IN THE MATTER OF:

THE LOEWEN GROUP, INC. and
RAYMOND L. LOEWEN,

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

ICSID Case No. ARB(AF)/98/3

COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

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INTRODUCTION

On October 30, 1998, The Loewen Group, Inc. ("TLGI" or "Loewen") and Raymond L. Loewen ("Ray Loewen" or "Mr. Loewen") (collectively "Claimants") submitted this claim to arbitration against the United States under Chapter Eleven of the North American Free Trade Agreement ("NAFTA"), the parties to which are the Governments of Canada, the United Mexican States, and the United States of America (the "NAFTA Parties"). The claim arises from a lawsuit exclusively between private litigants that proceeded in the courts of the State of Mississippi and was ultimately settled by agreement of those litigants.

The underlying lawsuit arose, in part, from Loewen's own aggressive business practices in the acquisition of funeral homes, for which the company is now well-known. In that lawsuit, a Mississippi jury found that Loewen had intentionally breached certain contracts and defrauded a competitor as part of a broader scheme to destroy competition and raise prices in local funeral home markets. Although Loewen initially appealed the jury's verdict and believed that its chances of success on appeal were overwhelmingly favorable, it chose instead to settle the dispute out of court rather than continue with the appellate process.

According to Claimants, the United States is liable under the NAFTA because, they contend, the Mississippi trial court wrongly permitted the lawyers for the opposing party to make inflammatory statements to the jury, resulting in a judgment that Claimants argue was unjust. Although that judgment was undeniably subject to appeal in higher courts, Claimants allege that Loewen was effectively denied its right to appeal when the Mississippi Supreme Court declined to lower the amount of a supersedeas bond that would have stayed execution of the judgment pending appeal.

Until now, this arbitration has proceeded solely on the basis of the facts as alleged by

Claimants. From the outset, the Tribunal has been asked to assume that the underlying litigation was no more than a "garden-variety contract dispute" that resulted in a disproportionately large jury award that, it is alleged, was the product of the jurors' supposed "anti-Canadian," racial, and class-based biases. At this stage of the proceedings, however, it is now appropriate to look behind Claimants' allegations to see the vastly different reality of what actually occurred in the Mississippi litigation.

As the underlying record makes plain, matters of nationalistic, racial, or class-based biases played no role whatsoever in the challenged decisions of the Mississippi courts. Instead, what the record reveals is that Loewen was found to have caused massive economic and personal damage to a Mississippi-based competitor as part of an intentional and deceptive scheme to destroy competition and raise prices to the consuming public. Both Claimants and their experts sidestep these essential aspects of the underlying litigation, which included claims against the company for fraud, malicious business practices, and abuse of monopoly power on a broad scale in an unusual industry involving deeply personal services – hardly the stuff of a "garden-variety contract dispute."

Claimants also ignore the central role that Loewen itself played in the litigation results of which Claimants now complain. Contrary to Claimants' grossly distorted presentation, the underlying record shows that Loewen made a series of tactical decisions and missteps – some of them grievous – that helped to lead the jury, the trial court, and the Mississippi Supreme Court to their ultimate decisions. In the end, Loewen fundamentally misconstrued and underestimated the gravity and scope of the allegations against the company, made a series of costly miscalculations at trial, and simply failed to argue persuasively that its conduct was anything but reprehensible

and deserving of a substantial damages award. When given the opportunity to show good cause for a reduction in the amount of a supersedeas bond by which it could have stayed execution of the judgment pending appeal, Loewen developed an unconvincing record before the Mississippi Supreme Court and ignored the repeated pleas of its counsel to avoid actions that would further undermine the company's credibility with the court. The NAFTA is not a no-fault insurance policy, however, and cannot be construed to afford the relief that Claimants seek here.

For any of several reasons, this claim should be dismissed in its entirety. First, although Claimants contend that the trial was "infected by repeated appeals to the jury's anti-Canadian, racial and class biases," Loewen never objected on such grounds at any point during the trial. Indeed, the record makes plain that much of the testimony of which Claimants now complain was introduced by Loewen itself during the trial. Although Claimants also contend that the Mississippi courts should have reduced the required supersedeas bond because corporate reorganization was an ineffective remedy for the company, Loewen never argued the point to the Mississippi courts, despite having been challenged repeatedly to do so at the time. As we demonstrated in the United States' jurisdictional submissions, and as we explain in further detail below, the alleged inaction of the Mississippi courts under these circumstances cannot support a claim under NAFTA Chapter Eleven.

Second, Loewen's settlement of the underlying litigation in lieu of an appeal from the trial court judgment precludes any possibility of recovery from this Tribunal. Although Claimants now contend that Loewen's settlement was not voluntary, but was instead the product of "economic duress," there is no basis for this contention – even assuming that such an excuse is recognized under customary international law. As we demonstrated in the preliminary phase of

this case, Loewen was advised by counsel and fully prepared to pursue effective, alternative legal remedies by which it could have continued with its appeal without fear of execution on the trial court judgment. The availability of these alternatives, as well as several other factors, defeats Claimants' assertion of "economic duress" and demonstrates that Loewen, in the end, simply made a business decision that negated any possible liability on the part of the United States.

Third, even if the Tribunal were to examine Claimants' assertions under Articles 1102, 1105, and 1110 of the NAFTA, Claimants nevertheless cannot establish the United States' liability under any of these provisions on the facts of this case. Although Claimants allege that Loewen received treatment less favorable than a United States investor would have received in like circumstances, Claimants fail to identify any such United States investor or what constitutes "like circumstances" for purposes of comparison, thus failing even to assert a *prima facie* claim under NAFTA Article 1102. Regardless of this failure, the allegation of "anti-Canadian" bias that permeates Claimants' entire claim is wholly unsupported by the record of the underlying litigation – in which, for example, the foreman of the jury was born and raised in Canada and is a former Canadian military serviceman.

Neither can Claimants establish that the courts of Mississippi failed to accord Loewen the international minimum standard of treatment required under NAFTA Article 1105. As a matter of substantive customary international law, domestic courts cannot be said to have breached an international obligation – a so-called "denial of justice" – unless the judicial action in question was rendered by a court of last resort. This is so regardless of the extent to which NAFTA Article 1121 waives the traditional "local remedies rule," a procedural requirement that a claimant must exhaust domestic remedies before its claim is admissible in an international

forum.[1] Because the jury verdict was unquestionably subject to appeal in a higher court, and because Loewen had effective means of pursuing that appeal (and, indeed, was advised and fully prepared to pursue them), Claimants cannot make out a claim for "denial of justice" on the facts of this case.

Even if Claimants could somehow establish that Loewen did not have an effective appeal open to it, the actions of the Mississippi courts nevertheless fully comported with the international minimum standard required under NAFTA Article 1105. Indeed, the claim that these trial proceedings were so marred by nationalistic, racial, or class-based biases as to overcome the overwhelming presumption of regularity accorded to domestic judiciaries is, on the record of this case, simply absurd. As is shown by a review of the trial proceedings and confirmed by expert analysis, the trial was conducted properly and fairly, the jury was in no way motivated by the biases that Claimants allege and, in fact, much of what Claimants now bemoan as improper was the result of Loewen's own actions.

Neither is there support for Claimants' assertion that the jury's verdict – which, in the end, Loewen never paid – was so "grossly excessive" as to violate the international minimum standard of treatment. In fact, Claimants' entire argument in this regard would require the Tribunal to overlook that the jury's verdict was never enforced and that Loewen's ultimate payment to end the litigation was substantially less than one-fifth of the amount of that verdict. Given the gross misconduct that the jury found Loewen to have committed, and in view of the evidence presented to the jury at trial, the amount that Loewen paid to end the litigation cannot

[1]We respond to the Tribunal's recent inquiry regarding the effect of NAFTA Article 1121 on the local remedies rule in Part III of the United States' legal argument below. See infra at 107.

be viewed as so excessive as to constitute a "denial of justice" under customary international law.

The fact that Loewen, like unsuccessful litigants the world over, was required to post security to stay execution of the judgment against it pending an appeal from that judgment also does not give rise to a "denial of justice" in violation of NAFTA Article 1105. The same sort of bond requirement at issue here is a common feature of legal systems around the world, as is the principle that a party seeking relief from such a requirement bears a heavy burden to establish good cause for relief. In view of the unconvincing record that Loewen presented to the Mississippi courts, the decision to require a full supersedeas bond in this case can in no way be said to amount to a denial of justice.

In the end, Claimants' allegations of denial of justice rest on little more than unsubstantiated inferences of institutional bias in the Mississippi court system. At the same time, Claimants' own witnesses have conceded that this inference is weak and without evidentiary support. In fact, at the time of the Mississippi proceedings, Loewen and its attorneys fully acknowledged and expected that the Mississippi Supreme Court would give them a fair hearing and that an inference of bias was unfounded. To the extent that Claimants maintain their allegations to the contrary in this proceeding, they do so without any support, solely to further their litigation agenda.

Having failed to make out a claim of denial of justice under NAFTA Article 1105, Claimants' final claim – that the Mississippi court judgments were tantamount to an uncompensated expropriation in violation of NAFTA Article 1110 – also must fail. Simply put, this case is not one of expropriation, as even Loewen's own international law expert recognizes. International decisions provide no support for the suggestion that a civil court judgment entering

money damages against a foreign investor in a private dispute can constitute an expropriation. Moreover, even if a case like this could ever amount to an indirect expropriation, Claimants have not shown, and cannot show, that any investment was in fact expropriated as a result of the trial court's judgment in the O'Keefe litigation.

Professor Christopher Greenwood, Q.C., a prominent international law scholar and professor of law at the London School of Economics, concurs that the overall claim presented to the Tribunal by Claimants is not well-founded. As Professor Greenwood explains, under international law, "the decision of a trial court does not amount to a denial of justice where recourse is available to a higher court," regardless of the provisions of NAFTA Article 1121. Opinion of Christopher Greenwood, Q.C. ("Greenwood Opinion") at 2 (appended at Tab A hereto). Because Loewen's means of appeal "cannot be dismissed as 'obviously futile' or 'manifestly ineffective,'" Professor Greenwood concludes that Claimants cannot make out a claim for a denial of justice. Id. In any event, in Professor Greenwood's view, neither the trial proceedings nor the award of punitive damages against Loewen violated international law. Id.

Professor Richard Bilder, another prominent international law scholar and emeritus professor of law at the University of Wisconsin-Madison, also concludes that neither the trial court's conduct, nor the jury's verdict, nor the Mississippi courts' application of the supersedeas bond requirement – whether individually or collectively – violated any provision of NAFTA Chapter Eleven. See Opinion of Richard B. Bilder ("Bilder Opinion") at 7-31 (appended at Tab B hereto). Professor Bilder also agrees that, regardless of the provisions of NAFTA Article 1121, Claimants' claim is defeated in any event by Loewen's failure to pursue all reasonably available appeals of the trial court's judgment. Id. at 31-42.

Professor Stephan Landsman, an experienced practitioner and prominent scholar in the fields of adversarial justice and trial practice, concludes that the underlying record cannot support Claimants' allegations of improper bias and that, instead, the underlying trial proceedings "were conducted in a manner consonant with the dictates of adversarial justice . . . ." Statement of Stephan Landsman ("Landsman Statement") at 2 (appended at Tab C hereto). Indeed, Professor Landsman further concludes that "such difficulties as were encountered by the Loewen Group were the result of its lawyers' strategic choices or miscalculations." Id.

Professor Neil Vidmar, an internationally-recognized expert on civil juries who holds joint positions in law and psychology at Duke University, concludes that Claimants' allegation that the jury was motivated by nationalistic, racial, or class-based biases cannot be sustained on the record of this case. See Statement of Neil Vidmar ("Vidmar Statement") at 2-3 (appended at Tab D hereto). Indeed, Professor Vidmar relies for his conclusions on interviews of the jury members conducted by Loewen's own counsel shortly after the verdict was rendered. As Professor Vidmar explains, Loewen's own contemporaneous investigation not only undermines Claimants' allegations of bias, but "support[s] an opposing view: that is, the data indicate that the jury followed the judge's instructions on the law and reached a verdict based on the evidence presented at trial." Id. at 1.

BACKGROUND

I. The Loewen Group and the Death-Care Industry

In the United States' Memorial on Matters of Competence and Jurisdiction, the United States provided a summary of the nature and history of the death-care industry in general, and of The Loewen Group in particular. See U.S. Jurisdictional Mem. at 7-17.[2] In the interests of economy, we will not repeat that summary here. A familiarity with that background, however, is essential to an understanding of the Mississippi litigation and the context in which the underlying disputes arose. We therefore respectfully urge the Tribunal to review that section of our jurisdictional memorial and we incorporate the entirety of that memorial by reference.

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[2]The following abbreviations will be used throughout this counter-memorial:

"TLGI Mem." – Memorial of the Loewen Group, Inc., dated October 18, 1999;
"RLL Mem." – Memorial of Raymond L. Loewen, dated October 18, 1999;
"U.S. Jurisdictional Mem." – Memorial of the United States of American on Matters of Competence and Jurisdiction, dated February 18, 2000;
"TLGI Jurisdictional Sub." – Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, dated May 26, 2000;
"U.S. Jurisdictional Resp." – Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, dated July 7, 2000;
"TLGI Final Jurisdictional Sub." – Final Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, dated July 28, 2000;
"RLL Final Jurisdictional Sub." – Final Submission of Raymond L. Loewen Concerning the Jurisdictional Objections of the United States, dated July 27, 2000;
"Tr. ____" – reference to the transcript of trial proceedings in O'Keefe, et. al. v. The Loewen Group, et al.;
"A___" – reference to the Appendix submitted by The Loewen Group, Inc.; and
"U.S. App. ___" – reference to the Appendix submitted by the United States.

II. The Dispute

Contrary to Claimants' account, the Mississippi litigation was anything but "an ordinary commercial dispute." TLGI Mem. at 53. Although Loewen's breaches of contract were surely an important part of the underlying claims, Claimants omit a critical element of the lawsuit's allegations: that Loewen's conduct was wilful, fraudulent, tortious, and part of a broader pattern of dishonest business practices, including the monopolization of funeral-home markets and overcharging of grief-stricken consumers of funeral services who, given the false impression that their funeral home was still owned by a trusted member of the local community, were unlikely to notice or question the rising prices. Because it is impossible to understand the import of the selective and grossly misleading portions of the trial that appear in Claimants' memorials without a full understanding of the circumstances leading to the litigation, a more complete summary of the relevant background follows.

A. Funeral Home Competition in the Gulf Coast Region of Mississippi

The Mississippi litigation originated from a longstanding competition between two funeral companies in the Gulf Coast region of Mississippi, a region substantially to the south of, and distinct from, the metropolitan area surrounding the city of Jackson, Mississippi. In the Gulf Coast city of Gulfport, the funeral business was for many years dominated by the Riemann family, which had owned and operated funeral homes in Gulfport since 1920. (Tr. 2644; U.S. App. 0024). In neighboring Biloxi, the funeral business was led by the O'Keefe family, which had owned and operated funeral homes in the region since the 1860s. (U.S. App. 0024; Tr. 2010).

Both the O'Keefe and Riemann families had managed to build substantial local empires

over the years. The O'Keefes, under the leadership of the family's patriarch Jeremiah O'Keefe, built a successful combination of insurance companies, which operated under an umbrella company known as the Gulf Group, Inc., to complement the family's funeral home businesses (collectively, "O'Keefe" or the "O'Keefe companies").[3] The Riemanns built a similar empire, consisting of both funeral homes and funeral insurance companies. (Tr. 2644).

B. Loewen's Acquisition of Riemann Holdings

By 1990, Loewen's aggressive nationwide spree of buying funeral homes reached Mississippi, when Loewen purchased the Riemann businesses. (U.S. App. 0009; A1018). The Riemann businesses were restructured into a holding company, known as "Riemann Holdings, Inc.," of which LGII became 90 percent owner. (Tr. 2673-74).[4] As was typical in its acquisitions of funeral homes generally, Loewen concealed the fact of its ownership of the Riemann funeral homes from the general public and retained the previous owners and managers as salaried employees of Loewen, thereby creating the false impression that the Riemann funeral homes were still owned by members of the local community. (U.S. App. 0024, 0179). Even after the Loewen acquisition, Riemann continued to advertise itself to the Gulf Coast community as locally-owned, claiming that "we haven't sold out: we just have a new partner, The Loewen Group International." (U.S. App. 0953-54).

Although the O'Keefes had been competing with the Riemanns for years before Loewen's acquisition of Riemann Holdings, Loewen's control of Riemann Holdings posed an

[3]A diagram of the corporate structure of the various O'Keefe family businesses appears in the U.S. appendix at U.S. App. 0952.

[4]"LGII" refers to The Loewen Group International, Inc., Loewen's principal U.S. subsidiary.

even greater threat to the Gulf companies. O'Keefe responded to this new threat in essentially two ways. First, O'Keefe attempted to expand his own funeral business in markets other than the Gulf Coast region in order to remain a viable competitor with the much-larger Loewen. To this end, O'Keefe began development of a cemetery and funeral home combination on a cemetery tract in Natchez Trace, a suburb to the north of Jackson, on which he held an option. (Tr. 481, 503, 2057-58).

Second, O'Keefe challenged Riemann Holdings' claim to be "locally owned," which the company maintained even after it had been acquired by Loewen. O'Keefe attempted to expose this misrepresentation through a series of advertisements in the local Gulf Coast community, calling attention to the fact that Riemann was really owned by Loewen rather than by any "local" concern in Mississippi. (Tr. 2041-42). At the same time, the Mississippi Attorney General's Office of Consumer Protection wrote to Loewen notifying the company that Riemann's claim of "local ownership" might be deceptive and in violation of certain consumer-protection statutes. (U.S. App. 0957-58). Loewen rejected these assertions, maintaining that David Riemann – a son of the former owner of the Riemann businesses – was one of Loewen's so-called "regional partners" and that this justified the claim that the company was still locally owned. (Tr. 85).

C. Loewen's Expansion Into The Jackson Funeral Market

Loewen's purchase of Riemann Holdings provided Loewen with not only additional funeral properties for its rapidly expanding empire, but also a convenient vehicle for acquiring and consolidating additional funeral homes throughout Mississippi and neighboring states. Soon after its acquisition of Riemann Holdings, Loewen turned its focus northward to Jackson, the capitol of Mississippi and the largest metropolitan area in the state.

Through Riemann Holdings, Loewen purchased the Wright & Ferguson Funeral Home, the largest funeral home in Jackson. Wright & Ferguson already had a longstanding business relationship with the O'Keefes dating back to 1974, when O'Keefe purchased the exclusive right to sell Gulf funeral insurance through the Wright & Ferguson Funeral Home. (U.S. App. 0009-10, 0181; A40-41).

Loewen itself owned several funeral insurance companies and, as part of its consolidation efforts, often sought to sell its own brand of insurance through the funeral homes it acquired. Despite the pre-existing exclusive contractual relationship between Wright & Ferguson and the Gulf companies, Loewen began selling its own funeral insurance through the Wright & Ferguson home. (U.S. App. 0010, 0025; A41).

D. The O'Keefe and Loewen Negotiations

O'Keefe was distressed by Loewen's decision to sell insurance in breach of the exclusive contracts between Gulf and Wright & Ferguson. (Tr. 2038-39). At the same time, O'Keefe was experiencing difficulties with his insurance companies as a result of the failure of the savings and loan industry in the United States in the 1980s. (Tr. 393-94). O'Keefe was thus interested in adding to the reserves of his insurance companies to ensure their compliance with Mississippi's regulatory requirements. Rather than file a lawsuit over Loewen's breach of the exclusive contracts, O'Keefe sought to negotiate with Loewen over a possible purchase and sale of properties for the mutual benefit of O'Keefe and Loewen. (Tr. 2047, 2517)

Loewen also expressed an interest in negotiations and invited O'Keefe and his lawyer, Michael Allred, to meet with company officials in Vancouver to discuss a possible deal. Ray Loewen hosted O'Keefe and Allred on his yacht, which Loewen regularly used as a "secret

weapon in the subtle art of funeral-home acquisition" to dazzle would-be sellers. (U.S. App. 0025, 0181). As O'Keefe would later recount that meeting, Ray Loewen demanded that O'Keefe sell him all of O'Keefe's funeral homes, which would have eliminated O'Keefe from the funeral home business entirely. (Tr. 2047). O'Keefe refused the proposal and returned to Mississippi without a deal.

In the months that followed, Loewen continued to sell its insurance through Wright & Ferguson, despite repeated requests from O'Keefe to honor the exclusive contracts. (U.S. App. 0955-56). Then, in April 1991, O'Keefe filed suit in Mississippi state court alleging that Loewen had breached the exclusive contracts between the Gulf companies and Wright & Ferguson. (A20). Shortly thereafter, Loewen once again contacted O'Keefe to discuss the possibility of settling the dispute. (U.S. App. 0025, 0181).

After negotiations in Mississippi (O'Keefe refused to go to Vancouver again, having already incurred the expense of the first visit; see Tr. 2050), O'Keefe and Loewen reached a settlement agreement on August 19, 1991. Under its terms, Loewen agreed to sell an insurance company and a related trust fund to O'Keefe and to provide O'Keefe with the exclusive right to provide certain insurance policies sold through Loewen funeral homes. In exchange, O'Keefe agreed to dismiss the lawsuit against Loewen, to sell Loewen two O'Keefe funeral homes, and to assign Loewen the option that O'Keefe held on the cemetery tract north of Jackson, Mississippi. (A594-649).

E. Loewen's Breach of the Settlement Agreement

Prompt implementation of the settlement agreement was important to O'Keefe, as the agreement would infuse his insurance companies with sufficient assets to ensure their

compliance with state regulatory requirements. (U.S. App. 0181-82, 1034-36; Tr. 2085). Because the Gulf insurance companies were scheduled for a triennial review by state regulators in 1992, O'Keefe included provisions in the agreement stating that implementation was to be completed within 120 days of execution (i.e., by December 19, 1991) and that "time is of the essence." (A630; Tr. 223-24, 1213).

Unknown to O'Keefe, however, Loewen was already aware of O'Keefe's regulatory worries before the parties entered into their agreement on August 19, 1991. As O'Keefe would later discover, Loewen knew that O'Keefe was counting on the settlement agreement to resolve his regulatory concerns and that, if implementation of the agreement were delayed, O'Keefe would likely be unable to satisfy the state regulatory requirements. (U.S. App. 0181-82, 0959-61; Tr. 235-240).

In addition, the Riemann family members – Loewen's "regional partners" – had not been informed about Loewen's agreement with O'Keefe and, upon learning of it, were extremely displeased that Loewen would negotiate with the Riemanns' longtime competitor without first consulting with them. (U.S. App. 0962-69). In late August 1991, Robert Riemann and his two sons, David and Michael, traveled to Vancouver and confronted Ray Loewen directly about the agreement and expressed their strong objections to the deal. (Tr. 220-21, 1260, 4107-08). Even though the agreement with O'Keefe had already been executed, Ray Loewen privately assured the Riemanns that the deal would not close without their approval. (Tr. 221, 1261).

Although Loewen proceeded to take O'Keefe's option on the cemetery tract under the settlement agreement and thereby eliminate O'Keefe from the Jackson market, Loewen delayed implementation of the remainder of the agreement and attempted to impose additional

conditions, eventually preventing the deal from ever closing. (U.S. App. 0181-82; A107, A128; Tr. 1566-67, 2071, 2082). After the deal collapsed, the Gulf Companies were placed under administrative supervision by the Mississippi Department of Insurance and O'Keefe was eventually forced to sell four of his funeral homes to another consolidator (Loewen's main competitor, Service Corp. International ("SCI")) in a distress sale to raise sufficient cash to meet the state regulatory requirements. (U.S. App. 0180-82; Tr. 627-28). Gulf eventually emerged from the administrative supervision after nearly a year and a half, narrowly avoiding the complete loss of the business that had been in the O'Keefe family for almost 130 years. (Tr. 536, 2110-15).

The O'Keefes then renewed their lawsuit against Loewen, adding claims that Loewen fraudulently induced O'Keefe into a settlement agreement that it had no intention of honoring. (A42-53). O'Keefe alleged that Loewen willfully breached the August 1991 settlement agreement in an attempt to drive O'Keefe into insolvency and thereby either acquire O'Keefe's funeral properties at distress prices or simply eliminate O'Keefe as a competitor entirely. (Id.) O'Keefe also alleged that Loewen's actions were part of the company's broader scheme to acquire and abuse monopoly power in funeral home markets by destroying competitors, like O'Keefe, through ruthless, fraudulent and predatory business practices, in violation of Mississippi's antitrust laws. (Id.; see also A151-59).[5]

[5]Claimants allege that O'Keefe "improperly joined Wright & Ferguson as a defendant to prevent Loewen from removing the case to U.S. federal court." TLGI Mem. at 18; see also RLL Mem. at 12-14. Apart from the fact that both Wright & Ferguson *and* Riemann Holdings (which was also a Mississippi corporation) were necessary parties to the lawsuit, Claimants ignore the obvious legal remedy that would have been available to them even if their contention had any merit: a claim of "fraudulent" or "improper joinder." It is a well-settled rule of federal court practice that, where a claim has been improperly pleaded to prevent removal (including the (continued...)

III. The Trial

The trial in the case of O'Keefe, et al. v. The Loewen Group, et al. began on September 11, 1995, in a Hinds County courtroom in downtown Jackson, Mississippi, and lasted for nearly two months. All of the parties to the case (and their corporate representatives) were white. Three of Loewen's five trial attorneys, including the company's lead trial attorney, Richard Sinkfield, were African-American. Although two of those attorneys were prominent African-American lawyers from Mississippi (Edward Blackmon and Robert Johnson), Loewen brought Mr. Sinkfield to Jackson from Atlanta, Georgia to assume the lead role at trial. The jury foreman, a retired electrical engineer and one of four whites on the twelve-person jury, was born, raised and lived in Canada until the age of twenty-seven, and was a veteran of the Royal Canadian Air Force. (U.S. App. 1163-66).

The presiding judge was the Honorable James E. Graves, Jr., a well-respected jurist with a national reputation for judicial excellence and independence. Among his many professional accomplishments, Judge Graves has taught trial advocacy at the Harvard Law School in Cambridge, Massachusetts, received the National Bar Association's "Distinguished Jurist Award" in 1996, and is the current Vice-Chairman of the National Conference of State Trial Judges. (U.S. App. 0975-83). Judge Graves was appointed to the bench in 1991 by then-Mississippi Governor Raymond Mabus (himself a Harvard-educated lawyer) and ran unopposed for reelection in both 1994 and 1998. Id.; see also Declaration of the Honorable Raymond E. Mabus, Jr., dated March 23, 2001 (appended hereto at Tab E).

[5](...continued)
improper inclusion of in-state parties to defeat diversity jurisdiction), removal to federal court is permitted. See, e.g., Badon v. RJR Nabisco, Inc., 236 F.3d 282, 286 (5th Cir. 2000) (citing cases). Loewen, of course, made no effort to remove the case to federal court.

Over the course of the two-month trial, the jury heard extensive evidence and testimony from several witnesses – including former high-level Loewen Group employees – that Loewen intentionally breached the contracts with O'Keefe with the intent to eliminate O'Keefe as a competitor, was deceptive in its business dealings, expressly sought to acquire clusters of funeral homes in order to dominate regional markets, and routinely raised prices immediately upon the acquisition of funeral homes (and annually thereafter) with the expectation that bereaved consumers would not notice the price hikes. (E.g., Tr. 273-76, 1030-39, 1131-36, 1041-42, 1045-47, 1218-20, 1228-33, 1240, 1254-55, 1837-49, 1863-67, 3072-73).

Claimants, of course, have painted a very different picture of the trial. Their account, however, bears virtually no relation to the events as they actually occurred. As any fair reading of the trial transcript makes clear, the court conducted the entire two-month trial skillfully, judiciously and even-handedly, notwithstanding the complexity of the case – and despite the remarkably poor performance of Loewen's own fractured trial team. From beginning to end, Judge Graves' rulings on the literally thousands of objections, motions and complaints made by the parties over the course of the two-month proceeding demonstrate that the court was in no way "biased" toward any party, but instead afforded both sides a fair trial. (E.g., Tr. 354-56, 428-36, 777-93, 1237, 1385-86, 1768-70, 1782-84, 2808-14, 3086-89, 3123-29, 3415-23, 3446-58, 3749-54, 3846-50, 4334-36, 4665-67, 4791-97).[6]

Rather than the product of appeals to "nationality, race, and economic class," (see TLGI

[6]Judge Graves also presided over more than four years of pre-trial proceedings in the case, in which he granted many of Loewen's motions, including the grant of a motion for summary judgment dismissing three counts of the O'Keefe plaintiffs' complaint. See, e.g., A12.

Mem. at 15), the verdict reflected the jury's finding that Loewen was a dishonest and predatory company that sought to destroy O'Keefe as a competitor, all as part of the company's broader practice of acquiring and abusing monopoly power in local funeral markets. (E.g., A783-84). In addition, the record makes clear that Loewen's own trial counsel made a series of tactical decisions and missteps – many of them grievous – that helped lead the jury to that ultimate conclusion.

In the discussion that follows, we first examine what the record reveals on the subject of each of Claimants' principal factual contentions about the trial. We then summarize chronologically the principal events that took place during the trial.

A. Alleged Improper Appeals to "Nationality, Race, or Class"

Claimants allege that the trial court wrongfully allowed O'Keefe's counsel to make or elicit "highly prejudicial" remarks throughout the trial. The record of the trial, however, provides no basis for this claim. Of course, as we discuss below, the fact that Loewen *never* objected to any of these alleged remarks on the grounds of prejudice or bias at *any* point during the trial is dispositive of Claimants' claim in any event. See infra at 65-72. But the record makes clear that Judge Graves, contrary to Claimants' allegations, demonstrated an abundance of concern to ensure a trial free of such improper appeals.

At one illustrative moment in the trial, O'Keefe's counsel (Michael Allred, a white man) asked one of Loewen's witnesses whether the statement that the Riemanns "had some reservations" about Loewen's contract with O'Keefe "mean[t] the same thing in common Mississippi southern English as 'they were opposed to it'?" (Tr. 4312). Shortly thereafter, Judge Graves excused the jury from the courtroom and, without prompting from Loewen's counsel,

gave the following stern rebuke:

> Please be seated. Mr. Allred, before I say this, I want to apologize if I have misperceived your question or if I'm overly sensitive to matters like this, but in one of your questions, you made reference to common Mississippi southern English which seemed to me to be dangerously close to insulting somebody because they were not from common Mississippi and the south. Now, for anybody in here to make any efforts to appeal to ethnicity, colloquialism or God forbid, racism, I can't always prevent that. Some of it may actually be – may be appropriate.[7] A lot of it wouldn't be, but *I'm not going to allow any courtroom where any witness, any litigant, any lawyer is insulted based on race, ethnicity or national origin. I'm not going to have that in this courtroom*, and if I misperceived your comment in that direction, then I'm sorry, but it provides me with an opportunity to make it clear that *nobody is going to come into this courtroom and be subject to any insult because of race, eth[n]icity or national origin.*

Tr. 4325-26 (emphasis added).

At only one point in the entire two months of trial could Loewen's counsel even arguably be said (and it is a stretch) to have objected to a line of questioning as improper on grounds of racial, class, or nationality "bias." See Tr. 1139-41 (objecting to testimony relating to pricing in black and white funeral home markets). That objection was *sustained* by Judge Graves, to the apparent satisfaction of Loewen's counsel. (Tr. 1140-41). While Claimants purport to have identified other references to "nationality, race, and class" in their memorials that Judge Graves did not address, each of the cited references is either presented entirely out of context or, indeed, was the result of *Loewen's* own tactical decisions to introduce such matters into the case. Although Claimants allege in the present proceeding that it was O'Keefe who made those "improper appeals," the record of the Mississippi litigation tells a very different story.

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[7]Judge Graves' suggestion that some references to race "may be appropriate" was an apparent acknowledgement of the fact – which had already been established by that point in the trial, and which we discuss below – that matters of race were directly relevant to certain aspects of the claims in the case. See infra at 25-26.

1. References to Geography and Nationality

Claimants purport to have identified numerous instances during the trial where, it is alleged, the trial court improperly permitted O'Keefe's counsel to make references to Loewen's Canadian nationality and to contrast it with O'Keefe's Mississippi roots. See TLGI Mem. at 15-34; RLL Mem. at 16-29. Stripped of counsel's editorial characterizations, however, and viewed in the proper context in which they occurred in the trial, the cited instances provide no support for Claimants' theory. Indeed, as the record makes clear, Loewen's own counsel and witnesses made at least as many references of the same sort that Claimants now contend were improper.

The vast majority of the cited references involve descriptions of events that occurred "up in Vancouver" or "down here in Mississippi" or the like. Given that these statements are entirely accurate descriptions of the events as they occurred, and that such formulations are a common manner of speaking about geography, Claimants' complaint about these statements (to which, in any event, Loewen never objected at the time) rings hollow. The parties' various negotiations took place primarily in three locations – Vancouver (where Loewen is headquartered), Mississippi (where O'Keefe and Riemann are headquartered), and Cincinnati, Ohio (where LGII is headquartered)[8] – and much of the trial involved disputes over whether a given event took place in one or the other location.[9] It should be no surprise, therefore, that the trial is replete with countless statements by Loewen's own counsel distinguishing between events that occurred

[8]LGII is actually headquartered in Covington, Kentucky, which is just across the Ohio River from Cincinnati. The parties frequently used "Cincinnati" as a shorthand reference for LGII's headquarters.

[9]See, e.g., Tr. 212-13 (witness John Turner explaining that "controversy was brewing" over Wright & Ferguson contracts before O'Keefe and Allred "came to Vancouver").

during "the trip to Vancouver" (Tr. 742; question by James Robertson) or in "that meeting up in Ohio" (Tr. 315; question by Mr. Sinkfield), or involving people "coming from Canada" who had "to fly . . . down here" to Mississippi (Tr. 2440-41; statement by Mr. Sinkfield).[10] Even in the present proceeding, Claimants' counsel cannot help but describe how "O'Keefe traveled to Canada" on certain occasions to meet with Loewen. See RLL Mem. at 11. Because Loewen's counsel presumably did not view such remarks as harmful when they uttered them, it is difficult to see how those same remarks were harmful when uttered by O'Keefe's counsel.[11]

More important, to the extent that the jury heard testimony relating to "anti-Canadian" bias (even assuming that any such bias exists in the United States), it is because *Loewen itself*

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[10]See also, e.g., Tr. 185 (Mr. Sinkfield refers to meeting "in Vancouver"); Tr. 1736 (Sinkfield refers to Riemann's "return[] to Gulfport" "after the meeting in Vancouver"); Tr. 1738 (Sinkfield refers to Riemann's "return[] from Vancouver"); Tr. 1739 (same); Tr. 1741 (Sinkfield refers to Riemann coming "back from Vancouver"); Tr. 1742 (same); Tr. 1754 (Sinkfield refers to "the people in Vancouver"); Tr. 1755 (Sinkfield refers to "Mr. Loewen or somebody at [sic] Canada"); Tr. 2170 (Sinkfield says "y'all went to Canada"); Tr. 2182 (Sinkfield asks whether Allred "visited Canada"); Tr. 2184 (Sinkfield asks whether Loewen executive "actually came to Mississippi"); Tr. 2496-97 (Mr. Clark mentions other death-care consolidators, like "Stewart out of New Orleans"); Tr. 2719 (Mr. Blackmon asks about concerns "raised up in Vancouver"); Tr. 2933 (Blackmon refers to "meeting up in Vancouver"); Tr. 4080 (Sinkfield characterizing Loewen's request that "y'all be permitted to come up there" to Vancouver); Tr. 4996 (Ray Loewen stating that "Mr. Allred and Mr. O'Keefe came up to Vancouver"); Tr. 5039 (Sinkfield asking about Riemann trip "up to Vancouver"); Tr. 5675 (Blackmon explains how Riemanns were compelled to "travel up to Canada").

[11]Loewen clearly misunderstands another reference in which O'Keefe's counsel, in his closing argument, refers to the fact that one witness, Bill Mendenhall, "lived over at . . . Whitfield," which is fifteen miles southeast of Jackson. See TLGI Mem. at 41. Contrary to Loewen's misinterpretation, O'Keefe's counsel was not "excusing" Mr. Mendenhall for not living in Jackson, but was merely reviving a joke made earlier in the trial about the fact that Mr. Mendenhall resides in Whitfield, the site of Mississippi's state mental institution. Compare Tr. 1538 with Tr. 5582 ("We call Whitfield in Florida 'Chatahoochie,'" which is Florida's State Hospital for the Insane). This remark was hardly an "anti-foreigner" ploy, contrary to Loewen's suggestion.

chose to introduce such testimony as part of a deliberate litigation strategy. From the beginning of Loewen's opening statement and throughout the trial, Loewen's counsel consistently pounded the theme that O'Keefe was a biased and unfair competitor who had engaged in an anti-foreigner advertising campaign as part of his effort to take business away from Riemann Holdings. (E.g., Tr. 96-98, 105, 722-27, 1102-03, 1984-88, 2172-76, 2572, 2677-78, 2687-2704, 4077-78, 4485-87, 5673-77). Indeed, Loewen went so far as to call as a witness the owner of the advertising agency that printed O'Keefe's advertisements – a strategy that backfired for Loewen, as the jury found the matter irrelevant to the genuine issues in the case, and the witness was otherwise very supportive of O'Keefe. See Tr. 3424-42 (testimony of Mr. Reed Guice).

Although Loewen now contends that O'Keefe's advertisements "generated widespread anti-Canadian sentiment" (TLGI Mem. at 11), the record once again belies this contention. First, the record makes clear that the advertisements were confined to the Gulf Coast region, which is hundreds of miles to the south of Jackson;[12] in any event, Loewen explored to its satisfaction during voir dire (as was its right and obligation) whether any of the jurors had seen the advertisements before the trial. See, e.g., U.S. App. 1002-20 (Loewen-prepared questionnaire asking potential jurors, inter alia, whether they knew "anything about the rival funeral business on the Gulf Coast.").

Second, in an internal memorandum that surfaced at trial, Loewen noted with pleasure that "public sentiment on the Gulf Coast regarding O'Keefe's ad campaign is that his campaign

[12]For example, the document that Claimants incorrectly describe as a "billboard" (and which is reproduced in Loewen's memorial at page 10) was in fact a small poster – introduced by Loewen at the trial – that was displayed for only a few hours at a local county fair. See, e.g., Tr. 722-27, 1984-86, 2572.

was detrimental to O'Keefe and that confidence in the Riemann name was rising." (U.S. App. 0960). It is, of course, for this reason that Loewen was emboldened to bombard the jury with evidence and testimony relating to the advertising campaign and claims of anti-foreign bias (including seemingly endless and irrelevant discussions of Canada, Japan, Hong Kong and Shanghai),[13] as Loewen fully expected that it would curry sympathy from the jury.

But for Loewen's decision to introduce and underscore this evidence and testimony, the jury never would have heard it. Indeed, Loewen intended – and succeeded in its effort – to force O'Keefe's counsel to attempt to minimize the evidence and to plead with the jury that the case "is not about Canada . . . ." (Tr. 12).[14] Having made the tactical decision to use such evidence and testimony as part of its case-in-chief, Loewen cannot now be heard to complain that it was somehow improper for the jury to hear it.[15]

In fact, at other points, Loewen's counsel seemed to inject Loewen's nationality into the case for no apparent reason at all. For example, in examining Loewen's general counsel, Mr.

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[13]At several points, Judge Graves tried to signal to Loewen's counsel that he had overplayed the issue, but Loewen's counsel ignored those signals. See, e.g., Tr. 2176 (stating to Mr. Sinkfield that "if I hear the word Hong Kong/Shanghai bank one more time before I leave here today [. . .] [Y]ou need to move to another area of cross examination.").

[14] See also, e.g., Tr. 5586 (O'Keefe's counsel explaining that witness Mike Espy "didn't make an issue out of Canada and America," despite Mr. Sinkfield's attempt to do so; "That ain't the point. We've got good relations. That lawsuit ain't about that. Don't get carried away on that."); Tr. 1987-88 (O'Keefe attorney, responding to Loewen's questions regarding anti-foreign bias, explaining that "I have no ax to grind . . . . I have nothing against Canada. I was in Canada a few weeks ago. I like Canada.").

[15]References to geography were also relevant to a number of issues at the heart of the dispute, such as: (1) O'Keefe's claim of manipulation and unfair treatment by Loewen, which required him to travel "up to Vancouver" and "up to Ohio" at substantial personal expense, even though Loewen had no intention of honoring the deal in the end; and (2) Riemann's claim to be "locally owned" even though the company was actually owned by Loewen.

Peter Hyndman, Loewen's trial counsel asked Mr. Hyndman to describe "the citizenship of the board members" of the company (Tr. 4385) and, even more inexplicably, to "give the jury something about your origin as a Canadian . . . ." (Tr. 4373).

2. References to Race

Claimants also contend that the trial court permitted O'Keefe's counsel to improperly "invoke racial issues" at several points in the trial. TLGI Mem. at 19. Once again, Claimants fail to acknowledge the direct relevance of race to the legal claims in the dispute, as well as Loewen's own role in invoking race as part of its flawed litigation strategy. Indeed, in this respect, Claimants' distortion of the underlying record is particularly egregious, as Loewen itself was consciously playing "the race card" well before the trial even began.

(a) The Relevance of Race to Market Definition

One of the many claims in the litigation was that Loewen's treatment of O'Keefe was part of a broader practice of obtaining and abusing monopoly power in local funeral home markets to raise prices on the bereaved. As Loewen itself acknowledged at the time, funeral home markets in many parts of the United States often divide along racial lines as a result of the deep personal and cultural sensitivities of caring for the dead. See, e.g., Tr. 1117, 1138-39 (explaining division between white and minority funeral homes); Tr. 2786 (David Riemann admitting that Loewen homes in Corinth, Mississippi served "a predominant [sic] white market."); Tr. 3112 (Loewen witness started "doing business strictly in the white funeral market.").[16] As one witness explained at trial, funeral home competition divided "almost 100 percent" along racial lines in

[16]Even in this arbitration, Mr. Loewen acknowledges the point when he refers to Baldwin-Lee, one of Loewen's funeral homes in Jackson, as a funeral home "that served a predominantly white clientele." RLL Mem. at 33.

some Mississippi counties. (Tr. 1831).

To define Loewen's market power in certain areas, therefore, it was necessary to establish that the relevant markets for purposes of comparison included white funeral homes that Loewen owned and excluded African-American funeral homes with which they did not compete, a point that was conceded by Loewen's own counsel at the time. See, e.g., Tr. 2390 (Loewen attorney discussing exhibit of Loewen-owned funeral homes that "do[es] not include those who serve the African-American population."). Significantly, O'Keefe demonstrated that, in those white markets in which Loewen/Riemann had near-monopoly power, the company charged significantly higher prices for funeral products than it charged for identical products in white markets where it faced greater competition. See, e.g., Tr. 1131-37, 1825-37, 1839 (records of the Federal Trade Commission "clearly show that [Loewen] ha[s] consistently raised prices in almost every instance" in which it established market dominance).

(b) The National Baptist Convention Contract

As the trial was approaching, Loewen was scrambling to close a contract with the National Baptist Convention, a large African-American religious organization, that would make Loewen the company of choice for the organization's estimated eight million members. Loewen publicly announced the deal on September 19, 1995, after the first week of the trial. To its investors, Loewen boasted that the potential for increased revenues from the deal was "huge," as it "provide[d] an entrance into markets in the United States in which [Loewen] ha[d] not before had a strong presence." (U.S. App. 1021).

Loewen promptly sought to introduce testimony regarding the National Baptist Convention contract into the O'Keefe trial. (See Tr. 3593-96). The testimony was plainly

irrelevant to the matters in dispute and was merely, as Loewen's own counsel would later concede, "a bid by Loewen to ingratiate itself with black jurors." (U.S. App. 0010). Loewen argued vaguely to the court, however, that the testimony was relevant to explain the "affiliation for empowerment before the National Baptist Convention as it exists with The Loewen Group." (Tr. 3594). As the record demonstrates (see, e.g., Tr. 4750-85), and as we explain below (see infra at 47-48), this tactical decision was ill-considered and backfired badly for Loewen.

(c) The "Race Card" Remark

Claimants place great emphasis on a brief colloquy that occurred, outside of the jury's presence, in which Judge Graves observed that the "race card" had already been played by both sides in the case. According to Claimants, the colloquy somehow proves that O'Keefe's counsel was improperly permitted to incite the jury with appeals to racial bias. See TLGI Mem. at 31-32; RLL Mem. at 32-33. Once again, however, Claimants have distorted the record by relying on isolated statements divorced from their proper context. In view of the record as a whole, Claimants' selected references offer no support for this implausible claim.

Tellingly omitted from Claimants' submissions in this arbitration is any reference to a conference that Judge Graves held in his chambers before the trial began on September 11, 1995. In that conference (a transcript of which we include in our appendix at U.S. App. 0984-1001), Judge Graves expressed his concern that the parties may have been attempting to manipulate the outcome of the trial by adding to their trial teams prominent African-American attorneys with whom Judge Graves was acquainted. Although he made his points evenhandedly, Judge Graves expressed particular concern about two actions taken by Loewen with respect to its hiring of African-American attorneys: (1) Loewen's highly unusual request, two weeks earlier, that Judge

Graves meet personally with Mr. Sinkfield, and (2) the addition of two prominent African-American state legislators to Loewen's legal team, one of whom was Robert Johnson, a close personal friend of Judge Graves. (U.S. App. 0987-89).[17]

Judge Graves firmly cautioned both sides that he would not permit such maneuvering to affect the outcome of the case: "I don't want anybody thinking that any result that you got in this case had anything to do with the fact that I like Robert Johnson . . . [.] I want y'all to understand that that doesn't have anything to do with any results to be obtained in this case." U.S. App. 0992; see also id. at 0994 (expressing disapproval of "all of the maneuvering and machination and the 'lawyer of the week' hiring that I have seen in this case.").

It is in view of this pre-trial conference – as well as the trial record as a whole – that the "race card" colloquy must be understood. Indeed, in making his remarks about the "race card," Judge Graves expressly directed counsel to "recall my discussion in chambers prior to the beginning of the trial." (Tr. 3596). So viewed, it is clear that Judge Graves was not, as Claimants falsely claim, "favoring" O'Keefe's use of race. To the contrary, in portions omitted by Claimants' ellipses, Judge Graves made clear that "before the trial started, race has been injected into this case, and *nobody* has shied away from raising [racial issues] when they thought it was to their advantage to raise it. I haven't seen anybody, *either side of the case*, shy away from dealing with race when there was some apparent advantage to them in dealing with it." (Tr. 3595) (emphasis added).

More fundamentally, this colloquy did not arise in the context of any complaint or

[17] Halbert Dockins, one of O'Keefe's attorneys, later described Loewen's pre-trial addition of African-American lawyers to its already-large legal team as "racial pandering of the most blatant sort." (U.S. App. 0183).

objection from Loewen that O'Keefe had somehow improperly appealed to the alleged racial bias of the jury, for there was of course no such objection at any point in the trial. Rather, the cited portion of the transcript shows Judge Graves granting Loewen the very thing it requested: permission, over *O'Keefe's* objection, to introduce matters of race into the case in a blatant (and later acknowledged) attempt "to ingratiate itself with black jurors." (U.S. App. 0010). It is only now, after its chosen strategy proved to be a failure, that Loewen cries foul.

Neither is there any support in the record for Claimants' theory that Judge Graves, by joking that it was a "great day" because "we've got black folks," had somehow "aligned himself with Mr. Gary, a black lawyer, against Mr. Loewen and his white counsel." RLL Mem. at 33 (quoting Tr. 3597); see also TLGI Mem. at 32. Indeed, the reference to Loewen's "white counsel" is an inexcusable misrepresentation of fact, as Mr. Sinkfield – Loewen's lead trial counsel and the only Loewen attorney involved in the colloquy – is himself African-American, as are two of the other four Loewen attorneys of record who were present with him at the time. See also RLL Mem. at 58 (inaccurately representing that Loewen had "white lead counsel"). It is utterly implausible, therefore, that Judge Graves had, by his remark, somehow "aligned himself" with Mr. Gary. Instead, the remark was obviously no more than an offhand, facetious comment, made outside of the presence of the jury, intended as a lighthearted consolation to Mr. Gary for having had his objection overruled. As the record makes clear, all counsel who were present – including Loewen's counsel – understood it as such at the time.[18] Compare Tr. 5670 (one of

[18]The record further indicates that, while Judge Graves was well-acquainted with Loewen's African-American Mississippi lawyers (as well as with Loewen's two white lawyers, James Robertson and David Clark), he knew of Mr. Gary only by reputation. (U.S. App. 0995). For this reason as well, it is implausible that Judge Graves had "aligned" himself with Mr. Gary or any of O'Keefe's other lawyers. To the contrary, trial observers noted "Judge Graves' thinly (continued...)

Loewen's African-American attorneys, in closing argument to the jury regarding the National Baptist Convention contract, refers to "*our people* who belong to that association") (emphasis added).

3. References to Class Distinctions

The Loewen Group – but not Ray Loewen – further complains that Judge Graves wrongfully permitted O'Keefe's counsel to portray Loewen as a large, wealthy corporation in contrast to O'Keefe as a small, family-owned business. See TLGI Mem. at 2. This not only misstates the underlying record, but it ignores the particular legal claims at issue in the case.

Among the many allegations in the O'Keefe companies' pleadings was that Loewen had exploited its "unequal financial means to oppress the Plaintiffs" throughout the parties' negotiations. See A44; A50; Tr. 949-50; see also A125 ("Defendants have taken advantage of their wealth and unequal bargaining position with that of the Plaintiffs."). It should have been no surprise to Loewen, therefore, that O'Keefe would seek to support its allegations from the pleadings that "[t]he Defendants are wealthy, Canadian, international and nationwide business corporations which have superior and unequal financial means to those of the Plaintiffs." (A44). To the contrary, the record demonstrates that Loewen's counsel fully understood that it was their responsibility as advocates to rebut this claim with evidence of an equal bargaining relationship between the parties. See, e.g., Tr. 84 (Sinkfield, in opening argument, asserts that O'Keefe's companies are large and complex, and that O'Keefe "is successful" and "has made what, by you [sic] and my standards, might be a lot of money."); 93-94 ("[T]he O'Keefes are a pretty big

[18](...continued)
concealed dislike for [Michael] Allred," O'Keefe's counsel. (U.S. App. 0185).

company.").

To support its theory of improper appeals to "class" differences, Loewen relies almost exclusively on a single, brief exchange that occurred between Ray Loewen and O'Keefe's counsel regarding Mr. Loewen's yacht, which, as Loewen's own witnesses explained at trial, was an important tool that the company used in its negotiations. See TLGI Mem. at 35. Although Loewen now contends that the exchange was "irrelevant but inflammatory," Loewen never attempted to object on such grounds at the time. A review of the transcript explains why.

Well before Mr. Loewen took the stand, Loewen called as a witness Peter Hyndman, who was then Loewen's Vice President of Law and Corporate Secretary. Early in the questioning, Loewen's counsel (Mr. Blackmon) asked a series of questions about Mr. Loewen's "boat" and encouraged Mr. Hyndman to provide extensive details about the ownership of the boat, its size, and its role in the company's business strategies. See Tr. 4401-05.[19] Significantly, when O'Keefe's counsel attempted to cross-examine Mr. Hyndman on the subject, Judge Graves *sustained* Loewen's objection and prevented the inquiry, concluding that "we've heard enough about boats." Tr. 4575-77.

When Mr. Loewen later took the stand, however, Mr. Sinkfield, despite having received this favorable ruling from Judge Graves, nevertheless proceeded to ask more questions about the boat. See U.S. App. 0188 ("Sinkfield resumed the subject for reasons no one – not even Loewen, apparently – could fathom."). The two men engaged in a clumsy exchange, with Mr. Sinkfield pursuing the difference between a "boat" and a "yacht," and Ray Loewen asserting that he did not

[19]Loewen's counsel presumably felt that such testimony was needed in response to a fleeting reference that Mr. Gary made to the "yacht" during his opening statement several weeks earlier. See Tr. 64.

know the difference between the two, or whether a 110-foot yacht is "big." (Tr. 5102). It was this exchange that permitted O'Keefe's counsel to pursue the same matter on cross-examination, about which Loewen now complains.

Loewen also asserts that Mr. Gary's references to punitive damages and net worth during voir dire were improper, as they "invited the jury to award large punitive damages." TLGI Mem. at 16-17. Loewen ignores, however, the concession by its own lawyer that such references were entirely proper. During a bench conference just prior to voir dire, Mr. Gary asked the court whether he would be permitted to ask prospective jurors for their feelings about punitive damages and to explain that they could consider the defendants' worth in awarding such damages. (A256). Judge Graves asked Loewen's counsel for a response, to which counsel (Mr. Robertson) replied: "No problem with that." (Id.). It is thus no surprise that Loewen made no objection whatsoever to the cited statements during voir dire.

B. Chronological Summary Of Significant Trial Events

It is, of course, impossible to convey the entirety of any trial, much less a two-month trial, in summary form. The nuances of the countless points made and arguments accepted or rejected, as well as the demeanor and credibility of each witness and attorney, cannot be reduced to a few pages in a brief from the many thousands of pages that comprise the record of this case. Indeed, even the full transcript cannot adequately capture the following observation of how Loewen's courtroom presentation appeared to the jury:

> Some of [Loewen's lawyers] had never worked together before. More than once, Judge Graves noticed a Loewen lawyer at the counsel table looking with incredulity – "as if to say, 'What the hell is he doing?'" – at another Loewen lawyer examining a witness. "Demeanor is important from the moment you walk into the courtroom," the Judge later remarked. "And the jurors noticed

everything."

(U.S. App. 0185).[20]

We submit that, if the Tribunal is to reach the merits of Claimants' allegations that the Mississippi courts breached the substantive provisions of NAFTA Chapter Eleven, the Tribunal must review the entirety of the record, for that is the only fair way that any determination on the merits can be made.[21] Nevertheless, because Claimants' allegations demand more than the scant and highly misleading context provided in the Claimants' memorials, we venture the following attempt at a more developed summary of the trial's significant events:

1. Voir Dire

During voir dire, both sides are generally afforded an opportunity to screen prospective jurors for biases that might prevent them from fairly considering the evidence. See Landsman Statement at 16-17. As Loewen conceded at the time, one proper area of inquiry in this respect was to ask whether the prospective jurors felt that "people in other places should be treated differently . . . ." A357 (statement of Mr. Sinkfield). The parties were granted substantial latitude in this respect, as the court, in addition to permitting the lawyers to question the jury pool directly, allowed the lawyers to submit to the jury pool a detailed questionnaire that sought a wide variety of personal information about each prospective juror to ferret out even the remotest

[20]Loewen was represented by no fewer than five different law firms at the trial, including one of the largest law firms in Mississippi, Mr. Sinkfield's law firm from Atlanta, Georgia, and a large corporate law firm from Chicago, Illinois, which was hired to oversee the litigation. (U.S. App. 0183). It is thus not surprising that Loewen's legal team suffered from dissension and lack of focus.

[21]See 9/20/00 Transcript at 72 ("I think one has to look at the entire record in order to determine whether a denial of justice has occurred . . . .") (statement of Mr. Loewen's counsel).

possible bias. See U.S. App. 1002-1020. As the record makes clear, Loewen had no complaint at the time that any of the seated jurors were impermissibly biased.

2. Opening Statements

The presentation to the jury began with O'Keefe's opening statement, which was first given by Michael Allred (a white man and one of O'Keefe's principal lawyers). As is typical in opening statements, Mr. Allred gave the jurors an overview of O'Keefe's theory of the case and foreshadowed some of the significant evidence he expected to show during the trial. Mr. Allred summarized O'Keefe's claim that Loewen was a dishonest and predatory company that wilfully and repeatedly broke contracts in order to dominate local funeral markets, and that the company "raised prices as soon as they got strong enough to deny the people a choice." (Tr. 11-12). Allred argued to the jury that Loewen's treatment of O'Keefe was merely another example of those practices, and that Loewen "knew of [O'Keefe's] financial vulnerability and intended to take advantage of it." (Tr. 26-27). Willie Gary, O'Keefe's lead trial attorney, followed Mr. Allred and reiterated some of the same points, emphasizing Jeremiah O'Keefe's honor and determination to fight what he viewed as Loewen's malicious business tactics. (Tr. 49-79).

Loewen's opening statement was delivered by Loewen's lead trial attorney, Richard Sinkfield. Mr. Sinkfield began by pointing out that he was from "out of town," although his colleagues were local attorneys. (Tr. 80). Mr. Sinkfield also argued that Riemann Holdings was "co-owne[d]" by David Riemann, even though Loewen owned 90 percent of the company's equity. (Tr. 85). Mr. Sinkfield devoted the bulk of his presentation to O'Keefe's advertising campaign (which, until then, had not been introduced to the jury), reading extensively from the advertisements and arguing that O'Keefe's "rabble rousing about the Japanese and other

foreigners" reflected poorly on O'Keefe and showed him to be an unfair competitor. (Tr. 96-106). As for the breaches of contract, Mr. Sinkfield argued (with some indirection) that Loewen did not breach the settlement agreement, that the agreement contained numerous open terms, and that, in any event, Loewen was justified in delaying implementation of the agreement on the basis of a rumor that the Gulf companies were in regulatory trouble. (Tr. 106-28).

3. Significant Witnesses and Evidence

Forty-one witnesses testified over the course of the two-month trial. O'Keefe presented 16 witnesses, and Loewen presented 25. Together, the parties introduced more than 350 separate exhibits into evidence.

Loewen had substantial difficulty establishing the credibility of its defense with the jury throughout the presentation of witnesses and evidence (the "case-in-chief"). In addition to the problems discussed in the attached Statement of Professor Stephan Landsman (Tab C hereto), Loewen's presentation during the case-in-chief suffered from essentially four major problems:

First, Loewen's counsel failed to convey a credible or coherent explanation of the company's overall defense. Much of counsel's questioning of witnesses focused on minutiae or extraneous matters, avoiding the central allegations of the case. See, e.g., Tr. 752-59 (Loewen attorney James Robertson arguing that August 1991 agreement was not a "settlement agreement" because the word "settlement" did not appear in agreement's title or "whereas" clauses), 819 (same), 1343-49. On several occasions, Judge Graves urged Loewen's counsel to streamline their questions, as it had become obvious that they were boring or even alienating the jurors with unnecessary tedium. At one point, for example, Judge Graves excused the jury and asked Mr. Sinkfield why he insisted on questioning a witness on the basis of "line by line" readings of

documents, as there was no apparent purpose to the questions other than preserving a record that had already been made. (Tr. 2221-23). Judge Graves warned Mr. Sinkfield:

> I'm inclined to do some research this evening to see whether or not this is unlawful for me to limit cross examination. I don't know if you're looking at the same 12 people I'm looking at. . . . . If you don't pick it [the pace of questioning] up, . . . [then] I'll take the chance of the Mississippi Supreme Court telling me it was inappropriate for me to pick it up, but I suspect that if anybody on that Court painstakingly reads what we've been going through this afternoon they'll be inclined to agree with me that the pace needs to be picked up. . . . I am dead serious when I'm telling you that I am considering limiting cross examination. This is painful. See you tomorrow morning at 8:30.

Tr. 2222-24. See also Tr. 945, 994, 1124-25, 1710-16, 2131-34, 2143, 2166, 2176, 2209, 2289-92, 2331-32, 2405-06, 2469-72, 2531-33, 3211-24, 3266-67, 3454-56, 5063 (Judge Graves to Mr. Sinkfield: "[I]t's not for me to say how you are to conduct your direct examination, so if you want to do it in a painful way without anesthesia, then we'll hurt, and we'll go through it. So bring the jury back unanesthetized, and we'll go through it.").

Second, Loewen delayed the disclosure and production of two very significant documents until after the O'Keefe plaintiffs finished calling their witnesses. (Tr. 2589). The documents, which were letters written by David and Michael Riemann complaining of serious mistreatment by The Loewen Group and suggesting that the Riemanns regretted their affiliation with Loewen, were extremely damaging to Loewen's position in the case. See U.S. App. 0962-69. O'Keefe's counsel relied on the letters extensively in cross-examination of several of Loewen's witnesses (including the Reimanns themselves), highlighting the suspicious circumstances of their belated disclosure, and thereby reinforcing the impression of Loewen as a dishonest and ruthless company, and undermining Loewen's claim of a genuine "regional partnership" with the Riemanns. (E.g., Tr. 2815-18).

Third, Loewen's counsel attempted improperly (and notoriously) to influence testimony at trial, which resulted in the striking by the court of the testimony of one of Loewen's witnesses, Mr. Dan Ellis, an actuary who was involved in implementing the August 1991 settlement agreement on Loewen's behalf. (Tr. 3700-13). During cross-examination of Mr. Ellis, O'Keefe's counsel (Mr. Allred) established that Loewen had sent Mr. Ellis two highly improper letters that tainted his testimony. The first was a letter from Loewen's counsel, James Robertson, asking for Mr. Ellis' "assurances" that he would deny having been told to accept Loewen's actuarial assumptions. (Tr. 3692). O'Keefe's counsel cross-examined Mr. Ellis about the letter, whereupon Mr. Ellis conceded that he had, in fact, received actuarial assumptions from Loewen. (Tr. 3691-94).

Still more troubling was the second letter, by which Mr. Robertson provided Ellis with a partial transcript of the testimony of an earlier O'Keefe witness, in plain violation of the court's sequestration order. (Tr. 3699-3700).[22] Loewen's counsel admitted that they had violated the court's order and, indeed, Mr. Sinkfield conceded that "I'm not sure why I wasn't smart enough to spot that in advance . . . ." (Tr. 3704-05). Although Judge Graves struggled to find a less severe remedy, he saw no alternative but to instruct the jury to disregard all of Mr. Ellis' testimony. (Tr. 3700-13). As Professor Landsman observes, "[t]his incident could not help but have dealt the defendants a sharp blow, especially in a case where accusations about lying and fraud were of central importance." Landsman Statement at 42.

Finally, many of Loewen's witnesses – and Mr. Loewen in particular – did not appear

[22]The court had earlier established that witnesses were to be sequestered from the testimony of other witnesses. See, e.g., Tr. 129; 1017.

credible to the jury, in contrast to the favorable impressions made by most of O'Keefe's witnesses. E.g., Tr. 4304-09 (Loewen witness Don Holmstrom exhibiting suspiciously selective memory); Vidmar Statement at 28-34 (Tab D hereto). Indeed, as Loewen's own post-trial investigation revealed, "[t]he overriding theme in juror comments about Ray Loewen was that he lied . . . ." (U.S. App. 1131). Still other witnesses called by Loewen were actually favorable to O'Keefe in important respects, leaving jurors to wonder why Loewen had called them to testify at all. (E.g., Tr. 3424-42; U.S. App. 1165-66). The following are brief summaries of the testimony of some of the more significant witnesses from the trial:

a. John Turner[23]

O'Keefe's first significant witness was John Turner, a former senior executive of The Loewen Group.[24] While at Loewen, Turner held the second-highest ranking executive position in the company, and was sent to Mississippi by Ray Loewen to negotiate the settlement with O'Keefe over the breach of the Wright & Ferguson contracts. (Tr. 197-98; 212).

Turner testified that, after the settlement was executed, he learned that Loewen intended to prevent the deal from closing. (Tr. 250). Although the agreement left some items to be resolved, Turner testified that those items could and should have been resolved within the 120-

[23]This is not the same John Turner who is a member of Loewen's Board of Directors, and who submitted a declaration in the jurisdictional phase of this case.

[24]O'Keefe's first witness was Susan O'Keefe Knight, one of Jeremiah O'Keefe's thirteen children and the President of Gulf National Insurance Company. Ms. Knight testified generally about the history of the Gulf companies and the values of hard work, honesty and fair-dealing that her father imparted to his children as they entered the family business. (Tr. 166-69). Ms. Knight also explained the history of the excellent relationship that the O'Keefe companies enjoyed with the Wright & Ferguson Funeral Home until Loewen acquired Wright & Ferguson, and the financial and emotional strain that her family and the Gulf businesses suffered as a result of Loewen's actions. (Tr. 139-59; 169-77).

day time frame provided in the contract. (Tr. 360). Turner explained that, in negotiating the settlement, O'Keefe relied on his assurance that the Riemanns would have no ability to prevent the deal from closing. (Tr. 215-17, 220-23). After execution of the agreement, however, and without Turner's knowledge, Ray Loewen (as Turner would later discover) privately assured the Riemanns that he would not allow the deal to close without their approval. (Tr. 229). Turner explained that O'Keefe made numerous concessions to Loewen in an effort to close the deal, but that Loewen continued to make new demands well beyond the contractual closing date. (Tr. 232-33).

On cross-examination, Loewen's attorney asked Turner about a rumor that Loewen learned in early 1992 about a possible investigation by the Federal Bureau of Investigation ("FBI") involving the Gulf companies, and whether that rumor justified Loewen's refusal to close the deal. Turner explained that there was no basis in the contract for refusing the deal on the basis of the FBI rumor and that, in any event, the rumor did not emerge until well after the deal was supposed to have closed in the first place. (Tr. 247). Turner stated that it was not the FBI rumor that killed the deal, but instead it was Ray Loewen's secret assurance to the Riemanns that the deal would not close without their approval. (Tr. 349-50).

Turner also explained that Loewen's treatment of O'Keefe was not an isolated instance of such conduct. To the contrary, Turner testified about a similar case in Pennsylvania in which Loewen wilfully breached a contract with another small insurance company solely to pursue a more attractive deal. (Tr. 262-76). That transaction led to a separate lawsuit, which was pending in federal court in Philadelphia at the time, in which Loewen was charged with breach of contract, fraud, conspiracy, tortious interference with contractual relations, and breach of the duty

of good faith. See Provident Am. Corp. v. The Loewen Group, Inc., 1995 WL 105483 (E.D. Pa. Mar. 10, 1995) (denying Loewen's motion for summary judgment). Loewen would later settle that litigation for $30 million in early 1996, just weeks after the settlement of the O'Keefe litigation.

b. Walter Blessey

O'Keefe next called to the stand Mr. Walter Blessey, the President of Gulf Holdings, Inc., one of the principal companies on the insurance side of the O'Keefe family businesses. (U.S. App. 0952). Mr. Blessey testified in detail regarding Loewen's breaches of the contracts, as well as the substantial anticipated value to O'Keefe of the August 1991 settlement agreement. Blessey explained that the deal would have, among other things, significantly improved the Gulf companies' liquidity position and ensured their compliance with regulatory requirements. (Tr. 451, 454-56, 536). Discussing an internal Loewen memorandum showing Loewen's knowledge that Gulf was "one step ahead of the regulators" before the parties entered the August 1991 agreement, Blessey testified that Loewen intentionally and in bad faith delayed implementation of the agreement with the expectation that, by leading O'Keefe to believe that the deal would be completed, he would fail to take other steps to improve the Gulf companies' position with respect to the regulatory requirements. (Tr. 541, 658-59, 909, 939). See also Tr. 237-38 (John Turner's discussion of Holmstrom Memorandum); Tr. 2126-27 (testimony of Jeremiah O'Keefe).

Blessey further testified that Loewen's breach of the August 1991 agreement caused massive economic losses to the O'Keefes and their companies, including $22.6 million in foregone additional liquidity (Tr. 544-45), $14 million in foregone insurance premium income (Tr. 625-26), and other substantial costs (Tr. 517-18, 592, 602, 635). Blessey also explained that

the O'Keefes were planning a major expansion of their funeral business into the lucrative Jackson market, but that Loewen's taking of the cemetery option under the agreement eliminated the O'Keefes from the Jackson market entirely. (Tr. 481-82, 503, 545-46).

c. James ("Jack") Robinson

Jack Robinson owned funeral homes and funeral insurance companies in Mississippi since the late 1950s. Mr. Robinson testified regarding events that occurred after Loewen purchased a Jackson, Mississippi funeral home that had a longstanding exclusive contract with Mr. Robinson's funeral insurance company. According to Robinson, Loewen evaded Robinson's repeated requests for assurances that Loewen would honor the exclusive contract and eventually started selling its own insurance through the funeral home. (Tr. 1030-39). Robinson also testified that Loewen promised to absorb Robinson's insurance company into Loewen's larger insurance operations and that, based on Loewen's assurances, Robinson provided Loewen with confidential information regarding his insurance company. (Tr. 1041-43). According to Mr. Robinson, Loewen never followed through on its proposal to absorb the insurance company, hired salespeople away from Robinson's insurance company, and eventually drove Mr. Robinson out of business. (Tr. 1030-39; 1041-46).

d. Mike Espy

Although Claimants identify Mike Espy as a "significant witness" (indeed, Mr. Loewen's memorial implies that Espy was the *most* significant witness, see RLL Mem. at 22-28), the record makes clear that Mr. Espy testified only for a matter of minutes and did not at all figure prominently in the trial. See Tr. 1083-1110. Nevertheless, because Claimants have focused on Mr. Espy's testimony, we address it here. It is important to note at the outset that, before Mr.

Espy even took the stand, Judge Graves pointedly asked Loewen's counsel whether he had any objections to Mr. Espy testifying. (Tr. 1082). Mr. Sinkfield replied: "No, Your Honor." (Id.).

Mr. Espy testified that he grew up in the funeral business and spent many years working in his grandfather's funeral home. (Tr. 1090). Espy explained the importance of trust and honorable dealings to the success of any funeral business because of the peculiar vulnerabilities of bereaved and grief-stricken customers. (Tr. 1093). Espy, who was once an attorney with the Mississippi Attorney General's Office of Consumer Protection, also opined that the Mississippi Attorney General's letter to Riemann properly questioned the company's claim to be "locally owned." (Tr. 1108). Although Claimants complain that Mr. Espy also offered "irrelevant" testimony about the NAFTA (to which Loewen never objected in any event), it was *Loewen*, not O'Keefe, who elicited this testimony on cross-examination and, indeed, it was *Loewen* who first mentioned the NAFTA at all. See, e.g., Tr. 1100-02.

e. Earl Banks

O'Keefe called Earl Banks, an African-American lawyer, state legislator and president of a Jackson, Mississippi funeral home that had been in his family since 1925. Mr. Banks testified regarding the nature of funeral services generally, emphasizing the importance of charging a fair price to consumers of funeral services who are particularly vulnerable because of their personal loss. (Tr. 1114). Banks also testified that Loewen-owned funeral homes in the town of Corinth, Mississippi – where Loewen had monopoly power – charged nearly $1,000 more for the identical casket than did Loewen-owned funeral homes in Jackson, where Loewen faced greater competition. (Tr. 1131-32, 1135). O'Keefe would later call Mr. Banks to testify again, as a rebuttal witness concerning Loewen's contract with the National Baptist Convention. See infra

at 48.

f. Lorraine McGrath

O'Keefe's next witness was Ms. Lorraine McGrath, the former Comptroller of Riemann Holdings. While at Riemann Holdings, Ms. McGrath worked with John Turner on implementing the August 1991 agreement with O'Keefe on behalf of Loewen.

Ms. McGrath testified that Loewen had an established policy of raising prices on funeral products and services immediately upon the acquisition of a funeral home, and at least annually thereafter. (Tr. 1228-29, 1240, 1254). She explained that this policy was one of the primary reasons for her decision to leave the company, as she believed that "at some point we should say, 'the price is high enough.'" (Tr. 1228). Ms. McGrath also explained that it was a matter of company policy that local employees were "not to broadcast that they worked for Loewen." (Tr. 1255).

Ms. McGrath testified that Loewen's purported "regional partnership" with the Riemanns was a sham, as David Riemann was a mere figurehead with no genuine authority in the company. (Tr. 1242-46, 1257, 1260). She explained that Mr. Riemann was treated poorly by Loewen's central management and was required to answer to Loewen headquarters with regard to virtually all aspects of Riemann Holdings' business. (Id.)

With respect to the August 1991 settlement agreement with O'Keefe, Ms. McGrath testified that O'Keefe was generally cooperative in his efforts to implement the agreement, but that Loewen attempted to impose unreasonable conditions on the deal after it was executed and failed to disclose certain relevant information to O'Keefe. (Tr. 1209, 1215-20, 1672-73). Ms. McGrath testified in detail regarding an internal memorandum from Don Holmstrom (a Loewen

employee) to Ray Loewen and others revealing Loewen's intention to "beat O'Keefe to [the Jackson] market" and its belief that Loewen "would easily dominate the market." (Tr. 1249-50). The memorandum also demonstrated that Loewen was aware, before it entered into the agreement, that O'Keefe's insurance companies were "one step ahead of the regulators" and that consummation of the deal would enable O'Keefe to resolve his regulatory problems. (Tr. 1249-50, 1663-66; U.S. App. 0960).

Ms. McGrath also testified that, after she left the company, two of her family members passed away and that she entrusted O'Keefe rather than a Loewen affiliate with their burial. (Tr. 1209; see also Tr. 2004).

g. Dale Espich

One of O'Keefe's expert witnesses was Dale Espich, a funeral business management consultant from Illinois. Mr. Espich testified in detail regarding the funeral business generally and the various factors that influence the business environment of funeral homes. (Tr. 1789-1879). Mr. Espich explained that, because of the uniquely sensitive and emotional nature of funeral services, local relationships between funeral homes and their communities are especially entrenched and, as a result, it is extremely difficult to introduce competition into local funeral home markets. (Tr. 1825-29).

Mr. Espich testified with specific regard to Loewen's holding company system in Mississippi, explaining that Loewen had rapidly achieved a dominant position in many Mississippi markets, and that Loewen's practice of raising prices was most dramatic in those markets it dominated. (Tr. 1833-49). Espich explained that Loewen had a practice of raising prices through "clustering," by which it purchased the dominant funeral homes in nearby markets

and thereby obtained synergies and control over pricing in both markets. (Tr. 1845-56, 1864). Espich testified that Loewen "raise[d] prices at will" through this practice in order to meet predetermined profit projections, and that Loewen kept its ownership of the local homes secret from the general public. (Tr. 1863-66). According to Espich, Loewen's practices resulted in "a very serious increase in what it costs the consumer for a funeral in markets where [Loewen] dominate[d]." (Tr. 1848). Loewen elected to forego cross-examination of Mr. Espich. (Tr. 1868-69, 2406).

h. David Riemann

One of Loewen's first witnesses was David Riemann, the elder son of the former owner of the Riemann funeral businesses and Loewen's so-called "regional partner." Because his highly-damaging letter to Loewen had just been read in its entirety to the jury during the testimony of the previous witness, see supra at 36,[25] Mr. Riemann was immediately on the defensive as he took the stand. (Tr. 2643).

On direct examination, Mr. Riemann gave detailed testimony regarding his local roots and those of his family, as well as the history of the Riemann funeral business and the family's decision to sell the business to Loewen. (Tr. 2643-72). Consistent with its strategy of painting O'Keefe as anti-foreign, Loewen's counsel spent much of Mr. Riemann's direct examination on the subject of anti-foreign sentiment and the O'Keefe advertisements, including extensive inquiry

[25]The previous witness was Jeffrey O'Keefe, the president of the O'Keefe family's funeral home operations (Bradford-O'Keefe Funeral Homes, Inc.), and one of the named plaintiffs in the case. Loewen called Mr. O'Keefe to testify as its first witness. (Tr. 2458). It was during a break in Mr. O'Keefe's testimony that Loewen first produced the Riemann letters to O'Keefe's counsel (Tr. 2589), which O'Keefe's counsel proceeded to use extensively in his examination of Mr. O'Keefe. (Tr. 2626-33).

of whether Mr. Riemann had "any problem with doing business with Canadians?" or whether he had "problems with doing business with Japanese?" or whether he had "any problem doing business with Chinese people?" (Tr. 2677-78, 2687-2704).

On cross-examination, O'Keefe's counsel focused attention back on Mr. Riemann's letter, which had "just surfaced somehow yesterday . . . ." (Tr. 2817). Riemann admitted that the contents of the letter were true (Tr. 2818), that neither he nor the other Riemanns were told about the deal with O'Keefe until after it was signed (Tr. 2841), and that Loewen had stripped him of his responsibilities as president of Riemann Holdings, including a directive from Loewen's president that Mr. Riemann stay out of the Riemann funeral homes. (Tr. 2853-59, 2878). O'Keefe's counsel effectively demonstrated that Mr. Riemann was merely a local figurehead for Loewen, with no genuine independent authority, notwithstanding Riemann's claim to be in "partnership" with Loewen. (Tr. 2835-66, 2878-79, 2911-14). Mr. Riemann also acknowledged that one of his responsibilities to Ray Loewen was to identify funeral directors with whom O'Keefe had a relationship so that Loewen could make "special efforts to affiliate" with them. (Tr. 2885-90; U.S. App. 0964).

i. John Wright

Loewen called John Wright, the former owner of the Wright & Ferguson Funeral Home, to testify regarding the contracts between O'Keefe and Wright & Ferguson, as well as Mr. Wright's decision to sell his business to Loewen in 1990. On cross-examination, Mr. Wright stated that he had known Jeremiah O'Keefe for many years and that he believed O'Keefe was an honorable man who always kept his word. (Tr. 3065-67). Mr. Wright, who was then on the Board of Directors of LGII, also admitted that he knew of no case in which Loewen purchased a

funeral home and did not immediately thereafter raise the prices of the home's funeral services, which is precisely what happened following Loewen's purchase of Wright & Ferguson. (Tr. 3072-73). Indeed, Mr. Wright acknowledged that he did not know, at the time he elected to join LGII's Board, that "Loewen was going to raise his prices on every acquisition that he made . . . ." (Tr. 3092). Mr. Wright explained that Loewen did not allow pricing decisions to be made at the local level, but instead controlled those decisions through its own budget process. (Tr. 3091).

j. Reverend Edward Jones

Loewen called the Reverend Edward Jones, an officer of the National Baptist Convention ("NBC"), to testify regarding the contract between the NBC and Loewen. (Tr. 4753-62; see supra at 26-27). Under the terms of the contract, the NBC would endorse Loewen as the NBC's death care provider of choice, in exchange for which Loewen would provide training for salespeople who would market Loewen's cemetery products (e.g., graves, mausoleums, crypts, etc.) to the NBC's estimated 8.2 million members. (U.S. App. 1026). On direct examination by Loewen's counsel, Jones insisted that the contract "was not designed to just put money in preachers' pockets" but was instead intended "to employ people who are otherwise unemployable . . . ." (Tr. 4761).

Reverend Jones was immediately defensive on cross-examination. Without prompting by O'Keefe's counsel, Jones criticized a Canadian newspaper account of the contract as "misleading" insofar as it suggested that the contract was a "bad deal" for the NBC and its members. (Tr. 4766-68; U.S. App. 1021). Jones nevertheless conceded that the contract did not require Loewen to do anything other than train a sales force that would sell Loewen's products to the NBC's members, and that all other costs were to be borne by the NBC. (Tr. 4758-59, 4768-

70). Jones also acknowledged that the contract was disadvantageous in several other respects, such as its failure to empower the NBC to influence the prices that Loewen would charge NBC members for its products (Tr. 4785), or to specify who would keep the interest on the substantial reserves that the contract required to be withheld from commissions to be paid to pastors and churches on each sale. (Tr. 4773-79). Although he eventually conceded that more work needed to be done on the contract to protect the NBC's interests, he had earlier acknowledged that nothing in the agreement suggested it was not a final, binding agreement. (Tr. 4764-65, 4781). When pressed to do so, Jones was unable to name a single lawyer who represented the NBC in the negotiations with Loewen over the contract. (Tr. 4780-81).

Later in the proceedings, O'Keefe called Earl Banks to testify as a rebuttal witness regarding the NBC contract. Banks, himself an African-American lawyer and funeral home owner, explained in detail how the contract "does not empower the National Baptist Convention to do anything" of significance, and how Loewen stood to profit enormously from the deal. (Tr. 5339-43, 5357, 5360-61, 5366-68). In particular, Banks explained that the contract's silence with respect to the accrued interest on reserves held back on sales commissions meant that Loewen could keep potentially hundreds of millions of dollars for doing nothing other than training a sales force to sell its own products. Id.[26]

[26]A telling postscript to the National Baptist Convention deal demonstrates how reckless Loewen was in its haste to ingratiate itself with (and, it ultimately hoped, to profit from) the African-American community. Reverend Henry J. Lyons, the former leader of the National Baptist Convention who signed the contract with Loewen, was subsequently convicted of racketeering and fraud in connection with his relationship with Loewen, and is currently serving a 5 ½-year prison term. See D. Barstow & M. Davey, Anatomy of a Swindle: The Rev. Henry J. Lyons and the Loewen Group, St. Petersburg Times, Aug. 30, 1998.

5. Jury Instructions

In Mississippi, as in all U.S. jurisdictions, the parties are given an opportunity to propose and object in advance to the court's instructions to the jury. In the O'Keefe case, Judge Graves began the bench conference on proposed jury instructions with a stern warning to all counsel that, under established precedent of the Mississippi Supreme Court, any objection to a jury instruction is "only preserved" for purposes of appeal "if you state it." (Tr. 5388).[27] Judge Graves explained that, to streamline what was likely to be a time-consuming process, "all you have to do . . . is object and state the basis for your objection, and it's preserved" for purposes of appeal. (Tr. 5389).[28]

Before addressing each of the parties' proposed instructions, Judge Graves gave the parties an opportunity to object to five instructions proposed by the court. When asked by the court if he had any objection to the court's first instruction – which, among other things, instructed the jury not to be "influenced by bias, sympathy or prejudice" in reaching their decision – Loewen's lawyer replied: "Do not." (Tr. 5390-91). Loewen's lawyer did object, however, to the very next instruction, which the court agreed to modify in accordance with Loewen's objection. (Tr. 5391).

Consistent with its strategy of excess, Loewen proposed over 100 jury instructions,

[27]This strict requirement has been reaffirmed numerous times by the Mississippi Supreme Court. See, e.g., Barnett v. Mississippi, 725 So. 2d 797, 801 (1998) (citing cases).

[28]The day before the bench conference, the court foreshadowed these ground rules by cautioning the parties to have their objections ready: "When I call up an instruction and I ask whether or not you have an objection to that instruction, you better have it ready, and if you don't have your objection ready, I'm going to consider it waived, and I'm moving to the next instruction." (Tr. 5379).

despite the court's earlier warning that the rules of procedure presumptively limit the parties only to six instructions. See Tr. 5298-5300, 5311, 5379 (citing Miss. R. Civ. P. 51). The court nevertheless agreed to deliver several of Loewen's proposed instructions, and sustained numerous objections that Loewen raised regarding O'Keefe's proposed instructions. See Tr. 5392-5492. At no point, however, did Loewen ever object – as it does now – on the grounds that the instructions the court proposed to give would not adequately "address the heightened risk of improper nationality-based, racial, and class bias." TLGI Mem. at 39.

6. Closing Arguments

O'Keefe's closing argument was made by only one lawyer, Mr. Gary. Mr. Gary summarized the evidence that had been presented and argued that it (as well as the conduct of Loewen's witnesses and lawyers in this very trial) proved O'Keefe's overarching theory: that Loewen was a dishonest and predatory company as a matter of practice; that Loewen had lied to O'Keefe and fraudulently induced him into the settlement agreement with the intent of putting him out of business; and that Loewen did so in order to ensure monopoly power in the funeral home markets so that it could continue to raise prices on the bereaved. Mr. Gary also used a visual aid that provided a detailed accounting of the actual damages (as opposed to punitive damages) he believed his side had proven, which added up to $105,832,000. (Tr. 5566-68, 5713-14).

Although Loewen's defense was already in substantial disarray by this point, the company compounded the problem by having three different lawyers present its closing argument. This tactical decision only reinforced a major problem that Loewen experienced throughout the trial: an inability to present a clear and coherent explanation of its defense.

None of the three Loewen lawyers offered a clear or convincing "big picture" of their defense, nor did they make any significant effort to challenge Mr. Gary's calculation of damages in the amount of $105 million. While Mr. Robertson argued that some of the smaller elements of O'Keefe's damages calculations were too high (Tr. 5651, 5653), he did so in a highly technical manner, overloaded with jargon. (Tr. 5655-56). Mr. Robertson also spoke, as he had throughout the trial, in cold terms about "declining volumes" in funeral homes (i.e., fewer people dying), suggesting a general insensitivity to the delicate nature of death-care services, thereby reinforcing the image of Loewen as a cold, calculating predator that derived its profits from price increases on death-care services. (Tr. 5644-46). Mr. Blackmon focused largely on O'Keefe's advertising campaign and argued that it showed Mr. O'Keefe to be prejudiced against foreigners. (Tr. 5672-77).

7. The Initial Verdict and its Reformation

On November 1, 1995, the jury returned a verdict in favor of O'Keefe in the amount of $260 million. (A650-58). At Loewen's request, the court polled the jurors and determined that eleven of the twelve jurors (including three of the four white jurors) voted in favor of that verdict. (Tr. 5732-33).[29] After the court indicated that the trial would proceed to the punitive damages phase, the jury foreman wrote the judge a note explaining that the jury had intended the $260 million verdict to be the entire award, which consisted of $100 million in compensatory ("loss") damages and $160 million in punitive damages. (A659).

Loewen complained that the verdict was inconsistent with a then-recent Mississippi tort-

[29]Under Mississippi law, "[a] verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury" in a civil case in Circuit Court. Miss. R. Civ. P. 48(a).

reform law that requires juries to consider punitive damages separately from compensatory damages. See Miss. Code Ann. § 11-1-65(b)-(c). Although there was some question whether the new law applied, given that the O'Keefe lawsuit was filed before the law was enacted (see A765; U.S. App. 1045), Loewen's counsel, expressing their "belie[f] that the verdict on its face evinces bias, passion and prejudice," moved orally for a mistrial on the ground that the jury had "ignored the instructions of the Court, particularly regarding the burden of proof . . . ." (Tr. 5738-39).[30] Judge Graves denied Loewen's oral motion and noted that "defendants did not offer an instruction" regarding bifurcation of the proceeding and that, "if an instruction like that had been offered by the defendant, it would have been granted." (Tr. 5742).

Instead, Judge Graves proposed to accept only the jury's compensatory award of $100 million and to conduct a separate proceeding on the issue of punitive damages. (Tr. 5739-43). Although Claimants now suggest that Judge Graves had no authority to reform the verdict in this manner, Mississippi law clearly provides to the contrary. It has long been settled in Mississippi that, where a verdict is "expressed so that the intent of the jury can be understood by the court," the court may deem the verdict sufficient and may reform it "at the bar" to cure any procedural defect. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 151 (Miss. 1998) (citing

[30]Loewen had earlier argued that, under Mississippi's new tort reform law, the plaintiff bears a heavier burden of proof with regard to punitive damages than with compensatory damages. (See Tr. 5744). Loewen's oral motion for a mistrial thus appears to complain primarily that the verdict was improper because the jury, by failing to bifurcate, used the same "preponderance of the evidence" standard for both punitive and compensatory damages rather than a separate, more stringent "clear and convincing evidence" standard for punitive damages. Loewen's position, however, was incorrect as a matter of Mississippi law. See American Funeral Assurance Co. v. Hubbs, 700 So. 2d 283, 285-86 (Miss. 1997) (holding that Mississippi tort-reform law does not apply to contract cases; recovery for tortious breach of contract need only be based on preponderance of the evidence).

cases). This principle has been codified by statute since 1972. See Miss. Code Ann. § 11-7-159 ("If the verdict is informal or defective, the court may direct it to be reformed at the bar."); see also Miss. Code Ann. § 11-7-157 ("No special form of verdict is required, and where there has been substantial compliance with the requirements of the law in rendering the verdict, a judgment shall not be arrested or reversed for mere want of form therein."). It is perhaps because this authority was so obvious to the parties that neither O'Keefe nor Loewen objected to Judge Graves' proposal to reform the verdict at the time. (Tr. 5741-5749).

Before proceeding to address punitive damages, however, Judge Graves strongly encouraged Loewen to consider an offer made by O'Keefe to accept the $260 million verdict as the total verdict and forego the punitive damages phase, which would require Loewen to waive only one technical ground of objection on appeal; namely, the absence of evidence of net worth in support of the punitive damages portion of the verdict.[31] Judge Graves cautioned: "I don't think you want to go back in there after they hear the net worth of the defendant and you already know they've given 160 million without knowing it." (Tr. 5741). The parties were unable to agree to the terms of a stipulation in this regard and thus proceeded to the punitive damages phase of the case. (Tr. 5744-47).[32]

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[31]Sir Robert Jennings incorrectly refers to this offer as a "settlement" offer. See Opinion of Professor Sir Robert Jennings, Q.C. ("Jennings Opinion") at 7.

[32]There is absolutely no basis in the record for Claimants' assertion that the "obvious implication" of Judge Graves' reformation of the verdict was that "a $160 million punitive award would be insufficient . . . ." TLGI Mem. at 44. See also RLL Mem. at 58 (alleging that Judge Graves "sent a clear message to the jury that the original $160 million punitive damages award . . . was inadequate . . . ."). Judge Graves' explanation to the jury regarding the need for a separate punitive damages phase was abundantly clear and utterly devoid of the improper "message" that Claimants misrepresent here. See Tr. 5752-54.

8. The Punitive Damages Phase

Although Loewen's trial team made a number of significant mistakes throughout the trial, perhaps none was so costly as its poor presentation to the jury on the matter of punitive damages. As one account of the trial put it, Loewen's punitive damages presentation "was, by any measure, an extraordinary and – for Loewen – grievous example of a poorly coordinated presentation by his legal team." (U.S. App. 0190).

O'Keefe's counsel began the punitive damages hearing by asserting, in his opening statement, that Loewen was worth in excess of $3 billion. (Tr. 5756). In response, Loewen's counsel, Mr. Sinkfield, insisted that all of the "evidence" and "all of the published documents that we have" will show that the company was worth only "411 million dollars, 411 million dollars." (Tr. 5757).

O'Keefe presented the testimony of two experts in economics and the valuation of businesses, Drs. Bernard Pettingill and Hugh Parker. Both Dr. Pettingill and Dr. Parker testified that The Loewen Group was worth in excess of $3 billion. (Tr. 5762, 5769). Dr. Parker further testified that it was inappropriate to rely solely on Loewen's financial statements in determining the company's worth, as that value would not necessarily indicate what the company was worth in the open market. (Tr. 5769). Although Loewen's counsel cross-examined Dr. Pettingill, he inexplicably declined to do so with Dr. Parker. (Tr. 5770). On cross-examination, Dr. Pettingill pointed out that, even on the basis of Loewen's own financial statements, the company's reported net worth increased by over $200 million during the six-month period between December 31, 1994 and June 30, 1995. (Tr. 5765-66).

Loewen called only one expert, Mr. Charles Harvell, to testify. Although Mr. Sinkfield

had earlier assured the jury that "all the documents that we have" would show that Loewen was worth only $411 million, Mr. Harvell began his testimony by stating, on the basis of a Loewen document, that the net worth of the company, as of June 30, 1995, "was in excess of 600 million dollars but less than 700 million," some sixty percent greater than Sinkfield's earlier claim. (Tr. 5772). Mr. Harvell also stated, on direct examination by Loewen, that the company's then-current market value was $1.7 billion. (Tr. 5778). Loewen made no effort to elicit testimony from Mr. Harvell as to whether Loewen's financial statements or its value in the open market was the more appropriate measure of the company's worth.

In his closing argument, O'Keefe's counsel seized upon the inconsistencies in Loewen's presentation and suggested that they were merely examples of the company's general propensity for dishonesty, both in its business practices and in its litigation of the case. (Tr. 5807-09). O'Keefe's counsel reminded the jury of Loewen's conduct that led them to trial, including the practice of destroying competition through dishonest business practices, abusing its monopoly power, and profiting unfairly from vulnerable families who are burying their loved ones. O'Keefe's counsel argued that the wilfulness and reprehensibility of Loewen's conduct, together with the valuation of the company in excess of $3 billion, justified an award of punitive damages of $1 billion. (Tr. 5793-5802).

Loewen's counsel, Mr. Sinkfield, was remarkably ineffective in his short, unfocused response. (Tr. 5802-07). Mr. Sinkfield made no effort whatsoever to dispute O'Keefe's claims that the company's conduct was reprehensible and deserving of punishment. He also failed to challenge meaningfully the assertions of O'Keefe's experts that the company was worth in excess of $3 billion, made no meaningful effort to explain whether financial statements or market

valuations were the appropriate measure of the company's value and, in fact, effectively endorsed the $1.7 billion market valuation given by Loewen's own expert. (Tr. 5803-04). Loewen thus left the jury with the impression that the company was worth at least $1.7 billion and, if O'Keefe's experts were to be believed, in excess of $3 billion.

Claimants cannot excuse this performance by suggesting, as they have done here, that Loewen was "rushed" in its presentation. See, e.g., RLL Mem. at 35 (alleging that "Judge Graves made it plain to the jury that he intended to rush through the entire punitive damages phase . . . in just one day."). As the record makes clear, Judge Graves offered both sides as much time as they wanted for the punitive damages phase, to which Loewen's counsel responded: "It should not take longer than a day, Your Honor, and I'm including [in] that two or three hours and argument time." (Tr. 5720). See also Tr. 5721 (when asked whether he could start the punitive damages phase on the same day as the compensatory damages verdict, Loewen's counsel replied: "Not a problem for us, Your Honor."); Tr. 5750 (Mr. Sinkfield: "We don't want any opening statement.").

The jury returned from its deliberations with a verdict of $400 million in punitive damages, by the same 11-1 vote as the first verdict. (Tr. 5810-11). The total verdict of $500 million was reduced to judgment and entered by the trial court on November 6, 1995.

IV. Loewen's Appeal and the Bond Question

On November 27, 1995, after an unsuccessful post-trial motion,[33] Loewen filed an appeal of the trial court judgment with the Mississippi Supreme Court, as was its right under Mississippi law. See Miss. Code Ann. § 11-51-3; A18. Under Mississippi law, a party may pursue such an appeal without posting any sort of bond. An appellant may also stay the execution of a money judgment (which is otherwise enforceable as of right) for the pendency of the appeal by posting a supersedeas bond in the amount of 125 percent of the judgment from which the appeal is taken. See Miss. R. App. P. 8(a). If it had posted a bond in the amount of $625 million, therefore, Loewen could have prevented O'Keefe from enforcing the judgment while the appeal was pending.

Loewen argued, however, that it could not afford a bond in the full amount required by the Mississippi statute. Therefore, on November 28, 1995, Loewen asked the trial court to reduce the bond to $125 million – 125 percent of only the compensatory damages portion of the judgment – pursuant to the court's authority to reduce a bond "for good cause shown." Miss. R. App. P. 8(b); see A818.

A. Trial Court Proceedings on the Bond Issue

The trial court held a hearing on Loewen's motion to reduce the bond and, at Loewen's request, did so on an emergency basis on November 29, 1995. (A1044). Contrary to Loewen's claim, the court did not "summarily deny" Loewen's motion, but instead offered an extensive

[33]On November 15, 1995, Loewen moved for a judgment notwithstanding the verdict ("JNOV") or for a new trial and/or reduction of the verdict. (A660). O'Keefe filed a written brief in opposition to that motion the next day. (A765-785). The court denied the motion after hearing oral argument on November 20, 1995. (A787-817).

explanation of its reasons for requiring the full bond, including the observation that the very purpose of the bond "is to effect absolute security to the party affected by the appeal." (A1074). The court reviewed all of the parties' written submissions, afforded Loewen a full hearing on the matter and, as a review of the transcript makes clear, gave careful consideration to the arguments presented by both sides. (A1046-80). The court also encouraged the parties to negotiate a compromise on the question, but no compromise was reached. (A1072).[34]

Loewen was fully aware that it bore a substantial burden of justifying a departure from the statutory bond requirement. Outside of the courtroom, Loewen and its counsel privately acknowledged that, "[a]s the unsuccessful defendants, we presently are not very well positioned to be arguing whether the plaintiffs here are more entitled to one form of damages than another because . . . at this stage of the proceedings, plaintiffs are at least more entitled to all of their damages than we are to not having to secure plaintiffs against those damages." (U.S. App. 0894-95). As Loewen's counsel correctly observed, "it is less a windfall to the plaintiffs to be secured against the loss of an award the law (so far) says rightfully is theirs, than it would be a windfall to us if we are relieved of all obligation to plaintiffs to secure them against the loss of that (presently) valid judgment." (Id. at 0895).

Despite this recognition of the substantial burden it would have to carry, Loewen never argued to the trial court, as it does here, that reorganization protection under Chapter 11 of the U.S. Bankruptcy Code was not a reasonable means by which it could have pursued its appeal even if the court did not depart from the full supersedeas bond. During the hearing on the

[34]O'Keefe's counsel had earlier suggested the possibility of compromise in open court, inviting Loewen to discuss "ways they can stop the execution without having a court order" if Loewen could show "substantial credit," even if not the full amount. (A1060).

supersedeas bond question, Judge Graves, demonstrating an appropriate concern for Loewen's ability to proceed in the face of a full bond requirement, pressed O'Keefe's counsel to explain how Loewen's interests could be protected:

> [L]et's assume that . . . the judgment is either reversed or substantially reduced [by the Mississippi Supreme Court]. . . . but by then you've already moved to collect on your judgment which, if we assume again that [the Loewen defendants are] right about their financial condition, would effectively shut them down . . . . [H]ow are they then supposed to get back to where they were if the Supreme Court agrees that I was wrong or the jury was wrong . . . .? What happens to them then? How do we guard against what that could lead to?

(A1057-58). O'Keefe's counsel (Joel Blass, a former Justice of the Mississippi Supreme Court) responded that Loewen *"would go into Chapter 11 and in the meantime pursue us*," id. at A1058 (emphasis added), and that "[t]hey can appeal without supersedeas. They can go into bankruptcy or receivership if they have to . . . ." (A1062; see also A1059 ("They could go in and get the protection of Chapter 11.")). Although Loewen was fully aware of the availability of Chapter 11 protection (among other remedies) and had already set its lawyers to work to pursue it, see U.S. Jurisdictional Mem. at 72-83; U.S. Jurisdictional Resp. at 59-74, Loewen said nothing on the subject, leaving O'Keefe's answer to the court entirely unrebutted.

The court, after a full hearing and discussion of relevant points and authorities, denied Loewen's motion. (See A1072-78).

B. The Mississippi Supreme Court Proceedings

Loewen appealed the trial court's bond decision to the Mississippi Supreme Court, which the court also agreed to hear on an expedited basis. On November 30, 1995, one day after the trial court's ruling, the Mississippi Supreme Court granted Loewen an interim stay of execution

of the judgment while it was considering the bond issue. (A1082-83). As a condition of the interim stay, however, the court required Loewen to post a $125 million bond, which Loewen represented was all that the company could reasonably afford. (A1027, A1083).[35] Although Loewen argued that the court should permanently reduce the bond requirement to $125 million, its counsel privately acknowledged that such a departure from the bond requirement would be "unprecedented . . . ." (U.S. App. 0603; see also id. at 0633).

As they had done in the trial court, the O'Keefe plaintiffs argued to the Mississippi Supreme Court that a departure from the full bond was unjustified because, among other things, Chapter 11 reorganization provided adequate protection to Loewen. (A1113). O'Keefe invoked the concurring opinion of two U.S. Supreme Court Justices in the Pennzoil v. Texaco case to this effect:

> [i]n this case, Texaco clearly could exercise its right to appeal in order to protect its corporate interest even if it were forced to file for bankruptcy under Chapter 11. Texaco, or its successor in interest, could go forward with the appeal, and if it did prevail on its appeal in Texas courts, the bankruptcy proceedings could be terminated. Texaco simply fails to show how the initiation of corporate reorganization activities would prevent it from obtaining meaningful appellate review.

Id. (brief of O'Keefe, quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 22-23 (1987) (Brennan and Marshall, J.J., concurring)). As it had done in the trial court, Loewen offered no response to this challenge, leaving O'Keefe's point entirely unrebutted.

Two weeks later, on December 15, 1995, while the bond matter was under advisement in

[35]In their brief, the O'Keefe plaintiffs also questioned the veracity of Loewen's bankers' claim that the most the company could afford was $125 million, which O'Keefe noted was suspiciously the same amount, to the dollar, as 125 percent of the compensatory damages award. (See A1109).

the Mississippi Supreme Court, Loewen's Mississippi counsel reported to the company that he had obtained highly confidential (and improper) information indicating that the Court was poised to rule in Loewen's favor. (U.S. App. 1211). Loewen's counsel, James Robertson (himself a former Justice of the Mississippi Supreme Court), informed Loewen that he had approached the Chief Justice of the Court at a Christmas party and that, according to Robertson, the Chief Justice indicated that the Court had just privately voted in Loewen's favor and would soon be releasing a decision. (U.S. App. 1212-13). Robertson also reported that he corroborated this information, which he believed had "a 90 percent probability of accuracy," and learned that the vote was going to be 6-3 in the company's favor. (Id.). In light of this news, Robertson advised Loewen "to begin serious foot dragging on settlement discusssions" with O'Keefe, and "to go into a holding pattern on alternative security ideas" for the bond. (U.S. App. 1213).

Emboldened by this inside information, Loewen proceeded with its plans to raise still more capital for its aggressive acquisition strategy in the debt and equity markets, despite the strong and continuing advice of its counsel to avoid any actions that would suggest to the court that the company had greater financial capacity to post a full bond than it had represented. (U.S. App. 0439, 0601, 0633, 0653, 1049).[36] As its counsel had feared, however, Loewen, in the course of raising this capital, had already suggested to potential investors that the company was, in fact, able to finance the full supersedeas bond. (U.S. App. 0798).

On December 16, 1995 – the day after Mr. Robertson conveyed his expectation of a forthcoming 6-3 victory – O'Keefe filed a brief with the Mississippi Supreme Court charging that

[36]On December 20, 1995, Loewen raised $155 million to fund acquisitions by issuing new Loewen stock in the Canadian equity markets, and was preparing to raise an additional $200 million in a debt offering in January 1996. (TLGI Mem. at 57; U.S. App. 0653).

Loewen had perpetrated a fraud on the court by claiming an inability to post the full bond. (U.S. App. 0798). O'Keefe attached a transcript of a conference call that Loewen hosted for investors in which Loewen executives implied that the company would, in fact, be able to finance the full bond if necessary. (Id.). Four days later, rather than issue the 6-3 ruling that Mr. Robertson had told Loewen to expect, a 5-4 majority of the Mississippi Supreme Court issued an order continuing the interim stay pending the Court's further consideration of the case. (A1394).

Mr. Robertson responded to this development by imploring Loewen to avoid any further acts that would indicate the company's ability to afford a bond larger than it had represented to the Court. As Mr. Robertson explained,

> I cannot overemphasize the necessity of Loewen doing nothing which, either in its appearance to a fair-minded observer, or in its practical effect regardless of intent, would have any adverse impact upon the rights and interests of the O'Keefe Plaintiffs. . . .
>
> It is important that you realize that at least some of the five Justices who voted with us feel that they have gone out on a limb. The 125 percent of judgment supersedeas bond rule has been a part of Mississippi jurisprudence from the beginning of time. This is likely the first substantial relaxation of that rule some of the Justices have ever encountered. Their mind set at the moment is likely to be that they feel they have done us a favor. It is critically important that nothing occur which would cause them to question the wisdom of the judgment they have made for us.

(U.S. App. 1221-22).

Ignoring this exhortation from its counsel, Loewen continued with its plans to raise more capital in an equity offering scheduled for late January. This effort brought another plea from counsel on January 23, 1996, indicating that Mr. Robertson's team was "very worried" that Loewen's actions were undermining its credibility with the Court. (U.S. App. 0653).

The next day, on January 24, 1996, an *en banc* panel of the Mississippi Supreme Court,

by a vote of 7-2, denied Loewen's request for a reduction of the bond and ordered that the interim stay of execution of the trial court judgment, which had then been in effect for nearly three months, would expire on January 31, 1996, unless Loewen posted a bond in the full amount of $625 million. (A1176).

V. Loewen's Decision To Settle Rather Than Continue With The Appeal

After the Mississippi Supreme Court's decision on January 24, 1996, Loewen had several options by which it could have continued with its appeal of the jury verdict, including: (1) posting the full bond and thereby staying execution of the judgment pending appeal, (2) proceeding with the appeal without posting a supersedeas bond, (3) seeking relief from and review of the Mississippi Supreme Court's bond decision in the U.S. Supreme Court, (4) seeking relief from the bond requirement in a U.S. federal district court, or (5) filing for protection under Chapter 11 of the U.S. Bankruptcy Code and proceeding with the appeal under such protection, without the need for any bond at all.

Loewen and its counsel were extremely confident of their chances of success on appeal of the jury verdict. According to its counsel, Loewen faced "a high probability – approaching 90 percent – that we will secure a reversal of a substantial portion" of the judgment. (U.S. App. 0384). See also U.S. App. 0401 ("I think the chances are excellent that we will secure substantial, if not complete, relief" from the jury verdict); U.S. App. 0431 (attorneys consulted "were unanimous in the view that any judgment entered on this verdict will be reversed or substantially reduced" by the Mississippi Supreme Court); U.S. App. 0606.

Despite this extraordinary confidence in the likelihood of success on appeal – and, as we demonstrated in our jurisdictional memorials, the advice of its counsel that viable means existed

for pursuing an appeal – Loewen elected to settle the Mississippi litigation with O'Keefe. On January 29, 1996, Loewen settled the litigation on the following terms: O'Keefe would receive $50 million in cash from Loewen's lenders (led by the First National Bank of Chicago) on January 31, 1996, Loewen would issue O'Keefe 1.5 million restricted shares of The Loewen Group, Inc. on February 15, 1996, and Loewen would issue an unsecured note to O'Keefe promising annual payments of $4 million for the next twenty years. (A1503, 1530-1723). The total value of the settlement, according to Loewen, was approximately $85 million.[37]

On February 2, 1996, at the request of the parties, both the trial court and the Mississippi Supreme Court issued consent judgments vacating their prior orders and dismissing the entire O'Keefe lawsuit with prejudice. (A1589-91; A1620-21).

[37]Although Loewen values the settlement at $175 million for present purposes, that amount does not reflect the deferral of payment and tax benefits that Loewen received from the settlement. In statements to the U.S. Securities and Exchange Commission (a federal agency that regulates the securities markets) and in its press releases at the time, Loewen estimated the after-tax, net present value of the settlement to be approximately $85 million. (A1509).

ARGUMENT

I. THE UNITED STATES CANNOT BE HELD LIABLE FOR THE MISSISSIPPI COURTS' ALLEGED FAILURES TO ACT BECAUSE LOEWEN NEVER REQUESTED COURT ACTION ON THE GROUNDS THAT IT ALLEGES IN THIS PROCEEDING

In its preliminary objections, the United States established that Loewen never requested judicial action – whether during the trial or the proceedings on the supersedeas bond question – on the grounds that it alleges in this arbitration and that, therefore, the alleged inaction of the Mississippi courts cannot give rise to the United States' liability as a matter of law. See U.S. Jurisdictional Mem. at 86-88; U.S. Jurisdictional Resp. at 81-92. The Tribunal deferred this issue to the merits, but noted that, "[i]f the Respondent's case on this point is made out, it could result in a dismissal of the claim." Decision on Competence ¶76. The United States respectfully submits that now is the time for the dismissal of the claim on this ground.[38]

Because the United States briefed this issue in the jurisdictional phase, we will not rehearse the points already made and instead respectfully refer the Tribunal to the United States' previous submissions, which we incorporate by reference. We limit ourselves here only to a few points of clarification.

Although Claimants do not dispute that "'[n]ational and international decision-makers alike resist finding an affirmative duty on governments to act from customary international law

[38]This contention is not limited to the fact that Loewen never objected during the trial on the grounds that the challenged testimony and rhetoric improperly appealed to the jury's alleged "anti-Canadian, racial, and class biases." Rather, the point also extends to the fact that, during the post-trial proceedings concerning the supersedeas bond, Loewen never argued for a reduction of the bond requirement on the principal ground that it alleges in this proceeding (i.e., that corporate reorganization was not an effective means of protection for the company) and, instead, gave the Mississippi courts reason to believe that a reduction was neither warranted nor necessary under the circumstances. See U.S. Jurisdictional Resp. at 88-92; supra at 57-63.

or treaty without the clearest normative expression of such duty,'" U.S. Jurisdictional Resp. at 81 (quoting Gordon A. Christenson, Attributing Acts of Omission to the State, 12 Mich. J. Int'l L. 312, 360 (1991)), Claimants purport to have found such a clear expression of duty in two places: (1) the requirement in NAFTA Article 1105 that host governments accord foreign investments "full protection and security," and (2) the "plain error" exception to the contemporaneous objection rule. See TLGI Final Jurisdictional Sub. at 60, 63. These contentions were briefly addressed at the September 2000 hearing on jurisdiction, to which we add the following points:

First, the "full protection and security" provision of NAFTA Article 1105 on which Claimants rely has no application to this dispute. As we explain in greater detail below, the requirement of "full protection and security" has been construed by international tribunals to require only reasonable police protection against acts of a criminal nature that physically invade the person or property of an alien, a form of protection that is neither questioned nor implicated in this case. See infra at 176-80. This principle of customary international law therefore offers no support for Claimants' hypothetical "duty of action" that the Mississippi courts allegedly breached.

Second, there can be no question that Loewen was fully on notice of its obligation to object to improper testimony or counsel remarks at the trial. Indeed, Loewen was represented at trial by no fewer than five separate law firms, each of which was charged with knowledge of the applicable rules of procedure, including the contemporaneous objection rule.[39] If this were not

[39]See, e.g., 1 Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States § 219 at 729-30 (1945) ("When the nationals of one State enter the territory of another State, whether for business or pleasure, they subject themselves to the laws of the (continued...)

enough, Judge Graves repeatedly used the opportunity of bench conferences throughout the trial to remind counsel of their obligations to object. At one illustrative point, Judge Graves explained that "I keep hearing questions and testimony that seems to me to be irrelevant, but nobody objects, and y'all know the case, so I'm giving everybody the benefit of the doubt when there are no objections, and I assume everything that y'all bring up is relevant . . . ." (Tr. 2405).

At another point, Judge Graves explained, in connection with a particular objection:

> What's been going on [is] people have been pitting the testimony of one witness against the testimony of another. This is the first time anybody's bothered to object to it. It has never been appropriate. It's always been objectionable. Somebody finally objected. Sustained.

(Tr. 1682). Minutes later, Mr. Sinkfield once again ignored these clear signals and drew the following admonition (outside of the jury's presence) from an exasperated Judge Graves:

> [W]hen you first got up on cross-examination [of Lorraine McGrath], you asked her if she had talked to Mr. Gary. You raised no motion at that time, you raised no objection to her being allowed to testify. There was no motion to exclude her testimony. There was no nothing. Then we have a break, you look for a document, you come back, and then finally you think, "Oh, maybe I need to move to exclude her testimony." I've got two words for that that you've been hearing throughout the course of this trial . . . too late. You're just too late. Now, with all these folks sitting around this room [referring to Loewen's very large legal team], if nobody thought of [that] at the time when you asked her that . . . you ought to move to exclude her testimony and raise it at that time . . . . [F]rom now on, when I hear this stuff that's coming up five, 10, 15 minutes, two hours after it should have been thought up, I'm going to write me a little sign and hold up two words . . . too late, and we're going to keep going. Now, you are too late.

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[39](...continued)
latter State and although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home State, so long as such laws and rules are not below the standard generally obtaining in well-ordered States and are administered fairly and impartially, neither the aliens nor their governments have a right to complain.") (internal quotation omitted).

Tr. 1698-99. See also, e.g., Tr. 163 (signaling that Mr. Sinkfield should be more diligent, noting that "he may let something slip by like some stuff slipped by yesterday if you'll recall, and when you don't invite people to make objections, sometimes they don't."); Tr. 1373-74 (chastising Mr. Robertson for waiting for bench conference rather than objecting contemporaneously in open court); Tr. 1786 (criticizing Mr. Allred's failure to object to particular testimony, noting that "[i]f you'd objected [to it], I probably would have stopped [Loewen's lawyer] from talking about it . . . ."); Tr. 3536-37 ("With respect to objections [to deposition testimony], unless an objection is raised here at the trial, it's simply not raised."); Tr. 5379 (regarding jury instructions, "if you don't have your objection ready, I'm going to consider it waived, and I'm moving to the next instruction.").

As Professor Landsman explains, "[t]he courts under scrutiny in this matter, as is the case with virtually all American courts, rely on a robustly adversarial approach to adjudication." Landsman Statement at 3 (Tab C hereto). Indeed, "America utilizes the most robustly adversarial system to be found anywhere in the world." Id. at 3-4. Such a system requires the judge to play "a fundamentally passive role" and "'assumes that competing litigants are capable of protecting their respective interests by presenting their cases to the trier of fact in an effective way.'" Id. at 5 (quoting Stephen Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. 1, 7 (1978)). While the adversarial system of justice at issue here grants the parties "substantial autonomy and authority in the preparation and prosecution of the case[,] [i]t also means that counsels' strategic choices and courtroom conduct will often have a determinative impact on the outcome of proceedings." Id. at 6. Far from placing a "duty of action" on the judge, the adversarial justice system makes it "the *attorney's* duty to make the

record and failure to do so will, in all but the most extraordinary of circumstances, lead to an adverse determination on appeal." Id. (emphasis added). See also Miss. Code Ann. § 11-7-155 (under Mississippi law, "[t]he judge in any civil cause *shall not* sum up or comment on the testimony, or charge the jury as to the weight of evidence.") (emphasis added).[40]

When pressed to do so at the September 2000 hearing, Claimants still failed to identify a single instance during the trial when Loewen objected to any remark or testimony on the grounds that it improperly appealed to the jury's alleged "racial, nationalistic, or class biases." Indeed, Mr. Loewen's counsel acknowledged at the hearing that he was still "trying to think of the reason" why no such objection was made "until the motion for new trial" fully two weeks after the conclusion of the trial proceedings. 9/20/00 Transcript at 205-06. Although Claimants place great weight on the fact that Loewen alleged in its motion for a new trial that "[p]laintiffs repeatedly and impermissibly interjected issues and matters of race, national origins, class and economic status into the case . . . ," (see TLGI Jurisdictional Sub. at 44) – which allegation was itself entirely unsupported when made – the law of Mississippi (and elsewhere) makes clear that this objection was far too late in any event. See, e.g., Barnett v. Mississippi, 725 So. 2d 797, 801 (Miss. 1998) (objection raised "after the jury has returned a verdict and been discharged is simply too late."); Hogan v. Mississippi, 741 So. 2d 296, 298 (Miss. Ct. App. 1999) ("It is too late to raise the point *for the first time* in a motion for a new trial.") (emphasis in original).[41]

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[40]Indeed, handwritten notes produced by Loewen suggest that officials of the company were extremely displeased with its trial counsel's handling of the case. (U.S. App. 1099-1100).

[41]See also, e.g., Francis v. Southern Pac. Co., 333 U.S. 445, 450-51 (1948) (objection to make-up of jury panel "made for the first time in the motion for a new trial" comes "too late"); West Virginia v. Beckett, 310 S.E.2d 883, 890 (W.Va. 1983) (objection to improper impeachment of a witness, raised for the first time in a motion for new trial, is untimely and (continued...)

Even if Judge Graves could still be said to have been under so extraordinary a duty to notice "plain error" in this case as Claimants suggest – despite the absence of *any* contemporaneous objections on the grounds complained of here, and given the fact that the plain error rule is discretionary, not mandatory[42] – customary international law would still not support a finding of state responsibility under these circumstances. As we have explained, international law does not recognize any such "plain error" exception that could justify a finding of state responsibility based on an alleged failure of a domestic court to protect rights that the claimant never asserted. See U.S. Jurisdictional Resp. at 82-84.

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[41](...continued)
"forecloses consideration of this point on appeal"); Morgan v. Price, 150 S.E.2d 897, 903-04 (W.Va. 1966) (objection to court's decision to suspend jury deliberations, made for the first time in a "motion to set aside the verdicts and judgments and to grant . . . a new trial," "came too late"); Idaho v. Thompson, 977 P.2d 890, 896 (Idaho 1999) ("'ordinarily an objection comes too late for the purpose of review on appeal, if made for the first time after the jury has retired or the cause has been submitted to them, or after the close of the arguments, or on motion for new trial or otherwise, after the verdict has been rendered'") (citation omitted); Starr v. State, 190 S.E.2d 58, 59-60 (Ga. 1972) (objection to introduction of evidence, made for the first time in a motion for new trial, "came too late"); Louisiana v. Fink, 231 So. 2d 360, 365 (La. 1970) (objection to jury charge, "[w]hen raised for the first time in a motion for a new trial, . . . comes too late"); Watson Constr. Co. v. AMFAC Mortgage Corp., 606 P.2d 421, 433 (Ariz. Ct. App. 1979) (objection to improper argument of counsel, raised for the first time in a motion for new trial, "is simply too late"); Missouri v. Emmons, 595 S.W.2d 792, 796 (Mo. Ct. App. 1980) (objection to allegedly prejudicial event, raised for the first time in a motion for new trial, "comes too late"); Weinrob v. Heintz, 104 N.E.2d 534, 539 (Ill. App. Ct. 1952) (objection to submission of an issue of fact to the jury, raised for the first time in a motion for new trial, "is too late"); Berger v. Rosenberg, 66 So. 2d 278, 280 (Fla. 1953) (objection to jury instruction, raised for the first time in a motion for new trial, "was too late").

[42]See United States v. Olano, 507 U.S. 725, 735 (1993) (the plain error rule "is permissive, not mandatory. If the forfeited error is 'plain' and 'affects substantial rights,' the court of appeals has authority to order correction, but is not required to do so."); Miss. R. App. P. 28(a)(3) ("[T]he court *may, at its option*, notice a plain error not identified or distinctly specified.") (emphasis added).

For example, the decisions of the European Commission of Human Rights reflect the understanding that a claimant "should not identify in the duty of domestic courts to investigate matters *ex officio* a factor relieving him of the obligation to raise the issues of his case (the substance of his complaint) before the domestic courts." A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law 83-85 (1983) (surveying decisions of the European Commission). Other sources of international law – as well as the rules governing this very proceeding – underscore that it is the claimant's responsibility to identify the basis for objection in the first instance, or else those objections are waived. See ICSID Arbitration (Additional Facility) Rules, art. 34 ("A party which knows or ought to have known" of a basis for objection "and which fails to state promptly its objections thereto, shall be deemed to have waived the right to object."); Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 207 (Nov. 18) (rejecting argument that arbitrator had not been selected in accordance with treaty terms, noting "[n]o question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such"); id. at 209 (similar ruling on different point).[43]

[43]Much of the material of which Claimants complain was introduced by Loewen in the first instance during the trial. See supra at 19-32. The principle of "invited error," which is related to the contemporaneous objection rule, thus further eliminates any alleged "duty" of the Mississippi courts to have acted to prevent O'Keefe's counsel from invoking similar material in the absence of any request from Loewen to do so. Under this well-established principle, recognized not only in Mississippi but in common-law jurisdictions generally, a party will not be heard to complain on appeal of errors which that party induced or provoked the court or the opposing party to commit. See, e.g., Wigmore on Evidence § 15 & n.5 (rev. ed. 1983) (describing "the orthodox English rule" of invited error); Evans v. Mississippi, 547 So. 2d 38, 40 (Miss. 1989) (an "[a]ppellant has no standing to seek redress from alleged error of his own creation."); Demyers v. Demyers, 742 So. 2d 1157, 1160 (Miss. 1999) ("An appellant will not be (continued...)

In short, Loewen never asked the Mississippi courts to act on the grounds that it alleges in this proceeding. During the trial, Loewen never objected to the testimony and remarks that they challenge in this proceeding on the grounds that the testimony and remarks improperly appealed to the alleged "nationalistic, racial, or class biases" of the jury. After the verdict, when Loewen sought a reduction of the required supersedeas bond amount, Loewen never argued, as it does here, that Chapter 11 reorganization was not a reasonable means of protection in the event that the company could not afford to post the full bond. Instead, Loewen ignored the advice of its own counsel and proceeded with an aggressive business strategy that gave the courts further reason to doubt the bona fides of the company's already suspect claims of poverty. Neither the NAFTA, nor customary international law, nor Mississippi law reflects a duty – let alone the "clearest normative expression of such duty" – that could render the United States liable for the alleged inaction of the Mississippi courts under these circumstances.[44]

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[43](...continued)
permitted to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to.") (quotation omitted); 58 Am. Jur. 2d § 53 ("Litigants are generally not entitled to a new trial when it appears that they had knowledge of the irregularity of which they complain and did not promptly seek to have the defect corrected at the trial of the case, or that their failure to obtain such knowledge and have the defect corrected was due to their own fault or lack of diligence.").

[44]See, e.g., 6 John B. Moore, Digest of International Law § 976 at 622 (1906) ("To international claims the rules of general jurisprudence in this relation apply as follows: A party to a malicious wrong cannot recover from another for damages therefrom resulting to himself. A person whose negligence is the immediate cause of a negligent injury to himself cannot recover from another damages for such injury.") (internal quotation omitted); 1 Marjorie M. Whiteman, Damages in International Law 145 & n.352 (1937) ("Where the claimant's injuries have arisen from his own carelessness, imprudence, or noncompliance with local regulations, the claim will be disallowed.") (citing cases).

II. LOEWEN'S AGREEMENT TO SETTLE THE MISSISSIPPI LITIGATION OUT OF COURT DEFEATS THIS CLAIM IN ITS ENTIRETY

It appears to be common ground among the parties that the settlement of claims generally precludes any international recovery. See TLGI Mem. at 124-25; RLL Mem. at 46-47. Even Claimants' own sources recognize that "[n]o claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim." L. Sohn & R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens 186 (1961) [hereinafter "1961 Sohn & Baxter Draft Convention"].

Although Loewen chose to settle the Mississippi litigation rather than pursue its appeal, Claimants offer two arguments to avoid the dispositive effect of Loewen's settlement agreement on this claim. Claimants argue, first, that the settlement agreement was not freely entered into, but was instead the result of "economic duress," and, second, that the settlement agreement, even if voluntary, did not purport to waive this NAFTA claim against the United States. Both of these arguments are legally and factually incorrect.

A. Loewen Cannot Be Excused From Its Settlement Of The Mississippi Litigation On The Ground Of "Economic Duress"

The United States agrees with Claimants that a settlement obtained by duress does not preclude an international claim. The United States also agrees that the courts of Australia, Canada, the United Kingdom, and the United States all recognize, at least in principle, the defense of "economic duress."[45] We strongly disagree with Claimants, however, over how those

[45]While all of these jurisdictions generally recognize the defense of economic duress, there is some variation in the degree to which each jurisdiction is willing to allow the defense to operate. In England, for example, "there has been an evident concern on the part of Judges to (continued...)

standards are to apply where, as here, the challenged contract was the settlement of commercial litigation between sophisticated parties represented by experienced counsel. Claimants assert that sufficient duress is established where a judicial act creates economic pressure such that, much as a claimant would prefer to pursue its rights on appeal, paying a lesser amount in settlement is the least painful alternative available to the claimant. Claimants' assertion is without merit.

The United States has located no international decision in which a claim for denial of justice was permitted to proceed where the claimant settled the municipal litigation that gave rise to the claim and where effective further resort to the courts was available. There is simply no support for Claimants' assertion that economic pressure, by itself, can transform a settlement of

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[45](...continued)
protect commercial transactions from an overdose of good conscience standards." Sir Anthony Mason, The Impact of Equitable Doctrine on the Law of Contract, 27 Anglo-Am. L. Rev. 1, 2 (1998). The defense is also particularly disfavored in the United States in the commercial context, "where two businesses have dealt at arm's length through counsel." Ismert & Assoc., Inc. v. New England Mutual Life Ins. Co., 801 F.2d 536, 550 (1st Cir. 1986) (Breyer & Coffin, JJ., concurring). To the extent that some jurists may favor a more active judicial role, such a view is not uniformly accepted and, therefore, cannot be said to be among "the general principles of law recognized by civilized nations" that may properly be regarded as a source of international law. See Statute of the International Court of Justice, Oct. 24, 1945, art. 38(1)(c). Indeed, whether the defense of "economic duress" (as opposed to *physical* coercion) is even recognized at all in customary international law is uncertain. See, e.g., Detlev F. Vagts, Coercion and Foreign Investment Rearrangements, 72 Am. J. Int'l L. 17, 33 (1978) ("[T]here is no very solid or wide consensus on coercion outside of the cases dealing with physical force."); Dubai-Sharjah Border Arbitration (1981), 91 I.L.M. 543, 569 (1993) ("There is still a measure of uncertainty, of course, over the definition and content of 'coercion'. The question of including or excluding 'economic coercion' from such a definition divided States represented at the Vienna Conference. Economic coercion was not expressly included within the terms of the Convention but was the object of a special Declaration adopted by the Conference, which was not of an obligatory or binding character. In the light of this Declaration of 1969 the expression 'threat or use of force' could not have, earlier in 1956 [the date of events at issue in the case] comprehended the use of economic coercion.").

disputed claims in litigation into an international claim. As Professor Greenwood points out,

> [t]he decision whether to settle a case rather than pursue an appeal is always a business decision, based on a wide range of factors including advice as to the prospect of success, the effect of prolonged litigation on the share price and credit of a company, other corporate plans etc. A company is entitled to take whichever decision it pleases in these matters but if, in the exercise of its business judgement, it elects not to pursue an appeal, it cannot then be heard to say that no appeal was available to it. Whether in the context of the local remedies rule or the definition of what constitutes a denial of justice, it has never been suggested (nor, in my view, can it be) that a remedy is available only if it makes business sense (taking account of all of the party's other business interests) to pursue it. To hold otherwise would mean that a party who chose not to appeal because he wished to use all available funds for other purposes could argue that an appeal was not a remedy available to him.

Greenwood Opinion at ¶ 59.

As illustrated by the only authority on point cited by Claimants, international law regards a claimant's settlement of a claim based on an allegedly wrongful judicial act as involuntary only where the claimant had available no effective further resort to the courts. In Mathews and Wilkenson (U.S. v. Mexico), Dec. No. 15-C, American Mexican Claims Commission 242 (1948), private individuals had illegally occupied mines lawfully leased to the Claimants. Id. at 244-245. After some delay, the Claimants sought to expel the trespassers by seeking relief in a Mexican court of first instance. The court, despite repeated intervening administrative rulings that the Claimants, and not the trespassers, had the exclusive right to exploit the mines, took no action. After twenty-one months of inaction and facing no other alternative, the Claimants reached a settlement with the trespassers. The American-Mexican Claims Commission found that, given the obvious futility of resort to the Mexican court, the settlement with the trespassers did not waive the Claimants' international claim. Significantly, the claims commission found that it could disregard the settlement only under circumstances that established that further resort

to the Mexican courts was futile. Id.[46]

The municipal authorities on which Claimants rely similarly afford no support for ignoring the effect of Loewen's settlement agreement on this claim. Indeed, the mainstream of duress jurisprudence in the leading common-law jurisdictions is particularly restrictive and conservative with respect to settlements of litigation and commercial matters involving sophisticated parties, as is the case here. See, e.g., Ellis v. Friedland, [2000] 273 A.R. 35, 2000 Alta. D.J. LEXIS 463 at * 55 (Alta. Q.B. Sept. 20, 2000) (Can.) (no duress found where complainant, "an educated, experienced oil and gas businessman, consulted a lawyer and considered various negotiation strategies . . . ."); CTN Cash and Carry Ltd. v. Gallaher Ltd., [1994] 4 All E.R. 714, 717 (C.A. 1993) (Eng.) (no duress where agreement resulted from "arm's length commercial dealings between two trading companies," even though alternative to agreement "would have seriously jeopardised the plaintiffs' business."); Cities Service Oil Co., v. Coleman Oil Co., Inc., 470 F.2d 925, 929 (1st Cir. 1972), cert. denied, 411 U.S. 967 (1973) (given the "obvious public policy favoring the amicable settlement of litigation, . . . agreements accomplishing this result will be disregarded for only the strongest of reasons."); Equiticorp. Fin. Ltd. (in liq) v. Bank of New Zealand (1993) 32 NSWLR 50, 109 (C.A.) (Austl.) ("[C]ourts should be even more circumspect about extending the remedy of economic duress to cases of the

[46]The United States notes that the Mathews award was issued in a context in which the local remedies rule had been expressly waived; the award's relevance to the issues before this Tribunal therefore is not dependent on the applicability of the local remedies rule. See Trindade, supra p. 71 at 127 (1983) ("A notorious example of such waiver [of the local remedies rule] was afforded by the practice of the Mixed Arbitral Tribunals and Mixed Claims Commissions in the inter-war period."); see also id. n.420 at 348-49 ("The model provision on waiver of the rule was Article V of the 1923 Convention establishing the U.S. – Mexican General Claims Commission. In fact, all the Conventions instituting the *six* Mexican Claims Commissions rejected the local remedies rule.") (emphasis in original).

contracts between substantial businesses . . . .") (Kirby, P.). Cf. Martel Bldg. Ltd. v. Canada, [2000] S.C.C. 60, ¶ 55 (Can.) ("[T]here are compelling policy reasons to conclude that one commercial party should not have to be mindful of another commercial party's legitimate interests in an arm's length negotiation").

Indeed, municipal courts have observed that, in a "free market system, it is not the function of the judiciary to measure economic adversaries' bargained concessions in retrospect, upsetting the scales the parties themselves perceived as balanced when they struck the deal." Federal Deposit Insurance Corp. v. Linn, 671 F. Supp. 547, 561 (N.D. Ill. 1987). See also, e.g., Equiticorp. 32 NSWLR at 107 (cautioning against "the dangers of courts' substituting their opinions about agreements for those reached by parties . . . where the parties are substantial corporations and where millions of dollars are involved"). As the Alaska Supreme Court noted in Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 23 n.4 (Alaska 1978), a case relied upon by Loewen, "'the grounds for judicial interference must be clear.'" (quoting Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 500 (Alaska 1962)) (cited in TLGI Mem. at 133).[47]

It is beyond dispute, therefore, that Claimants bear a heavy burden to establish that the

[47]The Totem Marine decision of the Alaska Supreme Court is often cited for its survey of the American law of duress. Other courts have observed, however, that Totem Marine advocated "taking an active role in policing contracts and correcting inequalities," a stance that is at variance with principles, enunciated above, disfavoring invalidation of contracts unless their "illegality is clear and certain." Freedlander, Inc., The Mortgage People v. NCNB Nat'l Bank of N. Carolina, 706 F. Supp. 1211, 1221 (E.D. Va. 1988) (internal quotation omitted), aff'd, 921 F.2d 272 (4th Cir. 1990). In Northern Fabrication Co., Inc. v. UNOCAL, 980 P.2d 958 (Alaska 1999), the Alaska Supreme Court seemed to retreat from the activist principle tacitly endorsed in Totem Marine, emphasizing that "the preservation of agreements entered into in good faith and the encouragement of settlement of disputes constitute strong arguments for enforcing releases." Id. at 962 (quotation omitted).

settlement of the Mississippi litigation was the product of economic duress. See, e.g., Dubai-Sharjah Border Arbitration (1981), 91 I.L.M. 543, 569 (1993) ("[I]t is manifestly clear that any allegation of duress, of whatever kind, which is alleged to vitiate consent must be the subject of very precise proof."). In any case alleging economic duress, the complainant must prove the elements of the claim by "clear, cogent, and convincing evidence[.]" Freedlander, 706 F. Supp. at 1215 (Virginia law); see also International Halliwell Mines, Ltd. v. Continental Copper & Steel Indus., Inc., 544 F.2d 105, 108 (2d Cir. 1976) ("[A] party seeking to avoid his contractual obligations on grounds of economic duress shoulders a heavy burden."); Huyton SA v. Peter Cremer GmbH & Co., [1999] 1 Lloyd's Rep. 620, 639 (Q.B. 1998) (Eng.) (the "underlying legal onus remains at the end of the day on the party seeking relief.").

The hallmark of any claim of duress is that the victim has no alternative to the agreement. Oxxford Clothes XX, Inc. v. Expeditors Int'l of Washington, Inc., 127 F.3d 574, 579 (7th Cir. 1997) (citing cases); Pao On v. Lau Yiu Long, [1980] A.C. 614, [1979] 3 All E.R. 65, 79 (P.C.) (Eng.) (economic duress requires, inter alia, that "the victim . . . must have had no alternative course open to him") (Lord Scarman); Restatement (Second) of Contracts § 175 cmt. b. (1981) ("[a] threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it."). It is a fundamental tenet of the law of duress "that the execution of the agreement sought to be avoided [must have been] the *only* choice reasonably available to the party challenging it. Where . . . the avenue of litigation is open to the challenging party but he chooses not to pursue it, it cannot be said that the subsequent settlement was a product of duress." Undersea Engineering & Constr. Co. v. International Tel. & Tel. Corp., 429 F.2d 543, 550 (9th Cir. 1970) (emphasis added) (footnote omitted), overruled in part

on other grounds, Avery v. United States, 829 F.2d 817, 818-19 (9th Cir. 1987). This requirement is a strict one, for even "a highly unattractive alternative" may nevertheless be "a real alternative. Economic duress can only provide a basis for avoiding a contract if there was no real alternative." Hennessy v. Craigmyle & Co. Ltd. and Another, [1986] I.C.R. 461, 468 (C.A. 1986) (Eng.); Warner Communications, Inc. v. Williams, (C.A. Jul. 13, 1990) (LEXIS UK Library, ENGCAS File) ("[T]he fact that a person who is in straitened circumstances and does not want the expense of litigation makes an unpalatable decision as to the best commercial solution to his problems, does not amount to economic duress.") (Dillon, LJ).

As we explain below, Claimants cannot meet their heavy burden to establish economic duress in this case. Instead, the agreement to settle the Mississippi litigation must be seen for what it was: a considered business decision, reached in consultation with Loewen's numerous legal and business advisors and representatives, to reject other available remedies in favor of the expediency of obtaining an immediate release from liability for all of O'Keefe's claims against the company.[48]

1. The Availability of Injunctive Relief in a U.S. Federal Court Defeats a Claim of Economic Duress

The United States demonstrated in the jurisdictional phase of this proceeding that Loewen had a reasonable opportunity to obtain a stay from a federal court – including the United States

[48]Claimants have consistently maintained that they had no realistic possibility of appealing the trial court judgment. If Claimants were correct, then one must wonder why the O'Keefes would have agreed to forego in settlement roughly 4/5 of the jury's award, the execution of which Loewen contends it had no viable means of stopping other than through settlement. Of course, the mere fact that the O'Keefes were willing to forego such an enormous amount of their entitlement itself demonstrates most convincingly that Loewen's alternatives to settlement were very realistic indeed.

Supreme Court – that would have allowed Loewen to appeal the Mississippi trial court judgment without fear of execution on the judgment by O'Keefe. See U.S. Jurisdictional Mem. at 56-72; U.S. Jurisdictional Resp. at 37-59. Indeed, we showed that Loewen's own attorneys acknowledged the availability of such relief at the time, and were fully prepared to pursue it. Id.

Where, as here, an allegedly coerced party could have appealed and sought emergency injunctive relief, a claim of economic duress will not succeed. E.g., DSND Subsea Ltd. v. Petroleum GEO Servs., ASA, [2000] B.L.R. 530, 2000 WL 1741490 at ¶ 137 (Q.B. Jul. 28, 2000) (Eng.) (no duress where, inter alia, complainant "could obtain a swift injunction"); International Halliwell Mines, Ltd. v. Continental Copper & Steel Indus., Inc., 544 F.2d 105,109 (2d Cir. 1976) (coerced party gave no reason why it could not have instituted suit and sought a stay or injunction against foreclosure proceedings); Peoples Mortgage Co., Inc. v. Federal Nat'l Mortgage Ass'n, 856 F. Supp. 910, 921 (E.D. Pa. 1994) (no duress where coerced party settled instead of seeking injunctive relief).

For example, in Professional Serv. Network, Inc. v. American Alliance Holding Co., 238 F.3d 897 (7th Cir. 2001) ("PSN"), the United States Court of Appeals for the Seventh Circuit held that duress would not invalidate a settlement agreement where the allegedly coerced party to a lawsuit, there the defendant, Alliance, could have sought emergency injunctive relief to extricate itself from worsening financial pressure created by the continued pendency of the lawsuit. Noting that Alliance had "at least a week in which to apply for judicial relief" from the coercive pressure, id. at 901, the court concluded that:

> Alliance had a legal remedy right at hand. Even if a liquidity crisis would have made its normal remedy, namely fighting the case to judgment, inadequate to stave off disaster, it had only to ask [the presiding judge] for a temporary

restraining order or . . . a preliminary injunction[.]

Id. (Posner, J.). The court rejected the duress claim "as a matter of law" and chided Alliance, stating that it "should have known that unless it took steps to obtain judicial relief, PSN would have no incentive to abandon its position . . . unless Alliance yielded to PSN's settlement demand." Id. See also, e.g., Oxxford Clothes XX, 127 F.3d at 579 (no duress, even where actions of coercing party "sound[ed] a lot like extortion, and almost like theft and ransom" that threatened destruction of plaintiff's business; "all [the plaintiff] had to do, having failed to persuade the [trial] court . . . , was to appeal to [the U.S. court of appeals] and seek an injunction pending the decision of the appeal").

Loewen was situated no differently. As we have already demonstrated, Loewen had the option (which it was fully prepared to pursue) to seek an emergency stay of the Mississippi Supreme Court bonding decision pending review of that decision by the United States Supreme Court. This remedy would have given immediate relief, allowing Loewen to proceed with its appeal of the underlying trial court judgment in the Mississippi appellate court without fear of execution by O'Keefe.

To support their contrary view, Claimants rely exclusively on the statements of Loewen's experts, Professors Laurence Tribe and Charles Fried, to the effect that Loewen had no realistic prospect of obtaining injunctive relief from a federal court, including the U.S. Supreme Court. See TLGI Mem. at 135. In considering duress claims, however, courts have rejected as untenable theoretical assertions that the pursuit of alternatives would have been "difficult," "futile," or ineffective. E.g., Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 F.2d 1178, 1185 (5th Cir. 1993) (general references to the inability to pursue other legal

alternatives because of "cash flow problems," and "difficulty and expense" are insufficient and conclusory); JPM, 94 F.3d at 273 (court rejected allegedly coerced party's speculation about the inefficacy of a legal remedy, holding that party had a viable option); Tyger Const. Co. v. Beer Precast Concrete Ltd., 896 F.3d 1367 (4th Cir. 1990) (Table), 1990 WL 15658 * 3 (text of unpublished disposition) (allegation of futility of alternatives is insufficient to make out duress claim). In PSN, for example, the court of appeals was unmoved by Alliance's claim that obtaining judicial relief would have been difficult; it was enough for the court simply that Alliance could have tried. 238 F.3d at 902. There is no reason why Loewen should not be held to at least the same standard.

At the very least, there is in this case a disagreement among the parties' distinguished experts as to the availability of injunctive relief as an alternative to Loewen's decision to settle, with Professor Drew S. Days, III (a former Solicitor General of the United States) on one side, and Professors Tribe and Fried (the latter also a former Solicitor General) on the other. The ultimate burden of proof, however, is for the Claimants to carry, not the United States. As Professor Greenwood observes,

> I am not in a position to assess whether, as a matter of United States law, the advice of one former Solicitor-General of the United States is to be preferred to that of another. Where one United States lawyer of that distinction testifies, however, that a remedy is available in the US Supreme Court and that there was a reasonable prospect of success, I find it impossible to say that there was no reasonable possibility that a remedy lay in that direction.

Greenwood Opinion at ¶ 63.

2. The Availability of Protection Under Chapter 11 of the U.S. Bankruptcy Code Defeats a Claim of Economic Duress

Although Claimants dismiss the protection of Chapter 11 of the U.S. Bankruptcy Code as an unreasonable alternative to the settlement, "several courts have held that bankruptcy is a valid legal option sufficient to defeat an economic duress claim." Capizzi v. Federal Deposit Ins. Corp., 1993 WL 723477 at * 9 (D. Mass. 1993) (citing cases). See also, e.g., Teachers Ins. and Annuity Ass'n of Am. v. Wometco Enterprises, Inc., 833 F. Supp. 344, 349 n.7 (S.D.N.Y. 1993) (no economic duress where complaining party "could have filed for bankruptcy protection as an alternative to granting plaintiff's requests for further concessions."). As the United States has already demonstrated, Chapter 11 reorganization protection was very much a reasonable alternative for Loewen at the time and, indeed, the company was strongly advised to pursue it. See U.S. Jurisdictional Mem. at 72-74; U.S. Jurisdictional Resp. at 59-74. The record before this Tribunal, therefore, does not support Claimants' allegation of economic duress.

For example, in Federal Deposit Insurance Corp. v. Linn, 671 F. Supp. 547 (N.D. Ill. 1987), a defense of economic duress was raised by debtors seeking to invalidate various agreements made with a creditor-bank, where it was undisputed that the debtors' only alternative to signing the agreements was Chapter 11 reorganization. 671 F. Supp. at 557 & n.21. The court rejected the claim of economic duress for reasons wholly applicable to the present case:

> Threatened bankruptcy is insufficient to create economic duress . . . Quite the contrary is true on defendants' own version of things: Bankruptcy proceedings would appear to have been their opportunity for legal escape from oppressive demands by [the creditors]. Any resulting financial embarrassment from declaring bankruptcy is not sufficient to explain why such legal redress would be inadequate.

671 F. Supp. at 560 (citations omitted); id. at n.33 (bankruptcy was a "viable alternative" to the

creditors' allegedly harsh terms).[49]

Similarly, in Freedlander, 706 F. Supp. at 1218-19, a complainant sought to invalidate, on grounds of economic duress, a settlement agreement that it had entered into with a lender, arguing that the lender's conduct imposed "crippling financial conditions" that forced the complainant to enter into the agreement. Although it accepted that the complainant's financial circumstances were indeed dire, the court rejected the claim of economic duress, noting that the complainant could have "file[d] suit against [the lender] immediately, or [sought] the protection afforded by Chapter 11 bankruptcy" instead of accepting the settlement agreement. Id.

The court specifically recognized the Chapter 11 option as a means "for legal escape from oppressive demands" by the lender, id. at 1220 (quoting Linn), and held that, by foregoing that option, the complainant had simply made "a business decision" that could not be revisited through a claim of economic duress. Id. at 1219, 1223. The court of appeals agreed, finding that, "[a]t the time of the settlement, Freedlander had alternatives to signing the release including bringing suit against NCNB or filing for bankruptcy." 921 F.2d 272 (4th Cir. 1990) (Table), 1990 WL 209860 at *1 (unpublished opinion). The appellate court pointedly observed that "[m]ere financial hardship cannot constitute duress; if it did, almost all settlements and releases would be called into question." Id. (citations omitted). See also Capizzi, supra, at *10 (because bankruptcy protection was an alternative to the settlement agreement, disregard of the agreement

[49]The court also noted that the threat of bankruptcy actually worked to the debtors' advantage in negotiating the agreements, as the "ability to declare bankruptcy . . . posed an obvious threat to [the creditor's] interests . . . ." 671 F. Supp. at 560. See, e.g., A1494 ("If it goes into Chapter 11 bankruptcy protection, [Loewen] can appeal the Mississippi lawsuit without posting any money – another point that may encourage the O'Keefes to settle."); Declaration of Wynne S. Carvill, appended to TLGI Jurisdictional Sub. at Tab E, pp. 9-10 ("The 'bankruptcy card' was the only credible threat we had in the final negotiations.").

on grounds of economic duress would "demonstrate the type of '[h]eads I win, tails you lose' mentality" that is disfavored in the law) (quoting Ismert & Assocs., Inc. v. New Eng. Mut. Life Ins. Co., 801 F.2d at 550-51).

Against this overwhelming weight of authority, Claimants contend that Chapter 11 reorganization cannot be viewed as a reasonable alternative to the settlement because, they assert, bankruptcy is viewed as "irreparable injury" in the United States. TLGI Final Jurisdictional Sub. at 45 (citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)). It is not surprising that Claimants must rely chiefly on an authority from 1975 for this inaccurate claim, as the U.S. Bankruptcy Code underwent a sweeping revision in 1978 that renders Claimants' authority entirely obsolete.[50]

As the United States' experts, Professor Elizabeth Warren and Mr. J. Ronald Trost, indicated in the jurisdictional phase of this case, the 1978 overhaul of Chapter 11 of the U.S. Bankruptcy Code conferred dramatically enhanced powers on large corporations (such as Loewen) in a broad range of areas, including the ability to stay substantially all acts or proceedings against the corporation and its property while continuing in the ordinary course of business. See Warren Statement at 8-13; Trost Declaration at 5-6, 11. Indeed, the post-1978 version of Chapter 11 is often criticized as having conferred *too much* power on corporations to avoid adversities and to permit poorly managed or inefficient companies to survive when they

[50]The only other U.S. authority identified by TLGI, Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280 (10th Cir. 1996), did not purport to analyze whether Chapter 11 reorganization, or the threat thereof, would constitute "irreparable injury." The remainder of TLGI's sources are not from the United States and thus are entirely irrelevant to the question of the effectiveness of Chapter 11 reorganization, which is, of course, a remedy that is unique to the United States in the breadth of protections it afford to corporate debtors.

ought instead be liquidated. See, e.g., James J. White, Harvey's Silence, 69 Am. Bankr. L. J. 467 (1995) (criticizing "Chapter 11 virtuoso[s]" for their alleged unwillingness to acknowledge Chapter 11's social cost of inhibiting the American economy from "cleans[ing] itself of economic failure."). A 1992 article on the revised Chapter 11 offers a useful illustration of the powerful effects that the 1978 amendments had on American commercial life:

> This notion – that Chapter 11, rather than signifying the last gasp of a dying company, is often one of several alternatives that creative managers consider irrespective of a company's solvency – has been widely chronicled in the popular press, especially recently. One recent article declared, for example, that "[b]ankruptcy practice has evolved into a major corporate planning tool," and noted that the 1978 Act had "increased the availability and acceptability of the Chapter 11 alternative" by dropping "negative terms" and providing that "a debtor company may file for Chapter 11 for any legitimate business purpose, without showing grounds such as insolvency." Harold L. Kaplan, Bankruptcy as a Corporate Management Tool, A.B.A. J., Jan. 1, 1987, at 64, 64-65. Another noted that a "new attitude exists . . . toward the word 'bankruptcy,'" observing that bankruptcy reorganization "is considered a strategy rather than failure" and that bankruptcy lawyers "now play an integral role in the day-to-day operations of their . . . business clients, troubled or not." Gary Taylor, Bankruptcy: No Longer a Dirty Word, Nat'l L. J., Mar. 14, 1988, at 1. The article concludes by quoting a leading bankruptcy practitioner: "Bankruptcy is a critical and important part of business, an option now that anyone needs to consider." Id. at 25; see also Kate Ballen, Strategy for the 1990s: Bankruptcy, FORTUNE, Feb. 11, 1991, at 13 ("Filing for protection from creditors under the bankruptcy code used to be akin to contracting a social disease. Not anymore." The article quotes bankruptcy practitioner Thomas J. Salerno: "Chapter 11 is no longer an embarrassment. People have watched mega-companies like Texaco and Manville go in, clean up their balance sheets creatively, and come out whole."); Lawrence J. DeMaria, Market Place; An Overemphasis on Bankruptcies, N.Y. TIMES, Apr. 13, 1989, at D8 ("Bankruptcy is no longer the worst word on Wall Street. In fact, bankrupt companies are attracting investors as though Chapter 11 contained a formula for success instead of a description of failure."); G. Heileman and Its Bondholders, N.Y. TIMES, Jan. 27, 1991, § 3, at 2 ("Used to be that a bankruptcy filing was a company's last exit. But these days, it's more like a highway tollbooth."); Stephen Labaton, Bankruptcy is Better in America, N.Y. TIMES, Jan. 23, 1990, at D1, D2 ("America has the only legal system that in a sense actually encourages a company to seek bankruptcy protection long before a full-blown financial collapse is near, allowing a business to file a Chapter 11 petition even though it is not insolvent.").

Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 Yale L. J. 1043, 1047 n.20 (1992). See generally Kevin J. Delaney, Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage (1992). Claimants' reliance on pre-1978 authority for their characterization of United States bankruptcy law, therefore, is entirely misplaced.

The effectiveness of a Chapter 11 reorganization for Loewen at the time of the Mississippi events was already discussed at length in the United States' prior submissions and, therefore, will not be rehearsed here.[51] For present purposes, we simply note the overwhelming authority for the view that where, as here, a corporation foregoes the substantial protections of Chapter 11 reorganization in favor of entering into a settlement agreement, that corporation has made nothing more than a business decision that cannot be revisited through a claim of economic duress. See supra at 83-85.

3. The Threat Of Execution Was Insufficiently Realistic Or Imminent To Support a Claim of Economic Duress

In its January 24, 1996 order, the Mississippi Supreme Court ruled that the interim stay granted Loewen would expire in seven days, absent the posting of a full supersedeas bond. (A1176). Claimants have seized on this seven-day time frame as partial support for their argument that the underlying settlement was "coerced." For example, Claimants contend they

[51]Because TLGI made additional claims regarding Chapter 11 reorganization in their final jurisdictional submission (to which the United States has not had an opportunity to submit a written response), we attach at Tab H hereto a supplemental declaration of Mr. J. Ronald Trost, which addresses many of those additional claims.

could not, in only seven days, obtain a stay of execution from the United States Supreme Court,[52] or arrange financing for a full bond (which, according to at least one of Loewen's declarants, was on the horizon).[53] According to Claimants, absent a stay or a bond, O'Keefe "would have been able to use . . . sheriffs throughout the United States to seize large portions of Loewen's U.S. investments, sell them at distress prices, and destroy the value of Loewen as an ongoing enterprise." See TLGI Mem. at 54; 9/20/00 Transcript at 30-31, 75-77, 190-92, 194-95.[54]

The United States does not dispute that, as of noon on January 31, 1996, O'Keefe *could*, as a theoretical matter, have begun execution proceedings in Hinds County, Mississippi (the site of the trial) and any of the fourteen Mississippi counties where O'Keefe had caused the judgment to be enrolled. But there is no record evidence demonstrating that execution – particularly *outside* Mississippi – would have occurred with sufficient immediacy or scope (or, indeed, at all)

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[52] See TLGI Jurisdictional Sub. at 29 (arguing Loewen "was unlikely to obtain, within the seven days available" a stay from the U.S. Supreme Court); Statement of Laurence H. Tribe at 16 (in concluding that Loewen had no realistic hope of obtaining a stay, noting that "[b]y itself, the short time frame – seven days – made the situation desperate"); Declaration of Wynne S. Carvill at ¶ 8 (noting that the "shortness of time," among other things, made "direct appeal to the United States Supreme Court an illusory choice"). Of course, contrary to Claimants' argument, we have already shown that the U.S. Supreme Court can grant a stay of execution in as little time as a single day. See Reply Statement of Professor Days at 5 n.3.

[53] See Declaration of Rt. Hon. John N. Turner, P.C., C.C., Q.C. at ¶ 19 (while noting "the likelihood that a supersedeas bond could have been arranged," concluding the effort to obtain a bond "ultimately faltered in view of logistical difficulties stemming from the minimal time allowed by the Mississippi Supreme Court to arrange such a bond.").

[54] It should be noted that the seven-day time frame did not affect Loewen's decision to forego reorganization protection. After the Mississippi Supreme Court ruled, Loewen was fully prepared to file a reorganization petition as a means of obtaining a stay of execution of the underlying O'Keefe judgment – which would have been effective *immediately* upon filing – and, indeed, used the "'bankruptcy card'" as a "threat" during settlement negotiations. See Declaration of Wynne S. Carvill at ¶ 16.

to support Claimants' contention that the settlement agreement was the product of economic duress. That is, there is no record evidence demonstrating that execution was the "menacing and imminent reality" Claimants allege. See RLL Final Jurisdictional Sub. at 10.

As an initial matter, Loewen has not demonstrated that execution was imminent even in Mississippi. At the time of the underlying events, Loewen's lawyers stated they were "convinced" that Michael Allred (one of O'Keefe's primary lawyers) "kn[e]w" the verdict could not "be sustained on the basis of the record at trial." (U.S. App. 0601). This is significant because, in Mississippi (as in most jurisdictions), a judgment creditor who executes a judgment pending appeal may be liable in restitution for "wrongful" execution if the judgment ultimately is reversed or reduced. See Statement of Jack F. Dunbar, Esq. at 5-6 (appended at Tab F hereto) ("Dunbar Statement").[55] It is hard to see why Loewen would have feared widespread execution pending appeal if it believed Mr. Allred expected the judgment to be reversed.

Moreover, under Mississippi law, County Sheriffs (the state officials charged with enforcing writs of execution) also are liable for "wrongful" execution. See Dunbar Statement at 8. Thus, a Sheriff can require a judgment creditor to post a bond of indemnity, up to double the value of any personal property subject to execution, whenever "a doubt shall arise whether the right to the property be in the defendant or not." See id. at 8-9; Miss. Code Ann. § 13-3-157. Loewen, by its own estimate, had approximately $560,000 in personal property (mostly fixed assets at the Wright & Ferguson funeral home) subject to execution in Mississippi. (U.S. App. 0639). As Mr. Dunbar notes, assuming this property would have been encumbered in some way

[55]Mr. Dunbar, a practicing Mississippi attorney and former President of the Mississippi Bar Association, has over forty years' experience as a trial attorney in the Mississippi court system. See Dunbar Statement at 1-2.

(by mortgage, assignment, pledge as collateral, or otherwise), "it is inconceivable that the Sheriff would not have required such a bond." See Dunbar Statement at 9. Claimants have adduced no evidence showing that O'Keefe could or would have posted a bond (which could have been upwards of $1,000,000).

But even assuming, *arguendo*, that O'Keefe would have been willing and able to execute the judgment in Mississippi, the portion of the Company's in-state assets was relatively small. At the time of the underlying events, Loewen estimated it had approximately $5,160,000 in real and personal property subject to execution in the entire State. (U.S. App. 0639). The real concern, therefore, was the threat of execution in the other forty-plus states where Loewen held virtually all of its U.S. assets. See A1992-93 (listing 42 states where Loewen owned funeral homes and/or cemeteries as of year-end 1995). The record contains no support, however, for the proposition that execution in any of those states was imminent on January 31, 1996.

At the September 2000 hearing on the United States' jurisdictional objection, Claimants noted that, as of 1996, the majority of states (including most of the states where Loewen held assets) had adopted the Uniform Enforcement of Foreign Judgments Act ("UEFJA"), 13 Uniform Laws Annotated (2000 Supp.). See 9/20/00 Transcript at 30-31, 191-92. Claimants also noted that, in those states, O'Keefe could have relied on the UEFJA to enroll the Mississippi judgment and initiate execution proceedings. See id. Finally, Claimants noted that the procedure contemplated by the Uniform Act is intended to be "speedy and economical." See 9/20/00 Transcript at 191.

But while intended to be "speedy," the UEFJA procedure is not automatic. See 9/20/00 Transcript at 30-31, 192 (Claimants' conceding as much). For example, documents produced in

discovery indicate that Loewen was most concerned about execution proceedings in seven states (each of which has adopted some form of the UEFJA): Alabama, California, Florida, Georgia, Kentucky, North Carolina, and Texas. See U.S. App. 1121-23; 1224-28; see also TLGI Mem. at 50 (listing these states as ones where Loewen owned "significant property"). To enforce the Mississippi judgment in any of these locations, O'Keefe would first have had to apply to enroll it.[56] There is no evidence in the record, however, that, at the time of settlement, O'Keefe had sought to enroll the judgment in *any* state outside Mississippi. To the contrary, the record evidence is that O'Keefe had caused the judgment to be enrolled in only 14 of 82 Mississippi counties, and (as Loewen knew at the time) had taken no steps to enroll the judgment in at least three Mississippi counties where the company had assets.[57] It is an understatement, indeed, to say that O'Keefe's execution plan (to the extent that he had one) was not well-formulated.

But even if O'Keefe had enrolled the judgment in one of these seven states, he could not have proceeded automatically to execution. For example, the court clerk (or O'Keefe himself) would first have had to serve notice of enrollment on Loewen.[58] Then, O'Keefe would have had

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[56]See Ala. Code § 6-9-232; Cal. Civ. Proc. Code §§ 1710.15, 1710.20, 1710.25; Fla. Stat. Ann. § 55.503; Ga. Code Ann. § 9-12-132; Ky. Rev. Stat. Ann. § 426.955; N.C. Gen. Stat. § 1C-1703; Tex. Civ. Prac. & Rem. § 35.003.

[57]See U.S. App. 1076-1094 (copies of letters from O'Keefe's counsel to court clerks in 14 counties enrolling the judgment; all dated November 22, 1995); id. at 1124 (listing counties where O'Keefe had enrolled the judgment as of December 11, 1995).

[58]See Ala. Code § 6-9-233; Cal. Civ. Proc. Code § 1710.30; Fla. Stat. Ann. § 55.505; Ga. Code Ann. § 9-12-133; Ky. Rev. Stat. Ann. § 426.960; N.C. Gen. Stat. § 1C-1704; Tex. Civ. Prac. & Rem. § 35.004.

to wait a prescribed period of time – generally twenty to thirty days, depending on the state[59] – to allow Loewen time to appear and either challenge the judgment as invalid under Mississippi law (see Statement of Drew S. Days, III, at 44-45), or seek a stay of enforcement. See Dunbar Statement at 11-13. For this reason alone, Loewen's claim that it had only "seven" days to obtain a stay in the U.S. Supreme Court (or financing for a supersedeas bond) is overstated.

Moreover, under the UEFJA, a judgment debtor generally can seek a stay of execution under the laws of the *foreign* state.[60] See Dunbar Statement at 11-12. Thus, if O'Keefe had attempted to execute the judgment in any of the targeted states, Loewen could have argued that any statutorily-prescribed bond should be reduced for cause, either as a matter of state law (in those states with statutes authorizing departures for cause),[61] or federal due process. See A1136 (advancing due process argument in the Mississippi Supreme Court); see also Dunbar Statement at 12-13 (noting that Loewen could have sought to have any bond limited to the value of its

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[59]See Ala. Code § 6-9-233 (30 days); Cal. Civ. Proc. Code § 1710.30 (30 days); Fla. Stat. Ann. § 55.505 (30 days); Ga. Code Ann. § 9-12-133(b) (time period not specified); Ky. Rev. Stat. Ann. § 426.960 (20 days) ; N.C. Gen. Stat. § 1C-1703 (30 days); Tex. Civ. Prac. & Rem. § 35.003 (time period not specified); but see Moncrief v. Harvey, 805 S.W.2d 20, 22-24 (Ct. App. Tex. 1991) (suggesting 30 day time period under Texas law).

[60]See, e.g., Ala. Code § 6-9-234(b); Fla. Stat. Ann. § 55.509; Ga. Code Ann. § 9-12-134; Ky. Rev. Stat. Ann. § 426.965; Tex. Civ. Prac. & Rem. § 35.006; see also Cal. Civ. Proc. Code § 1710.50 (court "shall" grant a stay where appeal is pending in the issuing state or where "interests of justice require"); N.C. Gen. Stat. § 1C-1705 (judgment debtor may seek relief from a judgment on "any . . . ground for which relief from a judgment of this State would be allowed").

[61]See Cal. Civ. Proc. Code § 1710.50(c) (court "may require an undertaking in an amount it determines to be just"); Ga. Code Ann. § 5-6-46 (statutorily-prescribed bond may be reduced for "good cause"); Ky. R. Civ. Proc. 73.04 (same); Tex. Civ. Prac. & Rem. § 52.002 (outlining circumstances in which statutorily-prescribed bond may be reduced for cause). In North Carolina, bonding of "noncompensatory damages" is limited to $25,000,000. See N.C. Gen. Stat. § 1-289(b).

assets within the foreign state). The Mississippi courts' decision to impose a $625 million bond *as a matter of Mississippi law* would not have been given preclusive effect. As Mr. Dunbar notes:

> [t]he threat of this approach [i.e., seeking stays in any jurisdiction where O'Keefe sought to execute] coupled with the potential restitution that the O'Keefe Plaintiffs would have been required to pay in the event that the judgment was reversed or reduced below the amount collected, would have given Loewen a formidable tool and a reasonable basis to continue its appeal without supersedeas in the post-verdict phase of the litigation.

See Dunbar Statement at 14.

Finally, contrary to what Mr. Loewen's lawyer suggested at the hearing, the notion that Loewen might have delayed, or even staved off, execution proceedings is not the product of "academic musings." See 9/20/00 Transcript at 76. The discovery makes clear that, at the time of the underlying events, Loewen's lawyers knew they could make execution difficult for O'Keefe (even in Mississippi),[62] and fully expected that execution would (in the words of one document) "take[] a long time." See U.S. App. 0390 (undated handwritten notes).

For example, in a November 26, 1995 letter, Kevin E. White, one of the company's principal outside lawyers, candidly acknowledged "the far flung nature of [Loewen's] properties" and "the obvious burden" that filing "judgment liens all across the country would impose on plaintiffs." See U.S. App. 0896-97; see also id. at 0423 (noting "the paper work required to have the Mississippi judgment enrolled in other states"). Indeed, Mr. White appeared to fret that a court might view as "tongue-in-cheek . . . or even disingenuous" the suggestion that, if Loewen

[62] See U.S. App. 0427 (urging Loewen lawyers to "[b]e fully up to speed on the Mississippi attachment process [O'Keefe] is required to follow, with plans to roadblock his actions").

were permitted to post a reduced supersedeas bond, O'Keefe could nevertheless protect his judgment by filing liens nationwide. See id. at 0896.

Loewen also questioned whether O'Keefe would have the wherewithal to litigate if the company contested any attempt at nationwide execution. Just two weeks before the Mississippi Supreme Court issued its bond decision, Robert Wienke, LGII's general counsel, wrote:

> Moreover, the filing of separate [federal collateral] actions in Covington[, Kentucky] and Vancouver[, British Columbia] can provide a tactical advantage. *This would require plaintiff's contingent fee counsel to litigate in far reaching and unfriendly forums on multiple fronts*. In that regard, we also may want to consider whether there is any basis for attacking on independent grounds any judgment liens which may have been filed outside of Mississippi.

See U.S. App. 0652 (emphasis added). In fact, Mr. Wienke may have been overstating the resourcefulness of O'Keefe's "contingent fee counsel." As noted above, there is no record evidence that, at the time of settlement, O'Keefe's lawyers had made any effort even to *enroll* the judgment in other states (or, indeed, in certain parts of Mississippi where Loewen owned property).[63]

For all of these reasons, Claimants have failed to establish that execution was the "menacing and imminent reality" they now allege. To the contrary, the record demonstrates that Loewen had more – and probably substantially more – than the seven days following the Mississippi Supreme Court's decision in which to continue to negotiate with O'Keefe or pursue

[63]In support of their argument that O'Keefe was planning to execute the judgment nationwide, Claimants have pointed to a January 25, 1996 letter from O'Keefe's counsel stating that "as of 12:00 noon, Wednesday, January 31, 1996, we shall start execution on all property, real and personal, that you have in the state of Mississippi and in other states as well." See A 1470; see also 9/20/00 Transcript at 75. But this vague reference to "other states," in a letter that was transparently a bargaining tactic, merely underscores that, as of late January 1996, O'Keefe had taken no concrete steps to enroll the judgment outside Mississippi.

other alternatives. As Loewen knew at the time, and contrary to Claimants' account of the events in this proceeding, the risk of execution on the judgment was neither of sufficient imminence nor sufficient scope to justify the avoidance of Loewen's settlement decision as the product of economic duress. As Mr. Dunbar concludes: "the Loewen Defendants could . . . have had an effective strategy (excluding settlement) to seek an expedited appeal before the Mississippi Supreme Court[64] while making execution upon the judgment more difficult and costly for the O'Keefe Plaintiffs pending appeal." See Dunbar Statement at 15.

4. Economic Duress Cannot Be Found Where The Complaining Party Was Itself Responsible for Its Own Difficult Financial Conditions

Although Claimants spend much of their memorials decrying the "desperate" circumstances in which Loewen found itself in the days leading to the settlement of the Mississippi litigation, nowhere is there any recognition of Loewen's own role in creating those conditions. The law is clear that a party seeking to excuse an agreement on the ground of economic duress cannot do so where, as here, that party is itself responsible for its own financial difficulties. See, e.g., FDIC v. Linn, 671 F. Supp. 547, 560 (N.D. Ill. 1987) ("This Court does not doubt defendants were between a rock and a hard place when they negotiated the Agreement, but what defendants blithely ignore is their own responsibility for their financial predicament."); Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd., [1983] 1 W.L.R. 87, [1983] 1 All E.R 944, 960 (Chancery Div. 1982) (Eng.) (plaintiff "completely failed to establish" duress where its "great financial difficulties . . . were of its own making."). For several reasons, Loewen bears responsibility for the allegedly "coercive" circumstances it contends required it to settle the

[64]The Mississippi Supreme Court has discretion to grant an expedited appeal "for any good cause shown." See Dunbar Statement at 15 n.7 (quoting treatise).

Mississippi litigation rather than pursue an appeal and, therefore, cannot argue that the settlement was the product of economic duress.

First, as the record makes clear, the jury verdict was the result not of any impermissible "bias" on the part of the jury, but of Loewen's own misdeeds in its dealings with the O'Keefes and in the death-care industry generally, as well as Loewen's poor presentation of its case at trial. See supra at 9-56; Landsman Statement at 19-45. Loewen only compounded its problems in this regard by failing to argue convincingly that it was entitled to a reduction of the required bond amount, and by ignoring the advice of its counsel to avoid actions that would give the Mississippi Supreme Court reason to question the veracity of its claimed inability to post a bond greater than $125 million. See supra at 57-63. Had the company been more responsible in these respects, Claimants may very well never have confronted the difficulties of which they now complain.

Second, Loewen had a full three months (not merely the seven days on which Claimants have seized) in which to prepare for the contingency of an adverse decision from the Mississippi courts on the question of the bond. Yet, as Loewen's own documents reveal, the company chose a deliberate strategy of "foot dragging" as of December 16, 1995, on the basis of its mistaken assumption that Loewen was going to prevail in the Mississippi Supreme Court. See U.S. App. 1213; supra at 60-61. The law is clear that "[a]llowing the matter to be prolonged until the eleventh hour, then claiming a crisis because of [the complainant's] own financial necessities, does not amount to economic duress." Turner v. Low Rent Housing Agency of the City of Des Moines, 387 N.W.2d 596, 599 (Iowa 1986). See also PSN, 238 F.3d at 901 (no economic duress where complainant failed to seek injunctive relief from threat; the "fault lay with [the

complainant] for not doing anything to stop the clock before time ran out . . . . [Time was sufficient where the complainant] still had at least a week in which to apply for judicial relief. It piddled the week away.").

Third, it is beyond dispute that Loewen was already in an extremely precarious financial condition of its own making well before the jury rendered its verdict. As the United States has already demonstrated, Loewen's business model of "growth through acquisitions," funded with proceeds of sales of debt and equity, was well-known to be an exceptionally high-risk venture that threatened the company's collapse upon the occurrence of any number of unknown contingencies, not limited to an adverse jury award. See U.S. Jurisdictional Mem. at 14-16; U.S. Jurisdictional Resp. at 63-64. A 1992 article about Loewen concisely described the problem:

> It's a circle game. Acquisitions feed earnings, which in turn pump the P/E ratio. And with the high P/E, they can keep selling stock to make more acquisitions. But as soon as one part weakens, the whole thing collapses.

Seth Lubove, Death Stock, Forbes (June 22, 1992) at 88 (U.S. App. 0002). See also, e.g., Deirdre McMurdy, Shunning the "D" Word, Maclean's (June 5, 2000) (citing Loewen as one of the "notorious crash-and-burn examples" of this dangerous growth strategy) (U.S. App. 0947).

Loewen's alleged inability to post the full bond was attributed solely to the highly-leveraged position of the company that was the result of Loewen's aggressive growth strategy. See, e.g., A1027-31; TLGI Mem. at 56 ("Loewen could not obtain a new $625 million letter of credit because it already had approximately $736 million of outstanding debt . . . ."). Even Loewen's own counsel in this proceeding has acknowledged that "of course . . . Loewen was over-leveraged and wanted to be more and more leveraged. He was borrowing a great deal." Don Wallace, Jr., State Responsibility for Denial of Substantive and Procedural Justice Under

NAFTA Chapter Eleven, 23 Hastings Int'l & Comp. L. Rev. 393, 398 (2000) (extensive panel discussion of the Loewen NAFTA claim).[65] It is for this same reason that Claimants now contend (although they said nothing on the subject before the Mississippi courts) that the protection of Chapter 11 corporate reorganization would not have been the effective alternative that it has been for numerous U.S. companies in virtually identical circumstances. See, e.g., TLGI Jurisdictional Sub. at 34-35, 37-39. But just as in the case of FDIC v. Linn, where the complainants had engaged in "a highly speculative business venture in the best of economic times[,]" Loewen "cannot deflect [its] full responsibility for the consequences of such risks . . . ." 671 F. Supp. at 560. The law of economic duress simply does not permit a dangerously leveraged company, such as Loewen was at the time, to "blame [the allegedly coercing party] for the pressures caused by [the company's] own business decisions and by general economic conditions." Id. See also Parras Holdings Pty. Ltd v. Commonwealth Bank of Australia, [1999] FCA 391, AUST FEDCT LEXIS 559 at *47-48, 54-56 (Fed. Ct. New South Wales Dist. Registry Apr. 9, 1999) (no duress where "applicants' problems arose from their own position, their inability to realise the state of their financial affairs and their determination to proceed with developments when they were financially unequipped to carry them out"); McCallum Highlands, Ltd. v. Washington Capital DUS, Inc., 66 F.3d 89, 93 (5th Cir. 1995) (accepting that coercive act "may have been the proverbial straw that broke the camel's back, but that does not make [the alleged coercing party] responsible for [the complainant's] financial distress."); Liebherr Crane

[65]Don Wallace serves as counsel and advisor to the law firm of Jones Day Reavis & Pogue (TLGI's law firm) for purposes of this case. Mr. Wallace's remarks on this arbitration were delivered as part of a symposium on NAFTA Chapter Eleven issues in February 2000, and were reprinted in the aforementioned law journal.

Corp. v. United States, 810 F.2d 1153, 1158 (Fed. Cir. 1987) ("To the extent [the complaining party] faced a Hobson's choice, it was the product of its own choice and blunder."); Chouinard v. Chouinard, 568 F.2d 430, 434 (5th Cir. 1978) (economic duress cannot be established "merely on the necessities of the purported victim. Thus, the mere fact that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic necessity is not sufficient.").[66]

5. The Threat of Execution on the Judgment Was Not Illegitimate

Even if Claimants were able to establish that they were "coerced" to settle by the absence of alternatives (which they cannot do), their claim of economic duress would nevertheless fail because the allegedly coercive threat – i.e., the prospect that O'Keefe might have attempted to execute on the judgment – was neither illegal nor improper. As Loewen's own sources explain,

> [a] party relying on duress must first satisfy the court that he was in fact coerced; it will clearly not suffice that he acted simply with a view to putting an end to further dispute. . . . If . . . this hurdle cannot be surmounted, then *cadit quaestio*. Otherwise, he must next establish that the coercive pressure applied to him was illegitimate. If it involved a threat of unlawful action, then it will be considered illegitimate. If not, then the circumstances will govern.

I. J. Hardingham, "Unconscionable Dealing," in P.D. Finn, ed., Essays in Equity 23 (1985) (Australian law).

[66]Moreover, in the days leading up to the settlement, Loewen was heading toward a separate trial in federal court in Philadelphia in a lawsuit charging Loewen with breach of contract, fraud, conspiracy, tortious interference with contractual relations and breach of the duty of good faith, for which the plaintiffs sought $58 million in compensatory damages and an unspecified amount of punitive damages. See Provident Am. Corp. v. The Loewen Group, Inc., 1995 WL 105483 (E.D. Pa. Mar. 10, 1995). The Provident case was a matter of concern to financial analysts and to the company (see, e.g., A1247, 1311). The pendency of that lawsuit, which Loewen settled only a few weeks later for $30 million, placed additional pressure on Loewen to settle the Mississippi litigation – pressure for which the Mississippi courts were not responsible. See, e.g., A1736-37.

As we explain in greater detail below, the United States' requirements for suspending execution of a lower-court judgment pending appeal are consistent with those imposed by a substantial number of developed legal systems. See infra at 144-52. Those requirements therefore accord with the international minimum standard of justice and cannot be considered to be wrongful under international law. Lawful requirements such as these cannot, as a matter of law, constitute duress sufficient to vitiate an otherwise voluntary settlement. See, e.g., Chitty on Contracts § 7-035 ("[I]t is obvious that prima facie a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat. Consequently a contract which is obtained by means of such a threat must prima facie be valid, and cannot be impeached on grounds of duress."); Apfelblat v. National Bank Wyandotte-Taylor, 404 N.W.2d 725, 728 (Mich. Ct. App. 1987) ("Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully.") (citing Transcontinental Leasing, Inc. v. Michigan Nat'l Bank of Detroit, 738 F.2d 163, 166 (6th Cir. 1984)); Hancock v. Visy Board Pty Ltd., [1997] 113 FCA,1997 AUST FEDCT LEXIS 72 at *29-30 (Fed. Ct. West. Austl. Dist. Registry, 13 February 1997) (no duress in settlement agreement, even where "the necessary corollary of the respondent succeeding [in the underlying lawsuit] was that it was entitled to enforce its judgment against at least the applicant and his wife . . . . In the event of a judgment for the sums claimed . . . the bankruptcy of the applicant and his wife was at least highly likely." Because respondent "had remedies open to it lawfully which it was entitled to pursue[,] [s]o far as it constituted pressure it cannot amount to more than commercial pressure of the type which does not reach the level of unconscionability.").

Loewen, in fact, recognized this point at the time. For example, in the course of drafting

Loewen's brief in the Mississippi Supreme Court on the issue of the supersedeas bond, Loewen's counsel advised that "[u]nder no circumstances should we refer to the plaintiffs' threats regarding attachment and the like as 'extortion,'" as it would have been inappropriate to characterize "plaintiffs' availing themselves of statutory rights" as such. (U.S. App. 0901). Loewen's counsel properly conceded that, "at this stage of the proceedings, plaintiffs are at least more entitled to all of their damages than we are to not having to secure plaintiffs against those damages." (U.S. App. 0895). Having recognized the legitimacy of O'Keefe's possible actions, Claimants cannot now contend that the threat of those actions amounted to duress sufficient to vitiate the company's agreement to settle.

Indeed, if the result were otherwise, the validity of settlements in all civil appeals involving money judgments would be in doubt and would create an exception that would swallow the rule that appellants must post a bond to suspend execution of judgments pending appeal. Roughly thirty percent of all civil appeals in the United States federal courts in cases between private parties are settled before a decision on appeal is rendered.[67] The appellants in the great majority, if not all, of such cases would prefer to press their case until they achieve vindication in a higher court. They settle because of the economic pressure implicit in every judgment for money damages and the disruptive prospect that the judgment will be enforced. They settle, in short, for reasons that are in many respects indistinguishable from those that prompted Loewen to dismiss its appeal. Such everyday considerations do not constitute duress.

[67] 1999 Annual Report of the Director, Administrative Office of U.S. Courts, Table B-1A. This assertion is based on the number of private, civil appeals to federal appeals courts terminated by federal judicial staff for the fiscal year 1999 as compared to the total number of such federal appeals commenced in that year, net of cases disposed of by consolidation.

See, e.g., The Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983) ("The adverse effect on the finality of settlements and hence on the willingness of parties to settle their contract disputes without litigation would be great if the cash needs of one party were alone enough to entitle him to [challenge] the validity of the settlement.").

6. Loewen's Ratification of the Settlement Agreement Defeats a Claim of Economic Duress

It is black letter law that a claim of economic duress may not be maintained where, as here, the complaining party does not manifest its intention to avoid the contract within a reasonable time. See Restatement (Second) of Contracts § 381; Chitty on Contracts § 7-063 ("The right to rescind on the ground of undue influence may be lost either by express affirmation of the transaction by the victim, by estoppel or by delay amounting to proof of acquiescence."). See also Resolution Trust Corp. v. Ruggiero, 977 F.2d 309, 314-315 (7th Cir. 1992) (duress defense denied where not raised for twenty months after signing note); McCallum Highlands, Ltd. v. Washington Capital DUS, Inc., 66 F.3d 89, 93 (5th Cir. 1995) ("delay in raising a claim of duress in addition to the existence of a negotiated agreement between parties represented by counsel is compelling evidence that there was in fact no duress") (internal quotation omitted); Teachers Ins. and Annuity Ass'n of Am. v. Wometco Enterprises, Inc., 833 F. Supp. 344, 348 (S.D.N.Y. 1993) ("a party who fails promptly to disaffirm a contract entered into under duress is deemed to have waived its right to disaffirm or to have elected to affirm it.").

There can be no question that Loewen did not act promptly to disaffirm the settlement agreement. To the contrary, in the days and weeks following the agreement, Loewen publicly embraced the settlement, trumpeting to investors that the company's "core operations have

essentially been unaffected," that the company "hadn't lost one deal because of the lawsuit, and that 'if anything, acquisitions are accelerating.'" (A1516). See also A1526 ("Beyond legal costs, there will be almost no impact on 1996 results, Mr. Loewen said."); id. ("The structured cash payments and partial payment in stock . . . enable Loewen to absorb the costs without a major impact on its debt situation."). It was not until nearly three years later, in this proceeding, well after the company's irresponsible business practices had caught up with it, that Loewen first suggested that the settlement was coerced.

* * * * *

Claimants' assertion that "duress" compelled Loewen to settle out of court and dismiss its appeal on consent is entirely without merit. No authority supports Claimants' assertion that a money judgment rendered by an inferior court constitutes duress sufficient to vitiate Loewen's consensual agreement to withdraw its appeal. Claimants' assertion is even more absurd when considered in light of the fact that Loewen, a multi-billion dollar and multi-national corporation, had greater and more sophisticated legal representation at the time of its decision to settle than the vast majority of litigants in the United States.

Indeed, if the type of inconvenience alleged to constitute "duress" here were sufficient, few judgment debtors in large cases would *not* be able to assert duress. Because the United States laws that purportedly compelled Loewen to dismiss its appeal accord with the international minimum standard, see infra at 144-52, no duress may be asserted here. Moreover, the factual record makes clear that Loewen settled the O'Keefe claims for business reasons similar to those faced by most appellants, not because of any "duress" illegal under international law. It is only now, after their reckless business choices and strategies have proved to be a failure, that Loewen

seeks to undo the agreement that it freely entered into many years ago.

B. Loewen's Waiver of Claims Through The Settlement Agreement Eliminates State Responsibility

Claimants argue that, even if Loewen's decision to settle the Mississippi litigation was not the product of economic duress, their claim against the United States still survives. According to Claimants, the settlement agreement covered only the Mississippi litigation, not any NAFTA claim that Claimants might have against the United States. See TLGI Mem. at 136; RLL Mem. at 46. Claimants' submissions miss the point, however, because Loewen, by choosing to settle the underlying litigation, eliminated any possible state responsibility for the actions of which Claimants now complain. See infra at 124-30; Greenwood Opinion at ¶¶ 15-63.

Moreover, Claimants cannot dispute that O'Keefe was never, at any point, able to execute on the trial court's judgment, as execution was immediately stayed by operation of law and, subsequently, by two orders of the Mississippi Supreme Court. Loewen was therefore under no obligation to pay O'Keefe until it bound itself to do so under the terms of the settlement agreement. Court judgments (including the trial court's judgment here) are not self-executing, and it was entirely within Loewen's power to pursue a further stay of execution beyond the expiration set by the Mississippi Supreme Court, whether through filing a motion for stay of execution in a federal court, filing a petition for corporate reorganization protection, posting a full bond, or negotiating a "standstill" agreement with O'Keefe.[68] Loewen's decision to forego those options and instead to enter into the settlement was thus an independent cause of the

[68]The idea of a "standstill" was not unknown to the parties. The settlement agreement itself reflects that "the parties entered into a Standstill Agreement on January 31, 1996 . . . whereby the O'Keefe Parties agreed not to execute on the judgment pending closing of the settlement on February 2, 1996." (A1565).

company's alleged injury, thereby breaking any possible causal link between the Mississippi judgments and Loewen's payment to O'Keefe.

The international law of state responsibility has long recognized the tautology that "[s]tate responsibility is only engaged when an act or omission is attributed to a state." David J. Bederman, Contributory Fault and State Responsibility, 30 Va. J. Int'l L. 335, 346 (1990) (citing treatises); see also Michael Straus, Causation as an Element of State Responsibility, 16 Law and Policy in Int'l Bus. 893 (1984); Restatement (Third) of Foreign Relations Law of the United States § 207, cmt. c (1987) ("the state is not responsible for injuries caused by private persons that result despite [reasonable] police protection"). Although Claimants assert that their claim is based on acts or omissions of the courts of Mississippi, the injuries alleged in this case flow directly from Loewen's payment of money, pursuant to a binding agreement, to settle a private dispute.[69]

The record in this case also establishes a clear and unequivocal representation that the settlement was to end *all* claims concerning the O'Keefe matter forever. As part of the settlement, an authorized officer of each of the Loewen defendants executed, under oath, an Absolute Release with Indemnity Agreement and Covenants that was expressly intended to be "a full accord and satisfaction of all claims and causes of action in the premises as against the Releasees *and any and all other persons, firms and/or corporations having any liability in the*

[69] Cf. Peter Kennedy, Loewen Files for Damages under NAFTA, Globe & Mail (March 1, 2001) at B3 (the Tribunal's Decision on Jurisdiction "marks the first extension of a potential NAFTA liability to a claim arising out of a *private* legal dispute, with *no overt government involvement*.") (quoting Mr. Loewen's counsel) (emphasis added).

premises." (A1609) (emphasis added).[70] This all-encompassing language firmly establishes that, if the United States had any liability for the actions then (and now) at issue, it was disposed of in the settlement agreement.[71]

Even if the settlement were not so plainly all-encompassing by its express terms, Claimants have consistently argued that O'Keefe's threatened execution was itself the "state action" that gave rise to their NAFTA claim. See TLGI Jurisdictional Sub. at 47 ("the threat of execution, even by a private party, constitutes 'state action'. . . ."). Claimants cannot assert, on the one hand, that O'Keefe represented the State for purposes of the NAFTA but, on the other hand, did not for purposes of the settlement agreement. Claimants simply cannot be permitted to have it both ways.

[70]The instrument recited that "the purpose of this settlement and release instrument is to end this matter forever" and engaged the Loewen defendants to "do any and all things necessary to effectuate a full, final and complete release of all parties/releasees and all others having any liability in the premises." (A1610). It further noted that it "extends to and applies to, covers and includes, all unknown, unforeseen, unanticipated and unsuspected damages, loss and liability, and the consequences thereof, as well as those now disclosed and known to exist." (A1609).

[71]The settlement agreement also expressly provided that, "as a part of the Closing" of the agreement, "[t]he parties shall obtain an Order . . . from the [Mississippi Supreme] Court" entering the parties' joint motion to dismiss Loewen's appeal. (A1567). For the settlement to be effective, both the Mississippi Supreme Court and the trial court had to – and did – approve and enter orders dismissing the case with prejudice. See A1589-91 (Mississippi Supreme Court order of dismissal, dated Feb. 1, 1996); A1618-19(trial court order dismissing motion for attorneys' fees and expenses, dated Feb. 2, 1996). Thus, if acts of the Mississippi courts are to be attributed to the United States under principles of state responsibility, then the participation of those courts in the settlement (a *sine qua non*) was effectively the participation of the United States.

III. RESPONSE TO THE TRIBUNAL'S INQUIRY REGARDING THE EFFECT OF NAFTA ARTICLE 1121

In its preliminary objections, the United States asserted that the Tribunal lacked jurisdiction over these claims because the Mississippi court judgments were not final acts of the United States judicial system and therefore were not "measures adopted or maintained by a Party" that could constitute a breach of NAFTA Chapter Eleven. See Decision on hearing of Respondent's objection to competence and jurisdiction, Jan. 5, 2001, ¶ 32(ii) [hereinafter cited as "Decision on Competence"]. The Tribunal questioned this objection in part, and joined it to the merits.

The Tribunal suggested that in contemporary international law "the rule of judicial finality is no different from the local remedies rule." Id. ¶ 71. The Tribunal reserved decision on whether NAFTA Chapter Eleven waived the local remedies rule with respect to judicial acts, however, and suggested that the parties consider in their further submissions the effect of NAFTA Article 1121(2)(b) and the International Court of Justice's advisory opinion in Applicability of the Obligation to Arbitrate under Section 21 of the U.N. Headquarters Agreement, 1988 I.C.J. 12 (Apr. 26) ["Headquarters Agreement"]. Decision on Competence ¶ 74.

The United States respectfully disagrees with the Tribunal's suggestion that no rule of judicial finality exists independent of the local remedies rule. However, we submit that, regardless of the effect of NAFTA Article 1121 on the local remedies rule, the availability of a fair and effective appeal nevertheless disposes of Claimants' claims here in their entirety. As demonstrated further below, on the facts and circumstances of this case, several rules of

international law independently compel this result.

A. The Local Remedies Rule Relates Only To The Admissibility Of Claims, Not To Their Merits

Thus far in this arbitration, the parties have addressed only whether the availability of further domestic appeals deprives this Tribunal of its *competence* to hear the case. The Tribunal has suggested that, if NAFTA Article 1121 waives the local remedies rule in the context of denial of justice claims, then the Tribunal is competent to review the denial of justice claims presented here, regardless of whether Loewen could have appealed the Mississippi judgments in domestic courts. See Decision on Competence ¶¶ 71-74. The Tribunal expressly reserved its ruling, however, on the entirely separate question of whether a waiver of the local remedies rule has any effect on the *merits* of Claimants' denial of justice claims. See Decision on Competence ¶ 74 (deferring, inter alia, ruling on the argument that "the local remedies rule has no application to denial of justice cases").

The local remedies rule is well-recognized as governing only the admissibility of international claims, and not the substantive merits of those claims. See, e.g., C. Gray, Judicial Remedies in International Law 98 (1987) (exhaustion of local remedies is necessary for claim to be "admissible" in international court); Castor H.P. Law, The Local Remedies Rule in International Law 98 (1961) ("The rule is seen to be a sine qua non to be satisfied before a claim is admissible."); Draft Articles on State Responsibility, Provisionally Adopted, art. 45, U.N. Doc. A/CN.A/L.600 (2000) (describing local remedies rule as governing "admissibility of claims").[72]

[72]One leading scholar has observed that, if the local remedies rule were anything more than a procedural rule of admissibility, "it would follow that a waiver of the requirement that local remedies should be exhausted would not be possible." C.F. Amerasinghe, State Responsibility for Injuries to Aliens 207 (1967).

Regardless of whether or to what extent NAFTA Article 1121 waives the local remedies rule, therefore, the merits of any claim under NAFTA Chapter Eleven must still be evaluated under the substantive provisions of the Chapter and the principles of customary international law that they incorporate.[73]

The very structure of NAFTA Chapter Eleven reflects this distinction between rules of jurisdiction and admissibility and the substantive merits of a given claim. The Chapter expressly separates the governments' substantive obligations of treatment (Part A) from the procedural rules governing the resolution of disputes over alleged breaches of those substantive obligations (Part B). Article 1121, which addresses nothing more than the procedural conditions precedent to the submission of a claim to arbitration, appears in Part B of the Chapter.

Even under a reading most generous to Claimants, therefore, the most that NAFTA Article 1121 could accomplish by waiving the local remedies rule would be to confer *competence* on the Tribunal to review challenges to judicial acts, even where, as here, those acts are committed by inferior courts from which an effective appeal was available. As a procedural provision only, Article 1121 does not – and, indeed, could not – alter the applicable customary

[73]Claimants, as they must, have already conceded the distinction between matters of jurisdiction and the substantive elements of a denial of justice claim. See TLGI Final Jurisdictional Sub. at 13-14 ("The Tribunal should reject the United States' efforts to superimpose the substantive requirements of a denial of justice claim upon the 'jurisdictional' question of whether the complained of acts constitute a 'measure.'"); id. at 14-15 ("[T]he question of whether a judicial act rises to the level of a 'manifest injustice' is not logically relevant to whether the judicial act is a NAFTA 'measure' in the first place."); id. at 14 n.9 ("[A] judicial act adverse to a NAFTA signatory's investment may be a NAFTA 'measure,' but not so unjust as to constitute a denial of justice and thus a breach of international law.").

international law rules governing the *merits* of a denial of justice claim.[74] In other words, a purported denial of justice claim based on an appealable court action may still be without merit even though a tribunal, by virtue of a waiver of the local remedies rule, concludes that it is competent to review it.[75]

As discussed in greater detail below, the customary international law principles incorporated into NAFTA Articles 1105(1) and 1131(1) require the Tribunal to consider the United States' system of justice as a whole – including the availability of effective appeals – in determining whether there has been a denial of justice in this case. See infra at 124-30. A fundamental issue in any denial of justice case is whether the respondent State has met its international obligation to provide a minimally adequate system of justice. Id. The parties to the

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[74]See William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter 11 of the NAFTA, 23 Hastings Int'l & Comp. L. Rev. 357, 376 n.87 (2000) (the author's conclusion that "Chapter Eleven does not require the exhaustion of domestic remedies is limited to exhaustion as a procedural requirement. For some Chapter Eleven claims, *like denial of justice*, the exhaustion of local remedies may be a substantive element of the claim.") (emphasis added). See also Napier Case (U.S. v. Gr. Brit.), No. 143, reprinted in 3 Moore, International Arbitrations at 3155 ("True, the treaty confers upon us *jurisdiction* of such claims, because it refers them to this commission. The question in hand is not of *jurisdiction*, but it is whether the cases as stated in the several memorials constitute claims which ought to be allowed. I do not doubt the jurisdiction, but that does not determine their *validity*. It only makes it our duty to decide whether they are valid or not; and that decision should be according to the principles of international law.") (opinion of Mr. Frazer) (emphasis in original).

[75]See, e.g., R. Jennings & A. Watts, Oppenheim's International Law 525 n.8 (9th ed. 1992) ("The local remedies rule has to be distinguished from a requirement . . . that, as a matter of substantive obligation, a state must provide for recourse to an independent tribunal to adjudicate upon civil rights and obligations."); Amerasinghe, supra n.72 at 212 ("The rule which makes a 'denial of justice' by the maladministration of the judicial process an international offence is different in its content, its application and purpose from the rule that requires that local courts be resorted to in the case of an international offence before that offence be presented to an international tribunal. The former rule is not an aspect of nor is it in any way connected with the local remedies rule").

NAFTA did not intend to alter the fundamental requirement of international law that a claimant wishing to assert a cognizable denial of justice claim must allow a fair and equitable domestic judicial system, which it believes has denied it justice, to first correct the problem of which the claimant alleges it is aggrieved. There can be no denial of justice where the judicial system has not been afforded an opportunity, through effective mechanisms designed to address alleged judicial errors, to do justice.[76] Simply put, where justice is available but is not pursued, no denial of justice can be found.

B. Even With Respect To Admissibility, NAFTA Article 1121 Does Not Waive The Local Remedies Rule In The Context Of Denial Of Justice Claims

Even if the Tribunal were still to examine the jurisdictional effects of NAFTA Article 1121, the Article cannot be read to waive the local remedies rule with respect to denial of justice claims. See U.S. Jurisdictional Resp. at 30-32.[77] By its terms, Article 1121 involves the relinquishment of rights by Claimants, not States. The only thing the Article does expressly is to require Claimants to waive certain rights to pursue certain court and other proceedings. See Decision on Competence ¶ 74 (allowing for "an argument that Article 1121(2)(b) does no more

[76]The United States' system of justice permits parties who believe they have been aggrieved by the judicial system to employ various avenues of redress for errors alleged to have occurred therein. There is no evidence that the United States or the other NAFTA Parties intended to create in the NAFTA an international remedy that would override the international law requirement that a denial of justice claim cannot be made out where, as here, justice is available but the claimant has failed to pursue it. Loewen chose not to pursue its available domestic remedies. Claimants cannot now be permitted to bypass customary international law principles and pursue their present claim for denial of justice without having afforded the judicial system in the United States an opportunity to do justice. See infra at 124-30.

[77]Because Claimants challenge only judicial action in this case, the Tribunal need not resolve the broader question of the extent to which Article 1121 waives the local remedies rule with respect to actions of other government organs (i.e., legislative or administrative acts). The arguments of the United States are specifically limited to denial of justice claims.

than curtail or restrict rights that a claimant would otherwise have but for the existence" of the provision). By requiring Claimants to surrender those rights in order to proceed under Chapter Eleven, the Article is designed primarily to benefit the State Parties to the NAFTA, not private claimants. As is clear from Article 1121's terms, the primary function of the provision is to protect the State Parties from having to answer claims for damages arising out of government measures in two fora at the same time, and from having to continue answering them anywhere after the conclusion of NAFTA Chapter Eleven proceedings. Any benefit that claimants may derive from Article 1121 is clearly secondary to this primary function. See Decision on Competence ¶ 73 (accepting that "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so.") (citation omitted).

Moreover, an interpretation of Article 1121 that would waive the local remedies rule as to denial of justice claims would violate the "cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable." Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, ¶ 84 (Feb. 3) (separate opinion of Judge Ajibola) (quotation omitted); see also Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 109 (1987) (treaty interpretation that leads to manifestly absurd or unreasonable result "cannot be admitted."). If the local remedies rule were waived for denial of justice claims, then any disappointed alien litigant in an inferior court could choose to have his case reviewed in the first instance by a NAFTA Chapter Eleven tribunal, even in cases where there was no question as to the adequacy and availability of an appeal through the domestic judicial system. With creative counsel, disappointed litigants could thus effectively substitute the NAFTA

Chapter Eleven process for the entire appellate machinery of the judiciaries of each of the State Parties to the NAFTA. No matter how broadly one may construe the NAFTA's goals of investment protection, it is simply impossible to accept that the NAFTA Parties intended so absurd a result.[78] See Bilder Opinion at 35-42.

To the contrary, the NAFTA Parties negotiated against a backdrop of customary international law that holds judiciaries in special regard and rejects having international tribunals sit, in effect, as international courts of appeals. See, e.g., Vienna Convention on Consular Relations (Paraguay v. United States), 1998 I.C.J. 248, 257 ¶38 (Apr. 9) ("[T]he function of this Court is . . . not to act as a court of criminal appeal."); Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 158 (Feb. 5) ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation,' the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka).

Indeed, the interpretation sought by Claimants here would be more extreme than even those situations heretofore envisioned by international courts. Whereas international courts have resisted a role in which they would effectively sit in review of domestic courts of last resort, see,

[78]It is hardly a sufficient answer to this unreasonable result to suggest, as Claimants did at the September 2000 hearing on jurisdiction, that the narrow scope of international review will serve as a check on abuses of the NAFTA process by disgruntled litigants. See 9/20/00 Transcript at 192-93. As the present case illustrates, a claimant may perceive that it would fare better in an international proceeding than in a domestic court for any number of strategic reasons, such as less probing discovery obligations or the international tribunal's lack of familiarity with the municipal law that would govern in a domestic appeal. See, e.g., U.S. App. 0882 (showing that Loewen was aware at the time it elected not to file its draft petition for relief from the U.S. Supreme Court that it could pursue a claim under NAFTA Chapter Eleven).

e.g., Barcelona Traction, supra, Claimants here urge an interpretation that would allow NAFTA Chapter Eleven tribunals to examine decisions of even the *lowest* of courts without the benefit of any domestic appellate review. It should go without saying that the lowest courts in all countries with tiered judiciaries, even those with the most sophisticated and developed legal systems, occasionally will err, sometimes grievously. It is manifestly unreasonable to suggest that the NAFTA Parties intended to internationalize such errors even where effective domestic appeals were available to remedy the error in the first place.

C. The Advisory Opinion Of The International Court Of Justice In The *Headquarters Agreement* Case Is Inapposite

The United States respectfully submits that the advisory opinion of the International Court of Justice in the Headquarters Agreement case has no bearing on the matter in dispute here. That opinion did not implicate State responsibility for injury to an alien or the substantive requirements of a denial of justice. Instead, it involved a potential dispute between an international organization and a State concerning the State's interpretation and application of an international agreement to a context other than that of alleged injury to an alien. As both the International Court of Justice and each of the commentators on the local remedies rule cited by Claimants acknowledge, the local remedies rule has no application where a State's claim is based on a direct injury to its own rights and is not asserted on behalf of its nationals.[79]

[79] See Amerasinghe, supra n.72 at 113 ("There is no reason to question the validity of the position which postulates that the rule of local remedies does not become relevant where there is a direct injury to a State . . . ."); Alwyn V. Freeman, International Responsibility of States for Denial of Justice 404 (1970) ("[I]t should be distinctly understood that this [local remedies] rule has no application in those cases where the claim is based upon violation of a right which is proper to the State itself, and is not one advanced on behalf of a given national."); Trindade, supra p. 71 at 173 (1982) ("Surely a sovereign State cannot be made to exhaust domestic remedies in the courts of another State. *Par in parem non habet imperium, non habet*

(continued...)

A comparison of the ICJ judgments in the Headquarters Agreement and the Elettronica Sicula (ELSI) cases, issued within 15 months of each other, illustrates this point. The compromissory clauses at issue in the cases were substantially similar: each provided for binding dispute resolution of "[a]ny dispute" between the parties "concerning the interpretation or [the] application of this agreement [or Treaty]."[80] In ELSI, the ICJ chamber found, despite the United States' assertion that it had suffered a direct injury, that the claim was in substance one presented on behalf of a U.S. national because of Italy's treatment of that national.[81] The ICJ chamber accordingly found the local remedies rule to apply. By contrast, there was no question in the Headquarters Agreement case that the dispute implicated an alleged direct injury to the United Nations: there was no national on whose behalf the United Nations could claim in a protective capacity. The ICJ accordingly found it to be "evident," in that context, "that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local

[79](...continued)
jurisdictionem. But this is assuming that the injury complained of is done directly to the claimant State."); see also Interhandel Case, 1959 I.C.J. at 89 ("The rule of the exhaustion of local remedies does not apply to a case in which the act complained of directly injures a State.") (Judge Armand-Ugon, dissenting).

[80]See ELSI, 1989 I.C.J. 15, 41 (Apr. 26) (quoting compromissory clause as follows: "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty . . . shall be submitted to the International Court of Justice . . . ."); Headquarters Agreement, 1988 I.C.J. at 14 (quoting clause as follows: "'Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement . . . shall be referred for final decision to a tribunal of three arbitrators . . . .'").

[81]See ELSI, 1989 I.C.J. at 42-43.

remedies as a condition of its implementation."[82]

State practice overwhelmingly recognizes the application, absent agreement to the contrary, of the local remedies rule in cases where States have consented to arbitration of claims by nationals of another State. Indeed, *every one* of the cases cited by the Claimants and the United States on the local remedies rule's standard of futility arose in the context of an international agreement submitting claims to arbitration.[83] Such claims agreements closely resemble Section B of Chapter Eleven in that they are negotiated between States for the benefit of their nationals. It is in precisely this context that the local remedies rule has been held to apply

[82]See Headquarters Agreement, 1988 I.C.J. at 29 ¶ 41.

[83]Panevezys-Saldutiskis Railway Case, 1939 P.C.I.J. 4, 22 (ser. A/B) No. 76 (Feb. 28) (relying on the declarations of Estonia and Lithuania in accepting compulsory jurisdiction under Article 36, paragraph 2 of the Statute of the Court, the Court held that "the objection regarding the non-exhaustion of remedies afforded by municipal law is well founded, and . . . the claim presented by the Estonian Government cannot be entertained."); Claim of Finnish Shipowners (Fin. v. Gr. Brit.) (1934), 3 R.I.A.A. 1479, 1482 ("The Government of the United Kingdom and the Government of Finland agree to submit to the decision of [the agreed-upon arbitrator]" in deciding whether Finnish shipowners had "exhausted the means of recourse placed at their disposal by British law."); The Salem Case (U.S. v. Egypt) (1932), 2 R.I.A.A. 1161, 1163, 1189 (where both parties agreed that "[t]he claim of the United States against the Royal Government of Egypt . . . shall be referred to an Arbitral Tribunal," the Arbitral Tribunal in turn noted that "the conclusion of an arbitration agreement involves no abandonment of the claim to exhaust all legal means."); Norwegian Loans Case (France v. Norway), 1957 I.C.J. 9, 22 (Jul. 6) (after both France and Norway had submitted to the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2 of the Statute of the Court, one objection raised was whether "the Application of the French Government was inadmissible on the ground that the French holders of the Norwegian bonds had not previously exhausted the local remedies."); Brown's Case, (U.S. v. Gr. Brit.) (1923), reprinted in Fred K. Nielsen, American and British Claims Arbitration 187 (considering whether a United States national sufficiently exhausted his remedies in the courts of South Africa when the matter was submitted to arbitration under "Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding Between the United States and Great Britain, Concluded August 18, 1910."); X v. United Kingdom, App. No. 3651/68, 31 Eur. Comm'n H.R. Dec. & Rep. 72, 90 (1970) (holding an application inadmissible due to the applicant's failure to exhaust local remedies as required by Article 26 of the Convention).

(unless clearly waived).

For these reasons, the United States respectfully submits that the Headquarters Agreement opinion is inapposite to the issues raised by the United States' objection here.

IV. THE MISSISSIPPI COURT JUDGMENTS DID NOT VIOLATE ANY OF THE SUBSTANTIVE PROVISIONS OF NAFTA CHAPTER ELEVEN

It is well-recognized that judicial acts can violate international obligations in only the most extreme and unusual of circumstances, and that judicial acts are afforded a far greater presumption of regularity under customary international law than are legislative or administrative acts. See, e.g., Putnam v. United Mexican States, Opinions of Commissioners 225 (U.S.-Mex. Cl. Comm'n of Sept. 8, 1923) ("A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined."); Submission of Mexico Pursuant to NAFTA Article 1128 (Oct. 16, 2000) at ¶19.[84] Therefore, while all NAFTA Chapter Eleven claimants bear the burden of proving a breach of the NAFTA's substantive provisions, see Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award at ¶¶83-84 (Nov. 1, 1999), that burden is even greater

[84]See also Charles de Visscher, Le Déni de Justice en Droit International, 52 R.C.A.D.I. 367, 381 (1935) (general presumption of conformity with international law is harder to overcome in the judicial context than in other areas); A.O. Adede, A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law, XIV Can. Y.B. Int'l L. 73, 93 (1976) (the doctrine of denial of justice should presume "the ability of . . . nations to do justice within local means, except in very exceptional cases."); 5 Hackworth, Digest of International Law § 522 at 526-27 (1943); Freeman, supra n.79 at 33 ("[T]he question of *proof* of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State.") (emphasis in original).

where, as here, the challenged measures are actions of a domestic judiciary.[85] As demonstrated below, Claimants cannot meet their substantial burden of proof in this case.

A. Claimants Fail To Establish A Violation Of NAFTA Article 1102

Claimants assert that, by "subjecting Loewen to extensive, irrelevant, and highly prejudicial comments about its own nationality and that of O'Keefe, the Mississippi courts treated Loewen less favorably than it [sic] treats United States or Mississippi defendants 'in like circumstances,'" in violation of NAFTA Article 1102. TLGI Mem. at 71. This claim fails for two reasons. First, as a legal matter, Claimants do not even attempt to meet the requisite elements of the national treatment standard set forth in Article 1102. Second, as a factual matter, there is simply no basis in the record for Claimants' wild allegations that the Mississippi courts discriminated against Loewen on the basis of a supposed "anti-Canadian" bias.

1. Claimants Fail To Assert A *Prima Facie* Claim Under NAFTA Article 1102

Although Claimants offer a catalog of allegedly prejudicial comments made and elicited by O'Keefe's counsel – which, as demonstrated above, is wholly unfounded in the record – Claimants decline even to discuss the most fundamental requirements of Article 1102: namely, that either Claimants or their investments received treatment "less favorable" than any treatment

[85]While the Tribunal observes correctly that "[t]he modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial," Decision on Competence ¶ 70, this is not to say that the various organs of the State receive an equal presumption of regularity regarding an alleged breach of an international obligation. This point is explained in detail in pages 14-26 of the Statement of David D. Caron, which was submitted as Attachment A to the United States' Response on Matters of Jurisdiction and Competence (explaining basis for heightened presumption of regularity of domestic judicial acts, notwithstanding attribution of judicial acts to state).

accorded U.S. investors and investments "in like circumstances." See NAFTA Article 1102.

Article 1102(1) and (2) require each NAFTA Party to accord to investors of another Party (and their investments) treatment no less favorable than the treatment accorded in like circumstances to its own investors (and their investments) with respect to investments.[86] This is a relative standard because the treatment a Party affords its own nationals provides the sole basis of comparison for the treatment it owes to investors of another Party (and to their investments). The standard in Article 1102 is also a limited one: it does not afford NAFTA investors and their investments protection in all instances. It is subject to a number of exceptions (see, e.g., NAFTA Articles 1108 and 2103 and Annex II (Reservations for Future Measures)) and it applies only in cases of "like circumstances."[87]

Thus, to establish a violation of Article 1102, more is required than merely showing that Claimants received treatment that they contend is adverse. Rather, Claimants must show that

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[86]Article 1102 states, in part:

> 1. Each Party shall accord to investors of another Party treatment *no less favorable* than that it accords, *in like circumstances*, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment *no less favorable* than that it accords, *in like circumstances*, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

NAFTA Article 1102 (emphasis added).

[87]See, e.g., Don Wallace, Jr. & David B. Bailey, The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions, 31 Cornell Int'l L.J. 615, 619-20 (1998).

they and/or their investments, when compared to U.S. investors or investments *in like circumstances*, received treatment that was *less favorable*. Claimants, however, offer neither argument nor evidence to establish these fundamental elements of an Article 1102 comparison.

Moreover, the United States is unaware of any international case – and Claimants identify none – in which a breach of a national treatment obligation has been found based upon treatment accorded an investor by a court in a civil trial.[88] Indeed, in such a situation, the appropriate basis for comparison under Article 1102 may be particularly difficult to specify. For example, many of the circumstances facing the litigants in a civil jury trial – the facts underlying the dispute, the parties' counsel, their strategic approaches and tactical choices, the demeanor of the witnesses, the members of the jury, etc. – will vary at least to some extent (and, in many respects, to a great extent) from case to case.

Determining what the "like circumstances" are for any Article 1102 analysis depends on the nature of the treatment at issue and all the relevant facts of the case. While in an appropriate case of civil litigation a claimant may be able to satisfy the "in like circumstances" requirement,[89]

[88]In one NAFTA Chapter Eleven case pending case against the United States, the claimant asserts an Article 1102 claim in the context of civil proceedings before a state court. See Mondev International Ltd. v. United States of America, Notice of Arbitration at 70-79 (Sept. 1, 1999). The Mondev case was filed almost a year after this arbitration, and the tribunal in that case has not rendered an award on the merits. The only Chapter Eleven tribunal to have examined the Article 1102 national treatment standard did so in the context of an allegedly discriminatory regulation. See S.D. Myers, Inc. (U.S.A.) v. Government of Canada, Partial Award at 26, 59-64 (Nov. 13, 2000) (examining under NAFTA Article 1102 a Canadian order banning the commercial export of PCB waste for disposal).

[89]For instance, a meaningful comparison could perhaps be made for purposes of Article 1102 where foreign and domestic parties are co-defendants comparably situated in the same case. See, e.g., Jennie M. Fuller (U.S. v. Cuba), 1971 U.S. Foreign Cl. Settlement Comm'n, Ann. Rep. to the Congress 53 (June 24) (where the tribunal examined, on different grounds, a Cuban court's treatment of American and Cuban co-defendants tried for the same crime but sentenced

(continued...)

in other situations one could reasonably question whether it is possible to do so. See, e.g., Joseph de Pencier, 17th Annual Symposium Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven, 23 Hastings Int'l & Comp. L. Rev. 409, 413 (2000) ("If there are no domestic investors with which to compare a foreign investor, how can the foreign investor receive 'less favorable treatment' than, let alone be 'in like circumstances' with, domestic investors?"). Here, however, Claimants offer nothing but silence on the application of the "like circumstances" requirement to the facts of this case. Claimants have thus failed even to begin to carry their burden of proving a violation of NAFTA Article 1102 and, as a result, their claim must be rejected.

2. The Record In Any Event Demonstrates That The Mississippi Courts Did Not Discriminate Against Loewen On The Basis Of Nationality

Contrary to Claimants' grossly distorted presentation of the underlying events, the record of the Mississippi litigation provides no basis for the claim that the jury or the courts were in any way motivated by an "anti-Canadian" bias. See supra at 21-25. Indeed, as noted above, the jury foreman himself – who was among the eleven jurors who voted in favor of the verdict – was born

[89](...continued)
differently; the American to death and the Cuban to life-imprisonment). Significantly, all of Loewen's co-defendants in the Mississippi litigation were U.S. companies, a point that Loewen's counsel underscored during the trial. See, e.g., Tr. 82 ("Loewen Group International is an [sic] United States corporation. . . . About 7,000 families in the United States earn their livelihood from Loewen International, a United States corporation."), 97, 4476-77, 4484. Indeed, a significant part of Loewen's defense in the Mississippi trial was that Reimann Holdings was justified in representing itself to the public as "locally owned." See, e.g., Tr. 85. Yet, the jury's verdict and the Mississippi court judgments made no distinctions among the defendants and applied equally to all of them.

and raised in Canada and was a veteran of the Royal Canadian Air Force. See supra at 17. The suggestion that the jury's verdict was somehow the product of any "anti-Canadian" animus is thus patently unsupportable. Even Loewen's own investigations into the jury's deliberations uncovered "no credible evidence to support the . . . allegations of improper jury bias" and, in fact, "support an opposing view . . . ." Vidmar Statement at 1. As Professor Landsman observes, the record of the trial, particularly "[i]n light of Loewen's exceedingly modest use of protective devices regarding references to Canadian citizenship and cognate matters," as well as Loewen's own decision to "repeatedly inject[] the question of anti-foreign sentiments into the trial," shows that Loewen had no concern at the time about any "anti-Canadian" bias on the part of either the court or the jury. See Landsman Statement at 23; Bilder Opinion at 12.[90]

Neither is there any basis for the assertion, once embraced by Claimants and now properly abandoned, that the Mississippi judiciary was somehow "institutionally" biased against Loewen by virtue of Loewen's nationality. At the start of these proceedings, Claimants argued – principally through the sworn testimony of Richard Neely, a retired West Virginia state court judge – that the Mississippi court system was inherently biased against Loewen because of its Canadian citizenship. See, e.g., Affidavit of Richard Neely ("Neely I") at 11-17 (attached as Exhibit B to Claimants' Notice of Claim and TLGI's Memorial). Claimants drew this conclusion from a single fact: that in Mississippi, as in many other U.S. states, state court judges are popularly elected. See id.

[90]The circumstances of this case are thus vastly different from those in the Fuller case, see supra n.89 at 57, 58 (finding "clearly evident" discrimination and noting contemporaneous protest), and the case of Solomon (U.S.) v. Panama, 6 R.I.A.A. 370 (1933) (finding that the evidence established "beyond question" a "high state of public sentiment," "local enmity" and abundant record evidence of a "hostile state of feeling" in Panama), on which Claimants rely.

As the briefing on jurisdictional issues progressed, however, Claimants laid this allegation to rest. Indeed, one of Loewen's own experts, Professor Tribe, effectively dismissed Mr. Neely's conclusions as "the wild accusations of 'conspiracy theories' found in bad political thrillers." See Reply Statement of Laurence H. Tribe at 18-19; see also Declaration of Wynne S. Carvill at 5 (stating that the company had no evidence, at the time of the underlying events, that the Mississippi Supreme Court was motivated by anti-Canadian bias). Then, Mr. Neely himself, in a second sworn statement, admitted he had no "direct evidence" that the Mississippi Supreme Court was motivated by any improper bias when it rejected Loewen's motion to reduce the supersedeas bond. See Declaration of Richard Neely at 6 ("Neely II"). In fact (and to our bewilderment), Mr. Neely denied ever having claimed that the Court was motivated by "nationalistic" bias.[91] See id. We thus now take Claimants at their word; namely, that they have no evidence of any "nationalistic" bias on the part of the Mississippi judiciary. See Neely II at 6.

Whatever analysis Claimants may eventually propose to address the required elements of the national treatment standard under NAFTA Article 1102, those elements simply cannot be met on the facts of this case, nor have claimants made a genuine effort to do so.[92] Claimants' claim

[91]For the evolution of Mr. Neely's opinion, compare Neely I at 17 ("I believe to a reasonable degree of jurisprudential certainty that Loewen, because of its Canadian citizenship, was intentionally subjected to a complete denial of justice by the Mississippi trial court *and* the Mississippi Supreme Court") (emphasis in original) with Neely II at 6 ("I have read the . . . [submissions of the government], which attribute to me the opinion that the bonding decision of the Mississippi Supreme Court in the O'Keefe case was motivated by racial, nationalistic, or class bias. In fact, I expressed no opinion whether the Mississippi Supreme Court (or its individual justices) were in fact so motivated.").

[92]Because Claimants fail to show that the Mississippi court judgments violated the national treatment requirement of Article 1102(1) and (2), their claim that Loewen was required to "sell or otherwise dispose" of an investment in the United States "by reason of its nationality" within the meaning of Article 1102(4) is similarly unavailing. See TLGI Mem. at 72 (alleging (continued...)

under Article 1102 must therefore be rejected.

B. Claimants Fail To Establish A Violation Of NAFTA Article 1105

Claimants observe correctly that NAFTA Article 1105, captioned the "Minimum Standard of Treatment," requires the government to accord investments "'the international minimum standard of treatment' established by customary international law." TLGI Mem. at 74 (quoting Ian Brownlie, Principles of Public International Law 527-28 (5th ed. 1998)). For reasons both legal and factual, however, Claimants cannot show on the facts of this case that the courts of Mississippi accorded treatment to Loewen below the international minimum standard required by Article 1105.

1. The Availability of Further Appeals Defeats Claimants' Article 1105 Claim as a Matter of Law

The international minimum standard incorporated into Article 1105(1) requires the Tribunal to consider the United States' system of justice as a whole – including its mechanisms for correcting any lower court errors on appeal – in assessing whether there was a denial of justice in this case. That the Tribunal must consider the entirety of the United States' system of justice stems from the nature of the customary international law obligation that gives rise to State responsibility for denial of justice.

[92](...continued)
violation of NAFTA Article 1102(4)(b)). Subparagraph (4) of Article 1102 merely describes, "[f]or greater certainty," one form of measure than may give rise to a violation of Article 1102(1) or (2). It does not provide an avenue for Claimants to base a claim on Article 1102 and avoid the burden of proving "less favorable" treatment in "like circumstances." As Claimants thus have not met their burden of proof in either respect, the allegation of a breach of Article 1102(4)(b) likewise must fail.

It is a requirement of customary international law with respect to the treatment of aliens that a State provide a minimum level of internal security and law and order.[93] Customary international law thus requires a State to provide a minimum level of police protection for persons and property within its territory. As discussed further below, a failure to meet this requirement with respect to the persons and property of aliens breaches the customary standard of full protection and security referenced in Article 1105(1). See infra at 176-80. Customary international law also requires that States provide aliens a minimally adequate system of justice for resolving disputes between private parties. Failure to provide a system in which an alien can vindicate his claims may result in a breach of customary international law generally known as a "denial of justice."[94]

In assessing whether this customary international law standard has been met, it is important to bear in mind two fundamental premises. First, international law does not require that a State's system of justice take any specific form: international law is indifferent whether the system relies for adjudication on appointed jurists, elected jurists, businessmen (as in the

[93]See, e.g., Andreas H. Roth, The Minimum Standard of International Law Applied to Aliens 138 (1949) ("the ordinary administration of the State's law-enforcement machinery . . . is itself contemplated by international law and delegated to the members of the society of nations for the performance according to the manner which they have chosen.").

[94]See, e.g., Harvard Research Draft in International Law, Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners 173 (Sp. Supp. 1929) [hereinafter "Harvard Research Draft"] ("A state has a duty under international law to administer justice with respect to aliens, and the failure to perform this duty may result in its becoming responsible to other states of which such aliens are nationals."); id. at 180 ("[An international claim may be advanced] only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized, or if, in a specific case, they have been subverted by the courts so as to discriminate against him as an alien or otherwise to perpetrate a technical denial of justice.").

French *tribunaux de commerce*) or lay juries.[95] In the words of the Cotesworth & Powell tribunal:

> No demand can be founded, as a rule, upon mere objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein.[96]

The question presented is thus whether the system of justice adopted by the State, whatever its form, is capable of providing the minimum level of justice required by international law. In

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[95]See Charles de Visscher, Le déni de justice en droit international, 52 R.C.A.D.I. 367, 397 (1935) ("The organization of tribunals, the rules of procedure, are in principle left to the discretion of each State, international law being indifferent as to the choice of the means but interested only in the result.") ("L'organisation de ses tribunaux, la réglementation de sa procédure, sont en principe laissées à la discrétion de chaque Etat, le droit international restant indifférent au choix des moyens pour ne s'attacher qu'au résultat.") (translation by counsel); Hyde, supra n.39 § 219 at 729 ("Save for the general obligation to conform to the practices of civilization, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code."); Freeman, supra n.79 at 78-79 ("In fulfilling [the requirement to provide an adequate judicial protection for the rights of aliens] each State enjoys a plenary margin of liberty. The organization of its courts, the procedure to be followed, the kind of remedies instituted, the laws themselves, are left to the State's own discretion.").

[96]Cotesworth & Powell (G.B. v. Colum.), reprinted in 2 Moore International Arbitration 2050, 2083 (1875) (emphasis in original); see also Salem (U.S. v. Egypt), 2 R.I.A.A. 1161, 1202 (1932) ("[I]nternational law has from the beginning conceived under the notion of 'denial of justice' . . . only exorbitant cases of judicial injustice . . . . As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like every other human work."); Hyde, supra n.39 § 219 at 729-30 ("When the nationals of one State enter the territory of another State, whether for business or pleasure, they subject themselves to the laws of the latter State and although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home State, so long as such laws and rules are not below the standard generally obtaining in well-ordered States and are administered fairly and impartially, neither the aliens nor their governments have a right to complain.") (internal quotation omitted); Harvard Research Draft at 178-80 ("in countries in which the inquisitorial system of criminal law prevails, a fair application of the law to aliens and citizens alike removes all ground of complaint on the part of foreign countries, even of those adopting the accusatory system.").

answering that question, a tribunal necessarily must consider the specific structure of the system of justice a State has adopted.[97]

Second, the obligation imposed by international law is to provide a *fundamentally adequate* system of justice as a whole – not one in which all court decisions are immune from error.[98] International law thus recognizes that errors are inevitable in any system of justice. In evaluating a State's performance of its international obligation to provide an adequate system of justice, a tribunal must necessarily take into account that system's ability to correct the errors that international law acknowledges to be inevitable. Doing so necessarily requires consideration of any appellate mechanisms made available in a State's system of justice in the case in question.

The United States accepts the Tribunal's ruling that "conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State."

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[97]See Western Sahara, 1975 I.C.J. 12, 43-44 (Oct. 16) ("Morocco requests that, in appreciating the evidence, the Court should take account of the special structure of the Sherifian State. No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today. Morocco's request is therefore justified.").

[98]Charles de Visscher, Le déni de justice en droit international, 52 R.C.A.D.I. at 381-82 ("[E]ven in the best-organized States there remains a place, in sum rather large, for inevitable divergences in opinion and for the risk of error that must be considered as inherent in human reason. *Errare humanum est*: error, which presumes good faith, excludes responsibility.") ("[M]ême dans les Etats les mieux organisés il reste une place, en somme fort large, pour des divergences d'appréciation inévitables comme pour des risques d'erreur qu'il faut considérer comme inhérents à la raison humaine. *Errare humanum est :* l'erreur, qui suppose la bonne foi, exclut la responsabilité.") (translation by counsel); see Salem (U.S. v. Egypt), 2 R.I.A.A. at 1202 (noting possibility that Egyptian courts erred in applying Egyptian law, but concluding that "[s]uch errors in judgment cannot be regarded as a denial or a warping of justice in the sense of international law."); cf. Restatement (Second) of Foreign Relations Law § 182 cmt. a (1965) ("Mere error in a decision, if not manifestly unjust, does not constitute a denial of procedural justice.").

Decision on Competence ¶ 70. The United States does not for purposes of this point of argument dispute that an act of an inferior court is imputable to a State, but respectfully submits that such an act cannot ordinarily form the basis for a denial of justice claim. As Professor Greenwood notes, although acts of lower courts are imputable to the State, "it is still necessary to ask whether the act imputable to the State constitutes a violation of international law." Greenwood Opinion ¶ 21. In other words, the proposition the United States advances here is a limited one based on the substantive content of the customary international law of denial of justice – that the "responsibility of the State for a denial of justice arises *only if* the system as a whole produces a denial of justice." Greenwood Opinion ¶ 24 (emphasis added).

That conclusion necessarily encompasses a requirement that claimants attempt (absent obvious futility) to avail themselves of the appellate and review procedures provided by the system of justice whose lower court decisions are allegedly at issue. Judicial systems are organized in a hierarchical structure, reflecting the fact that errors at lower levels, and corrections on review at higher levels, are normal occurrences. This is especially true of trial courts, which are frequently called upon to make immediate decisions, often without the benefit of briefing and with little time for deliberation. As Professor Greenwood notes, "[w]hile legal systems strive for perfection at all levels, they also recognize that such a result is unlikely to be attainable. It is precisely for that reason that legal systems today make extensive provision for appeal and that many also contain other provisions for challenging decisions of the lower courts on grounds which violate constitutional safeguards which are frequently very similar to the standards of international law." Greenwood Opinion ¶ 23. Because of this hierarchical structure, and the fact that error and correction on appeal are a normal course of events, court action must be viewed as

the end result of the multiple decisions resulting from the court system's individual parts, and a denial of justice only ensues once a final decision has issued.

The substantive elements of a "denial of justice" claim reflect this requirement. The Turkish-American Claims Commission in Pirocaco put the principle plainly: "As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort." Christo G. Pirocaco v. Republic of Turkey (1923), reprinted in Fred K. Nielsen, American-Turkish Claims Settlement under the Agreement of December 24, 1923 587, 599 (1937). Professor Greenwood, in his scholarly examination of substantive elements of a denial of justice claim, succinctly observes:

> [T]he obligation which the state owes the foreign national . . . is to provide a system of justice which affords fair, equitable and non-discriminatory treatment. So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal.

Greenwood Opinion ¶ 23.

The general principle that a final judicial decision is required before the elements of a denial of justice claim are established is supported by practical considerations as well. Without it, any decision of a lower tribunal, even an interlocutory order, could be the subject of an international claim. To ensure the coherent development of a domestic legal system, higher courts must be permitted to exercise the supervisory function with which they are entrusted. "It is important for the courts, the legal profession, and society at large that law develop in a harmonious and consistent manner. This requires that there be some central body to expound, clarify and harmonize it." See, e.g., Peter E. Herzog & Delmar Karlen, Attacks on Judicial Decisions, in XVI Int'l Encycl. Of Comp. L., Ch. 8 at 5 (Mauro Cappelletti, ed. 1982). The

customary international law of denial of justice reflects this consideration and requires, as an element of the claim, that there be a final judicial decision. "[W]hat constitutes a denial of justice in international law is not the isolated decision . . . but only a failure of the system of justice if that system either does not correct that decision where the decision was manifestly unjust or does not offer any effective means of challenging the decision." Greenwood Opinion ¶ 30.

It is undisputed that the United States judicial system provided a means for correcting lower-court error – including the type of lower-court errors alleged here. See, e.g., U.S. App. 0429 (Loewen attorney expressing "confidence in the appellate process"). Claimants therefore can establish a denial of justice only if they can demonstrate that appellate review was effectively unavailable to resolve their complaints. As explained above, and as the United States demonstrated during the preliminary phase of this case, Claimants cannot do so. See supra at 79-99; U.S. Jurisdictional Mem. at 58-67; U.S. Jurisdictional Resp. at 32-54.

2. The Mississippi Litigation Was Not A Denial Of Justice

An allegation of a denial of justice is an extreme one and is generally disfavored in customary international law. As Judge Tanaka of the International Court of Justice explained in the Barcelona Traction case,

> [i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

1970 I.C.J. at 160 (separate opinion of Judge Tanaka). An international tribunal will substitute

its judgment for that of a municipal court in only the rarest of circumstances. "[I]t is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country . . . ." Garrison's Case (U.S. v. Mexico), 3 Moore's Int'l Arb. 3129; see also Harvard Research Draft at 179 ("The rule that those who resort to foreign countries are bound to submit to the local law as expounded by the judicial tribunals is disregarded only under exceptional circumstances."). This is no different in the context of NAFTA Chapter Eleven claims. See Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award at ¶105 (Nov. 1, 1999) (noting, in *dictum*, that claimants bear the burden of proving "that the evidence for [the challenged court judgments] was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious . . . .").

Given the extreme nature of a denial of justice claim, it is no surprise that the standard of proof regarding such claims is exceptionally high. It is not sufficient to show merely that the challenged judicial action or decision was wrong. Rather, under settled rules of international law, "[o]nly a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law." Putnam supra p. 117 at 225. In cases challenging judicial action, "it is necessary to inquire whether the treatment . . . amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man . . . ." Chattin v. United Mexican States (U.S. v. Mexico), Opinions of Commissioners 422, 439-40 (1927). Even if Loewen truly had no further means of appealing the O'Keefe jury verdict (which, as we have already shown, is not so), the facts of this case – rather than Claimants' caricature of them – simply cannot

support such an extreme claim.

a. The Trial Proceedings

As already summarized above, there can be no serious dispute that Loewen was afforded a trial that, at the very least, comported with the minimum standard of justice recognized in customary international law. See supra at 17-56; Bilder Opinion at 21-22. The rules of procedure that governed the trial, as in all U.S. jurisdictions, were highly developed and afforded Loewen innumerable means of protecting itself and advancing its own interests. As Professor Landsman explains, "[a]s is the case in every sophisticated legal regime, the adversary system provides mechanisms to deal with the possibility that one side or the other may become the object of adjudicator prejudice or animosity." Landsman Statement at 16. If Loewen had any concerns about the fairness of the trial, it was fully within its rights to invoke countless protections, such as motions for transfer of venue, inquiry on voir dire, peremptory strikes, motions in limine, proposed jury instructions, and any number of possible objections. Id. at 16-18. Loewen was represented by several law firms with experienced counsel who were "charged with responsibility to initiate the use of these protective mechanisms." Id. at 18.

As we have already shown, the record simply cannot support Claimants' allegation that the trial court improperly allowed the trial to be marred by appeals to nationality, race, or class biases. See supra at 19-32. Instead, as Professor Landsman concludes, "the proceedings in O'Keefe v. Loewen were conducted in a manner consonant with the dictates of adversarial justice" and, moreover, "there is a sound basis to conclude that such difficulties as were encountered by the Loewen Group were the result of its lawyers' strategic choices or miscalculations." Landsman Statement at 2. Under such circumstances, the trial proceedings

can in no way be viewed as a "denial of justice."

b. The Jury Verdict

Claimants contend that the $500 million verdict "was grossly excessive under the prevailing standards of every nation on earth." TLGI Mem. at 87. At the outset, the United States notes the absence of any authority for the view that an excessive verdict in a civil case, if rendered in good faith, may give rise to an international claim. As Claimants' own authorities suggest, in a case where the decision "was correctly adverse to the alien" but which resulted in an "excessive" judgment or sentence, the excessive judgment is internationally wrongful if the court rendered the sentence "because of ill will toward the alien or because the court has been bribed . . . ." 1961 Sohn & R. Baxter Draft Convention, art. 8, Explanatory Note at 97 (quoted in TLGI Mem. at 79); see also Charles de Visscher, supra n.98 ("*Errare humanum est*: error, which presumes good faith, excludes responsibility.").

As already explained, the jury's verdict was not based on any nationalistic or other improper bias, but instead was based on the jurors' good faith view of the evidence introduced at trial. Indeed, even Loewen's own investigation into the jury's deliberations confirms that this was so. See Vidmar Statement at 1-2. One may thus readily doubt, *ab initio*, whether Claimants could ever assert a denial of justice claim on the basis of an excessive verdict in the absence of bad faith on the part of the courts or the jury. Even Loewen's own expert, Sir Robert Jennings, implicitly acknowledges as much. See Jennings Op. at 12 (quoting Professor Brownlie's recognition of "authority for the view that an error of law *accompanied by a discriminatory intention* is a breach of the international standard.") (emphasis added).

But even if an excessive civil verdict rendered in good faith could give rise to an

international claim, such a claim could not be sustained here. This is so for several reasons.

First, although Claimants seize on the $500 million awarded by the O'Keefe jury, they ignore the fact that Loewen never paid anywhere near that amount in the end. The last court action in the litigation was not the entry of judgment on the jury's verdict (the execution of which was forever stayed), but was instead the orders of the Mississippi Supreme Court and the trial court dismissing the litigation with prejudice on the basis of the parties' settlement agreement. See A1589; A1618; see also Dyches (U.S.A.) v. Mexico, 4 R.I.A.A. 458, 460 (1929) ("All the defects of procedure of which the claimant complains were, so to say, erased by the last decision which rendered justice to him."). By Loewen's own estimate, the value of the payments to O'Keefe in settlement, which were structured to be paid over twenty years, was $85 million.[99] The question presented, therefore, is not whether a never-executed $500 million verdict amounted to a denial of justice on the facts of this case, but whether the final entry of judgment dismissing the case on the basis of Loewen's agreement to pay $85 million did so. See 1961 Sohn & Baxter Draft Convention, art. 8, Explanatory Note at 97 ("The measure of the wrong done the alien is the difference between what the decision or judgment should have been and what it actually was.").

Second, Claimants (and their experts, Sir Robert Jennings and Richard Neely) are incorrect in their assertion that the O'Keefe litigation involved "property and assets in dispute of only a few million dollars . . . ." Jennings Op. at 4. To the contrary, O'Keefe presented

[99] See A1509. In fact, nearly $80 million of the settlement still remains to be paid under outstanding unsecured promissory notes, which obligation Loewen will likely discharge entirely in connection with its current Chapter 11 reorganization proceeding. The value of the settlement to Loewen is thus substantially lower than even the $85 million Loewen estimated at the time.

evidence throughout the trial establishing that Loewen's actions caused tens of millions of dollars in monetary damages, not even counting the emotional distress for which O'Keefe was also entitled to recover under Mississippi law.[100]

For example, O'Keefe's principal witness on economic damages, Dr. Hugh Parker, testified that Loewen's breach of the August 1991 settlement agreement caused $13.4 million in direct monetary damages to O'Keefe, not including the loss of O'Keefe's option on the Jackson cemetery tract and not including the lost future revenues from the insurance company that O'Keefe was to have obtained from Loewen under the deal. See, e.g., Tr. 2360-61, 2369. As for the latter damages, Loewen itself estimated that an insurance company O'Keefe was to have received would have yielded an additional $20 million in future revenues. (U.S. App. 0960).[101] Another O'Keefe witness, Dale Espich, testified that the value of the cemetery option that Loewen took from O'Keefe (thereby eliminating O'Keefe from the Jackson market entirely) was at least another $2 million. (Tr.1860). In all, O'Keefe presented credible evidence of more than $35 million in economic damages caused by Loewen's tortious breach of the August 1991 agreement, the proof of which O'Keefe's counsel summarized with effectiveness during his closing argument. See Tr. 5566-68 (summarizing visual exhibit that broke down components of compensatory damages).

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[100] See, e.g., Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 743 (Miss. 1999) ("In cases of intentional infliction of emotional distress, where the defendant's conduct was 'malicious, intentional or outrageous,' the plaintiff need present no further proof of physical injury.").

[101] Another O'Keefe witness testified that Loewen's $20 million estimate was actually low. See Tr. 464-65 (Walter Blessey).

Loewen's principal challenge to the jury's award of economic damages is that the "vast bulk" of those damages were allegedly "unforeseeable." (TLGI Mem. at 88). Loewen also asserts, without citation, that such damages are not recoverable "[u]nder the law of all nations . . . ." Id. Apart from the fact that O'Keefe presented credible evidence that the damages were, in fact, foreseen by Loewen (see, e.g., U.S. App. 1034-35, 1065), Loewen once again fails to acknowledge that O'Keefe's causes of action sounded in tort (and particularly *intentional* tort) as well as in contract. See Landsman Statement at 8-16. It is black letter law that foreseeability does not necessarily limit the recovery of consequential damages flowing from intentionally tortious acts. See, e.g., Restatement (Second) of the Law of Torts § 917 cmt. d (1979); Prosser and Keeton on Torts (5th ed. 1984) at 293; McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (applying Mississippi law).[102]

Third, the jury's award of punitive damages against Loewen was not inconsistent with the minimum standard of treatment under customary international law. As explained in the attached statement of Professor John Y. Gotanda, punitive damages do not, in and of themselves, violate customary international law. See Statement of Professor John Y. Gotanda

[102]Claimants also assert that the jury awarded only $26 million in economic damages, see TLGI Mem. at 88, but the jury verdict form (which Loewen itself prepared) in no way supports such an assertion, as it did not separate economic damages from emotional distress damages in the total award of $100 million in compensatory damages. See A650-58. Claimants appear to base their estimate on O'Keefe's Third Amended Complaint, which identified roughly $26 million in economic damages rather than the more than $35 million O'Keefe demonstrated at trial. See A202-05. However, under Mississippi law, pleadings may be amended to conform to the evidence presented at trial, even after the judgment. See Miss. R. Civ. P. 15(b) (directing courts "to be liberal" in amending pleadings to conform to the evidence at trial, motion for which may be made "at any time, *even after judgment*") (emphasis added). See A775. In fact, Judge Graves made this precise point during the hearing on Loewen's motion for new trial, during which O'Keefe moved (as a precaution) to amend his pleadings to conform to the evidence. See A796-97; A808.

("Gotanda Statement") at 18, 19-21 (appended at Tab G hereto); accord Greenwood Opinion ¶¶ 75-79 ("It is nowhere suggested . . . that the act of awarding punitive damages is a violation of public international law."). Cf. Ronald Brand, Punitive Damages and the Recognition of Judgments, 43 NILR 143, 172-73 (1996) (observing that punishment and deterrence are considered appropriate functions of civil remedies in both common law and civil law systems). Professor Gotanda's statement, which provides a comprehensive overview of the international treatment of punitive damages, concludes that the question of what constitutes *excessive* punitive damages "is unclear, and it appears to be an intensely factual, case-specific determination that should be made by the appropriate domestic court." Gotanda Statement at 9; cf. Chattin, supra p. 131 at 436-38 (imposition of a two-year prison sentence for embezzlement of four pesos did not, in itself, constitute a violation of international law, so long as such a penalty was permissible under local law, and in the absence of clear discrimination between similarly-situated Mexican and U.S. defendants).

Indeed, as Professor Gotanda observes, domestic courts accord deference to a jury's award of punitive damages. In England, for example, an award of punitive damages may not be set aside unless it is "so large . . . that twelve sensible men could not have reasonably given them" or that "no reasonable proportion existed between it and the circumstances of the case." Cassell & Co. Ltd. v. Broome [1972] 1 All E.R. 801, 819 (quotation omitted); Gotanda Statement at 10. Australia follows a similar practice. See Carson v. John Fairfax and Sons Limited and Anor, (1993) 178 CLR 44 ¶35 ("the verdict should not be disturbed unless the amount is such that no reasonable body of men could have awarded it.") (quotation omitted). In Mississippi, a punitive damages award "will only be altered or amended when it is so excessive

that it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience." Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 444 (Miss. 2000).[103]

Although no precise formula (and, perforce, no formula under principles of justice recognized by developed legal systems) has been established by domestic courts for determining whether a punitive damages award is excessive, the O'Keefe jury's award of punitive damages was not "grossly excessive," even by domestic measures. For example, in XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd. (1985) 155 CLR 448, the High Court of Australia upheld a punitive damages award of $150,000 (reduced by the court of appeals from $400,000 awarded by the jury) against a petrol company that had spiked the underground petrol tank of a smaller competitor. The sum of punitive damages was nearly 30 times the amount of economic damages caused by the act (a mere $5,527.90), which a majority of the Court upheld even though "the seriousness of the incursion" was reduced by the fact that "there was no repetition of the trespass . . . ." Id. at ¶17 (Gibbs, C.J.).[104]

In TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), the Supreme Court of the United States upheld a $10 million punitive damages award that was 526

[103]Although the courts of Canada are less deferential to jury awards of punitive damages, see Hill v. Church of Scientology of Toronto [1995] 2 S.C.R. 1130, 1208-09, Canada nevertheless recognizes that "[p]unitive damages can and do serve a useful purpose," especially with respect to large and wealthy defendants who might otherwise regard compensatory damage awards merely as "a license fee for continuing" their wrongful conduct. Id.

[104]Two of the five deciding Justices (Murphy and Brennan) did not believe that the jury's initial verdict of $400,000 should have been set aside. See 155 CLR 448 at ¶¶2, 3 (Murphy J.); id. at ¶8 ("Where a jury is entitled to award exemplary damages it is very difficult for a defendant to show that the award is so disproportionate as to warrant the setting aside of the verdict.") (Brennan J.).

times greater than the actual damages awarded by the jury. Notwithstanding this disparity, the Court concluded that factors such as "the bad faith of [the tortfeasor], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and [the tortfeasor's] wealth" left it "unpersuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." Id. at 462.

In contrast to these cases, the $400 million in punitive damages awarded by the O'Keefe jury was only four times the total amount of compensatory damages, and only eleven times the $35 million in pure economic damages proven by O'Keefe at trial.[105] Moreover, unlike the tortfeasor in XL Petroleum but like the tortfeasor in TXO, Loewen's tortious conduct was not found by the jury to be an isolated instance, but was instead found to be part of "a larger pattern of fraud, trickery and deceit . . . ." 509 U.S. at 462. See also BMW, 517 U.S. at 576 ("'trickery and deceit' . . . are more reprehensible than negligence.") (citation omitted). The O'Keefe plaintiffs, in their opposition to Loewen's motion for reduction in the amount of the verdict, summarized the point well:

> Consider the following wrongful conduct explicitly found by the jury:
>
> Defendants manipulated and monopolized the funeral services and funeral insurance markets and grossly inflated prices by which bereaved families paid much higher prices to bury their loved ones.
>
> Defendants engaged in dishonest, fraudulent and misleading advertisements and unfair business practices.
>
> Defendants monopolized and interfered with the business advantages and

[105]The United States Supreme Court in BMW of North America v. Gore, 517 U.S. 559 (1996), observed that the ratio between actual and punitive damages is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award . . . ." 517 U.S. at 580.

> relations of its competitors.
>
> Defendants acquired "clusters" of businesses and intentionally injured competitors by forcing those in weaker bargaining positions to accept indefensible contractual terms.
>
> Defendants breached covenants of good faith and fair dealing by entering contracts and continuing a course of negotiation through contracts Defendants never intended to honor.
>
> Defendants tortiously, fraudulently, maliciously and intentionally interfered with one or more o[f] Plaintiffs' contracts.
>
> Defendants wilfully and intentionally breach[ed] contracts with Plaintiffs and such breaches were attended with insult, abuse and malice so as to amount to independent torts.
>
> Defendants acquired or attempted to acquire monopoly power in the relevant geographic and product markets and intentionally committed unlawful and anti-competitive or predatory acts against Plaintiffs for the purpose of damaging or destroying Plaintiffs' business.

A783-84 (from Plaintiffs' Combined Opposition to Defendants' Motion to Vacate Judgment and to Defendants' Motion for Reduction of Excessive Punitive Damages). Indeed, as the O'Keefe plaintiffs also noted, Loewen's net worth had increased at a remarkable pace in the years leading up to the judgment as a result of some of the very same practices at issue in the litigation. See A780. As O'Keefe argued to the Mississippi court, "[t]he jury's punitive damage award merely denies Defendants the rewards of their wrongful conduct as reflected on their own balance sheets." Id. The U.S. Supreme Court made a similar point in upholding the punitive damages award in TXO, observing that "counsel for respondents stressed, in addition to TXO's vast wealth, the tremendous financial gains that TXO hoped to achieve through its 'elaborate scheme.'" 509 U.S. at 461.

Also, as Professor Landsman points out, tort remedies had a "heightened salience" in the

O'Keefe case, given that "the business at issue involved the handling of the deceased and transactions with the bereaved." Landsman Statement at 10. In contrast to the more typical businesses at issue in XL Petroleum and TXO, "Mississippi and, indeed, all of America, has shown itself to be particularly sensitive to any matter concerning the treatment afforded mortal remains and grieving families." Id. In fact, complaints about "the mischief at chain-owned mortuaries – especially SCI, Loewen, and Stewart [the third-largest death-care company]" are now well documented, as is the observation that "[o]ne thing is almost certain: when a corporate chain purchases a funeral home or cemetery, the prices go up even if the name stays the same." Lisa Carlson, Caring for the Dead 126-27 (1998). See also, e.g., Darryl J. Roberts, Profits of Death 139-40 (1997); U.S. Jurisdictional Mem. at 8-11. As the business practices of all of the death-care consolidators became known over the past few years (brought to light, in part, by the O'Keefe litigation), consumer-protection groups and internet websites have proliferated, government regulation of the death-care industry has increased, and critics of the industry have become more vocal. See, e.g., CNN, Senate Committee Investigates Funeral Industry (Apr. 11, 2000) (U.S. App. 1231); Report of the New York City Department of Consumer Affairs, The High Cost of Dying: Rising Prices and Consumer Deception in the Funeral Industry: Proposals for Reform (1998) (recommending various regulatory reforms, including antitrust investigations and mandatory disclosure of funeral home ownership) (U.S. App. 0055-56, 0065); M. Horn, The Deathcare Business: The Goliaths of the Funeral Industry are Making Lots of Money Off Your Grief, U.S. News & World Rep., March 23, 1998 (cover story) (U.S. App. 0012). The public outcry over business practices in the death-care industry – in which Loewen is still the world's second-largest participant – and the call for increased regulatory oversight of the industry in

recent years only serves to confirm that the O'Keefe jury's award was an understandable reflection of community disapproval. See BMW, 517 U.S. at 575 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

In the end, Claimants contend that the punitive damages award was excessive simply because it was larger than most, strictly in monetary terms. But this contention ignores the fact that Loewen was itself larger than most defendants, and that the O'Keefe jury rendered its verdict on the assumption – which Loewen's own lawyers only helped to reinforce – that the company was worth in excess of $3 billion. See supra at 54-56. The jury thus had a reasonable basis to conclude, under those circumstances, that only a substantial award of $400 million would provide adequate deterrence and retribution, given the perceived relative size of Loewen and the perceived breadth of the company's bad acts. Moreover, by avoiding discussion of the size of any damages award that the jury might consider, Loewen's counsel left the jury with no guidance on damages except that supplied by O'Keefe. As Professor Landsman points out, such a strategy is "extremely risky" and, indeed, is said to have been used to similar effect in the case of Pennzoil v. Texaco, in which a Texas jury rendered an award of $11 billion against Texaco. See Landsman Statement at 45.

Given the circumstances in which it was rendered, the jury's verdict cannot be viewed as "a clear and notorious injustice, visible, to put it thus, at a mere glance," Putnam, supra p. 117 at 225, or as an "an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." Neer v. United Mexican States (U.S. v. Mexico), Opinions of Commissioners 71, 73 (1927). In view of the fact

that Loewen paid no more than $85 million (and, ultimately, less than even that amount) to end the litigation, the jury's verdict cannot be said to have been a denial of justice on the facts of this case.

c. The Decisions Regarding The Supersedeas Bond

Claimants do not dispute that Mississippi provided them the right to appeal from the trial court's entry of judgment on the jury verdict. Their disagreement with Mississippi procedure addresses only the conditions under which execution of the lower-court judgment could be suspended while they pursued that right. According to Claimants, the courts of Mississippi "arbitrarily" prevented Loewen from appealing the jury verdict by requiring the company to post a supersedeas bond in the amount of 125 percent of the verdict, which amounted to a procedural denial of justice.

Claimants' contention is meritless. As we explain below, supersedeas bond requirements like those at issue in this case are common features of legal systems around the world. The standards for justifying a departure from such requirements are strict. The Mississippi courts' decisions to deny Loewen's request for a departure, on the record before the courts, were in no way a denial of justice under customary international law. Indeed, Claimants cite no case – and we are aware of none – in which the existence or application of a bond requirement has been found to amount to a denial of justice.[106]

[106]Loewen contends that the Sohn and Baxter Draft Convention supports the view that an "excessive security requirement can constitute a procedural denial of justice." TLGI Mem. at 90. This is not so. The Draft Convention suggests only that a "procedural barrier in the law, such as a requirement of posting excessive security for costs" can excuse the failure to exhaust local remedies before presenting an international claim. See 1961 Sohn & Baxter Draft Convention, art. 19, Explanatory Note at 168.

(i). Supersedeas Bonds Are A Common Feature Of Legal Systems Worldwide

Loewen's predicament in facing a supersedeas bond requirement was hardly an oddity of Mississippi or even United States practice. To the contrary, it is accepted in many jurisdictions that a judgment may either be enforced immediately when rendered, or, if an appellant seeks a stay pending appeal, that suitable security is required to obtain such a stay.

Both civil law and common law jurisdictions recognize the need and provide for measures to protect the interests of a litigant who has won a judgment. See generally Peter E. Herzog & Delmar Karlen, Attacks on Judicial Decisions, XVI Int'l Encycl. of Comp. L., at 17-18 (Mauro Cappelletti ed.,1982). For example, the rules of the High Court of Australia provide that an appeal does not stay the execution of a judgment unless otherwise ordered. High Court Rules O. 70, r. 8(1). If a stay of execution is ordered, the courts have the inherent power to require security with respect to the judgment under appeal. Dillon v. Baltic Shipping Co., [1991] S. 91/005 (Austl.), ¶¶ 9-10, 13. Absent such an order, or an undertaking by the appellant, an appellee would not upon reversal of a judgment be liable for any damages that might result from his execution of a judgment pending appeal. See Stergiou v. Citibank Savings Ltd., No. 134 [1998] (Sup. Ct. Austl. Cap. Terr.), at ¶¶ 35-36, 38. If appropriate security is not given, the High Court may order the dismissal of the appeal. Judiciary Act, 1903, sect. 77S Part XB(2) (Austl.).[107]

[107] In addition, the High Court may order an appellant to provide security for the costs of appeal, which can be a substantial sum because of the inclusion of attorneys' fees among costs. High Court Rules O. 70, r. 7.

Canada follows rules similar to those applied in the United States. In particular, under Canada's Supreme Court Rule 65(1), the filing of a notice of appeal of a money judgment does not stay execution of that judgment "until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid." Supreme Court Act, R.S., ch. S-26, § 65 (1985). The filing of a notice of appeal does not itself result in suspension of the judgment. See G. (L.) v. B. (G.), [1995] 3 S.C.R. 367, ¶6.

In England as well, a stay of execution of a judgment pending appeal is not automatic. The Queen v. Secretary of State for the Home Dept., No. CO/4816/1998 (Eng. QBD Admin. Ct.), reported at 2000 WL 1881264. Courts are more likely to grant a stay where the appellant provides sufficient security that the judgment will be paid. See Kuwait Airways Corp. v. Iraqi Airways Co., No. QBCMF 2000/0419/A3 (Eng. C.A.), reported at 2000 WL 33148670, at ¶ 21. On the other hand, where a judgment is for a sizable sum, and there is "no evidence to show that there is a realistic prospect" of the judgment being paid, there is no justification for a stay of execution. Halifax PLC v. Ghadami, No. B2/2000/3590 (Eng. C.A.), reported at 2000 WL 33128667. An appellant who claims inability to satisfy a security requirement has the burden to justify an excuse, and failure to meet that burden can result in dismissal of an appeal. M.V. Yorke Motors v. Edwards, [1982] 1 W.L.R. 444, 449, 451 (Eng. H.L.).

French law provides that, with respect to most types of cases, the first president of the Court of Cassation, the highest court in civil, commercial, and criminal matters, may effectively prevent an appeal from going forward until the petitioner demonstrates that the judgment below *has already been executed*, unless such execution will result in "manifestly exessive

consequences." N.C.P.C. art. 1009-1 (Fr.). The judges of the Court of Cassation have no power to grant a stay of execution even if there are serious grounds for the appeal and execution of the judgment would cause irreparable harm to the debtor. See Jacques Boré, Pourvoi en Cassation, § 1466 at 182 (March 1998), in 4 Répertoire de procédure civile (Serge Guinchard & Anne Raymond-Grèze eds., Dalloz, 2d ed.). Under this rule, the first president has refused to permit an appeal to go forward even where a debtor, in light of his precarious financial situation, had obtained a grace period from a lower court. See Cass. ord. prés., 11 May, 1990, D. 1990 somm. 341, cited in Roger Perrot, Procédure de l'Instance: Jugements et Voies de Recours. Voies d'Exécution et Mesures Conservatoires, 89 Revue Trimestrielle de Droit Civil 555, 563-65 (1990).

Under German law, appeals to the highest court may result in a stay of execution only where execution would cause irreparable harm to the judgment debtor *and* the court finds that the judgment creditor's interests do not outweigh the debtor's interests. §§ 712, 719, ¶ 2 ZPO (Ger.). Thus, even an assertion of irreparable harm, such as loss of a house or endangering of jobs, see Adolf Baumbach, Wolfgang Lauterbach, Jan Albers, & Peter Hartmann, Zivilprozeßordnung (München: C.H. Beck, 55th ed., 1997), § 707 Rn. 10, at 1717, is insufficient to warrant a stay if the judgment creditor has greater interests in immediate execution. If security is ordered in connection with such a stay, it should cover the actual value of the judgment plus interest, costs, and any other foreseeable damages due to delay in execution. See Bernhard Wieczorek & Rolf A. Schütze, 1 Zivilprozeßordnung und Nebengesetze, § 108 Rn. 5, at 1992 (Berlin: Walter de Gruyter, 3rd ed., 1994).

In Sweden too, money judgments are immediately enforceable despite the pendency of

an appeal. See Ruth Bader Ginsburg & Anders Bruzelius, Civil Procedure in Sweden, § 11.04, at 383 (1965). To obtain a stay of execution, an appellant must furnish sufficient security to cover interest and to compensate for any damages resulting from the delay, or must deposit the amount of the judgment itself with execution authorities. Id. at 384 and n.48. To obtain an exception from a security requirement, an appellant must establish that he lacks resources to provide security *and* that his claim has extraordinary merit. Id. § 6.05 at 221 n.33

The legitimacy of such bond requirements is also confirmed by the handful of international authorities to consider the question. For example, in the Jesse Lewis case, a claim of denial of justice arising out of the confiscation of a boat was disallowed, notwithstanding the fact that the boat's owner had been unable to appeal from the confiscation proceedings "partly due to his absence of pecuniary means." Jesse Lewis (U.S. v. Br.), 6 R.I.A.A. 85, 93 (1921).[108] Similarly, in the Napier case, the American and British Claims Commission disallowed a claim by owners of a captured ship whose claim had been denied in a United States court and who had failed to appeal that denial. This was despite evidence that the owners of the ship "were not of pecuniary ability to procure the necessary sureties without much inconvenience." Napier Case (Br. v. U.S.), No. 147 (Am.-Br. Claims Comm'n of 1871), reprinted in part in 3 Moore Int'l Arbitrations 3152, 3154; see also Sarah Starr & Aigburth (Br. v. U.S.), No. 292 (Am.-Br. Claims Comm'n of 1871), id. at 3158 (claim disallowed for insufficiency despite assertion that failure to appeal was due to inability to incur further expense).

Even more to the point is Ferrara's Case (1901), reprinted in 6 Moore, Digest of

[108]The tribunal in that case suggested to the British Government that, only "as an act of grace," it might consider granting some compensation to the claimant. Jesse Lewis, 6 R.I.A.A. at 93.

International Law 672 (1906). There, as here, an alien alleged that she was deprived of her opportunity to appeal a state court judgment in the United States by the requirement of an appeal bond that she could not afford. The United States refused to espouse the claim, explaining that

> [t]he poverty of the plaintiff, which, it is alleged, prevented her from taking the necessary legal proceedings to establish her rights, affords no basis for a claim of denial of justice. It is a rule practiced not only by many American courts, but also by those of other civilized states, that the plaintiff shall, as a condition to the prosecution of his case, give a bond to secure the costs. . . . Such requirement can not be treated as a denial of free access to the courts, nor as a denial of justice. . . .

Id. at 674-75. Identical results have been reached in other jurisdictions. See Aliens Before Courts in Austria, 1929-30 V Annual Digest of Pub. Int'l L. Cases, 263 (Aus. S. Ct. 1929) (ed. H. Lauterpacht) (holding that "[t]he order to deposit security costs constituted a procedural measure and could not be regarded as a limitation of the free access to the courts of justice.").

In modern international law, the practice of requiring security to obtain a stay of enforcement pending appeal has been adopted under various international conventions. Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), a court or other authority faced with an application to set aside an arbitral award may, "on the application of the party claiming enforcement of the award, order the other party to give suitable security." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. vi, 330 U.N.T.S. 38. Courts have interpreted this provision to require security for the full amount of the arbitral award plus interest, costs, and fees. See, e.g., Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871, 875-76 (S.D.N.Y. 1987).

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID") allows a party to seek a stay of enforcement of an award pending a request for annulment of that award. See ICSID Convention, art. 52. While the language of the Convention itself does not make such a stay conditional on the provision of security, in practice such security can be and is required before a stay is granted. In Amco v. Indonesia, for example, a stay of enforcement was granted only after Indonesia, the party seeking the stay, "furnished an irrevocable and unconditional bank guarantee for payment of the Award in accordance with such final decision as the ad hoc Committee might reach." Christoph Schreuer, Commentary on the ICSID Convention: Article 52, 13 ICSID Rev. - Foreign Inv. L. J. 507, 700 (1998). The same result was reached by agreement of the parties in SPP v. Egypt. Id. at 701. As a leading commentator on the ICSID has observed, "[t]he requirement of a performance bond by the party seeking annulment has much to commend itself. Until an award is annulled, the award debtor must be presumed to be under an obligation to pay eventually." Id.

Many of the nations of the European Community have embraced the same rule in the Brussels and Lugano Conventions. Article 39 of both conventions provides as follows:

> During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought. The decision authorizing enforcement shall carry with it the power to proceed to any such protective measures.

Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 39, 28 I.L.M. 620, 632; see also Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 39, 8 I.L.M.

269. As one commentator noted, the purpose of this provision is to protect against the possibility that the judgment debtor could dispose of any property against which enforcement would be made. Elisabethann Wright, European Community: The Brussels Convention, in International Execution Against Judgment Debtors, vol. 1 (D. Campbell ed. 1993), at EC-35.

Bond requirements in the United States in general – and in Mississippi in particular – are fully consonant with these practices and procedures. Indeed, bond requirements have a long history in United States law. See Oaks v. District Court, 631 F. Supp. 538, 548 n.10 (D.R.I. 1986) (citing court that traced lineage of surety bonds to reign of King George II in the 1700s). The supersedeas bond as a condition for a stay of execution of a judgment has now been codified in the United States federal court system, see Fed. R. Civ. P. 62(d), and in the judicial systems of almost all of the fifty United States. See Richardson R. Lynn, Appellate Litigation, 385-95 (1985) (listing provisions). Far from "arbitrary," supersedeas bonds are routine and widely utilized.

The purpose of the supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal. Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190-91 (5th Cir. 1979); see also Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1027 (9th Cir. 1991); Federal Prescription Serv. v. American Pharm. Ass'n, 636 F.2d 755, 760 (D.C. Cir. 1980). Once a money judgment is rendered, the successful litigant has a legally protected right to the fruits of that judgment, and a stay pending appeal deprives him of that right. A bond protects the judgment creditor against the risk of dilution of his judgment during appeal, and against any damages or other loss that might be sustained as a result of the delay in collection. As the Mississippi Supreme Court has

observed, the purpose of the bond is to provide "absolute security to the party affected by the appeal." Perkins v. Thompson (In re Estate of Taylor), 539 So. 2d 1029, 1031 (Miss. 1989).

To provide such security, the usual requirement in federal courts in the United States is that a supersedeas bond cover the amount of the judgment in question, plus any costs on appeal, interest, and damages for delay. Poplar Grove, 600 F.2d at 1191; see also Fed. R. Civ. P. 62(d). That type of bond – a "full" supersedeas bond – is the requirement in most circumstances. See Pacific Reinsurance Mgmt., 935 F.2d at 1027; Federal Prescription Serv., 636 F.2d at 760; Hamlin v. Charter Township, 181 F.R.D. 348, 351 (E.D. Mich. 1998) (full bond "almost always" required). Courts are permitted to allow lesser bonds only on "extraordinary" occasions. Advanced Estimating Sys. v. Riney, 171 F.R.D. 327, 328 (S.D. Fla. 1997). That is because, as the United States Supreme Court has stated, the rules *require* a federal court to ensure that the judgment creditor's position is secured. Peacock v. Thomas, 516 U.S. 349, 359 (1996).

Practice in most U.S. state courts mirrors the federal system, except that in many states the rules specify that a full bond be a certain percentage of the judgment rather than requiring a calculation of anticipated interest, costs, and damages for delay in payment. Mississippi, in which a full bond is defined as 125 percent of the amount of the judgment appealed from, is one of those states. See Miss. R. App. P. 8(a). In setting the full supersedeas bond amount at 125 percent of the judgment, Mississippi has essentially estimated that interest, costs, and damages for delay will amount to no more than 25 percent of the judgment. This is wholly consistent with accepted norms in other states. For example, Louisiana requires a supersedeas bond of 150 percent of the judgment appealed from, Idaho requires a supersedeas bond of 136 percent of the

judgment appealed from, Alabama and Iowa (like Mississippi) set their supersedeas bonds at 125 percent of the judgment, Pennsylvania requires 120 percent, and Florida sets the amount at 115 percent of the judgment. Lynn, Appellate Litigation, at 385-95.

(ii). The Refusal To Depart From The Full Bond Requirement Was Not, On The Basis Of The Record Before The Mississippi Courts, A Denial Of Justice

Although a full supersedeas bond is the general rule in the United States and elsewhere, see supra at 144-52, almost all statutory bond requirements in the United States allow some flexibility to deal with extraordinary circumstances. For example, in Mississippi, courts may, for good cause shown, exercise discretion to depart from the full supersedeas bond otherwise required. See Miss. R. App. P. 8(b); see also Poplar Grove, 600 F.2d at 1191 (tracing history of federal bond rules).

Claimants allege that the Mississippi courts' failure to grant such a departure in this case was "arbitrary"and done with the "purpose and effect of foreclosing Loewen's appeal rights." See TLGI Mem. at 64. In the Mississippi courts, Loewen argued that a departure was justified on both constitutional and equitable grounds. (A1025-31; A1040-41; A1129-1138). What Loewen did not do, however, was meet its burden to justify the extraordinary request it was making. The decisions of the Mississippi courts not to depart from the full supersedeas bond, far from "arbitrary," were based rationally on the arguments and the record that Loewen presented at the time.

We previously have explained that it is an open question of United States constitutional law whether the Due Process Clause of the United States Constitution limits a court's discretion to require a full supersedeas bond as a condition of obtaining a stay of execution pending

appeal.[109] Lower courts have held that the Clause may, in extraordinary circumstances, require a departure from a full supersedeas bond. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1154 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987); Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979).

The bases for granting an exception to a full bond as a matter of judicial discretion are more established. Courts have exercised discretion to allow a stay with less than a full bond in two types of circumstances. The first is where "the appellant has a clearly demonstrated ability to satisfy the judgment in the event the appeal is unsuccessful and there is no other concern that the appellee's rights will be compromised by a failure adequately to secure the judgment." In re Carlson, 224 F.3d 716, 719 (7th Cir. 2000). The second is where a judgment debtor pleads undue financial hardship. In this latter case, security other than a full supersedeas bond might be allowed if the judgment debtor "demonstrate[s] objectively that posting a full bond is impossible or impractical" and "propose[s] a plan that will provide adequate (or as adequate as possible) security for the appellee." United States v. Kurtz, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981).

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[109]As the United States noted during the jurisdictional phase, there are numerous ways in which the U.S. Constitution's Due Process Clause might *potentially* limit supersedeas bonds. For example, it is an open question whether, as a general matter, due process requires some departure where a full bond would deprive the judgment debtor of a meaningful opportunity to appeal. It also is an open question whether, in the specific context of punitive damages awards, due process requires some departure where a full bond would prevent judicial excessiveness review (or even whether the presumption in favor of a full bond should be governed by a separate legal standard when an award is punitive rather than compensatory). Further, it is an open question whether, in either of the above circumstances, any due process concerns may be satisfied if the judgment debtor can obtain an automatic stay of execution by filing a petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code. See generally Statement of Drew S. Days, III, at 16-28; Reply Statement of Drew S. Days, III, at 8-20; 9/21/00 Transcript at 371-79. None of these questions has been resolved by the U.S. Supreme Court.

In evaluating whether a departure is justified, the interests of the judgment creditor remain paramount. Thus, before a supersedeas bond may be reduced on the first ground, a court must find not only that the judgment debtor can satisfy the judgment, but that its "ability to pay the judgment is so plain that the cost of the bond would be a waste of money." Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 796 (7th Cir. 1986). The judgment debtor must also demonstrate a plan for satisfying the judgment after appeal. Poplar Grove, 600 F.2d at 1191; see also Hamlin, 181 F.R.D. at 353. With respect to the second ground (financial hardship), the judgment debtor must propose a plan for adequate alternate security for the prevailing parties. See Olympia, 786 F.2d at 797; Bank of Nova Scotia v. Pemberton, 964 F. Supp. 189, 192 (D.V.I. 1997).

Whatever the asserted ground for departure, however, the burden is *always* on the judgment debtor to demonstrate by specific and objective evidence that sufficient cause exists. See, e.g., Poplar Grove, 600 F.2d at 1191 (judgment debtor must "objectively demonstrate the reasons for such a departure"); Kurtz, 528 F. Supp. at 1115 ("In no case . . . has a court approved security different from a full supersedeas bond without a specific showing of good cause by the party seeking the stay. It is the appellant's burden. . . ."); North River Ins. Co. v. Greater N.Y. Mut. Ins. Co., 895 F. Supp. 83, 84 (E.D. Pa. 1995). The judgment creditor has no obligation to introduce evidence justifying a full bond. Hamlin, 181 F.R.D. at 353.

At the time of the underlying events, all of Loewen's principal lawyers recognized that the company bore a substantial burden to justify the requested eighty-percent departure. See, e.g., U.S. App. 0603 (noting the requested departure was "unprecedented") (Mr. Ayer); id. at 1222 (noting the Mississippi Supreme Court's *en banc* stay order was "likely the first

substantial relaxation of [the 125 percent supersedeas rule] some of the Justices have ever encountered") (Mr. Robertson). As one of the company's lawyers put it: "[a]s the unsuccessful defendants, we presently are not very well positioned to be arguing whether the plaintiffs here are more entitled to one form of damages than another because . . . at this stage of the proceedings, plaintiffs are at least more entitled to all of their damages than we are to not having to secure plaintiffs against those damages." Id. at 0894-95 (Mr. White).

Loewen's lawyers also knew the company would have to develop an unassailable record in support of its claim that a full supersedeas bond would be financially destructive (the principal basis for the requested departure). Just days after the verdict, James Robertson wrote Mr. Loewen, advising him to "[p]lease understand that our motion for relaxation [of the 125 percent supersedeas rule] must be supported by *detailed* and *credible* affidavits regarding the impact of the bonding requirement on the company and must be followed by a full evidentiary presentation in open court. . . . " (U.S. App. 0398 (emphasis added)). A few days later, he wrote the Loewen team, counseling (in advice the company ultimately took) that Loewen "prepare a record based on affidavits" alone, so that O'Keefe's lawyers would have no chance for "cross-examination." (U.S. App. 0796).

But while Loewen recognized its heavy burden, the company never developed a "detailed and credible" record in support of its claim that a full supersedeas bond would "dismantle" the company and prevent an appeal. (A1049). This is so for at least three reasons.

First, Loewen never argued to the Mississippi courts, as it does here, that reorganization protection under Chapter 11 of the U.S. Bankruptcy Code was not a reasonable means by which it could have pursued its appeal even in the face of a full supersedeas bond. This is significant

because, as explained above, O'Keefe asserted numerous times during the bond proceedings that the availability of Chapter 11 reorganization afforded Loewen adequate protection and eliminated any justification for modifying the bond. See supra at 57-60. Loewen left these assertions wholly unrebutted.

Second, Loewen damaged its credibility with the Mississippi courts by repeatedly insisting that the largest bond it could afford was $125 million. See, e.g., A828, A1026-27, A1049, A1131. As O'Keefe pointed out, this amount was (at the very least) a suspicious coincidence, given that it represented, to the dollar, 125 percent of the compensatory damages portion of the judgment. (A1109).[110] Loewen's protestations about its financial limitations thus appeared to be mere pretext for the company's refusal to acknowledge the punitive damages awarded against it. See A1032-33; cf. Carlson, 224 F.3d at 719 ("obstinance" of judgment debtor counsels against a request for extraordinary relief from a full bond).

Third, Loewen further undermined its credibility by suggesting to investors that it could, in fact, post a full bond if necessary. See supra at 60-63. These statements were contrary to what the company's lawyers were telling the Mississippi Supreme Court (*i.e.*, that Loewen could post no more than a $125 million bond), and led O'Keefe to file a brief alleging that Loewen had committed a fraud on the court. (U.S. App. 0798-0838). The significance of O'Keefe's filing was not lost on the company's lawyers, who privately implored Mr. Loewen to refrain from extra-judicial statements and conduct inconsistent with the company's litigation

[110]O'Keefe also pointed out to the Mississippi Supreme Court that Loewen's affidavits supporting its claim of inability to post a larger bond were full of "wiggle words," suggesting a lack of candor on Loewen's part. (U.S. App. 0800). For example, to support its claim that the largest bond it could make was $125 million, Loewen stated only that a bond "substantially in excess of" $125 million would trigger certain financial difficulties. (A828).

position. (U.S. App. 0633). This sense of frustration is palpable in Wynne Carvill's January 23, 1996 letter to Mr. Loewen, written just one day before the Mississippi Supreme Court finally ruled:

> Mississippi counsel are very worried that, as we go forward with financings and repeatedly try to rationalize to the Court how we can raise money for acquisitions but not for a bond, we will lose credibility at some point. That could cost us if the interim stay has not yet been resolved, or could cause such a stay to be revisited, or could conceivably even affect the merits of the appeal. Accordingly, they would like to see an all out effort by the Company to raise a $625MM bond.

(U.S. App. 0653).[111] Needless to say, Mr. Carvill's (and Mississippi counsel's) concerns were real, for as one observer has noted: "[w]here the court has reason to believe that a judgment debtor may dissipate assets or is concealing assets to avoid posting the bond, the court may of course insist on a bond in the full amount of the judgment." See Gary Stein, Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?, 61 N.Y.U. L. Rev. 463, 500 (1986). Loewen's counsel, of course, recognized this at the time. See U.S. App. 0439 ("If we appear to be in a position to post the $625M bond, we should assume that the Court will require us to do so, unless we have a good alternative, such as posting the shares of LGII.").

On the basis of this record, the Mississippi Supreme Court's refusal to grant Loewen the extraordinary relief it was seeking cannot properly be viewed as a denial of justice. To prevail on its motion to reduce the bond, Loewen, by its own admission, had to demonstrate persuasively and credibly that it could not post a bond in an amount greater than $125 million without suffering undue financial hardship. (U.S. App. 0398). Loewen, as its lawyers feared it

[111] As early as November 10, 1995, Mr. Carvill made known that he "want[ed] to make sure that what is said in court papers in Mississippi and what is told to [investment] analysts in Vancouver do not conflict." (U.S. App. 1049).

would, simply failed to meet this burden. Loewen also made no attempt to demonstrate that filing a petition for corporate reorganization would have denied it an effective appeal, despite having been challenged repeatedly by O'Keefe to do so. The Mississippi courts cannot be faulted for Loewen's failure to present a persuasive case.

The recent decision of the European Court of Human Rights in Arvanitakis v. France, No. 46275/99 (Dec. 5, 2000) (available at http://www.echr.coe.int), is instructive on this point. There, the claimant contended that an order of the French Cour de Cassation striking his appeal for failure to demonstrate that he had executed the lower-court judgment violated the provision of the European Convention on Human Rights requiring fair hearings by tribunals in civil matters. Id. at 3-4. The court dismissed the application, finding no compelling evidence to contravene the finding of the Cour de Cassation that the claimant had not carried his burden of demonstrating that "manifestly excessive circumstances" counseled in favor of allowing the appeal without proof that the lower-court judgment had been executed:

> Certainly, the claimant proclaims that he was insolvent and that all of his property had been pledged to creditors, but he produced no certificate attesting to his income. In addition, the real property belonging to him – even if it were mortgaged – seems to have had a monetary value that was not negligible. Moreover, the Court notes, without attaching any dispositive importance to it, that the claimant had retained the services of counsel whom he compensated himself, without . . . the benefit of state-paid legal aid.

Id. at 7.[112]

[112]("Certes, le requérant déclare qu'il était ruiné et que tous ses biens étaient hypothéqués, mais il ne produit aucun certificat attestant de ses revenus. En outre, les biens immobiliers lui appartenant – même grevés d'hypothèques – semblent avoir une valeur vénale non négligeable. Par ailleurs, la Cour relève, sans y attacher une importance décisive, que le requérant était assisté par un conseil qu'il rémunérait lui-même, et n'était donc pas bénéficiaire . . . de l'aide juridictionnelle.") (translation by counsel).

But even assuming, *arguendo*, that Loewen *had* proven its inability to post a bond greater than $125 million, and that it *had* proven the ineffectiveness of corporate reorganization as a means of appeal, there still could be no denial of justice on these facts. To make out a denial of justice claim, Loewen must show "a clear and notorious injustice, visible, to put it thus, at a mere glance." Putnam, supra p. 117. As Loewen's own draft petitions to the United States Supreme Court show, it is an open question of U.S. constitutional law whether the Mississippi Supreme Court would have been *required* to reduce the bond in Loewen's case. See, e.g., U.S. App. 0878 (draft petition requesting the Court to "take up a question present, but unresolved, in Pennzoil"); id. at 0880 (noting that "[q]uestions regarding the constitutionality of bonding requirements [have] created great uncertainty among the state courts and lower federal courts"). Indeed, Professor Days, before even seeing Loewen's draft petitions, confirmed the company's contemporaneous analysis. See, e.g., Reply Statement of Drew S. Days, III, at 4-5.

Given this uncertainty within a highly developed and well-respected legal system, it is difficult to see how the Mississippi courts' decisions not to depart from a requirement whose full application is generally presumed could, on the record of this case, be considered a "manifest injustice." In fact, other courts have declined requests to reduce supersedeas bond requirements in circumstances at least as compelling as Loewen's. See Carlson, 224 F.3d at 718-19 (requiring full bond despite evidence that judgment debtor might lose his home absent a stay); Bank of Nova Scotia, 964 F. Supp. at 191, 193 (requiring full bond despite finding that judgment debtor would suffer irreparable injury absent a stay); Oaks, 631 F. Supp. at 541, 550 (requiring full bond of indigent tenant seeking to appeal eviction). Even Loewen recognized this point at the time. See U.S. App. 0843-0844 (internal memorandum citing Oaks, among

other cases, for the proposition that "[courts] have held that where a litigant has had a trial from a competent court, it is permissible to bar an appeal from one who cannot afford a required [supersedeas] appeals bond").

In the end, Claimants appear to suggest that a departure was necessary in Loewen's case solely because of the *size* of the damages award it was ordered to secure. But Loewen was a billion or multi-billion dollar corporation that caused tens of millions of dollars in damages to the O'Keefe plaintiffs. Awards against corporations of that size in those circumstances are likely to be large. Moreover, it is no more important in the eyes of the law to reduce a multi-million dollar bond requirement for a large corporation than it is to reduce a $2,000 bond requirement for someone of little or no means. Cf. Oaks, 631 F. Supp. at 541, 547-49; Ferrara's Case 6 Moore, Digest at 674 (refusing claim espoused on behalf of alien who could not afford appeal bond (*caution judicatum solvi*) on $5,000 claim; "[t]he poverty of the plaintiff, which, it is alleged, prevented her from taking the necessary legal proceedings to establish her rights, affords no basis for a claim of a denial of justice."). As Justice Marshall of the United States Supreme Court wrote in his concurring opinion in Pennzoil v. Texaco,

> great sums of money, like great cases, make bad law. Because a wealthy business has been ordered to pay damages in an amount hitherto unprecedented, and finds its continued survival in doubt, we and the courts below have been presented with arguments of great sophistication and complexity, all concerned with a case which under clearly applicable principles should never have been in the federal courts at all. The Court's opinion, which addresses in sweeping terms one of these questions, is the result of what Justice Holmes called "a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."
>
> Had the sole proprietor of a small Texas grocery sued in the Southern District of New York to enjoin the enforcement of the Texas bonding provision in order to facilitate appeal in Texas from a state-court judgment in the amount of

> $10,000, the result below would surely have been different, even if inability to meet the bonding requirement and to stay execution of judgment meant dissolution of the business and displacement of employees. The principles which would have governed with $10,000 at stake should also govern when thousands have become billions. That is the essence of equal justice under law.

481 U.S. at 26-27. See also id. at 34 ("The price of evenhanded administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions.") (Stevens, J., concurring).

For all of these reasons, the decisions of the Mississippi courts not to depart from the required supersedeas bond cannot be held to have been a denial of justice.

d. General Allegations Of Institutional Bias

At bottom, the claim of denial of justice in this case rests not on any evidence that the Mississippi courts were motivated by an improper bias against Loewen – for there is no such evidence – but merely Loewen's unsubstantiated inference that the courts were so motivated. Significantly, having abandoned any claim that the Mississippi judiciary was inherently biased against it for "nationalistic" reasons, see discussion supra at 122-23, Loewen argues instead that the judiciary was biased against it for "political" reasons. See Neely II at 6; TLGI Final Jurisdictional Sub. at 44-45. While both Loewen and Richard Neely (its expert on this point) freely acknowledge they have no "direct evidence" of any improper "political" bias, see Neely II at 6; TLGI Final Jurisdictional Sub. at 44, Loewen apparently has determined to press this claim. See TLGI Final Jurisdictional Sub. at 45 n.27 ("Loewen will prove that the Mississippi Supreme Court's bonding decision was politically motivated . . . .").

It is hard to see how Loewen's claim of "political" bias is different from its now-

conceded claim of "nationalistic" bias; both theories seem to rest on the assumption that the Mississippi courts ruled against Loewen because it was from out-of-state. Assuming, *arguendo*, that these claims are different, we show below why Loewen's "political" bias claim lacks merit. We then show why this claim, like many Loewen advances in this proceeding, simply cannot be squared with the advice Loewen received at the time of the underlying events.

(i). There Is No Evidence That The Mississippi Judiciary Was "Politically" Biased Against Loewen.

Mr. Neely's claim that the Mississippi judiciary was "politically" biased against Loewen reduces to the following argument: (i) in Mississippi, state court judges are elected; (ii) the plaintiffs' bar contributes more money to judicial campaigns than the defense bar; (iii) thus, to stay elected, judges favor plaintiffs, particularly when the defendant is out-of-state and has no political constituency. See Neely I at 3-11. According to Mr. Neely, this dynamic was present when the Mississippi Supreme Court denied Loewen's motion to reduce the supersedeas bond. As Mr. Neely puts it:

> [the Mississippi Supreme Court] found a convenient way to avoid either reversing O'Keefe v. Loewen (which would have been politically dangerous given the power of the plaintiffs' bar in Mississippi) or of writing an opinion affirming O'Keefe v. Loewen (which would have humiliated the Mississippi Supreme Court and exposed it to review and reversal by the U.S. Supreme Court). This expedient was simply to require the posting of what the Mississippi Supreme Court knew to be an impossible bond – a ruling that had the effect of extorting a settlement from Loewen and making an appeal to the U.S. Supreme Court impossible.

See Neely I at 14.

As an initial matter, Mr. Neely's speculation that the Mississippi Supreme Court knowingly "extorted" the settlement – made up out of whole cloth – is particularly strange given

Mr. Neely's own published writings about the nature of elected judiciaries. For example, he has written:

> The fight over whether judges should be appointed or elected will never be settled. Since people will always disagree with court opinions, it will always be thought that where judges are appointed things would be better if they were elected, and where judges are elected that things would be better if they were appointed. *In fact, in my experience, it makes no difference.*

See Richard Neely, How Courts Govern America 190 n.1 (1981) (emphasis added); see also id. at 214 ("I have not noticed any significant variation in quality between elected and appointed state judges").

In any event, while there certainly is a long-standing debate in the United States about the "best" method for selecting state court judges,[113] there is no reasonable basis to conclude that the method of selection at issue here – popular election – had any impact on the decisions of the Mississippi courts in the O'Keefe case. Indeed, Mr. Neely, while refusing to retract his allegations, has been forced to admit there is no "direct evidence" to support a claim that improper "political" bias played any role in the Mississippi courts' decisions. See Neely II at 6 ("I did not contend, and I do not believe, that there was any direct evidence of such political motivation"). Loewen admits this point too. TLGI Final Sub. at 44 & 45 n.27.

[113]The United States Constitution mandates that federal judges be appointed by the President with the "advice and consent" of the United States Senate. See U.S. Const. art. II, § 2, cl. 2. While the Constitution recognizes that States may select judges through election, see U.S. Const., amend. XIV, § 2, cl. 2, it does not require that they do so, and leaves the issue of judicial selection to the states themselves. The debate over how judges should be selected in the United States extends back to the founding of the nation. See Peter D. Webster, Selection and Retention of Judges: Is There One "Best" Method?, 23 Fl. St. Univ. L. Rev. 1, 1-2 (1995) (noting their different views). This debate, while often vigorous, may ultimately be much ado about nothing, for, as one principal scholar has noted, "[e]mpirical work suggests that the method of selection has little, if any, effect upon the overall quality of judges." Id. at 15.

Lacking any evidence of bias, Claimants are left (in the words of their expert Professor Tribe) with only an "infer[ence]," i.e., that an elected judiciary "in itself creates a systematic bias against foreign litigants." See Reply Statement of Laurence H. Tribe at 19. And, as Professor Tribe himself notes, that "inference" is weak: "an elected judiciary is by no means unique to Mississippi, is expressly contemplated in Section 2 of the Fourteenth Amendment to the U.S. Constitution, and hardly renders a state judicial forum inadequate." See id. In fact, in three-quarters of the states, judges seeking to stay in office must stand for at least some form of periodic election.[114] If the existence of an elected judiciary were enough, standing alone, to create "political" bias, then the decisions of state courts throughout the United States would be inherently suspect, and potentially subject to attack (when involving foreign litigants) as "denials of justice."

Moreover, any "inference" of bias is particularly weak under the facts of this case. For example, Judge Graves, the trial court judge in the O'Keefe case, initially was *appointed* to the bench by former Mississippi Governor Raymond E. Mabus.[115] See Declaration of the Honorable Raymond E. Mabus, Jr. at ¶¶ 5-6 (Tab E hereto). As Governor Mabus explains,

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[114]Judges must stand for periodic election in the following thirty-eight states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. See The Book of the States 137-39 (2000-01 ed.). In many of these states, judges are appointed initially, and then must run for reelection in so-called "retention" elections. See id.

[115]For Circuit Court judges (like Judge Graves), terms are four years, see Miss. Const. art. 6, § 153, for Supreme Court Justices, eight years. See id. art. 6, § 149; Miss. Code Ann. § 23-15-991. Judicial vacancies are filled, on an interim basis, by gubernatorial appointment. See Miss. Code Ann. §§ 9-1-103; 23-15-849.

Judge Graves was recommended for appointment by the Judicial Nominating Committee of the State of Mississippi, a committee composed of "distinguished members of the Mississippi Bar and laypersons, including representatives of the business community."[116] See id. at ¶ 6. While Judge Graves subsequently ran for reelection in 1991, 1994 and 1998, he ran unopposed the latter two times (the elections closest in time to his presiding over the O'Keefe case). In 1994, Judge Graves raised no money for his election campaign (he reported modest campaign contributions in 1998).

At the Mississippi Supreme Court level, four of the nine Justices who decided Loewen's motion to reduce the bond also initially were appointed. See Southwick, Mississippi Supreme Court Elections: A Historical Perspective 1916-1996, 18 Miss. Coll. L. Rev. 115, 195 (1997) [hereinafter Mississippi Supreme Court Elections] (Appendix) (Prather, J., in 1982; Sullivan, J., in 1984; Banks, J., in 1991; and Mills, J., in 1995). Moreover, while Mr. Neely decries Mississippi's recent move to "non-partisan" judicial elections (see Neely I at 3-4), at the time Loewen's bond appeal was decided, only one of the nine Justices – Justice McRae – had run in a non-partisan election, see Mississippi Supreme Court Elections at 182, and he ultimately ran unopposed.[117] See id.

[116]From 1980-1991, applicants for judicial vacancies were reviewed by a nominating committee, which recommended potential appointees to the Governor. See Southwick, Mississippi Supreme Court Elections: A Historical Perspective 1916-1996, 18 Miss. Coll. L. Rev. 115, 193 (1997). This practice, which was intended to find "the most qualified, conscientious, and dedicated persons available" for appointment, see Miss. Exec. Order No. 587 (Gov. Raymond E. Mabus, Jr., Mar. 18, 1988), was discontinued by former Governor Kirk Fordice in 1992.

[117]While Justice McRae initially was opposed in 1994 (the year Mississippi moved to non-partisan judicial elections), his opponent was forced to quit the race, and he won unopposed on Election Day. See Mississippi Supreme Court Elections at 182.

(continued...)

Mr. Neely's "inference" of bias is misplaced for other reasons as well. His general assertion that, in Mississippi, the plaintiffs' bar contributes more money to judicial campaigns than the defense bar (see Neely I at 5), while perhaps true, misses the point. Local "political action committees," which represent the interests of the defense bar's business clients, are well-funded, and appear to be as active in Mississippi judicial campaigns as the plaintiffs' bar. See Mississippi Supreme Court Elections at 189 (noting that, in the 1996 election cycle, "business groups and plaintiff-lawyer groups each spent more than $100,000 on the four [Supreme Court] campaigns"); see also Bill Minor, GOP Influencing Business With PAC, Madison County Journal, Aug. 22, 1996 (at http://www.onlinemadison.com/aug22/editorial3.html).[118]

Similarly, Mr. Neely's assertion that Loewen was a target for "political" bias because it "had no significant local constituency of dependent wage earners" (see Neely I at 6) is factually incorrect. As Loewen itself informed the O'Keefe jury, one of its co-defendants, the 90 percent Loewen-owned Reimann Holdings, Inc., employed over four hundred persons in Mississippi (including at the Riemann-owned Wright & Ferguson Funeral Home, another Loewen co-defendant). See Tr. 5804 (Mr. Sinkfield). It is presumably for this reason that, at the time of the

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[117](...continued)

[118]National business organizations also have contributed to Mississippi judicial candidates. During the 2000 election cycle, the United States Chamber of Commerce "bought TV ads supporting four contenders [for the Mississippi Supreme Court] at an estimated cost of $450,000, about one-third of the money raised by all nine candidates in four races." See Mark Ballard, Election 2000, State by State, The National Law Journal, Nov. 6, 2000. Justice Smith, a beneficiary of the Chamber of Commerce advertising and someone viewed widely as a "pro-business" judge, see Court Races, Ballots Watched By Business, Business Insurance, Oct. 30, 2000, voted with the majority to deny Loewen's motion for a bond reduction (and, indeed, even dissented from the court's en banc December 20, 1995 decision to continue the interim stay). (A1394).

underlying events, Loewen predicted that any effort by O'Keefe to execute on the judgment would result in a "PR [public relations] downside" for O'Keefe. (U.S. App. 1098).

In the end, it appears that Mr. Neely may simply have confused his own experience as an elected judge with the facts of this case.[119] In a passage from a book he published while a state court judge in West Virginia, Mr. Neely asserted:

> The anarchy [in tort liability law] that currently prevails among American state jurisdictions absolutely guarantees *politically* that no line of any sort will ever be drawn. After all, I'm not the only appellate judge in America who wants to sleep at night. As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

See Richard Neely, The Product Liability Mess 4 (1988) (emphasis in original); see also id. at 1 ("[a]s a state court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck."); id. at 7 ("Since I'm paid to choose between deciding for Michelin [an out-of-state company] and sleeping well, I choose sleeping well. Why hurt my friends when there's no percentage in it?").

While Mr. Neely certainly is entitled to his opinion, there is no basis for imputing such extreme views to Judge Graves or the Justices of the Mississippi Supreme Court. Even Mr. Neely himself has written that "[m]ost judges sincerely want to be fair." See Richard Neely, Judicial Jeopardy: When Business Collides With The Courts 154 (1986); see also Richard

[119]Mr. Neely has observed that "[m]ost social theories are primarily the autobiography of the theorist," and that his own theory about politics and judging "is no exception because my election to West Virginia's highest court instructed my understanding of how politics makes judges." See Richard Neely, Why Courts Don't Work 38 (1982).

Neely, How Courts Govern America 190 n.1 (1981) (judicial selection "makes no difference" to case outcomes). And that is precisely what the record shows here: the Mississippi court system treated Loewen in a fair and even-handed manner.

(ii). At the Time of the Underlying Events, Loewen's Lawyers Advised The Company That The Mississippi Supreme Court Would Afford It A Full and Fair Hearing.

Claimants' argument that the Mississippi Supreme Court had a preexisting "political" bias against Loewen cannot be squared with advice the company received at the time of the underlying events. After the O'Keefe jury returned its verdict, Wynne Carvill, Loewen's "principal outside counsel" (see Declaration of Wynne S. Carvill at 1), made several trips to Mississippi to "get a better read on the [Mississippi Supreme] Court and the overall political climate [there]." (U.S. App. 0429). Out of those trips, he prepared a lengthy profile of the Mississippi Supreme Court, each of the individual Justices, and evaluated how the Court would be likely to treat Loewen's underlying appeal. (U.S. App. 0429-38).

Not surprisingly, Mr. Carvill paints a far different picture of the local "political climate" than Mr. Neely (who apparently was not even shown Mr. Carvill's conclusions). See Neely I at 2-3. For example, after acknowledging "the general reputation of the Mississippi Supreme Court as a 'plaintiff's court,'" Mr. Carvill concludes that reputation is "far too simple." (U.S. App. 0432). As he explains it:

> [t]hat reputation was largely generated by the leadership of one Justice who is by no means in control of the Court.[120] Other justices and trends in the larger body

[120]This is a reference to Justice McRae who, interestingly, was a member of the three-Justice panel that unanimously granted Loewen's motion for an interim stay on November 30, (continued...)

> politic provide a basis for more confidence, and recent cases [decided by the Mississippi Supreme Court] . . . support that conclusion.

(Id.).

This analysis is supported with profiles of the individual Justices, whom Mr. Carvill characterizes, in part, as "fair and impartial" (Justice Banks); "pro-business" (Justice Mills); "very aware of the economic effect of big punitive damage awards" (Justice Pittman); "kind and courteous . . . not a political in-fighter" (Justice Roberts); likely to "support the defense" (Justice Prather); and someone who "can be counted on . . . [to] resist . . . [a] 'plaintiffs' bar agenda'" (Justice Smith). (U.S. App. 0432-38). After profiling the Justices in detail, Mr. Carvill provides this bottom line:

> The above individual profiles are encouraging. In a complex case such as this it is very difficult to predict what issues the Court will focus on in its decision. The very least that might be done would be a reduction of damages; the easiest thing to do would be simply to remand for a new trial; the best result for the company would be outright reversal and entry of a defense judgment. The above profiles suggest that there should be at least [sic] 6-3 majority for one of these outcomes but beyond that it is difficult to predict what might happen.

(U.S. App. 0438).

Mr. Carvill was not alone in his views. Loewen's contemporaneous documents make clear that both the company and its lawyers were convinced that Loewen would prevail on its appeal in the Mississippi Supreme Court. See, e.g., U.S. App. 0384 (outside counsel James Robertson predicting "a high probability – approaching 90 percent – that we will secure a reversal of a substantial portion of the liability findings the jury has made against Loewen"); id.

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[120](...continued)
1995. (A1082).

at 0818 (general counsel Peter Hyndman informing investors "we have great confidence in the Mississippi Supreme Court"); id. at 0823-24 (Ray Loewen informing investors "we have much confidence that everything will be corrected . . . in the appeals court").

Of course, between the time of the underlying events and the initiation of this proceeding, Loewen has had a radical change of heart about the Mississippi Supreme Court. But that change of heart, as even Loewen admits, is based on nothing concrete, such as newly-discovered evidence. See Neely II at 6. It is based, instead, on an inference about the elected Mississippi judiciary, an inference that Mr. Carvill (rightfully) rejected as "far too simple," and that Loewen itself deems impermissible under United States law. See TLGI Final Jurisdictional Sub. at 44. There is no evidence – direct or circumstantial – that the Mississippi Supreme Court was biased against Loewen. In no event could such an unsupported inference sustain so extreme a charge as a "denial of justice" under customary international law.

3. Claimants Misconstrue Article 1105's Obligations Of "Full Protection And Security" And "Fair And Equitable Treatment"

Claimants contend that, even if the Mississippi litigation did not rise to the level of a denial of justice under customary international law, their claim nevertheless survives under NAFTA Article 1105. According to Claimants, "[b]y incorporating both the 'full protection and security' and 'fair and equitable treatment' standards, Article 1105 affords even more protection to alien investments than does the 'international minimum standard.'" TLGI Mem. at 74; see also RLL Mem. at 56. Claimants are wrong.

Article 1105(1) requires a NAFTA State Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable

treatment and full protection and security." The obligation of Article 1105(1), by its plain terms, is to provide "treatment *in accordance with international law*." "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1), not as obligations more expansive than the standards they illustrate. The plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to international custom.

a. "Fair and Equitable Treatment"

Claimants' suggestion that Article 1105(1) "goes 'far beyond' the minimum protections afforded to foreign investments under international law" (TLGI Mem. at 97) is rebutted not only by the plain language of the Article, but also by the historical context of the words "fair and equitable" in the Article. The most direct antecedent to the usage of "fair and equitable treatment" in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property, which was first proposed in 1963 and revised in 1967.[86] The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that the standard reflected the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States":[87]

[86] See United Nations Conference on Trade & Development, Bilateral Investment Treaties in the Mid-1990s 54 (1998) ("The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.").

[87] OECD, 1967 Draft Convention on the Protection of Foreign Property, reprinted in 7 I.L.M. 117, 119 (1968).

> The phrase "fair and equitable treatment" . . . indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that . . . protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[88]

In addition, in 1984, the OECD's Committee on International Investment and Multinational Enterprises surveyed the OECD member States on the meaning of the phrase "fair and equitable treatment." The committee confirmed that the OECD's members – the world's principal developed countries – continued to view the phrase as referring to principles of customary international law.[89] Thus, from its first use in investment agreements, "fair and equitable treatment" was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated "fair and equitable treatment" into its various bilateral investment treaties ("BITs").[90]

In the ensuing years, as international investment treaties incorporating variants of the OECD Draft Convention's formulation of "fair and equitable treatment" became more common,

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[88] Id. at 120.

[89]OECD, Commitee on International Investment & Multinational Enterprises, Intergovernmental Agreements Relating to Investment in Developing Countries, ¶ 36 at 12, Doc. No. 84/14 (May 27, 1984) ("According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated . . . .").

[90]See, e.g., Dep't of State, Letter of Submittal for U.S.-Bahrain Treaty Concerning the Encouragement and Reciprocal Protection in Investment, reprinted in S. Treaty Doc. 106-25 at viii (Apr. 24, 2000) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.").

an academic debate emerged concerning the meaning of the phrase as it appears in those agreements without express reference to customary international law.[91] The prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment.[92] A few scholars contended that the requirement of "fair and equitable" treatment announced a new, undefined conventional standard distinct from customary international standards – a subjective standard that left it to arbitrators to determine in each case "whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[93]

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[91]Rudolph Dolzer & Margrete Stevens, Bilateral Investment Treaties 59 (1995) ("Some debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept."); see also United Nations Conference on Trade & Development, Bilateral Investment Treaties in the Mid-1990s 53-54 (1998) (noting debate); United Nations Centre on Transnational Corporations, Key Concepts in International Investment Arrangements & Their Relevance to Negotiations on International Transactions in Services 12 (1990) (same); Mahmoud Salem, Les développements de la protection conventionelle des investissements étrangers, 113 J. Droit Int'l 579, 607-08 (1986) (same).

[92]See Swiss Dep't of External Affairs, Mémoire, 36 Ann. Suisse de Droit Int'l 174, 178 (1980) ("On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.") ("One thus references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international 'minimum standard,' that is, to accord them a minimum of personal, procedural and economic rights.") (translation by counsel); see also Paul E. Comeaux & N. Stephan Kinsella, Protecting Foreign Investment under Int'l Law 106 (1996) (standard U.S. BIT provision on fair and equitable treatment "relies upon already-existing requirements of international law, which binds each state to 'international minimum standards' of treatment even when there is no BIT in place"); United Nations Centre on Transnational Corporations & Int'l Chamber of Commerce, Bilateral Investment Treaties 1959-1991 at 9 (1992) ("fair and equitable treatment . . . is a general standard of treatment that has been developed under customary international law").

[93]F.A. Mann, Further Studies in International Law 238 (1990); see also United Nations Centre on Transnational Corporations, Key Concepts in International Investment Arrangements

(continued...)

Against this backdrop, the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard. Article 1105(1)'s provision for "treatment in accordance with international law, *including* fair and equitable treatment" (emphasis added) clearly states the primacy of customary international law,[94] while the heading of Article 1105(1) – "Minimum Standard of Treatment" – confirms the applicability of the customary international minimum standard. Finally, Canada's Statement on Implementation of the NAFTA clearly notes that Article 1105(1) "provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."[95]

For these reasons, the United States disagrees with the discussion of "fair and equitable treatment" in the awards by the Chapter Eleven arbitral tribunals in Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000), and S.D. Myers, Inc. v. Government of Canada (Nov. 12, 2000) (Award). Although the Metalclad award's sparse statement of reasons leaves some doubt, it appears to apply a "fair and equitable" standard

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[93](...continued)
& Their Relevance to Negotiations on International Transactions in Services 12-13 (1990).

[94]See Rudolph Dolzer & Margrete Stevens, Bilateral Investment Treaties 60 (1995) (although the formulation of "fair and equitable treatment" in some BITs suggests "a self-contained standard," in the NAFTA, "the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law").

[95]Dep't of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, in Canada Gazette 68, 149 (Jan. 1, 1994) (emphasis added).

without an evaluation of customary international law on the subject. To the extent that Metalclad can be read to suggest that "fair and equitable" in Article 1105(1) articulates a standard other than the international minimum standard, it is wrongly reasoned and should not be followed here.

The S.D. Myers panel majority plainly misconstrued Article 1105(1). Though the panel correctly found that Article 1105(1) incorporates certain rules of customary international law, two of the arbitrators inexplicably ignored the logical consequences of this conclusion by suggesting that a violation of standards that do not arise out of customary international law may establish a breach of Article 1105(1), and referring for support only to the writings of an academic arguing for his preferred construction of the phrase "fair and equitable" as it is found in British investment treaties. Id. at ¶¶ 262-68. This conclusion, too, is incorrect and should not be followed here.

Indeed, both Mexico and Canada share the United States' view that Article 1105(1) incorporates nothing more than the international minimum standard.[96] Such subsequent practice in the application of the agreement, reflecting the unanimity of all three Parties to the agreement

[96]Mexico has petitioned the Supreme Court of British Columbia to set aside the Metalclad award on the ground, *inter alia*, that the tribunal's interpretation and application of Article 1105 was incorrect. See United Mexican States v. Metalclad Corp., Vancouver Registry No. L002904 (Petitioner's Outline of Argument) (Feb. 5, 2001) ¶¶ 525-545 ("NAFTA expressly provides that the fair and equitable standard is 'explicitly subsumed under the minimum standard of customary international law.'") (citing R. Dolzer & M. Stevens, Bilateral Investment Treaties 60 (1995). Canada has taken the same position with respect to Article 1105. See United Mexican States v. Metalclad Corp., Vancouver Registry No. L002904 (Outline of Argument of Intervenor Attorney General of Canada) ¶¶ 63-64 (adopting Mexico's position). Canada has also petitioned the Federal Court of Canada in Ottawa to set aside the S.D. Myers award on the ground, *inter alia*, that the tribunal erred in its treatment of Article 1105. Attorney General of Canada v. S.D. Myers, Inc, Court File No. T-225-01 (Notice of Application) (Feb. 8, 2001) ¶¶ 9-10.

on this point, is entitled to considerable weight in interpreting the agreement's meaning. See Vienna Convention on the Law of Treaties, opened for signature May 22, 1969, 1155 U.N.T.S. 331, art. 31(3)(b).

b. "Full Protection and Security"

Claimants' discussion of Article 1105(1)'s guarantee of "full protection and security" rests on a similarly faulty understanding of the provision. As with the standard of "fair and equitable treatment," the "full protection and security" standard is defined by customary international law and does not expand or otherwise modify the minimum standard of treatment under customary international law. Moreover, cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.[97] This case does not resemble any of

[97] See, e.g., American Manufacturing & Trading, Inc. v. Republic of Zaire, 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); Asian Agricultural Products Ltd. v. Sri Lanka, 30 I.L.M. 577 (1991) (destruction of claimant's property violated full protection and security obligation); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); Chapman v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. (Mex.-U.S. Gen. Claims Comm'n 1930) (lack of protection found where claimant was shot and seriously wonded); Venable (U.S. v. Mex.), 4 R.I.A.A. 219 (Mex.-U.S. Gen. Claims Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. G.B.), 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store); 4 Moore, Digest of International Law 5 (1906) (passage Loewen cited as evidence of international protection and security obligation taken from case that involved loss of physical property); see also, e.g., Restatement (Second) of Foreign Relations Law of the United States § 183 (1965) (which significantly is not included in the part of the Restatement dealing with economic injuries) cmt. a ("A state is not an insurer of an alien's safety in its territory, but a state is liable for failure, intentional or negligent, to maintain a police system adequate for the protection of aliens . . . ."), cmt. c ("The rule stated in this Section does not apply to injurious conduct of a (continued...)

those international decisions in the slightest – neither physical harm or invasion, nor criminal activity, is involved – and this Tribunal can, and should, summarily dismiss Claimants' "full protection and security" argument.

In its Memorial, Loewen glosses over this difficulty. Loewen asserts instead that two international cases stand for the proposition that the duty of "full protection and security" imposes "an even heightened affirmative duty of ca[r]e." TLGI Mem. at 91 (citing Asian Agricultural Products Ltd. v. Sri Lanka ("AAPL"), 30 I.L.M. 577 (1991) and Case Concerning Elettronica Sicula S.P.A. ("ELSI") (United States v. Italy), 1989 I.C.J. 15 (July 20)). Neither case supports Loewen's contention.

Loewen simply misconstrues AAPL. That tribunal *rejected* the argument that the phrase "shall enjoy full protection and security" imposed strict liability on the host government. 30 I.L.M at 599-602. Looking at "both the oldest reported arbitral precedent and the latest I.C.J. ruling [i.e., the ELSI case]," the tribunal reaffirmed that "the language imposing on the host State an obligation to provide 'protection and security' or 'full protection and security required by international law' . . . could not be construed according to the natural and ordinary sense of the words as creating a 'strict liability,'" and that the due diligence standard remained the

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private nature, such as ordinary negligence, breach of contract or patent infringement. It is concerned only with conduct that is of a criminal nature or that the police are normally concerned with preventing in the interest of preserving public order."); Article 7(1) of the "Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft," reprinted in F.V. García-Amador et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 129, 130 (1974) ("The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.").

operative one. Id. at 600-01. To be sure, the tribunal did write the sentence that Loewen quotes: "the addition of words like 'constant' or 'full' to strengthen the required standard of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law." Id. at 601. However, the tribunal wrote that sentence for the purpose of rejecting the proposition it contains. In the very next sentence the tribunal stated: "But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words 'constant' or 'full' are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a 'strict liability.'" Id. Moroever, in AAPL, the treaty provision guaranteeing full protection and security, unlike Article 1105(1), did not expressly restrict its coverage to protection in accordance with international law. Id. at 633. In short, AAPL does not support Loewen's assertion that the word "full" alone evidences an intent of the NAFTA Parties to obligate themselves to provide protection and security that exceeds, or otherwise is different from, that required under customary international law.

ELSI – one of the cases that the AAPL tribunal consulted – is even clearer on this point. In ELSI, the parties disputed the meaning of an article of a treaty of friendship, commerce and navigation which provided: "'The nationals of each High Contracting Party shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.'" 1989 I.C.J. at 63. Noting that the "primary standard laid down by Article V is 'the full protection and security required by international law,'" the ICJ held: "in short the 'protection and security' must conform to the minimum international standard." Id. at 66. Thus, in ELSI, the ICJ confirmed

that, by obligating themselves to provide "full" protection and security, the State Parties had not intended to require a level of protection and security in excess of the international minimum standard.

Neither is there support for claimants' suggestion that, even under the minimum standard, "[t]he requirement to provide 'full protection and security' obligates a government to prevent economic injury inflicted by private parties." TLGI Mem. at 94. As noted above, cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien. Loewen cites no case, and the United States is aware of none, where an international tribunal held that the obligation to provide "full protection and security" extends beyond physical protection and security for individuals and tangible property against criminal activity. Cf. Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L., 501, 510 n.28 (1998) ("It does not appear . . . that any BIT party thus far has claimed that a host state's failure to protect intellectual property rights violated" the full protection and security obligation.).

Indeed, if the full protection and security requirement were to extend to an obligation "to prevent economic injury inflicted by private parties," TLGI Mem. at 94, NAFTA Article 1105(1) would constitute a very substantial enlargement of that obligation as it has been recognized under customary international law. As Umpire Ralston stated in Sambiaggio, 10 R.I.A.A. 499, 521 (Mixed Italy-Venez. Comm'n of 1903), if the governments intended to depart from the general principles of international law, then the "agreement would naturally have found

direct expression in the protocol itself and would not have been left to doubtful interpretation." Likewise, in AAPL, in rejecting the claimant's construction of "full protection and security" in a bilateral investment treaty, the tribunal stated:

> proper interpretation has to take into account the realization of the Treaty's general spirit and objectives, which is clearly in the present case the encouragement of investments through securing an adequate environment of legal protection. But, in the absence of travaux preparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by previous treaties, and to establish a "strict liability" in favour of the foreign investor as one of the objectives of their treaty protection. Equally, none among the authors referred to by the Parties claimed in his commentary that the Sri Lanka/U.K. Treaty or similar Bilateral Investment Treaties had the effect of increasing the customary international law standards of protection to the extent of imposing "strict liability" on the host State in cases where the investment suffers losses due to property destruction.

50 I.L.M. at 601. For similar reasons, this Tribunal should reject Claimants' invitation to construe the duty of "full protection and security" to extend beyond the minimum standard under customary international law.

C. Claimants Cannot Establish A Violation Of NAFTA Article 1110

As their final substantive claim under Chapter Eleven, Claimants attempt, without support, to characterize this as a case of expropriation by the courts of Mississippi. According to Loewen, the O'Keefe judgment was "tantamount to" an expropriation of its investments and also amounted to an indirect expropriation under NAFTA Article 1110.[98] See TLGI Mem. at

[98] Article 1110(1) states:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with

(continued...)

99-100, 103-04; RLL Mem. at 62. This case, however, is simply not one of expropriation.

First, there is no support in international case law for the proposition that a civil court judgment entering money damages against a foreign investor in a private dispute can constitute an expropriation. Second, there is no merit to Claimants' argument of last resort that, even if the Mississippi judgment was not an indirect expropriation, it was "tantamount" to one. Claimants have simply misconstrued Article 1110. Finally, even if a case like this could ever amount to an indirect expropriation, Claimants fail to demonstrate that any investment was in fact expropriated as a result of the trial court's judgment in the O'Keefe litigation.

a. No International Tribunal Has Found An Expropriation Based Upon The Entry Of A Civil Judgment For Money Damages

Loewen's assertion that the acts of the Mississippi courts could ever amount to an expropriation of its U.S. investments is wholly unsupported. Indeed, each of the international law experts who have opined on the subject in this case – including Loewen's own expert, Sir Robert Jennings – agrees that this case does not implicate Chapter Eleven's expropriation provision. See Jennings Opinion at 17 ("This expropriation is another aspect of the denial of justice."); Greenwood Opinion at 5 ("Although the Loewen claim also alleges an expropriation in violation of Article 1110, an award of damages, including an award of punitive damages, can amount to an expropriation only if the court proceedings are so flawed as to amount to a denial of justice."); Bilder Opinion at 30 ("In my opinion, this Article has little useful application to this case since, whatever may be the truth of the alleged wrongs of which Loewen complains,

[98](...continued)
due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.

they do not in my opinion fall within the usual meaning and understanding in international law of the terms 'nationalization or expropriation'.").

Moreover, we know of no case in any jurisdiction – and Loewen cites none – that has found an expropriation based upon the entry of a judgment for money damages in a civil suit.[99] It is axiomatic that, in any system of justice, courts are empowered to award one party damages that the other party must pay. But it simply cannot be that an expropriation occurs (and, thus, requires compensation under Article 1110)[100] when courts of NAFTA Party lawfully enter a judgment for money damages against an investor in a civil litigation. Loewen's Article 1110 claim is, at best, incidental to its primary claim and, standing alone, it is entirely unfounded.

b. Claimants Misconstrue The Scope Of Article 1110

Loewen also errs by suggesting that Article 1110 broadens the "settled international prohibition against uncompensated expropriation" so as to also "encompass measures 'tantamount to' an uncompensated expropriation." TLGI Mem. at 99-100. To the contrary, the

[99]Loewen's reliance on Oil Field of Texas v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986), and Walter Fletcher Smith (U.S.A.) v. Compañia Urbanizadora del Parque y Playa de Marianao (Cuba), 2 R.I.A.A. 915 (1929), is misplaced. In the first place, neither case concerned civil litigation between private parties. In Oil Field, the tribunal found an expropriation where the court of Ahwaz had ordered, without a hearing, respondent to cease payments for and retain equipment belonging to claimant. Oil Field at 318-19. In Smith, there was no finding of expropriation "accomplished through an unfair judicial proceeding," as Loewen suggests. TLGI Mem. at 102. The Smith case is distinguishable for several other reasons as well: (1) it concerned condemnation proceedings instituted by municipal "orders and decrees" and carried out by a mob (id. at 916); (2) the expropriation was undisputed (id.), (3) the arbitrator was asked only to render a decision regarding restoration and/or damages (id.); and (4) the arbitrator did not "reflect[] . . . upon the character of the courts of Cuba" (id. at 918).

[100]Under Article 1110, a Party's obligation to compensate arises as soon as an expropriation takes place. See NAFTA art. 1110(1) ("No party may directly or indirectly nationalize or expropriate an investment . . . except: [among other things]. . . (d) on payment of compensation in accordance with paragraphs 2 through 6.").

Parties to the NAFTA[101] and other Chapter Eleven tribunals[102] agree that the phrase "tantamount to" does not expand the protections of Article 1110 beyond those contemplated by the customary international law concepts of "direct" and "indirect" expropriation. That the three Parties unanimously agree on this point – and that their unanimous agreement has found acceptance by other tribunals – must be given considerable weight. Pursuant to applicable rules of international law governing treaty interpretation, the Tribunal must "take[] into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ." Vienna Convention on the Law of Treaties, art. 31(3)(b). Accordingly, Loewen's suggestion that the O'Keefe judgment could be "tantamount to" – "but not an indirect expropriation" – must fail.

In addition, Loewen misinterprets sub-paragraphs (a) through (d) in Article 1110(1). Sub-paragraphs (a) through (d) do not bear at all "on the question of whether any expropriation has occurred," as Loewen suggests. TLGI Mem. at 102. Rather, the criteria contained in sub-

[101] See, e.g., Pope & Talbot, Inc. (U.S.A.) v. Government of Canada, Interim Award at 31 ¶ 89 (June 26, 2000) (stating Canada's position as respondent in that case); Metalclad Corp. (U.S.A.) v. United Mexican States, Award at 11 ¶ 27 (Aug. 30, 2000) (stating the United States' position expressed in a submission made pursuant to Article 1128); see also Mexico's Application to Supreme Court of British Columbia to Review Arbitral Award in Metalclad Corp. v. United Mexican States (No. L002904) at 176 ¶¶ 578-89 (stating Mexico's identical position); Joseph de Pencier, Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven at 414-15 (noting the "tri-lateral position" among the NAFTA Parties that "'tantamount to' expropriation [does] not expand the established international law content of 'expropriation.'").

[102] See, e.g., Pope & Talbot, Interim Award at 34 ¶ 96 ("the Tribunal does not believe that the phrase 'measure tantamount to nationalization or expropriation' in Article 1110 broadens the ordinary concept of expropriation under international law"); S.D. Myers, Inc. (U.S.A.) v. Government of Canada, Partial Award at 70-71 (Nov. 13, 2000) ("[the] Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation', rather than to expand the internationally accepted scope of the term expropriation").

paragraphs (a) through (d) specify the parameters for when a State would not be liable under Article 1110. See NAFTA art. 1110(1) ("No Party may . . . expropriate . . . *except* . . . .") (emphasis added). In this regard as well, Loewen plainly misconstrues the meaning of Article 1110.[103]

c. Claimants Fail To Establish That The Mississippi Court Judgments At Issue Constitute An Indirect Expropriation

Claimants fail in any event to carry their burden of proving that the judgment for money damages entered in the O'Keefe case could have amounted to an indirect expropriation of Loewen's U.S. investments, including LGII, Riemann Holdings and Wright & Ferguson. The degree of interference with those enterprises, if any, that resulted from the O'Keefe judgment is plainly insufficient to support the conclusion that those investments have been effectively expropriated under Article 1110.[104]

For one thing, the United States questions how a civil judgment for money damages that was never enforced could constitute an expropriation in any sense. Loewen, notably, offers neither argument nor authority to support its novel assertion. For this reason alone, its Article 1110 claim fails.

[103]Moreover, the cases that Loewen cites in support of its interpretation (TLGI Mem. at 102) are inapposite. See, e.g., BP Exploration Co. v. Libyan Arab Republic, 53 I.L.R. 297, 313, 329 (1979) (where the sole arbitrator merely recognized that the "BP Nationalisation Law" – which unequivocally effected a "taking" of all of claimant's rights in an oil concession – *also* violated public international law for being discriminatory); Board of Editors, The Measures Taken by the Indonesian Government Against the Netherlands Enterprises, 5 Neth. Int'l L. Rev. 227, 242-43 (1958) (where the tribunal made two distinct findings: that a series of decrees had the effect of "taking over" the Netherlands enterprises and thus constituted a confiscation, and *also* that the measures were discriminatory).

[104]Because Claimants do not allege a direct expropriation, the United States does not – nor need the Tribunal – address the circumstances, if any, in which a court action, by itself, could be deemed to have effected a direct expropriation of an investment in violation of Article 1110.

Neither does Loewen offer any proof of actual interference with any investment that could constitute a taking. Instead, it asserts only that the judgment "constituted a substantial state interference" with its enterprises. TLGI Mem. at 103-04. In fact, the measures challenged by Claimants exhibit none of the traditional indicia of an indirect expropriation, including those present in the cases Loewen cites as examples of indirect expropriation. See, e.g., Starrett Housing Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 154-55 (1983) (appointment of manager rendered shareholder's rights useless); Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1984) (appointment of managers and cessation of all communication deprived foreign partner of interests); Sedco, Inc. v. National Iranian Oil Co., 9 Iran-U.S. Cl. Trib. Rep. 248, 277-79 (1985) (replacement of directors to manage routine affairs effected deprivation of shareholder interest); Payne v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 3, 7-8, 11 (1986) (appointment of directors, dismissal of managers and failure to report to or pay shareholders constituted taking); American Bell Int'l v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 170, 214 (1986) (denial of access to bank accounts without consent or justification constituted a taking)[105]; In re Jeno Hartmann, 8 Whiteman's Digest at 1011-12 (1958) (prohibitions on entry, use and alienation constituted expropriation of real property).[106]

[105]Moreover, in American Bell, the Iran-U.S. Claims Tribunal expressly noted that the interference with the claimant's bank account, though an expropriation on the facts as established, would have been justified had it been seized to settle an obligation owed to a creditor. 12 Iran-U.S. Cl. Trib. Rep. at 214 ("The only conceivable justification for the taking of the funds would have been the settlement of outstanding accounts with landlords and creditors of ABII.").

[106]Loewen incorrectly cites Foremost Tehran, Inc. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 228, 251 (1986) as a case where the Iran-U.S. Claims Tribunal found a taking (see TLGI Mem. at 100). That case specifically did not find an expropriation, noting instead that "[i]t is open to the Tribunal to make a similar finding in the present Cases to the extent that the level of interference (continued...)

In contrast to these cases, Loewen does not dispute that it remained in full control of LGII and its other investments in Mississippi after it settled the O'Keefe lawsuit. The Mississippi courts did not replace any of LGII's managers or directors, or interrupt payment of dividends to TLGI's shareholders. At no time did the courts oust Claimants from ownership or control of their investments.[107] Loewen simply has not shown that the Mississippi courts took any action that could constitute an indirect expropriation under international law.

In sum, Claimants' allegations under Article 1110 are nothing more than incidental to their primary claim. There is no support for Loewen's claim that a court's judgment for money damages in a private commercial litigation can constitute an indirect expropriation. The facts alleged here do not establish a violation of Article 1110.

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[106](...continued)
established here constitutes 'other measures affecting property rights' as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration, though it may not have risen to the level of an actual taking."

[107]In this regard, one of the cases Loewen cites is worth noting. In Eastman Kodak v. Iran, the Iran-U.S. Claims Tribunal rejected an indirect expropriation claim, in large part, because "the Claimant, as a majority shareholder, was able effectively to decide to liquidate and to declare [the investment] bankrupt at points in time significantly later than the occurrence of the events which the Claimant contends caused the loss of its shareholding interest." 17 Iran-U.S. Cl. Trib. Rep. 153, 169 (1987) (emphasis added). Here, Loewen made a business decision not to seek protection under Chapter 11 of U.S. Bankruptcy Code for itself and for its investment (LGII) and cannot now seek relief from this Tribunal on the unfounded ground that it was effectively deprived of its control of the very same investment.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in submissions of the United States on matters of jurisdiction and competence, the claim for arbitration in this matter should be dismissed in its entirety.

Respectfully submitted,

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