

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Posting

Will this Order be Published? Yes

Bankruptcy Caption: *In re* Thomas Robert Leavens

Bankruptcy No.: 21 BK 12369

Adversary Caption: N/A

Adversary No.: N/A

Date of Issuance: April 1, 2025

Judge: Jacqueline P. Cox

Appearance of Counsel:

Cindy M. Johnson, Johnson Legal Group, LLC counsel for the movants

Kevin B. Salam, counsel for creditors, Brent Duke and 21 Century Smoking, Inc.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

In re:)	Chapter 7
)	
Thomas Robert Leavens,)	Case No. 21-12369
)	
Debtor.)	Hon. Jacqueline P. Cox
)	

**Order on Amended Motion for Relief from Judgment (BK Dkt. 89) and
Motion to Enforce District Court Order for Transfer of Claims 3-1 and 4-1 (BK Dkt. 102)**

At issue herein is essentially a dispute between creditors regarding the proper disposition of funds from a settlement of a malpractice claim against the Debtor. The dispute involves the Chapter 7 Trustee (the “Trustee”) and two creditors, Brent Duke and 21 Century Smoking, Inc. (collectively, “Duke/21”). Brent Duke and 21 Century Smoking, Inc. are defendants in an ongoing district court case that was commenced in 2012. Here, Duke/21’s malpractice attorney, Attorney Kevin B. Salam, argues that he holds an attorney’s lien on a portion of the settlement funds. However, other parties in the district court case assert they are entitled to the funds through an assignment.

I. Jurisdiction

The court has jurisdiction over this matter under 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the U.S. District Court for the Northern District of Illinois. This matter is a “core” proceeding under 28 U.S.C. § 157(b)(2)(A), matters concerning the administration of the estate, and § 157(b)(2)(K), determinations of the validity, extent, or priority of liens.

Note that other courts have reached different conclusions regarding jurisdiction, although this court finds such cases are distinguishable. In *Keefe, Anchors & Gordon PA v. ASI Holding Co., Inc.*, 598 B.R. 20, 26 (N.D. Fla. 2018), the court found that post-confirmation, the bankruptcy court lacked jurisdiction under § 157(b)(2)(K) to adjudicate charging liens sought by a third-party against

a creditor after the settlement proceeds were distributed, since the action would not have a conceivable effect on the debtor, other creditors or the administration of the bankruptcy estate.

On a similar vein, another bankruptcy judge held that where a creditor claimed an attorney's lien or an equitable lien in proceeds owed to his former client (another creditor), the matter was "a matter to be taken up by the state courts" *In re Rosebud Farm, Inc.*, 660 B.R. 222, 235, 237-39, 272-74 (Bankr. N.D. Ill. 2024) (citations omitted).

Here, the settlement proceeds at issue arise from a post-petition settlement between the Chapter 7 Trustee (on behalf of the Debtor) and two creditors (Duke/21), although the sanctions that gave rise to the malpractice settlement at issue were entered pre-petition. Moreover, post-petition, after Mr. Salam's lien was adjudicated in bankruptcy court without any objections from interested parties, the district court assigned Duke/21's "rights and interests to anything of value" that Duke/21 would receive from the bankruptcy proceeding to other creditors. It is the post-petition settlement between the Trustee and two creditors, as well as the post-petition assignment of these creditors' claims to other creditors that makes this case distinguishable.

Similarly, another court found that there was subject-matter jurisdiction under 28 U.S.C. § 157(b)(2)(A) to hear a dispute between creditors and their attorney regarding their attorney's charging lien on bankruptcy estate assets because it involved the court's determination of who was to receive a distribution of estate assets. *In re LaRosa*, 449 B.R. 258, 260-62 (Bankr. N.D. W. Va. 2011) (citations omitted). In *In re La Rosa*, the court also found there was jurisdiction under § 157(b)(2)(K) because "[a] claim of an attorney's charging lien in proceeds held for distribution by the bankruptcy estate require[d] the court to determine the validity, extent, or priority of liens in property being held by the bankruptcy estate." 449 B.R. at 262 (citations omitted). The court

reasoned that “[b]ankruptcy courts routinely resolve the conflicting interests of secured creditors in estate property, and the court can discern no significant difference when the conflicting interests in estate property are between the lien interests of a creditor and the creditor’s attorney.” *Id.*

II. Background

Pre-petition, on September 7, 2012, an e-cigarette company, DR Distributors, LLC (“DR”) sued another e-cigarette company, 21 Century Smoking, Inc. (“21”), in the U.S. District Court for the Northern District of Illinois for trademark infringement, counterfeiting, false designation of origin, and unfair competition under the Lanham Act, 15 U.S.C. §§ 1051–1127. *See* Complaint (Dkt. 1), ¶¶ 1, 7, 9, 25-30, *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-cv-50324 (N.D. Ill. filed Sept. 7, 2012).¹ DR also brought supplemental state law claims against DR for common law unfair competition and violation of the Illinois Deceptive Trade Practices Act, 815 ILCS 510/2. *See* Complaint (Dkt. 1), ¶¶ 59-70; *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-CV-50324, 2024 WL 2846035, at *2 (N.D. Ill. June 5, 2024); and Mem. Opinion & Order (Dkt. 626).

When the litigation commenced, DR owned the registered trademark “21ST CENTURY SMOKE” and had filed a trademark application for the mark “SMOKE THIS BY 21ST CENTURY SMOKE.” Complaint (Dkt. 1), ¶¶ 9-15. 21 formerly had the trademark “21 CENTURY SMOKING,” which it used as a trade name. Complaint (Dkt. 1), ¶¶ 9, 13; Answer & Counterclaim (Dkt. 8), pp. 22, 29, ¶¶ 5, 43. The parties agree that the marks are confusingly similar. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-CV-50324, 2024 WL 2846035, at *2 (N.D.

¹ All references to the “Dkt.” refer to filings in the district court case, *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-cv-50324 (N.D. Ill. filed Sept. 7, 2012).

Ill. June 5, 2024).

On October 3, 2012, 21 filed counterclaims for trademark infringement, unfair competition, deceptive trade practices, and cancellation of DR's 21st CENTURY SMOKE mark and its application for the mark SMOKE THIS BY 21st CENTURY SMOKE based on 21's alleged prior use, and thus senior right to the 21 CENTURY SMOKING mark. Answer & Counterclaim (Dkt. 8), pp. 22-30, ¶¶ 5-46; Order (Dkt. 80), p. 3.

In 2012, the Debtor, Thomas R. Leavens (the "Debtor") of the law firm Leavens, Strand, Glover & Adler, LLC filed an appearance as the lead attorney for 21; he filed an appearance as the attorney for Duke in 2013. Appearance (Dkt. 6); Appearance (Dkt. 39).

As will be pertinent later in this opinion, before the trademark action was commenced, Duke obtained an insurance policy for himself and 21.² Duke/21's counsel in the trademark case are *Peppers* counsel because Duke's insurance company is defending Duke/21 under a reservation of rights. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 879 n.18 (N.D. Ill. 2021).³ Starting in 2013, the Debtor Leavens' fees incurred from representing Duke/21 in the trademark action were paid by Duke's insurance company, up until the Debtor Leavens withdrew. See Defs.'/Counterclaimants' Local Rule 56.1 Statement of Additional Facts (Ins. Dkt. 116), Ex.

² All references to the "Ins. Dkt." refer to filings in the case Duke's insurance company filed against Duke and 21, *Diamond State Ins. Co. v. Duke*, Case No. 1:14-cv-07764 (N.D. Ill. filed Oct. 6, 2014).

³ In the trademark matter, Duke's insurance contract is the basis for Duke/21's insurance company's duty to defend Duke and 21. *Pepper Const. Co. v. Cas. Ins. Co.*, 145 Ill. App. 3d 516, 518-19, 495 N.E.2d 1183, 1184-85 (Ill. App. 1986).

In Illinois, if a conflict of interest arises between the insurer and the insured regarding the conduct of the defense of the action, the insured can refuse to accept the counsel selected by the insurer and seek independent counsel and have the reasonable cost of defending the action paid for by the insurer. See *Md. Cas. Co. v. Peppers*, 64 Ill. 2d 187, 198-99, 355 N.E.2d 24, 31 (Ill. 1976); *Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 53, 165 N.E.3d 439, 458-59 (Ill. App. 2020). Such counsel is known as *Peppers* counsel. *DR Distributors, LLC*, 513 F. Supp. 3d at 879 n.18.

2: Leavens Decl., ¶¶ 2-7, Case No. 1:14-cv-07764 (N.D. Ill. Mar. 4, 2021); Status Report by Non-Party Diamond State Insurance Company (Dkt. 322), p. 1 (stating that in a separate action filed by the insurance company against Duke/21, a judge ruled the insurance company had a duty to defend Duke/21 in the DR action).

In 2013, other attorneys at the Debtor’s firm, Peter J. Strand and Heather Ryan Liberman (“Liberman”), also filed appearances as Duke’s attorney. Appearance (Dkt. 40) & Appearance (Dkt. 41).⁴

On May 1, 2013, DR amended its complaint to bring its claims against 21’s principal and sole owner, Brent Duke (“Duke”). See Plaintiff’s First Amended Complaint (Dkt. 29), ¶ 3, 8-11, 31, 50, 59-61; Answer to First Amended Complaint (Dkt. 37), ¶ 8.

That day, 21 amended its counterclaim to allege the same counterclaims against an individual, Carlos Bengoa (“Bengoa”), who was the principal of DR and the owner of DR’s affiliate, CB Distributors Inc. (“CB”). See First Amended Counterclaim (Dkt. 32), ¶ 3-34; Answer to Amended Counterclaims & Counter-Claimant CB Distributors, Inc.’s Counterclaim (“Answer to Am. Counterclaim & CB’s Counterclaim”) (Dkt. 36), ¶ 15.

In November 2012, Duke/21 filed initial Rule 26(g) disclosures, signed by Debtor Leavens, stating that: “Electronic records are located at 1535 North Ashland Avenue, Chicago, Illinois and reside on three or four computers located there.” *Id.* at 890.⁵

⁴ This court notes that throughout the district court case, Duke/21 have had many different defense attorneys. For purposes of brevity and clarity, this court only refers to the defense attorneys that are relevant to the district court’s sanctions orders and this bankruptcy proceeding. For a full history of all of Duke/21’s defense attorneys and their role in the district court case, see *DR Distributors, LLC*, 513 F. Supp. 3d at 839-983.

⁵ The court later found these initial disclosures made by Duke and signed by Debtor Leavens, which did not include emails and a recording relevant to the defamation claim, were incomplete and incorrect at the time they were made and were not timely supplemented. *Id.* at 954.

On June 10, 2013, CB—DR’s exclusive distributor of its e-cigarette products—filed a counterclaim against Duke and 21 for trademark infringement and counterfeiting, unfair competition, common law unfair competition, and violation of the Illinois Deceptive Trade Practices Act. Answer to Am. Counterclaim & CB’s Counterclaim”) (Dkt. 36), ¶¶ 3, 7-10, 33, 52-63, 91-116.

In response to 21 and Duke’s counterclaims, DR and CB raised various affirmative defenses, including the unclean hands defense. Answer to Amended Counterclaim (Dkt. 35), p. 6; Answer to Amended Counterclaims & Counter-Claimant CB Distributors, Inc.’s Counterclaim (“Answer to Am. Counterclaim & CB’s Counterclaim”) (Dkt. 36), p. 7.

In March 2013, DR moved for a preliminary injunction and requested an expedited hearing, seeking to enjoin 21 and Duke from using DR’s trademark in connection with the sale of e-cigarettes, including in metatags, and from attending an industry trade show in Las Vegas in March 2013. *DR Distributors, LLC*, 513 F. Supp. 3d at 892. Judge Kapala granted that motion in part, ordering, among other things, that neither party would use the other’s trademark or make any statement that implied the products were affiliated with each other. *Id.*

In April 2014, the case was reassigned to then-Magistrate Judge Johnston as the magistrate judge on the case. Minute Entry (Dkt. 74).

On June 16, 2014, Judge Kapala granted Duke/21s’s motion for summary judgment in part and denied it in part, finding that 21 was the senior user of the mark, but that there was a genuine issue of material fact as to whether it should be permitted to cancel DR’s marks on account of the unclean hands defense. Order (Dkt. 80); *DR Distributors, LLC*, 2024 WL 2846035, at *3.

In November 2014, Duke/21 was granted leave to amend its counterclaim. Second Amended Counterclaim (Dkt. 99), ¶¶ 78-84; Minute Entry (Dkt. 97). Its amended counterclaim added a

counterclaim for defamation per se based on a conversation that occurred at a September 2013 Las Vegas trade show that was allegedly captured on a digital video recording. *DR Distributors, LLC*, 513 F. Supp. 3d at 881, 896; Second Amended Counterclaim (Dkt. 99), ¶¶ 78-84. Despite being requested, Duke did not timely produce electronically stored information (“ESI”) (here, emails and a recording) that allegedly supported his defamation claim and did not produce said documents to his former defense attorneys. *DR Distributors, LLC*, 513 F. Supp. 3d at 897; Oct. 28, 2019 Hr’g Tr. (Dkt. 355), pp. 183-194.

In June 2015, just before the close of fact discovery, Peter S. Stamatis (“Stamatis”), an attorney who had previously worked with Debtor Leavens, filed an appearance as the attorney for 21 and Duke. *DR Distributors, LLC*, 513 F. Supp. 3d at 879; Appearance (Dkt. 129).

In June 2015, DR filed a motion to compel, seeking documents including communications between Duke/21 and their search optimization consultant and her company. *Id.* at 901. The court granted that motion in part and denied it in part, ordering Duke/21 to answer certain contested interrogatories and to produce documents relating to the communications between Duke/21, its consultant, and her company. *Id.* at 901-02. One day after that order was entered, after merely asking Duke if responsive documents existed and not conducting any other investigation, Debtor Leavens informed DR that no responsive documents existed. *Id.* at 941. However, it was later revealed to the court that responsive documents did exist. *Id.*⁶

By around 2017, the district court found that Stamatis began working as lead counsel. *Id.*

⁶ In its January 19, 2021 sanctions order, the district court found that at the time the motion to compel was granted, Debtor Leavens knew that Duke used Yahoo! chat to communicate for business purposes, but did not ask Duke whether he searched Yahoo! chat for these relevant and responsive documents ordered to be produced. *Id.* at 902. However, not only was it untrue that responsive documents existed but also some of the responsive documents were not produced until 2018, years after the fact discovery cutoff and the supplementation date. *Id.* at 941.

at 879.

In January 2018, the parties filed cross-motions for summary judgment. *DR Distributors, LLC*, 513 F. Supp. 3d at 908 (citing Dkts. 213, 214, 215, and 216). DR, CB, and Bengoa's (collectively, the "Bengoa parties") memorandum in support of their summary judgment motion (Dkt. 216) alleged that Duke/21 withheld and destroyed ESI, including critical email communications about diversion of the Bengoa parties' customers and disparagement of its products and business. *Id.* at 908. According to the Bengoa parties, these actions in conjunction with other actions established their unclean hands defense. *Id.*

In March 2018, in response, Duke/21 produced hundreds of previously undisclosed ESI (Yahoo! emails) and used some of said documents in support of their summary judgment motion. *Id.* at 908. In Duke's declaration attached to exhibits responding to DR's summary judgment motion filed on March 19, 2018, Duke disclosed to the court and DR, for the first time, that ESI (GoDaddy.com emails) was spoliated at the beginning of the litigation due to failure to disable the autodeletion functions (the "autodeletion problem"). *Id.* at 908; Supplemental Local Rule 56.1(a)(3) Statement of Material Facts (Dkt. 234), part 2, Brent Duke's Decl., p. 2.

In August 2018, Steven S. Shonder filed an appearance as the attorney for Duke/21. Appearance (Dkt. 265).

In March 2019, DR, CB, and Bengoa (collectively, the "Bengoa parties") moved for sanctions against Duke/21 under the district court's inherent authority, Federal Rules of Civil Procedure 26(g), 37(a)-(c), (e), and 56(h), and 28 U.S.C. § 1927. *Id.* at 917; *see* Pl.'s Mem. of Law in Supp. of Renewed Mot. for Sanctions (Dkt. 294). As remedies for these alleged violations, they sought evidentiary sanctions, attorney's fees and dismissal of Duke/21s's counterclaims, and entry

of default on DR's complaint. *DR Distributors, LLC*, 513 F. Supp. 3d at 917.

In May 2019, Judge Kapala retired as district judge; Judge Thomas M. Durkin was assigned as the district judge on the case. *Id.* at 918. On May 29, 2019, Shonder and Stamatis were "shocked and surprised" to learn from Duke that there were GoDaddy emails that had not been searched. *Id.* at 917.⁷ They informed Duke they would have to inform "everyone" and the court of this. *Id.*

Two days later, on May 31, 2019, Stamatis, Shonder, Leavens, and Leavens' associate all moved to withdraw as the attorneys for Duke/21. *Id.* at 918; *see* Motions to Withdraw at Dkt. 300, 303, 304, and 305. Duke/21 also moved to stay the response to DR's motion for sanctions. *DR Distributors, LLC*, 513 F. Supp. 3d at 918; Motion to Stay Briefing Schedule on Motion for Sanctions (Dkt. 298). In June 2019, the court granted the motion to stay response and the various motions to withdraw. *DR Distributors, LLC*, 513 F. Supp. 3d at 918.

On August 8, 2019, Attorney Kevin Salam of the firm Kevin B. Salam, PC, d/b/a The Law Offices of Kevin Salam (hereinafter "Attorney Salam" or "Salam") filed an appearance as lead counsel for Duke/21 in the district court case. *See* Appearance (Dkt. 317).⁸ Attorney Salam is also *Peppers* counsel, Duke/21's independent counsel being paid for by Duke's insurance company. Status Report by Non-Party Diamond State Insurance Company (Dkt. 322), p. 4.

At some point between August 2019 and June 2024,⁹ Duke and 21 also retained Attorney

⁷ On May 29, 2019 Duke met with Shonder and Stamatis and informed them that he had another GoDaddy account and that since emails from that account were stored on the cloud and not the computers, they had not been searched. *Id.* at 917.

⁸ Another attorney, Michael I. Leonard, from the firm Leonard Meyer, LLP also filed an appearance as lead counsel for Duke/21. *See* Appearance (Dkt. 316).

⁹ In November 2015, Mr. Leavens testified that Mr. Salam informed him in August 2019 that he was going to file a malpractice action against him. Nov. 15, 2019 Tr. (Dkt. 364), p. 1091. Mr. Salam filed a copy of a contract for attorney services related to the malpractice claims signed by him, Brent Duke, and 21 Century Smoking on June

Salam to represent them in their malpractice case against their various former attorneys in the district court case, including the Debtor, Mr. Thomas Robert Leavens. Petition to Adjudicate Attorneys Lien (BK Dkt. 60), ¶ 1, *In re Leavens*, Case No. 21-12369 (Bankr. N.D. Ill. filed Oct. 29, 2021). All references to filings in *In re Leavens*, Bankr. Case No. 21-12369, will hereinafter be referred to as the “BK Dkt.” Initially, Attorney Salam had an oral fee agreement to be paid \$400.00 per hour by 21 Century Smoking, Inc. and Brent Duke. *See* Defs.’ Response to Motion to Compel (Dkt. 603), p. 11.

Between October 28, 2019 and November 19, 2019, the district court held five days of evidentiary hearings, at which the court heard testimony from Duke, Debtor Leavens, and Stamatis regarding the ESI issues. *Id.* at 869-70, 873-83.

On January 19, 2021 (Dkt. 439), the district court entered a Memorandum Opinion and Order (the “First Sanctions Order”) (Dkt. 439) entering discovery-related sanctions against Duke/21 and Duke/21’s former defense attorneys (Debtor Leavens and Stamatis) after it found that Duke/21 spoliated ESI evidence (GoDaddy emails and Yahoo! chats) because Duke and his former defense attorneys failed to disable the autodeletion functions. *See DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 863-64, 933-34 (N.D. Ill. 2021); First Sanctions Order (Dkt. 439), p. 230.¹⁰

15, 2023. Defendants’ Response to Plaintiff’s Motion to Compel Compliance with Court’s Order (“Defs.’ Response to Motion to Compel”) (Dkt. 603), pp. 11-14.

¹⁰ The district court case has a long, complex history spanning nearly twelve (12) years. There were many discovery sanctions opinions and orders entered against Duke/21 in that case. This court will be referring to the January 19, 2021 sanctions order at Docket No. 439 as the “First Sanctions Order,” and the October 6, 2022 sanctions order at Docket No. 541 as the “Second Sanctions Order” for simplicity. For a full history of that case, *see* the other filings in *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-cv-50324 (N.D. Ill. filed Sept. 7, 2012).

The court found Debtor Leavens and his associates failed to issue a written litigation hold or otherwise instruct Duke at the outset of the litigation to disable the autodeletion functions on his GoDaddy email and Yahoo! chat accounts; thus, they failed to take “reasonable steps” to preserve ESI when the duty arose. *See DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d at 876, 884-85, 890, 895, 903-905, 934-38.¹¹ Instead, Debtor Leavens permitted Duke to engage in self-collection of ESI without any instruction, monitoring, or documentation. *Id.* at 884. The court thus found the Debtor Leavens’ “understanding of ESI identification, preservation, collection, and productions is inadequate.” *Id.* at 875. The district court sanctioned Duke/21’s former defense attorneys, including Stamatis and Debtor Leavens, by requiring them to complete at least eight hours of continuing legal education (CLE) on ESI. *Id.* at 865.¹²

More importantly, the district court’s January 2021 sanctions order also required Duke/21, Debtor Leavens, and Stamatis to pay DR’s attorney’s fees incurred in connection with DR’s motion for sanctions (originally filed at Dkt. 294; then, Dkt. 294 was stricken without prejudice by the Order at Dkt. 394, and the motion for sanctions was refiled at Dkt. 394) and summary judgment motion (Dkt. 216) that were “derailed” due to Duke/21, Debtor Leavens, and Stamatis’ “discovery failures.” *Id.* at 864. In that order, the court did not decide the amount of attorney’s fees Duke/21 owed, but stated that “[t]he fees and costs will be paid in the following proportions: Duke to pay 50% and the former defense counsel to pay 50%, with former defense counsel Thomas Leavens paying 80% and former defense counsel Peter Stamatis paying 20% of that 50%.” *Id.* The court also stated that “[i]n

¹¹ The district court also found Debtor Leavens failed to conduct custodian review nor had any of his associates conducted a custodian interview or otherwise instructed Duke to disable autodeletion functions. *Id.* at 875-85, 904, 963.

¹² For the full explanation of all discovery sanctions imposed against Duke/21, Debtor Leavens, and Stamatis by the district court’s January 19, 2021 order, *see DR Distributors, LLC*, 513 F. Supp. 3d at 863-64.

imposing these sanctions, the Court is fully aware that Plaintiff's [DR's] request for attorneys' fees and costs will likely exceed seven figures as Plaintiff has already paid its counsel for this work." *Id.*

The court also required that "[a]t their own expense, within 30 days of this order, Defendants [Duke/21] must conduct a reasonable search for all responsive ESI and produce the responsive material to Plaintiff [DR], which Plaintiff [DR] can use if it chooses." *Id.* at 863. Additionally, the court barred Duke/21 from "using any information not disclosed to DR by June 1, 2015" and precluded Duke/21's expert witness from testifying that their opinions would not change had they considered the documents and information not disclosed before June 1, 2015. *Id.* at 863 (citing Fed. Rs. Civ. P. 37(b)(2), 37(c)).

In that opinion, the court referred to filings by Attorney Salam, who is Duke/21's defense counsel in the district court case and Duke/21's malpractice counsel, and arguments he made at a hearing in the district court case. *See DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d at 961-62; Defs.' Response to Motion to Compel (Dkt. 603), p. 11. Transcripts in that case also show that Mr. Salam was present at the hearings held regarding discovery sanctions before the First Sanctions Order was entered. *See DR Distributors, LLC*, 513 F. Supp. 3d at 962; Oct. 27, 2020 Hr'g Tr. (Dkt. 421), p. 4. The November 15, 2019 transcript shows that the Debtor, Mr. Thomas Robert Leavens, testified as a witness in the district court case at one of the hearings in the sanctions matter. Nov. 15, 2019 Tr. (Dkt. 364), p. 853. At that hearing, the Debtor testified he would did not have the ability to pay a \$750,000 sanction. *Id.*, p. 1076. The Debtor also testified that he was told in August 2019 by Mr. Salam that "he was going to file a legal malpractice action against you [Mr. Leavens]," and in response, the Debtor "agreed to sign a tolling agreement" *Id.*, p. 1091.

The transcripts and the district court's opinion show that Duke/21, and their attorney, Mr. Salam, were on notice by January 19, 2021, if not earlier, that Duke/21 and Attorney Thomas Leavens (the Debtor) would owe money to the Bengoa parties.

On May 6, 2022, Duke/21 filed the Motion to Modify the Automatic Stay to the Extent of Insurance (the "Duke/21's Stay Relief Motion") (BK Dkt. 38), whereby Duke/21 sought relief from the automatic stay to allow them to prosecute their malpractice claims against the Debtor to the extent of the Debtor's professional liability insurance coverage. Duke/21's Stay Relief Motion (BK Dkt. 38), ¶¶ 1-2.

At the August 10, 2022 status hearing in the district court case, the Debtor Leavens' counsel therein stated that the Debtor Leavens needed at least 12 months of medical leave due to a stroke. Aug. 10, 2022 Tr. (Dkt. 529), pp. 4-5. This, he explained, delayed the filing of a response to the Bengoa parties' second sanctions motion, as he was unable to communicate with his client. *Id.*, pp. 9-10.

In its subsequent Memorandum Opinion and Order (Dkt. 541) (the "Second Sanctions Order") entered on October 6, 2022 (Dkt. 541), the District Court granted the Motion for Attorney's Fees (Dkt. 450) in part and denied it in part. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340, at *1 (N.D. Ill. Oct. 6, 2022); Second Sanctions Order (Dkt. 541), p. 1. The Second Sanctions Order awarded DR attorney's fees of \$2,526,744.76 of which Duke was ordered to pay 50% (\$1,263,372.23). *DR Distributors, LLC*, 2022 WL 5245340 at *1. The remaining 50% of the attorney's fees were ordered to be paid by Duke/21's former defense counsel, the Debtor (Thomas Leavens) (to pay 80% of 50%) and Peter Stamatis (to pay 20% of 50%). *Id.*

On January 4, 2023, the district court entered a Minute Entry (Dkt. 562) stating that:

The Court has been previously informed that Mr. Duke has given notice of a potential malpractice claim against various former defense counsel, including Mr. Leavens. The Court recalls some discussion of a tolling agreement as well. The Court knows that Mr. Leavens has filed a petition for bankruptcy. The Court needs to know if the bankruptcy proceeding discharged the alleged malpractice claim by Mr. Duke against Mr. Leavens or had any effect on that claim. By February 3, 2023, counsel for Mr. Leavens must notify the Court what if any effect the bankruptcy proceeding had on Mr. Duke's alleged malpractice claim against Mr. Leavens.

See Minute Entry (Dkt. 562).

On January 18, 2023, Attorney Michael S. Baird filed a Response to the district court's January 4, 2023 order:

[A]ccording to Mr. Leavens' bankruptcy counsel, Kevin Morse, the order entered on April 1, 2022, granting Mr. Leavens a discharge ends all personal liability Mr. Leavens may have had for Mr. Duke's potential malpractice claims [against Mr. Leavens]. By his counsel, Mr. Duke filed an unliquidated claim against the assets of Mr. Leavens bankruptcy estate and can seek to recover a portion of said assets in the event his malpractice claim becomes liquidated. The bankruptcy discharge order does not prevent Mr. Duke from attempting to collect his damages (if any) from any insurance coverage that Mr. Leavens and his law firm may have had at the relevant times. The parties have executed a tolling agreement relative to said potential insurance coverage to stay the time limitations for bringing a claim.

See Response of Former Defense Counsel Leavens to the Court's Order of 1/4/23 (Dkt. 566).

On January 12, 2023, the district court entered a Memorandum Opinion and Order (the "Third Sanctions Order") sanctioning Duke/21 and their counsel, Attorney Salam—jointly and severally—\$6,000 for violating the court's January 19, 2021 sanctions order. *See* Second Sanctions Order (Dkt. 565); Oct. 7, 2022 Tr. (Dkt. 549), p. 12 (the court told Attorney Salam that its sanctions order, entered on January 19, 2021, barred the type of expert opinion testimony proffered by Duke/21); Notice of Appeal (App. Dkt. 1), p. 1, *DR Distributors, LLC v. 21 Century Smoking, Inc.*, Case No. 24-2117 (7th Cir. filed July 1, 2024) (stating the \$6,000 sanction was paid by Attorney

Salam).¹³

On June 15, 2023, Duke, 21, and Attorney Kevin B. Salam entered into a contingency fee arrangement under which Attorney Salam “shall be paid a contingent fee of 40%, plus costs (currently \$10,500), plus \$20,000 from any recovery on Client’s claims in the Leavens Bankruptcy, whether by settlement, trial, appeal or otherwise” *See* Defs.’ Response to Motion to Compel (Dkt. 603), pp. 11-12, 14-15; Attorney’s Lien Petition (BK Dkt. 60), ¶ 2.

On July 24, 2023, Mr. Salam filed his Petition to Adjudicate Attorneys Lien (the “Attorney’s Lien Petition”) (BK Dkt. 60), which sought to adjudicate his attorney’s lien pursuant to 770 ILCS Section 5/1. In the Attorney’s Lien Petition, Attorney Salam asserted that in or about July 2019, he was retained by Duke/21 to represent them in their malpractice claims against their former defense counsel, the Debtor. *Id.*, ¶ 1. However, per the signature page of the malpractice agreement itself (filed in the district court case only), Attorney Salam and Duke/21 did not enter into a written contingency fee agreement until June 15, 2023. *See* Defs.’ Response to Motion to Compel (Dkt. 603), pp. 14–15.

On August 1, 2023, this court approved the Settlement Motion. Order (BK Dkt. 63). That Order approved the Trustee’s compromise with Brent Duke and 21 Century Smoking, Inc., which settled their malpractice claims against the Debtor. Order (BK Dkt. 63). Pursuant to the parties’ agreement, the Parties stipulated that Proof of Claim No. 3-1 of 21 Century Smoking, Inc. was allowed as a \$625,000 nonpriority general unsecured claim and Proof of Claim No. 4-1 of Brent

¹³ All references to the “App Dkt.” refer to filings in the 7th Circuit appeals, *DR Distributors, LLC v. 21 Century Smoking, Inc.*, Case Nos. 24-2117, 24-2145, and 24-2146. These appeals were subsequently consolidated. *See* Order (App. Dkt. 3), *DR Distributors, LLC v. 21 Century Smoking, Inc.*, Case No. 24-2145.

Duke was allowed as a \$625,000 nonpriority general unsecured claim.¹⁴ Order (BK Dkt. 63), ¶¶ 3-4. The Order did not mention Attorney Salam's lien.

On August 17, 2023, a hearing on the Attorney's Lien Petition (BK Dkt. 60) was held; the Court entered an Order Adjudicating Attorneys Lien (BK Dkt. 67). Pursuant to that order, the Court found that Mr. Salam established he had an attorney's lien and he was to be paid 40% of the distribution on Proof of Claim No. 3-1 and Claim 4-1, as well as \$10,000 each from Proof of Claim No. 3-1 and Claim 4-1, and \$6,118.91 each from the distribution of Proof of Claim No. 3-1 and Claim 4-1. Order (BK Dkt. No. 67). No objections were filed to the Settlement Motion (BK Dkt. 57), the Attorney's Lien Petition (BK Dkt. 60), or the Orders granting the Petition and the Settlement Motion. *See* Orders at BK Dkt. 63 & 67.

On December 5, 2023, in the District Court Case, the Bengoa parties filed a Status Report and Motion to Order Immediate Payment of Monetary Sanctions and For Other Miscellaneous Relief (the "Immediate Payment Motion") (Dkt. 571), requesting that the \$2,526,744.46 monetary sanction be paid immediately by Duke, 21, and their former defense lawyers, the Debtor and Mr. Stamatis. The Bengoa parties asserted the District Court case "was interrupted by the Leavens bankruptcy filing on October 9, 2021" due to the stay, which was subsequently lifted on April 5, 2022.

In its December 6, 2023 order on the Immediate Payment Motion, the district court stated, in pertinent part, that "[t]he portion of the \$2,526,744.46 sanctions owed by 21 Century Smoking,

¹⁴ It is unclear whether the Debtor had malpractice insurance. The Stipulation between Duke/21 and the Trustee states that "[n]othing herein is intended to release Claimants' malpractice claims against . . . the Debtor to the extent of any professional liability insurance that covers the Debtor for the alleged malpractice." Settlement Motion (BK Dkt. 57), Ex. A: Stipulation, p. 16, ¶ 5. In the Debtor's Schedule A/B: Property, the Debtor scheduled an Umbrella Policy with Nationwide. Petition (BK Dkt. 1), Schedule A/B, p. 15. A Lawyer Search of the Debtor, Thomas Robert Leavens, on the ARDC website stated that "the attorney reported that the attorney, or the attorney's firm, maintains malpractice insurance." *See* <https://www.iardc.org/Lawyer/Search> (last visited Sept. 23, 2024).

Brent Duke, and Thomas Leavens is immediately due.” Order (Dkt. 572), p. 2.

On February 21, 2024, in the Bankruptcy Case a Notice of Objection (BK Dkt. 71) was filed to the TFR on behalf of the Bengoa parties.

On March 1, 2024, in district court, the Bengoa parties filed a motion asking the court to impose a judicial lien in the amount of \$1,263,372.23 plus interest against Duke/21 from any recovery on their legal malpractice claims against their former defense attorneys and/or their firms in order secure the payment of Duke/21s’s share of the monetary sanctions owed to them per the Second Sanctions Order (Dkt. 541) entered on October 6, 2022.

A status hearing was held in the district court case on March 8, 2024. At that hearing, Attorney Salam discussed the settlement between the Trustee and Duke/21 regarding their malpractice claims against the Debtor Leavens related to the discovery sanctions, as well his lien on said settlement funds. Mar. 8, 2024 Hr’g Tr. (Dkt. 606), pp. 26-28. Attorney Salam stated that the Trustee settled 21’s Claim 3 and Duke’s Claim 4 for \$625,000 each and proposed to pay Duke and 21 \$25,000 each on their claims. *Id.* In response, Judge Johnston told Attorney Salam and the other parties:

[I] think it is plaintiff’s point . . . is I enter an order saying Mr. Bengoa is entitled to have the attorneys’ fees that he has expended relating to the ESI issue paid to him to compensate him. He hasn’t seen dime one since . . . 2021. . . . [T]heir point is why are other people getting money from Mr. Leavens, who also was sanctioned, why are they getting money out of the bankruptcy estate before they are?

See Mar. 8, 2024 Hr’g Tr. (Dkt. 606), p. 28.

On March 26, 2024, Judge Johnston granted the Bengoa parties’ Assignment Motion (Dkt. 579). In that Order (the “Assignment Order”) (Dkt. 610), Judge Johnston stated that:

2. The Claim number 3-1 filed by 21 Century Smoking, Inc. and Claim number

4-1 filed by Brent Duke in the Leavens Bankruptcy Action shall and are hereby be transferred to Plaintiffs DR Distributors, LLC, CB Distributors, Inc. and Carlos Bengoa;

3. The transfer shall be effective upon the entry of this Order, is an outright transfer and is done in accordance with Rule 3001(e) of the Federal Rules of Bankruptcy Procedure;

4. This Order shall serve as notice of the transfer and shall be filed in the Leavens Bankruptcy Action, and a copy shall be served upon the Leavens Bankruptcy Action Case Trustee, Ira Bodenstein, Esq., of the firm Cozen O'Connor, by email at: IBodenstein@cozen.com within three (days) of the entry of this order.

5. That the Leavens Bankruptcy Action Case Trustee, Ira Bodenstein, Esq., is hereby ordered to pay all distributions for Claim number 3-1 filed by 21 Century Smoking, Inc. and Claim number 4-1 filed by Brent Duke in the Leavens Bankruptcy Action to Plaintiffs DR Distributors, LLC, CB Distributors, Inc. and Carlos Bengoa.

Assignment Order (Dkt. 610).

That day he granted the Bengoa Parties' Motion for a Judicial Lien (Dkt. 601), awarding the Bengoa parties a \$1,263,372.38 judicial lien against Duke and 21's "monetary recovery made or obtained on any claim asserted against their Former Defense Counsel . . ." [i.e., the Debtor Leavens and his firm, as well as other prior counsel] "for legal malpractice related to their representation in this matter." Order for a Judicial Lien Against Any Recovery in Defendants' Legal Malpractice Actions (Dkt. 612), ¶2, *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 3:12-cv-50324 (N.D. Ill. filed Sept. 7, 2012). Duke and 21 were ordered to pay the Bengoa parties the full \$1,263,372.38 sanctions award plus interest "out of any monetary recovery referred to . . . in the preceding paragraph, before Duke and 21 "receive any part of any such monetary recovery." *Id.*, p. 2, ¶ 3.

On May 24, 2024, the Bengoa parties filed a motion seeking relief from this court's Order Adjudicating Attorney's Lien (BK Dkt. 67) under Fed. R. Civ. P. 60(b)(2) and Fed. R. Bankr. P. 9024. *See* Amended Assignees' Motion for Relief from Order of August 17, 2023 Pursuant to Rule

9024 of the Federal Rules of Bankruptcy Procedure (“9024 Motion”) (BK Dkt. 89). The Trustee filed a Notice of Objection (BK Dkt. 90) thereto and Attorney Salam filed a Response (BK Dkt. 93).

Afterwards, on June 5, 2024, the District Court dismissed Duke and 21’s counterclaims, entered a default judgment in favor of DR and against Duke and 21, dismissed all of Duke/21’s counterclaims, and entered case-terminating sanctions. *DR Distributors, LLC*, 2024 WL 2846035, at *34; *see* Mem. Opinion & Order (Dkt. 626) and Judgment (Dkt. 627).

III. Analysis of Issues Regarding this Court’s Lien Adjudication Order and the Claim Waiver Order

Salam argues the Bengoa parties waived their argument that his perfected attorney’s lien (Claim No. 5-1) is “derivative” of Claims No. 3-1 and 4-1 and this entitles them to be paid on Claims No. 3-1 and 4-1 before he is paid anything on his perfected attorney’s lien because they failed to cite any legal authority or develop this argument. *See* Response (BK Dkt. 93), pp. 4, 9 (citation omitted). The court notes that although arguments offered for the first time in a reply are ordinarily deemed waived, courts have the discretion to overlook a waiver. *See In re Leventhal*, 2012 WL 1067568, at *3 n. 3 (Bankr. N.D. Ill. 2012) (citations omitted). Courts have found the principle of waiver does not apply where, as here, although an argument was raised for the first time in a reply brief, any problem of a deficiency to respond meaningfully was eliminated because the opposing party had the opportunity to respond to address the issues at a hearing or in the sur-reply.

Salam asserts that under Illinois law, his perfected attorney’s lien is superior and has priority over the Bengoa parties’ interests in the funds held by the Trustee. *Id.*, pp. 4, 9-10 (citations omitted). Salam asserts that Duke/21 could only assign and the district court could only transfer claims and interests that Duke/21 actually possessed at the time of the assignment or transfer. *Id.*,

p. 10 (citing *In re Kleckner*, 93 B.R. 143, 147 (N.D. Ill. 1988)). He alleges that at the time the Bengoa parties acquired their interest in Claims No. 3-1 and 4-1 (the unsecured claims for legal malpractice against the Debtor), Duke and 21 did not have any right to possess or transfer any rights to the Debtor's funds to which Salam's attorney's lien attached (the settlement funds), now held by the Trustee. *Id.*, pp. 10-11.

Attorney Salam relies on *In re Kleckner*, which involves an adversary proceeding whereby a chapter 7 trustee claimed a pre-petition transfer to a debtor's personal injury attorney pursuant to a contingent fee agreement was an avoidable preferential transfer under 11 U.S.C. § 547(b) (1982). *In re Kleckner*, 93 B.R. 143, 144 (N.D. Ill. 1988). The Bankruptcy Court denied the attorney's motion for summary judgment, ruling the attorney had not perfected a statutory lien pursuant to the Illinois Attorney's Lien Act, and granted the trustee's motion for summary judgment under 11 U.S.C. § 544(a) (1982), treating the bankruptcy trustee as a hypothetical lien creditor. *Id.* The district court reversed, finding an equitable assignment (that did not need to be perfected, unlike an equitable lien) existed at the time of the signing of the pre-petition contingent fee agreement. *Id.*, p. 147. The court reasoned that because "the debtor had no right to disburse those funds, and had no right to possess those funds at any time," the trustee could not recover the funds using his strong arm powers under § 544(a) and § 547(b).

Attorney Salam asserts that, like the debtor in *Kleckner*, upon the execution of his contingency fee agreement with Duke/21 on June 15, 2023, neither 21 nor Duke had the right to possess the Debtor's funds to which Salam's attorney's lien attached.

He alleges he perfected his *equitable* attorney's lien upon the execution of the contingency fee agreement on June 15, 2023, which gave him the right to recover his fees from the funds

recovered from the Debtor on 21 and Duke's malpractice claims. *Id.* (citing Response (BK Dkt. 93), Ex. B; *McKee-Berger-Mansueto, Inc.*, 691 F.2d 828, 837 (7th Cir. 1982)). He alleges he perfected his *statutory* attorney's lien on June 22, 2023, when Debtor Leavens received the certified Notice of Attorney's Lien under the Illinois Attorneys Lien Act, 770 ILCS § 5/1. *Id.* (citing Attorney's Lien Petition (BK Dkt. 60); *McKee-Berger-Mansueto, Inc.*, 691 F.2d at 837).

Attorney Salam also argues that Fed. R. Civ. P. 60(b)(6), the "catchall provision," which provides a party may receive relief from a final judgment, order, or proceeding for "any other reason that justifies relief" other than the reasons listed in Fed. R. Civ. P. 60(b)(1)-(6), does not apply because the Bengoa parties rely on Fed. R. Civ. P. 60(b)(6). Response (BK Dkt. 93), p. 12 (citations omitted). He argues that the Bengoa parties could not meet their burden under Fed. R. Civ. P. 12(b)(6) to show there are "exceptional circumstances" present that warrant the relief sought. *Id.* (citing *In re Taylor*, 575 B.R. 390, 394 (N.D. Ill. 2017)). He asserts the Bengoa parties had actual knowledge of the allegedly "new evidence" and could have presented it in these proceedings before this court entered its Order Adjudicating Attorney's Lien (BK Dkt. 67) on August 17, 2023. *Id.* He argues if the Bengoa parties believed this evidence was incorrectly considered by this court, they could have timely appealed its August 17, 2023 order. *Id.* He asserts that Fed. R. Civ. P. 60(b)(6) cannot be used where, as here, the movant could have obtained the requested relief by means of a direct appeal. *Id.* (citation omitted).

The Bengoa parties also assert that their motion seeks to have this court correct its order to avoid a conflict because its Order Adjudicating Attorney's Lien (BK Dkt. No. 67) directs the Trustee to pay Salam a share of Claims 3-1 and 4-1 and a district court order directs the Trustee to pay the Bengoa parties all monies from Claims 3-1 and 4-1. Reply (BK Dkt. 97), p. 1. The Bengoa parties

argue the conflict was created because this court exceeded the bounds of impressing an Illinois attorney's lien in favor of Salam on Claims 3-1 and 4-1 (held by Salam's clients); they argue the court went further than Illinois law allows because its Order Adjudicating Attorney's Lien (BK Dkt. 67) essentially created an assignment of a portion of Claims 3-1 and 4-1 to Salam by directing the Trustee to pay out to Salam specific dollar amounts from Claims 3-1 and 4-1. *Id.*, pp. 1-2, 3-4. They argue that changing who has title to the disputed funds herein goes a step further than impressing a lien on the funds, and the latter is not allowed under the Illinois Attorney's Lien Act, 770 ILCS § 5-1. *Id.*, p. 4.

The Bengoa parties argue their motion (BK Dkt. 89) does not seek an order directing the Trustee to pay the disputed funds to them. *Id.*, p. 3. This is because, they argue, the district court's March 26, 2024 Assignment Order (Dkt. 610) unambiguously ordered that Claims 3-1 and 4-1 were to be assigned to the Bengoa parties and paid to the Bengoa parties by the Trustee. *Id.*

They argue this court may have been a proper venue for Salam to seek to impress its lien on funds that his clients (Duke/21) might later receive from the bankruptcy estate, it is not the proper venue to determine who is the rightful owner of the disputed funds themselves, as long as the validity of the claims themselves are not being challenged. *Id.*, p. 4.

However, the court disagrees with this argument because § 157(b)(2)(K) provides that bankruptcy courts can determine "the validity, extent, *or priority* of liens." 11 U.S.C. § 157(b)(2)(K) (emphasis added).

Next, unlike Salam, the Bengoa parties assert that this court's Order Adjudicating Attorney's Lien (BK Dkt. 67) may not be final. *Id.*, p. 5. They argue if it is not final, the court may correct the order at any time under Fed. R. Civ. P. 54(b), incorporated by Fed. R. Bankr. P. 7054 and made

applicable to this matter by Fed. R. Bankr. P. 9014(c)), regardless of whether a party has raised the issue. *Id.*, p. 5 n.1 (citations omitted).

Next, the Bengoa parties argue that when priority rights to a pool of funds as between non-debtors in a bankruptcy case are being determined in separate district court litigation, any bankruptcy court order addressing those rights may not be final if the outcome of the other litigation affects the distribution of funds in the bankruptcy case. *Id.* (citing *In re Xonics, Inc.*, 813 F.2d 127, 130 n.1 (7th Cir. 1987)). They argue the priority rights to the monies owed on Claims 3-1 and 4-1 to be paid out in the bankruptcy case, as between the non-debtor parties of the Bengoa parties and Duke/21, were determined in the district court litigation. *Id.*, p. 5.

The court does not read *Xonics, Inc.* so broadly. *Xonics, Inc.* involved a dispute between two creditors over accounts receivable, but the accounts receivable at issue had been abandoned pursuant to the debtor's confirmed plan. 813 F.2d at 129. The Seventh Circuit stated that there was jurisdiction when the dispute was "related to" the bankruptcy, meaning it "affects the amount of property available for distribution or the allocation of property among creditors." *Id.* at 131 (citation omitted). The court reasoned that jurisdiction "lapses when property leaves the estate," and there, unlike in this case, the assets had been abandoned pursuant to the confirmed plan, and the disposition of the abandoned assets would not affect other creditors. *Id.* at 131-32 (citations impressed against anyone else's ownership in the funds). They argue this could change the outcome because, as the Order Adjudicating Attorney's Lien (BK Dkt. 67) currently stands, it improperly created the equivalent of an ownership interest in the funds separate from and superior to Duke/21's ownership interest in the funds. *Id.*, pp. 11-12.

When the claims transfer order was entered, Brent Duke and 21 Century Smoking, Inc. no

longer possessed the claims and, for that reason, they could not be transferred.

IV. Conclusion

The Motion for Relief from Judgment (BK Dkt. 89) is denied.

The Motion to Enforce District Court Order for Transfer of Claims (BK Dkt. 102) is denied

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April 1, 2025

ENTER: _____
Chief Judge Jacqueline P. Cox
U.S. Bankruptcy Court
Northern District of Illinois