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

REJOINDER OF THE UNITED STATES OF AMERICA

Mark A. Clodfelter
Barton Legum
Laura A. Svat
Alan J. Birnbaum
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
Suite 5519
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037

Steven F. Fabry
J. Carol Williams
OFFICE OF THE U.S. TRADE REPRESENTATIVE
600 17th Street, N.W.
Washington, D.C. 20508

David J. Anderson
Vincent M. Garvey
Kenneth L. Doroshow
Craig M. Blackwell
David O. Buchholz
Jonathan B. New
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20530
Tel: (202) 514-4263
Fax: (202) 616-8202

Attorneys for Respondent
United States of America

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I. INTRODUCTION

This arbitration concerns litigation in a Mississippi state court that went very badly for The Loewen Group. Why it went badly, and the international law consequences of that result, are the subjects of very different characterizations presented by the parties before this Tribunal. A close review of the record of the Mississippi proceedings, however, shows that claimants have largely invented a story of the O'Keefe litigation bearing little resemblance to the events as they actually occurred and, indeed, have done it so forcefully that they have persuaded several of their experts to mistakenly assume that the story is true. The resolution of this claim, however, should not turn on claimants' characterizations, but instead must turn on the actual record of the O'Keefe litigation, including the contemporaneous documentary evidence that claimants and their experts ignore.

Neither should resolution of this case turn on the alleged conduct of Willie Gary, despite claimants' effort to make Mr. Gary – rather than the gross business misconduct that Loewen was found to have committed, the company's tactical decisions, and its lawyers' mishandling of the O'Keefe litigation – the central focus of this case. Contrary to claimants' suggestion, the United States is not responsible, under either the NAFTA or international law more generally, for the actions of Mr. Gary, Mr. O'Keefe, or any other private individual. Rather, the United States can be held responsible in this matter, if at all, only for the actions of the Mississippi courts. As to the latter, claimants ask this Tribunal to assume, on the basis of nothing more than the very sort of stereotyping and innuendo that claimants contend marred the O'Keefe trial proceedings, that the Mississippi courts decided as they did not because the evidence presented in the case supported such rulings, but because the judges and jury were biased by alleged improper appeals

to certain alleged prejudices. The presumption under international law, however, runs in precisely the opposite direction, as does all of the contemporaneous evidence in this case.

As is manifest from the record before the Tribunal, Loewen made a series of carefully considered strategic choices at each step in its litigation with O'Keefe in the Mississippi courts. It consciously chose to present certain evidence and testimony before the Mississippi jury, and (consequently) not to object to the introduction of certain material by its adversaries. Loewen decided to make certain representations before the Mississippi Supreme Court, yet, to gain advantage in the wider court of public (investor) opinion, made other representations that ran contrary to its claimed inability to post a bond. Loewen knew it had appellate or alternative remedies available to it to challenge the jury verdict, yet it chose to settle and compromise the case. In short, Loewen had access to highly developed and fundamentally fair judicial mechanisms in both state and federal courts, but often acted to undermine its position, and, ultimately, to fully compromise it. No provision of the NAFTA, nor any principle of international law, could render the United States liable for any alleged injury to claimants under these circumstances.

Given the alarming number of inaccuracies that form the basis of this claim, it is perhaps fitting that one of the more fundamental of these appears on the very first page of the very first Memorial in the case. There, The Loewen Group assured this Tribunal that "[t]his claim does not seek direct or collateral review of the municipal-law issues addressed by the Mississippi courts in the *O'Keefe* litigation." TLGI Mem. at 1. As claimants' Joint Reply starkly reveals, however, this international claim is little more than a substitute for the appeal from the trial court's judgment that Loewen elected to forgo in the Mississippi courts. This Tribunal should decline

claimants' invitation to serve as a surrogate court of appeals, a role that neither the NAFTA nor international law permits.

Claimants' Joint Reply, despite its length, fails to overcome the central points established in the United States' Counter-Memorial, each of which requires the dismissal of this claim:

- Loewen never complained to the Mississippi court at any point during the O'Keefe trial – as claimants do extensively in this arbitration – on the grounds that O'Keefe's counsel had appealed to any alleged nationalistic, racial or class biases of the jury. In fact, much of the testimony of which claimants complain was introduced by Loewen itself during the trial.

- Loewen never argued to the trial or appellate courts at any point during the O'Keefe bond proceedings – as claimants do extensively in this arbitration – that corporate reorganization was an unreasonable means by which the company could have stayed execution of the trial court judgment pending appeal, without the need to post any supersedeas bond at all.

- Loewen elected to forgo several alternative means of appeal that, at the very least, were not "manifestly ineffective" or "obviously futile." Loewen's agreement to settle the litigation, whether by its terms or its consequences, thus defeats this NAFTA claim.

- The court judgments of which claimants complain were undeniably subject to further appeals within the domestic judicial system. Because Loewen had effective means of appeal open to it, those court judgments cannot be internationally wrongful under established customary international law principles of state responsibility.

- The actions or alleged inactions of the Mississippi courts did not, in any event, violate any of the substantive provisions of NAFTA Chapter Eleven.

As the United States explains below, claimants' contentions to the contrary rest on allegations and arguments that cannot be sustained by either the record of the Mississippi proceedings, the text of the NAFTA, or settled principles of customary international law.

II. CLAIMANTS CONTINUE TO GROSSLY MISSTATE THE TRIAL RECORD

The United States and claimants are in agreement on at least one point: that the parties have described two vastly different O'Keefe trials, one real and one imagined, and that the Tribunal must read the *entire* record of the O'Keefe litigation if it is to make a proper determination of the merits of these competing claims. Although the Tribunal must of course read the record for itself, the United States nevertheless commends to the Tribunal's particular attention the Statement of Stephan Landsman, appended at Tab C to the United States' Counter-Memorial. Professor Landsman (in an apparent contrast to claimants' experts) has read the entire record of both the pre-trial and trial proceedings in the O'Keefe litigation put before this Tribunal. His opinion offers a detailed and thorough summary of the proceedings that is amply supported with citations to the entire record – not just those sections of the voir dire, opening and closing statements selectively referred to by claimants and their experts[1] – and places the O'Keefe litigation in a proper legal context. In the interest of brevity, and in lieu of a point-by-point rebuttal to each of claimants' many misstatements, we respectfully encourage the Tribunal to review Professor Landsman's statement and limit ourselves to the following, more general responses to claimants' most recent mischaracterizations of the record.

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[1]Claimants' expert Armis Hawkins, for example, does not offer a single citation to the record to support his often hyperbolic and inaccurate assertions. See Statement of Armis E. Hawkins ("Hawkins Statement"). Likewise, Sir Ian Sinclair consistently bases his observations on various "paras. of the Loewen Memorial" rather than the actual record itself. See Opinion of Sir Ian Sinclair ("Sinclair Op.") at 6-11. For his part, Sir Robert Jennings (who never claims to have read more than a few isolated fragments of the trial record) now appears to view his role as that of an advocate for the claimants (e.g., writing as "we"), rather than as a dispassionate expert. See Jennings Third Opinion 23-24; id. at 21 (expressing view as "[t]he claimants, with respect").

A. Claimants Entirely Ignore The Seven Weeks Of Evidence And Testimony At Trial, As Well As The Many Errors Committed By Loewen And Its Counsel

One of the most striking aspects of claimants' Joint Reply is its utter silence with respect to the vast amounts of highly damaging evidence and testimony given over seven weeks of the O'Keefe trial, as well as the numerous – and grave – miscalculations of Loewen's trial counsel. Indeed, if claimants' account of the O'Keefe litigation were to be believed, the entire trial proceedings would have lasted for just a few days, consisting only of voir dire, O'Keefe's opening statements, Mike Espy's few minutes of testimony, and Willie Gary's closing argument. Of course, as the United States has shown and as the record makes clear, the trial lasted for nearly two months and involved far more than these isolated events – which, in any event, claimants distort beyond recognition. See Counter-Mem. at 17-56.

For example, as the United States has shown, Loewen's counsel failed throughout the trial to convey a credible or coherent explanation of the company's defense. See Counter-Mem. at 35-36. As Loewen's recent (albeit paltry) production of additional discovery confirms,[2] this view was shared even by members of Loewen's own trial team at the time. After the first week of the trial, David Clark, one of Loewen's trial counsel, privately complained to Loewen that Richard

[2]Loewen claims to have produced "all documents, generated by or in the possession of Loewen or others acting on its behalf," which arguably respond to the United States' request for documents reflecting contemporaneous assessments of the progress of the trial. See Letter from G. Castanias to K. Doroshow, June 20, 2001. Loewen's entire production in this respect, however (excluding a small handful of documents previously produced for other reasons and which happened to respond to this request as well), consists of only thirteen pages and contains only two letters written during the entire course of the litigation. See U.S. App. at 1234-46. While we take Loewen's current counsel at their word that they know of no additional responsive documents, it stretches credulity to accept that, during the entire two months of trial and three more months of post-trial proceedings, Loewen and its many experienced trial counsel generated only two documents that reflect any assessment of Loewen's own handling of the trial.

Sinkfield's performance was inadequate and that his role as lead trial counsel should be diminished (advice the company apparently chose to ignore). U.S. App. at 1234-35. Mr. Clark complained that Loewen's trial team was "still struggling to recover" from Mr. Sinkfield's unfocused opening statement and his "missed opportunities" with respect to the examination of John Turner, one of O'Keefe's first and most significant witnesses. Id. According to Mr. Clark, "[t]he jury did not hear a good summarization of our case until Jimmy's [James Robertson's] cross-examination of [Walter] Blessey," which did not occur until well into the trial. Id. Mr. Clark further lamented that, although "[w]e can try to 'replace'" Mr. Sinkfield's failures "with testimony from other witnesses, . . . much cannot be replaced at all and some of the rest inadequately." Id.[3]

Similarly, claimants and their declarants ignore the extensive evidence and testimony at trial establishing that Loewen intentionally breached the contracts with O'Keefe with the intent to destroy him as a competitor, all as part of the company's overall scheme to secure and abuse monopoly power. See Counter-Mem. at 18, 34-48. Indeed, neither claimants nor their witnesses even mention the letters from the Riemanns (Loewen's co-defendants) that suspiciously emerged halfway through the trial, despite Loewen's own recognition at the time that the letters were "very damaging to defendants" and, as reported by Loewen in its post-trial juror interviews, were an

[3]The interviewed jurors reportedly shared Mr. Clark's assessment. See, e.g., U.S. App. at 1133 ("The jury heard no message to shake Willie Gary's storyline."); U.S. App. at 1148 ("The trial was way too long. It probably hurt the defense."); U.S. App. at 1156 ("as for the Loewen Group's defense, there was 'nothing there'"); U.S. App. at 1165 ("The defense danced around the issues and were not hitting the real issues and the jury knew it.").

important basis for the jury's ultimate verdict. U.S. App. at 1132. See Counter-Mem. at 36.[4] Even claimants' own media source reported that the first of the "[t]hree key pieces of evidence [that] decided the size of the award" was "Loewen's treatment of the Riemann family . . . ." A3101.[5]

But of all the many telling omissions in claimants' Joint Reply, perhaps none is more striking than the absence of any mention of the woefully inadequate performance of Loewen's counsel with regard to the issue of punitive damages. See Counter-Mem. at 53-56. Indeed, no fair-minded reader of the transcript could fail to conclude that Loewen, and only Loewen, bears responsibility for the conversion of the jury's initial punitive damages award of $160 million into one for $400 million.[6] Both claimants and their experts concede as much by their silence.[7]

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[4]See also, e.g., U.S. App. at 1147 ("The Riemann letter was very damaging."); id. at 1151 ("The David Riemann letter described The Loewen Group to a tee, although Riemann tried to backpedal on that in the courtroom."); id. at 1158 ("[T]he 'Tammy cried' letter by one of the Riemanns was an impressive piece of evidence showing the way the Loewens treated their own people."); id. at 1165 (the Riemanns "wrote two letters to Loewen that were really damaging, and this didn't come out until the defense took over the case . . . ."); id. at 1187 ("Ms. Chapman told me that the single most significant piece of evidence was the August 1991 letter from David Riemann to Ray Loewen.").

[5]According to claimants' source (a February 17, 1996 newspaper article from the Toronto Star), the other two significant pieces of evidence were: (1) "the revelation that . . . the cost of dying [in markets where Loewen did business] increased in direct correlation to the decrease in competition," and (2) Loewen's contract with the National Baptist Convention. A3101.

[6]This is confirmed by Loewen's own summaries of juror interviews. See, e.g., U.S. App. at 1159 ("the punitive damages evidence put on by the defense was pitiful . . . ."); id. ("the defendants just had no case on punitives and . . . they did not clearly provide the jury with any numbers other than the numbers the plaintiff was putting forth. . . . [T]he defense did not have nearly as clear a message [as O'Keefe] on damages."); id. ("the defense message on damages was muddled."); id. at 1165 ("The defense should have really hit [O'Keefe's punitive damages showing] on closing. They [the defense] really just cried a little bit on the punitive argument."); id. at 1182 ("Richard Sinkfield continually lied to the jury," including his claim that Loewen's net

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B. Alleged Improper References To Geography And Nationality

The United States has shown that claimants' allegations of improper appeals to "nationalistic" biases have no basis in the record and that, in fact, much of what claimants bemoan as improper was actually introduced by Loewen itself at the trial. See Counter-Mem. at 19-25. Claimants offer essentially three responses. First, they contend that Loewen introduced matters of nationality only as a "defense" to Willie Gary's alleged improper references. Second, claimants contend that the jury foreman, despite having served in the Royal Canadian Air Force, actually "hated" Canadians. Third, claimants contend that no issues in the trial could have justified the comments that claimants contend impermissibly appealed to nationalistic biases. Each of these responses is meritless.

1. The Record Conclusively Demonstrates That Loewen, Not O'Keefe, Introduced Matters Of Nationality And Prejudice As A Central Component Of Its Case

As the United States has shown, the O'Keefe jury heard evidence relating to "anti-Canadian" bias only because Loewen itself chose to introduce such evidence as part of its deliberate litigation strategy, the purpose of which was to paint Jerry O'Keefe as a bigoted and

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[6](...continued)
worth was $411 million, followed by testimony from Loewen's own witness "that the Loewen Group net worth was $700 million. Usually an attorney will coordinate their lies with their witnesses.").

[7]Neither, for example, do claimants or their declarants mention Loewen's counsel's notorious violation of the court's sequestration rule, which resulted in the complete striking of the testimony of one of Loewen's witnesses. See Counter-Mem. at 37. While claimants and their declarants may choose to ignore this event, it certainly did not go unnoticed in the courtroom. See U.S. App. at 1158. ("the jury was very impressed by" Loewen's violation of the sequestration rule and "believed that all of this indicated some kind of improper maneuver by the defense") (reported comment of Juror Number 6).

unfair competitor, and to garner sympathy from the jury. See Counter-Mem. at 22-25. Claimants effectively concede that Loewen did so, but only (they contend) "to protect itself" from "[Mr.] Gary's numerous early appeals to local favoritism and national prejudice . . . ." Joint Reply at 21. This is absolutely false.

Well before it had even heard of Mr. Gary, Loewen made clear that a central part of its litigation strategy was to emphasize O'Keefe's negative advertisements as evidence of Jerry O'Keefe's alleged bigotry, as well as to call Mr. O'Keefe's integrity into question. For example, in its motion for summary judgment filed on July 28, 1995, weeks before Mr. Gary ever appeared in the Mississippi courtroom, Loewen alleged the following facts as material to its defense:

> [Around August 1990], O'Keefe initiated a scathing attack on Loewen and Riemann, emphasizing Riemann's "foreign ownership" (The Loewen Group, Inc., the parent of Loewen Group International, Inc., is a Canadian corporation), questioning the Riemanns' patriotism ("Remember Pearl Harbor") and trying to make much of the fact that one of its sources of financing, a branch bank in Seattle, Washington, was the Hong Kong-Shanghai Bank. These attacks continued in the summer and fall of 1990 and into 1991.

A63. Plainly, it was Loewen, not Mr. Gary, that deemed the company's nationality to be relevant (and useful), and it was Loewen, not Mr. Gary, that first introduced such matters as "anti-foreigner" bias, "Pearl Harbor" and the "Hong Kong-Shanghai Bank" into the case. See also, e.g., U.S. App. at 1189 (Loewen's attorney, James Robertson, acknowledging that "*[w]e* . . . offered evidence of the rather scurrilous slander campaign O'Keefe mounted just after Loewen's acquisition" of Riemann and "*[w]e* had introduced . . . the poster reflecting the Japanese and Canadian flags. . . . *[W]e* thought it was . . . significant.") (emphasis added).

Indeed, it was Loewen who had its witness (Peter Hyndman) explain to the jury, with regard to O'Keefe's advertisements, that "many Canadian lives were lost in the bloody and heroic defense of the British Crown Colony of Hong Kong by the Canadians against the Japanese." Tr. 4486. It is thus nothing short of astonishing that claimants should now complain, for example, that Mr. O'Keefe, on cross-examination by *Loewen* about the advertising campaign, made references to Loewen's nationality. See Joint Reply at 13.[8]

2. The Jury Foreman Did Not "Hate" Canadians And, By Loewen's Own Account, Had A "Good Grasp Of The Entirety Of The Trial"

One of the more alarming aspects of the Joint Reply is claimants' treatment of the fact that the foreman of the O'Keefe jury was himself Canadian by birth and a veteran of the Royal Canadian Air Force. Rather than accept the unavoidable conclusion that the jury's verdict could not have been motivated by an "anti-Canadian" bias, claimants now allege that the foreman actually "hated" Canadians and reached his verdict out of "contempt . . . for his ex-homeland." See Joint Reply at 9-10.

Appended hereto at Tab D is a declaration from the jury foreman, Glenn Millen, which conclusively demonstrates that claimants' allegation is as wrong as it is, in Mr. Millen's words,

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[8]Many of the other references of which claimants complain are likewise no different from Loewen's own statements to the jury. For example, Loewen complains that Mr. Gary mentioned Loewen's nationality during voir dire, but Loewen's own questionnaire (which was submitted to the jury pool long before Mr. Gary uttered his first words to the jury) asked such questions as "Do you believe that a *foreign* corporation with its corporation headquarters being located in *Canada* and Kentucky is entitled to a fair trial the same as an individual in *our* courts of law?" U.S. App. at 1015 (emphasis added). See also, e.g., U.S. App. at 1020. Similarly, claimants criticize Mr. Gary's description of lawsuits as "the American way" of resolving disputes, but Loewen's counsel (Edward Blackmon) also felt it important to tell the jury that "we [Americans] have one of the best systems in the world to settle disputes" and that, "under our way of justice and settling disputes in this country, . . . [w]e don't go fighting each other or start wars. [People] file lawsuits if there's a dispute." A404.

"completely ridiculous." Millen Declaration at 1. As his declaration makes clear, Mr. Millen was always proud of his Canadian origins, including his Canadian military service. Id. at 1-4.[9] Although he became a United States citizen at the age of thirty-three for professional reasons, Mr. Millen continued to be extensively involved with Canada and Canadians both personally and professionally, and his Canadian origins remained very much a part of his identity throughout his life. Id. Indeed, Mr. Millen's wife of fifty years is a Canadian national, as are many of his relatives and personal friends, and Mr. Millen for decades traveled regularly to Canada (including to Vancouver, where Loewen was headquartered) for both professional and personal reasons. Id. at 2-3. Not only was there thus never a basis for inferring any "anti-Canadian" sentiments on Mr. Millen's part, but, as Mr. Millen explained, "in my many years of living and working in the United States, I have never experienced or witnessed such a thing as 'anti-Canadian' hostility." Id. at 3.

In fact, Loewen itself offered a very different assessment of Mr. Millen at the time of the Mississippi litigation. Reporting on his interview with Mr. Millen after the verdict, Loewen's counsel (John F. Corlew, a witness for claimants in this proceeding) described Mr. Millen as "gregarious, articulate" and "forthright," possessing "a good grasp of the entirety of the trial." U.S. App. at 1163. Claimants' remarkably revised portrait of Mr. Millen simply does not square with the facts, even as developed by Loewen itself at the time.[10]

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[9]We note, sadly, that Mr. Millen passed away suddenly and unexpectedly on July 30, 2001, just two weeks after providing the United States with his declaration.

[10]Mr. Millen's declaration addresses only claimants' allegation that he harbored an "anti-Canadian" bias, and does not address claimants' ascription of statements to Mr. Millen on the basis of Loewen's post-trial interview of him. The United States did not ask Mr. Millen to

(continued...)

3. References To Geography And Nationality Were Relevant To Several Issues In The Case

Claimants complain at length that many of the alleged references to geography and nationality at trial cannot be justified "on grounds of mere locational reference . . . ." Joint Reply at 10-16. This is a classic straw-man argument, for the United States never suggested that "locational disputes" were the sole reason for these references. See, e.g., Counter-Mem. at 24 n.15. As both the record and the context of the litigation make clear, the challenged references were relevant to several issues at the heart of the dispute, not limited to issues of geography.

For example, by showing that Riemann was not truly "locally owned" as Riemann had represented itself to the community, O'Keefe sought to explain the very advertising campaign that Loewen had made a central issue in the case. Loewen argued that O'Keefe's advertisements were not only bigoted but false because Riemann, by virtue of the alleged "partnership" between LGII and David Riemann, was not "foreign owned." See, e.g., Counter-Mem. at 11-12; Tr. 85, 4476-77. O'Keefe was thus fully justified in showing that Loewen was the true owner of the Riemann companies and that David Riemann's purported ownership through his "partnership" interest was insignificant. See Counter-Mem. at 36, 43, 45-46; Tr. 1986-87. Thus, for example,

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[10](...continued)
discuss this latter subject, given our concern that it would possibly have been improper to do so. See, e.g., Martinez v. Food City, Inc., 658 F.2d 369, 373 n.2 (5th Cir. 1981) (questioning the propriety of inquiry into jury deliberations, noting that "such 'fishing expeditions' . . . are looked upon with severe disfavor in this Circuit as violating, inter alia, the substantial policy interests in protecting the confidentiality of the jury function."); Gregory v. United Kingdom, 25 E.H.R.R. 577 (Eur. Ct. H.R. 1998) ("the rule governing secrecy of jury deliberations is a crucial and legitimate feature of English trial law which reinforces the jury's role as arbiter of fact and guarantees open and frank deliberations among jurors on the evidence"). The Tribunal should thus not construe Mr. Millen's silence with respect to his or any other juror's deliberations as any sort of endorsement or acceptance of claimants' allegations in this regard.

O'Keefe's explanation that Riemann's "payroll checks come out of Canada," was not at all the "gratuitous" appeal to nationalism that claimants allege (see Joint Reply at 13), but was instead a rebuttal to Riemann's specious claim of local ownership, autonomy, and independence from Loewen. Indeed, as was ultimately disclosed at trial, even the co-defendant Riemanns themselves privately complained to Loewen that "[t]here is too much direct orders [sic] coming from Canada." U.S. App. at 0965.

Relatedly, a key aspect of Loewen's deceptive business practices involved its wilful concealment of the company's ownership of local funeral homes from the general public. See, e.g., U.S. App. at 0024, 0179; Tr. 1255, 1863-66. As the O'Keefe plaintiffs made clear in their pleadings and at trial, Loewen's mistreatment of O'Keefe was part of an overall plan to raise prices through a general practice of deception, both as to competitors and to consumers. See, e.g., A146, A151, A157, A159. O'Keefe's proof that the Riemann homes were, in fact, owned by Loewen rather than any "local" concern was thus entirely relevant, both to show the falsehood of Loewen's persistent claims to the contrary, and to demonstrate that Loewen had misled consumers to trust that they were dealing with a community-based funeral home that would not exploit them for excessive profit in their time of bereavement. E.g., id.; U.S. Jurisdictional Mem. at 9-10; A3272-74.[11] As their context makes clear, many of the references to Loewen's

[11]O'Keefe also argued that Loewen's concealment of its ownership from the general public was an "unfair method of competition" in violation of Mississippi law. A3272-74 (citing Miss. Code Ann. § 75-24-5). As O'Keefe explained, Loewen's clustering of funeral homes that it held out to be independently owned deceived consumers to believe the funeral homes were in competition with one another, thereby preventing true price competition in the relevant market. Id. Since the O'Keefe litigation, several jurisdictions – including several U.S. states and the United Kingdom – have implemented rules mandating the disclosure of funeral home ownership to prevent this very problem. See, e.g., B. Hills, Foreign Bodies, Sydney Morning Herald at 1 (continued...)

nationality of which claimants complain were directed to these points, and not to any alleged nationalistic bias.

C. Alleged Improper References To Race

Claimants are wide of the mark when they assert that "[t]he United States cannot dispute that Willie Gary played the race card first . . . ." Joint Reply at 34. As the United States has shown, it was Loewen, not O'Keefe, that began the practice of racial pandering by adding to its already-large legal team a number of prominent African-American attorneys, and it was Loewen that attempted to ingratiate itself with the African-American jurors throughout the trial. See Counter-Mem. at 26-30. Although this fact is already evident from the record, Loewen's recent production of documents (meager as it is) makes it even clearer.

For Loewen, it was not enough that Richard Sinkfield, the company's lead trial counsel, was African-American and that two of the other four lawyers on the team were prominent African-American members of the Mississippi state legislature. As David Clark, one of Loewen's two white trial lawyers, privately explained to the company at the time,

> Richard is a bright and able lawyer, but *the person we have on our side who is well known to the black* (and to a more limited extent, white) *community here is Ed Blackmon*. In addition, several members of the jury know him, and one knows his wife even better.

U.S. App. at 1234 (emphasis added). Given Mr. Blackmon's perceived influence with the African-American jurors, Loewen's counsel urged that "*we need to get Ed Blackmon on his feet and in front of this jury more, and soon*." Id. (emphasis added).

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[11](...continued)
(Aug. 2, 1997) (U.S. App. at 1334-37) (noting that the UK Monopolies and Mergers Commission ruled that SCI, Loewen's principal competitor, had to "disclose publicly its ownership of funeral businesses it took over."); U.S. App. at 0065, 0072.

Mr. Blackmon, who was on Loewen's trial team well before Loewen had even heard of Willie Gary, fully understood Loewen's strategy in this regard. Indeed, Mr. Blackmon's first words to the jury pool during voir dire (before Mr. Gary uttered any of the statements that claimants allege were racially-charged) were a thinly-veiled reference to the success of the African-American civil rights movement in Mississippi. See A398. Mr. Blackmon observed that "the composition of the jury was quite different" in the Hinds County courthouse when he began practicing law in 1974 than it was by the time of the O'Keefe trial "because of the laws that says [sic] that everybody has to be treated fairly, everybody has to be included in the system." Id.

Mr. Sinkfield followed Mr. Blackmon and, at the urging of Loewen's other counsel, took pains to point out to the prospective jurors that two African-American Mississippi state senators (Robert Johnson and Mr. Blackmon) were representing Loewen in the case. See A414.[12] Mr. Sinkfield asked those lawyers to stand so the jurors could see them, noting that "these two gentlemen are honorable members of the Mississippi State Legislature," thereby seeking to give Loewen an endorsement from these prominent members of the local African-American community. Id.[13]

Mr. Sinkfield continued this tactic in his opening statement, which he devoted largely to criticizing O'Keefe for having engaged in a bigoted advertising campaign against Riemann. Sinkfield questioned O'Keefe's "character," charging that O'Keefe had sought to appeal to "an

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[12]Mr. Sinkfield was prepared to sit without making this point, but, as he made clear, did so only because he was asked by his colleagues to do it. A414.

[13]Claimants themselves complain that, among the sixteen witnesses called by O'Keefe at trial, two were "prominent black members of the local community," including Earl Banks, who (as claimants are quick to point out) was a "black state legislator," just like two of Loewen's own trial counsel. Joint Reply at 32.

audience . . . who doesn't like you because you're sensitive to people of a different country or *because you're associated with people of a different race* . . . ." Tr. 105 (emphasis added). In contrast to this portrait of O'Keefe as a racist, Mr. Sinkfield described Ray Loewen as "a courteous and hospitable man" who sought only "to help bring peace down there" to the Gulf Coast in response to O'Keefe's "rabble rousing about the Japanese and other foreigners." Id.

This strategy pervaded Loewen's presentation during the case-in-chief. See Counter-Mem. at 22-25. For example, in cross-examination of Walter Blessey (a white man and O'Keefe's third witness), Loewen's counsel again criticized the O'Keefe advertisements as racist, charging that the advertisements "could have said that [O'Keefe's funeral homes are locally-owned] without making any reference or appeal to racial prejudice . . . ." Tr. 731. See also Tr. 2173 (Loewen's counsel suggesting that O'Keefe did not "distinguish . . . between the concept of pro-American buying and Japanese bashing"); 2677 (Loewen's counsel asking witness whether he had "problems with doing business with Japanese? . . . People who are of the Japanese race?").

Mr. Blackmon, as Loewen had expected, executed the company's strategy all the way through to closing argument. Mr. Blackmon devoted the bulk of his closing argument to O'Keefe's advertising campaign, charging that Mr. O'Keefe "played on . . . race" by mentioning the Japanese in his advertisements. Tr. 5673. To ensure that the African-American jurors sympathized with Loewen (and the allegedly-maligned Japanese), Mr. Blackmon added his observation that "[i]t could have easily been *any other race*" and that, "in this day and age," one should not have to apologize for employing someone of another "race or nationality . . . ." Tr.

5677 (emphasis added). This was especially so, Blackmon argued, "after all we've been through," once again referring to the civil rights movement. Tr. 5674.[14]

Mr. Blackmon underscored these themes by complaining that O'Keefe had "assaulted" the "reputation and . . . integrity" of the "largest religious African-American religious [sic] organization in this country [the National Baptist Convention]" and – in a direct appeal to the African-American members of the jury – arguing that "*our people* who belong to that association are going to be doing mighty good" as a result of the Convention's affiliation with Loewen. Tr. 5668-70 (emphasis added). According to Mr. Blackmon, O'Keefe's alleged "assault" on the National Baptist Convention was particularly inappropriate, given what the organization has "tried to do for *this* community . . . ." Tr. 5669 (emphasis added). Indeed, it appears that Mr. Blackmon even went so far as to imply that O'Keefe's alleged insensitivity to minorities extended to anti-Semitism, charging – with absolutely no predicate in the record – that O'Keefe had brought the "emotional edge . . . to an extreme" by saying "that he [Loewen] tried to 'Jew them down.'" Tr. 5668.

Thus, not only did Loewen lodge no objection to any of the alleged racial appeals by O'Keefe, but, as the record makes clear, Loewen itself injected race and racial division into the litigation from the very start. Loewen's obvious strategy was to paint Mr. O'Keefe as a racist, insensitive to minorities, and an exploiter of racial tensions. In contrast, Loewen sought to portray itself as another victimized minority (i.e., a "foreigner") that the African-American community – as represented by Loewen's prominent African-American counsel and the National

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[14]Blackmon added his speculation that O'Keefe intended the advertisements to exploit racial tensions that allegedly existed in the fishing community on the Mississippi Gulf Coast as a result of an influx of Vietnamese immigrants after the U.S. war in Vietnam. Tr. 5674.

Baptist Convention – had taken under its wing.[15] In short, claimants' protestations of innocence with respect to the playing of the "race card," as well as the irrelevant foray into which side "started" the playing of that card, are thoroughly disingenuous.[16]

D. Alleged Improper References To Class

Despite the United States' showing that neither the jury verdict nor any of the Mississippi court judgments was motivated by an improper "class-based" animus, see, e.g., Counter-Mem. at 30-32, claimants still contend otherwise. According to claimants, O'Keefe's counsel made several improper references to "class-based" or "populist" sentiments that were irrelevant to any issues in the case, and which influenced the jury's and the court's ultimate decisions. Not so.

Claimants' principal error in this respect is the mistaken assertion that the challenged references were directed only to O'Keefe's "oppression" claim, which Judge Graves prevented (at Loewen's request) from going to the jury. See Joint Reply at 37. As the record makes clear, the O'Keefe plaintiffs *generally* alleged, with reference to *all* of their claims, that "Defendants have taken advantage of their wealth and unequal bargaining position with that of the Plaintiffs." A125.

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[15]Mr. Gary's characterization of Loewen's defense as "Excuse me. I'm from Canada," which claimants misrepresent as an appeal to local bias without predicate (see Joint Reply at 14-15), was plainly a response to Loewen's strategy of seeking sympathy from the jurors on the basis of its status as an allegedly victimized foreigner.

[16]Judge Graves' casual remark of "Oh, I know y'all didn't start it" was hardly the finding of fact that claimants contend. (Tr. 5289). Viewed in the context of the litigation as a whole (as well as Judge Graves' justifiably waning patience with the lawyers), Judge Graves' remark was plainly intended merely to chide the squabbling parties and to urge them to move the case along. Id.

For example, the O'Keefe plaintiffs alleged, in support of their claims of fraud, wilful and malicious breach of contract, bad faith, and violations of state anti-monopoly laws, that "[t]he Defendants knew, and acted upon the knowledge, that the Plaintiffs had an unequal bargaining position and could not afford to continue to leave this transaction [the August 1991 settlement agreement] in an incomplete posture for an indefinite time,"A128, and that "[t]he Defendants[']acts, course of business, or usage in trade is typical conduct of these Defendants which they have used on a wide basis to the detriment of small businesses such as Plaintiffs in similar transfers." A125; see also, e.g., A147-49.[17] Claimants' emphasis on the "oppression" claim is thus a distraction.

Similarly, several of the excerpts from the record that claimants offer to support their theory are from the *punitive damages* phase of the litigation. See Joint Reply at 40-41; id. at 37 (citing TLGI Mem. at 16-17, 43-47). Because one of the principal purposes of the punitive damages phase was to establish Loewen's net worth, it is difficult to see how Loewen could complain of O'Keefe's references to Loewen's worth – which claimants now characterize as a "wealth-based incitement strategy" – in that portion of the litigation.

Finally, claimants once again rely principally on the exchange that occurred at trial concerning Ray Loewen's yacht to support their claim of impermissible "class-based" bias. See Joint Reply at 37, 39, 42-46, 68. Claimants, however, misconstrue the import of this alleged

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[17]As Mr. O'Keefe related elsewhere, Loewen used its unfair bargaining power to intimidate even John Wright, Loewen's co-defendant in the case. According to Mr. O'Keefe, during his meeting with Mr. Loewen aboard Loewen's yacht, "Loewen boasted how he maneuvered John Wright to sell the Wright & Ferguson Funeral Home by threatening to build a brand-new home in his territory. Loewen demonstrated how Wright's hand shook so much the coffee sloshed from his cup." U.S. App. at 0025.

"yacht theory" of the case, an invention attributed to Willie Gary in a newspaper article five years after the O'Keefe trial. As the article makes plain, Mr. Gary "jumped on the matter" of Loewen's yacht only after Mr. Loewen testified, in response to questions from Loewen's own lawyer, that he did not know the difference between a boat and a yacht. A3122. The issue then was simply one of Mr. Loewen's credibility, which Mr. Gary challenged with effectiveness by pointing out to the jury that Loewen and its witnesses "lied to Jerry, and they lied to you. They even lied for no reason. . . . What about the boat? Nothing wrong with the man having a yacht, but if you've got a yacht, say it." Id.; Tr. 5557. Mr. Gary's boast of his supposed "yacht theory" five years after the fact was simply a reference to Loewen's dishonesty – the actual theme of the O'Keefe case – having nothing to do with class or populism.

E. Loewen Raised The Character Issues Of Which Claimants Now Complain

Throughout their discussion of the alleged appeals to bias, claimants complain that certain witnesses testified favorably to Mr. O'Keefe's character which, according to claimants, was irrelevant to the case and impermissibly appealed to nationalistic or racial biases. See Joint Reply at 11-12, 14, 24, 31-33. Although they concede that Loewen itself spent much of the trial assaulting Mr. O'Keefe's character – including sustained efforts to portray Mr. O'Keefe as a racist, a xenophobe, a slanderer or defamer, and a dishonest businessman who associated with criminals – claimants contend that Loewen was "forced" to do so by the earlier testimony of O'Keefe's witnesses. See, e.g., Joint Reply at 24. This is demonstrably not so.

As already noted, Loewen made clear from the outset of the case, well before any witness took the stand, that an essential part of its strategy was to characterize O'Keefe as a bigot who exploited racial divisions in his advertisements. See supra at 8-10, 14-18. O'Keefe was thus well

within his rights to elicit testimony showing, for example, that he was "a man without bias." Joint Reply at 32 (quoting testimony of Mike Espy).

Beyond this, however, one of Loewen's most basic defenses to its breach of the August 1991 settlement agreement was that Loewen allegedly had reason to question O'Keefe's honesty, good faith and reputation and, therefore, had reason to prevent the transaction from closing. See, e.g., U.S. App. at 1255; Tr. 3270, 5660. As Loewen argued to the court in its pretrial briefs, Loewen was allegedly concerned about "possible impropriety" by O'Keefe that caused Loewen to reconsider its agreement to enter into a relationship with the O'Keefe companies, even though the agreement had already been executed. See A85. Loewen thus sought to excuse its breach because, "[a]s Plaintiffs' own attacks on Loewen's 'foreign ownership' and the like suggest, the reputation of a funeral home company in the community it serves is one of its most valuable assets." Id.[18]

Loewen signaled this defense to the jury as early as the voir dire proceedings. For example, Mr. Blackmon suggested to the prospective jurors that O'Keefe had been dishonest with Loewen, telling "one truth at one time" to Loewen and telling "another story" in another setting "outside of the state or in Florida," and that O'Keefe's "word was not what they purported it to be." A401-02.[19] See also A402-03 (Mr. Blackmon referring to "an investigation of the O'Keefe"

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[18]Several witnesses at trial, including former Loewen executive John Turner, established that this purported excuse was utter pretext for Loewen's intentional, bad faith breach of the agreement. See, e.g., Tr. 247, 349-53, 2089-93, 2623.

[19]Mr. Blackmon's reference to "Florida" was a foreshadowing of Loewen's allegation, explored at great length during Loewen's presentation at trial, that O'Keefe had been involved in an improper – and, Loewen would assert, fraudulent – series of loans involving a real estate investment in Florida. See, e.g., Tr. 2338-49, 2623, 3445-46, 3473-3510, 5602-08; see also (continued...)

business by the Mississippi Department of Insurance). This strategy persisted – and magnified – over the course of the trial, including Loewen's presentation of certain witnesses whose sole purpose (as Loewen's counsel would later acknowledge) was to "suggest[] misconduct on the part of O'Keefe." U.S. App. at 1190; see also, e.g., Tr. 732 (questions by Loewen's counsel alleging that the O'Keefes did not "always tell the truth to the public about what they're doing with their money.").[20]

Having thus placed O'Keefe's honesty and reputation squarely at issue from the very start, Loewen could not be heard to complain about testimony establishing that Mr. O'Keefe was, for example, "'an honorable man,' 'a decent guy,' 'a very respectable person,' 'a friend,' and 'a man without bias and without prejudice.'" Joint Reply at 24 (quoting testimony of Mike Espy).[21] Even

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[19](...continued)
TLGI Mem. at 30.

[20]One notable instance was Loewen's presentation of Mr. Kenny Ross, a former business associate of O'Keefe's, whom claimants themselves describe as a "significant witness." See TLGI Mem. at 30 (TLGI incorrectly describes Mr. Ross as a former "owner" of an O'Keefe entity). Loewen called Mr. Ross to testify with full knowledge that Mr. Ross would do nothing other than invoke his constitutional protections against self-incrimination (the Fifth Amendment), thereby tarring Mr. O'Keefe – solely by association – with whatever undefined misconduct of Mr. Ross the jury might infer from his refusal to testify. See Tr. 3523-35. Judge Graves, despite noting O'Keefe's "concern[] about the inference that may be drawn from Kenny Ross taking the fifth," permitted Loewen to call Mr. Ross as a witness, over O'Keefe's vigorous objection. Id. The only "significance" of Mr. Ross's testimony, therefore, is as an example of Loewen's strategy of besmirching Mr. O'Keefe's character and reputation throughout the trial. See, e.g., Tr. 3446, 5604-07 (Mr. Sinkfield, in closing argument, asserting that O'Keefe's involvement with Mr. Ross showed O'Keefe to be "a crook" who was "cooking the books").

[21]Even if Loewen had not presented these issues to the jury from the outset, O'Keefe would still have been within his rights to elicit this testimony. The well-established rule of "anticipatory rehabilitation" allows a calling party to explore on direct examination facts or points that rehabilitate an anticipated area of impeachment. See, e.g., Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 269, at 193 n.6 (2d ed. 1994).

in the present proceeding, claimants acknowledge that issues of Mr. O'Keefe's credibility were "crucial" in the Mississippi trial. Joint Reply at 22.

One can, of course, reasonably question the wisdom of Loewen's strategy in this respect. See, e.g., Declaration of the Honorable Raymond E. Mabus, Jr. at 4 (former Governor of Mississippi opining that, "[t]o the extent that The Loewen Group's legal strategy in the trial was to suggest that Mr. O'Keefe was anything but honorable in his dealings with Loewen, I would expect that such a strategy would have been doomed to fail.") (Tab E to Counter-Mem.). Nevertheless, it is the strategy that Loewen chose. Claimants therefore cannot be heard to complain now of the consequences of that choice.

F. The *O'Keefe* Case Was Far More Than A Mere Contract Dispute, And Involved Valid (And Proven) Antitrust Claims

Claimants persist in their erroneous contention that the O'Keefe litigation was nothing more than a "garden-variety contract dispute" and that O'Keefe's antitrust claims (to say nothing of the fraud and intentional tort claims proven at trial) were without legal or factual basis. See Joint Reply at 61-75. According to claimants, O'Keefe's antitrust claim was legally unsupported and, in any event, was not the "real" focus of O'Keefe's overall claims against Loewen. Id. Apart from the fact that this is precisely the sort of question of municipal law that is well beyond the role of this Tribunal to assess,[22] claimants' contention is wrong as a matter of both law and fact.

[22]See, e.g., Alwyn A. Freeman, International Responsibility of States for Denial of Justice 319 (1938) ("[N]o domestic judgment may be attacked merely because it is unsound in the light of applicable principles of local law and justice. . . . [T]he question whether a given decision is correct or not is not of itself relevant to or determinative of the issue whether it constitutes a denial of justice."); id. at 325 ("It must always be remembered that the function of an international tribunal is not . . . to sit in review as a municipal court of appeals, but solely to determine whether the judgment rendered was *so obviously* wrong and unjustified as to amount (continued...)

1. O'Keefe's Antitrust Claims Were Legally Sound And Properly Submitted To The Jury

With characteristic bravado, claimants assert that O'Keefe's antitrust claim "was so legally deficient that any fair-minded judge would have dismissed it prior to trial." Joint Reply at 70. Once again, however, precisely the opposite is true: O'Keefe's antitrust claim was so plainly valid as a matter of law that Loewen's mishandling of the issue is yet another example of the grievous errors committed by Loewen's trial counsel.

Claimants and at least two of their experts contend that O'Keefe "grounded his 'monopolization/antitrust' claim" solely on a theory of predatory pricing, whereby a defendant sells products below cost in order to drive out competition.[23] This is simply untrue. As O'Keefe argued to the court, "[p]redatory trade practices may consist of any per se or statutory violation of law, *or any practice which is intended to destroy competition* . . . ." A3232 (citing Miss. Code Ann. § 75-21-3) (emphasis added). Although O'Keefe did argue that "price discrimination by locality" would have been a per se violation of Mississippi's anti-monopoly law, O'Keefe also argued that Loewen's *other* "malicious acts . . . which [were] intended and calculated to destroy competition and exclude weak competition from the market . . . are predatory trade practices" in violation of the statute. Id. (citing Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962)).

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[22](...continued)
to an *international* delinquency.") (emphasis in original).

[23] See Joint Reply at 70-71; Hawkins Statement at 21; Statement of John G. Corlew ("Corlew Statement") at 8.

O'Keefe, of course, was absolutely right. Mississippi's anti-monopoly law is not limited only to prohibitions against predatory *pricing*, but instead broadly proscribes predatory or exclusionary *conduct* in any form. See Miss. Code Ann. § 75-21-3; see also Standard Oil Co. v. State, 61 So. 981, 982 (Miss. 1913) (predecessor statute "denounces all restraints of the freedom of trade, and is broad enough to cover every and all kinds of business dealings inimical to the general welfare of the people of the state."). While, "[i]n its classic form, predation occurs as pricing below cost to drive a rival from the market," Philip E. Areeda & Herbert Hovenkamp, Antitrust Law § 396g (1995), predatory pricing is by no means the only way to violate anti-monopoly law. Rather, "[t]he offense of monopolization" is defined more generally as "the possession of monopoly power coupled with the attainment or maintenance of that power by unfair means . . . ." E. Kintner, Federal Antitrust Law § 14.5 at 437 (1980); see also Areeda & Hovenkamp, Antitrust Law § 650c (antitrust law generally proscribes "monopolies shown to be achieved with the aid of reprehensible conduct").[24]

O'Keefe's pleadings clearly alleged (and O'Keefe ultimately proved at trial) the "unfair means" by which Loewen attempted to attain its monopoly power, having nothing to do with "pricing below cost." See, e.g., A175.[25] As O'Keefe explained to the court during a pre-trial

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[24]See also NAACP v. Claiborne Hardware Co., 393 So.2d 1290, 1301 (Miss. 1980) (federal case law construing federal antitrust law is persuasive authority in application and interpretation of Mississippi's antitrust statutes), rev'd on other grounds, 458 U.S. 886 (1982).

[25]To the extent that O'Keefe also asserted an "impermissible pricing" claim, Judge Graves gave Loewen precisely what it wanted in the court's instructions to the jury. See Tr. 5525-26 (instructing jury that "any claim for impermissible pricing must show that the plaintiffs were injured because defendant charged a price for a product or service . . . that was lower than that defendant's cost for that product or service."). The court's instruction on the law of "monopolization," however, was entirely distinct from the "impermissible pricing" instruction.
(continued...)

hearing on this very issue, Loewen violated the anti-monopoly laws by (among other things) manipulating the August 1991 settlement agreement in bad faith with the intent to drive O'Keefe out of relevant funeral home markets, thereby enabling Loewen to continue to raise its prices without fear of competition. See A3344-47. O'Keefe also argued that Loewen's treatment of O'Keefe was part of a broader practice of destroying or excluding smaller competitors through similar unfair methods. See, e.g., A158-59. As Mississippi trial lawyer Jack Dunbar explains in his attached declaration, such allegations were more than sufficient to state a claim for a violation of Mississippi's anti-monopoly laws. See Supplemental Statement of Jack F. Dunbar, Esq. ("Supplemental Dunbar Statement") at 2-8 (Tab C hereto).

Claimants, who merely parrot the misguided arguments of Loewen's trial counsel, are similarly incorrect when they assert that O'Keefe, as a competitor of Loewen, lacked the requisite legal standing to bring a monopolization claim against Loewen. See Joint Reply at 72. As a leading antitrust treatise observes, "[s]tanding is clear and seldom challenged when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff, or to preclude his entry, so that the defendant could maintain or create a monopoly." Areeda & Hovenkamp, Antitrust Law § 373d. See also, e.g., Oltz v. St. Peter's Cmty. Hosp., 19

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[25](...continued)
See id. at 5527-28 (instructing jury that, "[t]o prevail on a claim of monopolization and to recover damages, the plaintiffs must prove . . . that the defendants had monopoly power in the relevant market . . . [,] that the defendants willfully acquired or maintained such monopoly power through restrictive or exclusionary conduct[,] [a]nd . . . that the plaintiffs were injured in their business or property as a result of such . . . conduct."). Claimants and their expert, Mr. Corlew, are thus wrong in asserting that "[t]he only antitrust jury instruction which plaintiffs were granted involved 'predatory pricing' . . . ." Corlew Statement at 8.

F.3d 1312, 1314 (9th Cir. 1994) (competitor "is entitled to seek recovery for all damages resulting from the destruction of his business" by antitrust conspirators).[26]

Claimants, like Loewen's trial counsel, thus fundamentally misconstrue the antitrust claims at issue in the O'Keefe case. O'Keefe's "antitrust injury" did not purport to flow from Loewen's exorbitant increases of the prices of funeral services, as claimants contend. See Joint Reply at 72. Rather, O'Keefe's antitrust injury resulted from Loewen's bad faith exclusionary conduct, which Loewen had undertaken with the ultimate goal of raising prices, in violation of Mississippi's anti-monopoly statutes. O'Keefe's right to recover on *that* claim, and not the claim as erroneously described by claimants, is clear as a matter of (in claimants' words) "black letter antitrust law." As events have proven, the failure of Loewen's counsel to appreciate this important distinction was yet another unfortunate mistake for the company.[27]

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[26]Claimants are correct that antitrust laws "were enacted for the protection of competition, not competitors," Joint Reply at 72 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)), but that principle only serves to illustrate that O'Keefe's monopolization claim was entirely valid. By showing that Loewen's exclusionary acts resulted in reduced competition and higher prices to the consumer, O'Keefe proved that Loewen's acts were "injurious to the public welfare" and, therefore, had violated the antitrust laws. See, e.g., Young Refining Corp. v. Pennzoil Co., 46 S.W.3d 380, 390-91 (Tex. App. 2001) (competitor may bring antitrust claim for its injuries caused by rival's exclusionary acts, but only if such acts also injure competition in general) (applying Mississippi law); Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 816-17 (D.C. Cir. 2001) ("[A] rival has clear standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude competitors from the market.") (quoting 2 Areeda & Hovenkamp, Antitrust Law § 348 at 387).

[27]Claimants' discussion of the "tort" of "oppression" is another distraction. See Joint Reply at 73-74. As claimants themselves acknowledge, Judge Graves did not submit any independent claim of "oppression" to the jury, nor did the jury render any verdict on such a claim. Id. at 74. That O'Keefe's pleadings contained a separate count of "oppression" in addition to O'Keefe's valid causes of action is thus irrelevant.

2. The Antitrust Claims Were An Essential Part Of O'Keefe's Presentation At Trial

According to claimants, the record of the O'Keefe litigation shows that the case was "at bottom" one of a "straightforward" breach of contract. See Joint Reply at 61-69. This contention not only reinvents the record, but, once again, misapprehends the nature of the antitrust claims that were at the heart of the litigation.

Contrary to claimants' contention, the record amply demonstrates the centrality of O'Keefe's monopolization claim. In fact, the vast bulk of Michael Allred's opening statement on behalf of O'Keefe focused on the monopolization claim, including detailed references to how Loewen would "control the market" and "deny the people a choice so that they can raise prices" on a broad scale, and how the company routinely did "whatever it takes to . . . injure the business of their competitors" in order to maintain their monopoly power. See Tr. 17-18. Mr. Allred made clear that monopolization was Loewen's motive for the bad faith and tortious breaches of contract with O'Keefe: "to [achieve][28] monopoly power in not one but all three of the largest areas in the state, he needed to remove the O'Keefe family as an obstacle in his way." Tr. 38-39; see generally Tr. 19-44.

O'Keefe also presented extensive evidence and testimony at trial to substantiate the monopolization claims, evidence and testimony that claimants entirely ignore. Indeed, as the United States has already shown, Loewen ignored – at its ultimate peril – one such witness during the trial, Mr. Dale Espich, a highly-credible expert who testified in detail with regard to

[28]The transcript misquotes "achieve" as "a chief."

Loewen's monopolistic practices, and whom Loewen chose not to cross-examine. See Counter-Mem. at 44-45.

In the end, claimants contend that the antitrust issues were not at the "bottom" of the case simply because O'Keefe's counsel, as a thematic device, often described the case in relation to the breaches of contract. See Joint Reply at 63-68. But, in so doing, claimants once again misapprehend the nature of the monopolization claim at issue. As O'Keefe argued, and as the jury found, Loewen intentionally broke the contracts as a *means* of excluding O'Keefe from the market and thereby securing its monopoly power; the breaches of contract and the predatory conduct that gave rise to the antitrust violation were thus one and the same thing. It is entirely appropriate, therefore, that O'Keefe's counsel, as a matter of effective advocacy, reduced the claim to a theme involving Loewen's bad faith breaches of contract. Cf., e.g., T. Mauet, Trial Techniques at 44 (4th ed. 1996) ("Every case can, and should, be distilled into one, two, or no more than three themes that summarize your positions on the case in an engaging, easily remembered way.").[29]

G. Claimants Misrepresent Loewen's Report On Post-Trial Juror Interviews

As part of discovery in this arbitration, Loewen produced the self-titled "Report on Post-Trial Juror Interviews," dated December 11, 1995. See U.S. App. at 1125-1191. This document, prepared on Loewen's behalf by John G. Corlew (a witness for claimants in this

[29]Claimants' reliance on news accounts of the trial that allegedly describe the contract claims as the focus of the case is similarly misplaced. Even claimants' own news source observed that one of the "[m]ore damaging" aspects of the case for Loewen was the proof at trial that "the cost of dying increased in direct correlation to the decrease in competition." A3101. See also id. (noting that the case offered "a rare insight into the secretive and rapidly consolidating funeral-home industry. That can mean higher prices and local monopolies with communities unaware that control of these services has even changed hands.").

proceeding) and another lawyer at his firm, contains (i) the lawyers' summaries of their interviews with five of the rendering jurors (id. at 1146-91); and (ii) Mr. Corlew's analysis of those interviews and the jury selection process. Id. at 1126-38 ("Corlew Report") (collectively "Corlew documents").

The United States has shown, through the statement of Professor Neil Vidmar ("Vidmar Statement"), that the jury interview memoranda, taken as a whole, "provide no credible evidence to support claimants' allegations of improper jury bias, jury incompetence, or that the trial improperly 'inflamed the passion' of the jury." See Vidmar Statement at 1. In fact, as Professor Vidmar explained, "the interviews support an opposing view: that is, the data indicate that the jury followed the judge's instructions on the law and reached a verdict based on the evidence presented at trial." See id.

While claimants' take issue with Professor Vidmar's conclusions, they offer no expert testimony in rebuttal.[30] Nor do claimants make any coherent attempt to grapple either with Professor Vidmar's analysis, or the vast majority of the interviewed jurors' reported comments demonstrating that the jury, rather than being swayed by improper prejudice, simply assessed Loewen's evidence and witnesses as not credible. See Vidmar Statement at 27-39.

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[30]Professor Vidmar is an internationally-recognized expert in civil juries (including juror prejudice) who, through 25 years of research, has gained unprecedented insights into the behavior and performance of civil juries. See Vidmar Statement at 3-5; see also U.S. App. at 1348. While Sir Ian Sinclair, one of claimants' international law witnesses, discusses the juror interviews in his opinion (see Sinclair Op. at 15-26), he does not purport to be a civil jury expert, or, indeed, to have any experience interviewing, surveying, or observing civil jurors, or otherwise researching their behavior. See also Second Opinion of Christopher Greenwood QC ("Second Greenwood Op.") (attached hereto at Tab A) at ¶ 96.

More fundamentally, claimants' discussion of the Corlew Report and juror interview memoranda is misleading (if not outright inaccurate) in a number of critical respects. For example, in their Joint Reply, claimants:

- fail to attribute statements from the jury interviews to particular jurors, obscuring that most, if not all, of the derogatory statements on which they rely are the purported comments of a single juror – the lone dissenter from the verdict – discussing other members of the jury panel with whom she disagreed and from whom she was estranged;[31]

- inaccurately describe statements and observations of the lone dissenting juror as "admissions" of other jurors;[32]

- repeatedly attribute statements or observations of one juror to "the jurors" or "the jury" generally;[33]

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[31] See, e.g., Joint Reply at 25 (block quote in ¶ 48 attributable to interview of dissenting juror); id. at 42 (all quotations in ¶ 85 attributable to same); id. at 90 (all but the last two quotations in ¶ 190 attributable to same); id. at 105 (all quotations in the first sentence of ¶ 225 attributable to same). The lack of juror identification is particularly confusing when claimants, in the same sentence, combine quotations from interviews of different jurors, such as the dissenting juror and another member of the panel. See, e.g., Joint Reply at 68 (third sentence of ¶ 142).

[32] For example, claimants assert "[t]he jurors themselves admitted that Gary's nationalistic appeals affected their verdict." Joint Reply at 25. But the document claimants cite reflects only the dissenting juror's reported impressions of the other jurors. Similarly, claimants assert the foreman (Mr. Millen) "admitted" he disliked Canadians. Joint Reply at 10. But again, the cited document reflects only the dissenting juror's (erroneous) impression of the foreman. See U.S. App. at 1148.

[33] See, e.g., Joint Reply at 25, 42, 47-48, 51, 61, 90, 99-100, 105, 128, 129. To take one example, claimants repeatedly assert that "the jurors freely admitted" they were seeking to "destroy" Loewen (or some variation of that charge). See Joint Reply at 47, 50, 129. The actual statement – which Mr. Corlew did not even include in his Report – allegedly was made by the dissenting juror, in reference to a single other juror. See U.S. App. at 1147.

- repeatedly fail to distinguish between the interview memoranda and the Corlew Report, portraying Mr. Corlew's analysis and conclusions as actual statements of the interviewed jurors;[34] and

- repeatedly refer to a memorandum of Mr. Robertson's interview of the dissenting juror as "the Juror Report" (see Joint Reply at 42, 90, 129).

Perhaps most egregiously, though, claimants, throughout their Joint Reply, represent Loewen's lawyers' paraphrases and summaries of the jurors' purported remarks in the interview memoranda as *actual quotations* of the jurors themselves. See Joint Reply at 25, 41, 42, 48, 51, 61, 68, 69, 99-100, 105, 128, 129.[35] In fact, claimants go so far as to italicize certain phrases in the lawyer summaries to "emphasize" what claimants portray – without any qualification to the Tribunal – as the individual jurors' own words. See Joint Reply at 41, 51, 68, 69.

Although it is tempting to correct, or provide context to, each of claimants' (mis)citations to the Corlew documents, Professor Vidmar's unrebutted statement provides a clear, thorough accounting of the jurors' reported comments. Thus, beyond urging the Tribunal to read, for itself, the underlying documents, we add only the following brief comments to put the Corlew Report and interview memoranda into an appropriate context.

Claimants repeatedly characterize the Corlew Report and juror interview memoranda as a "government source," suggesting, it seems, that the government played some role in their creation. These documents, in reality, were the fruit of a Loewen-sponsored investigation,

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[34]See Joint Reply at 35, 41-42. Again, this is particularly confusing when claimants, in the same sentence or paragraph, combine quotations from the Corlew Report with quotations from the interview memoranda. See Joint Reply at 41, 68-69, 90, 128-29.

[35]There is no indication the interviews were taped or transcribed verbatim (nor have claimants produced any such tape recording or transcription), and the interview memoranda consist largely of paraphrases and summaries of statements the jurors purportedly made during the interviews. The few juror statements reported directly appear in quotation marks.

conducted by Loewen-retained lawyers, designed to "ferret out" any basis for complaint about the jury on appeal. See Landsman Statement at 29. The relevance of the Corlew documents thus is not, as claimants seem to believe, that Mr. Corlew or the dissenting juror made statements or reached conclusions supportive of Loewen's arguments here. Rather, the relevance of the Corlew documents is that, notwithstanding their quite obvious bias, they demonstrate the jury rendered its decisions in good faith, and not as a result of some latent prejudice.

The Corlew Report. The Corlew Report plainly is a work of advocacy. Authored by Loewen-retained lawyers, the Report analyzes, and ultimately recommends, potential arguments for appeal, see U.S. App. at 1137-38, generally avoiding (or downplaying) the vast majority of statements in the interview summaries indicating the jurors decided O'Keefe's claims based on the evidence presented at trial. Compare Vidmar Statement at 19-39 with Corlew Report at 7-11 (U.S. App. at 1132-36).

Given its bias, the Report's most striking feature is what it does *not* say. For example, in the "Conclusion and Recommendations" section, Mr. Corlew does not say (or even suggest) that he found the interviewed jurors prejudiced against Loewen for nationality- or class-based reasons. See U.S. App. at 1137-38. Elsewhere, Mr. Corlew affirmatively states he found no evidence of "juror misconduct," see id. at 1126, and that "it is not probable that reversible error can be found in the [jury] selection process" (i.e., voir dire). See id. at 1129. These contemporaneous admissions (and omissions) by Loewen's lawyers run directly contrary to arguments that claimants advance in this proceeding.[36]

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[36]The Corlew Report undermines claimants' arguments before the Tribunal in other ways as well. For example, claimants and their witnesses have suggested throughout this proceeding (continued...)

The Interview Summaries. The interview summaries, too, must be seen for what they are: the work of advocates marshaling arguments, not social scientists conducting a study. See Vidmar Statement at 16-17. While Mr. Corlew surely cannot be faulted for failing to observe methodological rules that would govern a social scientist, the interview summaries, as a result, are neither balanced nor even-handed.

For example, Mr. Corlew has acknowledged that, in conducting the interviews, he informed the jurors he was "inquiring on Loewen's behalf." See Corlew Statement at 2 (footnote) ("I would be stunned if any of the jurors did not understand, based on our disclosures, who 'the true sponsor of the inquiries' was"). As Professor Vidmar has explained, revealing Loewen as the interview sponsor "would tend to result in answers tilted more favorably to Loewen." See Vidmar Statement at 17; see also Reference Manual on Scientific Evidence 238

[36](...continued)
that the jury was swayed by the outcome of the O.J. Simpson trial (see, e.g., Joint Reply at 30), but the Corlew Report notes that "[t]he O.J. Simpson verdict was never mentioned in post-trial interviews . . . ." See U.S. App. at 1134. Claimants also have argued that the jury was dominated by its "predominantly black" members (see, e.g., Joint Reply at 34, 108), but the Corlew Report notes that three of the four "strong personalities" on the jury were white (and that two of these white jurors joined the verdict). See U.S. App. at 1127, 1134. Indeed, claimants fail to mention that the jury – as originally picked and impaneled – included an equal number of white and black members. See U.S. App. at 1135. Two white jurors were excused for illness early in the trial and replaced by African-American alternates. See id.

(Federal Judicial Center 1995).[37] Loewen's international-law expert, Sir Ian Sinclair, concedes this point as well. See Sinclair Op. at 15.

Moreover, the juror's answers were paraphrased, not reported verbatim; the interview questions focused primarily on the jurors' reactions to the lawyers (rather than the trial evidence); and, to the extent the questions raised issues relating to the evidence, they focused on plaintiffs' breach of contract claim (largely ignoring the other issues the jury was asked to decide). See Vidmar Statement at 17. For all of these reasons, Professor Vidmar has concluded (id.):

> there is a reasonable probability that the psychological influences in the interviews tilted some jurors' answers away from a neutral disclosure of attitudes and events at trial toward answers consistent with the defense *perception* of how jurors responded at trial.

But again, the summaries are most notable because, notwithstanding the "methodological problems," the "jurors' answers still produce a picture of the jury that is vastly different than – and inconsistent with – the claims put forth by [claimants]." See Vidmar Statement at 17. While we have referred the Tribunal to the interview memoranda themselves, we note that even the dissenting juror reportedly made a number of statements inconsistent with claimants' allegations here. For example, according to Mr. Corlew, this juror reportedly said:

> that the Loewen defendants breached the 1974 contract (U.S. App. at 1146); that Judge Graves was not "a great influence on the way that the jury reacted" (id. at

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[37]James Robertson's interview of the dissenting juror, upon which claimants rely so heavily in their Joint Reply, is particularly unreliable. See Joint Reply at 42, 90, 129. Not only was Mr. Robertson on the team of lawyers representing Loewen at trial, see Reference Manual on Scientific Evidence 237 (Federal Judicial Center 2000) ("the attorney should have no part in carrying out [a survey to be offered as scientific evidence]"), but it is apparent that, based on discovery produced by claimants, he had a very personal stake in the dissenting juror's views. In a post-settlement letter to the Loewen team, Mr. Robertson went so far as to state: "[t]here are moments when [the dissenting juror] is all that stands between me and despair." See U.S. App. at 1240,1242, 1244, 1246.

> 1147); that he was "very hard" on [O'Keefe attorney] Michael Allred (id.); that the Riemann letter was "very damaging" (id.); and that the defense witnesses "really didn't help [Loewen], because of cross-examination." (id. at 1148).

And according to Mr. Robertson, this juror reportedly said:

> that O'Keefe had suffered "severe losses" (id. at 1185); that the Riemann letter was "the single most significant piece of evidence" (id. at 1187); that the jurors "regarded [John Turner] as a very credible witness" (id. at 1188); that they "reacted very favorably to all of the lawyers in the case" (id.); and that Loewen's "presentation of the contract with the National Baptist Convention backfired." (id. at 1189).

In fact, Mr. Robertson reported that the dissenter was "complimentary of Judge Graves" (id. at 1191), and, in a fitting rejoinder to claimants' allegations here, was "reluctant to question the motives of her fellow jurors." Id.

In the end, we do not dispute that claimants can find isolated statements in the interview memoranda to support some of their allegations. But that is to be expected. The interviews, after all, were conducted by Loewen's attorneys, in an obvious effort to "ferret out any basis for complaint about the jury," no matter how "fanciful or legitimate." See Landsman Statement at 29. Professor Vidmar's analysis makes clear, however, that any fair reading of the jury interviews, in their totality and in view of the trial record as a whole, provides compelling proof that the jury, rather than being swayed by prejudice, "followed the judge's instructions to decide the case based on the trial evidence." See Vidmar Statement at 20.

III. CLAIMANTS CANNOT OVERCOME LOEWEN'S FAILURE TO COMPLAIN TO THE MISSISSIPPI COURTS ON THE GROUNDS RAISED IN THIS PROCEEDING

The United States has thrice shown that Loewen never complained during the relevant portions of the O'Keefe litigation on the grounds that claimants raise in this proceeding. (See U.S. Jurisdictional Mem at 86-88; U.S. Jurisdictional Resp. at 84-92; Counter-Mem. at 65-72).

In response, claimants contend that the government's "real position is plainly that Loewen did not object *enough* to the[] tactics" of which claimants complain in this proceeding. Joint Reply at 202 (emphasis in original). The record of the O'Keefe litigation is clear on this point, so let us be clear as well: Loewen *never* objected at any time during the trial on the grounds that the alleged "tactics" of O'Keefe's counsel appealed to any nationalistic, racial or class animus. Likewise, in the post-trial proceedings, Loewen *never* argued to the Mississippi courts that Chapter 11 reorganization was an insufficient means by which the company could have stayed execution pending appeal without a supersedeas bond, despite having been challenged repeatedly to do so. As the United States has fully demonstrated, and as we confirm below, these failures deprive claimants of their asserted grounds for complaint in this proceeding as a matter of international law.

A. Claimants Still Fail To Identify A Single Instance Where Loewen Raised These Complaints To The Mississippi Courts

Claimants and their witnesses contend that Loewen objected repeatedly throughout the O'Keefe trial. This contention is entirely unremarkable, for the United States agrees that Loewen objected repeatedly throughout the trial. Indeed, any litigant would assume that its counsel would object repeatedly over the course of a two-month trial in any American courtroom. What claimants fail to address is the fact that Loewen never objected *on the grounds of which it complains here* – i.e., that O'Keefe's counsel appealed to alleged prejudices of nationality, race and class during the trial, and that (in the post-trial proceedings) a full supersedeas bond deprived Loewen of a meaningful opportunity to appeal because Chapter 11 reorganization was an unreasonable form of protection for Loewen under the circumstances. It is Loewen's failure to

make *these* complaints to the Mississippi courts that deprives claimants of any grounds for raising these same complaints now.

1. Failure To Object At Trial On The Grounds Of Alienage, Race Or Class

Claimants' contention that Loewen objected at trial on the grounds of nationality, race or class bias, like much of this NAFTA claim generally, finds no support in the record. As Professor Landsman observed, "[t]here were a large number of objections made on the record during the trial but *none* appeared to be addressed to racial or class bias, *no* argument was made by Loewen's counsel on these points and *no* curative instructions were sought." Landsman Statement at 32 (emphasis added). Similarly, Loewen made "*[n]o* objections regarding prejudice arising from references to Canadian citizenship, foreign corporations or any related subject . . . during the course of the seven week trial." Id. at 22 (emphasis added).

Claimants offer nothing but rhetoric to the contrary, relying instead on their newest witnesses' assertions that Loewen objected on the relevant grounds during the trial. See Corlew Statement at 6; Hawkins Statement at 3.[38] Like claimants, however, Mr. Hawkins does not offer

[38]Evidently, claimants have added the declarations of Armis Hawkins and John Corlew to bolster the opinions of Richard Neely, which cover essentially the same ground. This is not surprising, given that Mr. Neely, since submitting his initial opinion in this case (an opinion on which it appears many of claimants' experts have relied), has been criticized for a shortage of truthfulness by a federal court. See Henley v. FMC Corp., 189 F.R.D. 340, 343 n.6 (S.D.W.Va. 1999) (noting that in a "crucial exchange [with the Court], Plaintiff's counsel [Mr. Neely and others] fell short of the duty to be candid and truthful . . . ."). Shortly before submitting that opinion, Mr. Neely was rebuked by his former colleagues on the West Virginia Supreme Court for his litigation conduct. See Lawyer Disciplinary Bd. v. Neely, 528 S.E.2d 468, 471 n.8 (W.Va. 1998) (while declining to find Mr. Neely guilty of ethics violations, the majority noted that "we are troubled by the threatening content of the letters Mr. Neely sent to the insurance company," and "[s]imply put, what the lawyer did in this case was unfair and inappropriate."); see also id. at 475 (noting that Mr. Neely "g[ot] off by the skin of [his] teeth for filing a spurious lawsuit," and that his conduct "does not bring respect to the profession") (Workman, J., (continued...)

a single citation to the record to support his assertions. Although Mr. Corlew offers a string of citations to the record, not one of these citations actually supports claimants' position.

For example, Mr. Corlew highlights Loewen's objection at page 62 of the trial transcript, but that objection (which, in any event, the court sustained) did not complain of any appeal to bias; it instead complained only on the unremarkable ground that one of opposing counsel's opening statements was premature "argument." Tr. 62.[39] Likewise, the apparent basis for Loewen's objection at page 484 (also sustained) was that opposing counsel's question to the witness sought inadmissible hearsay. In a similar vein, Loewen's objection at page 1110 (again, sustained) was not on any grounds of improper bias, but merely that opposing counsel's questions were "lead[ing] the witness . . . ." And the list goes on.[40]

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[38](...continued)
concurring).

[39]Such objections are routine in American litigation, as "[a]rguments are reserved for closing arguments." T. Mauet, Trial Techniques §3.3(1).

[40]See, e.g., Tr. 1132 ("Object to leading, Your Honor."); id. ("Object to hearsay, Your Honor."); Tr. 1139-40 (objection to testimony about black and white funeral markets not based on bias, but merely that testimony "hadn't been narrowed to a particular area he's talking about."; objection sustained); Tr. 1212 (objections on apparent ground of hearsay; sustained); Tr. 1831 (objection to expert testimony regarding lack of competition between black and white funeral markets not based on bias, but merely that testimony was allegedly outside scope of expert's testimony as identified by O'Keefe pre-trial); Tr. 2039-41 (objections on grounds of "no foundation," "hearsay," "argumentative and leading"); Tr. 2269 (objection to witness's unresponsive "comment on depositions"; objection sustained); Tr. 2518 ("I object. This is not responsive to the question."); Tr. 3535 (objection to lack of foundation; sustained); Tr. 4317 (objection to compound question; sustained); Tr. 5169 (objection to question as "argumentative"; sustained); Tr. 5334 (objections on grounds of "leading" and "foundation"); see also Swington v. State, 742 So.2d 1106, 1110 (Miss. 1999) ("An objection on one specific ground waives all other grounds.").

As the United States has shown, it was not until Loewen submitted its numerous post-trial motions on a variety of matters – fully two weeks after the jury rendered its verdicts and the trial proceedings were closed – that Loewen first claimed that "plaintiffs repeatedly and impermissibly interjected issues and matters of race, national origins, class and economic status into the case . . . ." A729. Even then, this cursory allegation was buried in an 87-page motion following 70 pages of often tedious and impenetrable arguments about other aspects of the trial, and was made without the support of even a single example from the record. Under any standard, this claim was both far too late and far too unspecific to constitute a proper objection. See, e.g., Barnett v. State, 725 So.2d 797, 801 (Miss. 1998) (objection raised "after the jury has returned a verdict and been discharged is simply too late."); Oates v. State, 421 So.2d 1025, 1029 (Miss. 1982) ("We have said many times that general objections will not suffice."); Counter-Mem. at 69 n.41.[41]

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[41]Although the United States has already addressed claimants' contention that Loewen's proposed jury instruction on "bias" qualifies as an objection (see, e.g., Counter-Mem. at 49-51; U.S. Jurisdictional Resp. at 86), Mississippi trial lawyer Jack Dunbar discusses this issue in further detail in his attached supplemental statement (see Tab C hereto). As Mr. Dunbar explains, Judge Graves did not err in refusing to give the proposed instruction in favor of the court's more neutral instruction on "bias," to which Loewen did not object. See Supplemental Dunbar Statement at 8-13. The contrary opinion of claimants' witness, Armis Hawkins, finds no basis in the actual circumstances of the trial and, indeed, is best seen as an example of the "typical Hawkinsian Fury" and "hyperbole" for which Mr. Hawkins is well-known among his colleagues. See Statement of W. Joel Blass ("Blass Statement") at 5-6 (attached at Tab B hereto). As the actual record makes clear, Loewen never lodged any objection during the case-in-chief alleging any improper appeals to bias – and, in fact, devoted much of its own case to making such appeals itself. Loewen's proposed instruction, therefore, was either a further effort to curry sympathy from the jury or, at the very most, a substitute for an objection that came far too late. See Supplemental Dunbar Statement at 11-12. Even in its post-trial motions, Loewen offered no argument that the refusal to give the instruction was error (as it did with several other instructions that were refused), and instead buried the instruction ("D-3") in a final "laundry list" general assignment of error. See A718-23. Claimants' much-belated effort to give the point

(continued...)

In short, since the United States first challenged them to do so, neither claimants nor their witnesses have been able to identify a single instance during the trial where Loewen raised an objection that O'Keefe's counsel had improperly appealed to the jury on the grounds of nationalism, race or class.[42] The opinion of the court in Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130 (1967), is thus a fitting description of claimants' allegations here:

> If, as . . . counsel now claim, the arguments were, among other things, 'grossly improper and inflammatory', 'intemperate and inexcusable', 'appeals to passion and prejudice', 'corruptions of the evidence', 'completely unsupported by the evidence', and 'unsworn testimony of counsel', it is inconceivable to us that they would have delayed so long without raising the slightest hint of an objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought.

Id. at 714.

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[41](...continued)
prominence now confirms that the allegation is a mere afterthought.

[42]At the hearing on jurisdiction, Mr. Loewen's counsel suggested that Loewen's four-word motion for a mistrial during O'Keefe's closing argument might qualify as an objection on these grounds (see 9/20/01 Transcript of Hearing at 206-07), but counsel has simply misconstrued the record. Loewen did object to Mr. Gary's statement in closing argument that Loewen's "actions have hurt this family and the people of Mississippi" (an objection Judge Graves sustained) and moved for a mistrial. Tr. 5543. Viewing the record in its entirety, however, the basis for this objection and motion was not that Mr. Gary had appealed to any improper "bias," but that, by referring to the entire State of Mississippi, Mr. Gary had exceeded the court's pre-trial ruling on a motion *in limine* that limited O'Keefe's presentation regarding monopolistic practices only to seven Mississippi counties. See, e.g., A295 (limiting O'Keefe to proof of monopoly in seven counties); Tr. 18-19 (sustaining objection to Mr. Allred's reference to Loewen's monopolies in areas beyond scope of ruling on motion *in limine*); 44-46 (Judge Graves' *sua sponte* admonishment of Mr. Allred for same).

2. Failure To Argue For A Departure From The Bond Requirement On The Ground That Reorganization Protection Was Inadequate

The United States has shown that Loewen, during the proceedings on the supersedeas bond question, never argued for a reduction of the bond requirement on the ground that corporate reorganization was an unreasonable means of protection for the company, despite having been challenged in both the Mississippi trial and Supreme courts to do so. See U.S. Jurisdictional Resp. at 88-92; Counter-Mem. at 58-63. In response, claimants contend that Loewen did so argue to the courts and that, in any event, the company had no obligation to make such a showing. See Joint Reply at 203-04. Claimants are wrong in both respects.

As the record makes clear, Loewen left entirely unrebutted O'Keefe's repeated assertions to the Mississippi courts that Chapter 11 reorganization provided adequate protection to Loewen even in the face of a full supersedeas bond. See, e.g., A1058, A1062. Claimants offer only three citations to the record where, it is alleged, Loewen sufficiently informed the Mississippi courts of the inadequacy of reorganization protection. See Joint Reply at 120, 203 (citing to footnote in prior submission). One need not tarry long to see that the cited portions of the record have nothing whatsoever to do with reorganization protection, which is not even mentioned. Claimants thus offer no serious factual rebuttal in this respect.

Instead, claimants contend that Loewen had no obligation to argue to the courts that reorganization protection was inadequate because, they contend, the United States' argument to the contrary is supported only by "a minority view of only two of the nine [J]ustices [of the U.S. Supreme Court] and thus had no legal force." Joint Reply at 203-04. This, too, is wrong.

As the United States has already demonstrated, business reorganization is a well-known mechanism in the United States' legal system for staying the execution of large judgments where,

as is alleged here, the cost of a supersedeas bond would be prohibitive. See U.S. Jurisdictional Mem. at 72-81; U.S. Jurisdictional Resp. at 59-61.[43] The authority for the reasonableness of this often-used practice is by no means limited only to Justices Brennan and Marshall of the U.S. Supreme Court (the two Justices to whom claimants refer). Consider, for example, the following additional authorities in existence at the time of the Mississippi proceedings:

- Justice Stevens of the United States Supreme Court, a current Justice who was on the Court at the time Loewen's petition for relief would have been heard, independently concluded in the Pennzoil v. Texaco case that corporate reorganization obviated the need for a departure from a full bond. Indeed, Justice Stevens found the point to be obvious: "*Of course*, if Texaco were forced to file for bankruptcy under Chapter 11, the claims of judgment creditors would be automatically stayed. See 11 U.S.C. § 362. If Texaco were then to prevail on its appeal from the Texas judgment, the bankruptcy court could dismiss the reorganization proceeding. 11 U.S.C. § 1112." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 32 n.6 (1987) (Stevens, J., concurring) (emphasis added).

- Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit, an acknowledged expert regarding the economic aspects of law, amply explained why corporate reorganization is generally adequate protection for a judgment debtor faced with an allegedly unaffordable supersedeas bond:

  > [T]here is no reason to treat bankruptcy as a bogeyman, as a fate worse than death . . . . No evidence of which I am aware demonstrates that the bankruptcy process is particularly costly. True, there are high costs, including the costs of trustees and lawyers and the costs of judicial error. *But the costs of reorganization come from the financial distress of the firm, not from the judicial process though which that distress is worked out*. . . .

[43]Loewen has already admitted as much in this proceeding. See TLGI Counter-Mem. at 39 ("Loewen readily agrees that a bankruptcy filing was *a theoretical* local remedy available to the Company following the *O'Keefe* verdict . . . . .") (emphasis in original). According to Loewen's own counsel and witness, Wynne Carvill, "[t]he 'bankruptcy card' was the only credible threat we had in the final negotiations." Declaration of Wynne S. Carvill at 9-10.

> The alarums in . . . Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1152 (2d Cir. 1986), which equated a Chapter 11 filing with the imminent dismissal of 55,000 employees and the destruction of the valuable assets of a firm[,] are unjustified. *Firms in reorganization go on as before; all operations with positive values are maintained; operations that are not continued in bankruptcy should not be continued outside it, either*. The principal effect of the judicial process is to stave off asset-grabbing and to ensure that creditors of the same level of priority are treated alike. This is, of course, just what the plaintiffs want – to receive the same treatment as [the judgment debtor's] other general creditors, who may get paid off while plaintiffs cool their heels in the appellate process.

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 802-03 (7th Cir. 1986) (Easterbrook, J., concurring) (emphasis added).

- Loewen's own witness, Laurence Tribe, in his brief to the U.S. Supreme Court in the Pennzoil v. Texaco case, argued that the very sort of harms that Loewen alleges here "do[] not comport with the reality of contemporary bankruptcy." U.S. App. at 0326. As Professor Tribe explained, a full supersedeas bond requirement that results in a filing for corporate reorganization protection is consistent with due process, as "[a] number of corporations, both large and small, have . . . found that Congress has created [with the 1978 revisions to the bankruptcy code] a rather pleasant and profitable harbor of refuge in the bankruptcy court." Id. (quotation omitted).[44]

- Countless corporations in the United States, both before and since the O'Keefe litigation, have successfully – and notoriously – invoked the protections of Chapter 11 reorganization to stave off the execution of

[44]Drew S. Days, III, who was the Solicitor General of the United States at the time Loewen's petition for relief from the U.S. Supreme Court would have been heard, is in agreement with Professor Tribe on this point: "I doubt that the financial hardship that allegedly would follow O'Keefe's execution of the judgment against Loewen would suffice to establish irreparable harm, since it seems likely that such 'harms' can be avoided, without any due process problems, by filing a petition for reorganization protection under Title 11 of the U.S. Code." Days Statement at 31-32 n.19. The United States has also offered the expert testimony of some of the nation's most respected bankruptcy practitioners and scholars, whose unanimous conclusion is that Chapter 11 reorganization was a reasonable alternative for Loewen at the time.

> potentially ruinous judgments.[45] Similarly, numerous federal courts have held that the availability of corporate reorganization protection "is a valid legal option sufficient to defeat an economic duress claim." Capizzi v. Federal Deposit Ins. Corp., 1993 WL 723477 at * 9 (D. Mass. 1993) (citing cases). See also Teachers Ins. and Annuity Ass'n v. Wometco Enterprises, Inc., 833 F. Supp. 344, 349 n.7 (S.D.N.Y. 1993).[46]

Former Mississippi Supreme Court Justice Joel Blass confirms that the authority for this practice was well known to the participants in the O'Keefe bond proceedings:

> Loewen could also have, of course, obtained a stay under Chapter 11 in the bankruptcy court without any bond for protection. Many major companies have done so and now prosper. Neither Judge Hawkins nor Judge Clark disputes this plain and common practice in litigation in the United States. Judge Graves knew it and the Mississippi Supreme Court knew it. It is an indisputable fact. Every litigating lawyer in the United States knows it.

Blass Statement at 12.

Given how well-recognized the protections of the Bankruptcy Code are for corporate debtors confronted with large supersedeas bond requirements, it is no surprise that Professor Tribe and his colleague, Charles Fried, were specifically instructed by Loewen's counsel to ignore the alternative of corporate reorganization as adequate protection for Loewen in the face of a full bond requirement. See Tribe Statement at 4 ("*I am informed* that [bankruptcy or an unbonded appeal] would have been catastrophic alternatives . . . .") (emphasis added); Fried Statement at 2 ("*I am informed*" that "the protection of a federal bankruptcy court" would have

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[45]See Statement of Elizabeth Warren at 7, 12-16; Supplemental Declaration of J. Ronald Trost at 4.

[46]Of course, Loewen also had the contemporaneous advice of the nation's leading bankruptcy practitioners that Chapter 11 reorganization was a reasonable alternative, and had fully prepared, over the course of three months, all of the documents necessary to invoke those protections. See U.S. Jurisdictional Mem. at 72-83 and Tabs C & D thereto; see also, e.g., U.S App. at 0447-0594.

imposed large and unrecoverable costs on Loewen) (emphasis added). Loewen offered no such instruction, however, either to Judge Graves or to the members of the Mississippi Supreme Court, choosing instead to leave the courts with an eminently reasonable basis to conclude that O'Keefe's unrebutted argument on the subject was correct. Surely, the Mississippi courts cannot be said to have breached any "duty to act" under these circumstances.

B. International Law Does Not Excuse Loewen's Failures To Object

Claimants offer no international authority – and the United States is aware of none – for the extraordinary proposition that a State may be held in breach of an international obligation if its courts failed to act on the basis of a point that an alien litigant could have raised, but did not. To the contrary, as the United States has demonstrated, there has long been "a translation into international law of the rule common to municipal systems that a litigant cannot have a second try if, because of ill-preparation, he fails in his action." 2 Daniel P. O'Connell, International Law 1059 (2d ed. 1970). See U.S. Jurisdictional Resp. at 81-84; Counter-Mem. at 70-72.[47] As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held earlier this year, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party." Prosecutor v. Delalic, IT-96-21-A (ICTY 20 Feb. 2001) at ¶ 640.[48]

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[47]See also Eduardo Jiménez de Aréchaga, International Law in the Past Third of a Century, 159 Académie de Droit International, Recueil des Cours 282 (1978) ("[A] State cannot base the charges made before an international tribunal or organ on objections or grounds which were not previously raised before the municipal courts.").

[48]The claimed error in Delalic, a war-crimes prosecution, was that one of the judges in the trial court was sleeping through portions of the trial. The Appeals Chamber found that the defendant's counsel had waived the objection by not raising the point below, even though a (continued...)

Claimants ignore the international law authorities entirely and, instead, argue that the domestic doctrine of "plain error" creates an exception that would allow this Tribunal to find a NAFTA violation on the basis of points not raised before the Mississippi courts. International law, however, recognizes no such exception based on any alleged duty of the domestic courts to act of their own accord: a claimant "should not identify in the duty of domestic courts to investigate matters *ex officio* a factor relieving him of the obligation to raise the issues of his case (the substance of his complaint) before the domestic courts." A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law 83-85 (1983) (surveying decisions of the European Commission). Moreover, as we discuss below, claimants' version of the "plain error" doctrine is unsupported even by the domestic sources cited and cannot form the basis of the new rule of international law that claimants ask this Tribunal to create here.

1. Claimants' Statement Of The "Plain Error" Doctrine Is Inaccurate And, In Any Event, Is Not International Law

Claimants and their experts proclaim at great length that the O'Keefe judgment would "certainly" have been reversed by the Mississippi Supreme Court had Loewen followed through with its appeal. See, e.g., Joint Reply at 202-03; Hawkins Statement at 29-30. Whether or not that is so, however, is entirely beside the point. The question here is not whether "reversible error" occurred in the case as a matter of Mississippi or United States law, but instead whether

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[48](...continued)
videotape demonstrated that the judge was, indeed, asleep at various points in the trial, including one stretch of thirty minutes. See id. at ¶¶ 628, 640-49. The Chamber noted that "defence counsel, who alone truly knows the interests of his or her client, is necessarily obliged to safeguard those interests at every moment during the trial, in order to avoid prejudice which cannot be remedied." Id. at ¶ 635.

the Mississippi courts breached an *international* obligation to act, even in the absence of an objection from Loewen.[49]

Although they do not dispute that the standard for proving the existence of such a duty is extraordinarily high,[50] claimants suggest that the municipal law of a handful of jurisdictions – almost all within the United States – supports their contention that the "plain error" exception amounts to a principle of international law that would excuse, for purposes of this claim, Loewen's failure to object during the O'Keefe proceedings. See Joint Reply at 204-07. Municipal law, however, is relevant as a source of international law only to the extent that it reflects a "general principle of law" that is common to the major legal systems of the world.[51] Moreover, "[t]he existence of a general principle of law cannot be assumed; it must be proved."[52] Claimants have failed to meet their burden to do so here.

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[49]See, e.g., NAFTA art. 1131(1) (a tribunal shall decide issues in accordance with the NAFTA and "applicable rules of *international* law") (emphasis added); Freeman, International Responsibility of States for Denial of Justice, at 330 ("there is unquestionably no [international] responsibility for simple or ordinary 'reversible' errors (i.e., errors which might allow a domestic court of appeals to reverse the judgment below)").

[50]See Gordon A. Christenson, Attributing Acts of Omission to the State, 12 Mich. J. Int'l L. 312, 360 (1991) ("National and international decision-makers alike resist finding an affirmative duty on governments to act from customary international law or treaty without the clearest normative expression of such duty.").

[51]Statute of the International Court of Justice, Art. 38(1)(c) (identifying "general principles of law as recognized by civilized nations" as a source of international law). See also Restatement (Third) of the Foreign Relations Law of the United States § 102 & note 7 (1986) ("It has become clear that this phrase [in the ICJ Statute] refers to general principles of law common to the major legal systems of the world.").

[52]Michael Akehurst, Equity and General Principles of Law, 25 Int'l Comp. L. Q. 801, 818 (1976).

To rise to the level of a general principle of law, the principle must exist in most, if not all, of the major legal systems of the world, including those of non-Western jurisdictions:

> [I]t is not permissible to give a preference to one group of legal systems over another group, *e.g.* to allow principles derived from civil law countries to override principles derived from common law countries, or to allow principles derived from Western systems of law to override principles derived from non-western systems of law. A principle which is accepted in only a minority of States of the world cannot be said to be a *general* principle of law.[53]

Consequently, "rules peculiar to common law countries" – and especially rules particular to only *some* common law countries – "are, therefore, not general principles of law."[54] If variations in the substantive elements of the particular rule exist among or within the major legal systems, a tribunal cannot simply choose one approach over another, but may instead apply only those elements that the systems share in common.[55]

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[53]Id. at 818-19 (emphasis in original) (citation omitted); see also id. at 814 ("If a rule does not exist in the generality of municipal legal systems, there is very good reason to believe that municipal legislators are of the opinion either that the rule is not required by justice and equity, or else that the rule, although desirable from an ideal point of view, would probably prove unworkable in practice - in which case it is not likely to prove workable as a rule of international law."); David J. Bederman, International Law Frameworks 13-14 (2001) ("In order for an international lawyer to argue that a general principle of law is a binding rule of international law, it would be necessary to canvass all of the world's great legal systems for evidence of that principle, and also to reference manifestations of that principle in the actual domestic law of as many nations as possible. This is no easy task. Simply citing a few U.S. Supreme Court decisions, or to quote a Latin legal maxim, will not do the trick."); Amco Asia Corp. v. Indonesia, 24 I.L.M. 1022 ¶ 248 (1985) (Nov. 21, 1984 Award) (tribunal examined common law, civil law and Islamic law traditions and found *pacta sunt servanda* to be a "general principle of law" because "it is common to all legal systems in which the institution of contract is known").

[54]Akehurst, Equity and General Principles of Law, at 817 n.85.

[55]H.C. Gutteridge, Comparative Law 65 (2d ed. 1949) ("If any real meaning is to be given to the words 'general' or 'universal' and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognised in substance by all the main systems of law, and that in applying it he will not be

(continued...)

Claimants have cited no authority that in any way suggests that municipal recognition of their proposed "plain error" exception is sufficiently universal to be considered a principle of international law. Indeed, as we demonstrate below, even the United States' law of "plain error" – which claimants suggest is most generous to their cause – does not support the proposed international law principle that claimants ask this Tribunal to create.

a. "Plain Error" Is Generally Not Recognized In Civil Cases

To support their claim of entitlement to an unprecedented "plain error" review in this international forum, claimants rely on several municipal cases in which the "plain error" doctrine was applied in the context of criminal prosecutions. See TLGI Final Jurisd. Sub. at 60-61 & n.33; Joint Reply at 205 & n.52. This reliance is misplaced, however, as "[m]any of the reasons given for the use of the 'plain error' doctrine are simply not applicable in civil cases." 21 Wright & Graham, Federal Practice & Procedure § 5043 at 236 (1977). In contrast to criminal cases, "liberty and life are not involved" in civil cases and therefore do not justify an exception to the strict requirement of a contemporaneous objection. 1 McCormick on Evidence § 52 at 212 (4th ed. 1992). As a result, many jurisdictions refuse to recognize the doctrine at all in civil cases, regardless of how egregious the alleged error or its effect on the outcome of the proceedings. See, e.g., Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114, 117 (Pa. 1974) (the doctrine of "fundamental error has no place in our modern system of jurisprudence."); Hammer v. Gross, 932 F.2d 842, 847 (9th Cir. 1991) ("there is no 'plain error' exception in civil cases in this circuit.").[56]

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[55](...continued)
doing violence to the fundamental concepts of any of those systems.").

[56]Accord, e.g., Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1295 (7th Cir. (continued...)

Claimants ignore this distinction entirely and, in so doing, fundamentally mischaracterize the law of "plain error." For example, claimants rely on no fewer than four decisions of intermediate courts in the State of Florida for their view that a civil litigant may complain on appeal of improper argument by opposing counsel, even in the absence of an objection in the trial court. See Joint Reply at 109 n.13, 205-06 n.52, 211. Claimants fail to note, however, that the positions expressed in each of those cases to this effect were specifically overruled by the Supreme Court of Florida just last year. See Murphy v. International Robotic Sys., Inc., 766 So.2d 1010, 1027 (Fla. 2000) ("We . . . disapprove decisions issued by Florida's District Courts of Appeal to the extent that they stand for [the] proposition" that "improper, but unobjected-to closing argument in a civil case may be challenged for the first time on appeal.").

Even in those jurisdictions that allow for "plain error" review in civil cases, the law is clear that "the plain error standard, high in any event, . . . is near its zenith" in the context of civil litigation. Clausen v. Sea-3, Inc., 21 F.3d 1181, 1196 (1st Cir. 1994) (internal quotations

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[56](...continued)
1987) ("No doctrine of 'plain error' protects parties from the consequences of their decisions in civil litigation"); Durham v. Quincy Mut. Fire Ins. Co., 317 S.E.2d 372, 377 (N.C. 1984) ("Heretofore, this Court has limited the application of the plain error doctrine to appeals in criminal cases, and we decline to apply it in appeals in civil cases."); Mayrose v. Fendrich, 347 N.W.2d 585, 586 (S.D. 1984) ("the plain error doctrine is a rule of criminal procedure and is inapplicable to this civil case."); Murphy v. International Robotic Sys., Inc., 766 So.2d 1010, 1027 (Fla. 2000) (appellate relief from opponent's improper closing argument is absolutely barred in civil cases where such argument was not objected to in trial court); Gitten v. Haught-Bingham, 716 A.2d 1063, 1066 (Md. Ct. Spec. App. 1998) ("no Maryland court" has adopted "a 'plain-error'-type doctrine in civil cases . . . ."); cf. Imported Car Center, Inc. v. Billings, 653 A.2d 765, 770 (Vt. 1994) ("It is not clear whether plain error is ground for reversal in civil cases."); Hobson v. Wilson, 737 F.2d 1, 32 n.96 (D.C. Cir. 1984) (questioning whether "plain error" doctrine applies in civil cases); Vakauta v. Kelly, [1989] 63 HCA 610, 614 (Austl.) ("There is abundant authority which establishes, at all events in civil cases, that a party may waive his right to object on the ground of bias.") (Dawson, J.).

omitted). Because litigants are bound by the actions of their counsel, "[t]he plain error exception in civil cases" is "an extraordinary, nearly insurmountable burden." Phillips v. Hillcrest Med. Ctr., 244 F.3d 790, 802 (10th Cir. 2001). As one state's highest court has explained,

> the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice. . . . Parties in civil litigation choose their own counsel who, in turn, choose their theories of prosecuting and defending. The parties, through their attorneys, bear responsibility for framing the issues and for putting both the trial court and their opponents on notice of the issues they deem appropriate for jury resolution.

Goldfuss v. Davidson, 679 N.E.2d 1099, 1103-04 (Ohio 1997) (quotation omitted). As a result, "in appeals of civil cases, the plain error doctrine is not favored . . . ." Id. at 1104.[57]

The O'Keefe litigation was, of course, a civil proceeding and not a criminal prosecution; neither Loewen nor any of its co-defendants were imprisoned or otherwise deprived of life or liberty. Accordingly, even if the "plain error" doctrine were ever to have some application on the international plane, it could have no application here.

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[57] Accord, e.g., Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999) ("Plain error is a rare species in civil litigation, encompassing only those errors that reach the pinnacle of fault . . . .") (quotation omitted); Johnson v. Ashby, 808 F.2d 676, 679 n.3 (8th Cir. 1987) (in civil litigation, plain error exception is limited to only "the most compelling cases"); State v. Berg, 927 P.2d 975, 982 (Mont. 1996) ("only on rare occasion is the [plain error] doctrine invoked in civil cases.") (quotation omitted); Palanti v. Dillon Enters., Ltd., 707 N.E.2d 695, 701 (Ill. App. 1999) ("As civil trials do not implicate sixth amendment concerns, the application of the plain error doctrine to civil cases should be exceedingly rare . . . .") (quotation omitted); Cavuoti v. New Jersey Transit Corp., 735 A.2d 548, 561 (N.J. 1999) ("Relief under the plain error rule [], at least in civil cases, is discretionary and should be sparingly employed.") (quotation omitted); Reese v. Brooks, 43 S.W.3d 415, 419 (Mo. App. 2001) ("the plain-error doctrine is rarely resorted to in civil cases.").

b. The "Plain Error" Rule Is Foreclosed Where The Failure To Object Was A Tactical Choice

Nowhere in any of their submissions do claimants suggest that the absence of objection was anything but a deliberate strategy of Loewen's counsel at trial. To the contrary, claimants' own declarant, John G. Corlew, confidently asserts that "the Loewen counsel made sound tactical decisions with respect to trial objections," Corlew Statement at 6, and claimants elsewhere contend that Loewen's trial counsel "[c]ertainly . . . understood what was necessary in this regard . . . ." TLGI Final Jurisdictional Sub. at 59. This concession is fatal to claimants' position, because the "plain error" rule is absolutely foreclosed where, as here, "failure or refusal to raise an issue in trial court is conscious and intentional on the part of trial counsel." Martinez v. Montana Power Co., 779 P.2d 917, 920 (Mont. 1989). See also, e.g., Johnson v. United States, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him"; plain error review foreclosed).[58] This is equally so in Mississippi. See, e.g., Ward v. State, 461 So.2d 724, 726 (Miss. 1984) (Robertson, J.).[59] As one

[58]Accord, e.g., United States v. Yu-Leung, 51 F.3d 1116, 1122 (2d Cir. 1995) ("If . . . the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review"); United States v. Handly, 591 F.2d 1125, 1128 (5th Cir. 1979) ("Where . . . the record indicates that defense counsel's failure to object to an improper comment was part of his defense strategy, then the defendant will not be heard to claim he was prejudiced by the prosecutor's indiscretions"); County of Cook v. Colonial Oil Corp., 153 N.E.2d 844, 848 (Ill. 1958) ("We have consistently held that experienced counsel cannot take a chance of failing to make objections and then, upon receiving what they consider an adverse jury verdict, claim error.").

[59]Loewen asserts that its "lead trial lawyer understood what was necessary in this regard [to preserve objections for appeal] – he was himself a former justice of the Mississippi Supreme Court," referring to James Robertson. TLGI Final Jurisdictional Sub. at 59. As the United States (continued...)

court has explained in analogous circumstances, "it is hardly a miscarriage of justice when a party fails to object to improper argument by its opponent and chooses to retaliate with improper argument of its own, only to have this strategic decision backfire when the jury returns a substantial award against it." Smith, 177 F.3d at 28.

c. The "Plain Error" Doctrine Is Discretionary, Not Mandatory

Claimants persist in their assertion that the "plain error" rule reflects a duty that required the Mississippi courts to act on Loewen's behalf, even in the absence of objection from Loewen at the time. See Joint Reply at 204-11. The United States Supreme Court has made clear, however, that the plain error doctrine, even in *criminal* cases, "is permissive, not mandatory. If the forfeited error is 'plain' and 'affects substantial rights,' the court of appeals has authority to order correction, but is not required to do so." United States v. Olano, 507 U.S. 725, 735 (1993). Although claimants dismiss Olano as a "non-Mississippi case" (Joint Reply at 208), Mississippi's "plain error" rule is identical in every respect to the federal rule. Compare Miss. R. Evid. 103(d) ("Nothing in this rule *precludes* taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.") (emphasis added) with Fed. R. Evid. 103(d)

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[59](...continued)
has shown, the reference to Mr. Robertson as Loewen's "lead trial lawyer" is contrary to fact, as Loewen's lead trial lawyer was Richard Sinkfield, not Mr. Robertson. See Counter-Mem. at 29. We agree with Loewen, however, that Mr. Robertson "certainly . . . understood what was necessary" with regard to the plain error rule, as he authored the unanimous opinion of the Mississippi Supreme Court in Ward v. State, which held that the "plain error rule . . . has no force" when it appears that the failure to object is "part of the overall defense strategy of defense counsel, albeit ultimately unsuccessful." 461 So.2d at 726 (Robertson, J.).

(same).[60] See also Miss. R. App. P. 28(a)(3) ("[T]he court *may, at its option*, notice a plain error not identified or distinctly specified.") (emphasis added).[61]

In fact, the Mississippi Supreme Court has indicated that, because the "extreme cases" in which a trial court's exercise of its "sound judicial discretion" to notice plain error may be justified are "rare," it can be error for a trial court to grant a new trial on the basis of matter that was not objected to at trial. Berryhill v. Byrd, 384 So.2d 1026, 1029 (Miss. 1980) (disapproving and reversing trial court's decision to invoke plain error rule to grant new trial). Thus, even if the plain error rule could be deemed to have applied to this civil dispute in which Loewen was represented by numerous experienced counsel, in no event could this authority reflect a "duty" on Judge Graves to have acted on the basis of the alleged "plain errors" to which Loewen never objected.[62]

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[60]The official comment to Mississippi's plain error rule notes expressly that the Mississippi and federal rules are "identical." Miss. R. Evid. 103 (comment).

[61]Even claimants' own source describes the plain error rule as an "*option* of the [Mississippi] Supreme Court." Robbins v. Berry, 47 So.2d 846, 848 (Miss. 1950) (emphasis added). For his part, claimants' declarant John Corlew misstates three Mississippi cases as examples of "reversals" of lower court decisions premised on "the court's 'duty' or 'obligation' to prevent or correct . . . fundamental injustices." Corlew Statement at 11. In fact, one of these cases, Dunaway v. State, 551 So.2d 162 (Miss. 1989), was an *affirmance* of a criminal conviction in which the Mississippi Supreme Court made clear that its power to notice "plain error" was discretionary. 551 So.2d at 164. Similarly, the court in McCullom v. Franklin, 608 So.2d 692 (Miss. 1992) – the only civil case cited – did not speak of a "duty" of the courts, but rather the duty of *counsel* both to refrain from impermissible statements and to object to such statements when they are made. 608 So.2d at 694. In the third case, Brooks v. State, 46 So.2d 94 (Miss. 1950), the Mississippi Supreme Court exercised its discretion to notice plain error where prejudicial evidence touches on "[c]onstitutional rights in serious criminal cases," noting only that the "dispensing of justice is the object of courts." 46 So.2d at 97.

[62]Claimants also speculate that Mississippi's plain error rule "may well be discretionary in cases involving ordinary, technical, or non-prejudicial errors" but not in cases involving

(continued...)

2. The Obligation To Provide "Full Protection and Security" Did Not Impose A Duty On The Mississippi Courts To Act In The Absence Of An Objection

Claimants continue to press their claim that, apart from the plain error rule, NAFTA Article 1105's obligation of "full protection and security" imposed an independent duty on the Mississippi courts to act, even in the absence of an objection by Loewen. See Joint Reply at 204. However, as stated in the NAFTA Free Trade Commission's binding interpretation of Article 1105, dated July 31, 2001, the obligation to provide "full protection and security" does not impose duties on the government beyond the minimum standard of treatment required by customary international law to be afforded alien investments. See infra at 143-52. Tribunals applying this obligation under customary international law have recognized the obligation only to require reasonable police protection against criminal conduct that physically invaded the person or property of an alien, a requirement that has absolutely no application to the circumstances of this case. Id. at 148-51; Counter-Mem. at 176-77.[63]

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[62](...continued)
"egregious appeals to local prejudices." Joint Reply at 205. But the plain error rule applies, if at all, only in "extreme cases in order to prevent manifest injustice . . . ." Berryhill, 384 So.2d at 1029 (quotation omitted). By definition, therefore, an "ordinary, technical, or non-prejudicial error" could never be regarded as "plain error," let alone error as to which review could be said to be "discretionary." Claimants' effort to manufacture a distinction suggesting any mandatory application of the plain error rule in this case is thus entirely baseless.

[63]Claimants seize upon this Tribunal's passing remark, made in the context of a wholly separate jurisdictional question, that "Article 1105, in requiring a Party to provide 'full protection and security' to investments of investors, must extend to the protection of foreign investors from private parties when they act through the judicial organs of the state." Joint Reply at 147 (quoting Loewen, Decision on Competence at ¶ 58). Unlike claimants, the United States does not interpret the Tribunal's remark as a "conclusion" on this question, as the meaning of "full protection and security" was not at issue (and therefore was not briefed) in connection with any matter decided in the Tribunal's decision. Moreover, the decision predates the Free Trade
(continued...)

Moreover, even if the obligation of "full protection and security" were given claimants' unprecedented construction to apply in the context of litigation, it could not impose so broad a duty as claimants seek to create here. To the contrary, even in the most analogous context involving the judicial function at all, tribunals and commentators applying the customary international law obligation of protection recognize liability only "if the authorities were *manifestly* and *inexcusably negligent* in the prosecution, trial and punishment of the persons guilty of the injurious act." Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, Article 8(2), reprinted in F.V. García-Amador et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 129, 130 (1974) (emphasis added). Surely, even if this Tribunal were to take the broad and unprecedented leap urged by claimants and were to extend the "full protection and security" obligation to the courtroom setting, the Mississippi courts' alleged failures to act in the civil O'Keefe litigation on the basis of points that Loewen failed to raise cannot be said to have been so "manifestly or inexcusably negligent" as to fall short of the minimum expectations of international law.[64]

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[63](...continued)
Commission's interpretation of Article 1105. To the extent that the Tribunal intended its remark to give content to the "full protection and security" obligation, the United States submits, with respect, that the statement is inconsistent with the Free Trade Commission's interpretation and the obligation as it is understood in customary international law. See infra at 143-52.

[64]In the seminal case of Neer v. United Mexican States, 4 R.I.A.A. 60 (1927), an international tribunal refused to find a state liable for its failure to apprehend or punish the murderer of an alien, concluding that the failure of the state to act, "in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." Id. at 61-62.

Indeed, under any standard of reasonableness (and even those academics who, according to claimants, advocate a "full protection and security" obligation broader than the international minimum standard accept that the obligation is bounded by reasonableness under the circumstances),[65] the Mississippi courts' alleged failure to act could not be said, given the circumstances of this case, to have breached any duty to provide "full protection and security" to Loewen. While claimants may allege that the Mississippi courts were under a duty to act here, the truth of the matter is that, in courtrooms in the United States, "[t]he initiative is placed on the party, not on the judge." 1 McCormick on Evidence § 52 at 200 (4th ed. 1992). As the United States Supreme Court has explained, "[u]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. *Any other approach would rewrite the duties of trial judges and counsel in our legal system.*" Estelle v. Williams, 425 U.S. 501, 512 (1976) (emphasis added). It would be utterly unreasonable to accept that, by agreeing to include in Article 1105 an obligation to provide "full protection and security" – an obligation that has never been found to apply in the courtroom setting – the NAFTA Parties intended to reconfigure the very foundations of the United States' adversary legal system.[66]

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[65]See, e.g., Kenneth J. Vandevelde, United States Investment Treaties 77 (1992) ([T]he "full protection and security" clause "is not one of strict liability. Rather, the government must provide protection reasonable under the circumstances.").

[66]See, e.g., W. Michael Reisman, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold, 15 ICSID Rev. - Foreign Inv. L. J. 362, 366 (2000) ("A basic postulate of public international law is that every territorial community may organize itself as a State and, within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own national values.").

In any event, as the record makes clear, the United States clearly provided Loewen with "full protection and security," under any reasonable formulation of that obligation. As Professor Landsman explains, Loewen was afforded a vast array of mechanisms to protect itself against the possibility of improper bias, and was represented in the proceedings by numerous experienced counsel who were fully familiar with the use of such mechanisms. See Landsman Statement at 16-17. Moreover, although claimants' Joint Reply is silent on the point, the record shows that Judge Graves took great pains to manage the trial, intervening frequently (often without prompting) to chastise counsel for improper comments, including the strong (and *sua sponte*) admonition that "I'm not going to allow any courtroom where any witness, any litigant, any lawyer is insulted based on race, ethnicity or national origin." Tr. 4325-26; see also, e.g., Tr. 44-46; Counter-Mem. at 17-18; 35-36.

With respect to the bond question, Judge Graves afforded Loewen a full hearing on the subject and a full opportunity to explain, in response to specific challenges by O'Keefe's counsel, why Chapter 11 reorganization was inadequate protection for the company in the event that the court did not depart from the full bond requirement. Similarly, the Mississippi Supreme Court continued the stay of execution on the judgment (which had already been stayed for nearly a month by operation of law) for an additional two months to give careful consideration to Loewen's request for an unprecedented reduction in the required bond amount. During that time, the Court afforded Loewen numerous opportunities to explain why Chapter 11 reorganization was inadequate protection for the company, but Loewen chose instead to remain silent on the point.

In short, the United States unquestionably afforded "full protection and security" to Loewen. As a matter of the NAFTA, customary international law, and common sense, claimants' contentions based on an alleged failure of the Mississippi courts are without legal and factual merit.

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

The United States has previously shown that Loewen's decision to obligate itself to pay the O'Keefe plaintiffs in settlement of the O'Keefe litigation extinguished any possible NAFTA claim. See Counter-Mem. at 73-106. Claimants disagree, for essentially two reasons. First, claimants contend that Loewen's settlement of the litigation was between Loewen and O'Keefe only and, therefore, the United States cannot claim rights as a beneficiary of that agreement. See Joint Reply at 176-79. Second, claimants contend that, even if the settlement would otherwise extinguish this claim, this Tribunal should be the first ever to excuse a settlement of civil litigation on the grounds of "economic duress" as a matter of international law. Id. at 179-201. As we have shown, and as we confirm below, neither contention has merit.

A. Loewen's Waiver Of Claims Through The Settlement Agreement Eliminates State Responsibility

Loewen's agreement to settle the O'Keefe litigation defeats claimants' claims in at least two ways. First, the agreement, by its terms, waived all claims arising out of the O'Keefe litigation, including any claims against the United States. See Counter-Mem. at 105-06. Second, regardless of whether the United States is a beneficiary of the agreement, Loewen's decision to forgo its appeal in favor of the settlement was an independent cause of the company's alleged

injuries, thus eliminating any possible responsibility of the United States. Id. at 104-05. Claimants offer no effective response to either point.

1. The Settlement, By Its Terms, Waived Claims Against The United States

Claimants concede, as they must, that the instrument by which Loewen settled the O'Keefe litigation contained broad and unambiguous language that waived all claims arising from that litigation. See Joint Reply at 178. Claimants also concede that a non-signatory may be treated as a third-party beneficiary of a settlement agreement where the settlement reflects "the express or implied intention of the parties to benefit the third party." Joint Reply at 178 (citing Frank & Breslow, LLP v. United States, 43 Fed. Cl. 65, 67 (Fed. Cl. 1999)). In Mississippi in particular, "[a] third person may in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and the consideration." Burns v. Washington Savings, 171 So.2d 322, 324 (Miss. 1965) (quoting 17 Am. Jur.2d Contracts 297 (1964)); see also The Country Club of Jackson Miss., Inc. v. Saucier, 498 So.2d 337 (Miss. 1986) (general release can discharge third parties who are intended beneficiaries of the settlement).[67] Given the broad terms of the agreement's waivers, as well as the circumstances of their implementation, there can be no question that the United States is entitled to the benefits of the settlement here.

[67]The settlement agreement provides that it is to be governed by and construed in accordance with Mississippi law. See A1578, A1610. Claimants' discussion of the "settled principles of international law" regarding the effect of settlement agreements, see Joint Reply at 176-77, is thus misplaced, for international tribunals refer to municipal law to determine the effect of private instruments such as these. See, e.g., Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) Nos. 20-21, at 41 (July 12) ("Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country"; engaging in choice-of-law analysis to determine municipal law governing bonds issued by Serbian government to French investors).

Despite claimants' assertions to the contrary, (Joint Reply at 179), the government gave consideration to Loewen for the release and thus was no mere "stranger" to the agreement.[68] In particular, the Mississippi courts gave consideration to Loewen in the form of the dismissal of the appeal, the vacatur of the Mississippi Supreme Court's decision and order on the supersedeas bond, and the entry of judgment by the trial judge in accordance with the settlement terms. See A1585-91, 1618-23. Indeed, the Absolute Release granted by Loewen provides expressly that it was given "for and in consideration of the dismissal with prejudice" of the O'Keefe case in addition to the corresponding release granted by the O'Keefe parties. A1605.[69] Only the Mississippi courts could have provided such consideration. See Miss. R. App. P. 42 (b); Wolf v. Mississippi Valley Trust Co., 93 So. 581, 581 (Miss. 1922) ("The right of an appellant to dismiss his appeal is not absolute but can be exercised only by leave of court.").

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[68]Although the consideration was given by the Mississippi courts, the United States is entitled to the benefit of any waiver of claims against the Mississippi courts, as the alleged liability of the United States in this matter is entirely derivative of that of the Mississippi courts. Because the United States stands in the shoes of the Mississippi courts for purposes of this claim, the claim against the United States can be no greater than any claim that would lie against the Mississippi courts. A waiver against the Mississippi courts (the instrument of the United States' alleged wrongdoing under the NAFTA, according to claimants), therefore, is a waiver against the United States for purposes of this claim. See, e.g., Nguyen Quoc Dinh, Patrick Daillier & Allain Pellet, Droit international public 413 (6th ed. 1999) ("[A State's] 'government,' from the perspective of public international law, includes not only the executive authorities of the State, but the ensemble of its 'public powers.' It is the entirety of the internal political judicial and administrative order that is envisaged (cf. article 5 of the draft articles of the I.L.C. on State responsibility).") (translation by counsel).

[69]This language stands in contrast to other provisions of the Settlement Agreement meant to define O'Keefe's obligations as opposed to those of the courts – i.e., "the O'Keefe Parties shall sign and cause to be delivered to the Loewen Parties"; "executed Orders . . . shall be obtained from the said Courts"; "executing and filing such documents as may be necessary . . . to vacate or otherwise nullify the effect of any such recording or lien." A1569, A1577.

In fact, the Mississippi courts were not only a beneficiary of the settlement but also a necessary party to its execution. Regardless of whether Loewen fulfilled the financial terms of the settlement agreement, the agreement could not close unless the Supreme Court of Mississippi dismissed the appeal and vacated its decision on the bond, and the trial court dismissed the action with prejudice (and O'Keefe's pending motion for attorney's fees) by a specified date. A1567, A1570-1572. Although parties to a litigation are free to settle on whatever (lawful) terms they wish, they cannot dictate the actions a court must take through a bilateral contract.[70] As one court has explained, "by conditioning the waiver of appeal upon the vacatur of the decision in this matter, the parties have placed in issue the integrity of the judicial process." Aetna Casualty and Surety Co. v. Home Ins. Co., 882 F. Supp. 1355, 1357 (S.D.N.Y. 1995).[71]

The Mississippi courts not only granted the orders prescribed by the Settlement Agreement, but expressly conditioned the entry of their orders on the fulfillment of the agreement's terms. See A1590-91, A1618-19, A1620-21. Thus, the courts ensured that Loewen

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[70]See Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 128 (3d Cir. 1991) ("[A]ction by the court can neither be purchased nor parleyed by the parties . . . A provision for such action in a settlement agreement cannot bind the court."); In re Memorial Hosp. of Iowa Cty, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) ("When the parties' bargain calls for judicial action . . . , the benefits to the parties are not the only desiderata. . . . [T]he judge does not automatically approve but must ensure that the agreement is an appropriate commitment of judicial time and complies with legal norms.").

[71]Vacatur upon settlement is an extraordinary form of relief. See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) (appellate court should not vacate district court judgment because of a settlement absent "exceptional circumstances"); id. at 26-27 ("Judicial precedents are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur"); Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 385 (2d Cir. 1993) (refusing to vacate court of appeals judgment as a condition to settlement, stating that "once such a decision has been rendered we decline to allow [the parties] to dictate, by purchase and sale, whether the precedent it sets will remain in existence.").

would not be denied the opportunity to present its claims on appeal if the settlement were to unravel. At the same time, by taking these steps, the courts adhered to Mississippi's "strong and abiding policy favoring settlement." Preferred Risk Mutual Ins. Co. v. Collier, 712 F. Supp. 96, 98 (S.D. Miss. 1989).[72] Had the Mississippi courts believed that Loewen reserved the right to claim under the NAFTA for the alleged failings of those courts, they surely would have denied the joint motion for dismissal and addressed the merits of Loewen's claims on appeal. That they did not do so and instead dismissed the appeal (in addition to the extraordinary additional step of vacating the bond decision) only serves to confirm that Loewen's waiver and release was presented to the courts as, and was fully intended to be, inclusive of any claims against the state.

In any event, even if the courts were not themselves party to the agreement by virtue of the consideration given to Loewen, claimants concede that Loewen's settlement agreement contained broad and all-encompassing releases of claims, including a provision making clear that the agreement was intended to be "a full accord and satisfaction of all claims and causes of action in the premises as against the Releasees *and any and all other persons, firms and/or corporations having any liability in the premises*." A1609 (emphasis added). Claimants offer only a single, unsupported response to this self-evident waiver of all claims: that the United States is not entitled to the benefits of this broad waiver because the United States "is not a person, firm and/or corporation." Joint Reply at 178. The law, however, is otherwise.

Indeed, the court in Taggart v. United States, 880 F.2d 867 (6th Cir. 1989), interpreted a virtually identical waiver of claims as barring subsequent claims against the United States, even

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[72] See also Chertkof v. Harry C. Weiskittel Co., 248 A.2d 373, 377 (Md. 1968) ("Courts look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony.").

though the United States was not a party to the agreement or in any way connected to its formation or implementation. As the court explained,

> [w]e find the language of the release to be clear and unambiguous. The agreement releases and discharges not only the Church, "his successors and assigns" but further releases "*any and all other persons, associations and corporations*, whether herein named or referred to or not, and who, together with the above named, may be jointly or severally liable to the Undersigned." This language is not ambiguous. *The release does not exclude from its broad terms, either explicitly or implicitly, the United States or any other potentially liable party*.

Id. at 870 (emphasis added).

Moreover, even if the United States were not a "person, firm and/or corporation" for purposes of the waiver, the settlement is not limited only to those categories. Instead, the parties expressly agreed "to effectuate a full, final and complete release of all parties/releasees *and all others having any liability in the premises*." A1610 (emphasis added). At the very least, the United States falls within the class of the "all others" intended to be released from liability. As one court has explained,

> [i]n general, releases extending to 'all other persons' are frequently used and are commonly given effect by way of summary judgment to third parties not specifically named in the release. This applies even if the cause of action against the third party is unrelated to that against defendant in the first action.

Hughes Aircraft Co. v. United States, 15 Cl. Ct. 550, 554 (Cl. Ct. 1988) (suit against United States barred by settlement between plaintiff and third party). In light of this broad release, as well as the other terms of the settlement and the circumstances of their implementation, the United States is clearly entitled to the benefits of Loewen's waiver of all claims.[73]

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[73]It is of no consequence that the release did not refer expressly to Loewen's potential NAFTA claim against the United States. See Joint Reply at 178-79. Under Mississippi law, a (continued...)

2. Loewen's Decision To Settle Was An Independent Cause Of The Alleged Damages For Which Claimants Seek Recovery

As noted, O'Keefe was never, at any point, able to enforce the trial court's judgment, the execution of which was at all times stayed. See Counter-Mem. at 104. Because Loewen was thus never under any obligation to pay O'Keefe until it bound itself to do so under the terms of the settlement agreement, Loewen's decision to settle was the proximate cause of the alleged injuries for which claimants now seek recovery, regardless of whether the settlement, by its terms, waived this NAFTA claim against the United States. Id.

Claimants' response is remarkable. According to claimants, the NAFTA Parties, by including the phrase "by reason of, or arising out of" in NAFTA Articles 1116 and 1117, adopted a more "relaxed" and undefined standard of causation, unprecedented in international law, that would permit a claimant to recover damages alleged to flow even from the claimant's own decision to settle litigation. Claimants contend that Loewen's settlement, even if voluntary, was "a foreseeable, consequential link in the causal chain between" the O'Keefe court judgments and claimants' alleged injuries and that, as a result, the United States is responsible for the consequences of that voluntary settlement. Joint Reply at 174. Claimants' new theory of causation, however, is without basis in law, fact, or common sense.

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[73](...continued)
general release bars *all* subsequent claims by the releasor arising out of the settled controversy, absent an express reservation of rights. See, e.g., Mississippi Power & Light Co. v. United Gas Pipe Line Co., 729 F. Supp. 504, 508-09 (S.D. Miss. 1989) ("The broad language of the release indicates clearly and unambiguously that the parties intended that United release *all* claims arising prior to the settlement date, not just those involved in the two lawsuits."); Houser v. Brent Towing Co., 610 So.2d 363, 365-66 (Miss. 1992). The settlement agreement plainly does not contain any such reservation, with respect to this claim or any other.

To support its novel causation theory, claimants invoke several municipal court decisions construing insurance contracts. See Joint Reply at 172-73. NAFTA Articles 1116 and 1117, however, are to be interpreted in accordance with "applicable rules of *international* law." NAFTA arts. 102(2), 1131(1) (emphasis added). There can be no question that proximate cause is firmly established as a rule of international law.[74] In fact, a review of the international authorities establishes that States have, over the past two centuries, used a wide variety of clauses in international agreements submitting claims to arbitration – some quite similar to Articles 1116 and 1117, some broader in their language and scope – which uniformly have been interpreted to require proximate cause.

The most recent and closest example is that of the Algiers Accords, which granted the Iran-United States Claims Tribunal jurisdiction over claims that "*arise out of* . . . measures affecting property rights."[75] The Iran-United States Claims Tribunal has interpreted this provision to provide jurisdiction only over claims that meet the customary international law standard of proximate causation and, therefore, to reject the "lesser degree of causation" standard

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[74] See, e.g., Louis B. Sohn & R.R. Baxter, Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (Draft No. 12), art. 14(3), at 141, 145 (Harv. L. Sch. 1961) (recognizing proximate cause as a requirement for an international claim); Bin Cheng, General Principles of Law 244-45 (Grotius 1987) (1953) ("[T]he relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. . . . Hence the maxim: *In jure causa proxima non remota inspicitur*. . . . [D]erogation from this principle is not to be presumed."); Administrative Decision No. II, 7 R.IA.A. 23, 29 (Germ.-U.S. Mixed Cl. Comm'n 1923) (Proximate cause is a "rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating.").

[75] Declaration of Algeria Concerning the Settlement of Claims (Claims Settlement Declaration), Jan. 19, 1981, U.S.-Iran, art. II(1), 20 I.L.M. 230, 231 (1981) (emphasis added).

that claimants urge here.[76] That tribunal's interpretation of a substantially similar clause in a claims agreement governed by international law provides persuasive evidence of the content of the phrase "arising out of" in Articles 1116(1) and 1117(1).

Other international tribunals applying international law have similarly construed a wide variety of different treaty language – some plainly broader than the language in NAFTA Articles 1116 and 1117[77] – to be consistent with the customary international law principle that proximate

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[76]See Mohsen Asgari Nazari v. Iran, 1994 WL 109558, at 54 (Aug. 24, 1994) (Award No. 559-221-1) (noting lack of "evidence that the Respondent is culpable for proximate causation of the Claimant's loss . . . ."); Behring Int'l, Inc. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 238, 271 (1985) ("[T]he Tribunal has jurisdiction to adjudicate a counterclaim for all reasonably foreseeable damages . . . proximately caused by such breach . . . ."); Hoffland Honey Co. v. Nat'l Iranian Oil Co., 2 Iran-U.S. Cl. Trib. Rep. 41 (1983); see also Leach v. Iran, 23 Iran-U.S. Cl. Trib. Rep. 233, 239 (1989) (separate opinion of Judge Noori) (claim did not arise out of Iranian measures as claimant's employer's "decision was the actual, proximate and direct cause of the termination of contracts."); Iran v. United States, Award No. 597-A11-FT (April 7, 2000), ¶¶ 268, 275, 280, 291 (tribunal would "determine in a subsequent proceeding whether Iran has established that it has suffered a loss as *a proximate result* of that failure by the United States") (emphasis added); Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 459 (1998) ("Even where the claimant can prove that actions attributable to the Government of Iran were a cause of damages, recovery still will be denied unless its actions were the *proximate* cause. . . . The Tribunal correctly drew a distinction . . . between 'cause' and 'proximate cause' . . . . "); The American Society of International Law, Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility 318 (Richard B. Lillich & Daniel Barstow Magraw eds., 1997) ("It is further a basic premise that one is not liable for every harm that is caused. As discussed above, the tribunal in Hoffland Honey endorsed the general limiting principle of 'proximate cause,' which requires that the link between action and compensable harm be reasonably direct and obvious.").

[77]Compare, e.g., Treaty of Peace, Aug. 25, 1921, U.S.-Germ., art. I, 42 Stat. 1939 (incorporating section 5 of the July 2, 1921 Joint Resolution of Congress, which (as quoted in Administrative Decision No. II, 7 R.I.A.A. 23, 29 (Germ.-U.S. Mixed Cl. Comm'n 1923)) granted the German-U.S. Mixed Claims Commission jurisdiction over claims by U.S. nationals who "'suffered . . . loss, damage, or injury . . . *directly or indirectly . . . or in consequence of hostilities or of any operations of war or otherwise*'.") (emphasis in original), with Provident Mutual Life Ins. v. Germ., 7 R.I.A.A. 91, 116 (Germ.-U.S. Mixed Cl. Comm'n 1924) ("[T]he act of Germany in striking down an individual did not in legal contemplation *proximately result* in (continued...)

cause is a necessary prerequisite of any international claim.[78] These international tribunals reached the same result in construing differing language for a reason: unless a different intent unmistakably appears from the text, the ordinary relationship – that of proximate cause – between an alleged breach and an alleged loss must be proven for any international claim to proceed. As Umpire Ralston stated in the Sambiaggio case, if the governments intended to depart from the general principles of international law, then the "agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful

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[77](...continued)
damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death.") (emphasis added) and United States Steel Products v. Germ., 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (Germ.-U.S. Mixed Cl. Comm'n 1923) (rejecting on proximate cause grounds claims seeking reimbursement of war-risk insurance premiums); compare also, e.g., Protocol for Arbitration of Claims, Feb. 17, 1903, U.S.-Venez., art. I, T.S. No. 420 ("*All claims* owned by citizens of the United States of America against the Republic of Venezuela . . . shall be examined and decided by a mixed commission . . . .") (emphasis added), with Dix v. Venezuela, 9 R.I.A.A. 119, 121 (U.S.-Venez. Comm'n 1903) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.").

[78]Compare Elettronica Sicula, S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 41 ¶ 48 (quoting compromissory clause as encompassing "'[a]ny dispute between the High Contracting Parties as to the interpretation or the application of this Treaty . . . .'") with id. at 62 ¶ 101 (rejecting claim on ground that U.S. failed to establish that acts attributable to Italy rather than "ELSI's headlong course towards insolvency" were proximate cause of losses); compare also Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 25 (Dec. 2) (quoting compromissory clause as encompassing "'any dispute whatever [that] should *arise* . . . relating to the interpretation or application of the provisions of this Agreement . . . .'") (emphasis added) with id. at 99 (separate opinion of Judge Fitzmaurice) (noting that had the applicant sought reparation, it would have been required to establish "that these breaches were the actual and proximate cause of the damage alleged to have been suffered[.]"); compare Convention with Canada Relative to Certain Damages Arising From Smelter Operations at Trail, British Columbia, Apr. 15, 1935, U.S.-Can., art. III(1), 49 Stat. 3245, 3246 (tribunal shall decide "[w]hether damage caused by the Trail Smelter in the State of Washington has occurred . . . .") with Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1906, 1931 (first decision 1938) (rejecting claim for indirect damages arising from unintended and incidental interference with contractual relations with third parties).

interpretation."[79] Like the provisions of each of the international claims agreements reviewed above, Articles 1116(1) and 1117(1) contain no indication that the NAFTA Parties intended to vary from centuries of claims practice and dramatically expand the number and range of claims for which they would be liable.

Claimants ignore international law entirely (and thus the requirements of NAFTA Articles 102(2), 1131(1)) and rely instead exclusively on municipal cases, nearly all of which involved contracts of insurance and indemnity. See Joint Reply at 172-73 & n.38-40.[80] But insurance contracts have a fundamentally different object, purpose and context than that of NAFTA Chapter Eleven. On policy grounds, national courts construe provisions in insurance contracts broadly in favor of insureds.[81] Insurance contracts are the product of commercial

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[79]10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm'n of 1903); see also Asian Agricultural Products Ltd. v. Sri Lanka ("AAPL"), 30 I.L.M. 577, 601 ¶ 51(1991) ("[I]n the absence of travaux preparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by previous treaties . . . .").

[80]Of the fourteen municipal cases cited by claimants, twelve involved insurance or indemnity contracts; the remaining two cases had nothing to do with causation at all, but instead concerned only whether certain proceedings arose out of other proceedings for procedural purposes. See Re Hamilton-Irvine and the Companies Act 1985, 94 A.L.R. 428, 433 (S. Ct. Norfolk Island May 1, 1990) (pending proceedings did not arise out of other proceedings given that the latter were "in no sense dependent upon, or linked or associated with," the former); United States v. Friedland, 1998 A.C.W.S.J. 140040, at *53-*60 (Ont. Ct.) (counterclaim arose out of subject matter of proceedings initiated by plaintiff)).

[81]See, e.g., Amos v. Insurance Corp. of Brit. Colum., 3 S.C.R. 405, 1995 S.C.R. LEXIS 663, at *16 (1995) ("Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer."); Dodson v. Peter H. Dodson Ins. Servs., [2001] 1 Lloyd's Rep. 520, 2000 WL 1791537, ¶ 41 (Engl. C.A. 2000) ("In case of any ambiguity (and this is in our view, at lowest, such a case), an insurance wording such as the present falls to be construed against the insurers whose standard wording it is and who put it forward contractually (continued...)

transactions where insurers assume the risk of certain losses in exchange for payments. Chapter Eleven, in contrast, is not an insurance policy or any other form of liability-shifting mechanism. Instead, it imposes on a State legal obligations with respect to certain foreign investors and foreign-owned investments and creates a private right of action for monetary damages for violations of those obligations. A NAFTA Party's liability under Chapter Eleven is thus more analogous to that of a tortfeasor or violator of a statute: areas where, under municipal law, liability has been limited to the principle of proximate cause.[82] Thus, neither international law nor the policy rationale underlying the municipal-law decisions claimants invoke supports application of the substantially broader standard applied in the insurance law context to Chapter Eleven arbitration.

Moreover, claimants' suggestion that the use of the word "or" to separate "by reason of" and "arising out of" in NAFTA Articles 1116 and 1117 indicates that the two phrases "have distinct legal meanings" is wrong as a matter of simple grammar: "or" can be and often is used to

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[81](...continued)
in apparently general terms and then seek to read into it an unexpressed restriction on their liability."); Merchants Ins. Co. v. US Fid. & Guar. Co., 143 F.3d 5, 8 (1st Cir. 1998) ("Where policy provisions are ambiguous – that is, where the language permits more than one rational interpretation – the reading most favorable to the insured must prevail. That contra proferentem principle applies with added rigor in determining the meaning of exclusionary provisions.") (internal quotations, citations and footnote omitted); 2 George J. Couch, Cyclopedia of Insurance Law § 15:74 (2d ed., rev. vol. 1984) ("The words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases.").

[82]See, e.g., Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 287 (1992) (Scalia, J. concurring) ("One of the usual elements of statutory standing is proximate causality . . . . [I]t has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct.").

introduce synonymous terms.[83] For example, in Articles 1116(1) and 1117(1), just as "loss" and "damage" are interchangeable, "by reason of" and "arising out of" are interchangeable. If, as claimants urge, "arising out of" embodied a significantly more expansive standard of causation than "by reason of" – which claimants concede "has generally been held to connote the traditional tort concept of proximate causation," Joint Reply at 173 – the narrower standard would be read out of Chapter Eleven: the substantially more expansive causation standard would in all cases swallow the more restrictive one. Such an interpretation would thus be "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness."[84]

There can be no question, therefore, that NAFTA Articles 1116 and 1117 require claimants to prove, as a necessary element of their claim, that their alleged damages were *proximately* caused by the alleged breach rather than the intervening act of Loewen's decision to

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[83]This is so in the languages of all three NAFTA Parties. See, e.g., Webster's II New Riverside University Dictionary 826 (1988) (defining "or" as "a synonymous or equivalent expression" and providing the example "*claustrophobia, or fear of enclosed places*"); American Heritage Dictionary of the English Language 873 (2d ed. 1985) (defining "or" as "used to indicate a synonymous or equivalent expression" and providing the example "*acrophobia, or fear of great heights*"); Concise Oxford Dictionary 716 (1982) ("or" may be used as a "mere synonym (*common or garden heliotrope*)") (emphasis in original); Oxford American Dictionary of Current English (1980) (defining "or" as "also known as" and providing the example "*hydrophobia or rabies*"); El Pequeño Larousse Ilustrado 722 (2000) (defining "o" as "[i]ndica equivalencia o identidad: *el protagonista o personaje principal*."); 1 Le Micro-Robert Poche 883 (1992) (defining "ou" as "1. (Équivalence de formes désignant une même chose) Autrement dit. *La caccinelle, ou bête à bon Dieu.*").

[84]Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 ¶ 51 (collecting authorities); accord Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 24 ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

settle the litigation.[85] As the German-United States Mixed Claims Commission explained, proximate cause exists only where "*there is no break in the [causal] chain* and the loss can be *clearly, unmistakably, and definitively* traced, link by link, to [the State's] act." Administrative Decision No. II, 7 R.I.A.A. at 29-30 (emphasis added); see also Bin Cheng, General Principles of Law 246-47 (noting that the original wrongdoer is not liable if another was the natural cause of the injury). As the United States has already demonstrated, Loewen was under no obligation to pay O'Keefe at any point until it bound itself to do so under the settlement agreement. See Counter-Mem. at 57-63, 104. Because Loewen chose to forgo its appeal – a decision which was not the product of "economic duress" – it was that decision, and not the Mississippi court judgments, that proximately caused claimants' alleged injuries.[86]

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[85]Claimants assert incorrectly that the United States bears the burden of disproving proximate cause. See Joint Reply at 175. The absence of proximate cause is not an affirmative defense; rather, the existence of proximate cause is an indispensable element of a legally cognizable claim that any claimant must prove. Claimants' own authorities do not represent a contrary view. See, e.g., Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals at 334 (1987) ("the general principle [is] that the burden of proof falls upon the claimant . . . ."); Dan B. Dobbs, The Law of Torts § 150, at 359-60 (2000) (although the "defendant . . . has the burden of proving facts to support affirmative defenses such as contributory negligence," the "plaintiff must provide evidence of . . . facts from which a jury could reasonably find . . . proximate cause by a greater weight of the evidence."). In any event, even if the United States bore the burden of proving that claimants' settlement was the proximate cause of claimants' alleged injuries (which should not be confused with claimants' heavy burden of proving that the decision to settle was the product of "economic duress"), the United States has more than met that burden here.

[86]See, e.g., Yukon Lumber (G.B. v. U.S.), 6 R.I.A.A. 17, 20-21 ("[T]he Canadian Government does not seem justified in complaining now of a grievance which easily could have been avoided. . . . [T]he Canadian Government had every opportunity and facility" to prevent the harm alleged and, "having been able to avoid the grievance . . . , does not seem to be entitled now to hold the United States . . . in any way responsible for it."); Davis Case, 9 R.I.A.A. 460, 462-63 (U.S.-Venez. Comm'n of 1903) (where claimant's goods were improperly given by a third party to Venezualan customs officials for sale at public auction, claimant's failure "to forward the bill

(continued...)

B. Claimants Cannot Be Excused From Loewen's Settlement On The Ground Of "Economic Duress"

Claimants effectively concede that this claim must be dismissed if Loewen's settlement, either by its terms or by its consequences, extinguished claims against the United States arising from the O'Keefe litigation. See Joint Reply at 180. The heart of claimants' defense to such a result, then, is the contention that this Tribunal must disregard Loewen's settlement on the ground of "economic duress." Id. As the United States has shown, and as we confirm below, no defense of "economic duress" exists in international law (even assuming that such a defense exists at all) that would excuse Loewen's settlement under the circumstances of this case.

1. The Excuse Of "Economic Duress," Even If Recognized Under Customary International Law, Cannot Be Extended To Loewen's Circumstances

Claimants urge this Tribunal to excuse Loewen's settlement agreement through a claim of "economic duress" of unprecedented breadth, without even acknowledging the first hurdle to their assertion of any such claim here: whether "economic duress" is even recognized at all as an excuse under international law. As the United States has noted, "there is no very solid or wide consensus on coercion outside of the cases dealing with physical force" and, therefore, no firm basis from which to derive a rule of customary international law. Counter-Mem. at 74 n.45

[86](...continued)
of lading with the goods to a responsible Venezualan resident agent . . . was the real and primary cause of the conditions which followed, and the least that can be said is that this negligence was directly and proximately contributory to the injuries complained of."); Dix Case, 9 R.I.A.A. 119, 121 (U.S.-Venez. Comm'n of 1903) (after revolutionary army confiscated over half of claimant's cattle, claimant sold remaining cattle at a loss in response to perceived threat of further confiscation; tribunal disallowed recovery of losses from sale of cattle at depressed price on proximate cause grounds because "there is in the record no evidence of any duress or constraint on the part of the military authorities to compel [claimant] to sell his remaining cattle to third parties at an inadequate price.").

(quoting Detlev F. Vagts, Coercion and Foreign Investment Rearrangements, 72 Am. J. Int'l L. 17, 33 (1978)). Without such an international rule, claimants have no basis under the NAFTA to avoid the dispositive effect of Loewen's settlement.[87]

Despite the United States' challenge, claimants still offer no support for their assertion that economic pressure, by itself, can transform a settlement of disputed claims in litigation into an international claim. That is because there is no such support. See Counter-Mem. at 74-75. For this reason alone, Loewen's settlement of the O'Keefe litigation defeats this claim in its entirety.

Moreover, even with respect to municipal law, claimants fail to identify any analogous authority and entirely ignore the United States' showing that, in the specific context of settlements of litigation and commercial matters involving sophisticated parties, the duress jurisprudence of all of the leading common-law jurisdictions is particularly restrictive and conservative. See id. at 76-79. Instead, claimants summarily dismiss all duress law that is contrary to their preferred result – including that of states such as Virginia, Massachusetts, Illinois and New York, as well as the entirety of English law – as somehow "outside the mainstream" of the law of economic duress. See Joint Reply at 181, 194.

But, even if the excuse of "economic duress" were available under international law, claimants' convenient dismissal of numerous municipal jurisdictions leaves one to wonder what the "mainstream" of duress law is, given the apparent lack of uniformity in the application (or even recognition) of "economic duress" in the various leading legal systems of the world.

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[87]See NAFTA art. 102(2) (the NAFTA is to be interpreted "in accordance with applicable rules of *international* law")(emphasis added); see also id. art. 1131(1) (tribunal shall decide issues "in accordance with this Agreement and applicable rules of international law").

Whether the courts of Australia (which themselves do not appear to reflect a uniformity of view on the subject), Canada or New Zealand would, as claimants seem to suggest, consider that Loewen entered the settlement under "economic duress" (and claimants cite no authority indicating that those courts would do so) is not determinative of the question before this Tribunal. Rather, the question before this Tribunal is whether *international* law would regard Loewen's settlement as the product of "economic duress." In view of the acknowledged divergence in state practice on this point, as well as the absence of international precedent for the recognition of "economic duress" as an available excuse under international law, it would be inappropriate to apply anything but the most restrictive version of "economic duress" to this international dispute, if at all.[88]

2. The Availability Of Federal Court Review Defeats Any Claim Of Duress

Claimants' suggestion that the United States is no longer pressing its argument that Loewen had a reasonable opportunity to obtain a stay, and review, of the Mississippi Supreme Court's bonding decision in the U.S. Supreme Court, see Joint Reply at 182-83, is odd. While the United States chose to incorporate by reference, rather than repeat verbatim, the federal court arguments advanced in the jurisdictional phase, see Counter-Mem. at 79-80, these points are at the very core of the United States' rebuttal to claimants' allegation that Loewen settled under "duress." In fact, the United States Supreme Court's most recent punitive damages decision, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S.Ct. 1678 (May 14, 2001), decided

[88]See, e.g., Akehurst, Equity and General Principles of Law at 821 ("Certainly, if a State is not bound by a rule of customary law which it has consistently opposed *ab initio*, it would be illogical to regard a State as bound by a general principle of law which has always been rejected by its own law.").

after the United States filed its Counter-Memorial (but before claimants submitted their Joint Reply), provides yet more support for Professor Days' conclusion that Loewen would have had a reasonable opportunity to obtain U.S. Supreme Court review.[89]

Cooper Industries is the latest in a series of Supreme Court cases relating to the importance of judicial review of punitive damages verdicts under the Due Process Clause. See Statement of Drew S. Days, III, at 24-28 (reviewing prior cases). The Supreme Court, with only one Justice dissenting, held that, on appeal, courts should apply a de novo standard of review when passing on the constitutionality of punitive damages awards. See 120 S.Ct. at 1682-83. The Court rejected, as inconsistent with due process, the lower court's holding that a more relaxed "abuse of discretion" standard should apply. See id.

Decided by the same Justices before whom Loewen would have filed its application for a stay and petition for certiorari, Cooper Industries provides further evidence of the Supreme Court's keen interest in issues surrounding the role of the courts in reviewing punitive damages verdicts. As we previously have explained (and as Loewen's own lawyers recognized at the time), Loewen's petition would squarely have presented fundamental, far-reaching, and (still) unresolved questions implicating the reviewability of large punitive damages verdicts, questions

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[89]The United States has not, as claimants say in a footnote, "abandoned" its further argument that Loewen, as an alternative to seeking relief in the U.S. Supreme Court, could also have mounted a collateral attack on the Mississippi Supreme Court's bond decision in a U.S. federal district court. See Joint Reply at 183 n.42. While claimants deride the collateral attack option as "fantastic," id., they have yet to explain why, at the time of the underlying events, the company's own lawyer – James Robertson, a former Justice of the Mississippi Supreme Court – advised Loewen in writing that it could seek relief from an adverse bonding decision in a Mississippi federal district court. See U.S. App. at 0399. In his letter, Mr. Robertson stated with apparent confidence that a district court "would grant [the company] an immediate hearing on an application for a temporary restraining order and/or a preliminary injunction if the Plaintiffs were threatening immediate attachment or other process of Loewen assets in Mississippi." See id.

that remain certworthy today.[90] See, e.g., Counter-Mem. at 153 n.109; Statement of Drew S. Days, III, at 24-28; Reply Statement of Drew S. Days, III, at 13-14; U.S. App. at 0882 (draft stay petition). Contrary to claimants' continued assertions, and as we have shown, relief from the United States Supreme Court was, at the very least, "reasonably available" to Loewen to a degree sufficient to defeat any claim of economic duress.

3. The Availability Of Corporate Reorganization Protection Defeats Any Claim Of Economic Duress

In the face of four-square authority (and the advice of Loewen's own counsel) to the contrary, claimants continue to argue that reorganization protection under Chapter 11 of the U.S. Bankruptcy Code would not have avoided their alleged "economic duress" because it would not have been the effective option for Loewen that it has been for countless other U.S. companies in identical circumstances. Much has already been said in this case on this subject, so the United States will limit its response to the following two brief points.

First, to the extent that claimants offer any duress authorities that post-date the 1978 overhaul of the Chapter 11 reorganization provisions (and they offer very few), none of those authorities addresses the type of circumstances that claimants allege were present for Loewen in January 1996. See Joint Reply at 194-98. Indeed, many of claimants' authorities do not purport to assess the effectiveness of Chapter 11 reorganization at all, but deal instead with general, abstract notions of bankruptcy, such as personal bankruptcies or liquidation.[91] In particular, by

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[90]Moreover, as we also have explained, Loewen's petition would have raised other important issues, such as the potential liability of the United States under the NAFTA, see U.S. App. at 0882 (draft stay petition), increasing its "certworthiness" even further.

[91]See, e.g., Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., (continued...)

relying largely on authorities involving distressed companies with serious operational problems, "Loewen has confused two radically distinct situations." Supplemental Declaration of J. Ronald Trost at 5 (Counter-Mem. Tab H). Professor Elizabeth Warren explains this distinction, which claimants continue to obscure:

> If a company has no explanation for its filing other than a shrinking market, a tangled business operation, and a string of bad business decisions that it has no coherent plan to correct, the company may not survive a Chapter 11 filing. In such a case, Chapter 11 will give the company a last chance to straighten out before it is liquidated or sold. But if the company can identify an isolated problem that it can credibly expect to cure, the Chapter 11 filing is understood as a reasonable business strategy that has a high likelihood of success.

Warren Statement at 7 (U.S. Jurisdictional Mem. Tab E).

Claimants have insisted throughout this case that Loewen, at the time of the O'Keefe litigation, was not a deteriorating business suffering serious operational difficulties, but was instead an otherwise thriving company faced with a single, non-operational crisis: the threat of execution on a substantial judgment that was "virtually certain" to be reversed on appeal. See, e.g., TLGI Jurisdictional Sub. addendum B; Joint Reply at 200. If so, then claimants' authorities, which generally address the dangers, costs and complexities of Chapter 11 reorganization for troubled companies facing operational crises (which are the majority of companies that file for

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[91](...continued)
805 F.2d 351, 356 (10th Cir. 1986) (assuming that company facing bankruptcy "would likely collapse"). Sir Robert Jennings makes the same mistake when he misconstrues Loewen's decision to settle the litigation as a choice "between accepting the terms of the settlement or going into *liquidation*." First Jennings Op. at 16 (emphasis added). Significantly, claimants' "last word" on the subject comes from a note written by a law student having no experience (let alone expertise) with the realities of reorganization filings, and which predates the U.S. Supreme Court's decision in the Pennzoil v. Texaco case. See Joint Reply at 198 (quoting Gary Stein, Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?, 61 N.Y.U. L. Rev. 463 (1986) (law student note addressing Second Circuit's decision in Texaco v. Pennzoil before reversal by the U.S. Supreme Court)).

Chapter 11 protection) are irrelevant to the circumstances that claimants contend existed as of January 1996.[92] For Loewen, at the time, a Chapter 11 filing "would have been a highly organized, planned and strategic filing executed for the sole purpose of prosecuting what Loewen believed to be a successful appeal . . . without the necessity of posting a supersedeas bond . . . ." Supplemental Trost Declaration at 5.[93]

Second, the parties' disagreement over the extent to which Loewen could have continued its acquisitions program while under reorganization protection is largely academic, as claimants' lone bankruptcy expert concedes a more fundamental point: that Loewen's core business of owning and operating funeral homes "would have continued virtually uninterrupted during Loewen's Chapter 11 cases." Sworn Declaration of Kenneth N. Klee at 8-9. At the very worst, therefore, Loewen could have continued to operate its core business – which, according to claimants, was profitable at the time – without interruption while Loewen's appeal proceeded in the Mississippi Supreme Court. According to Joel Blass, a former Justice of the Mississippi

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[92]For example, claimants rely on an empirical observation of Professors Bradley and Rosenzweig that "stockholders and bondholders of bankrupt firms suffer dramatically greater losses under the 1978 Act than previously," an observation that was directed toward the far more common Chapter 11 filings of deteriorating or operationally-challenged companies rather than a strategic filing of the sort contemplated by Loewen in 1995-96. Joint Reply at 197 (quoting Bradley & Rosenzweig, 101 Yale L. J. at 1049). In any event, this empirical observation, even with regard to Chapter 11 filings by failing firms, has since been discredited. See J. Bhandari & L. Weiss, The Untenable Case for Chapter 11: A Review of the Evidence, 67 Am. Bankr. L. J. 131 (1993) (criticizing Bradley & Rosenzweig's empirical observation as based on "vacuous" evidence).

[93]Claimants' assertion that a reorganization filing "would have been hurried" or "desperate," Joint Reply at 198 n.51, is fully belied by the record, which demonstrates that all of the documents necessary for Loewen's reorganization filing were completed by mid-December 1995 (more than a month before the Mississippi Supreme Court's final decision), and needed only to be walked over to the courthouse and filed. See U.S. App. at 0447-0594.

Supreme Court, the Court would have expedited the appeal and the whole matter "would have been over within a few months." Blass Statement at 14. Such a temporary cooling of the company's overly-aggressive acquisitions would hardly have been "devastating" to the company, as claimants now contend.[94]

The United States need not prove, nor need this Tribunal decide, whether Loewen's decision to forgo an appeal under the protections of corporate reorganization in favor of the settlement was a reasonable path for the company to take under the circumstances.[95] The

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[94]As the United States has already shown, Loewen was already in an extremely precarious financial condition of its own making before the O'Keefe jury rendered its verdict. See Counter-Mem. at 97-99. The unrebutted expert testimony on this subject, that of Steven Saltzman, confirms that this was so. See Declaration of Steven Saltzman, C.F.A. (Tab D to U.S. Jurisdictional Resp.). To the extent that Loewen would not have been able to continue with its overly-aggressive acquisition practices while under reorganization protection, that would only be so if those practices were (contrary to claimants' assertions) unsound to begin with. As one leading American jurist has explained, "[f]irms in reorganization go on as before; all operations with positive values are maintained; operations that are not continued in bankruptcy should not be continued outside it, either." Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 786 F.2d 794, 802-03 (7th Cir. 1986) (Easterbrook, J., concurring). Claimants cannot have it both ways.

[95]The United States demonstrated during the jurisdictional phase of this arbitration that there are compelling reasons to conclude that Loewen's decision to forgo this alternative was not reasonable under the circumstances. See, e.g., U.S. Jurisdictional Resp. at 61-74. Claimants have offered a post-hoc theory that the reorganization option was made unreasonable by a supposed threat that O'Keefe might somehow take control of Loewen in bankruptcy, a theory which, as the United States has already shown, is frivolous. See Supplemental Trost Declaration at 12-18. In their Joint Reply, claimants, through their expert Mr. Klee, identify two new cases as support for this absurd "takeover" theory. See Joint Reply at 197-98; Sworn Supplemental Declaration of Kenneth N. Klee at 3-4) (citing the Texaco and Marvel Entertainment Group bankruptcies). Both cases are inapposite to the Chapter 11 reorganization filing that Loewen would have made in January 1996. For example, Mr. Klee fails to mention that Texaco's settlement with Pennzoil came *after* Texaco had already largely failed in the appellate courts and thus faced significantly worse prospects than Loewen for success on appeal. See Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987) (remitting judgment only from $10.53 billion to $8.53 billion); Declaration of Harvey R. Miller at 10. In the Marvel Entertainment case, a trustee (continued...)

question presented is not whether the course actually chosen by Loewen was reasonable, but whether claimants have met their heavy burden to prove that the alternatives Loewen did *not* pursue were manifestly ineffective or obviously futile. See U.S. Jurisdictional Resp. at 32-37; Counter-Mem. at 77-78. Even assuming that Loewen's choice to settle in lieu of continuing with the appeal under reorganization protection was reasonable, the decision to forgo one reasonable alternative in favor of another perceived to be less costly is nothing more than a business decision, and not one made under "economic duress."

4. An Unbonded Appeal Was A Reasonable Alternative For Loewen, As Execution Was Neither Imminent Nor Likely

The United States has demonstrated that, at the time of settlement, any "threat" of attachment of Loewen's assets was, at best, remote and theoretical, both as a matter of fact and as a matter of law. Claimants have not rebutted this showing.

The relevant facts are undisputed. That is, claimants do not dispute that, at the time of settlement, O'Keefe had taken no steps towards executing the judgment in any state outside Mississippi. They also do not dispute that, within Mississippi (where Loewen had a relatively insignificant portion of its assets), O'Keefe had enrolled the judgment in only fourteen of eighty-two Mississippi counties. Nor, apparently, do claimants dispute that, even within those

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[95](...continued)
was appointed only after the debtor's management had already been replaced post-filing at the behest of large and sophisticated institutional bondholders, and only after irreconcilable acrimony developed between the new management and the company's bank lenders. See In re Marvel Entertainment Group, Inc., 140 F.3d 463, 471 (3d Cir. 1998) (new, post-filing management's lack of "extensive familiarity with the company's operations" militated against the usual "strong presumption against appointing an outside trustee"). In contrast, Loewen's then-existing management would have been firmly in place as debtor-in-possession and, as the record makes clear, would have enjoyed the full support of the company's lenders in opposing O'Keefe's claim. See, e.g., Supplemental Trost Decl. at 8-9, 17-18.

Mississippi counties where the judgment was enrolled, no evidence suggests O'Keefe (or his contingent-fee counsel) would have been willing or able to pay any "sheriff's bond" required to secure attachment of assets. See generally Counter-Mem. at 89, 91.

Even more fundamentally, claimants offer no evidence to dispute the United States' showing that the threat of a "wrongful execution" claim would have prevented O'Keefe from executing on the judgment during the pendency of Loewen's appeal (which had already been filed at the time of settlement).[96] Nor could they. The record is clear that all counsel – Loewen's and O'Keefe's– viewed the damages verdict as potentially subject to reversal on appeal (Loewen's lawyers thought reversal was a "certainty"). As Joel Blass, O'Keefe's counsel during the bond proceedings and a former Mississippi Supreme Court Justice, has stated:

> I was of the opinion, and so informed Mr. O'Keefe, that while the case on the issue of liability was so strongly made that I felt very confident that it would stand, a remand on the damages issue was a definite possibility. In such circumstances, the chances of Mr. O'Keefe or anyone else risking their own personal liability to execute on unbonded assets during the appeal are simply negligible. *I know that Jimmy Robertson [Loewen's lawyer] understood this.*

Blass Statement at 11-12 (emphasis added); see also U.S. App. at 0601 (Loewen's lawyers stating they were "convinced" O'Keefe's counsel "kn[e]w" the verdict could not "be sustained on the basis of the record at trial").

To support their contrary argument – i.e., that the threat of execution was imminent – claimants cite Mr. Gary's hyperbolic statement to the press that he would "take over . . . the

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[96]Claimants' only argument on this point is their statement that a "retrospective remed[y] for 'wrongful execution' . . . would have little practical significance to a publicly traded company like Loewen." See Joint Reply at 191-92. But the relevance of a "wrongful execution" claim is not that Loewen, in the event of reversal, might recover damages for wrongfully-seized assets, but that the specter of such a claim would prevent O'Keefe from even attempting to seize company assets in the first place.

business" and "start embalming" if Loewen failed to obtain supersedeas. See Joint Reply at 188. But Loewen knew any such "threats" were idle.[97] Again, as Justice Blass has stated:

> [E]ven if [O'Keefe] had wanted to start execution immediately, the process to obtain execution on assets is not easy, and takes a good bit of time. We were not ready to execute on Loewen's assets at the time, and I am aware of no specific plans to go forward. Based on my conversations with Loewen's counsel, Loewen either knew or should have known that.

Blass Statement at 12. The record is thus clear that, at the time of settlement, there was no real "threat" that O'Keefe would execute on the judgment pending Loewen's appeal (and Loewen knew as much). There is no credible evidence to suggest otherwise. This alone defeats claimants' allegation of duress.

But even assuming – contrary to the record evidence, as well as common sense – that O'Keefe *would* have attempted to execute on the judgment pending appeal, the United States' expert Jack Dunbar's (unrebutted) testimony makes clear that Loewen "could still have had an effective strategy (excluding settlement) to seek an expedited appeal before the Mississippi Supreme Court while making execution upon the judgment more difficult and costly for the O'Keefe Plaintiffs pending appeal." See Statement of Jack Dunbar, Esq. ("First Dunbar Statement") at 15 (attached at Tab F to Counter-Mem.).

Claimants' only response to Mr. Dunbar is their contention that, under the Uniform Enforcement of Foreign Judgments Act ("UEFJA"), execution would have been "speedy" outside the State of Mississippi. See Joint Reply at 188-90. But claimants never really address the heart of Mr. Dunbar's point, i.e., that, under § 4(b) of the UEFJA, Loewen (i) could have sought a stay

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[97]It is quite clear that Loewen's lawyers took Mr. Gary's posturing during settlement negotiations with the proverbial grain of salt. See, e.g., U.S. App. at 0601 (advising that Mr. Gary's settlement posturing be treated "as nothing more than what it is – a negotiating strategy").

in any foreign state where O'Keefe sought to execute under the *foreign* state's laws, and, (ii) could have argued that any statutorily-prescribed bond be reduced for cause (including as a matter of federal due process), or be limited to the amount of its assets within the foreign state. See Counter-Mem. at 92 & n.60; First Dunbar Statement at 12-13.[98]

At the time of the underlying events, Loewen's lawyers knew they would have an obvious "tactical advantage" if O'Keefe's "'contingent fee counsel'" were forced to "'litigate in far reaching and unfriendly forums on multiple fronts.'" See Counter-Mem. at 94 (quoting U.S. App. at 0652). That is precisely what Loewen would have achieved by seeking stays in every jurisdiction outside Mississippi where O'Keefe might have sought to execute. See First Dunbar Statement at 14 (seeking stays "would have given Loewen a formidable tool and a reasonable basis to continue its appeal without supersedeas in the post-verdict phase of the litigation.").

Thus, while claimants say the notion of appeal without supersedeas lacks "real-world perspective," see Joint Reply at 191, it is claimants who blink at reality. At the time of the settlement, Loewen's lawyers knew (or should have known) that any risk of execution pending appeal, in any degree, was exceedingly remote. They also knew (or should have known) that, under the UEFJA, they had avenues for staying or otherwise delaying any attempted execution

[98]Claimants plainly misunderstand the UEFJA stay provision, asserting that Loewen could only have obtained a stay by showing the Mississippi courts lacked jurisdiction, that the O'Keefe judgment was procured by fraud, or that the judgment was void. See Joint Reply at 191. This, of course, is the standard for denying "full faith and credit" to a sister-state judgment, not the standard for obtaining a UEFJA stay. See Statement of Drew S. Days, III, at 44-45 (explaining full faith and credit standard and noting that, assuming the truth of claimants' factual allegations, Loewen would have had a viable argument that the O'Keefe judgment was void as a matter of Mississippi law).

during the company's appeal.[99] In the words of Mr. Dunbar, Loewen's failure to pursue an unbonded appeal or avail itself of other reasonable options "makes one wonder if its decision to settle was based on reasons not otherwise apparent from the record." See First Dunbar Statement at 15.

V. FURTHER COMMENT ON THE EFFECT OF NAFTA ARTICLE 1121

From their continued argument that NAFTA Article 1121 waives the local remedies rule, claimants make a further and unsupported leap that an erroneous lower court decision is not only attributable to the state, but may also be internationally wrongful, regardless of whether a domestic appeal was available from the decision in the first instance. In so arguing, however, claimants fundamentally misconstrue established principles of state responsibility, as well as Article 1121 itself, a jurisdictional provision that can have no application to the merits of this (or any other) denial of justice case. Moreover, even if Article 1121 could be construed as relevant because of its impact on the local remedies rule, the Article still would have no effect on the outcome of this proceeding. Article 1121 does not waive the local remedies rule with respect to denial of justice claims.

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[99]Even putting aside the UEFJA stay provision, the process to obtain execution on assets "is not easy, and takes a good bit of time." Blass Statement at 12. To execute the judgment outside Mississippi, O'Keefe, at a minimum, would have had to determine the location of Loewen's out-of-state assets; enroll the Mississippi judgment in the appropriate out-of-state counties; serve notice of enrollment on Loewen; pay any applicable "sheriff's bonds"; and, in the states where Loewen was most worried about execution, wait a proscribed period of time (usually 20-30 days) before commencing execution. See Counter-Mem. at 91-92 & n.59; see also Ga. Code Ann. 9-11-62(a); Tex. R. Civ. P. 627. These seemingly minor delays would have been critical in an appeal that "would have been over within a few months." See Blass Statement at 14.

A. NAFTA Article 1121 Is Irrelevant To The Outcome Of This Case

Claimants devote a substantial portion of their Joint Reply to a discussion of NAFTA Article 1121 and its alleged effect on the local remedies rule. See Joint Reply at 160-72. Claimants' discussion, however, is beside the point. For at least two reasons, the question of whether or to what extent NAFTA Article 1121 waives the local remedies rule is irrelevant to the outcome of this case.

First, Loewen's waiver of this claim through the settlement agreement renders NAFTA Article 1121 irrelevant here. This point does not appear to be in dispute, as claimants concede that, if Loewen's settlement waived this claim, claimants must prove that they are entitled as a matter of international law to avoid the effect of the settlement on the ground of "economic duress." See Joint Reply at 179-80. The United States agrees with claimants that, if such a defense is even recognized under international law at all, the relevant analysis is the same as it would be under the principles of "finality" or "exhaustion," as "[t]he standard [of economic duress] is manifestly no different from that prescribed by the . . . 'local remedies rule' . . . ." Joint Reply at 182. As the United States has shown (without contradiction), that standard is a strict one and imposes a heavy burden on claimants to prove the unavailability of an appeal "so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before [the] courts." Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9, 39 (separate opinion of Judge Lauterpacht) (emphasis added).[100]

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[100]See U.S. Jurisdictional Resp. at 32-37; Counter-Mem. at 77-79 see also, e.g., C.F. Amerasinghe, Local Remedies in International Law 195 (1990) ("[T]he test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests."); Dubai-Sharjah Border Arbitration (1981), 91 I.L.M.

(continued...)

Second, as the United States has explained, NAFTA Article 1121 is a jurisdictional provision that has nothing to do with the substantive law applicable to the merits of this (or any other) case under NAFTA Chapter Eleven. See Counter-Mem. at 108-111. In support of their contrary view, claimants rely largely on the opinion of Sir Robert Jennings, who professes to know of no authority for the view that the local remedies rule is distinct from the substantive law governing the merits of denial of justice claims. See Third Jennings Opinion at 21-22. But Sir Robert need look no further than the prominent treatise of which he is an editor, which states emphatically that "*[t]he local remedies rule has to be distinguished from a requirement . . . that, as a matter of substantive obligation, a state must provide for recourse to an independent tribunal to adjudicate upon civil rights and obligations*." Sir Robert Jennings & Sir Arthur Watts, Oppenheim's International Law 525 n.8 (9th ed. 1992) (emphasis added).

In fact, as Sir Robert acknowledged in his treatise but fails to acknowledge here, the distinction between the local remedies rule and the substantive rules of state responsibility for denial of justice is well established. In addition to the supporting sources that the United States has already identified in this proceeding, Professor James Crawford, Special Rapporteur to the International Law Commission ("ILC") on state responsibility, recently observed that "[t]here are . . . cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and *an aberrant decision by an official lower in the heirarchy, which is capable of being*

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[100](...continued)
543, 569 (1993) ("[I]t is manifestly clear that any allegation of duress, of whatever kind, which is alleged to vitiate consent must be the subject of very precise proof.").

reconsidered, does not of itself amount to an unlawful act."[101] Professor Crawford's discussion makes clear that this principle – which reflects essentially the same substantive law principle on which United States relies in this case – is independent of the local remedies rule. Id.

Professor Greenwood explains this point – and Sir Robert's error – in greater detail in his attached Second Opinion. As Professor Greenwood makes clear, much of the confusion over the relationship between the local remedies rule and the substantive rules of state responsibility for denial of justice stems from statements in earlier ILC drafts of the 1970s that have since been discredited. See Second Greenwood Op. at ¶¶ 50-62. This earlier view, which equated the local remedies rule with substantive law, "was heavily criticised both by governments and by commentators" and no longer reflects the accepted doctrine, which recognizes that the local remedies rule is a purely procedural rule that is independent of the substantive merits of any international claim. Id.[102]

The United Kingdom, which was a leading critic of the now-discredited view, explained in its 1996 comments to the ILC draft articles why it is important to maintain the distinction between the local remedies rule (as a matter of procedure) and the substantive rules in certain types of cases "in which unsuccessful recourse to the local courts is indeed necessary in order to

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[101]James Crawford, Special Rapporteur, Second Report on State Responsibility, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999) at ¶ 75 (emphasis in first sentence in original; emphasis added in second sentence).

[102]Professor Greenwood respectfully points out that this Tribunal, in paragraph 67 of its January 5, 2000 Decision on Competence in this case, relied on ILC materials reflecting the earlier, discredited view. See Second Greenwood Op. at ¶ 52. Professor Greenwood thus concludes (and the United States agrees) that the Tribunal must not have intended its decision on competence to have decided that the substantive merits of this claim are subsumed within the local remedies rule because, among other things, "the decision which Loewen asserts the Tribunal took would clearly have been wrong in international law." Id. at ¶ 57.

'complete' the violation of international law."[103] Because there are certain international obligations "where the breach arises only after a definitive position is taken by the courts or other organs of the State. . . , [t]he recourse to 'local remedies' is in this context not at all of the same nature as recourse to local remedies as a procedural precondition" for presentation of a claim on the international plane.[104] Whether or not an international agreement waives the local remedies rule, therefore, is irrelevant to the merits of such claims, for which the exhaustion of local remedies is a *substantive* requirement independent of the local remedies rule. See Second Greenwood Op. at ¶ 54.

As the United States has shown, and as we confirm below, the breaches alleged by claimants in this case are precisely of the sort described by the United Kingdom in its 1996 comments: instances "where the breach arises only after a definitive position is taken by the courts . . . of the State." See Counter-Mem. at 124-30; infra at 106-111. As such, the question of whether "a definitive position" was in fact taken by the courts of the United States in the O'Keefe litigation remains at the heart of this case, regardless of whether or to what extent NAFTA Article 1121 waives the local remedies rule.

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[103]UK Materials on International Law, 69 B.Y.I.L. (1998) 558-59 (quoted in Second Greenwood Op. at ¶ 53).

[104]Id.

B. Even If The Local Remedies Rule Were Relevant To The Substantive Merits Of NAFTA Chapter Eleven Claims, The Rule Is Presumed To Apply Absent Unequivocal Waiver

There is no support for claimants' startling suggestion that States, by the mere fact of permitting investors to assert claims under international law against them directly in arbitration, granted investors *greater* rights than States themselves have under international claims law. Claimants' assertion is that, although States remain limited by the local remedies rule in asserting claims based on injuries to their nationals against other States, investors are not limited by that rule or, for that matter, any other principle of international claims law. See Joint Reply at 166-69.

Claimants claim to find support for their theory in legal history: international claims law developed in an "'earlier and very different period of international law'" in which diplomatic protection was the most common method of presenting international claims, and such "relic[s] of a bygone era," claimants assert, have no application in the modern era of investor-State arbitration. See Joint Reply at 166, 168. Therefore, claimants conclude, even if the United States is correct that Article 1121 does not unequivocally waive the local remedies rule with respect to denial of justice claims, the rule has no application here in any event because of the mere fact that the NAFTA permits individuals to assert claims directly against states. See id. at 166 (quoting Third Jennings Op. at 8); id. at 168.

Modern State practice, however, does not bear out claimants' theory that the local remedies rule is irrelevant when individuals assert international claims directly against States. As Professor Greenwood observes:

> all of the major human rights conventions, which between them have created much the largest scope for individuals to bring claims before international

> tribunals (dwarfing ICSID in this regard), have made exhaustion of domestic remedies a requirement for bringing such a claim.
>
> . . . .
>
> Indeed, what the human rights treaties demonstrate is that the expansion of the jurisdiction of international tribunals so as to permit individuals to bring cases in their own right rather than having to rely upon the diplomatic protection of their State of nationality makes the local remedies rule more, not less, important.

Second Greenwood Op. ¶¶ 29-31 (citing European Convention on Human Rights (1950), International Covenant on Civil and Political Rights (1966), American Convention on Human Rights (1969) and Convention against Torture (1984)); see generally id. ¶¶ 20-44.

Neither is there a basis for concluding that principles of international claims law such as the local remedies rule are somehow inappropriate in the specific context of investor-State arbitration. To the contrary, the preparatory work of the ICSID Convention indicates that investor-State arbitration merely allows investors to assert the same international claim that States could have asserted in exercising diplomatic protection, subject to the same requirements of international claims law governing claims by States. For example, Aron Broches, the ICSID Convention's principal drafter, explained that, "by giving the investor the right to go before a tribunal, and by providing for the surrender of the right of diplomatic protection [in Article 27 of the ICSID Convention], the Convention implied that *the investor would have the same right as his Government* would have had if it had come before the tribunal on his behalf." 2 ICSID, Documents Concerning the Origin and the Formulation of the Convention 259 (1968) (emphasis added).[105]

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[105] See also id. at 241 (principal aspect of Convention was "firstly, recognition of the principle that a non-State party, an investor, might have direct access, in his own name and without requiring the espousal of his cause by his national government, to a State party before an (continued...)

In particular, Mr. Broches expressly disavowed the notion that the local remedies rule was inappropriate in investor-State arbitration:

> while the Convention implied a recognition that local courts were not necessarily the final forum for the settlement of disputes between a State and a foreign investor, it did not imply that local remedies could not play a major role. When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted to arbitration under the Convention.

Id. at 241.[106] As the Report of the World Bank's Executive Directors notes in the sentence immediately following that quoted in the Joint Reply (at 168), the ICSID Convention was drafted "to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc. No. 2, at 11 (1965). Thus, the history of the ICSID Convention – the instrument at the origin of investor-State arbitration as such – does not support claimants' hypothesis as to the irrelevance of international claims law in general or the local remedies rule in particular.

Finally, the cases cited in the Joint Reply (at 167-68) do not support the contrary proposition. The decision of the Chilean Claims Commission, established under the Convention

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[105](...continued)
international forum. States, in signing the Convention would admit that principle, *but only the principle*.") (statement of Mr. Broches) (emphasis added); id. at 420 (defending choice-of-law provision of ICSID Convention as appropriate for investor-State arbitration because "experience had shown that international arbitral tribunals had not in the past encountered insuperable difficulties and had in fact applied international law as if the national government of the individual concerned had espoused his case") (statement of Mr. Broches).

[106] See also id. at 431 ("[I]f it were felt that the present draft implied that the prior exhaustion of local remedies was undesirable per se the wording would call for reconsideration.") (statement of Mr. Broches).

of August 7, 1892, in the Trumbull case does not provide an example of "an arbitration agreement [that] guarantees claimants access to international panels," as the Joint Reply erroneously contends (at 167). To the contrary, that commission expressly *barred* any direct access by private claimants to proceedings before it. See 2 Moore's International Arbitrations 1473-74 (commission directed brief filed by private counsel "to be withdrawn, and ordered that in the future the briefs of private counsel be considered by the board only when it appeared that they were presented with the approval and upon the responsibility of the agent of the government in behalf of whose citizens the claim was filed."). The Trumbull case, like the others cited by claimants, simply represent instances early in the formation of the local remedies rule when tribunals construed the claims agreements in question to explicitly or implicitly waive recourse to local remedies. As the Tribunal has already found, cases where "the relevant treaty waived exhaustion" provide no guidance for the issue before this Tribunal as to whether Article 1121 of the NAFTA waives the local remedies rule with respect to denial of justice claims. Loewen, Decision on Competence, at ¶ 65; see also id. at ¶ 73 (noting general rule that exhaustion is required unless waived by "words making clear an intention to do so" or "express provisions which are at variance" with exhaustion requirement).

A final word is warranted regarding claimants' discussion of the Headquarters Agreement case, which the Tribunal asked the parties to discuss. According to claimants, "the Headquarters Agreement decision did not rest in any way on the presence, or absence, of an individual alien claimant." Joint Reply at 166. As the United States has already shown, however, that is precisely what the decision rested on, and that is precisely why the case is irrelevant to these proceedings. See Counter-Mem. at 114-17.

If there were any doubt on this point (and international law is so clear that there could not be), that doubt was fully resolved earlier this year, when Professor John Dugard, a Special Rapporteur to the International Law Commission, wrote specifically that the Headquarters Agreement case was an illustration of the principle that the local remedies rule applies to cases involving injury to aliens but "does not apply where the claimant State is directly injured by the wrongful act of another State."[107] As Professor Dugard observed, the Headquarters Agreement case was an example of the latter circumstance in which, because there was no injury to an alien, the local remedies rule was inapplicable.[108] The present claim, in contrast, falls squarely in the former category in which the injury is to the alien, not to the state directly. As Professor Dugard's discussion makes clear, the local remedies rule is presumed to apply in such circumstances unless unequivocally waived.[109] And, as Professor Greenwood confirms, "Article 1121 [of the NAFTA] does not manifest such a clear intention in respect of claims derived from

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[107]John Dugard, Second Report on Diplomatic Protection, International Law Commission, 53d Sess., U.N. Doc.A/CN.4/514 (2001) at ¶ 18.

[108]Id. at ¶ 27.

[109]Sir Robert Jennings' discussion of investor-state agreements in which the local remedies rule is presumed to be waived is similarly inapposite. See Third Jennings Report at 16-17. Contrary to Sir Robert's assertion, the ICSID Convention is *not* applicable here, as this case is proceeding under the ICSID's Additional Facility. See ICSID Additional Facility Rules, art. 3 ("[s]ince the proceedings [under the Additional Facility] are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."). Unlike the circumstances envisioned by Sir Robert's comments, the State has not directly agreed with the investor to arbitration, as there is no privity between the United States and Loewen. Rather, the only agreement (as such) is that among the NAFTA Parties themselves, by which each Party agreed with the others to consent to submission of claims to international arbitration under specified circumstances and conditions. There is thus no basis for presuming an intent that arbitration was to the exclusion of any other remedy, as there is when a State and an investor agree directly to arbitration as the exclusive means of resolving disputes between them.

a judicial decision which is open to appeal or other challenge." Second Greenwood Op. at ¶ 42; see also Counter-Mem. at 111-14.

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

As the United States fully demonstrated in its Counter-Memorial, claimants have failed to sustain their burden of proving that the Mississippi courts breached any of NAFTA Chapter Eleven's substantive obligations. See Counter-Mem. at 117-186. Despite the length of their Joint Reply, claimants have offered nothing to change this result. Instead, claimants have only confirmed that this claim is, in reality, little more than an attempt to obtain the appellate review that Loewen elected to forgo in the Mississippi courts, and to seek to hold the United States liable for a host of private actions, including Loewen's own. As we have shown, and as we confirm below, claimants' efforts find no support in the NAFTA or customary international law generally.

A. The United States Is Not Responsible For The Alleged Acts Of Mr. O'Keefe, His Counsel, Or His Witnesses

It is beyond dispute that, under established rules of international law, states are responsible only for *official* action or inaction, and not for the acts of private individuals.[110] Despite this settled principle, claimants and their experts devote the vast majority of their complaints to the alleged acts of O'Keefe, O'Keefe's counsel, or certain witnesses during the trial – including O'Keefe's advertising campaign, the testimony of Mike Espy and Jerry O'Keefe, and

[110] See, e.g., Restatement (Third) of Foreign Relations Law § 207, comment c ("the state is not responsible for injuries caused by private persons that result despite [reasonable] police protection"); id. at § 711; David J. Bederman, Contributory Fault and State Responsibility, 30 Va. J. Int'l L. 335, 346 (1990) ("State responsibility is only engaged when an act or omission is attributed to a state.").

countless remarks of O'Keefe's counsel – all private individuals for whom the United States is not responsible as a matter of law. Indeed, claimants take this effort to new heights in their Joint Reply, where they seek to attribute to the United States a lecture given by Willie Gary long after the O'Keefe litigation had been settled, in which Mr. Gary delivered a mock closing argument different from the one he gave during the trial. See Joint Reply at 35, 66. As Professor Greenwood explains,

> [t]he counsel for a private party appearing in civil litigation in a court are not organs of the forum State and that State is not responsible for their conduct. I accept that the conduct of Judge Graves is imputable to the United States, so that Loewen is entitled to argue that responsibility arises for what Loewen characterises (wrongly, in my view) as his failure to control the counsel in his court but that is an entirely different matter from holding the United States responsible for the behaviour of counsel themselves. It is important that the two should not be confused. . . . Unfortunately, they are so confused in the *Loewen Reply*, which at times treats them as interchangeable.

Second Greenwood Op. at ¶¶12-13.[111] Notwithstanding claimants' efforts to blur this important distinction, it should go without saying that any responsibility of the United States in this case is limited only to those acts or omissions for which it can be held responsible under international law.

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

In the face of overwhelming record evidence to the contrary, claimants continue to assert that "the *O'Keefe* litigation was precisely the sort of discriminatory and biased judicial proceeding that is condemned by NAFTA Article 1102 . . . ." Joint Reply at 78. Claimants' assertion is premised on a fundamental distortion not only of the underlying record of the

[111] See also Jennings & Watts, Oppenheim's International Law at 501 n.13 ("The state is in international law not legally responsible for the act [of a private person] itself, but for its own failure to comply with obligations incumbent upon it in relation to the acts of the private person: those acts are the occasion for the state's responsibility for its own wrongful acts, not the basis of its responsibility.").

proceedings, but of Article 1102 itself and the few decisions of NAFTA tribunals that have construed the provision. As confirmed below, claimants cannot possibly establish, on the record of this case, anything even approaching a violation of NAFTA Article 1102.

1. The United States Does Not "Concede" A Violation Of Article 1102

Claimants contend that the United States, through one of its experts, Professor Richard Bilder, "concedes" that the Mississippi courts' treatment of Loewen violated NAFTA Article 1102's requirement of national treatment to investors in like circumstances. See Joint Reply at 79. According to claimants, the United States has accepted that the Mississippi courts acted as they did simply because Loewen was "non-local." Id. at 80. In so arguing, claimants fundamentally misconstrue both Professor Bilder's statement and the United States' position, as well as the claims at issue in the O'Keefe litigation.

As Professor Bilder explained, it is true that Loewen's "non-localness" played some role in the ultimate verdict, but not, as claimants contend, for its own sake nor in any way prohibited by NAFTA Article 1102. Rather, a key issue in the O'Keefe litigation concerned Loewen's deliberate misrepresentation of the Riemann funeral homes as "locally owned," a misrepresentation intended to mislead consumers of death-care services to believe that they were dealing with a trusted member of their local community. The significance of this issue was thus not simply that Loewen was "non-local," but that Loewen, which traded in a business for which local community connections are of paramount importance, misrepresented itself as "local." As Professor Bilder suggests, any death-care company that engaged in such wilful misrepresentation would have received the same treatment. See Bilder Opinion at 9-11.

In fact, jurisdictions other than Mississippi – and indeed other than the United States – have expressed disapproval of the very practice at issue here. In the United Kingdom, for example, a recent report of the U.K. Office of Fair Trading on the "sharp practices in the funerals industry" found that "customers can be misled by the continued use of established local trading names by funeral parlours that have been bought by large chains." K. Brown, Watchdog Undertakes to Clarify Cost of Dying, Financial Times (July 27, 2001) (citing SCI and Loewen as examples) (U.S. App. at 1346). Similarly, after SCI (Loewen's principal competitor) launched an aggressive acquisitions campaign in England in 1995, the U.K. Monopolies and Mergers Commission ordered the company "to disclose publicly its ownership of funeral businesses it took over." B. Hills, Foreign Bodies, Sydney Morning Herald at 1 (Aug. 2, 1997) (U.S. App. at 1334-37) (noting the mounting criticism of similar practices in Australia).[112]

One particularly helpful illustration of this point is an investigation into the practices of the death-care consolidators that aired on February 1, 1998, on the CBS television news program "60 Minutes," a highly-respected television news program in the United States. That investigation, entitled "The High Cost of Dying," exposed the consolidators' broad practice of misrepresenting the ownership of their funeral homes as "local" in order to deceive consumers, as well as their practice of dramatically raising prices on death-care services. See U.S. App. at 1265-74. Significantly, although the investigation is very critical of these practices, no mention of nationality is made at any point in the program; indeed, the primary focus of the investigation is SCI, an American company. The United States has supplied the Tribunal with copies of a

[112]See also, e.g., U.S. App. at 0065, 0072 (New York commission recommending requirements of disclosure of ownership of funeral homes to prevent consumer deception); id. (noting that Massachusetts law requires disclosure of funeral home ownership).

videotape of the "60 Minutes" investigation, along with a transcript of the program. See U.S. App. at 1265-73, 1274. We encourage the Tribunal to view this videotape, as it illuminates some of the same practices at issue in the O'Keefe litigation and, of at least equal importance, makes clear that nationality had nothing to do with the O'Keefe jury's understandable disapproval of Loewen's conduct.

2. Loewen and O'Keefe Were Not "In Like Circumstances"

Claimants do not dispute that the national treatment obligation under NAFTA Article 1102 is only a relative one, and that it is their burden to establish that they and/or their investments, when compared to U.S. investors or investments *in like circumstances*, received treatment that was *less favorable*. Claimants also acknowledge that this determination "must depend on all the circumstances of each case." Id. (quoting S.D. Myers, Inc. (U.S.) v. Canada, (Partial Award) (Nov. 13, 2000) at ¶ 244); see also Pope & Talbot, Inc. v. Canada, (Award on the Merits, Phase 2) (Apr. 10, 2001) at ¶ 75 ("By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."). Claimants then proceed to ignore this very limitation and purport to derive a general rule, from the findings of other tribunals involving entirely different circumstances, that "all investors or investments that compete in the same business or economic sector" are necessarily in "like circumstances" in all cases and that, therefore, Loewen and O'Keefe were in "like circumstances" for purposes of NAFTA Article 1102. See Joint Reply at 84-85. Claimants' position is absurd on its face.

According to claimants' view, any civil lawsuit between competitors in the same business would involve investors in "like circumstances" with respect to their treatment by the court in which their case was being tried. If this were correct, then any civil lawsuit where the parties are

of different nationalities – "litigation competitors," as claimants call them; see Joint Reply at 85-86 – would necessarily result in a violation of NAFTA Article 1102 whenever the foreign party loses. The losing foreign party in every such lawsuit would thus claim that it was accorded less favorable treatment than its domestic rival, as the prevailing party, by definition, would have received more favorable treatment by the court. Claimants' positing of O'Keefe as the relevant investor for purposes of comparison – which ignores the "circumstances" (i.e., civil litigation) in which the investors must be "like" – is readily seen as frivolous.[113]

As the United States has suggested, the only meaningful comparison under the circumstances of this case is to inquire how any company in Loewen's situation (e.g., a death-care company accused of bad faith and monopolistic practices on a broad scale) would have fared in the same litigation, regardless of its nationality. In other words, what would have been the result of the litigation if Loewen, all other things being equal, had been a Mississippi corporation? Former Justice Blass puts the point succinctly: "Any Mississippi corporation in Loewen's shoes, owning what [Loewen] owned, trying to dominate the market, to control the business of death, would have faced the same or a similar outcome." Blass Statement at 5.[114]

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[113]Both Pope & Talbot and the S.D. Myers tribunal – the purported sources for claimants' proposed "general rule" – involved measures of general application and thus were both very different from the dispute before this Tribunal. As far as the United States is aware, no international tribunal has ever examined a claim of a violation of a national treatment obligation in the context of a civil jury award.

[114]According to claimants, it is not enough that Loewen received exactly the same treatment that any investor from any other state of the United States, or even from another location in Mississippi, would have received. See Joint Reply at 80 (quoting Bilder Op. at 8). Rather, claimants contend that Loewen was entitled to the same treatment that a similarly situated "local" investor would have received. But claimants once again misconstrue the claims at issue in the case. As already noted, one important aspect of the case involved Loewen's misrepresentation of its funeral homes as "locally owned." A "local investor," by definition,

(continued...)

3. Loewen Did Not Receive Treatment "Less Favorable"

As the United States has already shown, the record of the O'Keefe litigation, contrary to claimants' grossly distorted presentation of it, provides no basis for the allegation that the jury or the Mississippi courts were motivated in any way by an "anti-Canadian" bias. See Counter-Mem. at 21-25; supra at 8-14. Claimants make no claim (nor could they) that Loewen was denied the same broad array of procedural rights and protective mechanisms afforded to all litigants, regardless of nationality, to present their cases as they see fit. Cf. Landsman Statement at 16-33. And, as the international disapproval of certain practices in the death-care industry suggests (see supra at 99; Counter-Mem. at 141), the outcome of the litigation would have been no different had Loewen been a Mississippi corporation. In short, Mr. Blass is entirely correct to conclude that, "if Loewen had been a Jackson, Mississippi, company, the result would have been the same." Blass Statement at 15.

At bottom, the claim of "unfavorable treatment" in this case is not based on the actions of the Mississippi courts – indeed, claimants' expert, Sir Ian Sinclair, concedes that there are no "demonstrable and significant indications of judicial bias on the basis of nationality in this particular case . . . ." Sinclair Op. at 13. Rather, claimants allege only that *O'Keefe's counsel*

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[114](...continued)
could not be accused of such a misrepresentation, as the representation would be accurate in such a case. Thus, with respect to the treatment of the issue of Loewen's misrepresentation in this respect, there can be no "local" investor in "like circumstances." See, e.g., Joseph de Pencier, 17th Annual Symposium Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven, 23 Hastings Int'l & Comp. L. Rev. 409, 413 (2000) ("If there are no domestic investors with which to compare a foreign investor, how can the foreign investor receive 'less favorable treatment' than, let alone be 'in like circumstances' with, domestic investors?"). In any event, under claimants' strict definition of what constitutes a "local" investor, see Joint Reply at 82, O'Keefe was no more "local" to the Hinds County jury than was Loewen, as O'Keefe is from the Gulf Coast region of Mississippi, not from Jackson.

appealed to nationalistic biases by supposedly "favoring" Loewen's local co-defendants, John Wright and David Riemann. See Joint Reply at 17-19. Whether O'Keefe's counsel did so or not is, of course, irrelevant because, as already noted (supra at 96-97), the United States is not responsible under the NAFTA or international law for the actions of O'Keefe's counsel, but instead only for the actions or inactions of the Mississippi courts.[115] As the record makes clear, the courts treated all of the defendants equally and made no distinction – whether in the proceedings or in the ultimate judgments – among the "local" Mississippi defendants, LGII or their Canadian parent. In fact, as Loewen itself acknowledged in its post-trial investigation, "John Wright, despite plaintiff counsel's repeated references to his being a 'fine man[,]' did not appear to be so highly regarded by the jury." U.S. App. at 1132.[116]

In any event, claimants' suggestion that O'Keefe's counsel somehow favored the local co-defendants (John Wright and the Riemanns), even if relevant, once again misconstrues the O'Keefe record and the claims at issue in the case. To the extent that O'Keefe attempted to put John Wright or the Riemanns in a sympathetic light, the record makes clear that O'Keefe did so not for the purpose of inflaming any alleged "nationalistic" or "local" bias on the part of the jury, but rather to address several points in dispute in the trial.

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[115]The practical goals of litigation further illustrate why claimants' effort to derive an "unfavorable treatment" claim from the actions of O'Keefe's counsel is baseless. In any civil litigation, it is the role of counsel to advocate zealously on behalf of his client, and specifically *not* to do the same for the opposing party.

[116]The reported comments of the interviewed jurors confirm this point. See e.g., U.S. App. at 1132 ("The Riemanns were generally regarded as participating in the trial to the extent necessary for preservation of their relationship with the Loewen Group."); id. at 1164 ("The Wright sale of pre-need insurance was wrong . . . ."); id. at 1165 ("David Riemann was a dunderhead.").

For example, one of the central issues in the case was Loewen's broad practice of misconduct in connection with its acquisition of smaller death-care companies. As O'Keefe showed at trial, Loewen's mistreatment of both John Wright and the Riemanns was an illustration of this very practice. Most notable in this respect were the "Riemann letters," which revealed that Loewen, after it had acquired the Riemann companies, badly mistreated the Riemann family and divested them of meaningful control of their businesses, leading the Riemanns to (privately) reconsider their affiliation with Loewen. See U.S. App. at 0962-69. As claimants' own source observes, "the jury reasoned that if Loewen treated its own partners that way, why would O'Keefe have fared any better?" A3101.

Claimants similarly misconstrue the significance of O'Keefe's counsel's description of John Wright as "an honorable man" who "told you the truth." Joint Reply at 18. Among the "truths" to which O'Keefe's counsel was referring was Mr. Wright's testimony that Loewen raised prices on the services of his funeral home immediately after Mr. Wright had sold it to Loewen, without Wright's knowledge or consultation, and that Loewen did so with every other acquisition of which Mr. Wright was aware. See Tr. 3072-73; 5548; see also Counter-Mem. at 46-47. O'Keefe's counsel was thus not attempting to appeal to any alleged "local" bias through his positive descriptions of Mr. Wright, but was instead reinforcing the point that Loewen consistently mistreated smaller companies – including Loewen's own so-called "regional partners" – in its aggressive pursuit of greater profits. Again, we can look to claimants' own source to explain the point, which had nothing to do with an appeal to any improper bias:

"[w]hile preaching homespun values and local control, Loewen's actions showed something else." A3101.[117]

John Wright also served to rebut Loewen's allegation that O'Keefe had not been forthcoming in his dealings with Loewen, an allegation that Loewen had made a centerpiece of its defense. See supra at 20-23. On cross-examination, Mr. Wright testified that he had known Jerry O'Keefe for many years and believed O'Keefe was an honorable man who always kept his word. See Tr. 3065-67. One of O'Keefe's counsel's obvious goals in its favorable treatment of Mr. Wright, therefore, was to reinforce this helpful testimony, and not to appeal to any "local" bias.[118]

In short, there is no basis for claimants' theory that the O'Keefe litigation, whether in whole or in part, "force[d] Loewen to incur a $175 million liability because it was Canadian."

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[117]To support their theory of O'Keefe's "favoring" the local defendants, claimants allege that witness Walter Blessey "was clearly coached to say that 'the O'Keefe companies and Gulf National have no quarrel with John Wright and have no quarrel with David Riemann. . . . The actions were taken by Mr. Ray Loewen.'" Joint Reply at 18 (quotations and ellipses in original). This allegation is yet another blatant distortion of the record, for the quoted language preceding claimants' ellipses, which claimants attribute to a "coached" Mr. Blessey, was in fact uttered by *Loewen's* counsel, not by Mr. Blessey. See Tr. at 721.

[118]O'Keefe's positive treatment of Mr. Wright also served other legitimate, strategic goals. For example, at trial, Loewen made much of the fact that O'Keefe, before Loewen's acquisition of the Wright & Ferguson funeral home in 1990, had not challenged Mr. Wright's selling of insurance policies from another insurance company, despite the existence of an exclusive contract between O'Keefe and Wright & Ferguson. Indeed, claimants' expert Armis Hawkins seems to believe that Loewen's point was significant. See Hawkins Statement at 18. Among O'Keefe's responses to the point was to show that Jerry O'Keefe had granted Wright a concession from the contract as part of the warm and cordial business relationship that had existed between the two men for decades. See, e.g., Tr. 713-15. The positive portrayal of Mr. Wright thus served to explain away one of Loewen's principal defenses to its own subsequent breach of the Wright & Ferguson contract, as well as to illustrate the deleterious effects that Loewen's business practices introduced into an otherwise peaceful business climate. Neither strategic purpose had anything to do with an alleged "anti-Canadian" or "pro-local" bias.

Joint Reply at 78. As former Justice Blass observes, "[i]t is simply not true to say Loewen was treated differently as a result of its Canadian ownership, or the class or race of its owners." Blass Statement at 5.

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

As they did in their Memorials, claimants devote the bulk of their most recent submission to their claim that the Mississippi courts violated NAFTA Article 1105. See Joint Reply at 92-152. As before, however, claimants' entire argument proceeds on the basis of several fundamental errors of both fact and law. As the United States has demonstrated (see Counter-Mem. at 124-180), and as we show further below, claimants cannot show on the facts of this case that the Mississippi courts breached any obligation imposed by Article 1105.

1. The Availability Of Further Appeals Defeats Claimants' Article 1105 Claim As A Matter Of Law

The United States has shown that the substantive obligations of customary international law, as incorporated in NAFTA Article 1105, cannot be breached by decisions of domestic courts from which effective appeals were available. See Counter-Mem. at 124-30. The United States also has shown that this is so regardless of whether the local remedies rule has been waived. See id; supra at 88-90. Claimants and at least one of their experts continue to disagree, charging that the United States is "simply making . . . up" this substantive principle of state responsibility. Joint Reply at 132 & n.27.

In fact, however, despite some earlier academic confusion (from which claimants appear to suffer still) regarding the relationship between the local remedies rule and substantive rules of state responsibility (see supra at 88-90), it is now a well-established part of State practice that a lower court decision from which an effective appeal is available cannot constitute a denial of

justice, irrespective of the local remedies rule. As the United States explained in its comments on the most recent ILC Draft Articles on State Responsibility,

> [t]he lower court decision, in and of itself, may be attributable to the State pursuant to article 4 [of the ILC Draft]; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case.[119]

The United States is hardly alone in this view. For example, in its 1998 comments to the ILC Draft Articles on State Responsibility, the United Kingdom observed that "the duty to provide a fair and efficient system of justice" is not breached by a lower court from which an effective appeal was available: "*Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court*."[120] The United Kingdom emphasized that this substantive principle of state responsibility, which requires exhaustion of all "speedily available" appeals before a denial of justice could be found, "should be clearly distinguished" from the local remedies rule, which is strictly procedural in character.[121]

As Professor Greenwood notes, this comment of the United Kingdom, which is fully consistent with the view of the United States,

> is directly in point in the present case. It constitutes State practice, only three years old, which clearly indicates that the substantive obligation imposed on the

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[119] Draft Articles on State Responsibility, Comments and Observations Received from Governments, International Law Commission, 53d Sess., U.N. Doc. A/CN.4/515 (2001) at 26 (comments of the United States on Draft Article 15).

[120] Draft Articles on State Responsibility, Comments and Observations Received from Governments, International Law Commission, 50th Sess., U.N. Doc. A/CN.4/488 (1998) at 68-69 (comments of the United Kingdom on Draft Article 21) (emphasis added).

[121] Id.

> State is to provide a fair and efficient *system* of justice and that the decision of a lower court (even if it is not merely wrong but "corrupt") does not put the State in breach of that obligation if the State has provided the means within that system whereby that decision can be corrected.

Second Greenwood Op. at ¶ 83. The comment also confirms that the requirement of exhaustion of appeals in this context is not in any way an aspect of the local remedies rule, but is instead a substantive element of any claim for a breach of the obligation.[122]

In view of these and other authorities to the same effect (see Second Greenwood Op. at ¶¶ 82-88),[123] claimants' charge that the United States is "simply making it up" is ironic, for it is

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[122]Claimants' reference to the Pirocaco case, which claimants accuse the United States of "eliding," illustrates the United Kingdom's point as well as claimants' confusion with respect to it. See Joint Reply at 131 n.26. The Pirocaco tribunal's recognition that "[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" was not – and could not have been – an expression of the local remedies rule, as that rule was not applicable to the claims agreement at issue. See U.S. Jurisdictional Resp. at 24 & n.8. Rather, the Pirocaco tribunal recognized, as a *substantive* matter, that, "[a]s a general rule, a denial of justice can be predicated only on a decision of a court of last resort." Id. (quoting Pirocaco at 599). As the United Kingdom explained in its 1996 comments on the ILC draft articles, "[t]he recourse to 'local remedies' is in this context not at all of the same nature as recourse to local remedies as a procedural precondition" for presentation of a claim on the international plane. See UK Materials on International Law, 69 B.Y.I.L. (1998) 558-59 (quoted in Second Greenwood Op. at ¶ 53).

[123]See also, e.g., Crawford, Special Rapporteur, Second Report on State Responsibility, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999) at ¶ 75 ("systematic considerations enter into the question of breach [of the obligation to provide a fair and efficient system of justice], and *an aberrant decision by an official lower in the heirarchy, which is capable of being reconsidered, does not itself amount to an unlawful act*.") (emphasis added); Second Greenwood Op. at 62 (discussing 1986 Oil Field of Texas decision of the Iran-U.S. Claims Tribunal). The late Judge Jiménez de Aréchaga, a former President of the International Court of Justice, agreed that a manifestly unjust decision of a domestic court had to be "a decision of a court of last resort, all remedies having been exhausted," before it could be said to be in breach of an international obligation. E. Jiménez de Aréchaga, International Law in the Past Third of a Century at 282 (quoted in Second Greenwood Op. at ¶ 86). Judge Jiménez de Aréchaga made clear that this requirement is wholly independent of the local remedies rule, and is instead a recognition that "States provide in their judicial organization remedies designed to correct the natural fallibility of its judges." Id.

claimants, not the United States, who are without legal basis for their position. As Professor Greenwood observes, "neither Sir Robert nor Sir Ian has produced a single instance of an arbitral decision given by any international tribunal in which a State has been held responsible for the decision of a lower court when there was available within the legal system of that State a means by which that decision could effectively be challenged." Second Greenwood Op. at ¶ 89.[124]

In fact, despite the professed agreement of claimants' experts, it appears that even Sir Ian does not support the view expressed by claimants and Sir Robert in this regard. Notwithstanding the tenor of his opinion, Sir Ian does not dispute the general point that, "[s]o long as the system itself provides a sufficient guarantee of such treatment [in accordance with the customary international minimum standard], the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal." Sinclair Op. at 33 (quoting Professor Greenwood). Sir Ian's response is not that the point is incorrect, but only that there has been a "failure of the system" where, in a given case, the claimant has no reasonable means of challenging the defective decision – in other words, where an appeal would be futile. Id. This, of course, is precisely the United States' point: because Loewen's means of appeal were not manifestly ineffective or obviously futile, the Mississippi judgments cannot be said to have constituted a denial of justice.[125]

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[124]Although claimants purport to have found authority for their contrary view, claimants have simply misunderstood their own citations. As Professor Greenwood explains, "[n]either Oppenheim, nor Brownlie, nor Amerasinghe's detailed study of the [local remedies] rule, contain a statement in such sweeping terms and the older statements quoted by Loewen are either misrepresented or relate to cases in which the decisions of the lower courts were taken as proof that there would be no effective remedies in the higher courts, which is a different point altogether." Second Greenwood Op. at ¶ 32 (footnotes omitted).

[125]As Professor Greenwood explains, Sir Robert's and Sir Ian's differences of opinion are (continued...)

Although claimants contend that this Tribunal has already "foreclosed" consideration of this issue in its interim decision on competence, the United States does not believe that this is so, as the Tribunal has thus far addressed only the admissibility of the claims, not their merits (and, even then, did not decide the issue of admissibility but joined it to the merits). See Counter-Mem. at 108.[126] As Professor Greenwood notes, "the decision which Loewen asserts the Tribunal took would clearly have been wrong in international law." Second Greenwood Op. at ¶ 57. The Tribunal should thus reject claimants' invitation to err on the merits of this claim by "hold[ing] – *for the first time* – that a State is in breach of its treaty obligations as the result of a court decision which is open to challenge," for there is "nothing in th[e] terms [of NAFTA

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[125](...continued)
fundamental in this respect. Unlike Sir Robert, Sir Ian views the actions of the Mississippi courts (correctly) as "a single complex act" rather than as a series of discrete acts, each giving rise to state responsibility. See Second Greenwood Op. at ¶¶ 17-19 (quoting Sinclair Op. at ¶22). But, as Professor Greenwood points out,

> [i]f what is in issue, as Sir Ian suggests, is a single complex act, involving a number of actions by different parts of the judicial system, then there is no reason why that act should be treated as complete when other steps can still be taken within the judicial system the effect of which might be dramatically to alter the nature of that complex act.

Id. at ¶ 19.

[126]The Tribunal's reliance on the ILC Draft Articles on State Responsibility for its discussion of "judicial finality" and the local remedies rule further indicates that the Tribunal must not have decided, as a substantive matter of state responsibility, that a lower court decision from which effective appeal was available could constitute a denial of justice. See Loewen, Decision on Competence at ¶¶ 67, 70. The ILC has long made clear that its Draft Articles have addressed only "secondary" rules of state responsibility (e.g., rules of attribution, admissibility, and remedies) and not the "primary" substantive rules of responsibility (e.g., the specific content of an internationally wrongful act). See, e.g., Report of the International Law Commission on the Work of Its Fifty-Second Session, U.N. GAOR, 55th Sess., Supp. No. 10, at ¶ 60, U.N. Doc. A/55/10 (2000) ("the distinction between primary and secondary rules" has "long been the plinth on which the entire drafting exercise rested."); Dugard, Second Report on Diplomatic Protection, International Law Commission, 53d Sess., U.N. Doc.A/CN.4/514 (2001) at ¶¶ 7-10 & n.15.

Article 1105] to suggest a departure from a practice which was already firmly grounded both in authority and common sense." Id. at ¶ 91 (emphasis added).

2. Claimants Misstate The Liability Standard Under Article 1105

One of claimants' more fundamental errors in this case is their incorrect assumption, wholeheartedly embraced by claimants' international law experts, that the obligations imposed by NAFTA Article 1105 extend "'far beyond' the minimum protections accorded to foreign investments under customary international law." Joint Reply at 133 (quotation omitted); see also, e.g., Third Jennings Opinion at 26 ("the gravamen of the present case cannot be denial of justice according to customary international law"). As the United States submitted to the Tribunal on July 31, 2001, the Free Trade Commission, established under NAFTA Article 2001, has now issued a binding interpretation of NAFTA Article 1105 that conclusively rejects the fundamental premise of claimants' analysis and that of their experts concerning the extent of the United States' obligations under Article 1105.

The Free Trade Commission's interpretation confirms that "Article 1105(1) prescribes the *customary international law minimum standard of treatment of aliens* as the minimum standard of treatment to be afforded to investments of investors of another Party." FTC Interpretation of July 31, 2001 at ¶ B(1) (emphasis added). Contrary to claimants' interpretation, "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Id. at ¶ B(2). The Free Trade Commission's interpretation, which is binding on this and other NAFTA Chapter Eleven tribunals (see NAFTA art. 1131(2)), thus confirms that, contrary to claimants' contention, treatment in accordance with the customary

international law minimum standard is not merely "*one* of the protections afforded to investments under NAFTA Article 1105" (Joint Reply at 92 (emphasis added)), but it is the *only* protection afforded by Article 1105(1).

Claimants appear to concede that the customary international minimum standard, as applicable to the circumstances of this case, is the "denial of justice" standard. See Joint Reply at 77. They argue, however, that the standard for a "denial of justice" is not so "extreme" as the United States contends, suggesting that denials of justice arising out of domestic judicial proceedings are even "frequent" or "common" occurrences. See id. at 96-97 (quoting Freeman, International Responsibility of States for Denial of Justice 71-72 (1938), and Charles C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 731-32 (2d ed. 1945)).[127] If this were so, however, then one might expect that claimants would be able to find

[127]Claimants misconstrue even their own authorities, which accepted a high threshold for denial of justice, and advocated the following standard: "*clear* proof of *serious* error plus *additional* factors in the nature of malice toward the alien . . . or, stated negatively, the absence of good faith . . . ." Freeman, International Responsibility of States for Denial of Justice, at 330 (emphasis added). "Where it is not possible to establish the influence of corruption, bias or malice upon the outcome of the proceedings . . . the State's responsibility may still be engaged *where the decision is so erroneous that no court which was composed of competent jurists could honestly have arrived at such a decision*; or, as De Visscher has put it, 'where the judge's *défaillance* attains such a degree that one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason.'" Id. at 330-31 (emphasis in original). Similarly, Hyde's treatise characterized the standard in similar terms, citing as examples of "palpable injustice" by the judicial system the "application to an alien of local laws sharply at variance with treaty stipulations," instances of "perversion of the judicial system," and trials "conducted with gross injustice." Hyde, International Law, at 731-32. We also note that claimants' citation to Freeman as published in 1970, rather than 1938, appears to be a typographical error. See Joint Reply at 96.

more than the handful of "denial of justice" cases that they have identified in this proceeding, the most recent of which dates from the first half of the last century.[128]

In fact, even claimants' own international law experts do not support claimants in this contention. To the contrary, Sir Robert Jennings acknowledges that "the cases show that generally speaking it has been applied when the treatment of an alien has been outrageous and so without any doubt a breach of a minimum standard." First Jennings Op. at 17. See also Third Jennings Opinion at 27 (assuming that "the traditional minimum standard" requires a showing of "outrageous treatment"); id. (even if Article 1105 were not limited to the customary international law minimum, "[i]t may . . . readily be agreed that no court or tribunal will lightly or readily find the judicial acts of a respondent State in breach of the requirements of international law.").[129]

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[128]Claimants' only modern case is Azinian et al. v. Mexico, 14 ICSID Rev. - Foreign Inv. L. J. at 568, a NAFTA Chapter Eleven award that, as this Tribunal has already recognized, was not a denial of justice case as "it involved no challenge to the decisions of the Mexican courts." Loewen, Decision on Competence at ¶ 49. In any event, although the Azinian tribunal considered denial of justice principles in *dictum*, it recognized that the denial of justice standard is very demanding. See Azinian at ¶ 105 (claimants bear the burden of proving "that the evidence for [the challenged court judgments] was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious . . . .").

[129]Claimants suggest that Sir Robert Jennings and Sir Ian Sinclair endorse their view that "[t]he United States' 'extreme' formulations of the denial-of-justice standard are vestiges of a past in which only States could protect the rights of aliens through the extreme process of diplomatic espousal." Joint Reply at 95. Their experts' actual statements, however, which claimants quote out of context, say nothing of the sort. See Second Greenwood Op. at ¶ 99 ("the testimony of Loewen's international law experts does not support the conclusions for which it is quoted at this part of the Reply."). Rather, Sir Robert and Sir Ian assert (wrongly, as Professor Greenwood explains) only that international law has changed with respect to the local remedies rule in denial of justice cases; they do not dispute any other aspect of the traditional denial of justice standard. See supra at 91-96; Second Greenwood Op. at ¶ 99 ("What constitutes a denial of justice to an alien is exactly the same irrespective of whether that alien complains of that denial itself or has a claim brought on its behalf[,] and none of the authorities cited by Loewen even hints otherwise.").

Claimants' other sources confirm that a charge of denial of justice is an extreme one that is met only in the rarest of circumstances.[130]

As Professor Greenwood explains, "[c]ontrary to what is said by Loewen, international law sets a high threshold in this respect, recognizing a considerable 'margin of appreciation' on the part of national courts. Thus, the awards and texts make clear that error on the part of the national court is not enough, what is required is 'manifest injustice' or 'gross unfairness' . . . 'flagrant and inexcusable violation' . . . or 'palpable violation' in which 'bad faith not judicial error seems to be the heart of the matter.'" Second Greenwood Op. at ¶ 94 (citations omitted).[131]

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[130]See, e.g., Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad at 339-40 (Kraus Reprint Co. 1970) (1915) (describing as denials of justice "irregularities in the course of judicial proceedings" that are "sufficiently gross so as to become a denial of justice" as well as "grossly unfair or notoriously unjust" decisions); Clyde Eagleton, The Responsibility of States in International Law 114 (1928) (citing "manifest injustice" as the international standard of responsibility of the domestic judicial system); A.O. Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," 14 Can. Y.B. Int 'l Law 73, 93 (1976) ("The alien sustains a heavy burden of proving that there was undoubted mistake of substantive or procedural law leading to an adverse decision operating to his prejudice."); J.W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice," 1929 Brit.Y.B. Int'l L. 181, 188 ("manifestly or notoriously unjust" decisions); Article 9, Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 Am. J. Int'l L.133 (Supp. 1929) at 134 & 189, comment to art. 9 ("1929 Harvard Research Draft") ("It may be said that before an international claim ought to be considered well-founded it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion."); Sohn & Baxter, 1961 Harvard Draft Convention, at 98, comment to art. 8(a) ("The alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.").

[131]The cases cited by claimants are no different. See Joint Reply at 93-97 citing Garrison's Case (U.S. v. Mex.) (1871), 3 Moore's Int'l Arbitrations 3129, 3129 (1898) (an "extreme" case where court "act[ing] with great irregularity" refused Garrison's appeal "by intrigues or unlawful transactions"); see also TLGI Mem. at 75-80 citing Joseph F. Rihani, American Mexican Claims Commission (1942), 1948 Am. Mex. Cl. Rep. 254, 257-58 (finding decision of the Supreme Court of Justice of Mexico "such a gross and wrongful error as to constitute a denial of justice"); The Texas Company, American Mexican Claims Commission (1942), 1948 Am. Mex. Cl. Rep. 142, 144 (rejecting claim for failure to show error by Supreme (continued...)

Where the judicial action in question was mere error, it is not enough that the error had extreme consequences for the claimant, because "judicial error, *whatever the result of the decision*, does not give rise to international responsibility on the part of the State." Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, Article 3(3), reprinted in García-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens 129, 130 (emphasis added).[132]

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[131](...continued)
Court of Justice of Mexico "resulting in a manifest injustice"); Bronner (U.S.) v. Mexico (1874), 3 Moore's Int'l Arbitration 3134, 3134 (1898) (finding court decision was "so unfair as to amount to a denial of justice"); Chattin (U.S.) v. Mexico (1927), 4 R.I.A.A. 282, 286-87 (requiring that injustice committed by judiciary rise to the level of "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man"). Other international cases cited by claimants found denials of justice by courts in equally extreme contexts, though very different from the facts of the instant case, e.g., instances of detention of foreigners, or failure to prosecute violent crimes against foreigners, not in conformity with municipal law. See, e.g., Solomon (U.S.) v. Panama (1933), 6 R.I.A.A. 370, 372-72 (alien's arrest that did not comply with Mexican law found to be a "palpable injustice"); Dyches (U.S.) v. Mexico (1929), 4 R.I.A.A. 458, 461 ("long and unjustified delay" in obtaining justice for the accused alien constituted a denial of justice where delay was contrary to Mexican law); Morton (U.S.) v. Mexico (1929), 4 R.I.A.A. 428, 434 (improper prosecution and inadequate punishment of alien's murderer under Mexican law gave rise to international liability); Kennedy (U.S.) v. Mexico (1927), 4 R.I.A.A. 194, 198 (misapplication of Mexican law in prosecuting crime against alien revealed "negligence in a serious degree" constituting a "denial of justice"); Roberts (U.S.) v. Mexico (1926), 4 R.I.A.A. 77, 80 ("unreasonably long detention" of alien without a trial found to be contrary to Mexican law and, thus, denial of justice).

[132]Claimants also fail to refute the point that no denial of justice claim can be based on an excessive verdict in the absence of bad faith or discrimination on the part of the courts or the jury. See Counter-Mem. at 133. Indeed, each of the authorities cited by claimants by way of response confirms that discrimination or other bad faith is a prerequisite, even if proof of such can be circumstantial in certain cases. See Joint Reply at 127-28. As the United States has shown, the proof in this case demonstrates that the O'Keefe jury and the Mississippi courts were not motivated by any nationalistic or other improper bias, but instead reached their decisions based on their good faith view of the evidence and argument submitted by the parties. See Counter-Mem. at 18-19, 133. This fact alone is sufficient to defeat claimants' denial of justice claim.

In short, contrary to claimants' unsupported assertions, the customary international minimum standard applicable to this case is every bit as "extreme" as the United States has indicated. As Judge Tanaka of the International Court of Justice explained in the Barcelona Traction case,

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

1970 I.C.J. at 160 (separate opinion of Judge Tanaka).[133]

3. The Trial Proceedings

As the United States has already shown, the record of the O'Keefe trial proceedings fully belies claimants' charge that those proceedings were so marred by improper appeals to nationality, racial, and class biases as to amount to a "denial of justice" under customary international law. See Counter-Mem. at 132-33. In support of their continued allegations to the contrary, claimants offer nothing but the same fictional account of the O'Keefe trial that formed the basis of their Memorials in the first instance.

For example, claimants still purport to have identified several points in the voir dire (jury selection) proceedings where, it is alleged, the court improperly permitted O'Keefe's counsel to appeal to the prospective jurors' alleged improper biases. See Joint Reply at 11, 17, 18, 20, 26, 27, 35, 38. Although claimants offer the opinion of Mr. John Corlew as support for this allegation (see Corlew Statement at 3-4), Mr. Corlew offered a different assessment when he

[133] See also, e.g., Chattin, 4 R.I.A.A. at 295 ("Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment . . . amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man.").

privately reported to Loewen (his client) shortly after the trial that "it is not probable that reversible error can be found in the jury selection process . . . ." (U.S. App. at 1137). As the record makes clear, Mr. Corlew's earlier assessment – made under a somewhat different set of incentives than the present case – was the more accurate one. See Counter-Mem. at 33-34, 132; U.S. Jurisdictional Resp. at 85.

Similarly, as summarized in the United States' Counter-Memorial (see Counter-Mem. at 17-56), and confirmed above (supra at 5-46, 103-06), there can be no serious dispute that Loewen was afforded a trial that, at the very least, comported with the minimum standard of justice required under customary international law.[134] Although claimants concede that the rules of procedure that governed the trial were highly developed and afforded Loewen innumerable means of protecting itself and advancing its own interests (see Joint Reply at 126-27), they nevertheless contend that the alleged failure of the Mississippi courts to invoke those procedures *sua sponte* for Loewen's benefit constituted a denial of justice. (Id.). But claimants once again have it precisely backwards: it was Loewen, not the courts, that was "charged with responsibility to initiate the use of these protective mechanisms." Landsman Statement at 18. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has observed, "defence counsel, who alone truly knows the interests of his or her client, is necessarily obliged to safeguard those interests at every moment during the trial, in order to avoid prejudice which cannot be remedied." Delalic at ¶635. As the record makes clear, the O'Keefe trial proceedings

[134] See, e.g., Landsman Statement at 16-18; Freeman, International Responsibility of States for Denial of Justice, at 267 ("[I]f the alien is granted what an ordinary, reasonable international judge would designate as a *decent* trial, then the duty of judicial protection will have been fulfilled despite whatever inconsequential irregularities may have been committed in administering the local adjective law.") (emphasis in original).

unquestionably, and at the very least, accorded with the minimum standard of treatment required under customary international law.

4. The Form Of The Verdict

Although they acknowledge that the court reformed the jury's initial verdict of $260 million and thus rendered the initial form of the verdict irrelevant, claimants nevertheless contend that the initial verdict (rather than the reformed verdict) worked a denial of justice both in form and in substance. See Joint Reply at 57-60. The United States readily agrees that the jury's response to the initial verdict form – which Loewen itself drafted – was confused, insofar as the award included punitive damages and assigned separate amounts to each of several counts relating to the same breaches of contract (which the form, as written, apparently led the jurors to believe was required).[135] But claimants' complaints about this confusion are irrelevant, as Judge Graves rejected that verdict form in favor of a far clearer expression of the jury's intent, which did not suffer from these flaws. See Tr. 5739-53.

As the record makes clear, the jury foreman's note, which unambiguously indicated the jury's intention to award $100 million in compensatory damages separate from an award of $160 million in punitive damages, bore no relation to the confused breakdown of damages in Loewen's verdict form. Instead, it clearly expressed a general verdict of $100 million compensatory damages without any breakdown at all, whether as to individual claims or types of compensatory

[135]The party that proposed the verdict form may generally not be heard to complain of flaws in the form. See, e.g., Grove Holding Corp. v. First Wis. Nat'l Bank, 12 F. Supp.2d 885, 899 (E.D. Wis. 1998) ("If the party presently complaining participated in drafting the form that was ultimately submitted to the jury and requested the portion of the verdict of which it now complains, waiver [of the right to object after submission] likely will be found."). O'Keefe objected on several occasions to Loewen's proposed form of verdict, including on grounds that the form was unnecessarily complex, and offered instead a more general form of verdict. See, e.g., Tr. 5472-74, 5503-05.

damages.[136] Because the initial verdict form was never accepted by the court, any confusion reflected in that form was of no consequence to the case and, thus, could not have denied justice to Loewen.[137]

Although claimants complain that Judge Graves had no authority to reject the initial verdict form in favor of the general verdict as expressed in the foreman's note, the United States has shown that Judge Graves' authority to do so is well-established under Mississippi law. See Counter-Mem. at 52-53. It is of no consequence that the jury's actual intent was clarified in the note rather than on the verdict form itself because no special verdict form was required. See Miss. Code Ann. § 11-7-157.[138] Indeed, claimants' expert Armis Hawkins, who now characterizes Judge Graves' decision to reform the verdict as "bizarre" (see Hawkins Statement at 19), has himself recognized the court's authority in this respect. See, e.g., Singleton v. State, 495 So.2d 14, 16 (Miss. 1986) (Hawkins, J.) ("Courts do have the power to correct a verdict obviously irregular and to make it conform to a clear and unequivocal jury intent.").

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[136]Mississippi law provides for three types of verdicts: (a) general verdicts, (b) special verdicts, and (c) general verdicts accompanied by answers to interrogatories. See Miss. R. Civ. P. 49. The determination of which verdict to submit to the jury is within the court's discretion. Id. & cmt. A general verdict, which does not break down the award by claims, is presumptively to be applied, subject to the court's exercise of discretion to employ a different verdict form. Id.

[137]The jury foreman's note made clear that the jury did not intend to double-count various types of damages, as claimants allege was evident from the initial verdict form. Instead, the jury intended simply to award $100 million in compensatory damages generally and, as they believed was required by the initial verdict form, to give "weighted values" of that amount to each of the nine items specified in the form. See A659. Claimants' expert Armis Hawkins seems to agree that this is how the jury approached the initial verdict form. See Hawkins Statement at 19.

[138]The form that Loewen drafted for submission to the jury was not a "special verdict" form, as claimants assert, but a set of interrogatories to accompany a general verdict. See A650; Miss. R. Civ. P. 49(c).

In fact, Judge Graves was *obligated* to find a way to give effect to the jury's intent and to avoid a mistrial, as "[t]he trial court [is] under the duty to see that loss of time and the expense of the trial should not be nullified by failure [of the jury] to put their verdict in proper form." Adams v. Green, 474 So.2d 577, 580 (Miss. 1985) (quoting Universal C.I.T. Credit Corp. v. Turner, 56 So.2d 800, 803 (Miss. 1952)). Mississippi law, and United States law generally, expects that a defective verdict will be reformed so as to give effect to the jury's intent. See, e.g., Miss. Code Ann. §§ 11-7-157, 11-7-159; ACandS, Inc. v. Godwin, 667 A.2d 116, 151 (Md. 1995) ("'[I]n a proper case [a verdict] can be molded or reformed to reflect what the jury manifestly and beyond doubt intended.'") (citation omitted).[139] As Mississippi trial lawyer Jack Dunbar explains, "the jury is returned to deliberation only where their expressed intent with regard to the issues submitted to them is unclear. Where the intent of the jury is clear, the Court is duty-bound to give it effect." Supplemental Dunbar Statement at 16.

In this case, the foreman's note provided a clear and unequivocal expression of the jury's intent. As Judge Graves explained, "this note clarifies what the jury's intent was with regard to an award of compensatory damages which they indicate very clearly in this note was 100 million dollars." Tr. 5739. See also Tr. 5749 ("The Court is of the opinion that the note is abundantly clear and that there is absolutely no question about whether the jurors intended what they . . .

[139]Claimants protest that the verdict in the O'Keefe case should not have been reformed because it was not "intelligent," see Joint Reply at 60-61, but this is just a recasting of their argument that the verdict was excessive. In any event, the relevant question for Judge Graves was whether the verdict was understandable to the court. See, e.g., Wilson v. State, 19 So.2d 475 (Miss. 1944) ("test of the validity of a verdict is whether or not it is an *intelligible* answer to the issues submitted to the jury") (emphasis added). The jury foreman's note in the O'Keefe case, combined with the written verdict, more than meets that standard. Indeed, even the sole dissenting juror reportedly stated that the foreman's note accurately expressed the jury's intent. See, e.g., U.S. App. at 1146 (summary of interview with dissenting juror reporting her statement that the jury intended to award "$100 million compensatory and $160 million punitive").

said, what they did or why they did it."). Addressing the jury directly, Judge Graves reiterated that "you have, by way of your verdict and then by way of clarification through this note, indicated that it was your intention to award the plaintiff 100 million dollars in compensatory damages, and so the Court accepts that as the verdict of the jury with regard to compensatory damages." Tr. 5753.[140] Judge Graves therefore properly gave effect to that intent, consistent with his obligation under domestic law to construe the jury's verdict "by exegesis if necessary, . . . before [he was] free to disregard the jury's [] verdict and remand the case for a new trial." Gallick v. B. & O. R.R. Co., 372 U.S. 108, 119 (1963).[141] Thus, as Mr. Dunbar concludes, Judge Graves "did not commit error in reforming the verdict in this fashion." Supplemental Dunbar Statement at 18.

5. The Amount Of The Judgment

Claimants continue to assert that the O'Keefe judgment was so "grossly excessive" as to violate even the minimum standard of protection of aliens required under customary international law. See Joint Reply at 97. Although claimants purport to offer new reasons for this exaggerated assertion, their position suffers from the same fundamental flaws as in their opening Memorials.

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[140]Claimants' complaint that the jury included an "illegal" award of $160 million in punitive damages (Joint Reply at 60) is similarly irrelevant, as the court rejected that award and accepted only the $100 million compensatory award. See Tr. 5739-43. Moreover, the contention that the jury's inclusion of punitive damages was "in obvious violation of Mississippi procedural law" (Joint Reply at 60) is belied by Loewen's own counsel, who candidly admitted to his colleagues at the time that, "[t]echnically, this statute [requiring bifurcation in punitive damages cases] is not effective for actions filed before July 1, 1994," as the O'Keefe case was. U.S. App. at 1045.

[141]See also Wilks v. Reyes, 5 F.3d 412, 415 (9th Cir. 1993) ("when there is tension between a general verdict and written interrogatories the [] court must attempt to sustain the judgment by harmonizing the answers and the verdict"); Harvey v. General Motors Corp., 873 F.2d 1343, 1347 (10th Cir. 1989) ("trial court *has a duty* to try to reconcile the answers to the case to avoid retrial.") (emphasis added).

a. The Proper Benchmark

As before, claimants continue to seize on the $500 million awarded by the O'Keefe jury, dismissing as immaterial the fact that Loewen never paid anywhere near that amount in the end. Although they acknowledge that the Mississippi courts' ultimate entry of judgment in the O'Keefe litigation was not based on the never-executed-upon verdict of $500 million, but was instead based on Loewen's $85 million consideration under the settlement agreement, claimants contend that the $85 million consideration is properly viewed only as Loewen's mitigation of damages, not as the benchmark of the wrongfulness of the challenged measures. This is so, claimants argue, because "'the measure of the wrong done' is a question of damages, not of international liability *vel non*." Joint Reply at 107 (quoting Sohn & Baxter, 1961 Harvard Draft Convention at 97). Claimants, however, have confused two entirely separate concepts.

The violation of NAFTA Article 1105 that claimants have alleged here is that the O'Keefe judgment was "grossly excessive." As claimants' own authority suggests, for an excessive judgment to be wrongful as a matter of substantive international law, it must be determined whether that judgment was grossly excessive in the first place. See Sohn & Baxter, 1961 Harvard Draft Convention at 97. While the *degree* to which the judgment was grossly excessive may be a question of damages, it is very much a question of liability (i.e., wrongfulness) in the first instance whether the judgment was so grossly excessive as to breach an international obligation *at all*. Id.

This distinction between the *degree* of excessiveness and the *fact* of excessiveness, which claimants have confused, is also readily seen in analogous municipal practice. For example, as claimants are quick to point out, "U.S. courts have struck down excessive punitive damages

awards in a wide range of circumstances" where those awards exceeded the constitutional limits of due process. TLGI Mem. at 84. In such cases, the court need not determine *how* unconstitutionally excessive was the judgment to find a due process violation, but only that the judgment was unconstitutionally excessive *at all*. See, e.g., BMW of N. Am. v. Gore, 517 U.S. 559, 585-86 (1996) (finding that judgment was excessive so as to violate due process guarantee, but remanding the case to state court for further proceedings for appropriate remedy).

Loewen's ultimate payment of $85 million to end the litigation is thus not properly viewed as the mere "mitigation" of damages for purposes of claimant's denial of justice claim to be decided in the damages phase of this case, but is instead the benchmark by which claimants' claim of "excessiveness" must be measured in the first place. As claimants' own authority suggests, the wrongfulness of a judgment must be determined by reference to "what it [the judgment] actually was." Sohn & Baxter, 1961 Harvard Draft Convention, at 97.[142] Because the last judgment in the case was based not on the jury's verdict but on the parties' agreement to settle for $85 million, claimants' arguments of excessiveness based on the $500 million verdict that Loewen did *not* pay are immaterial to the determination of whether Loewen suffered a denial of justice in the O'Keefe litigation.[143]

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[142]For example, had Judge Graves granted Loewen's post-trial request for a remittitur and reduced the judgment to $85 million, or had Loewen succeeded in obtaining such a remittitur after continuing with its appeal in the Mississippi Supreme Court, claimants would surely have had no claim of excessiveness based on the jury's $500 million verdict. That Loewen ultimately achieved the same result through settlement rather than through the appellate process is immaterial.

[143]Indeed, this Tribunal has no authority under NAFTA Chapter Eleven to issue a declaration whether the $500 million award, if paid, would have amounted to a denial of justice, as the NAFTA explicitly limits the authority of the Tribunal to award *only* monetary damages and restitution of property, and does not permit the issuance of declaratory relief or advisory

(continued...)

b. The Elements Of Damages

In addition to their specious claim that the jury's verdict was the product of improper biases, claimants contend that the judgment was "grossly excessive in its compensatory and punitive components" and was "unsupported by the evidence . . . ." Joint Reply at 97. This contention is meritless as well, for several reasons.

First, with respect to the economic damages awarded by the jury, claimants effectively concede that O'Keefe proved, and that Mr. Gary identified in his closing argument, more than $35 million in purely economic damages flowing from Loewen's misconduct. See Joint Reply at 58.[144] Rhetoric aside, claimants' only complaints about the economic damages component of the award are: (1) that the initial verdict form did not reflect this assessment of economic damages but instead appeared to double-count damages for certain claims, and (2) that the $35 million in economic damages "consisted primarily of legally impermissible damages." Joint Reply at 57-58.

As the United States has already shown, claimants' complaints based on the initial verdict form (submitted by Loewen) are irrelevant, because the court did not accept that form as the appropriate expression of the jury's actual intent and instead accepted the general verdict, as reflected in the foreman's note, to award $100 million in compensatory damages. See supra at 118-121; Supplemental Dunbar Statement at 16-18.

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[143](...continued)
opinions. See NAFTA Article 1135.

[144]Although claimants weakly suggest that these damages "bore no natural relationship to . . . the record evidence" (Joint Reply at 98), nowhere do they identify any such "record evidence" to support this suggestion.

The contention that the $35 million in economic damages were "legally impermissible" is similarly without merit. Although claimants contend that "virtually all" of those damages "were not foreseeable and therefore as a matter of law not recoverable," the record demonstrates (as the United States has already shown) that the damages were, in fact, foreseen by Loewen. See Counter-Mem. at 136. In any event, both municipal and international law recognize that foreseeability need not limit the recovery of consequential damages where, as here, the tortious acts were intentional and directly inflicted on the person claiming injury.[145]

Claimants also challenge the $35 million on the ground that it included $20 million in lost future revenue, whereas, according to claimants, Mississippi law allows recovery of only "lost future *profits* (i.e., lost revenue minus saved expenses)" and not "future *revenue*." Joint Reply at 58 (emphasis in original). To the extent that claimants' legal argument in this regard is sound under Mississippi law, one must then ask why Loewen never advanced it before the Mississippi court – whether during the trial or in any of Loewen's post-trial motions – and never made any effort to establish O'Keefe's alleged "saved expenses" so as to offset the conceded loss of $20 million in future revenue. See, e.g., A660-747. At the very most, this newly-minted argument, made more than five years after the fact, only confirms that Loewen should have continued with its appeal and raised this point of domestic law to the Mississippi Supreme Court.[146]

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[145]See, e.g., Cheng, General Principles of Law at 251 ("If intended by the author, such consequences are regarded as consequences of the act for which reparation has to be made, irrespective or whether such consequences are normal, or reasonably foreseeable."); Counter-Mem. at 136.

[146]See J. Arechaga, International Law in the Past Third of a Century, 159 Recueil des Cours (1978) at 282 ("a State cannot base the charges made before an international tribunal or (continued...)

Second, claimants challenge the jury's award of approximately $65 million in damages for Loewen's intentional infliction of emotional distress as "monstrously excessive." Joint Reply at 98. As the United States has shown, Mississippi law clearly permits recovery of damages for emotional distress, even absent proof of physical injury, where, as here, the tortious conduct was intentional. See Counter-Mem. at 135 n.100 (quoting Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 743 (Miss. 1999)).[147] Nevertheless, the United States agrees that Loewen would have had compelling arguments on appeal for a substantial reduction of the jury's award of emotional distress damages.[148]

More fundamentally, however, claimants' complaint about this component of the award once again ignores the fact that Loewen never paid anywhere near the full amount awarded by the jury. Indeed, if the entire emotional distress component were subtracted from the $500 million award (even assuming that the jury awarded $74.5 million in emotional distress damages, as claimants contend), Loewen's consideration of $85 million to settle the case would still

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[146](...continued)
organ on objections or grounds which were not previously raised before the municipal courts."); supra at 46-47.

[147]Claimants' suggestion that Adams forecloses recovery of emotional distress damages on the basis of testimony concerning "loss of sleep and worry" is misleading. See Joint Reply at 99. The Adams court made clear that such proof was insufficient when the emotional distress was the result of "simple negligence." See 744 So. 2d at 743-44. The court expressly stated that, "where the defendant's conduct was 'malicious, intentional or outrageous,' the plaintiff need present no further proof of physical injury." Id. at 743.

[148]That is not to say, however, that the emotional distress damages would have been rejected entirely on appeal. O'Keefe presented evidence at trial demonstrating that Loewen's conduct, which nearly resulted in the complete loss of the business that had been in the O'Keefe family for nearly 130 years, caused the O'Keefes to suffer emotional distress, lasting through the entirety of the administrative supervision and all the way through the trial. See, e.g., Tr. 176-77; 2107-16.

represent only a fraction of even the reduced award.[149] Loewen thus cannot be heard to argue that Loewen was denied justice on the basis that the jury had awarded such damages in the first place.

Finally, claimants continue to assert that the jury's award of $400 million in punitive damages was so excessive as to violate even the minimum standard of protection under customary international law. See Joint Reply at 48-52, 100-105. As before, claimants ignore the evidence and conduct on which that award was based, preferring instead to treat the underlying litigation as if it were a simple contract dispute between ordinary commercial parties concerning an innocuous trade. As the United States has shown, however, the record and context of the O'Keefe litigation cannot be so easily dismissed. See, e.g., Counter-Mem. at 139-43.

For example, as discussed above (supra at 23-29), claimants fundamentally misapprehend the broader monopolization claims that were at the heart of the case, dismissing those claims as merely "peripheral" to "ordinary contract" claims. Joint Reply at 62.[150] In this respect, claimants' revisionist complaints about the jury's award suffer from the same failings that observers attributed to Loewen's handling of the trial at the time: "Loewen's main failure was to

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[149]Claimants dispute the amount of emotional distress damages awarded by the jury, arguing that the "actual" emotional distress award was "$74.5 million" rather than the $65 million difference between the $35 million in economic damages and the overall compensatory award of $100 million. See Joint Reply at 54-55. The United States is curious as to how claimants can know the "actual" amount of this award, as the jury's general verdict makes no distinction among the categories of compensatory damages. It appears from the record that O'Keefe's counsel sought $70.45 million in emotional distress damages out of a total of $105.832 million in compensatory damages. See Tr. at 5566. The jury awarded only $100 million of O'Keefe's requested amount, and gave no indication that it did not intend to include in that award the entire $35 million in proven economic damages, leaving only $65 million for emotional distress damages.

[150]Even claimants' own media source noted that "[a]t the heart of the dispute with Loewen was the contention by the O'Keefes that the treatment they received was part of a wider ploy to eliminate competition as the chain moved into new markets." A3098.

underestimate the seriousness of the case." A3100 (Toronto newspaper account of the O'Keefe litigation two weeks after settlement). Monopolization is indeed regarded as a serious offense in the United States, which provides for an automatic trebling of damages under federal law.[151] Thus, had the O'Keefe plaintiffs proven their monopolization claim in a U.S. federal court under the federal antitrust laws – which, as noted above, are substantially similar to the Mississippi laws at issue in the O'Keefe case (see supra at 25 n.24) – Loewen would automatically have been assessed a statutory penalty of a trebled amount of O'Keefe's actual damages, plus attorneys' fees, irrespective of any alleged "bias, passion or prejudice" on the part of the jury. Even excluding the entirety of the emotional distress damages award, a trebling of the more than $35 million in purely economic damages that O'Keefe proved at trial would have resulted in an award of over $105 million, well more than Loewen ever paid to end the O'Keefe litigation.

Similarly, claimants ignore the uniquely sensitive character of the death-care industry at issue in the O'Keefe case, which, as Professor Landsman points out, gave the tort remedies in the case a "heightened salience." See Landsman Statement at 10. Given the widespread public outcry in recent years over some of the very business practices at issue in the O'Keefe case – including complaints about the "sharp practices" of the major death-care consolidators in the United Kingdom and Australia as well as in other jurisdictions in the United States (see supra at 99) – there is no reason to assume that the O'Keefe jury's assessment of punitive damages was

[151]Section 4 of the "Clayton Act," a federal statute that authorizes private antitrust actions, provides (in relevant part) that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "The availability of a private antitrust action, and its accompanying treble damages remedy, serves both to compensate private persons for their injuries and to punish wrongdoers." Andrx Pharmaceuticals, 256 F.3d at 805.

anything other than a genuine (and understandable) expression of disapproval of the conduct proven at trial. Indeed, as a recent review of a new book about the O'Keefe case observed, the case "was the first sign that the junk-mail, telemarketed, hard-sell, pre-need peddling, conglomerate model of funeral service brought to us by Ray Loewen and Robert Waltrip (of SCI) was going to be hugely repudiated by the marketplace, the media, and consumers." T. Lynch, Grave Matters, Both, Times of London (Aug. 15, 2001) (U.S. App. at 1354).

Claimants also have little to say about the evidence that O'Keefe submitted to the jury showing Loewen's net worth to be in excess of $3.1 billion. See Joint Reply at 49. Claimants' silence in this regard is not surprising, given the performance of Loewen's trial team during the punitive damages phase of the trial and its confused and remarkably ineffective response to that evidence at the time. See Tr. at 5756-5807; Counter-Mem. at 54-56. As the United States has already shown, the jury's award of punitive damages under those circumstances could in no way be said to have been "so obviously wrong and unjust that no court could honestly have arrived at such a conclusion." Freeman, International Responsibility of States for Denial of Justice, at 319 (quoting with approval Answer of British Government in claim of R.E. Brown (U.S. v. Gr. Brit.) (1923)) (citation omitted); see also Counter-Mem. at 136-143. That Loewen paid no more than $85 million (and, ultimately, less than even that amount) to end the litigation only confirms that the award of damages in the O'Keefe case did not constitute a denial of justice in violation of NAFTA Article 1105.[152]

[152]Of course, claimants' complaints about both the form and the amount of the verdict do not address the more fundamental fact that the O'Keefe jury found Loewen to be liable for violations of each of the counts presented to it.

6. The Decisions Regarding The Supersedeas Bond

Claimants are still unable to point to a single case in which the existence or application of a bond requirement has been found to be a denial of justice. Moreover, the application of such requirements, even to parties without the financial resources to meet them, has been consistently found, both internationally and domestically (in the United States and elsewhere), to be proper. In support of their claim that the bond requirement in the O'Keefe litigation denied them justice, claimants assert that: (1) the unanimous case authority that bonds may be required even of those who cannot afford them is inapplicable to very wealthy corporations faced with obtaining a bond in a high numerical amount; and (2) the Mississippi courts, on the record before them, were *required* to grant Loewen an exception to the bond requirement. Neither of these suggestions is supported by fact or law.

a. Imposition Of A Neutral Supersedeas Bond Requirement, Despite An Appellant's Claimed Inability To Pay, Is Not A Denial Of Justice

The United States has cited numerous international and municipal cases in which parties challenged the application of bond requirements they claimed to be financially unable to meet. See, e.g., Counter-Mem. at 147-48, 159-60 (citing cases). In each case in which the issue was raised, the court or tribunal found that application of the bond requirement did not constitute a denial of justice. Claimants have cited no relevant contrary authority.[153] Instead, they attempt to dismiss the United States' authorities as a series of "unexceptional" cases in which "a 'poor' or 'impoverished' claimant could not afford to pursue an appeal or obtain a standard security

[153]Claimants refer to only two cases. See Joint Reply at 112 n.14. In one, the Jones Claim, a person was held in jail for 31 days on excessive bail, a deprivation of liberty wholly different from a neutral requirement to post security in a civil action. The other, the Burt Case, does not at all discuss (or even mention) security requirements.

instrument." Joint Reply at 112-13 (quotation marks in original). But this case is no less "unexceptional." Like the parties in each of the cited cases, Loewen professed to be financially unable to obtain a security instrument in conformance with the requirements of a neutral local law (i.e., a law applying equally to foreign and local parties). While claimants suggest the bond necessary to stay execution of the O'Keefe verdict was "excessive," the bond was no more "excessive" (to Loewen) than a multi-thousand dollar bond is to an individual facing the loss of her home. See Counter-Mem. at 159. The rules of international law cannot, and do not, apply to States any differently when the claimant is a large, wealthy corporation than when the claimant is a poor individual.

In the face of this authority, and relying essentially on one draft convention, claimants assert that international law "universally" treats bond requirements that cannot be met as a denial of justice. Joint Reply at 111-12 (quoting Sohn & Baxter, 1961 Harvard Draft Convention at 186). As the United States has previously explained, however, the Sohn & Baxter Draft Convention never suggests, let alone states, that an allegedly prohibitively expensive supersedeas bond constitutes a denial of justice, regardless of whether the bond amount is set by statute or by judicial order. See Counter-Mem. at 143 n.106. Instead, the Draft Convention advocated that resort to local remedies should be considered futile if the price of pursuing such remedies is an excessive or prohibitive *cost* (not supersedeas) bond. See Sohn & Baxter, 1961 Harvard Draft Convention at 161, 168.[154] Even with respect to cost bonds, Professors Sohn and Baxter

[154]The language from Sohn & Baxter on which claimants rely does not address supersedeas bonds (the type of bond Loewen was trying to obtain). This is an important distinction. While a party unable to provide a cost bond may be denied a right to continue litigation or appeals (thus explaining why Sohn and Baxter viewed this as rendering further exhaustion of local remedies futile), a party confronting a supersedeas bond that it cannot afford (continued...)

specifically rejected claimants' interpretation of their draft convention: "this view [of when the failure to exhaust local remedies may be excused] entails *the rejection of the theory that State responsibility arises out of a 'denial of justice' in the course of an alien's attempting to gain redress within the courts of the respondent State*." Id. at 161 (emphasis added). In any event, the unanimous legal authorities upholding bond requirements against denial of justice challenges – which would all have been wrongly decided if claimants' position were correct – provide full and sufficient rebuttal to claimants' assertion of a "universal" practice to the contrary.

Claimants' other sources are similarly unhelpful to their cause. Freeman, for example, opines that "prohibitive" security requirements can give rise to an international complaint when such requirements are "*arbitrary* obstacles . . . placed in the path of an alien claimant" or "restrictions *designed* to render the alien's access to local tribunals impossible." Freeman, International Responsibility of States for Denial of Justice at 224 (emphasis added). But Freeman says nothing about requirements (like Mississippi's) applied neutrally to alien and domestic parties alike. While the Harvard Draft Convention does cite one case for the proposition that states are responsible internationally when they have "unlawfully prevented an appeal by an alien," (1929 Harvard Research Draft, in 23 Am. J. Int'l L. at 185, comment to art. 9), in that case, the "appeal from the Acapulco judge to a Mexican court of appeal was prevented by intrigues or unlawful transactions," hardly analogous to the application of a non-

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[154](...continued)
remains free to continue with its appeal, subject only to the risk or cost (which may or may not be present in a given case) that its opponent may attempt to execute on the judgment during the pendency of that appeal. Of course, as explained above, Loewen could have continued its appeal without supersedeas. See supra at 82-86; Blass Statement at 11-12.

discriminatory bond requirement. Garrison's Case (U.S. v. Mex. 1871), No. 8, cited in 3 Moore International Arbitrations 3129 (1898).

This is why, contrary to claimants' assertions, the accepted application (worldwide) of supersedeas bonds to "poor or impoverished" parties is both relevant and important. If a claimed inability to meet a neutral supersedeas bond requirement is not a manifest injustice for purposes of customary international law, then, to prevail on their denial of justice claim, claimants must show that Loewen's nationality was the motivating factor behind the bond decisions (i.e., that a Mississippi party in Loewen's shoes seeking a departure from the ordinary bond requirement would have received it). Not only have claimants failed to prove such an allegation, but they concede that no evidence exists to support it. See Joint Reply at 91; Sinclair Op. at 35.

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

The United States has demonstrated that the Mississippi courts' bond decisions were entirely rational in light of Loewen's failure to justify, through a "detailed and credible" record, an exception to the ordinary 125 percent bond requirement. See Counter-Mem. at 155. Claimants offer two arguments in response. First, they contend that the courts failed to exercise judicial discretion in determining whether the bond amount should be reduced. See Joint Reply at 118-20; Clark Statement at 12-13. Second, they contend that, even if the courts exercised discretion, they abused that discretion. See Joint Reply at 118; Hawkins Statement at 25. Both contentions are meritless.

(i). The Mississippi Courts Did Not Fail To Consider Loewen's Grounds For Departure

Claimants appear to equate the Mississippi courts' denial of Loewen's request for a reduction of the bond with a failure of the courts even to consider whether a reduction was in fact appropriate. Claimants are wrong to do so. At several points during the bond hearing, Judge Graves acknowledged his authority under Mississippi Rule of Appellate Procedure 8(b) to depart from the ordinary bond requirement.[155] At Loewen's urging, Judge Graves explicitly rejected O'Keefe's argument that he had no authority to vary from a 125 percent bond because of Rule 8(a). See A1065 (Judge Graves telling Loewen's counsel "[the supersedeas rule] seems to be saying exactly what you said."); A1066 (Loewen's counsel telling Judge Graves "[your understanding of the rules makes] perfect sense and I think you're right on."). And, as part of his oral decision denying Loewen's motion, Judge Graves stated: "[I am] persuaded that it is appropriate to reduce [a bond] for good cause shown." A1074. As former Justice Blass (who, as O'Keefe's counsel, was on the losing side of that part of the argument) confirms, Judge Graves "had a very clear understanding" of the difference between Rules 8(a) and 8(b). Blass Statement at 8.

Thus, the record shows that Judge Graves did exactly what claimants' expert says he should have done – "carefully examine the good cause shown by Loewen" and determine how to "assure that the rights of both parties are protected." Clark Statement at 12-13. Judge Graves considered the risks to Loewen from pursuing appeal without a bond (A1057-59); considered the company's affidavits suggesting it could not obtain a full bond; and considered the case authority

[155]This Rule *allows*, but does not require, courts to depart from the ordinary full bond: "The court . . . for good cause shown *may* set a supersedeas bond in an amount less than the 125 percent. . . ." Miss. R. App. P. 8(b) (emphasis added).

Loewen cited. A1075-78. While Judge Graves ultimately was persuaded that granting Loewen's motion would unfairly risk O'Keefe's interests in the judgment, this does not mean he "did not in fact exercise discretion." Joint Reply at 118. It means only that, in exercising discretion, Judge Graves chose to reject the alternative proposed by Loewen. As claimants' own witness has written elsewhere:

> when we say a court has *discretionary* authority to say yes or no to a particular question, we must acknowledge it is a question as to which there can be honest disagreement between equally intelligent individuals. If the answer to the question is never uncertain, or never subject to any doubt, there would be no need to vest a court with discretionary authority in its answer.

Hooten v. State, 492 So.2d 948, 950 (Miss. 1986) (Hawkins, J., dissenting) (emphasis in original); see also Blass Statement at 10 ("Discretion means that the court has within its lawful scope the ability to balance both sides, to weigh all interests, and to make a decision within a range of appropriate and just options. That is what the Court did.").

(ii). The Mississippi Courts Did Not Abuse Their Discretion

Claimants alternatively argue that, even if the Mississippi courts exercised their discretion, they abused that discretion in denying Loewen's request for a departure. See Joint Reply at 118; Hawkins Statement at 25. But while it was (and is) an open question of United States constitutional law whether a reduced bond in Loewen's situation would have been required on due process grounds, see U.S. Counter-Mem. at 152-53 & n.109, there is nothing in the Mississippi rules of procedure or case law that would have required the courts to grant a departure on the equitable grounds Loewen asserted.

While claimants ignore the point in their submission, Loewen bore the burden to demonstrate that the requested departure – an extraordinary eighty-percent reduction from the

ordinary bond amount – was justified. See Counter-Mem. at 154. At a minimum, therefore, Loewen was required to prove not only that a $125 million bond was all it could afford, but that it had "a clearly demonstrated ability to satisfy the judgment" in the event its appeal was unsuccessful, and that there was "no other concern that [O'Keefe's] rights [would] be compromised by a failure adequately to secure the judgment." In the Matter of Carlson, 224 F.3d 716, 719 (7th Cir. 2000). Moreover, as even claimants' own expert has acknowledged elsewhere, in balancing the parties' relative interests, the courts were required to give more weight to O'Keefe's interest in satisfying the judgment than Loewen's interest in a stay. See, e.g., Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190-91 (5th Cir. 1979) (Clark, J.). In at least three respects, it is far from obvious that Loewen met its burden.

First, Loewen's extensive effort to prove that its financial situation caused difficulty in obtaining a bond – in particular, its dangerously high debt load – also had the effect of raising questions about the company's eventual ability to satisfy the judgment if a reduced bond were allowed. As Judge Graves noted during the bond hearing, there was a legitimate question whether "the same assets which are subject to levy right now would still be there and subject to levy a year from now or eighteen months from now." A1077.[156] Courts routinely insist on a full supersedeas bond in such circumstances.[157]

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[156]During the bond proceeding, O'Keefe pointed out the risk that another pending case in Pennsylvania would result in an adverse judgment against Loewen and that the plaintiffs in that case would gain priority over O'Keefe if his entire judgment were not secured. See A1056-57; see also Blass Statement at 9-10. That concern was proven justified when the Pennsylvania litigation settled only weeks later for $30 million.

[157]See, e.g., Avirgan v. Hull, 125 F.R.D. 185, 187 (S.D. Fla. 1989), aff'd, 932 F.2d 1572 (11th Cir. 1991) (debtor's "admitted precarious financial condition . . . defeats their contention that this case is a rare instance where a bond is unnecessary or alternative collateral properly (continued...)

A full bond was especially important given Loewen's uncontroverted assertion that, at the time of the judgment, Loewen had assets sufficient to satisfy the judgment. See A825; see also A1387-88. Many of the cases in which a departure has been found appropriate – and, indeed, almost all of the cases claimants cite – involve circumstances where the reduced bond secures the judgment debtor's entire present ability to pay, even if that does not amount to the full judgment. See, e.g., C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501, 520 (E.D. Pa. 1973) (defendants "without sufficient assets to satisfy the judgment").[158] Claimants' expert makes this same point. See Clark Statement at 12 ($100,000 bond should be approved to secure a $150,000 judgment against a debtor worth $100,000). These statements and cases, however, are irrelevant to a judgment debtor like Loewen with assets sufficient to satisfy the entire judgment. In a case like Loewen's, the court must determine how best to ensure that *the entire judgment* will be collectible after appeal. See, e.g., Olympia, 786 F.2d at 800 ("the district judge has a very difficult task – to make the judgment creditor as well off during the appeal as it would be if it could execute at once, but no better off") (Easterbrook, J., concurring). It is simply not true,

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[157](...continued)
could be posted"); see also id. at 188 ("this case appears to be just the type for which the supersedeas is designed – 'the financial distress of the debtor puts the judgment creditor in peril if it waits for the appeal to take its course.'") (quoting Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 800 (7th Cir. 1986)); Bank of Nova Scotia v. Pemberton, 964 F. Supp. 189, 192 (D.V.I. 1997) (existence of other creditors seeking same property is reason to insist on full supersedeas); United States v. Panhandle Eastern Corp., 696 F. Supp. 983, 985-86 (D. Del. 1988) (pending litigation raising uncertainty as to whether judgment can be satisfied after appeal is basis to deny reduction in bond); Counter-Memorial at 145-46 (citing British and French cases for same proposition).

[158]See also Miami Int'l Realty Co. v. Paynter, 807 F.2d 871, 874 (10th Cir. 1986) (deposition revealed debtor had no assets beyond bond amount); Hurley v. Atlantic City Police Dept., 944 F. Supp. 371, 378 (D.N.J. 1996) ("nothing in the record suggests that" debtor could satisfy judgment); Isern v. Ninth Court of Appeals, 925 S.W.2d 604, 606 (Tex. 1996) (security approved was equal to entire amount of debtor's assets).

then, to say that a $125 million bond would have provided "more" security to O'Keefe than collecting the entire $500 million judgment. Cf. Joint Reply at 117.

Second, contrary to claimants' current view, nothing in the record showed that a $125 million bond was the most Loewen could provide. As the United States has previously demonstrated, Loewen's affidavits were carefully worded to avoid making such a claim. See, e.g., A881-82 (Loewen could not provide bond "anywhere near" $625 million because of excessive debt); A902-03 (bond above $125 million meeting creditors' terms impossible "[a]t this moment").[159] The company's affiants acknowledged that $625 million in bonding was available and could have been arranged but for Loewen's exceedingly high pre-existing debt. See A877-79, A882. That debt did not limit the company to a $125 million bond, however, but rather to some figure between $125 and $625 million. See A2297-98 (showing $125 million bond would have left Loewen well under maximum debt/equity ratio); see also A898 (explaining effect of bond on debt/equity ratio). Loewen also submitted evidence to the court that market analysts expected the company to continue reporting record earnings even after the verdict, and that the decline in share price reflected an "overblown" reaction. A779; see also A1216. Loewen cannot now dismiss as "innuendo" the very evidence it presented to the courts. See Joint Reply at 114, 122.

Claimants also conveniently dismiss the evidence that O'Keefe presented to the Mississippi Supreme Court which suggested that Loewen, despite its protestations, could have afforded a larger bond. See Counter-Mem. at 59-63. Claimants contend that this evidence was

[159]In their Joint Reply, claimants suggest that this point is equivalent to a series of perjury accusations against Loewen's affiants. Joint Reply at 122. To the contrary, in order to be truthful, Loewen's affiants very carefully worded their statements to avoid direct representations that a bond in any amount higher than $125 million would be impossible for Loewen to afford.

inaccurate, as it allegedly misquoted Loewen officials as having told investors that the company "will be able to *pay for* this thing and win in the final . . . judgment" and that Loewen had "the contingency *funds* for every possible contingency." Joint Reply at 122-23 (quoting O'Keefe's transcript of Loewen investor conference call) (emphasis in original). According to claimants, the "official" transcript (i.e., the one prepared by Loewen in response to O'Keefe's filing) reflected that Loewen said only that the company "will be able to *fight* this thing and win in the final judgment" and that the company had "the contingency *plan* for every possible contingency." Joint Reply at 123 (quoting Loewen's transcript of the conference call) (emphasis in original).

But, even assuming that O'Keefe's transcription (which, like Loewen's, was sworn and notarized; see U.S. App. at 806-07) was inaccurate, Loewen still did not effectively answer the charge that Loewen was telling two different stories – one to the court and another to investors – concerning the company's prospects in the event of a full bond requirement. For example, Loewen's own transcription quotes Ray Loewen as assuring investors that, even in "the worst case scenario," the company would still "be able to fight this thing and win in the final judgment." A2977. Similarly, even Loewen's allegedly corrected statement to investors of a "contingency *plan* for every possible contingency" ran contrary to Loewen's representation to the court that a full bond would result in "disastrous" consequences for the company. Compare A2981-82 with A1026.[160]

Moreover, even if Loewen had not represented that it had the contingency "funds" to pay for a full supersedeas bond, the assurance of a contingency "plan" was fully consistent with the

[160]Indeed, accorded to Loewen's own transcription, company officials assured investors that, even if the entire $500 million award were upheld on appeal, the company would not suffer "any major long-term harm on [its] liquidity . . . ." A2982.

possibility of an alternative security arrangement, which the company was, in fact, developing at the time. As the record makes clear, Loewen was planning a pledge of LGII stock, in lieu of cash, to satisfy even a full bonding requirement. See U.S. App. at 0603-05. Upon learning that the Supreme Court had privately voted in Loewen's favor on the bond issue, however, Loewen's counsel immediately recommended that the company "go into a holding pattern on alternative security ideas, e.g., the pledge of the stock of Loewen Group International, Inc." U.S. App. at 1213.

While the Mississippi Supreme Court did not mention the evidence submitted by O'Keefe in its order affirming Judge Graves,[161] claimants do not dispute that, by Loewen's own lawyer's report, the Court had voted to rule in Loewen's favor just before learning the full extent of Loewen's ongoing financial activities. See Counter-Mem. at 60-63. To be sure, there is no possible measurement of the impact of this evidence on the court. But "if[,] as . . . Judge Hawkins says, the Court is not 'removed from human affairs,' this evidence would have had a profound impact on the views of the justices, especially in a case where large-scale fraud and misrepresentation by the defendants were the major jury findings." Blass Statement at 9 (citing Hawkins Statement at 24).

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[161]Claimants err in suggesting (Joint Reply at 123) that the Mississippi Supreme Court was limited to considering evidence presented at the trial-court level. The Mississippi rules give the Supreme Court authority to accept additional evidence on the question of the propriety of a stay and the appropriate amount of security. See Miss. R. App. P. 8(c) ("the motion shall be supported by affidavits or other sworn statements"). Indeed, Loewen itself submitted "new" evidence to the Mississippi Supreme Court, see A1128 n.1, A2713-16, A2800-43, A2851-54, and specifically argued that the Court had authority to receive it. A1138-39. In any event, as noted above, Loewen itself had presented evidence to the trial court suggesting that the predictions of dire consequences from the judgment were overstated. See supra.

Given that Loewen's own evidence suggested that $125 million was not the most it could afford, the $125 million figure – which matched exactly 125 percent of the compensatory damages award (and zero percent of the punitive damages award) – was, at a minimum, convenient. See A889 ($125 million figure was first suggested to bankers by Loewen). It allowed Loewen to argue, as it does today (see, e.g., Hawkins Statement at 22-23), that O'Keefe had no legitimate interest in the punitive damages award and that no bond should be required to secure it. See A1032-33, A1067. As Loewen's counsel recognized at the time, however, that argument was a novel one, and rejection of it can hardly be deemed an abuse of discretion. See U.S. App. 0894-95; see also Trans World Airlines v. Hughes, 314 F. Supp. 94, 96, 98 (S.D.N.Y. 1970) (rejecting offer to post bond for only compensatory damages portion of judgment).[162]

Third, while claimants now cite a series of cases where companies argued successfully that the prospect of a Chapter 11 reorganization cut in favor of a reduced bond, see Joint Reply at 121, they cannot dispute that Loewen *did not* make that argument at the time. Rather, O'Keefe's suggestion to the Mississippi courts that Loewen could easily use reorganization to obtain an automatic, unbonded stay went entirely unrebutted. See supra at 42. Moreover, not one of the cases claimants cite holds that a court abused its discretion by denying a request for a departure from a statutorily-required bond. To the contrary, Mr. Clark's seminal opinion in Poplar Grove found it can be an abuse of discretion for a trial court to *approve* a reduced bond. See 600 F.2d at 1191 (ordering district court to "establish some type of positive protection of the judgment

[162]The TWA case, on which claimants have relied, is notable as well because the court both rejected the notion that alternate security could be obtained through regular reporting of a company's net worth (cf. Joint Reply at 116-17) and suggested that it was inappropriate for a judgment debtor to commit financial resources to other acquisitions – "business as usual" – while refusing to post a full bond. 314 F. Supp. at 97-98.

creditor's rights as outlined herein, or, in the alternative, to vacate its order approving a reduced supersedeas bond and require full bonded protection during the pendency of this appeal."); see also Missouri Pac. Ry. Co. v. McGrew Coal Co., 40 S. Ct. 503 (1920) (reversing lower court's allowance of reduced bond, and ordering appellant to provide bond in excess of judgment).[163]

It is by no means obvious, therefore, that the Mississippi courts abused their discretion in denying a departure on equitable grounds. Indeed, not even claimants' own witnesses seem to say that Loewen's request for a $125 million bond should have been granted.[164] But even if the bonding decisions were abuses of discretion under municipal law, that does not mean they were also denials of justice. "Rather than implying bad faith or an intentional wrong on the part of the trial judge, an abuse of discretion is viewed as a strict legal term that is 'clearly against logic and effect of such facts as are presented. . . .'" White v. State, 742 So.2d 1126, 1136 (Miss. 1999) (quoting Black's Law Dictionary). A court that has abused its discretion has of course committed an error under local law, but, as claimants' sources agree, "mere error in the application of local

[163]There is a multitude of cases, too many to cite here, in which parties with claims similar to Loewen's, including claims that the cost of a bond would trigger bankruptcy, had requests for a departure denied, and in none of these cases was the denial found an abuse of discretion. See, e.g., Brabson v. The Friendship House, 2000 WL 1335745, *2 (W.D.N.Y. 2000) (defendant in bankruptcy); N.J. Collins, Inc. v. Pacific Leasing, Inc., 1999 WL 1102605, *2 (E.D. La. 1999) (defendant would be "thrown into bankruptcy absent a stay"); Endress & Hauser, Inc. v. Hawk Measurement Sys. Pty., 932 F. Supp. 1147, 1150-52 (S.D. Ind. 1996) (defendant claimed bond would drive it to bankruptcy); Triton Containter Int'l v. Baltic Shipping Co., 1996 WL 28511, *2 (E.D. La. 1996) (defendant's "financial condition is bleak"); Avirgan, 125 F.R.D. at 187 (bond would render party "insolvent and force [it] to discontinue its operations").

[164]See Clark Statement at 13-14 (arguing only that Loewen's evidence of "good cause" should have been carefully examined); Hawkins Statement at 24 ("the Court should have sought some way, some possible way, *to accommodate both sides*") (emphasis added). This, of course, is exactly what the Mississippi courts did. See, e.g., A1072 (Judge Graves seeking compromise between $125 million and $625 million).

law does not constitute an unjust judgment." Adede at 90. Nor, erroneous or not, do the Mississippi courts' bond decisions.

7. Claimants' "Fair And Equitable Treatment" And "Full Protection And Security" Arguments Are Without Merit

In its Counter-Memorial, the United States showed that the "fair and equitable treatment" and "full protection and security" obligations are defined by the minimum standard of treatment of aliens under customary international law. See Counter-Mem. at 170-80. The United States noted, in particular, that State practice consistently supported the view that "fair and equitable treatment," as used in bilateral investment treaties, referred to the customary international law minimum standard of treatment of aliens. It further observed that each of the other NAFTA Parties concurred in this understanding of Article 1105(1) – an agreement as to the interpretation of the provision that, under the principles stated in Article 31(3) of the Vienna Convention on the Law of Treaties, was authoritative. See id. at 175 & n.96.

In their Joint Reply (at 133, 143-44), claimants reiterated their assertion that the "fair and equitable treatment" standard "goes 'far beyond' the minimum protections accorded to foreign investments under customary international law." Claimants offered no support in State practice for their reading of the standard, but instead discussed the writings of certain academics and the interpretations of Article 1105(1) in three arbitral awards that have been issued during the course of this arbitration. Joint Reply at 138-42, 143-45. Claimants urged the Tribunal to disregard the agreement of the three NAFTA Parties as to the proper interpretation of the provision in the treaty among them, contending that agreement informally stated in "litigating positions" did not meet the requirements of Article 31(3) of the Vienna Convention. Id. at 139-43.

On July 31, 2001, the Free Trade Commission, established under NAFTA Article 2001, issued the following interpretation of Article 1105:

> Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretation of Chapter Eleven in order to clarify and reaffirm certain of its provisions:
>
> . . . .
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[165]

Under NAFTA Article 1131(2), this Free Trade Commission interpretation is binding on this Tribunal.[166]

In a startling about-face, in a letter to the Tribunal of August 9, 2001, claimants assert that the Commission's interpretation "confirms" that customary international law now incorporates "fair and equitable treatment." By this, claimants appear to contend that customary international law now encompasses the view of this term espoused in the Joint Reply – that the standard requires an assessment of a State's conduct against what an arbitrator considers to be "fair" or "equitable" in a subjective and intuitive sense, rather than assessment of that conduct against

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[165]NAFTA Free Trade Commission, Interpretation of July 31, 2001 (available at <http://www.ustr.gov/regions/whemisphere/nafta-chapter11.pdf>); see also id. ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

[166]Article 1131(2) provides that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

established rules of law. Claimants do not identify the basis for the dramatic change in the supposed content of customary international law in the few short weeks since the submission of the Joint Reply, in which claimants' position was that "fair and equitable treatment" standard "goes 'far beyond' . . . customary international law." Joint Reply at 138-42, 143-45. Claimants also assert that, if the Commission's interpretation indeed means what it says, the Tribunal should disregard it as an "impermissible amendment" and an "intrusion" into an ongoing arbitration proceeding.

Claimants' new contentions are without merit. First, there is no basis for claimants' assertion that their subjective and intuitive version of "fair and equitable treatment" has entered into customary international law. A new norm of customary international law can be established by widespread State practice that evidences an understanding that the practice is required by law. See, e.g., Restatement (Third) of Foreign Relations Law § 102(2) (1987). Claimants are correct that the terms "fair and equitable treatment" appear in a large number of bilateral investment treaties. See Joint Reply at 136-37 & n.28. That fact alone, however, says nothing about the *content* of the "fair and equitable treatment" standard. All of the State practice of record before this Tribunal, however, views that standard as a reference to the long-standing customary international law minimum standard of treatment of aliens.[167] Claimants' newfound belief that

[167] See Counter-Mem. at 171-72 (quoting commentary to OECD 1967 Draft Convention on the Protection of Foreign Property: "fair and equitable treatment" standard "conforms in effect to the 'minimum standard' which forms part of customary international law"); id. (quoting 1984 report surveying OECD membership on meaning of standard, to similar effect); id. at 173 n.92 (quoting 1980 statement by Swiss Department of External Affairs that "fair and equitable treatment" "references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international 'minimum standard.'"); id. at 174 (quoting Canada's 1994 Statement of Implementation of the NAFTA, noting that Article 1105(1) "provides for a minimum absolute standard of treatment, based on long-standing (continued...)

their version of "fair and equitable treatment" is a customary international law norm lacks support.

Second, claimants' characterization of the NAFTA Parties' view of "fair and equitable treatment" as an "amendment" rather than an interpretation is wrong. As just noted, State practice over the past 30 years establishes that "fair and equitable treatment" has always referred to the customary international law minimum standard of treatment. Indeed, even those academics suggesting a contrary view have consistently acknowledged that viewing the standard as a reference to customary international law is a legitimate, alternative way to read the provision. See Counter-Mem. at 172-73 & nn. 91, 93. The Free Trade Commission's clarification that one interpretation was right and the other wrong does not make either any less an interpretation.

Finally, there is no merit to claimants' assertion that the Commission's interpretation represents an impermissible "intrusion" into an ongoing arbitration. In submitting their claims to arbitration, claimants expressly consented to arbitration "in accordance with the procedures set

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[167](...continued)
principles of customary international law"); id. at 172 n.90 (quoting 2000 letter of submittal for U.S.-Bahrain bilateral investment treaty: paragraph setting forth "fair and equitable treatment" standard "sets out a minimum standard of treatment based on standards found in customary international law"). The reading of "fair and equitable treatment" in the U.S.-Bahrain letter of submittal is consistent with statements by the United States as to the content of the standard made contemporaneously with the NAFTA's negotiation and entry into force. Dep't of State, Letter of Submittal for U.S.-Armenia Treaty Concerning the Reciprocal Encouragement and Protection of Investment, reprinted in S. Treaty Doc. 103-11 at viii (Aug. 27, 1993); ("Paragraph 3 guarantees that investment shall be granted 'fair and equitable' treatment in accordance with international law. . . . This paragraph sets out a minimum standard of treatment based on customary international law."); accord Dep't of State, Letter of Submittal for U.S.-Moldova Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in S. Treaty Doc. 103-14 at ix (Aug. 25, 1993) (same); Dep't of State, Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in S. Treaty Doc. 103-37 at ix (Sept. 7, 1994) (same).

out in this Agreement." NAFTA art. 1121(1)(a). Those procedures have always included Article 1131(2)'s provision for the Commission to issue interpretations binding on Chapter Eleven tribunals. Nor is it any surprise that neither Article 1131(2) nor the July 31 interpretation suggests that ongoing arbitrations should be unaffected by a Commission interpretation; the general rule in international law is that agreements as to the interpretation of a treaty provision are retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant.[168]

a. Claimants Fail To Establish A Denial Of "Fair And Equitable Treatment" As That Obligation Is Defined Under Customary International Law

Claimants assert in error that the treatment provided them by the Mississippi courts did not accord with the "fair and equitable treatment" prescribed by customary international law. For all of the reasons demonstrated above, the treatment accorded claimants fully satisfied, at the very least, customary international law's minimum requirements of justice. Moreover, claimants' assertion that customary international law prohibits discrimination based on nationality, race or class does not advance their cause. Joint Reply at 144. Claimants do not suggest that a different standard applies to this allegation of alleged discrimination than to their allegations of discrimination under Article 1102 or under the principles of denial of justice already addressed.

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[168] See Mustafa Yasseen, L'interprétation des traités d'après la Convention de Vienne, 151 R.C.A.D.I. 1, 47 (1976) (Mr. Yasseen was the chair of the drafting committee at the conference that adopted the Vienna Convention on the Law of Treaties) ("The rule is that the interpretation is embodied in the text interpreted; the effect of a subsequent agreement thus goes back to the day of the entry into force of the original treaty.") ("Il est de règle que l'interprétation fasse corps avec le texte interprété ; l'effet d'un accord interprétatif remonte donc au jour de l'entrée en vigeur du traité initial.") (translation by counsel); see also, e.g., LaGrand (Germ. v. U.S.), 2001 I.C.J. 104 ¶¶ 99, 109-116 (June 27) (resolving question of interpretation of article of ICJ and PCIJ Statutes that had been subject of decades of controversy in literature and applying interpretation adopted to acts at issue before Court).

Thus, for the same reasons, claimants' assertion of a violation of international law based on supposed discrimination under Article 1105(1) must fail.

b. Claimants Fail To Establish A Denial Of "Full Protection And Security" Under Customary International Law

In its Counter-Memorial, the United States showed that the cases in which the customary international law obligation of "full protection and security" was found to have been breached are limited to those cases in which a State failed to provide reasonable police protection against acts of a criminal nature. See Counter-Mem. at 176. In response, claimants do not dispute that this case does not remotely resemble those international cases because they have not proven that the United States failed to provide reasonable police protection against acts of a criminal nature that physically invaded claimants' property. See Joint Reply at 145-53. Rather, relying on their incorrect interpretation that Article 1105 "does *not* incorporate any reference or restriction to 'customary' international law," id. at 147 (emphasis in original), Claimants assert that the "full protection and security" requirement extends to contexts entirely different from those where it

has been recognized.[169] See id. at 145-52. Claimants fail, however, to identify a single international decision (and the United States is aware of none) supporting this assertion.[170]

Claimants wrongly assert that Maffezini v. Kingdom of Spain, Case No. ARB/97/7 (Nov. 13, 2000), supports their position. See Joint Reply at 148. Maffezini involved a state entity's transfer of the claimant's funds in the absence of a legally binding contract formalizing the transaction. See Maffezini at 25 ¶¶ 74-75. In that context, the tribunal found that "these acts amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty." Id. at 27 ¶ 83. Under that article, however, Spain was not required to provide "full protection and security" in accordance with the customary international law minimum standard of treatment, but to protect Argentinean-

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[169]We note that claimants' suggestion (Joint Reply at 147-48) that the definition of "investments" in Article 1139 evidences the NAFTA Parties' intention that the "full protection and security" obligation would extend to non-physical intrusions not only is not persuasive as a matter of logic (*i.e.*, because there is no reason to infer that every obligation embodied in Chapter Eleven necessarily could give rise to a breach with respect to every type of investment), but also is erroneous in the face of the Free Trade Commission interpretation of Article 1105. Likewise unavailing – especially in the face of the Free Trade Commission interpretation – is claimants' reference (id. at 148-49) to Professor Kenneth J. Vandevelde's statement that the full protection and security language in most bilateral investment treaties "certainly is broad enough to *permit*" – not, as claimants assert (Joint Reply at 148) "to require" – "an interpretation that it requires protection of investments (which includes intellectual property rights in most BITs) against injury by private parties . . . ." Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L., 501, 510 n.28 (1998) (emphasis added). Also, unavailing in the face of the Free Trade Commission interpretation – showing that the NAFTA Parties did not intend "to require within their treaty relationship a standard of due diligence higher than the minimum standard of general international law" – and for the reasons (ignored by claimants) explained in the Counter-Memorial (at 177-78), is claimants' continued reliance on AAPL, 30 I.L.M. 577 (1991). Joint Reply at 145 (quoting AAPL, 30 I.L.M. at 601 (internal quotation marks omitted)).

[170]For the reasons explained above, this Tribunal should reject claimants' assertion (Joint Reply at 147) that the Tribunal's Decision on Competence forecloses the United States from arguing that the "full protection and security" requirement is not even implicated in the context of this case. See supra at 56 n.63.

owned investors and investments in conformity with Spain's own laws. See Acuerdo para la Promoción y la Protección Reciproca de Inversiones entre el Reino de España y la República Argentina, Oct. 3, 1991, art. 3(1) ("Each Party shall protect the investments effected in its territory, in conformity with its legislation, or investors of the other Party . . . .") ("Cada Parte protegerá en su territorio las inversiones efectuadas, conforme a su legislación, o inversores de la otra Parte . . . .") (translation by counsel). This is, obviously, quite a different legal regime than that of Article 1105(1), which prescribes international law, not domestic law, as the standard of protection. Thus, Maffezini is inapposite.

Claimants also assert in error that the United States' position in this case is inconsistent "with the United States' own longstanding stance toward protection of its own citizens." Joint Reply at 146. Nothing in "the positions [the United States] has urged before other international tribunals,"[171] "its official diplomatic positions,"[172] or "its other treaty obligations"[173] suggests that

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[171]None of the authorities claimants cite supports their contention that the United States' position here is inconsistent with the positions it has taken before other international tribunals. See American Mfg. & Trading, Inc. v. Republic of Zaire, 36 I.L.M. 1534 (1997) (involving destruction and looting of property); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (involving hostage-taking); Home Insurance Co. v. Mexico (U.S.-Mex. Cl. Comm'n 1926), reprinted in Opinions of the Commissioners 51 (1927) (involving seizure of coffee); Case of the "Montijo" (U.S. v. Colombia) (1874), reprinted in 2 Moore's International Arbitration 1421 (1898) (involving seizure of steamship by rebels). Moreover, claimants wrongly assert that "the United States has successfully urged ICSID tribunals that foreign countries had failed to *'take all measures necessary*' to 'ensure' the protection and security of an American company's investments." Joint Reply at 152 (quoting Zaire, 36 I.L.M. at 1548) (emphasis supplied by claimants). The United States did not so "urge" the Zaire tribunal: the United States was not a party to, and made no appearance in, that case.

[172]None of the authorities claimants cite supports their contention that the United States' position here is inconsistent with its diplomatic positions. See Instructions of Sec'y Dulles to the American Embassy, Tripoli, No. A-101, May 21, 1957, MS. Dept. of State, reprinted in 8 Whiteman's 8 Digest of International Law 831 (1967) (liability for loss or injury to aliens arising from "mob demonstrations" exists only where claimant shows that authorities "failed to employ (continued...)

under customary international law the "full protection and security" requirement could apply here, a context not even remotely similar to those in which a breach of the obligation has ever been found; i.e., where a State failed to provide reasonable police protection against acts of a criminal nature that invaded the person or property of an alien. Joint Reply at 149.

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[172](...continued)
all reasonable means at their disposal to prevent the unlawful acts" or "failed to take proper steps to apprehend and punish the wrongdoers"); Dec. 8, 1923 treaty between the United States and Germany (at art. I), 44 Stat. 2133, 4 Treaties 4192 (Trenwith 1983), reprinted in 3 Hackworth Digest of International Law 630 (granting to aliens "that degree of protection that is required by international law"); Two French Citizens, 3 Op. 253, Butler (1837), in Digest of the Published Opinions of the Attorneys-General and Leading Cases on International Law 3 (1877) (noting that "where aliens have suffered violence from citizens of the United States, they can be protected only by the redress to be afforded in the courts and the special interposition of the legislature"); Letter of Mr. Adams, Sec'y of State, to Mr. de Onis, Spanish Minister (1818), reprinted in 4 Moore's Digest of International Law § 535 (1906) (stating that Spain had a duty under international law to prevent French cruisers from seizing U.S. ships and cargo in Spanish waters).

[173]None of the authorities claimants cite supports their contention that the United States' position here is inconsistent with any of its treaty obligations. See Treaty of Friendship, Commerce and Navigation (Argentina-U.S.) Art. II (1853), available at http://www.yale.edu/lawweb/avalon/diplomacy/argen02.htm (offering general protection to those engaged in business, "subject always to the general laws and usages of the two countries respectively."); Convention to Regulate the Commerce Between the Territories of the United States and of His Britannick Majesty, Art. I (1815) (reprinted in Charles I. Bevans, 12 Treaties and Other International Agreements of the United States of America 49, 50 (1974)) (offering merchants and traders general protection for commerce, "subject always to the Laws and Statutes of the two countries respectively"); Treaty of Friendship, Limits, and Navigation (Spain-U.S.) Art. VI (1795) available at http://www.yale.edu/lawweb/avalon/diplomacy/sp1795.htm#art6 (requiring parties to "protect and defend all Vessels and other effects" of the other party's nationals and to make efforts to "recover and cause to be restored to the right owners" those vessels and effects; the preceding and subsequent articles concern violent attacks and physical seizures); Treaty of Amity, Commerce and Navigation Between His Britannick Majesty and the United States of America ("The Jay Treaty"), available at http://www.yale.edu/lawweb/avalon/diplomacy/jay.htm (granting rights of entry and protection for merchants in time of European war and threats of piracy); Kenneth J. Vandevelde, United States Investment Treaties at 77 (noting simply that the phrase "full protection and security" in bilateral investment treaties corresponds to similar language in friendship, commerce and navigation treaties).

Thus, because, for the reasons explained in the Counter-Memorial and here, the full protection and security obligation does not extend beyond the customary international law minimum standard of treatment of aliens and that standard – contrary to claimants' assertion (see TLGI Mem. at 94) – does not require states "to prevent economic injury inflicted by private parties," claimants fail to meet their burden of proving that the challenged measures violate the "full protection and security" requirement.

D. Claimants Fail To Establish A Violation Of NAFTA Article 1110

Claimants continue to argue that the result of the O'Keefe proceedings – a court-approved settlement – violated Article 1110 of the NAFTA. See Joint Reply at 159. Yet claimants still have not provided the Tribunal with any authority that supports their allegation that such an action by a court could effect a taking in violation of Article 1110.

NAFTA Article 1110 – and the cases interpreting it – require that claimants establish an "expropriation" of an "investment of an investor." Here, claimants have made repeated (though unsubstantiated) allegations of discrimination and denial of justice, but have ignored the fundamental protection afforded by Article 1110(1): "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party . . . ."[174]

For example, claimants dismiss too swiftly the fact that no international tribunal has found – or even heard an allegation of – an expropriation on facts such as these. This is not a case of an investor prevented from operating its investment by denial of a permit (see, e.g.,

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[174]Proof of failure of one of the four requisite characteristics of a lawful expropriation – i.e., "(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation" – is a secondary step in the analysis. NAFTA art. 1110 ("No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party . . . ('expropriation'), except . . . .").

Metalclad Corp. (U.S.) v. United Mexican States (Award) (Aug. 30, 2000), ICSID Case No. ARB(AF)/97/1, at ¶ 106), or of an investor/lessor deprived permanently of the value of its property by order of a court directed to the lessee without any notice to the lessor (see, e.g., Oil Field of Texas, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986) at ¶¶ 41-43), or even of alleged substantial interference with an investment's ability to carry on its business (see, e.g., Pope & Talbot, Inc. (U.S.) v. Canada, (Interim Award) (June 26, 2000) at ¶ 102). Rather, this is a case where claimants allege that settlement of a lawsuit for civil damages constitutes an "expropriation." Just as international "precedent usually does not treat regulatory action as amounting to expropriation" (S.D. Myers, supra, at ¶ 281), the United States is aware of no case that has imposed liability under the theory of expropriation for a case such as this one (i.e., involving "the carrying out of a judgment of a court in a civil case"). See Sohn & Baxter, 1961 Harvard Draft Convention, comment to art. 10(5), at 115.

Finally, claimants have not satisfied their burden (noted by their own source) even to identify "some form of economic interest that can be identified as its 'investment' under NAFTA Article 1139[.]" Joint Reply at 158 (citing an unpublished commentary on Article 1110 written by an advocate for claimants in other Chapter Eleven cases). Claimants offer neither argument nor evidence to show that any of the multiple forms of consideration provided for by the O'Keefe settlement constitute an "investment of an investor of another Party in its territory," as required by Article 1110(1). If the amount of money paid in settlement of a civil suit could constitute an investment, then, as the United States has already noted (Counter-Mem. at 182), every settlement of civil litigation resulting in payment by a foreign investor (from a NAFTA country) would give rise to liability under Article 1110.

In sum, claimants put the cart before the horse. By resting their argument on sub-paragraphs (a) through (d) of Article 1110(1), claimants leave unanswered the fundamental inquiry posed by that expropriation provision: has the government taken any property and does that property constitute an investment of an investor in the territory of the NAFTA Party? Claimants here have failed to establish a claim of expropriation of an investment of an investor.

CONCLUSION

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

Respectfully submitted,

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David J. Anderson
Vincent M. Garvey
Kenneth L. Doroshow
Craig M. Blackwell
David O. Buchholz
Jonathan B. New
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20530
Tel: (202) 514-4263
Fax: (202) 616-8202

Mark A. Clodfelter
Barton Legum
Laura A. Svat
Alan J. Birnbaum
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
Suite 5519
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037

Steven F. Fabry
J. Carol Williams
OFFICE OF THE U.S. TRADE REPRESENTATIVE
600 17th Street, N.W.
Washington, D.C. 20508

Attorneys for Respondent
United States of America

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