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

MEMORIAL OF THE LOEWEN GROUP, INC.

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

1. On October 31, 1998, The Loewen Group, Inc. ("TLGI"), a Canadian corporation, and Raymond Loewen, a Canadian citizen, submitted to arbitration a claim against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). In this claim, TLGI seeks compensation for harms inflicted upon it and upon Loewen Group International, Inc. ("LGII"), its principal United States subsidiary, as a direct result of NAFTA breaches committed primarily by the State of Mississippi. Those breaches occurred during litigation filed against TLGI and LGII (collectively "Loewen") in Mississippi state court by Jeremiah O'Keefe, Sr., his son, and various of their family-owned companies (collectively "O'Keefe").

2. This claim does not seek direct or collateral review of the municipal-law issues addressed by the Mississippi courts in the *O'Keefe* litigation. Rather, this claim seeks compensation from the United States for breaches of NAFTA, and for violations of international law principles incorporated into NAFTA, committed during the *O'Keefe* litigation. Neither the State of Mississippi nor O'Keefe is a party to this arbitration.

3. The *O'Keefe* litigation arose out of a commercial dispute between O'Keefe and Loewen, who are competitors in the funeral home and funeral insurance industries in Mississippi. The dispute principally involved three contracts between O'Keefe and Loewen valued by O'Keefe at $980,000, and a proposed exchange of two O'Keefe funeral homes worth approximately $2.5 million for a Loewen funeral insurance company worth approximately $4 million.

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I. INTRODUCTION

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4. The Mississippi jury awarded O'Keefe $500 million in damages, including $74 million in damages for emotional distress and $400 million in punitive damages. The $500

million verdict was by far the largest in Mississippi history, was 78% of Loewen's entire net worth, and was over 100 times greater than the entire net worth of the companies to be exchanged in the principal underlying transaction. The $400 million punitive damages award was 50 times greater than the largest punitive damages award ever considered by the Mississippi Supreme Court, and more than 200 times greater than the largest punitive damages award ever upheld by that court. Even by United States standards, the verdict was grossly excessive.

5. The $500 million verdict was the product of a seven-week trial infected by repeated appeals to the jury's anti-Canadian, racial, and class biases. Throughout the trial, the court repeatedly allowed O'Keefe's attorneys to make extensive, irrelevant, and highly prejudicial references to: (i) Loewen's "foreign" Canadian nationality, which was contrasted to O'Keefe's Mississippi roots and his willingness to "fight for his country" (the United States) during World War II; (ii) race-based distinctions between O'Keefe and Loewen, including explicit testimony that O'Keefe was not racist, which was contrasted with testimony implying that Loewen and its then-Chairman, Raymond Loewen, were racist (none of which had any conceivable relevance to a dispute in which all the parties were white); and (iii) class-based distinctions between Loewen, which was portrayed as a large, wealthy corporation, and O'Keefe, who was portrayed as running family-owned businesses. After permitting those references, the trial court refused to give an instruction stating clearly that nationality-based, racial, and class-based discrimination is impermissible.

6. Loewen attempted to appeal the $500 million verdict and judgment, but was prevented from doing so by the arbitrary application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment, but allows the bond to be

reduced or eliminated for "good cause." There was good cause to reduce the appeal bond in this case because (i) the biased and patently excessive judgment almost certainly would have been reduced or vacated on appeal, (ii) a $625 million appeal bond was practically unavailable to Loewen, (iii) and Loewen offered to post a bond for $125 million (125% of the *compensatory* award) and, in order to fully protect O'Keefe's interest as a judgment creditor, to allow court control of its financial transactions while its appeal was pending.

7. On January 24, 1996, however, the Mississippi Supreme Court refused to reduce the bond *at all*, and instead required Loewen to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. That decision effectively foreclosed Loewen's appeal rights.

8. Loewen was then forced to settle the case under extreme duress. Loewen faced a Hobson's choice among five alternatives: (a) attempting an appeal without a stay of execution, which would have allowed O'Keefe to seize and liquidate Loewen's assets throughout the United States; (b) turning to the U.S. federal courts for relief; (c) filing for bankruptcy; (d) posting the $625 million bond at ruinous cost; or (e) settling with O'Keefe. Because each of the first four options was catastrophic, unavailable, or both, Loewen was forced to settle. On January 29, 1996, with execution against its U.S. assets scheduled to start the next day, Loewen settled for $175 million a case that had started as a commercial dispute involving transactions worth, in the aggregate, substantially less than $5 million.

9. The *O'Keefe* litigation breached most of the principal investment protections contained in NAFTA and international law. By admitting extensive anti-Canadian and pro-American testimony and counsel comments, the trial court violated Article 1102 of NAFTA,

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which bars discrimination against foreign investors and their investments. Discrimination also plainly tainted the otherwise inexplicably large verdict. Similarly, by permitting the extensive nationality-based, racial, and class-based testimony and counsel comments, the trial court violated Article 1105 of NAFTA, which imposes a minimum standard of treatment for investments of foreign investors. Article 1105 also was violated by the grossly excessive verdict and judgment (even apart from the discrimination) and by the Mississippi courts' arbitrary application of the bonding requirement. Finally, the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal, and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated expropriation of investments of foreign investors.

How is a jury verdict an expropriation? ??

10. For two separate reasons, the United States is responsible for the NAFTA breaches that occurred during the *O'Keefe* litigation. First, the United States is vicariously liable for Mississippi's NAFTA breaches under Article 105 of NAFTA, which requires the United States to ensure that its state governments (including state courts) comply with NAFTA. Article 105 codifies the established principle that, under international law, a federal government is responsible for the misconduct of its constituent states. The United States has recognized and affirmatively espoused this position for decades. Second, by tolerating the various misconduct that occurred during the *O'Keefe* litigation, the United States itself directly breached Article 1105 of NAFTA, which imposes affirmative duties on the United States to provide "full protection and security" to investments of foreign investors, including "full protection and security" against third-party misconduct.

11. Sir Robert Jennings, Q.C., former President of the International Court of Justice, has concluded that the verdict and judgment were the product of anti-Canadian bias deliberately

Judges must take NAFTA into account in their courtroom rulings?

fomented by counsel for O'Keefe: "The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice, particularly against 'Canadians' (that term being used as a self-explanatory pejorative one), was the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury." Jennings Op. at 4.[1] Sir Robert also characterized the amount of the verdict and judgment as "astonishing" and "so bizarrely disproportionate as almost to defy belief." *Id.* at 13. Sir Robert summarized the trial as follows: "No reader of the transcript of the Mississippi trial could fail to understand that this whole episode was outrageous from beginning to end; and must be without doubt a breach of the minimum standard required both by international law and by the NAFTA treaty." *Id.* at 16.

12. The Honorable Richard Neely, former Chief Justice of the West Virginia Supreme Court of Appeals, has concluded that the Loewen defendants "were subjected to invidious discrimination because they were Canadians and were subjected to a complete denial of justice as that term is traditionally used in international law." Neely Aff. at 3.[2] Chief Justice Neely further explained that O'Keefe's lawyers had "reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and Canadian citizenship," *id.* at 6, and that "when the regular invocation of these themes is combined with the way in which the trial judge handled the issue of punitive damages, it becomes apparent that Loewen was targeted for a plundering." *Id.* at 7. Chief Justice Neely concluded that "the case of *O'Keefe v. Loewen*, from beginning to end, descends to the level of a mockery of justice." *Id.* at 3.

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[1] A copy of Sir Robert's opinion is attached to this Memorial as Exhibit A.

[2] A copy of Chief Justice Neely's affidavit is attached as Exhibit B.

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13. The Honorable Kirk Fordice, Governor of the State of Mississippi, has concluded that the *O'Keefe* verdict "was tainted by xenophobic rhetoric that may have resulted in a violation of Loewen's due process rights" and that "the $500 million verdict was shocking to me in light of the value of the underlying economic transaction." Fordice Let. at 1.[3] Governor Fordice has further concluded that the Mississippi Supreme Court's refusal to reduce the required bond "effectively denied Loewen a meaningful opportunity" for appellate review and left Loewen "without an effective remedy and with no reasonable alternative but to settle." *Id.* Governor Fordice summed up the litigation as follows: "The *O'Keefe* verdict represents to me everything that is wrong with the court system, and stands as a vivid example of the continuing need for tort reform. It concerns me that Loewen's status as a Canadian based company may have deprived it of fundamental rights that would otherwise be guaranteed to the citizens of our state. It appears to represent a denial of justice that I can assure you is otherwise contrary to the public policies of the great state of Mississippi." *Id.* at 1-2.

14. In accordance with Article 38 of the ICSID Additional Facility Rules, Loewen hereby submits its Memorial.[4] Part II of this Memorial sets out the relevant facts of this dispute

[3] A copy of Governor Fordice's letter to this Tribunal is attached as Exhibit C.

[4] This Memorial incorporates by reference the Notice of Claim, including the supporting materials to that Notice. For the sake of completeness, this Memorial includes substantial portions of the factual allegations and legal argument previously included in the Notice of Claim, as well as additional relevant facts, law, arguments, and supporting materials. Loewen reserves the right to request an opportunity to reply to any counter-memorial filed by the United States, in accordance with ICSID (AF) Article 38(1)b-c, and to provide any additional factual background and support or argument pursuant to ICSID's further evidence marshaling procedures, in accordance with ICSID (AF) Article 40. For the Tribunal's convenience, Loewen has compiled and will provide separately to the Tribunal and to the United States copies of most of the legal materials referred to or cited in this Memorial and the original Notice.

In accordance with this Tribunal's direction at the May 18, 1999 hearing, Part III specifically identifies the measures at issue. Part IV sets forth the law relevant to this claim: subpart (A) demonstrates the various NAFTA breaches and international law violations that occurred during the *O'Keefe* litigation, including invidious discrimination, substantive and procedural denials of justice, the denial of full protection and security, unfair and inequitable treatment, and illegal expropriation; subpart (B) demonstrates that the United States is directly and vicariously responsible for those breaches and violations; and subpart (C) demonstrates that NAFTA affords Loewen a private arbitral right of action against the United States. In accordance with the Tribunal's direction at the May 18, 1999 hearing, Part V briefly describes the damages suffered by Loewen. Finally, Part VI demonstrates that the various arguments and objections asserted by the United States at the May 18 hearing are meritless.

15. One of the United States' principal objections was that Loewen waived its right to pursue this arbitration by entering into a settlement with O'Keefe. As demonstrated below, however, it is well settled that waivers cannot arise from settlements entered into under duress, and the *O'Keefe* settlement plainly was made under duress. To the extent the United States contends that no duress was present because Loewen could have sought relief in federal court, Loewen submits the attached expert opinions of Professor Laurence Tribe, a leading U.S. constitutional law expert and professor of law at Harvard Law School, and Professor Charles Fried, a former Solicitor General of the United States and a professor of law at Harvard Law School. Professor Tribe demonstrates that "it would have been futile for Loewen to seek relief in federal court — so plainly futile, in fact, that efforts to seek such relief would have been

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sanctionable." Tribe Op. at 13.[5] Professor Fried similarly demonstrates that "TLGI had nowhere to go: not to federal district court, which had no jurisdiction to hear its claims; and not to the Supreme Court, which had jurisdiction but would not have heard them." Fried Op. at 24.[6]

II. RELEVANT FACTS

A. The Commercial Disputes Between O'Keefe And Loewen

16. The O'Keefe family has owned funeral homes in Mississippi since the latter half of the 19th century. (Trial Transcript (hereinafter "Tr.") at 2010).[7] The O'Keefe family also has long owned Mississippi funeral insurance companies, including Gulf National Life Insurance Company. (Tr. at 416-422) In 1974, 1979, and 1987, Gulf National entered into contracts to conduct business in conjunction with the Wright & Ferguson Funeral Home. According to O'Keefe's own trial witnesses, the total value of these three contracts to O'Keefe, at the time of the litigation, was $980,000. (Tr. at 2367)

17. In 1990, Loewen made significant investments in Mississippi. LGII purchased 90% of the stock of Riemann Holdings, Inc., O'Keefe's principal and long-time competitor in the Mississippi funeral services and insurance industries. (Tr. at 94-95; Appendix (hereinafter "App.") at A60, A62-63).[8] Riemann Holdings in turn acquired Wright & Ferguson Funeral

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[5] A copy of Professor Tribe's opinion is attached as Exhibit D.

[6] A copy of Professor Fried's opinion is attached as Exhibit E.

[7] References to "Tr." are to the trial transcript filed with the Notice of Claim trial.

[8] References to "App. at __" are to the cited pages of the Appendices. The first two volumes of Appendices were filed with the Notice of Claim; volumes 3-5, which are numbered consecutively with the first two, are filed with this Memorial.

Home (Tr. at 3061; App. at A63), which began to do business not only with Gulf National, but also with competing insurance companies owned by Loewen. (Tr. at 93, 3049-51)

18. In response to this new foreign investment, O'Keefe began a bigoted advertising campaign against Loewen. In January 1990, O'Keefe distributed to potential customers a direct-mail advertisement criticizing Loewen for its Canadian ownership — a theme that would later play a prominent role at the trial:

> By now, you probably received a letter from David Riemann outlining their sale to a foreign company. . . . Loewen Group has not come in as a partner. . . . The majority of the board of directors are Canadian. . . . Obviously, prices are raised and profits go out of the U.S.A.

(Tr. at 96-97) In July 1990, O'Keefe distributed a more strident direct-mail advertisement:

> Sometimes it seems America is being sold off piece by piece. The Rockefeller Plaza, Columbia Pictures, now, Riemann Funeral Home. . . . Recently, Riemann Funeral Homes sold out controlling interest to a chain in Canada. Furthermore, the acquiring company is largely funded from sources outside the United States. This has led some people to wonder who is still locally-owned and operated, thereby supporting the local community. . . . This year we're coming to celebrate our 125th anniversary. What does that mean to you? It means a commitment from us to remain as one of Coast's locally owned and operated funeral homes, a commitment to the local constituents. . . . We keep our money in south Mississippi . . . . Let me assure you after 125 years of service, we're here to stay. Since [my great] grandfather founded Bradford-O'Keefe in 1865, we've done everything we can to meet the needs of south Mississippi, both personally and professionally.

(Tr. at 98-99, 2689-91) Finally, on December 7, 1990, O'Keefe distributed a direct-mail advertisement analogizing Loewen's competition against him to the Japanese "sneak attack" on Pearl Harbor — an analogy that would also reappear at trial:

> The Japanese killed 3,451 Americans in that sneak attack on Pearl Harbor, December 7, 1941. . . . Millions of young Americans responded to the country's need and Jerry O'Keefe was among those distinguished himself in the U.S. Marines and was awarded the Navy Cross, our countr[y's] highest award. . . . To remain free and at liberty were among the strongest goals of the people. Freedom

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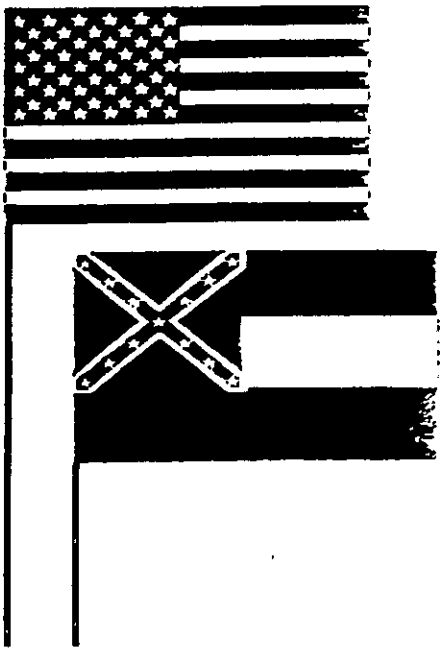
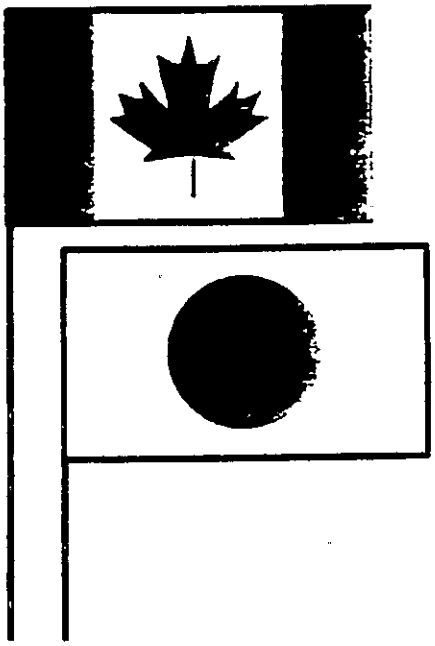
> allowed Riemann to sell their funeral homes to a foreign firm. Riemann is now owned by a Canadian firm, financed over [$]25 million from a Hong Kong bank. Freedom to sell to anyone is a right in this country, but freedom also carries with it responsibility of the truth. . . . Riemann borrowed some money from the Shanghai Bank.

(Tr. at 104-05, 2694-96) That advertisement was deceptive as well as xenophobic, because there were no Asian investors associated with Loewen's Mississippi investment and because the "Shanghai Bank" was in fact located in Seattle, Washington. (Tr. at 2678, 2698)

19. O'Keefe's advertising campaign also included billboards decrying foreign competition. For example, one of those billboards displayed the United States, Mississippi, Canadian, and Japanese flags and asked, "'Does the business you patronize keep your money in the local economy?'" (Tr. at 4421) Under the U.S. and Mississippi flags was the word "Yes"; under the Canadian and Japanese flags was a large "No." (Tr. at 4421-22) A copy of that advertisement appears on the following page:

DOES THE BUSINESS YOU PATRONIZE KEEP YOUR MONEY IN THE LOCAL ECONOMY?





YES.

O'BRYANT-O'KEEFE
FUNERAL HOME

BRADFORD-O'KEEFE
FUNERAL HOME, INC.

NO.

LOWEN COMPANY

RIEMANN HOLDING COMPANY

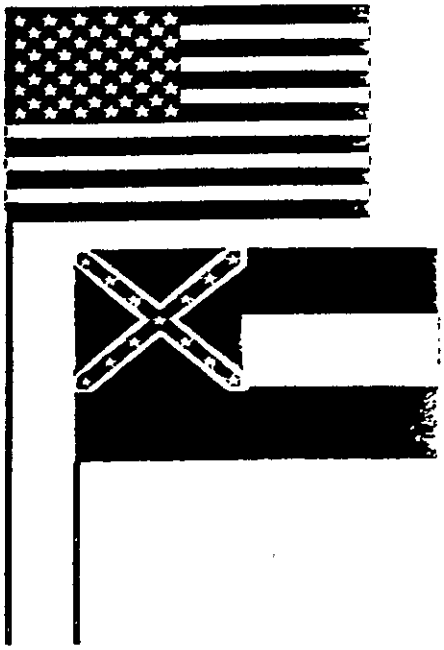
HOLDER-WELLS

O'BRYANT-O'KEEFE AND BRADFORD-O'KEEFE.....

RIEMANN FUNERAL HOMES.....

O'BRYANT-O'KEEFE
FUNERAL HOME

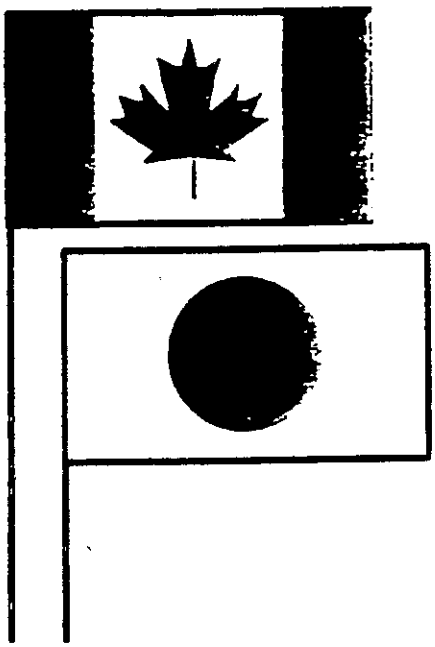
DOES THE BUSINESS YOU PATRONIZE KEEP YOUR MONEY IN THE LOCAL ECONOMY?



YES.

O'BRYANT-O'KEEFE
FUNERAL HOME

BRADFORD-O'KEEFE
FUNERAL HOME, INC.



NO.

LOWEN COMPANY

RIEMANN HOLDING COMPANY

HOLDER-WELLS

O'BRYANT-O'KEEFE AND BRADFORD-O'KEEFE.....

RIEMANN FUNERAL HOMES.....

O'BRYANT-O'KEEFE
FUNERAL HOME

20. O'Keefe's advertising campaign generated widespread anti-Canadian sentiment, including local newspaper articles and a letter to Loewen from the Mississippi Attorney General's Consumer Protection Office, which complained that Loewen had not publicized the Canadian nature of its ownership of Riemann Holdings. (Tr. at 4471-73) Loewen responded to the letter in detail and complained itself about O'Keefe's xenophobic advertisements. (Tr. at 4473-80, 4483-87) The Attorney General's office took no further action on either letter. (Tr. at 4480, 4487)

21. While O'Keefe was publicly railing against Canadian investment, he himself was attempting to sell funeral homes and insurance companies to Loewen. (App. at A63) Negotiations stalled because Loewen was interested in buying only funeral homes, but O'Keefe insisted on packaging his insurance companies, which were then experiencing financial difficulty, with his funeral homes. (Tr. at 106, 1329-49)

22. On April 24, 1991, O'Keefe filed a lawsuit against Loewen alleging breaches of the 1974, 1979, and 1987 contracts between Gulf National and Wright & Ferguson. (App. at A20-23) Despite the lawsuit, Loewen continued to negotiate with O'Keefe.

23. On August 19, 1991, O'Keefe and Loewen signed an agreement containing five principal elements. *First*, O'Keefe would dismiss his pending lawsuit against Loewen. (App. at A632, A661; Tr. at 320) *Second*, O'Keefe would sell Loewen two funeral homes worth between $2 and $2.5 million. (App. at A68, A603-05) *Third*, Loewen would sell O'Keefe an insurance company and trust fund worth between $3.3 and $4 million. (App. at A73-74, A598-601; Tr. at 677) *Fourth*, O'Keefe would assign to Riemann Holdings an option, valued at $19,500, to purchase a Jackson, Mississippi cemetery tract. (App. at A607-08; Tr. at 227) *Fifth*, O'Keefe

would become the exclusive provider of certain insurance policies sold through Loewen funeral homes. (App. at A601-03)

24. The 1991 agreement left open a number of critical issues, including (i) the selling prices for the funeral homes and the insurance company, (ii) the terms of the exclusive insurance provider relationship, and (iii) the details regarding how the insurance trust fund would be valued and held. (App. at A71-74) The parties subsequently disputed whether, in light of these various open terms, the 1991 agreement was a binding and enforceable contract. The parties further disputed whether the agreement could be binding and enforceable without prior approval from the Mississippi Insurance Commissioner. (Tr. at 117-19; App. at A74, A81, A670, A689)

25. The 1991 agreement required all transactions to close within 120 days (*i.e.*, by December 17, 1991), "provided all documentation has been provided, all valuations determined, and all requirements met." (App. at A75-76, A630-31) The parties never agreed, however, on the valuations of the funeral homes and the insurance company. For the funeral homes, O'Keefe asked for approximately $2.5 million, and Loewen offered $2 million. (Tr. at 664-65) For the insurance company, O'Keefe offered approximately $3.3 million, but Loewen asked for $4 million. (Tr. at 675-78)

26. In February 1992, while the parties were still negotiating, the U.S. Federal Bureau of Investigation seized the Mississippi Insurance Commissioner's records concerning O'Keefe's insurance companies. (App. at A239-40) When Loewen expressed concern about the O'Keefe companies' financial security (Tr. at 247-48, 250, 359), O'Keefe falsely represented to Loewen that the target of the investigation was the Mississippi Insurance Commissioner, not O'Keefe,

and that its insurance companies were financially secure. (App. at A240-41; Tr. at 2089-90, 2301)

27. In April 1992, after the parties failed to agree on the open terms (App. at A87), O'Keefe filed an amended complaint alleging breach of the 1991 agreement and, for the first time, common-law fraud and violations of state antitrust law. (App. at A88, A225) That complaint sought actual damages of only $5 million. (App. at A33)

28. In May 1992, the Mississippi Insurance Commissioner placed Gulf National under administrative supervision, the insurance equivalent of bankruptcy. (App. at A56) Subsequently, O'Keefe expanded his complaint to include claims for various consequential damages allegedly suffered as a result of the administrative supervision. (App. at A160-66, A227-28, A677-78; Tr. at 71-74, 523-24, 527-29) O'Keefe later testified, however, that the administrative supervision was a "big mistake" (Tr. at 2119-22), and was thus obviously not foreseeable to others.

B. The Mississippi Court Proceedings

29. The trial took place in the in the Circuit Court for the First Judicial District of Hinds County, Mississippi, a court created by the State of Mississippi, Miss. Code § 9-7-3(1). The presiding judge, the plaintiffs' lead trial counsel, and eight of the twelve jurors were black. A number of prominent local black citizens and ministers attended the trial and were conspicuous in their support of O'Keefe. (App. at A741-42)

30. The presiding judge was James Graves, one of four elected judges who comprise the Circuit Court for Hinds County, Mississippi. Under United States law, the voting districts of that court are drawn to guarantee the election of two white judges and two black judges. *Martin*

v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988). Judge Graves' political constituency is thus predominately black.

31. O'Keefe named as defendants not only TLGI and LGII, but also local Mississippi corporations owned by Loewen, such as Wright & Ferguson Funeral Home. By naming such Mississippi defendants, O'Keefe made it impossible for Loewen to remove the case to U.S. federal court, where all judges are appointed and have life tenure, and are thus not beholden to any particular local constituency. *See* 28 U.S.C. § 1332.

32. O'Keefe's lead trial lawyer was Willie Gary, a flamboyant plaintiffs' lawyer from Florida. I. Portsmouth, *The Trial of Ray Loewen*, PROFIT—Toronto, Feb. 1996, at 24; P. Moore, *Mississippi Jury Awards Gary Client $500 Million*, Palm Beach Post, Nov. 7, 1995, at 1B. Gary belongs to the "Million Dollar Verdict Club" and the "Golden Legal Eagles," clubs whose members refuse cases alleging less than $100 million in damages. Y. Samuel, *Florida Attorney to Receive State King Award*, St. Louis Post-Dispatch, Jan. 8, 1998, at B1. Gary has appeared on *Lifestyles of the Rich and Famous*, flies in a personal jet named the "Wings of Justice," and has described the *O'Keefe* litigation as "The Civil Trial of the Century." Portsmouth, *supra;* B. Harris, *From Migrant Shack to Posh Mansion*, Jackson Advocate, Nov. 16-22, 1995, at B1, C6; *Winning Words: Willie E. Gary's Voir Dire, Opening Statement and Closing Argument in the Civil Trial of the Century* (App. at A519); *see* www.williegary.com.

33. Gary made several improper public statements during the trial. Although the court had instructed the attorneys not to make public statements about the case (Tr. at 1123), Gary told the congregation of a local black church that "his prayers would be answered by a $600 million or greater verdict." (App. at A741) On other occasions, Gary spoke on a radio talk show

popular with the local black community. (App. at A742) Throughout all of this, the jury was not sequestered. (App. at A741)

34. During the seven-week trial, Judge Graves repeatedly allowed Gary to make irrelevant and highly prejudicial comments, and to elicit from witnesses irrelevant and highly prejudicial testimony, about the nationality, race, and economic class of the parties in this case. Those comments and testimony inflamed the passion of the jury, and ultimately produced a grossly excessive verdict.

1. Voir Dire

35. During voir dire, counsel screen prospective jurors for biases that might prevent them from fairly considering the evidence. If a juror displays such bias, the court must excuse him or her "for cause." If the court declines to excuse a juror "for cause," a party may exercise one of its limited number of "peremptory" challenges to excuse a prospective juror without stating a reason.

36. Gary introduced himself to the prospective jurors by focusing on irrelevant but inflammatory themes, such as O'Keefe's local roots: "We teamed up with our good friends . . . to represent one of your own, Jerry O'Keefe." (App. at A328) Gary continued with questions about issues such as patriotism and willingness to fight for the United States: "And y'all believe what it [the jury system] stands for in America?" "[H]ow many [of you] have serve[d] in the military?" (App. at A330) Later in the voir dire process, Gary explained: "Y'all remember when I asked the questions about the men and women that have been off to war and fought for their countries or been in the services? The reason why I did that was because I think jury

service is up there close, maybe second to going off to war or going in the armed service. It is an important service, and that's why I asked that question." (App. at A380)

37. Gary pointedly asked whether foreigners "from Canada" should be bound by "Mississippi" rules: "Now, let me ask you this question: The Loewen Group, Ray Loewen, Ray Loewen is not here today. The Loewen Group is from Canada. Do you think that every person should be responsible and should step up to the plate and face their own actions? . . . . Let me see a show of hands if you feel that everybody in America should have the responsibility to do that. Let me just say this: . . . that group is from Canada . . . . Just because the group is from Canada, you still have to give them a fair trial. Do you all agree to do that? I want to make that clear, but will you also agree that if they come down to Mississippi to do business in Mississippi, they've got to play by the same rules. Y'all agree to that?" (App. at A356) Loewen's counsel objected to these statements, but Judge Graves overruled the objection. (App. at A357)

38. Gary continued to stress Loewen's nationality: "[I]f we prove conspiracy to cheat, bad faith by Ray Loewen and his group from Canada, . . . do you have any problems with bringing damages against Ray Loewen and his group?" (App. at A357) As a further reminder, Gary asked, "Did you know Ray Loewen and his group out of Canada, The Loewen Group" (App. at A373) and later "Do any of you know anything about the case? Anybody knows anything about this case, the O'Keefe family suing The Loewen Group out of Canada . . . . ?" (App. at A383)

39. Gary also invited the jury to award large punitive damages because Loewen is a big corporation: "Have any of you ever heard of a situation where, like in the NBA, NFL [U.S. professional sports leagues], players got in, they didn't follow the rules, and they got fined for it?

. . . . They got punished, in other words. They're making these big salaries, and they hit them with it, right? . . . . But, if the judge allows you to consider the issue of punitive damages and he told you that you — one of the things you do is you consider the net worth of the person could all of you do that . . . ?" (App. at A363-64) "[T]he fine should fit the situation, should fit the situation. Whereas you have a big company, if you awarded punitive damages, and you just slap them on the wrist, that ain't going to stop them, right? Y'all understand?" (App. at A364)

40. Gary next alleged that Loewen's trade practices took advantage of families "here in Mississippi" and suggested that Loewen was "guilty" of a crime: "Members of the jury, would you allow room in your minds for me while we're proving this case to show you that not only did Ray Loewen and his group do these kind of things . . . here in Mississippi, but it was a practice for them, the way they did business . . . would you allow me to prove that to you, too? Would all of you do that, show you that not only did they do that here in Mississippi, but it's a way of doing business with them. . . . . Let's go a step further the same thing . . . if the evidence showed that Ray Loewen and his group tried to cheat the O'Keefe family, could you find them guilty?" (App. at A364)

41. Gary alleged that Loewen had come "down" from Canada to deceive Mississippi families: "Now, if we prove to you . . . that The Loewen Group came down to Mississippi, buying up small family business funeral homes, leaving their names on them, the family name, 150 years of tradition, sometime 100 years or whatever, and they used deceptive advertising, that is we're going to say you own it, but you really don't, and if they do that, gain trust to raise prices on the people, loved ones being buried . . . ." (App. at A367)

42. In the presence of the other prospective jurors, Gary had the following dialogue with a prospective juror about the Canadian ownership of Wright & Ferguson, which operated a funeral home near the courthouse:

> MR. GARY: [Y]ou were under the impression that was a business owned by Wright & Ferguson?
> MS. DICKERSON: Yes.
> MR. GARY: That's what you were led to believe?
> MS. DICKERSON: It's Wright & Ferguson Funeral Home. That's the name of it.
> MR. GARY: Did you know Ray Loewen and his group out of Canada, The Loewen Group?
> MS. DICKERSON: No.
> MR. GARY: The ones that really own it and not —

Loewen's counsel again objected, but Judge Graves overruled the objection. (App. at A373)

43. Despite the fact that O'Keefe had sued Wright & Ferguson, Gary stressed to the jurors that O'Keefe "had no beef with Mr. Wright," a Mississippi resident who had formerly owned Wright & Ferguson and was known as a leading local businessman by some of the prospective jurors. (App. at A371) Indeed, the transcript makes clear that Gary had improperly joined Wright & Ferguson as a defendant in order to prevent Loewen from removing the case to U.S. federal court. During his opening statement and closing argument, Gary reiterated that he had "no beef" with Mr. Wright (Tr. at 56) and that Mr. Wright was "really not in" the case (Tr. at 5709). Indeed, Gary went to great lengths to assure one prospective juror that "just because the Wright name is on [the case], you understand, *we're suing The Loewen Group*." (App. at A371. emphasis added)

44. Two prospective jurors were excused for reasons directly relating to Loewen's Canadian status. One juror stated that she did not "think that a foreign corporation could be given a fair trial here." (App. at A487) Another juror stated that a foreign company should not

be given a fair trial "'because of special tax breaks that foreign corporations receive.'" (App. at A488) Despite that explicit statement of bias, Judge Graves refused to excuse the latter juror for cause. (App. at A495-96) Accordingly, Loewen was forced to use one of its limited peremptory challenges to have him removed. (App. at A490-91)

45. From the outset, Gary emphasized to the prospective jurors the huge damages that he would ultimately be seeking: "[In] [t]his case, there will be claims as high as $650 million to $850 million dollars. I want you to look me in the face and tell me now if that's going to bother anybody here." (App. at A337)

2. O'Keefe's Opening Statements

46. O'Keefe's opening statements sounded the three themes that would resonate throughout the trial — nationality (Mississippians and Americans versus Canadians), race (O'Keefe was not racist but Loewen was), and economic status (small local company versus giant multinational conglomerate).

47. Two O'Keefe lawyers, Michael Allred and Willie Gary, gave opening statements. Allred began by invoking racial issues, telling the jury that he attended a local church "in which a lot of black and white people go to church together because they like to do that. It's often the case that black and white people in Mississippi choose to worship in different styles and different churches. Funeral business is something like that as well. . . . [T]hese businesses that Loewen bought were those that served primarily the white community." (Tr. at 16)

48. Allred then emphasized Loewen's Canadian nationality. Three times, he repeated that O'Keefe had gone to Vancouver to do business with Loewen. Allred said, "Mr. O'Keefe was invited to come to Vancouver, and you are going to see evidence of that trip to Vancouver.

At the trip in Vancouver . . . ." (Tr. at 20) Allred noted that the Riemanns also went to Vancouver to discuss business with Loewen. (Tr. at 30) Allred also remarked that negotiations over the 1991 agreement occurred when John Turner, a Loewen official, "came to Jackson, Mississippi." (Tr. at 22) Allred further stated that another Loewen employee "came to Jackson, Mississippi" to investigate possible acquisitions. (Tr. at 24-25)

49. Allred closed by stressing nationality and class, encouraging the jury to exercise the "power of the people of Mississippi . . . to say no to people like Loewen who would build rich fortunes upon the misery and poverty of burying loved ones of the people of the poorest state in our nation." (Tr. at 42)

50. Willie Gary's opening statement for O'Keefe struck the same three themes, but he focused primarily on nationality. He began by emphasizing O'Keefe's Mississippi roots and contrasting them to Loewen's Canadian ownership: "[I]n order for you to understand what this case is about, you need to know the man [Jerry O'Keefe]. And my daddy used to say in order to know . . . where you're going, you need to know from whence you come." (Tr. at 49) Gary went on to emphasize O'Keefe's long-standing Mississippi pedigree, contrasting it with Loewen's recent arrival in the state: "[T]he O'Keefe family just didn't start in Mississippi in 1990 like Ray Loewen did. He started with his great grandfather some 130 years ago . . . in Ocean Springs, Mississippi" (Tr. at 49).

51. Gary drew distinctions between O'Keefe's "American" citizenship and Loewen's Canadian ownership, replete with references to Loewen "coming down to" or "descending on" Mississippi. Gary repeatedly called O'Keefe a "fighter" for "our country" (Tr. at 50, 54) and an "American hero" (Tr. at 50) Gary explained how Loewen "decided to come to Mississippi and

put [O'Keefe and his family] . . . out of business." (Tr. at 54) Gary told the jury that Loewen "came down here" (Tr. at 61) and "descended on the State of Mississippi" (Tr. at 58).

52. Gary exploited the letter to Loewen from the Attorney General's Consumer Protection Office to further stress Loewen's Canadian nationality. Gary said, "[Y]'all see the seal up there [on the wall behind the judge's bench in the courtroom]. That's the State of Mississippi. That's the State of Mississippi, the State of Mississippi said now . . . to their [Loewen's] lawyer. Y'all see that, The Loewen Group up in Canada, and it [the letter] says to them . . . ." (Tr. at 61) The letter in question discussed an article in a Biloxi newspaper that, according to Gary, "centers around the issue of funeral home ownership, local versus foreign. Ain't no problem with you [foreigner] owning it. . . . [B]ut they say, 'Look, if you're going to do that, while foreign or natural [sic] — ownership of a local funeral home is certainly permissible, such foreign or national entities cannot represent to the consumers of a given area that they are locally owned.'" (Tr. at 62)

53. Gary described how Loewen and O'Keefe had negotiated the 1991 agreement "at Canada" after O'Keefe had threatened to sue Loewen in "the American way" of resolving disputes. According to Gary, Loewen "had him [O'Keefe] come up at [sic] Canada after he told them that if they didn't respond he was going to have to sue them, the American way, and they [Loewen] said, 'You come up to Canada, and we'll sit down and talk it over,' and then . . . no sooner than they got to Canada, no sooner than they got up there," Loewen offered to purchase some of O'Keefe's funeral homes. (Tr. at 63) Gary repeated for a fourth time that O'Keefe went to Canada, but returned "home" to Mississippi to file this lawsuit: "[N]ow, Jerry went back home. Jerry went back home, and he decided [sic] couldn't take anymore. . . . Now, he filed a

lawsuit here in this court, in this town . . . ." (Tr. at 65) Gary again asserted that O'Keefe's decision to file a lawsuit was "the American way." (Tr. at 65) Gary then described Turner's visit to Mississippi to negotiate the 1991 Agreement: Turner "came down to Mississippi. Jerry was down there tending to his own business, going along with his lawsuit, the American way. They [Loewen] said, 'Well, wait a minute. We want to try to make a deal with you.' . . . They came down here and made a settlement." (Tr. at 65-66)

54. Gary concluded his opening statement by appealing to the jury's Mississippi allegiances:

> Members of the jury, when it's all said and done, hear all the evidence in this case, there's no doubt in my mind you, too, will know that you can say with your verdict to Ray Loewen, "no more, not in the State of Mississippi and hopefully nowhere else, but no more. It's not right. You can't do that and come up with smoke screens, smoke screens, to try to get out of it."

(Tr. at 78)

3. Testimony of Significant Witnesses

55. In all, 40 witnesses testified at trial. For most of the significant witnesses, Gary elicited testimony or asked questions reiterating his principal themes of nationality, race, and class.

a. John Turner

56. O'Keefe called John Turner, who had worked as a senior Loewen executive for approximately two years.[9] (Tr. at 197-98) Gary asked, "[D]id Ray Loewen . . . send you down to Mississippi to settle the lawsuit with Jerry O'Keefe?" After Turner answered yes, Gary

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[9] This is not the John Turner who has long been a member of Loewen's Board of Directors.

continued to focus on the location of the meeting, twice again asking about "when you came down to Mississippi" and "did you come to Mississippi?" (Tr. at 212) Gary emphasized the Canadian location of an earlier meeting between Loewen and O'Keefe: "In other words, so one of the things that you discussed when he was — when he came to Canada was to try to resolve the controversy?" (Tr. at 213) Gary summarized the meeting locations yet again: "[S]o obviously the case didn't get settled when he came to Canada to try to get it done, but then the second meeting was when you came down here to Mississippi to meet with him?" (Tr. at 214)

b. Mike Espy

57. O'Keefe called Mike Espy, a prominent local black politician, to give wholly irrelevant testimony that O'Keefe (who is white) was not a racist. Espy had been U.S. Secretary of Agriculture in 1993 and 1994 until he was investigated (and indicted and ultimately acquitted) for campaign finance violations. Espy stressed that he had grown up in Mississippi (Tr. at 1083) and that his first legal job was in Jackson with Central Mississippi Legal Services, which Espy described as "right down the street, Pascagoula Street here." (Tr. at 1084)

58. Gary invited Espy to discuss O'Keefe's attitudes about race: "[As] an African-American in Mississippi trying to go out and be the best that you could be to represent your people or what have you, what did Jerry bring to the table that inspired you from that respect?" (Tr. at 1096) In response, Espy endorsed O'Keefe's character as not racist: "as an African-American, personally, . . . you run [for office] against people with attitudes and certain biases that they have, and I can say that he [O'Keefe] didn't exhibit any bias towards a person of a different race. He dealt with me as a person, no matter what color I am. He dealt with me based

on policies, and I can certainly say he is a man without bias and without prejudice . . . ." (Tr. at 1096)

59. On cross-examination, Loewen's counsel asked Espy if an anti-Canadian advertising campaign would be consistent with NAFTA. (Tr. at 1101) Espy responded with a diatribe about the allegedly unfair trade practices of Canadian wheat farmers, and the need to "protect the American market": "[W]e believe in free enterprise. We believe in the free flow of goods between countries, but it was also consistent with what I did as [U.S.] secretary [of Agriculture] to make sure no one took advantage of the American people. In that respect, I was very involved in certain actions which restricted Canadian products into our market because they tried to undervalue, particularly . . . we thought that their wheat, the Canadian wheat was underpriced. They would come in and flood our markets. Our people eat a lot of pasta, and they would not buy the American wheat. They would go for the cheaper wheat which was underpriced to take over the market, and then — then they would jack up the price, and that was not right consistent [sic] with what I've done in my life, try to protect people, protect the American market." (Tr. at 1101-02)

60. On redirect, Gary asked Espy about the letter — bearing "the seal of the State of Mississippi" (Tr. 1105) — that the Mississippi Attorney General's Consumer Protection Office had written to Loewen. Gary asked Espy to read this letter to the jury again. For the second time, the jury heard its irrelevant and prejudicial discussion of "the issue of funeral home ownership local versus foreign." (Tr. at 1107)

61. Gary also suggested that Canadians and Mexicans would not be true to their word under NAFTA. Gary asked Espy: "[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, did it?" (Tr. at 1109-10) Espy answered, "True." (Tr. at 1110)

c. Earl Banks

62. Gary called Earl Banks, a black state legislator and Jackson funeral home operator, to give further irrelevant testimony that O'Keefe was not a racist. Banks stressed that he had lived in Jackson his whole life (Tr. at 1110-12), that he received a law degree from the Mississippi College School of Law (Tr. at 1111), that he represented the local district in the Mississippi legislature (Tr. at 1111-12), and that his business was "celebrating 70 years of service here in the City of Jackson" (Tr. at 1112).

63. Banks described how the funeral industry in general was racially segregated (Tr. at 1116-17, 1138-41), but stressed O'Keefe's "unusual" willingness to pursue a partnership with Banks' black funeral home to "sel[l] preinsurance in the Afro-American market." (Tr. 1118) Banks testified that O'Keefe "did not have to come to us" but did so anyway. (Tr. 1118-19)

d. Jerry O'Keefe

64. O'Keefe began his testimony by stressing his long-standing local roots. He told the jury that he was from Biloxi, Mississippi and had grown up in Ocean Springs, Mississippi. (Tr. at 1996-97) O'Keefe also stated that his family had been "serving families in Ocean Springs, Biloxi area for 130 years." (Tr. at 2010; *see also* Tr. at 1998) O'Keefe further testified that his son would be the "fifth generation in this business," which has "been in the family so many years." (Tr. at 2000)

65. Gary elicited irrelevant testimony that presented O'Keefe as a dedicated American patriot:

MR. O'KEEFE: Well, I had just finished high school in 1941, and of course, the Japanese bombed Pearl Harbor in December of 1941 on Sunday, and I went down to try to get in the service the next day.

. . . .

MR. GARY: And did they call you by way of the draft to come in and serve your country?
MR. O'KEEFE: No . . . I volunteered my services.
MR. GARY: You wanted to serve your country?
MR. O'KEEFE: Yes, sir, certainly did.

. . . .

MR. GARY: And so now the next day after our country had been bombed by Pearl Harbor [sic], here you are standing before the service department wanting to volunteer your services?
MR. O'KEEFE: Yes, sir.

(Tr. at 2004-06) Gary questioned O'Keefe in detail about honors "for the service that [he] gave [his] country in World War II." (Tr. at 2007)

66. O'Keefe also characterized himself as someone who protected the interests of black as well as white Mississippians. For example, he described how, when he was being pressed to sell Gulf National, he tried to protect the interests of "small funeral homes, both white and black owned, all over the state of Mississippi." (Tr. at 2111)

67. Once Gary had established O'Keefe's local ties and patriotism, he contrasted those characteristics with Loewen's Canadian nationality and recent investments in Mississippi For example, O'Keefe testified that his contractual arrangement with Wright & Ferguson "went along very well for many, many years until Loewen came to town." (Tr. at 2022)

68. Gary also prompted O'Keefe to question Loewen's credibility and to endorse the Wright family based on how long each had been in the community:

MR. GARY: [H]ow long have you known Mr. John Wright over here?
MR. O'KEEFE: Well, I've known Mr. Wright ever since I . . . became active in the funeral home business, and so that's many, many years, 45 years, I guess, 48 years.

MR. GARY: And he's been around all that time, right?
MR. O'KEEFE: Yes, sir, he surely has.
MR. GARY: Through thick and thin, ups and downs, ins and outs and all of that?
MR. O'KEEFE: Yes, [the Wrights] have a proud tradition of funeral service here in the Jackson area.
MR. GARY: How long have Ray Loewen and his group been in the state and in this town?
MR. O'KEEFE: Well, they've been in this state about four or five years, five years, I guess.
MR. GARY: And when they first set foot in the state, when they first came to town . . . .

(Tr. at 2025-26)

69. Throughout O'Keefe's testimony, Gary repeatedly emphasized Loewen's Canadian nationality. He asked O'Keefe, "What would be the relationship of the time that you transacted with Mr. Wright & Ferguson [sic] to do the trust rollover and the time that they sold out to The Loewen Group out of Canada?" (Tr. at 2034) Gary similarly characterized the purchase of Riemann Holdings in this fashion: "The Loewen Group came down from Canada and took over the Riemanns . . . ." (Tr. at 2039) On redirect, after Gary asked O'Keefe "who owned Riemann Holdings," O'Keefe answered, "The Loewen Group out of Canada." (Tr. at 2352) O'Keefe described the start of negotiations with Loewen: "[W]e traveled to Canada . . . to see if we couldn't work out something with the Loewen people, because there's room for everybody to live and work in Mississippi . . . ." (Tr. at 2043)

70. To reiterate Loewen's Canadian nationality, Gary asked O'Keefe the following consecutive questions: "Now, obviously, you didn't reach a settlement agreement when you went up to Canada; is that correct?" "How many times did you go to Canada?" "Now, when you went to Canada, did you go there to try to resolve this matter?" (Tr. at 2047) A short while later, Gary asked O'Keefe, yet again, "Now, you didn't resolve the issue or settle the Wright &

Ferguson matter in Canada; is that correct?" (Tr. at 2048) Two questions later, Gary said again, "Now, . . . you didn't resolve it in Canada." (Tr. at 2049) O'Keefe answered: "Ray Loewen called me and wanted me to come back up to Canada . . . and I said, 'No, . . . I've already gone to Canada at substantial expense to myself . . . .'" (Tr. at 2050) Later in O'Keefe's testimony, Gary asked, "[T]hrough any efforts of your own . . . did you ever purport to go to Canada and get with Ray Loewen to sell out the business on the Coast?" (Tr. at 2108)

71. Gary also prompted O'Keefe to explain how his business was family-run, contrasting that with Loewen's larger size:

> MR. GARY: Now, let's go back a little bit. Let's talk about Jerry O'Keefe. How did you learn the funeral home business?
> MR. O'KEEFE: Well, I kind of grew up in the business. Of course, you start learning by unfolding chairs and carrying the flowers around, and I was about 10 or 11, 12 years old and just going along and doing what had to be done . . . .
> MR. GARY: So you worked with your father?
> MR. O'KEEFE: Yes, sir.
> MR. GARY: And what about your sons?
> MR. O'KEEFE: Well, my son, Jeff, who's over here, is — he's really the fifth generation in this business.
> MR. GARY: Raise your hand, Jeff.

(Tr. at 1999-2000) O'Keefe went on to say that his funeral homes have "been in the family so many years, and we're proud to see that, really." (Tr. at 2000)

72. Gary then turned to the irrelevant theme of Mr. Loewen's personal wealth. Initially, Gary asked O'Keefe "what type of person was Ray Loewen," adding parenthetically that "it's been said that most people don't get a chance to talk to him or he is a big man." (Tr. at 2047-48) Although Loewen's counsel successfully objected to this gratuitous remark, the jury nonetheless heard it, and Judge Graves gave no cautionary instruction about it. Gary then asked O'Keefe whether he had "g[otten] a chance to observe" Mr. Loewen. O'Keefe answered "Oh,

yes, yes, we — he took us out on his yacht, and I believe his company pays him about a million dollars a year to keep that yacht up and helicopter and other amenities that he's able to use." (Tr. at 2048) Gary prompted, "Did you observe him having people cater to him?" O'Keefe answered, "Oh, yes, yes, we was [sic] served dinner on the yacht that night, and we had a young lady there who was helping mix the drinks and serving, and she took occasion to light his cigar when he needed his cigar lit." (Tr. at 2048)

e. David Riemann

73. Loewen called David Riemann to address the transaction between Riemann Holdings and Loewen. (Tr. at 2674)

74. On cross-examination, another of O'Keefe's counsel, Lorenzo Williams, repeatedly called attention to Loewen's Canadian nationality. Williams asked, "Riemann Holdings is owned by Loewen Group and Ray Loewen out of Vancouver, Canada; is that correct?" (Tr. at 2831-32) Williams then asked Riemann: "You didn't see the [1991] agreement until you had to go up to Vancouver, Canada, to discuss this; is that correct?" (Tr. at 2838) Williams' next question was, "[Y]our partners and shareholder, Ray Loewen and The Loewen Group, signed away your rights under this agreement that prompted you to have to go to Vancouver, Canada . . . ; is that correct?" (Tr. at 2833) Williams asked Riemann: "[Y]ou was [sic] complaining to Ray Loewen that the Wrights was [sic] able to avoid discussing their problem with the regional manager and had a direct line to Canada; were you not?" (Tr. at 2894) Williams asked whether Riemann was "getting too many direct orders from Canada" or "getting too much interference from Canada." (Tr. at 2895) Williams repeated, "[M]y question

become[s] did you not say that there is too much direct orders coming from Canada, yes or no, sir?" (Tr. at 2896)

75. Continuing to emphasize Loewen's nationality, Williams then asked Riemann about his meeting with Loewen after the 1991 Agreement between Loewen and O'Keefe: "When you went to Canada after you found out about this agreement . . . ." (Tr. at 2913) Williams repeated the meeting's location four more times: "Sir, do you remember after you went to Vancouver, Canada, you talked about this letter from [the Riemanns] to John Turner; is that correct?" (Tr. at 2918) "You . . . went to Vancouver; is that correct?" (Tr. at 2918) "[T]he truth is when you got back from Vancouver . . . you . . . came back to attempt to sabotage this agreement; is that correct?" (Tr. at 2922) "Did you have any participation or negotiation after you got back with your veto vote from Vancouver, Canada?" (Tr. at 2923) Williams later continued: "You weren't a happy camper when you went up to Vancouver to discuss this contract with Ray Loewen, were you?" (Tr. at 2922-23)

f. Kenny Ross

76. Loewen called Kenny Ross, an owner, former director, and consultant to several of O'Keefe's Gulf National entities. (Tr. at 2337-38, 3509) Ross had been involved in some questionable investment decisions, which prompted the Mississippi Insurance Commissioner to place Gulf National under administrative supervision. (Tr. at 527-29; 2339-49) On the stand, Ross gave only his name, address, date of birth, and social security number. In response to all other questions, Ross invoked the Fifth Amendment of the U.S. Constitution. (Tr. at 3531-35) Under the Fifth Amendment, witnesses cannot be forced to testify if the testimony would incriminate them.

g. "The Race Card Has Been Played"

77. In an effort to respond to the racial focus of O'Keefe's case-in-chief, Loewen sought to amend its witness list to permit testimony by Dr. Edward Jones and Dr. Henry Lyons of the National Baptist Convention, the largest and oldest black religious organization in the United States. (Tr. at 3593, 4752) Judge Graves permitted Loewen to add Dr. Jones and Dr. Lyons to its witness list. In so doing, he freely acknowledged that, "on the plaintiffs' side," "the race card has already been played":

> MR. GARY: [N]ow to bring Dr. Lyons in here from the National Black Baptist Convention, what on God's earth — they just signed a big contract with them, and they wanted to show that they're doing business with black people. Now we haven't claimed that they have discriminated against black people. I mean, somewhere it's got to stop, Your Honor.
> JUDGE GRAVES: Well, I'm as sensitive to racial issues, Mr. Gary, as anyone, believe me, but from the very first — *well, actually before the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage* . . . . If this were a case where nobody raised it, and I had no reason to question why anybody had called certain witnesses and raised character issues and demonstrated that we did business with black folks, *I mean, that's been happening on the plaintiffs' side.* Now, maybe there's other motivation for doing it, but it certainly looked like in the vernacular of the day, *the race card has already been played* . . . .
> MR. GARY: *Right.*
> JUDGE GRAVES: So all I know is I know what's going on, and I know the jury knows what's going on, but it's going on. So if everybody wants to keep it going on, *the race card has been played*, so everybody's got one in their (inaudible) apparently.

(Tr. at 3595-96) (emphases added). Judge Graves also acknowledged that it was plaintiffs who first played the "race card." *See* ¶ 89, below.

78. Judge Graves' reference to "the race card" as "the vernacular of the day" was a clear reference to the highly-publicized criminal trial of former football star O.J. Simpson, who had been acquitted only nine days earlier, by a predominately black jury, of charges that he had

murdered his ex-wife and her companion. When the Simpson verdict came down, Simpson attorney Robert Shapiro criticized his own colleagues' strategy (in a widely quoted phrase) of "deal[ing] the race card from the bottom of the deck." *See Simpson Lawyer Shapiro Says Defense Overplayed Race*, Reuters World Service, Oct. 3, 1995. Willie Gary himself has continued to draw parallels between the O.J. Simpson case and the O'Keefe case. The Simpson trial was frequently referred to by the popular media as "The Trial of the Century." The title of Willie Gary's self-published excerpts from the O'Keefe trial gives a similar characterization to the O'Keefe trial: *Winning Words: Willie E. Gary's Voir Dire, Opening Statement and Closing Argument in the Civil Trial of the Century* (App. at A519).

79. Judge Graves expressed no regret at having allowed Gary to play "the race card," thus forcing Loewen to defend against irrelevant and highly inflammatory charges of racial prejudice. Judge Graves explained to Gary, "They [defendants] just want a few black folks, they just want a few black folks on their side apparently." (Tr. at 3596) Judge Graves urged Gary: "Just enjoy it. It's a great day. We've got black folks. They want to bring black folks in." (Tr. at 3597) Judge Graves thus explicitly identified himself as aligned with Gary ("we"), and opposed to Loewen ("they"). After Judge Graves asserted that "[e]verybody's playing the race card," Gary replied: "I want a chance to do it. That's all." (Tr. at 3597)

80. Only Reverend Jones ultimately testified. He explained how the National Baptist Convention's relationship with Loewen contributed to the "economic empowerment and development" of the local black community. (Tr. at 4753-54)

h. Raymond Loewen

81. During his cross-examination of Mr. Loewen, Gary deepened the nationalistic divide that he had earlier created between Mississippi and Canada. Gary asked Mr. Loewen about sending John Turner "down to meet with Jerry O'Keefe in Mississippi." (Tr. at 5117) Three further questions also emphasized geography: "[A]re you claiming that John Turner just came down here on his own with no instructions from you?" "Sir, are you claiming that John Turner just came — you sent him down then, right?" "Did [Turner] come down to Mississippi to talk to Mr. O'Keefe about settlement of the lawsuit, yes or no?" (Tr. at 5118) Gary then asked about Mr. Loewen himself: "[Y]ou didn't set foot in the state of Mississippi one time to work out this agreement that John Turner worked out with O'Keefe; is that correct?" (Tr. at 5119) Towards the end of the examination, Gary repeated, "How many days did you spend in Mississippi trying to make this deal close?" "Not a single one?" (Tr. at 5181)

82. Gary reminded the jury that O'Keefe had traveled to Canada to discuss business with Loewen: "[W]hen Mike Allred and Jerry O'Keefe came to Canada, do you remember that?" (Tr. at 5147) Gary also stressed how the Riemanns "came to Canada, storm[ed] in [to] your office, called you on the carpet . . . ." (Tr. at 5119) Gary repeated: "Dave Riemann, Bob Riemann and his daddy, they came all the way to Canada, right." (Tr. at 5133)

83. Gary's questions about disagreements between the Riemanns and Loewen always emphasized Loewen's foreign nationality and geographic distance from Mississippi. Gary asked about whether Loewen had known about a particular issue "when they [the Riemanns] came to Canada?" (Tr. at 5122) Gary further asked whether Loewen had remembered a particular letter from the Riemanns "before they came up to Canada knocking on your door?" (Tr. at 5128) Gary

also asked, "[T]hen you agreed with him that your philosophy of bottoms up management was not working in Mississippi with Dave Riemann and his family?" (Tr. at 5153)

84. Gary criticized Mr. Loewen for not spending his time in Mississippi:

> MR. GARY: Well, you spend most of your time up in Canada, don't you?
> MR. LOEWEN: I think the answer to that also is no, particularly this year.
> MR. GARY: Well, how much time have you spent down here in Mississippi on the firing line with people where the real action is going on within the company? How many times have you been to Mississippi to work this year?
> [The objection by Loewen's counsel was sustained because the question was argumentative.]
> MR. GARY: How many times, then, but for this trial have you been to Mississippi this year?
> MR. LOEWEN: But for this trial, I have not been in Mississippi this year.
> MR. GARY: Not one day but for this trial?
> MR. LOEWEN: That's what I said.

(Tr. at 5169)

85. Gary then raised the issue of "funeral home ownership, local versus foreign." (Tr. at 5174) He accused Loewen of failing to publicize the "foreign ownership" of Riemann Holdings: "Well, you know the difference between local ownership and foreign ownership, don't you?" "And you know that there are state laws in Mississippi that says that you can't deceive people about ownership as it relates to state versus local?" (Tr. at 5171) Gary also asked, "Of all the funeral homes, Riemann Holdings in general, here in Mississippi, Dave Riemann owns what percentage of it?" "And your group out of Canada owns how much?" (Tr. at 5175) Gary then proceeded to re-read the Attorney General's letter to the jury for a third time. (Tr. at 5174)

86. Gary also emphasized the irrelevant but inflammatory issue of Mr. Loewen's personal wealth. He began his cross-examination with an extended discussion about whether Mr.

Because Loewen lawyers raised it

Loewen's boat was actually a "yacht." He asked, "Do they [The Loewen Group directors] know that you don't know the difference between a boat and a yacht?" "Well, you can land a helicopter on your canoe, boat or yacht, which one? Can't you land a helicopter on it?" (Tr. at 5106) "Can you land a helicopter on your yacht?" (Tr. at 5106-07) Gary persisted: "Now, sir, so you knew that it's a yacht and not a boat . . . . You know it's a yacht, don't you? You've referred to it as a yacht, haven't you?" (Tr. at 5107) This sideshow continued for several more questions: "Either it's a boat or a yacht." "Have you referred to it as a boat or yacht?" "Is it a yacht?" "I just need to know was it a yacht?" (Tr. at 5108)

87. Gary ended his cross-examination by focusing the jurors on the extent of Loewen's U.S. investments: "How much money have you all spent this year in buying up these — buying out these class of people . . . their funeral homes and their businesses?" (Tr. at 5185)

i. Earl Banks (Rebuttal)

88. On rebuttal, Gary sought to call two witnesses, Earl Banks and Hugh Parker, to testify that Loewen's relationship with the National Baptist Convention did not benefit the Convention. (Tr. at 5284-85, 5288) Ultimately, only Banks testified.

89. Loewen's counsel objected to Parker testifying. In overruling the objection, Judge Graves once again acknowledged that O'Keefe and his counsel had introduced the issue of race into the trial.

> JUDGE GRAVES: That argument would mean something to me if, at the time this trial started, we knew y'all were going to be trying to out African-American each other. We didn't know that. Y'all got in and they called all of your African-Americans in and you want yours.

Contradicts earlier claim about "We"!

MR. ROBERTSON [Loewen's counsel]: We didn't start it, Your Honor.
JUDGE GRAVES: Oh, I know y'all didn't start it. You're going to bring up the rear, and it ain't going too fast.

(Tr. at 5289)

4. The Refusal to Give Appropriate Jury Instructions

90. At the close of the evidence, Loewen requested a jury instruction attempting to mitigate the anti-Canadian, racial, and class biases that had pervasively infected the trial. (App. at A2231) Judge Graves refused, however, to give any such instruction.

91. Judge Graves began his jury instructions with instruction "C-1," a boilerplate instruction given in every case and addressing such general topics as the role of the jury, the court, the evidence, and counsel's argument. (Tr. 5438, 5507-09). Buried in instruction "C-1" is a perfunctory, one-sentence warning against bias in general, which makes no mention at all about nationality-based or racial bias in particular. Instruction "C-1" provides:

> Members of the jury, you have heard all of the testimony and received the evidence and will shortly hear arguments of counsel. I will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict. When you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence in reaching your verdict in this case. It is therefore, your duty as jurors to follow the law which I shall now state to you. You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given in these instructions by the Court.
>
> You are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole.
>
> It is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law.

Both the Plaintiff and the Defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case.

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. *You should not be influenced by bias, sympathy or prejudice.* Your verdict should be based on the evidence and not upon speculation, guesswork, or conjecture.

You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

The evidence which you are to consider consists of the testimony and statements of the witnesses and exhibits offered and received. You are also permitted to draw such reasonable inferences from the evidence as seem justified in the light of your own experience.

Arguments, statements, and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement, or remark has no basis in the evidence, then you should disregard that argument, statement, or remark.

The production of evidence in Court is governed by rules of law. From time to time during the trial it has been my duty as Judge to rule on the admissibility of evidence. You must not concern yourself with the reasons for my rulings since they are controlled and governed by rules of law. You should not infer from any rulings by me on these motions or objections to the evidence that I have any opinion on the merits favoring one side or another. You should not speculate as to possible answers to questions which I did not require to be answered. Further, you should not draw any inference from the content of these questions. You are to disregard all evidence which was excluded by me from consideration during the course of the trial.

If in stating the law to you I repeat any rule, direction or idea, or if I state the same in varying ways, no emphasis is intended and you must not draw any inference therefrom. The order in which these instructions are given has no significance as to their relative importance.

(App. at A2229-30; emphasis added)

92. Given the anti-Canadian, racial, and class-based focus, Loewen requested an additional jury instruction more specifically and more forcefully warning against bias on these impermissible grounds. Loewen first attempted to raise this issue when the trial court asked if there were any objections to the instructions it had drafted. Judge Graves, however, abruptly refused to listen to Loewen's concern:

> I know y'all just received the Court's instructions. There are just five of those.
>
> . . . .
>
> Any objection from the plaintiffs?
>
> MR. DOCKINS: No, Your Honor.
>
> JUDGE GRAVES: Defendants?
>
> MR. ROBERTSON: From the Defendants, Your Honor, we would request first with respect to C-1 the middle paragraph regarding bias, sympathy or prejudice, we had submitted an instruction, a more elaborate one that we think is tailored to this case which we would request be given, and if I can have a second —
>
> JUDGE GRAVES: I don't need to hear yours. You need to tell me what's wrong with this one.
>
> MR. ROBERTSON: There's nothing wrong with this one as it's written.
>
> JUDGE GRAVES: Do you have an objection?
>
> MR. ROBERTSON: We would only request an additional one, so —
>
> JUDGE GRAVES: Let me stop you. Let me set the ground rules right now. All I'm asking is if you have an objection to this instruction. Do you?
>
> MR. ROBERTSON: Do not.

Tr. at 5390-91.

93. Later in the instruction process, Loewen again sought to raise the same issue. Loewen specifically proposed an instruction to address the heightened risk of improper nationality-based, racial, and class bias. The proposed instruction provided:

> The law is a respecter of no persons. All are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status.
>
> In deciding the issues presented in this case, you must not be swayed by bias or prejudice or favor or any other improper motive. The parties, the court and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict based on these two things alone, regardless of the consequences.
>
> This case should be considered and decided by you as a matter between parties of equal standing in the community, between persons or businesses of equal standing and holding the same or similar stations in life. A corporation or other business entity is entitled to the same fair trial at your hands as a private individual.
>
> The Loewen Group, Inc. is a corporation organized and having its principal place of business in Vancouver, British Columbia, Canada. Loewen Group International, Inc. is a corporation having its principal place of business in Covington, Kentucky, just across the Ohio River from Cincinnati. These parties are 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)

94. O'Keefe's counsel objected to this instruction as "cumulative" of the one-sentence, generalized warning against "bias" set forth in the standard instruction. (Tr. 5447) Judge Graves sustained that objection and refused to provide the jury with *any* instruction that

specifically addressed the impropriety of nationality-based, racial, or class-based bias, or that was otherwise tailored to the facts and circumstances of this case. *Id.*

5. Closing Arguments

95. During his closing argument, Gary ruthlessly exploited Judge Graves' failure to instruct the jury against nationality-based, racial, or class-based bias. Indeed, Gary's closing argument was centered on the impermissible themes struck in his opening statement — nationality, race, and wealth.

96. Gary began his closing argument by emphasizing nationalism: "[Y]our service on this case is higher than any honor that a citizen of this country can have, short of going to war and dying for your country." (Tr. at 5539) He described the American jury system as one that O'Keefe "fought for and some died for." (Tr. at 5540-41) Gary said Loewen "thought we'd back down, and they [Loewen] didn't know that this man . . . he's a fighter . . . . He'll stand up for America, and he has." (Tr. at 5544)

97. Gary repeated his U.S.-versus-Canada theme towards the end of his closing: "[O'Keefe] fought, and some died for the laws of this nation, and they're [referring to Loewen] going to put him down for being American." (Tr. at 5588) Regarding O'Keefe's and Turner's discussion about the 1991 agreement, Gary again drew attention to nationality and geographic location by asking, "[W]hy did they [Loewen] send John Turner all the way from Canada down here. Mr. O'Keefe had been up there, tried to settle that case, . . . and he came back minding his own business, and Ray Loewen got on the phone . . . and they sent John Turner down here. . . . They sent John Turner down here because . . . they wanted [O'Keefe] out of business . . . ." (Tr. at 5546-47)

98. Gary reminded the jury that many of O'Keefe's witnesses were Mississippians. (Tr. at 5576, 5578, 5580, 5589, 5591) Gary excused Bill Mendenhall, another of O'Keefe's witnesses, for residing in Whitfield, which is fifteen miles southeast of Jackson: "He's the one that told you that he lived over at . . . Whitfield . . . . But he said it was because his wife works over there. He wanted to make that clear. It was only because his wife worked over there." (Tr. at 5581-82) By contrast, Gary characterized Mr. Loewen as a foreign invader who "came to town like gang busters, like gang busters. Ray came sweeping through, took over Wright & Ferguson . . . ." (Tr. at 5548)

99. Gary described business disagreements between Loewen and the Riemanns in charged and nationalistic terms. For example, Gary said that "even a dog deserves a pat on the back every now and then, and [Mike Riemann] couldn't get it from those people out of Canada." (Tr. at 5549) According to Gary, while David Riemann "was down here on the firing line doing the work, making the profits, Ray Loewen was up there spending the money." (Tr. at 5570) To discuss their differences, Gary continued, "Riemann had to go up there," to Canada. (Tr. at 5570)

100. Gary repeated Espy's irrelevant testimony about the alleged unfair trade practices of Canadian wheat farmers: "'I was very bothered by certain actions which restricted Canadian products into our markets because they tried to undervalue . . . . The Canadian wheat was underpriced. They would come in, flood our markets, our people would eat a lot of pasta, and they would not buy American wheat. They would go for cheaper wheat which was underpriced to take over the market, and then they would jack up the price, and that was not right, not consistent with what I've done in my life, try to protect people, protect the American market.'"

(Tr. at 5587) Like the Canadian wheat farmers, Gary implied, Loewen would "come in" and purchase a funeral home, and "'[n]o sooner than they got it, they jacked up the prices down here in Mississippi.'" (Tr. at 5588)

101. Gary also alleged that Loewen's contract with the National Baptist Convention hurt the black community: "This is money they're [Loewen] going to get off 8.2 million African-Americans, a contract that was clearly without question unfair to those members, and you know it." (Tr. at 5541-42) Gary then ridiculed the contrary testimony by Reverend Jones: "Little Mr. Jones, . . . it was like a little fish surrounded by sharks on that contract. Y'all see how bad it is. It's terrible. It is terrible. It is terrible for the people, and they took advantage of him . . . . [I]f they take just half of them [Convention members], they make 7.9 billion dollars off of the National Baptist Convention, Baptist [C]onvention get 1 percent of this." (Tr. at 5553-55) This $7.9 billion figure, although frequently referred to by Gary (Tr. at 5554-55, 5577-78, 5704, 5799), is absurd on its face and was unsupported by the evidence.

102. In summing up the damages for the jury, Gary requested over $105 million in compensatory damages. (Tr. at 5713) Of that amount, $74,500,000 represented damages for emotional distress, calculated at the rate of $50,000 per day since the alleged breach of the 1991 agreement. (App. at A731-32; Tr. at 5566, 5713-14)

103. To conclude, Gary drew an analogy between Loewen's competition with O'Keefe and the Japanese bombing of Pearl Harbor: "[S]omething inside [Jerry O'Keefe] said . . . fight on. [Loewen] lied to him, and a voice said fight on. . . . [W]hen they cheated him, a little voice said fight on. . . . He's a fighter, and he's fought them. You see, that little voice, . . . it's called faith . . . . It's called pride, in America. . . . It is called love, love for your country . . . . You see,

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

6. The Initial Verdict and Its Improper "Reformation"

104. In all punitive damages cases, Mississippi law requires a bifurcated trial procedure. At the first stage, the jury determines liability and compensatory damages; then, at the second stage, the jury considers under a different and higher standard of proof whether to award punitive damages. The jury cannot consider liability and punitive damages at the same time. Miss. Code Ann. § 11-1-65(b)-(c).

105. Consistent with this provision, the jury was instructed only to consider liability and compensatory damages issues, and the parties introduced neither evidence nor argument on punitive damages during the initial phase of the trial.

106. On November 1, 1995, the jury returned a verdict for O'Keefe of $260,000,000. In so doing, the jury assigned multiple damage awards for conduct that could have caused only one indivisible harm:

(Wright & Ferguson contracts)	
Breach of one or more of the Wright & Ferguson contracts:	$31,200,000
Tortious interference with a Wright & Ferguson contract:	$7,800,000
Tortious breach of a Wright & Ferguson contract:	$23,400,000
Breach of covenants of good faith in a Wright & Ferguson contract:	$15,600,000

(1991 Agreement)

Willful or malicious breach of the 1991 Agreement:	**$54,600,000**
Tortious breach of the 1991 Agreement:	**$54,600,000**
Breach of covenant of good faith in the 1991 Agreement:	**$36,400,000**
State antimonopoly law:	**$18,200,000**
Common law fraud:	**$18,200,000**
	Total: $260,000,000

(App. at A651-58) After the initial verdict was announced, the jury foreman wrote Judge Graves a note explaining that the $260 million "covers both loss [sic] damages ($100,000,000), and punitive damages ($160,000,000). . . . The $260,000,000 was a 'negotiated compromise' between a low of $100,000,000, and a high of $300,000,000. Total of loss damages and punitive damages." (App. at A659)

107. Loewen immediately moved for a mistrial, arguing that the verdict was biased, excessive, and procedurally defective given its joint resolution of liability and punitive damages. (Tr. at 5738-39) Judge Graves, who had, of course, ample authority to declare a mistrial, denied Loewen's motion without discussion. (Tr. at 5739) Instead, without polling the jury as Loewen had requested, Judge Graves purported to "refor[m]" the verdict. (Tr. at 5742-44) Judge Graves informed the jury that he had "accepted" its $100 million award of compensatory damages, but had not "accepted" its $160 million punitive damages award. (Tr. at 5753) As Chief Justice Neely has explained (Neely Op. at 10-11), the obvious implication was that a $160 million punitive damages award was inadequate.

108. After denying Loewen's motion for relief and signaling to the jury that a $160 million punitive award would be insufficient, Judge Graves continued with a separate punitive damages phase.

7. The Punitive Damages Phase

109. The entire punitive damages hearing occurred on a single day, November 2, 1995. Gary presented only two witnesses, who testified for "no more than 10, 15 minutes each," about the alleged net worth of Loewen. (Tr. at 5754)

110. In his opening statement on punitive damages, Gary made yet another provincial appeal to Mississippian and American interests: "Punitive damages, no doubt about it, it's going to punish them. And if you don't do that, then you come short of your duty. It's to stop wrongdoing. It's to deter wrongdoing. It's to make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again." (Tr. at 5755) Gary stated that Loewen "didn't feel sorry for the people up in Corinth," another Mississippi town in which Loewen owned funeral homes, "when they gouged them." (Tr. at 5756) Gary concluded by appealing directly to the jury's passion: "[M]ake a decision based on your heart." (Tr. at 5756)

111. O'Keefe's chief punitive damages witness, Bernard Pettingill, testified that the net worth of Loewen was almost $3.2 billion. (Tr. at 5762-63) Pettigill acknowledged that the total market capitalization of Loewen, based on the then-current value of its shares, was less than $1.8 billion. (Tr. at 5762-64) However, Pettigill asserted that the market had failed to take into consideration the "future value" of Loewen's contract with the National Baptist Convention, and that this "future value" accounted for the difference between the market's valuation of under $1.8 billion and his own valuation of almost $3.2 billion. (Tr. at 5762)

112. Loewen presented expert testimony that its entire net worth, as reflected in official filings with the U.S. Securities and Exchange Commission, was between $600 and $700 million.

(Tr. at 5771-72) Loewen's expert further testified that Loewen's market value was approximately $1.7 billion. (Tr. at 5777)

113. Gary began his closing argument on punitive damages by emphasizing Mr. Loewen's supposed arrogance for not being present in Mississippi: "Ray Loewen is not here today. He's not here, and I think that's the ultimate arrogance, ultimate arrogance. He didn't even show up today. That's the ultimate arrogance for him to think that he can do what he's doing to people like Jerry O'Keefe . . . and to the consumers of this state, and he can deal with it in this fashion . . . ." (Tr. at 5794-95) Gary further stated that "Ray comes down here, he's got his yacht up there . . . ." (Tr. at 5801)

114. Focusing again on geography, Gary alleged that Loewen officials were "smiling when they charge grieving families in Corinth, Mississippi." (Tr. at 5796) Gary also invoked state provincialism in urging the jury to award O'Keefe a large sum of punitive damages: "You can say that down here in Mississippi, we sent a message to Ray Loewen and his group that you're not going to come down here, buy up these small family funeral homes, target . . . [those] who are in disarray . . . ." (Tr. at 5797)

115. As he had done previously, Gary stressed the National Baptist Convention contract, repeating his facially absurd and factually unsupported charge that Loewen would make "over [$]7.9 billion, that's off of that one contract, and that's just selling vaults." (Tr. at 5799) Gary further alleged, again without factual support, that Loewen discriminated against blacks in selling related burial services: "You ain't going to buy a vault and put it in your garage. You pay for a vault, you're going to want a burial plot. That's not even included. That's not even included, members of the jury, and to add additional insult to injury, they locked the National

Baptist Convention in, and what they did is they said, '*You can't even come to our funeral homes for burial.* We'll sell you a vault, and that's it.' . . . They [Loewen] want to take the unimproved cemeteries . . . black cemeteries . . . . [T]hey want to take them, and he's [Ray Loewen is] going to get them for nothing, and then resell them, and they're going to make billions of dollars. You've got to hit them now, and 1 billion dollars, members of the jury, will get their attention." (Tr. at 5799-5800) (emphasis added) There was, of course, no evidence whatsoever for the false suggestion that Loewen-owned funeral homes would not welcome National Baptist Convention members "for burial."

116. Gary concluded his closing argument on punitive damages with one final geographic reference: "1-billion dollars, 1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may not ever get this chance again. And you're not just helping the people of Mississippi, but you're helping . . . families everywhere." (Tr. at 5809)

117. On the afternoon of November 2, 1995, the jury returned a punitive damages award of $400 million. (Tr. at 5810) The $500 million total verdict was far and away the largest in Mississippi's history, *see* Mississippi Economic Council, *Populist Jurisprudence* 7, 26-27 (1996); was 78% of Loewen's entire net worth based on its June 30, 1995 financial statements (App. at A736); and was over 100 times the value of either the Loewen insurance company or the O'Keefe funeral homes that were the principal subjects of the underlying contractual dispute. The $400 million punitive damages award was 50 times the size of the largest punitive damages award ever reviewed by the Mississippi Supreme Court, and more than 200 times the size of the largest punitive damages award ever upheld by the court. *See Populist Jurisprudence, supra*, at 7, 26-27.

8. The Entry of Judgment and Denial of Loewen's Post-Trial Motions

118. On November 6, 1995, the trial court entered judgment on the jury's biased, excessive, and procedurally defective verdict. Under Mississippi law, such a judgment is enforceable by execution beginning 10 days after the entry of judgment. Miss. R. Civ. P. 62(a).

119. Also on November 6, 1995, Loewen filed a motion to reduce the punitive damages on grounds of bias and excessiveness. (App. at A1196) On November 15, 1995, Loewen filed a separate motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur (App. at A660), in which it repeatedly argued that the jury's verdict evinced "bias, passion and prejudice" against Loewen:

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

(App. at A727; *see also* A725, A728, A730, A737, A741) Loewen also argued that each element of the $500 million in damages was excessive. (App. at A730, A731, A733, A736, A737) Finally, Loewen argued throughout the motion that the jury's liability verdict was totally unsupported by the evidence.

120. On November 15, O'Keefe filed a "Motion for Additur" (App. at A761-63), which brazenly asserted that "[t]he jury's punitive damage award is . . . inadequate" because it was "a mere four (4) times the compensatory damage award in this case." Astonishingly, O'Keefe asked the judge to increase the punitive damages award "by an additional Six Hundred Million Dollars ($600,000,000)," to an even one billion dollars. (App. at A762)

121. On November 20, 1995, Judge Graves denied Loewen's post-trial motions as well as O'Keefe's additur motion. (App. at A787-817) Although Judge Graves purported to hear oral argument on these motions, the transcript makes clear that he had drafted a written decision prior to the hearing, and simply read his decision into the record after a perfunctory oral proceeding. (App. at A812-816)

9. The Arbitrary Appeal Bond Requirement

122. After entry of the $500 million judgment, the Mississippi courts imposed an arbitrary requirement that Loewen post a $625 million bond in order to pursue an appeal. The Mississippi procedural rules, which permit almost immediate execution of a judgment and which require an appealing defendant to post a bond for 125% of the judgment in order to stay execution pending appeal, also permit appropriate reductions of the bond for good cause. However, both the trial court and the Mississippi Supreme Court ruled that Loewen, despite facing severe financial loss and possibly bankruptcy, had not shown good cause for *any* bond reduction.

123. Absent a stay of execution, O'Keefe could have begun to enforce the $500 million judgment on December 1, 1995, ten days after the trial court denied Loewen's post-trial motions. In Mississippi, O'Keefe could have enforced the judgment simply by having courts throughout the state issue, *e.g.*, writs of garnishment, execution, or attachment, which would have entitled O'Keefe, with state assistance, to seize and liquidate Loewen's Mississippi property, assets, and investments. O'Keefe also could have easily enforced the Mississippi judgment in other U.S. states as well, for the U.S. Constitution's Full Faith and Credit Clause (Art. IV, § 1) requires one state to honor the judicial judgments of another. Many of the states where Loewen owned

significant property have adopted the Uniform Recognition of Judgments Act, which allows a plaintiff to begin the execution process merely by registering, in any local court where the defendant has property, a certified copy of the judgment at issue. *See, e.g.*, Ky. Rev. Stat. Ann. § 426.975; 6 Ala. Code § 6-9-234(a) Cal Code Civ. Proc. § 1710.50(a)(1)-(2); Fla. Stat. Ann. § 55.509(2); Ga. Code Ann. § 9-12-134(a); N.C. Gen. Stat. § 1C-1705(a); Tex. Civ. Prac. & Rem. Code § 35.006(a). These laws would have allowed O'Keefe to use state courts and sheriffs to seize and liquidate property, assets, and investments owned by Loewen anywhere in the United States.

124. Loewen could have stayed such execution only by posting a 125% appeal bond, which would have resulted in an automatic stay, Miss. R. App. P. 8(a), or by showing that there was good cause to grant a stay on the basis of a reduced bond, Miss R. App. P. 8(b). On November 28, 1995, Loewen filed with the Mississippi trial court a Motion for Stay of Enforcement of Final Judgment Pending Appeal. (App. at A818) Loewen explained that because punitive damages represent a "windfall" to the plaintiff, a defendant should not be required to post an appeal bond for the punitive component of a potentially bankrupting judgment. Among other cases, Loewen cited *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796-97 (7th Cir. 1986), which reduced an appeal bond on that basis, and *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970), which stressed that courts are permitted to waive appeal bond requirements "so that, in effect, the defendant's right of appeal would not be destroyed."

125. Loewen thus asked the trial court to reduce the appeal bond to $125 million — 125% of the *compensatory* damages awarded by the jury. Loewen argued that there was "good

cause" for reducing the bond because it was likely to succeed on its bias and excessiveness claims on appeal, because the financial consequence, to the company of posting a $625 million bond would be devastating, and because the prejudice to O'Keefe would have been virtually nil, since a $125 million bond was still almost five times the maximum damages ($26 million) demanded by O'Keefe in his final amended complaint. (App. at A818-42) Moreover, Loewen pledged that while its appeal was pending, it would (i) notify the court and O'Keefe before conveying or encumbering any significant assets; (ii) notify the court and O'Keefe before making any increased dividend payments; and (iii) provide O'Keefe with a monthly financial accounting. (App. at A957)

126. Loewen supported its motion with affidavits from Paul Wagler (Loewen's then Chief Financial Officer) (App. at A976); Robert Bourke (a Senior Managing Director of The First National Bank of Chicago, the bank that managed Loewen's $500 million line of credit) (App. at A1000); and Theodore C. Sevier, Jr. (Vice President of Marsh & McLennan, Inc., Loewen's principal broker in attempting to obtain the $625 million appeal bond) (App. at A989). Those affidavits showed that posting a $625 million bond would have been virtually impossible.

127. On November 29, 1995, only one day after Loewen filed its lengthy motion for a stay and reduced bond, the trial court summarily denied it. (App. at A1072-78) The court concluded that there was no good cause for reducing the bond below $625 million, and that, despite the various protections offered by Loewen, *no* reduced bond would adequately secure O'Keefe's "interest in protecting the victor's judgment." (App. at A1078)

128. Loewen immediately sought relief from the Mississippi Supreme Court. (App. at A1008-43) On November 30, 1995, a three-justice panel of that court issued an order granting

Loewen an interim stay upon the posting of a $125 million appeal bond, and "until further order of this Court." (App. at A1082-84) On December 20, 1995, the full nine-justice Mississippi Supreme Court extended the interim stay indefinitely, also pending further order of the court. (App. at A1394)

129. On January 24, 1996, however, the Mississippi Supreme Court entered a perfunctory order — over the dissent of two justices — holding that the trial court had "not abused its discretion in refusing to lower the amount of the supersedeas bond." (App. at A1176) The Mississippi Supreme Court ordered Loewen to post a bond "in the amount required by Rule 8" (*i.e.*, $625 million) within seven days. (*Id.*) Thus, if Loewen did not post the full bond by January 31, 1996, O'Keefe could begin to enforce the $500 million judgment by using courts and sheriffs throughout the United States to seize and liquidate Loewen's assets, and thus dismember the company.

C. The Coerced Settlement

130. Between the time of the verdict and the settlement, Loewen had, at least in theory, five options for dealing with the *O'Keefe* crisis: (1) proceed with its appeal while allowing O'Keefe to execute upon the Mississippi judgment; (2) seek relief from a U.S. federal court; (3) file for bankruptcy in Canada and the United States; (4) post an appeal bond and thereby stay execution of the Mississippi judgment pending appeal; or (5) settle the case with O'Keefe. In the end, the first four options proved to be either impossible, or catastrophic, or both. Consequently, Loewen chose the least catastrophic alternative — settling with O'Keefe. That settlement was Loewen's only viable alternative, and was entered into under extreme duress.

131. Prior to November 1, 1995, Loewen regarded the *O'Keefe* lawsuit as an ordinary commercial dispute involving a relatively small amount: it was a "minor problem." (App. at A1227, A1304, A1223) Loewen, which was preparing to announce "record results" (App. at A1222) for its "best nine months ever" (the first nine months of 1995) (App. at A1372), had never been in better financial shape: (i) its stock was trading on the NASDAQ at a very high multiple and a price of $40.05 on October 31, 1995 (App. at A1200); (ii) it was regularly concluding acquisitions worth $10-20 million per week on average (*see* App. at A1231; App. at A1841), to acquire death care businesses all over North America; (iii) it was borrowing money as an unsecured creditor, at only one-half a percent over the London InterBank Offered Rate (LIBOR); (iv) as reported by Standard & Poor's, Loewen's debt rating was BBB, an extremely low-risk, "investment grade" debt (App. at A1216; App. at A1232); and (v) the company was just about to close on an additional bank facility that would increase its line of credit from $500 million to $750 million. (App. at A1179) This $250 million increase was particularly important in Loewen's continued growth, for at the time of the Mississippi verdict, Loewen had signed (but not yet closed) deals to acquire $347 million worth of cemetery and funeral-home businesses. (App. at A1193) As Loewen's then-Vice President of Finance put it, "Acquisitions are the key to maintaining [Loewen's] credibility." (App. at A1231)

132. Everything changed after the Mississippi debacle. After November 1, 1995, when the jury's initial verdict was announced, every member of Loewen's senior management had not only heard of the *O'Keefe* case, but was preoccupied by its aftermath: management devoted much of its time to dealing with the impact and potential consequences of the verdict. (*See, e.g.*, App. at A1300; *see also* App. at A1303; *see generally* App. at A1178, A1257, A1262, A1305, A1320,

A1325; A1395, A1404, A1408, A1443, A1455, A1465, A1468, A1496, A1498, A1501, A1724, A1736, A1740, A1745) The shock of the Mississippi verdict was felt in other, more tangible ways as well: (i) Loewen's share price dropped immediately by over 20 percent, from $40.05 per share on October 31, 1995 to $31.87 per share on November 3, 1995 (App. at A1200); (ii) Loewen's lenders required it to pledge security for its loans, which impaired the company's ability to respond quickly to attractive acquisition candidates and business opportunities; (iii) in January 1996, Standard and Poor's "slashed" Loewen's debt rating from BBB to CCC (a debt rating usually reserved for borrowers in, or in serious risk of, default (*see* App. at A1513); (iv) the banks immediately canceled the $250 million increase in Loewen's line of credit; and (v) bankers refused to assure Loewen of "full access to funds to continue its acquisition program" while the Mississippi judgment remained unresolved. (App. at A896)

133. Despite these devastating blows, Loewen still had to meet the competing financial burdens of keeping the company running — including acquiring over $500 million in new capital to roll over existing debt and finance the acquisitions that were under contract — while at the same time attempting to finance an appeal bond, possibly for as much as $625 million. Loewen had little choice but to complete the transactions already under contract; after the *O'Keefe* verdict, it could not responsibly risk another breach-of-contract suit. (App. at A1193)

134. Loewen never seriously considered the first option, allowing O'Keefe to execute upon the $500 million judgment while Loewen pursued its appeal. That would have, quite literally, destroyed the company, for O'Keefe would have been able to use state courts and sheriffs throughout the United States to seize large portion of Loewen's U.S. investments, sell them at distress prices, and destroy the value of Loewen as an ongoing enterprise. Additionally,

attachment would likely have "cause[d] certain company indebtedness to accelerate," possibly forcing bankruptcy. (App. at A1359; *see also* App. at A2205-06) Obviously, this was no "option" at all.

135. Loewen also could not have pursued the second option, recourse to U.S. federal courts, even after the Mississippi Supreme Court refused to reduce the bond. As described in the attached opinions of Professors Laurence Tribe (Exhibit D) and Charles Fried (Exhibit E), recourse to the U.S. federal courts was almost certainly unavailable as a matter of U.S. law; thus, this theoretical "option" was also a practical impossibility.

136. Consequently, Loewen had only three realistic alternatives: bankruptcy, posting an appeal bond, or settlement. (App. at A1473; *see also* App. at 1478, A1469) After the Mississippi verdict, Loewen considered all three, immediately putting together three internal management teams to analyze each alternative. (*See, e.g.*, App. at A1300)

137. Loewen viewed bankruptcy as "by far the least desirable alternative" (App. at A1473), since bankruptcy would have terminated the successful acquisition strategy that had created so much of its stock value and was "the key to maintaining its credibility." (App. at A1231) Loewen further believed that if it stopped its growth, even temporarily, reestablishing its reputation as a solid, well-managed growth company would be extraordinarily difficult. (*Id.*; *see also* App. at A1284)

138. Loewen's preferred option was to appeal. (App. at A1227-28) Senior management viewed the biased and excessive verdict as "out and out wrong" (App. at A1191), "outrageous" and "inexplicable" (App. at A1223) (*See* App. at A1191; *see also* App. at A1304, A1227-28, A1230) Likewise, industry analysts concluded that the award was "grossly excessive

and would be reversed by the Mississippi Supreme Court in its present form. . . . [W]e think that most or all of the award will be taken away from the plaintiffs on appeal." (App. at A1286; *see also* App. at A1304)

139. The requirement of posting a $625 million bond blocked Loewen from pursuing an appeal. From early November 1995 until late January 1996, Loewen's senior financial executives worked to obtain the financial backing for a $625 million appeal bond. Ultimately, these efforts proved unsuccessful, for as detailed in the affidavits of Messrs. Wagler, Sevier, and Bourke, obtaining so large a bond was effectively impossible. (App. at A976-1007)

140. A $625 million appeal bond would have been "the second largest [appeal] bond ever arranged in this country." (App. at A991) An appeal bond of this magnitude would have been all the more remarkable because Loewen's "size and financial capacity is far below that of the larger American corporations that from time to time are required to post [appeal] bonds. Measured by volume of sales, Loewen is approximately *one percent the size of the major American corporations.*" (App. at A991, emphasis added) Indeed, immediately after the verdict, a Senior Vice President of NationsBank wrote to Loewen's Manager of Corporate Finance to indicate her view (based on a prior experience) that, for any litigant, "it is virtually impossible to post a bond in the magnitude of $500 million." (App. at A1187)

141. The principal problem Loewen faced was the insistence of surety companies that the bond be fully secured through a letter of credit. However, Loewen could not obtain a new $625 million letter of credit because it already had approximately $736 million of outstanding debt, and taking on $625 million in new debt would have drastically increased its debt-to-equity ratio. That, in turn, would have violated covenants that Loewen previously had made to existing

lenders, and thus triggered an immediate default on the entire $736 million of existing debt. (App. at A982-83) As industry analysts recognized, so large a bond "could trigger defaults on Loewen's senior debt and bank credit lines." B. Simon, *Damages Award Puts Loewen in Jeopardy*, Financial Times, Jan. 26, 1996, at 22. (*See, e.g.*, App. at A878, A886-87, A898) Loewen's existing lenders refused to waive any of their covenants (App. at A998, A1005), and on December 12, 1996, Loewen publicly warned the capital markets that "the company is unable to obtain financing to support a bond in excess of $125 mm." (App. at A1359, A2205-06) Thus, the only way for Loewen to obtain the letter of credit, if at all possible, was to issue new equity, so that the debt-to-equity ratio would not rise so high as to violate any covenant. (App. at A985-86)

142. However, Loewen faced equally serious obstacles in issuing new equity. Loewen's bankers were reluctant to allow Loewen to issue new equity unless it pledged to use the funds for the ongoing acquisition program. (App. at A986, A1379-81)

143. To finance the acquisitions then under contract, Loewen in late 1995 issued $155 million of convertible preferred shares. These shares were much more expensive than previous issues, for they had to carry a fixed dividend rate substantially higher than the discretionary dividends on the common shares, and their conversion prices were set substantially below what they would have been prior to the verdict. (App. at A1145) Loewen's investment bankers required that the proceeds of this preferred share offering be placed in a trust and used *solely* to finance the acquisition program; none of the proceeds could be used to finance an appeal bond. (App. at A2206)

144. The prospectus for this preferred share offering captured many of the difficulties that Loewen faced:

> As of Dec. 12, 1995, the company is unable to obtain financing to support a bond in excess of $125 mm. If the [Mississippi] Supreme Court sets the amount of the bond above the $125 mm provided in the interim stay, the company will need to determin[e] if financing to support the increased bond is then available. Such financing may include the issuance of substantial equity at a price lower than the current market price of the common shares. . . . If financing is not available for an increased bond, or if the company otherwise determines that it will be unable to post a bond in the increased amount, then following the operation of any stay or enforcement of the judgment then in effect, [O'Keefe] will be entitled to attach assets of the company defendants. Attachment of assets could cause certain company indebtedness to accelerate. In circumstances where the assets and operations of the company are, absent a stay, at risk, the company may determine that it would be in the best interests of its continued operations, shareholders and creditors generally to place the company defendants under bankruptcy protection.

(App. at A1358-59, A2205-06)

145. Loewen personnel even went so far as to have discussions with merchant banking firms concerning a transaction in which the Loewen would effectively be taken over by financiers, who would then post the company's appeal bond and pursue the appeal. Ultimately, however, no offers were forthcoming from any of these organizations.

146. After the Mississippi Supreme Court's order, any investment in Loewen became a much riskier proposition, as the company's drastically reduced debt rating demonstrated. And once the Mississippi Supreme Court ended the hope of a reasonable appeal bond, the markets recognized that Loewen's demise, by way of bankruptcy, was a real and imminent possibility, and Loewen's bargaining strength was thus radically diminished. As a result, the costs of funding a $625 million bond rose substantially, to the point that bond financing, even if available, would have been even more expensive than the "virtually impossible" bond financing

described in the Wagler, Sevier, and Bourne affidavits of late November 1995, and it would have almost certainly curtailed, or even terminated, Loewen's acquisition strategy.

147. The last possible avenue for an appeal bond lay with NationsBank, which in mid-January 1996 suggested that it might be willing to provide the necessary financing for a significant portion of a $625 million appeal bond. (*See* App. at A1438) But once the Mississippi Supreme Court refused to reduce the $625 million bond, NationsBank backed away, effectively ending Loewen's last hope of posting the bond and pursuing its appeal. (*See* App. at A1516.1) Thus, after January 24, a settlement with O'Keefe became Loewen's only practical alternative.

148. Loewen had always been willing to consider a reasonable settlement. (*See, e.g.*, App. at A1238) On November 7, 1995, Willie Gary proposed to Loewen a post-judgment settlement meeting. (App. at A1236) (App. at A1238) Later that day, Gary made his first settlement demand: Loewen would pay O'Keefe the full $500 million "plus pre-judgment interest and costs." (App. at A1240) At the meeting, however, O'Keefe and Gary amazingly "*increase[d]* their demand to a sum $25,000,000.00 greater than the face amount of the judgment." (App. at A1298, emphasis added) Not surprisingly, no settlement was reached.

149. After the Mississippi Supreme Court's order requiring Loewen to post the full $625 million bond within seven days, Gary wasted no time in threatening to execute upon Loewen's U.S. investments. The very next day, January 25, 1996, Gary sent a letter to Loewen's lawyers, advising that O'Keefe would begin seizing Loewen's U.S. assets in six days:

Gentlemen:

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. Be further advised that any previous [settlement] offers made or suggested by anyone other than myself are hereby rescinded. . . .

In conclusion, it is important that you understand that I firmly believe that we are going to prevail on appeal and ultimately collect every dime owed to us. However, 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, and only someone with settlement authority, call me.

(App. at A1470-71)

150. The Mississippi Supreme Court's order sent shockwaves through the financial markets. Loewen had managed to maintain credit ratings in the BBB range even after the Mississippi verdict, but after the bond denial, the markets reacted harshly: "[T]he three biggest U.S. rating agencies — Standard & Poors Corp., Moody's Investors Service Inc. and Duff & Phelps Credit Rating Co. — all slashed the ratings on [Loewen's] outstanding debt. Senior debt was downgraded a full rating point to triple-C or its equivalent from triple-B." Brian Milner, *Loewen Scrambles to Survive,* The Globe and Mail (Toronto), Jan. 26, 1996, at B1. Loewen's U.S. share price fell again, to $18.63, which was 54% below the pre-verdict price of $40.06.

151. While the markets were battering Loewen, O'Keefe drastically lowered his settlement demand to $175 million. At this point, settlement became Loewen's least catastrophic option. As expensive and damaging as settlement was to Loewen, the bonding option, even if it were available, was worse. Moreover, settlement was less disruptive and threatening than bankruptcy or a further appeal: it avoided the devastating legal and financial consequences of

III. THE MEASURES AT ISSUE

154. At the May 18 hearing, the United States professed uncertainty, despite Loewen's meticulously detailed Notice of Claim, about what measures are at issue in this arbitration. The Notice of Claim was perfectly clear on this point, and more than satisfied any conceivable pleading requirement. However, to remove any possible doubt, Loewen confirms that the measures at issue include the following:

1. The trial court allowed O'Keefe's counsel to make irrelevant and highly prejudicial comments, and to elicit from witnesses irrelevant and highly prejudicial testimony, about the nationality, racial attitudes, and economic class of the parties in this case. As detailed in Chief Justice Neely's affidavit, the trial court permitted (i) at least 262 references contrasting the Canadian background of Loewen to the American or Mississippian background of O'Keefe, (ii) at least 38 references to racial matters, and (iii) at least 66 references to wealth disparities between the parties.

2. The trial court refused to instruct the jury against rendering a verdict based on improper considerations of nationality, race, and economic class. Instead, it gave only boilerplate instructions wholly inadequate to protect Loewen in the particular circumstances of this case.

3. The jury rendered an initial $260 million verdict for O'Keefe that was (i) tainted by bias, (ii) procedurally defective because the jury had simultaneously considered compensatory and punitive damages, and (iii) grossly excessive in its award of approximately $26 million in economic damages, approximately $74 million in damages for pain and suffering, and $160 million in punitive damages

4. The trial court denied Loewen's motion for a mistrial and, instead, "reformed" the verdict *sua sponte*. In effect, the court ratified the compensatory damages award and invited the jury to award even higher punitive damages.

5. The jury rendered a subsequent $400 million punitive damages verdict that was (i) tainted by bias, (ii) procedurally defective because of the improper "reformation," and (iii) grossly excessive.

6. The trial court entered judgment for O'Keefe for $500 million.

bankruptcy; it shielded Loewen from any further injustice at the hands of the Mississippi courts; and, in contrast to bonding and bankruptcy, it would not have ended Loewen's acquisition and consolidation program. The $175 million settlement thus became Loewen's only practical alternative.

152. Accordingly, on January 29, 1996, Loewen settled with O'Keefe. Under the settlement, O'Keefe received $50 million in cash on January 31, 1996, 1.5 million Loewen shares on February 15, 1996, and annual payments of $4 million for the next twenty years. (App. at A1504-05, A1564) Although only 35% of the verdict and judgment, the $175 million settlement was still 30 to 50 times greater than the amount at issue in the underlying commercial dispute.

153. Even after the settlement, market analysts and observers had serious doubts about Loewen's continued financial health. One industry analyst noted that Loewen's competitors "don't have these issues out there," referring to "the company's battered image" as well as possible problems concerning "the company's continuing access to financing, the impact of the Mississippi lawsuit on other U.S. lawsuits, and the effect on management strategy and practices." B. Milner, *Loewen Licks Its Wounds Funeral Operator Heads For Recovery*, The Globe and Mail (Jan. 31, 1996). Other analysts noted that Loewen "won a battle but not the war" by settling the *O'Keefe* case, and that the Mississippi experience would negatively "colour the perception of the company" among potential acquisition targets. (App. at A1522)

7. The trial court denied Loewen's several post-trial motions challenging the verdict as tainted by bias, procedurally defective, and grossly excessive.

8. Both the trial court and the Mississippi Supreme Court arbitrarily required Loewen to post a $625 million bond in order to pursue its appeal rights.

Considered singly and together, these measures breached NAFTA and compelled Loewen to pay O'Keefe an extortionate $175 million settlement.

IV. RELEVANT LAW AND ARGUMENT

A. NAFTA Violations

155. It is beyond serious dispute that the state of Mississippi, including its courts, are bound to follow NAFTA. Article 105 of NAFTA provides that NAFTA signatories, including the United States, "shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments." The United States has interpreted this Article to mean that "state, provincial and local governments must, as a general rule, conform to the same obligations as those applicable to the three countries' federal governments." *U.S. Statement of Administrative Action*, H.R. Doc. 103-159, 103d Cong., 1st Sess., v.2, at 4 (1993).

156. Under United States law, the Mississippi courts are not free to disregard these obligations. The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2) provides that "the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, in *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), the U.S. Supreme Court specifically held that state and local courts are bound by U.S. treaty provisions.

157. Even without NAFTA, international law constitutes binding "laws of the United States" for purposes of the Supremacy Clause. The U.S. Supreme Court has held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States*, § 111 (1) (1987), states that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States." *See also State v. Marley*, 509 P.2d 1095, 1107 (Haw. 1973) ("[i]nternational law is a part of our law and as such is the law of all States of the Union"); L. Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1557 (1984) ("from our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction").

158. As explained in detail below, the Mississippi courts violated three different NAFTA principles or provisions during the *O'Keefe* litigation: the anti-discrimination principles set forth in Article 1102 and incorporated into Articles 1105 and 1110, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. These violations encompassed virtually every critical ruling in the case: the admission of hundreds of witness and counsel statements designed to incite improper bias against Loewen; the refusal of instructions designed to mitigate that bias; the request that an excessive initial award be increased even more; the entry of judgment on a biased, grossly excessive, and procedurally defective $500 million verdict; and the arbitrary imposition of a $625 million bonding requirement with the purpose and effect of foreclosing Loewen's appeal rights.

Considered individually or jointly, these rulings and violations compelled Loewen to reach an extortionate settlement with O'Keefe and inflicted severe damage on the company.

1. Discrimination (Articles 1102, 1105, and 1110)

159. The right of foreigners to be secure from invidious discrimination in judicial proceedings is a universally recognized element of international law, and literally hundreds of treaties recognize the right. For example, Article 7 of the [United Nations] "International Bill of Human Rights" provides:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

G.A. Res. 217 (III), Dec. 10, 1948, *reprinted in* 8 M. Whiteman, *Digest of International Law* 378 (1967). Similarly, Article 6(i) of the European Convention on Human Rights and Fundamental Freedoms provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal." Leading commentators also have unanimously embraced this principle: "A, a foreigner, sues B, a native, for goods sold and delivered. The court being clearly biased against A because he is a foreigner improperly gives judgment in favour of B. This is a denial of justice." G. Fitzmaurice, *The Meaning of the Term "Denial of Justice,"* [1932] Brit. Y.B. Int'l L. 93, 97; *see also Restatement (Second) of the Foreign Relations Law of the United States* § 181 (1965); A. Freeman, *The International Responsibility of States for Denial of Justice* 267, 268, 549, 557 (1970) (hereinafter "Freeman, *Denial of Justice*"); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 334 (1916); S. Verosta, *Denial of*

Justice, *in* 1 Encyclopedia of Public International Law 1007, 1008 (1992); 8 Whiteman *Digest*, *supra*, at 407, 722, 724, 725; 5 G. Hackworth, *Digest of International Law* 527 (1943).

160. Article 1102 of NAFTA codifies this antidiscrimination principle. It provides:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
>
> 4. For greater certainty, no Party may:
>
> . . . .
>
> (b) require an investor of another party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

161. Article 1105 of NAFTA, which provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law," also incorporates the international-law right to an impartial trial untainted by invidious discrimination, as does Article 1110, which requires any expropriation to be on "a non-discriminatory basis."

162. A legal proceeding violates international law if it includes irrelevant and prejudicial remarks about an alien's race or nationality. For example, the Cuban trial of an American violated international law in part because it was conducted "with long political

harangues and a 'Roman Circus Atmosphere.'" *In the Matter of Jennie M. Fuller (U.S. v. Cuba)*, 1971 Foreign Claims Settlement Commission of the United States — Annual Report to the Congress 53, 58-59. In *Fuller*, the Commission accepted the argument that "long political harangues bearing no relation to the facts in the case" and the creation of "an atmosphere of political diatribe" are "wholly improper and prejudicial." Letter from U.S. Department of State to Cuban Foreign Ministry of 11/11/60, *quoted in* 8 Whiteman *Digest, supra*, at 720. Similarly, a Panamanian trial violated international law because the Panamanian government "denounced" the United States during the trial and "improperly went out of [its] way to excite hostility" against the American defendant. *Solomon (U.S.A.) v. Panama*, 6 R.I.A.A. 370, 373 (1933). In awarding damages to the claimant, the United States-Panama Claims Commission concluded that the trial had been improperly "influenced by strong popular feelings" and strong "local sentiment." *See id.*

163. Every leading nation has also prohibited invidious discrimination against foreigners.[10] In England, courts have held that the absence of real or perceived bias is of "fundamental importance," *R. v. Sussex Justices ex McCarthy*, [1924] 1 KB 256, DC, Lord Hewart CJ, and that parties are entitled to an independent and impartial tribunal, *Piersack v. Belgian*, A53 (1982) 5 EHRR 169, E Ct HR. Thus, English jurors cannot appear biased,

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[10] General principles of law recognized by the municipal law of leading nations are an important source of international law. For example, Article 38(1)(c) of the Statute of the International Court of Justice identifies "the general principles of law recognised by civilised nations" as a source. *See also Sea-Land Service Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149, 168 (1984) (stating that the concept of unjust enrichment is "codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals") (footnotes omitted); B. Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (1987).

Application 22299/93, *Gregory v. UK*, (1998) 25 EHRR 577, E Ct HR, and English judgments will be reversed if there is a "real possibility" or "real danger" that bias infected a verdict, *R. v. Gough*, [1993] AC 646.

164. Article 1 of the French Constitution ensures "the equality of all citizens before the law, without distinction of origin, race or religion." Aliens in France enjoy the same civil rights as nationals, unless expressly provided to the contrary. (Civil Code of France, Article 11 and *Cass. Civ. 27 juillet 1948, Lefait: D. 1948, 535; Rev. Crit. DIP 1948, 75).*

165. In Australia, courts have likewise recognized "the right of every litigant to have his case fairly tried, free from bias and prejudice, and free from the intrusion of any extraneous matters calculated to influence the jury improperly in arriving at a determination." *Smout v. Smout* [1989] V.R. 845 (citing *Croll v. McRae* (1930) 3d S.R. (NSW) 137 at 143); *Leeth v. The Commonwealth*, (1992) 174 CLR 455, 487 (Deane and Toohey JJ.) (recognizing that at the heart of their obligation to act judicially "is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds"). Indeed, if in the circumstances there is a "reasonable apprehension or suspicion" that a juror or jury has not or will not "discharge its task impartially," the juror or jury must be dismissed. *Webb v. The Queen* (1994) 181 CLR 41 at 52-53. In *Smout, supra,* the plaintiff appealed from a low jury verdict rendered after a prejudicial closing argument in which defense counsel had told the jury that the plaintiff's case was a "rort" (a term which, in context, might have "convey[ed] meaning of an exaggeration or fraud or deceit," *id.* at 849). *Id.* at 848. The Supreme Court of Victoria, per Kaye, J., found that "[a] serious consequence" of the "rort" epithet "was that the jury was likely to have been prejudiced

unfairly against the plaintiff." *Id.* at 850. This epithet was "calculated to create such a degree of prejudice against the plaintiff that his Honour ought not to have entertained confidence that any instruction by him would remove the high degree of mischief introduced into the proceedings, and that a fair trial was then no longer possible." *Id.* at 851. The court concluded that a curative instruction was "inadequate, and given too late," and that a new trial was therefore necessary. *Id.* at 852.

166. Canadian law similarly prohibits appeals to jurors' biases, including irrelevant references to nationality. The Canadian Charter of Rights and Freedoms asserts that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *The Canadian Charter of Rights and Freedom*, § 15 (The Honorable Gerald A. Beaudoin and Errol Mendes, eds., 3d ed. 1996). In a case involving irrelevant references to the nationality of a plaintiff whose country was "then and now at war with Great Britain," the court condemned the references as not only "wrong" but also "flagrant." *Gage v. Reid* (1917) 34 D.L.R. 46, 38 O.L.R. 514 (S.C.-A.D.), per Meredith, C.J.C.P., at p. 49). After noting the obvious irrelevance of the plaintiff's nationality, the court stated, unequivocally:

> There is *no sort of excuse for the introduction of such evidence,* and it could have had no purpose but that of an unjust discrimination because of the man's nationality: a thing *so obviously inexcusable that it is surprising to me that there should be any attempt to excuse it, not to speak of attempting to justify it.* It was just as bad as attempting to influence a jury to disregard their duty and their oath of office, in ***denying justice*** to any one on account of his creed or colour; and in its effect was worse in this case, because it was so easy to stip up the animosities of the jury

> against an alien enemy, whilst it might have been difficult, if not impossible, on account of colour or creed.

Id. at 50 (emphasis supplied).

167. Under United States law, it is almost always unconstitutional for state actors to discriminate on the basis of race, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954), or alienage, *e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971). *See generally* G. Gunther & K. Sullivan, *Constitutional Law* 663-81, 720-25 (13th ed. 1997). This constitutional prohibition against invidious discrimination in the conduct of judicial proceedings is so strong that it applies even to private civil litigants. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

168. Applying these strict principles, U.S. courts must reverse judgments infected by irrelevant and potentially prejudicial statements about a party's race or nationality. *See Statement By Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial*, 99 A.L.R.2d 1249 (1965). Moreover, the American Bar Association Model Code of Judicial Conduct, Canon 3(6), states that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others." Indeed, even the Mississippi Supreme Court reversed a jury verdict where plaintiff's counsel "blatantly played the 'race card' before a jury that was over 90% African-American." *General Motors Acceptance Corp. v. Baymon*, 732 S.2d 262, 271 (Miss. 1999).

169. Prejudicial comments need not overtly disparage a particular group, for comments that subtly play upon a jury's sense of ethnic or racial identity are clearly impermissible. *See, e.g., Texas Employers' Ins. Assoc. v. Guerrero*, 800 S.W.2d 859, 862 (Ct.

App. Tex. 1990) (reversing judgment where Latino lawyer had argued to Latino jury: "Things that unite us far exceed those things that divide us. . . . We have to stick together as a jury of peers of a man to pass judgment and help that person."). Even oblique references to historical events relating to ethnic identity are improper. *See, e.g., LeBlanc v. American Honda Motor Co., Inc.*, 688 A.2d 556, 559 (N.H. 1997) (reversing judgment where plaintiff's counsel had commented: "What's this case about? It's not about Honda making great automobiles or Sony making good Walkmans. But also it's not about Pearl Harbor or the Japanese prime minister saying Americans are lazy and stupid. . . . it's about corporate greed").

170. Invidious discrimination can include ostensibly neutral comments about foreign corporations, such as "[i]t doesn't make any difference whether it is an American company or whether it is English — this English company stretched out across the pond to Chicago." *London Guarantee & Accident Co v. Woelfle.*, 83 F.2d 325, 339 (8th Cir. 1936). Even comments prejudicial to out-of-state American corporations are improper. *See, e.g., Prudential Fire Ins. Co. v. United Gas Corp.*, 199 S.W.2d 767, 771 (Tex. 1946) (reversing judgment where plaintiff's counsel had referred to defendant as "this Oklahoma corporation coming down here trying to recover off of your local concerns").

171. The Mississippi courts violated the national treatment requirement of Article 1102. In subjecting Loewen to extensive, irrelevant, and highly prejudicial comments about its own nationality and that of O'Keefe, the Mississippi courts treated Loewen less favorably than it treats United States or Mississippi defendants "in like circumstances." Moreover, the admission of such evidence and counsel comments, combined with the excessive verdict that followed as a

result, required Loewen, "by reason of its nationality," to "sell or otherwise dispose" of various of its United States investments, in violation of Article 1102(4)(b).

172. The Mississippi courts also violated the antidiscrimination principles set forth in international law and incorporated into NAFTA by Article 1105. Those principles prohibit not only discrimination based on nationality, but also discrimination based on other invidious grounds such as race or class. In permitting literally hundreds of anti-Canadian, pro-American, or pro-Mississippian comments by witnesses and counsel during the *O'Keefe* litigation, the Mississippi trial court violated the antidiscrimination principles set forth in Articles 1102, 1105, and 1110 of NAFTA. These irrelevant and highly inflammatory comments dominated the trial, inflamed the passions of the jury, and produced the grossly excessive verdict and judgment. As Sir Robert Jennings has concluded: "The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice" was "the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury." Jennings Op. at 4; *see also id.* at 12 ("both the Judge and counsel knew perfectly well that counsel was intentionally stirring up racial and nationalistic bias against Canada and Canadians"); Neely Affid. at 6 ("During the course of the *O'Keefe v. Loewen* trial, the Plaintiffs' lawyers reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and many of the defendants' Canadian citizenship."). These comments were an intentional and effective incitement to discrimination.

173. These irrelevant, invidious, and discriminatory remarks about Loewen and O'Keefe infected the entire trial, including Gary's initial description of O'Keefe as "one of your own" during *voir dire* (App. at A328); Gary's opening statement that O'Keefe was a "fighter" for

"our country" and an "American hero" (Tr. at 50, 54); Gary's opening statement that Loewen had "descended on the State of Mississippi" (Tr. at 58); Espy's entirely irrelevant testimony about the allegedly unfair trade practices of Canadian wheat farmers (Tr. at 1101-02); Gary's closing statement that O'Keefe would "stand up for America, and he has" (Tr. at 5544); and Gary's outrageous analogy between Loewen's competition against O'Keefe and the Japanese bombing of Pearl Harbor. (Tr. at 5593-94) The stridency and pervasiveness of these remarks constituted impermissible discrimination under any conceivably applicable standard: they subjected Loewen to unfavorable treatment by reason of nationality, race, and class; they were clearly designed "to excite hostility" against Loewen (*Solomon*, 6 R.I.A.A. at 373); and they created a "real possibility" of a biased verdict (*Gough*, [1993] AC 646). Unlike the subtle and isolated references held improper in *Guerrero* and *LeBlanc*, the statements here — including several to the effect that this case *was* about fighting the Japanese at Pearl Harbor — were both direct and, as Chief Justice Neely has demonstrated, egregiously repetitive.

174. The Mississippi courts gave legal effect to this discrimination by entering an enforceable judgment on the tainted verdict and by requiring Loewen to post a $625 million bond in order to pursue on appeal bias claims that were, under both Mississippi and U.S. constitutional law, plainly meritorious.

2. NAFTA Minimum Standard of Treatment (Article 1105)

175. Even apart from its rank anti-Canadian bias, the *O'Keefe* litigation failed to satisfy the NAFTA "minimum standard of treatment" required under Article 1105 of NAFTA. That provision obligates the United States to give investments of Canadian investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security."

176. By ensuring treatment "in accordance with international law," Article 1105 guarantees that aliens receive the "international minimum standard of treatment" established by customary international law. *See generally* I. Brownlie, *Principles of Public International Law* 527-28 (5th ed. 1998). That standard, which the United States has continuously advocated, provides aliens with certain minimum substantive and procedural protections. *See, e.g.*, E. Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 Mich. L. Rev. 445 (1940); A. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949). Among other things, it prohibits states and their judicial organs from taking actions that constitute either substantive or procedural "denials of justice." *See generally* Freeman, *Denial of Justice*, *supra*

177. By incorporating both the "full protection and security" and "fair and equitable treatment" standards, Article 1105 affords even more protection to alien investments than does the "international minimum standard." As explained below, the "full protection and security" requirement imposes on states broad affirmative duties to prevent harm to alien investments, and the "fair and equitable treatment" requirement incorporates traditional equitable principles found in both common law and civil legal systems around the world. *See, e.g.*, B. Cheng, *General Principles of Law or applied by International Courts and Tribunals*, Appendix 2, at 400-08

(1987) (compiling "Municipal Codes which Provide for the Application of the General Principles of Law, Equity, or Natural Law"); *see generally* C. Rossi, *Equity and International Law* (1993).

178. During the *O'Keefe* litigation, the Mississippi judiciary violated all of these related standards: it committed substantive and procedural denials of justice, and it failed to provide either full protection and security or fair and equitable treatment to Loewen's United States investments.

a. Substantive Denial of Justice

179. Under settled principles, an egregiously wrong judicial judgment against an alien violates international law and is described as a substantive "denial of justice." *See, e.g., Rihani Claim*, Decision 27-C, American Mexican Claims Report, 254, 257 (1948) ("clear and notorious injustice" violates international law; thus, "international arbitral tribunal" may "put aside a national decision presented before it" and "scrutinize its grounds of fact and law"); *The Texas Company Claim*, Decision 32-B, American Mexican Claims Report, 142, 143 (1948) ("palpable injustice in the administration of law" violates international law); Harvard Research in International Law, *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, Article 9, 23 Am. J. Int'l L. 133, 134 (Special Supp. 1929) (hereinafter "1929 Draft Convention") ("manifestly unjust judgment" violates international law); A. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, XIV Can. Y.B. Int'l L. 73, 91 (1976) ("denial of justice" includes "unjust decisions"); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 340 (1916) ("grossly unfair or notoriously unjust decision" violates international law).

180. Two leading commentators have confirmed this fundamental rule:

> A decision or judgment of a tribunal . . . rendered in a proceeding involving the determination of . . . obligations of an alien . . . granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful:
>
> (a) if it is a clear and discriminatory violation of the law of the State concerned;
>
> (b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or
>
> (c) if it otherwise involves a violation by the State of a treaty.

L. Sohn and R. Baxter, *Convention on The International Responsibility of States for Injuries to Aliens*, Article 8, at 96 (12th Draft, 1961) (hereinafter "Sohn & Baxter *Draft Convention*"); *see also id.* at 97-98 ("a procedural or substantive decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant, even absent ill will or corruption").

181. The United States repeatedly has espoused the view that manifestly unjust judicial decisions violate international law. In the *Denham Claim* (*U.S. v. Pan.* 1933), Hunt's Report 491, 500 (1934), the United States argued that "'denial of justice' . . . has come . . . to comprehend all acts of governmental authorities, legislative, executive, *and judicial*, which result in the failure of parties concerned to receive substantial justice at the hands of such governmental agencies after due efforts have been exerted in the pursuit of their rights" (emphasis shifted). Thus, the United States concluded, "a nation is responsible for the *manifestly unjust* decisions of its courts." *Id.* at 506. On another occasion, the U.S. Secretary of State wrote that judicial decisions violate international law "when palpable injustice had been done, or a manifest

violation had been committed of the rules and forms of proceeding." Letter from Mr. Forsyth, Sec. of State, to Mr. Welsh, Mar. 14, 1835, in 6 Moore's *International Law Digest* 696 (1906).

182. International tribunals have repeatedly held that judicial decisions in civil cases can be so unjust as to violate international law. For example, in the *Rihani Claim*, an international tribunal held that a decision by the Supreme Court of Mexico was "such a gross and wrongful error as to constitute a denial of justice." Decision 27-C, American Mexican Claims Report at 257. In *Rihani*, a Mexican trade commission, Commission Reguladora del Mercado de Henequen, refused payment on certain bills that were supposed to circulate as legal tender. A lower court ordered full payment, and the Mexican Supreme Court reversed. However, the international tribunal concluded that the Supreme Court's decision was itself a denial of justice:

> From all of the foregoing this Commission is of the opinion that the action of the Supreme Court in vacating the attachment and suspending the action upon the ground that claimant had not presented the Reguladora bills as required by statute in the face of the clear and indisputable evidence in the record to the contrary, more particularly in view of the fact that the attention of the court had been drawn to such evidence by one of its members, warrants the conclusion that the said court wilfully disregarded such evidence; that the decision of the court was lacking in good faith and that the same fell so far short of international standards as to amount to a denial of justice.

Id. at 258.

183. In the *Burt Case (U.S. v. Gt. Brit. 1923)*, Nielsen's Report 588 (1926), an international tribunal held that an adjudicatory decision by the Fiji Board of Land Commissioners, an agent of Great Britain, constituted a denial of justice. The United States argued that the Fiji Board had improperly refused to recognize the valid property rights of Burt, an American citizen. The tribunal framed the question before it as "whether . . . under all the

circumstances the [Board] was bound to recognize and respect" Burt's title. *Id.* at 595. The Tribunal "look[ed] only to the general result which was reached and note[d] that this result was the ultimate denial of Burt's right." *Id.* at 595-96. The Tribunal reached its decision despite finding no problem with the "methods and the procedure adopted and employed in dealing with land titles." *Id.* at 595.

184. Similarly, in *Bronner v. Mexico* (1874), an international umpire awarded compensation to a claimant whose goods had been confiscated by Mexican customs authorities. 3 *Moore's Int'l Arbitrations* 3134. The municipal tribunal had found an intent to defraud on the part of the claimant. The umpire, however, concluded that this decision was "so unfair as to amount to a denial of justice." *Id.* He explained: "So far from the evidence proving any intention to defraud, the umpire is of [the] opinion that the claimant caused more than usual precautions to be taken with a view to prevent the possibility of any such accusation." *Id.*

185. In a case involving a judicially-approved confiscation of the American schooner *Orient (U.S. v. Mexico 1839)* by Mexican authorities, an international tribunal concluded that the Mexican court decision at issue was "not sustained by the evidence before the court." 3 *Moore's Int'l Arbitrations* 3229, 3231. Therefore, the tribunal concluded, the "sentence of confiscation" had been "improperly rendered." *Id.* Another international tribunal reached a similar result in a case involving confiscation of the cargo of the American schooner *Fourth of July (1842)* by Mexican authorities. 3 *Moore's Int'l Arbitrations* 3227-28.

186. International law does not distinguish between judgments rendered after bench trials and those rendered after jury trials. Either kind of judgment may deny justice: "to maintain that a state may be held responsible for a manifestly unjust judgment of a court means little

unless it includes also the verdict of a jury when it is equally unjust." J. 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, 185. Judges and juries "are inseparable parts of the judicial organ, and for the act of either when it constitutes a denial of justice the [S]tate, it would seem, should be equally responsible." *Id; see also* Freeman, *Denial of Justice, supra,* at 363 (concluding "no ground for distinguishing" jury verdict "from other cases in which the judgment of a court is impugnable").

187. International law also does not distinguish, for reviewability purposes, between determinations of liability and damages. Thus, courts violate international law when they impose excessive judgments upon aliens. Sohn and Baxter explain:

> Account must also be taken . . . of the possibility that either a civil or criminal proceeding may terminate in a decision or judgment which was correctly adverse to the alien but that the judgment granted or the sentence imposed was excessive. For example, an alien may in fact have committed a crime under such circumstances that there is no doubt of his guilt and no impropriety in a court's finding him guilty. However, if the court sentences him to an excessively long period of confinement or imposes a particularly heavy fine because of ill will toward the alien or because the court has been bribed, such conduct is wrongful. The measure of the wrong done the alien is the difference between what the decision or judgment should have been and what it actually was.

Sohn & Baxter *Draft Convention*, Article 8, Explanatory Note, at 97.

188. In the criminal context, international tribunals repeatedly have applied these principles. Thus, a government violates international law, and "can be held liable," for treating an alien unduly "harshly" or "cruelly." *Quintanilla (Mexico) v. United States of America*, 4 R.I.A.A. 101, 103 (1926); *see, e.g., Dyches (U.S.A.) v. United States,* 4 R.I.A.A. 458, 461 (1929) (awarding damages for 18-month sentence where crime warranted maximum imprisonment of

one year); *Chattin (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 282 (1927) (awarding damages even absent finding of judicial bad faith); *Roberts (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 77, 80 (1926) (awarding damages for "excessively long imprisonment"). Similarly, a government violates international law, and can be held liable, for imposing "exorbitant" bail on an alien. *See Jones Claim (U.S. v. Spain 1880)*, 4 *Moore's Int'l Arbitrations* 3253-54 (awarding $5000 based on excessive bail of $17,000 to $20,000). When a citizen commits a crime against an alien, the government also has an "obligation to impose on the criminal a penalty proportionate to his crime." *Kennedy (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 194, 196-97 (1927) (two-month sentence for shooting alien constitutes denial of justice); *Morton (U.S.A.) v. United Mexican States* 4 R.I.A.A. 428, 434 (1929) (four-year sentence for homicide of an alien constitutes denial of justice); G. Schwarzenberger, *International Law* 621 (3d ed. 1957) ("imposition of a completely incommensurate penalty for a crime committed against a foreign national constitutes an international tort"). These proportionality principles apply in this arbitration because punitive damages are a quasi-criminal sanction and because, in any event, "there would seem to be no reason to distinguish between criminal and civil proceedings where the propriety of the decision rendered is being examined," Freeman, *Denial of Justice*, *supra*, at 324. Citing these principles in *Denham*, a civil case, the United States itself espoused the position that a judicial judgment disproportionate to the underlying offense is a denial of justice and a violation of international law. *See Denham*, Hunt's Report, at 506.

189. General principles of law in leading nations confirm that excessive punitive damages violate international law. Most countries do not recognize punitive damages at all. *See, e.g.*, Brand, *Punitive Damages and the Recognition of Judgments*, NILR 143, 165, 168 at n.150

(1996) (Germany); Kojima, *Cooperation in International Procedural Conflicts: Prospects and Benefits*, 57 Law & Contemp. Probs. 59, 64 (1994) (Japan); A. Cortese & K. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. Penn. J. of Int'l Bus. L. 52 (1992) ("The entire concept of using the civil law, as opposed to the criminal law, to punish a litigant simply does not exist outside the United States."). Even countries that permit punitive damages in some circumstances disdain the frequency and size of awards in the United States. *See, e.g.*, R. Kreindler & J. Holdsworth, *Transnational Litigation: A Practitioner's Guide* at CAN-82 (1997) (Canada would not enforce "[a]wards of punitive damages on the scale seen in some American jurisdictions"); F. Juenger, *A Hague Judgments Convention?*, 24 Brooklyn. J. Int'l L. 111, 113 (1998) (proposed treaty for recognition of judgments failed because British "were leery of excessive American jury verdicts and punitive damages awards").

190. English courts repeatedly have invalidated excessive awards of punitive damages. For example, in *Lewis v. Daily Telegraph*, [1963] 1 QB 340, the court vacated an exemplary (*i.e.*, punitive) damage award in a libel case, even though the defendant had improperly accused the plaintiff of fraud and dishonesty, because the total award of £217,000 was, in the words of Lord Devlin, "ridiculously out of proportion to the injury suffered." Similarly, in *Riches v. News Group Newspapers*, [1986] QB 256, the court set aside an exemplary damages verdict of £250,000 for ten plaintiffs as unreasonable and excessive. Even outside the punitive damages context, English courts do not permit unjustified or excessive damages awards. *See, e.g., Ash v. Ash*, (1695) Comb 357 (vacating damages award because the jury refused to give a reason, "thinking they have an absolute despotic power"); *Praed v. Graham*, [1890] 24 Q.B.D. (vacating damages award because "the damages are so excessive that no twelve men could reasonably have

given them"). English courts will even vacate damages awarded by a judge if they are "entirely erroneous," *Davies v. Powell Duffryn Colliers*, [1942] AC 601, or "an extravagance that a most reckless jury would hardly have achieved," *Knupffer v. London Express Newspaper*, [1943] AC 116.

191. In France, tort damages are limited to the injury caused, (*Civ. 2ème 21 juillet 1982, Bull. civ. II, n° 109)* and only that injury *(see, e.g,. Civ. 2ème 9 nov. 1976, Bull. civ. II, n° 302).*

192. The High Court of Australia, in *Carson v. John Fairfax and Sons Limited and Anor* (1993) 178 CLR 44 at 61-62 stated, "If an appellate court is convinced, not that in its own view the amount is too high or too low but that the amount awarded is so high or so low that it is outside the range of what could reasonably be regarded as appropriate to the circumstances of the case, the proper performance of its function will require it to intervene to prevent a miscarriage of justice." *Id.* at ¶ 35 (citing *Coyne v. Citizen Finance Limited* (1991) 172 CLR 211 at 215 (Mason CJ and Deane J)). Thus, punitive damages awarded by juries may be reduced on appeal. *See XL Petroleum (NSW) Pty Limited v. Caltex Oil (Australia) Pty Limited* (1985) 155 CLR 448 (where the defendant trespassed on the plaintiff's premises and disabled the plaintiff's underground petrol tanks causing actual damage of $5,527.90, the High Court nonetheless upheld a decision by the Court of Appeal reducing the jury's award of punitive damages from $400,000 to $150,000).

193. Canada, too, will not tolerate excessive compensatory or punitive awards. The Ontario Court of Appeal will not uphold compensatory verdicts that are "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly

operate," or verdicts "so exorbitant or so grossly out of proportion to the [defendant's act] as to shock the court's conscience and sense of justice." *Walker v. CFTO Ltd.*, 1987 ACWSJ LEXIS 1503, at *12 (Ontario Ct. App., March 17, 1987) (holding that an $883,000 compensatory libel verdict was excessive because "the jury used an arbitrary yardstick in measuring" the damages, which bore "no reasonable relationship to either the circumstances of the case or the injury inflicted"). More recently, the Saskatchewan Court of Appeal affirmed a trial court ruling that a jury's $100,000 "loss of enjoyment of life" award, and its $150,000 exemplary (punitive) damage award, were both "plainly unreasonable and unjust," "'shock[ing to the judicial] conscience and sense of justice,'" and "'perverse.'" *Lauscher v. Berryere* [1999] 172 D.L.R. 4th 439, 442, 445-46. The appellate court noted that the punitive damages award was "exorbitant and grossly out of proportion to the conduct of the [defendants]." *Id.* at 445 (citing the Supreme Court of Canada's decision in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865, 126 D.L.R. (4th) 129, 184 N.R.1, 84 O.A.C. 1, 25 C.C.L.T. (2d) 89, 30 C.R.R. (2d) 189). *See also Deutch v. Martin* [1943] Can. S.C.R. 366, 368-69 (reversing personal-injury verdict of $165,000 as excessive, and as the product of jury's "'biased or mistaken view of the whole case'"); *In re Buxbaum*, 1997 ACWSJ LEXIS 84083, at *3 (Ontario Ct. App., December 19, 1997) (reducing punitive damages award from $130,000 to $65,000 because it was, in combination with the "extremely generous" general damages award, "manifestly excessive").

194. Even the United States — the only jurisdiction on earth that produces the type of titanic award at issue here — prohibits excessive awards of punitive damages. The U.S. Constitution itself requires punitive damages to be reasonably related to the reprehensibility of the defendant's conduct, the amount of harm caused, and the sanctions authorized for comparable

misconduct. *BMW of North America v. Gore*, 517 U.S. 559, 574-85 (1996). Applying these criteria, U.S. courts have struck down excessive punitive damages awards in a wide range of circumstances. *See, e.g., Inter Medical Supplies, Ltd. v. EBI Medical Sys., Inc.*, 181 F.3d 446, 465-70 (3d Cir. 1999) (reducing $100,600,000 punitive award to $1,000,000 in business tort case where injuries were "only economic" in nature); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 640-42 (10th Cir. 1996) (reducing $30 million punitive award to $6 million in similar case); *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 987 F. Supp. 535, 550 (S.D. Tex. 1997) ("the jury simply went too far and, it appears, blindly based its verdict solely in proportion to [the defendant's] balance sheet without also taking into consideration the actual damages sustained by [the plaintiff] and the relative degree of reprehensibility of [the defendant's] conduct"); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 113-24 (Ala. 1997) (per curiam) (reducing $6 million punitive award to $1.8 million in business tort case because defendant's conduct "does not exhibit the extremely high degree of reprehensibility that would indicate a $6 million punitive damages award," *id.* at 116); *Management Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W. 2d 67, 81-83 (Wis. 1996) (reducing $1.75 million punitive award to $650,000 because larger award "is shocking to the conscience of the court" and "more than necessary to serve the purposes of punitive damages," *id.* at 83).

195. In the United States, excessive punitive damages violate state law as well. The Mississippi Supreme Court, for example, has held that a punitive damages award is improper under state law "'where it is so excessive that it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience of the court.'" *Dixie Insurance Co. v. Mooneyhan*, 684 So. 2d 574, 586 (Miss. 1996) (citation omitted). In *Dixie Insurance*, the Mississippi Supreme

Court applied that standard to strike down as excessive a $1 million punitive award imposed on a defendant insurance company charged with bad faith. *See id.* at 585-86. *Accord, e.g., Baymon*, 732 So. 2d at 275 ($5,000,000 punitive award is excessive in case involving only $762 in actual damages and only $35,000 in excessive compensatory award); *Mutual Life Ins. Co. of New York v. Wesson*, 517 So. 2d 521, 531-33 (Miss. 1987) (reducing $8 million punitive award to $1.5 million in case involving bad faith misconduct). Other states impose comparable restrictions. *See, e.g., Kimzey v. Wal-Mart Stores*, Inc., 107 F.3d 568, 575-78 (8th Cir. 1997) (applying Missouri law) (reducing $50 million punitive award to $350,000 in sexual harassment case where "[t]he harassing conduct was certainly objectionable but was not the most egregious type of sexual harassment"); *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1217-1221 (Ala. 1999) (reducing $13 million punitive award to $4 million in case where defendant's vending machine electrocuted plaintiff's child); *Arab Termite & Pest Control of Florida, Inc.*, 409 So. 2d 1039, 1043 (Fl. 1982) ("It is still proper . . . to issue an order for new trial or remittitur when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct.").

196. Excessive or disproportionate awards for emotional distress, unrelated to the actual injury, also violate international law. In the *Lusitania Cases*, for example, an international tribunal held that damages for "mental suffering" should be "commensurate to the injury." *Lusitania Cases*, 7 R.I.A.A. 32, 40 (1923). Such suffering must be "real and actual, rather than purely sentimental and vague," *id.* at 37, and mental suffering damages should not be awarded "as a penalty." *id.* at 40. The same is true of general principles of law in leading nations, for most countries require damages to be proportionate to the actual emotional injury. *See, e.g., Re*

the Enforcement of a U.S. Judgment, 3 Int'l Litig. Proc. 430, 437-38 (1992) (German court refuses to recognize U.S. award for pain and suffering); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1149 (N.D. Tex. 1980) ("However similar the laws of Texas and Canada may be with regard to compensatory damages, they are widely divergent in the areas of compensation for pain and suffering.").

197. Excessive compensatory damages are equally improper under international law, and in contract cases it is well-settled that unforeseeable consequential damages are impermissible. *See, e.g., UNIDROIT Principles of International Commercial Contract. Art. 7.4.4 (2d ed. 1997); United Nations Convention on Contracts for the International Sale of Goods*, Art. 74; 3 M. Whiteman, *Damages in International Law* 1830 (1943) ("Damages are disallowed when they are 'not a natural consequence' of the wrongful act for which the respondent government is liable under international law."). *See also Behring Int'l, Inc. v. Islamic Republic of Iran Air Force et al.*, 27 Iran-U.S. Cl. Trib. Rep. 218, ¶ 52 (1991) ("Tribunal has jurisdiction to adjudicate a counterclaim for all reasonably foreseeable damages. . ."); Civil Code of France, Art. 1150; *Lusitania Cases*, *supra*, at 36 (damages in general must "balance as near as may be the injury suffered").

198. United States courts also will invalidate unjustified or excessive awards of compensatory damages. Such damages must be (i) "rationally proportionate" to awards in similar cases, *Joan W. v. City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985), so that a "reasonable jury" could have awarded them, *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035 (7th Cir. 1990); (ii) supported by the evidence, *Trademark Research Corp. v.*

Maxwell Online Inc., 995 F.2d 326, 336-37 (2d Cir. 1993); and (iii) not so large as to evidence "passion and prejudice," *Benson v. Allphin*, 786 F.2d 268, 280 (7th Cir. 1986).

199. The $500 million verdict and judgment violated any and all of these applicable standards. Most obviously, the $400 million punitive damages award was grossly excessive under the prevailing standards of every nation on earth. Even under liberal United States standards, the award would not have survived review under *BMW*. First, it was entirely unrelated to the reprehensibility of Loewen's underlying conduct — which involved, at worst, the breach of a putative commercial contract between sophisticated parties to exchange corporate assets valued respectively at $2.5 million and $4 million, in circumstances involving legitimate dispute about the existence and enforceability of that contract. The award was also entirely unrelated to any reasonable measure of actual harm suffered by O'Keefe: it was four times the absurdly inflated compensatory damages awarded (including primarily pain and suffering), 16 times the highly inflated economic damages awarded (including primarily unforeseeable consequential damages), and more than 80 times the entire net worth of the principal companies at issue in the underlying business transaction. And, the punitive damages award — which was 50 times the size of the largest such award ever considered by the Mississippi Supreme Court and more than 200 times the largest such award ever affirmed by that court — was entirely unrelated to the sanctions imposed under Mississippi law for any comparable conduct. Similarly, the award would not have survived state-law review under *Dixie Insurance*: it was unrelated to the compensatory damages award, far more than necessary to deter any future misconduct, and so excessive as to "'evinc[e] passion, bias, and prejudice'" and to "'shock the conscience'" of any fair-minded court. *See* 684 So. 2d at 585-87.

200. The $74 million award for pain and suffering was also grossly excessive, and therefore violated international law under any conceivably applicable standard. Even apart from its obvious disproportionality, the evidence presented by O'Keefe (conclusory and self-serving testimony that he was upset at the failed transaction with Loewen) (Tr. 2114-15) does not even begin to support the $74,500,000 pain and suffering award, which was calculated at the absurdly inflated rate of $50,000 per day, Tr. 5566; *see* Tr. 239-40).

201. Finally, the $26 million award for economic damages was also grossly excessive. The vast bulk of these damages were consequential damages that the Mississippi regulatory authorities allegedly caused when they forced O'Keefe into bankruptcy — actions that O'Keefe himself acknowledged to be a regulatory "mistake," and thus unforeseeable (Tr. at 2119-22). Under the law of all nations, such unforeseeable damages are not recoverable.

202. Viewed as a whole, the $500 million verdict and judgment was obviously a manifest injustice. In the words of Sir Robert Jennings, the amount of this judgment was "bizarre" (Jennings Op. at 4), "outrageous" (*id.* at 8), "astonishing" (*id.* at 13), and "so bizarrely disproportionate as to almost defy belief" (*id.*). Under any conceivable international standard, the award constituted a substantive denial of justice. The Mississippi courts gave effect to this unlawful award by reducing it to an enforceable judgment and then, despite Loewen's plainly meritorious excessiveness claims under *BMW* and *Dixie Insurance*, by imposing an arbitrary $625 million bond requirement as a condition for Loewen to pursue those claims on appeal.

b. Procedural Denial of Justice

203. By incorporating principles of international law, NAFTA also prohibits procedural denials of justice. International law guarantees aliens "[f]air courts, readily open to aliens, administering justice honestly, impartially, without bias or political controls." E. Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 Mich. L. Rev. 445, 460 (1940). Thus, a state violates international law when it permits an "improper administration of civil and criminal justice as regards an alien, including denial of access to courts, [and] inadequate procedures," Adede, *supra*, at 91, or when it imposes on aliens an "unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, [or] failure to provide those guaranties which are generally considered indispensable to the proper administration of justice," 1929 *Draft Convention* Art. 9. Even under the most narrow view of denial of justice, a state may not deny an alien reasonable access to courts. *See, e.g.*, *Brown Case* (U.S. v. Ct. Brit. 1923), Nielsen's Report 187 (1926); *Idler Claim* (*U.S. v. Venez. 1885*), 4 *Moore's Int'l Arbitrations* 3491 (1898); *Case Concerning Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 144 (separate op. of Tanaka, J.); *Restatement (Third) of the Foreign Relations Law of the United States* § 711 cmt. a (1987); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 334-37 (1915); Adede, *supra*, at 77-81.

204. In *Idler*, an international tribunal concluded that the national courts of Venezuela had committed a procedural denial of justice. Among other things, the Venezuelan government had manipulated the personnel of its courts, which then permitted an unprecedented recovery against an alien. *See* 4 *Moore's Int'l Arbitrations* at 3517. In concluding that these actions

constituted a procedural denial of justice, the international tribunal stressed that aliens are entitled to "ordinary justice" in the courts. *See id.*

205. Under the reasonable access to courts standard, an excessive security requirement can constitute a procedural denial of justice. Sohn and Baxter, in discussing the question of when a local remedy must be available to aliens, specifically note that international law prohibits unreasonably excessive security requirements:

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

See Sohn & Baxter *Draft Convention*, Explanatory Note to subpara. 2(b), at 168.

206. During the *O'Keefe* litigation, the trial court committed procedural denials of justice by allowing hundreds of irrelevant and highly prejudicial comments about the nationality, race, and class of the principal parties, by refusing an instruction designed to mitigate the impact of O'Keefe's incitement to bias, and by entering judgment on a verdict plainly tainted by such bias. The Mississippi courts then foreclosed Loewen's appeal rights by an arbitrary $625 million bonding requirement — an independent procedural denial of justice in its own right, and the device through which the Mississippi courts, in effectively requiring Loewen to abandon its appeal, finalized the damages from their own prior breaches.

c. Denial of Full Protection and Security

207. International law imposes on states affirmative duties to exercise "due diligence" in protecting the persons and property of aliens. *See, e.g., Asian Agricultural Prods. Ltd. v. Sri Lanka*, 30 I.L.M. 577, 600-01 (1991) ("*AAPL*"); *Sambiaggio Case* (Italian-Venezuelan Commission), 10 R.I.A.A. 499, 512, 524 (1903). By imposing a duty of "full protection and security," Article 1105 of NAFTA imposes on signatory countries an even heightened affirmative duty of case.

208. In *AAPL*, an ICSID Tribunal held that "the addition of words like 'constant' or 'full' to strengthen the required standard of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law." 30 I.L.M. at 601. Similarly, the International Court of Justice has held that a treaty obligation to provide the "most constant protection and security" is "in addition" to obligations "existing under general international law." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), 1980 I.C.J. 3, 31-32. In *Case Concerning Electtronica Sicula S.P.A. (ELSI)* (*U.S. v. Italy*), 1989 I.C.J. 15, 63, 66, the ICJ concluded that the use of treaty phrases such as "the most constant protection and security" or "full protection and security," in combination with national treatment, established standards "which may go further . . . than general international law requires."

209. Even under the minimum "due diligence" standard, states have a clear affirmative duty to act. *See, e.g., Janes (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 82, 91 (1921) ("International law imposes on a nation the *obligation to take appropriate steps to prevent the infliction of wrongs upon aliens* and to employ prompt and effective measures to apprehend and

punish persons who have committed such wrongs.") (emphasis added); *Restatement (Third) of the Foreign Relations Law of the United States* § 207(c), at 96 (1986) ("A state is responsible for any violation of its obligations under international law resulting from action *or inaction* by any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.") (emphasis added). Moreover, "the violation of international law entailing the State's responsibility has to be considered constituted by 'the mere lack or want of diligence,' without any need to establish malice or negligence." *AAPL*, 30 I.L.M. at 612 (citation omitted).

210. In *H.G. Venable (U.S.A). v. United Mexican States*, 4 R.I.A.A. 219 (1927), an international tribunal applied these principles to hold the Mexican government liable for an improper attachment of three locomotive engines by a Mexican bankruptcy court. The tribunal explained:

> Through the prosecuting attorney the [Mexican] Court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable space of time. The Court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft of the most wanton form, . . . no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required . . ., and nothing was done to have the bankruptcy proceedings wound up. *Even if, there was no wilful neglect of duty, there doubtless was an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.* Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The Court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. *Nor can the Court exculpate itself by alleging that no American citizen has applied to it in order to have these wanton*

> *acts investigated and to have the necessary action both against the perpetrators of crimes and the unreliable custodians started; to do such things is an essential part of proper governmental action and can not be made dependent upon private initiative.*

Id. at 229 (emphasis added).

211. The United States has always recognized that states have an affirmative duty to protect the persons and property of aliens. Sometimes, the United States has urged that a state is responsible for its "failure to exercise due diligence to protect the life and property of foreigners." 8 Whiteman *Digest*, *supra*, at 817. More often, however, the United States has argued that international law imposes an even stricter affirmative duty of care. As early as 1818, for example, the U.S. Secretary of State asserted to the Spanish Minister:

> There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign *by all the efforts in his power*. This common rule of intercourse between all civilized nations has, between the United States and Spain, the further and solemn sanction of an express stipulation by treaty.

4 Moore, *Digest of International Law* 5 (1906) (emphasis added). Similarly, in 1957, after Libyan mobs had damaged U.S. property in Libya, the U.S. State Department asserted that international liability exists if "the authorities failed to employ *all reasonable means at their disposal* to prevent the unlawful acts resulting in loss or injury to aliens or failed to take proper steps to apprehend and punish wrongdoers." 8 Whiteman *Digest*, *supra*, at 831-32 (emphasis added). Article 1105 merely codifies the heightened standard of care urged by the United States in 1818 and 1957, and incorporated into many bilateral investment treaties ("BITs") signed by the United States since then.

212. The requirement to provide "full protection and security" obligates a government to prevent economic injury inflicted by private parties:

> BIT obligations apply to the states that are parties to the treaty and limit the conduct of those state parties, not private parties. Most BITs do have a provision requiring states to provide "full protection and security" to covered investment, which *requires the host state to take reasonable steps to protect covered investment against injury by private parties*. This language certainly is broad enough to permit an interpretation that it requires protection of investment (which includes intellectual property rights in most BITs) against injury by private parties in the form of misappropriation.

K. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Colum. J. Transnat'l L. at 501, 510 n.28 (1998) (emphasis added).

213. ICSID tribunals have twice imposed liability under this "full protection and security" standard. In *American Mfg. & Trading, Inc. v. Republic of Zaire*, 36 I.L.M. 1531, 1548 (1997), a tribunal awarded damages to an American company whose property had been looted and damaged by soldiers of Zaire. The ICSID tribunal held that a provision of the 1984 U.S.-Zaire BIT — that "Investment of nationals and companies of either Party shall at all times . . . enjoy protection and security" — constituted an "obligation of guarantee for the protection and security of the investments made by nationals and companies of one or the other Party":

> The obligation incumbent upon Zaire is an *obligation of vigilance*, in the sense that Zaire as the receiving State of investments made by AMT, an American company, shall take *all measures necessary* to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. Zaire must show that it has taken all measure of precaution to protect the investments of AMT on its territory.

Id. (emphases added). The tribunal concluded that Zaire had "breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question." *Id.* at 1549. Similarly, in *AAPL*, 30 I.L.M. at 616, another ICSID Tribunal imposed

liability on Sri Lanka for failing to take steps to provide "full protection and security" for a U.K. investment during a counterinsurgency operation against Tamil guerillas:

> Accordingly, the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking *all possible measures* that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.

Id. (emphasis added).

214. An analogous case in the European Community further illustrates the extent of this affirmative duty. Article 5 of the EC Treaty requires Member States "to take all appropriate measures to ensure fulfilment of their obligations arising out of that Treaty." *Commission of the European Communities v. French Republic*, Case C-265/95, 1997 ECJ Celex LEXIS 7550, at *10 (1997). In the *French Republic* case, the Court of Justice of the European Communities imposed liability on France for its failure to protect trucks carrying farm produce from other EC countries from repeated violence by French farmers. *Id.* at*4-*11, *14. The Court held that when a Member State "abstains from taking action or . . . fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States," it "is just as likely to obstruct intra-Community trade as is a positive act." *Id.* at *15. The Court concluded that "the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts," and that, "by failing to adopt all necessary and

proportionate measures," the French Government had "failed to fulfil its obligations." *Id.* at *23-*24.

215. During the *O'Keefe* litigation, the Mississippi courts utterly failed to afford "full protection and security" to Loewen and its investments. During the trial itself, the court took no action to restrain the hundreds of invidious appeals by plaintiffs' counsel to national pride, to disparities in wealth, and even to racial prejudice, despite its explicit acknowledgment that plaintiffs had played the "race card" improperly. (Tr. 3595-97) Indeed, the court affirmatively overruled objections made by Loewen to what Sir Robert Jennings has described as O'Keefe's "quite ruthless and blatant working up of both racial and nationalistic prejudice." Jennings Op. at 4. For example, during voir dire of the jury, the trial court overruled Loewen's objection to comments by O'Keefe's counsel alluding to Loewen's Canadian ownership. (App. at A373) Similarly, the court refused Loewen's request to excuse a prospective juror who believed that foreign corporations, such as Loewen, should *not* be given a fair trial in Mississippi. (App. at A487-96) Then, at the end of the trial, the court twice refused an instruction that would have asked the jury not to give effect to the various prejudices deliberately fomented by O'Keefe. (Tr. 5390-91, 5447)

216. When the jury returned its initial $260 million verdict, it became perfectly clear that O'Keefe's incitement to bias had succeeded; that the damages award was grossly excessive; and that the jury had improperly considered compensatory and punitive damages together, in violation of Mississippi law. Even then, the trial court not only denied Loewen's motion for a mistrial, but took affirmative action to aggravate the damages. Specifically, the court "reformed" the verdict to accept the biased, excessive, and procedurally defective compensatory award, (Tr.

at 5742-44), and invited the jury, as Chief Justice Neely has explained (Neely Aff. at 10-11), to award even greater punitive damages. Not surprisingly, the court again failed to protect Loewen when the jury rendered its even more absurdly excessive $500 million award. Instead, the trial court denied Loewen's motion for post-trial relief on grounds of bias and excessiveness, and it entered a judgment for the full amount of $500 million. (App. at A814, A816)

217. Finally, both the trial court and the Mississippi Supreme Court utterly failed to protect Loewen's appeal rights, despite Loewen's obviously meritorious discrimination, excessiveness, and procedural claims. Instead, the courts imposed an arbitrary $625 million bond that foreclosed any realistic avenue of appeal, and thus compelled Loewen to pay an excessive and extortionate settlement to O'Keefe.

d. Denial of Fair and Equitable Treatment

218. By imposing a requirement of "fair and equitable treatment," Article 1105 incorporates a standard used in United States BITs, most of which also impose this requirement. *See* M. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, Table C, at 237, in I. Shihata, *Legal Treatment of Foreign Investments: "The World Bank Guidelines"* (1993).

219. The "fair and equitable" standard goes "far beyond" the minimum protections afforded to foreign investments under international law. F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. 241, 243 (1981) ("unfair and inequitable treatment is a much wider conception" than the prohibition against "arbitrary, discriminatory or abusive treatment" under "customary international law"); K. Vandevelde, *United States Investment Treaties: Policy and Practice* 2, 76 (1992) ("fair and equitable

treatment" is an "additional" standard that provides "a baseline of protection" even where other international law protections are inapplicable); K. Gudgeon, *United States Bilateral Investment Treaties*, 4 Int'l Tax & Bus. Law. 105, 125 (1986) (concept of fairness and equity requires construing treaty provisions "in a manner most favorable to the investor").

220. By its terms, the "fair and equitable treatment" standard infuses NAFTA with the historic principles of equity and natural justice recognized in common law and civil law countries throughout the world. *See* B. Cheng, *General Principles of Law as Applied By International Courts and Tribunals*, Appendix 2, at 400-08 (1987) (compiling "Municipal Codes Which Provide for the Application of the General Principles of Law, Equity or Natural Law"). The standard thus ensures that investments are accorded treatment consistent with recognized principles of equity. G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad*, 14 Current Legal Probs. 213, 220 (1961) ("fair and equitable treatment" standard "presents an imaginative attempt to combine the minimum standard with the standard of equitable treatment"); *see also Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. 6, 62-63 ¶ 32 (1964) (op. of Koo, J.) ("International law being primarily based upon the general principles of law and justice, is unfettered by technicalities . . . . [I]t is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interests. In other words it is the substance which carried weight on the international plane rather than the form.").

221. The principle of equity is especially important in considering the actions of a municipal court. *See North Sea Continental Shelf*, 1969 I.C.J. 3, 48 ("Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense

equitable."). Under the standard, a tribunal must "decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable." Mann, Brit. Y.B. Int'l L., at 244.

222. The Mississippi courts failed to provide "fair and equitable treatment" to Loewen during the *O'Keefe* litigation. As explained above, those courts violated fundamental principles of fairness, equity, and natural justice in permitting O'Keefe to foment prejudice based on nationality, race, and class; in refusing to instruct the jury about the inappropriateness of these biases; in encouraging the jury to increase its already excessive initial verdict; in entering judgment on a biased, excessive and procedurally defective verdict; and in foreclosing Loewen's appeal rights by arbitrarily refusing to reduce the bonding requirement. As Sir Robert Jennings, has demonstrated (Jennings Op. ¶ 10), the *O'Keefe* litigation became "a travesty of the elementary notions of justice." By allowing that travesty, the Mississippi courts failed to provide Loewen with "fair and equitable treatment."

3. Illegal Expropriation (Article 1110)

223. Article 1110 of NAFTA provides:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (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. . . .

NAFTA thus not only incorporates the settled international prohibitation against uncompensated expropriation, *e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 712 (1987), but also broadens that prohibition to encompass measures "tantamount to" an

uncompensated expropriation. The *O'Keefe* judgment was, at a minimum, "tantamount to" such an uncompensated expropriation.

224. Under international law, any significant and unjustified "interference" with an alien's use or enjoyment of his property constitutes an expropriation. *See, e.g., Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 155 (1983) (question is whether interference rendered property rights "so useless that they must be deemed to have been taken"); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1984); ("form of the measures of control or interference is less important than the reality of their impact"); *Payne v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986) (finding expropriation by looking to "the effect" of government action). Applying these principles, international tribunals routinely have found expropriations even for relatively limited interference with property rights. For instance, the Iran-United States Claims Tribunal routinely found expropriations where the Iranian government had appointed individuals to exercise control over "Iranian companies or offices in which American claimants had an ownership interest." G. Aldrich, *What Constitutes A Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Am. J. Int'l L. 585 (1994). *See, e.g. Sedco, Inc. v. National Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 277 (1985). Similarly, that Tribunal found takings where the Iranian government had placed unreasonable burdens of access to bank accounts, *see American Bell International Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 213-15 (1986), and where it had appointed directors who refused to pay dividends to minority shareholders, *see Foremost Tehran, Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 248-53 (1986). Another international tribunal found an expropriation where the Hungarian government had allowed an alien to hold title to the real estate at issue, but

had prevented him from entering or using it. *In re Jeno Haitman*, 8 Whiteman *Digest*, *supra*, at 1011.

225. Under international law, judicial actions can constitute expropriation:

> It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court.

Oil Field of Texas, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 308, 318-19 (1986). In this case, an international tribunal found an expropriation based on an order by the Islamic Court of Ahwaz directing the National Iranian Oil Company to cease making payments on certain oil drilling equipment, and to retain the equipment for its own use. *Id.* Citing numerous prior French precedents, the Iran-U.S. Tribunal concluded:

> A sentence rendered by a judicial authority is an emanation of an organ of the State, just like a law promulgated by a legislative authority, or a decision taken by an executive authority. The non-observance of an international law by a tribunal, creates [gives rise to] an international responsibility on the part of the community of which the tribunal is an organ, even if the tribunal applied a domestic law consistent with international law. [Claimant's translation]

Oil Field of Texas, 12 Iran-U.S. Cl. Trib. Rep. at 318.[11]

226. Expropriation occurs even when the state itself acquires nothing, so long as it "has been the instrument of redistribution" to another party, even a private party. For example, in *Smith v. Compania (U.S.A. v. Cuba)*, 2 R.I.A.A. 915 (1929), the arbitrator accepted the United States' argument that the compelled transfer of property from a U.S. citizen to a Cuban private

[11] The actual text of the decision provided: La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'Etat, tout comme la loi promulgée par l'autorité législative, ou la décision prise par l'autorité éxecutive. La non-observance d'une règle internationale, de la part d'un tribunal, crée la responsabilité internationale de la collectivité dont le tribunal est un organe, même si le tribunal a appliqué un droit interne conforme au droit international.

party, accomplished through an unfair judicial proceeding in Cuban courts, constituted an expropriation. *Id.* at 917-18. *See also Oil Field of Texas v. Iran, supra; Eastman Kodak v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 153, 181 (1987) (concurring and dissenting opinion of Brower, J.) ("An expropriation ordinarily implies that the State . . . has been the instrument of its redistribution."); J. Herz, *Expropriation of Foreign Property*, 35 Am. J. Int'l L. 243, 250 (1941) (expropriation can occur "regardless of what happens to the property seized").[12]

227. Article 1110 of NAFTA makes clear that analysis of expropriations must consider whether the state action at issue is for a public purpose, whether it is nondiscriminatory, and whether it amounts to a denial of either due process or the minimum standard of treatment under Article 1105. These considerations bear on the question whether any expropriation has occurred, as well as on the lawfulness of any expropriation. *See, e.g., BP Exploration Co. v. Libyan Arab Republic*, 53 I.L.R. 297, 315-16, 329 (1979); *The Measures Taken by the Indonesian Government Against the Netherlands Enterprises*, 5 Neth. Int'l L. Rev. 227, 245 (1958).

228. Authorities going back to the nineteenth century make clear that expropriations for the sole benefit of a private individual fail to satisfy the "public purpose" requirement. For instance, in an exchange of diplomatic letters concerning the King of Greece's uncompensated expropriation of an Englishman's gardens for inclusion in palace grounds, Lord Palmerston wrote "Mr. Finlay's land was forcibly taken from him . . . and not for any public purpose, but

[12] In its application to state-compelled transfers of property from one private party to another, the international law of expropriations parallels the United States law of takings. As the leading treatise explains, U.S. constitutional law has always made "undisputed condemnation of any law attempting to 'take property from A. and give it to B.'" L. Tribe, *American Constitutional Law*, 588 (2d ed. 1988), quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

solely for the personal convenience and accommodation of the King." As a consequence, the King "was at all events bound to pay those private individuals." XXXIX British and Foreign State Papers, 1849-1850[2] at 431-32. Similarly, the United States has agreed that there was an illegal expropriation where a foreign court had seized an American citizen's property "to be used by the defendant for purposes of amusement and private profit, without any reference to public utility." *Smith*, 2 R.I.A.A. at 917-18, submitted to the Department of State by letter dated May 2, 1929, *reprinted in* 24 Am. J. Int'l 382, 384 (1930).

229. International tribunals repeatedly have found illegal expropriations where the state interference at issue discriminates against aliens. *E.g.*, *Restatement (Third) of the Foreign Relations Law of the United* States § 712 (Reporter Note 5) at 210 (finding illegal expropriation where Libyan government purported to justify its action as a "'cold slap in the insolent face of the investors' government'") (quoting *Texas Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1 (1978)); *BP Exploration Co. v. Libya*, 53 I.L.R. 297, 329 (1979) ("the taking . . . of the property, rights and interest . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."); *Chilean Copper Case*, (L.G. Hamburg 1973), *reprinted in* 12 I.L.M. 251, 276-77, 278 (1973) (illegal expropriation found where interference included only foreign-owned mines); Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 Neth. Int'l L. Rev. 243-42 (expropriation is "a delict in international law" if it "discriminate[s] against one particular group").

230. Under these standards, the *O'Keefe* litigation effected an illegal expropriation. The *O'Keefe* judgment and related execution law clearly constituted a substantial state

interference with Loewen's investments in the United States. Moreover, that judgment created a huge and undeserved windfall for O'Keefe, a private individual whose damages, if any, were a tiny fraction of the amount awarded. The judgment also was the product of discrimination on several impermissible bases, including race and nationality; was rendered in violation of both due process and every international law standard incorporated into Article 1105; and was enforced through arbitrarily foreclosing Loewen's appeal rights. Finally, of course, the ultimate expropriation was entirely uncompensated. Thus, through their judgment and foreclosure of Loewen's appeal rights, the Mississippi courts became the "instrument of redistribution" for an expropriatory transfer from Loewen to O'Keefe.

B. The Liability of the United States

231. For two separate reasons, the United States is liable under NAFTA for the actions of the Mississippi courts.

232. First, under Article 105 of NAFTA, the United States is absolutely responsible for any NAFTA breaches committed by the State of Mississippi and its courts. Article 105 by its terms provides:

> The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

According to the *U.S. Statement of Administrative Action* on NAFTA, Article 105 makes clear that "no country can avoid its commitments under the Agreement by claiming that the measure in question is a matter of state or provincial jurisdiction." H.R. Doc. 103-159, 103d Cong., 1st Sess., v. 2, at 4 (1993). Moreover, according to the United States Trade Representative, "Article

105 . . . mean[s] that the federal government will be held accountable if it cannot secure state or provincial compliance with NAFTA obligations." Letter from Michael Kantor to Hon. Henry A. Waxman, Chairman, Subcomm. on Health and the Environment of 9/7/93, *reprinted in* 1993 U.S.C.C.A.N. 2858, 2862.

233. Article 105 merely codified an established principle of international law:

> The attribution to a federal State of the acts of organs of its component states, in cases where such acts enter into consideration at the international level as a source of responsibility, is also a firmly established principle . . . even in regard to situations in which internal law does not provide the federal States with means of compelling the organs of component states to fulfil international obligations.

[1971] 2 *Y.B. Int'l L. Comm'n* 257; *see also* I. Brownlie, *System of the Law of Nations: State Responsibility, Part I*, 141 (1983) ("It is well settled that a state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.").

234. This principle applies to make a federal sovereign liable, under international law, for violations committed by the courts of its constituent states. *See, e.g., Iran v. United States*, Iran-U. S. Cl. Trib., Award No. 586-A27-FT, at para. 71 (June 5, 1998) ("It is a well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state."); *Oil Fields of Texas, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308, 318 n.4 (1986) ("The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State") (quoting ILC Yearbook 1980, Vol. II, Part Two, p. 31).

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235. The United States for decades has recognized that it is responsible, under international law, for the misconduct of its states and their courts. In *De Galvan (Mexico) v. United States of America*, 4 R.I.A.A. 273 (1927), where the United States was held liable for the misconduct of Texas officials, the State Department explicitly refused to defend on the ground that the acts at issue were those of state officials. *See* Political Subdivisions, 5 Hackworth *Digest* § 527, at 593-595 (1943). The State Department acknowledged that, in its own dealings with nations with other federal systems, "we have invariably insisted on the liability of the Federal Government, although the failure . . . was chargeable to the officials of one of the constituent states or provinces." *Id.* at 594. Similarly, President McKinley has made it clear that "the officers of the State charged with police *and judicial* powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents *as to make this Government answerable for their acts* . . . ." Stmt. of Pres. McKinley, Dec. 5, 1899, 1901 For. Rel. vii, at xxii-xxiv (emphases added).

236. Second, Article 1105 requires the United States to provide "full protection and security" to the investments of Canadian investors. As explained in detail above, the "full protection and security" standard codifies the settled principle that a state is responsible, under international law, for its failure to prevent harms to an alien caused by third parties. *See, e.g.*, 1929 *Draft Convention* Arts. 10 & 11; I. Brownlie, *supra*, at 161; 8 Whiteman *Digest*, *supra*, at 817-18; L. Henkin et al., *International Law: Cases and Materials* 717 (3d ed. 1993); *Restatement (Second) of the Foreign Relations Law of the United States* § 183(b)(ii); *Restatement (Third) of the Foreign Relations Law of the United States* § 711(b), cmt. e (1987). For example, in *Youmans (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 110 (1926), Mexico was held liable for

its failure to protect three American citizens from a mob. Similarly, in *Chapman (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 632 (1930), Mexico was held liable for its failure to prevent the shooting of an American.

237. The United States has long respected this principle of state responsibility. For example, the United States paid Italy an indemnity when a New Orleans mob lynched eleven Italian citizens. *See* 6 Moore, *supra*, at 837-41. The United States' official statement observed that although the injury "was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity." *Id.* at 840.

238. Just as the United States acknowledged responsibility for its failure to prevent a lynching in New Orleans, it should also be held responsible, under the "full protection and security" provision of Article 1105, for its failure to prevent the gross injustice that Loewen suffered in Mississippi.

C. Causes of Action

239. The causes of action in this case arise under Chapter 11 of NAFTA. Section A of Chapter 11, titled "Investment," imposes on signatory Parties various obligations regarding foreign investors and their investments. Section A includes Articles 1102, 1105, and 1110, the substantive provisions directly at issue. Section B of Chapter 11, titled "Settlement of Disputes between a Party and an Investor of Another Party," creates private rights of action to enforce Section A. Section B includes Articles 1116 and 1117, which create the causes of action directly at issue.

240. In pertinent part, Article 1116 provides that an "investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under" Section A "and that the investor has incurred loss or damage by reason of, or arising out of, that breach."

241. The Loewen Group, Inc. satisfies all of the elements for a claim under Article 1116. *First*, TLGI is an investor of Canada, which is a NAFTA signatory, and of no other state. TLGI's investments in the United States include its U.S. subsidiary, LGII, and, through LGII, Riemann Holdings and Wright & Ferguson Funeral Home. *Second*, as explained at length above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105, and 1110 during the *O'Keefe* litigation. *Third*, as explained above and below, TLGI suffered grave damages as a result of those breaches, either directly or through its United States investments.

242. In pertinent part, Article 1117 provides that an "investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under" Section A "and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."

243. The Loewen Group, Inc. satisfies all of the elements for a claim under Article 1117. *First*, as noted above, TLGI is a Canadian investor. *Second*, LGII is a United States enterprise that is a juridical person directly owned and controlled by TLGI. *Third*, as noted above, both the United States and Mississippi (for whose acts the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105, and 1110 during the

O'Keefe litigation. *Fourth*, as explained above and below, LGII suffered grave damages as a result of those breaches.

V. DAMAGES

244. At the May 18, 1999 session, the Tribunal requested that Loewen, in its Memorial, "sketch out, but not going into too much detail, how it is they intend to establish their claim for damages." Set forth below is that "sketch." Of course, Loewen reserves its right to provide a more extensive submission at the damages phase of this arbitration.

245. Article 1135 of NAFTA provides that a tribunal may award "monetary damages" and "any applicable interest" and "costs in accordance with the applicable arbitration rules."

246. Under international law, damages must provide "full" compensation for the injuries caused by a State's breach of its legal obligations. F.V. Garcia-Amador, 2 *The Changing Law of International Claims* 579 (1984). The leading damages case holds that a state in breach "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Chorzow Factory Case* (Ger. v. Poland), 1928 P.C.I.J. (Ser. A) No. 17, at 47; *accord, e.g.*, *Lusitania Cases* (U.S. v. Ger), 7 R.I.A.A. 32, 35-36 (1923) (the "remedy must be commensurate with the injury received" and "must be adequate and balance[d] as near as may be the injury suffered"); *Administrative Decision No. II* (U.S. v. Ger.), 7 R.I.A.A. 23, 29 (1923) ("It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of"); 3 M. Whiteman, *Damages in International Law* 1767 (1943) ("In recent cases, it is frequently stated that the losses sustained are the direct result of the wrong of which complaint is made and that they are therefore

allowable."). Moreover, "full" compensation must include appropriate, foreseeable consequential damages in order to fully "wipe out the consequences" of the illegal actions:

> Reparation, as the Court sees it, would cover *restitutio*, or its monetary equivalent, *plus* any potential consequential damages, in order to 'wipe out' all the consequences of the illegal act.

Amoco Int'l Finance v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, at 245 n.10 (1987) (citing *Chorozow Factory*).

247. International law also permits damages for the loss of intangible assets. For example, in determining how to value businesses expropriated by the Iranian government, the Iran-U.S. Claims Tribunal used a "going concern" measure that "encompasse[d] not only the physical and financial assets of the undertaking, but also the intangible valuables . . . as well as goodwill and commercial prospects." *Amoco Int'l Finance*, 15 Iran-U.S. Cl. Trib. Rep. at 270; *see generally* Aldrich, *supra*, at 247-270.

A. The Impact of the NAFTA Breaches Upon Loewen's Operating Strategies

248. In assessing the damages caused by the *O'Keefe* litigation, it is important to understand the nature of Loewen's business and the impact of the litigation on the company's current and future operations. Loewen's principal business plan was to acquire and consolidate small funeral homes, cemeteries, crematoriums and pre-need insurance companies (collectively "death care businesses") into an integrated, international company.[13] Before the *O'Keefe* judgment, Loewen had pursued this strategy with great success, and had rapidly grown into a thriving corporation that was trading at a very high multiple of earnings.

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[13] Loewen's Stewart Enterprises and Service Corp. International (SCI), follow similar strategies.

249. Loewen's acquisition and consolidation strategy had several key components. The first was finding the right companies to acquire. The death care industry is comprised of many small businesses and a few relatively large consolidators such as Loewen and its competitors. In 1995, the industry was approximately 15% consolidated, so there were many businesses available as acquisition candidates for Loewen and its competitors. Loewen's strategy was to identify families seeking to sell their death care businesses, and to convince them to become part of Loewen's international enterprise.

250. A second key was maintaining a strong share price, which maximized Loewen's ability to use equity offerings to finance its acquisitions. As a large corporate buyer, Loewen could and often did make cash or near-cash offers, which required a strong market demand for its equity and debt issues. In addition to facilitating liquid offers, a strong share price also enabled Loewen to finance acquisitions directly with its own stock. The attractiveness of a stock deal was further enhanced to the extent sellers expected Loewen's share price to appreciate over time: if Loewen's economic viability became uncertain, or its stock price unstable, then sellers would find a stock transaction less attractive, and would insist on more cash.

251. A third key was maintaining Loewen's access to the capital markets. In 1995, Loewen's acquisitions totaled $488 million, approximately 80% of its 1995 revenue. This acquisition program could not be funded internally, but required constant access to debt and equity markets on favorable terms, so that Loewen could make the cash offers that most sellers wanted.

252. Fourth, it was imperative that Loewen maintain its reputation as both a growing and a trustworthy company. The success of its acquisition strategy largely depended on

Loewen's borrowing costs, which persisted in the years after, was directly attributable to the Mississippi litigation.

259. **Increased Cost of Raising Equity.** As previously described, Loewen's business strategy of growth through acquisition and consolidation required it to frequently raise equity capital. The share value of Loewen stock on the Toronto Stock Exchange and on NASDAQ declined more than 27% between the date the *O'Keefe* verdict was announced and the date of the *O'Keefe* settlement.[14] The fall in the stock price resulted in an increase in the cost of the new equity that Loewen actually issued of approximately $125 million for 1996, $175 million for 1997, and $1 million for 1998. This damage represents future costs, and is thus distinct from the loss in market capitalization of the company as measured under the Market Method, which looks to the loss of value in existing shares.

260. **Risk Premium for Acquisitions.** As earlier described, a key element in Loewen's consolidation and growth strategy was its ability to attract sellers of small funeral homes and cemeteries. After the Mississippi disaster, the damage to Loewen's reputation as a trustworthy company resulted in Loewen having to pay a premium on its acquisitions. Funeral home sellers were typically retained as employees of Loewen, and thus needed assurance that their business would continue to be run with the same integrity and quality that their local community had come to expect. Therefore, the perception of Loewen's ability and willingness to run the business "as usual" was very important if local funeral home and cemetery owners were

[14] In addition, during the period between the Mississippi verdict and the settlement, Loewen was effectively precluded from accessing the equity market, and was required to issue convertible preferred stock to finance its acquisition obligations. There were significant additional costs associated with this issuance, primarily because of the lower common stock price.

to sell to Loewen rather than one of its competitors. The loss of Loewen's reputation in the marketplace as a direct result of the *O'Keefe* litigation reduced its bargaining power with acquisition targets, so that Loewen had to offer a higher price in order to persuade them to entrust their family businesses to a "risky" corporation.[15]

261. **Bonding Costs.** As described above, Loewen briefly obtained interim relief from the Mississippi Supreme Court permitting a reduction in the appeal bond to $125 million. According to the company's 1996 Annual Report, the cost to obtain that $125 million bond was $7.4 million. Loewen expended further sums, including finance-related costs, in pursuing various options to post the $625 million appeal bond ultimately required by the Mississippi Supreme Court.

262. **Litigation Costs.** As a result of O'Keefe's improper trial focus on nationality, race, and wealth, and of the excessive judgment and ensuing litigation crisis, the *O'Keefe* case became much more complicated and expensive than any garden-variety contract dispute should have been. To these costs must be added the legal costs of preparing for a possible bankruptcy filing and the need for extensive interim financing required by the *O'Keefe* verdict. Even allowing an offset for what should have been the ordinary litigation costs of defending a simple commercial contract dispute, Loewen incurred additional litigation costs in the in the range of $5-10 million; Loewen also incurred other litigation-related costs, not quantifiable at this time, as a direct result of the several NAFTA breaches.

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[15] Quantifying the "risk premium" requires an analysis of industry data not available to Loewen at this time. Loewen will provide an analysis quantifying the risk premium at the damages phase of this case.

263. The total damages that Loewen anticipates will be identifiable and asserted under the Itemization Method will be in excess of $600 million.

2. The Market Method

264. The market value of a company depends on the values of all financial claims against the company, which for Loewen consists of common stock, preferred stock, and debt. The calculation of damages under a market method is relatively straightforward for a company with publicly traded securities such as Loewen: the economic damage is equivalent to, and is best measured by, the loss in market value of the company as measured by the decrease in market values of the debt and equity over the time period of the event causing the change.

265. When investors learned of the *O'Keefe* verdict and settlement, analysts immediately began to assess their impact on the economic value of the company. In addition to the huge payment to O'Keefe in the near term, future investors came to consider Loewen a "risky" company. This in turn meant higher debt and equity costs for Loewen, and more onerous security terms. It also meant that many death care business owners would not consider Loewen as attractive an acquiring company. In short, the *O'Keefe* debacle gravely damaged the principal components of Loewen's critical acquisition strategy. Furthermore, a considerable amount of Loewen's market value was based on the expectation of profits created by future growth opportunities. The damage to the value of the growth opportunities was reflected in a fall in the stock price. Finally, the increased risk to Loewen's cash flows resulted in a reduction of its credit rating, as well as a drop in the market value of its outstanding debt.

266. At the time of the *O'Keefe* trial, Loewen stock was being traded on the Toronto Stock Exchange and on NASDAQ. There were 48.2 million shares outstanding at the end of

1995. Comparing the average stock price of $39.59 for the week immediately preceding the first verdict with the average closing price of $27.58 for the week immediately following the settlement yields a loss in equity value of approximately $579 million.[16]

267. The loss of debt value cannot be directly computed because Loewen's debt was not publicly traded during the time between the *O'Keefe* verdict and the settlement. This change in market value can, however, be estimated fairly reliably through the use of a discounted cash flow analysis. The price an investor is willing to pay for a bond is simply the present value of the interest and principal payments to be received over the life of the bond. Since the coupon payments and principal amounts are known and fixed, market value changes are created solely by changes in the discount rate, which can be viewed as the sum of a risk-free rate (*e.g.*, the U.S. Treasury rate) plus a risk premium specific to Loewen. The *O'Keefe* verdict severely increased the risk of Loewen's debt, as reflected in the precipitous decline of its debt rating. The debt downgrade served to raise the effective interest rate from approximately 6.78% to 7.38% and to increase the necessary underwriting commission. Assuming an average coupon of approximately 6.78% (95 basis points over the 5-year Treasury yield in October 1995) and maturity of 5 years for the $933 million of Loewen's debt on the books at the end of 1995 yields the following pre- and post-verdict debt values:

Pre-verdict value = $933 million (coupon = yield = 6.78%)
Post-verdict value = $910 million (coupon = 6.78%, yield = 7.38%)

[16] This estimate does not include the value of the MEIPs (management equity investment plan), an exchangeable/convertible security which could add another 4.25 million shares if fully converted.

The difference between the pre- and post-verdict values of $23 million represents a reasonable estimate of the loss of market value of the debt, as reflected in Loewen's outstanding debt securities, caused by the *O'Keefe* litigation.

268. Loewen's preferred stock also lost market value as the result of the Mississippi litigation. At the time of the *O'Keefe* trial, Loewen had outstanding $75 million of monthly income preferred stock traded on the New York Stock Exchange. There were 3.0 million shares of this stock outstanding at the end of 1995. Comparing the average closing stock price for Loewen preferred shares for the five days ending October 31, 1995 (in U.S. dollars, $27.40) with the average closing price for the five days beginning February 1, 1996 ($24.13), yields a loss in preferred stock value of approximately $9.8 million.

269. The total damages anticipated by Loewen to be identifiable and asserted under the Market Method will be in excess of $600 million.

3. Interest

270. Article 1135 of NAFTA expressly permits recovery of "any applicable interest." Loewen anticipates seeking such interest at a rate of 8%, a conservative rate that is lower than Loewen's internally computed cost of capital since the O'Keefe verdict.

4. Costs

271. Article 1135 also permits recovery of appropriate costs. Loewen anticipates seeking recovery of such costs (including a reasonable attorney's fee).

5. Conclusion

272. Loewen's acquisition and consolidation strategy, which was both essential for its future and exceptionally successful at the time of the *O'Keefe* trial, was devastated by the

O'Keefe verdict and settlement. The *Wall Street Journal*, a prime barometer of corporate reputation, recognized the damage :

> Even if Loewen somehow is able to post the full bond requirement, its business is likely to be harmed irrevocably. The company's ability to conduct its day-to-day business in the ultraconservative funeral services sector depends heavily on its reputation for straight-dealing, which already has taken a beating because of the publicity surrounding the jury verdict against the company.

('Ruling May Force Loewen to Seek Bankruptcy Shelter,' *Wall Street Journal*, January 25, 1996) at B5.

273. The Mississippi proceeding was, unfortunately, a defining moment for Loewen. While Loewen does not seek damages for every loss it has suffered since November 1, 1995 — and does not claim that the *O'Keefe* verdict is the sole source of its current bankruptcy reorganization — the fact remains that the damage inflicted on Loewen by the *O'Keefe* litigation was profound, and continues to this day.

VI. THE UNITED STATES' OBJECTIONS

274. During the May 18, 1999 hearing, the United States suggested four possible defenses to this arbitration: first, that Loewen is not really a Canadian investor under NAFTA; second, that the judicial actions at issue are not "measures" under NAFTA; third, that Loewen waived its right to pursue this arbitration by "voluntarily" settling the *O'Keefe* litigation; and fourth, that Loewen failed to provide timely notice to the United States. The United States contends that these defenses justify suspension of the merits of this arbitration pursuant to ICSID Additional Facility Arbitration Rule 46. The United States' arguments are unsound at every turn.

First, because its defenses do not bear on competence or jurisdiction, they cannot justify a bifurcation under Article 46. Moreover, the defenses in any event are meritless.

A. The United States' Defenses Do Not Address This Tribunal's Competence Or Jurisdiction

275. Article 46 of the Additional Facility Arbitration Rules permits an arbitration panel faced with a "competence" objection either to "deal with the objection as a preliminary question" or to "join it to the merits of the dispute." Applying that principle, ICSID tribunals repeatedly have refused to delay consideration of the merits based on dubious or objections clearly related to the merits. For example, in *AMCO v. Indonesia*, Jurisdiction Award, 1 ICSID Reports 389 (1983), the tribunal rejected a request to bifurcate in order to consider a defense that the claim involved matters beyond the scope of the arbitration agreement. In so doing, the tribunal concluded that it "must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal." *Id.* at 405. Similarly, in *Tradex Hellas, S.A. v. Albania*, ARB/94/2, Decision on Jurisdiction 185 (Dec. 24, 1996), a tribunal refused to bifurcate in order to consider a defense that the allegations failed to state a claim of expropriation. In so doing, the tribunal concluded that this defense was "so closely related to the further examination of the merits" that it "should be joined to the merits."

276. The "competence" objections that would justify bifurcation are extremely narrow in scope. The structure of ICSID rules makes clear that such "competence" objections do not encompass all defenses properly characterized as jurisdictional, for while Article 46 is limited by its terms to "competence" objections, Article 41 of the ICSID Convention Arbitration Rules

states that "[a]ny objection by a party to the dispute that that dispute is not within the *jurisdiction* of the Centre, *or for other reasons is not within the competence of the Tribunal*, shall be considered by the Tribunal" (emphasis added). Although competence is sometimes confused with jurisdiction, for ICSID purposes the term "competence" "refers to the narrower issues confronting a specific tribunal, such as its proper composition or lis pendens." Christoph Schreuer, *Commentary on the ICSID Convention*, 12 ICSID Rev. Foreign Inv. L.J. 318, 387-88 (Fall 1997). None of the objections raised by the United States bears on the "competence" of this tribunal — whether the tribunal is somehow unfit because of its composition or because of another pending proceeding. Accordingly, the tribunal should deny the United States' request for bifurcation under Article 46.

277. Nor do any of the United States' objections bear on the jurisdiction of this tribunal. The ICSID Additional Facility has two principal jurisdictional requirements: first, "either the State party to the dispute or the State whose national is a party to the dispute [must be] a Contracting State," meaning a signatory to the ICSID Convention, *see* ICSID Additional Facility Rules Art. 2(a); and second, there must be an "agreement . . . for conciliation or arbitration," *see id.* Art. 4(1). Both requirements are clearly satisfied here: the United States has signed the ICSID Convention, and is thus a "Contracting State" for purposes of Article 2; and in Article 1122 of NAFTA, the United States unequivocally agreed to ICSID Additional Facility arbitrations. As the United States recognized in its *Statement of Administrative Action*, "Article 1122 itself constitutes advance consent by the three NAFTA governments to arbitration." *U.S. Statement of Administrative Action* at 134.

278. Because the Additional Facility jurisdictional requirements are relatively simple, jurisdictional challenges (in contrast to competence challenges) are ordinarily not reviewed by an Additional Facility tribunal. The Secretary-General of ICSID makes the straightforward determination whether jurisdiction under the Additional Facility exists in a particular case, and, if it does, he then registers the claim. The Secretary-General's decision to register a claim has been characterized as "a *conclusive determination* that the proceedings contemplated by the agreements come within the scope of the Additional Facility, thus barring jurisdictional objecti[ons] on this issue once proceedings have been instituted." ICSID Additional Facility Rules Art. 4, cmt. (i) (emphasis added). Thus, Article 46 plainly does not authorize a suspension of the merits to resolve a jurisdictional objection that does not bear on the tribunal's competence.

279. Finally, even where a proper competence objection has been raised, Article 46 neither requires nor encourages bifurcation. At the May 18 hearing, the United States offered no persuasive reason why any competence objection should be addressed "as a preliminary question," rather than "join[ed] . . . to the merits." To the extent that bifurcation would significantly delay consideration of the merits, it is inappropriate here because such delay would prejudice Loewen's efforts to emerge from its ensuing bankruptcy.

B. The U.S. Objections In Any Event Are Meritless

1. TLGI is a Canadian Investor Under NAFTA

280. The United States errs in suggesting that TLGI is not a Canadian investor under NAFTA. Article 1139 of NAFTA defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." As a corporation organized under Canadian law, TLGI is clearly an "enterprise" of

Canada (a "Party" to NAFTA): Articles 201 and 1139 of NAFTA define an "enterprise" to include any corporation "constituted or organized under applicable law," and further define an "enterprise of a Party" to include "an enterprise constituted or organized under the law of a Party." Moreover, under Article 1139, LGII clearly qualifies as: (1) a United States "enterprise," because it is "constituted or organized" under United States law; (2) an "investment," either because it is an "enterprise" or because it holds "real estate or other property" used for "economic benefit or other business purposes"; and (3) an "investment" of TLGI because it is "owned or controlled directly or indirectly" by TLGI. Finally, TLGI clearly qualifies as an "investor" of Canada, because it is an "enterprise" of Canada that "has made an investment" in LGII.

281. Other NAFTA materials confirm that, in defining the nationality of a corporate investor for NAFTA purposes, the only relevant inquiry is its place of incorporation. In its *Statement of Administrative Action*, the United States concluded that "investor of a Party" is defined to encompass "firms (including branches) established in a NAFTA country, without distinction as to nationality of ownership." *U.S. Statement of Administrative Action* at 138. Similarly, Daniel Price, one of the U.S. negotiators of Chapter 11, has concluded that its protections apply to all entities incorporated in a NAFTA signatory country, regardless of the nationality of their shareholders; and that, therefore, even a Canadian investment of a United States subsidiary of a European company would qualify for Chapter 11 protection. *See* Price & Christy, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in Bello et al. eds., *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* 165, 173 (1994).

282. TLGI also should be treated as a Canadian company as an equitable matter. The United States itself regards TLGI as a Canadian company, and has consistently treated TLGI as a Canadian company for purposes of the Canada-U.S. Income Tax Treaty. 1 CCH Tax Treaties ¶ 1901.02, at 21,005 (1998). Even more importantly, TLGI was treated as a Canadian company during the *O'Keefe* litigation, in which plaintiff's counsel incited, the trial court permitted, and the jury gave effect to bias against TLGI precisely because of its status as a foreign company.

283. TLGI is, and as a matter of equity must be, treated as a Canadian investor under Chapter 11 of NAFTA. It is therefore entitled to pursue this arbitration against the United States.

2. The Forced Settlement Did Not Waive Loewen's NAFTA Rights

284. The United States errs in contending that Loewen waived its right to pursue this arbitration by settling the *O'Keefe* litigation. The *O'Keefe* settlement does not bar this arbitration because it was plainly made under duress and because, in any event, the settlement between Loewen and O'Keefe did not even purport to encompass NAFTA claims by Loewen against the United States.

a. Settlements Under Duress Do Not Waive Rights to Seek Redress

285. Under international law, a settlement made under duress does not waive a party's right to later seek relief if there was no practical alternative to the compelled settlement, and if the duress was illegitimate.

286. Section 203 of the *Restatement (Second) of the Foreign Relations of Law of the United States* states that an alien's waiver or settlement of a claim is valid only if the "waiver or

also G.C. Christie, *What Constitutes a Taking of Property?*, [1962] British Y.B. Int'l L. 307, 324 (1964) ("[A]n apparently voluntary transfer made under the threat of an impending expropriation is, none the less, forced. . . . [T]he commentators recognize the right to compensation of an alien who has been subjected to such treatment."); *Restatement (Third) of the Foreign Relations Law of the United States* § 712 cmt. g (1992) (state action forcing alien to abandon property or sell it at a distress price is an actionable violation of international law).

289. International tribunals have applied these principles for over a century. In the *Case of Gowen and Copeland* (*U.S. v. Venezuela 1885*), in 4 Moore's Int'l Arbitrations 3354 (1898), a tribunal awarded damages arising out of a state-compelled transfer from one private party to another. In *Gowen*, the Venezuelan government seized certain real property on which the U.S. claimants had built a plant. After the seizure, another company leased the property from the Venezuelan government, and the claimants agreed to transfer their plant to that company. The tribunal concluded that, even though the claimants were not "compelled to make this bargain," "it is difficult to see what other arrangement could have been made without a total sacrifice of the plant as long as Venezuela held it for the purpose of aiding the lessees in consummating the agreement made with her." *Id.* at 3357. The tribunal concluded that the transfer "was in the nature of a forced sale, which under the circumstances was a substantial appropriation of the property, and it awarded damages." *Id.* at 3358.

290. In the *Case of James M. Hallowes* (*U.S. v. Chile*), in 1 M. Whiteman, *Damages in International Law*, 208-10 (1937) another tribunal awarded damages despite a compelled settlement agreement. The claimant in *Hallowes*, a U.S. citizen, defaulted on a construction contract with a private party because the Chilean government had improperly seized his

settlement is not made under duress." Such duress "is not confined to physical duress; it may be duress through economic pressure." *Id.* cmt. b. The *Restatement* illustrates this principle:

> A vessel owned by X, a national of state A, is illegally seized in a port of state B. The authorities of B offer the master of the vessel the choice of accepting a payment of $500 in full settlement of any claim or demand that might have arisen out of the seizure or of having the vessel detained indefinitely and ultimately libeled and sold to defray wharfage costs. The loss growing out of the seizure substantially exceeds $500 but, faced with the alternative possibility of greater loss, the master accepts the $500 settlement and signs a waiver on behalf of X. Later, A espouses X's claim. The waiver is not effective as a defense to B.

Id. cmt. b, illus. 2.

287. Similarly, Article 22 of Sohn & Baxter's *Draft Convention* states that a waiver or settlement is effective only if made "without duress." Sohn & Baxter *Draft Convention* art. 22, at 186. The *Draft Convention* recognizes that such duress "may be either physical or economic." *Id.* at 191. With regard to economic duress, it recognizes that courts must distinguish ordinary economic pressures from improper "economic compulsion exercised by the respondent State over the claimant in order to force him to settle." *Id.*

288. International commentators repeatedly have recognized that settlements under duress, like forced sales consummated under duress, do not waive rights to bring international claims. On the contrary, such government-imposed duress transforms what would otherwise be a valid transaction into an invalid expropriation or taking. *See Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 171 (1983) (Holtzmann, concurring) ("there is 'a general consensus that proven threats of coercion . . . are sufficient duress to make an otherwise valid transfer a [taking].'") (quoting B.H. Weston, "*Constructive Takings" under International Law: A Modest Foray into the Problems of "Creeping Expropriation*," 16 Va. J. Int'l L. 101, 142 (1975)); *see*

"Duress" is structure of a conduct- & example

machinery. Following that default, the claimant reached a settlement under which he "was compelled to surrender" to the private party his interests in the mines at issue. *See id.* at 209. The claimant acknowledged that the settlement was in his "'best . . . interest'" when it was made. *Id.* (quoting claimant's allegations). Despite the settlement, however, the tribunal found a breach of international law and awarded damages.

291. In the *Case of Mathews and Wilkinson* (*U.S. v. Mexico*), Dec. No. 15-C, American Mexican Claims Report 242 (1948), a U.S-Mexico Claims Tribunal awarded damages for a settlement entered into under duress. In *Mathews and Wilkinson*, a Mexican court refused to evict certain trespassers from mines owned by the American claimants. The Claims Tribunal later characterized the Mexican court's "failure to take this action" as a "denial of justice since it deprived claimants and their property of that right of protection which they were entitled to receive under international law." *Id.* at 243. Faced with no other alternative after the Mexican court's refusal to act, the claimants reached an agreement with the trespassers in order to regain possession of the mines. In awarding damages for the failure to protect and the compelled settlement, the Claims Tribunal found that claimants were forced to enter into the agreement by the Mexican court's denial of justice: "claimants entered into the said agreement as a result of such denial and their consequent inability to regain possession of the mines otherwise." *Id.* at 244.

292. The concept of illegitimate duress was further developed by international tribunals established after World War II to compensate for injuries caused by Nazi Germany. *See generally* M. Karasik, *Problems of Compensation and Restitution in Germany and Austria*, 16 L. & Contemp. Probs. 448 (1951). A number of these cases arose under United States Military

Government Law No. 59 and its Allied analogs, which sought to restore to former owners (or their successors) property that had been seized or transferred as a result of Nazi "threats or duress." *See* United States Military Government Law No. 59, Article 2 (reprinted in 42 Am. J. Int'l L. 11 (Supp. 1948)). These postwar provisions were just two of many similar provisions that voided transfers resulting from such duress. *See* 2 Whiteman *Digest*, *supra*, at 693.

293. The Nazi cases confirm that transfers made under duress are not waivers, but compensable events. In *Poehlmann v. Kulmbacher Spinnerei A.G.*, 3 U.S. Ct. Rest. App. 701 (1952), a tribunal awarded damages to a hotel owner who, faced with a Nazi boycott because his wife was Jewish, had been forced to sell his hotel at a distress price. In so doing, the tribunal held it irrelevant that the purchaser himself was not the cause of the duress, because the purchaser "knew of the threats and the position of persecution in which the claimant found himself and [] took advantage of the plight." *Id.* at 709. Similarly, in *Stadt Wuerzburg v. Institut der Englischen Fraulein, B.M.V.*, 3 U.S. Ct. Rest. App. 753 (1952), the court found an "aggravated confiscation" where a Catholic religious order had been forced to sell school property under the threat of expropriation by the Nazi regime. The tribunal concluded that the sale was compelled by governmental actions, and that these actions "steep[ed] the entire transaction in immorality." *Id.* at 761; *see also id.* ("[t]he school was literally strangled to death by Nazi action"). Based on that duress, the tribunal ordered compensation for the forced sale. *See id.* at 762. Many other cases reached similar conclusions on comparable facts. *See, e.g.*, *Osthoff v. Hofele*, 1 U.S. Ct. Rest. App. 111 (1950) (forced sale of furniture store); *Kleinschmidt v. Liebmann*, 1 U.S. Ct. Rest. App. 104 (1950) (forced sale of shares in a company); *Hussy v.*

Stern, 4 U.S. Ct. Rest. App. 228 (1953) (purchaser exploited duress to acquire property at distress price).

294. In another postwar decision, the Swiss Federal Tribunal refused to recognize a transfer of property made under duress by an inmate in a Communist Czech prison. *Wichert v. Wichert*, 1948 Ann. Digest and Rep. of Pub. Int'l Cases 23 (Switz. Fed. Trib. 1948). In so doing, the court held that "[r]ecognition of a document signed under duress was contrary to Swiss public policy." *Id.* at 23.

295. The Foreign Claims Settlement Commission of the United States, which resolved post-War claims arising in many other European countries, also repeatedly held that forced sales are not waivers, but actionable events. That Commission readily inferred duress from an examination of the relevant surrounding circumstances: "In most cases of forced sales the element of duress was apparent from the circumstances of the sale, such as participation of internal revenue or police authorities in the transaction, or the inadequacy of the purchase price coupled with the additional fact that a portion of the purchase price was withheld to cover an 'escape tax' on the seller." *Decisions and Annotations of the Foreign Claims Settlement Commission of the United States* 594-95 (1968).

296. Most recently, the Iran-U.S. Claims Tribunal applied similar concepts of duress under international law. *See, e.g., Too v. Greater Modesto Insurance Assoc.*, Iran-U.S. Cl. Trib., Iran Award 460-880-2, at ¶ 26 (1989) (state is liable for discriminatory action that causes alien to enter into transaction under duress); *Cherafat v. Iran*, Iran-U.S. Cl. Trib., Iran Dec. 106-277-2, at ¶ 26 (1992) ("duress or fraud" are grounds for reinstating claims); *Davidson v. Iran*, Iran-U.S.

Cl. Trib., Iran Award 585-457-1, ¶ 117 (1998) ("fair market value" of expropriated property is market price "on condition that none of the two parties are under any kind of duress").

297. National court systems recognize the same principles. Under English law, for example, duress is present, and may transform an otherwise binding agreement into an actionable tort, if a party has been subjected to illegitimate pressure and is left with no practical alternative to the agreement at issue. Some English decisions stress the element of illegitimacy:

> It is, I think, already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss. The authorities upon which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted.
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> * * * *
>
> [I]n life, including the life of commerce and finance, many acts are done 'under pressure, sometimes overwhelming pressure': but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.

Universe Tankships Inc. of Monrovia v. I.T.F. [1982] 2 W.L.R. 803 at 828-29, per Lord Scarman (citations omitted). Other decisions stress the unavailability of practical alternatives. For example, the leading English text on contract law states that, in determining the validity of a plea of duress, "[t]he all-important question is whether, having regard to all the circumstances, [the alternative] remedy is a practical and effective one." Chitty on Contracts, § 7008 (27th ed. 1994), discussing *Pao On v. Lau Yin Long*, [1980] A.C. 614, 635.

298. Australian law also recognizes that a contract induced by "illegitimate" or "unconscionable" pressure is voidable. In order to maintain an action in economic duress, the proper approach, as set out in the New South Wales Court of Appeal decision in *Crescendo*

Management Pty Ltd v. Westpac Banking Corp (1989-1990) 19 NSWLR 40, per McHugh JA at 46, is to determine: (a) "whether any applied pressure induced the victim to enter into the contract;" and (b) "whether that pressure went beyond what the law is prepared to countenance as legitimate." Such pressure is illegitimate "if it consists of unlawful threats or amounts to unconscionable conduct." *Id.* Unconscionable conduct "'will commonly involve the use of or insistence upon legal entitlements to take advantage of another's special vulnerability or misadventure in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. That being so, the question whether the conduct is or is not unconscionable in the circumstances of a particular case involves a real process of consideration and judgment." *NZI Capital Corp. Limited v. Ianthe Pty Limited,* NSW Supreme Court July 31, 1991, Unreported LEXIS 9338, *13-*14 (quoting *The Commonwealth of Australia v. Verwayen* (1990) 170 CLR 394 at 441). In *Ken Morgan Motors Pty Ltd v. Toyota Motor Corp Australia Ltd,* Supreme Court of Victoria, Nov. 6, 1992, Unreported LEXIS 522 at *9, *rev'd on other grounds,* (1994) 2 VR 106, the court concluded that a settlement is made under duress and not enforceable if it results from "illegitimate pressure" that leaves the duressed party "with no other practical choice." *Id.* at *204. The court applied those principles to invalidate a settlement secured by tortious misconduct. *Id.* at *196-*197.

299. In summarizing English and Australian law, a leading Australian commentator has explained that illegal conduct is sufficient, but not necessary, to establish illegitimacy:

> Thus a party relying on duress must first satisfy the court that he was in fact coerced: . . . he must next establish that the coercive pressure applied to him was illegitimate. If it involved a threat of unlawful action, then it will be considered illegitimate. If not, then the circumstances will govern.
>
> . . .

> [T]he essential question is whether apparent consent was induced by pressure which the law does not regard as legitimate.

I. Hardingham, "Unconscionable Dealing," in *Essays in Equity*, ed. P.D. Finn (1985), at 23 & n.2.

300. Canadian law is similar. In *Gunn v. Stollery*, 1990 ACWSJ LEXIS 672, at *8 (Ontario Ct., October 15, 1990), the court held that economic duress is "a factor which may render a contract voidable." And in *Stott v. Merit Investment Corp.* (1988) 48 D.L.R. 4th 288, 63 O.R. (2d) 545, 25 O.A.C. 174, 19 C.C.E.L. 68 (C.A.); leave to appeal dismissed (1988) 49 D.L.R. (4th) viii, 63 O.R. (2d) x (S.C.C.), the Ontario Court of Appeal summarized the factors that establish duress:

> [There are] two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. . . . The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realization that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) with later developments when the law came also to recognize as duress first the threat to property and now the threat to a man's business of trade.

Id. at 307.

301. United States law recognizes the same duress principles. In the United States, "[a]greements extracted by duress contravene the public policy of the nation," and are therefore unenforceable if not tortious. *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F. Supp. 352, 358 (S.D.N.Y. 1979). Although verbal formulations differ, there is general agreement that duress requires significant pressure, improper conduct, and the absence of feasible alternatives. *See, e.g.* , 1 *Farnsworth on Contracts* § 4.16, at 478 (2d ed. 1998) ("First,

there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent."); *Totem Marine Tug Barge, Inc., v. Aleyeska Pipeline Service Co.*, 584 P.2d 15, 21 (Alaska 1978) (economic duress exists where "(1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party." (citing cases)).

302. As under English law, illegal conduct is sufficient, but not necessary, to establish the requirement of improper conduct or illegitimacy. *See, e.g., Systems Technology Assoc., Inc. v. United States*, 699 F.2d 1383, 1387-88 (Fed. Cir. 1983) ("An act the Government is empowered to take under law, regulation, or contract may nonetheless support a claim of duress if the act violates notions of fair dealing by virtue of its coercive effect."); W. Lehmann, *Refusal to Pay Debt as Economic Duress or Business Compulsion Avoiding Compromise or Release*, 9 A.L.R. 4th 942 (1981) (threats "need not be criminal, tortious, or in breach of contract in order to be wrongful. In fact an act or threat may be considered wrongful if it is merely wrongful in the moral sense.").

303. As under English law, the availability of reasonable alternatives is a critical question to be resolved by the trier of fact. *See, e.g., Applied Genetics Int'l Inc. v. First Affiliated Securities Inc.*, 912 F.2d 1238, 1242 (10 Cir. 1990) ("Because of the financial situation that [plaintiff] was in when it had to decide whether to enter into the Settlement are Release Agreement, there is a material question as to the reasonableness of any alternative that may have caused delay in [plaintiff] receiving financial assistance . . . [and therefore the plaintiff] may have signed the Agreement under] economic duress."); *Totem Marine Tug B Barge*, 584 P.2d at 22

(existence of reasonable alternative "is a question of fact, depending on the circumstances of each case").

304. As the above discussion should make clear, the international decisions follow the two principles stressed in domestic law. First, a wide range of conduct can satisfy the requirement of illegitimacy or impropriety: for example, the improper seizures in *Gowen* and *Hallowes*; the racially-motivated boycott in *Poelhmann*; the improper communist imprisonment in *Wichert*; or, most directly relevant here, the judicial denial of justice in *Mathews*. Second, the unavailability of practical alternatives is a critical consideration in analyzing duress, as recognized explicitly in *Gowen* (4 Moore's Int'l Arbitrations at 3357) and *Matthews* (Dec. No. 15-C, American Mexican Claims Report at 244), and as is apparent from the facts of the other international cases.

b. The O'Keefe Settlement Was Made Under Duress

305. Loewen's settlement with O'Keefe clearly was made under duress. *First*, there can be no serious question that the $500 million *O'Keefe* judgment and the requirement that Loewen post a $625 million bond in order to pursue an appeal constituted substantial pressure that were a direct and immediate cause of the settlement.

306. *Second*, the pressure exerted by the *O'Keefe* judgment and the bonding requirement were caused by conduct that was not only illegitimate and improper, but also illegal. As explained above, the measures taken by the Mississippi courts during the *O'Keefe* litigation violated international law in numerous ways: they were invidiously discriminatory, they were a substantive and procedural denial of justice, they violated applicable standards of protection and

security, they were unfair and inequitable, and they were tantamount to an uncompensated and otherwise illegitimate expropriation.[17]

307. *Third*, Loewen had no reasonable financial alternatives to the *O'Keefe* settlement. As explained in detail above, the only available alternatives — permitting execution during the pendency of an appeal, posting a $625 million appeal bond, or filing for bankruptcy — were all far more catastrophic than paying the $175 million settlement.

308. *Finally*, Loewen had no reasonable legal alternatives to the *O'Keefe* settlement. Loewen had no available avenues of relief in the Mississippi courts because the trial court already had entered a binding and enforceable judgment, and the Mississippi Supreme Court — the highest judicial body in the state — already had required Loewen to post a $625 million bond in order to appeal that judgment. Moreover, as explained in detail in the attached expert opinions of Laurence Tribe, a leading authority on American constitutional law, and Charles Fried, a former Solicitor General of the United States, Loewen had no available avenues of relief in U.S. federal court, either on direct review in the Supreme Court of the United States or on collateral review in a U.S. district court.

309. In sum, the *O'Keefe* judgment and bonding requirement imposed substantial and illegitimate pressure on Loewen, and left it with no reasonable alternative but to pay O'Keefe an extortionate settlement. Under settled international law principles, that settlement did not waive Loewen's right to pursue this arbitration, but merely finalized the damages caused by the prior NAFTA breaches.

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[17] Because the duress in this case was caused by illegal state action, this tribunal need not address the extent to which conduct that is legal, but nonetheless illegitimate or improper in a broader sense, can support a claim or defense of duress.

c. The Settlement Covered Only The Mississippi Litigation, Not Any NAFTA Action

310. Even if Loewen's settlement with O'Keefe had not been made under extreme duress, it still would not preclude this action. The *O'Keefe* settlement was not one with the United States, and nothing in the settlement agreement can possibly be construed as explicitly or implicitly waiving Loewen's right to bring this NAFTA claim against the United States. By its terms, the *O'Keefe* settlement covers only tort and contract claims by O'Keefe against Loewen, not NAFTA claims by Loewen against the United States.

311. Waiver is particularly inappropriate in this context because Canada, through NAFTA, has effectively delegated to Loewen its sovereign right to espouse Loewen's claim against the United States, and it is well established that private settlements do not deprive a sovereign of the right to bring an international claim. *See Restatement (Third) of Foreign Relations Law* § 713, Reporter's Note 6 (the "United States has taken the position that it will not be bound [by a national's settlement] if its national accepts less than adequate compensation") (citing [1975] Digest of U.S. Practice in Int'l Law 488-89); *see also* Mr. Bayard, Sec'y of State, to Mr. Hill, Feb. 16, 1997, 1887 For. Rel. 100 ("no agreement by a citizen to surrender the right to call on his government for protection is valid either in international or municipal law").

312. Moreover, under general principles of law in leading nations, a settlement with one party is binding only as to that party, not as to third parties against whom other rights may lie. *See, e.g., Cloutte v. Storey* [1911] 1 Ch. 18, 34 ("It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not in contemplation by any of the parties to

such deed." (citations omitted)); *The French Civil Code*, Article 1165 (John H. Crabb, trans., Rev. ed. 1995) ("Agreements are effective only between the contracting parties; they do not harm a third party, and they benefit him only in the case [of a specifically identified third-party beneficiary]."); *United Dairies v. Felletti*, 1992 NSW LEXIS 7066, at *21 (NSW Ct. App., April 3, 1992) (noting that workers' compensation settlement for a redemption of claims "only binds the parties to it" and "has no effect, as such, on the rights of another party"); *Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F.2d 685, 689 (D.C. Cir. 1963) (defendant who sued a third-party for indemnity "did not lose its contract right to indemnification simply because it settled [the original] plaintiff's claim"). These principles should govern this case: Loewen's settlement with O'Keefe did not waive its rights to bring a separate claim against a third party such as the United States.

3. Judicial Acts Are NAFTA Measures

313. The United States errs in suggesting that the Party "measures" regulated by NAFTA include legislative, executive, or administrative measures, but exclude judicial measures. That suggestion is inconsistent with the text, structure, and negotiating history of NAFTA; with the background international-law principles against which NAFTA was enacted; and with NAFTA's basic purposes and objectives. [18]

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[18] All of these traditional interpretive tools have been incorporated into the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980, which provides for interpretation of a treaty "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1)); which defines treaty "context" to include "[a]ny relevant rules of international law applicable to the relations between the parties" (Art. 31(3)(c)); and which permits recourse to "supplementary means of interpretation" either to resolve ambiguity or, even when meaning is otherwise clear, to avoid "a result which is manifestly absurd or unreasonable" (continued...)

314. Article 201 of NAFTA specifies the governmental measures subject to the treaty. It provides that "measure includes any law, regulation, procedure, requirement or practice." These enumerated terms plainly encompass judicial measures. For example, the term "law" — in contrast to the more restrictive term "statute" — clearly includes judge-made law as well as legislatively-enacted statutes. Indeed, the development and enforcement of legal norms through case-by-case adjudications, as occurred in the *O'Keefe* litigation, is the very essence of the common *law*. The term "procedure" plainly encompasses the adjudicatory procedures used by courts, as well as other distinct legislative or regulatory procedures. For example, in the *O'Keefe* litigation, the Mississippi courts purported to justify the arbitrary $625 million appeal bond under Rule 8 of the Mississippi Rules of Appellate Procedure. Even more obviously, the term "requirement" encompasses both procedural orders of courts, which impose requirements for the conduct of litigation, and private civil damages judgments, which impose requirements — backed up by the coercive procedures of state execution law — for defendants to pay money to plaintiffs.[19] By entering judgment in the *O'Keefe* litigation, for example, the trial court imposed a "requirement" that Loewen pay O'Keefe $500 million; then, the trial court and Mississippi

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[18](...continued)
(Art. 32). Another NAFTA tribunal has relied on the Vienna Convention to aid in its construction of Chapter 11. *See* Award on Jurisdiction at 25-38, *Ethyl Corp. v. Canada* (June 24, 1998), *reprinted in* 38 I.L.M. 708, 722-23 (1999). The United States has signed but not ratified the Convention. The U.S. Department of State has nonetheless recognized that "particular articles of the Convention . . . codif[y] existing international law" and therefore are the "foreign relations law of the United States." *Restatement (Third) of the Foreign Relations Law of the United States*, Pt. III, Introductory Note; *see also id.* § 382 ("Interpretation of Treaties") (explicitly adopting Articles 31(1) and 31(3) of the Vienna Convention)).

[19] Under United States law, civil damages judgments constitute a state-imposed "requirement." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) (plurality); *id.* at 548 (concurrence).

Supreme Court imposed a further "requirement" that Loewen post a $625 million bond in order to pursue an appeal without being dismembered by execution; and, in so doing, those courts effectively imposed a further "requirement" that Loewen enter into an extortionate "settlement" with O'Keefe. Finally, the term "practice" plainly encompasses repeated judicial actions as well as repeated executive or administrative actions.[20]

315. Nothing in Article 201 *excludes* judicial actions from coverage under NAFTA. On the contrary, Article 201 merely states that a measure "*includes* any law, regulation, procedure, requirement, or practice" (emphasis added). In contrast, every other definition in Article 201 states what the defined term "means" (a term of exclusion as well as inclusion), not

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[20] If necessary, Loewen will demonstrate that the U.S. judicial system makes a *practice* of issuing excessive verdicts. In 1998 alone, eight juries each awarded over $100 million; the top ten verdicts totaled $2.8 *billion* in the aggregate. *The Top Ten Verdicts Of 1998*, Lawyer's Weekly (Jan. 8, 1999). Recent examples of this practice of unjust excessive verdicts include:

- A Mississippi jury awarding $5 million in punitive damages in an insurance-contract dispute worth, at most, $762;
- An Alabama jury awarding $531 million in punitive damages for an alleged overcharge of $1200 for a television satellite dish;
- A Texas jury awarding an inventor $1.5 *billion* for a number of alleged torts; the plaintiff's lawyer stated: "we let the jury tumble to. And they tumbled to it hard";
- An Alabama jury awarding $50 million in punitive damages because a finance company had allegedly overcharged him $1,000 for a car loan;
- Another Alabama jury awarding $4 million in punitive damages because a car purchaser's automobile had been repainted without his knowledge prior to sale (later reversed by the U.S. Supreme Court as "grossly excessive").

The existence of this "practice" will become a moot issue if the tribunal rules, as it should, either (1) that the judicial actions at issue constitute laws, procedures, or requirements or (2) that judicial actions need not constitute a "law, regulation, procedure, requirement, or practice" in order to constitute a "measure."

what the defined provision "includes." The structure of NAFTA confirms that coverage is defined by reference to subject-matter area, not by reference to modes of party action. Thus, Chapter 7 applies to Party "measures" regarding agricultural trade, Art. 701(1); Chapter 10 applies to Party "measures" regarding government procurement, Art. 1001(1); Chapter 11 applies to Party "measures" regarding foreign investors and their investments, Art. 1101; Chapter 12 applies to Party "measures" regarding cross-border trade in services, Art. 1201(1); Chapter 13 applies to Party "measures" regarding telecommunications, Art. 1301(1)(a); Chapter 14 applies to Party "measures" regarding financial services, Art. 1401(1); Chapter 15 applies to Party "measures" regarding anti-competitive conduct, Art. 1501(1); and Chapter 17 applies to Party "measures" regarding intellectual property rights, Art. 1701(1). It is highly implausible that, within each of these carefully specified subject-matter areas, legislative, executive, and administrative action would be regulated in great detail, but judicial action would be entirely unregulated.

316. Chapter 17 of NAFTA confirms that judicial acts are covered "measures." That Chapter states explicitly: "Each Party shall provide that its *judicial* authorities shall have the authority to order prompt and effective provisional *measures*" to prevent infringement of intellectual property rights. Art. 1716 (emphases added). Article 1716 conclusively demonstrates that the term "measure," as used in NAFTA, includes judicial orders and judgments.

317. Both the United States and Canadian governments have broadly construed the term "measures." The U.S. government has stated that Chapter 11 "applies to *all government measures* relating to investment with the exception of measures governing financial services,

which are treated in Chapter 14." *U.S. Statement of Administrative Action, supra*, at 128 (emphasis added). Like Article 201 itself, that statement contains no suggestion of a blanket exclusion for judicial measures as opposed to legislative, executive, or administrative ones. The Canadian government has stated even more emphatically: "The term 'measure' is a *non-exhaustive* definition of the ways in which governments impose discipline in their respective jurisdictions." *Canadian Statement on Implementation* at 12 (emphasis added). Judicial orders and judgments plainly constitute one of the many possible "ways in which governments impose discipline."

318. The term "measure" has been used to define the coverage of a series of Bilateral Investment Treaties ("BITs") between the United States and its trading partners.[21] These BITs were the precursors of Chapter 11, and the NAFTA negotiators borrowed from them heavily. *See U.S. Statement of Administrative Action, supra*, at 133. The United States has repeatedly construed the BITs to encompass judicial action. For example, in its standard Letter of Submittal of a BIT to the President, the State Department stresses that the prohibition against uncompensated expropriation applied to "essentially 'any measure' *regardless of form*, which has the effect of depriving an investor" of important property rights. *See* K. Vandevelde, *United States Investment Treaties: Policy and Practice* app. C, at 166 (reprinting Basic Submittal Letter) (emphasis shifted). Moreover, in its Letter of Submittal accompanying the Trinidad and

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[21] *See, e.g.*, Draft BIT Art. II.4 (Jan. 21, 1983) ("Neither Party shall in any way impair by arbitrary and discriminatory *measures* the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party." (emphasis added)); *id.* Art. III.1 ("No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other *measures* or series of *measures*, direct or indirect, tantamount to expropriation . . . ." (emphasis added)).

Tobago BIT (at vi), the State Department stated that "adjudicatory decisions" were covered as a form of governmental "regulation." NAFTA should be construed consistent with this settled understanding.

319. International law reinforces the conclusion that NAFTA encompasses judicial measures as well as legislative, executive, and administrative measures. Under international law, it is axiomatic that governments are responsible for the actions of their courts. *See, e.g., Oil Field of Texas, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308, 318 (1986) ("It is well established in international law that the decision of a court in fact depriving the owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court."); Schwarzenberger, *International Law* 691 (3d ed. 1957) ("In principle, States are as much responsible for breaches of international obligations by judicial as by any other State Organs."); Freeman, *Denial of Justice, supra,* at 309 ("a judgment from the viewpoint of international law, is nothing but a manifestation of certain State activity"). Similarly, governments are responsible for the actions of their juries. *See, e.g.*, J. 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, 185 ("to maintain that a state may be held responsible for manifestly unjust judgment of a court means little unless it includes also the verdict of a jury when it is equally unjust"); Freeman, *Denial of Justice, supra*, at 363 ("no ground for distinguishing" jury cases "from other cases in which the judgment of a court is impugnable").

320. The principal protections of Chapter 11 codify or incorporate international-law principles that apply to judicial action. As explained in detail above, international tribunals routinely hold nations responsible for actions of their courts that violate: the antidiscrimination

principles codified in Article 1102 and incorporated into Article 1105, *e.g.*, *Solomon (U.S.A.) v. Panama*, 6 R.I.A.A. 370, 373 (1933); the substantive denial of justice principles incorporated into Article 1105, *e.g.*, *Rihani Claim*, Decision 27-C, American Mexican Claims Report 254, 257 (1948); the procedural denial of justice principles incorporated into Article 1105, *e.g.*, *Idler v. Venezuela (U.S. v. Venez.)*, 4 *Moore's Int'l Arbitrations* 3491 (1898); the "full protection and security" principles codified in Article 1105, *e.g.*, *H.G. Venable (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 219, 229 (1927); the "fair and equitable treatment" principles codified in Article 1105, *e.g.*, *North Sea Continental Shelf*, 1969 I.C.J. 3, 48; and the anti-expropriation principles codified in Article 1110, *e.g.*, *Oil Field of Texas, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep., at 318-19. Indeed, *only* courts can commit a "denial of justice" under international law. *See Restatement (Third) of the Foreign Relations Law of the United States* § 711 cmt. a (1987).[22] It is simply unimaginable that NAFTA codified or incorporated this vast body of precedent throughout Chapter 11, but simultaneously eviscerated these same precedents by excluding judicial action from the scope of covered "measures." Nothing in Article 201, or any other NAFTA provision, supports such an astonishingly implausible result.

321. International tribunals have construed the term "measure" to include judicial acts. In *Regina v. Pierre Bouchereau*, Case 30-77, 1977 ECJ Celex LEXIS 1448 (1977), the European Court of Justice addressed whether a judicial deportation "decision" or "recommendation"

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[22] Comment a states in pertinent part (emphasis added):

> Any injury to an alien for which a state is responsible under this chapter has sometimes been characterized as a "denial of justice." More commonly the phrase "denial of justice" is used narrowly, to refer only to injury consisting of, or resulting from, denial of *access to courts*, or denial of procedural fairness and due process *in relation to judicial proceedings*, whether criminal or civil (emphasis added).

constituted a "measure" under a controlling EEC Council Directive. The ECJ concluded that "the concept of 'measure' *includes the action of a court* which is required by the law to recommend in certain cases the deportation of a national of another member state." *Id.* at *10 (emphasis added). According to the Court, a "measure" broadly encompasses "any action which affects the right of persons coming within the field of application of [the Treaty]." *Id.* at *11.

322. The Iran-United States Claims Tribunal also has construed the term "measures" to include judicial decisions. That tribunal had jurisdiction over "measures affecting property rights." *See* Article II (1), Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981. In *Oil Fields of Texas, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986), the Claims Tribunal construed that phrase to include judicial acts. The claimant in that case asserted that certain actions of the Iranian judiciary constituted an actionable taking of its property. The Tribunal agreed, holding that "there is no question that, under the Claims Settlement Declaration, the Tribunal has jurisdiction over the Respondents and over the subject matter of the claim." *Id.* at 314.

323. The International Court of Justice has construed the word "measure" similarly broadly. In the *Fisheries Jurisdiction Case (Spain v. Canada)*, (Dec. 4, 1998) that Court construed the phrase "conservation and management measures" as used in a Canadian declaration. Appealing to "the sense in which that expression is commonly understood in international law and practice" (*id.* at 28), the Court held that the word "measure" is "wide enough to cover any act step or proceeding, and imposes no particular limit on their material

content or on the aim pursued thereby" (*id.* at 26). Applying that definition, the Court rejected an argument that the word "measure" encompasses executive action but not legislative action. *See id.* at 25-26. Under the same reasoning, the word "measure" cannot encompass legislative, executive, and administrative action, but not judicial action.

324. Article 1120 of NAFTA provides for arbitration under one of three arbitral regimes: the ICSID Additional Facility Rules, the ICSID Convention, or the UNCITRAL Arbitration Rules. Each of these treats judicial acts as "measures": Article 47(4) of the ICSID Additional Facility Arbitration Rules provides that parties "may apply to any competent *judicial* authority for interim or conservatory *measures*" (emphases added); Article 39(5) of the standard ICSID Arbitration Rules (which govern ICSID Convention proceedings) similarly provides that "[n]othing in this Rule shall prevent the parties . . . from requesting any judicial or other authority to order provisional *measures*" (emphases added); and Article 26(3) of the UNCITRAL arbitration rules similarly recognizes the capacity of "judicial" authorities to issue "interim measures of protection" (emphasis added). Moreover, Article 1134 of NAFTA empowers this Tribunal to "order an interim measure of protection." Such an "order" would be far more judicial in nature than legislative, executive, or administrative.

325. Finally, and perhaps most importantly, the term "measure" should be construed consistent with the underlying objectives of Chapter 11: to "increase substantially investment opportunities in the territories of the Parties," Art. 102(1)(c), and, as the Canadian government has explained, to create an "extensive set of obligations which will ensure that Canadian [and American] interests will continue to be protected," *Canadian Statement of Implementation*, *supra*, at 68. Creating a blanket exemption for judicial acts would frustrate those objectives and

produce the absurd result that a Party seeking to avoid its NAFTA commitments — or, for that matter, any country seeking to avoid its commitments under most of the investment treaties now in force — could always accomplish through its judiciary what it could not otherwise accomplish through its legislature or its executive. There is not a shred of evidence that any of the NAFTA signatories, least of all the United States, intended NAFTA's vital investment protections to be so ephemeral.[23]

4. Loewen Provided Timely Notice to the United States

326. The United States errs in suggesting that Loewen did not provide it with timely notice of this NAFTA claim. Article 1119 of NAFTA specifies the notice to which the United States was entitled. In pertinent part, it provides that "[t]he disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted." Loewen satisfied that requirement: On July 29, 1998, 92 days before submitting its Notice of Claim to ICSID, Loewen gave written notice to Robert J. McCannell, Executive Director of the Office of the Legal Advisor of the United States Department of State, of its intention to submit this claim to arbitration.[24]

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[23] Article 102(2) of NAFTA states that "[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in Paragraph 1 and in accordance with applicable rules of international law." That provision confirms that the principal purpose of Chapter 11 — investment protection — should be a paramount consideration in interpreting NAFTA.

[24] *See* App. G to Notice of Claim.

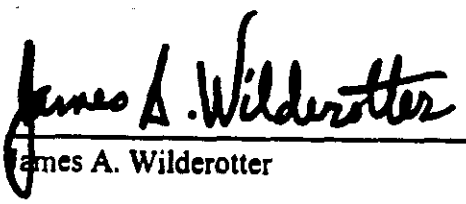
VII. CONCLUSION

For all the reasons detailed above, Loewen requests that this Tribunal find the United States liable to Loewen for the various NAFTA breaches and international law violations that occurred during the *O'Keefe* litigation.

DATED: October 18, 1999

Respectfully submitted,

Christopher F. Dugan



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