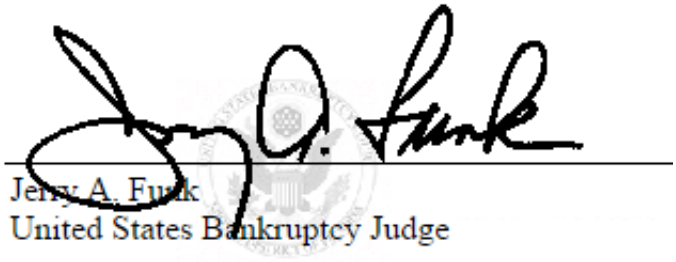
ORDERED.

Dated: July 18, 2019



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

Chapter 11

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,	Case No.	3:09-bk-07047-JAF
REO SPECIALISTS, LLC, and	Case No.	3:09-bk-10022-JAF
HOME AMERICA MORTGAGE, INC.	Case No.	3:09-bk-10023-JAF

Debtor,

(Jointly Administered Under Case No. 3:09-bk-07047-JAF)

_____/

NEIL F. LURIA, as Trustee for the TAYLOR, BEAN & WHITAKER PLAN TRUST,

Plaintiff,

Adv. Pro. No. 3:11-ap-0693-JAF

v.

THUNDERFLOWER, LLC,

Defendant.

_____/

ORDER GRANTING CHAPTER 11 TRUSTEE'S
MOTION TO COMPEL PRODUCTION OF POST-JUDGMENT DISCOVERY

This proceeding is before the Court on the motion to compel production of post-judgment discovery (Doc. 99) filed by Plaintiff NEIL F. LURIA, as the Chapter 11 Trustee for the TAYLOR

BEAN & WHITAKER PLAN TRUST (the "Plaintiff"). Third-party Respondent McGLINCHEY STAFFORD PLLC ("McGlinchey Stafford") filed a response in opposition (Doc. 100); Plaintiff filed a reply (Doc. 101). For the reasons set forth herein, the Court grants Plaintiff's motion.

Background

Taylor, Bean & Whitaker Mortgage Corporation ("Taylor Bean") filed a Chapter 11 petition in August 2009, case number 3:09-bk-07047. The Court confirmed Taylor Bean's Chapter 11 plan and appointed the Plaintiff as the Chapter 11 trustee in July 2011. (Doc. 3420 ¶ 68, in case no. 3:09-bk-07047). The Plaintiff filed this adversary proceeding in August 2011. (Doc. 1). The essential claims sought to avoid preferences and fraudulent transfers against various defendants. A final judgment in the amount of $6,176,787.75 was awarded in favor of Plaintiff and against Defendant THUNDERFLOWER, LLC ("Thunderflower") in December 2018. (Doc. 97).

In January 2019, Plaintiff served a subpoena to produce documents on third-party law firm McGlinchey Stafford, the law firm that formerly represented Thunderflower in this action. (Doc. 99 at 10-19). McGlinchey Stafford objected to certain requests contained in the post-judgment subpoena. (Doc. 99 at 21-25). At issue are McGlinchey Stafford's objections to Requests 15 and 17. The subject requests and objections state as follows:

> **Request No. 15:** Any and all documents evidencing or tending to evidence the transfer of or change in ownership of CPMG at any time between August 4, 2009 and the Present.
>
> **Objection to Request No. 15:** This request seeks documents that would be subject to and protected by the attorney-client privilege between McGlinchey and CPMG, a separate entity for whom the privilege will not be waived and is not being waived. Plaintiff dismissed its adversary proceeding against CPMG without obtaining a judgment against CPMG and cannot use this action/forum in which to conduct discovery about CPMG.

> **Request No. 17:** Any and all documents provided to [McGlinchey Stafford] by Lee Farkas, Joseph Ellis, Gregory Hicks, Sanjay (Sonny) Bector, and/or Alan Briggs relating to the ownership of each or any of (i) Thunderflower; (ii) CPMG; (iii) Chisholm Properties; and (iv) Blake's.
>
> **Objection to Request No. 17:** This request appears to be duplicative of requests numbered 6, 8, 9, 11, 13, 14 and 16, and as such, McGlinchey refers to its responses above accordingly. With regard to the portion of the request seeking the production of documents related to Chisolm Properties or Blake's, McGlinchey has no responsive documents. With regard to the portion of the request seeking the production of documents related to Thunderflower, McGlinchey objects as vague, ambiguous, and overbroad in time and scope due to the improper and overreaching definition of Thunderflower. Further, all requested documents are subject to the attorney-client privilege. With regard to the portion of the request that seeks documents related to CPMG, a separate entity and non-party to the instant action for whom the privilege will not be waived and is not being waived. Further, Plaintiff dismissed its adversary proceeding against CPMG without obtaining a judgment against CPMG and cannot use this action/forum in which to conduct discovery about CPMG.

(Doc. 99 at 17, 23, and 24). Plaintiff states that he seeks the information described above, "in large part, so that [he] can identify the appropriate person(s) to depose in an effort to locate executable assets of Thunderflower since it is no longer represented by counsel." (Doc. 99 at 3). Responsive documents pertaining to CPMG, LLC, which is the "CPMG" referenced in the subpoena, are the sole point of contention. CPMG is also a former client of McGlinchey Stafford. Record evidence in this adversary proceeding indicates that Defendant Thunderflower solely owns or owned CPMG. (Doc. 69 at 21, ¶ 6).

As to the objection concerning the definition of "Thunderflower," the subpoena provides the following definition: "'Thunderflower' as used herein means Thunderflower, L.L.C., a Florida limited liability company, and/or Thunderflower, L.L.C., an Illinois limited liability company." (Doc. 99 at 14). As to the attorney-client privilege, McGlinchey Stafford has apparently not produced a privilege log for the benefit of Plaintiff.

Analysis

"The rules governing discovery in post-judgment execution proceedings are quite permissive." Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 138 (2014). "Federal Rule of Civil Procedure 69(a)(2) states that, '[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from *any person*—including the judgment debtor—as provided in the rules or by the procedure of the state where the court is located.'" Id. at 139 (emphasis added). The general rule in the federal discovery process is that, "subject to the [trial] court's discretion, '[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.'" Id. In light of this, Rule 69(a)(2) clearly contemplates and permits post-judgment production of documents from third parties concerning a judgment debtor's assets.

To invoke the attorney-client privilege, the claimant must establish that:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Noriega, 917 F.2d 1543, 1550 (11th Cir. 1990); see also 8 Fed. Prac. & Proc. Civ. § 2017 (3d ed.) (discussing attorney-client privilege); 8 Fed. Prac. & Proc. Civ. § 2016.1 (3d ed.) (discussing assertion of a privilege in response to a discovery request). "A [privileged] communication between an attorney and his client will be protected if it is: '(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential.'" Id. at 1551. "The attorney-client privilege, however, protects only 'disclosure of

communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.'" Slep-Tone Entm't Corp. v. Johnson, 518 F. App'x 815, 821 (11th Cir. 2013).

When a party asserts a discovery privilege, Rule 26(b)(5) requires that party to produce a privilege log[1] so the requesting party and the Court may make a prima facie determination whether the privilege applies. United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991) ("The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential."); Horton v. United States, 204 F.R.D. 670, 673 (D. Colo. 2002) ("To satisfy the burden established by Rule 26(b)(5), the party asserting the privilege must provide a privilege log that describes in detail the documents or information claimed to be privileged and the precise reasons the materials are subject to the privilege asserted."); Fed R. Civ. P. 26(b)(5); Fed. R. Bankr. P. 7026.

Here, there is no question that the documents described in Requests 15 and 17 fall within the permissive scope of post-judgment discovery. Further, Request 17 is not vague, ambiguous, or overbroad in light of the subpoena's definition of Thunderflower. The definition defines "Thunderflower" as two specific limited-liability companies and includes their respective states of organization and the request contains a reasonably limited temporal scope.

Both requests target evidence concerning ownership of CPMG. Evidence exists showing that CPMG is or was owned by Defendant Thunderflower. (Doc. 69 at 21, ¶ 6). Non-privileged documents pertaining to the ownership of and/or transfer of ownership of CPMG are, without question, discoverable in post-judgment discovery.

[1] See, e.g., King v. Univ. Healthcare Sys., 645 F.3d 713, 721 (5th Cir. 2011) ("The privilege log lists the authors and recipients of the e-mails, a brief description of each withheld communication, the amount of each document withheld, and the type of privilege asserted. A review of the privilege log entries confirms the district court's conclusion that it describes communications between client and attorney for the purpose of obtaining legal advice.").

McGlinchey Stafford contends that Plaintiff should request the documents directly from CPMG. The law, however, does not require Plaintiff to seek the documents from CPMG. Instead, the law requires McGlinchey Stafford to produce all responsive documents not covered by the attorney-client privileged.

As to the attorney-client privilege, McGlinchey Stafford has not produced a privilege log in spite of having raised this objection. Without a privilege log, neither Plaintiff nor the Court can assess the prima facie applicability of the privilege. McGlinchey Stafford must produce a privilege log concerning all responsive documents that it contends are privileged. The Court notes that Requests 15 and 17 do not appear specifically targeted at communications between McGlinchey Stafford and its clients. Further, to be clear, responsive documents given to McGlinchey Stafford by its clients and responsive documents obtained by McGlinchey Stafford through any other means are *not* protected by the attorney-client privilege. See Slep-Tone Entm't, 518 F. App'x at 821.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiff's motion to compel (Doc. 99) is GRANTED.

2. McGlinchey Stafford shall produce all documents responsive to Requests 15 and 17 that fall outside the protective scope of the attorney-client privilege. Noriega, 917 F.2d at 1550.

3. As to any responsive documents to which McGlinchey Stafford claims the attorney-client privilege applies, McGlinchey Stafford shall produce a privilege log containing the following information: a) a description of the communication that is sufficient to adduce its general subject-matter without disclosing privileged information, b) the dates/times the communication was sent and received, c) the attorney(s) and client(s) involved in the communication, d) all persons and entities who received or sent the communication, and e) all persons/entities known to have been informed of the communication's substance.