

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

PETER L . FLANAGAN :
 :
 v. : C.A. No. 10-436L
 :
 BANCORP RHODE ISLAND, INC., :
 et al. :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72(a)) are two Motions to Modify Subpoena and for Protective Order filed by Defendant Bancorp Rhode Island, Inc. (Document Nos. 17 and 18). Plaintiff opposes both Motions. (Document Nos. 23 and 25). A hearing was held on April 27, 2011.

In mid-March, Plaintiff issued third-party document subpoenas to Crowe Horwath, LLP, Defendant's internal audit firm, and KPMG, Defendant's external public auditor. Defendant moves for a protective order narrowing such document subpoenas arguing that they "seek documents that are irrelevant and are not reasonably calculated to lead to the discovery of admissible evidence." (Document Nos. 17 at p. 1 and 18 at p. 1).¹

Under Rule 26(b)(1), Fed. R. Civ. P., a party may obtain discovery regarding any nonprivileged matter that is relevant to a claim or defense in the case. This is a whistleblower

¹ At the hearing, Defendant's counsel additionally argued that the requested production would be burdensome. However, that argument was not raised in the Motions for Protective Order and is not supported by any specifics. In addition, neither Crowe Horwath nor KPMG has moved to quash the subpoenas, and Defendant would not appear to have standing to raise the issue of burden when it is not the subpoenaed party who has possession of the requested documents and the obligation to respond.

retaliation case brought under the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A) and the Rhode Island Whistleblowers' Protective Act (R.I. Gen. Laws § 28-50-1, et seq.). Plaintiff, formerly employed as the Bank's Chief Internal Auditor, claims that he was fired because he communicated violations of federal securities laws and SEC regulations to upper management "concerning inadequacies in the internal controls of the Bank over operations and financial reporting." (Document No. 24 at pp. 1-2). In particular, Plaintiff alleges that he expressed concern about the "fail[ure] to segregate key institutional functions" increasing the risk of fraud and financial reporting misstatements. (Document No. 21 at p. 8). In his Amended Complaint, Plaintiff specifically alleges structural control problems in four areas: Lending Services, Operations, Small Business Lending and Human Resources/Payroll. Id. at p. 9. While Plaintiff couches his allegations with open-ended language such as "for example" and "without limiting," this is a whistleblower case in which Plaintiff alleges that he was retaliated against for communicating certain concerns to upper management and thus he should know the substance of such communications and could have easily identified them in his detailed, fourteen-page Amended Complaint. Thus, the Court will resolve these Motions based upon the allegations specifically articulated in the Amended Complaint. Defendants dispute that Plaintiff engaged in any protected conduct and, in any event, argue that the decision to terminate Plaintiff's employment and outsource the internal audit function to Crowe Horwath was based upon legitimate, non-discriminatory business considerations, i.e., cost and performance.

After considering the parties' respective arguments, Defendant's Motions to Modify Subpoena and for Protective Order are GRANTED in part and DENIED in part as follows:

A. Crowe Horwath Subpoena

1. Request Nos. 1 and 2. Defendant's Motion to Modify and for Protective Order is DENIED.

2. Request Nos. 3 and 4. Defendant's Motion to Modify and for Protective Order is GRANTED. These Requests are limited to documents and internal audit reports for Operations' Verification and Process; Lending Services (Small Business Lending, Retail Lending and Loan Operations); Operations' Monetary and Maintenance; Human Resources and Payroll; Sarbanes-Oxley 302; and Sarbanes-Oxley 404 procedures.

3. Request No. 5. No objection made by Defendant.

B. KPMG Subpoena

1. Request Nos. 1, 2 and 5. No objection made by Defendant.

2. Request No. 3. Defendant's Motion to Modify and for Protective Order is GRANTED in part. The Request is limited to internal audit reports for the departments or subject areas identified in subsections c through f, m and n.

3. Request No. 4. Defendant's Motion to Modify and for Protective Order is GRANTED in part. The Request is limited to documents concerning the adequacy of the presence or absence of appropriate segregation of duties within departments at Bancorp Rhode Island, Inc.

4. Request No. 6. Defendant's Motion to Modify and for Protective Order is GRANTED. The Request is stricken as overly broad and is not modified because it would be redundant of Request No. 7 if narrowed as appropriate.

5. Request No. 7. Defendant's Motion to Modify and for Protective Order is DENIED.

Conclusion

Defendant's Motions to Modify Subpoena and for Protective Order (Document Nos. 17 and 18) are GRANTED in part and DENIED in part as specified herein. Plaintiff shall modify his subpoenas as directed herein and reissue them in accordance with Fed. R. Civ. P. 45. In addition, the parties shall confer in good faith as to whether any of the documents produced pursuant to such subpoenas should be treated as "Confidential Information" under the terms of the Consent Protective Order (Document No. 14) entered on February 23, 2011.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
May 4, 2011