

In the Circuit Court of Marion County, West Virginia

**American Bituminous Power Partners,)
LP,)
Plaintiff,)
)
vs.))
)
Employers' Innovative Network, LLC c/o)
Cogency Global Inc.,)
Vensure HR, Inc. c/o Cogency Global)
Inc.,)
Defendants)
)**

Case No. CC-24-2020-C-136

Order Denying Defendants' Motion to Quash

Came the parties on June 14, 2021, on Defendants' Motion to Quash Subpoenas (4.20.21) (Motion to Quash) and AMBIT's Response to Defendants' Motion to Quash (4.28.21) (AMBIT's Response), seeking the Court's determination whether AMBIT's subpoenas to Innovative Insurance Solutions (IIS) and to Encova (Brickstreet) should be struck. The issues were fully briefed by the parties and were heard before the Court on June 14, 2021.

Defendants challenge the subpoenas as placing an undue burden on third parties, especially given defendants' expectation that the information will be duplicative and given that EIN's other 'employees' will be listed there as well. Defendants further argue that they were still producing workers' compensation information at the time the subpoenas were served, such that delaying the process could prove the subpoenas unnecessary. Finally, defendants oppose the subpoenas as seeking information that is "inconsistent with the contractual relationship between ABMIT and EIN." Motion to Quash at 7ff.

AMBIT asserts that defendants have impeded its efforts to discover the profits and taking underlying the surface terms of the CSA. AMBIT believes the subpoenas are

necessary because of defendants' failure to disclose facts such as EIN's failure to identify IIS as an affiliate, failure to define the profit it built into the process, failure to clarify that AMBIT had no role, standing or access to that information or process (defendants' current position), and purposeful diversion or negligent mishandling of sizeable sums through *inter alia* placing AMBIT among other entities who needed to benefit from AMBIT's relatively low experience modifier or EMOD. Whereas defendants cite statutory authority for the policies purchased, AMBIT cites its discovery of an undisclosed 'margin,' the purpose, timing and amount of which remains unknown. AMBIT further cites that IIS is a captive agent of EIN, which was never disclosed to AMBIT.

Neither of the entities served with subpoenas appeared before the Court, nor was any documentation provided, demonstrating that IIS or Encova objected to the subpoenas or the document collection/production process or that they found compliance with the subpoenas unduly burdensome.

Both parties cite *Kahle's Kitchens, Inc. v. Shutler Cabinets, Inc.*, 240 W. Va. 209, 809 S.E.2d 520 (2018), in which West Virginia's Supreme Court of Appeals found that the discovery rules apply to Rule 45 determinations as well:

Rule 45 is subject to the provisions of our discovery rules. In Syllabus Point 4 of *Keplinger v. Virginia Electric and Power Company*, 208 W.Va. 11, 537 S.E.2d 632 (2000), this Court held:

When Rule 45 of the West Virginia Rules of Civil Procedure is used as a discovery device as permitted in W.Va. R. Civ. P. 34, Rule 45 is subject to all of the discovery provisions, including, but not limited to, the scope of discovery outlined in W. Va. R. Civ. P. 26(b)(1), which permits discovery only of matters that are relevant to the subject matter involved in the pending action, not privileged, and are, or are likely to lead to the discovery of, admissible evidence.

Both parties agree that *Kahle* asserts that the discovery rules apply, especially Rule 26, to the subpoena process. Both parties agree that this Court has the authority to

intervene to protect non-parties from undue burden in responding to a request by subpoena. However, the Court finds that both Encova and IIS agreed to provide the information with a release from EIN.

AMBIT distinguishes these subpoenas from that at issue in *Kahle*, which sought confidential, proprietary information from a non-party, when that non-party had objected and had offered a viable workaround. The subpoena in *Kahle* sought detailed information about work done for other clients over an extended period. Here, the subpoenas seek information on coverage paid for by AMBIT for its employees, by and through EIN and IIS, whom, AMBIT asserts, may have profited in the process, either directly (margins) or indirectly (increased customer base seeking pooling with AMBIT's EMOD). AMBIT asserts that, only by reviewing the information as it was processed can AMBIT determine where the decisions were made, what options were overlooked or discarded in favor of what others, what defendants knew and decided (were they purposeful or negligent). AMBIT expects these answers from these documents. AMBIT asserts that its need for this information is keen.

The subpoena served upon non-party IIS and accepted by defense counsel requested the following:

any and all documentary information relative to and/or reflective of the process by which EIN and/or Vensure HR selected and/or purchased workers' compensation and/or any disability or other insurance coverage or any benefits package whatsoever for AMBIT, including by example only all materials/information demonstrating how you or EIN or Vensure HR particularized the purchase and pricing relative to AMBIT's risk rating (including by example the experience modification factor (EMOD) utilized and applicable employee/worker classification codes, annual estimated and actual wages applicable to the individual and collective AMBIT employee classifications for the policy), detailed breakdown of premiums/costs/ surcharges applicable to AMBIT, a copy of the Annual Declaration ("DEC") sheet including the experience modification factor (EMOD) utilized and applicable employee/worker classification codes, annual estimated and actual wages applicable to the individuals and collective AMBIT employee classifications for the policy, and fees and related charges/surcharges included by IIS (as insurance broker) for these services.

See AMBIT's Response at Exhibit F. It is AMBIT's position that this subpoena requests information on how EIN and/or Vensure HR selected coverages for AMBIT including workers' compensation and seeks information including premium costs and any surcharges. It requests the declarations page or sheet. AMBIT sees this as an outgrowth of the interrogatory to defendants and reflects what AMBIT has been learning in reviewing the documents that defendants have produced to date. *See also* Order on Pending Motions (3.30.21).

As for Encova, the subpoena accepted by its legal department without objection (without even seeking additional time to respond) seeks the following:

Any and all information relative to the WC policies covering AmBit employees, but not limited to the following:

1. The WC policy for each year of coverage including detailed breakdown of premiums/costs/surcharges applicable to AmBit;
2. A copy of the Annual Declaration ("DEC") sheet including the experience modification factor (EMOD) utilized and applicable employee/worker classification codes;
3. Annual estimated and actual wages applicable to the individual and collective employee classifications for the AmBit policy; and
4. Any and all communications, correspondence, rate sheets or proposals between Employers' Innovative Network/Innovative Insurance Solutions and Brickstreet/Encova regarding WC coverage.

See AMBIT's Response Exhibit G.

WHEREFORE, for all of the reasons set forth in AMBIT's Response to Defendants' Motion to Quash and the arguments at the hearing held on June 14, 2021, and for good cause shown, the Court DENIES Defendants' Motion to Quash Subpoenas.

The objections and exceptions of any aggrieved party are noted and preserved.

Entered this ____ day of _____, 2021.

HONORABLE JAMES H. YOUNG, JUDGE
CIRCUIT COURT OF MARION COUNTY
BUSINESS COURT DIVISION

Prepared by:

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Circuit Court Judge
16th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.