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 CLAIMANT,
RAYMOND L. LOEWEN
Re: As to Raymond L. Loewen's Article 1116 Claim

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SUMMARY OF REJOINDER

1. The United States does not dispute that no challenge to the Tribunal's jurisdiction in respect of Mr. Loewen's Article 1116 claim remains relevant.

2. There is no reconsideration at issue here because there has not been an award on the merits of Raymond Loewen's Article 1116 claim. The Tribunal's reasons on the merits are *dicta*. Once it has been found there is no jurisdiction over the claim, the remaining discussion must be *dicta* as the Tribunal has determined that it has no authority to decide the merits of the other claims.

3. The United States' treatment of the merits of Raymond Loewen's claim is inconsistent with the standard determined by the Tribunal in its Award, fails to accurately state the evidence, and treats probative and unchallenged evidence dismissively and without regard to this Tribunal's responsibilities and authority.

I. SCOPE OF THE RULE PROVIDING FOR SUPPLEMENTAL DECISION

4. Having requested a supplemental decision under Article 58 with respect to Raymond Loewen's claim, the United States now seeks to restrict this Tribunal's consideration of its request as confined to consider the relief sought by the United States alone. The Tribunal, upon receiving such a request, may render a supplemental decision in favour of either party. Despite the United States' earlier decision to seek a supplemental decision, it now suggests that there is no necessity for one because all of the claims were dismissed both on jurisdictional and meritorious grounds. If this were so, there would be no need for an Article 58 application at all.

5. In particular, the United States alleges that, "most of these claims were dismissed on jurisdictional grounds". Later, the United States refers to the absence of any determination of Raymond Loewen's Article 1116 claim as being one, "which he asserts were not dismissed on jurisdictional grounds".

> *Reply of the United States of America supporting its Request for a Supplementary Decision*, dated December 19, 2003, pp. 2 & 3

6. This appears to be an ungainly way of conceding that Raymond Loewen's 1116 claim is not disposed of anywhere in the Award. Whether expressly or not, the United States concedes that Raymond Loewen's 1116 claim is not addressed in the Award. Most importantly, the United States does not allege any relevant jurisdictional challenge to Raymond Loewen's 1116 claim.

7. The United States now maintains that the reasoning within the Award included a disposition of the merits of all the claims. Whether this is so for the corporate claims and Raymond Loewen's 1117 claim, it cannot be so for Raymond Loewen's 1116 claim. Put simply, the "reasons for this conclusion", referred to in paragraph 2 of the Award, are not a substitute for an actual award on Raymond Loewen's 1116 claim. By definition, having declined jurisdiction, the Tribunal's further reasons are not in the alternative, but are explanatory of what they would have concluded had they found jurisdiction to render an award.

8. Given this is so, Raymond Loewen is entitled to ask this Tribunal to address the merits of his claims since it has not rendered an award in respect of his claims.

9. The only way to clarify the Award in a manner consistent with the United States's view of the Rule would be for the Tribunal to state that Mr. Loewen's claims filed under Article 1116 are dismissed on the jurisdictional grounds referred to in the Award. Not even the United States suggests this be done. What is required is for the Tribunal either to apply its *obiter dicta* to the merits of the Article 1116 claim, or to determine the facts on the record as requested by Raymond Loewen. It is clearly within its power to do so.

10. In reply to the United States' reference to the period within which to file an Article 58 request, it is noteworthy that the United States did so on the last permissible day. This foreclosed Mr. Loewen's right to apply to set aside the Award in the Federal Court in Washington, D.C. on the basis that his Article 1116 claim had not been addressed. As the remedy in such an event would be remission to the Tribunal to render an award on the claim which was not addressed, it is appropriate and proper that the Tribunal do so pursuant to this request.

II. DOES THE EVIDENCE ALREADY FILED MEET THE STANDARD DETERMINED BY THE TRIBUNAL IN ITS AWARD

11. The United States avoids the irrefragable fact that there was evidence on the very matter on which this Tribunal believed that the parties had "failed to present evidence". This now having been established as being incorrect, the Tribunal is duty bound to apply the standard it has determined to the evidence before it. The record shows that as a matter of historical fact, the Company sought and obtained expert advice that, in the circumstances, any relief from the United States Supreme Court was "illusory".

12. The Reply also distorts the Award and impermissibly changes the standard established by the Panel. The United States incorrectly suggests that there is a requirement of proof that settlement was, "the only option". Further, it refers to the Tribunal's evaluation of reasonableness as, "not relevant", and it frames the issue as, "whether any of the various judicial remedies were objectively available". Finally, it reframes the Tribunal's reasoning from no evidence to, "the accuracy of the Board's conclusion".

> *Reply of the United States of America supporting its Request for a Supplementary Decision*, dated December 19, 2003, pp. 6 & 7

13. The United States' submission that the application of business judgment excluded the claim has been rejected by the Tribunal. Similarly, the submission that the standard was to require exhaustion of remedies without any standard of reasonableness has also been rejected.

> *ICSID Award*, dated June 26, 2003, paras. 207-217 and, particularly, para. 214

14. Both Claimants submitted substantial and compelling submissions with respect to why it was not reasonable to expect Raymond Loewen to file under Chapter 11 or to seek certiorari from the Supreme Court in all the circumstances.

15. The Tribunal believed no evidence had been filed on the point and so it did not apply the standard it had determined to the full record.

16. The United States avoids acknowledging that the Tribunal held back from determining the overall question and assumes rather that the application by Raymond Loewen is to decide the case in his favour solely on the basis of the evidence of Wynne S. Carvill and John Napier Turner. Raymond Loewen's application is based upon the clearly incorrect conclusion that Loewen had failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options as referred to in paragraph 215 of the Award. The evidence of Carvill and Turner clearly establish the contemporaneous view of those options and the basis for the Company's decision. This being the case, the Tribunal is required to determine whether in those circumstances the remedies in question were reasonably available and adequate.

> *ICSID Award*, dated June 26, 2003, para. 215

17. The United States dismissively characterizes the evidence of Messrs. Carvill and Turner as consisting of "two conclusory sentences". This is not of assistance to the Tribunal. Virtually the entirety of Wynne Carvill's Declaration addresses the Company's consideration of its options, including both bankruptcy and other judicial remedies after the delivery of the verdict in Mississippi. It is unclear which "two conclusory sentences" are referred to by the United States, but all the United States refers to in support of its submission that Loewen's evidence was contradicted is reference to separate points relating to the impact of a bankruptcy filing on the value of Raymond Loewen's shares in the Company. This is beside the point and not a contradiction of the Company's reasons for not filing in the Supreme Court of the United States - which is the point on which the Tribunal believed it had no evidence.

18. The United States now complains that Mr. Carvill's and Mr. Turner's evidence contains "none of the analysis considered by the Board in deciding what option to pursue." That

is wrong, for the evidence does describe why each option was rejected. More important, if the United States was dissatisfied with this evidence, it should have cross-examined the witnesses about why the Board rejected the Supreme Court petition and other options.

19. In addition to submitting this unchallenged evidence, the Loewen Group expressly drew the Tribunal's attention to it in paragraph 62 of its "Submissions Concerning the Jurisdictional Objections of the U.S." dated May 26, 2000. In its Reply filed on July 7, 2001, the United States challenged Mr. Carvill's evidence, arguing that it was inconsistent with the draft petition for certiorari. *U.S. Submission, July 7, 2001 at pp. 50-53.* In response, the Claimants pointed out that *drafting* a petition – leaving no stone unturned –was not inconsistent with the legal advice that was given to Mr. Carvill that chances of success at the Supreme Court were "extremely remote".

> *Submission of The Loewen Group, Inc.*, dated July 27, 2001, para. 70 at p. 37-38; *Submission of Raymond L. Loewen*, dated July 27, 2001, p. 24

20. The Tribunal cannot reasonably conclude that there was insufficient evidence that the Board *subjectively* believed there were no reasonably available local remedies. The evidence as to the Board's *subjective* belief was from two sources, and was not seriously challenged or contested by the United States. Because the United States declined to cross-examine Mr. Carvill or Mr. Turner, on their subjective states of mind, the evidence *conclusively* establishes the Board's state of mind.

21. Thus, the evidence concerning the Board's subjective understanding of the Supreme Court remedy is certainly not, as the United States claims, "in equipose". The *only* evidence directly relevant as to the Board's state of mind in the record conclusively shows that the Board believed the Supreme Court remedy was not reasonably available.

22. As to whether the Supreme Court remedy was objectively available – i.e., whether the legal advice given to the Tribunal was correct – the Claimants put in reports from two prominent experts and Harvard Law professors, Professor Laurence Tribe and Professor Charles Fried (former Solicitor General of the United States), opining that there was virtually no chance that the Supreme Court would have accepted a petition for certiorari.

23. The United States' expert, Professor Drew Days, was tepid in his endorsement of the Supreme Court remedy. As the Tribunal itself noted, he did not state the remedy was reasonably available, and he did not state that the Court would grant the relief suggested. Instead, the Tribunal noted his view was, "there was a prospect, at most a reasonable prospect or possibility, of such relief being granted".

ICSID Award, dated June 26, 2003, para. 211

24. The Board's contemporaneous understanding, so long as it was reasonably based, should be controlling here. Given the circumstances in which the Board considered the remedies – a mere seven days to consider the options, while facing the imminent threat of nationwide execution against its assets – a reasonable belief that no local remedies were reasonably available supports a finding that local remedies were exhausted. In light of the undisputed contemporaneous advice of counsel in 1996, as well as the opinions of Professors Tribe and Fried, the Board's belief that no Supreme Court remedy was available was bona fide and reasonable.

25. The dismissive tone of the United States' Reply avoids the significance of this application. The integrity and international acceptance of the NAFTA's arbitral procedures is implicated in this application. Unless parties believe that their cases will be fully adjudicated upon the full record, NAFTA claims will be discarded on the ash-bin of history. Dismissing this claim would add an additional chapter of inexplicable and unnecessary error to a history of the judicial wrongs committed in Mississippi. This Tribunal has the duty and authority, invoked by the United States itself, to issue a supplemental decision, to apply the standards it has determined upon the facts, and to render an award in Raymond Loewen's favour.

III. PROCEDURAL ISSUES

26. Both parties have indicated they do not consider an appearance in person to be necessary. This being said, counsel for Mr. Loewen will attend if that is useful to the Tribunal.

Respectfully Submitted,

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