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Raymond Loewen - Final

7-27-2000

IN THE MATTER OF

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

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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

FINAL SUBMISSION OF RAYMOND L. LOEWEN CONCERNING THE JURISDICTIONAL OBJECTIONS OF THE UNITED STATES

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Claimant/Investor Raymond L. Loewen ("Mr. Loewen") respectfully files this Final Submission Concerning the Jurisdictional Objections of the United States pursuant to the Tribunal's Order of April 3, 2000.

I. INTRODUCTION

On November 1, 1995, a jury of 12 Americans sitting in Hinds County, Mississippi, returned a verdict directing a Canadian company, The Loewen Group, Inc. ("TLGI") to pay local resident Jerry O'Keefe $500 million in a dispute over properties whose combined worth was only $8 million. This staggeringly inequitable verdict was the result of a trial infected by open appeals to the jurors' national and racial bias, highlighted by an inflammatory and entirely irrelevant anti-Canadian diatribe by former United States Secretary of Agriculture Mike Espy. The effect of this torrent of racial and xenophobic appeals was revealed by the post-trial statements of the jury foreman, who contemptuously described Mr. Loewen as "this Canadian who didn't know anything about blacks, trying to say he was creating jobs for these black people he loved so much," and a "rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole' Mississippi boy."[1]

The Mississippi Supreme Court initially stayed execution of the judgment in the O'Keefe case while it considered TLGI's request for a reduction of the insurmountable $625 million appeal bond required by previous action of the Mississippi legislative. On January 24, 1996, however, the Mississippi Supreme Court abruptly lifted this stay and ordered TLGI to either post the full $625 million bond or pay the $500 million judgment within seven days. Faced with no

[1] C. Loose, *Black Churches Selling Out, Funeral Homeowners Say; Pact With Firm is Threat*, Washington Post, August 30, 1997, at A1; N. Bernstein, *Brash Funeral Chain Meets its Match in Old South*, New York Times, Jan. 27, 1996, at A1.

viable avenue of appeal or collateral attack, and under an express threat from the plaintiffs to utilize the power of the Mississippi executive department to begin seizing its property the minute the judgment came due, TLGI settled the O'Keefe claims for $175 million. This payment was the direct result of the combined force of actions by the Mississippi judicial and legislative branches *and* by the imminent threat of action by the Mississippi executive department.

Because of the O'Keefe verdict, Mr. Loewen's investment in TLGI suffered losses of at least $54 million, and his personal and business reputation was severely damaged. Mr. Loewen has turned to this Tribunal for relief from the inequitable treatment he received at the hands of the Mississippi government, against which the United States Government offered no protection.

Thus far, the Government's response to Mr. Loewen's claim has combined venomous personal attacks upon Mr. Loewen and blind indifference to law and equity in a manner unfortunately reminiscent of his mistreatment in the Mississippi courts. After dredging up a handful of discredited and discreditable business enemies and REDACTED to fling inaccurate, irrelevant hearsay accusations at Mr. Loewen, the Government offers the testimony of "a distinguished expert in the international law of state responsibility" who flatly misstates the holding of the central case on this issue in urging the Tribunal to close its eyes to an injustice that even the Government now concedes "present[s] a serious challenge to the application of the Mississippi bonding requirement and the conduct of the Mississippi judiciary."[2]

In his Memorial and previous Submission on Competence and Jurisdiction, Mr. Loewen urged the Tribunal to assert jurisdiction over this claim and to hear the matter on the merits. As discussed below, the Government's Response does not weaken, but rather strengthens and confirms, Mr. Loewen's right to redress under NAFTA and in this Tribunal.

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[2] Reply Statement of Drew S. Days, III ("Days Reply Statement"), at 3.

II. SUMMARY OF ARGUMENT

Mr. Loewen's injuries arose directly from the actual and threatened acts of all three branches of the Mississippi and other states' governments, and the federal Government. The Government's attempt to create an exception to the now-conceded rule that judicial acts may constitute actionable "measures" under NAFTA Article 1101 because there was supposedly "no government participation" in the trial, appellate, and threatened execution process is thus without merit. Further, prior decisions of this Tribunal have squarely rejected the Government's claim that the term "measure" must be read restrictively.

NAFTA Article 1121 eliminates any requirement that claimants exhaust all available judicial remedies before bringing their claims, and in fact requires claimants to waive their rights to bring or to continue any judicial action. Even if any supposed "judicial finality" requirement applies here despite the clear meaning of Article 1121, the Mississippi Supreme Court's ruling of January 24, 1996 was such a "final" judicial act because there was no reasonable possibility that the U.S. Supreme Court or the local federal district court would correct the manifest errors of the Mississippi courts in the seven days between the Mississippi Supreme Court's ruling and the seizure of TLGI's property. The Government's other proposed course of action, bankruptcy, would not change the *fact* of Mr. Loewen's injuries from the O'Keefe verdict and appeal process, only the *amount* of those injuries.

The Government's Response offers no new argument regarding TLGI's supposed failure to adequately object at the trial court level, while the Government's novel assertion that TLGI was somehow required to advise the Mississippi Supreme Court of the consequences of bankruptcy – a course of action that TLGI never intended to follow – is unprecedented and without merit.

Finally, the Government's attempt to revive and re-direct its failed attack on Mr. Loewen's standing under NAFTA Article 1117 on the grounds that Article 1117 does not permit separate claims by the Investor *qua* Investor and on behalf of the Investment that he owns or controls is utterly without support in law, logic, or the language of NAFTA.

III. ARGUMENT

A. The Acts Complained of Were "Measures" Attributable to the United States

1. The Government Concedes Both The General Rule That Judicial Acts May Constitute "Measures," and That Mr. Loewen Has Stated a Claim Under This Rule

Retreating from the untenable position staked out in its initial Memorial on Matters of Competence and Jurisdiction, the Government now concedes that the judicial acts of a NAFTA Party may constitute "measures adopted or maintained" by that Party under NAFTA Article 1101. See Response of the United States of America to the Submissions of Claimants on Competence and Jurisdiction ("Response") at 8 ("[T]he United States agrees with Loewen that acts of the judiciary may be attributable to the state"). The Government further agrees that state liability for the acts of its judicial authorities arises, at a minimum, where "there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort." Id. (quoting A.V. Freeman, *International Responsibility for the Denial of Justice* 33 (1938)). Finally, the Government, through its expert Drew S. Days, III, has finally admitted that Claimants have alleged precisely the type of "flagrant or notorious injustice or denial of justice" giving rise to state responsibility for judicial acts:

> Loewen's submissions make detailed allegations that the Mississippi courts' conduct of the *O'Keefe* litigation was infected with invidious discrimination that severely damaged Loewen when the verdict was rendered and when the Mississippi Supreme Court

> refused to reduce the appeal bond. Taken together and assuming they are true, these allegations present a serious challenge to the application of the Mississippi bonding requirement and the conduct of the Mississippi judiciary.... 'By failing to follow the overwhelming weight of authority, the Mississippi Supreme Court deliberately forced the Canadian Defendant, Loewen, into an extorted settlement... [T]here is no doubt in my mind that these actions were willful and deliberate...[T]hese actions constituted not merely a denial of justice but a mockery of justice.' If those allegations are true, Loewen has suffered discrimination based on race or alienage, which is expressly prohibited by the U.S. Constitution and federal law.

Days Reply Statement at 3 (citations omitted). By acknowledging that Claimants have alleged a clear violation of the rights enjoyed by American citizens under the U.S. Constitution and federal laws, the Government has *a priori* admitted that these same allegations make out a denial of national treatment under NAFTA.

Thus, the Government now concedes both the general rule that judicial acts may be actionable "measures" under NAFTA Article 1101, and that Claimants have alleged precisely the type of outrageous conduct that gives rise to state liability under this rule. Having agreed both that it may be liable for judicial acts and that Mr. Loewen has alleged all of the facts necessary to show such a judicial "measure," the Government bears the burden of proving that it qualifies for some exception to the rule of state liability for such acts.

2. Representatives of All Three Branches of the Mississippi Government Played Dispositive Roles in Denying Claimants Justice and Equal Treatment

The exception that the Government seizes on to avoid responsibility for the mockery of justice that occurred in the Mississippi courts is the so-called "act of state" doctrine, under which the Government protests that it cannot be held responsible for Mr. Loewen's losses because the suit was between private parties, "with no government participation." Response at 4.

The record is overwhelmingly to the contrary. Indeed, members of *all three* branches of the Mississippi government, and even a recent member of the Cabinet of the United States, played integral roles in every stage of the Mr. Loewen's injury.

First, it has been alleged that trial court Judge Graves, a black Mississippi state court judge elected under a voting system mandated by the United States Government for the express purpose of fostering the election of black judges, displayed precisely the same type of racial parochialism that gave rise to the outlandish and irrational verdict. See Memorial of Raymond L. Loewen ("Loewen Memorial") at ¶¶ 44, 101-103. Significantly, it was Judge Graves who set the stage for the astronomical $500 million verdict in the O'Keefe case, by improperly instructing the jury to reconsider the amount of punitive damages after it had already returned a verdict of $260 million that expressly included $160 million in punitive damages. Loewen Memorial at ¶¶ 106, 107.

The United States does not, and cannot, assert that Judge Graves prevented the repeated injection of racist and xenophobic diatribe into the trial. On the contrary, as shown in detail in the Notice of Claim and the Loewen Memorial, Judge Graves repeatedly *refused* to protect TLGI and Mr. Loewen from such improper appeals. For example, Judge Graves refused to excuse a prospective juror for cause who believed that a foreign corporation should not be given a fair trial "because of special tax breaks that foreign corporations receive." TLGI counsel was forced to resort to one of its few allotted peremptory strikes to have this obviously biased juror removed, thus limiting TLGI's ability to strike equally hostile jurors from the panel. (Appendix to Notice of Claim ["App."] at A488, A490-91, A495-96). At the close of the trial, Judge Graves refused TLGI's request for a jury instruction that might ameliorated some of the damage from the plaintiffs' deliberately anti-Canadian and racist campaign. The instruction, if given, would

have advised the jury that TLGI was entitled to the "same fair trial at your hands as are other parties who are residents of Mississippi, such as the O'Keefes and the eight separate O'Keefe corporations that are plaintiffs in this case. All persons and parties stand equal before the law and are to be dealt with as equals in this court of justice." (App. at A2231-32), (Tr. at 5390-91, 5447).

Government participation in the trial was not limited merely to the misconduct of Judge Graves. Indeed, some of the most improper, baseless, irrelevant, and yet damaging evidence presented at trial came from Mississippi state legislative and executive officials, as well as a prominent former state and federal officer. Earl Banks, a sitting member of the Mississippi House of Representatives, testified concerning racial segregation in the funeral industry, and personally vouched for plaintiff Jerry O'Keefe as *not* being a racist – thus implying that Mr. Loewen and TLGI *were*. Loewen Memorial, at ¶ 99; Tr. at 1110-1119.

Another important piece of evidence at trial was a letter from the Mississippi Attorney General threatening TLGI's local affiliate with sanctions under Mississippi's consumer protection statutes for allegedly failing to "warn" consumers that it was owned by a Canadian company. In an open attempt to invoke the power of local and federal governments against the supposed Canadian interloper, plaintiffs' counsel Willie Gary read the entire text of this letter to the jury *three times,* and made it a key issue in his opening statement. Loewen Memorial ¶¶ 60, 67, 81; Tr. at 61, 5171, 5174, 1105-1108.

Perhaps the most strikingly improper evidence that plaintiffs presented at the O'Keefe trial the testimony of Alfonzo "Mike" Espy, a former assistant Mississippi Attorney General and United States Congressman who had only recently resigned from service as United States

Secretary of Agriculture.[3] Tr. 1086-110. Mr. Espy testified at length concerning his duties and activities with both the Mississippi Attorney General's Office and as Secretary of Agriculture, emphasizing his efforts to protect poor Mississippians from being swindled by foreign companies and to promote American agricultural products against the alleged unethical trade practices of other nations. Id. This wildly improper testimony culminated in a bitter and totally irrelevant attack on supposedly unethical Canadian wheat farmers, whose pricing policies Mr. Espy claimed injured American farmers. Id. Mr. Espy ended his testimony by discussing NAFTA's alleged unfairness to and unpopularity among Americans, and stating that NAFTA did not shield Canadian or Mexican citizens from liability for dishonest conduct. Loewen Memorial ¶¶ 76-78; Tr. at 1109-1110. Although TLGI's trial counsel objected and attempted to repair the damage from this improper testimony, Judge Graves refused to allow TLGI counsel to further examine Mr. Espy. Loewen Memorial at ¶ 79; Tr. at 1110.

The invidious participation of all three branches of government in the O'Keefe litigation continued throughout the appellate process. Obviously, the very bond requirement and bond reduction statutes under which TLGI suffered between November 1, 1995 and January 24, 1996 were creations of the Mississippi legislature. Miss Code Ann. § 11-51-31 (1999) ("A supersedeas shall not be granted in any case pending before the Supreme Court, unless the party applying for it shall give bond as required by the Rules of the Supreme Court."); Miss. R. App. P. 8(a) and (b) (promulgated in accordance with legislative mandate, and requiring parties to post a bond in the amount of 125% of the judgment appealed from, unless, for good cause, the

[3] As noted in the Loewen Memorial, Mr. Espy had been out of office for less than one year at the time of his testimony, and was thus under significant restrictions concerning his participation in judicial proceedings. Loewen Memorial ¶¶ 68, 69. Although plaintiffs' counsel Willie Gary took Mr. Espy through a detailed account of his service with the state and federal governments, he deliberately cut this train of questioning short just after Mr. Espy discussed his appointment as Secretary of Agriculture, thus leaving the jurors with the impression that Mr. Espy still held that federal office. Loewen Memorial ¶¶ 72-73; Tr. at 1083-89.

Supreme Court reduces the amount of the required bond). It was the Mississippi Supreme Court that initially granted a stay of execution on the $500 million judgment, then suddenly and arbitrarily lifted the stay, leaving TLGI with only seven days to pay the $625 million bond or the judgment. Moreover, the entry of the O'Keefe judgment and the lifting of the stay of its enforcement set in motion a series of events that are grounded in legislative statutes and executive enforcement.

In Mississippi, all circuit court clerks are required to keep a book entitled "the Judgment Roll," in which the clerk is required to enroll all final judgments. Miss. Code Ann. § 11-7-189(1) (1999). Any judgment enrolled constitutes a lien upon and binds all property of the defendant within the county where it is enrolled. Miss. Code. Ann. § 11-7-191 (1999). In order for a judgment to be a lien on property outside the county of enrollment, a plaintiff must file an abstract of the judgment with the circuit court clerk of any other county in which the plaintiff desires a lien. Miss. Code. Ann. § 11-7-195 (1999). These legislative provisions allow a plaintiff who has received a final judgment in state court to attach the property of the defendant throughout the state of Mississippi.

A plaintiff who has received a final judgment in a Mississippi court may also attach the defendant's property in other states to satisfy the Mississippi judgment. In order to enforce a money judgment in other states, a plaintiff must either: (1) file a new action to establish the judgment, or (2) in states that have adopted the Uniform Enforcement of Foreign Judgments Act, register the foreign judgment in the state where plaintiff wishes to enforce the judgment. See 47 Am. Jur. 2d, Judgments § 946 (1995).

After the lien is filed, a plaintiff must rely on the executive authority of the state to enforce the judgment. Under Mississippi law, the county sheriff is the local officer charged with

executing the judgments of the circuit courts. Miss. Code. Ann. § 9-9-29 (1999). A judgment is enforceable by writ of execution, issued by the clerk of court of the county and directed to the sheriff. Miss. Code. Ann. § 13-3-155 (1999). The sheriff is authorized to sell the defendant's property either at the courthouse itself, or at "any convenient point in the county where it is found." Miss. Code. Ann. § 13-3-161 (1999). All execution sales are by auction, to the highest bidder for cash. Miss. Code. Ann. § 13-3-169 (1999).

Thus, the acts of the Mississippi *legislature* empowered the Mississippi *executive* branch to enforce the final judgment entered against TLGI by the Mississippi *judiciary system*. The complete governmental power of the State of Mississippi was engaged in this process.

Here, the threat of direct and forceful executive action was no mere theoretical concept, but a menacing and imminent reality. Just as he had understood and played upon the bias and fears of the O'Keefe jurors, plaintiffs' counsel Willie Gary shrewdly exploited the coercive power of the Mississippi laws regarding the execution of judgments to pressure TLGI into settling. On the day after the Mississippi Supreme Court ordered TLGI to either pay the $500 million judgment or post a $625 million supersedeas bond within seven days, Mr. Gary sent a letter to TLGI that began by declaring plaintiffs' intent to have local sheriffs seize TLGI's property throughout the United States literally upon the minute the judgment became final. Deftly combining the threat of seizure with a demand for settlement, Mr. Gary wrote:

> Please be advised that as of 12:00 noon, Wednesday, January 31, 1996, we shall start execution on all property, real and personal, that you have in the state of Mississippi and in other states as well. ...[S]ettlement in this case is in your client's best interest.... We are willing to give you a second chance to resolve this case and avoid bankruptcy. Therefore, I am renewing my offer to resolve this case for four hundred seventy-five million dollars. If you are interested, have someone, <u>and only someone with settlement authority</u>, call me.

TLGI Appendix Volume III, Tab 97 (emphasis in original) (copy attached hereto as Exhibit H).

As the O'Keefe plaintiffs correctly noted, Mississippi law allowed them to seize all of TLGI's property in the State of Mississippi, and to levy against TLGI's property in many other states pursuant to the Uniform Enforcement of Foreign Judgments Act. See, e.g., 6 Ala. Code §6-9-234(a) (Michie 1993); Cal. Code Civ. Proc. §1710.50(a)(1-2) (West 1982); Fla. Stat. Ann. §55.509(2) (West 1994); Ga. Code Ann. §9-12-134(a) (1993); N.C. Gen. Stat. §1c-1705(a) (1995); Tex. Civ. Prac. & Rem. Code §35.006(a) (West 1986).

As indicated by Mr. Gary's letter, the looming governmental presence in the O'Keefe case was perhaps most acutely felt in the aftermath of the Mississippi Supreme Court's lifting of the stay of execution on the $500 million judgment against TLGI. In the seven frantic days between the lifting of the stay and the date set for execution, Mr. Loewen and TLGI did not fear Jerry O'Keefe or Willie Gary, nor TLGI's bankers and competitors. As the plaintiffs well knew, what TLGI and Mr. Loewen rightly feared was an army of sheriff's deputies, armed with writs and padlocks, seizing Loewen holdings and selling them on the steps of county courthouses throughout the United States. It was this threat of seizure of property – made possible by legislative action and carried out by agents of the executive branch – that coerced the $175 million settlement.

The academic musings of David A. Caron, the Government's "distinguished expert in international responsibility," fall flat in the face of the raw coercive power of executive action shown in Mr. Gary's real-world correspondence. Professor Caron concedes, as he must, that all courts themselves do not actually carry out the sentences they impose or execute the judgments that they enter,

> but rather, in the form of an Order or an Award of Interim Measures, order someone else to do so. The "someone else" who

> has been ordered to take the measure may be one of the parties, a third party such as a bank, *or – in the case of courts – perhaps a government agency or official.*

Statement of David D. Caron (Caron Statement) ¶25 (emphasis added). To say that the statutes passed by the Mississippi legislature or the judgments entered by the Mississippi courts are not "measures" because they merely direct "someone else" – i.e., the executive branch – to carry out the physical task of seizure is, with respect, transparent sophistry.

The Government itself concedes that the *actual* seizure of property by a Party is a "measure" under NAFTA. See Response at 25-26 (citing G.W. McNear, Inc. v. United Mexican States, 4 R.I.A.A. 373 (U.S. v. Mex. 1928); The Texas Company (U.S. v. Mexico), American Claims Commission 142 (1948); Young, Smith & Co. v. Spain (U.S. v. Spain 1879), *reprinted in* 3 Moore, International Arbitrations at 3147 (1989); and Frederic Bronner v. Mexico (U.S. v. Mex.) *reprinted in* 3 Moore, International Arbitrations at 3135 (1898). There is thus no legal or logical basis to claim that the *threatened* seizure of property is not a "measure" under NAFTA where, as here, that threat causes injury to the claimant.[4]

The record flatly refutes the Government's claim that there was "no government participation" in the trial and appeal of the O'Keefe litigation. On the contrary, government participation, both actual and threatened, was at the heart of the injury complained of here. The Government has not and cannot carry its burden of showing that it qualifies for the supposed "act of state" exception to the general rule of state liability for judicial acts.

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[4] Indeed, any act which merely interferes with an alien's use or enjoyment of his property constitutes government seizure as a matter of settled international law. See, e.g., Tippett, Abbett, McCarthy, Stratton v. Iran, 6 Iran-U.S. C.T.R. 219, 225 (1984). Here, the mere announcement of the tainted verdict in O'Keefe caused an immediate $54 million dollar decrease in the value of Mr. Loewen's investment in TLGI. Loewen Memorial ¶ 209 and Exhibit 5. If this does not constitute interference with his access to and right to enjoy that investment, Mr. Loewen is at a loss to say what would. Thus, even if direct Government misappropriation were a prerequisite to showing an actionable "measure" under NAFTA, Mr. Loewen has clearly alleged such misappropriation. Notice of Claim ¶¶ 162-167.

3. The Government is Not Entitled to a Restrictive Reading of the Term "Measures"

Perhaps realizing that its jurisdictional arguments under the "act of state" doctrine are strained, inequitable, and contrary to the record, the Government claims that any ambiguity in the definition of the key jurisdictional term "measure" must be resolved in favor of a restrictive reading that would negate jurisdiction. This argument has been resoundingly rejected by previous decisions of this Tribunal.

In its Award on Jurisdiction in Ethyl Corporation v. Canada, (reprinted at 38 I.L.M. 708 (1999) (copy attached hereto as Exhibit I), the Tribunal was squarely presented with the issue of whether a piece of Canadian legislation constituted a "measure" under Article 1101. Id. at 33. Canada, as the respondent, "quite clearly urge[d]" that jurisdictional terms in NAFTA Chapter 11 must be "strictly interpreted." Id. at 28 n.20. Before even going on to discuss the language of Article 1101, the Tribunal stated as follows:

> The Tribunal considers it appropriate to dispense with any notion that Section B of Chapter 11 is to be construed "strictly." The erstwhile notion that in case of doubt a limitation of sovereignty must be construed constrictively has long since been replaced by Articles 31 and 32 of the Vienna Convention.[5]

Id. at 28 (internal citations omitted); see United Sates-Iran, Case No. A17, Decision No. DEC 37-A17-FT (May 13, 1985) (Brower, J., concurring) ("The Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed").

Indeed, the Ethyl Tribunal noted that jurisdiction presumptively arose when the Claimant timely filed a Notice of Claim stating a *prima facie* claim under Article 1116. Ethyl at 31-32

[5] The Government concedes that the jurisdictional analysis in this case is governed by the Vienna Convention. Caron Statement ¶ 18.

(citing Decisions and Opinions, Mixed Claims Commission, United States and Germany, Administrative Decision No. 11 (1992) ("When the allegations in a petition... bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches"); Ambatielos Case, 1953 I.C.J. Rep. 10, 11-12 (Judgment of May 19) (fact that allegations in claim may ultimately be disproved does not alter the power of those claims to invoke jurisdiction). Where, as here, the claimant has met these requirements, it is for the respondent to rebut the presumption of jurisdiction. Id.

As another ICSID Tribunal stated in Amco Asia Corporation v. Indonesia (Jurisdiction), ICSID Case No. ARB/81/1 (Award of 25 Sept. 1983), "[L]ike any other conventions, a convention to arbitrate [such as NAFTA] is not be construed *restrictively,* nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties." (Emphasis in original). In similar circumstances in the past, the United States has argued for liability against other countries whose judicial and other governmental officials either actively participated in anti-American discrimination or failed to protect Americans from such discrimination. See Matter of Jennie M. Fuller, 1971 Foreign Claims Settlement Commission of the United States, Annual Report to the Congress at 53, 58-59; Solomon v. Panama, 6 R.I.A.A. 370, 373 (1933). Thus, the United States cannot now be heard to argue for a "restrictive" view of Article 1101. Neither can the Government deny that it is the common will of the NAFTA signatory parties that claims such as those presented here fully support the jurisdiction of this Tribunal.

B. The Mississippi Supreme Court's Refusal to Reduce the $625 Million Appeal Bond Was a "Final" Judicial Act As Both a Legal and Practical Matter

The Government concedes that NAFTA Article 1121 significantly relaxes the "exhaustion of remedies" requirement by requiring claimants to waive any right "to initiate *or continue*" any judicial proceeding involving the dispute. NAFTA Article 1121(1)(b), (2)(b) (emphasis added).[6] In its Response, however, the Government attempts to create an artificial distinction between the analytically identical concepts of judicial finality and exhaustion of remedies, and to set up an excessively high standard for judicial finality. In fact, Article 1121 completely *eliminates* any exhaustion of remedies requirement by instead requiring that potential claimants *waive* their right to further judicial process. In any case, the Government's theoretical contortions are for naught, as Claimants' allegations surpass even the unreasonably high standard that the Government suggests for its alleged judicial finality "requirement." Indeed, the testimony of the Government's supposed "expert" on this topic contains an error so glaring as to remove all credibility from his Statement.

1. NAFTA Article 1121 Incorporates, and Eliminates, Any Requirement of Judicial Finality

The Government admits that the Parties enactment of the waiver requirements of Article 1121 show that, "[w]ithout doubt, the Parties contemplated some loosening of the procedural requirement of recourse to local remedies." Response at 31. The Government also concedes that the exhaustion of remedies rule, which requires a claimant to exhaust *all* potential avenues of redress, necessarily includes and eclipses any requirement of judicial finality, which would

[6] The Government does not dispute the fact that both Mr. Loewen and TLGI have filed written waivers pursuant to Article 1121. Notice of Claim, Exhibit F.

require the claimant only to pursue all reasonably available *judicial* appeals. Id. at 20. From these laudable admissions, however, the Government departs on a tortured review of everything but the language of NAFTA and its interpretations in an attempt to create some theoretical distinction between the analytically and practically identical concepts of exhaustion of remedies and judicial finality.

Although the heading of this section of the Government's Response claims that "the text of the NAFTA" "requires" judicial finality, the Government fails to cite to a single word of the treaty containing any such "requirement." On the contrary, the plain language of Article 1121 requires that all potential claimants *waive* their right to continue any judicial procedures in which they may also be involved. To construe this language to somehow *require* a claimant to pursue all theoretically possible avenues of judicial relief, as the Government attempts to do here, is to stand Article 1121 on its head, and to render it a nullity. Only if viable appeals are still open to a potential claimant would Article 1121's waiver requirement serve any logical purpose. By requiring claimants to waive all viable appeals, Article 1121 necessarily eliminates any judicial finality requirement.

This commonsense notion has been specifically endorsed not only by legal scholars, but also by the Government's own statements concerning the exhaustion of remedies requirement before and after the enactment of Article 1121. See B.S. Amor, *International Law and National Sovereignty: The NAFTA and Claims of Mexican Jurisdiction*, 19 Hous. Int'l L. 565, 574 (1997) (Article 1121 waiver requirement eliminates the need to pursue other available remedies, including judicial remedies); Memorandum of M. Whiteman, Assistant Legal Advisor, U.S. Department of State, *Comments on Report on "International Responsibility," December 15, 1956, reprinted in* 8 M. Whiteman, *Digest of International Law* 789 (1967) ("where the initial

act or wrong is *imputable* to the State [as alleged here], *substantively* it is unnecessary to exhaust local remedies") (emphasis in original); Statement of Administrative Action, North American Free Trade Agreement Implementation Act at 125 (1993) ("Article 1121 requires the investor and, in certain cases, the enterprise that is owned or controlled by the investor, to consent in writing to arbitration *and to waive the right to initiate or continue any actions in local courts* or other fora, except for actions for injunctive or other extraordinary relief") (emphasis added).

After a rambling, 11-page discourse through an impressively musty assortment of decisions having nothing at all to do with the treaty in question, the Government reluctantly concedes that its arguments concerning the alleged "substantive" requirement of finality are still no more than "a developing area of international law, subject to active intellectual debate among respected scholars." Response at 27. The Government further acknowledges the string of cases that Claimants have cited in which international tribunals have asserted jurisdiction over claims despite the claimants' failure to exhaust judicial remedies, noting weakly that the Tribunal is not absolutely required to follow this well-trodden path. Id.; see Submission of The Loewen Group Inc. Concerning the Jurisdictional Objections of the United States at ¶ 45. Finally exhausted to the point of candor, the Government concedes that Article 1121 contains at least an "implied" waiver of any judicial finality requirement, and resorts once again to the discredited theory that Article 1121 is a jurisdictional requirement that "must be read narrowly." See, e.g., Ethyl at 28 (rejecting notion that Section B of NAFTA Chapter 11 [including Article 1121] should be strictly construed).

Perhaps the most inexcusable error in the Government's argument on this issue appears in the testimony of Professor Caron, a "distinguished expert" in the field. Response at 3. Professor Caron's statement includes a description of the holding in the Ethyl case, *supra*, which

he claims "unequivocally supports the finality requirement." Caron Statement ¶ 62. Professor Caron then describes the holding in Ethyl as follows: "In that instance, the arbitration panel concluded that a Canadian legislative bill that had not yet received the 'royal assent' was not a final legislative act and therefore not a measure within the meaning of Article 1101." Id.

Nothing could be further from the true holding of Ethyl. In fact, the Ethyl Tribunal noted that Canada itself had broadly defined the term "measure" as "a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions." Ethyl, *supra* at 34 (quoting Canada's Statement on Implementation of the North American Free Trade Agreement, Can. Gaz. Part IC(1) (1994) at 80. Noting that Article 201(1) of NAFTA states that the term "measure" includes "any law, regulation, procedure, requirement or practice," the Tribunal concluded that "clearly something other than a 'law,' even something in the nature of a 'practice,' *which may not even amount to a legal stricture*, may qualify" as a measure. Id. at 34 (emphasis added).

The Ethyl Tribunal remarked that the "royal assent" necessary to complete the legislative process of the act in question was generally "granted as a matter of course once the Government has requested it," and that such royal assent had eventually been given, albeit not until after the claim was filed. Id. at 36. Thus, the Tribunal went on to find – contrary to Professor Caron's description – that the legislation *was* a "final" act despite the lack of royal assent, and *did* constitute a measure giving rise to jurisdiction under Article 1101. Id. at 36.

Professor Caron's characterization of the holding in Ethyl is plainly erroneous. His gaffe is particularly harmful to the Government's case because it only serves to highlight the Ethyl decision, which firmly supports Mr. Loewen's claim that the act of the Mississippi Supreme Court was a "final" measure. As described below, the rejection rate of certiorari petitions to the

United States Supreme Court averaged in excess of 98% during 1995 and 1996. Thus, it can truly be said that such rejections, like the grant of royal assent for Canadian legislation, was "a matter of course." Ethyl at 36.

In sum, the Government's novel and unsupported attempt to construct "judicial finality" as a separate substantive jurisdictional requirement is far too flimsy and suspect a theorem upon which to limit the jurisdiction of this Tribunal or impede Mr. Loewen's access to it, and should be rejected in favor of the clear language and effect of Article 1121.

2. The Facts Alleged Clearly Satisfy Any Judicial Finality Requirement, Even as That Alleged "Requirement" is Variously Described in the Government's Response

Throughout its discussion of the alleged judicial finality requirement, the Government cites to a bewildering variety of language concerning exactly what this supposed "requirement" requires of a claimant. Fortunately, the Tribunal need not puzzle over which of these various explications should apply, as the facts alleged here show that Mr. Loewen and TLGI satisfy any reasonable finality requirement.

Citing first to Alwyn Freeman, an authority on international responsibility upon whom both sides have relied in this dispute, the Government first suggests that the finality "requirement" obligates a potential claimant to proceed in court as long as "there still remains the *substantial possibility* that an appellate tribunal will correct the wrong below." Response at 23 n.6 (citing A. Freeman, *International Responsibility of States for Denial of Justice* 33 (1938)) (emphasis added). Several pages later, the Government discusses a collection of claims arising out of prize court proceedings in support of requiring Claimants to have pursued "*reasonably available* avenues of appeal." Response at 27 n.9 (emphasis added).

The Government next claims that the true standard by which a NAFTA claimant's efforts to meet the alleged finality "requirement" must be gauged is the "'*obvious futility or manifest ineffectiveness* of appeal, not the absence of a reasonable probability of success or the improbability of success, which are both less strict tests.'" Response at 33 (all emphasis added) (citing C.F. Amerasinghe, Local Remedies in International Law 195 (1990)). After making this pronouncement, however, the Government continues to cite to cases relying on the "less strict tests" of reasonable possibility of success. See Response at 33 (citing Norwegian Loans Case, 1957 I.C.J. Rep. 9, 39 (separate opinion of Judge Lauterpacht) (claimant has burden of ruling out "*as a matter of reasonable possibility*," any further judicial remedy) (emphasis added); X v. United Kingdom, App. No. 3651/68, 31 Eur. Comm'n H.R. Dec. & Rep. 72, 90 (1970) (remaining judicial remedy must be "intrinsically able to offer a *real chance of success*) (emphasis added); see also Response at 35 (citing L. Sohn and R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12 168 (1961) (exhaustion of remedies doctrine requires claimant to pursue *reasonable possibility* for appeal) (emphasis added); Response at 37 (faulting TLGI for failing to pursue its alleged "*reasonable opportunity*" to obtain federal court review of the Mississippi Supreme Court's refusal to reduce the appeal bond) (emphasis added); Days Statement at 4, 5 (claiming that TLGI had a "*reasonable prospect*" to obtain a stay of execution from the U.S. Supreme Court, and a "*reasonable opportunity*" to obtain U.S. Supreme Court review of the merits of its claim) (emphasis added)).

Regardless of whether the test for judicial finality is phrased affirmatively – such as requiring a "reasonable opportunity," "reasonable prospect," "reasonable possibility," "substantial possibility" or "real chance" of success – or negatively, such as requiring a showing

that further appeal would be "obviously futile or manifestly ineffective," the facts alleged here clearly satisfy any such requirement.[7]

In the interests of brevity, Mr. Loewen will not review the extended testimony offered by Professor Laurence Tribe and Professor Charles Fried, and which conclusively shows that Claimants had no reasonable chance of success in an appeal to the U.S. Supreme Court or local federal district court. In its Response, the Government offers three arguments: the supplemental opinion of Professor Days; documents produced by TLGI showing that it drafted pleadings seeking U.S. Supreme Court review; and a supposed divergence between Professor Tribe and Chief Justice Richard Neely, Claimants' witness concerning the state appellate procedure and the misconduct at the trial court level, concerning the extent of that misconduct.

a. Professor Days' Opinion is Entirely Speculative

Professor Days' opinion is an exercise in sheer post-facto academic speculation that ignores American appellate jurisprudence and history. While he opines with bland assurance that TLGI had a "reasonable prospect" of obtaining a stay of execution *and* a grant of certiorari from the U.S. Supreme Court – both of which would be required in order to render effective relief – Professor Days fails to note the sobering practical fact that the U.S. Supreme Court granted only 280 out of the 15,157 petitions for certiorari filed in 1995 and 1996, and heard argument on only 180 of those petitions granted.[8] If Professor Days views a route of appeal

[7] At one point in its Response, the Government claims that the judicial finality "requirement" demands that the claimant must "demonstrate, in particular, that *the entire judicial system of the State is incapable of affording justice*. Response at 34 (emphasis added). As the Government cites no case, court, or commentator that has ever employed this language, and does not itself seek to impose such a patently unreasonable standard upon Claimants, this hyperbolic contention does not warrant further discussion.

[8] Source: Clerk, United States Supreme Court.

having a greater than 98% failure rate as offering a "reasonable" or "substantial" possibility of success, then Mr. Loewen respectfully suggests that he is unique in his optimism.

Professor Days and the Government also mis-state the significance of Pennzoil v. Texaco, 481 U.S. 1 (1987), in which the Supreme Court voted unanimously to *reverse* the Second Circuit's decision to void a Texas bonding requirement as applied to the appellant Texaco. 481 U.S. at 18. Much has been said already about the Pennzoil case in the statements of Professor Tribe, and which need not be repeated here. Suffice it to say that the Pennzoil case involved a $11 billion judgment against Texaco, which, under Texas law, could only be appealed if Texaco first posted a good and sufficient bond in "at least the amount of the judgment, interest, and costs." 481 U.S. at 5 (quoting Tex. Rule Civ. Proc. 364(b)). On appeal, the Second Circuit exercised federal jurisdiction over Texaco's claims, and ruled that the mandatory Texas lien and bond statutes were unconstitutional as applied. Texaco v. Pennzoil, 784 F.2d 1113, 1157 (2d Cir. 1986), reversed, 481 U.S. 1 (1987). The U.S. Supreme Court reversed, declining to review the constitutionality of the Texas law even though it required Texaco to post a bond of approximately $13 billion – a truly phenomenal sum representing 26 times the $500 million verdict in O'Keefe. Pennzoil, 481 U.S. at 18. Significantly, the Court's vote on this issue was a unanimous 9-0, loudly slamming the appellate door in Texaco's face and eliminating the possibility that TLGI, eight years later, could appeal to some sympathetic member of the Court in support of its petition for certiorari.[9]

[9] In its Response, the Government argues that the Pennzoil case actually supports the appealability of the bond requirement in O'Keefe because Justice Harry Blackmun, despite voting with the rest of the Court not to hear Texaco's constitutional claims, nevertheless indicated that he would not disturb that portion of the decision below that found that these claims raised a "fair ground" for litigation. Response at 49 n.23; 481 U.S. at 28; see Days Statement at 18 n.11. Both the Government and Professor Days fail to note, however, that the author of this lone piece of *obiter dicta* regarding the appealability of the O'Keefe decision retired from the Supreme Court at the end

(continued ...)

Finally, notably absent from Professor Days' analysis is any consideration of the time pressure under which TLGI would have been required to prepare and file its petition for certiorari and for a stay pending the ruling on that petition. TLGI did not make the decision not to pursue futile federal appeals in the calm oasis of academia in which Professor Days leisurely researched his legal opinion. Rather, the Mississippi Supreme Court's abrupt and arbitrary lifting of the stay gave TLGI just *seven days* in which to prepare the mass of pre-printed forms and briefs attendant to petitions for certiorari.[10] Of course, merely filing a certiorari petition would have been of no use to TLGI or Mr. Loewen unless the Supreme Court not only received, by actually *ruled* on the motion for stay of execution in less than seven days from the lifting of the stay. The improbability of such swift and complete relief demonstrates, without more, the fact that the January 24, 1996 ruling of the Mississippi Supreme Court was a "final" judicial act under any of the standards that the Government has cited.

(...continued)
of the 1993 term, years before any potential appeal in that case. See 514 U.S. iii, iv (1994) (allocating seats of active Justices of the Court; listing Justice Blackmun as retired).

[10] Indeed, the extremely detailed requirements for filing a petition for writ of certiorari make it a very time-consuming process. Under the Rules of the Supreme Court of the United States, an appellant must submit 40 copies of the petition for certiorari. The Rules provide that a petition shall be prepared "in a 6 1/8 by 9 ¼ inch booklet-format using a standard typesetting process . . . to produce text printed in typographic characters. . . . The text must be reproduced with a clarity that equals or exceeds the output of a laser printer."). Supreme Court Rule 33(1)(a). The Rules provide for every minute detail of the filing process: "Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. . . . The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text shall be obscured by the binding." Supreme Court Rule 33(1)(c). Rule 33(1(g) provides nine different colors for the cover of a document, depending on the type of document and the party submitting it. All of this preparation would be for naught if TLGI's lawyers also did not file an application for a stay of the Mississippi Supreme Court's order. Within the same seven-day time frame, the attorneys would have had to draft and file the stay application. Supreme Court Rule 23. After filing, one Justice of the Supreme Court would have had to receive, review, and approve the stay by January 31, 1996. Id.

b. <u>The Drafts of Unfiled Petitions for Certiorari That TLGI Has Produced Show Nothing More Than That the Company Considered the Possibility of Such an Appeal Before Concluding That It Was Not Reasonably Available</u>

The Government's reliance on the fact that TLGI prepared draft versions of a petition for certiorari to the U.S. Supreme Court as evidence that such a petition had a "reasonably possibility" of success is, if anything, less convincing than Professor Days' interpretation of the <u>Pennzoil</u> decision. In the first place, any documents tending to show the subjective mindset of TLGI or its counsel concerning the likelihood of success on appeal are entirely irrelevant under the Government's own theory of the law, which is that the judicial finality requirement is judged according to an *objective* standard, regardless of what the claimant may have believed at the time. Response at 36 (collecting cases).

In any case, it may be said without citation that every practicing attorney of any experience has directed the preparation of pleadings covering every conceivable course of action. This does not mean that the attorney or client believes that, because the pleadings are drafted, success is likely or even possible in each such course of action.

The Government's attempts to find scraps of optimism concerning appeal amid the mass of correspondence between TLGI's many counsel produces a similarly unremarkable result. To its credit, TLGI did fully discuss and investigate the possibility of Supreme Court appeals. Such a thorough review should argue for, not against, the validity of TLGI's conclusion that it had no viable avenue of appeal.

c. There Is No Divergence of Opinion Between the Statements of <u>Chief Justice Neely and Professor Tribe</u>

Little need be said of the Government's attempt to create an artificial rift between Professor Tribe and Claimants' witness Chief Justice Richard Neely, other than it is based upon both a mischaracterization of Professor Tribe's Reply Statement and a fundamental misunderstanding of the nature of Mr. Loewen's Chapter 11 claim.

Mr. Loewen's theory of the case – in which TLGI apparently joins – is that he was the victim of *two* distinct NAFTA violations during the course of the <u>O'Keefe</u> litigation. Each violation entitles Mr. Loewen to relief before this Tribunal. The first occurred during the conduct of the trial, in which Mr. Loewen was subjected to an outrageous barrage of nationalistic attacks and racial appeals. The trial judge not only openly condoned these improper arguments, but at times voiced his sympathy with them. The <u>O'Keefe</u> plaintiffs were actively assisted in this mockery of justice by not only the trial judge, but also by various witnesses and evidence from the other two branches of the Mississippi state government and the federal government. This conduct constituted a direct violation of NAFTA's national treatment and "minimum standard of treatment" provisions, Articles 1102 and 1105, as well as expropriation of property under Article 1110.

By refusing to reduce the resulting $625 million appeal bond, the Mississippi Supreme Court violated Mr. Loewen's Section A rights a second time, in that it willfully failed in its duty under Article 1105 to protect Mr. Loewen and TLGI from the discrimination in the trial court. The federal Government similarly failed to offer adequate protection by failing to provide a realistic method of appealing the action of the Mississippi Supreme Court. These allegations of an essentially two-stage denial of justice are neither new nor novel, but rather have been the

Claimants' stated theory of the case from the earliest days of this proceeding. See Notice of Claim ¶¶ 139-174.

Chief Justice Neely's Affidavit, submitted on behalf of both Mr. Loewen and TLGI, first catalogues and discusses the myriad glaring errors that Judge Graves committed at the trial level because of his outright favoritism towards the local, black-oriented plaintiff and against the foreign, all-white defendant. Notice Of Claim, Exhibit B, at 6-11 and Exhibit B thereto. Mr. Loewen expressly re-affirms his reliance upon these conclusions of Chief Justice Neely concerning the initial or "first-stage" NAFTA violation.

Chief Justice Neely – himself a former Justice and Chief Justice of a state supreme court in the southern United States – then goes on to conclude that the Mississippi Supreme Court deliberately abdicated its duty to protect TLGI and Mr. Loewen from the disastrous impact of Judge Graves' misconduct for political reasons; that is, that the Mississippi Supreme Court deliberately manipulated the bonding requirement to effectively strip TLGI of its ability to appeal, and thus avoid the "politically unenviable" but otherwise unavoidable task of reversing a verdict wildly popular among their most influential constituents. Id. at 10-17. As Chief Justice Neely freely admits, however, neither he nor TLGI can ever hope to secure direct proof of the motive behind this second NAFTA violation. Rather, Chief Justice Neely relies on his experience as a state appellate court judge and American lawyer when he states, in a characteristic colloquialism, that "when you see an owl at a mouse picnic, you know he didn't come for the sack races."[11]

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[11] As the Tribunal may know, "sack races" at a traditional American picnic involve a race where the contestants stand inside a burlap sack and, with feet and legs so constrained, hop towards the finish line. This activity is collateral to the feast that is the main purpose of the event. See Webster's Ninth New Collegiate Dictionary 1035 (1983).

A fair reading of both statements shows that Chief Justice Neely's Affidavit, although indeed "colorful" in its expression, is neither at odds with Professor Tribe's Reply Statement nor criticized as such in that statement. Rather, as Professor Tribe makes abundantly clear, it is Professor Days' conclusions that are described as relying on "a caricature" of Claimants' allegations of discrimination in order to argue that these exaggerated claims would have qualified for the extremely narrow exceptions to the three doctrinal bars to collateral review of state court judgments in federal court.[12] Thus, when Professor Tribe speaks of the "wild accusations of 'conspiracy theories' found in bad political thrillers," he is clearly referring to Professor Days' magnified and distorted reflection of Claimants' allegations, not the contents of Chief Justice Neely's Affidavit. Reply Statement at 18-19.

Indeed, Professor Tribe's Reply Statement and Chief Justice Neely's affidavit are in complete accord as to the *political* basis for the Mississippi Supreme Court's actions. Both experts also agree as to both the necessity of strong proof of such political bias and the absence of such direct evidence during the seven days between the lifting of the stay and the deadline for execution on the judgments. As Professor Tribe points out, "mere allegations" of such political or institutional bias are plainly insufficient to attract the attention of the federal courts. Reply Statement at 19. Chief Justice Neely readily admits in his Affidavit that he has no concrete evidence of the *scienter* of the Mississippi Supreme Court on January 24, 1996, the date on which it refused to reduce TLGI's appeal bond and set an execution date of January 31, 1996. Neely Affidavit at 16.

[12] As listed in Professor Tribe's initial Statement and Reply Statement, these are the "Full Faith and Credit" doctrine, the Rooker-Feldman doctrine, and Younger abstention.

Thus, Professor Tribe's Reply Statement neither criticizes nor undercuts Chief Justice Neely's testimony concerning the political background and motive of the Mississippi Supreme Court's actions, but rather places that testimony in the proper context of an attempt to surmount the overriding obstacles to collateral review in the federal courts.

C. Bankruptcy Would Only Have Changed the Nature and Extent of Damages, Not Allowed the Claimants to Avoid All Damage

1. The Government's Arguments Concerning Bankruptcy Are Irrelevant, As It's Own Experts Have Conceded the Damages Flowing From Chapter 11 Filings Render Such Filings a "Last Resort," and More Damaging Than a Reasonable Settlement

The proposal that Claimants are somehow without recourse to the jurisdiction of this Tribunal because TLGI failed to declare bankruptcy rather than settle the claims with the O'Keefe plaintiffs remains an irrelevant red herring despite the Government's half-hearted attempts to revive this argument.

REDACTED

This candid and common sense testimony places the Government's contrary expert opinion well beyond the realm of credibility. Given the facts of this case, it is particularly apt to note that J. Ronald Trost's hollow assertion that "Chapter 11 planning is considered part of ordinary business planning by many large corporations" sounds uncannily like the sales pitch of

an estates lawyer selling will-writing services.[13] Declaration of J. Ronald Trost at 5. Planning for one's own demise is also part of ordinary estate planning. This does not mean that death is either welcome or without adverse consequences to the party experiencing it.

Claimants have alleged and offered substantial evidence to show that bankruptcy would not only have cost TLGI more than the settlement ultimately negotiated with the O'Keefe plaintiffs, but also that TLGI management universally viewed bankruptcy as ruinous to the company's all-important acquisitions program.

REDACTED

The Government's own submissions confirm the adverse effects **REDACTED**

REDACTED See David Baines, *B.C. Funeral Firm Settles Suite for $85 Million; Out-of-Court Deal With U.S. Company Saves the Loewen Group From Bankruptcy*, Vancouver Sun, January 30, 1996, at A1 (Government App. Vol. III at Tab 90) (reporting that TLGI "fac[ed] a humiliating future as a ward of the U.S. bankruptcy court," and that "[t]he stock market, relieved that the company had negotiated its way out of a $500 million U.S. jury award," bid up TLGI stock by $12.25; quoting stock analyst as stating that "'the cost of posting the [appeal] bond and

[13] It is no accident that all of the bankruptcy experts that the Government has enlisted to extol the joys of bankruptcy are themselves bankruptcy practitioners; that is, lawyers whose business depends upon the demise of others' businesses. Had the Government found a corporate CEO, small business owner, or individual to testify about their own happy experience as bankrupts, its arguments might have been more persuasive.

raising distress financing was going to be exorbitant for the company, and there was still a substantial risk that they would not win on appeal in the Mississippi Supreme Court.'"); *Heroes*, The Daily News, January 29, 1996 (Government App. Vol. III at Tab 96) (reporting that the settlement "removed the specter of bankruptcy from over Loewen's head, causing the stock to surge $8 1/9 to $29"). Similarly, the reaction of the financial markets in both Canada and the United States, as confirmed in these same news reports, confirms the considered judgment of the financial community that settlement was greatly preferable to bankruptcy.

Significantly, the Government even now does not contest the Claimant's allegation that bankruptcy would have foreclosed additional acquisitions, alleging only that "throughout the entirety of a Chapter 11 proceeding, Loewen would have been able to continue its core business of operating funeral homes and cemeteries without interruption." Response at 59. This allegation ignores the fact, again reported in the Government's own submissions, that it was TLGI's "growth-by-acquisition strategy that made Loewen the second-largest funeral services provider in North America and boosted the company's share price...." *B.C. Funeral Firm Settles Suit, supra*. In order to continue such growth, now doubly necessary because of the burden of paying the O'Keefe settlement, TLGI needed to continue its acquisition strategy, not just simply manage its current holdings.

At bottom, the Government's bankruptcy argument rests upon the theory that a corporate claimant must commit financial suicide before it may appeal to this Tribunal for relief. The Tribunal should reject this implausible and inequitable notion.

2.

REDACTED

REDACTED

a scrap of notepaper regarding a "TC" between Alan Miller and some unidentified party on December 21, 1995

REDACTED

There is no evidence that this note was written by any Loewen employee concerning any statement that unidentified person may have made to Mr. Miller

REDACTED

REDACTED

D. The Government's Response Offers No New Arguments or Evidence Regarding TLGI's Supposed Failure to Object at the O'Keefe Trial, Which Theory Claimants Have Amply Refuted

In the interests of brevity, Mr. Loewen will avoid merely restating his prior arguments where, as here, the Government has offered no new evidence or argument in support of its objections. Claimants previously identified various instances in which TLGI objected to the misconduct in the trial court. In this final submission, Mr. Loewen identifies yet another – TLGI's objection to Mike Espy's utterly irrelevant and inflammatory testimony that NAFTA "didn't mean that because you were from Canada or from Mexico or from any other country that you could sign it and have no intentions of living up to it." Tr. at 1110. Although Judge Graves sustained TLGI counsel's objection to this testimony, it refused counsel's request to further examine Mr. Espy, leaving his xenophobic testimony ringing in the ears of the jury.

One particular note *is* necessary to rebut a plain falsehood in the Government's Response on this issue. The Government states:

> Ray Loewen alleges (without citation) that Loewen's lawyers objected to the court's proposal to accept only the jury's initial compensatory award of $100 million and to conduct a separate proceeding on the issue of punitive damages. See RLL Sub. At 25. This is manifestly untrue... Loewen expressed no objection whatsoever (let alone an objection on the grounds alleged in this proceeding) to the proposal to reform the verdict in this manner.

Response at 86. The glaring inaccuracy of this accusation is plain from a review of both Mr. Loewen's submission, which does indeed contain a citation to the record (Tr. 5738-39), and of that portion of the record itself (copy attached hereto as Exhibit K). In the attached excerpt,

counsel for TLGI clearly objects to the proposal for a new and separate proceeding on punitive damages, as well as to the verdict itself. As counsel stated (in words that are indeed "strenuous," notwithstanding the Government's jeering criticism of that term):

> MR. ROBERTSON: Your Honor, we believe the verdict on its face evinces *bias, passion, and prejudice towards the defendants.*. It's contrary to the evidence, not supported by the evidential [sic] and is certainly contrary to the instructions of the Court. Those general premises stated, we think this note that has been received and accepted by the Court makes clear that the jury has completely ignored the instructions of the Court, particularly with regard to the burden of proof, and we would move for a mistrial on that ground with respect to all issues.
> JUDGE GRAVES: That motion is denied.

Tr. 5738-39 (emphasis added). Such clear language, combined with the Government's concession that TLGI made valid and contemporaneous objections on at least some of the various instances previously cited, leave Mr. Loewen frankly at a loss to understand precisely how many more times the Government believes TLGI should have objected in order to secure this Tribunal's review.

In any case, the Government has offered no credible support for the novel proposition that TLGI should have objected to the supersedeas bond on the grounds that bankruptcy was not a viable option for the company. In fact, the Government's entire four-page argument on this bizarre attempt to require TLGI to object to the appellate court based on actions that it did *not* intend to take contains only one citation to an appellate brief filed by the plaintiffs in the O'Keefe action. This hardly constitutes competent authority, let alone the type of precedent necessary to support such a broad expansion of the duty to object.

E. The Government's Reversal of Course on the Issue of Control Cannot Save Its Failed Argument Concerning Mr. Loewen's Standing Under Article 1117

In its initial submission on jurisdiction, the Government argued solely that "RAYMOND LOEWEN'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE HE DOES NOT 'OWN OR CONTROL' THE ENTERPRISE AT ISSUE." Memorial of the United States on Matters of Competence and Jurisdiction at 88. In his subsequent Submission Regarding Competence and Jurisdiction, Mr. Loewen pointed out that the Government had selectively cited the language of Article 1117 to omit language allowing the requisite ownership or control to be "direct *or indirect*." Id. at 27; NAFTA Article 1117 (emphasis added). Mr. Loewen also noted the irreconcilable contradiction between the Government's personal attacks on him, all of which assumed that he had total control over TLGI acted upon his command, and its argument that he lacked standing under Article 1117 because he had *no* control over the company and its wholly-owned affiliate Loewen Group International, Inc. ("LGII").

In its Response, the Government does not contest either of Mr. Loewen's counter-assertions. Indeed, the Government now goes so far as to say that Mr. Loewen's allegations concerning his control over TLGI and LGII "are amply supported by the record in this case, and the United States certainly does not argue otherwise." Response at 94 n. 53.

Instead, the Government retreats into repeating its previous argument, that "the only proper party to bring an Article 1117 claim is the investor that owns or controls directly or indirectly the enterprise *at the time the claim is being prosecuted*." Response at 94 (emphasis in original). As Mr. Loewen noted in his original submission on jurisdiction, this argument is utterly without support in the text of Article 1117 or its various interpretations. Significantly, the Government's own commentary concerning Articles 1116 and 1117 fails to mention any such

limitation on Article 1117 claims, and indeed indicates that both claims may be brought by the same Investor:

> Articles 1116 and 1117 set forth the kinds of claims that may be submitted to an arbitration: respectively, allegations of *direct* injury to the investor, and allegations of *indirect* injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor. *In both cases*, investors may bring claims where the injury results from an alleged breach of Section A or of certain provisions governing the behavior of government monopolies in Chapter 15.

Statement of Administrative Action, North American Free Trade Implementation Act (1993) at 124 (emphasis added). Thus, the Government has conceded not only that the injuries complained of in Article 1116 and Article 1117 claims are distinct in character, but also that the only requirement for such claims is that they be based upon a violation of Section A of NAFTA's Chapter 11.

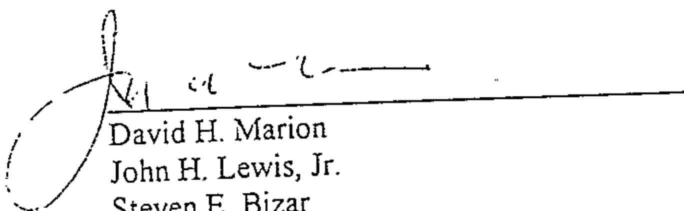
The Government's Response offers no support for its insupportable interpretation of Article 1117 – an inequitable interpretation which offers the distinct possibility that an Investor like Mr. Loewen could not only be stripped of his interest in an investment by virtue of another Party's acts, but could then also be denied the right to bring a claim for his losses because the injury was so great so as to end his control over the investment.

III. CONCLUSION

Through personal attacks on Mr. Loewen, tortured reasoning, and the testimony of a host of conflicting and less-than-credible "experts" ranging from Professor Caron REDACTED the Government has sought to distract this Tribunal from the core truth of this Claim: that Mr. Loewen was stripped of his fortune, his reputation, and his control over the company that bore his name by deliberate appeals to the anti-Canadian and racial bias of the O'Keefe jury, and that

neither the Mississippi nor the federal government protected him from that unfair treatment. On the contrary, those governments participated in the actual and threatened violation of his NAFTA rights. Mr. Loewen and TLGI pursued their right of appeal to the limits of practicality – indeed, to the edge of TLGI's corporate survival. Having been denied both equal treatment and the protection of the United States against such discrimination, Mr. Loewen is fully entitled to invoke the jurisdiction of this Tribunal. Under both the letter of NAFTA and established equitable principles of international law, the Tribunal must overrule the Government's objections to jurisdiction and competence, and proceed to the merits of this Claim.

Respectfully submitted,



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