord's affairs was inadequate and misleading, and that there
9 should be a revised disclosure statement and a resolicitation of
10 votes.

11 The court is troubled by the foregoing inaccuracies, and
12 under different circumstances and with a Chapter 11 case in a
13 different posture, might indeed require a new solicitation of
14 votes. However, the failure to state the value of the Rose
15 Olivet's lots may be more a failure of proof than a matter of
16 substance, and the court reaches the conclusions herein regarding
17 feasibility based upon the lower valuation of Rose Olivet's lot as
18 established by Gross' expert.

19 As to the operating income, the uncontroverted evidence is
20 that the merged churches will enjoy significant economies with
21 certain operating expenses eliminated and the potential for both
22 gross and net income enhanced. Stated otherwise, because the Plan
23 is feasible primarily because of the strong financial contribution
24 by Rose Olivet (in cash and in real property), Concord's
25 understatement of annual income is of no serious consequence.

26 The court reaches the above-conclusions at the risk of giving
27 the impression of condoning misstatements in disclosure
28 statements. That is not the case at all. Rather, based upon a

1 thorough examination of the totality of circumstances presented by
2 the two merger partners and the pressing need to end this Chapter
3 11 case and let Reorganized Concord get on with being a church,
4 the court believes that the misstatements can be excused. A
5 resolicitation of votes would produce exactly the same results.
6 First, Class 5's treatment is completely independent of any
7 valuation of Rose Olivet's real property or Concord's contribution
8 of net income because it shares in a fund of \$500,000 coming
9 principally from Rose Olivet. Class 6, having already rejected
10 the Plan, would presumably do likewise upon resolicitation. The
11 same would be expected from for Classes 1.1, 1.2, and 1.3. Next,
12 Classes 2, 4 and 4(a) would likely accept the Plan again, but even
13 if they did not, the Plan could be confirmed under section 1129(b)
14 for the reasons stated above in Part IV, B. Finally, counsel for
15 Harris, Phillips and Graves argues that clarifying this misleading
16 information concerning Rose Olivet's land values and Concord's
17 earnings requires a resolicitation of votes of the members of
18 Class 8. That would be an idle act, as those votes are not
19 necessary as a matter of law. See Part IV, B.

20 V. Disposition

21 Because of the objections of Gross regarding the 30-year
22 amortization of its loans the court has determined that the Plan
23 may not be confirmed. However, for the reasons stated above, the
24 court will confirm a revised plan that incorporates the terms and
25 conditions of the Plan but provides for a balloon payment for the
26 members of Classes 1.1, 1.2 and 1.3 at the end of ten years from
27 the Effective Date of the plan. If Concord is prepared to make
28 such a modification it should submit a revised Fourth Amended Plan

1 Of Reorganization that treats the foregoing classes in that manner
2 and memorializes the corrected treatment of Class 5 consistent
3 with the matters discussed on the record at the hearing on
4 confirmation. That Fourth Amended Plan,¹⁶ together with a proposed
5 order confirming it and an order dismissing the adversary
6 proceeding against the Homeowners, should be submitted to the
7 court and served upon counsel for Gross and objecting creditors
8 Phillips, Graves and Harris no later than 14 days from the date of
9 service of this Memorandum Decision. The court will hold the
10 Fourth Amended Plan Of Reorganization and the proposed orders for
11 seven days in order to give the objecting parties an opportunity
12 to file and serve any objections they may have.

13 If Concord does not elect to submit a Fourth Amended Plan Of
14 Reorganization by the deadline above, the court will hold a status
15 conference in this Chapter 11 case on April 20, 2000 at 1:30 P.M.

16 Counsel for Concord should comply with B.L.R. 9021-1 and
17 B.L.R. 9022-1.

18 Dated: March 17, 2000

19

Dennis Montali
United States Bankruptcy Judge

21

22 1. The following discussion constitutes the court's findings of
fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

23 2. During the Chapter 11 case, Concord initiated an adversary
24 proceeding against the Homeowners to determine the nature, extent
and validity of their liens and the amounts, if any, owed to them.

25

26 3. In its original Opposition To Plan Confirmation, Gross and
Leonard Gross Professional Corporation (an unsecured Class 6
27 claimant) also objected that the plan unfairly classified the
three secured claims represented by Gross in one class, thus
discriminating unfairly among the three members of that class.
28 Concord acknowledged the technical flaw in the structure of the

1 Third Amended Plan Of Reorganization filed January 31, 2000, and
2 has agreed to reclassify the three secured creditors as indicated
above.

3 4. The written objections by these parties contain other
4 allegations which pertain to events not material to the
confirmation issues and which will not be addressed here. To the
5 extent that those allegations constitute objections to
confirmation of the Plan, they are overruled as having no merit.
6 The objections also challenge the adequacy of disclosure, which is
discussed in Part IV, E.

7 5. Unless otherwise indicated all chapter, section and rule
8 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

9 6. During the confirmation hearing counsel for Phillips, Harris
10 and Graves made an argument to the effect that the court could not
approve the composition of a Board of Deacons, as that was a
11 matter of religious governance. While the court agrees that it
cannot interfere with religious matters, Reorganized Concord will
12 be, as Rose Olivet and Concord are, California nonprofit religious
corporations that are to be governed in accordance with the
13 provisions of applicable California law. Section 1129(a)(5)(A)
requires disclosure of the identity of individuals who will serve
14 as directors, officers or voting trustees of the debtor. Whether
those persons are called "trustees" "deacons" or something else,
15 the court has no authority to approve the selection of those
persons, but only to require the disclosure of them. That
16 disclosure is adequate and the court will leave to Reorganized
Concord how it designates its governing leaders.

17 7. See Part IV(D), *infra*.

18 8. Harvey and Patricia Collins, Willie B. Jones, Jill McGowan,
19 Katherine Mickels, Charley and Cloroneza Norris and Vinnie Mae
Watson.

20 9. A copy of that letter has been placed in the court's file.

21 10. The objection of Harris, Phillips and Graves that members of
22 Class 5 are not similarly treated, is without merit. Members of
that class share pro rata, based on allowed claims. See section
23 1123(a)(4).

24 11. While the court concludes that votes of the members of
Concord need not be counted, even if the members intend to reject
25 the Plan, the Plan could be confirmed as a matter of law. At least
one class of impaired claims has accepted the Plan, as required by
26 section 1129(a)(10), and no class junior to the members (Class 8)
will retain or receive anything. See section 1129(b)(2)(C)(ii)).

27

28

1 12. Three minors who are members of Concord submitted ballots
2 that Concord's counsel counted; despite arguments by counsel for
3 Harris, Phillips and Graves that those votes should not be
4 counted, there was no proof that adulthood is required to vote as
5 a member of a Baptist Church.

6 13. The only evidence of the Church's value is the Wycoff
7 appraisal, fixing the value at \$2,125,000. By stipulation, Gross
8 and Concord agreed that the amount of the Gross secured claims as
9 of confirmation is \$1,250,000. Those two figures produce a
10 blended loan to value ratio of 58.8%.

11 14. Because of that low loan to value ratio and the decreasing
12 interest rates on the existing notes held by these classes, the
13 application of the same interest rate to all these classes is also
14 fair and equitable.

15 15. The San Francisco real estate market is also is likely to
16 appreciate, although no one can predict either a natural
17 catastrophe such as another earthquake or a financial setback such
18 as a decline of real property values.

19 16. The Fourth Amended Plan Of Reorganization should be
20 accompanied by a blacklined copy, compared against the Plan.

21
22
23
24
25
26
27
28