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Loewen Group Submission  
5-26-2000

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

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**SUBMISSION OF  
THE LOEWEN GROUP, INC.  
CONCERNING THE  
JURISDICTIONAL OBJECTIONS  
OF THE UNITED STATES**

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## I. INTRODUCTION

1. The United States advances two central objections to the Tribunal's jurisdiction: (1) the actions of the Mississippi courts were not NAFTA "measures," and (2) NAFTA required Loewen to exhaust local remedies and obtain a "final" judgment before seeking arbitration.

Neither objection has merit.

2. When the United States signed and implemented NAFTA, it stated that the chapter on investment protection, Chapter 11, applied to "all governmental measures."<sup>1</sup> That statement was correct, for the NAFTA term "measure" includes judicial acts, as the text of NAFTA, its context, and international law all make clear. To oppose jurisdiction here, the United States now seeks to repudiate its past statements, narrow the scope of NAFTA retroactively, and renege on its commitments to treat Canadian investors equitably.

3. NAFTA does not require exhaustion of local remedies or "final" judicial decisions. Instead, like most bilateral investment treaties, NAFTA *expressly* provides that a party seeking Chapter 11 arbitration must *waive*, not pursue, its local remedies. NAFTA thus dispenses with the traditional exhaustion requirement, and this Tribunal cannot revive it through some "juridical miracle of resurrection." (Second Opinion of Sir Robert Jennings ("Jennings Op.") ¶ 38 (Tab A).)

4. Because the United States waived the exhaustion requirement in agreeing to NAFTA, Loewen was under no obligation to pursue any of the theoretically available local remedies to a final judgment. NAFTA did not require Loewen to seek relief from a lower U.S. federal court, nor to file a petition for *certiorari* with the U.S. Supreme Court, nor to file for bankruptcy. Consequently, most of the U.S. Memorial, which argues that a federal remedy was

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<sup>1</sup> U.S. Statement of Administrative Action, at 128, *reprinted in North American Free Trade Agreements*, Treaty Materials, Vol. 1, booklet 8 (Hoblein & Musch, eds. 1994) (emphasis added).

not impossible and that bankruptcy is actually quite an attractive business strategy, is legally immaterial.

5. Moreover, even if there were an exhaustion requirement, that requirement would be limited to remedies that were effective. In 1996, Loewen had no effective recourse to the federal courts, and bankruptcy, even assuming it can ever be characterized as a "remedy," clearly would have been disastrous for Loewen in 1996.

6. Before proceeding to a refutation of the United States' objections to the jurisdiction and competence of this Tribunal, Loewen must make two additional points. First, the government's February 18, 2000 Memorial contains numerous factual assertions that are largely irrelevant to its jurisdictional submission. Nonetheless, the cited "evidence" — which consists primarily of newspaper articles and other publications — actually supports Loewen's case by demonstrating, for example, that the Mississippi jury sought by its verdicts to "destroy" Loewen, which it viewed as a "foreign parasite." Loewen's complete response to these "factual" assertions is set forth in Addendum A.

7. Second, the Tribunal should not be misled by the United States' efforts to discredit Loewen's settlement of the *O'Keefe* litigation by invoking events that began well after that settlement was reached — in particular, what the United States characterizes as Loewen's "overly aggressive" acquisition program. Although the United States repeatedly suggests that this program was in place prior to the *O'Keefe* case, this accelerated acquisition program was actually caused by an attempted hostile takeover that itself was caused by the *O'Keefe* verdict and subsequent coerced settlement. Loewen's responses to this and other misstatements relevant to the bankruptcy issue are set forth in Addendum B.

## II. JUDICIAL ACTS IN LITIGATION BETWEEN PRIVATE PARTIES ARE "MEASURES" REGULATED BY NAFTA

8. In its Memorial, Loewen demonstrated that the "measures" regulated by NAFTA include judicial acts as well as legislative, executive, and administrative acts. Loewen showed that this conclusion is compelled by the text, structure, purpose, and negotiating history of NAFTA; by the background international-law principles against which NAFTA was enacted; and by the controlling interpretive principles set forth in the Vienna Convention.

9. At the outset of its argument, the United States concedes that judicial acts, like legislative, executive, and administrative acts, can constitute "measures" regulated by NAFTA. (U.S. Mem. at 29 n.21.) At the same time, the United States attempts to distinguish judicial acts in litigation "initiated by a government entity," where it concedes that any judgment would constitute a NAFTA "measure," from judicial acts in what it characterizes as "purely private" litigation (*i.e.*, litigation in which the plaintiff and defendant are private entities), where it contends that any order or judgment would not constitute a NAFTA "measure." (*Id.*)<sup>2</sup>

10. Throughout its ensuing analysis, the United States proceeds to ignore its concession and purported distinction. The United States advances various arguments for the proposition that judicial acts are not "measures" under NAFTA, thus attacking its own

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<sup>2</sup> The United States draws this purported distinction as follows:

We do not contend that a domestic court judgment resulting from an action initiated by a government entity, or from an action in which such an entity is otherwise involved, cannot be a measure under NAFTA Chapter 11. When such an entity is involved in a domestic court proceeding, it may, in appropriate circumstances, be that the resulting court judgment constitutes a "measure adopted or maintained by a Party." The *O'Keefe* litigation, however, was a purely private dispute and did not involve government action of any kind other than the partial adjudication of the parties' claims by the Mississippi court system.

(U.S. Mem. at 29 n.21.)

concession that judicial acts *are* NAFTA “measures,” at least in cases initiated by the government. On the other hand, the United States cites no treaty provision, adjudicatory decision, or secondary source that would distinguish, for purposes of construing a “measure” or other state action requirement, between judicial acts in litigation where the government is a party and judicial acts in litigation between private parties.

11. Loewen responds to the United States in two parts. First, it demonstrates once again that judicial acts are “measures” regulated by NAFTA. On this point, the United States was correct to concede that judicial acts are NAFTA “measures,” but incorrect to then attack its own concession. Second, it demonstrates that there is absolutely no basis for distinguishing among judicial acts depending on whether or not the government is a party to the litigation. On this point, the relevant authority is even more overwhelming, and it speaks volumes that the United States could not locate even a single authority to support its unprecedented contention.<sup>3</sup>

**A. Judicial Acts Are NAFTA Measures**

12. Barely two weeks after Loewen filed its Memorial, an ICSID tribunal rendered its decision in “the first dispute brought by an investor under NAFTA to be resolved by an award on the merits.” *Azinian v. United Mexican States*, Case No. ARB(AF)/97-2, in 14 Foreign Investment L.J., 538 (Fall 1999). *Azinian* involved a challenge to decisions by the Mexican courts upholding the annulment of a contract. *See id.* at 543-44, 564. The disappointed American contractor filed a claim under Chapter 11 of NAFTA, arguing that these decisions violated Articles 1105 and 1110, two of the NAFTA provisions directly at issue here. *See id.* at 566.

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<sup>3</sup> Indeed, the United States was reduced to quoting anonymous sources in the New York Times to support its position. (U.S. Mem. at 41.)

13. Although the tribunal rejected the claim *on the merits*, it left no doubt that NAFTA signatories are responsible for the acts of their courts. *See, e.g., id.* at 567 (“[I]n the present century State responsibility for acts of judicial organs came to be recognized. While independent of the Government, the judiciary is not independent of the State: *the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.*” (emphasis in original)); *id.* at 568 (“*What must be shown [under Chapter 11] is that the court decision itself constitutes a violation of the treaty.*” (emphasis in original)).

14. The Tribunal examined whether “the Mexican court decisions [could be] characterized as violations of NAFTA,” whether the Mexican courts “administer[ed] justice in a seriously inadequate way,” or whether there was a “clear and malicious misapplication of the law.” *Id.* at 568. The Tribunal concluded that the evidence was “sufficient to dispel any shadow over the *bona fides* of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.” *Id.* at 569. While the *Azinian* tribunal did not explicitly interpret the scope of “measures,” it left no doubt, in a unanimous decision, that municipal court decisions that violate international law are actionable under NAFTA Chapter 11.<sup>4</sup> This tribunal should follow the *Azinian* precedent.

15. Article 201 of NAFTA provides that the term “measure,” as used in NAFTA, “includes any law, regulation, procedure, requirement, or practice.” As Loewen has explained, the words “law,” “procedure,” “requirement,” and “practice” are more than broad enough to encompass the judicial acts at issue here. (Loewen Mem. at 138-39.) The United States offers virtually no response to this analysis. It does not dispute that “law” encompasses common-law

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<sup>4</sup> The *Azinian* tribunal did not distinguish between cases involving private parties and cases involving the government as a party.



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decisions as well as positive-law enactments. It does not dispute that “practice” includes repeated judicial actions as well as repeated executive or administrative actions.<sup>5</sup> It does not seriously dispute that the *O’Keefe* judgment imposed a “requirement” that Loewen pay O’Keefe \$500 million, or that the Mississippi courts imposed a “requirement” that Loewen post a \$625 million bond in order to appeal that judgment without suffering execution.<sup>6</sup> Finally, the United States briefly and erroneously contends that the word “procedure” should be restricted to “rules of procedure” promulgated by legislative bodies. (U.S. Mem. at 45.) There is no textual or linguistic support for that restriction, for judges (and arbitrators) routinely establish “procedure” to govern the conduct of individual cases. (See, e.g., Letter from M. Stevens to Claimants of Apr. 3, 2000 (imposing “written *procedure* on the objections to jurisdiction” (emphasis added)).)

16. The United States provides no support for its assertion (U.S. Mem. at 39) that the word “measures” is a “limiting phrase.” On its face, Article 201 merely states that a measure “includes” the various terms addressed above. Given the breadth of the enumerated terms, the expressly non-exhaustive list of what “measure includes,” and the repeated use of “measure” to

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<sup>5</sup> In particular, the United States does not dispute Loewen’s contention that the *O’Keefe* verdict was issued pursuant to a *practice* of excessive verdicts maintained through the judicial systems of its constituent states.

<sup>6</sup> The United States’ sole argument with respect to the term “requirement” is its assertion that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), did not construe that word to encompass tort liability as applied in particular cases. (U.S. Mem. at 45-46.) On its face, *Cipollone* held that the term “sweeps broadly and suggests no distinction between positive enactments and common law.” 505 U.S. at 521 (four-Justice plurality); see *id.* at 548-49 (two-Justice concurrence specifically agreeing). See also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (concurring opinion) (“One can reasonably read the word ‘requirement’ as including the legal requirements that grow out of the application, in particular circumstances, of a State’s tort law.”). In any event, regardless of what *Cipollone* actually held, the United States’ purported distinction between “a common-law right of action for damages” (which it concedes to impose a “requirement”) and “court judgments in such cases” (which it contends do not impose any “requirement”) simply makes no sense. By definition, common-law claims or liability can arise only in the context of individual cases adjudicated by the judiciary.

identify subject-matters addressed by NAFTA (*e.g.*, foreign investment), the term plainly operates as a shorthand reference for the various possible modes of party action (legislative, executive, administrative, or judicial) within the covered areas.

17. The United States errs in contending (U.S. Mem. at 30) that judicial acts are not “measures” under NAFTA because dictionaries define “measure” to encompass legislative enactments. That argument does not address the broad definition of “measure” specifically set forth in Article 201. In any event, the United States’ highly selective quotation simply ignores the many dictionary definitions that are inconsistent with its assertions. For example, although the United States notes that one “*specif.*” (*i.e.*, specific) meaning of the word “measure” is “a proposed legislative act,” *see Webster’s Third New International Dictionary* at 1400 (1986) (middle of definition 8), it crops that phrase from a single definition confirming that the word “measure” *also* extends more broadly to “an action planned or taken towards the accomplishment of a purpose” or a “means to an end,” *see id.* (beginning of definition 8). *Compare also, e.g., IX Oxford English Dictionary* at 528 (2d ed. 1989) (definition 22) (“*spec.*” definition: “[a] legislative enactment proposed or adopted”) *with id.* (definition 21) (“[a] plan or course of action intended to attain some object”). Other dictionary definitions of “measure” include actions that judges can undertake *and legislatures cannot*. *See, e.g., id.* (definition 15) (“[t]reatment (of a certain kind) ‘meted out’ to a person, esp. by way of punishment”). Indeed, this definition accounts for what is probably the single most famous usage of the word “measure” in the English language: “He professes to have received no sinister measure *from his Judge.*” W. Shakespeare, *Measure for Measure*, Act III, scene 2, line 257 (1603) (emphasis added). The United States cites nothing even remotely suggesting that the word “measure,” as defined either in the dictionary or in NAFTA, excludes judicial acts.

18. The United States further errs in its repeated contention (U.S. Mem. at 32-33, 38-39) that the phrase "adopted or maintained" excludes judicial acts from the definition of "measures." These terms are plainly consistent. In ordinary parlance, for example, the trial court "adopted" the *O'Keefe* verdict by entering it as a judgment, and the court "maintained" the judgment in denying Loewen's motion for post-trial relief. Moreover, under Mississippi law generally, judgments are *maintained* in a formal state record entitled "The Judgment Roll." See Miss. Code Ann. § 11-7-189(1) (1999).

19. The United States contends that the definition of "measure" in NAFTA excludes judicial acts because Canada, in certain treaties signed more than two decades before NAFTA, used the terminology of "legislative or administrative measures." (U.S. Mem. at 30-31.) But the drafters' need to specify "legislative or administrative measures" in those other treaties only confirms that the word "measures" is *not* limited by its own definition to legislative or administrative action: if the word "measures" is already limited to "legislative or administrative" action, as the United States suggests, there would have been no need for the drafters of these other treaties to use "legislative or administrative" to modify "measures"; it would be mere surplusage. More fundamentally, the United States' argument about selected other treaties ignores the broad definition of "measure," *as used in NAFTA*, officially embraced by the NAFTA signatories. See, e.g., Canadian Statement of Implementation at 12, *reprinted in North American Free Trade Agreement*, Treaty Materials, Vol. 2, booklet 12A (Hoblein & Musch, eds. 1994) ("The term 'measure' is a *non-exhaustive definition* of the ways in which governments impose discipline in their respective jurisdictions." (emphasis added)); U.S. Statement of Administrative Action, at 128 (Chapter 11 "applies to *all governmental measures* relating to investment" (emphasis added)). It also ignores the broad definition of "measure" contained in the bilateral

investment treaties that are the direct antecedents of NAFTA. *See, e.g., K. Vandeveld, United States Investment Treaties*, app C at 166 (Kluwer 1992) (reprinting BIT transmittal letter)

(providing treaty coverage for “essentially ‘any measure’ *regardless of form*, which has the effect of depriving an investor” of his property rights (emphasis added)).

20. Chapter 17 of NAFTA confirms that the term “procedure” encompasses all types of judicial acts, from evidentiary orders to final judgments. That chapter requires each signatory Party to provide specified “civil judicial procedures” for the enforcement of covered intellectual property rights. Art. 1715(1). These “judicial procedures” include a requirement that “judicial authorities” have the power to (a) order the production of evidence, (b) make “preliminary and final determinations,” (c) order a litigant “to desist from an infringement,” (d) order an infringer “to pay the right holder damages,” (e) order the infringer to pay costs and attorneys’ fees, and (f) order a litigant “at whose request measures were taken and who has abused enforcement procedures to provide adequate compensation to any party wrongfully enjoined or restrained in the proceeding.” Article 1715(2).

21. Chapter 17 also confirms directly (even apart from its repeated reference to judicial acts as “procedures”) that judicial acts are “measures” under NAFTA. The purpose of Chapter 17 is to protect and enforce intellectual property rights “while ensuring that *measures to enforce* intellectual property rights do not themselves become barriers to legitimate trade.” Art. 1701(1) (emphasis added). These enforcement “measures” obviously include the various “judicial procedures” set forth in Article 1715. Article 1715(2)(f) also authorizes a judge to order a litigant “at whose request *measures* were taken and who has abused enforcement procedures to provide adequate compensation to any party wrongfully enjoined or restrained in the proceeding.” On its face, that provision makes clear that judicial acts, including injunctions

and other "enforcement procedures," are "measures." Furthermore, Article 1715(6) expressly refers to the "judicial procedures" set forth in Article 1715 as "remedial measures":

In respect of the administration of any law pertaining to the protection or *enforcement* of intellectual property rights, each Party shall only exempt both public authorities and officials from liability to appropriate *remedial measures* where actions are taken or intended in good faith in the course of the administration of such laws. (Emphasis added.)

Finally, Article 1716 states explicitly: "Each Party shall provide that its *judicial* authorities shall have the authority to order prompt and effective provisional *measures*" to prevent infringement until a permanent "remedial measure" can be issued under Article 1715 (emphasis added).<sup>7</sup>

22. The United States' sole response on this point is the assertion that, even though provisional judicial acts admittedly constitute "provisional measures," final judicial acts do *not* constitute "measures." (U.S. Mem. at 35-38.) Not surprisingly, the United States cites no support for that bizarre contention. Moreover, even apart from its facial implausibility, that contention simply ignores the repeated references in Chapter 17 to provisional *and final* judicial acts as both "measures" and "procedures."

23. Chapter 10 of NAFTA further confirms that final judicial decisions are "measures." It applies to "measures adopted or maintained by a Party relating to [government] procurement." Art. 1001(1). Through an addendum titled "Publications for *Measures* in Accordance with Article 1019," it requires each Party to publish reports of "Precedential decisions" of the "U.S. Supreme Court;" "Circuit Court of Appeals" [sic]; and "District Courts." See Annex 1010.1(B), Schedule of United States, ¶ 2 (emphasis added). The annex further states: "All U.S. laws, regulations, *judicial decisions*, administrative rulings and procedures

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<sup>7</sup> As we have previously explained (Loewen Mem. 145), NAFTA reinforces this point by incorporating procedural rules that expressly recognize the "judicial" authority to issue "provisional" measures.

regarding government procurement covered by this Chapter are codified in [various publications].” *Id.* ¶ 3 (emphasis added).

24. Permitting review of judicial acts also would further the basic purposes of NAFTA: to codify principles of international law that are undisputedly applicable to judicial acts (*see* U.S. Mem. at 48); to make those principles enforceable through private arbitral rights of action in favor of foreign investors (Arts. 1116 & 1117); and thereby to “increase substantially investment opportunities in the territories of the Parties” (Art. 102(1)(c)). Nothing in this regime even remotely suggests a blanket immunity for judicial acts.

25. The United States’ assertion that NAFTA did not contemplate an international tribunal acting “as an appeals court for domestic judicial decisions” (U.S. Mem. at 40) is entirely beside the point. This arbitration is not an appeal: Loewen cannot secure reversal or vacatur of the *O’Keefe* judgment, and the success of its claim depends on showing not that the Mississippi courts misapplied *domestic* law, but that they violated the *international* law principles codified in Chapter 11. *See, e.g., Azinian, supra*, 14 ICSID Rev. Foreign Inv. L.J. at 566-68. (*See also* Jennings Op. ¶¶ 20-25.) If Loewen can sustain that burden (the extent of which is not at issue in this jurisdictional hearing), then recovery is consistent with NAFTA’s spirit as well as its text.

26. Even prior to *Azinian*, numerous international decisions had construed the term “measure” to include judicial acts. (Loewen Mem. 143-45.) These decisions reinforce the broad NAFTA definition of “measure” because NAFTA provides for its provisions to be construed “in accordance with applicable rules of international law.” Art. 102(2). In attempting to distinguish these decisions (U.S. Mem. at 46-48), the United States simply ignores their operative holdings and analysis. In *Regina v. Pierre Bouchereau*, Case 30-77, 1977 ECJ CELEX LEXIS 1448 (Oct.

27, 1997), the European Court of Justice framed the question presented as “[w]hether a judicial decision can constitute a ‘measure’” *id.* at \*7, rejected the UK’s argument that “measure” excludes “actions of the judiciary,” *id.* at \*11, and held instead that “a ‘measure’ is any action which affects the rights of persons coming within the field of application” of the relevant treaty provision. *Id.* In the *Fisheries Jurisdiction Case (Spain v. Canada)*, No. 96 (I.C.J. 4 December 1998), the International Court of Justice stated that “in its ordinary sense the word [‘measure’] is wide enough to cover *any act, step or proceeding*, and imposes no particular limit on their material content or on the aim pursued thereby. *Id.* ¶ 66 (emphasis added). And in *Oil Fields of Texas, Inc. v. NIOC*, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986), the Iran-U.S. Claims Tribunal held that the judicial acts at issue constituted “expropriations,” *id.* at 318-19, under a treaty provision restricted to “expropriations *or other measures* affecting property rights.” Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), Art. 2 (1) (emphasis added). Despite the United States’ suggestion to the contrary (U.S. Mem. at 48 n.28), that holding on its face brought the judicial acts at issue within the category of “measures affecting property rights.”

27. Sir Robert Jennings has explained the significance of these precedents for this arbitration:

These cases are indeed the key to the proper resolving of this problem. In all the cases cited, the court rejected any *a priori* solution of the “measures” problem, and insisted instead on examining the actual juridical context in which the term has been used *in that particular case*. The United States Government and governmental action are involved in the present case because the United States is a Party to the international treaty in which the term “measures” features. It is involved because the purpose of the Agreement, and especially of chapter 11, is to provide a remedy for investors of another Party to resort to arbitration by an impartial

tribunal, which is to apply as the proper law the terms of the Agreement and relevant international law. It is involved because the treaty makes the United States responsible for the actions of its member states. And surely the judgment of a court constituted by the State of Mississippi and administered through its government is an action attributable to that state, not merely to some private party (it is not as though an elected judge, presiding in a government courtroom with jurors culled from the community under the authority of the state, whose judgments are enforced with the power of the state, is akin to a mere private dispute resolution mechanism). It is surely evident that protection of investors of another Party must include protection against a punitive judicial award of damages that is alleged to have been in ludicrous disproportion both to the actual damage and to the importance of the case.

(Jennings Op. ¶ 18.)

28. International treaties also routinely include judicial acts within the definition of “measure.” For example, one International Law Commission (“ILC”) report states that restitution is “intended to bring about the revocation of the legislative, executive *or* judicial measure held to be contrary to international law.” F.V. Garcia-Amador, *Sixth Report to the ILC on State Responsibility in 1961 II Y.B. Int’l L. Comm’n* 1, 16 (emphasis added). Similarly, the ILC’s Revised Draft Articles on State responsibility, in a series of articles entitled “*Measures Affecting Acquired Rights*,” includes a provision imposing State responsibility for breach of contract “if there is imputable to the State a ‘denial of justice’ within the meaning of article 3 of this draft.” *Id.* at 47.

29. Finally, the United States attempts to fall back on the alleged interpretive “canon” that “treaties are to be interpreted in deference to the sovereignty of states.” (U.S. Mem. at 41-42.) It is far from clear whether this supposed “canon” ever existed. As one eminent scholar explained decades ago:

The principle of restrictive interpretation of contractual obligations is not a general principle of jurisprudence. . . . In the matter of



treaties it has received no substantial support either from international tribunals in general or from the International Court in particular. It has been discouraged as a matter of both practice and principle. Such occasional endorsement as it has received has been purely nominal.

H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int'l L. 48, 84 (1949); accord, e.g., *United States v. Iran*, Case A17, 8 Iran-U.S. Cl. Trib. Rep. 189, 207-08 (1985) (Concurring Opinion of Charles N. Brower, joined by Howard M. Holtzmann) (restrictive interpretation doctrine was "never universally favored"); *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, 62 (Advisory Op. of Apr. 26) (Separate Opinion of Judge Shahabuddeen) ("Arbitral jurisprudence . . . rejects the proposition that 'insofar as treaties of arbitration constitute conferrals of jurisdiction upon international authority, they are to be restrictively construed'"). (See also Jennings Op. ¶ 28 ("doctrine of restrictive interpretation" is "offset by the at least as plausible principle of 'effectiveness,' i.e. that the interpretation of a treaty should be one that gives full effectiveness to the object and intention of the treaty".))

30. Indeed, for every authority urging the principle of "restrictive interpretation," there are several adopting and applying the opposite interpretive principle that treaties should be construed broadly and equitably. See, e.g., Friedmann, *The Changing Structure of International Law* 197-98 (1964) ("Probably the most widely used and cited 'principle' of international law is the principle of general equity in the interpretation of legal documents and relations."), in 14 Whiteman, *Digest of Int'l Law* § 33, at 366; 5 Hackworth, *Digest of Int'l Law* § 493, at 223 (1943) ("where treaties are open to two constructions, one restricting the rights which may be claimed under it and the other enlarging those rights, the more liberal interpretation is to be

preferred"); 5 Moore, *Digest of Int'l Law* § 763, at 251 (1906) (Statement of U.S. Secretary of State) ("In doubtful cases that construction is to be adopted which will work the least injustice — which will put the contract on the foundation of justice and equity rather than of inequality."); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) ("When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred."); *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933) ("In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided . . . . [T]heir obligations should be liberally construed . . .").

31. In any event, the Vienna Convention plainly eliminated whatever canon of "restrictive interpretation" might previously have existed. In 1968, Hungary proposed inserting into the Vienna Convention a provision that, where a treaty is otherwise ambiguous, "a restrictive interpretation shall be applied in view of the principle of State sovereignty." United Nations General Assembly Document A/CONF.39/6/Add. 2 (March 23, 1968), at 5. That proposal was *rejected*. As Judge Torres Bernardez has explained:

Old theories about the so-called 'restrictive' interpretation of conventional instruments providing for the jurisdiction of international courts and tribunals do not correspond to present rules of treaty interpretation. They were consciously left out of those rules when the latter were codified by the Vienna Convention. No longer does restrictiveness in treaty interpretation govern *a priori* in any way the act of treaty interpretation of such kinds of conventional instrument.

*Case Concerning the Land, Island and Maritime Frontier Dispute* (El Sal. - Hond.: Nicar. Intervening), 1992 I.C.J. 351, 728-29 (Judgment of Sept. 11) (Separate Opinion); *see also* C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* 265 (1998) ("Proper application of the principles embodied in [the Vienna Convention] should uniformly dispense with a principle popular in an earlier era, namely that of 'restrictive interpretation.'"); *id.* at 265-66 (Vienna Convention "instructs interpreters to consider the ordinary meaning of treaty language

without any interpretive bias"). This consideration alone should be dispositive, for even the United States concedes (U.S. Mem. at 28-29) that the Vienna Convention "is the primary guide to interpreting terms found in the NAFTA."

32. In *AMCO Asia Corp. v. Republic of Indonesia*, 1 ICSID Reports 377 (1983), an ICSID tribunal rejected what it described as "the alleged principle of restrictive interpretation of limitations of sovereignty." *Id.* at 397. Like this case, *AMCO* involved a dispute over the scope of an agreement to arbitrate (there, between a private party and Indonesia). Like the United States here, Indonesia argued that "[t]he consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty is to be construed restrictively." *Id.* at 393. The tribunal disagreed emphatically:

[L]ike any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, *broadly or liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.

*Id.* at 397, 394 (emphasis in original).

33. The United States itself concedes that any "restrictive interpretation" principle would "not apply in a 'State-to-State' context." (U.S. Mem. at 41 n.24.) That concession controls this case because NAFTA is an agreement *among States*, and Canadian citizens are among the intended beneficiaries of that agreement. *See* Canadian Statement on Implementation, *supra*, at 2 (Canada decided to implement NAFTA in part because of "the critical role played by agreed rules and procedures in securing equal opportunities *for Canadians* in a world of much larger and more powerful trading entities" (emphasis added)). Moreover, there is only one NAFTA document, and it makes no sense that this document would bear one meaning in the

context of an interpretive dispute between two Parties and another in the context of an identical interpretive dispute between one Party and an investor of another. Unlike the arbitration agreement at issue in *AMCO* (where the “restrictive interpretation” principle was rejected in any event), this case involves a state-to-state agreement, a context in which the “restrictive interpretation” principle is even more clearly inappropriate.

**B. There Is No Exception For Judicial Acts In Private-Party Litigation**

34. The United States provides even less support for its alternative theory that judicial acts are “measures” if a governmental entity is involved in the litigation, but are not “measures” in what the government describes as “purely private” litigation. As explained above, Article 201 provides that “measure includes any law, regulation, procedure, requirement, or practice.” Nothing in that definition even remotely suggests that, in the context of judicial acts, the existence of a “measure” turns on the identity of the litigants.

35. As Sir Robert Jennings has explained, “[t]he United States has seemingly found it necessary in effect to invent a novel and distinct category of what it calls ‘purely private disputes’ into which of course it places the Mississippi decision.” (Jennings Op. ¶ 12.) Sir Robert further explains the textual impossibility of the United States’ position:

So the position now is that the United States wholly agrees with the [claimants’] view that a domestic court proceeding can be a “measure,” in the sense in which that word is used in Chapter 11 of the NAFTA, provided that governmental action is at some point “sufficiently involved.” But, one must ask, where is the textual support in the NAFTA for this reading? Where is the textual authority in the agreement for the proposition that “measures adopted or maintained by a Party” includes *some* domestic court judgments but not others? Where in the agreement is one to find that dividing line between domestic court judgments that are “measures” and those that are not? Particularly in view of the broad, general language of the NAFTA defining “measures,” the United States would have to point to some extraordinarily specific language in the agreement that fences out the specific category of

domestic court judgments in “purely private disputes” (as the United States defines them) from the general category of “measures,” which even the United States concedes admits of including domestic court judgments. The answer is that there is none.

(*Id.* ¶ 16.)

36. Chapter 17 affirmatively forecloses the United States’ position. As explained above, that chapter repeatedly describes judicial acts as “measures” and “procedures” — without distinguishing between litigation initiated by the government and litigation between private parties. Moreover, it does so in the context of intellectual property infringement litigation, which typically involves private-party disputes.

37. Chapter 10 likewise forecloses the United States’ position. Chapter 10 requires the publication of “measures” including *all* “precedential decisions” — regardless of the identity of the litigating parties.

38. Even outside the context of NAFTA itself, the United States has failed to cite a single treaty provision, international decision, domestic decision, or secondary source construing a Party “measure” or other state action requirement to apply to judicial acts in litigation commenced by the government, but not to apply to judicial acts in private-party litigation.

39. The United States’ position is oxymoronic. Judicial action itself obviously constitutes state or Party action regardless of the identity of the litigants. Moreover, all judicial judgments are subject to enforcement through the full coercive power of the state executive branch, regardless of the identity of the litigants.

40. The United States’ position is inconsistent even with domestic state action doctrine. Legions of cases hold that jury verdicts and judicial judgments in private-party litigation constitute “state action” for federal constitutional purposes. *See, e.g., BMW of North*

*America, Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996) (punitive damages award) (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (tort liability) (“The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised”); cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“regulation can be as effectively exerted through an award of damages as through some form of preventive relief”). Indeed, the existence of coercive governmental power so permeates judicial proceedings that *even a private party* can become a state actor with respect to its litigation tactics, see, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (use of peremptory strikes in private-party litigation), and the means through which it seeks enforcement of a judgment, see, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (attachment of property in private-party litigation). Professor Days readily acknowledges this point. (Days Statement at 34-35 (“state action” is “satisfied where a private party uses state machinery to enforce a judgment”).) The United States’ characterization of the *O’Keefe* litigation as a “purely private dispute” that “did not involve government action” of any significance (U.S. Mem. at 29 n.21) is simply not sustainable.

41. The Vienna Convention requires this Tribunal to interpret NAFTA in light of “[a]ny relevant rules of international law applicable to the relations between the parties.” Art. 31(3)(c). These provisions are based on longstanding principles that treaties should be interpreted to be consistent with international law:

It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognised principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the

consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States.

I Lauterpacht, *Oppenheim's Int'l Law* 952-53 (8th ed., 1955), reprinted in 14 M. Whiteman, *Digest of Int'l Law* 385 (1970).

42. The rule of international law most relevant here is the responsibility of states for derelictions of their municipal courts, a responsibility the United States accepts. While it is true that such state responsibility is different in concept from the definition of "measure," both NAFTA and the Vienna Convention require this Tribunal to look to — and be guided by — the general rule of state responsibility when interpreting the NAFTA term "measure." This Tribunal's interpretation of "measure" can only be consistent with international law if it includes all judicial acts for which a State is responsible under international law, including judicial decisions in "private" lawsuits.

43. For all the above reasons, the Tribunal should interpret "measure" to include all judicial acts.

**III. BECAUSE NAFTA EXPRESSLY WAIVES THE REQUIREMENT TO EXHAUST LOCAL REMEDIES, THERE IS NO REQUIREMENT THAT A JUDICIAL ACT BE "FINAL"**

44. The United States' extended argument that international law required Loewen to obtain a "final" judgment in order to pursue its NAFTA claim (U.S. Mem. 49-56) is a thinly-disguised argument for application of the traditional requirement that an international claimant must exhaust local remedies. But NAFTA requires an arbitral claimant to *wave* its local remedies, not *exhaust* them. In relevant part, Article 1121 provides that a Chapter 11 claim can be filed only if:

the investor and . . . the enterprise, *wave their right to initiate or continue* before any administrative tribunal or court under the law

of any Party, or other dispute settlement procedures, *any proceedings* with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 . . .

Article 1121(1)(b) (emphasis added). Article 1121 thus expressly “eliminates the necessity to exhaust local remedies provided by the host country’s administrative or judicial courts.” B. Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Hous. J. Int’l L. 565, 574 (1997).<sup>8</sup>

45. In the face of this express exhaustion waiver, the United States attempts to create a purportedly distinct “substantive” principle of “finality,” under which judicial actions by lower-court judges could not qualify as a denial of justice or a breach of international law. However, NAFTA does not recognize this purported “finality” exception, and international tribunals have often reviewed the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable. For example, in *G.W. McNear, Inc. v. United Mexican States* (United States v. Mexico), Docket No. 211, *Opinions of the Commissioners* 68 (1928), the claimant alleged a Mexican court had improperly seized his property. Instead of pursuing his local remedies, he filed an international claim. Given an applicable exhaustion waiver,<sup>9</sup> the Claims Commission had no trouble reviewing his international claim on the merits:

Mexico must be responsible under international law, notwithstanding that possibly McNear might have had his right recognized, if he had brought a formal action before the Court.

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<sup>8</sup> It is beyond dispute that States may by treaty agree to dispense with the exhaustion requirement. “Obviously, where [an international instrument] expressly dispenses with the rule, the international tribunal’s jurisdiction can not be affected by a plea that local remedies have not been exhausted.” A. Freeman, *Denial of Justice* 435 (1970); see also E. Borchard, *Diplomatic Protection of Citizens Abroad* 819, 825 (1916).

<sup>9</sup> See 5 G. Hackworth, *Digest of Int’l Law* 525 (1943) (noting that “Article 5 of the Claims Convention of September 8th, 1923, between the United States and Mexico, dispense[s] with the rule that local remedies must first be exhausted before a claim can be brought before the tribunal”).



*Id.* at 71 (emphasis added). The concurring opinion added:

And whatever legal remedies, if any, may have been open to him against wrongful seizure or detention or both, that point has been eliminated by Article V of the Convention of September 8, 1923.

*Id.* at 72. See also *The Texas Company Claim*, Decision 32-B, American-Mexican Cl. Rep. 142 (1948) (Mexican court action did not bar arbitration claim because treaty waived exhaustion); *Bronner v. Mexico* (1874), 3 *Moore's Int'l Arbitrations* 3134, 3135 (1898) (umpire decided the case based on judicial acts; no evidence that the judicial decision was appealed to Mexico's highest court); *Case of Young, Smith & Co.* (1879), 3 *Moore's Int'l Arbitrations* 3147, 3148 (1898) (where decision of captain-general of Cuba was not appealed, and international commission had jurisdiction over denials of justice, there was no need to exhaust).

46. The United States cites no authority to support the existence of a "substantive" finality requirement independent of the concededly waived exhaustion requirement. The United States concedes that "much" of its analysis "developed in the espousal context, where the exhaustion of local remedies is a procedural prerequisite for presentation of a claim." (U.S. Mem. at 50-51.) Moreover, to the extent its sources use phrases such as the "highest court," they do so merely as linguistic expressions that describe the customary rule of exhaustion. For example, the United States selectively quotes one treatise for the proposition that "[i]t is a fundamental principle that [with respect to acts of the judiciary] . . . only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state." (U.S. Mem. at 49, quoting Borchard's *The Diplomatic Protection of Citizens Abroad* 198 (1915) (all alterations by U.S.)) In fact, the full text of the treatise reads quite differently:

It is a fundamental principle that the acts of inferior judges or courts do not render the state internationally liable *when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise*, for only the highest court to which a

case is appealable may be considered an authority involving the responsibility of the state.

(Emphasis added). On its face, the Borchard treatise equates the purported "finality" principle to the customary exhaustion requirement.

47. The *Interhandel* case, also cited by the United States, confirms that the doctrines are identical. There, the United States sought dismissal of an international claim on the ground that "Interhandel, whose case Switzerland is espousing, has not *exhausted the local remedies* available to it." 1959 I.C.J. 6, 11, 19, 26-27 (emphasis added). The ICJ agreed and dismissed the case squarely on exhaustion grounds:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law . . . .

*Id.* at 27 (emphasis added). Even the separate opinion of Judge Cordova (the only *Interhandel* opinion quoted by the United States), acknowledged that the ICJ holding rested on exhaustion:

I agree with the Court's decision to retain the Third Preliminary Objection, but, . . . I believe that the Court should have founded its application of the principle of exhaustion of local remedies on a much broader basis.

*Id.* at 44-45 (emphasis added).

48. Another United States source expressly states that the requirement of a "final decision" is merely a consequence of the exhaustion doctrine: "[E]xhaustion of local remedies meant that there must be a final decision of a court which is the highest in the hierarchy of courts to which the injured alien can have resort in the legal system of the respondent or host State." C.F. Amerasinghe, *Local Remedies in International Law* 181 (1990) (emphasis added).

49. Finally, in claiming support from the Freeman treatise, the United States simply misreads the limited purpose of the "substantive" requirement at issue:

*With respect to wrongful acts by private persons, [the exhaustion requirement] enjoys the substantive faculty of creating responsibility where local remedies function defectively, i.e., in the case of inadequate judicial protection.*

A. Freeman, *Denial of Justice* 407 (1970) (bold emphases in original, other emphases supplied).

Here, the wrongful acts at issue were committed by state actors (the *O'Keefe* jury, Judge Graves, and the Mississippi Supreme Court), so there was no need for a further denial of justice in order to implicate the state.

50. The "finality" principle alleged here by the United States is also flatly inconsistent with its prior interpretations of international law:

Under existing international law where the initial act or wrong of which complaint is made *is not imputable* to the State, the exhaustion of local remedies is required with a resultant denial of justice on the part of the State in order to impute any responsibility to the State. In this view, the exhaustion of remedies rule is a substantive rule, i.e., it is required from a substantive standpoint under international law in order to impute responsibility to a State.

On the other hand, where the initial act or wrong of which complaint is made *is imputable* to the State, *substantively* it is *unnecessary to exhaust local remedies* in order to impute responsibility to the State.

Memorandum prepared by M. Whiteman, Assistant Legal Advisor, U.S. Department of State, "Comments on Report on 'International Responsibility,' by Garcia-Amador, Special Rapporteur, International Law Commission (A/CN.4/96, 20 January 1956)," Dec. 18, 1956, MS. Department of State, at 116-17, *reprinted in* 8 M. Whiteman, *supra*, at 789 (bold emphasis in original; all other emphasis added).

51. At bottom, the United States' entire "finality" argument is an invitation for the tribunal to ignore NAFTA's express waiver of the exhaustion requirement. This tribunal should decline that invitation. As Sir Robert Jennings has explained: "I do not at all accept that the

local remedies rule can by this ingenious argument be raised from the dead and appear again in unmistakable and indistinguishable and active form. Once waived, the exhaustion requirement is waived for all purposes." (Jennings Op. ¶ 37.)

#### **IV. EVEN IF NAFTA DID NOT WAIVE EXHAUSTION, INTERNATIONAL LAW DID NOT REQUIRE IT**

52. Because NAFTA waives the exhaustion requirement, it is inconsequential whether Loewen *might* have been able to mount a challenge to the \$625 million bond requirement, either in federal district court or in the United States Supreme Court. And it is equally inconsequential whether bankruptcy was the attractive business strategy that the United States paints it as. However, even if NAFTA did not mean what it says with respect to the waiver, international law still would not have required Loewen to exhaust its "remedies" in 1996, because of the nature of the legal breaches, because of the existence of the NAFTA remedy, and most importantly, because the local remedies were not effective.

##### **A. International Law Does Not Require Exhaustion If There Was A Denial Of Justice Or An International Remedy**

53. International law does not require exhaustion (or "finality") where municipal courts have inflicted a denial of justice upon an alien. "A palpable denial of justice in the lower courts has on several occasions been held by the Department of State and by arbitral tribunals to relieve a claimant from the necessity of exhausting his local remedies." Borchard, *Diplomatic Protection, supra*, at 824. "Absence of due process . . . is a good excuse for not exhausting remedies." Amerasinghe, *Local Remedies*, 200. No exhaustion or finality is required "[f]irst, when there is undue discrimination against the party injured on account of his nationality; secondly, where the local tribunals are appealed to, but justice was denied in violation of those common principles of equity which are part of the law of nations." Mr. Bayard, Sec. of State, to

Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, *reprinted in* 6 Moore, *Digest of Int'l Law* at 699 (1906). *See also* Report of Mr. Bayard, Sec. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49 Cong. 2 sess., *reprinted in* 6 Moore, *Digest of Int'l Law* at 667 (1906) (where prior proceedings were "palpably arbitrary and unjust," no need "to attempt further judicial remedies in the local tribunals.") (emphasis added) (as cited in Borchard, *Diplomatic Protection, supra*, at 824 n.4). Because the Mississippi courts were so manifestly unjust to Loewen, and because the trial court proceedings there were so tainted by bias, international law did not require Loewen to exhaust its remedies.

54. International law also does not require exhaustion of municipal remedies where there is a remedy provided for by international agreement or treaty. *See Restatement (Second) of the Law of Foreign Relations* § 206(2) (1965) (for the purposes of exhaustion, remedies "include not only proceedings available under the law and practice of the state for the redress of injuries, but also any remedies that are available by agreement between the state and the alien, or by international agreement" (emphasis added)); *Restatement (Third) of Foreign Relations* § 713(2) (alien may pursue local remedy or remedy provided by international agreement). NAFTA Chapter 11 is precisely the type of international treaty remedy that the Restatements envision.

#### B. International Law Requires Effective Local Remedies

55. Well-established principles of international law excuse aliens from having to exhaust *ineffective* local remedies. *See, e.g., Norwegian Loans Case*, [1957] ICJ Rep 9, 39 (exhaustion not required if there are "no effective remedies available owing to the law of the State concerned or the conditions prevailing in it"); Sohn and Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, Article 19, Explanatory Note to subpara. 2(a), at 167 (12th Draft, 1961) (exhaustion applies only if local remedy is "effective");

*Government of Denmark*, [1958-1959] *Y. of the European Conv. on Human Rights* 412, 440 (1959) (exhaustion applies only if local remedies provide "an effective and sufficient means of redressing wrongs"); *Brown's Case* (U.S. v. Gt. Britain 1923) Nielson's Report 187, 199 (1926) (no exhaustion requirement where the "futility of further proceedings has been fully demonstrated"). As the United States has itself stated, "[a] claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust." Statement of Mr. Fish, Sec. of State, to Mr. Pile, Min. to Venezuela, May 29, 1873, MS. Inst. Venez II 228, reprinted in 6 Moore, *Digest of Int'l L.* at 677.

56. For a remedy to be "effective," it must be practically available to the alien under the particular circumstances presented, and it must be capable of adequately redressing the alien's injury. The critical question is "whether such a remedy which is in principle capable of providing redress is or would have been in the actual circumstances 'effective.'" D. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 Am. J. Int'l L. 389, 396 (1964). A local remedy is "considered as not available" "if the remedies are in fact foreclosed by an act or omission attributable to the State." Sohn and Baxter, *supra*, Article 19, subpara. 2(b). This provision "refers to conditions under which a remedy may be provided as a matter of law but resort to that remedy is rendered extremely difficult or indeed impossible through force of circumstances." *Id.*, Explanatory Note to subpara. 2(b), at 168. This provision prevents a State from hiding behind a supposed remedy that is "a practical impossibility," and permits the claimant "to introduce evidence of the practical workings of justice, as distinguished from the theoretical state of the law as reflected in code, statute, decision, and learned writing." *Id.*

57. The "practical workings" of local remedies — such as "excessive" or "prohibitive" security bond requirements — are precisely the sort of considerations that

transform a theoretically available local remedy into one that is "extremely difficult or indeed impossible":

[I]t may be that an alien in fact finds it difficult to employ an existing local remedy by reason of the existence of some other procedural barrier in the law, *such as a requirement of posting excessive security for costs, or, where the law leaves to the discretion of a court official the amount of security for costs to be posted, an order for the posting of a prohibitive amount.* Resort to a remedy might be foreclosed by a requirement that a fine must be paid before an appeal can be taken, if the fine imposed in a particular case were far beyond the capacity of the alien concerned to pay.

*Id.* (emphasis added). Thus, only remedies that are "reasonably available" need be exhausted.

*Id.*

58. Judge Lauterpacht has stated that exhaustion "is a rule which international tribunals have applied with a considerable degree of elasticity." *Norwegian Loans Case*, [1957] I.C.J. Rep. 9, 39 (separate opinion). When Loewen attempted to appeal the tainted and excessive Mississippi verdict, it faced precisely the type of theoretically available but practically ineffective remedies that the cases and commentators view as fruitless. The United States identifies two allegedly "effective" local remedies: attempting to attack the Mississippi judicial decision in federal court and filing for bankruptcy. (U.S. Mem. at 56-85.) As explained in detail below, these purported "remedies" were not effective at all.

### C. Neither Federal Court Remedy Was Effective

59. Largely through the witness statement of Professor Drew Days, the United States contends that Loewen could have sought review of the Mississippi judicial decisions in the *O'Keefe* litigation either through a petition for a writ of certiorari filed in the Supreme Court of the United States or through a separate, collateral lawsuit filed in a United States district court. As explained in detail in the reply statement of Professor Laurence Tribe (Tab B), in Loewen's

Memorial, and in the previously-filed statements by Professors Tribe and Charles Fried, neither of these options had any realistic possibility of success.

60. In the reply statement attached to this submission, Professor Tribe explains at length why Loewen almost certainly could not have obtained relief on direct review in the United States Supreme Court. As an initial matter, Loewen was unlikely to obtain, within the seven days available, an emergency stay of the decision by the Mississippi Supreme Court to require Loewen to post a \$625 million appeal bond. (See Tribe Reply Op. at 3-5.) Moreover, even if Loewen did obtain a stay, it was extremely unlikely that the Supreme Court would exercise its discretionary jurisdiction to grant any petition for a writ of certiorari. Because the Supreme Court is jurisdictionally barred from reviewing the judgments of lower state courts (28 U.S.C. § 1257), any petition for certiorari could have challenged only the Mississippi Supreme Court's decision to require an unreduced appeal bond, not the underlying merits of the pending appeal. And because the Supreme Court has long held that requiring an appeal bond is not *generally* unconstitutional, *see Louisville & Nashville R. Co. v. Stewart*, 241 U.S. 261, 263 (1916), Loewen would have been forced to contend that the bonding requirement was unconstitutional *as applied to the specific facts* of the *O'Keefe* litigation. As Professor Tribe has explained, any such petition for certiorari was extremely unlikely to be granted (i) because it would have presented an "extraordinarily fact-intensive" question, (ii) because the Supreme Court would have been required to assess in the first instance various factual disputes that would have arisen between Loewen and O'Keefe, (iii) because the "punitive damages" theme trumpeted by Professor Days would have been available only "in a purely atmospheric way," and (iv) because the decisions assertedly inconsistent with the Mississippi Supreme Court's bonding decision could readily be distinguished. (See Tribe Reply Op. at 5-13.)



61. Professor Tribe also explains at length why any attempted collateral attack in United States district court would have bordered on the "frivolous." (*Id.* at 16.) Neither Professor Days nor the United States disputes that any such claim would have had to overcome three procedural bars specifically designed to insulate state-court judgments against collateral attack in federal court: the Full Faith and Credit Act, the *Rooker-Feldman* doctrine, and the "abstention" doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971), and applied in the specific context of appeal bonds in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987). Moreover, Professor Days concedes that these doctrines would foreclose any collateral attack as long as Loewen had been given, or would be given, a "fair and adequate opportunity" to litigate its federal constitutional claims in state court. (Days Op. at 46 n.28.) As Professor Tribe explains, Loewen did receive an opportunity to challenge the bonding requirement in the Mississippi Supreme Court, and, under United States law, neither (i) the dubiousness of the Mississippi Supreme Court's decision on the merits nor (ii) the practical preclusive effect of that decision on the underlying appeal nor (iii) the systemic political bias of elected judges against out-of-state defendants would have permitted Loewen to mount a collateral attack in federal district court. (*See* Tribe Reply Op. at 16-23.) *See also Pennzoil*, 481 U.S. at 16 n.15 ("We cannot assume that [elected state-court judges] would refuse to . . . provide a forum to adjudicate substantial federal constitutional claims.").

62. The advice received by Loewen confirms this analysis. According to the principal outside counsel for Loewen responsible for dealing with the *O'Keefe* verdict, the Company was advised that the likelihood of obtaining Supreme Court review was "extremely remote," and that a collateral attack in federal district court was so clearly "foreclosed" by the *Pennzoil* decision as to be possibly sanctionable. (*See* Carvill Decl. at 3-5.)

#### D. Bankruptcy Was Not An Effective Remedy

63. In another place, and at another time, the United States government was excoriated for arguing that “[i]t [was] necessary to destroy the town in order to save it.”<sup>10</sup> The United States advances a version of this same discredited logic by urging that, in 1996, Loewen should have destroyed itself (by filing for bankruptcy) in order to save itself (from the *O’Keefe* judgment). Indeed, the United States describes bankruptcy in cheerful, glowing terms — “a relatively simple matter with minimal or no disruption to the company’s overall operations” (U.S. Mem. at 76) — as a panacea for the ills caused by the *O’Keefe* judgment. It is certainly true that the outlook for Loewen in the wake of the *O’Keefe* judgment was so grim that the company gave serious consideration to declaring bankruptcy in order to save itself. Nonetheless, bankruptcy was the last resort, the worst possible option available to Loewen and its shareholders, and clearly an inferior alternative to the settlement that was ultimately offered to and accepted by Loewen.

64. The United States argument cannot be reconciled with numerous unassailable facts, including:

- (a) the fact that bankruptcy (including the significant legal fees associated with a bankruptcy filing) would have cost Loewen at least as much as, and probably more than, settling the dispute with *O’Keefe*;
- (b) the fact that bankruptcy would have destroyed the core value of Loewen as an acquisition company, thereby depressing the company’s stock price;
- (c) the fact that bankruptcy would have tarnished Loewen’s reputation among customers, competitors, and potential acquisition targets; and

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<sup>10</sup> The place was Viet Nam; the time was 1968. A U.S. Army major explained why the U.S. bombed a Vietnamese hamlet: “It became necessary to destroy the town in order to save it.” *The New York Times*, Feb. 8, 1968, p. 14, as found in *Respectfully Quoted* 354 (S. Platt ed., 1989).

- (d) the fact that Loewen considered bankruptcy to be a last-ditch alternative, and rejected it for compelling business reasons in the interest of all of the company's shareholders.

65. The government ignores these objective facts and instead bases its legal position here on the subjective opinion statements of experts whose past writings contradict their present declarations,

**REDACTED**

66. The United States' argument is, in a word, ridiculous. As with so many of its contentions, the United States cites no legal authority to support its position. This is not surprising, for no treaty, commentator, or international decision has ever suggested that being driven into bankruptcy against one's will constitutes an effective local remedy. And the principle is simply not accepted in the legal systems of leading nations. There is thus no basis for this Tribunal to adopt such an illogical and unprecedented proposal.

**1. Even If Loewen Had Pursued Bankruptcy, The United States Would Still Be Liable**

67. Even assuming that bankruptcy could ever be a reasonable "remedy" under international law, and assuming further that Loewen had decided to file for bankruptcy in 1996, the United States would still be liable. The actions of the Mississippi courts violated NAFTA and international law, and those breaches would have been the cause of Loewen's bankruptcy. As is detailed below, bankruptcy would have permanently damaged Loewen's reputation in the death-care industry, depressed its stock price, crippled its finances, and caused the company to incur tens of millions of dollars in bankruptcy administration fees, among other damages. Even if one or two years later the Mississippi Supreme Court ultimately reversed the trial-court verdict, neither the Mississippi courts nor the bankruptcy court could have remedied all of the injury that

Loewen would have suffered. Thus, because bankruptcy could *never* have been a fully effective remedy for Mississippi's NAFTA breaches, the United States argument would not prevent a finding of liability even if it were wholly supportable on its merits (which it is not). At best, the United States' bankruptcy argument would suggest that Loewen had not mitigated its damages from the Mississippi litigation.<sup>11</sup> Accordingly, even if the United States' glowing descriptions of bankruptcy were wholly accurate, whether Loewen should have filed for bankruptcy presents at most a damages issue, not a jurisdictional bar.

## 2. Bankruptcy Would Have Been Prohibitively Expensive

68. Loewen showed in its Memorial (at 55) that the financial costs of a bankruptcy filing would have been prohibitive; indeed, contemporaneous financial analyses of the bankruptcy "option" showed that the costs of bankruptcy, including the significant attorneys' fees and administrative costs that would have attended a bankruptcy filing, were on par with, and in some estimates *higher than*, the pure financial costs of settlement or bonding, even assuming the latter "option" had been available. (App. at A1478) The United States does not dispute this showing; indeed, it does not account for these substantial costs at all in its arguments.

## 3. Bankruptcy Would Have Destroyed The Most Important Components of Loewen's Value

69. Loewen showed in its Memorial (at 55, 60-61) that even beyond the pure out-of-pocket financial costs to Loewen that would have been caused by being forced into bankruptcy, a bankruptcy filing would have destroyed the most important components of Loewen's value — its reputation, and its status as an active, ongoing acquisition company. The United States responds (U.S. Mem. at 75-81) by urging that bankruptcy would not have affected Loewen's reputation or

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<sup>11</sup> In reality, the \$175 million *O'Keefe* settlement was far less damaging than bankruptcy, and indeed was the least damaging option, which is precisely why Loewen chose it.

its acquisition program, and even if it would have adversely affected Loewen's acquisition program, that this adverse effect provides no justification for Loewen's coerced decision to settle the *O'Keefe* case rather than declare bankruptcy. These *post hoc* arguments in favor of bankruptcy are unconvincing.

70. One of the fundamental flaws with the United States argument is that it relies on general statements about the efficacy of bankruptcy for other companies, ignoring entirely the specific characteristics that gave Loewen its value — characteristics that made bankruptcy a devastating option for Loewen in 1996. The government's declarants — Trost, Warren,

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71. Because all businesses are not "fungible," the bankruptcy experiences of "different types of businesses" such as Texaco or Macy's will be vastly different from those of a company such as Loewen. (*See, e.g.*, Turner Decl. ¶ 26). It is not solely a question of size; indeed, many of the same considerations which mitigated against a bankruptcy filing by Chrysler

Corporation at the height of its difficulties in the late 1970s were equally applicable to the situation facing the much-smaller Loewen. These important differences based on "business type" are described in the sworn declaration of Kenneth N. Klee (Tab C), who possesses both the academic qualifications of a bankruptcy-law scholar and the practical experience and perspective of a long-time bankruptcy and reorganization practitioner. As Professor Klee demonstrates, the government's declarants ignore the two primary characteristics of Loewen's businesses: One, that Loewen was and is a *service business* vitally dependent on its reputation in the death-care community and on long-term relationships with its (employee) funeral home and cemetery operators and its customers; and two, that the fundamental business strategy of the Company was one of *growth through acquisitions*.<sup>12</sup>

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<sup>12</sup> It is important to consider not only the different types of businesses, but also the times and circumstances when making such comparisons. For example, United States declarant Trost tries to extrapolate from Loewen's 1999-2000 bankruptcy experience a hypothesis about what Loewen's bankruptcy experience would have been in 1996. Because of the fundamental differences between O'Keefe-era Loewen and present-day Loewen, this is a particularly dangerous and ultimately flawed exercise. Specifically, Trost opines that a Loewen bankruptcy in 1996 would not have affected Loewen's "historical growth strategy [of] acquisition and consolidation of funeral homes and cemeteries," a conclusion he bases in large part on the Loewen experience in bankruptcy over the last two years. (Trost Decl. at 12-14, 20-22.) However, as Trost's own declaration concedes, present-day Loewen is no longer acting as an acquisition and consolidation company, but has for the most part used the mechanisms of the bankruptcy law to conduct *sales* of some of its properties. (*Id.* at 21-22 (detailing Loewen's "near future" plans to "sel[1] up to 201 funeral homes and 170 cemeteries).) The 1999 Order relied upon by Trost anticipated "the purchase of a limited number of assets with relatively small purchase prices," and the only 1999-2000 "acquisition" that Trost specifically identifies (*id.* at 21) is a single \$15 million purchase "of certain real property in Florida adjacent to an existing Loewen cemetery" to ensure an adequate supply of burial sites. That is a far cry from the Loewen of 1996, which was spending close to \$500 million annually on acquisitions, and it proves the danger of trying to compare the two. (See Turner Decl. at 11.)

a. **Bankruptcy Would Have Damaged Loewen's Reputation**

72. In January 1996, which is the only time frame relevant to this case, Loewen was in a business where its reputation was essential. As described in detail in Loewen's Memorial (at 55, 60-61) and in the attached declaration of John N. Turner, a longtime Director of the Company (Tab D), maintaining Loewen's reputation was critical. The business of Loewen involved convincing family-owned funeral homes to commit their family businesses and their personal livelihoods to the consolidators' care. The typical funeral-home seller had many years — often, many generations — in the business, and was typically a prominent member of the local community. A key element of Loewen's business lay in retaining the family names and the family operators of those homes, while consolidating them into a larger international enterprise. The character, reputation, and public perception of The Loewen Group were critical factors in encouraging family-owned funeral home and cemetery operators to join it, rather than one of its major competitors. (Turner Decl. ¶ 20) Numerous articles in both trade publications and the general business press confirmed that it was often the personal integrity and charismatic character of Loewen's chairman himself that caused such sellers to entrust their livelihoods, financial futures, and personal reputations to Loewen. (*See, e.g., Loewen Group takeover will not happen*, Business Wire, Inc., Oct. 2, 1996. (App. at A2290A))

73. A Chapter 11 filing in 1996 would have severely damaged Loewen's reputation. Notwithstanding the protestations of the government and its declarants that there is no longer any "stigma" attached to bankruptcy (U.S. Mem. at 76; Trost Decl. at 5; Warren Decl. at 4-9), it is undeniable that bankruptcy still carries with it significant reputational costs; indeed, Professor Klee opines that "stigma remained a significant detrimental factor" to bankruptcy, particularly in the small communities where Loewen's acquisitions were most prominent. (Klee Decl. at 7) To

again quote the government's Professor Warren in a more candid context: "The assertion that often appears in the literature, that there is no longer much stigma attached to business bankruptcy . . . *was not the case.*" Warren & Westbrook, 73 Am. Bankr. L.J. at 516 (emphasis added). And as applied to Loewen, the reputational damage of bankruptcy would have been even more severe than in the ordinary course. There was little question that Loewen's competitors in the death-care acquisition marketplace (including Service Corporation International and Stewart Enterprises) would have aggressively capitalized on a Loewen bankruptcy filing with devastating impact, making the simple argument "Who do you want to sell your business to and join as an employee — a bankrupt organization or a thriving one?" (See Turner Decl. at 7.) To state the question in that way would make the answer obvious.

**b. Bankruptcy Would Have Damaged Loewen's Fundamental Business Strategy**

74. A bankruptcy filing by Loewen in 1996 would have also crippled Loewen's fundamental business strategy of growth through acquisitions, a strategy discussed in detail in Loewen's October 18, 1999 Memorial (at 52-61). That strategy was dependent upon Loewen having "regular and successful access to the capital markets for both equity and debt financing" in order to fund the purchase of family-owned funeral homes and cemetery operations. (Turner Decl. at 6.) Loewen's access to those markets would have effectively ended with a bankruptcy filing. Contrary to the theoretical assumptions of the government's declarants, the actual business characteristics and needs of Loewen demonstrate just how illusory any hope of continuing Loewen's business as usual, while in bankruptcy, would have been. As Professor Klee describes, it is very rare for a company in bankruptcy to issue equity, for a company's equity is subject to dilution under a plan of reorganization (Klee Decl. at 6). A Loewen bankruptcy filing would have resulted in an immediate and significant reduction in Loewen's share price, a



point that even the United States recognizes

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(U.S. Mem. at 82.) Nor was "debtor-in-possession" (DIP) financing a reasonable alternative, as the U.S. Memorial (at 78) suggests. As Professor Klee amply demonstrates, DIP financing is ordinarily available in limited amounts for limited purposes, typically just to maintain business operations.<sup>14</sup> By contrast, it is highly doubtful that any creditors' committee would allow extensive financing to fund continued acquisitions under the rubric of DIP financing, particularly on the huge scale assumed by the government; indeed, even the comparatively small amount of "Loewen's existing but not completed contractual commitments for . . . acquisitions" would have been threatened by a bankruptcy filing, dealing a "mortal blow to Loewen's reputation and credibility as an acquisition company." (Turner Decl. at 6.)

75. Loewen was a growth company; its business was acquiring other companies. It did this on a massive scale: In 1995, Loewen acquired 241 properties, spending \$488 million. The government cannot seriously argue that Loewen's creditors in a bankruptcy reorganization proceeding would have authorized, or even acquiesced in, such a level of acquisitions over such an extended period of time,<sup>15</sup> or that DIP financing facilities realistically would have been

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<sup>14</sup> During bankruptcy proceedings, most debtors need financing to "maintain business operations, make payroll, pay rent, utilities, insurance premiums and other crucial operating expenses, and to otherwise preserve the assets of the estate." Ronald W. Goss, *Part II: The Reorganization Process*, 4-NOV Utah B.J. 6 (1991).

<sup>15</sup> A contemporaneous article submitted by Loewen with its Memorial (App. at A1491), and (continued...)

available to fund them. As Professor Klee notes, there was no reasonable likelihood that a bankruptcy court would have approved a financing of the magnitude needed to support Loewen's acquisition program "[w]ithout the creditors' committee's support" (Klee Decl. at 7), since "as a practical matter judges are often reluctant to sign an order for postpetition financing without obtaining a consensus in favor of the financing." Practising Law Institute, *Obtaining Credit Under the Bankruptcy Code*, 368 PLI/Real 261, 271 (1991).

76. United States declarant Trost nonetheless asserts that Loewen would have been able to "continue to conduct its business in the ordinary course with little or no disruption during the reorganization proceedings." (U.S. Mem. at 73, quoting Trost Decl. at 4). Particularly in view of the fact that business in the "ordinary course" for Loewen meant acquiring hundreds of properties, for hundreds of millions of dollars annually, there is no evidence whatsoever to support Mr. Trost's assertion. There is, however, ample evidence that he is wrong. Indeed, Professor Klee demonstrates that Trost's assertion is fundamentally incorrect (Klee Decl. at 8-9).

#### 4. Loewen's Management And Directors Rejected A Bankruptcy Filing For Compelling Reasons

77. Loewen readily agrees that a bankruptcy filing was *a theoretical* local remedy available to the Company following the *O'Keefe* verdict and the failure of the Mississippi Supreme Court to reduce the appeal bond requirement. Loewen agrees that a bankruptcy petition, if filed and accepted, would have triggered the automatic stay provisions of the Bankruptcy Code.<sup>16</sup> And Loewen agrees that it in fact gave careful consideration to the

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<sup>15</sup> (...continued)  
selectively quoted by the government (U.S. Mem. at 77), pointed out that "it could take two years before the Mississippi Supreme Court hears the appeal," which further negates the notion that Loewen's business would have continued "as usual."

<sup>16</sup> Contrary to the government's claims, it is by no means certain that bankruptcy would  
(continued...)

possibility of a bankruptcy filing, but rejected it. Loewen disagrees, however, with the United States' submission that bankruptcy would have been anything less than catastrophic.

78. The Company's extended consideration of the possibility of bankruptcy is described in the Turner Declaration, as well as in the sworn declaration of Wynne Carvill (Tab E), a lawyer retained as special outside counsel for Loewen in charge of coordinating the various efforts to deal with the aftermath of the *O'Keefe* litigation. As Mr. Carvill describes (Carvill Decl. at 7), bankruptcy was "seriously considered" by Loewen management and the Board. But bankruptcy was not the *only* option, and it was ultimately rejected by the Loewen board of directors because it would, in fact, have been the worst of all conceivable options, one that would have been ruinous to the company and its shareholders. (Turner Decl. at 5-9; Carvill Decl. at 7-9) The Loewen board thus appropriately treated bankruptcy as the very last resort to save the Company.

79. Loewen's October 18, 1999 Memorial and the declarations of Messrs. Carvill and Turner demonstrate the integrity and diligence with which Loewen's management, directors, and outside advisers pursued Loewen's limited options after the *O'Keefe* verdict and the refusal of

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<sup>16</sup>

(...continued)

have even been *available* to Loewen, much less "reasonable" or "viable." Indeed, any filing by The Loewen Group in the circumstances present in January 1996 would have been vulnerable to dismissal by the Bankruptcy Court as having been made in bad faith, and the Loewen board was aware of this very real possibility. (Turner Decl. at 5). A bankruptcy court easily could have concluded that using Chapter 11 to avoid a state supersedeas bond was not a legitimate use of Chapter 11, since bankruptcy is a collective process, not a mechanism to gain leverage in an essentially two-party dispute such as the litigation between Loewen and the O'Keefes. *See, e.g., In re Tucson Properties Corp.*, 193 B.R. 292, 298-300 (Bankr. D. Ariz. 1995) (dismissing successive Chapter 11 petition as "bad faith" filing where debtor's motivation for filing bankruptcy was to "gain settlement leverage"); *In re Anderson Oaks (Phase I) Ltd. Partnership*, 77 B.R. 108, 112 (Bankr. W.D. Tex. 1987) (finding two-party disputes between debtor and single creditor should not be resolved in bankruptcy because it "confers unwarranted leverage in favor of the Debtors, without the attendant equities that normally justify that leverage").

the Mississippi Supreme Court to reduce the appeal-bond requirement. The evidence likewise makes clear that by the time Loewen decided to settle the case, the anticipated costs of settlement were less than those of bonding or bankruptcy (*e.g.*, App. at A1478); and settlement, of course, resulted in fewer penalties to Loewen's reputation, its relationships with customers, and its abilities to compete effectively, particularly when compared to a bankruptcy filing.

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81. In considering its fiduciary duty to shareholders, the Loewen board properly considered the serious and fundamental change in the relationship between board and shareholders that a bankruptcy filing would have caused. A bankruptcy filing requires management to "sever its ties to its stockholders and consider only its creditors." H. Tavakolian, *Bankruptcy: an emerging corporate strategy*, 60 SAM Advanced Management J. at 18 (Spring

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1999). This “instantaneous change of management focus” reflects the fact that a bankruptcy filing immediately “creates an adversarial relationship between the company’s stockholders and its creditors.” *Id.*<sup>18</sup> Where bankruptcy could have been avoided, it was the duty of Loewen’s board to make every effort to avoid it, and to regard Chapter 11 as an option of last resort, to be utilized only if absolutely necessary. That is exactly what it did. (*See, e.g.*, App. at A1473.)

82. In truth, as the declarations of Messrs. Turner and Carvill make abundantly clear, Loewen’s board considered, and pursued, the option of bankruptcy with diligence and thoroughness, at all times operating consistent with their fiduciary duties, and in the best interests of the company and all its shareholders. Mr. Carvill states the situation succinctly: “[C]ounsel [Weil Gotshal & Manges] failed to persuade Loewen that . . . bankruptcy was a viable option for a company that defined itself in terms of rapid expansion based on easy access to capital markets.” (Carvill Decl. at 8.) “Thus, the Board considered and rejected the bankruptcy option as a viable alternative to settlement.” (*Id.*)

83. In sum, the United States’ attack on the jurisdiction and competence of the Tribunal rests on the assertion that bankruptcy was a viable, reasonable, and strategic alternative

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<sup>18</sup> An article co-authored by government declarant Trost recognizes the different fiduciary duties that directors of a solvent corporation owe to the corporation’s shareholders as compared to the fiduciary duties owed by directors of bankrupt corporations: “Courts have long recognized that the relationship between a director and the corporation that she serves is a fiduciary one. Similarly, it is axiomatic that the constituency to whom the directors of a solvent corporation owe their fiduciary duties of care and loyalty are the owners of the business enterprise — the shareholder. As owners of the corporation, shareholders are the residual claimants and are the ultimate beneficiaries of its growth and increased value. In contrast, directors generally owe no fiduciary duty to the creditors or debt holders of a solvent corporation. In fact, favoring creditors to the detriment of shareholders may expose directors to liability at the hands of the adversely affected shareholders.” Trost and Schwartz, *Fiduciary Duties of Directors of Insolvent Corporations*, SD24 ALI-ABA 87 (1998). *See also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179, 182 (Del. 1985); *Palmer v. Carling O’Keefe Breweries of Canada Ltd.* (1989), 67 R. (2d) 161 (Div. Ct.); *CW Shareholdings, Inc. v. WIC Western Int’l* (1998), 160 D.L.R. (4th) 131 (Ont. Ct. (Gen. Div.)).

to Loewen after the *O'Keefe* verdict. (See U.S. Mem. at 72-85.) It was none of those things. Rather, bankruptcy was only an *available* option, and by far the worst option, for it would have effectively destroyed Loewen as it then existed, to the prejudice of the company and its shareholders. Accordingly, the United States' efforts to avoid the jurisdiction of this Tribunal should be rejected.

**V. THE MISSISSIPPI COURTS FAILED TO PROTECT LOEWEN, DESPITE ITS REQUESTS**

84. The United States suggests (U.S. Mem. at 86) that "Claimants have identified no instance where their lawyers objected on such grounds" related to anti-Canadian, racial and class biases. From this assumption, the United States concludes that "the Mississippi trial court's alleged failure to prevent the opposing party's attorneys from making inflammatory remarks [was not] a government 'measure' for purposes of the NAFTA." (*Id.* at 86-87.) The United States' objections are neither factually accurate nor legally sustainable.

85. First, Loewen did apprise the trial court of the tactics of Willie Gary. Loewen unsuccessfully objected to Gary's efforts to prejudice the entire pool of prospective jurors at the outset of the case. (App. at A357.) Loewen asked Judge Graves to remove a potential juror who stated that he could not give a foreign corporation a fair trial (App. at A488); when the judge refused to remove the juror despite his admitted bias against foreigners, Loewen used one of its limited "peremptory" challenges to remove him. (App. at A490-91.) Loewen proposed a detailed instruction, (App. at A2231-32, quoted in full at Loewen Mem. 39), that would have instructed the jury, *inter alia*, that "[a]ll are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status." The court rejected Loewen's proposed instruction in favor of a generic, one-sentence warning that jurors "should not be influenced by bias, sympathy or prejudice" (App. at A2229-30), which did not even identify what biases,

sympathies, or prejudices the jurors should avoid. Finally, in moving the court for a judgment notwithstanding the verdict or for a new trial, Loewen sought a new trial on the grounds, *inter alia*, (i) that “the verdict evinces bias, passion and prejudice on the part of the jury against the Defendants” (App. at A728), and (ii) that

Plaintiffs repeatedly and impermissibly interjected issues and matters of race, national origins, class and economic status into the case, made blatant and deliberate appeals to prejudice, and otherwise incited the jury so that the natural responses of the members thereof to prejudice would control or substantially affect the verdict of the jury.

(App. at A729.) Thus, the factual premise of the United States’ argument here — that there can be no NAFTA “measure” where “the court was never asked to act in the first place” (U.S. Mem. at 87) — is false. The Mississippi trial court was asked to protect Loewen on numerous occasions, yet on each occasion failed to do so.

86. Second, even if Loewen had not apprised the trial court of the appeals to nationality, race, and class, that would be of no legal moment. International law imposes on states (and the courts through which they act) an *affirmative* duty to protect the persons and property of aliens. (See Loewen Mem. at 91.) Indeed, the U.S. Department of State has long been a vigorous advocate of a strict duty of affirmative care, asserting that international liability for failure to protect an alien lies where states “fail to employ *all reasonable means at their disposal* to prevent the unlawful acts.” 8 Whiteman, *Digest of Int’l Law* 831-32 (1967) (emphasis added). See also 4 Moore, *Digest of Int’l Law* 5 (1906) (U.S. Secretary of State to Spanish Minister: “There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign *by all the efforts in his power.*”) (emphasis added). Article 1105 of the NAFTA codifies this heightened standard of care.

87. Third, even if Loewen had not objected, it was "plain error" even under Mississippi law for the trial court not to protect Loewen. The "plain error rule" is a "familiar" one in Mississippi law (*McDaniel v. Ritter*, 556 So. 2d 303, 306 (Miss. 1989)), which "reflects a policy to administer the law fairly and justly." *State Highway Comm'n of Miss. v. Hyman*, 592 So. 2d 952, 957 (Miss. 1991). The plain error rule originated at common law in Mississippi and has now been codified in rules such as Miss. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.") and Miss. R. App. P. 28(a)(3) ("the court may, at its option, notice a plain error not identified or distinctly specified"). The plain error rule, which "may be applied in either criminal cases or civil cases," allows appellate courts to reverse judgments of trial courts, even in the absence of an objection, where "substantial injustice . . . would occur if the rule were not invoked." Miss. R. Evid. 103(d) cmt.

88. For example, during the jury selection process, when Willie Gary embarked upon his campaign of xenophobia, racism, and class warfare, (*see, e.g.*, Loewen Mem. 15-19), Judge Graves should have attempted to protect Loewen by warning Gary that such prejudicial appeals would not be tolerated; by instructing the pool of prospective jurors similarly; or, if warranted, by striking the entire pool of jurors and starting the process over with a fresh jury pool unsullied by the taint of counsel's improper remarks. Likewise, during Gary's opening statements, where this tactic continued, Judge Graves should have instructed counsel to avoid the appeals to nationality, race, and class, or declared a mistrial. Indeed, the trial recognized *sua sponte* at least twice that plaintiffs had "played the race card" against Loewen. (Tr. at 3595-96; 5289.) *Compare, e.g.*, *General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 272 (Miss. 1999) (reversing



judgment against GMAC because plaintiff's counsel "played the 'race card'" before the jury, thereby "irreparably infect[ing] the proceeding below" and depriving GMAC of a fair trial).

89. The outrageously prejudicial closing arguments of O'Keefe's lawyers in both the liability and punitive phases of the trial (*see, e.g.*, Loewen Mem. 40-42, 46-47) likewise would have easily satisfied the plain error rule. *Compare, e.g., Johnson v. Fargo*, 604 So. 2d 306, 311 (Miss. 1992) (endorsing the federal Fifth Circuit's plain-error decision in *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276 (5th Cir. 1975), which held: "[Counsel accused of improper closing argument] maintains that since much of the argument was not objected to, this court cannot consider the error on appeal. This misconstrues the court's prerogatives on review — we always possess the power to consider errors to which no objection was made."), and Miss. R. Evid. 103(d) cmt. (also endorsing *Edwards* as stating the rule that if "substantial injustice" would occur, the court may invoke the plain error rule). "Substantial injustice" was obviously worked upon Loewen all throughout the *O'Keefe* trial; even if Loewen had stood mute throughout the trial, the "plain error" rule gave the Mississippi courts full power to protect Loewen.

90. In sum, the trial court's failure to protect Loewen in such circumstances was a violation of Mississippi law, as well as international law. Thus, even if Loewen had never objected to the biased and unfair treatment it received, the trial court's egregious failure to act would nonetheless be subject to challenge as a denial of justice, denial of full protection and security, and denial of fair and equitable treatment.

#### **VI. THE O'KEEFE SETTLEMENT WAS NOT "PRIVATE," BUT COERCED BY THE MISSISSIPPI COURTS AND THE THREAT OF EXECUTION**

91. It is difficult to credit the United States' perfunctory argument that the *O'Keefe* settlement was an agreement "in which no governmental entity was involved, to settle a purely private dispute," or that Loewen "was free to continue with its appeal." (U.S. Mem. at 85-86.)

The United States cites no legal or factual support for this proposition. As the record reflects, O'Keefe's lawyers had threatened to begin dismembering Loewen within seven days by using state courts and sheriffs throughout the United States to seize Loewen's assets in order to enforce the \$500 million judgment. (See Loewen Mem. at 59-60.) It is impossible to pretend that "no governmental entity was involved" in a settlement agreement which Loewen signed in desperation just two days before government seizures were to begin, and which Loewen signed precisely to forestall such devastating government action.

92. Drew Days, the United States' constitutional law expert, acknowledges that the threat of execution, even by a private party, constitutes "state action" under federal law.

Generally, the "state action" component of Section 1983 is satisfied where a private party uses state machinery to enforce a judgment. [Citations omitted]. Thus, O'Keefe's use of Mississippi judicial procedures to execute on the judgment would have constituted the necessary "state action" for Loewen's hypothetical Section 1983 claim.

(Days Op. at 34-35.) In light of the Days opinion, as well as common sense, it is disingenuous for the United States to argue that there was "no government involvement" in the settlement agreement.

93. Just as importantly, the United States erroneously contends that "the only injuries alleged in this case flow directly from Loewen's payment of money pursuant to a binding agreement." (U.S. Mem. at 85.) In fact, Loewen was seriously injured by the O'Keefe judgment, and by the denial of a reduced appeal bond, both of which irreparably damaged Loewen's reputation and directly caused its market value to plunge by 54%. (See Loewen Mem. at 54, 60.) Thus, even if the characterization of the O'Keefe settlement as "purely private" were valid, which it is not, the United States would still be liable for the damages flowing directly from the biased and excessive verdicts and the refusal to reduce the appeal bond.

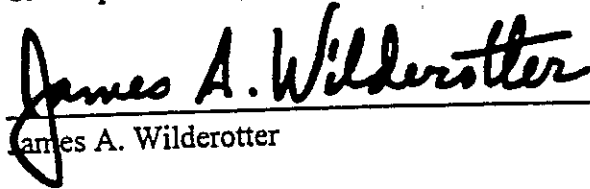
DATED: May 26, 2000

Respectfully submitted,



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## ADDENDUM A

### THE UNITED STATES' RECORD MATERIALS SUPPORT LOEWEN'S CLAIM

The United States' February 18, 2000 Memorial relies in substantial part on selective quotations from news articles and other materials. As it turns out, much of the material submitted by the United States provides strong support for Loewen's claims; similarly, other portions of those materials directly refute the government's own arguments.

#### A. The Characteristics of Loewen's Business

##### 1. Acquisitions Were the Critical Component of Loewen's Business

The United States' appendix materials demonstrate that the key aspect of Loewen's business was — as with its chief competitors — its acquisition and consolidation program.

Indeed, the very first article in the U.S. Appendix notes:

Things were really clicking. The more homes he [Loewen] bought, the faster sales and earnings compounded, the higher Loewen Group's stock rose, and the easier it was to raise more money to buy more homes. . . . Yet, if he cuts back, earnings will slow and Loewen Group's stock will likely plunge. Good-bye, cheap capital."

S. Lubove, *Death Stock*, Forbes, June 22, 1992 (U.S. App. 0002).

Another article selectively quoted by the U.S. notes, with respect to Loewen's chief competitor, Service Corporation International ("SCI"):

The real emphasis, the driving force behind this company was acquisitions.

G. Hassell, *Service Corp. Battles Tombstone Blues*, Houston Chronicle, Feb. 11, 2000 (U.S. App. 0206) (attributing statement to SCI's founder and Chairman, Robert L. Waltrip, "who built Service Corp. from a single funeral home in the Heights [an area of Houston, Texas] into an international behemoth with 3,823 funeral homes and 524 cemeteries").

## 2. Loewen Created Substantial Value Through Acquisitions and Consolidation

The materials cited by the United States also demonstrate that Loewen created value for its shareholders via this acquisition and consolidation program, a program which allowed the combined companies to provide superior service, centralization, and economies of scale in a fragmented industry:

[W]hen SCI and the other chains [including Loewen] move into a region, they are often able to cut their costs in half . . . They also benefit from the parent companies' vast resources and its training policies.

B. Mohl, *Growth of Chains Has Led to Rise in Funeral Prices*, The Boston Globe, Aug. 28, 1995 (U.S. App. 0003).

These economies of scale even allowed funeral homes to obtain lower prices on caskets and other burial merchandise:

These consolidators that are buying funeral homes are able to buy their caskets and other merchandise at a lower price, like a Walmart.

N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, The New York Times, Jan. 27, 1996 (U.S. App. 0009).

Centralization of certain management and service functions also allowed operators to spend more time providing families with better and more personal service:

All three large chains operate under what they call the "cluster" principle, buying more than one facility in an area to share operating costs and maximize profits.

The Everlys [a local family that sold to a chain] saw Stewart's [another Loewen competitor] operating methods as a way to give customers superior service while allowing the family a respite from relentless business demands. Stewart's experts managed the accounting, order and display funeral merchandise and finance renovations. Chain management also meant the end of round the clock hours for the family, because phone calls are routed through to an answering service and Stewart funeral directors rotate shifts to handle after hours-business.

John Everly said he found his health improved. And while critics of the chains complained that they have made the industry less personal, he found that he could concentrate on what he enjoys best about the business — meeting with families.

Stewart's Marlowe said the chains offer an important 'succession planning' service for many elderly funeral home owners who have no heirs willing to take over their businesses.

C. Loose, *Adieu to Family-Owned Mortuaries*, The Washington Post, Aug. 29, 1997 (U.S. App. 0034, 0036).

Another source noted:

Consolidation still makes sense in the death care industry — so long as companies do not overpay. By buying funeral homes in clusters, chains can share services generating profit margins more than twice of those of their independent counterparts.

J. Baer, *Earnings Woes Deadly for Funeral Stocks*, The Globe & Mail, Oct. 4, 1999 (U.S. App. 0157).

Yet another source noted that Loewen's economies of scale made its new acquisitions "even more profitable" than they had been before they became part of The Loewen Group:

Consolidation resulted in efficiencies of scale that were not available to family-owned businesses . . . He [Ray Loewen] found further savings by instituting a centralized accounting system, thereby reducing payroll costs in each home.

J. Harr, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0179).

### **3. Loewen Financed Its Acquisitions Through a Strong Share Price**

The U.S. citations show that Loewen's acquisition program, which was the key to its success, was financed by Loewen's strong share price. Because of the attractiveness of Loewen stock, the company was able to purchase new funeral homes in transactions that were primarily stock and only secondarily cash. For example, one source noted:

When Loewen purchased Palm Springs Mortuary from Honorine Flanagan and her husband in 1996, the couple received about \$2 million in cash and \$8 million in Loewen stock.

R. Fields, *Grim Time for Funeral Firms Once Highly Profitable*, Los Angeles Times, Oct. 24, 1999 (U.S. App. 0166).

Another of the United States' sources specifically mentioned "Loewen's robust, analyst-praised stock" as a core part of a "sweet proposal" to purchase a small chain of funeral homes in 1995:

Mr. Hoffmeyer and his two partners, who together owned six funeral homes in central Michigan, zeroed in on a sweet proposal from Loewen Group Inc.: more than \$10 million, 48% in cash and the rest in Loewen's robust, analyst-praised stock.

D. Morse & M. Heinzl, *Laid Low: Funeral-Home Owners Discover the Downside of Sale to a Consolidator*, The Wall Street Journal, Sep. 17, 1999 (U.S. App. 0147). The same source expressly noted that Loewen stock was "valuable currency for acquisitions":

Loewen grew, and its stock became valuable currency for acquisitions. In 1992, an owner of two Virginia funeral homes became a mini celebrity within Loewen by being the first to accept all stock instead of cash . . . .

*Id.* at 0148.

#### 4. Reputation Is Critical in the Death Care Business

The U.S. sources likewise demonstrate that reputation is a critical element in the death-care industry:

A successful funeral home's most valuable asset was its reputation in the community, achieved by years of service.

J. Hart, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0179).

This same point was echoed in a Wall Street Journal article from 1999, which highlighted the experience of a West Virginia funeral-home operator ready to sell his operations and trying to decide whether to sell to SCI or to Loewen. In the end, he chose Loewen because of its superior reputation:

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The Loewen case shows how a business proprietor ready to hand over the shop can spoil a career's worth of smart decisions with one final misstep. . . . The pitch appealed to Stanley Vaughn of Parkersburg, W. Va. In 1990, he was 65, tired of the business's long hours and growing regulation, and ready to retire. He wasn't interested in selling to Loewen's main competition, Service Corp. International, because of its reputation for imposing many changes and cutting jobs. "Our town wasn't ready for anything like that," Mr. Vaughn says.

D. Morse & M. Heinzl, *Laid Low: Funeral-Home Owners Discover the Downside of Sale to Consolidator*, The Wall Street Journal, Sept. 17, 1999 (U.S. App. 0148).

## B. The Mississippi Litigation

### 1. The Mississippi Litigation Was a Minor Business Dispute

Even the media reports cited by the U.S. confirm that the Mississippi dispute could not rationally have resulted in a \$500 million verdict. One article described the O'Keefe litigation as follows:

O'Keefe filed a lawsuit alleging breach of contract. It was the kind of innocuous business dispute that flares daily in thousands of courthouses throughout America.

E. Larson, *Fight to the Death*, TIME, Dec. 9, 1996 (U.S. App. 0024). The same article goes on to describe the "bloodless contract dispute" that "Willie Gary, a personal-injury attorney from Stuart, Florida, with the persuasive powers of a Pentecostal preacher," turned into a case that "would play well in rural Mississippi":

What Loewen's attorneys never seemed to grasp was that Gary had turned a bloodless contract dispute into an indictment of the new death-care industry, and that a Mississippi jury would view the industry's practices with less delight than would the company's stockholders.

*Id.* at 0027.

Another article noted that

[t]he case was, at root, a contract dispute, similar to thousands that are filed in courts across the land each year, and in this respect it was unremarkable.



J. Harr, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0171). The same article reported that in early 1995, O'Keefe himself valued the case at a much lower amount:

Cavanaugh and Dockins had tried to settle the case at a meeting in Cincinnati with Loewen executives and lawyers. Cavanaugh had started by asking for six and a half million dollars. He recalls that Loewen's lawyers reacted with incredulity, and then with derision. By the end of the meeting, Cavanaugh remembers, "I did everything but get down on my knees and beg for four million." They said "That's outrageous! Our client would fire us if we brought that back to him."

*Id.* at 0184. The article concluded:

The reward was of course outlandish and utterly out of proportion both to the damages and to Jeremiah O'Keefe's expectations.

*Id.* at 0193.

2. **The Mississippi Jury Wanted to "Destroy" Loewen, who it Regarded as a "Foreign Parasite"**

The U.S. sources show that the Mississippi jury wanted to "destroy" Loewen, which had been portrayed as a "foreign parasite":

"It was bad," chuckles Glen Millen, a retired Siemens electrical engineer who served as jury foreman. "If we'd had guns in there, we'd have probably been shooting." Eight of the twelve jurors wanted to destroy the company by levying a \$1 billion judgment in compensatory and punitive damages.

E. Larson, *Fight to the Death*, TIME, Dec. 9, 1996 (U.S. App. 0027).

Two articles described the O'Keefe trial strategy as seeking to portray Loewen as a "foreign parasite":

In November 1995, a Mississippi jury that had bought the portrayal of the Loewen Group as a foreign parasite awarded him a total of \$500-million (US).

J. Schreiner, *A Mutually Destructive Rivalry*, National Post, Apr. 3, 1999 (U.S. App. 0095).

In November 1995, a Mississippi jury bought a theatrical portrayal by the O'Keefe lawyer that the Loewen Group was a foreign parasite.

J. Schreiner, *In the Palm of Ray's Hand*, National Post, June 2, 1999 (U.S. App. 0134).

Another U.S. source described the O'Keefe strategy as villainizing "the foreigner from Canada":

Playing opposite O'Keefe, in the role of the villain, was the foreigner from Canada, Ray Loewen . . . .

J. Harr, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0184).

**3. Without a Stay or Settlement, O'Keefe Would Have Destroyed Loewen**

The United States' sources demonstrate that without a stay, O'Keefe would have seized most of Loewen's assets, putting an end to the company:

After the hearing, Gary said 'they have ten days to post the cash bond. If they don't, my client will proceed to take over their assets. That's every funeral home they own, every insurance company, every cemetery, their corporate jet, and their yacht.' He had Dockins and Allred preparing lists of Loewen's property and drafting notices of seizure.

J. Harr, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0191-92).

**4. Posting a \$625 Million Bond Would Have Been An Expensive Disaster**

Posting a \$625 million bond would also have been a disaster to the company. As one U.S. source noted:

His [Loewen's] circumstances were desperate. Even if, by some miracle, he did manage to post the \$625 million bond, and avoid immediate bankruptcy, that in itself would have serious repercussions for the company. The premium payments and interest would amount to tens of millions of dollars, and it would affect the warranties and covenants made to banks that had financed the acquisition of several hundreds of funeral homes. The lines of credit he had established to fuel the growth of his company would dry up.

J. Harr, *The Burial*, The New Yorker, Nov. 1, 1999 (U.S. App. 0191).

**5. Bankruptcy Would Have Radically Changed Loewen**

While this point is fully developed in Loewen's submission, it is well worth noting that the United States' own sources describe the changes that SCI, Loewen's principal competitor, has gone through in recent years as it shifted its business plan from acquirer to operator. This

only confirms the point made by Loewen, that a 1996 bankruptcy — which would have changed Loewen from an acquisition company to solely an operating company — would have caused a drastic change in Loewen's business plan, and indeed in the company's entire "culture":

An acquisition company is almost a 180 degree change from a mature, seasoned operating company. Waltrip [of SCI] said, 'we are changing the whole culture of this company.'

G. Hassell, *Service Corp. Battles Tombstone Blues*, Houston Chronicle, Feb. 11, 2000 (U.S. App. 0207).

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## ADDENDUM B

### LOEWEN'S RESPONSE TO CERTAIN MISSTATEMENTS

Throughout the United States' Memorial, but particularly in the section dealing with Loewen's consideration and rejection of the bankruptcy "option" prior to settling the *O'Keefe* lawsuit under duress, the United States launches into a series of unsupported allegations designed to besmirch Loewen's management and discredit Loewen's claim. This Appendix B addresses some of those misstatements and omissions.

#### A. Loewen's "Fundamentally Flawed, Overly Aggressive" Acquisition Program

The Submission and Appendix A detail numerous instances where the United States constructs arguments which are contrary to its own evidence, or without any basis in its evidence; they will not be repeated here.

One allegation, however, is so separated from reality that it warrants specific refutation here — the government's allegation (U.S. Mem. at 79) that it was "common knowledge" that Loewen's acquisition strategy was "fundamentally flawed, overly aggressive, and the cause of the Company's ultimate financial decline." What the government misrepresents, through a combination of misstatement and elision, is that the Loewen acquisitions that were said to be "overly aggressive" and "the cause of [Loewen's] financial decline" occurred only *after* the O'Keefe verdict, and were themselves the result of SCI's attempted and ultimately failed acquisition of Loewen later in 1996, an attempt which in turn was widely viewed as caused by the O'Keefe settlement.

The United States' Memorial is apparently designed to leave the reader with the misimpression that Loewen's status as an acquisition company was flawed *ab initio*. The record submitted by the United States, however, dispels any such misimpression.

1. **Before the Mississippi Debacle, Loewen Did Not Overpay for Acquisitions**

The U.S. sources recognize that prior to the Mississippi litigation, Loewen did not overpay for its acquisitions.

The Loewen Group still was disciplined then in what it would pay. That year [1994] Mr. Loewen declined to be the white knight with a premium bid when Great Southern Group, a British funeral operator, tried without success to fend off an SCI takeover.

J. Schreiner, *A Mutually Destructive Rivalry*, National Post, Apr. 3, 1999 (U.S. App. 0092).

2. **The Mississippi Judgment and Settlement Prompted SCI's Hostile Takeover Attempt**

The U.S. citations make clear that the Mississippi litigation prompted SCI's hostile takeover attempt:

But the lawsuit had an unexpected aftershock. It depressed the value of Loewen's stock. It also forced the Company to issue substantial amounts of new stock, thereby diluting Ray's holdings from 20% to 15%. Both developments made the company more vulnerable to attack. On Sept. 17 [1996], SCI announced it was offering to acquire Loewen.

E. Larson, *Fight to the Death*, TIME, Dec. 9, 1996 (U.S. App. 0027).

Indeed, the O'Keefe judgment and the coerced, outrageous settlement "opened the door" to SCI's hostile takeover effort:

Loewen shares were hit hard, falling from a high of \$56 before the Mississippi judgment to \$22.50 in 1996, after the company was almost forced to put itself under court protection from its creditors. That left the door open to SCI's hostile takeover bid in September 1996 . . . .

J. Schreiner, *A Mutually Destructive Rivalry*, National Post, Apr. 3, 1999 (U.S. App. 0095).

### 3. The SCI Bid Triggered the Overpriced Acquisitions

The United States' own exhibits demonstrate beyond any serious dispute that it was not a flawed decision to be an acquisition company in the first instance, but an effort to defend against SCI's hostile takeover bid (which in turn had been caused by the coerced \$175 million settlement) that triggered the 1996-98 "overspending." After describing the financial consequences of the O'Keefe settlement to Loewen, a U.S. citation continues:

Then SCI launched a takeover bid for the weakened Loewen. Loewen's board rejected it, whereupon SCI aimed an offer directly to Loewen shareholders. Loewen went on an acquisitions spree, and racked up enough debt "to make it impossible for a sensible company to take it over," says a Loewen's spokesman, Mike Kolbenschlager. Sure enough, SCI withdrew its \$45-a-share bid.

D. Morse & M. Heinzl, *Laid Low: Funeral-Home Owners Discover the Downside of Sale to Consolidator*, The Wall Street Journal, Sept. 17, 1999 (U.S. App. 0149).

It was not just Loewen that "made a spate of acquisitions to fend off the hostile bid"; SCI did the same thing:

Competition heated up in 1996 when SCI offered to buy rival Loewen. Loewen wouldn't sell and made a spate of acquisitions to fend off the hostile bid. Rather than pull back when prices continued to spiral higher, SCI kept buying, too.

J. Baer, *Earnings Woes Deadly for Funeral Stocks*, The Globe & Mail, Oct. 4, 1999 (U.S. App. 0156).

As yet another U.S. source states, the "frenetic pace of acquisitions" was designed to "fend off" SCI's attempted raid:

The buying binge was already in motion but heated up further in 1996 when Service Corp. International, the world's largest chain of funeral homes, offered to buy Burnaby, B.C.-based Loewen. Loewen refused, and speeded up its already frenetic pace of acquisitions to fend off the aggressive bid.

Service Corp started buying businesses to keep up with the Loewenses and the upward price spiral took off.

T. Hirschmann, *Death's No Sure Thing*, National Post, Oct. 9, 1999 (U.S. App. 0159).

Still another U.S. source makes the same point:

In 1996, SCI attempted a hostile takeover of Loewen. In response, Loewen's founder went on a buying spree partly intended to run up enough debt to make his company less appetizing. He succeeded a bit too well.

R. Fields, *Grim Time for Funeral Firms Once Highly Profitable*, Los Angeles Times, Oct. 24, 1999 (U.S. App. 0164).

These sources — the United States' very own — demonstrate that the only Loewen acquisitions that could reasonably be viewed as overly aggressive were the ones that took place in 1996, well after the coerced O'Keefe settlement took place. In fact, this aggressive spate of acquisitions was, if anything, caused by the O'Keefe litigation and settlement, which, as we have detailed, was itself the consequence of a series of NAFTA breaches.

B.

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