The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FIRST SOUND BANK, a Washington corporation, Plaintiff, v. LARASCO, INC., a Washington corporation, et al., Defendant.	No. C09-0056-TSZ WASHINGTON FEDERAL'S REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT
WELLS FARGO EQUIPMENT FINANCE, INC., a Minnesota corporation, et al., Plaintiff-Interveners, v. FIRST SOUND BANK, a Washington corporation, et al., Defendants-in-Intervention.	**NOTED FOR HEARING ON: FRIDAY, JUNE 25, 2010**

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

I. INTRODUCTION

This Court is uniquely situated and vested with jurisdiction to resolve this Motion to Enforce Settlement Agreement filed by Washington Federal Savings ("Washington Federal") against First Sound Bank ("FSB"). First, the principal assets that are the subject of the settlement between Washington Federal and FSB (the "Washington Federal Settlement") are the same assets that the Court is currently overseeing under the Writ of Attachment entered on August 10, 2009. Thus, the disposition of this Motion is plainly part of the "same case or controversy" for which the Court has federal question jurisdiction, and the exercise of supplemental jurisdiction is warranted. Second, the Court is well-versed in the facts of this case (including the identity of the parties, their respective claims, the nature of the lease portfolios, and the Banner Bank settlement) and can resolve this Motion in the most cost-effective and efficient manner. For these reasons, it is entirely proper for the Court to resolve this Motion at this time.

Regarding the merits of the Motion, FSB's refusal to grant Washington Federal the same settlement terms given to Banner Bank is unfounded and contradictory. First, FSB focuses on the alleged difficulty of comparing the value of the Banner Bank settlement with the Washington Federal Settlement due to the fact that both agreements turn, in part, on FSB's prospective recovery against Defendants in this action. But FSB ignores that, in requesting that its settlement terms be modified, Washington Federal acknowledged that its potential recovery vis-à-vis FSB's claims in this action must be capped in exactly the same manner as Banner Bank's recovery, *i.e.*, consistent with the $100,000 cap on potential recovery. With that cap in place, it is irrefutable that Banner Bank received a more favorable cash payment ($550,000 in immediate money) and a more lucrative deal with regard to its lease portfolio (control of servicing and ownership rights, including deposits). The Court need not undertake the speculative inquiry of whether a greater percentage recovery against Larasco would render the Washington Federal settlement more favorable. Washington Federal is assuming that risk by accepting the cap.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Second, common sense demands that the Motion be granted. If accepting the terms given to Banner Bank would be less favorable to Washington Federal, FSB should have no objection to modifying the Washington Federal Settlement in kind because FSB would benefit from such a modification. But if the terms of the Banner Bank settlement are more favorable, as Washington Federal strongly believes, FSB has no discretion in the matter under the "most favored nation" clause. The reality is that FSB knows that Banner Bank was given a better deal, but simply does not want to honor its contractual obligations to Washington Federal. FSB's attempt to frame this straightforward issue as a disputed issue of fact should be rejected and Washington Federal should receive the benefits of its negotiated settlement.

In sum, the Court has jurisdiction to hear this Motion. The issues presented are discrete and should be resolved efficiently and without unnecessary expense. Washington Federal is the protected party under the "most favored nation clause," and FSB should not be permitted to unilaterally determine when that protection is available. The Motion should be granted.

II. LEGAL ARGUMENT

A. The Court Should Exercise Supplemental Jurisdiction Over the Motion.

The Court has federal question jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331. Regarding the instant Motion, 28 U.S.C. Section 1367(a) provides that, in cases of federal question jurisdiction, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy...." *See Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1000 Fn. 1 (9th Cir. 1997); *see also In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir. 2005) (approving of supplemental jurisdiction over state law claims with common nucleus of operative facts where the subject claims "would ordinarily be expected to be resolved in one judicial proceeding"). The decision to exercise supplemental jurisdiction is within the discretion of the district court and that court must be given an opportunity to make that decision. *See Fang v. U.S.*, 140 F.3d 1238, 1244 (9th Cir. 1998).

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Washington Federal intervened in this lawsuit to safeguard its rights in the dispute between FSB, on the one hand, and Larasco, Inc., Lascor, LLC, Rascor LLC and the Secords (the "Defendants"), on the other hand. On August 10, 2010, the Court granted FSB's motion for a writ of attachment on all real and personal property of the Defendants valued at $2,734,000, plus $437,000 shares of FSB's stock owned by Larasco, Inc. Subsequently, Washington Federal and FSB settled their dispute by entering into an agreement entitling Washington Federal to an immediate $250,000 payment, a future payment of $250,000 out of an escrow account established by FSB, and a percentage interest in FSB's possible recovery against Defendants. Washington Federal's future means of recovery under the settlement are therefore directly tied to the assets that this Court is overseeing by virtue of the Writ of Attachment. Thus, this Motion to modify the measure and amount of Washington Federal's recovery against FSB is related to and intertwined with the underlying case and controversy.

These facts are entirely different than those presented in the cases relied upon by FSB in its Response. In both *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994) and *O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995), the district courts were not overseeing active lawsuits involving the same cases and controversies as the motions to enforce the settlement agreements, so supplemental jurisdiction would not have been appropriate. Instead, the moving parties in *Kokkonen* and *O'Connor* sought relief in cases where all parties had been dismissed and the only basis for jurisdiction was ancillary jurisdiction.

Here, by contrast, there is an existing and ongoing lawsuit, and federal question jurisdiction over a motion involving the same case and controversy is within this court's broad discretion under § 1367(a). It is both prudent and proper that the matters be resolved in a single proceeding when the parties and property are already under the Court's jurisdiction. Not only is the Court already familiar with the parties and their claims and the facts surrounding the lease portfolios, the Court is also familiar with the terms of the Banner Bank settlement, having been asked by FSB to interpret that settlement. FSB's attempts to force Washington Federal to

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

commence a new state court lawsuit, which would result in undue delay and unnecessary expense, should be rejected.

B. Washington Federal is Entitled to Receive Settlement Terms That It Deems to be Most Favorable.

The "most favored nation" clause in the Washington Federal Settlement is intended to protect Washington Federal, not FSB. Under this provision, if FSB settles with an Investor Bank on terms that are more favorable than those previously granted to Washington Federal, Washington Federal has the option of demanding equal treatment. FSB seeks to obstruct this benefit by claiming that it is impossible to compare the Banner Bank and Washington Federal settlements on account that both contain a measure of recovery that is contingent on the outcome of FSB's claims in this action. This argument is factually wrong and inherently contradictory. Moreover, on a commonsense level, FSB's resistance to modifying the Washington Federal Settlement is tantamount to an admission that Banner Bank received a better deal.

First, FSB's objects that the Washington Federal Settlement cannot be compared to the Banner Bank Settlement because it is unknown whether FSB will recover against Defendants and, if so, in what amount. FSB argues that if it obtains the entire amount it has demanded in damages, Washington Federal stands to recover "more than $2 million" as compared to "Banner's maximum recover of $650,000." Aside from ignoring that Defendants' bankruptcy filings may render any FSB victory a pyrrhic win, Washington Federal has acknowledged that acceptance of the Banner Bank settlement terms includes imposing a cap on Washington Federal's potential recovery vis-à-vis the instant suit, just like Banner Bank. Thus, FSB's focus on the contingent recovery aspects of the two settlements is misplaced. With Banner Bank and Washington Federal on equal footing regarding their possible contingent recoveries, it is only necessary to compare their respective cash payments received from FSB and Banner Bank's receipt of the servicing and ownership rights in its lease portfolio.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Second, there can be no dispute that Banner Bank received a more favorable cash payment of $550,000, paid in full by FSB and without conditions. In comparison, FSB made a $250,000 payment to Washington Federal with an additional $250,000 paid into an escrow account. Aside from the more favorable "cash in hand" value of the Banner settlement, the $550,000 cash payment represented 2.35% of Banner Bank's outstanding accounts receivable in its lease portfolio of approximately $23,400,000. In contrast, the unconditional payment of $250,000 to Washington Federal only accounts for .82% of Washington Federal's lease portfolio of approximately $30,400,000. Thus, in order to square the two settlements, FSB must make an unconditional payment of $714,400 to Washington Federal, including the release of the $250,000 in escrow and an additional payment of $214,400. For obvious reasons, up front cash is more valuable to Washington Federal than a contingent right to a possible future recovery against Larasco. As the saying goes, a bird in the hand is better than two in the bush.

Third, with regard to FSB's assignment of the servicing and ownership rights to Banner Bank of its lease portfolio, it is not credible for FSB to claim that the cost of servicing these leases renders the assignment a less favorable term. Control of the servicing and ownership rights is a lucrative asset; indeed, it is the specific asset that FSB and PSL strategically retained when selling lease portfolios to the Investor Banks, and it is the asset that Banner Bank insisted it receive in order to dismiss its claims in this lawsuit. As reiterated below, if the cost of servicing the lease portfolios were truly less desirable for the Investor Banks (and, thus, an obligation that FSB would seemingly desire to release), FSB should have no objection to assigning the servicing and ownership rights to Washington Federal, just as it did to Banner Bank.

Fourth, FSB's opposition to this Motion simply makes no sense. On the one hand, FSB argues that its settlement with Banner Bank is <u>less</u> favorable to the investor bank than the one entered into with Washington Federal. On the other hand, FSB strenuously objects to modifying the Washington Federal Settlement to match the Banner settlement – which FSB characterizes as less favorable. If the Banner Bank terms were truly less favorable (it is not), FSB should have no

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

objection to granting similar terms to Washington Federal. If the Banner Bank terms are more favorable, FSB has no right to withhold such terms from Washington Federal. The Court should see through FSB's nonsensical objections and recognize that FSB has admitted through its Response that Banner Bank received a better settlement deal.

III. CONCLUSION

The terms of FSB's settlement with Banner Bank are more favorable than those granted to Washington Federal. Yet FSB has refused to adjust the terms of the Washington Federal Settlement to address this discrepancy. Washington Federal requests that the Court order FSB to comply with the Washington Federal Settlement by making the adjustments to the Washington Federal Settlement described herein.

DATED this 25th day of June, 2010.

FOSTER PEPPER PLLC

/s/ Neil A. Dial
Tim J. Filer, WSBA No. 16285
Neil A. Dial, WSBA No. 29599

Attorneys for Plaintiff-Intervenor
Washington Federal Savings

1111 Third Ave., Ste. 3400
Seattle, WA 98101-3299
Business (206) 447-4400
Fax (206) 749-9700
e-mail: filet@foster.com
e-mail: dialn@foster.com

DECLARATION OF SERVICE

This hereby certifies that, on June 25, 2010, I electronically filed the attached document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following parties who have appeared in this action as of today's date:

C. Seth Wilkinson
swilkinson@yarmuth.com

Richard C Yarmuth
yarmuth@yarmuth.com

Jeremy E Roller
jroller@yarmuth.com

Russell B. Wuehler
Russell.wuehler@dlapiper.com

Alan L. Kildow
alan.kildow@dlapiper.com

Sonya R. Braunschweig
sonya.braunschweig@dlapiper.com

Charles E. Newton
cnewton@cairncross.com

Diana S. Shukis
dshukis@cairncross.com

Stephen P. VanDerhoef
svanderhoef@cairncross.com

Yousef Arefi-Afshar
Yarefi-afshar@cairncross.com

Frederick B. Rivera
FRivera@perkinscoie.com

Gary A Gotto
ggotto@kellerrohrback.com,dheller@krplc.com

Troy D Greenfield
Troy.Greenfield@Bullivant.com

Gloria S Hong
gshong@stoel.com,sea_docket@stoel.com,cmcastro@stoel.com

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Arthur Daniel McGarry
mcgarry@oles.com,smith@oles.com

Douglas Stuart Oles
oles@oles.com,melland@oles.com

Vanessa Soriano Power
vspower@stoel.com,sea_docket@stoel.com,gshong@stoel.com,ldlomax@stoel.com

Janis C Puracal
suzanne.petersen@bullivant.com,janis.puracal@bullivant.com

Aaron D. Goldstein
agoldstein@balljanik.com

Dwain M. Clifford
dclifford@balljanik.com

Bradley R. Duncan
bradleyduncan@dwt.com

Cassandra L. Kennan
cassandrakinkead@dwt.com

Matthew J Sekits
leslie.narayan@bullivant.com,tracy.horan@bullivant.com,matthew.sekits@bullivant.com

Larry Setchell
lsetchell@helsell.com

There are no other parties who have appeared in this action as of today's date that need to be served manually.

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

DATED June 25, 2010.

FOSTER PEPPER PLLC
/s/ Neil A. Dial
Neil A. Dial, WSBA No. 29599
Attorneys for Plaintiff-Intervenor
Washington Federal Savings
1111 Third Ave., Ste. 3400
Seattle, WA 98101-3299
Business (206) 447-4400
Fax (206) 749-9700
e-mail: FileT@foster.com
e-mail: DialN@foster.com