

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**PATCO CONSTRUCTION
COMPANY, INC.,**)
)
)
 PLAINTIFF)
)
v.)
)
PEOPLES UNITED BANK)
DBA OCEAN BANK,)
)
 DEFENDANT)

CIVIL No. 09-503-P-H

ORDER ON MOTION TO DISMISS COUNTERCLAIMS

The plaintiff’s motion to dismiss the defendant’s counterclaims, based upon contractual indemnification language, for costs and legal fees in defending against the plaintiff’s complaint in this very case is **GRANTED**. The defendant’s counterclaim for its legal fees cannot succeed under either Connecticut or Maine law. In Connecticut, “[t]he logic and rationale underlying our indemnity case law are based on the premise that an action for indemnification is one in which one party seeks reimbursement from another party for losses incurred in connection with the first party’s liability to a third party.” Amoco Oil Co. v. Liberty Auto & Elec. Co., 810 A.2d 259, 263 (Conn. 2002). “[T]he classic indemnification language of ‘protect, defend, indemnify and hold harmless’ . . . is a pure indemnification clause” and “does not support a direct breach of contract claim for first-party losses.” Connecticut Resources Recovery Auth. v. Murtha Cullina, LLP, 2006 WL 1530158, at *3 (Conn. Super.

2006). In Maine, for a contractual indemnification provision to apply to claims between the parties to the contract, rather than to third parties' claims, it must be stated clearly and unambiguously. Devine v. Roche Biomedical Labs., Inc., 637 A.2d 441, 446 (Me. 1994). The language in the Automated Clearing House and eBanking agreements at issue in this case does not meet the standard of either state's law.¹ Neither Lloyd v. Sugarloaf Mountain Corp., 833 A.2d 1 (Me. 2003), nor Dow-Westbrook, Inc. v. Candlewood Equine Practice, LLC, 2010 WL 724193 (Conn. App. 2010), is to the contrary.²

The motion to dismiss counterclaims is **GRANTED**.

SO ORDERED.

DATED THIS 31ST DAY OF MARCH, 2010

/s/D. BROCK HORNBY _____
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

¹ "Customer agrees to defend, indemnify, save and hold Bank harmless, from and against any loss, liability[,], damage or expense (including attorney's fees and expenses) resulting from or arising out of any claim of any person that Bank is responsible for, any act or omission of Customer, or any other person described in this Section 12(a)." Automated Clearing House Agreement ¶ 12(a) (Ex. A to Countercl.) (Docket Item 22-1).

You agree to indemnify, hold harmless and defend Ocean Bank from and against any and all claims, actions, suits, judgments and expenses (including court costs and reasonable attorney, accountant and expert witness fees) at your expense, arising from your failure to abide by these restrictions on the use of Ocean Bank eBanking.

Ocean Bank eBanking and Bill Payment Agreement IV(A) (Ex. D to Countercl.) (Docket Item 22-4).

² The language in Lloyd was distinctive: "[S]hould I or my successors assert my claim in contravention of this agreement, I or my successors shall be liable for the expenses (including legal fees) incurred by the other party or parties in defending . . ." Lloyd, 833 A.2d at 3. In Dow-Westbrook, there was no dispute over meaning, just over enforceability and public policy. Dow-Westbrook 2010 WL 724193 at *4-7. The Appellate Court did not even mention the Connecticut Supreme Court decision in Amoco Oil.

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET NO. 2:09cv503 (DBH)**

Patco Construction Company, Inc.,
Plaintiff

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v.

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