

CV-18-162

IN THE ARKANSAS COURT OF APPEALS

INCORPORATORS OF THE COMMUNITY
KNOWN AS LITTLE ITALY

APPELLANT

v.

PULASKI COUNTY and
CENTRAL ARKANSAS WATER

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
HONORABLE CHRIS PIAZZA, PRESIDING
PULASKI COUNTY CIRCUIT COURT CASE NO. 60CV-16-1779

ABSTRACT, BRIEF, AND ADDENDUM OF APPELLANT

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INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL? None

II. BASIS OF SUPREME COURT JURISDICTION?

(X) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) ___ Construction of Constitution of Arkansas
- (2) ___ Death Penalty, life imprisonment
- (3) ___ Extraordinary writs
- (4) ___ Elections and election procedures
- (5) ___ Discipline of attorneys
- (6) ___ Discipline and disability of judges
- (7) ___ Previous appeal in Supreme Court
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III. NATURE OF APPEAL?

- (1) X Administrative or regulatory action
- (2) ___ Rule 37
- (3) ___ Rule on Clerk
- (4) ___ Interlocutory appeal
- (5) ___ Usury
- (6) ___ Products Liability
- (7) ___ Oil, gas, or mineral rights
- (8) ___ Torts
- (9) ___ Construction of deed or will
- (10) ___ Contract
- (11) ___ Criminal

Incorporators of the Community Known as Little Italy (“Little Italy”) filed a petition for the incorporation of the community known as Little Italy. The Pulaski County Judge entered a judgment denying incorporation. Little Italy appealed to the Circuit Court of Pulaski County, Arkansas, pursuant to Arkansas District Court Rule

9(e), and named Pulaski County (the “County”) as the defendant. Central Arkansas Water (“CAW”) intervened in the case. CAW filed a motion to dismiss for lack of jurisdiction based on Little Italy’s failure to file and serve a complaint within 120 days of filing the appeal. The County joined the motion. CAW subsequently asserted an additional ground for dismissal based on Little Italy’s failure to name CAW as a defendant. The circuit court entered an order granting both motions to dismiss.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? No

V. EXTRAORDINARY ISSUES?

- appeal presents issue of first impression
- appeal involves issue upon which there is a perceived inconsistency in the decision of the Court of Appeals or Supreme Court
- appeal involves federal constitutional interpretation
- appeal is of substantial public interest
- appeal involves significant issue needing clarification or development of the law or overruling of precedent
- appeal involves significant issue concerning construction of statute, ordinance, rule or regulation

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Section III(A)(11) and VII(A) of Administrative Order 19?

YES NO

(2) If the answer is “yes”, then does this brief comply with Rule 4-1(d)

YES NO

JURISDICTIONAL STATEMENT

1. The present appeal involves an appeal from county court to circuit court pursuant to Arkansas District Court Rule 9. The issue of law is whether the circuit court erred in granting the motions to dismiss for lack of jurisdiction filed by the appellees. The bases given by the circuit court for granting the motions are as follows: (1) subdivision (e) of Arkansas District Court Rule 9 states the petitioner will have all of the obligations of a plaintiff, including filing a complaint, but appellant only filed a notice of appeal; and (2) subdivision (e) of Arkansas District Court Rule 9 states the petitioner will name all necessary, adverse parties as defendants, but appellant failed to name Central Arkansas Water as a defendant.

2. I express a belief, based on a reasoned and studied professional judgment, that the questions raised in this appeal are jurisdictionally significant. This appeal presents an issue of first impression: no Arkansas appellate court has examined whether Arkansas District Court Rule 9(e) requires a petitioner to file a complaint in addition to a notice of appeal to vest jurisdiction in the circuit court, nor has any Arkansas appellate court examined what constitutes a necessary adverse party for purposes of complying with Arkansas District Court Rule 9(e) or the effect of failing to name a necessary adverse party on the circuit court's jurisdiction over an appeal from county court.

/s/ Mary-Tipton Thalheimer

Mary-Tipton Thalheimer

POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

- A. Does Arkansas District Court Rule 9(e) Require A Petitioner To File A Complaint To Vest The Circuit Court With Jurisdiction?

Pack v. Clark, 2010 Ark. App. 756, 379 S.W.3d 676

Circle D Contractors, Inc. v. Bartlett, 2013 Ark. 131, 2013 WL 1279062

Ark. Dist. Ct. R. 9

- B. Does Arkansas District Court Rule 9(e) Require A Petitioner To Name All Necessary Adverse Parties To Vest The Circuit Court With Jurisdiction?

Britton v. City of Conway, 36 Ark. App. 232, 821 S.W.2d 65 (1991)

Ark. Dist. Ct. R. 9

Ark. R. Civ. P. 19

TABLE OF AUTHORITIES

Cases:

<i>Britton v. City of Conway</i> , 36 Ark. App. 232, 821 S.W.2d 65 (1991).....	Arg 8, 9, 10
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<i>Howard v. Ark. Cama Tech.</i> , 2012 Ark. App. 567 (unpublished)	Arg 3, 4
<i>Pack v. Clark</i> , 2010 Ark. App. 756, 379 S.W.3d 676	<i>passim</i>
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Statutes and Rules:

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ABSTRACT

I. HEARING ON MOTIONS TO DISMISS NOTICE OF APPEAL

[Abstractor's Note: Hearing was held on October 12, 2017, in the Circuit Court of Pulaski County, Arkansas, Second Division, the Honorable Chris Piazza presiding, with Messrs. Adam B. Fogelman and William Gruber appearing for Pulaski County, Ms. Judy Simmons Henry appearing for Central Arkansas Water, and Ms. Mary-Tipton Thalheimer and Mr. Seth Hampton appearing for the petitioners, the incorporators of the community known as Little Italy. **R 128.**]

The Court: We have a motion to dismiss for lack of jurisdiction.

Mr. Fogelman: This case began with a petition to the county court in May of 2015. **R 132.** The Petitioners asked for incorporation of an area known as Little Italy. On February 26, 2017, the county court entered a judgment denying the incorporation petition, and on March 23, 2017, the Petitioners filed their Notice of Appeal.

The issue is whether compliance with the second sentence of Rule 9(e) to the Arkansas District Court Rules alone can perfect an appeal. The question is whether the Petitioners have taken all of the legal steps necessary to perfect the appeal, and the answer is no. Rule 9(e) requires that the provisions of 9(b), (c), and (d) apply except in the instance when 9(e) sets out a separate procedure. To initiate an appeal from county court, 9(e) requires the filing of a notice of appeal and attach a certified copy of the county court's judgment. That is all that was done in this case and I would say that alone is not sufficient. **R 133.**

The Court: What does 9(e) require besides that?

Mr. Fogelman: 9(e) states that 9(a), (b), (c), and (d) govern appeals from county court to circuit court. Within thirty (30) days of the county court judgment, a certified copy of the judgment must be attached to the notice of appeal.

In the circuit court proceeding, the petitioner shall be plaintiff and have all of the obligations of the plaintiff in a case that is filed from district court to circuit court. If there were no defendants in the county court proceeding, the petitioner shall name all necessary adverse parties as defendants in the complaint filed in circuit court. Once the Petitioners filed their Notice of Appeal, nothing happened. One hundred and forty (140) days passed and then Central Arkansas Water filed its motion to dismiss. One day later, Pulaski County filed its motion to dismiss. Today, there is still nothing setting forth the factual basis for the appeal. **R 134.** No claims have been made, no complaint has been filed, and the petition from the underlying matter has not been filed.

Pulaski County's position is that once a notice of appeal and county court's judgment has been filed, one must then look to 9(b) to determine how to proceed. 9(b) requires the filing with the clerk of the circuit court a certified copy of the district court's docket sheet showing the entry awarding judgment, as well as all prior entries, or a certified copy of the record of the district court proceeding consisting of all documents and motions filed in the district court, and a certified

copy of the complaint filed in the district court. Compliance with 9(b) is necessary to vest the court with jurisdiction.

In the response filed by the Petitioners to the motions to dismiss, they argue that substantial compliance is all that is required. **R 135.** *Circle D*, a case cited by the Petitioners, is a case in which the entire record was lodged, but they mislabeled their notice of appeal a complaint and petition for declaratory judgment. The court was satisfied with that.

I discovered a case yesterday, *Sikora v. Boggard*, 2016 Ark. App. 619, and I have a copy if the court would like one.

The Court: Yes, please.

Mr. Fogelman: The court in *Sikora* ruled that District Court Rule 9 previously required, and I would like to highlight the word previously, a plaintiff to refile his or her complaint and plead all of his or her claims in the circuit court, but the rule was silent on the consequence of failing to do so. **R 136.** It was in *Circle D* that the Supreme Court ruled that repleading was a procedural matter, and thus, substantial compliance was all that was required. However, in *Sikora*, the court pointed out that after the *Circle D* decision, 9(b) was amended to require the additional filing of the docket sheet or complaint and the record in the matter, and ultimately, the court held strict compliance with 9(b) is required before a circuit court

can acquire jurisdiction over an appeal from district court. Pulaski County's position is that the holding also applies to appeals from County Court.

The Court: The *Pack* case seems to indicate that an appeal from the county court is somewhat different from the district court because the party filed the complaint loses and then has to refile to become the plaintiff in circuit court. It is a different situation in county courts where there is a request like in this case for establishing a municipality. There is a notice of appeal and the county judge's order, which sets out exactly what the findings are. **R 137.** So are you saying the *Sikora* case that dealt with the district court would change the *Pack* court's ruling?

Mr. Fogelman: I am not saying it would change the *Pack* ruling, but the *Circle D* finding. Pulaski County's position is that strict compliance, not substantial compliance, is required.

With respect to the *Pack* decision, the notice of appeal was in the form of a complaint and it attached the entire record, which satisfied 9(b). In the first footnote to the *Pack* decision, the court highlighted that the county court case file did not contain a document titled docket sheet or any document resembling a docket sheet because neither party has alleged that the case file was incomplete so the court could only presume that the county court docket sheet did not exist for the case. The fact that the court highlighted this shows that the court was looking at what was filed.

The *Pack* court went into detail regarding what constitutes a notice to perfect an appeal by looking at Rule 3(e) of the Arkansas Rules of Appellate Procedure. **R 138.** The court highlighted that a notice of appeal shall specify the parties taking the appeal; designate the judgment, decree, or order being appealed; designate the contents of the record on appeal; state the appellant has ordered the relevant transcript of the proceeding below; state the court to which the appellant is appealing; and state that the appellant abandons any unresolved claims. There are no unresolved claims in this matter, but the Petitioners did not designate a record. Rule 3(e) does not strictly apply to this situation, but it is instructive as to the substance of the pleadings necessary to perfect an appeal.

Once the Notice of Appeal was filed with the county court's judgment, the Petitioners had an obligation to also file the record and/or the docket sheet. With this being a county court case, I do not believe there would be a docket sheet, but so long as the record was attached and filed in this case, that would be sufficient to vest the court with jurisdiction. **R 139.** Even if the court disagrees as to whether 9(b) applies, 9(c) does apply, and it states all parties shall assert their claims and defenses in circuit court within thirty (30) days after a party serves counsel and any party not represented by counsel with certified copies of the district court docket sheet or district court record. This is another procedure stating the record and the certified copy of the complaint or claim form has to be served on the parties.

The Petitioners' actions in this case are simply inadequate to vest the court with jurisdiction. If 9(b) governs, strict compliance is required and they failed, but if the court disagrees with Pulaski County that 9(b) governs, 9(c) governs, and it requires that the claims be set out, and the only claim, which is really a conclusion, that the county court's order should be reversed and the matter should be sent back with instructions to grant the petition for incorporation provides no factual basis. There is nothing akin to an appeal brief or complaint in this matter. **R 140**. Looking at the face of the Notice of Appeal, I am not sure how the Petitioners could move forward.

The Court: Isn't the difference that 9(e) requires the county court's judgment be part of the record on appeal? There is an order that states exactly the findings of the county court and what the results were, and there is a notice of appeal from that decision. Doesn't that distinguish the county court from the district court? There is a docket sheet and maybe a record, but some of these courts are not courts of record. Here there is a succinct finding and an appeal that the finding should be reversed. Isn't that enough to put Pulaski County on notice?

Mr. Fogelman: It may be enough to put Pulaski County on notice of the Petitioners intention to perfect an appeal, but it is not enough to state the basis for that request. **R 141**. It would be like initiating a case but not commencing. In an appellant case, if the county or any other party disagrees with the circuit court, a

notice of appeal is filed in circuit court, and it does not have to state why, but the appeal brief does. The appeal brief has to be based on a record, and there is simply no record, no brief, no complaint on which relief can be granted.

The Court: Wasn't 9(e) put in by the Supreme Court to distinguish between the district courts and the county court where you have an entirely different type of process?

Mr. Fogelman: In every county court matter an order or something reflecting the order is entered into the record. There is not always much, and there is not always a docket sheet. In fact, I do not know any county that would have a docket sheet in a county court proceeding.

The Court: Do they even have court reporters in these county courts? **R 142.**

Mr. Fogelman: Yes, there's an audio recording of the proceedings below. Motions have been filed. Central Arkansas Water filed motions and there were responses from the Petitioners. None of those are before this Court because they were not filed or even designated as a potential record or, if you are looking at 9(c), considered relevant.

The Court: But aren't these appeals from county courts de novo.

Mr. Fogelman: They are de novo as to the facts, but I believe there is some authority that indicates one cannot go outside of the record below. The parties are constrained by the record below, but it is tried as an original case. **R 143.**

In summary, Pulaski County's position is that 9(e) absolutely governs but it incorporates the requirements of (a), (b), (c), and (d) within Rule 9 as well as the special requirements set out. The Petitioners' position is that 9(e)'s requirements are in lieu of, and not in addition to, whereas Pulaski County's position is that the requirements of 9(b) are in addition to and not replaced by what is required by 9(e). If the court disagrees with the jurisdictional grounds and strict compliance issues that stem from 9(b), then 9(c), according to the *Circle D* case, would set out the procedure and require substantial compliance.

Substantial compliance has not been met. In fact, no compliance has been met. There has been no claim form and there has been nothing setting out the basis for the actual appeal itself. For these reasons, Pulaski County would ask that the Notice of Appeal of the underlying matter be dismissed. **R 144.**

Ms. Henry: I have the pleasure to represent Central Arkansas Water to whom I will refer as CAW in this proceeding. A little bit more on the factual background and some chronology I think would help the court in determining the separate but similar motion of CAW set for hearing today.

On May 13, 2015, the petition was filed by Little Italy seeking to become a municipality. On July 13, 2015, CAW formally filed to enter its appearance in the county court case, and it also requested copies of everything as a party or party in interest in the case. This allowed CAW to participate in the case and to file papers

that were directly adverse to the positions of Little Italy, and to receive service copies of everything in the case being filed by the Petitioners and other opponents of Little Italy's petition, as well as the papers and pleadings filed by Pulaski County.

On December 16, 2015, CAW presented what I consider a very extensive brief. **R 146.** It was supported by exhibits and affidavits that were filed under oath in opposition to the proposed incorporation. CAW's participation in the subject of the petition was based on several things including the fact that it was an owner of over 2,800 acres in West Little Rock, both water and land, including Lake Maumelle and all of the surrounding property, and by virtue of its role as a public utility. Approximately ninety percent (90%) of the proposed incorporation is within the Lake Maumelle watershed, which is the primary water source for 400,000 plus people in Central Arkansas. Needless to say, both at the county court level and here, the petition was and is of great importance to CAW.

Both on December 16, 2015, and January 13, 2016, Judge Hyde held a hearing on the petition in which CAW appeared as a landowner in opposition to the proposed incorporation. On January 12, 2016, between the two hearing dates, Little Italy filed a response in opposition to CAW that was a fifteen (15) page brief. **R 147.** It was a lengthy, well documented opposition to CAW's opposition to incorporation.

On February 26, 2016, Judge Hyde entered the judgment in which he denied the petition for numerous very good reasons, and he cited four primary reasons that

are not really relevant today except for one: he found that the budget proposed by Little Italy was inadequate to maintain the services for the town's inhabitants. That factor directly implicates CAW, which is the entity that would be called upon to supply those water services.

On March 23, 2016, the Notice of Appeal was filed by Little Italy seeking a reversal of Judge Hyde's decision and asking for a remand to require incorporation. In the Notice of Appeal, Little Italy named "Pulaski County" and served the petition by certified mail according to its certificate of service on the Pulaski County attorney and on Judge Hyde himself. CAW was not named as a party in the Notice of Appeal even though it had fully participated, entered its appearance, and participated in the proceedings below, **R 148**, even though pleadings had been filed in support of CAW's position and by Little Italy in opposition of it. Further, CAW was not served, and to this day, it has never been served with a Notice of Appeal.

On April 25, 2016, CAW filed a motion to intervene in this case after finding out about it, and also filed a brief in support, which were served on all counsel for the named parties in this case as well as the county court judge. CAW asserted that it was a necessary party in this proceeding, an important and uncontested allegation that no one contested. There was never a response filed to the motion to intervene, and an order was submitted to the court without opposition. CAW was permitted to intervene in the case, which is how it became a party in what should have been an

original action that included CAW as a party from the outset. CAW appears here today as a necessary intervener in this case.

On August 10, 2016, CAW filed a motion to dismiss this appeal based on some of the same allegations that Pulaski County made and the rules that have already been well addressed and cited to the court. **R 149.** I will try not to retread on that, but there is a little bit of a twist for CAW for the reasons I have previously gone through in this chronology, and those are the service issues.

CAW contends that Little Italy did not timely serve the required certified copies, whatever that record looks like. Whatever the court decides, CAW agrees with Pulaski County that 9(e), which incorporates (a), (b), (c), and (d), does not usurp the requirement for service on a party and required naming necessary parties. Little Italy did not timely serve the required papers within the time allowed by 9(b)(3), and Little Italy failed to comply with 9(c) by failing to assert all of its claims in the court. The claims have been addressed by Pulaski County, but I would say that in response to some of the court's questions, the court does not have a record before it. The court has findings and conclusions of Judge Hyde but not the position of the parties.

I referenced earlier that CAW filed a substantial letter brief to Judge Hyde on which he relied in his findings. **R 151.** CAW also had a lot of documentation and information that is just as critical to the decision in the circuit court, as well as affidavits that have been filed and served under oath.

The district court rules are both mandatory and jurisdictional, and it is CAW's position that the failure of Little Italy to strictly comply with those results in a lack of jurisdiction in this court to even hear and determine the appeal. The appeal should be decided on the record presented below, and unfortunately, the court does not have that record before it. Little Italy has over one hundred and twenty (120) days to file the court docket sheet and the record, whatever the court determines that record to be, and the complaint or a claim form in the circuit court. That deadline expired on July 23, 2016, and to this day has not been met.

CAW contends that neither before nor after it was allowed to intervene has it been served with anything pursuant to Rule 9(b)(1). CAW was supposed to get certified copies of everything, and it was supposed to be named as a party. **R 151.** It was supposed to get certified copies, and it did not. CAW should have been named as a party at the outset and for some unknown reason, it got left out.

I think Little Italy took liberties with what it had to serve and whom it had to serve under 9(c)(2) by using its discretion. It argues in its papers here of what it "believed was material to the disputed issues in the circuit court." In an entirely, I think, unreasonable position, Little Italy asserts at page six (6) of its responsive brief that it is exonerated from filing any record here other than the order, and it does not address why CAW was not itself served with whatever record it had unilaterally determined was proper. Here is what Little Italy states "At the time Petitioner filed

the Notice of Appeal, there was no party adverse to the Petitioner, and there were no county court papers other than the final judgment Petitioner seeks to have reversed that Petitioner believed to be material to the appeal. **R 152.**

The position of the Petitioner is that it got to decide what the record looked like, and it got to decide who it named in the appeal when in fact both the county and CAW were parties in the lower court. CAW, the largest stake holder, landowner, is a necessary party. This is the sole argument that the record as to CAW was appropriate, and there is really no response other than Petitioner has the unilateral discretion to decide who got served in the appeal. Basically, Little Italy gets to make the determination on documents and participants in the proceeding.

CAW contends that even assuming that only Rule 9(e) controls, which it does not, Little Italy still failed to comply with the requirement that Little Italy “shall name all necessary adverse parties as defendants in its complaint filed in the circuit court.” **R 153.**

One of the key findings in *Pack* is that the notice of appeal named all parties, designated the correct final order, designated the entire county court case file as the record for appeal, and attached the entire record in that case. I think that every one of those findings is important to the arguments presented by Pulaski County and the arguments presented by CAW about not being named as a party or being served in

the case. It is a total lack of due process. Every party that participated in opposition to Little Italy below should have been named in the appeal.

For all of these reasons that are both common to the Pulaski County positions and that are unique or independent to CAW, I would ask that the appeal be found defective as not properly perfected and that the appeal be dismissed for lack of jurisdiction.

Ms. Thalheimer: I have a document that outlines Rule 9 and relevant case law that I'll be referring to. **R 154.** I would like to provide a copy to the court and opposing counsel if that is all right.

The Court: Yes.

Ms. Thalheimer: Both motions to dismiss are for a lack of jurisdiction. This court had jurisdiction vested in it as soon as Little Italy perfected its appeal. Rule 9(e), which governs appeals from county court to this court is very clear. If you will look at page five, "unless otherwise provided in this subdivision," being subdivision e, "the requirements in subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court." Put slightly differently, that means (a) through (d) do apply unless Rule (e) provides a different procedure.

If you will turn to page seven of the document, it clearly shows that 9(e) provides a different procedure for filing an appeal from county court than district court. **R 155.**

The Court: It says that in circuit court proceedings, a party who is the petitioner or the plaintiff in county court shall have all obligations of the plaintiff in a case that has been appealed from district court to circuit court if there were no defendants in the county court proceedings, then the petitioner shall name all necessary adverse parties as defendants in its complaint filed with the circuit court. Don't they add something besides the notice of appeal and judgment?

Ms. Thalheimer: Yes, and I would contend that Little Italy complied with that, too. As far as necessary parties, this is different than when there is an opposing side. There was not a side against Little Italy on the record. Little Italy did not have someone to point to and say "you are against us." Little Italy made Pulaski County a party. It seemed like the necessary adverse party because Pulaski County determined that incorporation was not appropriate, and all Little Italy seeks is to incorporate. **R 155.**

Central Arkansas Water filed a request for notice and an entry of appearance, but anyone can file a notice or request for notice. The hearing was open to the public. Anyone could come in and make an argument to the court. The only party that had to appear were the incorporators for Little Italy.

It is not very clear who a necessary party is, but the reporter's notes to Rule 9 in 2008 say that when determining who a necessary party is, look to Rule 19 of the Arkansas Rules of Civil Procedure. Under the Arkansas Rules of Civil Procedure,

it is someone whose interest will not be protected if they are not a part of the matter. Pulaski County and Central Arkansas Water's interests are aligned. They both want to protect the watershed. They both want to prevent Little Italy from incorporating.

Therefore, Little Italy determined that Central Arkansas was not a necessary party as required by Rule 19. Further, Rule 19 says if a necessary party was missed, the court can order the party be added. It is not jurisdictional; it is procedural. The only jurisdictional requirement is perfecting the appeal.

The *Pack* court said that to perfect an appeal from county court, **R 158**, all that must be done is file the notice of appeal with a certified copy of the judgment. Little Italy did that. Then a later case, *Howard v. Arkansas Cama Technology*, again said the only documents you need to file to perfect an appeal from county court to circuit court are the notice of appeal and the certified copy of the judgment. That court also said the only provision of subdivision (b) that could apply in an appeal from county court to circuit court is the service requirement. Little Italy served the party it believed to be the necessary party with the notice of appeal and a certified copy of the judgment.

The Court: Do you have a copy of that case?

Ms. Thalheimer: I do not.

The Court: Give me the cite.

Ms. Thalheimer: I can give you the cite. It is on page ten of what I gave you, and it is 2012 Ark. App. 567.

Ms. Keller: I'll print it. **R 158.**

Ms. Thalheimer: It says, and this is a direct quote, "In the only part of subdivision (b) that could apply to appeals from county court, the Rule provides: 'The appealing party shall serve a copy of the certified docket sheet upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt.' Accordingly, the notice of appeal and attached certified copy of the court's final judgment (required for appeals from county court instead of certified copies of the court's docket sheet) must be served upon counsel for all parties, and any party proceeding pro se, by any form of mail that requires a signed receipt." Little Italy complied with that.

As to the arguments that Little Italy did not file what it needed to file, again (c)(2) states that at the time a party filed their complaint, answer, motions, and claims, the party shall also file with the circuit clerk certified copies of any district court papers they believe are material to the disputed issues in circuit court. The only thing in dispute is the final judgment. **R 159.** This court will hear the entire matter de novo as if the underlying case never happened. It will be as if Little Italy brought this originally in front of this court.

Little Italy plans to introduce everything that supports its case and fully expects Pulaski County and now Central Arkansas Water to put on the case that they believe shows why Little Italy should not be incorporated. But as far as what was material to the disputed issues, the only issue is whether the final judgment was correct or not. Also, the very next sentence of (c)(2) says any party may file copies of additional district court papers at any time during the proceeding as the need arises. If the court feels that Little Italy should have filed other stuff, Little Italy will file it immediately. That is a procedural rule, not a jurisdictional rule so the failure to file what Pulaski County and Central Arkansas Water want filed does not strip this court of jurisdiction. Little Italy properly perfected its appeal as required by Arkansas District Court Rule 9 so to the extent they want the case dismissed for lack of jurisdiction, their argument fails because jurisdiction vested with the court as soon as Little Italy perfected its appeal. **R 160.**

Mr. Fogelman: With respect to the petitioner's position that CAW and Pulaski County are aligned because we are both interested in the watershed, I believe that the judgment speaks for itself and to the best of my recollection having reviewed the judgment, I do not believe that any mention of the watershed is made as a basis for denial. Not to get into the merits of the matter, but Pulaski County's basis for denial looks at whether it was right and proper, looks at the size of the prospective

community, looks at the unity of the place, looks at the budget, and there was no mention of the watershed as a basis for that denial.

Further, the proposition of the petitioner's that (c)(1)'s requirement that the record and documents are from the proceeding below, their position that they could be filed at any time ignores the provision in (c)(1) that within thirty (30) days after a party serves upon counsel for all other parties, it should send certified copies of, **R 161**, the district court docket sheet or record and certified copies of the district court complaint or claim form to the party who is the defendant in district court and it files its answer. There is a time limit. Pulaski County's position remains that the requirements of 9(b) and the filing of the record are mandatory and jurisdictional, but in the event the court disagrees, if 9(c) does govern and it is purely procedural, Little Italy still has an obligation to substantially comply. Substantial compliance is required.

As I noted earlier, we are five hundred and sixty-eight days after the notice of appeal, and there has never been even a complaint filed in this matter setting forth the facts upon which they seek relief. For this reason, Pulaski County asks that this court find that it does not have jurisdiction over the appeal and that it dismiss it accordingly.

Ms. Henry: I mentioned earlier that CAW was not just a bystander or someone sitting in the audience watching the proceeding below. It was an integral

part of that process offering testimony and evidence. **R 163.** It was not the only one. There were other parties in opposition to Little Italy and adverse parties who were not public utilities and who were not Pulaski County and who were not named in the notice of appeal. If CAW was not an adverse party necessary to this appeal, I do not know who would be one. One could not get more adverse and have an entity that had an independent interest to protect than CAW had below and here. There is absolutely no reason why Central Arkansas Water was not made a party and served with the appropriate pleadings in the case.

I will respond to the *Pack* court comment just briefly. In that case, they did not have a party left out and so *Pack* does not answer the question about an omitted party to the appeal. That is a difficult issue for CAW because it does have such a substantial interest in this case, and we contend that that is jurisdictional. That is not a procedural issue of whether or not CAW properly gets named and served in the case. Its interest as the state said overlaps somewhat with Pulaski County, but it has its own independent interest including but not limited to the fact that it is being called upon to supply water. **R 163.** That is an interest that Pulaski County does not have. Central Arkansas Water in its role as a public utility owner and supplier is very different from that of Pulaski County.

When CAW filed its motion to intervene on April 25, 2016, specifically it alleged that it had its own independent interest in the case. Paragraph 15, page 4,

Central Arkansas Water claims an interest relating to the land area which is the subject matter of this litigation. If Central Arkansas Water were not permitted to intervene, the disposition of pending action would impair and impede its ability to protect its own interest. Because it has an interest in this lawsuit that is not adequately protected by the parties, Central Arkansas Water seeks to intervene in this action as a right or permissively. Alternatively, Central Arkansas Water raises questions of fact in law that are common to those raised by the petitioners.

There is no question that CAW was an adverse and necessary party. The order was entered granting the motion to intervene. **R 164.** No one contested those findings, and they should not be allowed to be contested today.

Ms. Thalheimer: To the extent the parties argue that the failure to serve Central Arkansas Water with the notice of appeal and the certified copy of the judgment strips this court of jurisdiction, subdivision (b) explicitly states that failure to serve certified copies of the court docket sheet or district court record and a certified copy of the district court complaint or claim form, or in this case the notice of appeal and certified copy of the judgment, shall not affect the validity of the appeal. Failure to serve those does not strip this court of jurisdiction.

I would reiterate that, in response to the motion to intervene, they requested to intervene as a necessary party or by right or permissibly. They do own property in the proposed boundary. Little Italy has no problem with Central Arkansas Water

participating in this. Anyone who is a landowner has a right to intervene and be a part of this process. **R 165.** That does not necessarily make the person a necessary party to this action.

Pulaski County wants to prevent the incorporation of Little Italy. Anyone who wants to prevent the incorporation of Little Italy, their interest is protected by Pulaski County, and Little Italy does not have a problem with other parties who want to participate in this process intervening. In this case, Central Arkansas Water intervened, but if Central Arkansas Water was a necessary party, Rule 9 provides that the court shall order them joined as a party. It does not state the court must dismiss the case and start all over naming the necessary party. This is a procedural issue, not a jurisdictional issue. All that it took to vest jurisdiction in this court was perfecting the appeal, which Little Italy has done.

The Court: To tell you the truth, I hate these cases. I hate the appeals from district court or county court because the rules really are pretty vague, and also we have seen a lot of cases where parties trying to appeal just had no idea how to do it and get it done. This one is a little bit different. **R 166.** The Supreme Court ought to make a more clear statement about appeals from county court. I understand why they separated them from district court because there is not the same situation, one does not have a docket sheet and usually there is not a judgment other than the judge writes on a docket sheet for the defendant or plaintiff, and that is it. Here, we have

a notice of appeal and a judgment from the county judge. It states all of the findings and really most of the arguments that were made except the watershed issue.

The problem I have is that in 9(e), it says the certified copy of the county judge's final judgment must be attached to the notice of appeal in the circuit court proceeding. The party who is the petitioner or plaintiff in the county court shall have all the obligations of the plaintiff in a case that has been appealed from the district court to circuit, and those obligations are that the petitioner has to file the complaint and restate the issues and the reasons for the appeal. If there were no defendants in the county court proceeding, the petitioner/plaintiff shall name all necessary parties.

R 167. We have that problem.

I am going to grant the motion because I do not want to have a hearing on this issue and then have this issue be the tell-tale part of this case when it goes to the Supreme Court. I am going to let you prepare a record and notice of appeal and then take it up and let them decide and clarify this. If I am wrong, we can have a trial and make a decision. If you will prepare an order that I have granted this motion. I think it is a tough situation to be in from your standpoint because there is vagary in this law, but I think it is jurisdictional.

Ms. Thalheimer: Would it be possible for me to make one comment? **R 168.**

The Court: Sure you can.

Ms. Thalheimer: In *Circle D Contractors, Inc. v. Bartlett*, the Arkansas Supreme Court did say the requirement that a plaintiff refile its complaint in circuit court is not jurisdictional; it's procedural, and only substantial compliance is required.

The Court: I think they have made 9(e) a requirement, and they seem to indicate in that paragraph that it is a requirement so I am going to let them wrestle with that.

Ms. Henry: I was not able to hear a little bit of what you said. May I ask a question about CAW specifically?

The Court: Yes.

Ms. Henry: Did you rule on the issue of whether or not CAW should have been named under 9(e).

The Court: Yes, I think so. **R 169.**

STATEMENT OF THE CASE

Little Italy filed a petition with the Pulaski County Court on May 13, 2015, seeking to incorporate. **Addendum (“Add”) 1-15.** After a hearing on the petition, the Pulaski County Judge took the matter under advisement and entered a final judgment denying incorporation on February 26, 2016. *Id.* Within thirty (30) days of entry of the judgment, on March 23, 2016, Little Italy filed an appeal of the judgment to the Circuit Court of Pulaski County, Arkansas (the “Circuit Court”), pursuant to Arkansas District Court Rule 9(a) and (e). *Id.* To perfect its appeal, Little Italy filed a notice of appeal and certified copy of the county court judgment in the Circuit Court in the case styled as *Incorporators of the Community Known as Little Italy v. Pulaski County*, Case No. 60CV-16-1779, in accordance with Arkansas District Court Rule 9(e), which governs appeals from county court to circuit court. *Id.* The notice of appeal requested that the Circuit Court reverse the county court judgment and remand the matter to the county court with instructions to permit incorporation. *Id.*

CAW filed a motion to intervene on April 26, 2016, and the Circuit Court granted the motion on August 10, 2016. **Add 16—59.** On that same day, CAW filed its motion to dismiss the notice of appeal for lack of jurisdiction. **Add 60—66.** CAW asserted that Little Italy failed to perfect its appeal by failing to serve certified copies of the docket sheet or record and the complaint or claim form on CAW within

120 days of filing the complaint or claim form with the Circuit Court. *Id.* CAW further asserted Little Italy failed to state their claims. *Id.* Little Italy asserted in its response that it perfected its appeal by timely filing a notice of appeal and certified copy of the judgment. **Add 81—89.** CAW filed a reply raising the argument that the appeal should be dismissed for lack of jurisdiction because Little Italy failed to name CAW, a necessary adverse party, as a defendant. **Add 99-106.**

The County filed a motion to dismiss the day after CAW filed its motion. **Add 67—74.** The County also asserted that Little Italy failed to perfect its appeal because it did not file a certified copy of the docket sheet or record or the complaint or small claim form. *Id.* Little Italy asserted in its reply to the County that it perfected its appeal by timely filing a notice of appeal and certified copy of the judgment. **Add 75—80.**

The Circuit Court held a hearing on the motions to dismiss. **Abstract (“Ab”)**
1. The Circuit Court held that the failure to file a complaint in addition to the notice of appeal and the failure to name CAW as a defendant deprived the Circuit Court of jurisdiction and therefore, granted the motions to dismiss. **Ab 22—24, Add 116—118.**

ARGUMENT

A. Introduction

The issue of whether the Circuit Court had jurisdiction over Little Italy’s appeal of the County’s judgment denying incorporation (the “Judgment”) turns on the interpretation of Arkansas District Court Rule 9 (“Rule 9”), which governs appeals from district courts and county courts to circuit courts. Court rules are interpreted in the same manner used to interpret statutes. *Pack v. Clark*, 2010 Ark. App. 756 at 3, 379 S.W.3d 676, 677. Arkansas appellate courts review issues of statutory construction *de novo*, and the basic rule of statutory construction is to give effect to the intent of the legislature. *Regan v. Dodson*, 2016 Ark. App. 598, at 8—9, 509 S.W.3d 654, 659 (citing *GGNSC Holdings, LLC v. Lamb by and through Williams*, 2016 Ark. 101, 487 S.W.3d 348.).

A circuit court acquires jurisdiction of an appeal from county court once the appeal has been perfected. *See Dobbins Bros. v. Anderson*, 199 Ark. 635, 135 S.W.2d 325, 326 (1940) (“The circuit court acquired exclusive jurisdiction of the case when the appeal to that court had been perfected.”). Subdivision (e) of Rule 9, which sets forth special provisions for appeals from county court to circuit court, states that a “party may take an appeal from the final judgment of a county court by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the

matter within thirty (30) days from the date that the county court filed its order with the county clerk.” The Reporter’s Notes to the 2008 Amendment to Rule 9 states, in pertinent part, subdivision (e) “ties the time for taking an appeal from county court, and the method of perfecting that appeal, to the filing of the county court’s final order.” Construing subdivision (e) of Rule 9 just as it reads and giving effect to the intent of the legislature “makes it clear that an appeal from county court to circuit court may be perfected by filing *a notice of appeal and a certified copy of the county court’s final judgment.*” *Pack*, 2010 Ark. App. 756, at 4, 379 S.W.3d at 678 (emphasis in original).

The County entered the Judgment on February 26, 2016. **Add 4.** Within thirty (30) days, on March 23, 2016, Little Italy filed a notice of appeal and a certified copy of the Judgment with the Circuit Court. **Add 1.** Two (2) days later, on March 25, 2016, Little Italy served the County and the County’s attorney with file-marked copies of the notice of appeal and certified copy of the Judgment *via* U.S. certified mail, return receipt requested. **Add 89.** Under the terms of Rule 9, Little Italy did exactly what was required to perfect its appeal. The Circuit Court thus erred in dismissing the appeal for lack of jurisdiction.

B. Rule 9(e) Did Not Require Little Italy To File A Complaint For Jurisdiction To Vest In The Circuit Court

The County and CAW argued that in addition to subdivision (e) of Rule 9, Little Italy also had to comply with the entirety of subdivision (b) by filing a certified

copy of the docket sheet or a certified copy of the record and a certified copy of the complaint or the claim form, as well as subdivision (c) by filing complaint, to perfect its appeal. This argument ignores the fact that the documents necessary to perfect an appeal from district court differ from those necessary to perfect an appeal from county court. The argument also ignores the plain language of subdivision (e), which states:

Unless otherwise provided in this subdivision, the requirements of subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court. A party may take an appeal from the final judgment of a county court by filing a notice of appeal with the clerk of the circuit court having jurisdiction over the matter within thirty (30) days from the date that the county court filed its order with the county clerk.

Ark. Dist. Ct. R. 9(e) (emphasis added). Thus, subdivision (e) of Rule 9 only requires an appellant to file a notice of appeal and a certified copy of the county court judgment to perfect an appeal from county court.

As explained by the Arkansas Court of Appeals in *Howard v. Arkansas Cama Technology*:

[S]ubdivision (e) of Rule 9 provides special provisions for appeals from county court to circuit court, while stating that the requirements of (a), (b), (c), and (d) apply to the extent not “otherwise provided” in subdivision (e). Subdivision (e) requires a party appealing from county court to circuit court to file a notice of appeal and a certified copy of the county court’s final judgment; there is no provision for service of the notice. **In the only part of subdivision (b) that could apply to appeals from county court,** the Rule provides: “The appealing party shall serve a copy of the certified docket sheet upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt. **Accordingly, the notice of appeal and**

attached certified copy of the county court's final judgment (required for appeals from county court instead of a certified copy of the district court's docket sheet) must be served upon counsel for all other parties, and any party proceeding pro se, by and form of mail that requires a signed receipt.

2012 Ark. App. 567 (unpublished) (emphasis added). It is undisputed that Little Italy served the Pulaski County Judge and the Pulaski County Attorney with a copy of the notice of appeal and certified copy of the judgment *via* certified mail, return receipt requested, on March 25, 2016. Thus, Little Italy strictly complied with the only part of subdivision (b) that applied to its appeal from county court. Little Italy also strictly complied with subdivision (e).

In *Pack v. Clark*, the appellants did not file a notice of appeal, but instead filed a document titled *Complaint Appealing the Order of Van Buren County Court and Complaint for Trespass and Declaratory Judgment* (the "Complaint"), which stated they were appealing the Van Buren County Court's order filed on December 17, 2008. 2016 Ark. App. 756, at 2, 379 S.W.3d 676, 677. The appellees filed a motion to dismiss based on the appellants' failure to comply with Rule 9(e), which the circuit court granted. *Id.* On appeal, the appellate court found that the circuit court erred in finding the appellants did not comply with Rule 9(e). *Id.* at 5, 379 S.W. 3d at 679. Although the appellants filed the Complaint and not a notice of appeal, the Complaint was consistent with a notice of appeal because it alerted the circuit court and other parties of appellants' intention to appeal the county court's final order. *Id.*

at 5—6, 379 S.W.3d at 679. Accordingly, the appellate court held the appellants complied with Rule 9(e). *Id.* at 8, 379 S.W.3d at 680.

Unlike the *Pack* appellants, Little Italy filed a document titled “Notice of Appeal.” **Add 1.** Little Italy did not file a complaint, and the County argued that the failure to file a separate complaint resulted in Little Italy’s failure to perfect its appeal. The Circuit Court agreed that Little Italy’s failure to file a complaint stripped the Circuit Court of jurisdiction based on the last two sentences of subdivision (e) of Rule 9, which state:

In the circuit-court proceeding, the party who was the petitioner or plaintiff in county court shall have all the obligations of the plaintiff in a case that has been appealed from district court to circuit court. If there were no defendants in the county-court proceeding, then the petitioner/plaintiff shall name all necessary, adverse parties as defendants in its complaint filed in circuit court. **Ab 22—23.**

The Circuit Court’s ruling that a “complaint” is required and that Little Italy did not file one improperly elevates form over substance. A complaint is “[t]he initial pleading that starts a civil action and states the basis for the court’s jurisdiction, the basis for the plaintiff’s claim, and the demand for relief.” *Black’s Law Dictionary* (10th ed. 2014). Little Italy’s notice of appeal states the basis for the Circuit Court’s jurisdiction; that the County Court Judge denied Little Italy’s petition but should be reversed and Little Italy should be allowed to incorporate; and that Little Italy requests relief in the form of an order reversing the Judgment and

remanding the matter with instructions to permit incorporation. **Add 1—2.** Thus, Little Italy’s notice of appeal provides all of the information required for a complaint and substantially complies with the procedure set forth in Rule 9. *See Pack*, 2010 Ark. App. 756, at 6, 379 S.W.3d at 679 (“Arkansas appellate courts favor the concept of ‘substance over form’ when construing court documents and tend to put more weight into what the document actually says than how it is titled.”). Moreover, “[t]he requirement that a plaintiff refile its complaint in circuit court is not jurisdictional; it is procedural, thus only substantial compliance is required.” *Circle D Contractors, Inc. v. Bartlett*, 2013 Ark. 131, at 3 (unpublished). Little Italy’s notice of appeal substantially complies with the requirements of Rule 9(c). The Circuit Court, therefore, erred in determining that the failure of Little Italy to file a complaint in addition to the notice of appeal stripped the Circuit Court of jurisdiction over the appeal.

C. Rule 9(e) Did Not Require Little Italy To Name CAW As A Defendant For Jurisdiction To Vest In The Circuit Court

Pursuant to the last sentence of Rule 9(e), Little Italy had to “name all *necessary, adverse* parties as defendants in its complaint filed in circuit court.” (emphasis added). As there was no defendant in the County Court proceeding, Little Italy had to determine which parties constituted a necessary, adverse party. To determine whether a party is necessary, Little Italy had to reference Arkansas Rule

of Civil Procedure 19. *See* Ark. Dist. Ct. R. 9, Addition to Reporter’s Notes, 2008 Amendment (“Whether a party is necessary should be determined by reference to Rule of Civil Procedure 19 and the cases interpreting it.”).

Arkansas Rule of Civil Procedure 19(a) provides that a party is a necessary party if:

(1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party.

CAW contends that it is a necessary party and points to its unopposed motion to intervene as support for its contention. As a landowner of property located within the proposed boundary for incorporation, CAW is an interested party and had a right to intervene. *See City of Crossett v. Anthony*, 250 Ark. 660, 665, 466 S.W.2d 481, 485 (1971) (court held that any party interested, meaning any person who actually had some interest in the city or area affected, could participate in circuit court action affecting the area). However, being an interested party does not equate to being a necessary party. Under CAW’s logic, every landowner within the proposed boundary would be a necessary party.

In *Britton v. City of Conway*, petitioners sought the annexation of certain real property to the City of Conway, and the county court granted the petition. 36 Ark App. 232, 233, 821 S.W.2d 65, 65 (1991). Subsequently, the parties adverse to the annexation, the appellants, filed suit in circuit court to prevent the annexation. *Id.* The appellants only served the City of Conway with the complaint; they failed to serve the petitioners or the petitioners' attorney of record. *Id.* The statute under which the appellants filed their complaint required them to serve notice of the complaint on the city and the agent of petitioners. *Id.* at 236, 821 S.W.2d at 66. The circuit court dismissed the complaint for, among other things, the appellants' failure to serve the petitioners' or the petitioners' attorney of record with a summons. *Id.* at 234, 821 S.W.2d at 65.

The appellate court examined Arkansas Rule of Civil Procedure 19 to determine whether the appellants' failure to serve the petitioners was fatal to their action. *Britton*, 36 Ark. App. at 236, 821 S.W.2d at 67. The appellate court noted that the only reason the petitioners constituted necessary parties is because the statute explicitly required the petitioners be served with notice. *Id.* at 237, 821 S.W.2d at 67. The appellate court further noted "[t]he petitioners and the city are really on the 'same side.' Both of them filed motions to dismiss the complaint which was filed to prevent the annexation and both of them joined in the brief filed in this court seeking to uphold the trial court's order which dismissed that complaint." *Id.* While

the appellate court agreed the relevant statute required appellants to serve the summons on the petitioners, it held that the circuit court should have directed the petitioners be made a party rather than dismissing the complaint. *Id.*

The relief requested by Little Italy is an order reversing the Judgment and instructing the County Court Judge to permit the incorporation of Little Italy. **Add 2.** Thus, complete relief can be accorded among Little Italy and the County. Additionally, for purposes of the appeal, the County's interest and the interest of any party opposing incorporation of the Little Italy, including CAW, are the same. That is, the County and all parties opposing incorporation seek to have the Judgment affirmed and are really on the same side. Accordingly, the only necessary adverse party to Little Italy would be the County, and the Circuit Court erred in determining CAW was a necessary adverse party.

Even if CAW could be considered a necessary adverse party, the Circuit Court erred in determining Little Italy's failure to name CAW as a defendant deprived the Circuit Court of jurisdiction over the appeal. The policy behind Arkansas Rule of Civil Procedure 19(a) "is to avoid dismissing actions where possible and when it is possible to join an absent party, dismissal is not proper as such party will be ordered to enter the action as a defendant or plaintiff." *Britton*, 36 Ark. App. at 236, 821 S.W.2d at 67 (quoting Ark. R. Civ. P. 19, Reporter's

Notes). In this case, it was not necessary to order that CAW be joined because it voluntarily intervened. **Add 58.** CAW, therefore, cannot claim any prejudice here.

CONCLUSION

The Circuit Court obtained jurisdiction over Little Italy's appeal as soon as Little Italy perfected its appeal. Arkansas District Court Rule 9(e), which governs appeals from county court to circuit court, requires that the appellant file a notice of appeal and certified copy of the final judgment within thirty (30) days of entry of the judgment. Little Italy complied with Arkansas District Court Rule 9(e) and perfected its appeal. The County and CAW both requested the Circuit Court dismiss the appeal for lack of jurisdiction. However, the grounds raised by the County and CAW were not jurisdictional; they were procedural. The Circuit Court, therefore, erred in dismissing the appeal for lack of jurisdiction, and the Circuit Court's decision should be reversed and this matter should be remanded for trial.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2018, a true and correct copy of the foregoing was served, *via* electronic and/or U.S. Mail, postage prepaid, upon the following:

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/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

CERTIFICATE OF COMPLIANCE

I hereby certify that on April 4, 2018, I have submitted and served on opposing counsel an unredacted PDF document of the Brief of Incorporators of the Community Known as Little Italy that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free of computer viruses. A copy of the certificate has been submitted with the paper copies filed with the court and has been submitted with the paper copies filed with the Court and has been served on all opposing parties.

/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

ADDENDUM

A.	Notice of Appeal (R. 1)	Add 1
•	Exhibit A – Judgment (R. 5)	Add 4
B.	Central Arkansas Water’s Motion to Intervene (R. 17)	Add 16
•	Exhibit 1 – Affidavit of C. Tad Bohannon (R. 22)	Add 21
C.	Central Arkansas Water’s Brief in Support Of Motion to Intervene (R. 51)	Add 50
D.	Order Granting Motion to Intervene (R. 59)	Add 58
E.	Central Arkansas Water’s Motion to Dismiss Notice of Appeal (R. 61)	Add 60
F.	Central Arkansas Water’s Brief in Support Of Motion to Dismiss Notice of Appeal (R. 64)	Add 63
G.	Pulaski County’s Motion to Dismiss (R. 68)	Add 67
H.	Pulaski County’s Brief in Support of Motion to Dismiss (R. 70)	Add 69
I.	Petitioners’ Response to Pulaski County’s Motion to Dismiss (R. 76)	Add 75
J.	Petitioners’ Response to Central Arkansas Water’s Motion to Dismiss Notice of Appeal (R. 82)	Add 81
K.	Pulaski County’s Reply in Support Of Motion to Dismiss (R. 91)	Add 90
L.	Central Arkansas Water’s Reply in Support Of Motion to Dismiss (R. 100)	Add 99
•	Exhibit 1 – Entry of Appearance (R. 106)	Add 105

M. Petitioners’ Surreply in Opposition of
Motions to Dismiss Appeal **(R. 108)**.....Add 107

N. Order Granting Motions to Dismiss the Notice of Appeal
Filed by the Incorporators of the Community Known
As Little Italy **(R. 119)**Add 116

O. Incorporators of the Community Known
As Little Italy’s Notice of Appeal **(R. 123)**.....Add 120

P. Court Reporter’s Certificate **(R. 171)**.....Add 123

Q. Court Clerk’s Certificate **(R. 172)**.....Add 124

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO.: _____

PULASKI COUNTY

RESPONDENT/DEFENDANT

NOTICE OF APPEAL

The Incorporators of the Community Known as Little Italy (the "Petitioners"), for their notice of appeal, state as follows:

1. The Petitioners are qualified voters residing within Pulaski County, Arkansas.
2. Pulaski County is a political subdivision of the State of Arkansas.
3. On May 13, 2015, the Petitioners filed a Petition for Incorporation (the "Petition") seeking to incorporate the community known as Little Italy.
4. The Pulaski County Court scheduled a hearing on the matter for December 16, 2015. The hearing commenced on that date but was continued until January 13, 2016, to allow Petitioners and other interested parties to present all of their testimony. At the conclusion of the hearing, the Pulaski County Court Judge, Barry Hyde ("Judge Hyde"), took the matter under advisement.
5. On February 26, 2016, Judge Hyde entered a Judgment denying the Petition, a certified copy of which is attached hereto as Exhibit A.
6. This notice of appeal is filed pursuant to Arkansas District Court Rule 9(e).
7. This Court has jurisdiction over the subject matter hereof and parties hereto pursuant to Ark. Code Ann. § 16-13-201, which grants the circuit courts of Arkansas appellate

jurisdiction of the judgment and final orders of county courts in civil actions. Venue is proper pursuant to Ark. Code Ann. § 16-60-101.

8. This Court should reverse the Judgment entered by Judge Hyde denying the Petition and remand this matter to Pulaski County Court with instructions to permit the incorporation of the community known as Little Italy.

WHEREFORE, the Petitioners request that the Court hear this appeal and grant Petitioners the relief requested above and for all other just and proper relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 23rd day of March, 2016, a true and correct copy of the foregoing mailed *via* certified U.S. Mail, return receipt requested, upon the following:

Adam B. Fogleman, Pulaski County Attorney
Pulaski County Attorney's Office
201 S. Broadway, Suite 400
Little Rock, Arkansas 72201

Judge Barry Hyde, Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Suite 400
Little Rock, Arkansas 72201

/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

IN THE COUNTY COURT OF PULASKI COUNTY, ARKANSAS

IN THE MATTER OF THE PETITION
OF THE COMMUNITY KNOWN
AS LITTLE ITALY FOR
INCORPORATION PURSUANT TO
ARKANSAS STATUTE § 14-38-101

CASE NO. 2015-0004

JUDGMENT

FILED 02/26/16 10:08:26
Larry Crane Pulaski Circuit Clerk

Summary of Decision:

Petitioners have demonstrated, through their presentation and the provided documentation, that substantial time and energy has been invested into their incorporation efforts. This Court's adverse ruling does not reflect negatively on Petitioners' personal honesty and integrity nor the future of the community of Little Italy, but recognizes that incorporation is not right and proper according to Arkansas law. For the following reasons, Petitioners' petition for incorporation is denied:

- 1) The area is unreasonably large;
- 2) The proposed town lacks the necessary unity of a single place;
- 3) Petitioners' motivation for incorporation is found to be proper, in part, and improper, in part; and
- 4) The budget is inadequate to maintain services for the town's inhabitants.

Procedural History:

On May 14, 2015, a petition was filed with the Pulaski County Clerk seeking to incorporate an area to be known as Little Italy into a town pursuant to Arkansas Code Annotated § 14-38-101 *et seq.*

The petition for incorporation of Little Italy contained the following:

- 1) The purported two-hundred and thirty-five (235) signatures of qualified voters residing within the described territory;
- 2) A map of the area sought to be incorporated;
- 3) References to resolutions expressing consent to the incorporation by two (2) municipalities within five (5) miles of the area sought for incorporation, Fourche and Bigelow, both of which have extraterritorial zoning jurisdiction over parts of the geographic area which is the subject of the petition;
- 4) A name for the proposed municipality;
- 5) The name of the person authorized to act on behalf of the petitioners; and
- 6) The basis for the requested incorporation.

Pursuant to Ark. Code Ann. § 14-38-101, the statutory notice procedures were satisfied when notice of the public hearing was published in The Daily Record on September 29, 2015, October 6, 2015, and October 13, 2015. An initial hearing was commenced and held on Wednesday, December 16, 2015. Following the presentation of evidence and testimony by the Petitioners, the hearing was continued to a subsequent date to accommodate the County Judge's schedule. On January 13, 2016, a second hearing was held where petitioners completed their presentation of evidence, testimony and argument for incorporation. Following petitioners' presentation, five (5) interested parties, all of whom own or represented owners of property in the proposed incorporated area, spoke against the proposed incorporation of Little Italy.

Issues to be decided:

Whether the petition meets the requirements for incorporation and, specifically, whether incorporation is right and proper according to Arkansas law.

Applicable Law:

Arkansas Code Ann. § 14-38-104 provides the elements that must be satisfied in order for a petition for incorporation to be granted. Those elements, as listed in Ark. Code Ann. § 14-38-104, are:

- 1) The greater of either two hundred (200) or a majority of the qualified voters residing within the described territory have signed the petition;
- 2) The limits have been accurately described and an accurate map or plat of the limits made and filed;
- 3) The name proposed for the city or incorporated town is proper and sufficient to distinguish it from others of the like kind in the state; and
- 4) Moreover, that it shall be deemed right and proper in the judgment and discretion of the court that the petition shall be granted.

Analysis:

Petitioners' petition met the first three prongs of Ark. Code Ann. § 14-38-104

The Pulaski County Clerk's Office reviewed the submitted petition and determined the following:

- 1) The petition contained two hundred and twenty (220) valid signatures of qualified voters who reside within the proposed incorporated area; and
- 2) Three hundred and twenty-nine (329) qualified electors reside in the proposed incorporated area.

A review of the amended map and property description by the county surveyor determined that the limits of the proposed incorporated area accurately describe an area for which the borders close and which matches the map filed with the petition. This Court has

determined that the name of the proposed town is sufficiently unique to distinguish it from other towns and cities in the state. Thus, the first three (3) elements are satisfied.

Petitioners' petition fails to meet the fourth prong of Ark. Code Ann. § 14-38-104

The fourth element, on which the Arkansas General Assembly placed the greatest emphasis, requires a more thorough analysis. This element requires this Court to exercise its discretion and determine whether incorporation is "right and proper." Ark. Code Ann. § 14-38-104. On multiple occasions, the Arkansas Supreme Court has ruled that a town may only incorporate where the motivation for incorporation is proper, where the proposed town is not unreasonably large or small, and the land in the proposed town must be suited for municipal purposes. See Arkansas and Ozark Railway v. Busch, 223 Ark. 27, 264 S.W.2d 54 (1954) (order of incorporation revoked where the moving spirit in the incorporation effort was petitioner's desire to sell gasoline at Missouri prices and town determined unreasonably large); Quita v. Heidgen, 247 Ark. 943, 448 S.W.2d 631 (1970) (evidence that petitioners did not desire corporate government was substantial, incorporation was an effort to avoid annexation and associated municipal handicaps, rather than to obtain benefits of becoming a municipality); McCarroll v. Arnold, 199 Ark. 1125, 137 S.W.2d 921 (1940) (court found appellant correct in its assertions that incorporation of land unsuited for municipal purposes and on improper motivation was void *ab initio*); and Waldrop v. Kansas C.S.R. Co., 131 Ark. 453, 199 S.W.369 (1917) (order of the court organizing the proposed territory into an incorporated town was null and void for the reason that the land was not of such character as could form an incorporated town).

The area of the proposed town sits to the north and west of Lake Maumelle in northwestern Pulaski County on the Pulaski-Perry County line. The population of the proposed town is approximately three hundred and eighty (380) individuals. The proposed town would

consist of approximately eight and eight-tenths (8.8) square miles, or five-thousand six hundred and six (5,606) acres. Pulaski County currently maintains five and thirty-six one-hundredths (5.36) miles of roadway in the proposed town. The proposed town would become responsible for the maintenance of these roadways upon incorporation. Additionally, during their presentation to the court, Petitioners proposed an intent to convert an additional approximate five and eight-tenths (5.8) miles of private roads to publicly maintained town roadways.

The Area Sought for Incorporation is Unreasonably Large

There is little Arkansas case law providing instruction on what a court should consider in determining whether a proposed geographical area is "unreasonably large." The term was most recently discussed by the Arkansas Supreme Court in White v. Lorings, 274 Ark. 272, 623 S.W.2d 837 (1982). There, the Court wrote:

Although there is no definition for "unreasonably large" or "unreasonably small," we have to use common sense in passing judgment upon such matters. In considering an approximately two square mile area containing more than 900 people with its own post office, school and over 400 other buildings, we are of the opinion that the area does not fall within the definition of unreasonably large. Therefore, the court should have allowed the incorporation.

274 Ark. at 277, 623 S.W.2d at 839.

In Arkansas & Ozark Ry. v. Town of Busch, 223 Ark. 27, 264 S.W.2d 54 (1954), the Supreme Court agreed with the railway's allegation that the limits of the proposed town were unreasonably large. Reversing the circuit court's order of incorporation, the Busch court wrote:

The area of the proposed Town of Busch extends two and three-quarter miles along the public road from Mr. Huffman's store on the South to the Missouri line on the North; and the area is about one quarter mile wide. There is only one store in the proposed town; no church, and no schoolhouse. Mr. Huffman owns all the land on the public road that is in the Town, and only 21 other people live in the entire area sought to be incorporated. Mr. Huffman - the moving spirit in the incorporation effort - admitted on cross examination, that his desire to sell gasoline at the Missouri prices was a substantial factor in the effort for incorporation.

....
Thus a tract of rough terrain, about one-quarter mile wide and extending two and three-quarter miles along the public road from Huffman's store to the Missouri line, is sought to be incorporated into a town; and limits of the town were designed in order that Huffman might sell gasoline at the Missouri prices. We conclude that all the testimony shows that the limits of the proposed Town of Busch are unreasonably large; and that the Circuit Court should have entered a judgment annulling the County Court order of incorporation.
223 Ark. at 29-30, 264 S.W.2d at 55 (footnote omitted).

A proposed incorporated area has been successfully defeated where lands were rural and not urban in character, used for agriculture or timber, and not needed for legitimate expansion. See McCarroll v. Arnold, 200 Ark. 1094, 143 S.W.2d 35 (1940); see also Arnold v. McCarroll, 199 Ark. 1125, 1137, 137 S.W.2d 921 (1940).

Common sense dictates that the proposed town of eight and eight-tenths (8.8) square miles is unreasonably large considering the population of approximately three hundred and eighty (380). For comparison, the land area of Maumelle, Arkansas is approximately the same size and contains a population of approximately 17,000 residents. This comparison illustrates that the proposed town is substantially larger than can be justified for the purposes of incorporation. The vast majority of the proposed town is agricultural or timber land, is not urban in character, and is not planned for development or expansion. Petitioners point out that seven subdivided areas exist within the proposed town; however, although platted, nearly half of the lots remain undeveloped and the total platted land space is roughly equal to ten (10) percent of the total land are sought for incorporation. Thus, the proposed town is unreasonably large and the Petitioners' Petition for Incorporation must be denied.

The Proposed Town Lacks the Necessary Unity of a Single Place

In addition to the unreasonably large size of the proposed town, the area sought for incorporation does not make up a homogeneous community, which would commonly benefit

from incorporation. In Clark v. Holt, 218 Ark. 504, 237 S.W.2d 483 (1951), the Arkansas Supreme Court found an annexation improper when the land was a half mile removed from the existing community of Lead Hill, and was connected by a strip merely fifty (50) feet wide. In its holding, the Supreme Court quoted 37 Am. Jur., Municipal Corporations, § 27, with approval, which said:

The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants -- that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.

As contemplated by the Clark court, the proposed town lacks the necessary unity of a single place. Instead, some residents of the proposed town are connected only by a small strips of land not suited for municipal uses or development, while others are separated by nearly seven (7) miles of straight-line distance or more than twelve (12) road miles, which meander in and out of the limits of the proposed town. The geographic separation, the cluster of inhabitants, and the separate identities of the various communities were reflected by the testimony in opposition to incorporation. Included in the proposed town are portions of the Wye and Martindale communities, each of which have separate community identities and histories. Additionally, there exists a significant geographic separation of pockets of residents and improper connections exist to clusters of residents, which require a denial of Petitioners' Petition to Incorporate.

Motivations are found to be proper, in part, and improper, in part

A desire for corporate governance by a new municipal corporation, rather than by annexation, is certainly a legitimate reason for incorporation. Self-determination is the heart of democratic governance; however, petitioners must demonstrate the ability to provide just

compensation, through municipal services to residents of the municipality. Furthermore, the Petitioners assert that they seek incorporation to preserve the rural character of the area. Preserving rural, agricultural lands as such is antithetical to incorporation as a municipality. These rural, unimproved lands would not derive any benefit from incorporation, but would be subject to municipal taxation without receiving municipal services in return. Additionally, while preservation of history and heritage is an honorable goal, Petitioners' goal does not require incorporation to be accomplished, and as such does not overcome the shortcomings of the petition.

Budget is inadequate to maintain services for the proposed town's inhabitants

The court finds that the proposed general and road budgets contain reasonable estimates of revenues, but petitioners fail to demonstrate how existing services will be maintained, much less improved using existing tax revenues. The Petitioners state a desire to improve services, but, in several instances, note a desire to continue services currently received from Pulaski County. For example, the proposed town has expressed interest in preserving current waste management services, but has failed to budget for personnel to manage the associated administrative tasks, such as billing and day-to-day operations which would become the responsibility of the town.¹

Fire and emergency services may continue uninterrupted, because those services are provided by rural fire departments funded primarily through special assessments on property owners.

However, it appears that the proposed town has substantially under-budgeted for police protection. Recognizing that a town is not required to create a police department of its own, continued patrol service by the Pulaski County Sheriff's Office ("PCSO") must first be agreed to

¹ In the month of January, 2016, Pulaski County Sanitation Department received calls from approximately eight percent (8%) of its customers seeking assistance in addressing issues from a missed waste pickup, to reports of damaged cans and requests for additional cans or pickups of yard waste.

by Pulaski County and would be conditioned on appropriate compensation to Pulaski County for PCSO's service.

As a comparison, Wrightsville is approximately two (2) square miles in area with a population of over two thousand (2,000), Wrightsville's contract with Pulaski County for law enforcement services costs the city \$90,000 annually. While the substantially smaller population of the proposed town may be a justification for an annual rate lower than that paid by Wrightsville, the much larger geographic area would likely offset all or part of that reduction in cost. Petitioners have attempted to justify their estimated \$5,000 budget for police protection by referencing the number of police dispatches to the area in 2014. While, the low number of dispatches results in a low cost calculation, the Petition fails to propose police patrol of the area. Further, petitioners proposal for hiring or appointment of a town marshal for twenty (20) hours a month ignores that law enforcement is a twenty-four (24) hour a day, seven day a week job, leaving approximately seven hundred (700) hours a month without ready personnel stationed in the proposed eight and eight-tenths (8.8) square mile town. Furthermore, the petitioners ignore Ark. Code Ann. § 14-45-109, which requires the election of a town marshal. This would mandate a second election after a vote for adoption by the city board. This would result in an additional unbudgeted cost to the proposed town.

Petitioners also assert their intent to transport individuals arrested in the proposed town to the Pulaski County Regional Detention Facility ("PCRDF"), but, absent an agreement with Pulaski County providing adequate financial support of PCRDF by the proposed town, the proposed town would be subject to the daily rate structure set out in Pulaski County Ordinance 14-OR-31. As such, if even three (3) individuals were transported to PCRDF and stayed only a

single day each, pursuant to the rates established by the ordinance, the yearly budget established for jail costs would be more than consumed.

The three (3) examples above demonstrate that, while the Petitioners' proposal provides for a sizable cash balance at the end of 2016, issues remain unaddressed that would either result in a reduction of services rendered to the citizens of the proposed town or the budget surplus would likely be quickly consumed simply to maintain the levels of service already received.

An examination of Petitioners road budget reveals more substantial funding gaps. As noted above, Pulaski County currently maintains five and thirty-six one-hundredths (5.36) miles of roadway in the proposed town, the maintenance of which would become the responsibility of the proposed town upon incorporation. In addition to the county roads, the Petitioners, propose to convert an additional approximate five and eight-tenths (5.8) miles of private roads to publicly maintained town roadways. Petitioners estimated a dedicated revenue stream of approximately \$32,000 annually for road and bridge maintenance. Further, Petitioners estimate mowing costs only for the roads currently maintained by the county. Petitioners' stated intent to more than double the road miles maintained by Pulaski County would necessarily add to the cost of mowing. Petitioners borrow the remaining road budget line items from the City of Bigelow. While Bigelow's population is similar in size to that of the proposed town, Bigelow's geographic area is less than ten percent (10%) of the proposed town and, thus, expenses would necessarily be larger. Additionally, the proposed road budget does not include line items for drainage maintenance, roadway resurfacing, patching of existing roadways, ditching, mosquito spraying, herbicide spraying or weather related cleanup. Pulaski County's Public Works Department ("Public Works") has provided an annual cost estimate of \$69,081 to maintain the county road miles within the proposed town. Public Works acknowledges that precision is difficult to achieve

because of variables such as traffic, weather, age of the roadways, etc.; however, the billed costs provided for two (2) drainage repairs by Public Works in the recent past sufficiently demonstrate that the proposed budget is inadequate to address routine, however unexpected, necessary repairs to roadways and drainage structures.

Petitioners have provided this Court with information on possible sources of additional revenue, such as through short term financing or the creation of an urban service district, to be used for high cost budget items such as roadway resurfacing. Short term financing relies on the availability of revenue in the annual budget which would then be dedicated to the repayment of the short term loan. As previously noted, a reduction of current level of service provided is necessary, and is reflected in the budget as proposed, in order to create available revenues dedicated to repayment. Simply put, in order to afford roadway resurfacing, or expensive maintenance items, the proposed town would have to forego providing other services, which are currently provided, such as ditching, herbicide spraying, mosquito spraying, drainage maintenance, etc. If services are not reduced by the proposed town, but instead continued at the level currently provided by Pulaski County, dedicated revenues available for the repayment of short term financing, if any, would be insufficient to adequately fund roadway resurfacing and other expensive maintenance items.

Although urban service districts are referenced as an option to supplement the proposed town's road budget, this Court is unconvinced an urban service district would be a legally available option to finance road maintenance based on the enabling legislation. See Ark. Code Ann. § 14-95-101 et seq.

Although grant funds may be available to supplement local revenues, in order to provide for roadway maintenance or improvement, such a source of funds cannot be considered as a

revenue item until received. The grants referenced by Petitioners are in high demand and short supply, and cannot satisfy the needs of every community that submits an application. Thus, this Court cannot rely upon anticipated grant monies to fully fund the road maintenance and improvement needs within the proposed town.

While a reduction in services forced by maintaining current tax levels, or alternatively, increasing taxes simply to maintain current levels of service, may not constitute a taking, as referenced in Quita, supra, the shortcomings in the proposed budget weigh against incorporation. The budget framework proposed, in addition to existing revenue levels for the proposed town would place the proposed town in a precarious financial position, and likely a single adverse weather event would decimate the entire annual budget. Based on the foregoing reasons, this Court finds that the proposed town's budget is inadequate to maintain the level of services currently received.

For the reasons stated above, this Court finds that incorporation of the proposed town is not right and proper pursuant to Ark. Code Ann. § 14-38-104. The Petition for Incorporation is **DENIED.**

IT IS SO ORDERED.


Barry Hyde
Pulaski County Judge/Chief Executive Officer
Dated: 2/26/2016

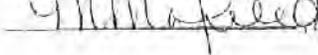
I hereby certify that the foregoing instrument is a true and correct copy of the

Original Judgement

filed in this office Feb 26, 2016 IN TESTIMONY WHEREOF

I have hereunto set my hand and seal of this office this March 23, 2016 12

JUDY CRANE, Pulaski County, Arkansas Circuit Court Clerk


Deputy Clerk



IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO.: 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

MOTION TO INTERVENE

Central Arkansas Water, pursuant to Rule 24 of the Arkansas Rules of Civil Procedure, moves the Court to intervene in this cause of action as party defendant to participate fully in all proceedings and in support of its motion, Central Arkansas Water states:

1. Petitioners are residents of real property located in Western Pulaski County, Arkansas.
2. On May 13, 2015, the Petitioners filed a Petition for Incorporation (the "Petition") seeking to incorporate the community known as Little Italy (the "Proposed Town").
3. After briefing and a hearing, on February 26, 2016, Pulaski County Court Judge, Barry Hyde ("Judge Hyde"), entered an order denying the Petition.
4. The Petitioners filed a notice of appeal with this Court on March 23, 2016.
5. Central Arkansas Water is an interested party in this case. Central Arkansas Water is a landowner within the boundaries of the Proposed Town and

has standing to intervene. Central Arkansas Water appeared at the county court hearing and as such, could have appealed if aggrieved. Therefore, it has standing to continue to protect its interest on appeal by the Proposed Town. The position of Central Arkansas Water should be taken into account by the Circuit Court before making a decision on the appeal.

6. On December 16, 2015, Central Arkansas Water submitted a letter brief to Judge Hyde in opposition to the incorporation of the Proposed Town. A copy of the letter brief with exhibits is attached hereto and incorporated herein.

7. On January 13, 2016, Central Arkansas Water appeared before the Pulaski County Court to oppose the Petitioners incorporation of the Proposed Town.

8. Central Arkansas Water is a consolidated water association serving customers throughout Pulaski County and central Arkansas. The principal source of water treated and distributed by Central Arkansas Water is Lake Maumelle. Lake Maumelle is an impoundment of the Maumelle River located in Western Pulaski County, containing over 9,000 acres. It was constructed in the 1950's by the Little Rock Municipal Waterworks, the predecessor to Central Arkansas Water. Lake Maumelle is now owned and maintained by Central Arkansas Water.

9. Since its construction, Central Arkansas Water and its predecessors have actively engaged in efforts to prevent pollution of Lake Maumelle by taking diligent, prudent and economic steps to safeguard the high quality of the drinking water stored and utilized by Central Arkansas Water.

10. Although Central Arkansas Water and its predecessors have purchased more than 8,500 acres in the Lake Maumelle watershed since the Lake's construction, it is not feasible for Central Arkansas Water to acquire the entire watershed which includes approximately 88,000 acres and stretches into Pulaski, Saline and Perry Counties. Over half of the acres in the Lake Maumelle watershed are held in non-governmental ownership and are, therefore, potentially subject to being developed by ownership and topography.

11. In 2005, Central Arkansas Water hired Tetra Tech, Inc., a firm with preeminent national credentials in developing watershed management strategies to (a) scientifically determine the limits on the increase in pollutants that could be absorbed by Lake Maumelle without compromising the long term water quality, and (b) translating those watershed limits into concrete steps that should be incorporated into any development within the watershed (regulating parameters such as lot size, minimum undisturbed open space and maximum restrictions on constructing impermeable surfaces) in order to successfully manage the hazard to public health and safety within acceptable limits which arises from full development of the private lands in the watershed.

12. Following Tetra Tech's work and consistent with its findings, the Board of Central Arkansas Water adopted the Lake Maumelle Watershed Management Plan (May 2007).

13. Central Arkansas Water has an interest in the subject of this lawsuit based on its ownership of Lake Maumelle and surrounding property and by virtue of its role as a public water utility.

14. This action seeks to allow Petitioners to incorporate a city within the Lake Maumelle Watershed. If incorporation is allowed, Central Arkansas Water's interest in protecting public health and safety by minimizing the impact of development in the Lake Maumelle Watershed will be hindered.

15. Central Arkansas Water claims an interest relating to the land area which is the subject matter of this litigation. If Central Arkansas Water were not permitted to intervene, the disposition of the pending action would impair or impede its ability to protect its interests. Because it has an interest in this lawsuit that is not adequately protected by the parties, Central Arkansas Water seeks to intervene in this action as of right or permissively. Alternatively, Central Arkansas Water raises questions of fact or law that are common to those raised by Petitioners.

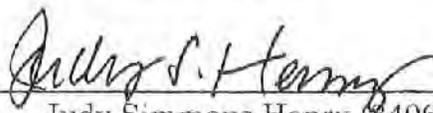
16. Central Arkansas Water's complaint in intervention would include the facts as set forth in Exhibit 1 and the exhibits to it.

WHEREFORE, Central Arkansas Water requests the entry of an order granting its motion to intervene in this action as party Defendant, to participate fully in all proceedings, to fix a date by which Central Arkansas Water is allowed to file a complaint in intervention or otherwise respond to and oppose the

incorporation of the Proposed Town, and to be granted all other relief to which it is entitled.

Respectfully submitted,

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX (501) 376-442
E-MAIL: jhenry@wlj.com

By 
Judy Simmons Henry (84069)
Attorney for Central Arkansas Water

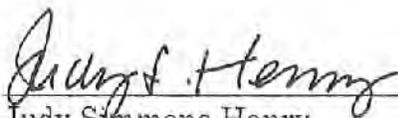
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was mailed this 25 day of April, 2016, via First Class U.S. Mail to the following:

Mary-Tipton Thalheimer
Quattlebaum, Grooms & Tull PLLC
111 Center Street, Ste 1900
Little Rock, AR 72201

Adam B. Fogleman,
Pulaski County Attorney
201 S. Broadway, Ste 400
Little Rock, AR 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Ste 400
Little Rock, AR 72201


Judy Simmons Henry

180081

AFFIDAVIT OF C. TAD BOHANNON

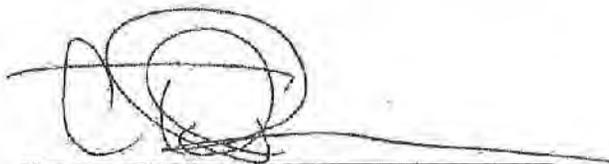
I, C. Tad Bohannon, first being duly sworn, upon oath state of personal knowledge:

1. I am C. Tad Bohannon, Chief Legal Counsel at Central Arkansas Water ("CAW"). I am authorized by CAW to submit this affidavit, which I understand will be used to support CAW's Objections to the Petition for Incorporation of the Town of Little Italy.

2. I personally prepared the attached letter dated December 16, 2015, with the assistance of various staff members at CAW.

5. The facts alleged in this affidavit are true and accurate to the best of my knowledge, information, and belief.

FURTHER, AFFIANT SAYETH NOT.



C. Tad Bohannon, Chief Legal Counsel

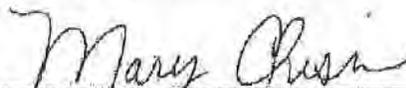
ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF SALINE

On this the 16th day of December, 2015, before me, a Notary Public, personally appeared C. Tad Bohannon, an individual, who executed the foregoing instrument for the purposes therein contained, by signing his name thereto.

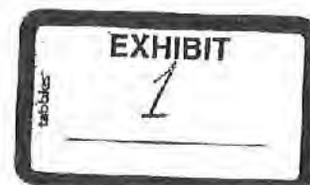
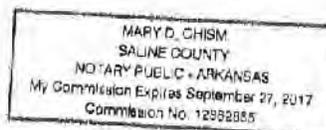
IN WITNESS WHEREOF, I hereunto set my hand and official seal.



Notary Public

My Commission Expires:

9-27-17





December 16, 2015

Pulaski County Court
c/o County Records
Attn: Marriage License Section
401 West Markham
Little Rock, AR 72201

Re: Proposed incorporation of the Town of Little Italy, Instrument No. 2015033208

Judge Hyde,

Central Arkansas Water (CAW) by and through C. Tad Bohannon, Chief Legal Counsel for CAW, submits these comments to the County Court for consideration in the above referenced matter

CAW is a consolidated municipal water system created and existing under the Consolidated Waterworks Authorization Act, Act 982 of the 83rd General Assembly of the State of Arkansas. CAW is governed by a Board of Commissioners and is an owner of approximately 28,000 acres of land and water within the Lake Maumelle Watershed in northwest Pulaski County in the vicinity of the proposed Town of Little Italy ("the proposed Town"). Approximately 90% of the proposed Town is within the Lake Maumelle watershed, which is the primary water source for 400,000 individuals throughout central Arkansas.

For reasons stated in more detail below, CAW opposes the incorporation of the proposed Town because the proposed incorporation will automatically remove over 5,600 acres of real property from the water quality protections provided by the Pulaski County Lake Maumelle Watershed Zoning Code and Chapter 8 of the Pulaski County Subdivision and Development Code. CAW believes that the County Court should deny the petition for incorporation because it does not comply with the requirements set forth in state law for the incorporation of a municipality.

CAW states that that the petition for incorporation should be denied because the incorporation is not right and proper and is not in the best interest of the citizens of Pulaski County or the citizens within the proposed Town. Specifically, the petition should be denied because:

1. The proposed Town is unreasonably large;
2. The land to be included in the proposed Town is primarily timber and agricultural land and is therefore not suited for municipal purposes or "adapted for urban use";
3. A primary purpose of the incorporation is to avoid regulation from other municipalities and Pulaski County rather than to obtain municipal benefits;

4. The area to be included in the proposed Town inappropriately includes areas through "stovepipe" connections; and
5. The Petitioners have not obtained appropriate, documented consent of all municipal corporations within 5 miles of the proposed Town that have exercised their planning jurisdiction.

Any of these deficiencies by itself is sufficient to justify denial of the petition for incorporation. Taken together, they demonstrate that the petition suffers from serious procedural and substantive deficiencies that require its denial.

I. Background and Statements of Fact

CAW has thoroughly researched the incorporation of the proposed Town and the area contained within the proposed Town. In gathering the information contained below, CAW has relied upon statements and documents from Little Italy petitioners ("the Petitioners"), information posted on www.littleitalyarkansas.com, news coverage regarding the incorporation efforts of the proposed Town, publically available geographic information system (GIS) data and CAW analysis, publically available census data, publically available municipal audit data, and other sources of data. Following are facts regarding the proposed Town, the incorporation efforts, and land within the proposed Town:

Petition and Signatures:

- 235 individuals signed the petition for incorporation.
- Petitioners submitted the petition on May 13, 2015.
- The Pulaski County Clerk certified 220 of the signatures on the petition as valid registered voters on May 14, 2015, and provided notice to the County Judge of said certification.
- CAW identified 2 of the 220 certified signatures as improper because the residence and associated property of the signatures are outside of the proposed Town boundary.
- Petitioners state that the purpose of incorporating is to preserve the 100-year history and rural character of the area "by preventing annexation or controls leveraged by another city government."
- Petitioners state that benefits of incorporation include "prevent[ing] annexation or falling into extra-territorial jurisdictions of other municipalities" and "prevent[ing] a tax program from being established."

Geographic Area

- The proposed Town is approximately 5,606 acres or 8.8 square miles.
- Approximately 90%, or 5,044 acres, of the proposed Town is within the Lake Maumelle watershed.
- The 5,044 acres of the proposed Town within the Lake Maumelle watershed represent approximately 25% of the developable land within the Pulaski County portion of the Lake Maumelle watershed.

Nearby Municipal Corporations

- The proposed Town is within 5 miles of three municipal corporations that have exercised planning authority: the City of Bigelow, the Town of Fourche, and Pulaski County.
- Petitioners submitted resolutions from the City of Bigelow and the Town of Fourche granting consent for incorporation.
- Pulaski County has exercised its planning jurisdiction through the Pulaski County Subdivision and Development Code (most recently amended as of April 30, 2009) and a Comprehensive Land Use Plan for the Lake Maumelle Watershed and a Lake Maumelle Watershed Zoning Code, including areas within the proposed Town and within five miles of the proposed Town, on April 23, 2013.
- Petitioners have not obtained consent from the Pulaski County Quorum Court for incorporation.

Population and Property Ownership

- The population of the proposed Town is approximately 380 individuals.
- The population density of the proposed Town is approximately 43.4 individuals per square mile.
- Among a survey of the 153 Arkansas municipalities with populations of 200 to 601, Little Italy would have the second lowest population density and the second largest geographic area.
- Petitioners state that they intend to annex additional property within Perry County into the proposed Town if incorporation is successful.
- The 235 individuals who signed the petition for incorporation own approximately 1,590 acres of the 5,606 acres within the proposed Town, representing only 28% of the land within the proposed Town.
- CAW owns approximately seven acres within the proposed Town boundary (see map attached as Attachment A and deed to property as Attachment B).
- CAW owns 1,006 acres of property that is immediately adjacent to the proposed boundary, consisting of 11 parcels.
- CAW's 11 contiguous parcels include a border with the proposed Town of approximately 2.6 miles.

Budget and Public Facilities

- The budget for the proposed Town identifies revenue of \$36,643, consisting of \$16,350 of unrestricted revenue and \$20,292.85 in street fund revenue.
- The budget for the proposed Town does not include funds for police protection, professional services, or non-street labor.
- Among a survey of the 153 Arkansas municipalities with populations of 200 to 601, Little Italy would have the lowest revenue of any municipality.
- The proposed Town includes approximately 6.25 miles of County roads that, if incorporation is successful, would become the responsibility of the proposed Town.
- Petitioners have stated that the proposed Town intends to assume maintenance responsibility of some or all of the approximately 10.25 miles of private roads within the proposed Town.

- The proposed budget for the proposed Town allocates \$781 to \$2,064 per mile for street and road maintenance, or \$0.15 to \$0.39 per linear foot.
- Petitioners state that "no new taxes will be collected" from residents within the proposed Town.

Land Use

- The land within the proposed Town is 84% forested, 11% pasture, 2% water, 1% developed, and 2% other unpaved surfaces according to 2009 high resolution land use and land cover data (see map in Attachment C).
- Approximately 65% of the land within the proposed Town is classified and taxed as timber property by the Pulaski County Assessor, 5% is classified as crop or pastureland, 29% is classified as residential property, and 1% is classified as water (see map in Attachment D). The proposed Town divides several tax parcels. Therefore, the classification data from the Pulaski County Assessor's offices does not exactly match the area from the petition for incorporation and the Pulaski County Assessor's data encompasses a total of 5,925.71 acres, rather than 5,606 acres. As a result, the percentages contained in this paragraph are based on an area approximately 320 acres larger than the proposed boundary of Little Italy.

II. Interested Party Status

State law provides that "any person interested may appear and contest the granting" of the petition for incorporation. In addition, affidavits in support of or against the petition may be submitted for consideration by the County Judge. Ark. Code Ann. § 14-38-103(a)(2).

As the owner of property within the proposed boundary of Little Italy, the owner of other property contiguous to the proposed boundary of Little Italy, the owner of property in the Lake Maumelle watershed, and the owner of numerous other properties within Pulaski County, CAW is an interested party in these proceedings. As established in *Perkins et al v Holman et al*, 43 Ark. 219, 1884 Ark. LEXIS 46 (1884), "any person interested" under ACA §14-38-103(a)(2) includes all individuals with "any interests to be affected by the determination of the question." CAW owns property within the proposed boundary of Little Italy. In addition, the substantial amount of property owned by CAW that is adjacent and contiguous to the proposed boundary of Little Italy will be directly affected by the incorporation of Little Italy because of any planning, infrastructure, or development decisions made by the future Town if it is permitted to incorporate. Both the water quality within and the property value of the property adjacent to the proposed Little Italy area may be negatively affected by the incorporation.

In the annexation-based *Perkins* case, the Court also stated that "any person interested" includes individuals that "reside, or own property, either in the old town or in the territory proposed to be annexed." Interested status is granted to individuals within the "old town" because the "old town" would receive additional property for which residents of the "old town" assume responsibility, and they, therefore, may be affected. In the instance of an incorporation question, property is removed from the jurisdiction and benefit of the county containing the

property. Therefore, the "old town" in an incorporation question is the county that is losing property to the proposed municipality.

In the case of the proposed incorporation of Little Italy, the "old town" is the entirety of Pulaski County. Any individual residing or owning property within Pulaski County may "be affected by the determination of the question" due to loss of tax base and the loss of jurisdiction over the proposed incorporated area.

CAW therefore qualifies as "any person interested" under three distinct tests:

- 1) CAW owns seven acres of real property within the proposed boundary of Little Italy that would be affected by the incorporation;
- 2) CAW owns approximately 1,006 acres of real property that are contiguous to the proposed boundary of Little Italy for approximately 2.6 miles that would be affected by the incorporation; and
- 3) CAW owns approximately 27,520 additional acres of real property within the Lake Maumelle watershed that would be affected by the incorporation, as well as numerous other properties within Pulaski County that would be affected by the incorporation.

III. Denial of Petition

As stated previously, the petition for incorporation should be denied because the incorporation is not right and proper and is not in the best interest of the citizens of Pulaski County or the citizens within the proposed Town. Specifically, the petition should be denied because:

- 1) The proposed Town is unreasonably large;
- 2) The land to be included in the proposed Town is primarily timber and agricultural land and is therefore not suited for municipal purposes or "adapted for urban use";
- 3) A primary purpose of the incorporation is to avoid regulation from other municipalities and Pulaski County rather than obtain municipal benefits;
- 4) The area to be included in the proposed Town inappropriately includes areas through "stovepipe" connections; and
- 5) The Petitioners have not obtained appropriate, documented, consent of all municipal corporations within 5 miles of the proposed Town that have exercised their planning jurisdiction.

The *Perkins* case cited earlier was an "annexation case." But the Supreme Court of Arkansas has historically used the same standards and interpretations for both annexation and incorporation cases. See, e.g., *Tuner v. Hiederkerh*, 261 Ark. 72, 546 S.W. 717, 1977 Ark. LEXIS 2043 (1977) (an incorporation case citing *Perkins* for definition of "any interested person"). Therefore, the County Court should apply the law from "annexation cases" and "incorporation cases" in this matter.

- 1) ***The proposed Town is unreasonably large.***

State law provides that following the Judge's decision regarding incorporation, a request for an injunction to prevent the incorporation may be submitted to the circuit court. The circuit court may annul the incorporation of the new city or town if it determines that the limits of the proposed city or incorporated town are unreasonably large or small or are not properly and sufficiently described. Ark. Code Ann. § 14-38-107(b). Therefore, it is reasonable for the County Judge to consider and determine if a proposed municipality is "unreasonably large or small" when determining if an incorporation is "right and proper" because those are factors that might be the basis for the later rejection of the County Judge's decision.

In *White v. Lorings*, 274 Ark. 272, 623 S.W.2d 837, 1981 Ark. LEXIS 1468 (1981), the Supreme Court stated that the determination of unreasonably large or unreasonably small **rests upon common sense**. In that case, they determined that a 2 square mile town with 900 residents and 400 buildings that had been platted for over 55 years in town lots was not unreasonably large.

In *Arkansas and Ozark Railway v. Busch*, 223 Ark. 27, 264 S.W.2d 54, 1954 Ark. LEXIS 607 (1954), however, the Supreme Court determined that a 3 mile long and 0.25 mile wide strip with a population of 21 was unreasonably large for incorporation as a town. Furthermore, it was also shown that the incorporation was not intended to provide municipal services, but was to allow one of the incorporators to form a town adjacent to the Missouri state line, which would permit the sale of gasoline at Missouri prices. The Supreme Court therefore ordered the Circuit Court to annul the County Court order of incorporation for the Town of Busch.

In the present case of the Town of Little Italy, the proposed Town is approximately 5,606 acres or 8.8 square miles in size with a projected population of approximately 380 individuals. The proposed Town thus has a population density of 43 persons per square mile. Of the two scenarios described above, the Proposed Town is more similar to the proposed Town of Busch in terms of size and population density. In fact, among a survey of the 153 Arkansas municipalities with populations of 200 to 601, the proposed Town would have the second lowest population density and the second largest geographic area. Petitioners have also stated that they intend to annex additional property within Perry County into the proposed Town if incorporation is successful; this would make the proposed Town even larger than currently proposed. Given the geographic size and population alone, it is clear that the proposed Town is unreasonably large.

However, the proposed Town is also unreasonably large when examined from a public facilities and budgetary perspective. The budget for the proposed Town shows revenue of only \$36,643, consisting of \$16,350 of unrestricted revenue and \$20,292.85 in street fund revenue. The proposed Town would have the lowest revenue of any of the 153 Arkansas municipalities with populations of 200 to 601. The proposed Town would also have to maintain 6.25 – 10.5 miles of roads contained within its proposed boundaries. The proposed budget and mileage of roads to be maintained would only allow \$781 to \$2,064 per mile for street and road maintenance, or \$0.15 to \$0.39 per linear foot. This single item further demonstrates that the size of the proposed Town is unreasonably large because it will not be able to generate sufficient revenue to maintain the expansive public infrastructure within its boundaries. Furthermore, the budget

for the proposed Town does not include funds for police protection, professional services, or non-street labor, all of which are necessary municipal functions.

In *Oulta v. Heidgen*, 247 Ark. 943, 448 S.W.2d 631, 1970 Ark. LEXIS 1373 (1970), the Circuit Court denied the incorporation because, in part, the incorporated area would be unable to offer sufficient municipal services. The court cited the insufficient annual revenue from the existing taxes in the area as evidence of such. The facts in this case are similar, if not identical. Petitioners have failed to demonstrate sufficient revenues to properly operate a town, and they have specifically stated an unwillingness to seek imposition of taxes to provide adequate revenues. Therefore, the petition for incorporation should be denied because the proposed Town is unreasonably large.

2) The land proposed to be included in the proposed Town is primarily timber and agricultural land and is therefore not suited for municipal purposes or "adapted for urban use."

The Supreme Court has determined that an additional consideration in determining if an incorporation is "right and proper" is whether the land included within the proposed boundaries of the new town is suited for municipal purposes or adapted for urban use.

In *Oulta v. Heidgen, supra*, the Supreme Court determined that the area proposed for incorporation was almost exclusively open farmland, pastureland, or timberland with rural homes. The proposed Town of Oulta only included a few platted lots and was generally not "urban territory." As a result, the Court upheld the lower court's determination that the incorporation was improper.

In *Waldrop vs. Kansas City Southern Railway Company*, 131 Ark. 453, 199 S.W.369, 1917 Ark. LEXIS 169 (1917), the Supreme Court nullified the Town of Ogden's incorporation because there was no reasonable anticipation of the use of the timberland and farmland for town lots in the future. Furthermore, the Court determined that incorporation and subsequent taxation of property must provide just compensation to property owners in the protection of life, liberty, or property.

The Supreme Court affirmed the circuit court denial of annexation in *Pine Bluff v. Mead*, 177 Ark. 809, 7 S.W.2d 988, 1928 Ark. LEXIS 189 (1928), of property adjacent to the City of Pine Bluff because the petition improperly included agricultural land that was not adapted to urban use.

The case of *Vestal v. Little Rock*, 54 Ark. 321, 15 S.W.891, 1891 Ark. LEXIS 52 (18891), saw the Supreme Court reverse the annexation of the unincorporated town of Argenta to the city of Little Rock because the proposed area to be annexed included a property not adapted to urban use. The Court based that conclusion on findings that the owner of a forty-acre tract had no need of local government and that the city had no need of his land.

In *Crossett v. Anthony*, 250 Ark. 660, 466 S.W.2d 481, 1971 Ark. LEXIS 1313 (1971), the Supreme Court affirmed the Circuit Court's denial of an annexation of an area of land to the north of the City of Crossett because there was insufficient evidence that the land was adapted

to urban use. In fact, of the 2,000 acres north of the City of Crossett at issue in the case, at least 682 acres of timber land and farmland (and possibly up to 800 acres) were not adapted to urban use.

Like the incorporation and annexation scenarios discussed above, a vast majority of the proposed Town is clearly not adapted for urban use. According to CAW's 2009 high resolution land use and land cover dataset, land within the proposed Town is 84% forested, 11% pasture, 2% water, 1% developed, and 2% other unpaved surfaces. Furthermore, the Pulaski County Assessor classifies and taxes approximately 65% of the land within the proposed Town as timber property, 5% as crop or pastureland, 1% as water, and 29% as residential property. In many of the Supreme Court cases discussed above, incorporation or annexation was denied because the area included a number of tracts that were not adapted to urban use or because 40% of an area (*Crossett v Anthony*) was rural property. When evaluated on terms of assessed value, the proposed Town contains a minimum of 70% rural property. It is more likely, however, that the current use of the property within the proposed Town is 95% rural, as identified in the 2009 high resolution land use and land cover dataset. Thus, the proposed Town is significantly more rural than the areas in the cases above, which were insufficiently developed to permit incorporation.

At no point have the Petitioners stated or shown that the area within the proposed Town is suited for urban or municipal use. In fact, the Petitioners explicitly state that the proposed Town is primarily rural property when they state that a core intent of the incorporation effort is to protect the "rural character" of the area. In a recent statement posted on the little Italy website, the leaders of the incorporation effort state that the "desire and driving force behind the incorporation is to keep the historic land . . . rural for the next 100 years . . ." Maintaining rural areas is antithetical to the nature of and reasons for municipal incorporation. In addition, a laudable purpose is not sufficient to justify incorporation. In *Waldrop*, the court noted that the petitioners desire to incorporate "for the purpose of organizing a single school district." The court concluded, however, using the power of incorporation to provide for a school district is not a municipal purpose. In this case, petitioners desire to incorporate to preserve rural life; that is not a municipal purpose.

Therefore, the property within the proposed Town should not be incorporated, and the petition should be denied.

3) A primary purpose of the incorporation is to avoid regulation from other municipalities and Pulaski County rather than obtain municipal benefits

In *Quita v. Heidgen, supra*, the Supreme Court affirmed the Circuit Court's denial of incorporation of the Town of Quita in part because those desiring incorporation sought it "to avoid municipal handicaps rather than to obtain municipal benefits." In other words, incorporation is not available simply to avoid municipal regulation—it must be to obtain the benefits of becoming a municipality.

The Petitioners state in their Business Plan, available at littleitalyarkansas.com, that the purpose of their incorporation effort is to preserve the 100-year history and rural character of the area "by preventing annexation or controls leveraged by another city government." Petitioners also state

that "current services such as police, fire, emergency, and all utilities will continue as they are now" and that "no new taxes will be collected" from residents within the proposed Town. A list of benefits created by the Petitioners specifically states that benefits of incorporation include "prevent[ing] annexation or falling into extra-territorial jurisdictions of other municipalities" and "prevent[ing] a tax program from being established."

In light of these statements and the aforementioned cases, it is clear that the Petitioners of Little Italy are incorporating to "avoid municipal handicaps rather than to obtain municipal benefits." The lack of municipal services outlined above demonstrates this point. While the Incorporation Benefits document identifies potential enhancements to municipal services, the Petitioners have not presented a realistic plan to fund and deliver these services other than through contracts with entities currently providing services to the area.

This inability to provide municipal services argues against incorporation in another way as well. In *Waldrop vs. Kansas City Southern Railway Company, supra*, the Supreme Court nullified the Town of Ogden's incorporation because it determined that incorporation and subsequent taxation of property would not provide just compensation to property owners in the form of protection of life, liberty, or property because of an inability to provide sufficient municipal services.

Like those seeking incorporation in *Waldrop*, the Petitioners have not demonstrated the ability to provide "protection of life, liberty, or property" in the proposed Town. In fact, the Petitioners have repeatedly stated that they will not increase taxes, and, therefore, it is unlikely that the proposed Town will be able to deliver any of the promised services.

It should also be noted that the Petitioners only own approximately 1,590 acres of the 5,606 acres within the proposed Town, representing only 28% of the land within the proposed Town. Therefore, the proposed Town would be unable to provide just compensation to the property owners of the remaining 72% of the proposed Town of Little Italy in the form of protection of life, liberty, or property. As in *Waldrop*, the rural property appears to be included in the proposed Town in order to provide a larger potential tax base as well as to connect isolated pockets of rural properties to one another.

Because the incorporation of the proposed Town seeks to avoid regulation from other municipalities and does not have a clear plan for providing municipal services, the petition should not be found to be right and proper and should be denied.

4) *The proposed area to be included in the proposed Town of Little Italy inappropriately includes areas through "stovepipe" connections.*

The Supreme Court has long held that "stovepipe" annexations or incorporations cannot be used to annex properties into municipalities or to form a city through incorporation.

In *McCarroll, Comm. Of Revenues v. Arnold*, 199 Ark. 1125, 137 S.W.2d 921, 1940 Ark. LEXIS 83 (1940), the Court held that unincorporated areas could not incorporate a strip of land four miles long and one quarter of a mile wide, particularly when it contains large amounts of areas unsuited for municipal purposes. Furthermore, the Court expounded that the incorporation was

also invalid because the effort was intended to circumvent state gasoline taxes and therefore avoid regulation/taxation.

In *Clark v. Holt*, 218 Ark. 504, 237 S.W.2d 483, 1951 Ark. LEXIS 371 (Ark. 1951), the Supreme Court invalidated the annexation of property into Lead Hill that included a strip of land 50 feet wide by 3,600 feet long. The Court invalidated the annexation because the strip, which was not dedicated to public use and included rural and hilly terrain, was not needed for the town's expansion and was clearly included in an effort to avoid higher taxes. The Court cited that in order to travel from "Lead Hill to the area in controversy it is necessary to travel over a county road outside of the corporate limits of the town and running parallel to the 50-foot strip." Citing these "gaps" between portions of the town, the Court noted that "the essential of continuity is lacking," thereby negating the annexation.

In *Park v. Hardin*, the Supreme Court invalidated an incorporation because it included a two-mile long narrow strip of land that allowed the town to be within a two-mile range of the State of Missouri and, therefore, avoid Arkansas gasoline tax rates. The Court stated that towns cannot incorporate by "reaching out, lasso-like, to harness space. Territorial utility must bear some relation to corporate needs." (*emphasis added*)

Many of the stovepipe arguments rest upon the legal treatise 37 Am. Jur., Municipal Corporations, § 27, which states the following: "The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants -- that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation."

Clearly, incorporations that include stovepipes to include property should not be held to be "right and proper." The proposed Town's irregular borders are formed by such improper stovepipes. The proposed Town includes nearly 1,720 acres that can be accessed solely by stovepipe connections on the southwest and southeast portions of the proposed Town. This is 30% of the area of the proposed Town. The stovepipes are approximately 1,200 feet wide and range in length from 1,100 feet to 4,300 feet. They solely exist to connect multiple isolated areas and, as a result, constitute a stovepipe under well-established case law because they are included solely for the purpose of connection, not for any proper municipal purpose. The areas that are included in the proposed Town of Little Italy are highlighted as Stovepipe Area 1, Stovepipe Area 2, and Stovepipe Area 3 in Attachment E. Simply by nature of the inclusion of significant acreage via stovepipes, the incorporation should be denied.

In addition, the use of stovepipes is clearly an effort to increase the size of the proposed Town in order to secure sufficient signatures to comply with state law and, ultimately, circumvent county land use regulations. Specifically, Stovepipe Area 1 includes 9 signatures, Stovepipe Area 2 includes 29 signatures, and Stovepipe Area 3 includes 5 signatures submitted with the petition. Because these Stovepipe Areas are inappropriately included in the proposed Town through stovepipe connections, these 43 signatures should be removed from the petition. Once

removed, the petition would only contain 177 certified signatures. In addition, there are two signatures on the petition where the residence noted on the petition is not included within the proposed Town but is in the proximity of Stovepipe Area 1 (the address provided on the petition is 40120 Highway 10, signed by Kathy and Jackson Zini). Once these additional signatures are removed, the petition only has 175 of the minimum 200 signatures needed for incorporation. Therefore, the petition should be denied as it would not meet the minimum number of signatures necessary under state law.

It could be argued that the Petitioners could expand the boundaries of the proposed Town to make larger connections to the Stovepipe Areas. However, doing so would add additional rural property that is not adapted for urban use and would also significantly increase the geographic area of the proposed Town. By both adding additional rural property and increasing the size of the proposed Town, any modification of the boundaries to eliminate these stovepipes would further justify denial of the petition under items 2 (unreasonably large) and 3 (not adapted for urban use) that are described in more detail previously.

Yet, in gerrymandering the proposed corporate boundaries, the Petitioners also divided or split many tax parcels. As a result, the proposed boundaries are going to create substantial confusion in the assessment, collection and distribution of future tax revenues.

Finally, the idea that municipalities are "of unity, not of plurality," does not comport with the boundaries of the proposed Town. The historic Little Italy community was significantly smaller than the 5,606 acres currently proposed. In fact, the proposed Town includes portions of the communities of Little Italy, Wye Mountain, and other areas that do not identify with either community. The proposed Town is not a community with a shared background or identity; rather, it is a clump of communities with little shared interests other than attempting to avoid regulation by Pulaski County.

Because the proposed Town inappropriately includes areas through stovepipe connections and because removal of these areas would cause the petition for incorporation to drop below the 200 signature threshold required under state law, the petition for incorporation should be denied.

5) *The Petitioners have not obtained appropriate, documented consent of all municipal corporations within five miles of the proposed town that have exercised their planning jurisdiction.*

State law provides that the "court shall not approve the incorporation of any municipality if any portion of the territory proposed to be embraced in the incorporated town shall lie within five (5) miles of an existing municipal corporation and within the area in which that existing municipal corporation is exercising its planning territorial jurisdiction, unless the governing body of the municipal corporation has affirmatively consented to the incorporation by written resolution." Ark. Code Ann. § 14-38-101(b)(1).

The proposed Town lies within the planning territorial jurisdiction of three municipal corporations: the City of Bigelow, the Town of Fourche, and Pulaski County. The Supreme Court has long-held that "A county is a municipal corporation." *Stilley v. Henson*, 342 Ark. 346,

28 S.W.3d 274, 2000 Ark. LEXIS 465 (2000); *City of Hot Springs v. Gray*, 215 Ark. 243, 219 S.W.2d 930 (1949). As a result, by specifically listing municipal corporation rather than municipality or city or town in Ark. Code Ann. § 14-38-101(b)(1), the General Assembly clearly intended to include county government as an entity with the authority to exercise planning territorial jurisdiction and of whom affirmative consent is required for an incorporation within its limits.

Pulaski County has clearly exercised its planning territorial jurisdiction through the Pulaski County Subdivision and Development Code (most recently amended as of April 30, 2009), a Comprehensive Land Use Plan for the Lake Maumelle Watershed, and a Lake Maumelle Watershed Zoning Code that includes areas within the proposed Town and within 5 miles of the proposed Town. As a result, the incorporation cannot proceed unless the Quorum Court of Pulaski County has affirmatively consented to the incorporation by written resolution. Yet, the Petitioners have provided no resolution from Pulaski County granting affirmative consent for the proposed Town's incorporation. The Petition must therefore be rejected.

CONCLUSION

Above, we have pointed out many flaws with the petition to form the proposed town of Little Italy, and it could be denied for any one or more of those reasons. Moreover, each of the flaws identified above are connected by a common thread – that of avoiding County regulations rather than increasing governmental benefits and services to the area's citizens. For this reason, the petition is directly contrary to everything that the Arkansas Constitution and General Assembly intend for cities and towns to be and, therefore, should be denied.

Historically, the Arkansas Constitution provides for three levels of government – the state, then counties, then cities. Art. 12, § 3 of the Arkansas Constitution provides that the "General Assembly shall provide, by general laws, for the organization of cities . . . and incorporated towns . . ." Therefore, cities and towns are entities of limited power, controlled by the legislature. As the General Assembly has enacted laws permitting the formation of towns, the General Assembly has recognized that cities and towns are special entities, created for special purposes – providing additional services to citizens that could not be provided by the County government. Even in 1971, the General Assembly recognized that the organization of cities can be important to provide "necessary municipal services to the citizens." Acts 1971, No. 711, § 4.

The General Assembly has also recognized that not every hamlet should be incorporated; the administrative burdens are too great when the population is too small or sparse. In 2001, the General Assembly increased the number of signatures required on a petition for incorporation from 75 to 200. Acts 2001, No. 1233, § 1. More importantly, the General Assembly increased the threshold to incorporation without modifying the traditional requirements discussed above – the area must not be unreasonably large; the area must be suited for municipal purposes and adapted for urban use; the purpose of the incorporation must be for obtaining municipal benefits (trash collection, police protection, fire protection, etc.); and the area must be of reasonable shape. The General Assembly knew and understood that the County Court would apply these accepted standards when considering a petition for incorporation. Petitions such as the one presented for the incorporation of Little Italy are the very reason the General Assembly

increased the signature requirement from 75 to 200. Petitioners have attempted to nullify the increased signature requirements by gerrymandering and expanding its borders to pick up remote signatures from here and there, but the only way the Petitioners could meet the 200 signature threshold was to ignore 200 years of case law regarding the size, purpose and design of a new town.

The area petitioners seek to incorporate as the new town of Little Italy is not appropriate for incorporation under State law, and therefore, the petition should be denied.

Respectfully,

CENTRAL ARKANSAS WATER

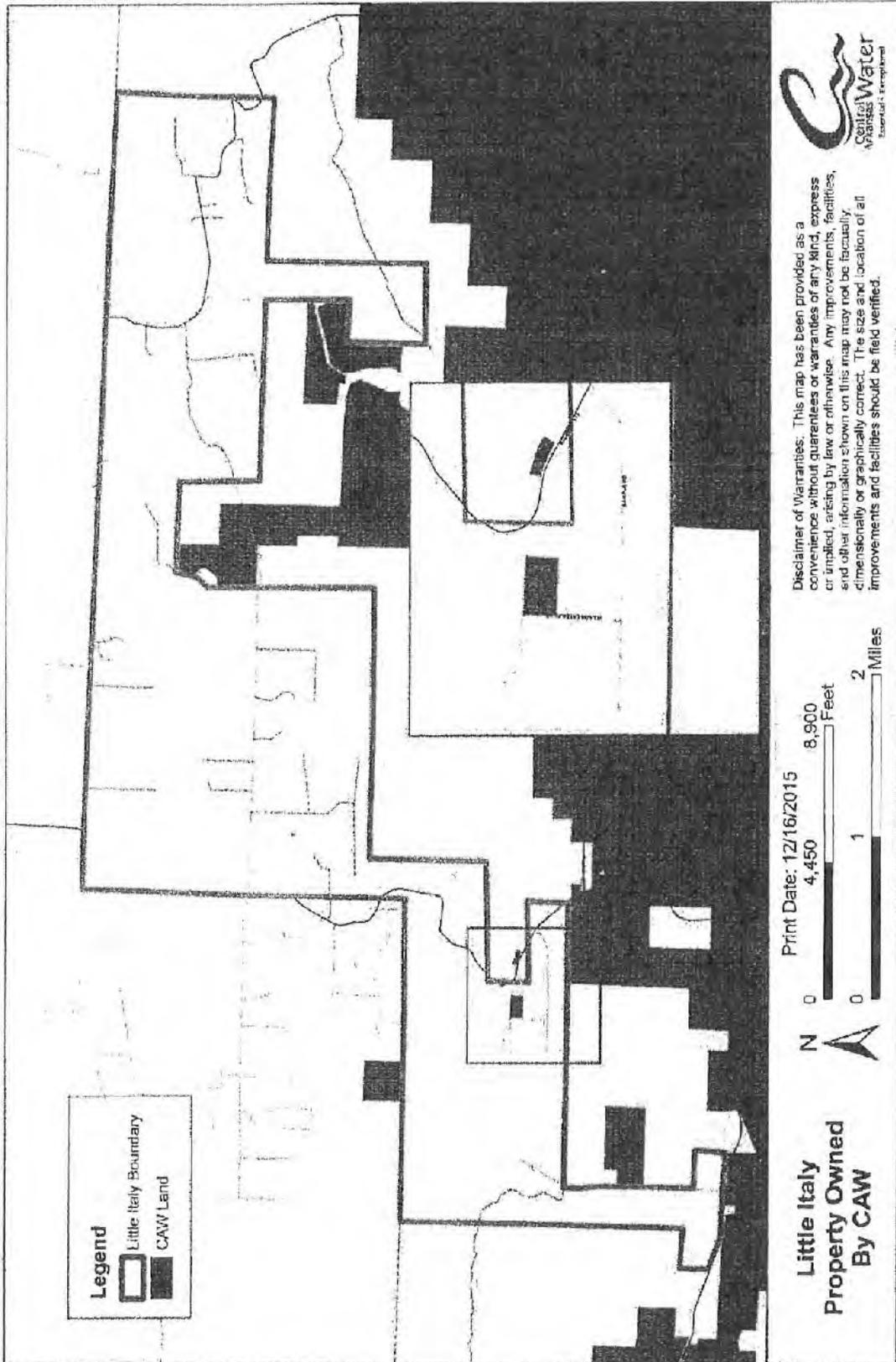


By: C. Tad Bohannon, Chief Legal Counsel

Attachments:

Exhibit A
Exhibit B
Exhibit C
Exhibit D
Exhibit E
Affidavit of Eve Jorgensen
Affidavit of Mary Chism

Attachment A Property Map



000035

Attachment B
Property Deed

ML 371

2005024593
03/23/2005 10:30:58 AM
Filed & Recorded in
Official Records of
PAT O'BRIEN
PULASKI COUNTY
CIRCUIT/COUNTY CLERK
Fees \$14.00

BEACH ABSTRACT & GUARANTY COMPANY

100 Center Street, P.O. Box 2580, Little Rock, AR 72203 (501) 376-3301
2200 N. Rodney Parham, Suite 101, Little Rock, AR 72212 (501) 225-0846
5505 John F. Kennedy Blvd, North Little Rock, AR 72116 (501) 758-0147
600 Edgewood Drive, Maumelle, AR 72113 (501) 851-6633



WARRANTY DEED
(Unmarried Person)

THE FORM OF THIS INSTRUMENT APPROVED BY
WILLIAM L. OWEN, P.A.,
ATTORNEY AT LAW
917 W. MARKHAM, SUITE B
LITTLE ROCK, ARKANSAS 72201
(501) 372-1655

FILE # 20051106



KNOW ALL MEN BY THESE PRESENTS:

That I, Jack N. Armstrong, an unmarried person, for and in consideration of the sum of --TEN AND 00/100-- DOLLARS--(\$10.00)--and other good and valuable consideration in hand paid by Central Arkansas Water, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said Grantee(s) and unto its successors and assigns forever, the following lands lying in the County of Pulaski and the State of Arkansas to-wit:

A part of the NE1/4 of the SW1/4 of Section 13, Township 3 North, Range 16 West, Pulaski County, Arkansas described as follows: Commencing at the Southeast corner of the NE1/4 SW1/4, Section 13; thence South 87 degrees 49 minutes 00 seconds West 440.49 feet to a found 3/8 inch rebar; thence North 00 degrees 07 minutes 50 seconds East 167.88 feet to the point of beginning being a found 1/2 inch rebar; thence North 00 degrees 08 minutes 47 seconds East 128.50 feet to a found 1/2 inch rebar; thence North 00 degrees 12 minutes 25 seconds East 296.80 feet to a found 1/2 inch rebar; thence North 89 degrees 51 minutes 11 seconds West 715.20 feet to found 1/2 inch rebar; thence North 89 degrees 51 minutes 11 seconds West 36.70 feet to a set 1/2 inch rebar in Wilson Lateral Road; thence South 1 degree 17 minutes 17 seconds West 431.93 feet to a set 1/2 inch rebar in Wilson Lateral Road; thence

(Page # of pages)

Initials: *JA*

Beach

000007

North 89 degrees 39 minutes 13 seconds East 760.17 feet to the point of beginning. EXCEPT the right of way of Wilson Lateral Road on the West side of subject property and that portion formed by the arc of the 120 foot diameter cul-de-sac at the South end of proposed new road which is to be used as public road right of way.

To have and to hold the same unto the said Grantee(s) and unto its successors and assigns forever, with all appurtenances thereto belonging.

And I hereby covenant with said Grantee(s) that I will forever warrant and defend the title to the said lands against all claims whatsoever.

WITNESS my hand and seal on this 11 day of March, 2005.

I hereby certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument. Except

or no consideration paid if none shown.
GRANTEE OR AGENT: Winnie Shaver, Agent
GRANTEE'S ADDRESS: 1500 West Maryland Avenue
North Little Rock AR 72120


Jack N. Armstrong

ACKNOWLEDGMENT

STATE OF KENTUCKY)
) 95.
COUNTY OF Jefferson)

BE IT REMEMBERED, that on this day came before me, the undersigned, a notary public within and for the County aforesaid, duly commissioned and acting, Jack N. Armstrong, an unmarried person, to me well known as (or satisfactorily proven to be) the grantor(s) in the foregoing Deed, and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11th day of March, 2005.

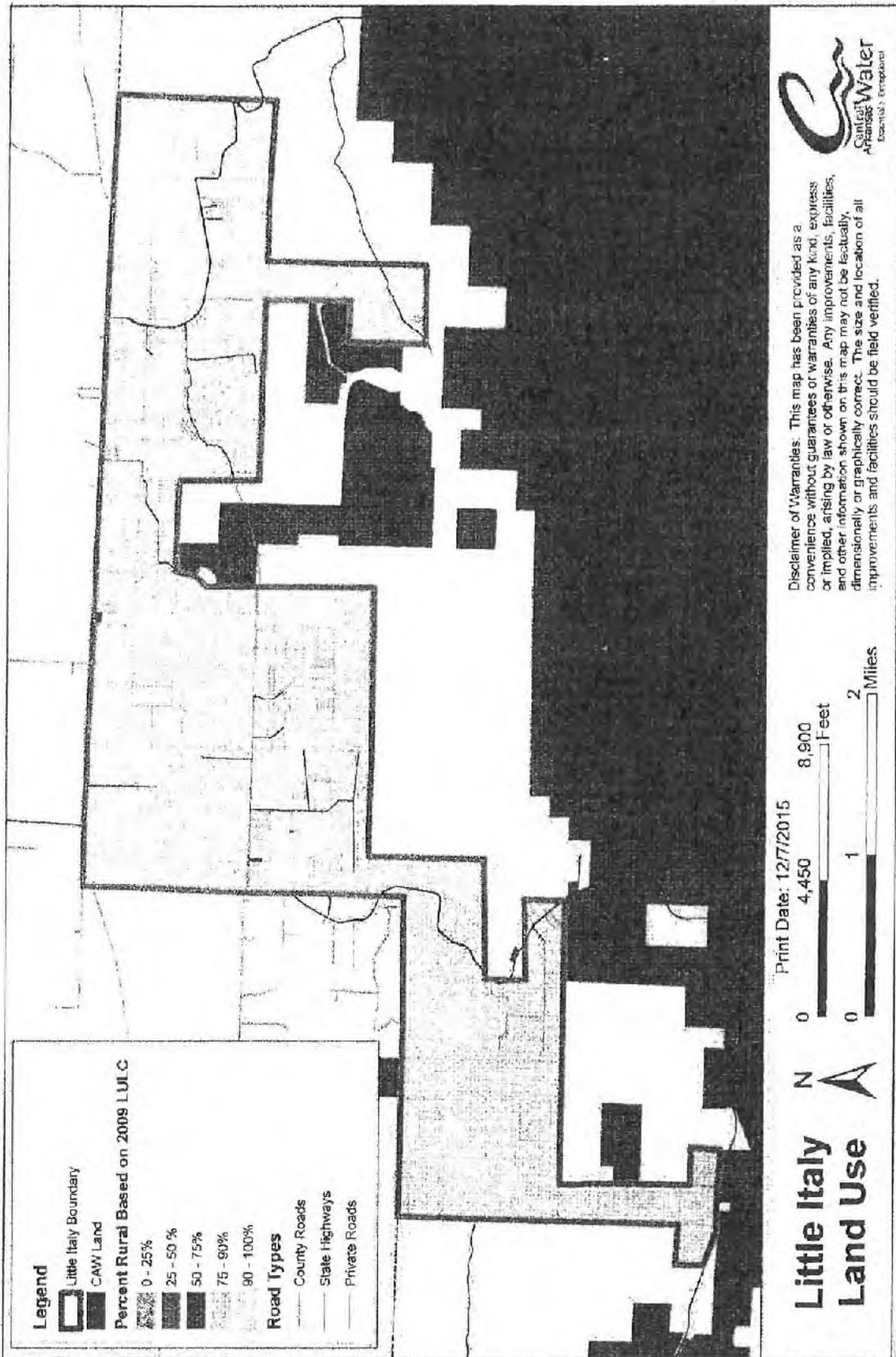
Salutha Beavers
Notary Public (Signature)

My Commission Expires:
30/2006

(S E & L)

Initials: JA

Attachment C Land Use Map



000040

AFFIDAVIT OF VINCE GUILLET

I, Vince Guillet, first being duly sworn, upon oath state of personal knowledge:

1. I am Vince Guillet, GIS Manager at Central Arkansas Water ("CAW"). I am authorized by CAW to submit this affidavit, which I understand will be used to support CAW's Objections to the Petition for Incorporation of the Town of Little Italy.

2. I reviewed the Land Use/Land Cover data set using the process attached hereto and then worked with John Tynan to create the map to which this affidavit is attached.

3. The facts alleged in this affidavit are true and accurate to the best of my knowledge, information, and belief.

FURTHER, AFFIANT SAYETH NOT.


Vince Guillet, GIS Manager

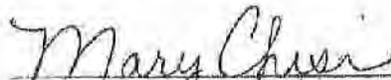
ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF ~~PULASKI~~ *SALINE*

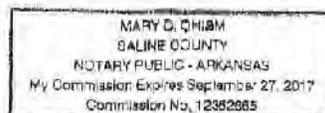
On this the 15th day of December, 2015, before me, a Notary Public, personally appeared Vince Guillet, an individual, who executed the foregoing instrument for the purposes therein contained, by signing his name thereto.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.


Notary Public

My Commission Expires:

9-27-17



2009 Land Use / Land Cover GIS Data Development Process Steps and Results

In November 2009 CAW contracted with a GIS service provider to develop a Land Use/Land Cover (LU/LC) dataset to for the Lake Maumelle Watershed in Perry, Pulaski, and Saline Counties Arkansas.

The LULC classification was done using the following steps:

1. Determined classes to be present in the final LU/LC dataset: Pasture/Bare Ground, Clear Cut, Deciduous Forest, Lake/Pond, River/Stream, Rooftop, Paved Surface, Unpaved Surface, and Natural Rock
2. Used previously obtained 1 foot resolution, color infrared, ortho-rectified aerial imagery. Imagery was rectified using on-board GPS and IMU, the best available elevation model, triangulation, and other adjustment methods.
3. Obtained representative sample points of each category by GPS ground collection.
4. Used the known points for each category to "train" computer image processing software on the spectral signature of each class desired.
5. Used the image processing software to auto-classify the color Infrared imagery into desired categories using the training results.
6. Hand reviewed the computer classification and made manual modification to results.
7. Used aerial Imagery to manually digitize classes that are easily identifiable by a human technician: Clear Cut, Rooftop, Paved Surface, Unpaved Surface, and Natural Rock
8. Replace auto-classified data with manually digitized features.
9. Use an independent set of test points (not used for previous training) of known classes to quality control the results

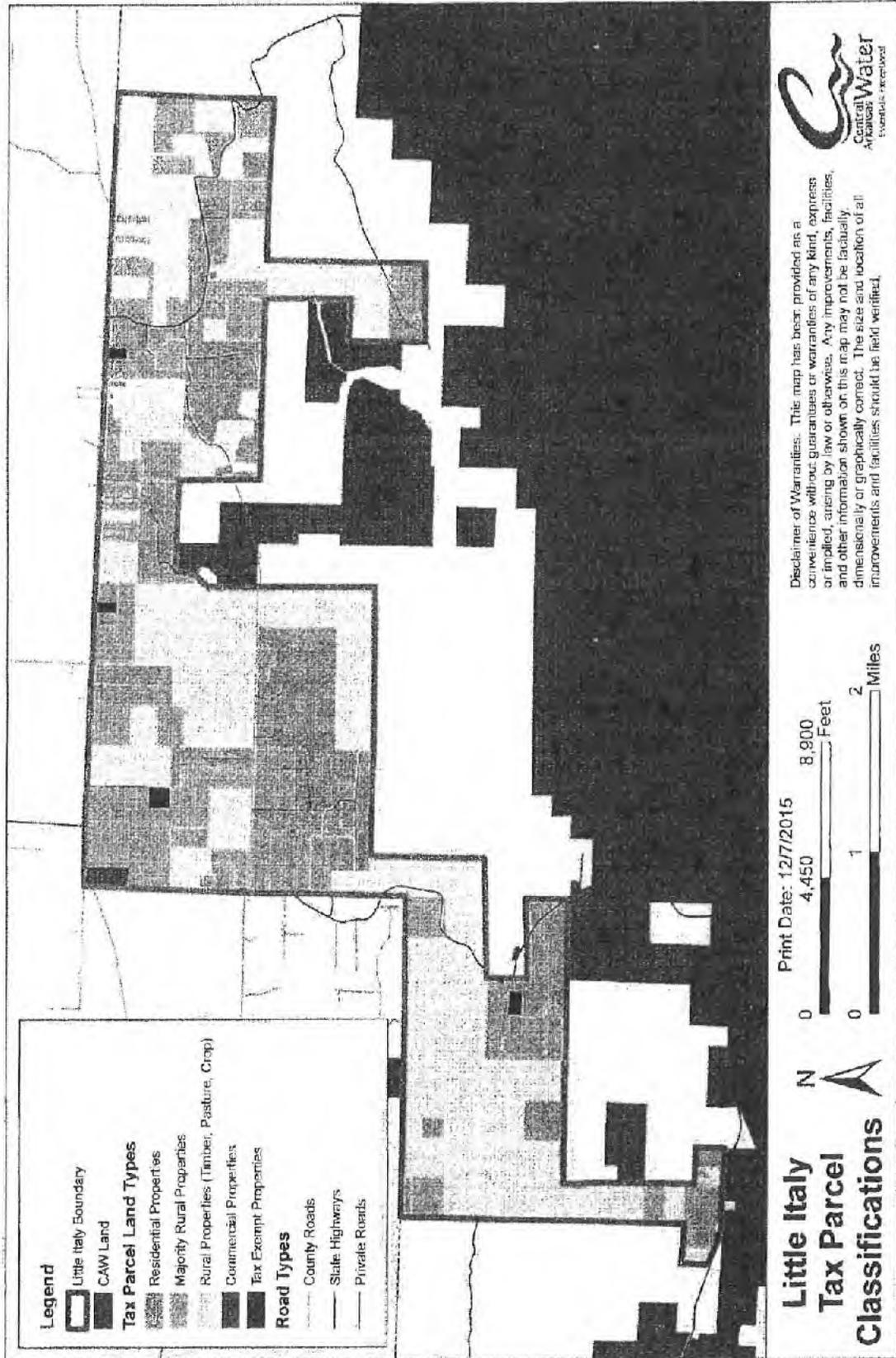
The following are the accuracy results from the quality control test data:

	Bare Ground-0	Clearcut-1	Hardwood-2	Lakes & Ponds-3	Pine-4	Rivers & Streams-5	Impervious Surfaces-6	Row Total	Producer's Accuracy
Bare Ground-0	12	0	1	0	1	0	0	14	85.71%
Clearcut-1	0	16	0	0	0	0	0	16	100.00%
Hardwood-2	0	0	76	0	15	0	0	91	83.52%
Lake & Pond-3	0	0	0	24	0	0	0	24	100.00%
Pine-4	1	1	17	0	194	0	0	213	91.08%
Rivers & Streams-5	0	0	0	0	0	2	0	2	100.00%
Impervious Surfaces-6	0	0	2	0	0	0	8	10	80.00%
Column Total	13	17	96	24	210	2	8		
User's Accuracy	92.31%	94.12%	79.17%	100.00%	92.38%	100.00%	100.00%		

Reference Data

Attachment D

Tax Assessor Classification Map



AFFIDAVIT OF JOHN TYNAN

I, John Tynan, first being duly sworn, upon oath state of personal knowledge:

1. I am John Tynan, Director of Customer Relations & Public Affairs at Central Arkansas Water ("CAW"). I am authorized by CAW to submit this affidavit, which I understand will be used to support CAW's Objections to the Petition for Incorporation of the Town of Little Italy.

2. I am familiar with the above referenced Petition and the Objections to be filed by CAW.

3. CAW's Objections states that approximately 65% of the land within the proposed Town is classified and taxed as timber property by the Pulaski County Assessor, 5% is classified as crop or pastureland, 1% is classified as water, and 29% is classified as residential property.

4. I personally reviewed the Pulaski County Assessor's data for each property in the proposed Town of Little Italy, with the exception of the tax exempt parcels, on or about June 15, 2015, at <http://www.arcountydata.com>. I transcribed the acreage of each tax type for each parcel from the Assessor's website into an excel spreadsheet. I completed quality control efforts on December 8 and 9, 2015. I then determined the percentages noted in item 3 above using the assessed acreage of the entire parcel. This analysis, therefore, assumes that for parcels that are partially within Little Italy, the assessed tax acreage for the portion within Little Italy has the same ratio as the entire parcel. The analysis provided a total of 5,925.71 acres of assessed acreage and is approximately 320 acres larger than the proposed boundary of Little Italy due to the inclusion of acreage for entire parcels when only portions of some parcels are within the proposed boundary. Working with Vince Guillet, GIS Manager at CAW, we created the map to which this affidavit is attached.

5. The facts alleged in this affidavit are true and accurate to the best of my knowledge, information, and belief.

FURTHER, AFFIANT SAYETH NOT.



John Tynan, Director of Customer Relations & Public Affairs at Central Arkansas Water

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF SALINE

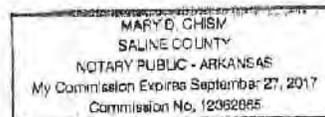
On this the 16th day of December, 2015, before me, a Notary Public, personally appeared John Tynan, an individual, who executed the foregoing instrument for the purposes therein contained, by signing his name thereto.

IN WITNESS WHEREOF, I hercunto set my hand and official seal.

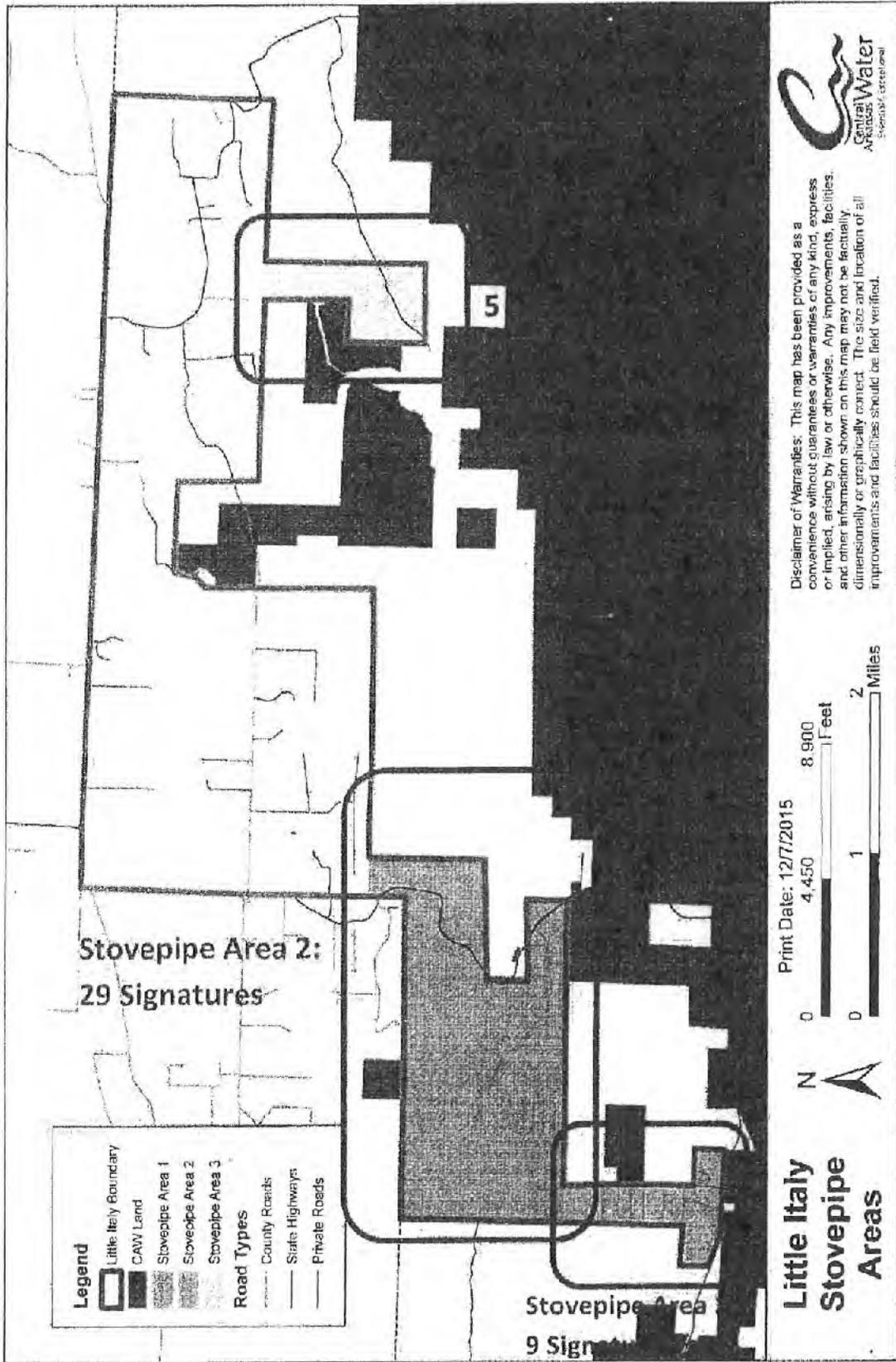

Notary Public

My Commission Expires:

9-27-17



Attachment E Stovepipe Area Map



AFFIDAVIT OF EVE JORGENSEN

I, Eve Jorgensen, first being duly sworn, upon oath state of personal knowledge:

1. I am Eve Jorgensen, GIS Technician at Central Arkansas Water ("CAW"). I am authorized by CAW to submit this affidavit, which I understand will be used to support CAW's Objections to the Petition for Incorporation of the Town of Little Italy.

2. CAW's Objections states that "the proposed Town is approximately 5,606 acres or 8.8 square miles" and that "approximately 90%, or 5,044 acres, of the proposed Town is within the Lake Maumelle watershed."

3. I personally reviewed and generated a map of the legal description of the proposed Town submitted with the Petition for Incorporation and completed the analysis to determine the above facts. I also reviewed the petition and assigned signatures to parcels based on addresses provided in the petition. This information was used to determine the number of signatures in each stovepipe area.

3. The facts alleged in this affidavit are true and accurate to the best of my knowledge, information, and belief.

FURTHER, AFFIANT SAYETH NOT.


Eve Jorgensen, GIS Technician

000037

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF SALINE

On this the 16th day of December, 2015, before me, a Notary Public, personally appeared Eve Jorgensen, an individual, who executed the foregoing instrument for the purposes therein contained, by signing his name thereto.

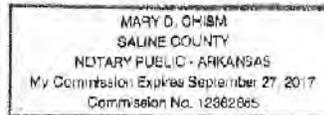
IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Mary D. Chism

Notary Public

My Commission Expires:

9-27-17



AFFIDAVIT OF MARY CHISM

I, Mary Chism, first being duly sworn, upon oath state of personal knowledge:

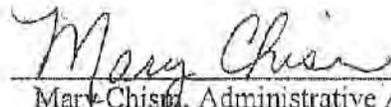
1. I am Mary Chism, Administrative Assistant at Central Arkansas Water ("CAW"). I am authorized by CAW to submit this affidavit, which I understand will be used to support CAW's Objections to the Petition for Incorporation of the Town of Little Italy.

2. CAW's Objections states "a survey of the 153 Arkansas municipalities with populations of 200 to 601, Little Italy would have the second lowest population density and the second largest geographic area" and "a survey of the 153 Arkansas municipalities with populations of 200 to 601, Little Italy would have the lowest revenue of any municipality."

4. I personally surveyed the Arkansas Legislative Audits for the municipalities mentioned above on or about June 4, 2015, at <http://www.legaudit.state.ar.us>. I placed the information into a database and created a table that ranked the municipalities according to population, geographic area, revenues and disbursements.

5. The facts alleged in this affidavit are true and accurate to the best of my knowledge, information, and belief.

FURTHER, AFFIANT SAYETH NOT.



Mary Chism, Administrative Assistant

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF PULASKI

On this the 15th day of December, 2015, before me, a Notary Public, personally appeared Mary Chism, an individual, who executed the foregoing instrument for the purposes therein contained, by signing his name thereto.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Judy Mallet
Notary Public

My Commission Expires:

2-4-2025



IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO.: 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

BRIEF IN SUPPORT OF MOTION TO INTERVENE

Central Arkansas Water, by and through its attorney, for its brief in support of motion to intervene, states:

1. Central Arkansas Water is entitled to intervene as a matter of right.

Central Arkansas Water seeks to intervene in this action pursuant to Rule 24(a) of the Arkansas Rules of Civil Procedure, which provides for intervention as a matter of right:

[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention is allowed as a matter of right when an Arkansas statute "confers an unconditional right to intervene" or the applicant "claims an interest relating to the property or transaction which is the subject of the action." See *Arkansas State Highway Com'n v. Wilkinson*, 12 Ark. App. 28, 670 S.W.2d 462 (1984). Central Arkansas Water has an interest related to the property that is the subject of this action and seeks intervention as a matter of right on that basis.

A party is entitled to intervention as of right if it satisfies three requirements: "(1) that he has a recognized interest in the subject matter of the primary litigation; (2) that his interest might be impaired by the disposition of the suit; and (2) that his interest is not adequately represented by existing parties." *Bradford v. Bradford*, 52 Ark. App. 81, 89, 915 S.W.2d 723, 727 (1996) (citing *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983)). Each of these requirements is satisfied in this instance.

A. *Central Arkansas Water has a statutory right to participate in this lawsuit.*

Central Arkansas Water is a landowner within the boundaries of the Proposed Town. On that basis alone, it has standing to intervene in this case. Ark. Code Ann. § 14-38-103(a)(2) specifically states that "any person interested may appear and contest the granting of the prayer of the petition. Courts have concluded that "any person interested" means any person who has some interest in the municipality or the area to be annexed. Central Arkansas Water as a landowner clearly has an interest in the area within the Proposed Town to be annexed. *City of Crossett v. Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971); *Turner v. Wiederkehr Village*, 261 Ark. 72, 546 S.W.2d 717 (1977).

Likewise, a person who appears at the county court hearing in protest is qualified to appeal. *Skinner v. City of El Dorado*, 248 Ark. 916, 454 S.W.2d 656 (1970). Therefore, if Central Arkansas Water can perfect an appeal to the Circuit Court, it should also be entitled to intervene and be a party to an appeal as a matter of right. See also, *Campbell v. City of Cherokee Village West*, 333 Ark. 310, 969

S.W.2d 179 (1998) (person need to appear at county court hearing to have standing to appeal for injunction in circuit court against such incorporation).

In the appeal, the Circuit Court is also required to make its decision on the petition after it receives all answers, affidavits, and proofs as it may deem pertinent. See Ark. Code Ann. § 14-38-107(a). Therefore, without Central Arkansas Water's intervention and participation, its answer, affidavits and proof are not before the Court. Intervention allows this Court to complete its review of all of the competing interests in the case.

B. Central Arkansas Water has a recognized interest in the subject matter of this suit.

The subject of this lawsuit is the request for incorporation of a community to be called Little Italy (the "Proposed Town"). Approximately ninety percent (90%) of the Proposed Town is within the Lake Maumelle Watershed, the key source of drinking water for 400,000 citizens of the Central Arkansas area. Central Arkansas Water, a consolidated municipal water system created and existing under the laws of Arkansas¹ is the owner of 28,000 acres of land and water within the Lake Maumelle Watershed. Central Arkansas Water depends on the Lake Maumelle Watershed to maintain a high-quality water source. Because of the importance of Lake Maumelle as the water supply for the area, Central Arkansas Water adopted a comprehensive Lake Maumelle Watershed Management Plan in February 2007.

The plan's key provisions seek to maintain Lake Maumelle as a high-quality drinking water supply, protect the lake from increased pollution that may result

¹ See Act 982 of the 83rd General Assembly of the State of Arkansas, the Consolidated Waterworks Authorization Act.

from development and other land disturbances, provide for the equitable sharing of costs and benefits associated with this protection, and minimize land-use restrictions on owners of property surrounding the water source.

The Proposed Town the Petitioners seek to incorporate would remove over 5,600 acres of real property from the water quality protections provided by the Pulaski County Lake Maumelle Watershed Zoning Code and Chapter 8 of the Pulaski County Subdivision and Development Code. The Proposed Town lies within what is known as "Critical Area B." This means that runoff from lands located within Critical Area B flow directly to Central Arkansas' Water Source, Lake Maumelle. Central Arkansas Water has identified specific requirements for the Conservation Design Approach in Critical Area B in order to further the provisions of the Management plan. Allowing for the Petitioners to incorporate a city within the boundaries of the Lake Maumelle Watershed could potentially have adverse effects on the water supply of Central Arkansas.

If the Lake Maumelle Watershed were to become tainted, Central Arkansas Water and all 400,000 residents served by Central Arkansas Water would face increased economic costs in treating the water. When a party has a recognized financial stake in a suit, its interest is sufficient for intervention. *See UHS of Arkansas, Inc. v. City of Sherwood*, 296 Ark. 97, 103, 752 S.W.2d 36, 38 (1988) (finding a party has a sufficient interest to intervene where an adverse ruling would affect its economic interest).

Here, Central Arkansas Water has an interest in maintaining the Lake Maumelle Watershed as well as a financial interest. The sparse development in the Lake Maumelle Watershed contributes to high-quality drinking water. The changes following an incorporation of the Proposed Town could impact and reduce the quality of the water and lead to increased treatment costs of the water for Central Arkansas Water. Therefore, Central Arkansas Water has a recognized interest in the subject matter of the suit.

C. *Central Arkansas Water's interest may be impaired by disposition of the suit.*

As set out above, Central Arkansas Water has a vital interest in the subject matter of the suit. If the Petitioners are allowed to incorporate the Proposed Town inside the Lake Maumelle Watershed may risk the quality of the local water supply. Central Arkansas Water's participation and evidence offered as an interested party at the Pulaski County Quorum Court highlights its significant interest in the Proposed Town within the Lake Maumelle Watershed for purposes of maintaining the water quality. Therefore, Central Arkansas Water's interest in maintaining a the water quality may be impaired if Petitioners are allowed to incorporate.

D. *Central Arkansas Water's interest is not adequately represented by existing parties.*

Although Pulaski County has an interest in defending this lawsuit, it does not share the same interest as Central Arkansas Water. The Pulaski County Court denied incorporation because the area was unreasonably large, lacked the necessary unity, and the community had an inadequate budget. Concern for water-quality

was not a recognized interest by Pulaski County. Central Arkansas Water can represent the unique and significant interests in this litigation. See *UHS*, 296 Ark. at 104 (“When the interest is identical with that of a party to the litigation, the interest is adequately represented, but where the applicant’s interest is significantly different from that of any party to the action, it is not . . .”). For these reasons, Central Arkansas Water is entitled to intervene as a matter of right.

2. Alternatively, Central Arkansas Water should be permitted to intervene.

Central Arkansas Water should also be entitled to discretionarily intervene under Arkansas Rule of Civil Procedure 24(b). Permissive intervention is allowed “when an applicant’s claim or defense and the main action have a question of law or fact in common.” Ark. R. Civ. P. 24(b)(2). Rule 24(b) further provides that “[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.*

Central Arkansas Water asserts it has a significant interest in this matter because the area Petitioners seek to incorporate lies within the Lake Maumelle Watershed. Maintaining the quality of the water supply is important to not only Central Arkansas Water, but all of the consumers who rely on Lake Maumelle as their water source. No other party in the matter has the extensive knowledge and research to explain and establish the importance of the areas located in the Lake Maumelle Watershed. Central Arkansas Water’s concerns about maintaining the quality of the water supply presents common questions of law and fact with the claims asserted by Petitioners.

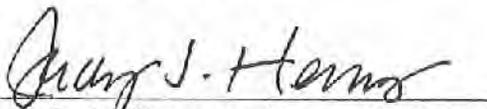
Further, allowing Central Arkansas Water to intervene will not result in any delay in adjudicating this matter as Petitioner has only recently filed its notice of appeal, and the case is not yet set for trial. Moreover, no parties will be prejudiced by Central Arkansas Water's intervention as it will merely be presenting facts on the importance to its business and its customers, the citizens of Pulaski County.

3. Conclusion.

The interests of justice will be served if Central Arkansas Water is afforded the opportunity to be heard and protect its interests in the matters raised by Petitioner's notice of appeal. This also affords the Court with the information to make a fully informed decision.

Respectfully submitted,

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX (501) 376-442
E-MAIL: jhenry@wlj.com

By 
Judy Simmons Henry (84069)
Attorney for Central Arkansas Water

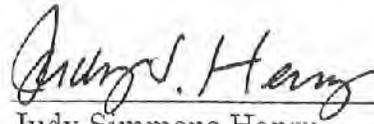
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was mailed this 25 day of April, 2016,
via First Class U.S. Mail to the following:

Mary-Tipton Thalheimer
Quattlebaum, Grooms & Tull PLLC
111 Center Street, Ste 1900
Little Rock, AR 72201

Adam B. Fogleman,
Pulaski County Attorney
201 S. Broadway, Ste 400
Little Rock, AR 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Ste 400
Little Rock, AR 72201



Judy Simmons Henry

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO.: 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

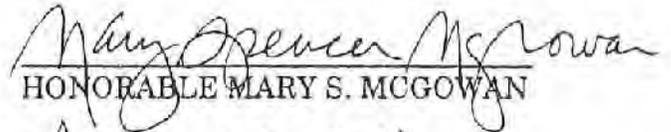
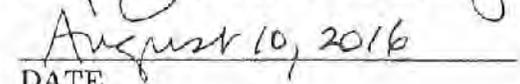
CENTRAL ARKANSAS WATER

INTERVENOR

ORDER GRANTING MOTION TO INTERVENE

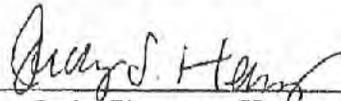
On April 25, 2016, Central Arkansas Water ("CAW") filed a motion to intervene (the "Motion"). There are no objections or responses to the Motion by the existing parties to this case. The Court, being well and sufficiently advised, FINDS that the Motion is well taken and that it should be granted. The Court ORDERS that the Motion is granted, that CAW is made a party defendant as intervenor in this case, and that the style of the case is revised to reflect that CAW is intervenor as shown above. It is further ORDERED that CAW shall have fourteen (14) days from the date of the entry of this order within which to file and serve an answer or otherwise respond to the appeal of the petitioner.

IT IS SO ORDERED.


HONORABLE MARY S. MCGOWAN

DATE

Submitted by:

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX (501) 376-442
E-MAIL: jhenry@wlj.com

By 

Judy Simmons Henry (84069)
Attorneys for Central Arkansas Water

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENTS/DEFENDANTS

CENTRAL ARKANSAS WATER

INTERVENOR

CENTRAL ARKANSAS WATER'S
MOTION TO DISMISS NOTICE OF APPEAL

Central Arkansas Water ("CAW") appears by and through its undersigned counsel and for its Motion to Dismiss the Notice of Appeal filed by the Incorporators of the Community Known as Little Italy (the "Petitioners"), states:

1. On May 13, 2015, the Petitioners filed a Petition for Incorporation (the "Petition") seeking to incorporate the community known as Little Italy.
2. On February 26, 2016, Pulaski County Court Judge Barry Hyde entered an order denying the Petition ("County Court Order").
3. On March 23, 2016, the Petitioners filed a notice of appeal of the County Court Order to this Court.
4. CAW, as an interested party, filed a motion to intervene on April 25, 2016. CAW's motion to intervene was granted on August 10, 2015.
5. Under Rule 9(e) of the Arkansas District Court Rules, a party may appeal from county court to circuit court by filing a notice of appeal with the clerk of

the circuit court within thirty days of the final judgment and a certified copy of the county court's final judgment must be attached.

6. Rule 9(e) also provides that "the petitioner or plaintiff in county court shall have all the obligations of the plaintiff in a case that has been appealed from district court to circuit court."

7. Rule 9(b)(3) states that if service of "certified copies of the *district court docket sheet or record and the complaint or claim form is not made within 120 days after filing the district court complaint or claim form with the circuit court or within the time period established by an extension granted pursuant to this subdivision, the action shall be dismissed without prejudice upon motion or upon the court's initiative.*" (emphasis added).

8. The Petitioners failed to comply with Rule 9(b)(3) by failing to timely serve the required certified copies within the time allowed.

9. The Petitioners failed to comply with Rule 9(c) by failing to assert all of their claims in Circuit Court.

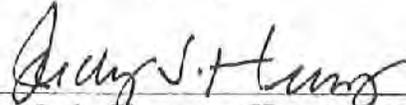
10. Accordingly, the Notice of Appeal must be dismissed because the Petitioners failed to timely perfect their appeal and to state their claims.

11. This Motion to Dismiss the Notice of Appeal is supported by a contemporaneously filed Brief in Support, incorporated herein.

WHEREFORE, Central Arkansas Water respectfully requests that this Court dismiss the Notice of Appeal filed by the Incorporators of the Community Known as Little Italy, without prejudice, and for all other just and proper relief.

Respectfully submitted,

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX (501) 376-442
E-MAIL: jhenry@wlj.com

By 
Judy Simmons Henry (84069)
Attorney for Central Arkansas Water

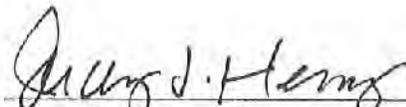
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was mailed this 10th day of August, 2016, via First Class U.S. Mail to the following:

Mary-Tipton Thalheimer
Quattlebaum, Grooms & Tull PLLC
111 Center Street, Ste 1900
Little Rock, AR 72201

Adam B. Fogleman,
Pulaski County Attorney
201 S. Broadway, Ste 400
Little Rock, AR 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Ste 400
Little Rock, AR 72201


Judy Simmons Henry

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENTS/DEFENDANTS

CENTRAL ARKANSAS WATER

INTERVENOR

CENTRAL ARKANSAS WATER'S BRIEF IN SUPPORT
OF MOTION TO DISMISS NOTICE OF APPEAL

Central Arkansas Water ("CAW"), by and through its undersigned counsel, for its brief in support of its Motion to Dismiss the Notice of Appeal filed by the Incorporators of the Community known as Little Italy (the "Petitioners"), states:

I. INTRODUCTION

The Petitioners filed a Petition for Incorporation (the "Petition") seeking to incorporate the community known as Little Italy on May 13, 2015. After briefing and a hearing, the Petition was denied on February 26, 2016. The Petitioners filed a notice of appeal with this Court on March 23, 2016. CAW filed a motion to intervene on April 25, 2016. The motion to intervene was granted on August 10, 2016.

The Petitioners failed to perfect their appeal within 120 days after filing the circuit court Notice of Appeal. No extension of time was ever sought or granted, and time has now expired. For these reasons, CAW requests that this Court dismiss the Petitioners Notice of Appeal without prejudice.

II. ARGUMENT

A. The Notice of Appeal should be dismissed because Petitioners failed to timely perfect their appeal.

Under Rule 9(e) of the Arkansas District Court Rules, a party may appeal from county court to circuit court by filing a notice of appeal with the clerk of the circuit court within thirty days of final judgment and a certified copy of the county court's final judgment must be attached. Rule 9(e) also provides that "the petitioner or plaintiff in county court shall have all the obligations of the plaintiff in a case that has been appealed from district court to circuit court." Rule 9(b)(3) states that if service of "certified copies of the *district court docket sheet or record and the complaint or claim form* is not made within 120 days after filing the district court complaint or claim form with the circuit court or within the time period established by an extension granted pursuant to this subdivision, *the action shall be dismissed without prejudice upon motion or upon the court's initiative.* (emphasis added).

District Court Rules governing appeals from district court to circuit court are mandatory and jurisdictional. *Velek v. State (City of Little Rock)*, 364 Ark. 531, 534, 222 S.W.3d 182, 185 (2006). Failure to comply with those rules mandates dismissal of an appeal. *Id.* Moreover, the circuit court has no authority to accept the appeal if the appellant fails to comply with the requirements of the rule governing appeals from district or county court to circuit court. *Arkansas Game & Fish Comm'n v. Eddings*, 2009 Ark. 359, 7, 324 S.W.3d 328, 332 (2009). The Arkansas Supreme Court requires strict compliance with rule governing appeals from district or county court to circuit court. *Id.*

This case is being appealed from county court to circuit court; therefore, the Petitioners have all the obligations of a plaintiff that has appealed from district court to circuit court. The first notice of appeal was filed on March 23, 2016, by the Petitioners. Therefore, according to Rule 9 of the Arkansas District Court Rules, the Petitioners had 120 days from March 23, 2016, to file the county court docket sheet or record *and* the complaint or claim form in circuit court. The deadline for the Petitioners to file the required documentation was July 23, 2016. To date, no county court docket sheet, record, or complaint has been filed and no extension of time was ever sought or granted to Petitioners.

Further, under Rule 9(c) the Petitioners have failed to assert their claims in this Court. AR.D.C.R. 9(c)(1). Petitioners not only failed to state their claims, they failed to file certified copies of their complaint and other papers material to the disputed issues. AR.D.C.R. 9(c)(2).

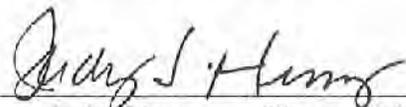
According to Arkansas law, the timely perfection of an appeal—pursuant to Rule 9 of the Arkansas District Court Rules—is a jurisdictional requirement which must be complied with in order to appeal. Moreover, since the Petitioners have failed to file their record or complaint, the circuit court has no authority to accept the appeal. Because the Petitioners have failed to strictly comply with Rule 9 to timely perfect their appeal, the Motion to Dismiss the Notice of Appeal with prejudice should be granted.

III. CONCLUSION

For these reasons, CAW requests that this Court dismiss the Notice of Appeal filed by the Petitioners without prejudice.

Respectfully submitted,

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By 
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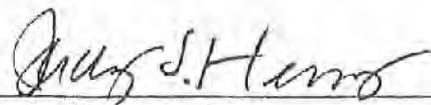
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was mailed this 10th day of August, 2016, via First Class U.S. Mail to the following:

Mary-Tipton Thalheimer
Quattlebaum, Grooms & Tull PLLC
111 Center Street, Ste 1900
Little Rock, AR 72201

Adam B. Fogleman,
Pulaski County Attorney
201 S. Broadway, Ste 400
Little Rock, AR 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Ste 400
Little Rock, AR 72201


Judy Simmons Henry

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
9th DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

MOTION TO DISMISS

Comes now Pulaski County, by and through their attorneys, the Pulaski County Attorney's Office, and for their Motion to Dismiss, doth state:

1. On March 23, 2016, Plaintiffs filed a Notice of Appeal in Pulaski County Circuit Court, pursuant to Ark. Dist. Ct. R. 9(e). Plaintiffs attached a certified copy of the county court's final judgment as an exhibit.

2. The basis of Plaintiffs' Notice of Appeal was that the Judgment entered by Pulaski County Judge Barry Hyde ("County Judge") should be reversed and remanded to the Pulaski County Court ("County Court") with instructions to permit the incorporation of the community known as Little Italy. (Pl. Notice of Appeal ¶ 8.)

3. As set forth in the accompanying Brief in Support of this Motion, Plaintiffs' Notice of Appeal should be dismissed as Plaintiffs failed to strictly comply with Ark. Dist. Ct. R. 9, by perfecting their County Court appeal, so this Court never acquired jurisdiction.

4. Pulaski County incorporates herein, as if stated word for word, the Brief filed in support of this Motion.

5. To the extent that there are any differences between Pulaski County's Motion to Dismiss and Brief in Support, and the Motion to Dismiss and Brief in Support filed by Central

Arkansas Water ("CAW") on August 10, 2016, Pulaski County joins in and adopts, pursuant to Ark. R. Civ. P. 10(c), CAW's Motion to Dismiss and Brief in Support.

WHEREFORE, Pulaski County prays that this Court dismiss Plaintiff's Notice of Appeal, as this Court never acquired jurisdiction, and for all other just and equitable relief to which they may be entitled.

RESPECTFULLY SUBMITTED,

PULASKI COUNTY ATTORNEY'S OFFICE
201 South Broadway, Suite 400
Little Rock, Arkansas 72201
(501) 340-8285

By: /s/ Adam Fogleman
Adam Fogleman, Ark. Bar #09234
Pulaski County Attorney
William A. Gruber, Ark. Bar #11104
Pulaski County Staff Attorney
Chastity Scifres, Ark. Bar # 99143
Chief Deputy Pulaski County Attorney

CERTIFICATE OF SERVICE

I, Adam Fogleman, do hereby certify that a true and correct copy of the above and foregoing was electronically filed on August 11, 2016, with the Clerk of this Court using the Court's electronic filing system, which shall send notification to all attorneys of record.

/s/ Adam Fogleman
Adam Fogleman

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
9th DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONERS/PLAINTIFFS

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Pulaski County, by and through their attorneys, the Pulaski County Attorney's Office, and for their Brief in Support of Motion to Dismiss, doth state:

I. FACTUAL AND PROCEDURAL HISTORY:

On May 14, 2015, petition 2015-0004 was filed with the Pulaski County Clerk ("County Clerk"), seeking to incorporate an area to be known as Little Italy into a town pursuant to Arkansas Code Annotated § 14-38-101 *et seq.* Ultimately, on February 26, 2016, the Pulaski County Judge ("County Judge") entered a Judgment, filed the same day with the Pulaski County Circuit Clerk ("Circuit Clerk"), denying the petition of the Incorporators of the Community Known as Little Italy (hereinafter "Petitioners"). On March 23, 2016, Petitioners filed their Notice of Appeal with the Pulaski County Circuit Clerk and attached the County Judge's February 26, 2016 Judgment. To date, Petitioners have not filed a certified copy of the docket sheet, or record and complaint, or claim form of the underlying matter, with the Pulaski County Circuit Clerk. No affidavit has been filed in this matter indicating that a certified copy was timely requested from the County Clerk. No additional pleadings, beyond the Notice of Appeal, have been filed by Petitioners in this matter.

II. LAW AND ANALYSIS:

A. PETITIONERS FAILED TO PERFECT THEIR APPEAL

Arkansas District Court Rule 9 governs the procedure for appealing county court decisions. The initial step, in appealing a county court decision, is filing a notice of appeal, with the clerk of the circuit court having jurisdiction over the matter, within thirty (30) days of the county court filing the relevant order with the county clerk. Ark. Dist. Ct. R. 9(e). Additionally, as an initial matter, a certified copy of the county court's final order must be attached with the notice of appeal. Id.

Upon a petitioner fulfilling section (e)'s obligations, they must then satisfy the requirements of Ark. Dist. Ct. R. 9(b) to perfect their appeal. Id. Specifically, Ark. Dist. Ct. R. 9(b)(1)(i) requires the appealing party file "a certified copy of the district court's docket sheet which shows the entry awarding judgment and all prior entries or a certified copy of the record of the district court proceedings consisting of all documents and motions filed in the district court [.]". Additionally, Plaintiff must file "a certified copy of the complaint filed in the district court or, if filed in accordance with Rule 10 of these rules, a certified copy of the claim form filed in the small claims division of the district court." Ark. Dist. Ct. R. 9(b)(1)(ii). Lastly, section (b) sets forth the requirements for service of the documents listed in (b)(1)(i) & (ii), to the defendant parties. Ark. Dist. Ct. R. 9(b). Strict compliance, not merely substantial compliance, with Ark. Dist. Ct. R. 9 is required. E.g., Johnson v. Dawson, 2010 Ark. 308, at 8, 365 S.W.3d 913, 917.

Petitioners met the requirements of Ark. Dist. Ct. R. 9(e) by filing their Notice of Appeal, and attaching a certified copy of the County Court's Judgment to their Notice of Appeal, on March 23, 2016. However, the mandatory procedural requirements of Ark. Dist. Ct. R. 9(b),

required to perfect their appeal, were not met by Petitioners. Specifically, Plaintiffs were required to complete the obligations of Ark. Dist. Ct. R. 9(b)(1)(i) & (ii).

Specifically, for Petitioners to comply with Ark. Dist. Ct. R. 9(b)(1), they had thirty (30) days from the filing of the County Court Order to file with the Circuit Clerk a certified copy of the County Court record. Ark. Dist. Ct. R. 9(b)(2). Petitioners' deadline to file its certified docket sheet, or record, and complaint, or claim form, was March 27, 2016. Alternatively, Petitioners might have filed an affidavit, within forty (40) days after the County Court filed its Judgment, stating that the County Court Clerk did not, after Petitioners' timely request, prepare or certify the necessary documents. Id. Petitioners' deadline to file such an affidavit was April 6, 2016. No certified copy of the record was filed, or affidavit, within the time period specified in Ark. Dist. Ct. R. 9(b)(2). As such, Petitioners did not perfect their appeal.

B. PETITIONERS' FAILURE TO PERFECT APPEAL RESULTS IN COURT NOT ACQUIRING JURISDICTION

As referenced in Section A, by not strictly complying with Ark. Dist. Ct. R. 9's procedural rules, Petitioners did not perfect their appeal. By not perfecting their appeal, this Court did not acquire jurisdiction.

The provisions of Ark. Dist. Ct. R. 9 are both mandatory and jurisdictional. E.g., Johnson, 2010 Ark. 308, at 9. Where an appeal from an inferior court is not perfected as required by law, the circuit court never acquires jurisdiction. E.g., Howard v. Ark. Cama Tech., 2012 Ark. App. 567, at 4-5, ___ S.W.3d ___. "Perfectured means that all legal steps have been taken which are necessary to complete the action undertaken." Wright v. City of Little Rock, 366 Ark. 96, 99, 233 S.W.3d 644, 646 (2006). Jurisdiction of a court to hear a matter is a threshold matter that must be heard first. E.g., Howard, 2012 Ark. App. 567, at 4.

Because Petitioners failed to take all necessary legal steps necessary, by not timely filing a record of the county Court proceedings, they have failed to perfect their appeal. Thus, this Court has not acquired jurisdiction over the matter.

C. PETITIONERS HAVE FAILED TO ASSERT THEIR CLAIMS

In addition to failing comply with Ark. Dist. Ct. R. 9(b), as referenced in Sections A & B above, Petitioners have failed to assert any claims in this matter. Pursuant to Ark. Dist. Ct. R. 9(c), assertion of claims, and their basis, is accomplished by filing of the record or claim form. Accordingly, Petitioners have failed to assert any claims, as required by Ark. Dist. Ct. R. 9(c). Cf. Compute-A-Call, Inc. v. Tolleson, 285 Ark. 355, 356, 687 S.W.2d 129, 130 (1985) (conclusory allegation, with no statement of fact, is not sufficient to give [] jurisdiction); Evans Indus. Coatings v. Chancery Court, 315 Ark. 728, 733, 870 S.W.2d 701, 703 (1994) (holding that pleading conclusory allegation without supporting fact insufficient to establish venue). Accordingly, Petitioners have failed to comply with Ark. Dist. Ct. R. 9(c).

As provided by Ark. Dist. Ct. R. 9(e), “[i]n the circuit-court proceeding, the party who was the petitioner or plaintiff in county court shall have all the obligations of the plaintiff in a case that has been appealed from district court to circuit court.” As stated above, it is incumbent on the Petitioner to satisfy the filing requirements of Ark. Dist. Ct. R. 9 (a)-(d) in order for the Circuit Court to acquire jurisdiction. While Ark. Dist. Ct. R. 9(e) allows for an appeal from County Court to be initiated by filing a notice of appeal and attaching the County Court’s judgment, this distinct requirement for appeals from County Court does not alleviate or abrogate the Petitioners’ obligation to assert their claims and basis for claims in the appeal process. Even if this Court reviews Petitioners’ Notice of Appeal in light of Ark. R. Civ. P. 8(f), which states “all pleadings shall be liberally construed so as to do substantial justice,” the Notice of Appeal

merely concludes “[t]his Court should reverse the Judgment entered by Judge Hyde denying the Petition and remand this matter to Pulaski County Court with instructions to permit the incorporation of the community known as Little Italy.” (Pet. Not. Appeal ¶ 8.)

As such, Petitioners’ Notice of Appeal insufficiently pled sufficient claims and facts to support a claim, sufficient for Petitioners to meet their requirements pursuant to Ark. Dist. Ct. R. 9(c). As such, Petitioners failed to perfect their appeal, which prevents this Court from acquiring jurisdiction.

III. CONCLUSION

The burden is on Petitioners to not just substantially comply with Ark. Dist. Ct. R. 9, but strictly comply with Ark. Dist. Ct. R. 9, to perfect their appeal and for this Court to acquire jurisdiction over their county court appeal. *E.g., Howard*, 2012 Ark. App. 567, at 4-5.

Petitioners failed to even minimally comply with Ark. Dist. Ct. R. 9. Thus, this Court lacks jurisdiction and should dismiss Petitioners’ appeal.

WHEREFORE, Petitioners’ appeal should be dismissed for the foregoing reasons, all relief requested by Plaintiffs be denied, for its costs incurred, and for all other just and proper relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

PULASKI COUNTY ATTORNEY’S OFFICE
201 South Broadway, Suite 400
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(501) 340-8285

By: /s/ Adam Fogleman
Adam Fogleman, Ark. Bar #09234
Pulaski County Attorney
William A. Gruber, Ark. Bar #11104
Pulaski County Staff Attorney
Chastity Scifres, Ark. Bar # 99143
Chief Deputy Pulaski County Attorney

CERTIFICATE OF SERVICE

I, Adam Fogleman, do hereby certify that a true and correct copy of the above and foregoing was electronically filed on August 11, 2016, with the Clerk of this Court using the Court's electronic filing system, which shall send notification to all attorneys of record.

/s/ Adam Fogleman
Adam Fogleman

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

RESPONSE TO PULASKI COUNTY'S
MOTION TO DISMISS

The Incorporators of the Community Known as Little Italy, by and through their attorneys, Quattlebaum, Grooms & Tull PLLC, submit this Response to Pulaski County's Motion to Dismiss.

I. INTRODUCTION

On May 13, 2015, The Incorporators of the Community Known as Little Italy (collectively, "Petitioner") filed a Petition for Incorporation (the "Petition") in the County Court of Pulaski County, Arkansas, seeking to incorporate the community known as Little Italy ("Little Italy"). After a hearing on the Petition, the Pulaski County Court Judge, Barry Hyde ("Judge Hyde"), took the matter under advisement. On February 26, 2016, Judge Hyde entered a final judgment denying the Petition (the "Judgment"). On March 23, 2016, pursuant to Arkansas District Court Rule 9 ("Rule 9"), Petitioner filed a Notice of Appeal, along with a certified copy of the Pulaski County Court's final Judgment, requesting this Court reverse the Judgment and remand the matter to Pulaski County Court with instructions to permit the incorporation of Little Italy. On August 11, 2016, Pulaski County filed its Motion to Dismiss. Pulaski County was apparently inspired by the Motion to Dismiss Notice of Appeal and brief in support thereof filed by Central Arkansas Water ("CAW") the day before. So much so that Pulaski County incorporated the same by reference into

its own Motion to Dismiss. For the reasons stated below, as well as the reasons stated in Petitioner's Response to CAW's Motion to Dismiss Notice of Appeal, which is incorporated herein by reference pursuant to Arkansas Rule of Civil Procedure 10(c), Pulaski County's Motion to Dismiss should be denied.

II. ARGUMENT

A. Petitioner Perfected Its Appeal.

Pulaski County admits in its Brief in Support of Motion to Dismiss that Petitioner "met the requirements of Ark. Dist. Ct. R. 9(e) by filing [its] Notice of Appeal and attaching a certified copy of the County Court's Judgment" within thirty (30) days of Judge Hyde filing the Judgment with the county clerk. *See* Pulaski County's Brief in Support of Motion to Dismiss, page 2. "Subdivision 9(e) makes it clear that an appeal from county court to circuit court may be perfected by filing a *notice of appeal and a certified copy of the county court's final judgment.*" *Pack v. Taylor*, 2010 Ark. App. 756, at * 4, 379 S.W.3d 676, 678 (emphasis in original). Accordingly, despite Pulaski County's declaration in the heading of Section A of its brief that Petitioner failed to perfect its appeal, statements made by Pulaski County in its own brief clearly establish Petitioner perfected the instant appeal.

Notwithstanding the fact Pulaski County's own brief establishes that Petitioner properly perfected its appeal, Pulaski County puts forth the nonsensical argument that to perfect its appeal, Petitioner had to strictly comply with subdivision (e) of Rule 9 as well as the entirety of subdivision (b)(1). This assertion completely ignores the plain language of subdivision (e), which makes it clear that the provisions of subdivisions (a), (b), (c), and (d) of Rule 9 apply to appeals from county court, but only to the extent those subdivisions are not displaced by the provisions of subdivision (e). *See* Ark. Dist. Ct. R. 9(e) ("Unless otherwise provided in this subdivision, the requirements

of subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court.”) (emphasis added).

The Arkansas General Assembly determined that subdivisions (a), (b), (c), and (d) of Rule 9 did not fit well in the context of appeals from county court because the procedures used in county courts varied and usually there was no docket sheet, complaint, or claim form. *See* Ark. Dist. Ct. Rule 9, Addition to Reporter’s Notes, 2008 Amendment. To remedy the deficiency in Rule 9 as it applied to appeals from county court, the legislature added subdivision (e) in 2008, which became effective on January 1, 2009. *See Pack v. Clark*, 2010 Ark. App. 756, at *8, 379 S.W. 3d 676, 680, n. 2. (“The Reporter’s Notes for the 2008 amendment recognize the differences in procedures between district courts and county courts—particularly that many county courts do not maintain a docket sheet—and indicate that the addition of subdivision 9(e) was necessary in order to fit appeals from county courts.”).

As noted above, subdivision (e) of Rule 9 requires a party appealing a county court’s decision to file a notice of appeal and a certified copy of the county court’s final judgment within thirty (30) days of the filing of the final judgment with the county clerk. This requirement is in lieu of, and not in addition to, subdivision (b)’s requirement that an appealing party file either a certified copy of the district court’s docket sheet or a certified copy of the record and either a certified copy of the complaint or the claim form. However, Pulaski County contends that in order to perfect its appeal, Petitioner had to not only file the Notice of Appeal and a certified copy of the Judgment, as required by subdivision (e), but also file a certified copy of the district court’s docket sheet or a certified copy of the entire district court record and a certified copy of the complaint or claim form within thirty (30) days of the entry of the Judgment. Not even CAW argued that the filing of certified copies of the docket sheet or record and complaint or claim form within thirty

(30) days of the filing of the Judgment with the county clerk was needed to perfect an appeal. Pulaski County's argument that Petitioner failed to perfect its appeal has no basis in law as it completely disregards the plain language of Rule 9(e), as well as relevant case law.

B. The Court Acquired Jurisdiction Over Petitioner's Appeal As Soon As Petitioner Perfected Its Appeal.

Pulaski County further asserts that this Court lacks jurisdiction over the instant appeal because Petitioner did not strictly comply with the provisions of subdivision (b)(1). This assertion is wrong for the same reason that Pulaski County's assertion that Petitioner failed to perfect its appeal is wrong: Pulaski County has failed to acknowledge the interplay between subdivisions (b) and (e). As is clear from the plain language of Rule 9 and relevant case law, when an appeal is taken from county court, "subdivision 9(e) controls." *Pack*, 2010 Ark. App. at *8, 379 S.W. 3d at 680 (emphasis added). Simply put, for purposes of applying subdivision (b) to appeals from county court, any time subdivision (b) refers to "certified copies of the district court docket sheet or district court records and a certified copy of the district court complaint or claim form," which constitute the appeal documents for purposes of an appeal from district court, that phrase should be substituted with "a notice of appeal and a certified copy of the county court's final judgment," which constitute the appeal documents for purposes of an appeal from county court.

Pulaski County admitted in its brief that Petitioner complied with the requirements of Rule 9(e) by filing the Notice of Appeal and the certified copy of the Judgment within thirty (30) days of entry of the Judgment. *See* Pulaski County's Brief in Support of Motion to Dismiss, page 2. Thus, Pulaski County has already acknowledged that Petitioner strictly complied with Rule 9's procedural rules as they apply to appeals from county court, and thus, perfected its appeal. *See Wright v. City of Little Rock*, 366 Ark. 96, 99, 233 S.W.3d 644, 646 (2006) ("Perfected means that all legal steps have been taken which are necessary to complete the action undertaken.").

C. Petitioner Has Not Failed To State Its Claims.

Pulaski County also asserts the Notice of Appeal insufficiently pled claims and facts to support a claim and thus failed to comply with Rule 9(c). Pursuant to Rule 9(b)(1), as it applies to appeals from county court, the filing of a notice of appeal and a certified copy of the county court's final judgment with the clerk of the circuit court "shall constitute the filing of the complaint for purposes of commencing the action in circuit court in accordance with Arkansas Rule of Civil Procedure 3(a)." Thus, Rule 9 does not require Petitioner to draft and file a new complaint, but instead provides that Petitioner's filing of a notice of appeal with a certified copy of the county court's final judgment constitutes a complaint.

A notice of appeal must alert the court and other parties of the appealing party's intention to appeal the county court's final order. *Pack*, 2010 Ark. App. at *5 – 6, 379 S.W.3d at 679. The Notice of Appeal clearly states Petitioner seeks reversal of the Judgment and instructions to the Pulaski County Court to permit the incorporation of Little Italy. Thus, the Notice of Appeal makes it clear the purpose of this action is to appeal the Judgment. It, therefore, sets forth the only claim it needs to: the Judgment should be reversed and Little Italy should be incorporated.

III. CONCLUSION

Petitioner complied with Arkansas District Court Rule 9, as it applies to appeals from county court and, therefore, perfected its appeal. For the reasons stated herein, Pulaski County's Motion to Dismiss should be denied, and Petitioner should be awarded all other relief to which it is entitled.

Respectfully submitted,

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By: /s/ Mary-Tipton Thalheimer
Timothy W. Grooms (84058)
R. Seth Hampton (2012279)
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2016, a copy of the foregoing was mailed by regular United States first class mail to the persons named below:

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Judge Barry Hyde
Pulaski County Chief Executive Officer
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/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

**RESPONSE TO CENTRAL ARKANSAS WATER'S
MOTION TO DISMISS NOTICE OF APPEAL**

The Incorporators of the Community Known as Little Italy, by and through their attorneys, Quattlebaum, Grooms & Tull PLLC, submit this response to Central Arkansas Water's Motion to Dismiss Notice of Appeal.

I. INTRODUCTION

On May 13, 2015, The Incorporators of the Community Known as Little Italy (collectively, "Petitioner") filed a Petition for Incorporation (the "Petition") in the County Court of Pulaski County, Arkansas, seeking to incorporate the community known as Little Italy ("Little Italy"). After a hearing on the Petition, the Pulaski County Court Judge, Barry Hyde ("Judge Hyde"), took the matter under advisement. On February 26, 2016, Judge Hyde entered a final judgment denying the Petition (the "Judgment"). On March 23, 2016, pursuant to Arkansas District Court Rule 9(e), Petitioner filed a Notice of Appeal, along with a certified copy of the Pulaski County Court's final Judgment, requesting this Court to reverse the Judgment and remand the matter to Pulaski County Court with instructions to permit the incorporation of Little Italy.

Central Arkansas Water ("CAW") filed a Motion to Intervene on April 26, 2016, which Petitioner did not oppose and this Court granted on August 10, 2016. Subsequently, CAW filed

its Motion to Dismiss Notice of Appeal, whereby CAW alleged Petitioner failed to comply with certain requirements set forth in Arkansas District Court Rule 9 ("Rule 9") and requested dismissal of Petitioner's appeal. Specifically, CAW asserts Petitioner failed to comply with Rule 9 subdivisions (b)(3) and (c). For the reasons stated below, however, CAW's Motion to Dismiss Notice of Appeal should be denied.

II. ARGUMENT

A. Petitioner complied with the applicable provisions of Rule 9(b)(3).

CAW first contends this appeal should be dismissed because Petitioner failed to comply with Rule 9(b)(3) by failing to "file the county court docket sheet or record *and* the complaint or claim form in circuit court." As detailed below, this contention lacks any basis in law or logic, and would require this Court to apply Rule 9 in a manner that strains credulity and ignores the settled rules of construction applicable to court rules, as well as binding precedent. The flaws with CAW's contention become apparent when Rule 9 is read in its entirety.

Rule 9 governs appeals to circuit courts from district courts and county courts, as well as administrative appeals from governmental bodies and agencies. The current version of Rule 9, as last amended on March 13, 2014, contains six subdivisions detailing the timing and procedure for such appeals. The last subdivision, subdivision (f) applies only to administrative appeals from governmental bodies and agencies. Subdivision (e) applies only to appeals from county courts, such as the appeal here. The remaining subdivisions—subdivisions (a), (b), (c) and (d)—also apply to appeals from county courts but only to the extent not displaced by the provisions of subdivision (e). See Ark. Dist. Ct. Rule 9(e) ("Unless otherwise provided in this subdivision, the requirements of subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court.").

CAW correctly asserts that appeals from district court must comply strictly with subdivision (b) of Rule 9. However, CAW's reliance on subdivision (b) in this matter is misplaced. As acknowledged by the Arkansas General Assembly, the requirements of subdivision (b) do not fit well in the context of appeals from county court, prompting the legislature to amend Rule 9 by inclusion of subdivision (e) in 2008, which became effective January 1, 2009. See *Pack v. Clark*, 2010 Ark. App. 756, at *8, 379 S.W. 3d 676, 680, n. 2. ("The Reporter's Notes for the 2008 amendment recognize the differences in procedures between district courts and county courts—particularly that many county courts do not maintain a docket sheet—and indicate that the addition of subdivision 9(e) was necessary in order to fit appeals from county courts.").

As noted above, subdivision (e) expressly provides that subdivisions (a) through (d) govern appeals from county courts to circuit courts, unless otherwise provided in subdivision (e). Thus, the requirements of subdivisions (a) through (d) apply to the instant appeal unless displaced by the provisions contained in subdivision (e).

When subdivision (b) is juxtaposed with subdivision (e), it becomes clear that Petitioner complied with Rule 9 in perfecting its appeal. Rule 9(e) provides that for an appeal to circuit court from county court, the appellant must only file a notice of appeal and a certified copy of the county court's final judgment. On the other hand, Rule 9(b)(1) provides that in an appeal to circuit court from district court, the appellant must file (1) either a certified copy of the district court's docket sheet or a certified copy of the record; and (2) either a certified copy of the complaint or the claim form, whichever was filed in district court. Thus, Rule 9 is clear that in an appeal from county court, with regards to what must be filed, subdivision (e) controls and subdivision (b) does not apply.

This conclusion was also reached by the Court of Appeals in *Pack v. Clark*: “**Here, the Packs appealed from county court, not district court, and subdivision 9(b) does not apply to the Packs’ appeal because subdivision 9(e) controls.**” 2010 Ark. App. at *8, 379 S.W. 3d at 680 (emphasis added). In sum, the appellate court’s decision in *Pack* clarified that, for purposes of applying subdivision (b) to appeals from county court, any time 9(b) refers to “certified copies of the district court docket sheet or district court records and a certified copy of the district court complaint or claim form,” which constitute the appeal documents for purposes of an appeal from district court, that phrase should be substituted with “a notice of appeal and a certified copy of the county court’s final judgment,” which constitute the appeal documents for purposes of an appeal from county court. Thus, CAW’s contention that Petitioner failed to comply with Rule 9(b)(3) by failing to “file the county court docket sheet or record” is meritless.

CAW also argues Petitioner did not comply with Rule 9(b)(3) by failing to make service of certified copies of the district court docket sheet or record and the complaint or claim form within 120 days after filing the complaint or claim form with the circuit court. Subdivision (b)(3) requires the appealing party to make service of the appeal documents within 120 days after filing the appeal documents with the circuit court. *See* Ark. Dist. Ct. Rule 9, Addition to Reporter’s Notes, 2014 Amendment. As noted above, Rule 9(e) clearly states an appellant must file a notice of appeal and a certified copy of the county court’s final judgment to appeal a county court decision—thus, contrary to the argument advanced by CAW, Petitioner is not required to file or serve certified copies of a docket sheet, record, complaint or claim form.

Here, Petitioner timely served copies of the Notice of Appeal and certified copies of the Judgment by certified mail, return receipt requested, as required by Rule 9(b)(1), on Judge Hyde and Pulaski County Attorney Adam Fogleman. Judge Hyde and Mr. Fogleman each received a

copy of the Notice of Appeal and a certified copy of the Judgment on March 25, 2016—well within 120 days from the filing of the Notice of Appeal. See **Exhibit A**, Return Receipt Card from Judge Hyde, and **Exhibit B**, Return Receipt Card from Mr. Fogleman. Accordingly, Petitioner complied with Rule 9(e) and the provisions of Rule 9(b)(3) applicable to the instant appeal.

Lastly, even assuming CAW is correct, and Rule 9 required Petitioner to serve certified copies of a docket sheet or record and complaint or complaint form, dismissal of the appeal is not warranted. Subdivision (b)(1) expressly states: “Failure to serve certified copies of [the docket sheet or record and complaint or complaint form] shall not affect the validity of the appeal.” Ark. Dist. Ct. Rule 9(b)(1) (emphasis added).

B. The Petition complied with the applicable provisions of Rule 9(c).

For its second contention for dismissal, CAW argues Petitioner did not comply with Rule 9(c) because Petitioner “failed to assert [its] claims in this Court” and “failed to file certified copies of [its] complaint and other papers material to the disputed issues.” CAW further asserts these requirements are jurisdictional and Petitioner’s failure renders this Court without jurisdiction over the instant appeal. These contentions are also meritless.

Reading subdivisions (e) and (b)(1) in tandem, as the state legislature intended, the filing of the notice of appeal and a certified copy of the county court’s final judgment with the clerk of the circuit court “shall constitute the filing of the complaint for purposes of commencing the action in circuit court in accordance with Arkansas Rule of Civil Procedure 3(a).” Therefore, Petitioner is not required to file a separate complaint; the Notice of Appeal and certified copy of the Judgment filed by Petitioner constitute the “complaint” for purposes of commencing this action. A similar argument was made by the appellees in *Pack* and rejected by the appellate court. Specifically, the Court of Appeals held the appellants perfected their appeal from county court to circuit court by

filing a certified copy of the county court's final order and a "Complaint Appealing the Order of Van Buren County Court and Complaint for Trespass and Declaratory Judgment"—which the court construed to constitute a sufficient "notice of appeal" under Rule 9. *Pack v. Clark*, 2010 Ark. App. at *5-6, 379 S.W. 3d at 679. This conclusion is consistent with the views expressed in the 2014 Addition to Reporter's Notes to Rule 9.¹

Here, Petitioner served counsel for Pulaski County, as well as Judge Hyde, with the Notice of Appeal and the certified copy of the Judgment, clearly stating Petitioner seeks reversal of Judge Hyde's Judgment and incorporation of Little Italy. Accordingly, Petitioner complied with Rule 9(c)(1). See *Cirele D Contractors, Inc. v. Bartlett*, 2013 Ark. 131, at *3, 2013 WL 1279062 at *2 ("The requirement that a plaintiff refile its complaint in circuit court is not jurisdictional; it is procedural, thus only substantial compliance is required.").

CAW also argues that Petitioner failed to comply with Rule 9(c)(2). As noted above, the Notice of Appeal states Petitioner seeks reversal of the Judgment with instructions to permit the incorporation of Little Italy. Rule 9(c)(2) only requires the parties file certified copies of court papers the parties "believe" are material to the disputed issues in circuit court. At the time Petitioner filed the Notice of Appeal, there was no party adverse to Petitioner, and there were no county court papers, other than the final Judgment Petitioner seeks to have reversed, that Petitioner believed to be material to the appeal. Furthermore, Petitioner did not believe any additional papers were material to the instant appeal because, as stated in the 2008 and 2014 Addition to Reporter's

¹ See 2014 Addition to Reporter's Notes to Ark. Dist. Ct. Rule 9 ("The amendment also provides that the filing in circuit court of the certified copy of the district court complaint or claim form constitutes the filing of the complaint for purposes of commencing the action in circuit court in accordance with the requirements of Arkansas Rule of Civil Procedure 3(a). . . . This approach to resolving the re-pleading issue reinforces the view expressed in the 2008 Addition to Reporter's Notes that "appeals from district court are appellate in form but original in fact.").

Notes to Rule 9, this subdivision reinforces the view that appeals such as this “are appellate in form but original in fact.” Thus, Petitioner complied with Rule (c)(2).

Moreover, it is worth noting that CAW argues Petitioner should have filed a certified copy of the entire record as well as a complaint. However, when the plaintiffs in *Pack* took those exact actions, the circuit court dismissed the appeal for failure to comply with Arkansas District Court Rule 9. *Pack v. Clark*, 2010 Ark. at *2, 379 S.W.3d at 677. In the plaintiffs’ appeal of the dismissal, they argued that they over-complied with Rule 9 by filing a certified copy of the entire county court record, which included the county court’s final order. The appellate court agreed, noting that “[s]ubdivision (e) makes it clear that an appeal from county court to circuit court may be perfected by filing a notice of appeal and a certified copy of the county court’s final judgment.” 2010 Ark. App. 756, at * 4, 379 S.W.3d 676, 678 (emphasis in original). Additionally, the appellate court found that even though the plaintiffs filed what they titled a complaint, the filing “alerted the court and the other parties to the [plaintiffs’] intention to appeal the county court’s final order.” *Id.* at *5 -6, 379 S.W.3d at 679. Similar to the plaintiffs in *Pack*, Petitioner has filed the Notice of Appeal, which makes it clear to all parties that Petitioner is appealing the Judgment, together with a certified copy of the Judgment, and has thus properly perfected its appeal from Pulaski County Court to the circuit court.

III. CONCLUSION

Petitioner complied with Arkansas District Court Rule 9, as it applies to appeals from county court. Therefore, CAW’s Motion to Dismiss the Notice of Appeal should be denied, and Petitioner should be awarded all other relief to which it is entitled.

Respectfully submitted,

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By: /s/ Mary-Tipton Thalheimer
Timothy W. Grooms (84058)
R. Seth Hampton (2012279)
Mary-Tipton Thalheimer (2011268)

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2016, a copy of the foregoing was mailed by regular United States first class mail to the persons named below:

Judy Simmons Henry
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201

Adam B. Fogleman
Pulaski County Attorney's Office
201 S. Broadway, Suite 400
Little Rock, Arkansas 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway Suite 400
Little Rock, Arkansas 72201

/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

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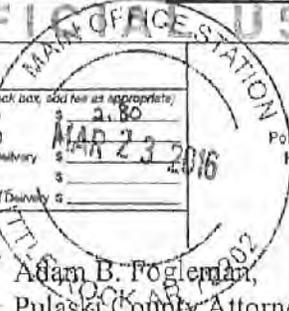
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Adam B. Fogleman,
 Pulaski County Attorney
 Pulaski County Attorney's Office
 201 S. Broadway, Suite 400
 Little Rock, Arkansas 72201

PS Form 3800, April 2015

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- Complete Items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Adam B. Fogleman,
 Pulaski County Attorney
 Pulaski County Attorney's Office
 201 S. Broadway, Suite 400
 Little Rock, Arkansas 72201



9590 9402 1499 5329 2953 16

2. Article Number (Transfer from service label)

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PS Form 3811, July 2015 PSN 7530-02-000-9053

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[Signature]

- Agent
- Addressee

B. Received by (Printed Name)

A. B. Fogleman

C. Date of Delivery

3/25/16

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- Signature Confirmation Restricted Delivery

Domestic Return Receipt

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
9th DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PLAINTIFFS/PLAINTIFFS

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Comes now Respondent/Defendant Pulaski County ("Pulaski County"), by and through its attorneys, the Pulaski County Attorney's Office, for its Reply to Petitioners/Plaintiffs' Response to Pulaski County's Motion to Dismiss and Brief in Support, doth state:

On March 23, 2016, Petitioners/Plaintiffs ("Plaintiffs") filed their Notice of Appeal with the Pulaski County Circuit Clerk and attached the Pulaski County Judge's February 26, 2016 Judgment. For one hundred and forty (140) days after Plaintiffs' Notice of Appeal and Judgment were filed, Pulaski County waited for Plaintiffs to file a record, and put Pulaski County on notice of Plaintiffs' basis for asserting that the February 26, 2016 Judgment should be reversed and remanded with instructions to permit the incorporation of the community known as Little Italy. (Pls. [] Not. Appeal ¶ 8.) On August 11, 2016, after Pulaski County allowed ample time for Plaintiffs to file a certified copy of the county court record or an affidavit explaining that the Plaintiffs requested the county court record and had not received it, Pulaski County filed a Motion to Dismiss and Brief in Support, arguing that Plaintiffs failed to fulfill the requirements of Ark. Dist. Ct. R. 9 and, thus, failed to perfect their appeal. (Def. [] Br. Supp. Mot. Dismiss ¶ 3.) Additionally, Plaintiffs' Notice of Appeal insufficiently pled necessary claims and sufficient

facts to support a claim for Plaintiffs to meet Rule 9(c)'s requirements. (Def. ['] Br. Supp. Mot. Dismiss ¶ 11.) As such, this court never acquired jurisdiction. (Def. ['] Br. Supp. Mot. Dismiss ¶ 7.)

Plaintiffs filed a Response to Pulaski County's Motion to Dismiss and Brief in Support on August 23, 2016, arguing that filing a Notice of Appeal, with attached Judgment, pursuant to the second sentence of Rule 9(e), is all that is required to perfect an appeal from county court to circuit court. (Pls. ['] Resp. ¶¶ 2-7) (emphasis added). Further, Plaintiffs argue that filing a notice of appeal, with only the statement "the Judgment should be reversed and Little Italy should be incorporated [,]" as its request for relief, along with the County Court Judgment, is sufficient for a claim to be stated. (Pls. ['] Resp. ¶ 9.)

A. Plaintiffs' Reliance On Pack v. Clark, 2010 Ark. App. 756, 379 S.W.3d 676 Is Misplaced And Their Interpretation is Imprecise.

Plaintiffs argue in section (A) & (B) of its Response that their appeal was perfected, relying on Pack v. Clark, 2010 Ark. App. 756, 379 S.W.3d 676 for the proposition that the only requirement, to perfect an appeal from county court to circuit court, is compliance with the second sentence of Ark. Dist. Ct. R. 9(e). (Pls. ['] Resp. ¶¶ 2-7) (emphasis added). Plaintiffs interpret Pack, in a vacuum, not considering the facts of Pack. Further, Plaintiffs' overly narrow reading of Rule 9 ignores the plain language of the rule. While Pack does not set forth the full record of what transpired at the county court and circuit court levels, it provided sufficient detail to determine that Pack is substantially dissimilar to the instant case. A brief summary of the facts in Pack illuminates that this Court should not rely on Plaintiffs' interpretation of that case.

Pack is a case out of Van Buren County Circuit Court where Appellants, Delmar and Jimmie Pack ("the Packs"), appealed the Circuit Court's dismissal of their action for failure to comply with Ark. Dist. Ct. R. 9. Pack, 2010 Ark. App. 756, at 1, 379 S.W.3d 676, 677. In Pack,

the Packs appealed an adverse county court order to the circuit court by filing a complaint, as well as, a certified copy of the entire county court case file, and a copy of the county court's final order. Id. at 2, 379 S.W.3d 676, 677. The court in Pack thoroughly analyzed the meaning of "notice of appeal" and determined that the Packs' complaint and certified copy of the county court's order were legally sufficient to comply with Ark. Dist. Ct. R. 9(e). Id. at 4, 379 S.W. 3d at 679. In its holding, the court in Pack recited the long favored principle of "substance over form," Id. at 6, 379 S.W.3d at 679. Further, the court in Pack found that Ark. R. App. P.– Civ. 3(e), while not applicable, provided guidance, along with the definition of "notice of appeal" in Black's Law Dictionary, for the proposition that the Pack's filing met the requirements of Rule 9(e) when they included the following in their appeal from county court to circuit court:

- (i) named all of the parties to the appeal, (ii) designated the Van Buren County Court's December 17, 2008 order as the order appealed from, (iii) designated the entire county court case file as the record for the appeal, (iv) attached the entire record (which eliminated the need to state that a transcript had been ordered), and (v) named the Van Buren County Circuit Court as the court to which the Packs appealed.

Id. at 5, 379 S.W.3d at 679.

Plaintiffs' argument is most succinctly stated in its Response, (Pls. ['] Resp. ¶ 6), where Plaintiffs argue:

Simply put, for purposes of applying subdivision (b) to appeals from county court, any time subdivision (b) refers to "certified copies of the district court docket sheet or district court records and a certified copy of the district court complaint or claim form," which constitute the appeal documents for purposes of an appeal from district court, that phrase should be substituted with "a notice of appeal and a certified copy of the county court's final judgment," which constitute the appeal documents for purposes of an appeal from county court.

This premise undergirds their entire argument in opposition to Pulaski County's Motion to Dismiss. Plaintiffs' interpretation of Rule 9 might pass the smell test if it was impossible for

Plaintiffs to comply with (b), as recognized by the Pack court. See Id., at 4, 379 S.W.3d at 678. What Plaintiffs fail to recognize is that, unlike the present situation, the Packs' compliance with the second sentence of Rule 9(e) also included compliance with the first sentence of Rule 9(e) and, as such, also likely complied with Rule 9(b) by attaching a certified copy of the entire lower court record. Accordingly, it would fly in the face of common sense, procedural rules for appeals from district court to circuit court, circuit court to the appellate courts, and the plain language of the first sentence of 9(c), for this Court to accept Plaintiffs' argument. Accepting Plaintiffs' interpretation of Rule 9 would lead to the absurd result of allowing an appeal to move forward for which they have yet to assert a basis for relief.

Additionally, Plaintiffs' narrow interpretation of Rule 9 and Pack defies logic. Plaintiffs recommend a reading of Rule 9 where "[u]nless otherwise provided in this subdivision, the requirements of subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court [.]” means that an appeal from county court to circuit court does not have to comply with relevant provisions in Rule 9 (a)-(d), instead only compliance with part (e)'s second sentence is required. (Pls. ['] Resp. ¶ 3.) Appeals, whether from district court to circuit court, or circuit court to Arkansas's appellate courts, require a procedural framework, or chaos would ensue. For instance, based on Plaintiffs' interpretation of Rule 9, they could wait in perpetuity to proceed in this matter, with total impunity, proceeding when it was convenient for them. This is not logical and not consistent with any procedural framework that exists in Arkansas's rules of procedure, or the plain language of Rule 9.

Further, to lend credence to Pulaski County's interpretation, the court in Pack references how Ark. R. App. P.–Civ. 3(e), while not applicable to a county court appeal, is analogous to the notice of appeal that is required by Rule 9(e). However, Rule 3(e) merely sets forth the content

of “what makes up a ‘notice of appeal.’” Ark. R. App. P.– Civ. 3(e). Similar to how Rule 9(a)-(d) sets forth the remaining procedural framework to perfect an appeal from district court, or county court, to circuit court, the remaining provisions of Rule 3 instruct an appellant on the procedural framework to follow, to perfect an appeal from a lower court to Arkansas’s appellate courts.

Pack does not ultimately consider whether the Packs complied with the provisions of sections (b) & (c) of Rule 9. Instead the issue in Pack was whether their filing, which included the certified copy of the record, a complaint and the judgment, sufficiently constituted “notice of appeal” and whether the Packs strictly complied with Rule 9. See Id. at 5, 379 S.W. 3d 676, 679. In Pack, the Packs filed a complaint and a certified copy of the entire lower court record. Id. at 4, 379 S.W. 3d 676, 678. Based on the facts recited in Pack, it appears as if the Packs complied with Rule 9(b), which is contemplated by the first sentence of Rule 9(e). As such, the facts of Pack are distinguishable from the present facts because, in this matter, Plaintiffs merely filed a pleading labeled “Notice of Appeal” and the County Court Judgment. Accordingly, Plaintiffs’ Notice of Appeal does not address the requirements set forth in Rule 3(e), nor the requirements of Rule 9(b) & (c), which are incorporated into Rule 9(e), by Rule 9(e)’s first sentence.

Thus, while Rule 3 does not apply to this matter, as stated by the Pack court, it is instructive for a determination of whether the pleading serves its intended purpose in placing the adverse party on notice of appeal. Accordingly, Plaintiffs’ failure to file and serve the lower court record and their failure to file a complaint demonstrate an important distinction between this matter and the issues addressed in Pack. For the foregoing reasons, in addition to the reasons set forth in Pulaski County’s Motion to Dismiss and Brief in Support, Plaintiffs’ Response is meritless and this Court should dismiss its Notice of Appeal.

B. Plaintiffs Failed To Assert Their Claims.

Plaintiffs argue in their Response that, pursuant to Rule 9(b)(1), they are only required to file a notice of appeal and attach a certified copy of the County Court's Final Judgment to assert its claims. (Pls. ['] Resp. ¶ 8.) Further, Plaintiffs cite Pack for the proposition that they were only required to state their intention to appeal the County Court's final order. (Pls. ['] Resp. ¶ 9.) Once again, Plaintiffs' interpretation of Rule 9 defies logic and their reliance on Pack is misplaced.

As noted in Pack, based on guidance provided by Black's Law Dictionary and the Arkansas Rules of Appellate Procedure—Civil, the Packs complied with Rule 9(e)'s requirement of a notice of appeal. The court found that the Packs "designated the entire county court case file as the record for the appeal [.]" and "attached the entire record (which eliminated the need to state that a transcript had been ordered [.]" Id. at 5, 379 S.W. 3d 676, 679. The court in Pack has limited discussion of Rule 9(b), as Pack is ultimately a case about whether the Packs filed a pleading that sufficiently complied with Rule 9, to place the adverse party on notice of appeal, even though they did not file a pleading specifically entitled "Notice of Appeal." See Id. at 5-6, 379 S.W.3d at 679. However, by attaching a certified copy of the entire record of the lower court and setting forth their claims and basis for relief, the Packs appear to have satisfied the requirements of Rule 9(b) and (c).

First, Plaintiffs argue that they were only required to put all parties on notice that they were appealing, and not set forth any claims as to why the circuit court should remand the matter, with instructions to permit the incorporation of Little Italy. (Pls. ['] Resp. ¶ 8.) (emphasis added). Paragraph eight (8) of Plaintiffs Notice of Appeal contains merely conclusory statements, with no basis in fact or law, for this Court to find that the Pulaski County Judge made

a reversible mistake or there are issues requiring the matter to be sent back for rehearing. (Pls. ['] Not. Appeal ¶ 8.) Arkansas courts do not look favorably on merely conclusory allegations, statements or pleadings. Cf. Compute-A-Call, Inc. v. Tolleson, 285 Ark. 355, 356, 687 S.W.2d 129, 130 (1985) (conclusory allegation, with no statement of fact, is not sufficient to give ['] jurisdiction); Evans Indus. Coatings v. Chancery Court, 315 Ark. 728, 733, 870 S.W.2d 701, 703 (1994) (holding that pleading conclusory allegation without supporting fact insufficient to establish venue).

While Rule 9(e) allows for an appeal from county court to be initiated by filing a notice of appeal and attaching the county court's judgment, this distinct requirement for appeals from county court did not alleviate or abrogate Plaintiffs' obligation to assert their claims and basis for claims. Even if this Court reviews Plaintiffs' Notice of Appeal in light of Ark. R. Civ. P. 8(f), which states "all pleadings shall be liberally construed so as to do substantial justice," the Notice of Appeal merely concludes "[t]his Court should reverse the Judgment entered by Judge Hyde denying the Petition and remand this matter to Pulaski County Court with instructions to permit the incorporation of the community known as Little Italy." (Pls. ['] Not. Appeal ¶ 8.)

Next, Plaintiffs butcher Rule 9(b)(1) in their Response when they state:

Pursuant to Rule 9(b)(1), as it applies to appeals from county court, the filing of a notice of appeal and a certified copy of the county court's final judgment with the clerk of the circuit court "shall constitute the filing of the complaint for purposes of commencing the action in circuit court in accordance with Arkansas Rule of Civil Procedure 3(a)."

(Pls. ['] Resp. ¶ 8.) Rule 9(b)(1) actually states that "[t]he filing of the certified copy of the district court complaint or claim form with the clerk of the circuit court shall constitute the filing of the complaint for purposes of commencing the action in circuit court in accordance with Arkansas Rules of Civil Procedure 3(a)." Ark. Dist. Ct. R. 9(b)(1). By adopting this language,

the Arkansas Supreme Court again recognized substance over form. See Pack, at 6, 379 S.W.3d at 679. However, Plaintiffs' Notice of Appeal places form over substance, and their Response fails to acknowledge the distinction between the content of their notice of appeal and the content required by Rule 9(b)(1) and (c). Thus, Plaintiffs' Notice of Appeal failed to plead claims and facts to support a claim, sufficient to meet the requirements of Rule 9(c).

The burden is on Plaintiffs to not just substantially comply with Rule 9, but strictly comply with Rule 9, to perfect their appeal and for this Court to acquire jurisdiction over their county court appeal. E.g., Howard v. Ark. Cama Tech., 2012 Ark. App. 567, at 4-5, ___ S.W.3d ___. Plaintiffs failed to even minimally comply with Rule 9. Thus, this Court lacks jurisdiction and should dismiss Plaintiffs' appeal. For the foregoing reasons, in addition to the reasons set forth in Pulaski County's Motion to Dismiss and Brief in Support, Plaintiffs' Response is meritless and this Court should dismiss its Notice of Appeal.

WHEREFORE, Plaintiffs' appeal should be dismissed for the foregoing reasons, all relief requested by Plaintiffs be denied, for its costs incurred, and for all other just and proper relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

PULASKI COUNTY ATTORNEY'S OFFICE
201 South Broadway, Suite 400
Little Rock, Arkansas 72201
(501) 340-8285

By: /s/ Adam Fogleman
Adam Fogleman, Ark. Bar #09234
Pulaski County Attorney
William A. Gruber, Ark. Bar #11104
Pulaski County Staff Attorney
Chastity Scifres, Ark. Bar # 99143
Chief Deputy Pulaski County Attorney

CERTIFICATE OF SERVICE

I, Adam Fogleman, do hereby certify that a true and correct copy of the above and foregoing was electronically filed on August 31, 2016, with the Clerk of this Court using the Court's electronic filing system, which shall send notification to all attorneys of record.

/s/ Adam Fogleman
Adam Fogleman

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENTS/DEFENDANTS

CENTRAL ARKANSAS WATER

INTERVENOR

CENTRAL ARKANSAS WATER'S REPLY BRIEF
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Central Arkansas Water ("CAW"), by and through its undersigned counsel, appears and files this reply brief in further support of its motion to dismiss the appeal. In their opposition to CAW's motion to dismiss, the Petitioner argues that it complied with Rule 9(e) and therefore has properly perfected its appeal. Because the Petitioner's notice of appeal is insufficient under Arkansas law, this motion to dismiss should be granted. In further support of its motion to dismiss, CAW states as follows:

A. Petitioner's Notice of Appeal is Insufficient Under Arkansas Law Because it Fails to Strictly Comply with the Applicable Rule.

Strict compliance, not substantial compliance, with the District Court Rule 9 is required when appealing from County Court to Circuit Court. *Pack v. Clark*, 2010 Ark. App. 756, 4, 379 S.W.3d 676, 678 (2010).

Pursuant to Rule 10(c), CAW adopts Pulaski County's Reply to Plaintiffs' Response to Motion to Dismiss filed on August 31, 2016.

B. Petitioner Failed to Name All Necessary Parties as Required by Rule 9(e).

Rule 9(e) of the Arkansas District Court Rules states “[i]f there were no defendants in the county-court proceeding, then the petitioner/plaintiff *shall name all necessary, adverse parties as defendants* in its complaint filed in circuit court.” (emphasis added). In *Pack v. Clark*, the case relied upon in the Petitioners’ response, the Arkansas Court of Appeals held that “an appeal from county court to circuit court may be perfected by filing a notice of appeal and a certified copy of the county court’s final judgment.” 2010 Ark. App. 756, 4, 379 S.W.3d 676, 678 (2010).

In determining what is sufficient to satisfy a notice of appeal, the Court sought guidance from Rule 3(e) of the Arkansas Rules of Appellate Procedure. Rule 3(e) provides that a notice of appeal must (i) specify the party or parties taking appeal, (ii) designate the judgment, decree, or order appealed from, (iii) designate the contents of the record on appeal, (iv) state that the appellant has ordered the relevant transcript of the proceedings below, (v) state the court to which appellant is appealing, and (vi) state that the appellant abandons any unresolved pending claim. *Pack v. Clark*, 2010 Ark. App. 756, 5, 379 S.W.3d 676, 679 (2010).

Importantly, the Court found that the plaintiff’s notice of appeal in circuit court was sufficient and consistent with the Black’s Law Dictionary definition of “notice of appeal” because it (i) named all of the parties to the appeal, (ii) designated the correct county final order, (iii) designated the entire county court case filed as the record for the appeal, (iv) attached the entire record, and (v) named the correct court. *Id.*

Petitioner's notice of appeal is insufficient under Arkansas law for at least two reasons. First, the notice of appeal fails to name all of the necessary adverse parties, as required by Rule 9(e), because the Petitioner did not name CAW and others as defendants. Although CAW and Pulaski County were not defendants in the county court proceeding, both appeared in Pulaski County Court and opposed the Petitioner's incorporation of the proposed town. In fact, on July 13, 2015, CAW formally entered an appearance in the County Court case by filing An Entry of Appearance and Request for Notice (the "CAW Entry/Request"). The CAW Entry/Request is attached hereto as Exhibit 1. In it, CAW specifically requested that notices be sent to it by the Petitioner and any other party-in-interest and provided contact information. The purpose of the CAW Entry/Request was to make known that CAW was an interested party and desired to receive all information related to the matter. Further, CAW filed detailed objections to the incorporation, so much so that on January 12, 2016, the Petitioner filed a fifteen (15) page response to CAW's opposition. Thus, in order to properly appeal to the circuit court, the Petitioner was required to name CAW as a necessary adverse party to the appeal.

There were also other interested parties in the County Court case who appeared and participated in the hearing, opposing the incorporation. Those adverse parties-in-interest were likewise entitled to receive the notice of appeal and other required filings from Petitioner. Based on the Court's record, it appears that they likewise were never served by Petitioner.

Additionally, CAW filed a motion to intervene in the appeal as a necessary party on April 25, 2016. The motion was unopposed by the Petitioner and CAW was allowed to intervene by this Court's order dated August 10, 2016. In its intervention, CAW asserted that it was a necessary party to the appeal as a basis to intervene. See CAW's Brief in Support of Motion to Intervene, p. 1-2. Petitioner did not dispute the fact that CAW was a necessary party to the circuit court case when CAW sought to intervene in this proceeding. The failure to contest the necessary party assertion for the intervention is an admission by Petitioner that CAW was in fact an adverse party in the trial court and a necessary party to the appeal. Accordingly, Petitioner should have, but failed to name CAW as an adverse party in the Petitioners' notice of appeal. On this basis alone, the motion to dismiss the appeal should be granted.

C. Petitioner Failed to Serve CAW as Required by Rule 9(b)(1).

CAW was required to be served with the notice of appeal and other documents by serving upon counsel of all other parties certified copies of the county court docket sheet or the county court record and a certified copy of the county court complaint or claim form. Ark. Dist. Ct. R. 9(b)(1). Not only was the required service rule not met, *no service* was made on CAW.

D. Petitioner Failed to Attach the Record and County Court Case File.

Petitioner's notice of appeal is also insufficient under *Pack* because the Petitioner failed to designate the county court case file and failed to attach the entire record. Although the final judgment is attached to the Petitioner's original

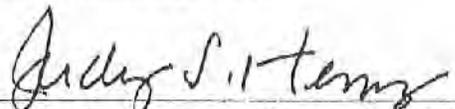
notice of appeal, there is no record attached and the county court case file is not attached. See *Pack v. Clark*, 2010 Ark. App. 756, 5, 379 S.W.3d 676, 679 (2010) (holding that the notice of appeal complied with Rule 9 because it included "the entire county court case file as record for the appeal" including the judgment and the appealing party "attach[ed] the entire record."). Petitioner here failed to designate the contents of the record on appeal.

E. Conclusion.

Petitioner failed to strictly comply with Rule 9 by failing to name CAW and other parties in interest who opposed the incorporation as adverse parties, by failing to serve CAW and others as adverse necessary parties by sending certified copies as set forth in Rule 9(b)(1)(A)-(D), by failing to comply with the elements of a notice of appeal set forth in *Pack v. Clark* and for the reasons stated in the incorporated reply brief of Pulaski County. The motion to dismiss should be granted.

Respectfully submitted,

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By 
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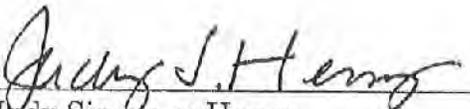
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was mailed this 2 day of September, 2016, via First Class U.S. Mail, postage prepaid to the following:

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Adam B. Fogleman
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Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway, Ste 400
Little Rock, AR 72201


Judy Simmons Henry

IN THE COUNTY COURT OF PULASKI COUNTY, ARKANSAS

IN RE: THE INCORPORATION OF THE COMMUNITY
KNOWN AS LITTLE ITALY

ENTRY OF APPEARANCE AND REQUEST FOR NOTICE

C. Tad Bohannon, Chief Legal Counsel and attorney for Central Arkansas Water, hereby enters this appearance and hereby request copies of all notices and pleadings filed in this matter, whether sent by the County Court, the Petitioners, or any other party-in-interest in this matter, be sent to the undersigned at the address given below.

CENTRAL ARKANSAS WATER
221 East Capitol Avenue
Little Rock, Arkansas 72202
Phone: (501) 377-1345
Fax: (501) 377-1244
Email: tad.bohannon@carkw.com

By:


C. Tad Bohannon (92089)
Attorney for Central Arkansas Water



FILED 07/13/15 08:09:50
Lara's Crime Redempt. Circuit Clerk
MM, DC

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015 a true and exact copy of the foregoing was sent by United States Postal Service and electronic mail to:

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Pulaski County Attorney
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amankin@pulaskicounty.net

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C. Tad Bohannon

FILED 07/13/15 08:09:15
LARRY CROWN FOR MAIL DELIVERY CLERK
MM, DC

000107

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

SURREPLY IN OPPOSITION TO MOTIONS TO DISMISS APPEAL

The Incorporators of the Community Known as Little Italy, by and through their attorneys, Quattlebaum, Grooms & Tull PLLC, submit this Surreply in Opposition to Motions to Dismiss Appeal.

I. INTRODUCTION

On February 26, 2016, the Pulaski County Court Judge entered a final judgment denying the incorporation of Little Italy. Within thirty (30) days of the entry of the final judgment, the Incorporators of the Community Known as Little Italy (collectively, "Petitioner") filed a Notice of Appeal and a certified copy of the Pulaski County Court's final judgment (the "Judgment"). The Pulaski County Court Judge and Pulaski County Attorney Adam Fogleman each received a copy of the Notice of Appeal and a certified copy of the Judgment on March 25, 2016, *via* certified mail, return receipt requested.

Central Arkansas Water ("CAW") filed a motion to dismiss the appeal on August 10, 2016, and Pulaski County filed a motion to dismiss the appeal on August 11, 2016. Both parties asserted Petitioner failed to perfect its appeal and failed to state its claims, thus depriving this Court of jurisdiction. Petitioner filed responses to both motions on August 23, 2016, citing case law and

the Reporter's Notes on Arkansas District Court Rule 9 ("Rule 9") that support a finding that Petitioner complied with Rule 9 and perfected its appeal.

Pulaski County filed a reply on August 31, 2016, but it raised no new arguments. Instead Pulaski County asserts that Petitioner misinterpreted Rule 9, as well as case law, and that Pulaski County's interpretation is correct. As stated more particularly in Petitioner's response to Pulaski County's motion to dismiss, Petitioner's interpretation of Rule 9, as it applies to perfecting appeals from county court, is based on relevant case law and the Reporter's Notes to Rule 9, which provide guidance as to Rule 9's meaning. Thus, no further response to the arguments of Pulaski County is necessary. However, CAW filed a reply on September 2, 2016, and in addition to reiterating its previous arguments, CAW raised the new argument that the appeal should be dismissed because CAW is a necessary party to the appeal and was not named as an adverse party. For the reasons stated below, the motions to dismiss the appeal should be denied.

II. ARGUMENT

A. Petitioner Properly Perfected its Appeal.

CAW's reply mischaracterizes Rule 9's compliance standards and jurisdictional requirements by relying on prior versions of Rule 9 and the case law stemming from the previous versions. Under the current version of Rule 9(e), which became effective on July 1, 2014, Petitioner was required to file its Notice of Appeal and a certified copy of the County Court's Judgment within thirty (30) days of the date the County Court filed the Judgment with the Pulaski County Clerk in order to perfect an appeal to this Court. As noted in Petitioner's response, because the County Court entered the Judgment on February 26, 2016, and Petitioner filed its Notice of Appeal, along with a certified copy of the Judgment, on March 23, 2016, Petitioner perfected the instant appeal as required by Rule 9(e).

B. Petitioner's Notice of Appeal is Sufficient.

Further, Petitioner's Notice of Appeal is sufficient because the relief sought by Petitioner—the appeal of the County Court's Judgment denying Petitioner's Petition to Incorporate—is clearly stated in the Notice of Appeal. See *Mountain Pure, LLC v. Little Rock Wastewater Utility*, 2011 Ark. 258, 7, 383 S.W.3d 347, 353 (2011) (quoting *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006)) (citations and quotations omitted) (“In *Wright*, this court held that an administrative appeal had been properly perfected even though the parties had filed a pleading captioned complaint for declaratory judgment, because the relief sought was the appeal of the decision of the Board, and that was clear from the pleading. Likewise, in the present case, we hold that the complaint filed by Mountain Pure fulfilled the requirements of the notice of appeal required under Rule 9 because it was clear it was pursuing an appeal of the decision of LRW.”).

C. Petitioner Complied With the Applicable Service Requirements in Rule 9.

CAW next contends that dismissal of the instant appeal is warranted because Petitioner failed to comply with multiple provisions of Rule 9(b). CAW's contentions regarding Rule 9(b), however, are misplaced, as the only provisions in Rule 9(b) applicable to the instant appeal required Petitioner to serve counsel for Pulaski County with copies of the Notice of Appeal and certified copies of the Judgment by certified mail, return receipt requested, within one hundred twenty (120) days of the date Petitioner filed its Notice of Appeal.

In *Howard v. Arkansas Cama Technology*, the Arkansas Court of Appeals addressed Rule 9's service requirements in the context of appeals from county courts to circuit courts and stated as follows:

Thus, subdivision (e) of Rule 9 provides special provisions for appeals from county court to circuit court, while stating that the requirements of subdivisions (a), (b), (c), and (d) apply to the extent not “otherwise provided” in subdivision (e). Subdivision (e) requires a party appealing from county court to circuit court to file

a notice of appeal and a certified copy of the county court's final judgment; there is no provision for service of the notice. In the only part of subdivision (b) that could apply to appeals from county court, the Rule provides: "The appealing party shall serve a copy of the certified docket sheet upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt." Accordingly, the notice of appeal and attached certified copy of the county court's final judgment (required for appeals from county court instead of a certified copy of the district court's docket sheet) must be served upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt.

2012 Ark. App. 567, at *3, 2012 WL 4832271 (emphasis added).

As noted in Petitioner's response, Petitioner timely served Judge Hyde and Pulaski County Attorney Adam Fogleman with copies of the Notice of Appeal and certified copies of the Judgment by certified mail, return receipt requested, on March 25, 2016—well within 120 days from the filing of the Notice of Appeal. Thus, Petitioner complied with the only part of Rule 9(b) that could apply to the instant appeal.

D. CAW Is Not a Necessary Party to this Appeal, and CAW's Absence Does Not Affect Jurisdiction over the Appeal.

CAW next contends the appeal should be denied because CAW is a necessary party to this action, and it and other necessary parties were not named in the Notice of Appeal or served with the appeal documents. Petitioner does not dispute that CAW is adverse to the incorporation of Little Italy or that CAW appeared before the County Judge to voice its opposition. CAW's assertion that it is a necessary party to this appeal, however, is without merit.

CAW incorrectly asserts that because it is an interested party, it is also a necessary party. In its motion to intervene, CAW stated that it was an interested party and sought to intervene as of right or permissively. The phrase "necessary party" does not appear in the motion. Petitioner concedes that CAW owns property within the area Petitioner seeks to incorporate. Thus, Petitioner did not object to CAW's motion to intervene because CAW's ownership of land in the area

Petitioner seeks to incorporate makes CAW an interested party for purposes of standing to contest the incorporation of Little Italy. See *City of Crossett v. Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971). Petitioner did not, however, admit that CAW was a necessary party to this appeal.

Rule 9 does not provide guidance as to what constitutes a necessary party for purposes of an appeal from county court. However, Arkansas Rule of Civil Procedure 19(a) concerns who is a necessary party and provides that a party should be joined, if feasible, if (1) in the party's absence, complete relief cannot be accorded among those already parties; or (2) the party claims an interest to the subject of the action and is so situated that the disposition of the action in its absence may impair or impede its ability to protect that interest or leave other persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

Petitioner is not seeking any relief against CAW, but it is seeking relief from the decision of the Pulaski County Court. Accordingly, Petitioner named Pulaski County as the respondent in this action. Pulaski County seeks to prevent the incorporation of Little Italy. CAW seeks the same thing. If Pulaski County is successful, CAW's interest in keeping Little Italy unincorporated will be protected. Thus, although CAW has demonstrated it is adverse to Petitioner, it has not demonstrated it is a necessary party to this action. Additionally, CAW asserts the other interested parties that appeared at the County Court hearing on the incorporation of Little Italy should have been included as necessary parties, but CAW provides no basis for this assertion. Moreover, based on CAW's interpretation, every party that owns property within the proposed boundary that opposes incorporation should have been served with the appeal documents. This is impractical.

Moreover, the fact that CAW and other parties testified at the County Court hearing has no bearing on the instant appeal. Appeals from county courts to circuit courts are "appellate in form but original in fact." See Reporter's Notes to the 2008 amendments to Rule 9. The circuit court

"obtains jurisdiction over the matter to the same extent as if it had been originally brought in that court, and it must proceed to fully try and determine the cause. It does not pass upon the question as to whether or not the county court has committed error in any of its rulings, either of law or of fact, but it must try the cause upon its merits, both of law and of fact, just as if it had been originally brought in the circuit court. It does not either affirm or reverse the findings or judgment of the county court, but tries the cause alone upon its merits, and determines the same by the exercise of its own discretion and judgment." *Cox v. Farrell*, 292 Ark. 177, 180, 728 S.W.2d 954, 955 (1987). Therefore, Pulaski County has the option to call parties that testified against incorporation at the County Court hearing as witnesses in the instant appeal, but the Court must hear the appeal as if the case had been brought in this Court in the first instance, making previous testimony irrelevant. See *Bigelow v. Union County*, 287 Ark. 486, 701 S.W.2d 125 (1985); *Gocio v. Harkey*, 211 Ark. 410, 200 S.W.2d 977 (1947).¹

Even assuming that CAW is a necessary party to this appeal, Petitioner's failure to serve CAW with the appeal documents would not warrant dismissal of the appeal or divest this Court of jurisdiction over the matter. In *Motor Cars of Nashville, Inc. v. Chronister*, the appellate court addressed the service requirements contained in subdivision (b) of Rule 9 as they relate to vesting the circuit court with jurisdiction. 2014 Ark. App. 430, 439 S.W.3d 101. The appellant argued that its failure to strictly comply with subdivision (b)'s service requirements did not affect the circuit court's jurisdiction over the subject appeal from district court. *Id.* at *1, 439 S.W.3d at 102. The

¹ With respect to the procedural posture of the appeal, Petitioner acknowledges that little case law exists on the matter—as did the Arkansas Supreme Court in *Wright v. City of Little Rock*, 366 Ark. 96, 99, 233 S.W.3d 644, 646 (2006) ("Rule 9 is silent on how the circuit court is to schedule briefing and hearings on the appeal. Under the current rules, the procedural method used in the circuit court to hear the appeal is left to the circuit court's discretion. Our rules fail to provide adequate procedure on appeals to the circuit court. It is apparent that the inadequate procedural rules in this case led to the confusion resulting in the circuit court's mistakenly dismissing an appeal for failure to perfect service when the appeal was already perfected by appellants' timely filing of the record. Once perfected, it was up to the circuit court to set a briefing schedule or order hearings as required.").

appellant contended that strict compliance with subdivision (b)'s service requirements is not necessary to perfect an appeal under Rule 9 because the Reporter's Notes to the 2008 amendments to Rule 9 provide that the amended version is meant to echo the service requirements of Arkansas Rule of Appellate Procedure—Civ. 3(f), which expressly provides that “[f]ailure to serve notice shall not affect the validity of the appeal.” *Id.* at *4, 439 S.W.3d at 103-104.6.

Relying on a prior version of Rule 9, the court in *Chronister* ultimately rejected appellant's argument emphasizing that “Rule 3(f) specifically provides that failure to serve a copy of the notice of appeal from a circuit court ruling does not affect the validity of the appeal” and “Rule 9(b), governing appeals from district court, contains no such language.” *Id.* at *5, 439 S.W.3d at 104. The *Chronister* court expressly noted that Rule 9 was amended, effective July 1, 2014, but because the appellant filed its appeal with the circuit court on August 23, 2013, and served appellee on September 16, 2013, the 2014 amendments to Rule 9 were not applicable to appellant. *Id.* at *8 n.2, 430 S.W.3d at 106. However, as of July 1, 2014, subdivision (b) of Rule 9 expressly states: “Failure to serve certified copies of the district court docket sheet or district court record and a certified copy of the district court complaint or claim form shall not affect the validity of the appeal,” which makes it clear that “failure to serve the appeal documents does not affect the validity of the appeal.” Ark. Dist. Ct. Rule 9, Addition to Reporter's Notes, 2014 Amendment. Accordingly, even if CAW is a necessary party, failure to serve CAW with the Notice of Appeal and certified copy of the Judgment would not affect the Court's jurisdiction or warrant dismissal of the appeal under the current version of Rule 9.

III. CONCLUSION

Petitioner complied with Arkansas District Court Rule 9, as it applies to appeals from county court and, therefore, perfected its appeal. For the reasons stated herein, as well as

Petitioner's responses, the motions to dismiss submitted by CAW and Pulaski County should be denied, and Petitioner should be awarded all other relief to which it is entitled.

Respectfully submitted,

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By: /s/ Mary-Tipton Thalheimer
Timothy W. Grooms (84058)
R. Seth Hampton (2012279)
Mary-Tipton Thalheimer (2011268)

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2016, a copy of the foregoing was mailed by regular United States first class mail to the persons named below:

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Little Rock, Arkansas 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway Suite 400
Little Rock, Arkansas 72201

/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

vs.

CASE NO. 60CV-16-1779

PULASKI COUNTY

RESPONDENTS/DEFENDANTS

CENTRAL ARKANSAS WATER

INTERVENOR

ORDER GRANTING MOTIONS TO DISMISS THE NOTICE
OF APPEAL FILED BY THE INCORPORATORS OF
THE COMMUNITY KNOWN AS LITTLE ITALY

On March 23, 2016, the Incorporators of the Community Known as Little Italy (the "Petitioners") filed a notice of appeal ("Notice") in the Circuit Court of Pulaski County from a judgment of the Pulaski County Court entered on February 26, 2016, denying a petition for incorporation. The Notice named only Pulaski County as a respondent and was only served on Pulaski County and the Pulaski County Judge. On April 25, 2016, Central Arkansas Water ("CAW") filed a motion to intervene as a necessary party, or alternatively as a permissive intervenor. Without objection, the motion to intervene was granted on August 10, 2016, and CAW was permitted to intervene as a necessary party.

On August 10, 2017, CAW filed a motion to dismiss Petitioner's Notice and brief in support ("CAW's Motion to Dismiss"). On August 11, 2016, the Pulaski County Attorney's Office ("Pulaski County") filed a motion to dismiss Petitioner's Notice and brief in support ("Pulaski County's Motion to Dismiss"). On August 23, 2016, the Petitioners filed responses to CAW's Motion to Dismiss and Pulaski

County's Motion to Dismiss ("Petitioners' Reply"). On August 31, 2016, Pulaski County filed a reply to the Petitioner's response to Pulaski County's Motion to Dismiss ("Pulaski County's Reply"). CAW also filed a reply to the Petitioner's response to CAW's Motion to Dismiss on September 2, 2016 ("CAW's Reply"). A surreply opposing CAW's Motion to Dismiss and Pulaski County's Motion to Dismiss was filed by the Petitioners on September 14, 2016 ("Petitioners' Surreply").

On October 12, 2017, a hearing was held on CAW's Motion to Dismiss and Pulaski County's Motion to Dismiss and all of the related pleadings. The Petitioners appeared by and through their attorneys, Mary-Tipton Thalheimer and Seth Hampton of Quattlebaum, Grooms & Tull PLLC. Pulaski County appeared by and through its attorneys, Adam B. Fogleman and William Andrew Gruber. CAW appeared by and through its attorney, Judy Simmons Henry of Wright, Lindsey & Jennings LLP.

After reviewing CAW's Motion to Dismiss, Pulaski County's Motion to Dismiss, Petitioners' Reply, Pulaski County's Reply, CAW's Reply, Petitioners' Surreply, hearing the arguments of counsel, being familiar with this case, the filings and service made and the applicable rules and law, the Court FINDS AND ORDERS that CAW's Motion to Dismiss and Pulaski County's Motion to Dismiss are both hereby GRANTED for the reasons stated at the conclusion of the hearing. The Notice filed by Petitioners is hereby dismissed with prejudice. The Court

hereby adopts and incorporates by reference its findings of fact and conclusions of law from the October 12, 2017, hearing as if fully restated herein.

IT IS SO ORDERED.

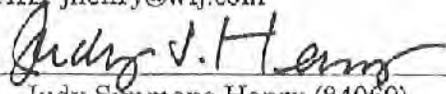


HONORABLE CHRIS PLAZZA
CIRCUIT COURT JUDGE

DATE 11-2-17

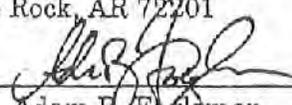
SUBMITTED AT THE DIRECTION
OF THE COURT BY:

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By 

Judy Simmons Henry (84069)
Attorneys for Central Arkansas Water

Adam B. Fogleman
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By 

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Attorneys for Pulaski County

APPROVED AS TO FORM:

Mary-Tipton Thalheimer
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By /s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer
Seth Hampton
Attorneys for Petitioners

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

INCORPORATORS OF THE
COMMUNITY KNOWN AS
LITTLE ITALY

PETITIONER/PLAINTIFF

VS.

CASE NO.: 60CV-16-1779

PULASKI COUNTY

RESPONDENT/DEFENDANT

CENTRAL ARKANSAS WATER

INTERVENOR

INCORPORATORS OF THE COMMUNITY KNOWN AS LITTLE ITALY'S
NOTICE OF APPEAL

Petitioner/Plaintiff Incorporators of the Community Known as Little Italy ("Little Italy") hereby give their notice of appeal.

1. The party taking this appeal is Little Italy.
2. This appeal is from the Court's November 2, 2017 *Order Granting Motions to Dismiss the Notice of Appeal Filed by the Incorporators of the Community Known as Little Italy*, which dismissed Little Italy's notice of appeal.
3. Little Italy designates the entire record in this matter as the record on appeal, including all of the pleadings, motions, briefs, exhibits, and the transcript of the hearing held in this case on October 12, 2017.
4. Little Italy has ordered the full transcript of the proceedings in this matter, and has made financial arrangements required by the court reporter under Ark. Code Ann. § 16-13-510(c).
5. This appeal is to the Arkansas Court of Appeals.
6. Little Italy has no other pending or unresolved claims.

Respectfully submitted,

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By: /s/ Mary-Tipton Thalheimer
Timothy W. Grooms (84058)
R. Seth Hampton (2012279)
Mary-Tipton Thalheimer (2011268)

Attorneys for Petitioner/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2017, a copy of the foregoing was mailed by regular United States first class mail to the persons named below:

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Little Rock, Arkansas 72201

Judge Barry Hyde
Pulaski County Chief Executive Officer
Pulaski County Court
201 S. Broadway Suite 400
Little Rock, Arkansas 72201

/s/ Mary-Tipton Thalheimer
Mary-Tipton Thalheimer

REPORTER'S CERTIFICATE

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STATE OF ARKANSAS
COUNTY OF PULASKI

I, DEBRA WESTMORELAND, hereby certify that I am a
Certified Court Reporter for the State of Arkansas, and that on
the date as aforementioned, I was present for the proceedings
had in the within and numbered cause. I further certify that
the foregoing pages contain and are a true and correct
transcription of the proceedings as reported by me herein, and
transcribed and reduced to typewriting under my direction and
supervision.

WITNESS my hand and seal on this the twenty-fourth
day of January, 2018.

Debra Westmoreland
DEBRA WESTMORELAND, CCR
Arkansas Certificate Number 254
(seal)

Cost of transcript:
47 pages @ \$4.10 \$192.70

CLERK'S CERTIFICATE

INCORPORATORS OF THE COMMUNITY KNOWN AS LITTLE ITALY

VS CV2016-1779

PULASKI COUNTY

CENTRAL ARKANSAS WATER

STATE OF ARKANSAS)

} SS

COUNTY OF PULASKI

I, LARRY CRANE, CLERK OF THE CIRCUIT COURT WITHIN AND FOR THE STATE AND COUNTY AFORESAID, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1-172 CONTAIN A TRUE, CORRECT, AND COMPARED COPY OF THE RECORD IN THE ABOVE CAUSE OF ACTION.

AS THE SAME, APPEARS ON FILE AND OF RECORD IN MY OFFICE. IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AS SUCH CLERK ON THIS 20TH DAY OF FEBRUARY, 2018.

LARRY CRANE, CIRCUIT CLERK

BY:


MIKE GARRETT

D.C.

COURT REPORTER'S COST: \$192.70
COURT CLERK'S COST: \$346.25

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