

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

**AMERICAN BITUMINOUS POWER
PARTNERS, L.P., a Delaware limited
Partnership,**

Plaintiff,

v.

**Civil Action No. _____
Hon. _____, Judge**

**EMPLOYERS' INNOVATIVE NETWORK, LLC,
A West Virginia Limited Liability Company, and
VENSURE HR, INC.,
An Arizona corporation,**

Defendants.

COMPLAINT

Now comes American Bituminous Power Partners, L.P. (hereinafter referred to as "AMBIT"), by counsel, John F. McCuskey, Roberta F. Green, and Shuman McCuskey Slicer PLLC, and for its Complaint states as follows:

PARTIES AND JURISDICTION

1. The Plaintiff, AMBIT, is a Delaware limited partnership licensed to do business in West Virginia with its principal place of business located in Marion County, West Virginia.
2. Defendant Employers' Innovative Network, LLC. (hereinafter "EIN") is a West Virginia corporation with its principal place of business located in Cross Lanes, Kanawha County, West Virginia.
3. Defendant Vensure HR, Inc. (hereinafter "Vensure") is an Arizona corporation, parent corporation to EIN, and is licensed to do business in West Virginia, with its principal place of business located in Chandler, Maricopa County, Arizona.
4. On information and belief, during the times at issue, EIN became a wholly owned subsidiary of Vensure.

5. The Plaintiff, AMBIT, has been engaged in the operation of an electric generation plant located in Marion County, West Virginia, at all times relevant to the Complaint.

6. The cause of action arises from professional employer organization (PEO) and human resources (HR) services that EIN and/or Vensure provided to AMBIT pursuant to the Employers' Innovative Network, LLC's Customer Services Agreement (Agreement).

7. Pursuant to the express terms of the Agreement, EIN and AMBIT co-employed the plant's employees in Marion County, West Virginia, with EIN operating from its offices in Kanawha County, West Virginia.

8. In the course of providing PEO services to AMBIT and in the process of co-employing workers in Marion County, West Virginia, EIN and/or its parent company Vensure converted, diverted or otherwise misappropriated moneys belonging to AMBIT, which resulted in a loss to AMBIT that manifested itself and was made evident in Marion County, West Virginia.

9. Venue and jurisdiction are proper in the Circuit Court of Marion County, West Virginia as pursuant to *SER Thornhill v. King*, 233 W. Va. 242, 759 S.E.2d 795 (2014), that is the location of the breach and where the monetary harm is most acutely felt.

FACTS PERTINENT TO COMPLAINT

10. On or about July 15, 2013, EIN and AMBIT (as Customer) entered the Agreement, whereby EIN would *inter alia* pay wages to the co-employees, administer the benefit plan, maintain personnel files and policies, and maintain workers' compensation and unemployment compensation coverages.

11. The Agreement requires that AMBIT pay EIN monthly fees to provide PEO and HR services. AMBIT has timely paid the monthly fee since the Agreement was signed in 2013 and has at all times complied with its duties under the Agreement.

12. The Agreement further provided that AMBIT “shall appoint an authorized representative(s) who will be responsible for reporting any and all information to EIN or receiving Employee information from EIN.”

13. AMBIT appointed its Plant Manager Steve Friend as its authorized representative, as clearly stated in the Agreement.

14. Also as part of the Agreement, AMBIT agreed that Steve Friend “has full and complete authority to report information to EIN and that EIN may rely on this information.”

15. The Agreement further provided that the authorized representative can only be changed in writing, signed by the President of Customer, and directed to EIN.

16. No such change was ever made.

17. The Agreement provides at Section XII General Provisions that whenever notices are required to be sent to AMBIT, the notices shall be sent to the Plant Manager, who is identified in the Agreement at section V.D. (Obligations of Customer), as Steve Friend.

18. No change was ever made in that designation.

19. The Agreement includes that AMBIT’s failures to pay EIN timely will result in AMBIT’s paying one and one-half percent (1-1/2%) of the delinquent amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest**” (emphasis in original) plus an additional three percent (3%) administrative charge against the delinquent amount.

20. The Agreement is silent as to EIN’s failures to reimburse, as the Agreement does not envision EIN’s taking and holding AMBIT’s overpayments. That is, the Agreement does not envision that the PEO would unjustly enrich itself by taking, holding, and converting Customer’s moneys and maintaining those moneys as its own.

21. The Agreement does provide a remedy for instances in which one party is placed under financial burden by the other party's failure to comply with its contractual duties or ethical behavior.

22. Pursuant to the Agreement prepared and presented to AMBIT by EIN, AMBIT was required to make an advanced deposit of an agreed-to estimate of the wages, payroll, and benefit costs not less than five days prior to each payroll date.

23. Also pursuant to the Agreement, if the deposit is less than the actual amount owed for payroll, AMBIT agreed to pay the difference by noon of the Wednesday immediately preceding the payroll date.

24. If the deposit is more than the actual amount AMBIT owes for payroll expenses, AMBIT was allowed by the Agreement to reduce its next deposit by the overage amount.

25. The parties continued in their co-employment of the plant employees, and, on February 23, 2017, Brandi Lusher (variously EIN's Chief Operating Officer and/or VP of Operations) emailed Ashley Conaway relative to the next invoice to AMBIT, given a "really large credit balance out there according to [EIN's] Accounting."

26. By February 23, 2017, EIN had evidence of more than 100 overpayments made by AMBIT, resulting in EIN's own accounting demonstrating AMBIT's moneys in EIN's account at that point in time, totaling \$216,013.52.

27. Despite recognizing the overpayments and AMBIT's moneys held in its accounts for over 100 pay periods, EIN never contacted Plant Manager Steve Friend, who was the only authorized representative ever designated by AMBIT as defined within the Agreement.

28. Instead EIN communicated repeatedly in February and March 2017 with AMBIT's payroll clerk Susan Santee, despite EIN's clearly expressed recognition in internal emails between and among its CFO and VP of Operations that Ms. Santee did not understand their

communications, the significance of the moneys, and how to reconcile accounts. EIN did not again address these issues until June 2020, when AMBIT contacted EIN, and this issue became clear.

29. Nonetheless, EIN continued to communicate only with Ms. Santee and never once communicated the overages or Ms. Santee's confusion to Steve Friend.

30. Indeed, over the seven years that EIN allowed this overage to accumulate in its accounts, EIN only contacted Susan Santee, the payroll clerk whose position and/or name appears nowhere in the Agreement.

31. Whereas EIN alleges to have elevated the issue to its upper management, EIN never advanced the discussion to AMBIT's designated agent or management, although EIN communications demonstrate a continuing belief that the money resulted from overpayments made by AMBIT.

32. On October 9, 2019, Brandi Lusher came to the AMBIT Plant to discuss HR and other issues face to face with Mr. Friend and Ms. Santee. Despite Mr. Friend's being the authorized representative to discuss any issues under the Agreement and/or between EIN and AMBIT, and despite Ms. Lusher's documented awareness of the overpaid moneys, Ms. Lusher never raised the subject of the overages during that meeting.

33. On information and belief, EIN maintained AMBIT's moneys in its operating accounts and used the moneys for its own advancement and purposes.

34. In June 2020, after AMBIT began to understand the overpayment issue, EIN finally conferred with management at AMBIT and agreed to pay back the then-believed total overage amount of \$255,159.34. EIN represented to AMBIT at that time that this amount represented overpayments dating back to January 2019, that a change in EIN accounting software was the root of this issue and that no further amounts were expected to have been overpaid by AMBIT prior to that time. Based upon this information, AMBIT agreed to accept repayment of \$255,159.34,

along with then ongoing additional credits during the period this information was under review in June and July 2020 totaling \$22,894.10 (total repaid amount of \$278,053.44). However, only at the insistence of AMBIT that payment records be reviewed by EIN dating back to 2013 did EIN finally admit the extent of the overage and produce information showing overpayments each and every year dating back to 2013, with a total reconciliation amount of overpayment of more than \$970,000. Communications and records that EIN had in its possession confirmed that the overpayments issue dated back to 2013.

35. At no time prior to June 2020 was AMBIT aware of the overpayment and of EIN's maintenance of those moneys as its own, all of which was then admitted by EIN and Vensure.

36. EIN credited AMBIT in four payroll installments totaling \$255,159.34, along with the ongoing credits due of \$22,894.10, which payback was completed as of September 2020 and which represented overpaid amounts only dating back to January 2019.

37. In August 2020, EIN, by and through its VP of Operations Brandi Lusher, notified AMBIT management that the total overage dating back to 2013 was actually \$971,984.98.

38. The parties – EIN, Vensure and AMBIT – have negotiated potential resolutions of AMBIT's claim, which discussions ended when Vensure, speaking on behalf of EIN and Vensure, rejected efforts to resolve the claim.

39. On September 16, 2020, after weeks of conversation that had ended without an agreement, AMBIT crystalized its position in a letter addressed to Vensure's CEO Alex Campos, demanding repayments of moneys.

40. On September 23, 2020, Vensure by counsel 'rejected' AMBIT's demand.

41. At no time in these discussions has Vensure denied its relationship to and its responsibility for EIN's acts and debts.

42. At the time of this filing, \$693,931.46 (exclusive of interest) remains outstanding.

COUNT ONE – BREACH OF CONTRACT

43. AMBIT reasserts each of the above paragraphs numbered 1 through 42 as if set forth in their entirety verbatim herein.

44. Pursuant to the express terms of the Agreement, EIN contracted to communicate with AMBIT only through AMBIT's authorized representative Plant Manager Steve Friend.

45. At no time from 2013 through June 2020 did EIN address the overages issue with Plant Manager Steve Friend.

46. Despite EIN's management's demonstrating express knowledge of the overpayments, EIN never communicated with AMBIT's authorized representative.

47. EIN's failure to communicate with the authorized representative from its first demonstrated knowledge in February 2013 until present resulted in the overage's growing to \$971,984.98. Once EIN communicated with Plant management in June 2020, the issue was addressed, albeit unsatisfactorily.

48. A contract exists between EIN and AMBIT, said contract termed Customer Service Agreement (referred to Agreement herein), entered by the parties on or about July 15, 2013. The Agreement provides at Section XII General Provisions that whenever notices are required to be sent to AMBIT, the notices shall be sent to the Plant Manager, who is identified in the Agreement at section V.D. (Obligations of Customer), as Steve Friend.

49. EIN breached the Agreement by failing to notify AMBIT of the overages as provided for in Section XII.

50. As a result of EIN's breach, AMBIT has been materially damaged in the loss of use of its \$971,984.98.

51. EIN still has control of \$693,931.46 of AMBIT's moneys that it has refused and declined to return.

52. As a result of EIN's breach, AMBIT has had to borrow additional money for operations at considerable cost.

53. AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

COUNT TWO – TORTIOUS CONVERSION

54. AMBIT reasserts paragraphs 1 through 53 as if set forth in their entirety herein.

55. The overpayment is money that all parties agree came to EIN from AMBIT without AMBIT's consent or knowledge.

56. The parties agree that EIN has maintained those moneys from 2013 to the present and still holds those moneys at this time.

57. At no time did EIN notify AMBIT via the contracted-for agent for notice.

58. As a result of EIN's breach of the Agreement, AMBIT did not discover the \$971,984.98, overpayment accumulating from 2013 until the present until June 2020.

59. Even now, Vensure and EIN have acknowledged having AMBIT's moneys and have refused to return it, absent four refund payments which represented overpaid amounts only dating back to 2019 made in July, August, and September 2020.

60. The total current arrearage, without interest, is \$693,931.46.

61. EIN converted AMBIT's moneys to its own use by wrongful act, inconsistent with the express terms of the Agreement.

62. AMBIT has been damaged by EIN's maintaining its moneys unlawfully over time.

63. AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

COUNT THREE – UNJUST ENRICHMENT

64. AMBIT reasserts paragraphs 1 through 63 as if set forth in their entirety herein.

65. AMBIT continued to pay payroll advances to EIN because of a mistake of fact, fostered by EIN's breach of the Agreement to notify the proper agent.

66. EIN and its parent company Vensure have been and are now unjustly enriched by maintaining and using AMBIT's money as their own, enjoying all of the benefits of those moneys over time.

67. Specifically, the party who received the money has no basis for retaining it and has received money of another to which it was not entitled.

68. AMBIT has been damaged by EIN's and Vensure's conversion of its moneys and seeks the enhanced market value of its property – the overpaid moneys plus interest pursuant to the contractual remedy for financial failures.

69. Specifically, AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

COUNT FOUR – BREACH OF FIDUCIARY DUTY

70. AMBIT reasserts paragraphs 1 through 69 as if set forth in their entirety herein.

71. AMBIT relied on EIN to fulfill the terms of the Agreement fully, fairly, and responsibly. In turn, AMBIT fulfilled its contractual responsibilities appropriately.

72. AMBIT detrimentally relied on EIN to be honest, professional, reliable and to adhere to the contractual duties agreed to between them.

73. EIN acknowledged AMBIT's reliance and confidence in it, continuing to function under the Agreement, purporting to act for AMBIT's benefit, leading AMBIT to believe that EIN was subordinating its own interests to those of AMBIT and its co-employees.

74. AMBIT seeks reimbursement for lost profits and/or opportunities relative to the unlawfully retained moneys and its out-of-pocket losses, including attorneys' fees, relative to this breach.

75. AMBIT has been damaged by EIN's maintaining its moneys unlawfully over time and continuing to maintain those moneys even after acknowledging and demonstrating to AMBIT that they are AMBIT's moneys, received and maintained pursuant to breach of the Agreement.

76. AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

77. Additionally, AMBIT seeks punitive damages on the basis that EIN's and Vensure's conduct in taking and maintaining moneys they acknowledge rightfully belong to AMBIT was willful, reckless, wanton and performed with criminal indifference and disregard of

AMBIT's rights and the compromised financial position in which the loss of \$971,984.98 placed AMBIT.

COUNT FIVE -- BREACH OF DUTY OF GOOD FAITH, FAIR DEALING

78. AMBIT reasserts paragraphs 1 through 77 as if set forth in their entirety herein.

79. In their breach of the Agreement and their continuing refusal to return AMBIT's moneys even after acknowledging that they are AMBIT's moneys, converted to EIN's and Vensure's accounts and purported use, EIN and Vensure have breached the duty of good faith and fair dealing.

80. AMBIT has been damaged by EIN's maintaining its moneys unlawfully over time and continuing to maintain those moneys even after acknowledging and demonstrating to AMBIT that they are AMBIT's moneys, received and maintained pursuant to breach of the Agreement.

81. AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

82. Additionally, AMBIT seeks punitive damages on the basis that EIN's and Vensure's conduct in taking and maintaining moneys they acknowledge rightfully belongs to AMBIT was willful, reckless, wanton and performed with criminal indifference and disregard of AMBIT's rights and the compromised financial position in which the loss of \$971,984.98 placed AMBIT.

COUNT SIX – CIVIL CONSPIRACY

83. AMBIT reasserts paragraphs 1 through 82 as if set forth in their entirety herein.

84. EIN and Vensure have joined by concerted action to unlawfully deprive AMBIT of its moneys by maintaining said moneys in their possession even after acknowledging that they are not the proper owner and that it was paid by AMBIT unknowingly, in error.

85. AMBIT has been injured by EIN's and Vensure's joint action to maintain the improper taking even after learning of their error in doing so.

86. AMBIT has been damaged by EIN's and Vensure's maintaining its moneys unlawfully over time and continuing to maintain those moneys even after acknowledging and demonstrating to AMBIT that they are AMBIT's moneys, received and maintained pursuant to breach of the Agreement.

87. AMBIT is entitled to the contractual remedy for financial missteps, specifically, payment of attorneys' fees and repayment of the amount it overpaid, plus interest, as AMBIT seeks the contractual damages as set out for unlawfully withheld amounts: one and one-half percent (1-1/2%) of the overpaid amount for each thirty (30) day period that the **unpaid balance remains outstanding, but in no event shall the amount exceed the lawful rate of interest.**

WHEREFORE, AMBIT prays for the following contractual and other relief and judgment against EIN and Vensure:

- (a) The return of all of AMBIT's unlawfully converted and maintained moneys.
- (b) One and one-half percent of the unlawfully retained amount for each thirty (30) day period that the unpaid balance remains outstanding.
- (c) Punitive damages.
- (d) AMBIT's fees and expenses expended in proceeding herein to gain this relief.

- (e) Lost opportunity costs.
- (f) Prejudgment and post judgment interest.
- (g) Such other relief as the Court deems just and proper.

Respectfully submitted,

**AMERICAN BITUMINOUS POWER
PARTNERS, L.P.,**

By counsel.

/s/ Roberta F. Green

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