

Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FIRST SOUND BANK, a Washington corporation,

Plaintiff,

v.

LARASCO, INC., a Washington corporation; LOUIS A. SECORD, JR., an individual; and RICHARD A. SECORD, an individual,

Defendants.

No. C09-0056-TSZ

**FIRST SOUND BANK'S REPLY IN SUPPORT OF MOTION FOR RELIEF FROM ORDER RE: ATTACHMENT BOND**

Noted on Motion Calendar:  
June 10, 2009

WELLS FARGO EQUIPMENT FINANCE, INC., a Minnesota corporation; PLAZA BANK, a Washington corporation; REGAL FINANCIAL BANK, a Washington corporation; COWLITZ BANK, a Washington corporation; and WASHINGTON FEDERAL, INC., a Washington corporation,

Plaintiff-Interveners,

v.

FIRST SOUND BANK, a Washington corporation; and LARASCO, INC., a Washington corporation,

Defendants-in-Intervention.

## I. INTRODUCTION

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FSB made a common-sense proposal that it be permitted to deposit cash in the Court's registry equal to the value of the assets to be attached. Larasco responds to that proposal by requesting that FSB deposit with the Court substantially *more* funds than the value of the attached property. Under Larasco's proposal, the attachment would impose a greater hardship on FSB (which has shown probability of success on the merits) than it would impose on Larasco (which the Court has found likely violated the Washington State Securities Act ("WSSA") and breached its contract with FSB).

The rationales Larasco provides for its proposal make no sense. Larasco contends that FSB's deposit should be increased by 25% in case the attached assets *appreciate* during the litigation. The purpose of this security, however, is to protect Larasco against the potential for *diminution* of the value of the assets as a consequence of attachment. If the assets FSB attaches increase in value pending the final outcome of this litigation, and the Court later determines that attachment of those assets was wrongful, there is simply no way that Larasco will have been harmed by the increase in value.

Larasco's suggestion that the cash to be posted in the Court's registry must include defendants' anticipated legal expenses for this entire matter is not supported by the law. Larasco cites no authority for the proposition that attorney's fees should be considered when setting the amount of security on an attachment. Requiring FSB to provide security for attorney's fees would also be inconsistent with the Court's attachment order: while the writ is intended to secure FSB's recovery under WSSA (which allows for recovery of attorney's fees), the Court did not include *FSB's* potential attorney's fees recovery in calculating the value of the writ. It would therefore be unfair to require FSB to provide security for attorney's fees that *Larasco* speculates it may recover in the future. Doing so would be particularly inappropriate because, by finding FSB's claims "probably valid," the Court has determined that FSB is more likely to recover attorney's fees than is Larasco.

1 The Court should permit FSB to post \$3,610,865 to secure the attachment of a  
2 commensurate measure of Larasco's assets.

## 3 II. DISCUSSION

### 4 A. Larasco Fails To Identify Plausible Damages In Excess Of \$3.6 Million.

5 Larasco admits that "posting approximately \$3.6 million in cash with the Clerk  
6 would provide Larasco with security for the potential loss of value of the attached  
7 property," but then argues that this substantial sum of money "provides no security for the  
8 additional damages Larasco would be entitled to recover should the attachment be found to  
9 have been wrongful." Response at 2. Larasco's additional "damages," however, are not  
10 damages at all, or are inflated and unsupported attorney's fees.<sup>1</sup>

#### 11 1. Larasco's Request For Additional Security For Anticipated Increase In 12 Value Of Attached Assets Is Nonsensical.

13 Larasco contends that many of its assets, some of which may be subject to  
14 attachment, have lost value in the past year. Response at 6; Secord Decl. ¶ 5. In a startling  
15 leap of reasoning, Larasco then argues that because it anticipates the value of its assets will  
16 rise by 25% prior to the conclusion of this litigation, the cash FSB should be required to  
17 post must be *increased* by 25%.

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20 <sup>1</sup> Larasco spends the first three pages of its brief speculating on the financial health of FSB. These inaccurate  
21 and unsupported concerns are irrelevant to the issue that must be decided here, as FSB is prepared to post \$3.6  
22 million in cash to the Court's registry. Because FSB has not yet provided shareholders with its audited 2008  
23 financial statements, Larasco speculates that the Bank's financial condition must be dire. In fact, FSB has not  
24 yet provided those audited financial statements for two reasons. Gould Decl. ¶ 4. First, the audit of FSB's  
25 financial statements was delayed by FSB's April 2009 restatement of its financial results to report a loss for  
26 2008 of approximately \$20 million, approximately \$18 million of which is directly attributable to losses in the  
PSL Division of FSB, which FSB purchased from defendants. *Id.* Additionally, because FSB moved from a  
"12 month" regulatory examination schedule to an "18 month" regulatory examination schedule, this year the  
regulatory examination took place in January, as opposed to July as in past years. *Id.* ¶ 5. Since the Bank's  
auditor will not issue its audit report until after it receives the results of the regulatory examination, the  
schedule change delayed the release of FSB's audited financial statements. *Id.* FSB's auditor recently  
completed its review of the bank's 2008 financial statements. *Id.* ¶ 6. The auditor's report contained a  
unqualified, or "clean," opinion. *Id.* ¶ 6 & Ex. 1. FSB anticipates mailing audited 2008 financial statements  
to its shareholders within the next two weeks. *Id.* ¶ 7.

1 Larasco's reasoning is inconsistent with the purpose of attachment security. As  
2 Larasco admits, damages from wrongful attachment "are those that naturally flow from the  
3 wrongful seizure." Response at 4 (citing *Huzzy v. Culbert Constr. Co.*, 5 Wn. App. 581,  
4 585, 489 P.2d 749, 752 (1971)). The typical "naturally flow[ing]" damage from a wrongful  
5 attachment is diminution of the value of the asset. *See, e.g., Seattle Crockery Co. v. Haley*,  
6 Wash. 302, 314, 33 P. 650, 654 (1893) (awarding "[a]ctual depreciation of the value of  
7 the goods by reason of the marshal's possession and treatment of them"). An *increase* in  
8 the value of an attached asset simply cannot constitute damage, much less one that  
9 "naturally flow[s] from the wrongful seizure."

10 FSB suspects that Larasco's real concern here, although inaccurately and inartfully  
11 characterized as *damage*, is that FSB will somehow obtain attachment of assets worth *more*  
12 than the amount the Court authorized if, following attachment of those assets, their value  
13 rises. That possibility fails to justify enhanced security for two reasons. First, as described  
14 above, if the value of the assets subject to attachment rises, Larasco will not be damaged as  
15 a result of the increase in value. Second, if an attached asset rises appreciably in value so  
16 that the attached property is worth substantially more than the amount authorized by this  
17 Court, Larasco is free to petition the Court for an appropriate adjustment to its  
18 attachment/asset freeze order.<sup>2</sup> *Id.*

19 "Speculative damages [from wrongful attachment] cannot be recovered." 1A Kelly  
20 Kunsch, *Washington Practice: Methods of Practice* § 51.5 at 404 (2d ed. 2004) (citing  
21 *Taylor v. Wilbur*, 170 Wash. 265, 16 P.2d 457 (1932) (refusing to award damages for time  
22 spent adjusting finances due to garnishment on grounds that such damages were too  
23 speculative)). Larasco's unsupported speculation that its assets – assets that Larasco has  
24 not yet even identified – will rise by 25% in the next nine months is an outcome that would

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26 <sup>2</sup> Similarly, if the value of attached assets appreciably falls during the pendency of this action, FSB may  
petition the Court to attach whatever additional assets are necessary to provide it the protection this Court has  
determined it is entitled.

1 thrill most property owners in this economy. This anticipated increase in value certainly  
2 does not constitute *harm* to Larasco, and cannot justify a requirement greater than posting  
3 to the Court's registry cash in an amount equal to the value of the attached assets.

4 **2. Larasco Is Not Entitled To Security For Attorney's Fees.**

5 Larasco cites authority that attorney's fees are sometimes recoverable in wrongful  
6 attachment actions, but it cites *no* case in which a court contemplated a potential attorney's  
7 fees recovery in calculating the amount of the attachment bond. Doing so would be  
8 inappropriate because the possibility of a fee award (and the amount of that award) is highly  
9 speculative. Requiring FSB to post security for attorney's fees would also be inconsistent  
10 with the Court's attachment order, in which it declined to consider FSB's entitlement to  
11 attorney's fees in the amount of the attachment. Whereas FSB's entitlement to attorney's  
12 fees under WSSA is likely (because its WSSA claim has been found probably valid and the  
13 statute explicitly provides for recovery of attorney's fees, RCW 21.20.430(1)), Larasco's  
14 entitlement to attorney's fees is extremely unlikely. In contrast to a prevailing WSSA  
15 plaintiff's entitlement to attorney's fees, a party's entitlement to attorney's fees in a  
16 wrongful attachment case is highly discretionary, and "depend[s] upon the circumstances of  
17 th[e] case." *Olsen v. National Grocery*, 15 Wn.2d 164, 173, 130 P.2d 78, 83 (1942).

18 Furthermore, even if Larasco was ultimately found to be entitled to fees associated  
19 with the wrongful attachment, those fees would be only a small subset of the \$1.85 million  
20 that defendants expect to incur. Larasco's counsel admits that "[t]his is an extremely  
21 complicated case, involving many hotly disputed issues that will require extensive  
22 discovery and expert analysis. It involves a total of nine parties, five of which have filed  
23 complaints in intervention." Shukis Decl. ¶ 3. But Larasco has made no effort to identify  
24 what portion of the \$1.85 million in anticipated attorney's fees will reasonably relate to the  
25 grounds for FSB's attachment – Larasco's breach of contract and WSSA violation – which  
26 are only two of the eight claims asserted by FSB in this matter. The remaining six claims

1 have nothing to do with FSB's attachment, and Larasco would not, under any  
2 circumstances, be entitled to fees associated with defending against those claims. Nor does  
3 Larasco attempt to segregate the fees associated with defending claims asserted by litigants  
4 other than FSB. Numerous investor banks have asserted multiple claims against  
5 defendants. Additionally, defendants have asserted numerous counterclaims against FSB.

6 Finally, the Court declined to order attachment against the Second Defendants. Only  
7 Larasco's assets will be attached. The vast majority of attorney's fees defendants will incur  
8 would have to have been incurred whether or not Larasco's assets were attached, and likely  
9 whether or not Larasco was even a defendant in this action. Accordingly, Larasco's  
10 anticipated (and at this point entirely speculative) attorney's fees should not serve to justify  
11 a security requirement greater than posting to the Court's registry cash in an amount equal  
12 to the value of the attached assets.

13 Even if Larasco had succeeded in showing that its anticipated \$1.85 million in  
14 attorney's fees should be secured – which it plainly has not – Larasco has not shown that  
15 FSB's deposit of \$3.6 million in the Court's registry is insufficient to protect against  
16 Larasco's speculative attorney's fees damages. Assuming that at the conclusion of this  
17 litigation the Court finds the attachment to have been wrongful *and* that Larasco is entitled  
18 to \$1.85 million in attorney's fees due to that wrongful attachment (a facially implausible  
19 assumption for the reasons described above), Larasco would be left with \$1.75 million *in*  
20 *the Court's registry* to cure any harm to the attached 437,500 shares of FSB stock and  
21 \$2,743,000 of other assets. Bizarrely, the *only* other potential harm resulting from  
22 attachment of those assets that Larasco identified was that the assets would *rise in value*  
23 during the next 9 months of this litigation. FSB's deposit of \$3.6 million in the Court's  
24 registry is more than sufficient to protect Larasco from any reasonably possible losses  
25 should the attachment later be proven wrongful.

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1 **B. Having Established “Probable Validity” On Two Of Its Claims, FSB Should**  
2 **Not Be Required To Post Security In Excess Of The Amount Attached.**

3 Based upon a compelling record of defendants’ misrepresentations and failure to  
4 keep their promises, this Court found that FSB had established probable validity of its  
5 WSSA and breach of contract claims, and that FSB was entitled to attachment of 437,500  
6 shares of FSB stock and \$2,743,000 of other Larasco assets. As security for that  
7 attachment, the Court directed FSB to post “proof of bond” equal to double the amount of  
8 the property attached, or \$7,221,731.80. As described in FSB’s opening brief and the  
9 Wilkinson and Ulfers Declarations, given the size of the contemplated bond, the complexity  
10 of this case, and the current economic climate, it is not reasonably possible to obtain a bond  
11 in that amount. *Larasco does not contest this fact.*

12 As a reasonable alternative, FSB proposed depositing \$3.6 million *in cash* – the  
13 value of the assets to be attached – to the Court’s registry. Such a deposit would provide  
14 Larasco even better protection than a bond, as it would not need to institute a separate  
15 proceeding to execute on the bond should the attachment be proven wrongful. Indeed, this  
16 procedure is specifically authorized by Washington law. *See* RCW 4.44.470. Moreover,  
17 Washington law proscribes that security be “not excessive” and that the Court has  
18 discretion to fix security as it deems fit. *Id.*; *see also* RCW 6.25.080(1) (attachment statute  
19 permitting court to set security at such “amount as the court shall fix”).

20 Given the unavailability of a \$7.2 million bond in this matter, FSB respectfully  
21 submits that requiring it to post more than \$3.6 million in cash to secure an attachment of a  
22 commensurate value would be punitive. FSB simply could not justify posting more than  
23 \$3,610,865 in cash as security for this attachment. This Court has found that FSB has  
24 established the probable validity of its WSSA and contract claims. It would be  
25 fundamentally unfair to require the party this Court has determined likely was wronged by  
26 Larasco to post cash assets in an amount greater than the Court has preliminary determined  
it will be entitled from Larasco.

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DATED: June 10, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2009 at Seattle, Washington.

s/ Shelley Meyer  
Shelley Meyer, Legal Assistant