

**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.

_____ /

DEFENDANT'S MOTION TO DISMISS

Defendant, Cleveland Indians Baseball Company, LP, by and through its undersigned attorneys, hereby moves to dismiss Counts II and III of the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that: (1) the claims for open account and account stated cannot be based on liquidated damages for breach of a written contract; (2) Plaintiff has not attached to the Complaint any "account"; and (3) the exhibits which are attached show that no such "open account" or "account stated" exists between Plaintiff and Defendant.

Dated: February 20, 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 February 20, 2009, I electronically filed the foregoing Motion 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: Frederick J. Murphy, Jr., 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.