Loewen Group - Final
7-27-2000

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

FINAL SUBMISSION OF THE LOEWEN GROUP, INC. CONCERNING THE JURISDICTIONAL OBJECTIONS OF THE UNITED STATES (AND APPENDIX)

Christopher F. Dugan
James A. Wilderotter
Gregory G. Katsas
Gregory A. Castanias

JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
July 28, 2000

Attorneys for Claimant
The Loewen Group, Inc.

TABLE OF CONTENTS

I. INTRODUCTION

1. Loewen's Submission Concerning the Jurisdictional Objections of the United States[1] demonstrated, beyond dispute, that this Tribunal has both competence and jurisdiction to hear Loewen's claims of NAFTA violations arising out of the 1995-96 *O'Keefe* debacle in Mississippi. Having no effective response, the U.S. advances dubious arguments to support its contrary case. It

- relies on a long outmoded doctrine of "restrictive interpretation" of treaties that has been rejected by modern authorities and by the Vienna Convention;
- advances an interpretation of "measure" contrary to NAFTA's plain language and stated purposes, contrary to all relevant authorities interpreting the term, and seemingly designed to exclude only Loewen's case from the definition of "measures";
- makes no attempt to explain why a judicial judgment requiring Loewen to pay O'Keefe $500 million is not a "requirement" and thus a "measure" under NAFTA;
- relies on an outdated version of the "act of state" doctrine, without noting that it was expressly replaced (in the later version of the U.S.'s own authority) with a definition that hurts the U.S. cause;
- urges, contrary to even the authority the U.S. itself cites, that the finality and exhaustion requirements are substantively different doctrines;
- claims that Loewen had an obligation to "exhaust" through demonstrably unavailable means and impractical remedies such as:

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[1] The following abbreviations appear in this Final Submission:

"Loewen Mem.":	Memorial of The Loewen Group, Inc. (Oct. 18, 1999);
"U.S. Mem.":	Memorial of the United States on Competence and Jurisdiction (Feb. 18, 2000);
"Loewen Subm.":	Submission of The Loewen Group Concerning the Jurisdictional Objections of the United States (May 26, 2000);
"U.S. Resp.":	Response of the United States on Competence and Jurisdiction (July 7, 2000).

(i) seeking Supreme Court review through an extraordinary writ granted in fewer than 2% of all cases;

(ii) attempting a collateral attack in federal district courts jurisdictionally barred from reviewing state-court decisions; and

(iii) filing for bankruptcy, which under U.S. law constitutes not a "remedy," but an irreparable injury; and

- submits, contrary to the record, that Loewen failed sufficiently to protect itself from the plundering it suffered at the hands of the Mississippi courts.

2. In the end, all of the material Loewen has submitted to this Tribunal, and supplied to the United States in discovery, fully supports Loewen's case. Facing imminent financial ruin in 1995 and 1996 as a result of the *O'Keefe* judgment, and cut off from meaningful appellate relief by the machinations of the Mississippi courts, Loewen carefully considered every possible alternative – federal-court relief from the state-court judgment (which in the dual U.S. court system is virtually never available), and even the drastically injurious alternative of bankruptcy – before settling the *O'Keefe* matter for an extortionate $175 million. (*See* Loewen Mem. at 49-61, 134-35.) The U.S. tries to make a case that Loewen believed these unavailable or injurious alternatives were "reasonable and viable" ones (U.S. Resp. at 32), but no evidence supports that contention.

II. THE RESTRICTIVE THEORY OF TREATY INTERPRETATION IS NOT APPLICABLE

3. Loewen has demonstrated that the restrictive theory of treaty interpretation is a relic of the past, showing:

(i) that the Vienna Convention rejected the restrictive interpretation doctrine (Loewen Subm. at 15-16);

(ii) that the ICSID decision in *AMCO Asia Corp. v. Republic of Indonesia*, 1 ICSID Reports 377, 393-94, 397 (1983) explicitly rejected the doctrine (Loewen Subm. at 16);

(iii) that NAFTA is a state-to-state agreement which, even under the United States' own articulation of the doctrine, cannot be interpreted restrictively (Loewen Subm. at 16-17); and

(iv) that adopting a restrictive presumption here, but not, for example, in a WTO dispute between the United States and Canada over NAFTA, could result in the same NAFTA terms having different meanings for different types of parties in different cases. (*See* Second Op. of Jennings ¶ 29.)

The United States has failed, or refused, to respond to these showings.

4. Indeed, even the NAFTA decisions cited by the U.S. have rejected any "restrictive interpretation" doctrine and instead construed NAFTA broadly. In *Ethyl Corporation v. Canada*, Award on Jurisdiction (June 24, 1998), *reprinted in* 38 I.L.M. 708 (1999), the Tribunal expressly refused to apply the "long . . . displaced" canon of restrictive interpretation:

> The Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter 11 is to be construed "strictly." The erstwhile notion that "in the case of doubt a limitation of sovereignty must be construed restrictively" has long since been displaced by Articles 31 and 32 of the Vienna Convention.

Id. ¶ 55 (footnotes omitted) (citing *AMCO*). The *Ethyl* panel refused to apply the narrow, formalistic meanings urged by Canada and instead interpreted NAFTA Chapter 11 according to its "object and purpose," *id.* ¶ 56 (quoting Vienna Convention Art. 31(1), which is to "create effective procedures . . . for the resolution of disputes" and "increase substantially investment opportunities." *Id.* ¶ 83.

5. The NAFTA panel in *Pope & Talbot, Inc. v. Canada*, Interim Award, June 26, 2000, although it did not directly address the canon of restrictive interpretation, also interpreted NAFTA broadly, not restrictively. The Claimant there argued that a Canadian export control regime had expropriated its right to export freely from Canada to the United States. Canada responded that the right to export is not an "investment" under NAFTA Article 1110, so that the

export regime could not constitute an expropriation. Canada also argued that the export regime was a nondiscriminatory exercise of its police powers, which in Canada's view could never be an expropriation under Article 1110. *Pope & Talbot*, ¶ 99. The panel rejected both Canadian arguments. It broadly interpreted "investment" to include "access to the U.S. market," *id.* ¶ 96, and rejected the narrow interpretation of "expropriation," concluding that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation," *id.* ¶ 99 (footnote omitted).

6. The doctrine of restrictive interpretation is a vestige of the past, and there is no basis for applying it to this dispute.

III. THE ACTS OF THE MISSISSIPPI COURTS WERE NAFTA "MEASURES"

A. The U.S. Has the Burden of Establishing Its Special Meaning of "Measure"

7. The U.S. now effectively concedes that the NAFTA term "measure" is broad enough to encompass judicial acts, and it has never disputed the statement of the ICJ, in an unambiguous and persuasive international precedent, that in its "ordinary sense" — the sense compelled by the Vienna Convention — the term "measure" is "wide enough to cover *any* act, step, or proceeding." *Fisheries Jurisdiction Case* (Spain v. Canada), 1998 I.C.J. No. 96, ¶ 66 (Dec. 4) (emphasis added). Nonetheless, the U.S. asks this Tribunal to adopt a special or exceptional meaning that excludes "private" litigation from the scope of the NAFTA term "measure."

8. As the party seeking an exception to the ordinary meaning of "measure," the U.S. has the burden of justifying such a special meaning. T.O. Elias, *The Modern Law of Treaties* 78 (1974) ("[T]he evidential burden of proof rests squarely on the party that seeks to invoke the

special meaning of the term in any given case.").[2] The U.S. can only prevail if it establishes that the NAFTA signatories agreed that "measure," contrary to its ordinary meaning, nonetheless excludes judicial acts in "private" litigation. As discussed below, the U.S. has produced no evidence that the NAFTA signatories agreed to this special meaning (indeed, it has produced none of the *traveaux préparatoires*), nor has it produced any evidence that international law in any way recognizes such a special meaning.

B. The NAFTA Definition of "Measure" Includes All Judicial Acts

9. It is worth recalling here NAFTA's textual definition of "measure": it "*includes any* law, regulation, procedure, requirement, or practice." NAFTA Art. 201(1) (emphasis added). The language is broad ("any") and "inclu[sive]," in keeping with NAFTA's broad remedial purposes of "eliminat[ing] barriers to trade," "promot[ing] conditions of fair competition," and "increas[ing] substantially investment opportunities." NAFTA Art. 102(1). These "objectives" are to be achieved via a broad, purposive interpretation of NAFTA "in the light of its objectives." *Id.* Art. 102(2). It is this broad, inclusive language that the U.S. must overcome to meet its burden of demonstrating its special meaning of measure.

10. The U.S. persistently refuses to address — and thus implicitly concedes — many important Loewen arguments concerning the definition of "measure," such as:

(i) that the Mississippi judgment ordering Loewen to pay O'Keefe $500 million and the Mississippi Supreme Court requirement that Loewen post a $625 million appeal bond were both

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[2] *See also* Vienna Convention on the Law of Treaties, Article 31(4) (1969) (emphasis added) ("A special meaning shall be given to a term *if it is established* that the parties so intended."); *East Greenland Case*, P.C.I.J. (1933), Series A/B, No. 43, at 49 ("If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to [a term], it lies on that Party to establish its contention."); 1 *Oppenheim's International Law* 1272 n.10 (R. Jennings & A. Watts, eds., 9th ed. 1992) ("The state contending for a special meaning of a term has to 'demonstrate convincingly the use of the term with that special meaning'" (quoting *Advisory Opinion on the Western Sahara*, 1975 I.C.J. 12, 53 (Oct. 16)).).

"requirements," and thus squarely within the NAFTA definition of "measure" (Loewen Mem. at 38-39; Loewen Subm. at 6);

(ii) that the Mississippi appeal bond requirement is both a "law" and a "requirement" (Loewen Mem. at 63);

(iii) that the excessive verdict against Loewen was part of a "practice" of the U.S. court system (Loewen Mem. ¶ 314 n.20);[3]

(iv) that both the U.S. and Canada construed "measure" broadly, not restrictively, at the time that NAFTA was enacted (Loewen Mem. at 140-41; Loewen Subm. at 8); and

(v) that numerous international treatises define "measure" to include judicial acts. (Loewen Mem. at 141-45; Loewen Subm. at 11-13.)

11. Loewen also offered additional textual evidence that NAFTA intends "measures" to include judicial acts and procedures. Loewen showed that Chapter 17 of NAFTA uses "measure" to refer to a full range of judicial acts and procedures. (*See* Loewen Mem. at 140; Loewen Subm. at 9-10.) The U.S. does not dispute this, but instead argues that even if "measure" includes judicial acts and procedures, that "does not mean that any individual court decision is open to challenge under NAFTA." (U.S. Resp. at 6.) But that is logically what it must mean: if "measures" includes judicial acts, then Chapter 11, which expressly creates an arbitration remedy for illegal "measures," makes illegal judicial acts arbitrable.

12. Similarly, as Loewen showed, NAFTA Chapter 10 includes "precedential judicial decisions" in a list of government procurement "measures" that NAFTA signatories must publish. (Loewen Subm. at 10-11.) The U.S. seizes on the word "precedential," arguing that non-precedential decisions, such as individual verdicts, are not "measures." (U.S. Resp. at 7-8.) But this argument goes too far, for in the context of a *publication* requirement, the "precedential"

[3] The most recent evidence of this practice is the punitive damage award of $145 *billion* just imposed on U.S. tobacco companies. *See* M. Curriden, *Smokers Awarded Record $145 Billion in Lawsuit; Tobacco Firms Vow to Appeal 'Ridiculous' Verdict*, The Dallas Morning

limitation means only that those are the sort of judicial decisions that the NAFTA signatories must publish. It does not mean individual verdicts are not measures.

13. The United States argues that *Azinian v. United Mexican States*, ICSID Case No. ARB (AF)/97/2 (Nov. 1, 1999), "did not involve a challenge to judicial actions" because the claimants raised no complaints against the Mexican courts, and that as a result, the Tribunal's comments are "*obiter dictum.*" (U.S. Resp. at 5-6.) However, the *Azinian* Tribunal stated:

> The Arbitral Tribunal does not . . . wish to create the impression that the Claimants fail on account of an improperly pleaded case. The Arbitral Tribunal thus deems it appropriate, *ex abundante cautela*, to demonstrate that the Claimants were well advised not to seek to have the Mexican court decisions characterised as violations of NAFTA.

Azinian, supra, ¶ 101. The Tribunal then carefully reviewed the Mexican court decisions, concluding that "the evidence positively supports the conclusions of the Mexican courts." *Id.* ¶ 120. The *Azinian* panel thus consciously and deliberately treated the decisions of the Mexican courts as reviewable NAFTA measures and exercised jurisdiction over them, just as Loewen asks this Tribunal to do here.[4]

(continued...)

News, July 15, 2000, at 1A ("The U.S. Chamber of Commerce said the jury's decision is 'an obscene symptom of a court system out of control.'") (App. at A2308.)

[4] Mexico appears to have adopted the *Azinian* holding that judicial proceedings are reviewable in a NAFTA arbitration for breaches of international law. In its Counter-Memorial Regarding the Competence of the Tribunal of November 5, 1999, filed in the recent case of *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (June 2, 2000), Mexico stated:

> The Respondent wishes the Claimant to be on notice that, if the Claimant persists in seeking compensation under Chapter Eleven, the Respondent will rely in part on the defense that a claim for breach of contract is not actionable under the NAFTA — especially when the Claimant has had access to judicial process under the domestic legal system, *and there is no indication that the domestic judicial proceedings were themselves inconsistent with international law.* In particular, the Respondent will rely on the reasons given in the recent award of the Arbitral Tribunal in

14. The only NAFTA decisions addressing the definition of "measure" have given the term its broad, purposive, and correct interpretation. The *Ethyl Corp.* Tribunal stated:

> In addressing what constitutes a measure the Tribunal notes that Canada's *Statement on Implementation of the North American Free Trade Agreement* . . . states that:
>
> > The term "measure" is a *non-exhaustive* definition of the ways in which governments impose discipline in their respective jurisdictions.
>
> This is borne out by Article 201(1), which provides that:
>
> > **measure** includes any law, regulation, procedure, requirement or practice.
>
> Clearly something other than a "law," even something in the nature of a "practice," which *may not even amount to a legal stricture*, may qualify.

Id. ¶ 66 (emphasis added). The *Pope & Talbot* panel likewise interpreted "measures" broadly:

> [M]easures should be subject to the requirements of international law if they impair the economic value of an investment to a degree that is equivalent to expropriation[;] . . . . the basic concept at work in the treaties, NAFTA included[,] [is that] measures are covered only if they achieve the same results as expropriation.

Id. ¶ 104 n.87.

15. Thus, the text of NAFTA and subsequent Chapter 11 adjudications fully and unanimously support an interpretation of measure that includes all judicial acts.

(continued...)

> *Azinian And Others v. The United Mexican States*, wherein a claim for breach of contract in connection with a municipal waste collection concession was dismissed on those very grounds.

Counter-Memorial, *Waste Management* at 25, ¶ 113 (emphasis added). This implies that Mexico accepts that "domestic judicial proceedings" that are "inconsistent with international law" *are* "actionable under NAFTA."

C. The U.S. "Act of State" Doctrine Does Not Limit the Meaning of "Measure"

16. In its May 26 Submission, Loewen noted that the U.S. had offered no basis whatever in the text of NAFTA, or in international law, for its proposed special meaning of "measure" that distinguishes between litigation involving the government and litigation involving private parties, and it challenged the U.S. to proffer some principled basis for the exception it seeks. (Loewen Subm. at 3-4, 17-20.)

17. The United States' July 7 response fails to meet the challenge. All the United States can offer to support its claimed distinction is a 1965 articulation of the U.S. "act of state" doctrine that distinguishes between private litigation and litigation involving a "public" interest. For at least six reasons, that authority lends no weight to the U.S. argument.

18. First, the act of state doctrine is not international law.[5] *See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (act of state doctrine is "a consequence of domestic separation of powers," not "an expression of international law"); *Restatement (Third) of the Foreign Relations Law of the United States* § 443 cmt. a (1987) (act of state doctrine is not "compelled . . . by international law"); *see also First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-22, 427 (1964). Although analogous doctrines exist in the domestic law of some other countries, the U.S. cites no authority that in any way suggests that the act of state doctrine has been adopted by enough countries to be considered international law pursuant to Article 38 of the ICJ. (U.S. Resp. at 12.)

19. Second, even if the general act of state doctrine were a principle of international law, the aspect of that doctrine that distinguishes between private and public litigation was

[5] International law and NAFTA are, of course, the only sources of law that govern this dispute. NAFTA Art. 1131(1).

adopted *only* by the U.S., not by any other nation. A singular articulation of an obscure legal distinction by one country can never be considered as international law.

20. Third, the United States' 1965 distinction between private and public litigation is no longer good law even in the U.S. The articulation of the act of state doctrine cited by the U.S. is the *Restatement (Second) of Foreign Relations Law of the United States,* adopted in 1965. However, the distinction between "private" and "public" litigation was abandoned in 1986 by the *Restatement (Third) of Foreign Relations Law of the United States*. *Compare Restatement (Second)* § 41 cmt. d *with Restatement (Third)* § 443 cmt. i.[6] The public/private distinction was eliminated from the *Third Restatement* because "[t]he domestic component of the foreign relations law of the United States has . . .undergone significant change since publication of the previous Restatement." *Restatement (Third)* intro. at 4. One of these "significant changes" to this "domestic component" of U.S. law involved the act of state doctrine, *see, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976) (ruling that the act of state doctrine "applies to 'acts done within their own States, in the exercise of governmental authority'") (emphasis omitted, citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

21. Under the *Restatement (Third)*, the act of state doctrine now broadly applies to "acts of a governmental character done by a foreign state within its own territory and applicable there." *Restatement (Third)* § 443(1). This formulation includes *all* acts of a governmental character, including judicial acts, public or private, mirroring the holding of the ICJ that "in its

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[6] Where an earlier Restatement is superseded by a later one, the later one controls. *See Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 179-80 (3d Cir. 1977) (concluding that between Restatement of Torts and tentative draft of Second Restatement of Torts, "the weight of authority" lies behind the tentative draft); *Landis v. Hodgson*, 706 P.2d 1363, 1367-69 (Idaho Ct. App. 1985); *Ripple v. Wold*, 549 N.W.2d 673, 675-76 (S.D. 1996); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335-37 (Tex. 1998) (rejecting comment contained in superseded Restatement), *cert. denied*, 526 U.S. 1040 (1999).

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." *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 I.C.J. No. 96, ¶ 66 (Dec. 4).[7]

22. Fourth, the U.S. is now in the contradictory position of arguing that the Mississippi judicial acts were "state action," (*see* Days Reply Statement at 34-35), but not "acts of state." No heroic rationalization can possibly reconcile those arguments.

23. Fifth, the NAFTA signatories — the U.S. included — plainly intended to protect foreign investors from injuries by private persons. Article 1105 requires each signatory to provide "full protection and security," which means "protecting investment against private as well as public action." *Bilateral Investment Treaties in the Mid-1990s*, United Nations Conference on Trade and Development, Geneva, 1998, at 55. It is simply not conceivable that NAFTA protects foreigners from injury inflicted purely at the hands of private parties, but fails to protect foreigners injured by private parties acting through state organs such as courts.

24. Finally — and most importantly — even if the U.S. were correct that international law recognizes the purported distinction between "private" litigation and litigation that gives effect to a "public" interest, the Mississippi litigation would still qualify as an act of state. Both courts and commentators in the United States agree that punitive damage awards — such as the penal judgment that required Loewen to pay the O'Keefes $400 million in punitive damages — are intended to give effect to "public interests":

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[7] Prof. Caron asserts that the *Second Restatement* was "applicable" when decisions referring to it, including *Liu*, were decided. (Caron Op. ¶ 37.) That is not so. The *Third Restatement* was promulgated on May 14, 1986, three months before the district court rendered its opinion in *Liu* (Aug. 11, 1986). The Tentative Draft of the *Third Restatement* dealing with the act of state doctrine was issued three years earlier, in 1983. *See* Tentative Draft #4 of the *Third Restatement* (April 1, 1983), at 1-20. Thus, it was inappropriate for the *Liu* court to rely

> [I]n the courts of the great majority of states, and in the federal courts, punitive damages are fully approved as extracompensatory awards. The windfall to the plaintiff is tolerated as a means of securing public good through a kind of quasi-criminal punishment in the civil suit.

1 D.B. Dobbs, *Dobbs Law of Remedies* § 3.11(1), at 457 (2d ed. 1993) (footnotes omitted).[8] Indeed, recognizing that punitive damages serve the public interest, several states statutorily mandate that a portion of every punitive damage award must be "paid to the state or some specified agency." *Id.* § 3.11(12), at 527 & n.39.

25. Most countries outside the U.S. likewise believe that punitive damages serve public ends, and for that reason numerous countries reject punitive awards as a misuse of private civil law for public, criminal law ends. *See* A.W. Cortese, Jr. & K.L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. Pa. J. Int'l Bus. L. 1, 52 (1992). Some countries thus refuse to enforce U.S. punitive damage verdicts. *See* R.A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NILR 143, 165, 168 & n.150 (1996) (Germany and Japan); T. Kojima, *Cooperation in International Procedural Conflicts: Prospects and Benefits*, 57 Law & Contemp. Probs. 59, 64 (1994) (Japan). Even the U.S. expert, Prof. Caron, explicitly recognizes that such penal court judgments are "public judgments" that

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(continued...)

upon the *Second Restatement* in 1986, or for Prof. Caron to claim that it was still "applicable" at the time of *Liu*.

[8] *See also Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 741 (4th Cir. 1989) ("The purpose of compensatory damages is to make the plaintiff whole by vindicating a private wrong. . . . In contrast, punitive damages serve a public purpose."), *overruled on other grounds by, Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991); *St. George v. Mak*, No. 5:92CV593, 2000 WL 303249, at *3 (D. Conn. Feb. 15, 2000) (declining to award punitive damages because they "would not serve any further public purpose"); *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976) ("[T]he availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs."); *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1010 (Mont. 2000) ("[P]unitive damages serve not only to punish, but also to set an example to the public for purposes of deterrence" (internal quotations omitted).)

are not enforceable outside the issuing jurisdiction precisely because they give effect to public interests. (Caron Statement ¶ 46 n.23.)

26. And importantly, there is no mistaking the fact that the enormous verdict in this case, including the punitive damages, was obtained by appeals to public ends. O'Keefe's counsel encouraged the massive award with statements such as this one from the closing argument in the punitive damage phase of the *O'Keefe* trial:

> 1 billion dollars, 1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may not ever get this chance again. *And you're not just helping the people of Mississippi, but you're helping . . . families everywhere.*

(Tr. at 5809 (emphasis added).) O'Keefe's counsel made other similar appeals to seeking justice for "the State of Mississippi," going so far as to cloak his client with the Mississippi State seal, which appeared on the wall behind the judge's bench in the courtroom. (Tr. at 61.)

27. Under the United States' own definition, then, the Mississippi verdict was a "public judgment," and thus an "act of state," and thus a NAFTA "measure." Accordingly, even if the special meaning of "measure" sought by the U.S. had some abstract validity — which it never had under international law, and no longer does under U.S. law — it would not support the United States' jurisdictional objection.

D. The Definition of "Measure" Is Unaffected by the Denial of Justice Standard

28. The United States' arguments conflate the definition of "measure" with the substantive requirements of a "denial of justice." (*See, e.g.*, U.S. Resp. at 8 (apparently arguing that a judicial act can be a "[measure] in only the most extreme and unusual of circumstances," such as where "'there has been some flagrant or notorious injustice or denial of justice'") (citation omitted).) The Tribunal should reject the United States' efforts to superimpose the substantive requirements of a denial of justice claim upon the "jurisdictional" question of

whether the complained of acts constitute a "measure." Even so, it is clear that Loewen's allegations amply show that the measures of the Mississippi courts not only satisfy the "jurisdictional" definition of "measure" under NAFTA, but constitute "extreme and unusual" denials of substantive and procedural justice.

29. Again, it is useful to return to the text of NAFTA. Chapter 11 of that Agreement applies to "measures adopted or maintained by a Party" that "relat[e] to" investors of another Party or their investments. NAFTA Art. 1101. "Measure" includes, but is not limited to, "any law, regulation, procedure, requirement or practice." NAFTA Art. 201. Any judicial "procedure, requirement or practice" that "relat[es] to" such investor or investment is, by definition, a NAFTA "measure." There is no principle of limitation anywhere in the text of NAFTA that would support the United States' notion that a Party "measure" must be particularly "extreme or unusual" to constitute a NAFTA "measure."

30. Many governmental "measures" do not violate NAFTA or international law. A nondiscriminatory U.S. administrative regulation or state law clearly would be a "measure" as long as it "relat[es] to" Canadian or Mexican investments; whether that "measure" violates NAFTA or international law presents an entirely different question.[9]

31. Under the denial-of-justice standard, judicial measures violate international law where they rise to the level of a manifest injustice. And Loewen has amply alleged facts to support such a claim here. (*See* Loewen Mem. ¶¶ 179-86, 203-05.) But the question of whether

[9] Thus, a judicial act adverse to a NAFTA signatory's investment may be a NAFTA "measure," but not so unjust as to constitute a denial of justice and thus a breach of international law. Indeed, that is precisely what the *Azinian* panel concluded with respect to the measure at issue there. *Azinian*, ¶ 120.

a judicial act rises to the level of a "manifest injustice" is not logically relevant to whether the judicial act is a NAFTA "measure" in the first place.[10]

32. "Measure" and "denial of justice" are related only in this sense: a NAFTA Tribunal has *jurisdiction* to consider a municipal judicial measure if a claimant credibly alleges that the measure violates NAFTA or international law. Such a violation is not limited to judicial denials of justice, but includes any other violation of NAFTA or international law, including illegal expropriation, discrimination, denial of full protection and security, etc. Loewen has, of course, clearly alleged judicial measures that violate NAFTA and international law in these and other ways. That establishes this Tribunal's jurisdiction.

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[10] The U.S. argues that "judicial acts can *violate* . . . international law . . . in only the most extreme and unusual of circumstances." (U.S. Resp. at 8 (emphasis added), (citing T. Baty, *The Canons of International Law* 127 (1930).) Baty, who was a proponent of the Calvo doctrine, argued that states were internationally responsible only if they treated aliens with "savage barbarity." Baty, *supra*, at 131 (emphasis omitted). Baty's view is, in the words of Freeman, in "abject disrepute," and Freeman rejected such a separate standard for judicial acts:

> Consequently, *the liability which arises out of wrongful acts of the judiciary is the same as that arising out of the wrongful acts of executive or legislative departments. All three classes are governed by identical principles*. The only permissible criterion of responsibility in respect to their actions is whether an injury has been caused as the result of an act which violates a rule of international law.

A. Freeman, *The International Responsibility of States for Denial of Justice*, 31 (1970) (footnote omitted). Similarly, the *Azinian* Tribunal stated:

> [I]n the present century State responsibility for acts of judicial organs came to be recognized. Although 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.*

Id. ¶ 98 (emphasis in original). The fact that a "judgment given by a judicial authority emanates from an organ of the State" unquestionably makes it a NAFTA "measure." *Id.*

E. This NAFTA Arbitration Is Not an Appeal

33. The United States argues that this NAFTA Chapter 11 claim "is for the claimant, for all practical purposes, an appeal" of the Mississippi judgment, for it "is a review both as to law and fact." (Caron Op. ¶ 54 n.25.) However, this arbitration claim is premised on violations of NAFTA and international law, not U.S. and Mississippi law, and it is brought against a different party, in a different forum, seeking different relief.

34. The best evidence of the fundamental difference between this arbitration and the Mississippi appeal are the local law issues that Loewen cannot pursue here, and that this Tribunal cannot decide. To note just a few examples, Loewen intended to argue on appeal that:

- The recovery of *any* damages should have been barred for the Mississippi court had no power under state law to collapse the "pre-need" insurance contracts of 1974, 1978, and 1987 into a single contract. (U.S. App. at 670 (TLGI03434).)
- Under Mississippi law, it was the exclusive province of the judge, not the jury, to determine whether the August 19, 1991 Agreement, as a matter of law, was an enforceable agreement, and under Mississippi law "agreements to agree" are unenforceable. (U.S. App. at 672 (TLGI03436).)
- The O'Keefe plaintiffs alleged that Loewen engaged in unfair trade practices under Mississippi law, including monopolization, but they failed to allege any of the requisite elements of the cause of action, such as valid geographic or product markets, or market power. Furthermore, O'Keefe's argument that the August 1991 Agreement was an illegal restraint on trade was irreconcilably in conflict with his simultaneous contention that the August, 1991 Agreement was a valid, binding and enforceable contract that was breached. Nonetheless, the jury awarded damages on both claims. (U.S. App. at 678 (TLGI03442).)

Such state-law errors of the Mississippi court, which would have dominated a Mississippi appeal, were not violations of international law and are utterly different from the issues before this Tribunal. Even so, Professor Caron's efforts to analogize this NAFTA claim to an "appeal" only serve to underscore, with dramatic effect, the fact that Loewen was denied its opportunity to appeal the outrageous O'Keefe judgment on any reasonable basis.

IV. LOEWEN WAS NOT REQUIRED TO EXHAUST LOCAL REMEDIES

A. NAFTA Article 1121 Waives the Exhaustion Requirement

35. After ignoring Article 1121 in its initial submission, the United States now concedes, as it must, that this provision "implies some relaxation of the local remedies rule." (U.S. Resp. at 30.) Similarly, Professor Caron admits that Article 1121 "goes some distance" in waiving the normal exhaustion requirement. (Caron Op. ¶ 59.) Thus, the only question is whether Article 1121 waives the exhaustion requirement entirely, or only waives "some" of it.

36. Article 1121 states, in relevant part:

> A disputing investor may submit a claim . . . only if . . . the investor and . . . the enterprise, waive their right to *initiate or continue before any . . . court* . . . any proceedings with respect to the measure [at issue]. (emphasis added)

By its express language, Article 1121 permits a claimant to commence arbitration while judicial proceedings remain pending, but only if its abandons those proceedings. *See, e.g., Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (June 2, 2000) (NAFTA arbitral claim dismissed where claimant pursued local remedies).[11] This right to commence arbitration, coupled with the mandatory requirement to abandon existing judicial proceedings, must be interpreted (as the U.S. and Prof. Caron at least partially concede) as a waiver of the normal rule of exhaustion.

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[11] Both Canada and Mexico agree that Article 1121 requires an election of remedies. *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (Canadian Submission Pursuant to Art. 1128) (Dec. 17, 1999) ¶ 5 (stating with respect to Article 1121, "The same measure . . . cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor has a clear choice and can choose one or the other — but not both."); *Waste Management, supra* (Counter-Memorial Regarding the Competence of the Tribunal by Respondent United Mexican States) (Nov. 5, 1999), at 23, ¶ 101 ("Article 1121 requires an election of remedies. . . . [A]rbitration is a substitute for litigation.").

37. Despite the unqualified language of Article 1121, the United States attempts to carve out a special exception for judicial denials of justice that is unsupported by text or purpose.[12] Specifically, the U.S. argues that, for denial of justice claims alone, an investor does *not* have the ordinary NAFTA right to elect arbitration, but instead must continue with and exhaust local judicial proceedings. This putative exception, however, finds no support either in the text or purpose of NAFTA. Accordingly, the Tribunal should apply the waiver as written, and conclude that Loewen was under no duty to exhaust.

B. International Law Does Not Recognize a Finality Requirement Distinct From Exhaustion

38. The U.S. errs in contending that, for judicial denials of justice alone, international law recognizes a "finality" rule distinct from exhaustion and not waived by Article 1121. Loewen contends that "finality" and "exhaustion" are merely different linguistic expressions of the same concept, and the U.S. now concedes "that judicial finality is commonly obscured by the local remedies rule." (U.S. Resp. at 21.) The reason they are "commonly obscured" is that they are the same, and the U.S. cites no authority whatsoever supporting the notion that finality is distinct from exhaustion.[13]

39. In arguing that the concepts are distinct, the U.S. relies heavily on the 1930 Hague Draft Codification, an unfinished, incomplete draft codification of international law.[14] In that

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[12] As discussed in Section III(A) above, it is the United States' burden to justify the adoption of any special meaning.

[13] Even the United States' own sources recognize that "exhaustion" means "finality." "*[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)).

[14] *See* F.V. Garcia-Amador, *State Responsibility: Int'l Responsibility: Report by F.V. Garcia-Amador, Special Rapporteur*, [1956] II Y.B., Int'l L. Comm'n 173, 178 (noting that the Committee of the 1930 Hague Conference "was unable to complete its study").

draft, the expression "exhaustion of the remedies" appears in Article 4, and the expression "a judicial decision which is not subject to appeal" appears in Article 9. (U.S. Resp. at 21-22.) Nonetheless, the United States' own representative at the Hague Conference, Professor Borchard, in discussing Article 9, explicitly equated these "finality" and "exhaustion" requirements: "[U]ntil the state has spoken *finally, that is, until local relief has been exhausted*, international responsibility cannot properly be created or invoked." E. Borchard, "*Responsibility of States" at the Hague Codification Conference*, *reprinted in* 24 Am. J. Int'l. L. 517, 533 (1930) (emphasis added).

40. The U.S. errs in contending that international tribunals have recognized a distinct "finality" requirement in denial of justice cases. The United States selectively quotes *Ferrara's Case* (1901), *reprinted in* 6 Moore, *Digest of Int'l Law* 672 (1906), as follows:

> [i]t frequently happens that litigants are denied rights by the decisions of inferior courts, and are obliged, in order to establish such rights, to carry the case to the courts of last resort. The plaintiff . . . should pursue the judicial remedy afforded by our laws, perfecting her appeal to the court of appeals . . . of Colorado, and, if necessary thereafter, by appropriate proceedings, bring the case before the Supreme Court of the United States.

(U.S. Resp. at 18.) However, the sentence immediately preceding the United States' quotation elaborates: "In the opinion of the Department the case, in its present stage, is not one for diplomatic intervention, *for the reason that the plaintiff has not exhausted her judicial remedy.*" *Ferrara's Case*, *supra*, at 674 (emphasis added). Similarly, *Christo G. Pirocaco v. Republic of Turkey*, (1923), *reprinted in* Fred K. Nielsen, *American-Turkish Claims Settlement Under the Agreement of December 24, 1923*, 587, 599 (1937) explicitly equates finality and exhaustion:

> As a general rule, a denial of justice . . . can be predicated only on a decision of a court of last resort. A litigant must *exhaust his remedies* before it can be said that he has had that *final judicial determination* of his case which the law affords. (emphasis added)

These cases rest squarely on exhaustion grounds and do not recognize, even by implication, a distinct "finality" rule for denial of justice cases.[15]

41. Finally, Professor Caron errs in contending (Caron Op. ¶ 62) that the *Ethyl* tribunal "unequivocally" recognized a broadly applicable "finality requirement." The question presented in *Ethyl* was whether a legislative act became a Party "measure" upon passage by the Canadian Senate or upon conferral of the Royal Assent. *See Ethyl Corp., supra,* ¶¶ 65-69. The panel did not address any question of finality, of exhaustion, or of judicial denials of justice, and its decision does not even remotely support the government's argument that there is a special finality rule distinct from exhaustion in denial of justice cases.[16]

C. The Exhaustion Requirement Is Waivable

42. The United States errs in contending that the exhaustion requirement is a substantive element of denial of justice, and thus is not subject to waiver through what the government describes as the "procedural" device of Article 1121.

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[15] The U.S. similarly errs in contending that the *Pirocaco* case recognized that finality is a substantive requirement. Nor did *Pirocaco* require "finality independent of the local remedies rule." (U.S. Resp. at 23-24.) The *Pirocaco* claim was rejected not because "the claimant failed to appeal," (*id.* at 24) as the U.S. incorrectly asserts, but because he failed to state a claim:

> It is unnecessary to observe that some meagerly stated, general conclusions by the claimant and his wife, to the effect that Turkish judicial authorities acted in an arbitrary manner in refusing to adjudge the complainants entitled to some parcels of land and therefore perpetrated a denial of justice, will not suffice to establish the perpetration of a denial of justice as the foundation of an international claim.

Pirocaco, supra, at 600; *see id.* at 598 ("By a brief, further analysis of specific complaints referred to in the claimant's statement of November 14, 1933, it can be indicated that he has utterly failed to support them as the basis of an international claim.").

[16] Moreover, the *Ethyl* panel concluded that the legislative act became subject to challenge *no later* than when the Royal Assent made it legally effective, *see id.*, ¶ 69. Under that reasoning, any implicit "finality" requirement would be satisfied here because the *O'Keefe*

43. Under prevailing international law, exhaustion is procedural. A leading commentator has stated that the proper construction of international law, is found in *Finnish Ships Arbitration Case* (1934), where the Permanent Court of International Justice held "(a) that State responsibility is incurred as a result of a breach of international law, provided the breach constitutes a direct act of the Government of that State; and (b) that although the act in question gives rise to international responsibility an international claim does not lie unless and until local remedies have been exhausted. This view is shared by legal opinion *almost unanimously*." F.V. Garcia-Amador, *State Responsibility: International Responsibility: Report by F.V. Garcia-Amador, Special Rapporteur*, [1956] II Y.B. Int'l L. Comm'n 173, 206 (emphasis added). Thus, international law clearly distinguishes between the substantive act that breaches international law and the procedural requirement of exhausting local remedies prior to lodging an international complaint.

44. Exhaustion is a substantive element of a denial of justice only in one circumstance: when the initial wrong is committed by a private party. The State Department has explained the reason for this exception:

> 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.

(continued...)
judgment and bonding requirement were subject to immediate enforcement long before the completion of any further appellate review.

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 789-90 (bold emphasis in original; all other emphasis added). The United States' response is to assert that Whiteman "should be read" to say that "exhaustion is substantive in cases where judicial action is the source of the harm claimed; procedural in others." (U.S. Resp. at 23 n.7.) That is not, however, what Whiteman does say.

45. While the U.S. selectively quotes from Bin Cheng (U.S. Resp. at 28-29), the full passage confirms that exhaustion is substantive only for private wrongs:

> *Cases of failure of local remedies in this sense should, therefore be carefully separated from cases of denial of justice proper, where the international unlawful act consists in the remedial organs of the State in failing to comply with the requirements of international law to provide redress for* ***private*** *wrongs suffered within its jurisdiction. In the latter case, the international unlawful act does not arise unless there is an established failure of local remedies.* The distinction is of great importance in those cases where, for instance, before a claims commission, the rule of local remedies is dispensed with. Such a provision can only dispense with the rule with regard to the former category of cases, but not with the latter. For in the second category of cases, where local remedies have not yet failed either by insufficient action or by their absence, there is no internationally unlawful act and hence to claim to be presented.

B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 179-80 (1987) (emphasis added). In sum, there is no support for the U.S.'s assertion that exhaustion is a substantive requirement even in cases where, as here, an organ of the state inflicted the initial wrong.

D. Exhaustion Is Not Required For Denials of Justice

46. At the conclusion of its argument for imposing an exhaustion (or "finality") requirement on denials of justice claims, the United States makes an extraordinary appeal for this Tribunal to disregard the precedent of other international and NAFTA tribunals:

> Even if, in some cases, international tribunals have taken jurisdiction over claims based on judicial actions that are still subject to appeal, this does not prove Loewen's point. While prior decisions can give some guidance as to the content of international law requirements, this Tribunal is of course in no way bound to follow the decision of any other Tribunal, even that of other NAFTA Tribunals.

(U.S. Resp. at 27.) This Tribunal should decline that invitation to repudiate settled precedent, which makes clear that international law does not generally require exhaustion to pursue denial of justice claims.

47. The "some cases" acknowledged by the U.S. include decisions such as *McNear, Case of Moses,* and *Garrison's Case.* Despite the United States' suggestion to the contrary, the international tribunals in these cases did review wrongs inflicted by lower courts, *without* requiring exhaustion. (Loewen Subm. at 21-22, 25-26.) In *G.W. McNear, Inc. v. United Mexican States* (U.S. v. Mex. 1928), Docket No. 211, *Opinions of the Commissioners*, 68, 69 (1929), *reprinted in* 4 R.I.A.A. 373, the claimant's property was initially seized by "*order*" of the Mexican "*District Court,*" and the claimant sought release of the goods "by application to the court." However, the "*decision of the Court*" was that "no release could be ordered." *Id.* at 69-70 (emphasis added). The Mexican court ordered the claimant to bring a different action, but the claimant instead filed an international claim, and the Claims Commission held Mexico liable "notwithstanding that possibly McNear might have had his right recognized [under Mexican law], if he had brought a formal action before the Court." *Id.* at 71.

48. Similarly, in the *Case of Moses* (U.S. v. Mex. 1871), No. 197, *cited in* 3 Moore, *International Arbitrations* 3127 (1898), the initial injury arose directly out of a fine "assessed by the district court of Saltillo." Mexico moved to dismiss the claim, arguing that "the seizure was a matter for judicial investigation" and that "the owner failed to pursue the proper legal remedies under the laws of Mexico." *Id.* at 3128. The umpire disagreed, concluding that "'there is no reason why claimant, a citizen of the United States, should not present himself before this commission and avail himself of the convention.'" *Id.* at 3128-29.

49. Finally, in *Garrison's Case* (U.S. v. Mex. 1871), No. 8, *cited in* 3 Moore, *International Arbitrations* at 3129, an umpire rejected Mexico's request to dismiss a denial of justice claim arising out of a partial adjudication within the Mexican court system:

> It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country, which nevertheless the law of nations universally allows in extreme cases. It has done so from the times of Hugo Grotius. The difficulty and delicacy, however, is very much lessened when it is believed that so many irregularities or wrongs have been committed in two countries by the authorities of the one against the citizens of the other that these wrongs by the respective authorities are spoken of in a special treaty or convention (as that under which our commission has its being) in which the governments of these two countries agree to redress the wrongs as much as possible, according to justice and equity. No doubt is left on my mind that the Mexican court or judge in Acapulco acted with great irregularity, and even with some violence, and that, as matters went, the case of the steamboat *Commodore Stockton* was by no means fully adjudicated, and that an appeal from the Acapulco judge to a Mexican court of appeal was prevented by intrigues or unlawful transactions. The whole is wrapped in confusion and presents a very fair subject to be adjudicated by our commission.

Id.[17]

[17] It bears noting that the U.S. espoused these international claims knowing that there had been no exhaustion. Evidently, the United States takes a different legal position when a claimant is not a U.S. citizen.

50. The U.S. itself has repeatedly recognized that exhaustion is not required in denial of justice cases. As one leading commentator explains: "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 (emphasis added, footnotes omitted). Specifically, the U.S. has concluded that exhaustion or finality is not 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. Similarly, the U.S. has recognized that, where prior court proceedings were "palpably arbitrary and unjust," there is no need "to attempt further judicial remedies in the local tribunals." Report of Mr. Bayard, Sec. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49th Cong. 2d sess., *reprinted in* 6 Moore, *Digest of Int'l Law* at 667.

51. In fact, the U.S. has acknowledged that the 1930 Hague Draft Codification, which it misleadingly cites for the existence of a distinct "finality" requirement, explicitly *exempts* denials of justice from finality/exhaustion. Professor Borchard, a U.S. representative to the Hague Conference, has explained that:

> Paragraph (1) of [Article 9] deals with final judicial decisions incompatible with international obligations, a fact which may not necessarily involve a denial of justice. The second paragraph, however, [Article 9(2), which is expressly exempted from the exhaustion requirement by Art. 4(2)] is designed to cover denial of justice.

Borchard, 24 Am. J. Int'l L. at 533. Thus, the U.S. has long recognized that international law does not require exhaustion (or "finality") in denial of justice cases.

52. International authorities have also recognized this principle. "[A]bsence of due process . . . is a good excuse for not exhausting remedies." C.F. Amerasinghe, *Local Remedies in International Law* 181, 200 (1990). "It does not seem incompatible with the essential purpose of the rule [of exhaustion] to require the alien to exhaust all the local remedies, *subject to a proviso concerning cases of denial of justice* . . . ." Garcia-Amador, *supra*, [1956] II Y.B. Int'l L. Comm'n at 205 (emphasis added); *see also* Research in International Law, *Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (Harvard Law School), 23 Am. J. Int'l L. 133, 150 (Spec. Supp. 1929) ("If, in the course of the prosecution of local remedies, there is a denial of justice, as that term is defined in Article 9, *the local remedies are clearly inadequate*, and the state of which the alien is a national has suffered injury for which the other state becomes responsible" (emphasis added).).

53. In sum, the vast body of international case law, the longstanding view of the U.S. itself, and the weight of respected international opinion establish that exhaustion is not required in denial of justice cases. In arguing to the contrary (U.S. Resp. at 34), it is the U.S., not Loewen, that has it "precisely backwards."

V. LOEWEN SATISFIED ANY APPLICABLE EXHAUSTION REQUIREMENT

A. A Party Need Only Exhaust Reasonably Available Remedies

54. Relying on isolated sources of international law, the United States continues to assert that an international claimant must exhaust all domestic remedies that are not "manifestly ineffective" or "obviously futile." (U.S. Resp. at 33, 36, (citing Amerasingle, *Local Remedies* at 195).) However, the government's own international case law demonstrates that exhaustion, where required, applies only to *reasonably* available local remedies. See, *e.g.*, *Amos B. Corwin v. Venezuela* (U.S. v. Venez. 1885), No. 39, *reprinted in* 3 Moore, *International Arbitrations* 3210, 3218 (1898) (cited in U.S. Resp. at 19) ("It is thoroughly well settled that in . . . judicial

sentences generally *where appeals are reasonably attainable* — a state's liability begins only when the court of last resort, *accessible by reasonable means*, has acted on it.") (emphasis added); *Case of Certain Norwegian Loans*, (Fr. v. Nor.) 1957 I.C.J. 9, 39 (July 6) (separate opinion of Judge Lauterpacht) (cited in U.S. Resp. at 33) (exhaustion required only where there is, "as a matter of *reasonable possibility*, any effective remedy before [the] courts") (emphasis added); *X v. United Kingdom*, App. No. 3651/68, 31 Eur. Comm'n H.R. Dec. & Rep. 72, 90 (1970) (cited in U.S. Resp. at 33) (claimant must exhaust all domestic remedies that are "intrinsically able to offer a real chance of success").

55. Most of the government's secondary sources likewise support this reasonableness standard. One commentator relied upon by the government (U.S. Resp. at 34) explicitly rejects an "obvious futility" test in favor of one grounded in "reasonableness:"

> Asking whether or not a remedy is "obviously futile" is about as *unsatisfactory* as asking whether a chattel is "inherently dangerous," a primitive test which the English courts eventually found to be so subjective as to be arbitrary, leading to the placing of one case on one side of the line and a similar case on the other side. A test containing the element of reasonableness would accord with the views of Judges Hudson and Lauterpacht cited above and . . . would introduce objectivity and be eminently workable.

D. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 Am. J. Int'l L. 389, 401 (1964); *see id.* at 404 ("Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness."). Other prominent commentators invoked by the government (U.S. Resp. at 35) similarly make reasonableness the touchstone of exhaustion analysis: "[S]ince the purpose of the [exhaustion rule] as a whole is to require exhaustion of a remedy *only if it is reasonably available*, it is important to provide not only for the case where a remedy is unavailable as a matter of law, but also for the case where a theoretically available remedy cannot in fact be utilized." L. Sohn & R. Baxter, *Convention on the International*

Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes) 168 (1961) (emphasis added). Indeed, the United States itself, in describing Sohn & Baxter states that exhaustion applies only to the extent that a state "provides a *reasonable possibility* for appeal." (U.S. Resp. at 35)

56. Finally, the government invokes Freeman (U.S. Resp. at 35), who states that the "fundamental purpose" of exhaustion is "to eliminate as far as possible any substantial doubt that the claimant might, *by the use of reasonable diligence*, have obtained a redress of his injuries in the municipal forum." A. Freeman, *International Responsibility of States for Denial of Justice* 423 (1970) (emphasis added).

57. Under these principles, a claimant need not exhaust remedies made inaccessible by the domestic authorities. As the 1930 Hague Codification makes clear, such conduct is itself independently actionable: "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact: . . . . (2) That, in a manner incompatible with the said obligations, the foreigner has been *hindered by the judicial authorities in the exercise of his right to pursue judicial remedies* or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice." 4 League of Nations, *Acts of the Conference for the Codification of International Law*, art. 9(2) at 237 (1930). Indeed, the United States itself embraced this position:

> First of all, I cannot see that there can be any objection to stating that a State ought to be responsible if the judicial authorities hinder a foreigner in the exercise of his rights. Why should not a State be responsible if the judicial authorities do not give the foreigner a chance to present his case in a reasonable way, give him a fair hearing and enable him to obtain justice as we understand the word? Are we to permit the courts to hinder litigants before them in the presentation of their cases? Are we to permit them to interpose dilatory objections of one kind or another and thus to hinder the foreigner in his efforts to obtain justice in the courts, or are we to expect from the courts that standard of fairness which will be calculated to give

> complete justice to litigants? I do not think that the American delegation could accept this proposal in any narrower form than that in which it is now stated. We would have to have everything that is in paragraph 2. We would, in fact, like to see it broader than it is.

Id. at 153 (statement by Mr. Hackworth, speaking on behalf of the United States with regard to what would become Article 9(2) of the 1930 Hague Codification).

58. In sum, the United States' authorities confirm that any applicable exhaustion requirement would have extended only to reasonably available remedies. In reality, it makes little difference how this Tribunal expresses any applicable standard, because the Mississippi Supreme Court cut off Loewen's appeal on the merits of the *O'Keefe* litigation, and other possible avenues of relief were not reasonably available, were manifestly ineffective, *and* were obviously futile.

B. Loewen Had No Reasonably Available Remedy After the Mississippi Supreme Court Required a $625 Million Bond

59. After the Mississippi Supreme Court required a $625 million bond for Loewen to pursue its appeal without being dismembered by execution, Loewen had no reasonable option — indeed, no option at all — other than settlement. Loewen has demonstrated that it could neither survive execution nor arrange, in seven days, to finance the $625 million appeal bond. (*See* Loewen Mem. at 52-61.) The government does not seriously dispute these contentions. Moreover, as explained previously and below, Loewen had no reasonably available or effective remedy in the federal courts, and the possibility of filing for bankruptcy, far from constituting a "remedy," would have imposed on Loewen irreparable injuries both in fact and in law.

60. This case involves textbook allegations of a denial of justice. Because of its Canadian nationality, Loewen was subjected to endless inflammatory trial testimony and, ultimately, an absurdly excessive judgment. Then the Mississippi Supreme Court, in arbitrarily requiring an excessive appeal bond, foreclosed Loewen's *only* appeal of right from that

judgment. When a municipal court system so repeatedly inflicts denials of justice upon a foreigner, international law does not require exhaustion of every possible avenue of relief, no matter how impractical. Moreover, the denial-of-justice exception to the normal rule of exhaustion was designed for precisely these circumstances, where persistent denials of justice make it unreasonable for the foreigner to continue with local procedures. (*See* ¶¶ 46-53, above.) Having been denied justice by both the Mississippi trial court and the Mississippi Supreme Court, Loewen had no duty to pursue litigation that, by then, had become an exercise in futility.

VI. FEDERAL REMEDIES WERE UNAVAILABLE AND MANIFESTLY INEFFECTIVE

61. Loewen has demonstrated that it had no realistic opportunity, during the seven days available to it after the Mississippi Supreme Court required it to post a $625 million bond, to obtain relief from either the Supreme Court of the United States or from a United States district court. Despite its rhetoric to the contrary, the United States' latest submission only confirms that no federal court would have intervened in the *O'Keefe* litigation.

A. The United States Supreme Court Would Not Have Reviewed the Mississippi Supreme Court's Bonding Decision

62. Professor Days does not dispute that, because of the finality requirement for Supreme Court jurisdiction, *see* 28 U.S.C. § 1257, Loewen could have sought certiorari review only of the Mississippi Supreme Court's decision to require a $625 million appeal bond, and not of the discrimination and excessiveness claims at issue in the underlying appeal. Professor Days also does not dispute that, because the Supreme Court had already held that appeal bonds are generally constitutional, *see, e.g.*, *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261, 263 (1916), Loewen could have challenged the *O'Keefe* bonding requirement only as applied to the particular facts of its case. In his opening statement, Professor Days nonetheless opined that Loewen might have obtained Supreme Court review (through a petition for certiorari) on the

question whether "application" of a bonding requirement is constitutional "when it deprives the judgment debtor of a meaningful opportunity to challenge the state court judgment on appeal and is not necessary to protect the judgment creditor." (Days Statement at 20.)

63. The U.S. now makes the necessary concession that the Mississippi Supreme Court "did not make any factual findings" regarding the two factual predicates of Professor Days' proposed question. (U.S. Resp. at 44.) In seeking relief from the appeal bond requirement, Loewen made a detailed evidentiary submission regarding (i) its inability to obtain a $625 million bond and (ii) its ability to protect by other means the plaintiffs' putative interest in the *O'Keefe* judgment. (App. at A818-A968.) Judge Graves denied Loewen's request to reduce the appeal bond requirement in a perfunctory oral order (App. at A1078), and the Mississippi Supreme Court denied the same request with a similarly perfunctory one-sentence assertion that there was "no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond" (App. at A1176). Neither of these courts made findings about the extent of Loewen's ability to post a bond, about the extent of Loewen's ability to protect O'Keefe's interests by other means, or about any subsidiary factual issue bearing on those questions.[18] Thus, in considering the petition for certiorari suggested by Professor Days, the Supreme Court would have had to sift through reams of financial information (discussed at 56-59 of Loewen's Memorial) — *and itself make factual findings in the first instance* — before it could even determine whether Professor Days' proposed question was in fact presented. Professor Days provides no support for his contention that the Supreme Court of the United States, which sits to decide legal questions of broad national import, and which has announced that petitions for

[18] In their briefs to the Mississippi Supreme Court, Loewen and O'Keefe vigorously disputed both the extent to which the bonding requirement would harm Loewen and the extent to which a reduced bond would harm O'Keefe. (App. at A1032-33, A1107-10.)

certiorari "will be granted only for compelling reasons," S. Ct. Rule 10, would have performed such fact-finding in order to review the unreasoned, unpublished, and non-precedential order of the Mississippi Supreme Court.

64. *First*, Professor Days and the United States err in contending that "the Supreme Court commonly takes cases to apply 'broad, general constitutional principles to different factual scenarios.'" (U.S. Resp. at 41 (quoting Days Reply Statement at 10).) On its face, Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari *is rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" (emphasis added).[19] Indeed, like any experienced Supreme Court practitioner, Professor Days has routinely and successfully opposed certiorari on the ground that the question presented is "factbound." *See, e.g.*, Br. in Opp'n at 7, *Bertoli v. United States Dist. Court*, No. 92-1917 (Days, S.G.) ("Petitioner's fact-bound claim does not merit review."); Supp. Br. in Opp'n at 15, *Vista Paint Corp. v. United States*, No. 92-2026 (Days, S.G.) ("These fact-bound evidentiary claims do not warrant this Court's review."); Br. in Opp'n at 11, *Cement Kiln Recycling Coalition v. Browner*, No. 93-1936 (Days, S.G.) ("That equitable, fact-specific determination warrants no further review."). Simply put, the Supreme Court almost never takes cases as factbound as Loewen's.

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[19] As demonstrated by Professor Days' own authorities (Days Reply at 10 n.6), the Supreme Court grants review almost exclusively in cases presenting important and recurring *legal* questions. *See Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1032-33 (2000) ("we must decide the proper framework for evaluating an ineffective assistance of counsel claim"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822-23 (1995) (whether public university may withhold funding of student groups based on their religious beliefs); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 493 (1984) (standard of review for fact-finding in First Amendment cases); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24 (1981) (whether state may terminate parental rights without appointment of counsel); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (whether state must provide hearing before terminating disability benefits); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (definition of constitutionally unprotected obscenity).

65. *Second*, Professor Days errs in contending that the existence of "disputed facts" was no impediment to review because the Supreme Court could have "resolved the legal standard and remanded for further proceedings." (Days Reply Statement at 11-12.) Professor Days cites no case in which the Supreme Court has granted certiorari to decide a question that incorporates as its very predicate "disputed facts" not even addressed, much less resolved, by the lower courts. To our knowledge, there is none.

66. Professor Days finds it "noteworthy that the Supreme Court reviewed the Second Circuit's decision in *Pennzoil* despite the existence of disputed facts." (Days Reply Statement at 12.) But the Supreme Court had no choice: when *Pennzoil* was decided, the Court was legally compelled — under a subsequently repealed jurisdictional statute — to review the federal appellate decision holding the Texas appeal bond requirement unconstitutional as applied to Texaco. *See* 28 U.S.C. § 1254(2) (1986).[20] Moreover, there were essentially no "disputed facts" in the *Pennzoil* case: in one thorough, published opinion, the *Pennzoil* district court specifically found that application of a full appeal bond would produce Texaco's "sudden death or dismemberment," and that application of a lesser security requirement would present only "slight" risk to Pennzoil. *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 252-53 (S.D.N.Y. 1986), *aff'd as modified*, 784 F.2d 1133 (2d Cir. 1986). And, in another thorough, published opinion, the *Pennzoil* appellate court specifically affirmed those and many related subsidiary findings. *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1155 (2d Cir. 1986), *rev'd on other*

[20] The U.S. attributes great significance to the fact that the Supreme Court permitted full briefing and argument in the *Pennzoil* case, rather than summarily affirming the court of appeals' decision. (U.S. Resp. at 48-50.) But for cases within what was then its *mandatory* jurisdiction, the Supreme Court permitted such full consideration unless the question presented was "unsubstantial." S. Ct. Rule 16(1)(c) (effective Nov. 21, 1980). In contrast, for cases within what is now its *discretionary* jurisdiction, the Supreme Court grants certiorari "only for compelling reasons." S. Ct. Rule 10.

grounds, 481 U.S. 1 (1987). Had the Supreme Court reached the merits of Texaco's challenge to the appeal bond, it almost certainly would have deferred to these findings. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) ("[A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). But had the Supreme Court considered the perfunctory unpublished orders of the Mississippi trial court (App. at A1078) and the Mississippi Supreme Court (App. at A1176), it would have had to find facts — or at least weigh evidence — in the first instance. That the Supreme Court simply does not do. As the Supreme Court has long and emphatically instructed, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).[21] Thus, it would have been extremely unlikely for the Supreme Court to grant review where the question presented depends on disputed facts not resolved by the lower courts.

67. *Third*, Professor Days errs in contending that Loewen could have obtained review because the Supreme Court's punitive damages decisions "would have been a critical element of Loewen's due process challenge" on the merits. (Days Reply Statement at 13.) These decisions would not have ameliorated the fatal problem that the question Loewen would have presented, even as formulated by Professor Days, was bound up in factual disputes not passed upon by the lower courts. Nor does the Mississippi Supreme Court's bonding decision directly conflict with

[21] Professor Days' footnoted authorities (Days Reply at 10 n.7, 12 n.8) demonstrate only that, when the Supreme Court announces a new rule of constitutional law, it often remands the case for the lower courts to apply the rule to the facts of the particular case. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced."). That proposition does

the punitive damages decisions cited by Professor Days. Of the four Supreme Court cases addressing the due process limits on punitive damages, none even remotely addresses the question of appeal bonds. Two of these decisions addressed substantive limits on the permissible size of awards, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) — an issue Professor Days concedes would not have been properly presented (*see* Days Reply Statement at 13-14). A third decision held that procedural protections in the punitive damages context need only satisfy three "general concerns of reasonableness," *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-21 (1991) — a standard far too open-ended to create the kind of direct legal "conflicts" contemplated by Supreme Court Rule 10.[22] The fourth decision held that states could not legally foreclose judicial review of punitive damages awards in *both* the trial and appellate courts. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 426-27, 432 (1994). The Mississippi Supreme Court's bonding decision did not directly conflict with *Honda* because it effectively foreclosed only *appellate* review (as demonstrated at pp. 56-59 of Loewen Mem.), and did so only in Loewen's individual case. The Supreme Court's punitive damage decisions were at best peripheral to Loewen's bonding question.

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not remotely support Professor Days' contention that the Supreme Court grants review where the very question presented depends on "disputed facts" not resolved by the lower courts.

[22] Since *Haslip* was decided, the Supreme Court has rejected every petition challenging application of the *Haslip* factors in particular cases. *See, e.g., Dahlstrom v. Placer Dome, U.S., Inc.*, 838 P.2d 938 (Nev.), *cert. denied*, 502 U.S. 864 (1991); *Academy Life Ins. Co. v. Guill*, 935 F.2d 1286 (4th Cir.), *cert. denied*, 502 U.S. 957 (1991); *Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 502 U.S. 1096 (1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992); *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Fraidin v. Weitzman*, 99 Md. App. 747 (Md. Ct. Spec. App. 1994), *cert. denied*, 517 U.S. 1219 (1996); *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997); *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996), *cert. denied*, 522 U.S. 810 (1997).

68. *Fourth*, Professor Days errs in contending (Days Reply Statement at 14-20) that Loewen could have obtained review of the Mississippi Supreme Court's decision based on its alleged conflict with *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), and *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), on the question whether the due process clause imposes limits on appeal bonds. None of these cases squarely resolves that question. *Henry* and *Texaco* merely upheld the issuance of *preliminary injunctions* against particular applications of state appeal bond requirements. *See* 595 F.2d at 302-05; 784 F.2d at 1152-57. In the preliminary injunction context, no court conclusively resolves the merits of the question presented: a district court decides only whether the plaintiff has a "likelihood" of success, 595 F.2d at 302, or a "fair ground for litigation," 784 F.2d at 1154, and a court of appeals decides only whether the district court committed an "abuse of discretion," 595 F.2d at 305; 784 F.2d at 1157. Moreover, the analysis in *Henry* turned squarely on the "heightened First Amendment concerns implicated" by the political speech at issue in that case. *See* 595 F.2d at 304. Accordingly, it is highly dubious that its analysis even applies to commercial disputes such as the *O'Keefe* litigation. *See Pennzoil*, 481 U.S. at 22 (Brennan, J., concurring) ("[T]he underlying issues in this case — arising out of a commercial contract dispute — do not involve fundamental constitutional rights.") (citing *Henry* for contrast). Finally, the Mississippi Supreme Court's bonding decision held only that there was "no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond." (App. at A1176.) Accordingly, the Supreme Court could not have discerned any constitutional holding at all without performing the precise sort of "review" of "evidence," *Johnston*, 268 U.S. at 227, that that Court does not undertake.

69. Furthermore, any putative conflict among these decisions would have entirely lacked what Professor Days has correctly described as "the practical significance necessary to warrant resolution by this Court." Br. in Opp'n at 16, *Episcopal Hosp. v. Shalala*, No. 93-429 (Days, S.G.); *see, e.g.*, R. Stern et al., *Supreme Court Practice* 167 (7th ed. 1993) ("[T]here must be a real or 'intolerable' conflict."). As an unpublished order, the Mississippi Supreme Court's bonding decision has no general legal significance whatsoever. *See, e.g., Westbrook v. City of Jackson*, 665 So. 2d 833, 837 n.2 (Miss. 1995) (court "cannot rely" on "unpublished authority"). Moreover, because the Supreme Court has now held that federal courts cannot entertain collateral attacks against the application of state appeal bond requirements, *see Pennzoil*, 481 U.S. at 10-14, any due process holdings of *Henry* or the Second Circuit in *Pennzoil* are dead letter. Thus, the Supreme Court's decision in *Pennzoil* has mooted any alleged conflict with the due process analyses of *Henry* or *Texaco*. *See* R. Stern, *supra*, at 172 ("A conflict will not necessarily result in the granting of certiorari if the issue is no longer a live one.").

70. In addition to repeating Professor Days' contentions, the United States cites to documents assertedly demonstrating that Loewen subjectively believed it had a "reasonable probability" of obtaining Supreme Court review. (U.S. Resp. at 39, 50-54.) But the only cited documents using that phrase — or anything even remotely like it — are *drafts of a Supreme Court brief* prepared by Loewen's counsel and *not submitted* to the Court. (U.S. App. at 0856, 0882.) Other documents merely report — without comment on the likelihood of success — that Loewen "intend[ed] to immediately file an appeal with the Mississippi Supreme Court and failing that, the federal courts, to have the size of the bond reduced." (App. at A1858 (SEC filing).) Yet other documents suggest that Loewen viewed Supreme Court review not as a reasonable possibility, but as a desperate attempt to "leav[e] no stone unturned." (App. at

A1385.) The evidence proffered by the U.S. does not undermine the direct testimony on this point by Mr. Carvill — that Loewen was advised that the likelihood of obtaining Supreme Court review was "extremely remote" (Carvill Decl. ¶ 5).

71. The Supreme Court grants review "only for compelling reasons," S. Ct. Rule 10, and only in less than two percent of the cases where litigants seek it. (*See* Tribe Aff. at 19; Fried Decl. at 6.) The United States provides no reason for concluding that there was even the remotest possibility for Supreme Court review of an unreasoned and non-precedential conclusion that there had been "no abuse of discretion" — based on facts not found and evidence not discussed — in requiring Loewen to post a full appeal bond.

B. No Federal District Court Would Have Enjoined Enforcement of the Mississippi Supreme Court's Bonding Decision

72. Professor Days does not dispute that any collateral attack on the Mississippi Supreme Court's bonding decision (or the underlying *O'Keefe* judgment) would have triggered three independent bars to federal jurisdiction: the Full Faith and Credit Act, the *Rooker-Feldman* doctrine, and the *Younger* abstention doctrine. All of these doctrines share a common objective: to prevent federal district courts from interfering with state-court judgments and pending state-court proceedings. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 96 (1980) (Full Faith and Credit Act "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."); S. Sherry, *Judicial Federalism In The Trenches: The*

Rooker-Feldman *Doctrine In Action*, 74 Notre Dame L. Rev. 1085, 1101 (1999) ("[T]he *Rooker-Feldman* doctrine is first and foremost an integral part of judicial federalism.").[23]

73. Professor Days argues that a litigant can evade each of these doctrines — and seek a federal-court injunction against enforcement of a state-court judgment — merely by pleading that the state-court judges were improperly motivated. Such improper motive, Professor Days reasons, would establish unconstitutional "bias" sufficient to overcome the Full Faith and Credit Act, the *Rooker-Feldman* doctrine, and *Younger*. (Days Reply Statement at 20.) Many have tried this end-run, but none has succeeded. Indeed, Professor Days fails to cite *even a single case* where such allegations of improper motive have supported a collateral attack, in federal district court, against a state-court judgment or pending proceeding.

74. As Professor Days' own leading case demonstrates, the Full Faith and Credit Act contains no exception for judgments alleged to be the product of unconstitutional motive. In *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir. 1995), an unsuccessful state-court plaintiff filed a civil rights action in federal court under 42 U.S.C. § 1983. In dramatic terms, the plaintiff alleged that the state-court judgment had been unconstitutionally motivated by politics:

> The present suit is against the same lawyers plus some of the judges at the different stages of the [state-court] litigation. It alleges a massive, tentacular conspiracy among the lawyers and the judges to engineer Nesses' defeat by, among other things, declaring him inexcusably dilatory in complying with a discovery order. He claims that the lawyers for his opponent . . . used their political clout to turn the state judges against him.

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[23] The *Pennzoil* case vividly demonstrates the reluctance of federal courts to intervene in ongoing state proceedings. Despite an $10 billion punitive damages judgment, and a requirement that Texaco post a bond in excess of $13 billion, the Supreme Court held unanimously that no federal relief was available. After the case was returned to the Texas state courts. *Pennzoil Co. v. Texaco Inc.*, 481 U.S.1, 4-5 (1987). Texaco was ultimately forced to settle for $3 billion. S. Borreson, *Baker & Botts Caught in Crossfire of Takeover Suit*, Texas Lawyer, Sept. 22, 1997, at 1. (App. at A2312.)

68 F.3d at 1004. The court of appeals assumed that such a "political bias" claim might state a constitutional claim, but it affirmed the dismissal of this claim *on the pleadings* because, under the Full Faith and Credit Act, "the judgment against him that was rendered in [the state-court] suit bars his effort to litigate the same claim in federal court." *Id.* at 1005-06.[24]

75. The *Rooker-Feldman* doctrine, which is routinely applied to bar constitutional claims asserted under 42 U.S.C. § 1983, *see, e.g., Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir. 1997); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986); *Curry v. Baker*, 802 F.2d 1302, 1310 n.5 (11th Cir. 1986), similarly contains no exception for judgments alleged to be the product of unconstitutional motive. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) itself, the Supreme Court ordered the dismissal of a constitutional claim that a state court had "acted unreasonably and discriminatorily," in violation of due process and equal protection. *See id.* at 469 n.3 (specifying claims); *id.* at 482 (ordering dismissal). Similarly, in *Hale v. Harney*, 786 F.2d 688, 689 (5th Cir. 1986), the Fifth Circuit applied *Rooker-Feldman* to affirm the dismissal of a claim that a state-court judge had been "biased and prejudiced" in his decision. The Fifth Circuit explained: "Judicial errors committed in state courts are for correction in the state court systems, at the head of which stands the United States Supreme Court; *such errors are no business of ours*." *Id.* at 691 (emphasis added). The district courts also routinely apply *Rooker-Feldman* to dismiss claims that a state-court judgment was the product of unconstitutional motive. *See, e.g., Davidson v. Garry*, 956 F. Supp. 265, 266

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[24] Professor Days attempts to limit *Nesses* to cases where the question of improper motive was actually litigated in state court. (Days Reply Statement at 21.) However, the Supreme Court has held unanimously that the Full Faith and Credit Act applies not only to issues actually litigated in state court (*i.e.*, issue preclusion), but also to claims or defenses that could have been litigated in state court, but were not (*i.e.*, claim preclusion). *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-85 (1984). Not surprisingly, Mississippi law recognizes both doctrines. *See, e.g., Glover v. Jackson State Univ.*, 755 So. 2d 395, 398-99 (Miss. 2000).

(E.D.N.Y. 1996) (claims that judge dismissed case because of "'vicious'" racial animus; these "claims of bias" fell "squarely within the boundaries of the *Rooker-Feldman* doctrine," *id.* at 269), *aff'd*, 112 F.3d 503 (2d Cir. 1997); *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 307 (E.D. Pa. 1998) (claim of unconstitutional "'favoritism, prejudice and bias'" by judge who "accepted significant campaign contributions" from an opposing party; "[t]o establish injury . . . the plaintiff would have to show that the violation of such an independent right caused an erroneous adverse decision to be made and this is precluded by the *Rooker-Feldman* doctrine," *id.* at 308); *Ackermann v. Doyle*, 43 F. Supp. 2d 265, 270 (E.D.N.Y. 1999) (constitutional challenges to allegedly "discriminatory" decision; "even if the state court was wrong, the judgment is an effective and conclusive adjudication until modified or reversed in the appropriate appellate proceeding," *id.* at 273).

76. Against all of this authority, Professor Days cites only *Nesses*, which held that a claim of unconstitutional judicial motive *was barred*, not by *Rooker-Feldman*, but by the Full Faith and Credit Act. *See* 68 F.3d at 1005-06. Thus, far from supporting a collateral attack against allegedly biased state-court decisions, *Nesses* would have affirmatively prevented such an attack.[25] But even apart from that problem, *Nesses* could not possibly have helped Loewen

[25] To be sure, *Nesses* did suggest that the *Rooker-Feldman* doctrine contains an exception for claims that a judgment was the product of unconstitutional motive. *See* 68 F.3d at 1005. In legions of subsequent cases, however, the Seventh Circuit has repudiated that suggestion. *See, e.g., Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999) (*Rooker-Feldman* "requires a party seeking review of a state court judgment *or presenting a claim that a state judicial proceeding has violated their constitutional rights* to pursue relief through the state court system" (emphasis added).); *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 702 (7th Cir. 1998) ("If the injury alleged resulted from the state court judgment itself, the *Rooker-Feldman* doctrine dictates that the federal courts lack subject matter jurisdiction, even if the state court judgment was erroneous or unconstitutional" (footnotes omitted).); *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996) (dismissing under *Rooker-Feldman* despite claims that state judgment was procured through fraud, and despite federal court's acknowledgement that state decision appeared "egregious"); *Young v. Murphy*, 90 F.3d 1225,

mount a collateral attack against the *O'Keefe* judgment because it was issued in a different circuit. Under the federal venue statute, 28 U.S.C. § 1391(b), any such attack could have been filed only in Mississippi, where controlling *Rooker-Feldman* law for that circuit plainly would have barred a claim that the *O'Keefe* judgment was the product of unconstitutional "bia[s] and prejudic[e]" on the part of the Mississippi courts. *See Hale*, 786 F.2d at 689; *id.* at 691 ("Judicial errors committed in state courts . . . are no business of ours.").

77. Finally, although there is a "bias" exception to *Younger* abstention, its parameters are exceedingly narrow, and it does *not* extend to claims that an individual state-court judge acted with unconstitutional motive. Professor Days errs in suggesting that *Gibson v. Berryhill*, 411 U.S. 564 (1973), established such sweeping "bias" exception to *Younger*. That case held only that *Younger* does not bar a collateral attack based on claims that a state *agency* acted with a "pecuniary interest" in the case. *See* 411 U.S. at 577-78. On the other hand, the Supreme Court has held that *Younger* does bar a collateral attack based on allegations that several members of a state supreme court (including its chief justice) had improperly coerced the defendant into testifying before the grand jury; these allegations, the Supreme Court concluded, did not demonstrate that "the *entire* [state] court system has been irretrievably impaired." *Kugler v. Helfant*, 421 U.S. 117, 127 (1975) (emphasis added). Moreover, because of the importance of *appellate* remedies for *Younger* purposes, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975), there is no *Younger* exception for claims that a state *trial* court acted with of unconstitutional motive. For example, in *Davidson v. Garry*, the court dismissed on *Younger*

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1230 (7th Cir. 1996) ("[L]itigants who feel a state proceeding has violated their constitutional rights must appeal that decision through their state courts."); *Garry v. Geils*, 82 F.3d 1362, 1368 (7th Cir. 1996) (*Rooker-Feldman* applies where "plaintiffs are basically claiming injury at the

grounds a constitutional claim that a judge had improperly dismissed a case because of racial bias. The court explained: "In addition to the painfully obvious statement that review by appeal is appropriate if the trial judge decided the case incorrectly, is the only marginally less obvious statement that a decision motivated by impermissible bias which unjustly affects the result is similarly reviewable by appeal." *Id.* at 269 n.3. Likewise, in *Levy v. Lerner*, 853 F. Supp. 636, 639 (E.D.N.Y. 1994), *aff'd*, 52 F.3d 312 (2d Cir. 1995), the court dismissed on *Younger* grounds a constitutional claim that a state trial court had been "motivated by racial animus." That court too stressed that the plaintiff could "present his federal claims" on appeal in the state system. *See id.* at 642.

78. Under these standards, Loewen could not have escaped the *Younger* bar. Under cases like *Davidson* and *Levy*, any proven bias on the part of Judge Graves would have been insufficient as a matter of law. Professor Days stresses that Loewen, through Chief Justice Neely, has also alleged that the Mississippi Supreme Court's bonding decision reflected "'an intent to deny appellate review.'" (U.S. Resp. at 55 (emphasis omitted).) But despite the government's repeated suggestions to the contrary, Chief Justice Neely further alleged that this "intent" was motivated by *politics*, not by race. (*E.g.*, Neely Aff. at 11 ("[P]olitically timid appellate judges were able, by deft manipulation of a facially neutral bond requirement, to avoid entirely the politically unpalatable task of reviewing a popular local verdict."); *id.* at 4 ("[T]he Mississippi Supreme Court found a convenient way to avoid . . . reversing *O'Keefe v. Loewen* (which would have been politically dangerous given the power of the plaintiffs' bar in Mississippi)."); Neely Decl. at 6 ("[T]he court was motivated by *political* considerations rather

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hands of the state court."); *see also GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 727 (7th Cir. 1993) ("[L]itigants cannot file collateral attacks on civil judgments.").

than legal or equitable ones." (emphasis in original)).)[26] If proven, this motive might not have established any constitutional violation at all, much less one sufficient to support the collateral attack on a state-court judgment. *See Nesses*, 68 F.3d at 1005 (reserving question of "the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics").

79. Furthermore, Chief Justice Neely's conclusion about the political motives of the Mississippi Supreme Court rests primarily on *circumstantial* evidence about the typical behavior of elected judges. As Chief Justice Neely has acknowledged, he has no *direct* evidence that the Mississippi Supreme Court was politically motivated, and "no series of depositions would elicit a confession." (Neely Aff. at 16; *see also* Neely Decl. at 6.) The only question presented here is whether these allegations would have supported a collateral attack, in federal court, on the *O'Keefe* judgment and bonding decision. They obviously would not have supported such a collateral attack, not because they are factually incorrect, but because they rest on inferences about elected judges that United States law simply does not permit. *See, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) ("[S]tate courts . . . are presumed competent to resolve federal issues."); *Pennzoil*, 481 U.S. at 16 n.15 ("We cannot assume that [elected judges] would refuse to . . . provide a forum to adjudicate substantial federal constitutional claims."); *Moore v. Sims*, 442 U.S. 415, 430 (1979) (possibility that "state courts

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[26] For reasons explained by Chief Justice Neely, *every* case involving the imposition of a bonding requirement to frustrate appellate review of a bankrupting judgment has arisen in Southern states with elected judiciaries: *Henry* arose in the Mississippi state courts, *Texaco v. Pennzoil* arose in the Texas state courts, and *O'Keefe* arose again in the Mississippi state courts. Recently, the Florida legislature enacted a statute limiting appeal bonds to a maximum of $100 million. Fla. Stat. § 768.733. That statute was enacted in anticipation of an unfathomably excessive state-court verdict of $145 *billion*. *See* M. Curriden, *supra* at 5 n.3.

were not competent to adjudicate federal constitutional claims" is "a postulate we have repeatedly and emphatically rejected").[27]

80. Chief Justice Neely's view that improper political considerations motivate many state courts is not novel. *See, e.g.*, Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. Rev. 263 (2000). Nonetheless, Professor Days does not cite a *single case* where claims of political bias supported a successful collateral attack on a state-court judgment or proceeding in federal court. Loewen had absolutely no reason to believe that its case would be the first; indeed, it would have had every reason to believe it would face sanctions if it had launched that type of proceeding.

VII. BANKRUPTCY WOULD HAVE BEEN A DEVASTATING INJURY TO LOEWEN

81. Loewen showed that "no treaty, commentator, or international decision has ever suggested that being driven into bankruptcy against one's will constitutes an effective remedy." (Loewen Subm. at 32.) The United States' various and voluminous filings have now failed to offer a single authority to contradict that statement, and contrary to the United States' assertions, it is preposterous to consider bankruptcy a "remedy," let alone one to be "exhausted" prior to an international claim. Bankruptcy is an injury, not a remedy: no less an authority than the Supreme Court of the United States has held that being forced into bankruptcy under United States law constitutes "irreparable injury." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32

[27] Although Loewen will prove that the Mississippi Supreme Court's bonding decision was politically motivated, its claim that this decision was a denial of justice under Article 1105 (Loewen Mem. at 89-90) does not depend on the subjective motive behind that decision.

(1975) (bankruptcy "[c]ertainly" constitutes irreparable injury sufficient to support granting an injunction). Other municipal courts have likewise recognized this principle.[28]

82. Indeed, consistent with this principle, the court of appeals in the *Pennzoil* case relied on so heavily by the United States held that where the injury that a party would suffer without an injunction pending appeal "is the irrevocable destruction of his business, resulting in bankruptcy or liquidation, a reversal [upon appeal] will not undo the injury, which cannot be measured in damages and would in no event be recoverable." *Pennzoil,* 784 F.2d at 1153. As a leading international commentator has recognized, "remedies" are only "effective" if they are "adequate to ensure the satisfactory reparation of the damage sustained." Garcia-Amador, *supra,* [1956] II Y.B. Int'l Comm'n at 204. Since bankruptcy would only have inflicted *more* damage upon Loewen, and "irreparable" damage at that, it cannot possibly be said to have been an "effective" local remedy.

83. The United States nonetheless claims (U.S. Resp. at 59) that, "beyond some empty 'doomsday' rhetoric," Loewen does not dispute the United States' showing that bankruptcy, under Chapter 11 of the U.S. Bankruptcy Code, would have been an unintrusive, even beneficial way for Loewen to prevent O'Keefe from executing the $500 million judgment, while simultaneously pursuing an appeal in the Mississippi courts without an appeal bond. To dispel the U.S.'s confusion on this point, Loewen *does* dispute the United States' submissions, and vigorously contests any suggestion that bankruptcy is any sort of "remedy" under international law. But it is the United States and one of its declarants that retreats from their

[28] *See, e.g., Country Kids 'N City Slicks, Inc. v. Sheen,* 77 F.3d 1280, 1289 n.11 (10th Cir. 1996) ("the threat of bankruptcy" is more than sufficient to show "irreparable injury"); *Yule, Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.,* [1977] 80 D.L.R. (3d) 725, 729 (Ont. H. Ct.) ("put[ting a company] out of business" constitutes "irreparable damage"); *RML Inv. Ltd. v. Rust*

earlier positions, with the result that the United States' arguments in favor of bankruptcy now rest on a series of indefensible premises.

A. The United States Would Still Be Liable Had Loewen Declared Bankruptcy

84. Loewen showed that the United States' "bankruptcy" arguments, even if they were valid (which they are not), would not provide a "jurisdictional" bar to Loewen's NAFTA claim, but would — at most — suggest a different and additional kind of damage that Loewen would have suffered. (Loewen Subm. at 32-33.) Had Loewen been forced into bankruptcy by the various violations of NAFTA that took place in Mississippi, that would not have in any way *cured* the NAFTA breaches, but would have injured Loewen even more — and irreparably so; since Loewen's substantial bankruptcy-related injury would then have become part of the damages caused by those NAFTA breaches. The United States misunderstands (perhaps willfully) this simple argument, claiming (U.S. Resp. at 80-81) that Loewen is now presenting "a purely hypothetical NAFTA claim." That was not Loewen's argument — indeed, it is the United States which has repeatedly raised "hypothetical" bankruptcy scenarios — and the United States' Response offers no answer to the argument Loewen *did* advance in its Submission.

B. Loewen's Value Was As an Acquisition Company

85. The United States asserts (U.S. Resp. at 61) that "Loewen's core business was, and is, operating funeral homes and cemeteries," calling Loewen's contrary showing "false and disingenuous." The United States' "bankruptcy expert," Trost, likewise claims to have found Loewen's showings "misleading and disingenuous" based on a single sentence in Loewen's official filings with the U.S. Securities and Exchange Commission ("SEC"), which Trost says—

(continued...)

Check Canada Inc., [1993] 125 N.S.R.(2d) 50, 54 (Nova Scotia S. Ct.) ("To deny the injunction is to put RML . . . out of business"; injunction granted).

in words almost identical to those used by the United States' lawyers—demonstrates that "Loewen's core business was operating funeral homes and cemeteries." (Trost Reply Decl. at 7.)

86. However, those same SEC filings show, on their face, that Loewen's principal business was *acquisitions*, not management, of funeral homes and cemeteries: the same paragraph of the filing cited by Trost also details Loewen's recently concluded agreement to acquire "75 funeral homes and 70 cemeteries in the United States" (App. at A1752); other portions of the Loewen SEC filings likewise refer to Loewen's "competition" in "*the United States funeral industry acquisition market*" (App. at A1754 (emphasis added)) and to the company's "growth strategy," whose primary component was "acquiring a significant number of small, family-owned funeral homes and cemeteries." (App. at A1769.) Indeed, even O'Keefe's lawyer, Willie Gary, elicited trial testimony that "in the business that The Loewen Group is in, you are buying businesses and buy the stock of those businesses." (Tr. at 208; *see also* Tr. at 259, 3072.)

87. Loewen has always stated that a substantial part of its business was, and is, "operating funeral homes and cemeteries." (*See, e.g.*, Loewen Mem. at 1; Loewen Subm. at 35; Klee Decl. at 4-5, 8; Turner Decl. at 6; Carvill Decl. at 6; App. at A1752-54 (Loewen SEC filing); App. at A1948 (1995 Loewen Annual Report); App. at A2002-06 (1996 Loewen Annual Report).) Thus, the United States misstates the facts in suggesting that Loewen has asserted that its business was "*simply* making acquisitions." (U.S. Resp. at 61.)

88. Moreover, the critical point is that Loewen's core *value* — the value that the market and investors placed on Loewen's stock at the time of the *O'Keefe* debacle — was not due to its business of "*operating* funeral homes and cemeteries," but due to its status as an active *acquirer* of smaller funeral-home and cemetery operations. (*See* Loewen Subm. at 33-35, 37-

39.) Contemporaneous financial articles submitted by the United States itself demonstrated this: "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." (U.S. App. at 0002; *see also id.* at 0206 (noting that "[t]he real emphasis, the driving force" behind Loewen's chief competitor "was acquisitions"); *see generally* Loewen Subm. at A-1 to A-3.) United States declarant Saltzman, a self-described expert in "the consolidating commercial services industries" (Saltzman Decl. ¶ 3), unwittingly proves this point throughout his own Declaration, which focuses almost entirely on Loewen's identity as an acquisition company. And Trost not only does not dispute that Loewen's value came from its acquisition program, *he admits it* — "[I]t is clear that in 1995 and 1996 Loewen was engaged in an acquisition program designed to grow its business — ***and that Loewen, its creditors and shareholders ascribed value to the acquisition program***" — in the very same paragraph in which he accuses Loewen of being "misleading and disingenuous." (Trost Reply Decl. at 7 (emphasis added).)

89. Semantic debates about whether acquisitions or operations of funeral homes and cemeteries constituted Loewen's "core business" (*e.g.*, U.S. Resp. at 59, 61; Trost Reply Decl. at 7) do not take away from the undisputed fact that the relevant markets recognized that Loewen's principal value as an ongoing enterprise was as an acquirer of funeral homes and cemeteries, not as an operator. In this light, it becomes evident that Trost's — and the United States' — arguments about Loewen's ability to conduct its "core" business "without interruption" while in bankruptcy (U.S. Resp. at 61-62; *see* Trost Reply Decl. at 8-11) depend entirely on the erroneous premise that Loewen's value came from nothing but its role as a manager of funeral homes and cemeteries. The facts are indisputably otherwise.

C. Bankruptcy Would Have Ended Loewen's Acquisition Program

90. Neither Trost nor the United States (nor, for that matter, the United States' new declarant, Saltzman) casts any doubt upon Loewen's showing that a bankruptcy filing would have destroyed Loewen's status as an acquisition company — and thus its share value, since the acquisition component is what gave Loewen its stock value. (Loewen Subm. at 37-38 & n.13, 40; Turner Decl. at 7-9; Carvill Decl. at 8.) That is surely why the United States, as well as its declarant Trost, resist characterizing Loewen as an acquisition company at such great lengths.

91. Recognizing the flaws in its principal position, the United States weakly suggests that even if Loewen *were* properly characterized as an acquisition company, it could have continued acquiring properties even while under the constraints of Chapter 11 bankruptcy protection. (U.S. Resp. at 61-62; Trost Reply Decl. at 11-14; Saltzman Decl. ¶¶ 45-48.) This assertion is contradicted by the United States' submissions.

92. The United States' "showing" in this regard consists of one equivocating sentence which seems to suggest that Loewen's position is right, and the United States' position is wrong: "Although a Chapter 11 filing *may have limited Loewen's ability to expand further* through acquisitions of other death-care companies to some extent . . . a Chapter 11 filing would not have prevented it from doing so entirely." (U.S. Resp. at 61 (emphasis added).) At the very least, this is a substantial retreat from the prior U.S. assertion that bankruptcy would have caused "minimal or no disruption to the company's overall operations." (U.S. Mem. at 76.)

93. Likewise, where the United States once confidently claimed that Loewen "could have supported its acquisition program with further equity issuances" while in bankruptcy (U.S. Mem. at 79), Trost — confronted with the contrary demonstration of Loewen's Declarant, Professor Kenneth Klee — admits that the U.S. position is wrong: "I do not disagree with the position taken by Loewen or its declarants that acquisitions conducted for equity, to the extent

that was Loewen's existing strategy, would likely have been foreclosed" in bankruptcy. (Trost Reply Decl. at 11.) Indeed, although U.S. declarant Saltzman deliberately misconstrues Loewen's Submission as claiming that "the company [was] making a significant number of acquisitions with stock" (Saltzman Decl. ¶ 48), even he recognizes that stock value was key to Loewen's ability to raise the *cash* that *was* used for acquisitions. (*See, e.g.*, *id.* ¶ 13; *see also* U.S. Resp. at 63.) The point is thus admitted by Saltzman and his sponsors: the fall in stock price that would have accompanied bankruptcy would have put an end to the acquisition portion of Loewen's business — the portion that gave that stock most of its value in the first place.

94. Trost's Reply Declaration suffers from the same sort of equivocation as the United States' Response. While Trost continues to maintain that "growth would have been possible" for a bankrupt Loewen in 1996, he concedes that any such growth would have to take place "under circumstances different than those outside chapter 11 [bankruptcy]." (Trost Reply Decl. at 11.) Likewise, Trost is only able to support his hypothetical bankrupt-but-growing Loewen by asserting that "Loewen also would have been able to conduct prospective acquisitions *under certain circumstances*" (*id.* at 12 (emphasis added)), though Trost offers no hint as to what those "different" or "certain circumstances" might possibly have been. And although Trost purports to maintain his opinion that Loewen would have been able to obtain $200-$600 million in "DIP" (debtor-in-possession) financing while in bankruptcy (*compare* Trost Decl. at 12-13 *with* Trost Reply Decl. at 13-14), Trost admits in a footnote that "it is impossible to predict the exact amount of financing that would have been available" (Trost Reply Decl. at 13 n.12), and neither Trost's Reply Declaration nor the United States' Response answers

the contrary showings made by Loewen (Loewen Subm. at 38) and by Professor Klee. (Klee Decl. at 6-7.)[29]

95. United States declarant Saltzman, who freely admits at some length the source of his biases against the Claimants (*see* Saltzman Decl. ¶ 56-69), unwittingly demonstrates just how extraordinarily difficult it would have been to convince acquisition targets to sell their properties to a bankrupt Loewen in 1996. According to Saltzman—who admits that "a Chapter 11 [bankruptcy] filing may have given some acquisition targets reason to pause before selling to The Loewen Group" (*id.* ¶ 44) — all that Loewen had to do to continue its acquisition program was convince the potential sellers "that the reason for the Chapter 11 filing" was the *O'Keefe* judgment (*id.*), and "that management and its legal counsel were certain [the judgment] would be overturned or at least significantly reduced" (*id.*); he also suggests that structuring the proposed transaction so that the property was sold indirectly, to one of Loewen's "regional partners," instead of to the bankrupt Loewen itself, "could have potentially provided additional comfort to the sellers." (*Id.* ¶ 46.) While such statements certainly "could have potentially provided" *explanations* for Loewen's plight had it entered into bankruptcy, what Saltzman fails to recognize is that no reasonable seller would accept these as valid *justifications* for selling to Loewen when other acquirors were unencumbered with such vexing "issues." And Saltzman, who both labels himself "one of the leading analysts of the death-care industry" and trumpets his personal knowledge of Loewen's business (*id.* ¶ 56), also failed to note one additional factor,

[29] Trost persists (Trost Reply Decl. at 13 n.11) in trying to draw analogies to Loewen's 1999 bankruptcy filing, suggesting that a 1999 court order allowing Loewen to purchase "a limited number of assets with relatively small purchase prices" somehow proves that Loewen in 1996 would have been able to secure bankruptcy court permission to continue with hundreds of millions of dollars worth of acquisitions. Loewen demonstrated that this logic is faulty (Loewen Subm. at 35 n.12) with the declarations of Turner and Klee. (Turner Decl. at 10-11; Klee Decl.

disclosed to the world in Loewen's securities filings, that would have scuttled a bankrupt Loewen's efforts to acquire other companies: a standard part of the acquisition "package" offered by Loewen to these sellers were long-term payments given in exchange for non-competition agreements with certain key management personnel. (App. at A1809; *see also* App. at A1790, A1793.) These long-term contractual obligations would have been put at substantial risk of being diminished or eliminated by the bankruptcy courts, further circumscribing Loewen's ability to grow.

D. Loewen Would Have Suffered Substantial Costs From Bankruptcy

96. Loewen showed (Loewen Subm. at 33) that the costs of bankruptcy, including interest costs, would have been crippling. The core of the United States' contrary response is that Loewen's bankruptcy-related costs would have been much lower because "all interest on Loewen's unsecured debts . . . would have stopped accruing immediately upon the filing of a Chapter 11 [bankruptcy] petition." (U.S. Resp. at 65; *see* Trost Decl. at 16.) The United States is flatly wrong, for Loewen would have entered bankruptcy in 1996 as a *solvent* debtor, not an insolvent one; and under those circumstances, United States bankruptcy courts would have required continued interest on unsecured claims. *See Commercial Paper Holders v. R.W. Hine (In re Beverly Hills Bancorp),* 752 F.2d 1334, 1339-40 (9th Cir. 1984); *In re San Joaquin Estates, Inc.,* 64 B.R. 534, 536 (BAP 9th Cir. 1986); *see also Equitable Life Assurance Soc. v. Sublett (In re Sublett),* 895 F.2d 1381, 1386 & n.10 (11th Cir. 1990). Indeed, had Loewen's Board of Directors merely *approved* a Chapter 11 bankruptcy filing (even if bankruptcy was not

(continued...)
at 8.) Trost and the United States, however, offer nothing but unjustified supposition and speculation to support their assertions.

ultimately pursued), its debt under at least one of its several credit facilities would have been "immediately accelerated." (App. at A2315.)

E. Bankruptcy Would Have Improved O'Keefe's "Leverage," Not Loewen's

97. The most astonishing new argument raised by the United States is that under a Loewen bankruptcy in 1996, O'Keefe "would have immediately lost nearly all of his negotiating leverage," simultaneously causing an "enormous increase in [Loewen's] bargaining power." (U.S. Resp. at 66.) This is so, says the United States, because bankruptcy would have prevented O'Keefe from executing on the judgment, while relegating O'Keefe to the status of an "unsecured" creditor in the bankruptcy proceeding. While Loewen did exercise this threat in settlement negotiations with O'Keefe (*id.*, citing Carvill Decl. at 9-10), most of the bankruptcy leverage was actually with O'Keefe, not Loewen.

98. As the United States recognizes elsewhere (U.S. Resp. 88-92), during proceedings on Loewen's motions to reduce the statutory bond amount it was O'Keefe, far more than Loewen, who urged that Loewen enter into bankruptcy in order to appeal the judgment without a bond.[30] It was O'Keefe's lawyers who told Judge Graves that Loewen could "go into Chapter 11 and in the meantime pursue us." (App. at A1058.) It was O'Keefe's lawyers who urged that "[Loewen] can appeal without supersedeas. They can go into bankruptcy or receivership if they have to get straightened out, take time, and recover it . . . ." (App. at A1062.) And it was O'Keefe's lawyers who invoked the language of the U.S. Supreme Court's decision in *Pennzoil*

[30] Even so, it is incorrect for the United States to suggest that Loewen never alerted the Mississippi courts to the risks of a Loewen bankruptcy. (*See, e.g.*, App. at A827 (full bond "would have the practical effect of destroying the Defendant corporations"); App. at A1026 (noting "[t]he disastrous and immediate effects on the Loewen defendants, *their creditors*, employees, and shareholders") (emphasis added); App. at A1027 (Loewen's "value as a going concern . . . will be lost"); *id.* ("only by reducing the amount of the required bond . . . will it be possible to preserve the Loewen defendants' ability to operate, and thus meet all of their obligations.").)

to urge that Loewen should be "'forced to file for bankruptcy under Chapter 11.'" (App. at A1113 (quoting *Pennzoil,* 481 U.S. at 22).)

99. O'Keefe's lawyers were urging bankruptcy because under Chapter 11 of the U.S. Bankruptcy Code, O'Keefe would have had a significant chance to *take over* Loewen or its assets. Thus, under section 1121 of the U.S. Bankruptcy Code, 11 U.S.C. § 1121, a debtor such as Loewen would be given the exclusive right to propose a plan of reorganization for the first 120 days of its bankruptcy case. While this period may be extended "for cause" under 11 U.S.C. § 1121(d), there is no guarantee that Loewen would have been able to obtain such an extension of its exclusivity period, since decisional law states that the exclusivity period may not be used as a litigation tactic to hold creditors hostage. *See, e.g., Teachers Ins. & Annuity Ass'n of Am. v. Lake in the Woods (In re Lake of the Woods),* 10 B.R. 338, 342-346 (E.D. Mich. 1981). Indeed, the legislative history to section 1121 noted that "[a]n extension should not be employed as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory." S. Rep. No. 95-989, at 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5904. Thus, courts typically have refused to use the pendency of an appeal to justify an extension of the exclusivity period. *See, e.g., In re American Fed'n of Television & Radio Artists*, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) ("The pendency of an appeal from an adverse judgment does not constitute 'cause' for an extension of the exclusivity periods."); *In re McLaury*, 25 B.R. 30, 32 (Bankr. N.D. Tex. 1982) (same).

100. Even in the largest such case in history, the Texaco bankruptcy arising from the *Pennzoil* litigation, the bankruptcy court granted *one* extension, so that Texaco could have its case heard by the Texas Supreme Court. *See In re Texaco, Inc.*, 76 B.R. 322 (Bankr. S.D.N.Y. 1987). When Texaco lost in the Texas Supreme Court, it sought a second extension of the

exclusivity period, which the bankruptcy court granted, but only conditionally. The "condition" that the court imposed was that if Pennzoil (Texaco's largest creditor) and the various statutory committees could agree to a plan of reorganization, the court would grant a motion to terminate the exclusivity period. *See In re Texaco,* 81 B.R. 806 (Bankr. S.D.N.Y. 1988).

101. This is precisely the risk that Loewen would have faced in bankruptcy. O'Keefe, even though an unsecured creditor, would have been Loewen's largest creditor, and as such would have had a significant voice in the reorganization proceedings. An extension request would almost certainly have been necessary because the Mississippi Supreme Court would have been extremely unlikely to rule on Loewen's appeal in anywhere near the 120 days of exclusivity allowed by the U.S. Bankruptcy Code. (App. at A1491 (predicting a two-year appeal process); *see* Loewen Subm. at 38-39 & n.15.) O'Keefe, as Loewen's single largest creditor, would have been able to fight any extension of Loewen's statutory exclusivity period, and could have suggested to creditors that he would be willing to take his $500 million in equity under a creditors' plan if exclusivity were not extended. If the creditors agreed with this plan—and there is no reason to believe that they would not, since such a proposal would have removed the scar of the *O'Keefe* judgment and allowed the other creditors' claims to be satisfied—the bankruptcy judge would likely have approved it. The result of such permissible legal maneuvering would have been to wrest control of Loewen's future from the company itself and to place the reorganized company largely in the hands of O'Keefe, himself a long-time operator of funeral homes. That hardly constituted "leverage" for Loewen.[31]

[31] Additionally, it bears noting that had O'Keefe been able to sustain the same claims of gross mismanagement that the United States and its declarants now make, that would have given the bankruptcy court authority to appoint a Chapter 11 bankruptcy trustee, *see* 11 U.S.C. § 1104, which would have caused Loewen automatically to lose its plan exclusivity under 11 U.S.C. § 1121(c), even before the end of the statutory 120-day exclusivity period.

102. And Loewen would not have "been free to terminate the Chapter 11 [bankruptcy] proceeding at any point that it wished," as the United States wishfully suggests. (U.S. Resp. at 67.) Unlike the U.S. Bankruptcy Code's Chapter 13, in which the debtor has an absolute right to dismiss most cases, *see* 11 U.S.C. § 1307(b), Chapter 11 of the U.S. bankruptcy laws allows the debtor to obtain dismissal only "for cause," *see* 11 U.S.C. § 1112(b), and only then where dismissal is in the best interest of the bankruptcy estate. Indeed, a bankruptcy judge is required by section 1112(b) to determine whether it would be better to convert the bankruptcy into a chapter 7 liquidation case (in which the assets of Loewen would be put on the market, and the company's existence ended) instead of terminating it entirely. *Id.* Moreover, Bankruptcy Rule 2002(a)(4) requires notice of the hearing on the motion to dismiss to be given to all creditors, which increases the chance for opposition. An O'Keefe bent on acquiring (or liquidating) Loewen surely would have offered vehement opposition to such a dismissal strategy.

F.

103.

REDACTED

104.

REDACTED

VIII. THE MISSISSIPPI COURTS IGNORED LOEWEN'S OBJECTIONS

105. Despite Loewen's showings to the contrary (Loewen Subm. at 43-46), the United States persists in claiming that Loewen "*never* objected on the grounds of nationality, race or class bias at any point during the [Mississippi] trial." (U.S. Resp. at 85.) Despite such rhetoric,

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[32] Another startling assertion by the United States is its accusation that although Loewen "purported to include a complete copy of the relevant Mississippi 'record' when they initiated this arbitration, *see, e.g.*, A1-A19, they never provided the Tribunal or the United States with a copy of O'Keefe's 'second supplemental' brief in the Mississippi Supreme Court." (U.S. Resp. at 91 n.50.) This statement is false, and cannot have been made in good faith. *First*, Loewen never "purported to include a complete copy of the relevant Mississippi 'record,'" and the Appendix pages cited by the United States contain nothing more than the *trial court* clerk's docket sheet; they certainly contain no representation of completeness on Loewen's part. Indeed, Loewen included only a fraction of the entire Mississippi record, and never pretended otherwise. *Second*, court filings such as the "second supplemental" brief are a matter of public record, so it would be difficult for Loewen to hide such a filing even had that been its intent, which it of course was not. *Third*, the copy of the "second supplemental" brief to which the government refers was withheld from initial discovery because it contained work-product notes and interlineations (*see, e.g.*, U.S. App. at 0800-02, 0806-07, 0831, 0836); only after the Tribunal clarified its discovery order did Loewen produce it. The U.S. has had little difficulty extracting confidential, privileged communications from former Loewen lawyers; its efforts to impugn Loewen's good faith by suggesting that Loewen withheld a document of public record from the United States Department of Justice is a strange strategy indeed.

it is apparent that the United States' argument is not that Loewen "*never* objected," but that Loewen did not object *enough* to suit the United States. For example, the United States calls Loewen's motion for a mistrial "perfunctory" (U.S. Resp. at 87), even though that oral motion specifically referred to the "bias, passion and prejudice against the defendants" that the initial verdict represented. (Tr. at 5738-39.) What was truly "perfunctory" was Judge Graves' treatment of that motion, which he summarily rejected ("That motion is denied") without even bothering to hear from the plaintiffs' counsel. (Tr. at 5739.) Similarly, Loewen's motion for a new trial — which even the United States has to concede objected to the verdict as the product of plaintiffs' "repeate[d] and impermissibl[e]" interjection of "issues and matters of *race, national origins, class and economic status*" (App. at A729 (emphasis added)) — is nonetheless deemed deficient by the United States because "Loewen failed to cite a single instance that would support this claim before the trial court." (U.S. Resp. at 87.) Of course, it was unnecessary as a matter of Mississippi law to provide such record citations to the judge who presided over the trial (*see* Neely Decl. at 2-5), and surely was not needed in this case, where Judge Graves himself recognized that it was O'Keefe who had "started" the process of playing "the race card" against Loewen. (Tr. at 3595-96, 5289.)

106. In common-law jurisdictions, litigants do not have the obligation to object to every single instance of improper trial conduct in order to have protected their rights; all that is ordinarily necessary is that the trial judge be alerted to the problem, which Judge Graves surely was. *See* Neely Decl. at 4; *Kettle v. Mississippi*, 641 So. 2d 746, 748 (Miss. 1994). Certainly Loewen's lead trial lawyer understood what was necessary in this regard — he was himself a former justice of the Mississippi Supreme Court. Making *too many* trial objections, moreover, can diminish a party's credibility before a jury, since that can be seen by jurors as impeding the

truth-seeking process: "As any experienced trial lawyer knows, multiple objections have a tendency to alienate a jury's good will." *Love v. Wolf,* 38 Cal. Rptr. 183, 190-91 (Cal. Dist. Ct. App. 1964) (rejecting argument that court "should refuse to recognize the misconduct because defendants did not always object). Indeed, an authority cited by the United States recommends that trial counsel "minimize your interference while evidence is being introduced before the jury" because "[j]urors dislike objections." T. Mauet, *Trial Techniques* § 9.3, at 421 (4th ed. 1996). Loewen surely objected more than enough to protect its rights.

107. Moreover, under Mississippi law the "plain error" rule required Judge Graves to stop O'Keefe's lawyers' egregious conduct and evidence even absent objections. (Loewen Subm. at 45-46.) The United States paints the plain error rule, which is well established in common-law jurisdictions around the United States (including Mississippi) and elsewhere in the world, as a "permi[ssive]" doctrine, not one of judicial obligation. (U.S. Resp. at 83.) But the United States' position is belied by decisional law. In Mississippi itself, that state's Supreme Court has characterized its obligation to notice and reverse plain errors as "our duty." *Robbins v. Berry,* 47 So. 2d 846, 848 (Miss. 1950) ("This point was not raised . . . but we deem it *our duty* to raise it *ex mero motu,* as a plain error." (emphasis added)); *Burnett v. Mississippi,* 285 So. 2d 783-784 (Miss. 1973) ("[W]e are convinced that the judgment of the trial court . . . must be reversed and remanded *in view of our duty where a plain error appears in the record.*") (emphasis added). Other United States jurisdictions similarly recognize that the plain error rule imposes a judicial duty to reverse even unobjected-to errors, where failing to do so would result in a denial of justice.[33] (*See generally* Neely Decl. at 2-6.)

[33] *See, e.g., Sanchez v. Wyoming,* 592 P.2d 1130, 1131 (Wyo. 1979) ("[w]e are *duty bound* to consider an unassigned error under the plain error doctrine . . . where the error is blatant and results in an unmistakable and unconscionable miscarriage of justice.") (emphasis added);

108. The U.S. does not and cannot assert that Judge Graves prevented the repeated injection of jingoism, racism, and wealth-based bias, all designed to inflame the passions of the predominantly black jury. The following are just a few examples:

- Judge Graves allowed O'Keefe's cross-examination of Ray Loewen to emphasize his nationality, and to accuse Loewen of failing to publicize the "foreign ownership" of Riemann Holdings: "Well, you know the difference between local ownership and foreign ownership, don't you?" "And you know that there are state laws in Mississippi that says that you can't deceive people about ownership as it relates to state versus local?" (Tr. at 5171); "And your group out of Canada owns how much?" (Tr. at 5175.)

- Judge Graves did nothing to stop O'Keefe's closing appeal to anti-Canadian sentiment by reading the previous anti-Canadian testimony of Mike Espy, former U.S. Secretary of Agriculture: "'I was very bothered by certain actions which restricted Canadian products into our markets because they tried to undervalue . . . . The Canadian wheat was underpriced. They would come in, flood our markets, our people would eat a lot of pasta, and they would not buy American wheat. They would go for cheaper wheat which was underpriced to take over the market, and then they would jack up the price, and that was not right, not consistent with what I've done in my life, try to protect people, protect the American market." (Tr. at 5587); O'Keefe then implied that Loewen was analogous to those Canadian wheat farmers, stating that Loewen would "come in" and purchase a funeral home, and "'[n]o sooner than they got it, they jacked up the prices down here in Mississippi.'" (Tr. at 5588.)

- Judge Graves did nothing to stop O'Keefe from comparing Loewen's competition with O'Keefe in the Mississippi funeral business to the bombing of Pearl Harbor by the Japanese in World War II: "Something inside [Jerry O'Keefe] said . . . fight on. [Loewen] lied to him, and a voice said fight on . . . . [W]hen they cheated him, a little

(continued...)

Halldorson v. Halldorson, 573 P.2d 169, 172 (Mont. 1977) ("[A]ppellate courts have a *duty* to determine whether the parties before them have been denied substantial justice by the trial court.") (emphasis added); *Nebraska v. Johnson*, 551 N.W.2d 742, 756-57 (Neb. Ct. App. 1996) (it is "incumbent" for courts to consider whether a trial court's "fail[ure] to act" "unfairly deprives the defendant of a substantial right and a just result."); *United States v. Blythe*, 944 F.2d 356, 359 (7th Cir. 1991) ("The plain error doctrine *requires* appellate courts to correct 'particularly egregious errors.'") (emphasis added) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

voice said fight on . . . . He's a fighter, and he's fought them. You see, that little voice, . . . it's called faith . . . . It's called pride, in America . . . . It is called love, love for your country . . . . 'You see, that little voice didn't just start speaking in 1991 when we started this lawsuit. That voice started back in 1941 on December 7th when our boys were bombed in the morning while they were sleeping. It was a Sunday morning, Sunday morning, caught them sleeping, got bombed, but on December 8th, early in the morning, Jerry O'Keefe got out of his bed and found his way down to the recruiters office. He was just a young lad then, just 19 years of age, but he wanted to fight for his country, and he fought, and he fought." (Tr. at 5593-94.)

- Judge Graves refused to excuse a prospective juror for cause who believed that a foreign company should not be given a fair trial "'because of special tax breaks that [foreign corporations] receive[ ],'" forcing Loewen to use one of its limited peremptory challenges to have the juror removed. (App. at A488, A490-91, A495-96.)

- Despite his explicit recognition that O'Keefe's lawyers "start[ed]" playing the "race card," Judge Graves never stopped that unconscionable tactic:

> JUDGE GRAVES: That argument would mean something to me if, at the time this trial started, we knew y'all were going to be trying to out African-American each other. We didn't know that. Y'all got in and they called all of your African-Americans in and you want yours.
>
> LOEWEN'S COUNSEL: We didn't start it, Your Honor.
>
> JUDGE GRAVES: Oh, I know y'all didn't start it. You're going to bring up the rear, and it ain't going too fast. (Tr. at 5289.)
>
> . . .
>
> JUDGE GRAVES: [B]efore the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage . . . . I mean, that's been happening on the plaintiff's side . . . . [T]he race card has already been played . . . . (Tr. at 3595-96.)
>
> . . . .
>
> JUDGE GRAVES: They [Loewen] just want a few black folks, they just want a few black folks on their side apparently" (Tr. at 3596.)
>
> . . . .

JUDGE GRAVES: [to O'Keefe's counsel] Just enjoy it. It's a great day. *We've* got black folks. They want to bring black folks in. (Tr. at 3597 (emphasis added).)

- Judge Graves allowed O'Keefe's lawyers to present wholly irrelevant testimony by a prominent black politician that Jerry O'Keefe was not a racist: "as an African-American, personally, . . . you run [for office] against people with attitudes and certain biases that they have, and I can say that he [O'Keefe] didn't exhibit any bias towards a person of a different race. He dealt with me as a person, no matter what color I am. He dealt with me based on policies, and I can certainly say he is a man without bias and without prejudice . . . ." (Tr. at 1096.) The implication was, of course, that Ray Loewen and his company *were* racist.

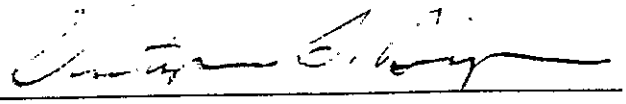
(See generally Loewen Mem. at 13-49.)

109. Under international law, a state must "take all measures necessary to ensure the full enjoyment of protection and security" to foreigners. *American Mfg. & Trading, Inc., v. Republic of Zaire*, 36 I.L.M. 1531, 1548 (1997). Thus, in the United States' own words, Mississippi and the United States had a duty — an "obligation of vigilance," *id.* — to protect foreigners "by all the efforts in [its] power." Mr. Adams, Sec. Of State, to Mr. De Onis, Span. Min., March 12, 1818, Am. St. Pap. For. Rel. IV. 468, 476, *reprinted in* 4 *Moore, Digest of Int'l Law* 5 (1906) (*see generally* Loewen Mem. at 91-97; Loewen Subm. at 44.) The courts of Mississippi had numerous means available to prevent or correct the injustices that were worked on Loewen — including the authority to reduce or eliminate the onerous appellate bond, the authority to order a new trial in the face of the inflammatory evidence and argument, the authority to stop O'Keefe from "playing the race card," and so on. The Mississippi courts employed none of these measures to protect Loewen. The United States' efforts to blame this outrage on Loewen's "carelessness, imprudence, or noncompliance" (*see* U.S. Resp. at 83), is an offensive "blame-the-victim" strategy that finds no support in the record.

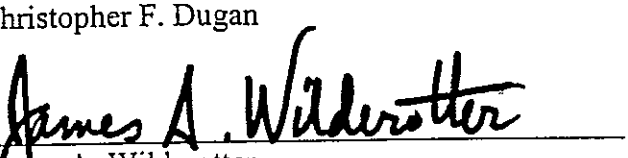
110. Loewen had a right, under NAFTA and international law, to receive fair treatment from Judge Graves and the Mississippi courts. Instead, it was "plundered" for the benefit of Mississippi citizens. That injustice can and should be redressed by this Tribunal, which unquestionably has the competence and jurisdiction to decide Loewen's claims.

DATED: July 28, 2000

Respectfully submitted,



Christopher F. Dugan



James A. Wilderotter

Gregory G. Katsas
Gregory A. Castanias
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700

Attorneys for Claimant
The Loewen Group, Inc.

WA:1205741v1