IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
KINDRED HEALTHCARE, INC.,	)	Case Nos. 99-3199 (MFW) to
f/k/a VENCOR, INC., et al.,	)	99-3327 (MFW)
	)	
Reorganized Debtors.	)	(Jointly Administered Under
	)	Case No. 99-3199 (MFW)

OPINION[1]

This matter is before the Court on the Motion of the United States Trustee ("UST") for an Order compelling the Debtors to file amended monthly operating reports and to pay delinquent quarterly fees. The Debtors have opposed the Motion and the parties have cross moved for summary judgment. For the reasons set forth below, we grant the Motion.

I. FACTUAL BACKGROUND

On September 13, 1999, Kindred Healthcare, Inc., f/k/a Vencor, Inc., and its 128 direct and indirect subsidiaries (collectively "the Debtors") filed voluntary petitions for relief under chapter 11. On that day, the Debtors filed, inter alia, a motion for approval of their cash management system ("the Cash Management Motion") which was granted. The Debtors had established that system many years before the chapter 11 filing

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

to provide for the centralization of the Debtors' collections and disbursements. As a result of that system, the ultimate parent of the Debtors (now known as "Kindred") consolidated all operating revenues of the Debtors and made all disbursements.

The Debtors operated their businesses and managed their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Subsequent to the filing of their chapter 11 petitions, the Debtors filed consolidated monthly operating reports. Based on those reports, the UST billed the maximum quarterly fee for Kindred ($10,000) and the minimum fee ($250) for all the other Debtors. During the course of the chapter 11 cases, the Debtors have paid over $500,000 in UST fees.

Shortly before confirmation of the Debtors' plan of reorganization, the UST advised the Debtors that the methodology by which the quarterly fees had been calculated was incorrect and, consequently, asserted that additional fees were due. As a result, the UST filed an objection to confirmation. The parties agreed to resolve this issue by separate motion and an Order confirming the Debtors' Plan was entered on March 19, 2001.

In its Motion, the UST asserts that the quarterly fees should have been calculated on the disbursements made on behalf of each individual Debtor rather than on a consolidated basis. The Debtors disagree, arguing that since Kindred paid all the

Debtors' expenses, it alone should pay the quarterly fees on those disbursements. If the UST's method of calculating the quarterly fees is accepted, the Debtors assert that they will owe in excess of $3 million in additional fees to the UST.

II. JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (B) & (O).

III. DISCUSSION

We recently addressed many of the same issues raised here by the Debtors in their opposition to the UST's Motion. See, e.g., In re Charter Behavioral Health Sys., LLC, 292 B.R. 36 (Bankr. D. Del. 2003). In that case, we concluded that "the plain language of the statute supports the UST argument that the word disbursement includes, as to the individual Debtors, the payment of their operating expenses. . . . [T]he majority [of courts] have ruled that 'disbursements' include all payments made by or for a debtor, regardless of the source of payment." Id. at 45. Therefore, we concluded that, in the absence of substantive consolidation, each debtor must pay quarterly fees based on the disbursements made in the quarter to satisfy that debtor's obligations, even if all the disbursements were made through a

centralized cash management system by one debtor alone. The Debtors seek an exception to that ruling for several reasons.

A. Inability to Calculate the Fee

The Debtors assert that their cash management system does not have the capability of determining the amount of disbursements on a Debtor by Debtor basis and, therefore, the Debtors should be excused from doing so. The Debtors have submitted an affidavit from their Corporate Director of Accounts Payable stating that it would require a modification of their computerized accounting system and an enormous expense (in excess of $300,000) to allocate the disbursements among the Debtors.

The UST argues that the Cash Management Motion itself sheds doubt on the Debtors' belated assertions that they cannot determine the amount of disbursements on a Debtor by Debtor basis. In that Motion, the Debtors represented that "[a]ll Facility deposits into shared Depository and Sub-Concentration Accounts are electronically encoded with the facility identification number. All health insurance receipts from governmental entities that are paid directly into Concentration Accounts are accompanied by sufficient information to allow allocation of the amount received among the Facilities which provided covered service, and therefore among the Debtors to which such Facilities relate." (Cash Management Motion at ¶13(e).) Similarly, the Cash Management Motion stated that "The

general ledger systems employed by the Debtors allow for disbursements from the Concentration Accounts, A/P Disbursement Accounts and Payroll Accounts to be properly allocated among the Facilities or other Vencor operations on whose behalf payments are made, and therefore among the Debtors to which such Facilities or other operations relate." (Id. at 13(i).) Thus, the UST argues that under the doctrine of judicial estoppel the Debtors cannot now, years later, assert that they are unable to determine disbursements on a per Debtor basis.[2]

The doctrine of judicial estoppel prevents a party from taking a position in litigation that is inconsistent with its prior position. The elements of judicial estoppel are:

> (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact, rather than law or legal theory; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently.

Devan v. CIT Group/Commer. Servs., Inc. (In re Merry-Go-Round Enters.), 229 B.R. 337, 345 (Bankr. D. Md. 1999), citing Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 292 (4th Cir. 1998). See also In re Home Health Corp. of America, Inc., 268 B.R. 74, 78 (Bankr. D. Del. 2001).

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[2] The UST also asserts that tax information provided by the Debtors similarly suggests that the Debtors have operating information on a Debtor by Debtor basis.

We agree with the UST that the doctrine of judicial estoppel prevents the Debtors from now asserting that they cannot allocate their disbursements on a Debtor by Debtor basis. In their Cash Management Motion, the Debtors represented to this Court that they were able to account for transactions on a Debtor by Debtor basis. These representations were factual, not legal. Our ruling on the Cash Management Motion was predicated on those representations. It is well-established that approval of a centralized cash management system would not be approved in this Court without such representations.[3] Accordingly, there can be no suggestion that the representations made by the Debtors in the Cash Management Motion were unintentional or inadvertent. As a result of these representations, the Debtors were authorized to continue using their centralized system without opening new debtor-in-possession accounts for each Debtor. Having obtained this advantage by making these representations, the Debtors are now precluded from asserting that they are unable to allocate their disbursements among the various Debtors.

Even if the Debtors were not judicially estopped, we would still reject their argument. The statute provides no basis for the position that only the Debtor which makes the disbursements

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[3] We also require a representation that the debtors are able to distinguish between pre and post-petition transactions in their centralized accounting system, to avoid the payment of any pre-petition claim without prior court approval.

is required to pay the quarterly fees. Each of the Debtors is a separate legal entity in a separate bankruptcy case. This Court approved the joint administration of their cases for procedural purposes only. Accordingly, each Debtor must comply with the Bankruptcy Code and Rules. The Order granting the Cash Management Motion did not excuse the Debtors from the requirement that they each comply with the Bankruptcy Code and Rules. Therefore, we conclude that the cost associated with complying with the requirements of the Code is an insufficient reason to excuse such performance.[4]

B. Accounting System Not Designed to Avoid UST Fees

The Debtors also argue that Courts interpreting "disbursements", as used in section 1930(a)(6), conclude that this term should be defined in a manner which prevents debtors from manipulating their accounting systems to avoid fees. The Debtors contend that this purpose is not served in this case because the Debtors' centralized cash management system had been in place for many years before they filed their chapter 11 petitions.

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[4] The UST also questions the conclusions drawn by the Debtors from the assertions in the Debtors' affidavit. The affidavit states that each of the Debtors maintains separate general ledgers, from which the UST asserts the Debtors surely should be able to determine whose expense was being paid without significant additional costs or modification of their computer system. We find it unnecessary to address this factual issue, since we conclude that additional cost to the Debtors is not an excuse for failure to comply with section 1930(a)(6).

This issue was raised in the Charter case as well. The Charter debtors continued to use the same cash management system that they had used for many years pre-petition. Furthermore, there was no suggestion that they were using the system simply to avoid or reduce the UST quarterly fees. We nonetheless concluded that "that is irrelevant; the fact is that the Debtors are avoiding the payment of UST fees, whether it was intended or not." Id. at 22. See also, In re Pars Leasing, Inc., 217 B.R. 218 (Bankr. W.D. Tex. 1997)(finding that third party's payment of certain expenses constituted disbursements of the debtor although the arrangement had been in place pre-bankruptcy).

We similarly conclude in this case that the fact that the Debtors' cash management system has been in place for many years is irrelevant. Section 1930(a)(6) requires payment of fees based on disbursements made on a per Debtor basis.

C. Section 1930(a)(6) Is Constitutional as Interpreted

The Debtors lastly argue that our interpretation of section 1930(a)(6) is unconstitutional as applied to these Debtors. The Debtors assert that our interpretation of the statute would result in an impermissible taking of the Debtors' property in violation of the Fifth Amendment to the Constitution. The Fifth Amendment bars the taking of private property by the government without just compensation. U.S. Const. amend. V. The Debtors argue that, since it is presumed that Congress enacts legislation

consistent with the Constitution, we must interpret section 1930(a)(6) to require fees only from the Debtor that wrote the check, rather than from the Debtors whose expenses were paid by that check. See, e.g., Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 290 (2001)("if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statue is 'fairly possible,' [courts] are obligated to construe the statute to avoid such problems").

The Debtors argue that by imposing additional fees in excess of $3 million, the United States is taking their property without just compensation. They argue that the UST cannot establish that the benefits provided by the UST to these Debtors are worth an additional $3 million. The Debtors argue that such a fee clearly exceeds the costs incurred by the UST program monitoring the Debtors' cases. As such, the Debtors argue that the fees sought are not a fair approximation of the benefits conferred and thus are an unconstitutional taking of the Debtors' property.

The UST responds that the statute enjoys a presumption of constitutionality and that the burden is on the Debtors (not the UST) to prove otherwise. See, e.g., Mistretta v. United States, 488 U.S. 361, 384 (1989). Further, the UST argues that the determination of whether a user fee is excessive does not depend on the specific facts of any individual case. See, e.g., United

States v. Sperry Corp., 493 U.S. 52, 60 (1989)("This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services."). Rather, the UST argues that the Constitution simply requires that the fee charged by the Government be a "fair approximation of the cost of benefits supplied." Massachusetts v. United States, 435 U.S. 444, 463 n. 19 (1978).

We conclude that the Debtors' constitutional argument is without merit. The quarterly fees which the UST seeks are user fees, that is, fees associated with the Debtors' use of the bankruptcy judicial system. See, e.g., United States Tr. v. Gryphon at Stone Mansion, 166 F. 3d 552, 554 (3d Cir. 1999)("Historically, § 1930(a)(6) set forth a scheme to impose the costs of the United States Trustee Program on its users"); In re Postconfirmation Fees, 224 B.R. 793, 795 (E.D. Wa. 1998)(UST system was to be self-funded whereby users, rather than the general public would pay for cost); In re Gates Cmty. Chapel of Rochester, 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997)(UST system is fee, not a tax, as it is a benefit shared only by debtors rather than the public at large).

Congress adopted the fee schedule in section 1930(a)(6) to assure that the UST system was self-funded. (HR Rep No. 764,

99th Cong. 2d Sess. 26 (1986).) In doing so, Congress assumed that larger cases tax the UST system more than smaller cases and that the size of the case can be determined by the amount of disbursements made by the particular debtor. Id. Both assumptions are logical. Further, Congress stated that it would "monitor the self-funding mechanism as it operates" to assure that the fees collected are sufficient to cover the costs of the UST program. Id. In fact, Congress did amend the fee schedule to increase the quarterly fees effective December 27, 1991. See Pub L 102-140, 105 Stat 782 (October 28, 1991).

Consequently, we conclude that the formula adopted by Congress does calculate the "fair approximation of the cost of benefits supplied" to these Debtors by the UST system. Massachusetts v. United States, 435 U.S. at 463 n. 19. A more precise calculation of the benefit on a case by case basis is not required. See Sperry, 493 U.S at 60 (concluding that "the amount of a user fee [need not] be precisely calibrated to the use that a party makes of Government services").

Further, it was not inappropriate for Congress to mandate the use of a percentage user fee. Id. at 62 (charge of 1.5% of any award received was not impermissible fee for use of Iran-United States Claims Tribunal). Although the lower court in Sperry had concluded that the percentage fee was an impermissible taking, the Supreme Court held that the fee was "not so clearly

excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee." Id.

Under section 1930(a)(6), the user fees range from $250 to $10,000 depending on the disbursements made in the quarter by the debtor. This represents .16% to 3.3% of disbursements for all categories except the minimum and maximum fee. Such a fee scheme is not so excessive as to be unconstitutional. Here, the Debtors focus on the dollar amount of the fee being assessed against them (which they assert is in excess of $3.5 million). However, the fee is not outrageous when considered as a percentage of the Debtors' disbursements.[5]

The Debtors also argue that the fee is excessive when the number of hours actually expended by the UST on this case is considered. Although the UST has not provided the Debtors with an analysis of the amount of time spent on this particular case, the Debtors estimate that it is no more than 400 hours. With this estimation, the Debtors contend that permitting the collection of over $3.5 million in fees would equate to an hourly rate of $8,750 for UST personnel. When asked to confirm this

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[5] While the minimum fee of $250 could be in excess of 100% of disbursements, in cases where there are no disbursements, the Debtors have not argued that the minimum fee is excessive. In fact, the Debtors argue that all the Debtors, except the parent Debtor, should be charged only the minimum quarterly fee.

estimate, the UST stated it was unable to calculate how many hours it had spent on this or any other case. The Debtors assert that, since the facts regarding this issue are solely within the knowledge of the UST, we must make a negative inference that the fees requested far exceed the time expended. See, e.g., U. S. v. Denver & Rio Grande R.R. Co., 191 U.S. 84, 92 (1903)("where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party").

Even if we were to assume this fact, we still would not conclude that the fee requested is excessive. The Supreme Court has stated that the government need not precisely determine the exact cost on the system that the fee is to cover. Sperry, 493 U.S. at 60. Congress need only establish a fee system that makes a reasonable approximation of what it will cost. Id. Guided by Sperry, we conclude that, by basing the fee on a portion of a debtor's disbursements, Congress constructed a reasonable approximation of the costs borne by the UST in doing its job. It need do no more. Therefore, we conclude that section 1930(a)(6) of title 28 is constitutional as we have interpreted it in the Charter case.

IV. CONCLUSION

For the foregoing reasons, we grant the UST's Motion for an Order compelling the Debtors to file amended monthly operating reports and to pay delinquent quarterly fees.

An appropriate Order is attached.

BY THE COURT:

Dated: October 9, 2003

Mary F. Walrath
United States Bankruptcy Judge

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	)	99-3327 (MFW)
Debtor.	)	
	)	(Jointly Administered Under
	)	Case No. 99-3199 (MFW))

O R D E R

AND NOW, this **9th** day of **OCTOBER, 2003**, upon consideration of the Motion of the United States Trustee ("UST") for an Order compelling the Debtors to file amended monthly operating reports and to pay delinquent quarterly fees and the Debtors' opposition thereto, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion is **GRANTED**; and it is further

ORDERED that the Debtors shall file corrected monthly operating reports reflecting disbursements made on account of each Debtor's operations and shall pay the appropriate quarterly fees due by each Debtor as a result.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

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