**IN THE CIRCUIT COURT FOR CUMBERLAND COUNTY, TENNESSEE**

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| **LAUREL HILLS WATER SYSTEM, in Receivership, by and through its Court-Appointed Receiver, RECEIVERSHIP MANAGEMENT, INC.,**  **Petitioner,**    **v.**    **MOY TOY, LLC, a Tennessee**  **limited liability company, and**  **TERRA MOUNTAIN HOLDINGS, LLC, a Georgia limited liability company,**    **Respondents.** | )  ) ) ) ) ) ) ) ) ) ) )  )  ) )  ) )  ) | **Docket No. CCI-2016-CV-6201**  **Jury Demanded** |

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# **PETITIONER LAUREL HILLS WATER SYSTEM, IN RECEIVERSHIP’S**

# **RESPONSE TO RESPONDENT TERRA MOUNTAIN HOLDINGS, LLC’S**

# **MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT**

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**I. INTRODUCTION**

Petitioner, Laurel Hills Water System, in Receivership (“LHWS”), by and through its Court-appointed Receiver, submits this filing as its response to Respondent Terra Mountain Holdings, LLC’s (“Terra Mountain”) Motion to Dismiss or for More Definite Statement (“Motion”).

**A. Terra Mountain’s Motion Admits that “Easement Already Exists” as to Water Supply Line at Issue in LHWS’s Petition.**

Terra Mountain is named in LHWS’s Petition for Condemnation and/or Clarification of Rights to Property (“Petition”) because it is the owner of the property across which a Water Supply Line runs that supplies water to the LHWS water system. *See* Petition at ¶¶ 32-33 and Exhibit G to Petition. That Water Supply Line runs from a Crab Orchard Utility District pump station on Mullinax Road “up the mountain” to property at the top of Renegade Mountain where an unused water tower is located. *Id*. at ¶¶ 26-40. That Water Supply Line has been in place for many years. *See* *id*. at ¶ 45. As to the area upon which Water Supply Line transverses Terra Mountain property, Terra Mountain specifically carved out a water utility easement along that Water Supply Line from a 2013 Deed of Conservation Easement it entered into with Atlantic Coast Conservancy, Inc. and thus is the owner of the property over which the Water Supply Line crosses. *See* ¶¶ 32-33 of Petition and Exhibit H thereto.

In its Motion, Terra Mountain states as follows:

9. The Petition fails to state a claim upon which relief can be granted wherever it seeks “easements” to existing waterlines, on Terra Mountain’s property, and specifically, the main supply line by reason of the fact said line has been in existence for decades, and certainly in excess of one (1) year. **Consequently, a “easement” already exists**. See: Teen. [sic] Code Ann. § 29-16-124.

Motion at p. 5 (¶9) (emphasis added). Accordingly, Terra Mountain admits that as to the Water Supply Line transversing its property, a utility easement already exists. LHWS’s Petition is one requesting either condemnation or clarification of property interests. Terra Mountain’s admission, as set forth in its Motion, is such a clarification – i.e. an easement already exists. Therefore, far from being a grounds upon which dismissal is warranted, Terra Mountain’s admission allows the Court to declare that a utility easement exists in favor of LHWS regarding the Water Supply Line as requested in the Petition – Petition at ¶¶ 33 and 44.a.

**B. Response to Terra Mountain’s Contention of “General Pleading Deficiency”**

Terra Mountain complains that the allegations against it do not satisfy the pleading requirements of Rule 8.01 / 8.05(2)[[1]](#footnote-1) Tenn R. Civ. P. Terra Mountain is incorrect.

In the first instance, Terra Mountain’s admission that an easement as to the Water Supply Line already exists, demonstrates that it is aware of why it is named as a party (it owns property over which the Water Supply Line transverses) and knows of the relief sought by LHWS (an easement as to that property).

Moreover, T.C.A. § 29-16-104 sets forth the contents of a petition for condemnation:

The person seeking to appropriate such land shall file a petition in the circuit court of the county in which the land lies, setting forth, in substance:

(1) The parcel of land or rights therein or incident thereto a portion of which is wanted, and the extent wanted;

(2) The name of the owner of such land or rights, or, if unknown, stating the fact;

(3) The object for which the land, etc., is wanted; and

(4) A prayer that a suitable portion of land or rights may be decreed to the petitioner, and set apart by metes and bounds, or other proper mode.

LHWS’s Petition specifically alleges that “Terra Mountain is the holder of the existing water line easement set forth in the above-quoted language of the Deed of Conservation Easement . . .” Petition at ¶ 33. The Petition specifically identifies that exiting water line easement through reference to the applicable portion of the Deed of Conservation Easement (Petition at ¶¶ 32-33) – which Terra Mountain presumably drafted and is intimately familiar with. The Petition states that the purpose of the potential taking of the Terra Mountain easement (or clarification of rights as to that easement) is to allow LHWS to operate as a public utility, to implement the court-approved Receivership Plan and, in furtherance of the public good, to supply a reliable source of potable water to the Renegade Mountain community. Petition at ¶¶ 33 and 42. The easement sought is described in the same exact fashion that Terra Mountain described it in Terra Mountain’s Deed of Conservation Easement. Petition at ¶ 32 and Ex. H thereto. Finally, the Petition requests that the Court title, in the name of LHWS, “the existing water line easement reserved by Terra Mountain in relation to the portion of the Water Supply Line that crosses the Conservation Easement . . .” Petition at ¶ 44.a. and Prayer for Relief at ¶ 5.

Respectfully, the Petition complies with the requirements of T.C.A. § 29-16-104 and thus is not “deficient” under Rule 8.01.

**C. Allegations of the Petition Establish that LHWS is Vested with the Power of Eminent Domain.**

Terra Mountain contends that LHWS does not have the power of eminent domain. Terra Mountain is incorrect.

In the Cumberland County Chancery Court litigation that ultimately gave rise to the entry of the Order to Appoint Receiver, the water system at issue was, without objection, determined to be a “public utility.” *See* *Laurel Hills Condominium Property Owner’s Ass’n v. Tennessee Regulatory Authority*, 2014 WL 1494126 at \*6 (Tn. Ct. App. April 14, 2014) citing to T.C.A. § 65-4-101(6)(A) (copy attached as **Exhibit A**). As a court-determined public utility, LHWS had/has rights of eminent domain. *See* T.C.A. § 29-16-101.

Through the Order to Appoint Receiver, LHWS was placed into receivership and the Receivership Court approved the LHWS Receivership Plan which ordered the LHWS Receiver to implement. Petition at ¶ \_\_\_. The Order to Appoint Receiver stated that the LHWS Receiver had exclusive custody and possession of the water system’s property and property interests and with full power to sue for and take possession of that property and those property interests – Petition at ¶¶ 2-3 – which again is a Court-determined ability to seek condemnation as to property interests needed to operate the water system and to fulfill the Court-approved Receivership Plan.

The LHWS, both prior to and subsequent to the appointment of the LHWS Receiver, was the water company of Renegade Mountain. It did (and does) provide potable water service to the Renegade Mountain community; it did (and does) purchase water from Crab Orchard Utility District; it did (and does) bill and collect fees for that water service; it did (and does) provide maintenance and improvements to the water system. *See* **Exhibit A** at \*1. As the water company for the Renegade Mountain, LHWS, in receivership, is a water company and thus, pursuant to T.C.A. § 65-27-101, has the power of condemnation:

**§ 65-27-101 Power of Condemnation**

(a) Any water company is empowered to acquire, by purchase, condemnation, or other proper means . . . [to] take such land . . . and such rights-of-way as may be necessary for establishing and maintaining its power houses . . . pipelines . . . and other works, and the rights-of-way to any and all lands between its . . . power houses . . . and other points at which its water may be transmitted, consumed or disposed of as may be necessary to place its . . . pipelines, either above or underground, and may from time to time enter thereon and repair same, or when advisable, to place additional equipment, appliances, or appurtenances; but in all cases, such act shall be done in such a manner and with such haste as to do as little injury to provide property as possible.

*Id.*

Moreover, as part of the LHWS Receivership proceedings (in Cumberland County Chancery Court), the Receivership Court adopted the LHWS Receiver’s Receivership Plan and ordered the LHWS Receiver to proceed to implement that Receivership Plan. Petition at ¶¶ 4-5. The Receivership Plan called for a bid process as to entities to bid for ownership and operation of LHWS. Through that bid process it was clear that parties (e.g. Defendant Moy Toy) asserted rights of ownership and control over property rights and interests necessary for the operation of LHWS and for any “buyer” of LHWS to hold in order to gain a Certificate of Convenience and Necessity (“CCN”). Petition at ¶ 6. Defendant Moy Toy refused to give the one and only bidder assurances that the needed property rights would be provided. *Id*. Therefore, in order to implement the Receivership Plan, the LHWS Receiver had to institute this action. *Id*. at ¶ 7. Accordingly, as a Court-declared public utility and as the water company for Renegade Mountain, LHWS, in receivership, has eminent domain rights pursuant to T.C.A. § 65-4-101(6)(N) / § 29-16-101 and T.C.A. § 65-27-101. The fact that the water company is in receivership does not effect this standing. T.C.A. § 65-4-101(6)(A) (which includes receivers of companies “that own, operate, manage or control within the state, any . . . water . . . or like system” as “public utilities.”)

Terra Mountain contends, however, that before LHWS, in receivership, has eminent domain powers, it must be a holder of a CCN from TPUC. Nowhere in T.C.A. § 65-27-101 is a CCN noted as a pre-condition of a water company to exercise the rights of eminent domain given thereunder. ***[But see case??]***

Moreover, on September 12, 2017, LHWS , in Receivership, applied for a provisional Certificate of Convenience and Necessity before the Tennessee Public Utility Commission.[[2]](#footnote-2) *In Re: Petition of Laurel Hills Water System in Receivership*, TPUC Docket No. 17-00098. A copy of that application was sent to counsel of record for Terra Mountain and the time for intervention in that proceeding has expired without Terra Mountain seeking to intervene. ***[in or out??]***

Finally, in *Laurel Hills Condominium POA* (copy attached as **Exhibit A**) and prior to the establishment of the LHWS Receivership, the Tennessee Court of Appeals rejected the argument that the TRA was prohibited from operating a public utility without a CCN to operate a water system. *Id*. at \*5-6. The rationale of the Court was that while T.C.A. § 65-4-201(a) indicates that a public utility regulated by the TPUC must obtain a CCN, a public utility operating without a CCN – such as the pre-receivership LHWS – was nevertheless subject to the TPUC’s regulation. *Id.* at \*6. Otherwise, a water public utility could operate in an unsafe, inadequate and improper fashion without regulatory recourse. In order to adequately and properly provide a reliable source of potable water to the Renegade Mountain community, LHWS needs the easement rights requested in the Petition regarding the land of Terra Mountain over which the Water Supply Line transverses. Even as the lack of a CCN does not prohibit the TPUC from regulating a public utility, so the lack of a CCN should not prohibit the public utility from exercising eminent domain as to property needed to provide that regulated service.

**D. Petition Adequately Alleges “Public Use”.**

Terra Mountain next contends, without any elaboration or detail, that the Petition seeks to condemn property for a non-public use for the benefit of a private party. Terra Mountain’s Motion to Dismiss at ¶¶ 2 and 8. In essence, Terra Mountain maintains that the condemnation is not for a public use. Terra Mountain is incorrect.

T.C.A. § 29-17-102(2) sets forth “public use” in the eminent domain context. It specifically states that “public use” includes:

The acquisition of any interest in land necessary for the function of a public or private utility, a governmental or quasi-governmental utility, a common carrier, or any entity authorized to exercise the power of eminent domain under title 65.

T.C.A. § 29-17-102(2)(B) (emphasis added).

As noted before, the LHWS water system has been determined by the Tennessee Court of Appeals to be a public utility under T.C.A. § 65-4-101(6)(A), *see* **Exhibit A** at \*6, and thus under T.C.A. § 29-16-101 is authorized to exercise power of eminent domain. Also, as noted above, under T.C.A. § 65-27-101, the LHWS water system operates as the water company for Renegade Mountain. Thus, under T.C.A. § 29-17-102(2), LHWS is an “entity authorized to exercise the power of eminent domain under title 65” and its acquisition of property through condemnation is considered a “public use.”

LHWS in Receivership owns the actual pipes and infrastructure of the Water Supply Line that crosses upon the Terra Mountain property. *See* Petition at ¶ \_\_\_\_. But it does not have any easement rights to come upon the Terra Mountain property to maintain or repair the Water Supply Line. In order to function as a public utility (or as the receiver of a public utility) and/or to function as a water company, it is necessary for the LHWS to have an easement as to the Terra Mountain property at and around the Water Supply Line. Accordingly, the “taking” sought as against Terra Mountain is for a public use.

Terra Mountain, in its Motion, complains that the LHWS Receiver’s efforts are to confer a private benefit on a particular private party. Again, Terra Mountain is incorrect. As set forth in the Petition, the LHWS Receivership was established, and the Receiver appointed, to operate the water system on Renegade Mountain and to present a Receivership Plan for ultimate disposition of the water system. In order to operate the water system (which again is a public water utility), easement rights are to the Terra Mountain property, over which the Water Supply Line transverses, are needed. The benefit of operating the water system is to the water consuming public on Renegade Mountain.

By its very nature, however, the LHWS Receivership is not a perpetual entity and has obtained the Receivership Court approval of a Receivership Plan. Petition at ¶ \_\_\_\_. That plan was to seek out water utility operators to bid upon the LHWS water utility. As set forth in the Petition, only one bid was made. Petition at ¶ \_\_\_. Terra Mountain, presumably, is seizing upon that in contending that the LHWS Receiver is taking action to benefit a private party – i.e. the one bidder – Aqua Green. Such is not the case. The LHWS Receiver seeks easement rights as to the Terra Mountain property over which the Water Supply Line transverses so as to secure the needed property rights to operate the LHWS for the public benefit of providing a reliable source of potable water to the Renegade Mountain community. These are rights needed by Aqua Green or any other water utility operator going forward and the ability to secure those rights are matters precedent to Aqua Green, or any other water utility operator, to purchase LHWS out of receivership. But the efforts of the LHWS Receiver are not to benefit the subsequent utility operator, but rather to benefit the public interest in providing potable water to the Renegade Mountain community.

**E. Petition Adequately Describes the Terra Mountain Property in a Proper Mode.**

Pursuant to T.C.A. § 29-16-104, a condemnation petition is to include a description of the property sought to be condemned “set apart by metes and bounds or other proper mode.” T.C.A. § 29-16-104(4) (emphasis added.) The LHWS Receiver asserts that the Petition identifies the Terra Mountain property at issue exactly the way that Terra Mountain chose to identify the subject land in its December 27, 2013 Deed of Conservation Easement (recorded at ROD Book 1422 / Page 1806-2009 Cumberland County Register of Deeds Office) wherein Terra Mountain placed the bulk of its land on Renegade Mountain under a conservation easement. Terra Mountain, however, carved out from the Deed of Conservation Easement (amongst other property) the property over which the Water Supply Line transverses. Petition at ¶ 32. It must be assumed that Terra Mountain would have identified that carved out section containing the “existing waterline” with the care and specificity it deemed adequate. In doing so, Terra Mountain’s description of the carve out from the Deed of Conservation Easement contains no metes and bounds descriptions. Rather, it is described only in reference to “the existing waterline” which is shown by a “Leopoidite Lilac” (i.e. pink/purple) line drawn on a map contained in an attachment to the recorded Deed of Conservation Easement. Petition at ¶ 33. This is exactly how the Terra Mountain property at issue is described in the Petition. Petition at ¶ \_\_\_. Moreover, in admitting in its Motion that is knows that the Water Supply Line has been “in existence for decades” (Motion at ¶ 9), Terra Mountain must, therefore, know where that water line is located and thus knows the specific property upon which the LHWS Receiver seeks easement rights.

In sum, the LHWS Receiver asserts that the Petition adequately describes in “other proper mode” the Terra Mountain property at issue (T.C.A. § 29-16-104(4)) and thus dismissal on that basis would be improper.

As a point of information, the LHWS Receiver has ordered a survey of the Water Supply Line which is on-going and expected to be completed by the end of October 2017. Upon denial of Terra Mountain’s Motion to Dismiss and as this matter progresses through discovery, that survey will be provided to Terra Mountain.

**F. Petition Adequately Establishes the Necessity of Condemnation of the Property / Property Rights It Seeks from Terra Mountain.**

Terra Mountain next complains that the Petition does not set forth that the condemnation of the subject Terra Mountain property is “necessary.” In doing so, Terra Mountain ignores the Petition and the reality of what is necessary to provide potable water to the Renegade Mountain community.

Clearly, it is necessary for LHWS to have continued the supply of water which is provided through the Water Supply Line that transverses the Terra Mountain property at issue. In order to ensure the continued supply of water to the Renegade Mountain community, easement rights, as requested in the Petition regarding the Tera Mountain property is needed. Petition at ¶ \_\_\_. Accordingly, the Petition adequately sets forth the “necessity” of condemnation of the property/property interests is seeks from Terra Mountain.

**G. Actual Case or Controversy Exists.**

Terra Mountain next complains that there is no case or controversy as between it and the LHWS Receiver that would support the request for a clarification of rights and/or clarification of rights regarding an easement as to the Terra Mountain property over which the Water Supply Line transverses.

With Terra Mountain’s admission that an easement exists as to the Water Supply Line (*see* Motion to Dismiss at p. 5, ¶ 9), perhaps Terra Mountain has a point on this issue. If such be the case, then the LHWS Receiver would request an order of Court conveying the easement rights it seeks as to the Water Supply Line regarding the Terra Mountain property at issue. *See* Petition at ¶¶ 32-34, 44.a. and Prayer for Relief ¶ 5.

It must be noted, however, that Terra Mountain’s position of “no case or controversy” belies the reality of the situation. Terra Mountain’s Motion to Dismiss sets forth numerous issues over which there is dispute and controversy. In the LHWS Receivership proceedings, a mediation was ordered to which Terra Mountain voluntarily participated – said mediation being unsuccessful. Terra Mountain owns the land over which a portion of the Water Supply Line transverses and is fighting the LHWS Receiver’s efforts to gain needed easement rights as to that property.

Terra Mountain can, however, effectively demonstrate that there is no case or controversy at issue by acting on its admission in its Motion to Dismiss that an easement already exists and entering into an order conveying the easement rights requested in the Petition. Otherwise, there is a dispute pled in the Petition between Terra Mountain and the LHWS Receiver sufficient to establish the existence of a case or controversy between them.

**H. Exhibits to Petition Do Not Contradict or Negate the Material Allegations of the Petition.**

Without any specificity Terra Mountain complains, as its next position in its Motion to Dismiss, that the exhibits to the Petition contradict or negate the material allegations of the Petition. In the first instance, the LHWS Receiver asserts that Terra Mountain should set forth – which it does not do – what exhibits it is referring to and how they contradict or negate the material allegations of the Petition. Otherwise, and again, the LHWS Receiver asserts that Terra Mountain is incorrect in its position.

The material allegations in the Petition regarding Terra Mountain are as follows:

1) Terra Mountain owns property over which the Water Supply Line transverses (Petition at ¶ \_\_\_);

2) The LHWS is a public water utility and is the water company that provides potable water to the Renegade Mountain area (Petition at ¶ \_\_\_);

3) As such, LHWS (through its Receiver) has the right to seek am easement in relation to the Terra Mountain property because such is necessary to the function of the water utility (Petition at ¶ \_\_\_).

Respectfully, the LHWS Receiver asserts that no exhibit attached to the Petition negates or contradicts those core allegations.

**I. Terra Mountain Mischaracterizes Reference to a “Settlement Agreement” in Petition.**

Terra Mountain’s final attempt to state a grounds for dismissal is that the LHWS Receiver requests clarification or declaratory relief concerning a “Settlement Agreement” to which the LHWS is not a party. In so posturing, Terra Mountain completely mischaracterizes the LHWS Receiver’s reference of the “Settlement Agreement” in the Petition.

The references to the “Settlement Agreement” in the Petition are part of the background of events that led to the establishment of the LHWS Receivership. Petition ¶¶ 16-23. The pre-receivership water utility operator (i.e. Laurel Hills Condominium Property Owners Association – “Laurel Hills POA”) was ordered by the TPUC to divest itself of the water utility. Because it could not do so, Laurel Hills POA entered into a settlement agreement with the TRA staff (Petition at ¶ 18). As a result of that “settlement,”[[3]](#footnote-3) the LHWS Receivership was established and numerous matters regarding the conveyance of property/property interests to the LHWS Receiver were addressed. Petition at ¶¶ 18 and 22. As stated in the Petition, to the extent that the “Settlement Agreement” did not cover property interests needed by LHWS, condemnation or clarification through this action was needed. Petition at ¶ 23.

Terra Mountain contends that by so stating, the LHWS Receiver seeks to clarify or have declared rights established in an agreement (i.e. the “Settlement Agreement”) to which the LHWS Receiver was not a party. This is incorrect. In this action, the LHWS Receiver does not attempt to enforce or have construed the “Settlement Agreement.” The Settlement Agreement is what it is and conveys what it conveys (or what the Cumberland County Chancery Court says it conveys as a result of the pending contempt proceedings). What the LHWS seeks in this action is to have condemned the property rights and interests it needs that are not addressed by the “Settlement Agreement” or the property rights or interests it needs in addition to those conveyed in the “Settlement Agreement.” In essence, the LHWS Receiver “got what it got”/“will get what it gets” from the “Settlement Agreement,” but in order to implement the Receivership Plan, and through the eminent domain powers afforded it as a public water utility/water company, it seeks to condemn the property/property rights it needs, or if simple clarification can be reached by agreement – e.g. an easement as to the Terra Mountain property already exists – then it seeks court order to that effect.

***[Insert argument in alternative to Amend Petition]***

**II. CONCLUSION**

For the reasons stated herein, LHWS, in Receivership, by and through its Receiver, requests \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Respectfully Submitted,

By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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*Attorneys for Petitioner for Laurel Hills Water System, in Receivership by and through its court-*

*Appointed Receiver, Receivership Management, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 2017, a true and correct copy of the foregoing has been served as noted to:

Robert Schwerer

*Respondent, Terra Mountain Holdings, LLC*

Scott D. Hall, Esq.

105 Bruce Street

Sevierville, TN 37862

*Counsel for Respondent, Moy Toy, LLC*

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J. Graham Matherne

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1. Rule 8.05(1) Tenn. R. Civ. P. sets forth the requirements of stating a claim based upon a violation of statute, ordinance or regulation. *See* Advisory Commission Comment to Rule 8.05. This action is one for condemnation of property (to the extent that property rights cannot be clarified through declaration). The Petition is not based on a violation of a statute, ordinance or regulation and thus Rule 8.05(1) does not apply. To the extent that statutes are involved, the Petition clearly references T.C.A. § 65-27-101 (which provides that a water company, such as LHWS, in receivership, has eminent domain powers) and T.C.A. § 29-16-101, *et seq.* (which sets forth the eminent domain procedures referenced in T.C.A. § 65-27-101). Petition at ¶ 12. [↑](#footnote-ref-1)
2. Insert here [↑](#footnote-ref-2)
3. The LHWS Receiver places the word “settlement” in quotes because there is currently pending in the Cumberland County Chancery Court a motion by the TPUC that seeks contempt in relation to failure to comply with the “settlement,” which calls into question what was or was not “settled.” Terra Mountain is fully aware of these contempt proceedings. [↑](#footnote-ref-3)