

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS
POWER PARTNERS, L.P.,

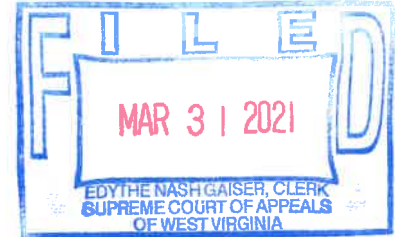
Plaintiff,

v.

EMPLOYERS' INNOVATIVE
NETWORK, LLC, and
VENSURE HR, INC.,

Defendants.

Marion County Circuit Court
Civil Action No. 20-C-136
The Honorable David R. Janes



MOTION TO REFER CASE TO BUSINESS COURT DIVISION

Defendants, Employers' Innovative Network, LLC ("EIN"), and Vensure HR, Inc. ("Vensure HR") (collectively, "Defendants"), by counsel and pursuant to Rule 29 of the *West Virginia Trial Court Rules*, respectfully request that the above-styled action be referred to the Business Court Division for all further proceedings.

Defendants have been sued based on contractual obligations in the Customer Service Agreement ("CSA") between EIN and Plaintiff, American Bituminous Power Partners, L.P. ("Plaintiff" or "AMBIT"). The CSA, entered in July 2013 and terminated January 2021, is a detailed contract under which EIN and AMBIT became co-employers of the workforce at AMBIT's Marion County plant.

AMBIT alleges that EIN improperly retained overpayments that allegedly accrued when AMBIT made estimated payroll payments called for by the CSA. AMBIT asserts six counts for breach of contract, business torts, unjust enrichment, and civil conspiracy. In addition, AMBIT has asserted other wrongdoing in early motions practice. And, AMBIT has sought extensive discovery on unemployment taxes, the selection of a retirement fund provider, workers'

compensation and other insurance, and the affiliation between EIN and Vensure HR. AMBIT now has suggested that its damages exceed \$2 million. In sum, this case encompasses many aspects of a nearly 8-year, contractual relationship between co-employers AMBIT and EIN with potentially millions of dollars at stake.

Rule 29.04 of the *West Virginia Trial Court Rules* contemplates that claims regarding significant transactions and operations between business entities are eligible for referral to the Business Court Division if beneficial. This case presents such a circumstance. For the reasons set forth below, Defendants respectfully request transfer to the Business Court Division.

I. The allegations and scope of discovery in this matter involve numerous aspects of a nearly 8-year, contractual relationship between co-employers.

1. AMBIT and EIN's business relationship was a complex contractual arrangement to jointly employ AMBIT's workforce at the Grant Town Power Plant. As discussed, EIN became a co-employer of AMBIT's employees and agreed to provide various professional employer services. *See* Compl. ¶¶ 6, 10, attached as **Exhibit A**.¹

2. As outlined in § III.B of the CSA, attached as **Exhibit C**, these services included, among other things, paying wages to employees, withholding and remitting employment taxes, administering benefit plans, keeping personnel records, and maintaining workers compensation and unemployment compensation insurance coverage.

3. The CSA contained a specific provision regarding how AMBIT would fund payroll payments. Rather than directly fund payroll through electronic funds transfers, the CSA called for AMBIT to make an estimated payment to EIN five days before each payroll date. *See Ex. C* § IV.B. EIN would then calculate the actual payroll payments. *Id.*

¹ Defendants' Answer is attached as **Exhibit B**.

4. If the actual payroll amount was greater than the estimated payment, AMBIT would pay the difference by “12:00 pm on the Wednesday immediately prior to the forthcoming payroll date.” *Id.* On the other hand, if the estimate exceeded the actual amount of payroll, AMBIT could “reduce its next deposit by such overage amount.” *Id.*; *see also* **Ex. A** ¶¶ 22-24.

5. AMBIT allegedly accumulated a credit balance over the course of the contractual relationship, which AMBIT alleges totaled \$971,984.98. *Id.* ¶¶ 25-26, 34, 37. AMBIT alleges that EIN was contractually required to, but did not, inform its plant manager of the overages. *Id.* ¶ 27. According to AMBIT, EIN has repaid it more than \$278,000, but “[a]t the time of [the Complaint], \$693,931.46 (exclusive of interest) remains outstanding.” *Id.* ¶¶ 34, 42.

6. In connection with these allegations, AMBIT asserts claims for breach of contract, tortious conversion, unjust enrichment, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and civil conspiracy. *Id.* ¶¶ 43-87.

7. In responding to AMBIT’s first set of written discovery in this matter, Defendants provided fulsome interrogatory answers concerning the alleged overpayments and have, to date, produced more than 20,000 pages of documents, including invoices, spreadsheets, and email communications, with more to come through supplemental productions.

8. In addition, AMBIT sought—and, over Defendants’ objection, the Circuit Court compelled them to produce—information and documents on every aspect of the relationship between EIN and AMBIT. The topics at issue in discovery now also include the calculation of payroll taxes, the selection of investment funds for retirement accounts, the procurement of insurance and benefits packages, and the acquisition of EIN in late 2019.

9. Based on statements made by AMBIT during this litigation, Defendants understand that it intends to seek millions of dollars in connection with the various aspects of the contractual relationship between AMBIT and EIN.

10. A copy of the docket sheet is attached as **Exhibit D**.

11. Pursuant to the current Scheduling Order, AMBIT has until June 18, 2021 to amend its Complaint. AMBIT has several times expressed its desire to amend its Complaint to assert additional claims against Defendants—and possibly add other related-entity defendants—arising out of the complex contractual relationship between co-employers AMBIT and EIN.

II. This action meets the criteria for “Business Litigation” and would benefit from transfer to the Business Court Division.

12. Rule 29.06(a)(1) of the *West Virginia Trial Court Rules* provides that “[a]ny party . . . may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia.”

13. “Business Litigation” is defined as an action in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

(3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant

disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. Trial Ct. R. 29.04(a).

14. This action is a model case for transfer to the Business Court Division. The claims—and potential future claims—are “of significance to the transactions, operations, or governance between” AMBIT and EIN. *See id.*

15. The Complaint alleges that EIN improperly maintained hundreds of thousands of dollars in overpayments made by AMBIT from 2013 through 2020. AMBIT also contends that it has suffered millions of dollars in damages because Defendants allegedly breached the CSA and/or acted wrongfully in connection with payroll taxes, retirement investments, insurance and benefits, and the purchase of EIN by the Vensure corporate family.

16. Put simply, AMBIT is placing every aspect of a nearly 8-year, contractual, co-employer relationship is at issue in this litigation. These disputes involve commercial issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution. Resolution will benefit from the specialized knowledge of the Business Court Division, both legal and substantive, regarding interpretation of complex contracts, business entity formation, accounting, financial services, insurance coverage, and state and federal taxation.

17. Finally, this action does not fall within any of the disqualifying categories listed in Rule 29.04(a)(3).

III. AMBIT, itself, has obtained transfer in similar contract disputes.

18. AMBIT should agree that this action is appropriate for transfer to the Business Court Division, as AMBIT has sought and obtained transfer of similar contract disputes. At least

twice, AMBIT successfully sought transfer to the Business Court Division of contractual disputes with its landlord, Horizon Ventures of West Virginia, Inc. (“Horizon”).

19. The first action involved a dispute over the monthly lease payment from AMBIT to Horizon. That case involved a years-long contractual relationship that governed AMBIT’s payment obligations. On appeal of summary judgment for Horizon, AMBIT “contend[ed] that the [remanded] case would be appropriate for referral to the Business Court Division,” although AMBIT filed no formal motion. *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Va., Inc.*, No. 14-0446, 2015 WL 2261649, at *7 (W. Va. May 13, 2015) (memorandum decision). Noting the “complexity of the contractual agreements governing [the] dispute,” this Court agreed and ordered transfer when it reversed and remanded. *Id.*

20. In another action that AMBIT filed against Horizon—“an outgrowth” of the action discussed above—AMBIT again sought referral to the Business Court Division. Notably, AMBIT maintained that referral was appropriate because the case involved the terms of a contract, “commercial torts,” “voluminous documents,” and “allege[d] mispayment or nonpayment of millions of dollars.” *See* Motion to Refer Case to the Business Court Division, Marion County No. 18-C-130 (Jan. 10, 2019), attached as **Exhibit E**. This Court granted AMBIT’s motion and referred the action to the Business Court Division. *See* Administrative Order, Marion County No. 18-C-130 (Feb. 19, 2019), attached as **Exhibit F**.

21. The same factors that supported AMBIT’s prior requests are present here and weigh in favor of granting Defendants’ current motion for transfer to the Business Court Division.

WHEREFORE, pursuant to Rule 29 of the *West Virginia Trial Court Rules*, Defendants Employers’ Innovative Network, LLC and Vensure HR, Inc. move the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted,

**EMPLOYERS' INNOVATIVE NETWORK, LLC
and VENSURE HR, INC.,**

By Counsel:



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Facsimile: (304) 353-8180

*Counsel to Employers' Innovative Network, LLC and
Vensure HR, Inc.*

Exhibit A



West Virginia E-Filing Notice

CC-24-2020-C-136

Judge: David Jones

To: Employers' Innovative Network, LLC c/o Cogency Global Inc.
1627 Quarrier Street East
Charleston, WV 25311

NOTICE OF FILING

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency
Global Inc.
CC-24-2020-C-136

The following complaint was FILED on 10/2/2020 1:06:11 PM

Notice Date: 10/2/2020 1:06:11 PM

Rhonda Starn
CLERK OF THE CIRCUIT
Marion
219 Adam Street, Room 211
FAIRMONT, WV 26554

(304) 367-5360
rhonda.starn@courts.wv.gov

SUMMONS

E-FILED | 10/2/2020 1:06 PM
CC-24-2020-C-136
Marion County Circuit Clerk
Rhonda Starn

IN THE CIRCUIT OF MARION WEST VIRGINIA

American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency Global Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Employers' Innovative Network, LLC c/o Cogency Global Inc., 1627 Quarrier Street East, Charleston, WV 25311.
THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY.

Roberta Green, PO Box 3953, Charleston, WV 25339

THE ANSWER MUST BE MAILED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT.

SERVICE:

10/2/2020 1:06:11 PM

/s/ Rhonda Starn

Date

Clerk

RETURN ON SERVICE:

☐ Return receipt of certified mail received in this office on _____

☐ I certify that I personally delivered a copy of the Summons and Complaint to _____

☐ Not Found in Bailiwick

Date

Server's Signature

COVER SHEET

E-FILED | 10/2/2020 1:06 PM
CC-24-2020-C-136
Marion County Circuit Clerk
Rhonda Starn

GENERAL INFORMATION

IN THE CIRCUIT COURT OF MARION COUNTY WEST VIRGINIA

American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency Global Inc.

First Plaintiff: ☒ Business ☐ Individual ☐ Government ☐ Other
First Defendant: ☒ Business ☐ Individual ☐ Government ☐ Other
Judge: David Janes

COMPLAINT INFORMATION

Case Type: Civil **Complaint Type:** Tort

Origin: ☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

Jury Trial Requested: ☒ Yes ☐ No **Case will be ready for trial by:** 10/4/2021

Mediation Requested: ☐ Yes ☒ No

Substantial Hardship Requested: ☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: _____

☐ I am proceeding without an attorney

☒ I have an attorney: Roberta Green, PO Box 3953, Charleston, WV 25339

SERVED PARTIES

Name: Employers' Innovative Network, LLC c/o Cogency Global Inc.
Address: 1627 Quarrier Street East, Charleston WV 25311
Days to Answer: 30 **Type of Service:** Plaintiff - Secretary of State

Name: Vensure HR, Inc. c/o Cogency Global Inc.
Address: 1627 Quarrier Street East, Charleston WV 25311
Days to Answer: 30 **Type of Service:** Plaintiff - Secretary of State

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

John F. McCuskey, Esquire (WVSB #2431)
Roberta F. Green, Esquire (WVSB #6598)
SHUMAN MCCUSKEY SLICER PLLC
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Exhibit B



West Virginia E-Filing Notice

CC-24-2020-C-136

Judge: David Janes

To: Russell Jessee
russell.jessee@steptoe-johnson.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency
Global Inc.
CC-24-2020-C-136

The following answer was FILED on 11/2/2020 2:18:57 PM

Notice Date: 11/2/2020 2:18:57 PM

Rhonda Starn
CLERK OF THE CIRCUIT
Marion
219 Adam Street, Room 211
FAIRMONT, WV 26554

(304) 367-5360
rhonda.starn@courtswv.gov

COVER SHEET

E-FILED | 11/2/2020 2:18 PM
CC-24-2020-C-136
Marion County Circuit Clerk
Rhonda Starn

GENERAL INFORMATION

IN THE CIRCUIT COURT OF MARION COUNTY WEST VIRGINIA

American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency Global Inc.

First Plaintiff: ☒ Business ☐ Individual
☐ Government ☐ Other

First Defendant: ☒ Business ☐ Individual
☐ Government ☐ Other

Judge: David Janes

COMPLAINT INFORMATION

Case Type: Civil

Complaint Type: Tort

Origin: ☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

Jury Trial Requested: ☒ Yes ☐ No **Case will be ready for trial by:** 12/1/2021

Mediation Requested: ☐ Yes ☒ No

Substantial Hardship Requested: ☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: _____

☐ I am proceeding without an attorney

☒ I have an attorney: Russell Jessee, PO Box 1588, Charleston, WV 25326

SERVED PARTIES

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

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

Plaintiff,

**Civil Action No. CC-24-2020-C-136
Hon. David Janes, Judge**

v.

**EMPLOYERS' INNOVATIVE NETWORK, LLC
and VENSURE HR, INC.,**

Defendants.

**DEFENDANTS EMPLOYERS' INNOVATIVE NETWORK, LLC AND
VENSURE HR, INC.'S ANSWER AND AFFIRMATIVE DEFENSES**

COME NOW, Employers' Innovative Network, LLC ("EIN") and Vensure HR, Inc. ("Vensure" and collectively with EIN, "Defendants"), Defendants in the above-styled action, and hereby file their Answer and Affirmative Defenses showing this Honorable Court as follows:

ANSWER

In this Answer, Defendants respond to the corresponding numbered paragraphs in the Complaint as follows:

PARTIES AND JURISDICTION

1. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 1, and therefore deny them in their entirety.
2. Defendants admit the allegations contained in Paragraph 2.
3. Defendants admit the allegations contained in Paragraph 3.
4. Defendants admit the allegations contained in Paragraph 4.
5. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 5, and therefore deny them in their entirety.

6. Paragraph 6 consists of assertions concerning a contract, which speaks for itself, and legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

7. Paragraph 7 consists of assertions concerning a contract, which speaks for itself, and legal conclusions to which no response is required. To the extent a response is deemed required, this paragraph is denied.

8. Paragraph 8 consists of legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

9. Paragraph 9 consists of legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

FACTS PERTINENT TO COMPLAINT

10. Paragraph 10 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

11. Paragraph 11 consists of assertions concerning a contract, which speaks for itself and legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

12. Paragraph 12 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

13. Paragraph 13 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

14. Paragraph 14 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

15. Paragraph 15 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

16. Paragraph 16 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract. Additionally, Defendants are without sufficient knowledge or information at this stage of the litigation to either admit or deny the remaining allegations contained in Paragraph 16, and therefore deny them in their entirety.

17. Paragraph 17 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

18. Paragraph 18 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract. Additionally, Defendants are without sufficient knowledge or information at this stage of the litigation to either admit or deny the remaining allegations contained in Paragraph 18, and therefore deny them in their entirety.

19. Paragraph 19 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

20. Paragraph 20 consists of assertions concerning a contract, which speaks for itself, and legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

21. Paragraph 21 consists of assertions concerning a contract, which speaks for itself, and legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

22. Paragraph 22 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

23. Paragraph 23 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

24. Paragraph 24 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

25. Paragraph 25 contains legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied. Paragraph 25 also contains factual allegations about e-mail correspondence, which speaks for itself and requires no response from Defendants. Finally, Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph 25, and therefore deny them in their entirety.

26. In response to Paragraph 26, Defendants admit that its own accounting identified some potential issues with AMBIT's deposits and brought this to AMBIT's attention. All other allegations in Paragraph 26 not expressly admitted herein are denied.

27. Paragraph 27 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract. Paragraph 27 also contains legal conclusions, to which no response is required. Defendants admit that they alerted AMBIT to potential issues with its deposits. Finally, Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph 27, and therefore deny them in their entirety.

28. Paragraph 28 consists of assertions concerning a contract, which speaks for itself, and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract. Paragraph 28 also contains legal conclusions, to which no response is required. Defendants admit that they alerted AMBIT to potential issues with its deposits. Finally, Defendants are without sufficient knowledge or information at this stage of the litigation to either admit or deny the remaining allegations contained in this Paragraph 28, and therefore deny them in their entirety.

29. In response to Paragraph 29, Defendants admit that they alerted AMBIT to potential issues with its deposits. Finally, Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph 29, and therefore deny them in their entirety.

30. Paragraph 30 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any

allegations inconsistent with the terms of this contract. Defendant deny the remaining allegations in Paragraph 30.

31. Paragraph 31 contains factual allegations about e-mail correspondence, which speaks for itself and requires no response from Defendants. Defendants deny the remaining allegations in Paragraph 31.

32. Paragraph 32 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract. Defendants admit the remaining allegations in Paragraph 32 but deny that any duty existed as implied by the allegations.

33. Defendants deny the allegations in Paragraph 33.

34. In response to Paragraph 34, Defendants are without sufficient knowledge or information to either admit or deny the allegations concerning the thoughts, motivations, knowledge, documentation or evidence of AMBIT at this stage of the litigation and therefore deny any such allegations. Defendants admit that conversations were had with AMBIT concerned alleged overpayments and that agreements concerning those overpayments were made, but Defendants deny AMBIT's characterization thereof. All remaining allegations in Paragraph 34 not expressly admitted herein are denied.

35. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 35, and therefore deny them in their entirety.

36. In response to Paragraph 36, Defendants admit that four installment payments from EIN to AMBIT totaling \$255,159.34 and an account credit of \$22,894.10 were completed in September 2020. All remaining allegations in Paragraph 36 not expressly admitted herein are denied.

37. Paragraph 37 contains factual allegations about correspondence, which speaks for itself and requires no response from Defendants. All other allegations contained in Paragraph 37 not expressly admitted herein are denied.

38. In response to Paragraph 38, Defendants admit that the parties have negotiated potential resolutions to this dispute. All other allegations contained in Paragraph 38 not expressly admitted herein are denied.

39. In response to Paragraph 39, Defendants admit that no resolution to this dispute was reached by the parties and that AMBIT sent a letter to Alex Campos, which letter speaks for itself. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 39, and therefore deny them in their entirety.

40. Defendants admit the allegations in Paragraph 40.

41. Paragraph 41 consists of legal conclusions, to which no response is required. To the extent a response is deemed required, Defendants state that Vensure has at no time either admitted or denied anything about its relationship with EIN, and Defendants deny that AMBIT has properly characterized that relationship.

42. Defendants deny the allegations contained in Paragraph 42 to the extent any amount remains “outstanding” as alleged by Plaintiff.

BREACH OF CONTRACT

43. Defendants reassert each of the above paragraphs numbered 1 – 42 as if set forth in their entirety herein.

44. Paragraph 44 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

45. Defendants admit the allegations contained in Paragraph 45 but deny that any duty existed as implied by the allegations.

46. Defendants deny the allegations contained in Paragraph 46.

47. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 47, and therefore deny them in their entirety.

48. Paragraph 48 consists of assertions concerning a contract, which speaks for itself and to which no response is required. To the extent any response is required, Defendants deny any allegations inconsistent with the terms of this contract.

49. Defendants deny the allegations contained in Paragraph 49.

50. Defendants deny the allegations contained in Paragraph 50.

51. Defendants deny the allegations contained in Paragraph 51.

52. In response to Paragraph 52, Defendants deny that EIN is in breach and state that they are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 52, and therefore deny them in their entirety.

53. Defendants deny the allegations contained in Paragraph 53 and deny that Plaintiff is entitled to any relief whatsoever.

COUNT TWO TORTIOUS CONVERSION

54. Defendants reassert each of the above paragraphs numbered 1 – 53 as if set forth in their entirety herein.

55. Defendants deny the allegations contained in Paragraph 55.

56. Defendants deny the allegations contained in Paragraph 56.

57. The allegations in Paragraph 57 are ambiguous as to what AMBIT is referring to and therefore Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 57, and therefore deny them in their entirety.

58. In response to Paragraph 58, Defendants deny they breached the agreement and state that they are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 58, and therefore deny them in their entirety.

59. In response to Paragraph 59, Defendants admit that four payments were made to AMBIT, and all remaining allegations contained in Paragraph 59 not expressly admitted herein are denied.

60. Defendants deny the allegations in Paragraph 60.

61. Defendants deny the allegations in Paragraph 61.

62. Defendants deny the allegations in Paragraph 62.

63. Defendants deny the allegations in Paragraph 63 and deny that Plaintiff is entitled to any relief whatsoever.

COUNT THREE: UNJUST ENRICHMENT

64. Defendants reassert each of the above paragraphs numbered 1 – 63 as if set forth in their entirety herein.

65. In response to Paragraph 65, Defendants deny they breached the Agreement and state that they are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 65, and therefore deny them in their entirety.

66. Defendants deny the allegations in Paragraph 66.

67. Defendants deny the allegations in Paragraph 67.

68. Defendants deny the allegations in Paragraph 68.

69. Defendants deny the allegations in Paragraph 69 and deny that Plaintiff is entitled to any relief whatsoever.

COUNT FOUR: BREACH OF CONTRACT

70. Defendants reassert each of the above paragraphs numbered 1 – 69 as if set forth in their entirety herein.

71. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 71, and therefore deny them in their entirety.

72. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 72, and therefore deny them in their entirety.

73. In response to Paragraph 73, Defendants assert that they complied with the terms of the agreement and state that they are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 58, and therefore deny them in their entirety.

74. In response to Paragraph 74, Defendants deny that Plaintiff is entitled to any relief whatsoever.

75. Defendants deny the allegations in Paragraph 75.

76. Defendants deny the allegations in Paragraph 76 and deny that Plaintiff is entitled to any relief whatsoever.

77. Defendants deny the allegations in Paragraph 77 and deny that Plaintiff is entitled to any relief whatsoever.

COUNT FIVE: BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

78. Defendants reassert each of the above paragraphs numbered 1 – 77 as if set forth in their entirety herein.

79. Defendants deny the allegations in Paragraph 79.

80. Defendants deny the allegations in Paragraph 80.

81. Defendants deny the allegations in Paragraph 81 and deny that Plaintiff is entitled to any relief whatsoever.

82. Defendants deny the allegations in Paragraph 82 and deny that Plaintiff is entitled to any relief whatsoever.

COUNT SIX: CIVIL CONSPIRACY

83. Defendants reassert each of the above paragraphs numbered 1 – 82 as if set forth in their entirety herein.

84. Defendants deny the allegations in Paragraph 84.

85. Defendants deny the allegations in Paragraph 85.

86. Defendants deny the allegations in Paragraph 86.

87. Defendants deny the allegations in Paragraph 87 and deny that Plaintiff is entitled to any relief whatsoever. Further answering, Defendants state that any allegation not expressly admitted herein is denied.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses without prejudice to the denials set forth in the preceding paragraphs and without admitting any allegations of the Complaint not otherwise admitted. Furthermore, because Defendants' investigation into Plaintiff's claims is continuing, Defendants expressly reserve the right to allege additional defenses as they become available during the course of this action, including through discovery.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims may be barred, in whole or in part, by the doctrines of waiver, estoppel, laches, and/or unclean hands or by principles of equity.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has not been damaged by the allegations, if true, contained in its Complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's tort claims (Counts II, IV, and VI) are barred by the gist-of-the-action doctrine.

FIFTH AFFIRMATIVE DEFENSE

The unjust enrichment claim (Count III) is not viable because there is an express contract regarding identical subject matter.

SIXTH AFFIRMATIVE DEFENSE

Count V fails because there can be no claim for breach of the duty of good faith and fair dealing separate from a breach of contract claim.

SEVENTH AFFIRMATIVE DEFENSE

Count VI fails because, *inter alia*, a parent cannot conspire with its subsidiary. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

~~EIGHTH AFFIRMATIVE DEFENSE~~

Insofar as Plaintiff undertakes to state a cause of action in contract, Plaintiff is not entitled to an award of consequential, incidental, "lost opportunity cost," or punitive damages.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are or may be barred by the applicable statute of limitations and/or contractual limitations period and/or the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are or may be barred in whole or in part by the failure of Plaintiff to mitigate any claimed damages.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims fail because the injuries and damages, if any, allegedly suffered and sustained by Plaintiff were the result of the actions of others not under Defendants' control and without Defendants' authorization or knowledge

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the plain language and terms of all applicable contracts.

THIRTEENTH AFFIRMATIVE DEFENSE

Insofar as Plaintiff seeks punitive damages, such claims and the relief sought violate the right of Defendants to equal protection and due process under the law and are otherwise unconstitutional under the Fifth and Fourteenth Amendment to the United States Constitution and under Article III and all other applicable provisions of the West Virginia Constitution.

FOURTEENTH AFFIRMATIVE DEFENSE

Defendants reserve the right to add further defenses or affirmative defenses as may be revealed in the course of further proceedings.

WHEREFORE, Defendants, Employers' Innovative Network, LLC ("EIN") and Vensure HR, Inc., respectfully request that this Court dismiss the Complaint, with prejudice, and award Defendants their costs and reasonable attorneys' fees incurred in defending this action.

Respectfully submitted,

**EMPLOYERS' INNOVATIVE NETWORK, LLC AND
VENSURE HR, INC.**

By Counsel

/s/ Russell D. Jessee

Russell D. Jessee (W. Va. Bar No. 10020)

russell.jessee@steptoe-johnson.com

Michael Barill (W. Va. Bar No. 5806)

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STEPTOE & JOHNSON PLLC

Chase Tower, 17th Floor

P.O. Box 1588

Charleston, WV 25326-1588

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*Counsel to Employers' Innovative Network, LLC and
Vensure HR, Inc.*

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

AMERICAN BITUMINOUS POWER
PARTNERS L.P.,

Plaintiff,

Civil Action No. CC-24-2020-C-136
Hon. David Janes, Judge

v.

EMPLOYERS' INNOVATIVE NETWORK, LLC
and VENSURE HR, INC.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2020, I filed electronically the foregoing "DEFENDANTS EMPLOYERS' INNOVATIVE NETWORK, LLC AND VENSURE HR, INC.'S ANSWER AND AFFIRMATIVE DEFENSES." Notice of this filing will be sent by operation of the Court's electronic filing system to the following party representatives. There are no unrepresented parties.

John F. McCuskey, Esquire
Roberta F. Green, Esquire
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia St. E., Suite 200
P.O. Box 3953
Charleston, WV 25301-3953

Counsel to Plaintiff

/s/ Russell D. Jessee

Russell D. Jessee (W. Va. Bar No. 10020)

russell.jessee@steptoe-johnson.com

STEPTOE & JOHNSON PLLC

Chase Tower, 17th Floor

P.O. Box 1588

Charleston, WV 25326-1588

Telephone: (304) 353-8000

Facsimile: (304) 353-8180

Exhibit C

EMPLOYERS' INNOVATIVE NETWORK, LLC

Customer Service Agreement

This Agreement is made this 15th day of July, 2013 by and between Employers' Innovative Network, LLC ("EIN"), whose principal office is located at 113 Goff Mountain Road, Cross Lanes, West Virginia 25313 and American Bituminous Power Partners L.P. ("Customer"), whose principal office is located at Grant Town Power Plant, 228 A/BPP Drive, PO Box 159, Grant Town, WV 26574. EIN and Customer may be collectively referred to as the "Parties" or individually as "Party".

RECITALS

WHEREAS, EIN is a company in the business of providing various professional employer services to various business entities;

WHEREAS, Customer desires to accept and pay for such services under the terms and conditions as set forth below;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, EIN and Customer agree as follows:

I. **PURPOSE.** EIN agrees to co-employ all of the employees (as defined in Paragraph III) assigned to provide services for Customer whereby the responsibilities for such employees are allocated between the Parties. The Parties agree that EIN is a company engaged in the business of providing professional employer services to Customer pursuant to this Agreement. Customer understands that it maintains an employment relationship according to law with Employees throughout the Term of this Agreement. This Agreement defines the allocation of responsibilities between EIN and Customer.

II. **TERM.** The Effective Date of this Agreement shall be July 15, 2013 ("Effective Date"). This Agreement shall commence on the Effective Date and remain in full force and effect for a period of one (1) year thereafter ("Initial Period"), unless terminated by customer with thirty (30) days prior written notice or by EIN with ninety (90) days prior written notice, or as provided in Paragraph XI. After the Initial Period, this Agreement shall automatically renew for one (1) year periods until terminated by either Party with prior written notice provided above or as provided for in Paragraph XI. Between the date written cancellation is sent to the other Party and the termination effective date, the Parties will continue to meet the obligations set forth in this Agreement, including without limitation, the obligation of Customer to pay all EIN invoices; in addition, following any termination of this Agreement for any reason whatsoever, EIN shall fully cooperate with Customer in all matters related to the orderly transfer of services to such other persons as may be designated by Customer. The period that this Agreement shall be in full force and effect is referred to as the "Term."

III. SERVICES PROVIDED BY AND OBLIGATIONS OF EIN.

A. Employees covered by this Agreement only include those employees who, after the decision to hire has been made by Customer, have completed EIN's employment process and have been accepted by EIN ("Employees"). Any individual who does not complete EIN's employment process and is not accepted by EIN shall not be considered an employee of EIN for any purpose including, but not limited to, workers compensation,

benefits or employment related laws.

B. The services to be provided by EIN for Employees include, but are not limited to:

1. Pay wages to Employees, and prepare, administer, compile, and file all payroll information and distribute payroll checks to Employees from its own accounts; "Wages" does not include any obligation between Customer and an Employee for payments beyond or in addition to the Employee's salary, draw, or regular rate of pay, such as bonuses, commissions, severance pay, deferred compensation, profit sharing or vacation, sick or other paid time off pay, unless EIN has expressly agreed, in writing, to assume liability for such payments elsewhere in this Agreement;

2. Based on complete, timely and accurate reporting of job duties and hours worked by Customer, assume responsibility for the withholding, collection, reporting, and remittance of federal and state employment taxes, including but not limited to: (i) federal income tax withholding; (ii) state and local income tax; (iii) Federal Insurance Contributions Act ("FICA") withholding; (iv) Federal Unemployment Tax Act ("FUTA") withholding; and (v) state unemployment tax withholding;

3. Administration of applicable benefit plans, selected by Customer, including remitting employee benefit payments from EIN's accounts for benefit programs set forth on Exhibit C beginning on the Effective Date. An Employee's available coverage and eligibility to participate in a given plan shall be governed by and subject to the terms and conditions of the plans offered by EIN. EIN and its applicable carrier reserve the right to change or substitute benefit plans or to implement cost increases. EIN shall provide prior notice, in compliance with state law, of any such change, substitution, or cost increase;

4. Maintaining Employee personnel records and personnel policy development in concert with and approved by Customer;

5. Consistent with applicable law, maintenance of workers compensation insurance coverage during the Term for Employees from a carrier authorized to do business in all applicable states, for which upon request EIN shall provide Customer a certificate of coverage, and management of workers compensation claims;

6. Provide unemployment compensation insurance in accordance with State law; and

7. Notify in writing, in conjunction with Customer, all Employees of the inception and termination of this Agreement.

C. Customer retains — and at all times under this Agreement shall exercise — the right to hire, fire, reassign, discipline, compensate, and otherwise manage Employees. The Parties agree that EIN is not liable for the acts, errors, or omissions of Customer or of an Employee when the Employee is acting under the express direction and control of the Customer.

D. The Parties acknowledge that they are entering into a co-employment relationship concerning Employees. The Parties shall share the responsibility for addressing Employee complaints, claims or requests relating to employment. Responsibility for any particular complaint, claim or request relating to employment shall be the responsibility of the Party who at the time of the incident, action or inaction giving rise to the complaint, claim or request was exercising or responsible for exercising direction and control over the Employee. Customer further acknowledges that the Parties' relationship may be influenced by Internal Revenue Code §414(n) and that an employment relationship is being established between EIN and Employees.

IV. SERVICE FEES.

A. In consideration for services rendered, Customer agrees to pay EIN service fees as shown on Exhibit A, which is attached and made a part of this Agreement, and for all wages, payroll taxes and benefit costs incurred by or payable to all Employees ("Fee"). Customer's Fee obligation shall continue during normal periods of Employee absence for vacation, sick leave, legal holidays and emergency situations.

B. Customer is not required to provide security to EIN under this Agreement. In lieu of security, not less than five (5) days prior to every payroll date, Customer shall, in a method described in C. above, make an advanced deposit of an agreed to estimate of the amount owed in A. above for the forthcoming payroll date. EIN will then immediately draw against this deposit for payment of the amounts owed in A. above for the forthcoming payroll date. If the deposit is less than the reconciled (actual) amount owed by the Customer pursuant to A. above for the forthcoming payroll date, Customer shall then pay the difference between the deposit amount and the actual amount. Such additional amount shall be paid not later than 12:00 pm on the Wednesday immediately prior to the forthcoming payroll date. If the deposit is more than the actual amount, Customer may then reduce its next deposit by such overage amount. As an example, if the next payroll is due on September 15 and the agreed to estimate is \$200,000, Customer would deposit \$200,000 on September 10, and EIN would draw against that amount on September 10. If when the payroll is reconciled for September 15, the actual amount owed pursuant to A. above is \$205,000, Customer would then, not later than 12:00 pm of the Wednesday immediately preceding September 15, remit an additional \$5,000 to EIN. Changing the facts, if the reconciled (actual) amount is \$195,000, Customer would only then be required to deposit \$195,000 not less than five (5) days prior to the next payroll date (assuming the estimate remained \$200,000). Failure of customer to make, in a manner described above, a timely advanced deposit, or payment of additional reconciliation amount owed (if any) by 12:00 pm on the Wednesday immediately preceding the forthcoming

payroll date, will be considered a material breach of this Agreement.

C. Customer shall pay all Fees upon delivery of the invoice to Customer. Payment shall be made by either ACH, cashier check, or bank wire transfer. If payment is refused by Customer's bank for any reason, Customer agrees to pay any bank or other service charges imposed upon EIN. If Customer fails to make payment as provided herein, Customer assumes full liability and responsibility for any wages, taxes, insurances and employment matters arising subsequent to the last pay period of which Customer paid according to these terms.

D. If payment is not made when due, Customer shall pay EIN, in addition to all other amounts due, a three percent (3%) administration charge on the delinquent amount. In addition, Customer shall pay one and one-half percent (1½%) 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.

E. Fees may be adjusted upon the effective date of any statutory increase in employment taxes, insurance rates, or cost of benefits to Employees. EIN may adjust the service fee subsequent one-year renewal periods following the initial term upon thirty (30) days advance written notice to Customer. Fees are based upon the value of services rendered and do not change as a result of an Employee's length of service or other non-market related conditions.

F. All payments will be applied to the most recent invoice issued to Customer. EIN retains the right to apply any overpayment to the subsequent invoice issued to Customer.

G. Customer agrees to pay for any compensation earned but not paid to or for Employees prior to, during, upon termination, and subsequent to their employment with EIN, including, but not limited to, premiums or contributions payable for employee benefit plans through the end of the month in which the Employee was terminated, unused paid time off, vacation or sick leave, and expense reimbursement.

V. OBLIGATIONS AND DUTIES OF CUSTOMER.

A. Customer shall be solely responsible for the day-to-day direction, supervision, training, and control of Employees in the conduct of their work and Customer is solely responsible for the quality, adequacy or safety of the goods or services produced or sold in Customer's business. Customer is solely responsible for the acts, errors or omissions of Employees while the Employee is engaged in Customer's business activities. Customer will be responsible for verifying skills and qualifications for employment and making the decision to hire an employee. If a license is necessary for the performance of Customer's work, Customer shall verify the existence, maintenance and validity of such license.

B. For Employees hired prior to the Effective Date of this Agreement, Customer warrants that all Employees are United States citizens or have provided proof of employment eligibility documents accepted by the USCIS or its predecessors at the

time of said Employee's hire. Any Employee whose proof of employment eligibility documents (such as temporary work visas issued by USCIS, Bureau of Citizenship and Immigration Service or Immigration and Naturalization Service) expire while said Employee is covered by this Agreement, must have their I-9 form re-verified according to USCIS requirements. It is Customer's sole responsibility to complete such re-verification. Furthermore, Customer warrants that all Employees' names and social security numbers match and that all Employees hired after the Effective Date of this Agreement are United States citizens or they have one of the documents currently accepted by the USCIS as proof of employment eligibility, as shown on USCIS' instructions for Form I-9. Customer shall obtain fully completed I-9 Forms from each Employee covered by this Agreement upon the Effective Date and during the Term of this Agreement. Customer agrees to retain copies of Employee I-9 Forms and to deliver the original to EIN upon completion by the Employee.

C. Customer shall maintain a record of actual time worked and verify the accuracy of wages and salaries reported to and paid by EIN during each pay period. At least forty-eight (48) hours prior to the Customer's payday, Customer shall provide to EIN via facsimile transmission, email or via EIN's internet connection, a report of the total hours worked by Employees. Customer warrants that the information reported to EIN is correct and accurate. Customer further agrees to hold EIN harmless from any liability that may arise as a result of the improper reporting of such information by Customer.

D. Customer shall appoint an authorized representative(s) who will be responsible for reporting any and all information to EIN or receiving Employee information from EIN. Customer appoints Steve Friend, AMBIT Plant Manager as its authorized representative. Customer agrees that the authorized representative has full and complete authority to report information to EIN and that EIN may rely on this information. Customer holds EIN harmless from any action taken by EIN as a result of the information provided by or to the authorized representative. The authorized representative can only be changed in writing, signed by the President of Customer and directed to EIN.

E. Customer agrees to abide by the employment policies and procedures developed by EIN and approved by Customer, which may be revised from time to time, if such policies and procedures are implemented. Customer also agrees to report any complaint, claim, accident, or other employment related issue raised by an Employee to EIN as soon as it becomes known to Customer.

F. Customer shall provide EIN written statements of its policies regarding employee benefits. Such policies will comply with all federal, state and local governmental laws and regulations. Customer will pay for any unpaid benefits due to Employees upon commencement or termination of this Agreement, including but not limited to unused vacation, severance pay, or continuing health and life insurance premiums until the end of the month during which this Agreement is terminated or until the end of the month in which the Employee separates employment.

G. Customer agrees to comply at its expense with all safety and health laws, regulations or rules, whether federal, state or local. Customer will also ensure compliance with safe work practices and use of protective equipment and devices imposed by controlling federal, state or local law. EIN retains a right, but not the duty, to provide for the health, welfare and benefit of Employees through such programs as professional guidance, including, but not limited to, employment training, and compliance matters. All accidents or injuries involving Employees shall be reported to EIN immediately. Customer agrees to cooperate with EIN's workers' compensation carrier in the inspection of work locations and the investigation of workplace accidents and injuries. Nothing in this Agreement shall relieve Customer of any obligations imposed under safety-related law. If EIN or EIN's workers' compensation insurance carrier recommends that light-duty work be provided to an employee suffering from a workplace injury, Customer agrees to take commercially reasonable measures to provide same.

H. Customer agrees to allow EIN's insurance carrier the right to inspect the customer's records and worksite to verify job duties and compensation of employees and to verify compliance with insurance-mandated safety requirements during the Term of the Agreement, as well as the right of the workers' compensation carrier to audit the Customer's records and worksite for up to one year after the end of any policy period, even if this Agreement has been terminated.

I. Customer maintains the right upon request to EIN to receive worksite loss experience data upon termination of this Agreement.

J. Customer shall maintain workers compensation insurance coverage for any employees working for Customer that are not covered by this Agreement. Additionally, Customer shall require that all contractors and sub-contractors doing work for Customer maintain workers' compensation. Furthermore, in states requiring same, Customer agrees to maintain separate workers compensation insurance covering Employees.

K. If any Employee is required in the performance of their duties, to deal with confidential or proprietary information of Customer, Customer agrees to institute any control procedures or confidentiality agreements to insure against disclosure of same. Customer holds EIN harmless from any and all liability which results from a disclosure of same whether during or after the Term.

L. Customer agrees that for any benefit plan maintained by Customer prior to, during, or after the Term, Customer is solely responsible for determining eligibility, participation, contribution matters, administration of Section 125 Plan if applicable, and the proper administration of COBRA, and that EIN has no responsibility for such benefits. Customer indemnifies and holds EIN harmless for any and all liabilities or consequences arising out of the maintenance of such benefits.

M. If not already in place, Customer agrees to cooperate with EIN in establishing and implementing a drug-free workplace

policy or program.

N. Customer is responsible for compliance with OSHA regulations, Environmental Protection Agency regulations, child labor laws, the Worker Adjustment and Retraining Notification Act ("WARN"), Fair Labor Standards Act ("FLSA") including Equal Pay Act, West Virginia Wage Payment and Collection Act, Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the National Labor Relations Act ("NLRA") and all other applicable Federal, State and Local labor and employment laws.

O. Customer shall retain all responsibilities with respect to union organization and/or collective bargaining with the Union or Unions and will be solely responsible for complying with any collective bargaining agreements. Customer acknowledges that EIN will not be a party to any collective bargaining agreement. Customer will indemnify EIN for any costs, including reasonable attorneys' fees or expenses or liabilities for unfair labor practice charges brought under the National Labor Relations Act, or state labor relations laws. Customer will be solely responsible for any collective bargaining and contract administration expenses for all proceedings under the National Labor Relations Act or any other proceedings under the National Labor Relations Act affecting its Worksite Employees and will indemnify and hold EIN harmless, including the cost of reasonable attorneys' fees, relating to the same.

VI. Workers Compensation and Safety Practices.

A. Customer's workplace must continue to comply with all regulatory aspects of doing business which applied to Customer before execution of this Agreement, including without limitation, the obligations to, provide at its expense and ensure use of all personal protective equipment, maintain a safe and accessible workplace under the Occupational Safety & Health Act ("OSHA"), and the ADA, and all related and similar state regulatory requirements. Customer at all times remains ultimately liable to provide workers' compensation coverage to Employees.

B. In relation to the provision of workers compensation benefits by EIN, Customer shall:

1. Cooperate with EIN in the maintenance of a drug-free workplace;
2. Cooperate with EIN in conducting pre-employment background investigations, as permitted by law, for such job positions as may be determined by EIN and its workers compensation insurer to represent significant risk;
3. Cooperate in the investigation of any workplace complaint or injury with EIN, or its workers compensation insurer, and provide them the right, if requested, to inspect and access, upon request, Customer's premises, records, and Employees in order to investigate the alleged violation of any Handbook Policy, safety concern, injury or other workplace incident;
4. Timely comply, at its sole expense, with any specific

directives from EIN, or its workers compensation insurer, regarding the safety of the Employees;

5. Notify EIN before assigning any Employee to work outside the state of West Virginia

6. If any Employee is injured, immediately report the accident or injury to EIN; and

7. Comply with EIN's, or its workers compensation insurer's, modified-duty requirements, including reinstatement of Employees in a modified-duty capacity. If Customer fails to accommodate any Employee released for modified duty assignment, Customer shall pay to EIN all workers compensation wages disbursed to such Employee as should have been paid in the form of earned wages for performing modified-duty services.

C. Employees shall perform job functions identified by the workers compensation classification codes applicable to the Employee's job function. EIN retains the right to change the classification codes, where necessary, to comply with the guidelines set forth by the National Council on Compensation Insurance or applicable state regulatory agency. Customer agrees to provide prior written notice to EIN before the addition of any workers compensation classification.

VII. INSURANCES.

A. If any Employee is required to drive a vehicle of any kind for Customer, Customer will provide liability insurance which will insure against public liability for bodily injury, death and property damage with a minimum combined single limit of One Million Dollars (\$1,000,000) and uninsured motorist insurance with a minimum combined single limit of One Million Dollars (\$1,000,000), in states where no fault laws apply. Not later than five business days after its execution and delivery of this Agreement, Customer shall cause its insurance carrier to issue a certificate of insurance to EIN verifying such coverage and providing for not less than 30 days' prior written notice to EIN of cancellation of or any changes to such coverage and identify EIN as an additional insured.

B. Customer agrees to keep in full force and effect at all times during the Term a comprehensive general liability insurance policy in the minimum limit of One Million Dollars (\$1,000,000) insuring Customer against bodily injury and property damage caused by Customer's premises-operations or completed operations. Not later than five business days after its execution and delivery of this Agreement, Customer shall cause its insurance carrier to issue a certificate of insurance to EIN verifying such coverage and providing for not less than 30 days' prior written notice to EIN of cancellation of or any changes to such coverage and identify EIN as an additional insured.

C. If any Employee performs any duties which requires the maintenance of a professional license and corresponding professional liability insurance, Customer agrees to keep in full force and effect during the Term professional liability insurance which shall cover any acts, errors or omissions, including but not limited to the negligent acts of the professional employee with a minimum limit of One Million Dollars (\$1,000,000). Not

later than five business days after its execution and delivery of this Agreement, Customer shall cause its insurance carrier to issue a certificate of insurance to EIN verifying such coverage and providing for not less than 30 days' prior written notice to EIN of cancellation of or any changes to such coverage and identify EIN as an additional insured.

D. With respect to any group health plan maintained by EIN and set forth on Exhibit C which provides coverage to eligible Employees, EIN assumes responsibility for proper COBRA administration, subject to timely notification by Customer of the occurrence of any "qualifying event". For these purposes any group health plan shall be maintained by EIN only if the contract is between EIN and the insurer. Customer agrees to provide continuation of health insurance coverage required by COBRA to any and all eligible participant's in Customer's current plan or upon termination of this Agreement, and indemnifies and holds EIN harmless from any claims therefore.

E. Customer may be covered in certain instances by EIN's Employment Practices Liability Insurance ("EPLI"). In the event that a claim or suit against Customer (alone, or in connection with other parties including EIN) results in a claim under EIN's EPLI policy, then Customer agrees to pay the deductible for the EPLI policy associated with the covered claim or suit.

VIII. CUSTOMER REPRESENTATIONS.

A. Customer is a sole proprietorship or that it is a limited partnership in good standing, and that the undersigned officer or representative is duly authorized to enter into this Agreement.

B. Customer has fully disclosed to EIN, all investigations, lawsuits, claims labor proceedings, employment related claims or other adversary proceedings involving Customer.

C. Customer warrants that in regard to any employee employed by Customer prior to the Effective Date, all wages and benefits for such employee are current and have been paid, and there is no liability for same, including any benefits for retirees.

D. Customer warrants that there are no claims or threatened claims or charges pending by any employee claiming that Customer engaged in any work practices which were in violation of any employment related law including but not limited to the Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA"), National Labor Relations Act ("NLRA") and any federal or state discrimination laws.

E. Customer has disclosed all employment related agreements in effect at the Effective Date including, but not limited to, collective bargaining agreements and any employment agreements.

F. Customer warrants that workers compensation classification codes provided to EIN are correct and that Customer will utilize Employees only in a manner consistent with those codes. Customer will notify EIN if Employees job duties change substantially. Failure to notify EIN of Employees job duties may result in a workers' compensation rate adjustment and/or

termination of this Agreement. Customer will be responsible for paying any adjustments.

G. Customer warrants that it is not a Federal, state or local government contractor or subcontractor and that none of the Employees perform work on government contracts, except as previously disclosed in writing to EIN. Customer agrees to provide written notice to EIN prior to entering into any government contract.

H. Except as disclosed on attached Exhibit D, there are no collective bargaining agreements, known union organizing activity, claims, suits, actions, proceedings or government investigations (collectively, "Claims") anticipated pending or threatened against Customer by former or current employees before or by any court or administrative agency and there have been no claims during the five years preceding the date of this Agreement.

I. Customer expressly agrees to indemnify, defend and hold EIN harmless from any and all claims or liabilities which may arise as a result of such claims for acts which occurred prior to the inception of this Agreement.

IX. EMPLOYMENT PRACTICES.

A. Customer agrees to indemnify, defend and hold EIN harmless from any and all claims, costs, or liabilities of whatsoever nature which arise out of or are related to the acts, errors, or omissions of Customer or of an Employee, when the Employee is acting under the express direction and control of the Customer. Further, Customer agrees to indemnify, defend and hold EIN harmless from any and all claims, costs, or liabilities of whatsoever nature which may be incurred by EIN as a result of any claims which arise decisions or actions taken by Customer with respect to employment related matters without consulting EIN or failure to abide by EIN's advice.

B. Customer agrees to comply with all applicable federal, state and local employment-related laws including but not limited to the ADA, FMLA, NLRA, West Virginia Human Rights Act, ADEA, FLSA and any federal, state and local discrimination laws. Specifically, Customer agrees to cooperate with EIN in returning Employees to work upon completion of any approved leave, including FMLA leave, and making reasonable accommodations under applicable disability laws.

C. With respect to the premises accommodation provisions of the ADA, Customer agrees that such responsibilities are solely the responsibility of the Customer, and Customer agrees to indemnify, defend and hold EIN harmless from any and all claims or liabilities as a result of Customer's failure to abide by same.

D. EIN and Customer are each individually responsible for determining whether such Party is a "covered entity" pursuant to HIPAA. If EIN or Customer determines that it is a "covered entity" under HIPAA, such Party is responsible for complying with the HIPAA privacy rules in respect of Employee's protected health information. If EIN is determined to be a covered entity pursuant to HIPAA or is required to sign or

obtain a business associate agreement with Customer, Customer agrees to cooperate in complying with same.

X. INDEMNIFICATIONS.

A. Customer shall release, defend, indemnify and hold harmless EIN and its officers, directors, shareholders, affiliates, subsidiaries, employees and agents (collectively, the "EIN Indemnified Parties") from and against any losses, liabilities, claims, obligations and/or expenses including, without limitation, court costs and reasonable attorneys' fees (whether or not such losses, liabilities, claims, obligations and/or expenses including, without limitation, court costs and reasonable attorneys' fees, are incurred or paid by EIN as part of an insurance deductible or copayment (collectively "Damages") that may be incurred by or asserted against any of the EIN Indemnified Parties, arising from or related to, in whole or in part, (i) the acts, errors or omissions of Customer (or its agents or contractors) or the Employees; (ii) any breach of this Agreement by Customer; (iii) any violation of any federal, state, or local law or regulation related to labor or employment, including but limited to workplace safety laws; and (iv) except as otherwise provided in this Agreement, any claims asserted by or liability to third parties arising from or related to, in whole or in part, Customer's business.

B. EIN shall release, defend, indemnify and hold harmless Customer and its officers, directors, shareholders, affiliates, subsidiaries, employees and agents (collectively, the "Customer Indemnified Parties") from and against any Damages that may be incurred by or asserted against any of the Customer Indemnified Parties, to the extent such Damages arise from or are related to any breach of this Agreement by EIN.

C. These indemnifications shall survive the termination of this Agreement.

XI. TERMINATION.

A. In addition to the termination provision contained in Paragraph II, EIN may terminate this Agreement with three (3) days prior written notice for the following material breaches by Customer:

1. Failure to pay any payment when due as stated in Paragraph IV of this Agreement which continues for five (5) days after written notice to Customer.
2. Failure to cooperate in the investigation of or report any workplace complaint or committing any act which usurps EIN's rights as an employer;
3. Failure to comply with any directive regarding the safety of the work environment from EIN's workers' compensation carrier or failing to provide a safe workplace including failing to implement safety policies, return-to-work programs, or timely injury reporting.
4. Refusal, without good cause, of a written request by EIN for Customer to discipline
5. Failure to provide and maintain the requisite insurance as provided for in this Agreement;
6. Failure to consult with EIN, or abide by the advice provided

by EIN with respect to material decisions governed by employment related laws, including but not limited to the ADA, FMLA, NLRA, West Virginia Human Rights Act, ADEA, FLSA and any federal or state discrimination laws.

7. The filing by or against Customer for bankruptcy, reorganization, or appointment of a receiver, supervisor, assignee, or liquidator over its assets or property;
8. The closing by Customer of any facility or operation where Employees are assigned or for which services are performed; or
9. Breaching any provision of this Agreement other than those material breaches described in 1. through 8. above, which continues for thirty (30) days after written notice to Customer.

B. Upon termination of this Agreement, Customer agrees to:

1. Pay all outstanding invoices or Fees due EIN;
2. Pay EIN for any payments required for unused vacation leave, severance pay, or other compensation due to Employees upon termination of this Agreement;
3. Continue to cooperate with EIN in the investigation or litigation of any claim or complaint;
4. Obtain replacement health insurance coverage for Employees, if those Employees are covered by EIN's health benefit plans;
5. Pay EIN the sum of \$750 for each Employee who elects COBRA coverage from EIN;
6. Assume sole and exclusive responsibility and liability for all legal obligations as an employer to Employees including, but not limited to, obtaining workers compensation coverage for Employees, paying Employees all wages due, and paying all employment-related taxes due, after termination of this Agreement; and
7. Assist EIN in informing Employees that the Agreement has been terminated.

XII. GENERAL PROVISIONS.

A. **APPLICABLE LAW.** This Agreement shall be governed by the laws of West Virginia and both Parties consent to venue and personal jurisdiction over them in the courts of that state, including the federal courts, for purposes of construction and enforcement of this Agreement.

B. **ENTIRE AGREEMENT.** This Agreement constitutes the entire understanding between the Parties with respect to its subject matter and supersedes all prior agreements and understandings, written or oral, with respect to its subject matter.

C. **MODIFICATION.** This Agreement may not be altered or amended except by written agreement duly executed by the Parties.

D. **ASSIGNMENTS.** This Agreement cannot be assigned by either Party other Party.

E. **SEVERABILITY.** Should any term, condition or provision of this Agreement be held to be invalid or unenforceable, the balance of this Agreement shall remain in force and shall stand as if the unenforceable part did not exist.

E. **NOTICES.** Whenever notices are required to be sent to either party, the notices shall be sent to the following addresses:

Employers' Innovative Network, LLC
113 Goff Mountain Road
Cross Lanes, West Virginia 25313
Attn: Jeff Mullins

American Bituminous Power Partners L.P.
Grant Town Power Plant
228 ABPP Drive
PO Box 159
Grant Town, WV 25313
Attn: Plant Manager

American Bituminous Power Partners L.P.
3 MacArthur Place, Suite 100
Santa Ana, CA 92707
Attn: Legal

G. **WAIVER.** The failure of any Party to enforce at any time the provisions of this Agreement shall not be construed as a waiver of any provision or of the right of such party thereafter to enforce each and every provision of this Agreement.

H. **HEADINGS.** The headings of this Agreement are inserted solely for the convenience of reference. They shall in no way define, limit, extend or aid in the construction, extent or intent of this Agreement.

I. **NO THIRD PARTY BENEFICIARY.** The Parties acknowledge and agree that this Agreement creates no rights for or in favor of any person or third party not a party to this Agreement, and that no such person may place any reliance hereon.

J. **INDEPENDENT LEGAL ADVICE.** Customer acknowledges that it is solely responsible for obtaining independent legal

advice regarding this Agreement, the relationship created hereby, as well as the related tax and employment law and other ramifications of transacting business with a professional employer organization.

K. **COOPERATION.** If an Employee or a government agency or entity files any type of claim, lawsuit or charge against EIN, Customer or both, alleging a violation(s) of any law or failure to do something which was otherwise required by law, Customer and EIN shall each cooperate with the other's defense of such claim, lawsuit or charge. EIN and Customer will make available to each other upon request any and all documents that either Party has in its possession which relate to any such claim, lawsuit or charge. However, neither Party shall have the duty to cooperate with the other if the dispute is between the Parties themselves, nor shall this provision preclude the raising of cross claims or third party claims between Customer and EIN, if the circumstances justify such proceedings. The Parties agree that this provision shall survive the termination of this Agreement.

L. **INTERPRETATION.** With respect to any dispute concerning the meaning of this Agreement, this Agreement shall be interpreted as a whole with reference to its relevant provisions and in accordance with its fair meaning, and no part of this Agreement shall be construed against EIN on the basis that EIN drafted it. This Agreement shall be viewed as if prepared jointly by EIN and Customer.

M. **NOT LEGAL ADVICE OR INSURANCE.** Customer acknowledges that although EIN may be providing human resource consulting services related to compliance with employment laws and regulations, such consulting is not legal advice and should not be interpreted as such. Customer is advised and encouraged to supplement any consulting provided by EIN with the advice of an attorney. Furthermore, EIN is not an insurance company or insurance carrier, and is not offering to sell insurance. As a result, no insurable risk is transferred to EIN as a result of the Parties entering into this Agreement.

IN WITNESS WHEREOF, the Parties enter into this Agreement as of the date first written above.

Employers' Innovative Network, LLC

Sign Joseph W. LaRocca
Print Joseph W. LaRocca
Title Sales Manager
Date July 15, 2013

American Bituminous Power Partners, L.P.

Sign Ken Niemann
Print Kenneth Niemann
Title Executive Director
Date July 15, 2013



July 15, 2013

COST ANALYSIS FOR:

AMERICAN BITUMINOUS POWER

PAYROLL TAXES, LABOR RELATED COSTS PER PAYROLL WITH EIN:

FUTA	0.60%
SUTA	2.70%
FICA, MEDICARE & SOCIAL SECURITY	7.65%
WORKERS' COMPENSATION (8810/7539)	0.25%/1.63%
EIN'S ADMINISTRATIVE FEES (% of gross payroll)	2.50%

EMPLOYEE ADMINISTRATION INCLUDED WITH EINS' SERVICES:

Payroll Administration (Tax Preparation & Filing)
W2 Administration
Unemployment Administration
Worker's Compensation Administration
401K Administration
Cafeteria Plan Administration
Human Resource Support (including Benefits Administration)

American Bituminous Power

July 15, 2013

Date

Employers' Innovative Network

July 15, 2013

Date

*Cost analysis contingent upon final underwriting review and accepted & executed GSA
*Workers' compensation rates will be evaluated at renewal

EXHIBIT B

**DIRECT DEBIT
AUTHORIZATION AGREEMENT**

I hereby authorize EIN LLC, hereinafter called COMPANY, to initiate debit entries or such adjusting entries, either debit or credit which are necessary for corrections, to my Checking _____/Savings _____ account indicated below and the financial institution named below to credit (or debit) the same to such account.

FINANCIAL INSTITUTION NAME CITY STATE

TRANSIT/ROUTING NUMBER ACCOUNT NUMBER

This authority is to remain in full force and effect until COMPANY has received written notification from me of its termination in such time and in such manner as to afford COMPANY a reasonable opportunity to act on it.

COMPANY NAME

FEIN #

SIGNATURE DATE

Please attach a copy of a voided check

EXHIBIT C
BENEFITS

4. Insurance and Benefits: In addition to Employee's gross payroll and Service Fees, Customer agrees to pay all costs and expenses, including but not limited to costs and expenses related to approved benefits, vacations, holidays, health, welfare, and pension plans, and other reimbursable expenses. The benefit plans itemized below are available generally to all Employees on EIN's payroll, unless provided separately by Customer. Only the ones specially marked will be available to Employees through this Agreement.

- ☐ Medical Health Insurance
- ☐ Dental Insurance
- ☐ Vision Insurance
- ☐ Short-term disability
- ☐ Long-term disability
- ☐ Term Life Insurance
- ☐ Supplemental Products

- ☐ 401(k) Retirement Plan <Match401> Matching _____
(Initials)
- ☐ Flexible Spending Accounts – Section 125 Cafeteria Plan

- ☐ Customer will provide no additional employee benefits

Customer acknowledges that EIN may change employee benefit programs because of circumstance, fact, law, or any other exigency which may require or cause a change in the discretionary benefits offered by EIN. Customer specifically authorizes EIN to effect any such changes upon reasonable notice to Customer. Such changes may materially change the cost of such benefit programs and may result in increased premiums.

Exhibit D

Customer identifies the following collective bargaining agreements, known union organizing activity, claims, suits, actions, proceedings or government investigations (collectively, "Claims") anticipated pending or threatened against Customer by former or current employees:

1. _____
2. _____
3. _____
4. _____
5. _____

Addendum to Contract

This document is in reference to a contract dated July 15, 2013 between the parties listed below. Be it known that the undersigned parties, for good consideration, agree to make the changes and/or additions outlined below. These additions shall be valid as if part of the original contract.

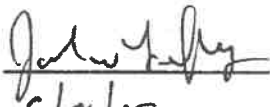
- 1) Customer and EIN acknowledge that EIN's single large group health insurance policy, currently offered through the HealthSmart Network, is *not* within the scope of services being offered in this agreement or otherwise made available to Customer or its employees. Further, any single large group health insurance policy offered in the future by EIN through any health insurer is *not* within the scope of services being offered in this agreement and will not otherwise made available to Customer or its employees. Customer shall at all times remain responsible for every aspect of administration of any health plan it offers to its employees, including, but not limited to, compliance with HIPAA, COBRA and the PPACA. Provided, EIN will, as part of this Agreement, to the extent permitted by law, withhold from Customers' employees' payroll the designated amount of co-premium to be paid by such employees of any group health plan. Further, EIN will assist Customer's employees in enrolling in an individual plan through the federal health exchange to the extent possible. The provisions of this paragraph shall supersede any other provisions of this agreement conflicting or inconsistent with this paragraph.
- 2) The reduction of administrative fees to 1.5% with the payroll dated 6/16/17.

No other terms or conditions of the contract are negated or changed as a result of this addendum.

Name: Employers' Innovative Network
L.P.

Signature: _____

Date: _____


6/8/17

Name: American Bituminous Power Partners

Signature: _____

Date: _____



6/8/2017

Exhibit D

Court:	Circuit	County:	24 - Marion	Case Number:	CC-24-2020-C-136
Judge:	David Janes	Created Date:	10/2/2020	Status:	Open
Case Type:	Civil	Case Sub-Type:	Tort	Security Level:	Public
Style:	American Bituminous Power Partners, LP v. Employers' Innovative Network, LLC c/o Cogency Global Inc.				

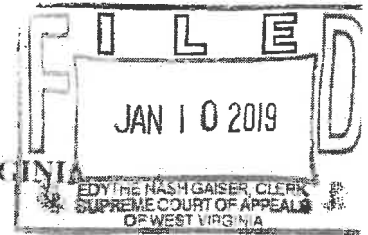
	Entered Date	Event	Ref. Code	Description
1	10/2/2020 1:06:11 PM	E-Filed		Complaint
2	10/2/2020 1:06:11 PM	Judge Assigned	J-24001	David Janes
3	10/2/2020 1:06:11 PM	Party Added	P-001	American Bituminous Power Partners, LP
4	10/2/2020 1:06:11 PM	Party Added	D-001	Employers' Innovative Network, LLC c/o Cogency Global Inc.
5	10/2/2020 1:06:11 PM	Party Added	D-002	Vensure HR, Inc. c/o Cogency Global Inc.
6	10/2/2020 1:06:11 PM	Attorney Listed	P-001	A-6598 - Roberta Frances Green
7	10/2/2020 1:06:11 PM	Service Requested	D-001	Plaintiff - Secretary of State
8	10/2/2020 1:06:11 PM	Service Requested	D-002	Plaintiff - Secretary of State
9	10/7/2020 11:14:23 AM	E-Docketed		Supporting Documents - RETURN FROM SOS
10	11/2/2020 2:18:58 PM	E-Filed		Answer - Complaint Denied
11	11/2/2020 2:18:58 PM	Attorney Listed	D-001	A-10020 - Russell David Jessee
12	11/2/2020 2:18:58 PM	Attorney Listed	D-002	A-10020 - Russell David Jessee
13	11/30/2020 12:59:01 PM	E-Filed		Certificate of Service - AMBIT's First Discovery to Defendants
14	12/3/2020 11:14:49 AM	E-Filed		Correspondence - NOTICE OF SCHEDULING CONFERENCE
15	12/30/2020 11:16:27 AM	E-Filed		Order - Case - SCHEDULING CONFERENCE ORDER (OCTOBER 2021 TERM)
16	1/4/2021 1:04:25 PM	Attorney Listed	D-001	A-13020 - James Edward McDaniel
17	1/4/2021 1:05:29 PM	Attorney Listed	D-002	A-13020 - James Edward McDaniel
18	1/4/2021 4:33:32 PM	E-Filed		Certificate of Service - Certificate of Service
19	1/7/2021 10:18:46 AM	E-Filed		Order - Case - Protective Order
20	1/8/2021 4:08:46 PM	E-Filed		Motion - Other
21	1/11/2021 4:56:59 PM	E-Filed		Certificate of Service - Certificate of Service
22	1/14/2021 3:47:46 PM	E-Filed		Certificate of Service - Certificate of Service
23	1/29/2021 1:49:13 PM	E-Filed		Motion - Judgment on the Pleadings
24	2/3/2021 11:19:53 AM	E-Filed		Notice of Motion Hearing - Notice of Hearing
25	2/10/2021 4:15:32 PM	E-Filed		Certificate of Service - Certificate of Service for Defendants' Third Supplemental Answers, Responses, and Objections to AMBIT's First Discovery to Defendants
26	2/24/2021 2:47:47 PM	E-Filed		Certificate of Service - Certificate of Service for Defendants' Fourth Supplemental Answers, Responses, and Objections to AMBIT's First Discovery to Defendants
27	3/4/2021 11:52:28 AM	E-Filed		Motion - Compel
28	3/5/2021 1:30:32 PM	E-Filed		Certificate of Service - Certificate of Service for Defendants' Fifth Supplemental Answers, Responses, and Objections to Ambit's First Discovery to Defendants
29	3/6/2021 4:01:10 PM	E-Filed		Notice of Case Hearing - Notice of Hearing on Motion To Compel Discovery Or, In The Alternative, To Amend Complaint: Certification of Good Faith Effort to Confer
30	3/6/2021 4:01:10 PM	Case Set for Hearing		Hearing Date - 3/15/2021 1:30 PM
31	3/9/2021 11:06:39 AM	Scanned Document		Motion - *SEALED* NOTICE OF MOTION
32	3/9/2021 11:11:50 AM	Scanned Document		Motion - *SEALED* MOTION TO COMPEL DISCOVERY OR, IN THE ALTERNATIVE, TO AMEND COMPLAINT
33	3/10/2021 4:32:04 PM	E-Filed		Motion Response - Response
34	3/11/2021 11:04:36 AM	E-Filed		Motion Response - Response

	Entered Date	Event	Ref. Code	Description
35	3/12/2021 9:30:12 AM	E-Filed		Motion Response - Other
36	3/16/2021 9:17:47 AM	E-Docketed		Supporting Documents - CLERK'S NOTES RE: PARTIAL MOTION FOR PARTIAL JUDGMENT
37	3/19/2021 2:46:33 PM	E-Filed		Supporting Documents - 3.19.21 NOTICE OF ISSUANCE OF SUBPOENA TO INNOVATIVE INSURANCE SOLUTIONS, BY COUNSEL
38	3/19/2021 2:53:41 PM	E-Filed		Supporting Documents - 3.19.21 Proof of Service
39	3/22/2021 8:45:55 AM	Scanned Document		Other - ***TRANSCRIPTS*** MOTION HEARING HELD ON MARCH 15, 2021 AT 1:30
40	3/22/2021 4:08:38 PM	E-Filed		Certificate of Service - Certificate of Service for Defendants' First Set of Interrogatories and Requests for Production to Plaintiff
41	3/30/2021 11:08:45 AM	E-Docketed		Order - Case - ORDER ON PENDING MOTIONS

Exhibit E

FILE COPY **DO NOT REMOVE FROM FILE**

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA



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

Plaintiff,

v.

**Civil Action No. 18-C-130
Hon. David Janes, Judge**

**HORIZON VENTURES OF WEST
VIRGINIA, INC., a West Virginia
corporation,**

Defendant.

**MOTION TO REFER CASE TO THE
BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, American Bituminous Power Partners, LLP (AMBIT), by counsel, John F. McCuskey, Roberta F. Green, Dominick Pellegrin and Shuman McCuskey & Slicer, PLLC, respectfully requests the above-styled case be referred to the Business Court Division.

Whereas an additional litigation is pending between these parties in Marion County, Civil Action No. 18-C-76 (Wilson, J.), the two litigations arise from unrelated contracts. The instant matter arises from disputes relative to rents overpaid and/or due pursuant to the Amended and Restated Lease Agreement (Lease Agreement) between the parties. The instant matter is also an outgrowth of Ohio County Civil Action No. 13-C-196, which was pending in the Business Court Division (Young, J.) for five years prior to final order entered on or about May 29, 2018. Additionally, the instant matter involves the same counsel as engaged through much of the Business Court proceedings. Arguably at issue in this claim are *inter alia* breach of contract, terms of a commercial lease, commercial torts, and declaratory relief between commercial entities. While AMBIT denies any and all allegations of wrongdoing raised against it, AMBIT nonetheless avers

that the issues between these parties relative to the Lease Agreement are salient and perpetual. Beyond the fact that the parties allege mispayment or nonpayment of millions of dollars over decades of the lease term, the issues – and most especially, the voluminous documents – are complex, contentious and previously litigated for years before Judge James Young.

The matter pending before Judge Wilson involves a separate contract – a consulting agreement – and includes a heretofore uninvolved counsel on behalf of Horizon Ventures. While it is a contract claim, it is an unrelated contract, with unrelated documents and issues. In terms of the significant litigation history between the parties, the matter before Judge Wilson is an outlier.

In support of this motion, attached please find the docket sheet, the Complaint, Horizon's Answer and Counterclaim for Declaratory and Other Relief of the Defendant, Horizon Ventures of West Virginia, Inc., and Order (from Civil Action 13-C-196, from which the instant matter arises).¹

In regard to expedited review, the Movant requests that the Chief Justice grant this Motion to Refer with only minimal time for responses. Whereas TCR 29.06(a)(4) provides twenty (20) days for responses, AMBIT notes the parties' familiarity with Business Court and with these issues, avers that it has expeditiously provided Horizon's counsel with this motion setting out the plan for expediting resolution of the transfer issue, and asks that the response time be limited to ten days in order to allow this Honorable Court to reach a decision and, potentially, refer this matter prior to AMBIT's responsive pleading, due on January 24, 2019.

WHEREFORE, pursuant to West Virginia Trial Court Rule 29, the undersigned hereby MOVES the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

¹ See Order (8 31 17) at 12ff.

Respectfully submitted, this 10th day of January, 2019.

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

A handwritten signature in black ink, appearing to read "John F. McCuskey", written over a horizontal line.

John F. McCuskey, Esquire (WVSB #2431)
Roberta F. Green, Esquire (WVSB #6598)
Dominick R. Pellegrin, Esquire (WVSB #12276)
SHUMAN, MCCUSKEY & SLICER, PLLC
1411 Virginia Street, East, Suite 200
Post Office Box 3953
Charleston, WV 25301-3953
(304) 345-1400

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

**Civil Action No. 18-C-130
Hon. David Janes, Judge**

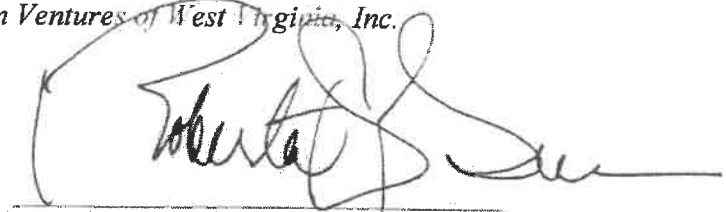
**HORIZON VENTURES OF WEST
VIRGINIA, INC., a West Virginia
corporation,**

Defendant.

CERTIFICATE OF SERVICE

I, John F. McCuskey/Roberta F. Green, hereby certify that on this 10th day of January, 2019, a true copy of the foregoing **"MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION"** was served on the following by Facsimile, E-mail and first-class U. S. Mail (exhibits by email and US mail only):

Gregory H. Schillace, Esquire
Schillace Law Office
P. O. Box 1526
Clarksburg WV 26302-1526
Counsel for Horizon Ventures of West Virginia, Inc.

A handwritten signature in black ink, appearing to read 'Roberta F. Green', is written over a horizontal line. The signature is stylized and cursive.

John F. McCuskey (WV Bar #2436)
Roberta F. Green (WV Bar # 6598)

Exhibit F

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**American Bituminous Power Partners, L.P.,
a Delaware Limited Partnership,
Plaintiff**

vs.) Civil Action No. 18-C-130 (Marion County)

**Horizon Ventures of West Virginia, Inc.,
a West Virginia corporation,
Defendant**


The Chief Justice of the Supreme Court of Appeals has been advised that Plaintiff American Bituminous Power Partners, L.P., by counsel, John F. McCuskey, Roberta F. Green, Dominick R. Pellegrin, and the law firm of Shuman McCuskey & Slicer, PLLC, has filed a motion to refer the above-referenced case to the Business Court Division pursuant to Rule 29 of the West Virginia Trial Court Rules ("TCR").

Upon careful review and consideration of the motion, the Chief Justice has determined that the principal claims in the action involve matters of significance to the transactions, operations, or governance between business entities as required by TCR 29.04(a)(1). The Chief Justice has further determined that specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy as required by TCR 29.04(a)(2), and the motion to refer should therefore be granted.

It is hereby ORDERED that the motion to refer this action to the Business Court Division is granted, and this order shall be transmitted to the Honorable Michael D. Lorensen, Chair of the Business Court Division, for assignment of a presiding judge and such other actions as are necessary to effectuate the provisions of TCR 29.

It is further ORDERED that a copy of this ORDER be transmitted to the Central Office of the Business Court Division; the Honorable David R. Janes, Judge of the Sixteenth Judicial Circuit; and to the Clerk of the Circuit Court of Marion County, who is to provide copies of the same to all parties of record or their counsel.

ENTERED: FEBRUARY 19, 2019


ELIZABETH D. WALKER
Chief Justice

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiff,

v.

**EMPLOYERS' INNOVATIVE
NETWORK, LLC, and
VENSURE HR, INC.,**

Defendants.

**Marion County Circuit Court
Civil Action No. 20-C-136
The Honorable David R. Janes**

CERTIFICATE OF SERVICE


The undersigned hereby certifies that, this day, the 31st day of March 2021, I served the foregoing **MOTION TO REFER CASE TO BUSINESS COURT DIVISION** with attachments by first class mail to the following:

John F. McCuskey, Esquire
Roberta F. Green, Esquire
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street, East, Suite 200
P.O. Box 3953
Charleston, WV 25301-3953
Counsel for American Bituminous Power Partners, L.P.

The Honorable David R. Janes
Marion County Courthouse
P.O. Box 1611
219 Adams Street
Fairmont, WV 26554

Rhonda Starn
Marion County Circuit Clerk
219 Adams Street, Room 211
Fairmont., WV 26554

Berkeley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, WV 25401



Russell D. Jessee (W. Va. Bar No. 10020)
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