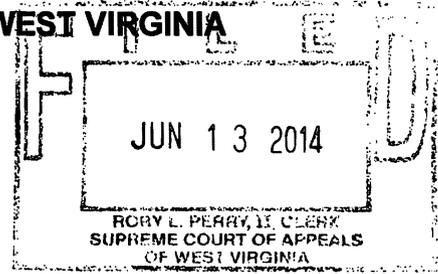


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-0058



CITYNET, LLC,

Defendant Below, Petitioner,

v.

Appeal from a Final Order of the Circuit
Court of Kanawha County (12-C-527)

RAY TONEY,

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

Counsel for Petitioner

Counsel for Respondent

Ancil G. Ramey State Bar # 3013
Bryan Cokeley State Bar # 774
Russell D. Jessee State Bar #10020
Steptoe & Johnson, PLLC
PO Box 1588
Charleston, WV 25326-1588
(304) 353-8000
ancil.ramey@steptoe-johnson.com
bryan.cokeley@steptoe-johnson.com
Russell.jessee@steptoe-johnson.com

J. Michael Ranson State Bar # 3017
Cynthia M. Ranson State Bar # 4983
RANSON LAW OFFICES
1562 Kanawha Blvd., East
Post Office Box 3589
Charleston, West Virginia 25336-3589
(304) 345-1990
jmr@ransonlaw.com
cmr@ransonlaw.com

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE.....	1
III. SUMMARY OF ARGUMENT.....	13
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	15
V. ARGUMENT.....	16
A. STANDARD OF REVIEW	16
B. THE EMPLOYEE INCENTIVE PLAN IS A CONTRACT AND THE CIRCUIT COURT CORRECTLY INTERPRETED THE CLEAR LANGUAGE OF THE PLAN.	18
1. <i>Citynet LLC does not have the right to refuse payment to properly vested employees under its Incentive Plan.</i>	18
2. <i>Citynet is not entitled to have discovery on the Plan and is not entitled to have questions of fact submitted to a jury.</i>	27
C. THE TIMELY PAYMENT PROVISIONS OF THE WAGE PAYMENT AND COLLECTION ACT MUST BE APPLIED TO PAYMENTS UNDER CITYNET'S EMPLOYEE INCENTIVE PLAN; AND RAY TONEY IS ENTITLED TO TREBLE DAMAGES AND ATTORNEY'S FEES.	28
D. CITYNET IS BOUND BY ITS OWN STIPULATION.....	34
VI. CONCLUSION	37

TABLE OF AUTHORITIES

Cases

<u>Battaglia V. Clinical Perfusionists</u> , 338 Md. 352, 658 A.2d 680 (1995).....	33
<u>Berkeley Co. Pub. Serv. Dist. V. Vitro Corp. Of Am.</u> , 152 W.Va. 252, 162 S.E.2d 189 (1968).....	25
<u>Bethlehem Mines Corp. V. Haden</u> , 153 W.Va. 721, 172 S.E.2d 126 (1969).....	25
<u>Brockley V. Lozier Corp.</u> , 241 Neb. 449, 488 N.W.2d 556 (Neb., 1992).....	32
<u>Charlton V. Chevrolet Motor Co.</u> , 115 W.Va. 25, 174 S.E. 570 (1934).....	26
<u>Cook V. Heck's Inc.</u> , 176 W.Va. 368, 342 S.E.2d 453, , (W.Va. 1986).....	19
<u>Crum V. Equity Inns, Inc.</u> , 224 W.Va. 246, 685 S.E.2d 219 (W.Va. 2009).....	28
<u>First National Bank V. Marietta Manufacturing Co.</u> , 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967).....	20

<u>General Electric Co. V. Keyser</u> , 166 W.Va. 456, 468, 275 S.E.2d 289, 296 (1981)	19
<u>Holderman V. Huntington Leasing Co.</u> (1984), 19 Ohio App.3d 132	21
<u>Jackson V. Putnam County Bd. Of Educ.</u> , 221 W.Va. 170, 177-78, 653 S.E.2d 632, 639-40 (2007)	17
<u>Lawrence V. Cue Paging Corporation</u> , 194 W.Va. 638, 641 461 S.E.2d 144, 147 (1995).....	25
<u>Meadows V. Wal-Mart Stores, Inc.</u> , 207 W.Va. 203, 530 S.E.2d 676 (1999).....	14, 31
<u>Medex V. Mccabe</u> , 372 Md. 28, 811 A.2d 297 (Md., 2002)	33
<u>Orteza V. Monongalia County General Hospital</u> , 173 W.Va. 461, 318 S.E.2d 40 (1984)....	25
<u>Painter V Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	17
<u>Pfs Distribution Co. V. Raduechel</u> , 387 F.Supp.2d 1020 (S.D. Iowa, 2005)	19
<u>Pingley V. Huttonsville Public Service Dist.</u> 225 W.Va 205, 691 S.E. 2d 531, (W.Va. 2010).	17
<u>Schaffart V. Oneok, Inc.</u> , 686 F.3d 461, 34 Ier Cases 1 (8th Cir., 2012)	32
<u>Stephens V. Bartlett</u> , 118 W.Va. 421, 191 S.E. 550 (1937)	25
<u>Stewart V. Blackwood Electric Steel Corp.</u> , 100 W.Va. 331, 130 S.E. 447 (1925)	25
<u>Thomas V. Am. Elec. Power Co. Inc.</u> , 2005 Ohio 1958 (Oh 4/28/2005), 2005 Ohio 1958 (Oh, 2005)	21
<u>Thompson V. St. Regis Paper Co.</u> , 102 Wash.2d 219, 685 P.2d 1081 (1984)	19
<u>Tri-State Asphalt Products, Inc. V. Dravo Corp.</u> , 186 W.Va. 227, 412 S.E.2d 225 (1991).....	25
<u>Tuttle V. Geo. Mcquesten Co.</u> , 227 A.D.2d 754, 642 N.Y.S.2d 356 (N.Y.App.Div.1996),....	33
<u>Verizon West Virginia, Inc. V. West Virginia Bureau Of Employment Programs, Workers' Compensation Div.</u> , 214 W.Va. 95, 586 S.E.2d 170, (W.Va. 2003)	19
<u>Watts V. West Virginia Dept. Of Health And Human Resources/Division Of Human Services</u> , 465 S.E.2d 887, 195 W.Va. 430 (W.Va., 1995)	25
<u>Winn V. Aleda Construction Co.</u> , 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984)	25
<u>Wolfe V. Adkins</u> , 2011 WI 4537318 (W.Va. 2011)	31
<u>Yunker V. Eastern Associated Coal Corp.</u> , 214 W.Va. 696, 591 S.E.2d 254 (2003) ...	31

Statutes

N.Y. Labor Law § 190 (1992) 33

West Virginia Code § 21-5-1 (C) 12

West Virginia Code § 21-5-4 5,6

West Virginia Code § 21-5-1(1) 12

West Virginia Code § 21-5-4(E)..... 12, 15

WV-WPCA § 21-5-1 (C) 31

WV-WPCA § 21-5-12 30

WV-WPCA § 21-5-4 (C) 30

WV-WPCA § 21-5-4 (E)..... 30

Comes now the Respondent, Ray Toney, by and through his counsel, J. Michael Ranson, pursuant to Rule 10 of the Revised Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals and responds to the brief Petitioner, CityNet, LLC, filed on April 30, 2014. In and for his Response Brief, Respondent states as follows:

I. ASSIGNMENTS OF ERROR

As set forth by Citynet LLC

1. The Circuit Court erred by ruling that, after Ray Toney voluntarily quit, Citynet, LLCs Employee Incentive Plan required Citynet to pay Mr. Toney his entire balance within 90 days of his request for payment, which was clearly contrary to the law, the terms of the plan, and the evidence.
2. The Circuit Court erred by ruling that the timely payment provisions of the Wage Payment and Collection Act apply to payments under Citynet, LLC's Employee Incentive Plan so that Mr. Toney is entitled to treble statutory damages and statutory fee-shifting, which was clearly contrary to the law and the evidence.
3. The Circuit Court erred by failing to credit Citynet with \$17,400 it had already had paid Mr. Toney under Citynet, LLCs Employee Incentive Plan, which was clearly contrary to the law and the evidence.

II. STATEMENT OF THE CASE

The Plaintiff, Ray Toney was employed by the defendant, Citynet LLC on May 1, 2001 and worked as a voice center administrator (i.e. he installs and administers phone systems).

On January 22, 2008, Citynet LLC announced that it was creating an Employee Equity Incentive Plan for its employees. Citynet LLC created the Plan by placing \$1,500,000.00 in the Plan. (A.R. 72-73)

The purpose of the Plan was set forth as follows;

Purpose. This Employee Incentive Plan (the "Plan") is established by Citynet, LLC for itself and its subsidiaries (collectively the "Company") to create incentives which are designed to motivate Participants (as hereinafter defined) to put forth maximum effort toward the success and growth of the Company and to enable the Company to attract and retain experienced individuals who by their position, ability and diligence are able to make important contributions to the Company's success. Toward these objectives, the Plan provides for granting Awards of Performance Units to Eligible Employees subject to the conditions set forth in the Plan. (A.R. 24)

The Plan was to be administered by a Board consisting of the CEO, General Counsel, CFO, and COO of Citynet. These Board members were also participants in the plan. (See Incentive Plan A.R. 24-37)

Pursuant to the Plan the Board members would:

- a. Select the Eligible Employees eligible to receive Awards under the Plan;
- b. Determine the time or times when Awards will be made;
- c. Determine the number of Performance Units subject to the Award, all of the terms, conditions, restrictions and/or limitations, if any, of an Award, including the time and conditions of vesting, and the terms of any Award Agreement, which may include the waiver or amendment of prior terms and conditions or acceleration or early vesting of an Award under certain circumstances determined by the Board in its sole discretion;
- d. Take any and all other action they deem necessary or advisable for the proper operation or administration of the Plan.

The Board would also appoint an administrator to manage the Plan. Under the Plan the administrator shall account for and shall report on:

- a. The Company's Equity Value.
- b. The Company's Equity Appreciation Value.
- c. All outstanding Equity Appreciation Units and their respective value.
- d. The Plan's Equity Appreciation Pool Value.
- e. All outstanding Performance Units and their respective value.

f. All Participant Account information.

Based upon the above factors the Board would decide the overall value of the incentive plan. The Board determined that the plan would be made up of the following groups

- (a) Executive Management. Executive Management shall consist of the Company's senior management who generally occupy the positions of: Chief Operating Officer, Chief Financial Officer, General Counsel, Senior Vice President and Vice President.
- (b) Management. Management shall consist of all front line management positions or other key contributors of the Company (as determined by the Executive Management) and generally include the positions of Director, Senior Manager, Manager and Engineer.
- (c) Supervisor. Supervisor shall consist of those individuals occupying the positions designated as "supervisor" or similar situation employees as determined by the Executive Management.
- (d) Staff. All other full time positions of the company are classified as Staff positions.

The Board also determined that on or about January 15th of each calendar year the Company **shall** make Performance Unit grants to each Participant based on the Participant's Annual Gross Earnings, which is divided by 1,000 and then multiplied by the Participant's Grade Multiplier. In the discretion of the Administrator, an equivalent salary may be applied to groups of Employees with similar responsibilities but varying salaries.

The Board also developed a Grade Multiplier that would increase the number of Performance Units that one received based upon ones classification. The Multiplier was as follows:

Executive Management	Grade Multiplier	4
Management	Grade Multiplier	3
Supervisor	Grade Multiplier	2
Staff	Grade Multiplier	1

An example was placed in the plan so that everyone would know how the plan worked.

Example 1: If Jane Doe was Manager of Finance (Grade Multiplier = 2) and had annual gross earnings of \$70,000 the calculation would be: $70,000 / 1,000 = 70$, then, $70 * 2 = 140$. Jane Doe would be granted an award of 140 Performance Units. (See Incentive Plan A.R. 24-37)

Under the Plan the actual Board members of the Plan obtained the greatest benefit. The Board members had the highest salary and the largest Grade Multipliers. Therefore each year they received the greatest amount of Performance Units.

When the Plan was started in January of 2008, Ray Toney was notified that he had been awarded 361 units at a value of \$118.93 and the he was 100% vested in the Plan in amount of \$42,933.73. (See Letter of Jim Martin CEO to Ray Toney A.R. 72-73).

Generally, an employee had to be in the Plan for five (5) years to be fully vested. However, the Board made the decision in 2008 to give all employees credit for their time with Citynet LLC. Consequently, some of the employees like Ray Toney became fully vested. (See Letter of Jim Martin CEO to Ray Toney A.R. 72-73). This action was of great benefit to the Board because the entire Board became immediately fully vested in the Plan.

Once Ray Toney became fully vested he was due the entire \$42,933.73 as this was his money. However, under the contract Ray Toney agreed that as a member of the Plan he could not take out the money that was due him until he left Citynet LLC's employment. (See Incentive Plan 5.6 (b), 5.7 (a), and 5.12 (a) A.R. 32-34).

Under the contractual agreement within the Plan current employees could make a yearly request to be paid 20% of their vested value. The Board would then make the decision on a yearly basis if it was going to make the 20% available to the employees or

if it would deny that request. Regardless of the decision, the decision would apply to everyone in the Plan. (See Incentive Plan 5.7 (b) A.R. 32)

Unquestionably, once an employee terminated his employment with the company he was entitled to 100% of his vested benefits.¹ (See Incentive Plan 5.6 (b), 5.7 (a), and 5.12 (a) A.R. 32-34).

The plan simply states

“In the event that a Participant voluntarily terminates employment with the Company after the 18 month anniversary of the Effective Date, all of the outstanding Performance Units granted to the Participant which have not vested as of the effective date of such termination shall be cancelled and forfeited without compensation to the Participant. **All Performance Units granted to the Participant which have vested prior to the effective date of such termination shall be available for redemption.**”

In order to make sure that this provision was understood the following example was written into the Plan.

John, a Participant of the Plan, voluntarily terminated his employment with the Company on June 1, 2012. John had a total of 1,000 Performance Units granted to him by the Company as of the effective date of his termination. John has been employed by the Company for 5 years and has not redeemed any of his Performance Units.

a) Units available for redemption.

John's Performance Units are vested at 100% since he has over 4 years of continuous employment with the Company since becoming a Participant. Therefore, all 1,000 of John's Performance Units are available for redemption.

Finally, in the letter in which Ray Toney was informed that he was 100% vested he was informed of the following:

“When an employee leaves Citynet, the employee is then entitled to “cash out” his or her entire vested balance subject to certain provisions contained in the plan document with respect to termination for cause.” (See Letter of Jim Martin CEO to Ray Toney under redemptions A.R. 73).

¹ This would be consistent with West Virginia Law which requires an employer to pay to an employee all vested benefits upon their leaving the company. **West Virginia Code § 21-5-4**

As this sentence states once you leave your employment you are entitled to 100% of your vested balance. The only caveat is that if an employee was terminated for cause then they would forfeit their incentive plan monies. (See Incentive Plan 5.6 (a) A.R. 32). The Plan was clearly created to give employees incentive to perform in such a way as to not be terminated for cause.

In **January of 2010**, Ray Toney was notified that his portion of the incentive plan had grown and that he was now 100% vested in the amount of \$87,000.48. Once again this amount was awarded by the Board and became Ray Toney's money. (See Letter of Todd Dlugos CFO to Ray Toney A.R. 74-75). In 24 months Ray Toney's vested interest in the Plan had increased by \$44,066.75 or an average of \$1,836.11 a month.

On **October 14, 2011** Ray Toney notified Citynet LLC that he was terminating his employment and that he was seeking payment of his fully vested incentive plan money. (See Citynet's Undisputed Facts A.R. 88)

Under West Virginia Law Citynet LLC is required to pay Ray Toney his vested incentive money by the next regular pay day, i.e. West Virginia Code § 21-5-4. However, as part of the Plan Ray Toney agreed to give Citynet LLC ninety (90) days to pay his incentive plan monies. (See Incentive Plan 5.8 A.R. 33). After the ninety (90) days expired, Ray Toney once again requested his vested incentive plan monies from Citynet, but CityNet refused and to date has continued to refuse to pay Mr. Toney.

Significantly, on December 31, 2012, Carolyn Barr, a 67 year old Citynet employee resigned her employment with Citynet. When she resigned, she was paid 100% of her vested incentive plan monies which totaled \$33,966.19. (Supplemental

A.R. 441-445)

On March 23, 2012, Ray Toney filed a complaint in the Circuit Court of Kanawha County seeking to recover the vested benefits due him under an Employment Incentive Plan pursuant to West Virginia Code § 21-5-1(c). (see A.R. 3-11).

On **April 27, 2012**, Citynet LLC filed a Motion to Dismiss the complaint. The Motion to Dismiss included as an exhibit the Incentive Plan. Citynet LLC requested the Court to review and interpret the Incentive Plan in such a way that would support its basis for refusing to pay Ray Toney his benefits. (A.R. 13-38)

In the Motion to Dismiss, Citynet LLC made the following concessions as it related to Ray Toney;

- Plaintiff is correct that he was fully vested in the Plan at the time he voluntarily resigned his employment with Citynet.
- Plaintiff also is correct that when an employee voluntarily resigns his employment with Citynet, he is "eligible to redeem all of his vested performance units
- Plaintiff further is correct that all "valid" redemption requests are payable within ninety (90) days of the request or shall be converted to unsecured debts of Citynet.

In Response to the Motion to Dismiss, Ray Toney filed a Partial Motion for Summary Judgment proclaiming that pursuant of the express language of the Incentive Plan he was fully vested and entitled to redeem 100% of the monies. (A.R. 39-41)

In response to Ray Toney's Motion for Summary Judgment, Citynet LLC converted its Motion to Dismiss to a Cross Motion for Summary Judgment. In its Cross Motion for Summary Judgment, Citynet LLC claimed two separate and distinct theories. The first was that the incentive plan was not a contract that was subject to the Court's review and

that the “Board” has the right to refuse to pay Ray Toney the fully vested amount. In its second argument, the Citynet LLC requested that the Court interpret the Incentive plan in a manner favorable to the Citynet LLC. (A.R. 87-98)

Importantly, in its Motion for Summary Judgment the Citynet LLC **stipulated** to the following facts;

- It is undisputed that the Plaintiff voluntarily resigned from his employ with Citynet on or about October 12, 2011
- It is undisputed that, at the time of his resignation, the Plaintiff was **fully vested** in the Performance Units that **had previously been awarded** to him.

It was clear at this point of the litigation that both Ray Toney and the Citynet LLC were in agreement that the case was ripe for decision on summary judgment. Neither party expressed any interest or need for discovery nor did any party raise any facts in dispute.

On **August 12, 2012**, the matter was set for oral argument before the Circuit Court. In hearing the oral arguments, the Circuit Court noted that “**the parties agree** and the Court **FINDS** that this matter is properly before the Court and is ripe for disposition.” (A.R. 105)

Following the oral arguments the parties were ordered to submit findings of fact and conclusions of law for the Court to consider.

The Citynet LLC submitted the following as undisputed facts under its submission of Findings of Fact and Conclusions of Law to the Court. (Supplemental A.R. 414-423).

- The Plaintiff worked for the Defendant for approximately twelve years and was fully vested in Performance Units awarded to him under The Plan.
- The Plaintiff quit his employment with the Defendant on October 12, 2011, consistent with his letter of resignation, submitted to the Defendant on said date.

- In his resignation letter, the Plaintiff requested payment of the full value of all Performance Units within ninety days of his resignation, citing a portion of the Plan in his resignation letter (Hearing Exhibit, p. 19).
- At the time of his resignation, the Plaintiff was fully vested in Performance Units which were valued at approximately \$87,000.48.
- The primary dispute with respect to the Plan involves Section 5.7 Redemption of Performance Units, which addresses the timing for payment of Performance Units to Plan participants.

Judge Stucky made a prompt and detailed ruling in favor of Ray Toney on September 18, 2012. In his ruling Judge Stucky set forth the following analysis.

(A.R.105-118)

- The central conflict between the parties is the applicable method of redemption by an employee who voluntarily terminates his employment with Citynet. Mr. Toney contends that he is entitled to cash out his entire vested balance of Eighty Seven Thousand Dollars and Forty-Eight Cents (\$87,000.48), which was accumulated as of the effective date his voluntary termination from employment. Mr. Toney submits that the Incentive Plan requires full payment of this entire balance within ninety (90) days of his voluntary termination.
- Citynet, on the other hand, denies that Mr. Toney can cash out or redeem his entire accumulated and vested balance of Eighty Seven Thousand Dollars and Forty-Eight Cents (\$87,000.48) within ninety (90) days of his termination. It is Citynet's contention that Mr. Toney's entire vested balance is available for redemption, but that he is limited to submitting redemption requests of not more than 20% of his vested benefit balance during a pre-defined four-month period. Citynet also contends that payments are subject to the sole and exclusive discretion of the Board, and that the Board has the discretion to deny any redemption request.
- In advancing their respective positions, both parties rely primarily on four documents: (1) the January 22, 2008 correspondence from Mr. Martin summarizing the new Incentive Plan ; (2) the Incentive Plan adopted on January 28, 2008 (effective January 1, 2008); (3) Mr. Toney's redemption request on or about the date of his termination- October 12, 2011; and (4) Citynet's response to Mr. Toney's redemption request on or about October 14, 2011
- In reviewing the Incentive Plan, the Court found that it is clear that Section 5.7 ("Redemption of Performance Units") is controlling on the central issue of redemption of the accumulated and vested benefits. Section 5.7 outlines four distinct circumstances whereby "Participants may redeem or request redemption

of their Performance Unit Awards." The parties do agree that Section 5.7 applies to redemption requests, but they disagree as to which subsection of Section 5.7 applies to Mr. Toney's redemption request.

- Mr. Toney submits that subsection 5.7(a) applies to terminations from employment without cause and that there is no distinction between such terminations initiated by the employer and the employee. Subsection 5.7(a) provides: "In the event the Participant's employment is terminated without cause, the Participant shall be eligible to redeem the vested portion of their Performance Units as of the effective date of the Participant's termination.
- Citynet denies that subsection 5.7(a) applies to Mr. Toney, arguing that the application of subsection 5.7(a) is limited to terminations without cause by the employer.
- The Court noted that there was no limiting or distinguishing language with respect to terminations by the employer and the employee.
- Citynet seeks application of subsection 5.7(b) ("Annual Voluntary Redemption") to Mr. Toney's redemption request. Subsection 5.7(b) provides: "Participants may redeem up to a maximum of 20% of their vested Performance Units during each calendar year." and Thus, Citynet believes Mr. Toney must submit his redemption requests during a specified four-month time period and that his request cannot exceed 20% of this vested balance.
- Mr. Toney denies subsection 5.7(b) applies to him as a former employee, arguing that it applies to active employees of Citynet.
- The Court found that it was necessary to determine, as a matter of law, whether subsection 5.7(a) or 5.7(b) applies to Mr. Toney's redemption request.
- Subsection 5.7(a) will entitle Mr. Toney to mandatory redemption of his entire vested balance as of the effective date of termination, or Eighty Seven Thousand Dollars and Forty-Eight Cents (\$87,000.48). Whereas, subsection 5.7(b) will afford Mr. Toney a limited temporal opportunity during which he may request redemption of up to 20% of the vested balance, yet any payment is subject to the discretion of the Board. In other words, the application of subsection (b) could result in no payment to Mr. Toney.
- The court found that subsection 5.7(a), does not contain any limiting language to distinguish a termination for cause by the employer from that by the employee, and also that this subsection uses the mandatory term "shall."
- The Court noted that subsection 5.7(b) does limit participants to redemption requests to 20% of the vested balance, and such redemption requests must be made during a specified four-month period each calendar year. Also, subsection

5.7(b) uses the discretionary term "may" and payment thereunder is subject to the discretion of the Citynet Board.

- In reading subsections (a) and (b) in pari materia, the Court found that it is clear that Citynet recognized the need to draft two separate provisions—one that applies to employees whose relationship has been terminated and another that applies to active employees seeking annual voluntary redemption at specified periods each calendar year.
- The Court found several reasons to reject Citynet's argument that an employee who voluntarily terminates his position of employment cannot redeem all of his accumulated and vested benefits under section 5.6 of the Plan.
- Plan. Section 5.6 defines four different types of "termination events." Section 5.6(b) addresses "Voluntary Termination of Employment by Participant," and specifically states that "[a]ll Performance Units granted to the Participant which have vested prior to the effective date of such termination shall be available for redemption." (emphasis added).
- Further Section 5.12 of the Incentive Plan was specifically drafted by Citynet to serve as an "Example of How the Plan Works." In Citynet's example, the fictitious employee, John, voluntarily terminates his position of employment with Citynet. At the time of termination, John is 100% vested and John had accumulated 1,000 performance units valued at \$96.00 each. In this example, Citynet states that "John would be due a total amount of \$96,000 (less applicable withholding) from the Company payable under the Payout provisions of the Plan.
- Thus, Citynet in the Incentive Plan uses the example of an employee who voluntarily terminated his position of employment without cause and who was then entitled to redeem all of his accumulated and vested benefits.
- Another reason to reject Citynet's argument is found in the Martin Letter dated January 22, 2008. The Martin Letter states that "an employee will be permitted to 'cash out' 20% of his or her vested balance on an annual basis. When an employee leaves Citynet, the employee is then entitled to 'cash out' his or her entire vested balance . . .

The Circuit Court then found, as a matter of law, that Ray Toney was entitled to the agreed upon amount of Eighty Seven Thousand Dollars and Forty-Eight Cents (\$87,000.48) of which he was fully vested under the Plan. (A.R. 117-118)

Pursuant to the written agreement between the parties, it was agreed that the

Citynet LLC would be paid the vested amount within ninety (90) days of Ray Toney's voluntary termination. The Court agreed that Citynet LLC had the full ninety (90) days to make the payment as opposed to the next pay period. However, the Court also found that Citynet had failed to make the payment and that the ninety (90) days had expired. (A.R. 117-118) The Court found that West Virginia Code § 21-5-1 (c) of the WV-WPCA provides, in pertinent part, that "the term 'wages' shall also include then accrued fringe benefits capable of calculation and payable directly to an employee." West Virginia Code § 21-5-1(1) of the WV-WPCA provides: "The term '**fringe benefits**'

means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes ...production incentive bonuses." (emphasis added). The Court found that West Virginia Code § 21-5-4(e) of the WV-WPCA imposes liability on employers who fail to pay an employee wages as required under the WV-WPCA for three times that unpaid amount as liquidated damages. (A.R. 116-117)

Following the ruling of the Circuit Court the only remaining issue was the Plaintiff's Count relating to fraud. At that time Ray Toney was willing to voluntarily dismiss the fraud claim. However, and before the 'Fraud Count' could be voluntarily dismissed, the Citynet LLC employed new counsel who thereafter inexplicably refused to agree to a dismissal of the fraud count against their own client. New counsel's refusal resulted in final order not being entered.

Instead, new counsel for the Citynet LLC sent out discovery requests on the remaining Fraud Count. In responding to the discovery, Ray Toney produced the affidavit of Ms. Carolyn Barr another employee of the Citynet LLC Citynet. (Supplemental A.R. 437-445)

In her affidavit, Ms. Barr affirmed that she resigned her employment with Citynet in

December of 2012 and that when she resigned she was fully vested in the incentive plan in the same manner as Ray Toney. Ms. Barr made a request to be paid her entire vested amount of \$33,966.19 which was due her as an employee who was terminating her employment. Ms. Barr was told that Citynet does not like paying out the money it owes under the Incentive Plan but that in her case they would make the payment and she in fact received her entire amount. Ms. Barr's affidavit was submitted to the Circuit Court in response to Citynet LLC's objection to the plaintiff voluntarily dismissing fraud Count against Citynet LLC. (Supplemental A.R. 441-445)

Finally, on December 30, 2013, or two years after Ray Toney was to receive his incentive pay, the Court entered an Order accepting Ray Toney's voluntary dismissal of the remaining Fraud Count and a final order was entered in these proceedings. (A.R. 378-379)

III. SUMMARY OF ARGUMENT

The Circuit Court did not err in granting Ray Toney the monies that he was due under the Citynet incentive plan. Well-established West Virginia law as well as law in other jurisdictions mandates the payout. The parties agreed that Ray Toney was 100% invested in the incentive plan on the date that he left Citynet LLC's employment. The Incentive plan clearly states that once an employee leaves Citynet LLC's employment Citynet LLC must make the payment of the 100% vested benefits within ninety (90) days. Judge Stucky accepted the written agreement and agreed that the ninety (90) day extension was appropriate. However once the ninety (90) days had expired Citynet was required to pay the amount that was 100% vested. As this Court stated in Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999) once an employee

benefits are vested he has a non-forfeitable right to receive his [or her] entire accrued benefit”.

In this case, it is undisputed that an incentive plan existed. It is also undisputed that Ray Toney was 100% vested in the plan at the time voluntarily terminated his employment and that he was fully vested in the amount of \$87,000.48. Pursuant to the incentive plan, Ray Toney was entitled to receive 100% of his vested benefits within ninety (90) days of his leaving the company.

In fact, it is also undisputed that in December of 2013 another Citynet employee, Carolyn Barr, who was also fully vested, was paid the full amount of her incentive plan \$33,966.19 upon her voluntary termination. The Court properly reviewed the stipulated facts, the appropriate law and made a correct ruling based upon the clear language of the Incentive Plan.

It is without question that the Citynet LLC moved for summary judgment and agreed that the matter was ripe for decision. Consequently, the Citynet LLC is estopped from now claiming that the Court somehow denied it discovery -- which it never sought. In fact, not one discovery request was made (or needed) prior to the Circuit Court hearing the Cross Motions for Summary Judgment.

As to the stipulated amount of Ray Toney's incentive plan, it was Citynet who informed the Court that it was undisputed that Ray Toney was fully vested and that he was owed \$87,000.48 under the Incentive Plan and that agreement between the parties required vested monies to be paid in ninety (90) days. The Court accepted the fact that the parties modified the time that payments of this nature are due from the next pay period to the agreed upon ninety (90) day time frame. Even with this extension, Citynet

refused to pay the monies due and owing Ray Toney. It is clear that *West Virginia Code § 21-5-4(e)* mandates that liquidated damages are due in this case. Absent the penalty set forth in the statute, any dishonest employer would refuse to pay the “wages” due and would instead force employees, such as Ray Toney, to endure years of litigation just to obtain benefits unequivocally due at termination.

Finally, the amount of Eighty Seven Thousand Dollars and 48/100 cents (\$87,000.48) as recited by the Circuit Court is based solely on Citynet's affirmation that this was the amount was due Ray Toney. The Incentive Plan has a formula to be utilized by the administrator to determine the amount of monies due an employee. Under the formula, it is believed that Ray Toney is actually due a sum much greater than (\$87,000.48). However, Citynet refuses to provide any information to its employees regarding their entitlement. Ray Toney, based upon his experience and those of fellow employees, realized that to litigate the amount would take years and so he was willing to accept the final amount of (\$87,000.48) as suggested by Citynet and agreed to by Citynet. Obviously, a litigant, like Citynet, cannot agree to an amount of stipulated damages and then, after receiving a ruling in opposition to its underlying legal position, require the process to start over and re-determine damages because it now disagrees with the number it provided to the Court. There is no basis in law or fact to support Citynet's request.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter does not need oral argument. Virtually all of Citynet's arguments for appeal are against its own actions. Poignantly, Citynet agreed no disputed facts existed, that the matter was ripe of disposition and requested Judge Stucky to rule on cross

motions for summary judgment. Now, Citynet seeks to have Judge Stucky's decision reversed because he granted Citynet's request. There is no legal basis for a non-prevailing party to seek a reversal of its own agreement that a matter is ripe for Summary Judgment after not prevailing on the motion. Further, Judge Stucky accepted the stipulated dollar amount of the Ray Toney vested portion of incentive plan based upon the numbers given to him by Citynet. Incredibly, Citynet now seeks a ruling from this Court that Judge Stucky was in error for accepting Citynet's stipulated amount.

The final error cited by Citynet is based upon its belief that it can refuse to pay accrued and vested benefits to its employee once the employee has left Citynet. This Court has expressly held that once a benefit is vested the employee has non-forfeitable right to receive his [or her] entire accrued benefit. The Citynet incentive program clearly states that once an employee leaves his employment and they are fully vested they are to entitled to 100% of their vested incentive plan benefits. The Plan even provides an example of a fully invested employee who upon terminating his employment is entitled to 100% of his vested incentive plan benefits. Citynet simply refuses to pay Ray Toney in violation of its own incentive plan. A Memorandum Opinion by this Court can easily end this litigation.

V. ARGUMENT

A. Standard of Review

This Court has held that in general that "[a] circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, Painter v Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). However this Court has also found that "summary judgment is mandated in

our courts where, after appropriate discovery, there is no legitimate dispute regarding a genuine issue of material fact impacting liability apparent from the record before the circuit court." Jackson v. Putnam County Bd. of Educ., 221 W.Va. 170, 177-78, 653 S.E.2d 632, 639-40 (2007) (emphasis added). , Pingley v. Huttonsville Public Service Dist. 225 W.Va. 205, 691 S.E.2d 531 (W.Va. 2010).

Importantly, in the matter below both parties agreed that the matter was ripe for Summary Judgment and neither party sought any additional discovery. The parties agreed without objection as to what documents the Court needed to review and sought an immediate ruling. Then Citynet filed a motion with the Court requesting the Court reconsider its Summary Judgment ruling. In its Motion to Reconsider Citynet did not request nor claim that additional discovery was needed or necessary. So while the standard of review is de novo, this Court should not set aside its mandate to the circuit courts to rule on Summary Judgment motions when there is no legitimate dispute regarding a genuine issue of material fact impacting liability apparent from either the record before the circuit court or the request of the parties.

As discussed below, application of this express directive reveals that the Circuit Court (1) did not err by interpreting the Citynet Employee Incentive Plan and holding that an employee must be paid the entire amount of his fully vested benefits within ninety (90) days of his leaving his employment with Citynet.

It cannot be forgotten that Citynet requested the circuit court interpret the Employee Incentive plan in its favor and even provided the Plan to the Court as an exhibit in support of its motions. Further, this court should turn a deaf ear to Citynet current cry the circuit court erred because it did not wait for discovery when Citynet

agreed the matter was ripe of disposition, that there were no facts in dispute and that additional discovery was not requested by either party. The Court was never informed that discovery was needed.

Further, the circuit court did not err by applying the WPCA's timely payment provisions as set forth under well-established West Virginia law especially when the Court recognized Citynet's right to extend the time in which such payment should be made and then even with the extension, Citynet failed to meet the extended deadline.

Finally, the circuit court did not err by failing to recognize that Citynet already had paid out \$17,400 to Ray Toney when the parties unequivocally stipulated and agreed that the amount in controversy was (\$87,000.48) - -an amount provided to the Court by Citynet.

B. The Employee Incentive plan is certainly a contract and the Circuit Court correctly interpreted the express language of the Plan.

1. Citynet does not have the right to refuse payment to properly vested employees under its Incentive Plan.

Virtually every jurisdiction in this Country recognizes that Incentive plans are contracts subject to interpretation by the Courts absent clear language to the contrary stating that the plan is in fact not a contract. See Cauvel v. Schwan's Home Serv. Inc. (W.D. Va., 2011), Pfs Distribution Co. v. Raduechel, 387 F.Supp.2d 1020 (S.D. Iowa, 2005) Several of the cases cited herein from other jurisdictions involve the Court interpreting Incentive plans.

Incentive plans are basically unilateral contracts and the obligations and promises therein are defined by the plan. In order for an agreement to be enforceable under contract law, the parties must manifest their objective intent to be bound. Such

intent is manifested through one party's offer and the other party's acceptance of the offer. When the offeror seeks acceptance through an act of performance on the part of the offeree, the offeror proposes a unilateral contract. A unilateral contract consists of a promise made by one party in exchange for the performance of another party, and the promisor becomes bound in contract when the promisee performs the bargained for act.

Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs, Workers' Compensation Div., 214 W.Va. 95, 586 S.E.2d 170, (W.Va. 2003).

In Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984) (which has been previously cited by this court) the court held "that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship." 102 Wash. 2d at 230, 685 P.2d at 1088. See Cook v. Heck's Inc., 176 W.Va. 368, 342 S.E.2d 453, (W.Va. 1986)

This Court has clearly recognized the traditional elements of contract formation. Before a contract can be formed, there must be an offer and an acceptance. General Electric Co. v. Keyser, 166 W.Va. 456, 468, 275 S.E.2d 289, 296 (1981). The concept of unilateral contract, where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise, has also been recognized: "That an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror is well established." First National Bank v. Marietta Manufacturing Co., 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967).

Citynet is a company that deals with internet and network installations. In order to perform this work they need highly qualified and skilled employees. In the present case in 2008, in order to motivate and retain these employees, Citynet informed the employees that they would all be a part of an Employee Incentive Plan².

The incentive plan states that its purpose is as follows;

Purpose, This Employee Incentive Plan (the "Plan") is established by Citynet, LLC for itself and its subsidiaries (collectively the "Company") to create incentives which are designed to motivate Participants (as hereinafter defined) to put forth maximum effort toward the success and growth of the Company and to enable the Company to attract and retain experienced individuals who by their position, ability and diligence are able to make important contributions to the Company's success. Toward these objectives, the Plan provides for granting Awards of Performance Units to Eligible Employees subject to the conditions set forth in the Plan. (A.R. 24)

A participant under the plan is defined as follows:

"Participant" means an Eligible Employee of the Company to whom an Award has been granted by the Company. (A.R. 27)

Under the Plan the participants were awarded Performance Points. The value of the Performance Points is based upon the Value and Performance of Citynet. In order to redeem performance points, an employee must remain in the program for five years and not be terminated for cause.

Clearly, the Citynet Plan provided its employees with promised financial incentive to remain with the company for at least five years and to motivate its employees to have an interest in the continued success of the company and to perform in such a way as to not be terminated for cause. In return, the Plan guarantees the employees they will be paid a vested employee balance if they meet the conditions of the Plan. Nowhere in the

² The plan sets forth that four individuals by job title will form the "Board" of the Incentive plan. Those four individuals are also participants in the plan.

plan does it give the Board the right refuse payment of vested benefits absent conduct that causes an employee to be terminated for cause.

The Plan gives the Board and Administrator specific duties. One of the primary duties requires the Board and the Administrator to administrate the plan in good faith. See, Holderman v. Huntington Leasing Co. (1984), 19 Ohio App.3d 132. Thomas v. Am. Elec. Power Co. Inc., 2005 Ohio 1958 (OH 4/28/2005), 2005 Ohio 1958 (OH, 2005).

Under Section 3.1 of the Plan the Board can define eligible employees, determine when awards will be made, determine the Performance awards to be awarded under the terms of the Award Agreement, can accelerate vesting and take action required for the proper operation or administration of the plan. Under Section 3.2 the Board has the power to run the Plan and to make the awards. The Plan does not, however, give the Board the power to refuse to payout employees vested benefits once the benefits are earned and awarded as set forth in the Plan. (A.R. 27-28)

Employees leaving Citynet's employment

After an employee is fully vested the employee could leave their employment either by their own choosing or by Citynet's choosing. Once the employee left their employment they are entitled to 100% of the vested benefits.

(a) Termination of Employment. In the event the Participant's employment is terminated without Cause, the Participant shall be eligible to redeem the vested portion of their Performance Units as of the effective date of the Participant's termination. Any amounts due will be paid in accordance with the Payout Schedule of the Plan. (A.R. 32-33)

In order to make sure that everyone understood what was meant by Termination of Employment the plan provided a straight forward example:

5.12 Example of How the Plan Works. Following is an example of how the Plan works.

John, a Participant of the Plan, voluntarily terminated his employment with the Company on June 1, 2012. John had a total of 1,000 Performance Units granted to him by the Company as of the effective date of his termination. John has been employed by the Company for 5 years and has not redeemed any of his Performance Units.

a) Units available for redemption.

John's Performance Units are vested at 100% since he has over 4 years of continuous employment with the Company since becoming a Participant. Therefore, all 1,000 of John's Performance Units are available for redemption. (A.R. 34)

The Plan as it relates to Mr. Toney

Upon implementation of the *Incentive Plan in 2008*, Citynet President, CEO and Board Member of the Incentive Plan issued a letter to Ray Toney, including, *inter alia*, confirmation that he was 100% vested in the *Incentive Plan*³ and that he held an award of 361 Performance Units as of January 1, 2008 for a total value of \$42,933.73. (A.R. 72-73). Importantly, Mr. Martin's letter advised Mr. Toney that he could "cash out" his entire vested balance when he left Citynet, except termination for cause. Specifically, Mr. Martin's letter stated: (A.R. 72-73)

When an employee leaves Citynet, the employee is then entitled to "cash out" his or her entire vested balance subject to certain provisions contained in the plan document with respect to termination for cause.

Once Mr. Toney received this letter it confirmed that he had been awarded \$42,933.73. This was Mr. Toney's money and could not be taken away absent his being

³ The question as to why the "Board" decided to give participants in the plan credit for years worked prior to the implementation of the plan is quite simple. The individuals who make up the Board of the incentive plan are also participants. As executives they hold the largest share of vested benefits from the plan. They also had been with the company for several years. In granting credit for past service the "Board" was in affect granting all of its member's immediate 100% vesting. Of course in doing so they are required to apply that rule to everyone. The same holds true for the language that allows one to claim 100% of their vested benefits upon leaving Citynet's employment. By placing this language in the plan and giving the clear example that it meant voluntary termination any Board member had the right to resign and obtain 100% of his now fully vested benefits.

terminated for cause. In order to obtain this money he only had to meet the benefit redemption requirements. Thereafter, on April 14, 2010, Citynet CFO Todd E. Dlugos, CPA, sent Mr. Toney and all Citynet employees an “update” on the value of what had been earned by the employee. By 2010 or within two years Mr. Toney had doubled the amount of money that was due him to **\$87,000.48** of which Mr. Toney was 100% invested. (A.R. 74-75)

Mr. Dlugos’ letter did not contain any modifications or changes to Mr. Martin’s prior letter addressing terminated or separated employees. Mr. Martin’s letter expressly stated that employees, who leave Citynet, except those terminated for cause, are “entitled to ‘cash out’ his or her entire vested balance.”

In 2011, Citynet failed to provide Mr. Toney with any update to the incentive plan. On October 12, 2011, after nearly twelve years of employment with Citynet, Mr. Toney voluntarily terminated his position of employment. Mr. Toney sought to “cash out” or redeem all of his accumulated Performance Units, which were 100% vested under the *Incentive Plan*. At the time of his voluntary termination, Mr. Toney was 100% vested with an accumulated balance of \$87,000.48. Based upon the terms and provisions of the *Redemption of Performance Units* and the *Payout Schedule*, as set forth in Sections 5.7(a) and 5.8 of the *Incentive Plan*, respectively, Mr. Toney expected full payment within ninety (90) days. (A.R. 33-34) However, Ray Toney was not paid within ninety (90) days and has yet to be paid. See, *Section 5.7(a), “Termination of Employment*

Moreover, Citynet now insists that Mr. Toney is required to process his redemption request, as if an active employee, pursuant to Section 5.7(b) of the *Incentive Plan*, entitled “Annual Voluntary Redemptions.” By forcing Mr. Toney to

redeem his accumulated and vested Performance Units under Section 5.7(b), Citynet seeks to limit his redemption request to a maximum of 20% of his vested Performance Units. Not only is Citynet's position illogical,⁴ it is contrary to the plain and unambiguous language of the *Incentive Plan*.

The Incentive Plan governs "**Redemption of Performance Units**" in Section 5.7 and outlines four (4) separate and distinct circumstances whereby Participants may redeem or request redemption of their Performance Unit Awards. Section 5.7(a) ("Termination of Employment") applies to redemptions occurring in conjunction with terminations from employment without cause – this the redemption provision invoked by Mr. Toney. Pursuant to the plain and unambiguous language of 5.7(a), "the Participant **shall be eligible to redeem the vested portion of their Performance Units as of the effective date of the Participant's termination**. Any amounts due will be paid **in accordance with the Payout Schedule of the Plan.**" (emphasis added)

While Citynet seeks to interject limiting terms and phrases into Section 5.7(a), none exist. Clearly, the term "shall" means Mr. Toney is eligible to redeem, and the phrase "vested portion" means his entire vested portion. There is absolutely no discretion extended to Citynet under Section 5.7(a), and Mr. Toney is entitled to redeem all of his vested Performance Units in accordance with the *Payout Schedule*.

Turning to the **Payout Schedule (Section 5.8, supra)**, the plain and unambiguous language states that Citynet must pay "any amount dues . . . within ninety (90) days of such redemption request." In fact, Citynet's failure to do so generates an

⁴ By way of example, if Mr. Toney were obligated to "cash out" as proposed by Citynet, Mr. Toney would never fully redeem his accumulated and vested benefits, because he would never be entitled to redeem more than 20% of his balance. In other words, twenty years from now, Mr. Toney would still have a "balance" of Performance Units.

unsecured debt. (A.R. 33-34)

"Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 3, Watts v. West Virginia Dept. of Health and Human Resources/Division of Human Services, 465 S.E.2d 887, 195 W.Va. 430 (W.Va., 1995) (citing, Syl. Pt. 2, Bethlehem Mines Corp. v. Haden, 153 W.Va. 721, 172 S.E.2d 126 (1969); Syl. Pt. 2, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984); Syl. Pt. 4, Tri-State Asphalt Products, Inc. v. Dravo Corp., 186 W.Va. 227, 412 S.E.2d 225 (1991)). " 'It is the province of the court, and not of the jury, to interpret a written contract.' Syl. Pt. 1, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937)." Syl. Pt. 1, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984). See also, Winn v. Aleda Construction Co., 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984). Also, "a contract of employment may be formed by correspondence." Lawrence v. Cue Paging Corporation, 194 W.Va. 638, 641 461 S.E.2d 144, 147 (1995). (citing, Syl. pt. 3, Stewart v. Blackwood Electric Steel Corp., 100 W.Va. 331, 130 S.E. 447 (1925)).

"The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, Berkeley Co. Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W.Va. 252, 162 S.E.2d 189 (1968). It is well-settled law that "[u]ncertainties in an intricate and involved contract should be resolved against the party who prepared it." Syl. Pt. 1, Charlton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (1934)." In the case *sub judice*, the *Citynet Incentive Plan* is not ambiguous. Nonetheless, should this Court somehow find it to be ambiguous, uncertainties are to be

resolved in favor of Mr. Toney. Judge Stucky in reviewing the plain language of the Plan and the evidence submitted by the parties found that under the plan Ray Toney was entitled to the earned vested benefits.

In order to affirm the decision of Judge Stucky, this Court need only make two findings: (1) Mr. Toney is entitled under the Plan to redeem all of his vested Performance Units as of the effective date of his termination; and (2) the Citynet Incentive Plan obligates Citynet to pay Mr. Toney in accordance with the *Payout Schedule*. Mr. Toney submits that the plain and unambiguous language of the Incentive Plan supports both findings. Moreover, the afore-cited letters from the CEO and CFO of Citynet and the “examples” of performance units and payouts remove any doubt as to the clear meaning of the provisions.

The “**Redemption of Performance Units**” is set forth in Section 5.7 of the *Incentive Plan* and describes the method by which “Participants may redeem or request redemption of their Performance Unit Awards.” Section 5.7(a) applies to redemptions following terminations without cause, such as Mr. Toney’s. Section 5.7(a) is clear and it provides that “the Participant shall be eligible to redeem the vested portion of their Performance Units as of the effective date of the Participant’s termination. Any amounts due will be paid in accordance with the Payout Schedule of the Plan.” Accordingly, Mr. Toney is eligible to redeem his vested Performance Units (\$87,000.48), as of October 12, 2011, in accordance with the *Payout Schedule*.

The ***Payout Schedule*** is found in Section 5.8 of the *Incentive Plan*, and clearly provides that Citynet “shall use commercially reasonable efforts to pay any amounts due, less normal withholdings, to the Participant within ninety (90) days of such redemption

request. If [Citynet] fails to pay the amounts due to a Participant within the ninety (90) day period, the remaining balance shall be converted to an unsecured debt of [Citynet] . . . accru[ing] interest at a rate of five percent (5%) per annum.” Accordingly, Citynet was obligated to use commercially reasonable efforts to pay Mr. Toney \$87,000.48 within ninety (90) days of his redemption request, and its failure to do so converts vis-à-vis the *Incentive Plan* to an unsecured debt of Citynet accruing interest at a rate of 5% per annum. (A.R. 33-34)

Finally, it is unquestionable that after the motion for summary judgment was ruled upon but before a final order was entered evidence was uncovered on the Fraud Count that within one year of Mr. Toney making his request for all of his vested benefits due him under the plan that Citynet did in fact pay 100% of vested benefits to an another employee, Carolyn Barr, who left its employment. In early 2013, Carolyn Barr left her employment with Citynet. She requested that she be paid 100% of her vested benefits as set forth in the *Incentive Plan*. Pursuant to the plan Citynet paid Ms. Barr \$33,966.19 or 100% of her vested benefits while continuing to deny payment to Mr. Toney. It is difficult to understand how Citynet can go forward with this appeal after discovery and disclosure of this evidence. (Supplemental A.R. 441-445)

2. Citynet never sought discovery and agreed the matter was in ripe for dispositive ruling by the Court

In essence, Citynet is filing an appeal against itself. This matter was brought before the circuit court on Cross Motions for Summary Judgment. The relevant facts were agreed upon and the relevant documents submitted. In fact, the circuit court asked on the record and the parties agreed that the matter was ripe for a summary judgment

ruling. Citynet never requested or sought any discovery nor did it make it known to the Court or to Mr. Toney that it needed any discovery whatsoever.

This Court has set forth the following standard when considering whether a case is ripe for summary judgment: [i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Crum v. Equity Inns, Inc., 224 W.Va. 246, 685 S.E.2d 219 (W.Va. 2009).

In the present case there was no outstanding discovery and Citynet never alleged or even hinted that discovery was needed or required. To the contrary, even when Citynet filed a motion for reconsideration it did not claim the need for any discovery. In fact, even in this Appeal Citynet has not described any discovery needed prior to Judge Stucky's ruling. Clearly, this ground for appeal is baseless and without merit.

C. The Timely Payment Provisions of the Wage Payment and Collection Act Should be Applied to Payments Under Citynet's Employee Incentive Plan and Ray Toney is Entitled to Treble Damages and Attorney's Fees

Citynet's argument is in direct contradiction to the West Virginia Wage Payment and Collection Act. Ray Toney's claim concerns his redeeming vested benefits already earned and for which the payment is due. In 2008, Mr. Toney was notified that he had

been awarded \$42,933.73 and that he was 100% vested in that amount. Once this award was made this was Mr. Toney's money. In 2010, Ray Toney was notified that the amount of his award had increased to \$ 87,000.48. This is additional money he earned because he met the requirements of the Incentive Plan. Ray Toney's money did not vest upon leaving -- it vested at the time of the award. Absent fraud, Mr. Toney's vested money already accrued and is sitting in the incentive plan account waiting for redemption.

Furthermore, Citynet recognizes the vested benefit as wages. In its letter notifying Mr. Toney of his award in 2010, Citynet states the following;

Finally, the Citynet Employee Incentive Plan is a non-qualified plan under the Internal Revenue Code. This means that the plan does not qualify to be a retirement plan like the Citynet 401 K Plan. As such, payouts from the Employee Incentive Plan are considered to be taxable income to the employee when received and direct rollovers to other retirement plans are not allowed. Current employees who may receive a payout will do so via regular payroll cycles as a separate check subject to all normal tax withholdings (Federal Income, State, Local, and FICA). (A.R. 75)

This Court has clearly and previously held that when a benefit has vested an employee has gained a non-forfeitable right to receive his [or her] entire accrued benefit. This Court has also held that the WPCA protects as "wages" only those fringe benefits which have both accumulated and vested. In order to ensure that the amount of accumulated benefits may be determined, only those benefits which are "capable of calculation" under the terms of the applicable employment policy are protected. Also, the fringe benefits must have vested according to the eligibility requirements of the terms of employment. See, Meadows, supra.

In this case, Ray Toney received documentation that he was 100% vested in the

Citynet incentive plan and this fact is not disputed.⁵ He was also advised that the amount that had accrued as of January 1, 2010 was \$87,000.48. Based on these two facts along, Ray Toney has, pursuant to West Virginia law, “a non-forfeitable right to receive his entire accrued benefit”. See Meadows, supra

Once Citynet LLC refuses to pay Mr. Toney his vested benefits he is entitled to liquidated damages pursuant to the provisions of the West Virginia *Wage Payment and Collection Act*, § 21-5-1, et seq. (“WV-WPCA”). Upon voluntary termination from employment by an employee, the WV-WPCA requires employers to pay employees wages at the time of quitting or by the next regular payday, depending on whether at least one pay period’s notice of intention to terminate is given by the employee. See, WV-WPCA § 21-5-4 (c).⁶ It is not disputed that the terms and provisions of the *Incentive Plan* afford Citynet up to ninety (90) days to pay the vested benefits.

In the event the employer does not pay the employee as required, the employer is liable for the unpaid amount and also for liquidated damages of three times the unpaid amount, plus attorneys’ fees and costs associated with bringing the action to enforce payment. See, WV-WPCA § 21-5-4 (e),⁷ in part, and WV-WPCA § 21-5-12,⁸ in

⁵ Citynet Motion for Summary Judgment states that “It is undisputed that, at the time of his resignation, the Plaintiff was fully vested in the Performance Units that had previously been awarded to him.”

⁶ WV Code § 21-5-4 (c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

⁷ W.Va. Code § 21-5-4 (e): If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, **in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages.** . . . (emphasis added)

⁸ W.Va. Code § 21-5-12. Employees' remedies: (a) Any person whose wages have not been paid in accord with this article, . . . may bring any legal action necessary to collect a claim under this article. . . . (b) The court in any action brought under this article may, in the event that any judgment is awarded to

part. Citynet's statutory duty to pay wages includes payment of "accrued fringe benefits capable of calculation and payable directly to Mr. Toney." See, WV-WPCA § 21-5-1 (c),⁹ in part. It is undisputed that Mr. Toney's vested benefits, as of the effective date of his voluntary termination from employment, were \$87,000.48.

Whether a particular fringe benefit is payable to an employee is determined by the terms of employment and not by the provisions of *W.Va. Code*, 21-5-1 (c). Syl. Pt. 5, in part, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999). "The 'terms of employment' not only include a written employment agreement but also includes the employer's personnel handbook or manual, personnel policy materials, memoranda and documents intended to be used by employers in establishing the benefits of their employees. See, Yunker v. Eastern Associated Coal Corp., 214 W.Va. 696, 591 S.E.2d 254 (2003), Wolfe v. Adkins, 725 SE2d 200 (W.Va. 2011). Ray Toney accepts that he agreed to give Citynet (90) days to pay him the benefits that were due. However, based upon the plain and unambiguous language of the Incentive Plan he was entitled to the payment of \$87,000.48 within ninety (90) days thereof.

The directive by the West Virginia Legislature for liquidated damages is clear. An employer cannot simply hold monies that are due an employee and refuse to pay the employee. Absent the liquidated damage clause there is zero incentive for an employer

the plaintiff or plaintiffs, **assess costs of the action, including reasonable attorney fees** against the defendant. . . . (emphasis added).

⁹ W.Va. Code § 21-5-1 (c): The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, **the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee**: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article. (emphasis added).

such as Citynet to pay the amount even if they admit that the amount is due. As in this case and despite the fact that Mr. Toney is owed a vested amount of money, the employer could just set back and force unnecessary litigation. It would not be feasible for an employee to bring an action to obtain his accrued benefits because the cost of litigation would eliminate any incentive to seek a recovery. The Wage Payment and Collection Act prohibits this conduct. We live in the age of the internet and West Virginia needs to attract or retain individuals with skills to perform this type of advanced employment. If an employee's wages and benefits are not protected then there is simply no incentive to work in this State.

In Schaffart v. ONEOK, Inc., 686 F.3d 461, 34 IER Cases 1 (8th Cir., 2012) the Court found that the lower Court had erred in finding that monies paid in an incentive plan are not wages. The Court stated:

One stated purpose of the ONEOK plans was to compensate ONEOK's key executives, declaring, "The purposes of this Plan are ... to provide competitive incentives that will enable the Company to attract, retain, motivate, and reward eligible [or Key] Employees." The plans expressly were compensation and benefits provided to attract new employees, retain current employees, and motivate and reward high performers.

The Court found that Nebraska's law applies that allowed for the collection of costs and attorney fees for having to bring an action to obtain wages. Further, Brockley v. Lozier Corp., 241 Neb. 449, 488 N.W.2d 556 (Neb., 1992) is strikingly similar to case at bar. Once again, the court found the plaintiff was entitled to cost and attorney fees pursuant to the Nebraska Wage Payment and Collection Act. Medex v. McCabe, 372 Md. 28, 811 A.2d 297 (Md., 2002) the Court found that monies due in an incentive plan are subject to the Maryland Wage Payment and Collection Law. In reaching its conclusion the Court made the following well thought out ruling.

The Act's mandate is clear, and complies with the public policy that was the origin of the Act. We have discussed the legislative purpose behind the Wage Payment and Collection Law on more than one occasion. See e.g., Battaglia v. Clinical Perfusionists, 338 Md. 352, 658 A.2d 680 (1995); Baltimore Harbor Charters, Ltd. v. Ayd, 365 Md. 366, 780 A.2d 303 (2001). The principal purpose of the Act "was to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages." Battaglia, 338 Md. at 364, 658 A.2d at 686. Maryland is one of forty-two states to enact wage payment laws, and courts across the country have found such laws to be expressions of state public policy.

More recently, in Tuttle v. Geo. McQuesten Co., 227 A.D.2d 754, 642 N.Y.S.2d 356 (N.Y.App.Div.1996), the appellate division of the Supreme Court of New York considered a case similar to the case *sub judice* under that state's payment of wages law, N.Y. Labor Law § 190 (1992). The employment plan called for incentive compensation, termed "hold over monies," to be payable in installments in the years following the year they were earned. The plan further required that the employee be employed by the employer at the time the payments came due. After finding that the compensation did indeed constitute "wages" under the act, the court ruled that the employee had a "vested right" to the money at the time of his resignation, and that "[u]pholding a forfeiture thereof would be violative of public policy." *Id.* at 358.

Likewise, in O'Brien v. Encotech Constr. Serv., Inc., 183 F.Supp.2d 1047 (N.D.Ill. 2002) (interpreting Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115/1 *et seq.* (2002)), the District Court for the Northern District of Illinois held that releases of claims under the Illinois Act were void as a matter of law. Referring to a line of Illinois

cases on minimum wage and wage payment laws, the court stated: "Such laws provide a floor, both as to amount and frequency, below which parties are precluded from contracting with respect to payment for labor services. Such laws by their very nature deny parties the right to contract for the payment of wages.... [I]t is their manifest public policy to limit freedom of contract with respect to the payment of wages in order to serve more important public purposes."

In accordance with the policy underlying the Maryland Act, an employee's right to compensation vests when the employee does everything required to earn the wages. Medex argued that the contractual provision does not conflict with the right to payment of wages, because the wages never became due. According to Medex, no wage has been earned without the continuous employment required by the employment policy. Such reading leads to results that are both unreasonable and illogical. In most states an employer cannot avoid the payment requirement of the States Wage Collection and Payment Act. In this case, Ray Toney accepted the 90 day payout period. However once Citynet refused to make the required payout within the 90 days, then the West Virginia Wage and Collection Act subjects Citynet to liquidated damages, costs and attorney fees.

D. CITYNET IS BOUND BY ITS OWN STIPULATION

Once again Citynet is filing an appeal against itself. As has been previously stated, each year the Plan calls for performance points to be awarded to the participants which are then multiplied by a predetermined factor. As a result, Ray Toney's Plan value was vesting at the rate of \$1,836 per month. However, and despite the fact that the Plan calls for yearly reports Citynet did not file a report in 2011 verifying the

employees value in the Plan. The last report Ray Toney received was in January of 2010. In the 2010 report, Ray Toney was 100% vested in \$87,000.48. It is also uncontested that in 2010 the participants in the Plan were allowed to redraw 20% of their vested money and Ray Toney removed \$17,400.10. All of these facts were known to the parties.

Ray Toney left his employment in October of 2011 or almost two years after receiving an undated report of his vested plan value. If the plan had continued at its past growth rate it would have increased by \$40,394.52 (\$1,836.11 x 22 months). However, Citynet had refused to provide the actual amount that Ray Toney was entitled to under the Plan and it would have required extensive litigation to obtain the true amount. Instead, both Citynet and Ray Toney agreed to simply submit the \$87,000.48 amount as a compromise to the Court for the fully vested amount. It is clear that Citynet, in reaching this agreement with Ray Toney, saved itself money or it would not have otherwise agreed.

Citynet submitted the following proposed language to the Court following the oral arguments related to the fully vested amount. (See Citynet's proposed Order Supplemental A.R. 414-423)

FINDINGS OF UNDISPUTED FACTS

6. At the time of his resignation, the Plaintiff was fully vested in Performance Units which were valued at approximately \$87,000.48.

Since the \$87,000.48 was submitted to the Court as an undisputed fact, the circuit court properly used this amount to determine the amount due Ray Toney

because he was fully vested in the Plan.

After the circuit court ruled in favor of Ray Toney, Citynet requested the circuit court set aside the agreed upon undisputed amount and deduct \$17,400.10 withdrawn from the Plan in 2010. Importantly, though, Citynet did not update the Plan to its value as of October 2011, when Ray Toney left his employment, but instead wanted the Plan reduced as if Ray Toney had left his employment in January of 2010. Because Judge Stucky was provided \$87,000.48 as the agreed upon amount, the Court refused to reduce the amount because Citynet now did not like the amount it previously agreed upon.

This Court held in Cesar L., In re, 221 W.Va. 249, 654 S.E.2d 373 (2007) that "a judicial admission is a statement of fact made by a party in the course of the litigation for the purpose of withdrawing the fact from the realm of dispute." The significance of such an admission is that it 'will stop the one who made it from subsequently asserting any claim inconsistent therewith.'" Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W.Va. 286, 302, 517 S.E.2d 763, 779 (1999) (quoting Clark v. Clark, 70 W.Va. 428, 433, 74 S.E. 234, 236 (1912) (additional citations and quotations omitted)). Accord Keller v. United States, 58 F.3d 1194, 1198 n. 8 (7th Cir.1995) "Judicial admissions are formal concessions ... or stipulations by a party or its counsel ... that are binding upon the party making them. They may not be controverted at trial or on appeal." Citynet cannot now dispute its judicial admission.

VI. CONCLUSION

For all the reasons stated herein, Respondent, Ray Toney respectfully prays and moves this Court to dismiss petitioner's appeal and affirm the Order of the Circuit Court of Kanawha County granting respondent summary judgment as a matter of law and grant him such and other relief as it may deem just and proper.

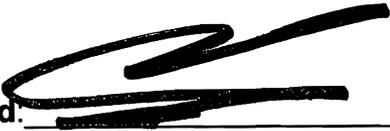
Signed: 

J. Michael Ranson, Esquire (WVSB #3017)
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2014, true and accurate copies of the foregoing ***Respondent's Brief*** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Ancil G. Ramey, Esq.
Bryan Cokeley, Esq.
Russell D. Jessee, Esq.
Steptoe & Johnson, PLLC
PO Box 1588
Charleston, WV 25326

Signed. 

J. Michael Ranson, Esquire (WVSB #3017)
Counsel of Record for Respondent