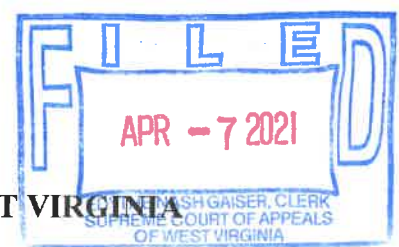


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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

AMERICAN BITUMINOUS
POWER PARTNERS, L.P.,

Plaintiff,

v.

Civil Action No. 20-C-136
The Honorable David R. Janes

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

Defendants.

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AMBIT'S RESPONSE TO DEFENDANTS' MOTION FOR REFERRAL

Now comes American Bituminous Power Partners, L.P. (AMBIT), by counsel, and, pursuant to West Virginia Trial Court Rule 29.06(a)(4), responds to Employers' Innovative Network, LLC (EIN), and Vensure HR, Inc.'s Motion to Refer Case to Business Court Division (3.31.21) ('Motion to Refer'), as follows.

AMBIT agrees that this litigation arises from a detailed contract that controlled the relationship between some or all of the parties for nearly eight years. Indeed, per TCR 29.04(a)(1), AMBIT agrees that the "principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities." AMBIT agrees that the Complaint raises six counts as against EIN and Vensure HR, and that AMBIT envisions amending the Complaint to comport with the other issues/transgressions identified through discovery and to include the other entities the current defendants have identified as involved. AMBIT agrees that the Circuit Court of Marion County ordered defendants to produce information and documents relative to other express aspects of the Customer Service Agreement (CSA), the contract between the parties. AMBIT agrees that, given what is known after two months of discovery, the initial

estimated/admitted diversion of \$971,984.98, appears now to be in excess of \$1.8 million, exclusive of interest, and, as defendants attest, discovery is continuing.

As demonstrated by Exhibit 10 to defendants' Motion to Refer, however, the Complaint in this matter was filed on October 2, 2020, in Marion County, and, for the intervening six months, the parties have litigated in Marion County, resulting in 41 docket entries in the first six months. On information and belief, the Circuit Court has been responsive and supportive of both parties' motions/requests, such that the only intervening event that has changed the event horizon for defendants is that the Circuit Court denied their motion for partial judgment on the pleadings and granted AMBIT's motion to compel, with the Order on Pending Motions being entered on March 30, 2021. The next day, the defendants filed their Motion to Refer. While the motion for referral can arise at any time after the answer is filed, or potentially sooner (TCR 29.06(a)(2)), AMBIT questions the timing and rationale for this motion at this time.

As defendants assert, AMBIT has been in Business Court in other matters and has been the moving party in accomplishing that referral.¹ However, AMBIT has never waited six months into a litigation and after an adverse ruling to seek a change in judicial officer.² Therefore, AMBIT notes the timing and tenor of the Motion to Refer, noting (as it does) defendants' opposition to the Circuit Court's recent rulings.³ Additionally, discovery cutoff is September 10, 2021, and the parties are well into written discovery and are exchanging deposition dates. A change to Business Court could result in a delay in reaching resolution of these document-intensive claims and given the nature of the claim and the damages (and the changes in personnel at EIN⁴). Therefore, to the

¹ See Ohio County Civil Action No 18-C-130.

² See, by analogy, *SER American Elec. Power Co. v. Swope*, 239 W. VA. 470, 801 S.E.2d 485 (2017).

³ Motion to Refer at ¶ 8.

⁴ AMBIT has been advised by EIN or by EIN through counsel that three key witnesses have separated from EIN: CEO Jeff Mullins, COO Brandi Lusher, and Controller/VP Finance/Regional VP of Accounting – SE Chelsea Adkins.

extent that this Honorable Court would move this matter from Marion County Circuit Court, where the parties have been progressing all these months, to Business Court, AMBIT further requests an early referral to the resolution judge, given that defendants have demonstrated knowledge of the claims and of the damages in their Motion to Refer. In sum, AMBIT questions the timing and rationale of this Motion to Refer but recognizes the great value of both the Circuit Court of Marion County and the Business Court Division.

American Bituminous Power Partners, LP, agrees to be bound by the decision of this Honorable Court.

**AMERICAN BITUMINOUS POWER
PARTNERS, LP,**
By counsel.



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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

**Civil Action No. 20-C-136
Hon. David Janes, Judge**

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I, John F. McCuskey/Roberta F. Green/, have this day, the 7th day of April, 2021, served a true copy of the foregoing **AMBIT'S RESPONSE TO DEFENDANTS' MOTION FOR REFERRAL** United States Mail and Marion County electronic service (courtesy copy via email), to the following:

Russell D. Jessee, Esquire
James W. McDaniel, Esquire
Steptoe & Johnson, PLLC
Chase Tower, 17th Floor
P O Box 1588
Charleston WV 25326-1588



John F. McCuskey, Esquire (WVSB #2431)
Roberta F. Green, Esquire (WVSB #6598)
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