

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>SARGENT TRUCKING, INC.,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 00-178-B</b>
	)	
<b>NORCOM, INC.,</b>	)	
	)	
<b>Defendant</b>	)	

**MEMORANDUM OF DECISION<sup>1</sup>**

Defendant Norcom, Inc., has moved for summary judgment in its favor on its counterclaim seeking damages from an alleged breach of contract. I now **DENY** the motion.

**SUMMARY JUDGMENT STANDARD**

A party moving for summary judgment is entitled to a grant of summary judgment in its favor only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the non-movant. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir. 2000).

**FACTUAL BACKGROUND**

Sargent Trucking is a Maine corporation with a principal place of business in Maine. Norcom is a Florida corporation with a principal place of business in Florida. In the spring and summer of 1999, Leo Tetreault, an agent of Norcom, contacted Bruce Sargent, President of

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Sargent Trucking, to solicit his telecommunications business on behalf of Norcom. At the time, Sargent Trucking was under contract with AT&T for telecommunications services. According to Sargent, Tetreault assured Sargent that Sargent Trucking could terminate the AT&T contract without legal liability. Sargent avers that Tetreault assured him that, if Sargent Trucking could not withdraw from the contract with AT&T, Norcom would permit Sargent to withdraw from the contemplated Norcom contract. Sargent states that he agreed to enter into several contracts with Norcom based on this representation. Norcom denies that Tetreault ever made such assurances to Sargent.

On June 23, 1999, Sargent Trucking signed a Dedicated Services Contract for the installation of a T-1 connection and the provision of inbound and outbound telephone services through that connection for a two-year period. The Dedicated Services Contract recites that it is a Sales Order Form/Contract. It describes “monthly recurring charges” of \$1250.00 for “T-1 Access” and indicates a two-year term. It does not recite any remedies for a breach of contract or indicate what actions constitute a breach. Nor does it reference other documents from which remedies can be incorporated.

In addition to the Dedicated Services Contract, Sargent Trucking also signed fourteen Subscriber Service Agreements/Letters of Authorization.<sup>2</sup> The Subscriber Service Agreements provide in their signature sections, “I agree to pay all toll charges by due date stated on the invoice. Failure to do so may result in discontinuation of service. NORCOM, Inc. will access a 20% fee to cover collection costs in the event that discontinuation of service is due to nonpayment of services.”

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<sup>2</sup> These forms appear to serve as authorizations for Norcom to switch specified phone numbers from current service providers to Norcom.

In order to fulfill its obligations under the Dedicated Services Contract/Order Form, Norcom placed an order with Network One for the installation of a telecommunications service package on or about July 7, 1999. In July 1999, Sargent Trucking informed AT&T that it intended to terminate its contract with AT&T. By letters dated July 28, 1999 and August 20, 1999, AT&T informed Sargent Trucking that it intended to refer the matter to its collections and litigation group. According to Sargent Trucking, it “promptly” notified Norcom that AT&T would not release Sargent Trucking from liability and that Sargent Trucking was therefore withdrawing from the contract with Norcom. However, on September 21, 1999, one month after the last AT&T letter threatening collections litigation, Sargent executed two additional form documents relating to Norcom services, a Private Line Agreement and a Carrier Access Request. The parties’ statements reveal that Sargent Trucking’s “prompt” notification was actually made after the execution of these documents. How much later is not disclosed.

The Private Line Agreement sets forth monthly billings and payment terms, but not the contract price or contract term. It provides, “In the event of non-payment, Customer agrees to pay all collection, legal fees and court costs.” It later provides that, in the event of termination, “Customer agrees to: (1) pay 50% of the monthly recurring charge multiplied by the number of months remaining in the service term, in a lump sum to Norcom Inc. within thirty (30) days of termination. (2). Reimburse Norcom Inc. for any waived installation, monthly access charges and special promotional credits given.” Other than being titled a “Private Line” agreement, the Private Line Agreement does not indicate what “service” it pertains to. Nor does Norcom’s statement of material facts provide this information.

The Carrier Access Request relates to a “Point-to-Point data/private line for a period of 12 months.” It recites a “monthly recurring fee” of \$998.00. It further provides:

The TERMS AND CONDITIONS of NETWORK SERVICES are in accordance with the TERMS AND CONDITIONS set forth in the SERVICE AGREEMENT. By signing this document the Customer agrees to follow the TERMS AND CONDITIONS set forth in the SERVICE AGREEMENT . . . . If the Customer willfully breaches the SERVICE AGREEMENT, the Customer will pay to NORCOM, INC. an amount equal to the monthly recurring fee of the NETWORK SERVICES provided times the number of months remaining to be paid on this Term.

Sargent Trucking's statement of material facts reveals that a T-1 line was installed over a one-month period, presumably by November 4, although the parties' statements do not make this clear. Presumably after the installation was completed, Sargent Trucking informed Norcom that it would not switch its service to Norcom because of the dispute with AT&T. After receiving this notification from Sargent Trucking, Norcom "unsuccessfully attempted to terminate the Network One agreement." On November 4, 1999, Bell Atlantic invoiced Network One in the amount of \$23,222.62 for access and installation charges associated with providing a T-1 connection to Sargent Trucking. Network One invoiced Norcom for this amount and paid the Bell Atlantic invoice by check dated December 16, 1999. According to a representation contained in a letter from Network One to Norcom, Norcom paid Network One \$23,222.62 as of February 5, 2000. On an undisclosed date, Norcom demanded payment from Sargent Trucking. Sargent has refused to reimburse Norcom for the T-1 installation cost and has refused to pay other alleged contract damages requested by Norcom. Sargent Trucking never made use of Norcom's telecommunication services.

Sargent filed suit in Aroostook County Superior Court, seeking a declaratory judgment setting its total liability to Norcom at \$1,750.00. Norcom removed the action to this Court, based upon diversity jurisdiction, and filed a counterclaim seeking reimbursement in the amount of \$23,222.62 for the T-1 installation, \$30,000.00 for two-years of monthly charges for use of the T-1 line pursuant to the Dedicated Service Contract/Order Form, \$5,988.00 for 50% of one year

of monthly charges under the Carrier Access Request, and \$19,736.87 in attorney fees pursuant to the Private Line Agreement. Notably, the attorney fees figure is not supported by affidavit or by a specific formula contained in the contracts. Norcom's counterclaim indicates that the attorney fee figure represents "one-third of principal." My computation of the non-attorney fee damages listed in the counterclaim amounts to \$59,210.62. One-third (33 1/3 %) of this amount is \$19,736.87. When added to the "principal," the sum is \$78,947.49, just over the \$75,000 diversity jurisdiction threshold.

## **DISCUSSION**

Norcom alleges the breach of three separate contractual undertakings by Sargent: the Dedicated Services Contract, the Carrier Access Request, and the Private Line Agreement. Additionally, Norcom attempts to justify, in part, its attorney fees claim by reference to the Subscriber Service Agreements. I address the contracts in turn to evaluate whether, as a matter of law, Norcom is entitled to the damages it seeks on this record. My conclusion is that the remedy provisions of the contracts are not sufficiently clear to permit *brevi*s resolution of this case.

### ***1. Dedicated Services Contract/Order Form***

Norcom seeks reimbursement of the \$23,222.62 paid to Network One for Bell Atlantic's installation of the T-1 line and \$30,000 for two years of monthly charges pursuant to the terms of its Dedicated Services Contract. Sargent Trucking argues that payment for the T-1 installation is not required by this document in the event of termination. The Dedicated Services Contract/Order Form does not contain a remedies section. It merely indicates monthly recurring charges of \$1250 for access costs, a 24-month term, inbound and outbound long distance usage rates, and an estimated monthly usage of "25k/mo." The absence of any clear damages

provisions in this document dissuades me from granting summary judgment on behalf of Norcom for any sum certain based on a contract theory of liability. I simply can find no language in the Dedicated Service Contract that indicates what amount is due and payable upon termination of the contract.

## ***2. Private Line Agreement***

Norcom argues that pursuant to the terms of its Private Line Agreement it is entitled to recover all collection, legal fees, and court costs. To begin, this language is at odds with language in Norcom's Subscriber Service Agreements/Letters of Authorization, which provides for a 20% fee to cover collections costs in the event of nonpayment of services. I do not understand how that language relates to the Private Line Agreement language or how or whether these separate documents relate to distinct products or services provided by Norcom. Furthermore, the "collection, legal fees, and court costs" provision expressly relates to non-payment of monthly billings, which calls into question whether these costs and fees are recoverable under the circumstances of this case, because no telecommunications services were provided or invoiced pursuant to this contract.<sup>3</sup>

Additionally, a subsequent paragraph in the Private Line Agreement concerning "termination" would appear to set forth a clearly applicable liquidated damages provision consisting of "50% of the monthly recurring charge multiplied by the number of months remaining in the service term." However, I cannot determine whether this provision invokes the

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<sup>3</sup> Assuming that Norcom ultimately prevails on the issue of liability and satisfies me that the "collection, legal fees and court costs" language in the Private Line Agreement document is relevant and related to the other two documents, I will enter a judgment indicating that they have a contractual right to recover attorney fees. Pursuant to Local Rule 54.2, Norcom should make an application for its attorney fees within 60 days of the entry of judgment. In the absence of any citation to federal authority to the contrary, I would expect that such application would explain the justification for the amount of attorney fees sought, including an explanation of any contingency fee agreement that may be operative in this case that would obviate the need for an hourly justification of billing figures.

monthly recurring charges and term of the Dedicated Services Contract<sup>4</sup> or the charges and term contained in the Carrier Access Request Form. In fact, it is impossible to tell whether the Private Line Agreement and the Carrier Access Request, executed on the same day, pertain to the same service. I note that, if they do, they each contain a different liquidated damages provision. I am unwilling to seriously consider granting summary judgment based on the provisions found in the Private Line Agreement.

### ***3. Carrier Access Request***

The Carrier Access Request indicates that there is a monthly recurring fee of \$998.00 per month and sets a term of twelve months. The Carrier Access Request Form is the only contract containing the signatures of both parties and it is the only contract containing language referring to or incorporating language contained in another document. However, the hope engendered by this language of incorporation is quickly squelched because the Carrier Access Request provides that its terms and conditions are in accordance with the terms and conditions provided in the “SERVICE AGREEMENT.” The only documents in the record that are labeled “Service Agreement” are the fourteen “Subscriber Service Agreements/Letters of Authorization,” which do not contain any terms and conditions. Thus, even though the Carrier Access Request Form clearly provides for damages “equal to the monthly recurring fee . . . times the number of months remaining to be paid,” there is no basis in the record for determining that a “SERVICE AGREEMENT” exists, let alone that it was breached. In other words, even though the damages provision is clear, the existence of breach is called into question through the reference to an unidentified document.

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<sup>4</sup> If this provision refers to the \$1250.00 per month recurring charge in the two year Dedicated Service Contract, it would provide a legal basis for an award of \$15,000.00, but not for an award of the additional \$30,000.00 sought by Norcom. Naturally, this would undermine Norcom’s grounds for asserting federal jurisdiction over this case.



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v.

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NORCOM INC                      PAUL W. CHAIKEN  
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v.

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counter-defendant              [COR LD NTC]

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