

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CITY OF WINTER HAVEN,
a Florida municipal corporation,

Plaintiff,

vs.

Case No. 08:09CV-00190-T-17EAJ

CLEVELAND INDIANS BASEBALL
COMPANY, LP, an Ohio limited partnership,

Defendant.

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DEFENDANT'S ANSWER & AFFIRMATIVE DEFENSES

Defendant, Cleveland Indians Baseball Company, LP, by and through its undersigned attorneys, hereby answers the Amended Complaint herein, in the order of its numbered paragraphs and asserts its affirmative defenses as follows:

1. Admitted.
2. Specifically denied.
3. Admitted.
4. Admitted.
5. Admitted that venue is properly laid in this Court; otherwise, specifically denied.
6. Admitted.
7. Specifically denied.
8. Admitted that Defendant executed a written Use Agreement with the Plaintiff in 1992; otherwise, specifically denied.
9. Admitted, except as to the allegation that the Amended Agreement was a novation which is specifically denied.

10. Admitted.
11. Admitted that the Amended Agreement is binding and that its terms speak for themselves; otherwise, specifically denied.
12. Admitted that the Amended Agreement is binding and that its terms speak for themselves; otherwise, specifically denied.
13. Admitted that the Amended Agreement is binding and that its terms speak for themselves; otherwise, specifically denied.
14. Specifically denied.
15. Specifically denied.
16. Specifically denied.
17. Specifically denied.
18. Specifically denied.
19. Admitted.
20. Specifically denied.
21. Specifically denied.
22. Specifically denied.

AFFIRMATIVE DEFENSES

1st Affirmative Defense – Amended Use Agreement: All withholding of sums from the Plaintiff is consistent with, and justified contractually by, the terms of the Amended Use Agreement.

2nd Affirmative Defense – Estoppel & Waiver: By its wrongful conduct and representations in concealing from the Defendant its payment of State taxes owed under the Amended Use Agreement, upon which conduct and representations the Defendant justifiably

relied, caused Defendant to overpay State taxes to its monetary damage and Plaintiff is therefore estopped from, and has waived its right to, seek damages in this action.

3rd Affirmative Defense – Breach of Implied Covenant of Good Faith & Fair Dealing: By its wrongful conduct and representations in concealing from the Defendant its payment of State taxes owed under the Amended Use Agreement, upon which conduct and representations the Defendant justifiably relied, caused Defendant to pay State taxes owed by Plaintiff under the Amended Use Agreement and thus breached the covenant of good faith and fair dealing implied into the Amended Use Agreement by Florida law.

4th Affirmative Defense – Set-Off for Post-Contractual Fraud: After the execution of the Amended Use Agreement the Plaintiff falsely and fraudulently represented to the Defendant that it had not paid certain State taxes to the Florida Department of Revenue owed under the Amended Use Agreement with the intent that the Defendant, in reliance on this representation, would pay them on Plaintiff's behalf. In reliance on this false representation, the Defendant paid the taxes, thus suffering damages in the amount of the overpayment.

Dated: May 5, 2009

PETERSON & MYERS, P.A.

By: /S/ J. Davis Connor

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2009, I electronically filed the foregoing Defendant's Answer and Affirmative Defenses with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record: Neal L. O'Toole, Esq., 310 East Main Street, Bartow, FL 33830; Frederick J. Murphy, Jr., Esq., Boswell & Dunlap, LLP, P. O. Drawer 30, Bartow, FL 33831, and; Warren Andrew Crawford, Esq. Boswell & Dunlap, LLP, P. O. Drawer 30, Bartow, FL 33831.

/S/ J. Davis Connor

J. Davis Connor, Esq.