IN THE MATTER OF:

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

Claimants/Investors,

V.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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NOTICE OF CLAIM

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I. INTRODUCTION

1. Pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"), investors The Loewen Group, Inc. ("TLGI"), a Canadian corporation, and Raymond L. Loewen, a Canadian citizen who has invested in TLGI, submit to arbitration this claim for damages inflicted upon them and upon Loewen Group International, Inc. ("LGII"), a United States corporation owned and controlled by TLGI. TLGI and LGII (collectively "Loewen") suffered these damages as a direct result of several NAFTA breaches committed during litigation filed against Loewen in the Mississippi state courts by Jeremiah O'Keefe, Sr., his son, and various of their family-owned companies (collectively "O'Keefe"). Mr. Loewen also suffered damages arising out of the same breaches.

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

3. 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.

4. 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 Chairman, Raymond Loewen, were racist (indeed, the judge himself concluded during the trial, without disapproval, that O'Keefe had played "the race card"); 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.

5. 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 patently excessive judgment almost certainly would have been reduced or vacated on appeal, (ii) the cost to Loewen of posting a full bond would have substantially exceeded $200 million, which Loewen could not have recovered even if it had prevailed on appeal, and (iii) 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.

6. By refusing to permit any reduction of the bond, the Mississippi courts effectively foreclosed Loewen's appeal rights. On January 24, 1996, the Mississippi Supreme Court required

Loewen to post a $625 million bond within seven days. Rather than incur over $200 million in non-recoverable costs, Loewen was forced to settle the case under conditions of extreme duress. On January 29, 1996, Loewen settled for $175 million what had begun as a commercial dispute involving transactions worth, in the aggregate, substantially less than $5 million.

7. Several NAFTA provisions were breached during the *O'Keefe* litigation. For example, by admitting extensive anti-Canadian and pro-American testimony and by allowing O'Keefe's counsel to make repeated anti-Canadian and pro-American comments, the trial court violated Article 1102 of NAFTA, which bars discrimination against foreign investors and their investments. That illegal discrimination was, in essence, ratified by the Mississippi Supreme Court's refusal to reduce the bond requirement. Similarly, by permitting the extensive nationality-based, race-based, 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 was also violated by the grossly excessive verdict and judgment and by the Mississippi courts' arbitrary application of the bonding requirement. Finally, the discriminatory conduct, the excessive verdict, the denial of the right to appeal, and the coerced settlement violated Article 1110 of NAFTA which bars the uncompensated expropriation of investments of foreign investors.

8. At the request of counsel for Loewen, Sir Robert Jennings, Q.C., former President of the International Court of Justice, reviewed the record of the *O'Keefe* litigation. He concluded that the verdict and judgment were the product of anti-Canadian bias deliberately 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 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.

9. At the request of counsel for Loewen, the Honorable Richard Neely, former Chief Justice of the West Virginia Supreme Court of Appeals, also reviewed the record of the *O* 'Keefe litigation. Chief Justice Neely 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 ofjustice." *Id.* at 3.

10. At the request of counsel for Loewen, the Honorable Kirk Fordice, Governor of the State of Mississippi, has agreed to provide this Tribunal with his views of the *O* 'Keefe litigation. Governor Fordice 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

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

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

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 Missisippi 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 0 *'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 ofjustice that I can assure you is otherwise contrary to the public policies of the great state of Mississippi." Id. at l-2.

11. At the request of counsel for Loewen, Professor Andreas Lowenfeld of the New York University School of Law has agreed to provide this Tribunal with his views of the 0 *'Keefe* litigation. Professor Lowenfeld will provide an expert report and/or will testify that the 0 *'Keefe* verdict and the failure to waive the appeal bond requirements were a violation of NAFTA and international law because they were discriminatory, unfair and inequitable, a denial of both substantive and procedural justice, and tantamount to expropriation.'

12. For two separate reasons, the United States is responsible for the NAFTA breaches that occurred during the 0 *'Keefe* litigation. First, Article 105 of NAFTA requires the United States to ensure that its state governments comply with the terms of 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

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

[4] A summary of Professor Lowenfeld's opinion and Curriculum Vitae are attached as Exhibit D.

espoused this position for decades. Second, by tolerating the various NAFTA breaches 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.

13. These NAFTA breaches caused various harms to Loewen. Most obviously, they produced a discriminatory and grossly excessive $500 million verdict and judgment, foreclosed as a practical matter any possible appeal, and thus coerced a grossly excessive $175 million settlement. Moreover, the excessive verdict and coerced settlement in turn damaged Loewen's business reputation, reduced Loewen's prospects for growth and investment, and impaired Loewen's credit rating and ability to raise money. Loewen suffered these various harms beginning on November 1, 1995, the date of the initial verdict. The Mississippi litigation represented, for the worst, a defining moment for Loewen, which continues to suffer these and other harms to this day.

14. The NAFTA breaches in the *O 'Keefe* litigation also caused various harms to Raymond Loewen both individually and as a shareholder of TLGI. Between October 3 1, 1995, one day before the initial verdict, and January 29, 1996, immediately after the settlement was announced, the value of Mr. Loewen's shares of TLGI plummeted from C$53¾ to C$39. Moreover, Mr. Loewen suffered grave damage to his reputation beginning on November 1, 1995 and continuing to this day.

II. PARTIES TO THIS ARBITRATION

15. Claimant The Loewen Group, Inc. ("TLGI") is a publicly traded corporation organized under the laws of British Columbia, Canada; it is a national of Canada and no other nation. The principal operating subsidiary of TLGI is Loewen Group International, Inc. ("LGII"), a corporation organized under the laws of Delaware, United States of America. TLGI owns 85% of the shares of LGII and directly controls LGII, which in turn owns and controls various lower-tier United States subsidiaries. TLGI's address is 4126 Norland Avenue, Bumaby, British Columbia, Canada, V5G 3 S8.

16. Claimant Raymond L. Loewen is a national of Canada and of no other nation. Mr. Loewen presently serves as co-Chairman of the Board of TLGI and as Director of LGII. When this claim arose, he was Chairman and Chief Executive Officer of both companies. At all times between then and now, Mr. Loewen has held a substantial percentage of the publicly traded shares of TLGI. Mr. Loewen's address is 4126 Norland Avenue, Bumaby, British Columbia, Canada, V5G 3S8.

17. Respondent The United States of America is a signatory to NAFTA. For purposes of disputes arising under NAFTA, the United States' address is c/o Robert J. McCannell, Esq., Executive Director, Office of the Legal Advisor, Suite 5 19, Department of State, 2201 C Street, N.W., Washington, D.C. 20520. See 58 Fed. Reg. 68,457 (1993) (copy attached at Exhibit G).

18. The relevant provisions embodying the agreement of the parties to refer this dispute to arbitration and regarding the number of arbitrators and their method of appointment may be found in Articles 1122 *et* seq. of NAFTA and in the Consent to Arbitration and Waiver of Other Dispute Settlement Procedures, filed contemporaneously herewith.

19. The date of approval by the Secretary-General of ICSID, pursuant to Article 4 **of** the Additional Facility Rules, of the agreement of the parties providing for access to the Additional Facility, will be supplied at a later date.

20. On July 29, 1998, TLGI and Raymond Loewen notified the United States of their intention to submit this claim to arbitration, as required by Article 1119 of NAFTA.

21. By letter dated September 25, 1998 (copy attached at Exhibit G), TLGI and Mr. Loewen offered to consult or negotiate about this claim as suggested by Article 1118 of NAFTA In mid-October, 1998, the United States agreed to meet with counsel for Loewen. On October 22, 1998, counsel for the parties met and consulted, but that meeting did not result in a settlement.

III. FACTS

A. The Commercial Disputes Between O'Keefe And Loewen

22. The O'Keefe family has owned funeral homes in Mississippi since the latter half of the 19th century. (Trial Transcript (hereinafter "Tr.") at 2010)[5] 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)

23. 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

[5] A copy of the trial transcript from the *O 'Keefe* litigation is being filed together with this Notice of Claim.

"App.") at A60, A62-63)[6] Riemann Holdings in turn acquired Wright & Ferguson Funeral 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, 3049-5 1)

24. 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 Croup 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 12.5 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 3,45 1 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

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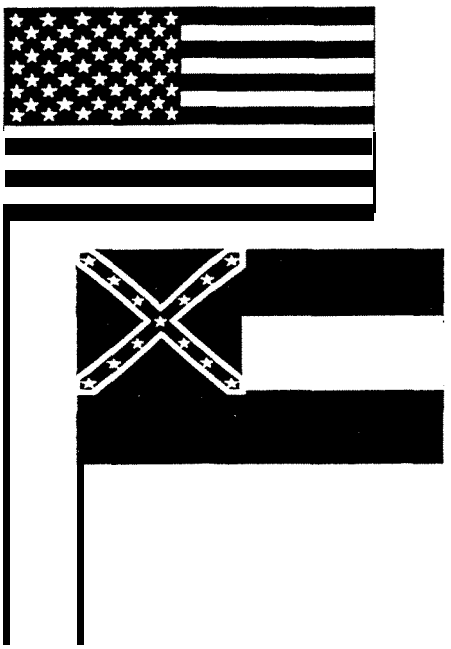
[6] Materials relevant to the 0 *'Keefe* case (other than the trial transcript) are being filed in an appendix to this Notice of Claim; all citations are to the Appendix page numbers.

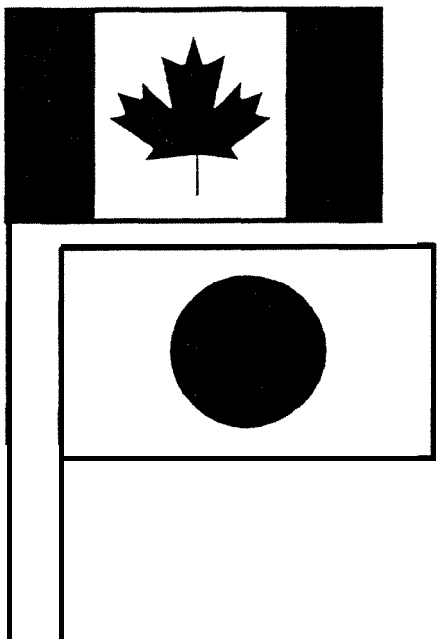
> and was awarded the Navy Cross, our countr[y's] highest award. . To remain free and at liberty were among the strongest goals of the people. Freedom allowed Riemann to sell their funeral homes to a foreign firm. Riemann is now owned by a Canadian firm, financed over [$]25 million from a Hong Kong bank. 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)

25. 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.

DOESTHEBUSINESS YOU PATRONIZE KEEP YOUR MONEYINTHE LOCAL ECONOMY?





YES.

O'BRYANT-O'KEEFE
FUNERALHOME

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
FUNERALHOME

26. 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)

27. 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)

28. On April 24, 199 1, 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.

29. 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 find 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)

30. The 199 1 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 provide; relationship, and (iii) the details regarding how the insurance trust fund would be valued and held. (App. at A7 I-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, A8 I, A670, A689)

31. The 199 1 agreement required all transactions to close within 120 days (i.e., by December 17, 199 1), "provided all documentation has been provided, all valuations determined, and all requirements met." (App. at A75-76, A630-3 1) 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)

32. In February 1992, the FBI 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 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)

33. 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 $5 million. (App. at A33)

34. 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

35. 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)

36. 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.

37. 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 federal

court, where all judges are appointed and have life tenure, and are thus not beholden to any particular local constituency.

38. 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 B 1, C6; *Winning Words: Willie E. Gary's Voir Dire, opening Statement and Closing Argument in the Civil Trial of the Century* (App. at A5 19).

39. 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)

40. 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

41. 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. .

42. 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 fiends . . 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)

43. 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 A3.57)

44. 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 any-thing about. this case, the O'Keefe family suing The Loewen Group out of Canada . . . ?" (App. at A383)

45. 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, 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)

46. 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)

47. 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)

48. 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 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 objected, but Judge Graves overruled the objection. (App. at A373)

49. 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) During his opening and closing arguments, 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)

50. 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)

51. From the outset, Gary emphasized to the prospective jurors the huge damages 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

52. O'Keefe's opening statements sounded the themes that would resonate throughout the trial — nationality (Mississippians and Americans versus Canadians), race (Loewen was a racist company), and economic status (small local company versus giant multinational conglomerate).

53. 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)

54. 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 199 1 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)

55. 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)

56. 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).

57. 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).

58. 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)

59. Gary described how Loewen and O'Keefe had negotiated the 199 1 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)

60. 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

61. 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

62. O'Keefe called John Turner, who had worked as a senior Loewen executive for approximately two years. (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 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

63. O'Keefe called Mike Espy, a prominent local black politiciari, to give wholly irrelevant testimony that O'Keefe (who is white) is not a racist. Espy had been U.S. Secretary of Agriculture in 1993 and 1994 until he was investigated (and later indicted) 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)

64. Gary invited Espy to discuss O'Keefe's attitudes about race: "[As] an Afi-ican-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)

65. 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 with what I've done in my life, try to protect people, protect the American market." (Tr. at 1101-02)

66. 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)

67. 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**

68. Gary called Earl Banks, a black state legislator and Jackson funeral home operator, to give further irrelevant testimony that O'Keefe is not a racist. Banks stressed that he had lived in Jackson his whole life (Tr. at 11 10-12), that he received a law degree from the Mississippi College School of Law (Tr. at 111 1), that he represents the local district in the Mississippi legislature (Tr. at 111 1-12), and that his business was "celebrating 70 years of service here in the City of Jackson" (Tr. at 1112).

69. Banks described how the funeral industry in general was racially segregated (Tr. at 1116- 17, 113 8-4 1), 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

70. Jerry 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)

71. 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 11." (Tr. at 2007)

72. 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)

73. 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)

74. 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 202526)

75. 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 23 52) 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)

76. 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 2 108)

77. 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)

78. 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**

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

80. 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 283 l-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)

81. 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

82. 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 353 l-35) Under the Fifth Amendment, witnesses cannot be forced to testify if the testimony would incriminate them.

g. “The Race Card Has Been Played”

83. 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)

84. 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 A5 19).

85. 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) 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)

86. 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

87. 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 5 117) Three f&her 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 5 118) 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 5 119) 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 5 18 1)

88. 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 5 147) Gary also stressed how the Riemanns "came to Canada, storm[ed] in [to] your office, called you on the carpet . ." (Tr. at 5 119) Gary repeated: "Dave Riemann, Bob Riemann and his daddy, they came all the way to Canada, tight." (Tr. at 5 133)

89. 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 5 122) 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 5 128) 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 5 153)

90. 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 fixing 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. LOEW'EN: That's what I said.

(Tr. at 5 169)

91. Gary then raised the issue of "fimeral home ownership, local versus foreign." (Tr. at 5 174) 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 5 171) 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 5 175) Gary then proceeded to re-read the Attorney General's letter to the jury for a third time. (Tr. at 5 174)

92. 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. 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 5 106) "Can you land a helicopter on your yacht?' (Tr. at 5 106-07) 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 5 107) 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 5 1 OS)

93. 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 5 185)

i. Earl Banks (Rebuttal)

94. 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.

95. 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.
> 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. Closing Arguments

96. Gary began his closing argument by revisiting many of the themes struck in his opening statement — nationality, race, and wealth. Gary first emphasized 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 5540-4 1) 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, 5.578, 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 558 l-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- I 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 199 1 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 199 I 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, Jeffy O'Keffe 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)

5. The Initial Verdict

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. 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:	$3 1,200,000
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 199 1 Agreement:	$54,600,000
Tortious breach of the 199 1 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 'A65 l-58)

106. After the 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 moved for a mistrial, arguing that the verdict was biased, excessive, and contrary to the Court's instructions. (Tr. at 5738-39) Judge Graves denied Loewen's motion without discussion. (Tr. at 5739) Based on the jury foreman's note, and after refusing to poll the jury as Loewen had requested, Judge Graves "reformed" the verdict to reflect $100 million in compensatory damages and then continued with a punitive damages phase. (Tr. at 5742-44)

6. **The Punitive Damages Phase**

108. 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)

109. 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) The obvious implication was that a $160 million punitive damages award would be inadequate.

110. In his opening statement on punitive damages, Gary made a 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.*

118. After the verdict, the jury foreman made a public statement that Ray Loewen "'was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn't work."' N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South,* New York Times, Jan. 27, 1996, at AI, A6.

119. Loewen filed three post-verdict motions to set aside or reduce the biased and excessive verdict. (App. at A660) Judge Graves denied all motions orally (App. at A8 14, A8 16) and entered judgment on the verdict.

7. The Appeal Bond And Coerced Settlement

120. Mississippi law generally requires appellants to post a bond for 125% of the judgment. Miss. R. App. P. S(a). However, Mississippi law also provides for reduction or elimination of the bond requirement "for good cause shown." Miss. R. App. P. 8(b). The Mississippi Supreme Court promulgated the "good cause" rule in response to *Henry v. First National Bank of Clarksdale*, *424* F. Supp. 633, 638-39 (N.D. Miss. 1976), *aff'd*, *595* F.2d 291 (5th Cir. 1979), cert. *denied,* 444 U.S. 1074 (1980), in which the U.S. federal courts held that the United States Constitution bars application of the full 125% bonding requirement in cases where the cost of posting the bond "would effectively bankrupt" the party seeking to appeal (595 F.2d at 305).

121. In this case, 125% of the judgment was $625 million — virtually all of Loewen's net worth. (App. at A736) The surety bond companies that Loewen contacted required 100% collateral in the form of a $625 million letter of credit. (App. at A980, A994)

122. Loewen could not have financed a $625 million letter of credit through new debt. Loewen already had approximately $736 million of outstanding debt, and taking on $625 million in new debt would have drastically increased its debt-equity ratio. That, in turn, would have violated covenants that Loewen had made to existing creditors, thus making the $736 million immediately due and payable. (App. at A982-83) Indeed, industry analysts speculated that "obligations related to the 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. Loewen's existing creditors refused to waive any of their covenants. (App. at A998, Al 005)

123. The only other way for Loewen to finance a $625 million letter of credit was to quickly sell new equity at "fire-sale" prices. (App. at A985-86) The cost to Loewen of pursuing an appeal — including the bonding cost itself (assuming a bond was available), the cost of selling equity at distress prices to finance the bond, and the added costs of continuing to finance TLGI's operations — was conservatively estimated at well over $200 million for the first two years alone. (App. at Al 145) Loewen could have recovered virtually none of these costs even if it had completely prevailed on appeal.

124. On November 28, 1995, Loewen filed a motion to reduce the appeal bond to $125 million *(i.e.,* 125% of the *compensatory* damages awarded by the jury). Loewen explained why it could not feasibly obtain a $625 million bond. (App. at A827-28) To protect O'Keefe's interest as a judgment creditor, Loewen offered, while an appeal was pending, to (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 monthly financial reports. (App. at A1025-26)

125. On November 29, Judge Graves concluded that there was not "good cause" for *any* reduction in the $625 million appeal bond. Judge Graves asserted that, despite the protections offered by Loewen, *no* reduced bond would adequately protect O'Keefe's interests. (App. at A1078) By contrast, the U.S. federal courts have concluded that, because punitive damages are by definition a "windfall" to plaintiffs, defendants should not be required to post an appeal bond for the punitive component of a potentially bankrupting judgment. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 786* F.2d 794, 796-97 (7th Cir. 1986);

see also Trans World Airlines, Inc. v. Hughes, 3 14 F. Supp. 94, 96 (S.D.N.Y. 1970) (courts are permitted to waive appeal bond "so that, in effect, the defendant's right of appeal would not be destroy&").

126. Loewen immediately sought review from the Mississippi Supreme Court. Despite granting Loewen interim relief on November 30, 1995 (App. at Al 082), and on December 19, 199.5, the Mississippi Supreme Court ultimately concluded that there was no "good cause" for any reduction in the appeal bond. (App. at Al 176) On January 24, 1996, over the dissent of two justices, that court ordered Loewen to post a $625 million bond, within seven days, in order to pursue an appeal. (App. at Al 176)

127. The Mississippi Supreme Court decision, which gave Loewen only one week to come up with hundreds of millions of dollars in financing, effectively foreclosed Loewen's appeal rights. On January 29, 1996, rather than incur well over $200 million in costs in 1996 and 1997 alone to pursue an appeal bond that still might not be available, Loewen settled the *O'Keefe* litigation, under extreme duress, for $ 175 million. Under the settlement, O'Keefe received $50 million in cash on January 3 1, 1996, 1.5 million Loewen shares on February 15, 1996, and annual payments of $4 million for the next twenty years. C. Osterman, *Loewen Escapes Bankruptcy with Lawsuit Settlement*, Reuters, Jan. 29, 1996. Although only 35% of the verdict and judgment, the $175 million settlement was still 30 to 50 times greater than the total value of the principal companies at issue in the underlying commercial dispute.

128. The settlement between O'Keefe and Loewen did not and could not waive Loewen's right to pursue this claim against the United States.

C. The Harms Suffered By Claimants/Investors

129. The excessive verdict and coerced settlement caused various damages to Loewen, including not only the $175 million settlement, but also (i) reduced opportunities for growth and investment, (ii) harm to Loewen's business reputation, (iii) reduced credit ratings, (iv) increased financing costs, and (v) other harms. Loewen suffered these harms beginning on November 1, 1995 and continuing to the present. Because of these immediate and continuing harms, the *O 'Keefe* litigation has, unfortunately, become the defining moment in Loewen's recent corporate history.

130. Several industry analysts have noted the grave impact of the excessive verdict and coerced settlement on Loewen's future business opportunities. In discussing the initial $260,000,000 verdict, one analyst noted: "'It's a tremendous amount of money. That would seriously restrict their acquisition program, which in turn fuels earnings growth."' C. Osterman, ***Loewen** Stock **Plunges After Surprise Damage Ruling,*** Reuters, Nov. 2, 1995. That analyst concluded that Loewen's "rapid growth [would] slow dramatically as a result of its legal troubles, which are likely to drain financial resources and hurt the company's reputation." C. Osterman, *Loewen's Woes Worsen with New Lawsuit,* Reuters, Nov. 7, 1995.

131. The excessive verdict and coerced settlement harmed Loewen's business reputation as well as its growth prospects. The *Wall Street Journal* explained:

> 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 publicity surrounding the jury verdict against the company. In addition, its growth prospects hinge on its ability to continue acquiring funeral homes and related assets in U.S. and Canada, where it has aggressively expanded its operations in recent years.

T. Carlisle, *Ruling May Force Loewen to Seek Bankruptcy Shelter,* Wall St. J., Jan 2.5, 1996, at B5.

132. The excessive verdict and coerced settlement also adversely affected Loewen's ability to obtain financing. For example, the *O 'Keefe* litigation prompted Standard and Poor's to revise Loewen's credit rating from "positive" to "negative." C. Osterman, *Damage Award Plunges Loewen into Legal Nightmare,* Reuters, Nov. 5, 1995.

133. Loewen's financial vulnerability after the *O 'Keefe* litigation prompted an attempted takeover in 1996, which Loewen spent substantial resources defending against. R. Siklos, *A Big Bump on Loewen Group 's Long Winding* Road, Financial Post, Sept. 16, 1997; J. Schreiner, *Loewen Plays Catch-Up with a Vengance,* The Financial Post (Toronto), June 13, 1997, at 24; C. Osterman, *Funeral Mogul Loewen Fights Back,* Reuters Financial Service, Jan. *26,* 1997; G. Hassell, *Talk of the Funeral Business,* The Houston Chronicle, Oct. 26, 1996, at 1.

134. Loewen continues to suffer the effects of the excessive verdict and coerced settlement. Industry analysts have concluded that Loewen's present financial condition is directly traceable to the Mississippi litigation. B. Constantineau, *Loewen Eagle Groundedfor Good, Analysts Fear: Company 's Woes Can Be Traced Back to Mississippi Breach of Contract Lawsuit, Anaiysts* Say, Vancouver Sun, August 1, *1998,* at H1; Siklos, *supra;* D. Francis, *Diamonds and Tourism Are Today 's Bargains,* The Financial Post (Toronto), Oct. 15, 1998, at 25; J. Vardy, *Canadian Funerai Companies Eye the Pickings at Loewen,* The Financial Post (Toronto), Oct. 14, 1998, at 1.

135. In July 1998, Loewen's largest institutional investor called for the sale of the company on the basis that it had failed to recover from the Mississippi lawsuit. *Sell Loewen, Institutional Shareholder Demands,* Vancouver Sun, July 29, 1998.

136. The excessive verdict and coerced settlement also caused severe damage to Raymond Loewen, including (i) decrease of value of his investment in TLGI and (ii) harm to his reputation.

137. The financial markets concluded that TLGI had suffered severe damage above and beyond the $175 million settlement. When the $500 million verdict was announced, the price of TLGI stock was "devastated." W. Chow, *Loewen Faces $500 Million US Payout: Mississippi Court Orders Damages in Acquisition Suit: Loewen: News Stuns Investors,* Vancouver Sun, Nov. 3, 1995, at D1. On October 3 1, 1995, the day before the first verdict was announced, TLGI closed at C$53¾. After the settlement was announced, TLGI closed at C$39, a 27.4% drop from its value before the November 1 verdict. The total drop in market value was approximately US *$550* million.[7]

138. Mr. Loewen's reputation was gravely damaged by the *O 'Keefe* litigation, in which he was repeatedly and unfairly derided as, for example, a "rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy."' N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South,* New York Times, Jan. 27, 1996, at Al, A6.

IV. NAFTA VIOLATIONS

The conduct of the 0 *'Keefe* litigation violated NAFTA provisions barring discrimination against foreign investors and their investments, NAFTA provisions requiring a minimum standard

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[7] Charts illustrating the damage to Loewen's market value caused by the 0 *'Keefe* verdict are attached as Exhibit E. The first chart shows Loewen's Toronto Stock Exchange price performance from July 1, 1995 through June 30, 1996. The second chart compares Loewen's stock performance with Service Corporation International's, an industry competitor, and with the S&P 500, from January 1990 to the present.

of treatment for investments of foreign investors, and NAFTA provisions barring uncompensated or discriminatory expropriation of investments of foreign investors.

A. Discrimination (Articles 1102 and 1105)

139. The introduction of extensive anti-Canadian and pro-American testimony and counsel comments during the *O 'Keefe* litigation violated Articles 1102 and 1105 of NAFTA This irrelevant and highly prejudicial testimony and commentary 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.").

140. By its terms, Article 1102 of NAFTA requires the United States and its states to accord Canadian investors and their investments treatment no less favorable than the treatment accorded to similarly situated United States investors and their investments. In pertinent part, Article 1102 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.

In being subjected to extensive, irrelevant, and highly prejudicial comments about its nationality, Loewen was treated less favorably than similarly situated United States investors and their investments.

141. The introduction of anti-Canadian evidence and comments during the *O'Keefe* litigation also violated Article 1105 of NAFTA, which provides in pertinent part that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law." Under international law, an alien is entitled to an impartial trial untainted by invidious discrimination. *See, e.g., Restatement (Second) of 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); 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 M. Whiteman, *Digest of International Law 407, 722, 724, 725* (1967); 5 G. Hackworth, *Digest of International Law 527 (1943).*

142. A legal proceeding violates international law if it includes irrelevant and prejudicial remarks about the nationality of an alien. 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 United States successfully argued 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 1 1/11/60, *quoted* in 8 M. Whiteman, *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 v. Panama (U.S. v. Pan.),* 6 R.I.A.A. 370,373 (1933). In awarding damages to the defendant, the United States-Panama Claims Commission concluded that the trial had been improperly "influenced by strong popular feelings" and strong "local sentiment." See *id.*

143. As explained in detail above, irrelevant and discriminatory remarks infected the entire trial in this case, 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 110 l-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 impact of these xenophobic appeals was reflected in the grossly excessive verdict and in the jury foreman's public statement that Ray Loewen "'was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy."' N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South,* New York Times, Jan. 27, 1996, at Al, A6. The trial court's invidious discrimination severely damaged Loewen when the verdict was rendered and when the Mississippi Supreme Court refused to reduce the appeal bond.

B. Minimum Standard Of Treatment (Article 1105)

144. Even apart from its rank anti-Canadian bias, the O *'Keefe* litigation failed to satisfy the "minimum standard of treatment" to which all investments of Canadian investors are entitled under Article 1105 of NAFTA. Article 1105 requires treatment "in accordance with international law, including fair and equitable treatment." That requirement was violated in three different ways.

1. Substantive Denial of Justice

145. Under settled principles, an egregiously wrong judicial judgment violates international law and is sometimes described as a substantive "denial of justice." *See, e.g., Rihuni 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, The *Law of 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 (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 ofjustice" includes "unjust decisions"); E. Borchard, *The Diplomatic Protection of Citizens Abroad 340 (19* 16) ("grossly unfair or notoriously unjust decision" violates international law).

146. 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 ofjustice' . . has come to comprehend all acts of governmental authorities, legislative, executive, *andjudicial,* 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).

147. In civil cases, judicial decisions have often been held to violate international law. In the *Rihani Claim,* for example, an international commission reviewed a decision by the Mexican Supreme Court and found it "to be such a gross and wrongful error as to constitute a denial of justice." Decision 27-C, American Mexican Claims Report, at 257. Similarly, in *Bronner* v. Mexico (U.S. v. Mex. 1874), an international umpire awarded compensation to a claimant whose goods had been confiscated by Mexican customs authorities. *See* 3 Moore *'s Int 'l Arbitration* 3 134. Although a Mexican court had concluded that the confiscation was permissible, the umpire found that decision to be "so unfair as to amount to a denial of justice." *Id.* In the *Burt Case* (U.S. v. Gt. Brit. 1923), Nielsen's Report 588 (1926), an international tribunal disagreed with the result of a property adjudication by the Fiji Islands' Board of Land Commissioners, and thus ordered that the claimant receive just compensation. *Id.* at 596-97.

148. In the criminal context as well, courts violate international law when they impose punishment disproportionate to the offense. Thus, courts violate international law when they impose unreasonably harsh sentences on aliens, *see, e.g., Quintanilla Claim* (U.S. v. Mex. 1926).

Opinions of the Commissioners 13 6, *13 8 (1927); Dyches Claim* (U.S. v. Mex.), Opinions of the Commissioners 193, 197 (1929); A. Freeman, *Denial* of *Justice* at 196-2 14, or when they impose unreasonably lenient sentences on citizens who commit crimes against aliens, see, *e.g.*, *Kennedy Claim* (U.S. v. Mex.), Opinions of the Commissioners 289, 292 (1927); *Morton Claim (U.S. v.* Mex.), Opinions of the Commissioners 15 1, 160 (1929). 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 ofjustice and a violation of international law. See *Denham*, Hunt's Report, at 506.

149. International law does not distinguish between judgments rendered after bench trials and those rendered after jury trials. Either kind ofjudgment 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. Gamer, *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 ofjustice the [S]tate, it would seem, should be equally responsible." *Id;* see *also* A. Freeman, *Denial of Justice, supra,* at 363 (finding "no ground for distinguishing" jury verdict "from other cases in which the judgment of a court is impugnable").

150. Under international law, large awards of punitive damages are suspect. 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, *Transnationai 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"). Although the domestic law of any individual country is not controlling, these standards are collectively significant because international law "may be ascertained . . . by the general usage and practice of nations." *United States v. Smith, 5* Wheat. *(18 U.S.)* 153, *160-6* 1 *(1820); see Filartiga v. Pena-Irala, 630* F.2d 876, 880 (2d Cir. 1980).

151. The $400 million punitive damages award at issue here is grossly excessive and unjust, and therefore violates international law, under any conceivably applicable standard. As explained in detail above, that award was 50 times the size of the largest punitive damages award ever considered by the Mississippi Supreme Court; more than 200 times the largest punitive damages award ever affirmed by that court; 16 times the size of the economic damages (including consequential damages) allegedly suffered by O'Keefe; more than 80 times the entire net worth of the principal companies at issue in the underlying business transaction; and 63% of Loewen's entire net worth.

152. Large awards for emotional distress are equally suspect under international law. In contrast to the United States tort system, which permits subjective awards for pain and suffering

that are disproportionate to the plaintiffs physical or economic damages, see, *e.g.*, W.P. Keeton, et al., *Prosser and Keeton on Torts* § 54, at 359-61 (5th ed. 1984), almost ail other countries require tort damages to be proportionate to physical or economic damages. See, e.g., *Re the Enforcement of a US. 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,* 49 1 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."). As explained above, the generally prevailing municipal legal standards shed light on the appropriate international-law standard. *See Smith, 5* Wheat. (18 U.S.) at 160-61.

153. The jury award of approximately $75 million in emotional damages was grossly excessive and unjust, and therefore violated international law, under any conceivably applicable standard. As explained above, those damages — calculated at the absurdly inflated rate of $50,000 per day, even though the underlying alleged injuries were purely economic in nature — were three times the size of the economic damages (including consequential damages) allegedly suffered by O'Keefe.

154. The economic damages awarded by the *O'Keefe* jury were grossly excessive. Even in the United States (as elsewhere), it is well-settled that consequential damages should not be awarded in contract cases unless they are foreseeable. *See, e.g., Restatement (Second) of Contracts § 244* cmt. a (1977); *Hadley v. Baxendale, 9* Ex. 34 1, 156 Eng. Rep. 145 (1854). In this case, the vast bulk of the economic damages claimed and awarded were consequential damages allegedly flowing from the administrative supervision of Gulf National. Under any reasonable standard of foreseeability, those damages should not have been recoverable.

155. In total, the jury awarded O'Keefe $500 million in a case where the underlying dispute involved the exchange of two funeral homes worth approximately $2.5 million for one insurance company worth approximately $4 million. In the words of Sir Robert Jennings, the amount of this award, and the resulting judgment, is "bizarre" (Jennings Op. at 4), "outrageous" (id. at 8), "astonishing" (id. at 13), and "so bizarrely disproportionate as to almost defy belief' (id.). If the judgment against Loewen in the *O 'Keefe* litigation was not a denial of justice, then no civil judgment is or could be.

2. Procedural Denial of Justice

156. A state also violates international law, and commits what is sometimes described as a procedural "denial of justice," 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 "unwarranted delay or obstruction of access to courts, gross deficiency in the administration ofjudicial 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. See, e.g., *Idler v. Venezuela (U.S. v.* Venez. 1885), 4 Moore *'s Int 'I Arbitrations* 349 1 (1898); *Brown Case* (U.S. v. Gt. Brit. 1923), Nielsen's Report 187 (1926); *Barcelona Traction* (Belg. v. Spain), 46 I.L.R. 288, 3 18 (1970) (separate opinion of J. Tanaka); *Restatement (Third) of Foreign Relations Law of the United States* § *7* 11 cmt. a (1987); E. Borchard, *The Diplomatic Protection of Citizens Abroad 334-37 (191.5).*

157. The Mississippi trial court committed procedural denials of justice by allowing O'Keefe's lawyers to repeatedly elicit irrelevant and highly prejudicial testimony, and to make irrelevant and highly prejudicial comments, about the nationality, race, and class of the principal parties in the litigation. As explained at length above, that testimony and those comments

pervaded the entire trial, inflamed the jury against Loewen, and produced the ultimate excessive verdict and judgment.

158. The trial court and the Mississippi Supreme Court also committed procedural denials ofjustice by requiring Loewen to post a $625 million bond in order to pursue its appeal. **As** explained in detail above, this arbitrary application of the appeal bond rule effectively foreclosed Loewen's right of "access," 1929 Draft Convention Art. 9, to the Mississippi appellate courts. The Mississippi courts thus effectively compelled Loewen to pay a coerced and excessive $175 million settlement. In so doing, the courts not only solidified the damage flowing from the biased trial and excessive verdict, but committed independent procedural denials ofjustice as well.

3. Denial of "Fair and Equitable Treatment"

159. The same actions that constituted substantive and procedural denials ofjustice under international law also constituted denials of "fair and equitable treatment" within the meaning of Article 1105 of NAFTA.

160. The "fair and equitable treatment" standard set forth in Article 1105, which is drawn from several United States Bilateral Investment Treaties, including the Model United States BIT, goes "far beyond" the minimum protections afforded to foreign investors under international law. *See* F.A. Mann, *British Treaties for the Promotion and Protection of Investments,* 52 Brit. Y.B. Int'l L. 24 I-244 (198 1) ("fair and equitable treatment" standard "is a much wider conception" and goes "much further" in protecting foreign investments); 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); Caudgeon, *United States Bilateral Investment Treaties,* 4 Int'l Tax & Bus. Law. 105, 125 (1986) (concept of fairness and equity

serves as a guide to interpreting and applying treaty provisions "in a manner most favorable to the investor")

161. For the same reasons that the Mississippi courts denied justice to Loewen, they also failed to provide Loewen with "fair and equitable treatment." Indeed, even if the *O 'Keefe* litigation did not rise to the level of a "denial ofjustice" under international law, it would nonetheless violate the "much wider" protection afforded under the "fair and equitable treatment" standard.

C. Expropriation (Article 1110)

162. The excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA.

163. Article 1 1 1 0(1) of NAFTA states:

> 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 in accordance with paragraphs 2 through 6 [of this Article].

164. Under settled international law, an expropriation occurs where government action interferes with an alien's use or enjoyment of property. *See, e.g., Tippetts, Abbett, McCarthy, Stratton* v. *Iran,* 6 Iran-U.S. C.T.R. 219, 225 (1984); *Starrett Housing Corp. v. Iran,* 4 Iran-U.S C.T.R. 122, 154, 172 (1983); *Restatement (Third) Foreign Relations Law of the United States* § 712, cmt. *g (1987);* L. Sohn & R.R. Baxter, *Responsibility of Statesfor Injuries to the Economic Interests* of *Aliens,* 55 Am. J. Int'l L. 545, 553 (1961) (hereinafter "1961 Draft Convention").

165. Expropriation can occur where the State itself acquires nothing of value, but "at least has been the instrument of redistribution." A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal 66 (1994). See, e.g., Poehlmann v. Spinnerei AG, 3* U.S. Ct. Rest. App. 70 1, 702-04, 710 (1952); G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal 188 (I 996); Tippetts*, 6 Iran-U. S. C.T.R. at 225.

166. The United States itself has long recognized that expropriation covers "a multitude of activities having the effect of infringing property rights." Statement of the President, U.S. Government Policy on International Investment (Sept. 9, 1983), reported in [1981-88] 2 Cumulative Digest of U.S. Practice in International Law, 2304, 2305; see ***also 8*** M. Whiteman, *Digest of International Law 1007* (1967); *Corn Products Refining Company Claim*, 1955 Int'l L. Rep. 333, 334.

167. The excessive verdict, denial of Loewen's appeal rights, and coerced settlement violated Article 1110 for several reasons. *First,* these measures had the effect of severely infringing and interfering with Loewen's property rights, and thus were tantamount to expropriation. *Second,* Mississippi has no "public purpose" for providing such huge private windfalls to O'Keefe, as required by Article 11 10(l)(a). *Third,* as explained above, the verdict and coerced settlement were the product of anti-Canadian discrimination, and thus not imposed "on a non-discriminatory basis" under Article 11 10(l)(b). *Fourth,* for reasons explained above, the verdict, denial of appeal, and coerced settlement satisfied neither Article 1105(1) nor the alternative "due process" requirement under Article 11 10(l)(c). *Fifth,* Loewen has not been compensated either for the coerced settlement or for the further harms it has suffered as a result of the *O 'Keefe* litigation.

V. LIABILITY OF THE UNITED STATES

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

169. First, under Article 105 of NAFTA, the United States is absolutely responsible for any NAFTA breaches committed by the State of Mississippi and its judiciary. 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 5 (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.

170. 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*, at 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.").

171. The United States for decades has recognized that it is responsible, under international law, for the misconduct of its states. In the *De Galvan Claim (U.S. v.* Mex.), Opinions of the Commissioners 408 (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.

172. Second, Article 1105 requires the United States to provide "full protection and security" to the investments of Canadian investors. The "full protection and security" standard codifies the settled principle that a state is responsible, under international law, for its failure to exercise due diligence to prevent harms to an alien caused by third parties. See, e.g., *Restatement (Second) Foreign Relations Law of the United States* § 183(b)(ii) (1995); *Restatement (Third) Foreign Relations Law of the United States* § 71 l(b), cmt. e (1987); 1929 Draft Convention Arts. 10 & 11; I. Brownlie, *supra*, at 161; 8 M. Whiteman, *supra* at 817-18; L. Henkin et al., *International Law: Cases and Materials* 7 17 (3d ed. 1993). In the *Youmans Claim*, for example, Mexico was held liable for its failure to protect three American citizens from a mob. *Youmans Claim* (U.S. v. Mex. 1926), Opinions of the Commissioners 150 (1927). Similarly, in the

Chapman Claim (U.S. v. Mex), 4 R.I.A.A. 632 (1930), Mexico was held liable for its failure to prevent the shooting of an American.

173. The United States has long respected this principle. For example, the United States paid Italy an indemnity when a New Orleans mob lynched eleven Italian citizens. See 6 Moore, *supra*, at 837-4 1. 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.

174. 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.

VI. CAUSES OF ACTION

175. 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.

176. 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."

177. 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 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.

178. Raymond Loewen also satisfies all of the elements for a claim under Article 1116. *First*, Mr. Loewen is an investor of Canada and of no other state. Mr. Loewen's investments in the United States, through TLGI, include substantial portions of LGII, Riemann Holdings, and Wright & Ferguson Funeral Home. *Second,* as noted 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, Mr. Loewen suffered grave damages as a result of those breaches, either directly or through TLGI or its United States investments.

179. 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."

180. 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 which 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.

181. Raymond Loewen also satisfies the elements for a claim under Article 1117. *First*, as noted above, Mr. Loewen is a Canadian investor. *Second*, LGII is a United States enterprise that is a juridical person indirectly owned or controlled, through TLGI, by Mr. Loewen. *Third*, as noted 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. *Fourth*, as noted above, LGII suffered grave damages as a result of those breaches.

182. Pursuant to NAFTA Article 1121, TLGI, Raymond Loewen, and LGII (as the enterprise) have consented to arbitration and waived their right to initiate or continue proceedings elsewhere. Those consents and waivers are attached to this Notice of Claim at Exhibit 4.

VII. DAMAGES

183. 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."

184. 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"); *Administrurivr 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.").

185. 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 v. Iran, 15* Iran-U.S. Cl. Trib. Rep. 189, 270 (1987); *see generally* Aldrich, *supra*, at 247-270.

186. TLGI seeks recovery of the coerced $175 million settlement payment, as well as its other damages, together with interest and costs, including but not limited to:

(a) reduced prospects for corporate investment and growth;

(b) harm to its business reputation;

(c) reduced credit ratings;

(d) increased financing costs; and

(e) other harms.

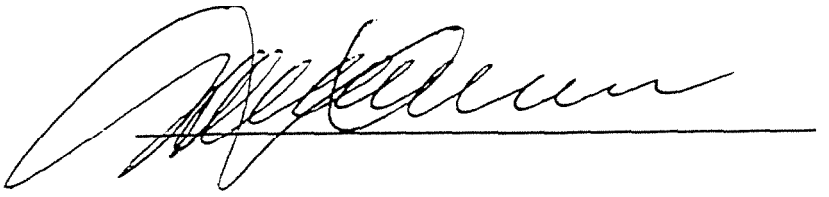
187. Raymond Loewen seeks recovery of his damages, together with interest and costs, including but not limited to:

(a) reduction in value of his TLGI shares attributable to the *O'Keefe* litigation; and

(b) harm to his individual reputation

ACCORDINGLY, Claimants respectfully request that the Tribunal award them not less than the sum of $725 million in damages, together with interest, the claimants' costs of litigation and attorneys' fees, and such further damages as would be just and appropriate under the circumstances.

RAYMOND L. LOEWEN



I, Bradley D. Stam, have been duly authorized by the Board of Directors of The Loewen Group, Inc. to sign this NOTICE OF CLAIM on behalf of Claimant/Investor The Loewen Group, Inc.

Bradley D. Stam

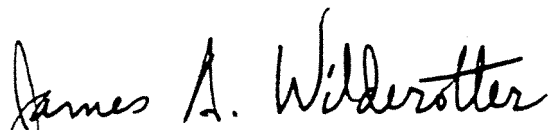
THE LOEWEN GROUP, INC.

By: /Bradley D. S tam
Senior Vice President, Law

DATED: October 30, 1998

Respectfully submitted,

Christopher F. Dugan



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EXHIBITS

A. Opinion of Sir Robert Y. Jennings, Q.C.

B. Affidavit of Chief Justice Richard Neely

C. Letter to Tribunal from Mississippi Governor Kirk Fordice

D. Summary of Opinion and Curriculum Vitae of Professor Andreas Lowenfeld

E. Stock Market Charts

F. Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures

G. Article 1119 Notice of Intent to Submit Arbitration Claim (July 29, 1998)
Affidavit Certifying Service of Article 1119 Notice (July 3 1, 1998)
58 Fed. Reg. 68,457 (1993) (service address for the United States)
Invitation to Article 1118 Consultation (September 25, 1998)