

IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE, FLORIDA

COMPLEX BUSINESS DIVISION

In Re: Assignment for the Benefit of Creditors of MIAMI PERFUME JUNCTION, INC., CASE NO.: 2020-012763-CA-44

Assignor,

To: LESLIE S. OSBORNE,

Assignee.

_____/ In Re: Assignment for the Benefit of Creditors of 2851 INVESTMENTS, LLC, CASE NO.: 2020-012770-CA-44

Assignor,

To: LESLIE S. OSBORNE,

Assignee.

_____/ In Re: Assignment for the Benefit of Creditors of DORAL INTERNATIONAL PRODUCTS, LLC, CASE NO.: 2020-012750-CA-44

Assignor,

To: LESLIE S. OSBORNE,

Assignee.

_____/ In Re: Assignment for the Benefit of Creditors of CLARUS GROUP, INC., CASE NO.: 2020-012748-CA-44

Assignor,

To: LESLIE S. OSBORNE,

Assignee.

ORDER ON ASSIGNEE'S MOTION TO DETERMINE WHO OWNS ASSIGNORS' ATTORNEY-CLIENT AND ACCOUNTANT-CLIENT PRIVILEGES

THIS MATTER came before the Court on Leslie S. Osborne, solely in his capacity as

assignee for the benefit of creditors (“Assignee”), motion asking this Court to determine who owns the Assignor’s attorney-client and accountant-client privileges. The Court having considered the motion, response, having heard argument of counsel, and having considered the applicable law, makes the following findings:

On June 16, 2020 (the “Assignment Date”), Assignors, Miami Perfume Junction, Inc., 2851 Investments, LLC, Clarus Group, Inc. and Doral International Products, LLC (collectively, the “Assignors”) irrevocably assigned their assets for the benefit of creditors to the Assignee. The Assignments were accepted by the Assignee on June 16, 2020.

Under the terms of the Assignments, Leslie S. Osborne became the Assignee of all the assets of the Assignors (the “Assets”).

NOW, THEREFORE, the Assignor, in consideration of the Assignee’s acceptance of this Assignment, and for other good and valuable consideration, hereby grants, assigns, conveys, transfers, and sets over, unto the Assignee, his successors and assigns, all of its assets, except such assets as are exempt by law from levy and sale under an execution, including, but not limited to, all real property, fixtures, goods, stock, inventory, equipment, furniture, furnishings, accounts receivable, bank deposits, cash, promissory notes, cash value and proceeds of insurance policies, claims and demands belonging to the Assignor, and all books, records, and electronic data pertaining to all such assets, wherever such assets may be located (collectively the “Estate”), which assets are, to the best knowledge and belief of the Assignor, set forth on **Schedule B** annexed hereto, subject to supplementation.

Prior to the Assignment Date, the Assignors were in the business of, among other things, selling perfume and cosmetics. On the Assignment Date, the Assignee filed Petitions for the Assignment for the Benefit of Creditors. Under Chapter 727, the Assignee is obligated to liquidate the Assignors’ assets, resolve all open issues regarding any claims against the Assignors’ estates,

and oversee the wind-down of the Assignors' estates. *See* Fla. Stat. §727.108. Additionally, the Assignee is charged with “[c]ollect[ing] and reduc[ing] to money the assets of the estate, whether by suit in any court of competent jurisdiction, or by public or private sale, including but not limited to, prosecuting any tort claims or causes of action which were previously held by the assignor.” Fla. Stat. §727.108 (8).

In connection with his administration of these Estates, the Assignee, through counsel, served various third parties, including accountants, attorneys, agents, and previous employees of the Assignors, with litigation hold/preservation letters and demands for immediate turnover of the Assignors' property and documents in their possession. In certain instances, the Assignee has issued, or will soon be issuing, subpoenas to third parties seeking production of information relating to the Assignors' business and financial affairs. These requests include demand letters to the Assignors' legal and accounting professionals.

In response to the Assignee's demand for turnover, a law firm that formerly acted as counsel to the Assignors requested confirmation from the Assignors that the Assignee was the owner of the attorney-client privilege. The Assignee requested confirmation of the same from Assignors' counsel. Counsel for Assignors indicated that they may need guidance from this Court to resolve the issue. The Assignee and principals of the Assignors have been unable to reach an agreement with respect to the issue of who owns and controls the privilege.

Pursuant to Chapter 727, “.....the [A]ssignor hereby appoint[ed] the [A]ssignee its *true and lawful attorney*, irrevocable, *with full power and authority to do all acts and things which may be necessary to execute the assignment* hereby created...” *See* Fla. Stat. §727.104 (b) (emphasis added). Because a corporation must act through agents, actions associated with the attorney-client privilege must be undertaken by individuals empowered to act on behalf of the

corporation. *Rogan v. Oliver*, 110 So. 3d 980, 983 (Fla. 2d DCA 2013).

Surprisingly, Chapter 727 of the Florida Statutes is silent on whether an assignee for the benefit of creditors holds the corporate privilege. *See generally*, Fla. Stat. §§727.101–117. This district has not addressed the issue, however, State Courts often look to title 11 of the United States Code (the “Bankruptcy Code”) when an assignment for the benefit of creditors statute fails to provide guidance. *See, e.g., Moecker v. Antoine*, 845 So. 2d 904, 911 n.10 (Fla. 1st DCA 2003) (“State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding involving assignments for the benefit of creditors”). The Bankruptcy law seems to support the finding that authority to assert the corporation's attorney-client and accountant-client privilege passes with the transfer *See, e.g., In re Financial Corp. of Am.*, 119 B.R. 728 (Bankr.C.D.Cal.1990) (holding that the authority to assert the corporation's attorney-client privilege passes with the transfer of substantially all of the corporation's assets and liabilities), and *In re Crescent Beach Inn*, 37 B.R. 894 (Bankr. D. Me.), *reconsid. denied*, 40 B.R. 56 (1984) (holding that the transferee of all the assets of a reorganized company was the debtor's successor for purposes of the attorney-client privilege and was therefore entitled to assert the privilege formerly held by the debtor).

The Assignor argues that a Chapter 727 assignee does not automatically step into the assignor's shoes for attorney-client privilege purposes and a general assignment does not implicitly waive the assignor's attorney-client privilege as to the assignee. *Law Office of David J. Stern, P.A. v. Sec. Nat. Serv. Corp.*, 969 So. 2d 962 (Fla. 2007); *Cowan, Liebowitz, & Latman P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005). However, these cases are both factually and legally distinguishable from the facts of this case. Generally speaking, the issue in both *Sec. Nat. Serv. Corp.* and *Kaplan* involved the assignment of legal malpractice claims. Both of those decisions essentially discussed whether an assignment of legal malpractice claims in situations where the legal services provided

by the attorney are not personal in nature and do not involve any confidential communications trigger policy concerns of protecting the attorney-client privilege which generally justifies the prohibition against the assignment of legal malpractice claims.

This Court declines the Assignor's invitation to find that after an assignment pursuant to Chapter 727, the Assignor corporations, and not the Assignee, continue to own and hold the Attorney-Client and the Accountant-Client Privileges. The Assignor appears to be asking this Court to prohibit Assignee from seeking and receiving any information that Assignor believes to be covered by the Attorney-Client or Accountant-Client privilege, such a request is denied. It is the finding of this Court that the Assignee cannot fully or effectively discharge its obligations pursuant to Chapter 727 without full and complete access to all books, records and communications of the Corporation. Therefore, it is

ORDERED AND ADJUDGED that prior to the Assignment, the Attorney-Client and Accountant-Client privileges belonged to the Assignor. However, the power to hold and assert the privilege passed to the Assignee by virtue of the execution of the assignment documents. Any contrary finding would obstruct and restrict the Assignee's reason and purpose as outlined in Chapter 727. However, finding that the Assignee has the power to hold and assert the privilege does not mean that the Assignee has the right to bring claims that are prohibited by law. This Court will address any case or controversy related to the legality of claims brought by the Assignee when and if such circumstances are presented to this Court.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 09/01/20.


WILLIAM THOMAS

CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.