IN THE MATTER OF:

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

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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

JOINT REPLY OF CLAIMANTS THE LOEWEN GROUP, INC. AND RAYMOND L. LOEWEN TO THE COUNTER-MEMORIAL OF THE UNITED STATES

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TABLE OF ABBREVIATIONS

Abbreviation	Meaning
TLGI Mem.	Memorial of The Loewen Group, Inc., filed on Oct. 18, 1999
R. Loewen Mem.	Memorial of Raymond L. Loewen, filed on Oct. 18, 1999
U.S. Mem. on Comp. & Juris.	Memorial of the United States on Matters of Competence and Jurisdiction, filed on Feb. 18, 2000
TLGI Juris. Subm.	Submission on Jurisdiction of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, filed on May 26, 2000
R. Loewen Juris. Subm.	Submission of Raymond L. Loewen Regarding Competence and Jurisdiction, filed on May 25, 2000
U.S. Juris. Resp.	The United States' Response to the Submissions of the Claimants Concerning Matters of Jurisdiction and Competence, filed on July 7, 2000
TLGI Final Juris. Subm.	Final Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, filed on July 28, 2000
U.S. Counter-Mem.	Counter-Memorial of the United States of America, filed on March 30, 2001
Joint Reply	Joint Reply of Claimants The Loewen Group, Inc. and Raymond Loewen to the Counter-Memorial of the United States, filed on June 8, 2001
Tr. __	*O'Keefe* Trial Transcript at page number __
App. at A__	Claimants' Appendix at page number __
U.S. App. at __	United States' Appendix at page number __
Hearing Tr. __	Transcript of the September 20-22, 2000 Hearing on Jurisdiction at page number __

Juror Report	Report on Post-Trial Juror Interviews (submitted with the United States' Counter-Memorial)
Bilder Op.	Opinion of Richard Bilder, dated March 16, 2001 and attached to U.S. Counter-Mem at Tab B
Clark Stmt.	Statement of Judge Charles Clark, dated June 6, 2001 and attached to Joint Reply at Tab C
Corlew Stmt.	Statement of John Corlew, Esq., dated June 6, 2001 and attached to Joint Reply at Tab E
Days Op.	Statement of Drew S. Days III, dated Feb. 15, 2000 and attached to U.S. Mem. at Tab A
Dunbar Stmt.	Statement of Jack F. Dunbar, Esq., submitted Mar. 30, 2001 and attached to U.S. Counter-Mem. at Tab F
Fried Op.	Opinion of Charles Fried, attached to TLGI Mem. at Tab E
Gotanda Stmt.	Statement of John Gotanda, dated March 19, 2001 and attached to U.S. Counter-Mem at Tab G
Greenwood Op.	Opinion of Christopher Greenwood, QC, dated March 26, 2001 and attached to U.S. Counter-Mem. at Tab A
Hawkins Stmt.	Statement of Justice Armis E. Hawkins, dated June 6, 2001 and attached to Joint Reply at Tab E
First Jennings Op.	First Opinion of Sir Robert Jennings, dated Oct. 26, 1998 and attached to TLGI Mem. at Tab A
Second Jennings Op.	Second Opinion of Sir Robert Jennings, dated May 24, 2000 and attached to TLGI Subm. at Tab A
Third Jennings Op.	Third Opinion of Sir Robert Jennings, dated May 29, 2001 and attached to Joint Reply at

	Tab A
Klee Decl.	Declaration of Kenneth Klee, dated May 26, 2000 and attached to TLGI Subm. at Tab C
Klee Supp. Decl.	Supplemental Declaration of Kenneth Klee, dated June 2, 2001 and attached to Joint Reply at Tab F
Landsman Stmt.	Statement of Stephan Landsman, dated March 9, 2001 and attached to U.S. Counter-Mem. at Tab C
Neely Aff.	Affidavit of Justice Richard Neely, dated Oct. 28, 1998 and attached to TLGI Mem. at Tab B
Neely Decl.	Declaration of Justice Richard Neely, dated July 27, 2000 and attached to TLGI Final Subm. at Tab A
Sinclair Op.	Opinion of Sir Ian Sinclair, QC, dated May 9, 2001 and attached to Joint Reply at Tab B
Sinclair Supp. Op.	Supplemental Opinion of Sir Ian Sinclair, QC, dated May 23, 2001 and attached to Joint Reply at Tab B
First Tribe Stmt.	Statement of Laurence H. Tribe dated October 18, 1999 and attached to TLGI Mem. at Tab D
Turner Decl.	Declaration of Rt. Hon. John N. Turner, P.C., C.C., QC, dated May 25, 2000 and attached to TLGI Juris. Subm. at Tab D
Vidmar Stmt.	Statement of Neil Vidmar, dated March 22, 2001 and attached to U.S. Counter-Mem. at Tab D

I. INTRODUCTION

1. Along with the Memorials filed earlier in this case, this Joint Reply establishes the liability of the United States of America to Claimants The Loewen Group, Inc. and Raymond L. Loewen for several breaches of the North American Free Trade Agreement ("NAFTA") that occurred during the *O'Keefe* litigation. The United States' Counter-Memorial cannot withstand even the mildest scrutiny: It grossly distorts the *O'Keefe* factual record; it improperly narrows the governing NAFTA standards to exclude even the egregious facts of this case; and it urges a series of patently meritless affirmative defenses. The Tribunal should therefore establish the United States' liability and proceed to the damages phase of this arbitration.

2. Attached to this Joint Reply are opinion statements from the following experts:

- The Third Opinion of Sir Robert Jennings (Tab A), which responds to the United States' "exhaustion" and "finality" arguments;
- The Opinion and Supplemental Opinion of Sir Ian Sinclair, QC, the former Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom (Tab B), which covers broadly many of the international law and NAFTA issues in this case;
- The Statement of Charles Clark, former Chief Judge of the United States Court of Appeals for the Fifth Circuit (Tab C), which addresses the Mississippi supersedeas bond requirements and the nature of the judicial duty;
- The Statement of Armis E. Hawkins, former Chief Justice of the Supreme Court of Mississippi (Tab D), which evaluates the *O'Keefe* case from the perspective of a Justice who retired from the Mississippi Supreme Court just hours before the *O'Keefe* case reached that court;
- The Statement of John Corlew, Esq., a distinguished trial practitioner in Jackson, Mississippi (Tab E), which provides the perspective of a leading trial lawyer in Jackson on the *O'Keefe* case and the United States' impugning of the trial strategy of Loewen's lawyers; and
- The Supplemental Declaration of Professor Kenneth Klee (Tab F), which confirms that bankruptcy would have been risky and injurious to Loewen in 1995 and 1996.

3. Claimants have endeavored to assist the Tribunal by filing a single Joint Reply; we nonetheless express our regret at its length. But we feel it essential to file such a reply in order to respond properly to the United States' own extensive submission and its eight new expert statements; we must set straight, at some length, the factual record, clarify the governing legal standards for Claimants' NAFTA claims, and respond to the United States' affirmative defenses.

A. The Competing Versions Of The Facts

4. In its extended factual recitation, the United States describes an *O'Keefe* trial that never happened. In the words of Claimants' expert witness, former Mississippi Chief Justice Hawkins, "the trial described by the United States in the Counter-Memorial it filed in the NAFTA case bears little resemblance to the trial record I reviewed. I am confident this Tribunal will read *this* record cover to cover, and make its own assessment of the accuracy of my view." (Hawkins Stmt. at 12.)

5. The United States virtually ignores the "main character" of the *O'Keefe* litigation — Willie Gary, the uniquely flamboyant lead counsel for Jeremiah ("Jerry") O'Keefe. The United States all but elides Gary's jingoistic and incendiary closing argument, including, among other things, his extended analogy of Loewen's competition with O'Keefe to the Japanese bombing of Pearl Harbor. The United States attempts to explain Gary's continual incitement of local, racial, and populist prejudices — in a case involving the alleged breach of commercial contracts — as necessary either to define antitrust markets or to identify the geographic location of particular meetings. The record flatly belies those contentions, and shows beyond doubt that Gary's obvious and successful litigation strategy was to demonize Loewen and its CEO as Canadian, and rich, and an enemy of black people.

6. The United States' attempts to justify the jury's $500 million verdict likewise find no support in the record. All the United States can muster is an argument that O'Keefe proved "tens

of millions of dollars" in damages, which in turn supposedly justified a $74.5 million "emotional distress" award and a $400 million punitive damages award. But the punitive award was grossly disproportionate to the damages allegedly suffered by O'Keefe (at most $8 million, according to the jury foreman), and the "emotional distress" award was based on exactly the sort of evidence — minimal testimony about Jerry O'Keefe's lost sleep and generalized worry — that the Mississippi Supreme Court has held will *not* support an award for emotional distress.

7. In the end, the United States' attempts to recast the *O'Keefe* trial all fail. In the words of the United States' own source, the *O'Keefe* case was not a tort case, not an antitrust case, not a case of overwhelming emotional distress, but "at root, a contract dispute, similar to thousands that are filed in courts across the land each year, and in this respect it was unremarkable." (U.S. App. at 171.) The record demonstrates that this "unremarkable" contract case was transformed into a high drama involving the Japanese attack on Pearl Harbor, the "race card," a yacht, Canadian wheat farmers, and the demonization of a man the jurors came to view as a "rich, dumb Canadian." We respond to the United States' factual statement in Section II, *infra*.

B. The Claimants' NAFTA Claims

8. The United States relegates its submissions on the merits to the end of its Counter-Memorial. There, it contends that NAFTA's substantive guarantees are strikingly narrow — indeed, so narrow as to preclude recovery even in extreme cases like this one, contrary to the text and investment-protection purpose of NAFTA. The United States' interpretations also conflict with international law, with the interpretations of NAFTA announced and applied by several NAFTA tribunals, and with positions repeatedly espoused by the United States when advocating the rights of its own citizens.

9. The United States acknowledges that its interpretation of Article 1102 is so narrow that "one could reasonably question whether it is possible" to meet it. (U.S. Counter-Mem. at

121.) Yet, as several NAFTA tribunals have held, Article 1102 by its terms guarantees foreign investors and their investments the "most favorable" treatment accorded *any* investor within the state. It is beyond serious debate that Loewen was not given such treatment; in fact, the United States' own expert, Richard Bilder, admits that the "sizable verdict" against Loewen was "likely explained by the plaintiff's counsel's successful persuasion of the jury that Loewen was a predatory, dishonest and exploitative company *from 'outside' the particular locality* . . . which was taking advantage of a local company and the local people." (Bilder Op. at 18 (emphasis added).) No company from "inside" the particular locality (Jackson, Mississippi) would conceivably have received such treatment. The *O'Keefe* case presents, in the words of Claimants' expert Sir Ian Sinclair, "a self-evident breach of paragraphs 1 to 3 of Article 1102 of NAFTA." (Sinclair Op. at 12.) We respond to the United States' Article 1102 discrimination submission in Section III(A), *infra*.

10. The United States' assertion that "denial of justice" is an "extreme allegation" and "generally disfavored" is likewise too narrow. Leading sources of international law describe denials of justice as "frequent and varied" and "a common type of official wrongdoing." In response to the United States and its expert (Professor Greenwood), Sir Robert Jennings explains that, despite the multiplicity of formulations of the denial-of-justice standard, "[n]ot one of them . . . defines it in Professor Greenwood's terms." (Third Jennings Op. at 23.) Sir Ian Sinclair concludes: "The conduct of the trial judge in failing to control the wholly improper actions of counsel for O'Keefe in pandering to, and even encouraging, these prejudices and sentiments, led to a flagrant miscarriage of justice" (Sinclair Op. at 25-26), as did the "grossly inflated $260 million dolla[r] verdict" (*id.* at 26), the $400 million punitive damages award (*id.* at 34), and the Mississippi Supreme Court's "failing to waive or reduce the massive supersedeas

bond requirement" (*id.* at 35). But even if the legal standard were as narrow as the United States says, Sir Robert concludes that it was easily satisfied in this "extreme case":

> [T]he claimants in this case have no need to wilt at the thought of any burden of proof. This is after all an extreme case. Even if it were necessary to show 'outrageous treatment' breaching even the traditional minimum standard, the Loewen case could serve as a text book example of a case that clearly breaches even that standard. The present availability of the jury interviews has made the evidence of this even stronger. The trial transcript and the jury interviews speak for themselves. That verdict of the jury was as outrageous as the methods by which that verdict was procured.

(Third Jennings Op. at 27.) We respond to the United States' Article 1105 denial-of-justice submission in Section III(B), *infra*.

11. The United States' interpretation of its Article 1105 obligation to provide "treatment in accordance with international law, including fair and equitable treatment and full protection and security," is similarly too narrow. The United States views these latter two guarantees as subsumed under the "minimum" requirements of "customary" international law, which it construes as imposing *no* general duties of fairness, equity, protection, or security. In so arguing, the United States ignores the fact that Article 1105 does not mention "customary international law," but explicitly requires both "fair and equitable treatment" and "full protection and security." Three NAFTA tribunals have declined to apply the United States' proposed interpretation, leaving the Untied States to contend only that these decisions were "wrongly reasoned." Moreover, the United States offers no defense at all on the merits under the straightforward interpretation of Article 1105 adopted in these decisions. As Sir Ian concludes, the conduct of the Mississippi courts "constituted a violation of the Claimants' right to 'fair and equitable treatment'" and "denied to the Claimants the 'full protection and security' to which they were entitled under Article 1105(1) of NAFTA." (Sinclair Op. at 61.) We respond to the

United States' Article 1105 "fair and equitable treatment" and "full protection and security" submissions in Sections III(C) and III(D), *infra*.

12. Finally, the United States urges that Claimants' Article 1110 expropriation claim cannot survive apart from their discrimination and denial-of-justice claims, and that no property was expropriated because Claimants remained in control of that property. The United States' first submission responds to an argument not made by the Claimants, and the second is — like its other proposed interpretations — far too narrow. NAFTA tribunals and commentators agree that "substantial interference" with an investment, even if not a wholesale takeover, can constitute an act "tantamount to expropriation" within the meaning of Article 1110. As Sir Ian concludes, this is "the exceptional case . . . where it is the totality of judicial acts in the State of Mississippi culminating in the coerced settlement which can be characterized as an uncompensated 'expropriation' of the assets of the Claimants." (Sinclair Op. at 73.) We respond to the United States' Article 1110 expropriation submission in Section III(E), *infra*.

C. The United States' Affirmative Defenses

13. The United States leads its legal arguments with three affirmative defenses. First, the United States persists in its untenable view that Article 1121 only partially waives the local remedies rule. The United States fails to address either this Tribunal's concern about "the lack of specificity" in its contention or the text of Article 1121, which expressly requires a NAFTA claimant to waive its rights to "initiate or continue" challenges in the municipal courts. Other NAFTA Parties and leading commentators have rejected the United States' position, which is also fundamentally in conflict with the *Headquarters Agreement* case identified by the Tribunal. Those and other authorities demonstrate that where an international agreement guarantees an individual claimant access to international relief, as does NAFTA, the local remedies rule is inapplicable. In all events, the local remedies rule would not apply to Claimants' denial of

justice claims, because a denial of justice *is* the failure of a local remedy, which obviates the need to seek further local remedies. *See* Section IV(A), *infra*.

14. Second, the United States contends that the *O'Keefe* settlement extinguished Claimants' international claims under NAFTA. But that settlement did not waive Claimants' right to bring an international action against the United States, for the United States was not a party to the settlement, which encompassed neither claims against the United States nor any international claims at all. Because the *O'Keefe* settlement does not encompass the claims at issue here, this Tribunal need not consider the issue of duress. But even if duress were at issue, the facts and law — all thoroughly rehearsed at the September 2000 hearing — amply demonstrate that Loewen had no feasible choice but to enter into the settlement. *See* Section IV(B), *infra*.

15. Third and finally, the United States' claim that Loewen failed to seek protection from the Mississippi courts is not well taken. Under NAFTA, the Mississippi courts had an affirmative duty to provide "full protection and security" to Loewen, which they plainly failed to discharge. In any event, as Chief Justice Hawkins and Mr. Corlew demonstrate in their Statements, the record demonstrates that Loewen did sufficiently request protection from the Mississippi courts, which failed at every turn to afford the level of protection guaranteed not just by international law, but by Mississippi's own law. *See* Section IV(C), *infra*.

II. THE FACTS DEMONSTRATE NUMEROUS NAFTA VIOLATIONS

16. In their Memorials, Claimants demonstrated (1) that the dispute between O'Keefe and Loewen was principally about three contracts valued by O'Keefe at $980,000, and a proposed exchange of two O'Keefe funeral homes worth approximately $2.5 million for a Loewen funeral insurance company worth approximately $4 million (TLGI Mem. at 8, 11, 12; R. Loewen Mem. at 11-12), and (2) that the excessive $500 million verdict was the product of a deliberate strategy, fomented by O'Keefe's lead trial counsel, Willie Gary, and blessed by Judge Graves, to appeal to the jury's baser instincts of nationalistic, racial, and class biases. (TLGI Mem. at 13-49; R. Loewen Mem. at 15-36.)

17. The United States' responses are largely fictional. The United States first contends that the $500 million O'Keefe verdict was a measured judicial response to a "scheme to destroy competition and raise prices in local funeral home markets." (U.S. Counter-Mem. at 1.) The United States then argues (U.S. Counter-Mem. at 30) that Gary's strategy of portraying Loewen as a wealthy, white band of foreign invaders was justified by O'Keefe's antitrust and "*oppression*" claims (which supposedly validate Gary's racial and class-based strategy), by the inherent need to identify the location of certain events at issue (which supposedly validates Gary's nationalistic strategy), and was in all events *Loewen's* fault, for itself failing to stop O'Keefe's counsel from this improper and unfortunate strategy.

18. These contentions cannot withstand scrutiny. Any fair review of the *O'Keefe* trial record refutes the United States' suggestion that this case centrally involved antitrust or monopolization claims. Moreover, the United States' contentions are contradicted by its own extra-record submissions (*e.g.,* the Juror Report, Jonathan Harr's *New Yorker* magazine article) and by the words of Willie Gary himself.

A. The Plaintiffs' Strategy of Anti-Canadian, Pro-Mississippi Animus Incited the Jury's Excessive Verdict

19. Claimants demonstrated (TLGI Mem. at 2, 14-30, 33-34, 40-43, 45-47; R. Loewen Mem. at 1-2, 15-29) that O'Keefe's trial strategy was to portray Loewen and its CEO as a ruthless foreign invader and to contrast Loewen to O'Keefe, who was portrayed as a dedicated Mississippian and an American war hero who, earlier in his life, had fought off the only foreigners ever to invade United States soil in living memory. Claimants also showed (TLGI Mem. at 2, 15, 43-44, 47-48; R. Loewen Mem. at 34-36) that this strategy successfully incited the jury to award damages that bore no proportion to the actual damages allegedly suffered by O'Keefe.

20. The United States offers three responses. *First*, the United States says that there was no nationalistic animus because the jury foreman "was born and raised in Canada." (U.S. Counter-Mem. at 121-22.) *Second,* the United States says that "the vast majority" of Gary's references to nationality merely help resolve "disputes over whether a given event took place in one or the other location." (U.S. Counter-Mem. at 21-22.) *Third*, the United States — in another variation of its "blame-the-victim" defense — says that it was Loewen, the Canadian defendant, that "chose to introduce" "testimony relating to 'anti-Canadian' bias." (U.S. Counter-Mem. at 22-23.) None of these arguments is accurate.

1. The Jury Foreman "Hated" Canadians

21. The United States and its experts contend that the *O'Keefe* jury could not possibly have been affected by nationalistic animus because Glenn Millen, the jury foreman, "was born and raised in Canada and was a veteran of the Royal Canadian Air Force." (U.S. Counter-Mem. at 121-22.) The United States' experts believe it "inconceivable that [Millen] would have been

receptive to or supported efforts to create anti-Canadian bias." (Bilder Op. at 9-10; *see also* Landsman Stmt. at 21, 29-30; Vidmar Stmt. at 26 & n.26.)

22. The facts are otherwise. Long before the *O'Keefe* trial, Mr. Millen renounced his Canadian citizenship by becoming a citizen of the United States, *see* Miss. Code Ann. § 13-5-1 (only "citizens" may be competent jurors); and it is not only "conceivable," but *admitted*, that he disliked his former countrymen. The post-trial Juror Report, introduced and heavily relied upon by the United States, demonstrates that Mr. Millen, despite previously living in Canada, "hates Canadians and the Canadian government." (App. at A3061.) And Millen himself acknowledged that Loewen was treated differently because it was Canadian: "[Millen] said that if [Ray] Loewen were testifying in Canada he might have been okay, but *people down here don't relate to that.*" (App. at A3079 (emphasis added).) Millen's post-trial statements to the media also demonstrated a similar contempt for Canadians: "The foreman, Glenn Millen, said in Jackson this week that Mr. 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.'" (U.S. App. at 9 (emphasis added).) The fact that Millen himself acknowledged that O'Keefe had lost "$6 to $8 million" at most (App. at A3079), but nonetheless voted to award O'Keefe $500 million, speaks volumes about the contempt of this former Canadian for his ex-homeland.

2. The Numerous References to "Ray Loewen and His Group from Canada," the Bombing of Pearl Harbor, "The American Way" of Resolving Disputes, and the Like, Cannot Be Legitimized

23. Next, the United States urges that "[t]he vast majority of the cited references [to nationality] involve descriptions of events that occurred 'up in Vancouver' or 'down here in Mississippi' or the like." (U.S. Counter-Mem. at 21.) This allegation is simply unsupportable. Indeed, the *only* support the United States can muster for its assertion that such testimony was necessary to resolve "disputes over whether a given event took place in one or the other location"

is a single reference to one page of trial testimony — to the effect that "witness John Turner explain[ed] that 'controversy was brewing' over Wright & Ferguson contracts before O'Keefe and Allred 'came to Vancouver.'" (*Id.* at n.9.) The United States simply ignores the numerous appeals to national pride and foreign animus that were in no way mere locational references, but gratuitous, rhetorical appeals to the jury's worst instincts.

24. The United States offers no justification for so much of the rhetorical excess of the *O'Keefe* case, such as these incidents during voir dire and opening statements:

- Willie Gary's statement that he had "teamed up" with Mississippi lawyers "to represent one of your own, Jerry O'Keefe and his family." (App. at A328; TLGI Mem. at 15; R. Loewen Mem. at 16.)

- Willie Gary's statement that "The Loewen Group, Ray Loewen, Ray Loewen is not here today. *The Loewen Group is from Canada*. He's not here today. 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." (App. at A356 (emphasis added); TLGI Mem. at 16; R. Loewen Mem. at 16.)

- Willie Gary's repeated (and incorrect) references to The Loewen Group, Inc. as "Ray Loewen and his group from Canada." (App. at A357, A383; TLGI Mem. at 16; R. Loewen Mem. at 16-17.)

- Willie Gary's and Mike Allred's appeals to the jury during opening statements, to exercise the "power of the people of Mississippi" to award huge damages. (Tr. at 42, 78; TLGI Mem. at 20, 22.)

- Willie Gary's and Mike Allred's contrasting of O'Keefe's Mississippi pedigree with Loewen's recent "descen[t] on the State of Mississippi." (Tr. at 9-10, 49, 58; TLGI Mem. at 20; R. Loewen Mem. at 19-20.)

- Willie Gary's references to lawsuits generally, and O'Keefe's lawsuit in particular, as "the American way" of resolving disputes. (Tr. at 65-66; TLGI Mem. at 22; R. Loewen Mem. at 21.)

- Willie Gary's use of O'Keefe's U.S. military service, irrelevant to the issues in the case, to portray O'Keefe as "an American hero" and a "fighter for his country." (Tr. at 50, 54; TLGI Mem. at 20; R. Loewen Mem. at 18.)

25. Nor can the United States justify, on grounds of mere locational reference, the gratuitous references to nationality that continued during the presentation of evidence at trial:

- Mike Espy's unprovoked diatribe about the need to "'protect the American market'" from Canadian wheat farmers; his discussion with Gary about the need to protect Mississippi consumers from foreign corporations deceptively posing as locally owned; and his assertion that "'[NAFTA] didn't mean that because you were from Canada or from Mexico or from any other country that you could sign it and have no intentions of living up to it . . . .'" (TLGI Mem. at 24-25; R. Loewen Mem. at 24-25; Tr. at 1101-02, 1109-10.)

- Gary's venomous cross-examination of Ray Loewen, which not only included repeated reminders of Mr. Loewen's Canadian nationality (as well as that of "his group") but also pointed out that Mr. Loewen had not "spent time" in Mississippi; similarly, Gary's cross-examination of Mr. Loewen on "'funeral home ownership, local versus foreign,'" in which Gary accused Mr. Loewen of "'deceiv[ing] people about ownership as it relates to state versus local,'" asking him "'[Do] you know the difference between local ownership and foreign ownership . . . ?'" (TLGI Mem. at 33-34; R. Loewen Mem. at 21-22; Tr. at 5119, 5181.)

- Gary's strategy of establishing witnesses' *bona fides* with the jury by stressing their Mississippi roots. (TLGI Mem. at 23, 25; *see, e.g.,* Tr. at 131-32 (Susan O'Keefe Knight: "born in Biloxi," still lived in the Biloxi area, and started working in the family's business in "Junior High school"); Tr. at 367-71 (Walter Blessey: born and lived in Biloxi, obtained his college and law school degrees from Mississippi institutions); Tr. at 1014-15 (Jack Robinson: "live[d] in Jackson, Mississippi" and had been in business in Mississippi since 1959); Tr. at 1083-86 (Mike Espy: grew up in "Yazoo City," Mississippi, held his first job "right down the street, Pascagoula Street here," and had a long and distinguished career as one of Mississippi's first successful black politicians); Tr. at 1110-12 (Earl Banks: "a resident of Hinds County, Mississippi" "[a]ll of [his] life"; educated in Mississippi institutions; member of the Mississippi Bar, local businessman, and a Mississippi legislator); Tr. at 1202-05, 1538 (Loraine McGrath and Bill Mendenhall: both born and educated in Mississippi); Tr. at 1277, 1377-78 (Jimmy Burkes and Harland Dyer: lived and worked in Mississippi).)

- Jerry O'Keefe's extensive testimony of the "proud" "local" "tradition" of his family and funeral business (Tr. at 1996-2019); of his patriotism and war exploits (Tr. at 2004-06); of Loewen's relatively recent entry into the Mississippi business community (Tr. at 2025-26); and of Loewen's Canadian nationality (Tr. at 2034-50; *see generally* TLGI Mem. at 25-29).

26. O'Keefe himself was clearly prepared to point out to the jury, whenever possible, that Loewen was a foreign corporation.[1] For example, in response to a question asking for David Riemann's title within the Loewen organization, O'Keefe gratuitously volunteered that Loewen's "payroll checks come out of Canada," and "their invoices are printed in Canada." (Tr. at 2196.) And in response to a yes-or-no question on cross-examination, O'Keefe went out of his way to assert that "the people in this community" would not have wanted to trade with a "Canadian company . . . that came to Mississippi with financing from the Hong Kong/Shanghai Bank":

> Yes, sir, that's correct, but what they would have would — the people in this community would have a third option to deal with a *Mississippi-owned company* if they decided they wanted to deal with a *local or Mississippi-owned firm*, they wouldn't necessarily have to go to Baldwin and Enochs, Baldwin and Lee or Wright & Ferguson for their funeral services since all were *owned by a foreign company, the Canadian company, Loewen, that came to Mississippi with financing from the Hong Kong/Shanghai Bank.* A *lot of people might not want to do that*

(Tr. at 2280-81 (emphasis added).)

27. Nor can the United States possibly justify, as a "disput[e] over whether a given event took place in one or the other location" (U.S. Counter-Mem. at 21), the deplorable tactics Willie Gary utilized in his closing argument. Although the rhetorical centerpiece of the trial, Gary's closing receives the slightest of treatment, in one bare paragraph, in the United States' Counter-Memorial. (*Id.* at 50.)

28. It was certainly not necessary for Willie Gary to equate Loewen with the Japanese who bombed Pearl Harbor (*see, e.g.*, Tr. at 5593-94; App. at A3145-46) in order to establish

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[1] In U.S. litigation, a party and his counsel usually prepare the questions and answers, together, very carefully creating what is in essence a script of rehearsed answers to expected cross-examination questions. *See* T. Mauet, *Trial Techniques* 475 (4th ed. 1996).

where some disputed event took place. The same goes for Gary's efforts to analogize O'Keefe's World War II fight against the Japanese with his 1995 fight against Loewen:

- "[Loewen] didn't know that this man didn't come home just as an ace pilot who fought for his country, but he's a fighter, . . . and he'll stand up for what he believes in. *He'll stand up for America, and he has*." (Tr. at 5544 (emphasis added); *see* TLGI Mem. at 40.)

- "Millions of dollars spent, sleep lost, Mr. O'Keefe having been jacked around, pushed from one side to the other, having been told that he'd never make it here; but through it all, we're here, calling on a system, *calling on a system that he fought for and some died for*. . . . [W]e are here, and we have a jury that we feel confident will speak the truth." (Tr. at 5540-41 (emphasis added); *see* TLGI Mem. at 40.)

- "I don't know what your verdict is going to be, but I know you'll do the right thing. Jack Robinson couldn't hold out, but Jerry did. It wasn't easy. Times were tough. Sometimes he said he felt like giving up, but something inside said run on, fight on. They lied to him, and a voice said fight on. You see, when they cheated him, a little voice said fight on. When they jacked him around, as they talked about in the memo, the little voice said just fight on, and when he thought he was going to lose it all, everything, a little voice said just fight on. He's a fighter, and he's fought them. You see, that little voice, members of the jury, has a name, and it's called faith, faith in God. *It's called pride, pride in America*. It's called character, character in person. That's what Susan talked about. *It is called love, love for your country,* Jerry O'Keefe. You see, that little voice didn't just start speaking in 1991 when we started this lawsuit. That voice started back in 1941 on December 7th when *our boys* were bombed in the morning while they were sleeping. It was a Sunday morning, Sunday morning, caught them sleeping, got bombed, but on December the 8th, early in the morning, Jerry O'Keefe got out of his bed and found his way down to the recruiters office. He was just a young lad then, just 19 years of age, but *he wanted to go fight for his country*, and he fought, and he fought. We don't come seeking charity. Charity is a nuisance, but justice is calling. That's all we ask is for *justice, heart and soul of the American dream*. Thank you and may God be with you when you deliberate." (Tr. at 5593-94 (emphasis added); *see* TLGI Mem. at 42-43; R. Loewen Mem. at 29).)

29. Likewise, it was unnecessary, in order to address "whether a given event took place in one or the other location," for Gary to suggest that the Mississippi jury had an obligation to award substantial damages to O'Keefe because of their duty as Americans and Mississippians, or that Loewen's position could be summarized as "Excuse me. I'm from Canada":

- "[M]embers of the jury, your 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. And as I look at you this morning, I have grown to know you, and I want you to know that for your service, we're proud of you." (Tr. at 5539; *see* TLGI Mem. at 40.)

- "'Just tell me now, that's all. *You go back to Canada*, and I'll come to a jury and have my case settled. *That's the way we do it in America*.'" (Tr. at 5571 (emphasis added).)

- "[Loewen's] actions have hurt this family and the people of Mississippi." (Tr. at 5543.)

- "Excuse me. *I'm from Canada*. Excuse me. You heard him. Mr. Sinkfield says excuse us, excuse us, excuse us. Well, they've been excused enough, and it's catching up with them." (Tr. at 5703 (emphasis added).)

30. Locational disputes similarly were not the point of Gary's description of Loewen as a foreign invader that "came to town like gang busters, like gang busters" (Tr. at 5548; *see* TLGI Mem. at 41), or of his description of Mississippi Loewen partner Mike Riemann not being able to get "a pat on the back every now and then . . . from those people out of Canada." (Tr. at 5549; *see* TLGI Mem. at 41; R. Loewen Mem. at 28.)

31. In a textbook example of *praeteritio* (stating a proposition while seeming to deny it) that might have made Cicero blush, Willie Gary emphasized Loewen's foreignness while ostensibly denying the relevance of "Canada and America" to the lawsuit. Referring specifically to testimony given by plaintiffs' witness Mike Espy, Gary stated:

> Then Mr. Sinkfield got up, and he didn't make an issue out of Canada and America. That ain't the point. We've got good relations. That lawsuit ain't about that. Don't get carried away on that. Canada and America, you go up there, they come down here, everybody's fine. It doesn't give you the right to cheat people no matter where you're from. You can be from anywhere. It doesn't give you the right to cheat people, and his testimony said when Mr. Sinkfield got up and talked about this treaty, this treaty that allows us to do business, he says, "Yeah, I was there, I was there, but I want you to know I was very bothered by certain actions which restricted Canadian products into our markets because they tried to undervalue . . . we bought their wheat." 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. We believe in free enterprise, Mr. Sinkfield, but we don't believe in being cheated.

(Tr. at 5586-87; *see* TLGI Mem. at 41-42; R. Loewen Mem. at 24-25.) Obviously, this passage also did not involve resolving a dispute about whether a particular event took place in Mississippi or Canada. The United States' claim that Espy "did not at all figure prominently in the trial" (U.S. Counter-Mem. at 41) also cannot possibly be squared with Willie Gary's focus on his testimony in closing argument, or with the Juror Report. (App. at A3044, A3048, A3070.)

32. Nonetheless, the United States suggests, based on the first portion of this very passage from Willie Gary's closing argument, that Loewen "force[d] O'Keefe's counsel to minimize the evidence [of nationalistic bias] and to plead with the jury that the case 'is not about Canada.'" (U.S. Counter-Mem. at 24 & n.14.) In truth, the passage demonstrates that Willie Gary was on the offense, not the defense; and his design was to leave the jury with the distinct impression that Canadians "would jack up the price, and that was not right." No fair-minded reader could possibly conclude that Willie Gary "minimized" nationalistic biases.

33. These many gratuitous references to nationality (most of which stand unaddressed by the United States), along with the numerous others that Claimants have previously highlighted but which we could not possibly cite in a manageable Reply, establish that there is no support for the United States' statement (U.S. Counter-Mem. at 21) that the "vast majority" of references to nationality during the *O'Keefe* trial were harmless efforts to establish the location of disputed events.

3. O'Keefe Relentlessly Distinguished Between "Locals" and "Foreigners"

34. Throughout the trial, Willie Gary persistently tried to convince the jurors that almost everyone associated with the Loewen companies, including its U.S. subsidiaries, should be considered foreign. Gary thus argued repeatedly that LGII, Reimann Holdings, and Wright & Ferguson were not *really* domestic companies because they were owned and controlled by "Ray Loewen and his group from Canada." (Tr. at 2028; *see* App. at A367-68, A373; Tr. at 61-62; TLGI Mem. at 24; R. Loewen Mem. at 22, 26.)[2] Indeed, from voir dire through closing argument, Gary pressed the argument that Loewen had "misrepresented" to the people of Mississippi that Reimann Holdings and Wright & Ferguson remained "locally owned," when in fact they were owned and controlled by a Canadian transferring their dollars straight to the "foreign" Hong Kong/Shanghai Bank. (*See* App. at A367-68; Tr. at 61-62, 2172, 5551-52; TLGI Mem. at 34; R. Loewen Mem. at 22, 26.)

35. In contrast, Gary treated John Wright much differently. Mr. Wright, a life-long Mississippian, was president of Wright & Ferguson (*see* Tr. at 2997), a named defendant, and a member of the board of directors of Loewen Group International, Inc.; or, as Gary called it, "Ray Loewen's board." (Tr. at 3071.) Wright thus presented a challenge to Willie Gary's trial strategy because, as a life-long local Mississippian, Wright — as an individual — could well

[2] *See also* Tr. at 3067 (O'Keefe cross-examination of Mr. Wright: "All the people in Mississippi associated with this company [Wright & Ferguson] worked directly under and took direction from The Loewen Group; isn't that right?"); *id.* at 3070 ("everybody in this chain right here [Wright & Ferguson management] was paid by The Loewen Group with checks out of Canada; is that right?"); *id.* at 3091 ("And isn't it true, Mr. Wright, that bottoms up management really means that Ray Loewen controls your budget and your prices?"); *id.* at 2816 (O'Keefe cross-examination of Mr. Riemann: "Ray Loewen . . . That's your boss, right?"); *id* at 2831-32 ("And Riemann Holdings is owned by Loewen Group and Ray Loewen out of Vancouver, Canada; is that correct?"); *id.* at 2862 (Ray Loewen "controls the largest block voting shares [sic] in all three of those corporations; is that correct?").

have been considered by the jury as "one of their own" — just like O'Keefe. (App. at A328.) To solve this problem and the local-versus-foreigner dynamic, during voir dire Gary asked whether the jury would be able to "come back with a verdict of over 650 million dollars, *just because the Wright name is on it, you understand, we're suing The Loewen Group*, would that cause you any problem *to have to face Mr. Wright* just because he was here and a party *or any of the Wrights* for that matter, would it cause you a problem *to have to face them later on*?" (App. at A371-72 (emphasis added).) Allred likewise stated during his opening statement: "Ladies and gentlemen, our fight is with Ray Loewen. Our fight is not with John Wright . . . . our fight is not with David Reimann." (Tr. at 29-30.)

36. Gary even apologized for including Mississippians like John Wright and David Riemann among the defendants. In opening statements, Gary explained that O'Keefe "had to include the Wright & Ferguson on there because the contract was with them. Y'all understand that? The contract was with them. But really, Mr. Wright — *he had no beef with Mr. Wright*." (Tr. at 65 (emphasis added).) Similarly, plaintiffs' witness Walter Blessey was clearly coached to say that "the O'Keefe companies and Gulf National have no quarrel with John Wright and have no quarrel with David Riemann. . . . The actions were taken by Mr. Ray Loewen." (Tr. at 721.)

37. In closing arguments, Gary again singled out John Wright as an "honorable man" not truly involved in the lawsuit: "Where are you Mr. Wright? He's here somewhere, he's been here, an honorable man, an honorable man. He told you the truth. He told you the truth. He told you, *it's not about John Wright*. He just happened to be on the name, but it's about Ray Loewen, because they owned it. They're the ones that own it. *It ain't against John Wright*." (Tr. at 5548-59 (emphasis added).) During his rebuttal closing argument, Gary stated: "Now, you

know that the Riemanns own Wright & Ferguson. That's what we kept saying, *Mr. Wright* [sic] *really not in this*, he's really not in it." (Tr. at 5709 (emphasis added).) Gary explicitly excluded Loewen director Wright when he told the jury that Loewen was comprised of "terrible people": "The truth is The Loewen Group and The Loewen Group International, *I'm not talking about Mr. John Wright*, I'm not talking about him, but The Loewen Group International, they're terrible people, members of the jury. They're dishonorable." (Tr. at 5556 (emphasis added).) Finally, during closing arguments in the punitive damages phase, Gary told the jurors: "A message has to go out to the defendants, and *I'm not talking about Mr. John Wright*." (Tr. at 5797 (emphasis added).)

4. Loewen Never "Chose" to Introduce Anti-Canadian Testimony

38. Finally, the United States resorts to its "blame-the-victim" strategy. The United States urges that "to the extent that the jury heard testimony relating to 'anti-Canadian' bias . . . it is because Loewen itself chose to introduce such testimony as part of a deliberate litigation strategy" to portray O'Keefe as "a biased and unfair competitor who had engaged in an anti-foreigner advertising campaign as part of his effort to take business away from Riemann Holdings." (U.S. Counter-Mem. at 22-23 (emphasis omitted).) This is simply false.

39. Long before the trial ever began, O'Keefe injected nationality into the case. O'Keefe's complaints, which referred to Loewen and its affiliated companies as "wealthy, Canadian, international and nationwide business corporations" (App. at A30, A44; *see also* App. at A20 (referring to Loewen as a "foreign corporation"), A25 (referring to Loewen as a "Canadian corporation"), A37 (same), A146 (referring to Loewen as a "large, rich, powerful, international corporation"), A157 (same)), repeatedly claimed that Loewen had acted improperly by not disclosing that it — a Canadian company — owned the local Riemann funeral homes. (App. at A45, A143, A146.) Indeed, O'Keefe went so far as to accuse Loewen of "deceptively

hiding behind the honored names of local, Mississippi families in the funeral services business." (App. at A146; *see also* App. at A144, A151, A157, A159.) These allegations presuppose the existence of the very nationalistic bias denied by the United States. In any event, Loewen and Riemann had always been open about the nature and structure of their business relationship — a partnership 10 percent owned by Riemann and 90 percent by Loewen. (*See* Tr. at 95-96, 2674-79, 2696.)[3]

40. During voir dire, Willie Gary again stressed — long before Loewen's lawyers were themselves allowed to question the jurors — that Loewen's Canadian nationality would play a prominent role throughout the trial:

> Now, if we prove to you by way of the evidence, and if the law supported it by way of the evidence 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 A367-68.) Gary later asked one potential juror in the presence of the others: "Did you know Ray Loewen and his group out of Canada, the Loewen Group? . . . . The ones that really own it [Wright & Ferguson Funeral Home]." (App. at A373.)

41. This theme continued during Gary's opening statement, which took place before Loewen's lawyers were able to counter:

> They [Loewen] came down here — now, y'all see the seal up there. That's the State of Mississippi. That's the State of Mississippi, the State of Mississippi said now, this is to a senior vice president and general counsel, to their lawyer. Y'all see that, The Loewen Group up in Canada, and it says to them, "We're writing to you on behalf of the Mississippi Attorney General's

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[3] In fact, Loewen and Riemann held a press conference to announce their partnership, and sent a letter to the community describing the 90%-10% equity relationship. (Tr. at 96-97.)

> Office, Consumer Protection" — that's their people, that's not just Jerry, the people, members of the jury. "Our office is responsible for protecting — protecting Mississippi consumers." From what? Can y'all read that? "Unfair, deceptive practices in the conduct of any trade or commerce." Now, the bottom line is, and I'm going to just — I don't have time to read it all to you, by they go down here and they say "the 'Sun Herald', and that's a paper no doubt down in Biloxi, near the Coast, the 'Sun Herald' article centers around the issue of funeral home ownership, local versus foreign." Ain't no problem with you owning it. You can come out of another country and own it, but they say, "Look, if you're going to do that, while foreign or natural — 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." You see what I'm saying? In other words, remember when we say, go to the deal, you know what you're dealing with, you've got a right to know. It's all right if you stay in business, save your goodwill, just don't fool anybody because they've got a right to know. Don't tell me I'm in Wal-Mart buying K-Mart goods.

(Tr. at 61-62; *see* TLGI Mem. at 21; R. Loewen Mem. at 19.) In view of Gary's numerous early appeals to local favoritism and national prejudice, the United States cannot support its assertion that, "[b]ut for Loewen's decision to introduce and underscore this evidence and testimony, the jury never would have heard it." (U.S. Counter-Mem at 24.)

42. Loewen properly and understandably sought to protect itself. In retrospect, the only thing that "backfired" (*see* U.S. Counter-Mem. at 23) on Loewen was its counsel's naïve attempt to appeal to this jury's better nature by noting the egregiously discriminatory advertising campaign run by O'Keefe — which directly paralleled O'Keefe's emerging trial strategy. Loewen's opening statement to the jurors thus included the following:

> [M]aybe with Riemann joining Loewen, Mr. O'Keefe got upset. Within a month after the public announcement, he started a vicious slanderous campaign against Riemann and Loewen and against Loewen International . . . . "By now, you probably received a letter from David Riemann outlining their sale to a foreign company. A few important facts left. Loewen Group has not come in as a partner." Wrong, they are partners, 10 percent, 90 percent. . . . "Obviously, prices are raised and profits go out of the

> USA." Wrong, false. The evidence will be, and it will be undisputed, the profits made in the U.S. stay in the U.S. corporation. The banking is U.S. corporations, and you're going to see something with Hong Kong-Shanghai Bank on it. The Hong Kong-Shanghai Bank is a London bank, and . . . the bank that we dealt with, the evidence will show, is the branch located in Seattle, Washington, and they collect deposit funds from U.S. citizens.
>
> . . . .
>
> This is just one of the billboards they put up. . . . "Do you do business with U.S. companies?" It's got a Japanese flag on it and all that sort of stuff, suggesting that we were dealing with Japanese. They even had rumors out that we had Japanese embalmers. So what if we did. If they're qualified people, what's wrong with having a Japanese embalmer? We had to try to counter this stuff in the marketplace, spent lots of money trying to counter these rumors.

(Tr. at 95-99.)[4]

43. The United States further accuses Loewen of ignoring Judge Graves' "signal[s] to Loewen's counsel that he had overplayed the issue" of O'Keefe's "anti-foreign bias." (U.S. Counter-Mem. at 24 n.13.) To support its assertion, the United States directs the Tribunal to Judge Graves' statement that "if I hear the word Hong Kong/Shanghai Bank one more time before I leave here today, you need to move to another area of cross-examination." (Tr. at 2176.) But in context, this statement only demonstrates his efforts to *prevent* defense counsel from fully cross-examining O'Keefe on crucial issues of credibility.

44. The entirety of this exchange (Tr. at 2171-76) illuminates how Judge Graves controlled the trial. It began when O'Keefe first denied that there had even been an anti-Loewen ad campaign. (Tr. at 2171 ("We never had an ad campaign, no, sir.").) When confronted with

[4] A copy of the "billboard" referenced in Loewen's opening argument appears between pages 10 and 11 of Loewen's Memorial.

evidence that proved otherwise, O'Keefe proceeded to answer each question from Loewen's counsel with gratuitous and nonresponsive asides about Loewen's foreign connections:

> Q. Did you direct the use of those posters at the state fair or the fair that had the Japanese —
>
> A. No, sir, I didn't do that. In fact, I didn't know that it had been done until after the fact, but of course, I stand behind that because my employees over in Pascagoula apparently did that. Of course, we're dealing now with a foreign company that came in here from Canada being financed, their primary source of fund was the Hong Kong/Shanghai Bank. I don't know who controls that bank, and Loewen has never certified to me that the Japanese don't control it. Now, they may not, but I don't know that, and they [O'Keefe's employees] did display that Japanese flag, but it was not on my direction, but it could very well be an accurate presentation of what was going on.

(Tr. at 2172.) Loewen then questioned O'Keefe about the accuracy of the poster's use of a Japanese flag to represent Loewen and Riemann:

> Q. Did you know at the time you wrote these letters that the Shanghai bank was a Hong Kong bank?
>
> A. Hong Kong/Shanghai Bank is an international bank, and international banks are not subject to the same regulations that the domestic banks in the [U.S.] are subjected to, and we had a foreign company coming in here with financing outside of the [U.S.] from an international bank, and the biggest thing that they brought to Mississippi was increasing the price to bury Mississippians.

(Tr. at 2173.)

45. Throughout this entire exchange, O'Keefe was a largely unresponsive and difficult witness, who offered prepared diatribes in lieu of direct answers. Nonetheless, Loewen finally succeeded in getting O'Keefe to concede that he didn't "approve of sending out false letters" (Tr. at 2176) — and was on the cusp of an admission that O'Keefe had done so: "But you didn't check one way or the other to see whether the information was correct as to whether the Shanghai Bank was Chinese, Japanese, or otherwise before —" when Judge Graves *sua sponte*

interrupted, *in front of the jury*: "Mr. Sinkfield, if I hear the word Hong Kong/Shanghai bank one more time before I leave here today, you need to move on to another area of cross-examination." (Tr. at 2176.) In its entirety, then, this incident does *not* support the United States' claim of incompetent trial lawyering, but rather demonstrates that Judge Graves was capable, even if selectively so, of interfering at a critical point in order to protect a witness — in this case, O'Keefe. That is a far cry from the "passive" arbiter and "robustly adversarial" process described by the United States' witnesses. (*See, e.g.*, Landsman Stmt. at 4.)

46. Similarly, Landsman argues that Loewen's counsel determined to cross-examine Michael Espy on matters relating to Canada and NAFTA "[w]ithout any predicate whatsoever in the direct examination." (Landsman Stmt. at 26.) Again, that is simply untrue. Espy, who was called to testify solely as a character witness for O'Keefe, described O'Keefe as "an honorable man," "a decent guy," "a very respectable person," "a friend," and "a man without bias and without prejudice." (Tr. at 1094, 1096.) Because Espy's direct testimony consisted only of statements regarding O'Keefe's good and unbiased character, Loewen was forced to cross-examine Espy on matters relating to O'Keefe's character, including O'Keefe's slanderous and bigoted advertising campaign. Yet when questioned about that campaign, Espy ducked the question: "I don't know if I'm qualified to answer that kind of a question. I know him as a person. I know him in his business dealings with me, and so if the question is as to my — you know, my assessment of his character, I would say that I believe that he's a honest, forthright gentleman." (Tr. at 1099-1100.)

47. To rebut Espy's character testimony for O'Keefe, Loewen was therefore left to inquire of Espy (who was "involved" in the implementation of NAFTA as U.S. Secretary of Agriculture, *see* Tr. at 1100) whether it would be "consistent with the spirit of NAFTA and the

work that you've done in encouraging the purchase and sale of American goods in Mexico and Canada to compete with them on the basis of an ad campaign that says, 'Don't buy Canadian, just buy American'?" (Tr. at 1101.) Instead of responding to that question, Espy offered a diatribe about price-gouging Canadian wheat farmers and his responsibility as Secretary of Agriculture "to protect the American market." (Tr. at 1102.)

48. The post-trial juror interviews on which the United States and its experts place so much weight demonstrate that Loewen's protective appeal to the jurors' better instincts did indeed "backfire," because the jurors "saw nothing wrong" with protecting Mississippi markets against foreign competition:

> We had offered evidence of the rather scurrilous slander campaign O'Keefe mounted just after Loewen's acquisition of the Riemann Funeral Homes in January of 1990. We had introduced the letters O'Keefe sent out and, particularly, the poster reflecting the Japanese and Canadian flags. Ms. Chapman reported that *the jurors saw nothing wrong with this and could not understand why we thought it was so significant*. She said they considered this O'Keefe response one that was *entirely appropriate* in view of the fact that Loewen had come in and gobbled up his competitor. They particularly latched onto the O'Keefe view of the Hong Kong-Shanghai banking connection. She said they were *absolutely convinced this did suggest that Loewen had an Oriental connection* and the fact that Hong Kong and Shanghai are in China, not Japan, was a meaningless irrelevancy.

(App. at A3091-92.) With respect to the anti-Canadian advertising campaign, "Many of them [the jurors] said that is exactly what they would have done under the circumstances." (App. at A3045.) The jury foreman said as much: "The Japanese flag thing, the jurors would have done the same thing." (App. at A3078.)

49. The jurors themselves admitted that Gary's nationalistic appeals affected their verdict. Indeed, the lone dissenting juror observed that Loewen's case was impossible in view of the jurors' reactions to Gary's trial strategy: "Ms. Chapman advised me that, as a practical

matter, there was probably *not anything we could have done* to sway the majority of the remainder of the jurors." (App. at A3088 (emphasis added).) Gary's repeated and successful incitement of bias, which occurred long before Loewen even began its case-in-chief, cannot possibly be attributed to "tactical decision[s]" (U.S. Counter-Mem. at 24) made by Loewen in its uphill defense. Loewen was forced to address its nationality because Willie Gary, with approval from Judge Graves, repeatedly made it an issue. Loewen's misplaced faith that the jury would rise above its base prejudice cannot properly be used to bar Loewen's recourse to NAFTA.

5. The Trial Court Allowed Nationality to Be a Problem in the Case and Refused to Correct It

50. The record also reflects that Judge Graves allowed Loewen's nationality to become a problem and then refused to correct it. Two examples prove the point.

51. *First,* during voir dire, Judge Graves refused to excuse for cause the second of two jurors who had demonstrated blatant anti-foreign bias. Loewen had first challenged one juror who had stated on her questionnaire that foreign corporations should not be given a fair trial in the United States. (App. at A487.) Gary opposed Loewen's challenge, arguing that despite this admitted bias, the juror had been "rehabilitated" because she raised her hand when Loewen's counsel asked the potential jurors if they "could . . . be fair to a foreign company." (App. at A487-88.) Judge Graves excused that first juror, explaining to Gary: "I guess if I agree with you, I'd have to assume he didn't only rehabilitate her, he had to convert her because she had a religious conviction about that answer." (App. at A488.)

52. "[F]or similar reasons," Loewen challenged a second juror who also felt that a foreign corporation should not receive a fair trial in the United States "'because of special tax breaks that foreign corporations receive.'" (App. at A488.) As he did with the other juror, Gary argued that this second juror had been "rehabilitated." (App. at A489-90.) Remarkably, however, Judge

Graves *did not* excuse this second juror for his admitted bias. Instead, Judge Graves proposed to "bring . . . back" both jurors and let Gary attempt to "rehabilitate, reform and convert" them. (App. at A490.) When Loewen objected, Judge Graves became angry:

> See, that's my problem. Everybody wants to come in here and be rewarded for all the questions that they did not ask, and *as mad as it's going to make them for me to bring them back down here*, I'll bring them back down here and let y'all ask them some more questions, but you're putting the Court in the position of rewarding you for questions that you never asked, *particularly with this because of special tax breaks that they received*. I mean, that's something we could have had when you individually explored that.

(App. at A491 (emphasis added).) As a result of the trial court's refusal to strike this juror for cause, Loewen was forced to use one of its limited peremptory challenges to remove this obviously prejudiced juror. (*See* TLGI Mem. at 18-19; R. Loewen Mem. at 17-18.)

53. *Second,* Judge Graves refused Loewen's request that the jury, in light of Gary's antics throughout the trial, be *specifically* forbidden from considering Loewen's "national origin, wealth, or social status." (App. at A2231-32; *see* TLGI Mem. at 39.) Judge Graves refused Loewen's detailed, specific, four-paragraph-long request because he viewed it as cumulative to a perfunctory, standardized instruction that "[y]ou should not be influenced by bias, sympathy, or prejudice." (App. at A2229; *see* Tr. at 5390-91; *see generally* TLGI Mem. at 36-40.)

54. The United States attempts to portray Loewen's challenge to the bias and prejudice jury instruction as waived (*see* U.S. Counter-Mem. at 49) because Loewen responded "Do not" when asked if Loewen objected to the perfunctory instruction. However, at every turn, Loewen attempted to point out the inadequacy of that instruction:

> JUDGE GRAVES: [Any objection on the perfunctory instruction from] Defendants?
>
> MR. ROBERTSON: From the defendants, Your Honor, we would request first with respect to [this instruction] the middle paragraph regarding bias, sympathy or prejudice, we had submitted

> an instruction, a more elaborate one that we think is tailored to this case which we would request be given, and if I can have a second —

(Tr. at 5390.) Judge Graves interrupted: "I don't need to hear yours. You need to tell me what's wrong with this one." (Tr. at 5390.) Loewen replied: "There's nothing wrong with this one as it's written." (Tr. at 5390-91.) Judge Graves immediately responded, "Do you have an objection?" (Tr. at 5391.) Loewen again tried to raise the issue of supplementation ("We would only request an additional one, so —"), but the Judge would not hear of it: "Let me stop you. Let me set the ground rules right now. All I'm asking you is if you have an objection to this instruction. Do you?" (Tr. at 5391; *see* TLGI Mem. at 38.) Loewen responded, "Do not." (*Id.*)

55. Later, Loewen again attempted to have its detailed anti-bias instruction read to the jurors. (*See* Tr. at 5447 (discussing proposed instruction "D-3"); TLGI Mem. at 39.) O'Keefe objected to the instruction — which would have told the jury that, as a Canadian corporation, Loewen was "entitled to the same fair trial at your hands as are other parties who are residents of Mississippi" (App. at A2232) — as "cumulative" to the court's generic, one-sentence warning against unspecified bias. (Tr. at 5447; *see* TLGI Mem. at 39-40.) Judge Graves summarily rejected Loewen's instruction: "It's refused." (Tr. at 5447.)

56. U.S. expert Landsman suggests that (i) the Loewen instruction was properly refused because it "duplicated" the court's instruction, and (ii) by not lodging an objection to the jurors being instructed *against* bias — however minimally — Loewen failed to reveal "any substantial concern at trial about alleged O'Keefe efforts to 'foment' anti-Canadian feelings." (Landsman Stmt. at 23.) As former Chief Justice Hawkins opines, however "[t]his one error alone is staggering," and in that light "[i]t is difficult for me to read and believe that the United States and at least one of its experts seek to defend the circuit judge's refusal of this instruction on the ground it was *cumulative*!" (Hawkins Stmt. at 17.) The instructions were obviously *not*

"duplicative," however, and given Loewen's proffer of evidence and argument that it was wrong for O'Keefe to slander Loewen for being foreign, and Loewen's extensive efforts to have a tailored and detailed anti-bias instruction given to the jury, Landsman's suggestion that Loewen was unconcerned about nationalistic bias is simply not credible.

B. The Plaintiffs' Strategy of Racial Politics Served Further to Incite the Jury's Excessive Verdict

57. In their Memorials, Claimants demonstrated (TLGI Mem. at 19-36, 40-43, 45-48; R. Loewen Mem. at 29-34) that O'Keefe's counsel made and elicited from witnesses wholly irrelevant racial remarks and inferences, intended solely to encourage and inflame the prejudices of the predominately black jury against Loewen. The United States responds by conceding that Willie Gary played the "race card" (U.S. Counter-Mem. at 27) but urges that "Claimants fail to acknowledge the direct relevance of race to the legal claims in the [*O'Keefe*] dispute, as well as Loewen's own role in invoking race as part of its flawed litigation strategy." (*Id.* at 25.) But race was not at all relevant to the legal claims in the *O'Keefe* case, and "Loewen's own role" was limited to trying to defend itself in the context of a racially-charged lawsuit filed in a racially-polarized state.

1. The Trial Was Racially Charged

58. Although the United States suggests otherwise, Willie Gary himself bragged that race played a prominent role at trial. In his trial strategy manual, *Winning Words*, Gary boasted that he is "particularly proud of being at the center of the social and political dynamics of the [*O'Keefe*] case. His role here is that of a young black lawyer representing a 72-year-old white man . . . ." (App. at A521.) Those "social and political dynamics" included racial appeals: "This was a case where cross-cultural currents played a big part, including a subtle race card. Nobody was better at exploiting it than Willie E. Gary." (App. at A3099.)

59. The O'Keefe trial took place in the shadow of what was surely the most highly publicized trial in United States history, in which a predominantly black jury acquitted former football star O.J. Simpson, who also is black, of two murders that he almost surely had committed. As Simpson's own lawyers acknowledged, the acquittal was largely due to a trial strategy of "deal[ing] the race card from the bottom of the deck." (*See* TLGI Mem. at 32; R. Loewen Mem. at 32 n.12.) Willie Gary himself linked the *O'Keefe* case to the Simpson trial — where the Simpson trial was popularly called "The Trial of the Century," Gary christened his *O'Keefe* victory "The Civil Trial of the Century." (App. at A519.)

60. The fact that the *O'Keefe* trial took place in Jackson, the capital of the State of Mississippi, made Gary's racial appeals even more dangerous. Mississippi, the "most openly segregationist state in the Deep South" during the 1960s, was the center of the black civil-rights movement. *See, e.g.,* Nicolaus Mills, *Like a Holy Crusade: Mississippi 1964 — The Turning of The Civil Rights Movement in America* 19, 27 (1992); *see also* Len Holt, *The Summer That Didn't End: The Story of The Mississippi Civil Rights Project of 1964* (1992). The United States' own source, Jonathan Harr's *New Yorker* magazine article, recounts O'Keefe's concern about "the fact that the jury pool in Hinds County, which encompassed the city of Jackson, was approximately two-thirds black" — a concern that ultimately led to the hiring of Willie Gary. (U.S. App. at 183.) The jury ultimately selected included eight blacks; and, while the United States stresses the inclusion of four whites, it omits the fact that Mississippi law permits a civil verdict by agreement of only nine jurors. (Tr. at 5520; Miss. Code Ann. § 13-5-93.) And, as Claimants have previously explained, under the United States' Voting Rights Act, Judge Graves (who is himself black) was elected from a voting district drawn specifically to guarantee the

election of a black judge. (*See* TLGI Mem. at 13-14; R. Loewen Mem. at 14; Neely Aff. at 6); *see also Martin v. Mabus,* 700 F. Supp. 327 (S.D. Miss. 1988).

2. O'Keefe Exploited Racial Divisiveness

61. The United States concedes that O'Keefe injected racial issues into the trial, but contends that race was relevant to O'Keefe's antitrust claim: "To define Loewen's market power in certain areas . . . it was necessary to establish that the relevant markets for purposes of comparison included white funeral homes that Loewen owned and excluded African-American funeral homes with which they did not compete." (U.S. Counter-Mem. at 26.) As discussed below, *see* pp. 74-75, *infra*, this is a makeweight excuse.

62. Even apart from the fact that O'Keefe's antitrust claim was utterly unsupportable, the trial record reveals innumerable gratuitous references to race made by O'Keefe's counsel and elicited from O'Keefe's witnesses that could not even plausibly be justified by "market definition" issues. (*See*, *e.g.*, Tr. at 139, 461, 1083-1096, 1116-19, 2111, 2261.) As Claimants have shown (TLGI Mem. at 14-15, 23-25, 31-32, 42, 46-47; R. Loewen Mem. at 29-34), Gary's obvious strategy was to prejudice the jury by portraying O'Keefe as a friend of the black community, while portraying Ray Loewen and The Loewen Group, Inc. as racist.

63. As Claimants demonstrated (TLGI Mem. at 23-25; R. Loewen Mem. at 31-32), Gary called a parade of character witnesses to establish that O'Keefe was an unbiased friend of the black community (not to mention a war hero and a proud Mississippian). Susan O'Keefe Knight, Jerry O'Keefe's daughter, was the very first witness presented at trial; she struck the racial theme by testifying that her father "has been in business for 40 years dealing with people all over the State of Mississippi, funeral homeowners, other insurance company owners, black and white." (Tr. at 139.) Walter Blessey, president and director of Gulf Holdings, similarly testified that "Our Gulf National O'Keefe family companies do business with approximately 130

funeral homes, both black and white funeral homes throughout the State of Mississippi." (Tr. at 461.) O'Keefe's "antitrust" theory was that he and Loewen competed only in predominately white markets. (*See* R. Loewen Mem. at 33; *see also, e.g.*, Tr. at 16, 403, 1132.) Thus, the fact that O'Keefe did business in different, predominantly black markets was legally irrelevant.

64. Nor does the United States even attempt to suggest that the similarly gratuitous testimony by prominent black members of the local community, such as Mike Espy (*see* TLGI Mem. at 23-24; R. Loewen Mem. at 31-32) and Earl Banks (*see* TLGI Mem. at 25; R. Loewen Mem. at 32), was relevant to "antitrust" issues. It had nothing to do with "antitrust" or "market definition" when Espy endorsed O'Keefe as "a man without bias": "[A]s 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.) It had nothing to do with "antitrust" or "market definition" when Earl Banks, a black state legislator and Jackson, Mississippi, funeral home operator, testified about O'Keefe's "unusual" willingness to pursue a partnership with Banks' black funeral home. (Tr. at 1118-19; *see generally* TLGI Mem. at 23-25.) These overt racial appeals were effective; as confirmed by the post-trial Juror Report, "Mike Espy and Earl Banks were very well received." (App. at A3044.)

65. Nor can the United States excuse on antitrust-related grounds O'Keefe's own, carefully prepared testimony (*see* TLGI Mem. at 26) about his desire to protect "[t]he little people" who owned "both white and black" funeral homes "all over the state of Mississippi":

> MR. O'KEEFE: When I wasn't able to get the extension approximately 30 days after May the 20th — as a matter of fact, it was on Father's day, on Sunday, 1991, and I flew to South Carolina, and I endorsed all of the shares that I owned in the

> company, gave them to Ralph Ogden, president of Liberty life, told him I would give him my interest in this company, which was the controlling interest, if he would see that the company wasn't closed down, because if it was, the policyholders would be damaged . . . .
>
> MR. GARY: The little people?
>
> MR. O'KEEFE: Yes, sir and a lot of those were small funeral homes, *both white and black owned* all over the state of Mississippi, and they would have all suffered substantial loss, and I was willing to give up my interest in the company if Liberty Life would assure the survival of Gulf National.

(Tr. at 2110-11 (emphasis added); *see also id.* at 2261 (O'Keefe testifying that his company "deal[t] with 100 funeral homes around Mississippi approximately, *white-owned funeral homes and black-owned funeral homes* . . . .") (emphasis added).)

66. Finally, the United States cannot justify, on antitrust grounds, Gary's characterization of Loewen's business relationship with the National Baptist Convention, the largest and oldest black religious organization in the United States, as being racially exploitative. (*See, e.g.,* Tr. at 5577-78, 5704, 5798-99.)

67. In sum, it is clear that O'Keefe's repeated racial appeals were not intended to define antitrust markets, but were made simply to inflame the predominantly black jury against Loewen and in favor of O'Keefe.

3. The "Race Card" Was Played First by Gary

68. Claimants showed (TLGI Mem. at 31-32, 35-36; R. Loewen Mem. at 32-33) that, midway through trial, Judge Graves noted that "on the plaintiff's side" the lawyers had "called certain witnesses and raised character issues and demonstrated that we [meaning O'Keefe] did business with black folks." (Tr. at 3595.) Indeed, Judge Graves acknowledged that "it certainly looked like in the vernacular of the day, the race card has already been played." (Tr. at 3595-96, 3597.) And he later remarked, in the course of allowing an O'Keefe rebuttal witness to give

racially-based testimony, that it was not Loewen who had started this strategy: "I know y'all [Loewen] didn't start it. You're going to bring up the rear, and it ain't going too fast." (Tr. at 5289.)

69. The United States cannot dispute that Willie Gary played the race card first, leaving Loewen to "bring up the rear." Nonetheless, the United States urges the Tribunal to view these statements in the "context" of a pre-trial conference (U.S. App. at 984-1001) at which Judge Graves "evenhandedly" (U.S. Counter-Mem. at 27) expressed concern about what he called the parties' "'lawyer of the week' hiring" practices. (U.S. App. at 994; *see also* U.S. App. at 180-84 (describing Gary's hiring as lead counsel to replace the admittedly "prejudiced" Michael Allred).) The United States says that "Judge Graves expressed particular concern about two actions taken by Loewen with respect to its hiring of African-American attorneys" (U.S. Counter-Mem. at 27), but the record is clear that not once during this conference did Judge Graves ever express concern about Loewen's "hiring of African-American attorneys"; indeed, not once during this conference did Judge Graves make *any* reference to race or racial matters.

70. Thus, nothing refutes Claimants' clear showing, based on the trial record itself, that Gary and O'Keefe "played the race card" first (Tr. at 5289) and that Judge Graves recognized this but did nothing about it. (Tr. at 3597.) Indeed, as the United States implicitly concedes (U.S. Counter-Mem. at 28-29), Loewen was attempting to protect itself in the face of Gary's racial appeals and Judge Graves' refusal to stop them. Once it became clear that Judge Graves had approved O'Keefe's efforts to pander to the predominantly black jury, Loewen was forced to show that it too was engaged in business dealings with the black community. For example, Dr. Edward Jones testified that Loewen's contract with the National Baptist Convention contributed to the "economic empowerment and development" of the local black community. (Tr. at 4753-

54.) It is perverse for the United States to now urge, as it does (U.S. Counter-Mem. at 29), that Loewen's responsive but ultimately unsuccessful efforts to protect itself from racial discrimination somehow bar its NAFTA claim to seek redress for that very discrimination.

4. Gary's Religious Appeals Also Invoked Racial Issues

71. The United States' own sources describe Willie Gary as having "the persuasive powers of a Pentecostal preacher" and as accepting "only cases capable of boiling the conscience of a jury." (U.S. App. at 27.) As one opposing counsel explained: "'Voir dire . . . is like an old-fashioned Baptist revival. He [Gary] does everything but lead them in hymn and shout praise the Lord. . . . He does stuff that no other lawyer would be permitted to do.'" (App. at A3122.) Gary's preacher-like style is also apparent in his videotaped reprise of the *O'Keefe* closing argument, which Claimants have submitted to the Tribunal. (App. at A3150.)

72. As the jurors themselves recognized, before the trial even began, Gary sought to "identify the O'Keefe side of the litigation as the right side for black jurors to be on." (App. at A3048.) To this end, Gary enlisted the help of Reverend Jeffrey Stallworth, who allowed Gary to speak in his predominantly black church and brought other well-known black leaders to trial to be seen by the jury shaking hands with Willie Gary. (App. at A3048-49; *see also* A3061, A3073.) Numerous members of Reverend Stallworth's congregation were present during the trial to demonstrate the black community's support for O'Keefe. (App. at A741-42.) One juror called the presence of black ministers and leaders in the courtroom "obvious." (App. at A3050.)

73. Despite Judge Graves' instruction not to make public statements about the case (Tr. at 1123) and with full knowledge that the jury was not sequestered, 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; *see also* App. at A397-98.) On another occasion, Gary returned to that church and spoke directly from the pulpit. (*See* App. at A741.) And in the middle of the trial, Gary and

his partner Lorenzo Williams appeared on a local radio show and made what Loewen's lawyer told Judge Graves was "at least one appeal for community prayers for that side of the case in connection with this action." (Tr. at 1002.) Gary responded by claiming that "the facts of the case was [sic] never discussed," but defended his request for prayers by saying "Now, if — I'm a religious person. That's just me, and I always close by saying, 'I will pray for you and you pray for me' or 'I need your prayers' or whatever." (Tr. at 1004.) This was typical behavior for Willie Gary, who once boasted that "[m]ixing church and law is great." (App. at A3125.)

74. In his closing argument, Gary made repeated gratuitous appeals — entirely unrelated to "antitrust" or "market definition" — to religion and race. Describing his preparation for closing argument, Gary told the jury: "And last night as I thought about what I'd say, I couldn't find words that were adequate to express what I wanted to say to you. I couldn't find words, so as always, I called on a power that's greater than Willie Gary. I said, 'Lord, tell me what to say. Show me the way.'" (Tr. at 5540; *see also* App. at A3150.)

75. Gary also gratuitously invoked Reverend Dr. Martin Luther King's famous "I have a dream" speech: "Members of the jury, you know the workings of the jury systems speak louder than . . . the words of Dr. Martin Luther King, Jr. in his famous I have a dream speech. . . . Dr. King said, 'No crown without a cross.' Its been almost five years that we've been fighting." (Tr. at 5539-40.) Mixing racial and religious sentiments on another occasion, Gary again borrowed language from the black civil rights movement: "I'm reminded of that [religious and civil rights protest] song that we are soldiers in the Army, and we're fighting. Sometimes we have to fight, sometimes we have to cry, but we're fighting. That's all right. We're going to keep fighting. Persecute us, call us nobody, talk about us. . . . This is what he's [O'Keefe] been through. . . ." (Tr. at 5706-07.)

C. O'Keefe Used Class-Based Animus To Further Incite the Jury

76. Claimants demonstrated (TLGI Mem. at 16-17, 28-29, 34-35, 46) that Willie Gary repeatedly portrayed Loewen as a gigantic, wealthy, foreign corporation (and its CEO, similarly, as a wealthy foreigner), and contrasted the similarly wealthy O'Keefe as a small, local, family businessman. Claimants also showed that this strategy significantly contributed to the verdict. (TLGI Mem. at 43-47.)

77. In response, the United States suggests that Gary's class-based incitement rests "almost exclusively on a single, brief exchange" involving Loewen's "yacht." (U.S. Counter-Mem. at 30, 31.) The United States also contends that the "particular legal claims at issue in the case" justified O'Keefe's appeals to class prejudices. (*Id.* at 30-31.) Neither contention is sustainable.

1. O'Keefe's Populist Appeals Were Not Merited By The Claims

78. The only justification that the United States offers for O'Keefe's appeals to class-based animus is that the complaint had alleged that Loewen exploited its "unequal financial means to oppress the Plaintiffs." (U.S. Counter-Mem. at 30 (quoting App. at A44).) That is a slender reed on which to defend Willie Gary's antics. As discussed below, Mississippi does not recognize the tort of "oppression" under which these allegations were made; that claim was obviously included to justify the incendiary rhetoric that O'Keefe, primarily via Willie Gary, would use at the trial.

79. In any event, O'Keefe's "oppression" claim simply cannot justify the numerous references to Loewen's wealth, and its status as a big corporation, that pervaded the trial. It cannot possibly justify Gary's repeated references to Loewen's size and wealth (and his concomitant efforts to paint O'Keefe as a poor, small businessman) during voir dire:

- "[D]oes anybody in here feel that a big corporation should have the right to make a deal for someone else and not be bound by it, just back out? Anybody feel that they should have the right because they're big and powerful to do that?" (App. at A343-44.)

- "But you also agree that it doesn't give them any advantage over anybody else because they're a big corporation." (App. at A356.)

- "You wouldn't . . . hold it against [O'Keefe] because there were times in his life, even goes all the way back to the depression where they needed money, he needed money, no other reason, needed money. Would you hold that against him? If he needed money, you won't find [O'Keefe] guilty for that, will you? All of us would have to be found guilty, right? Do y'all agree with that?" (App. at A369 (emphasis added).)

80. Nor can O'Keefe's "oppression" claim possibly justify the numerous appeals to class-based animus, the efforts to align O'Keefe with "the people of the poorest state in our nation," and the first of many snide references to Loewen's yacht, all of which appeared in the opening statements for O'Keefe:

- "If the [1991] settlement [agreement] was not carried out, he [O'Keefe] would have to fight for his life in a difficult and expensive litigation against a rich and powerful international corporation." (Tr. at 24.)

- "He [Ray Loewen] wants to raise prices upon the backs of poor people who need to bury their beloved old." (Tr. at 38.)

- "This is a case about broken vows, deceit, lies, betrayal, greed, wealth, power. The given word means nothing, naked power means everything. At law, those are called fraud, breach of good faith, and its called the power of the people of Mississippi through the legislature, giving the power to the people of Mississippi through the jury box to say no to people like Loewen who would build rich fortunes upon the misery and the poverty of burying loved ones of the people of the poorest state in our nation." (Tr. at 41-42; TLGI Mem. at 20.)

- "Jerry and his wife started the Gulf Life National Insurance, and they worked it up. They worked it up. It just didn't happen overnight. We're not talking about Jerry with all kind of money. You're going to find that from The Loewen Group, they spend as much as 200 million dollars a year taking over small, small family-owned businesses, buying them out, 200 million a year. Jerry worked, and they built this business, members of the jury, the evidence is going to show that. . . . Now, members of the jury, the evidence will show that Jerry O'Keefe refused to stand by and allow The Loewen Group to do what they were doing to poor

people, poor people, people who could least afford to be taken advantage of, The Loewen Group." (Tr. at 53-54.)

- "Over here, they own 75 percent of the market. We own all the market, we charge you what we want to charge. And these are the people, the least of these that they should be charging like that." (Tr. at 56.)
- "When they went up to Canada, Jerry, Mike Allred, to try to resolve this, they had to come up because Ray Loewen said, 'You come up, visit me on my yacht.' A yacht that, through the company, the board allows him to spend a million dollars a year just to keep it, and his helicopter. 'So you come up and talk to me. Come talk to me.'" (Tr. at 64.)

81. O'Keefe and his attorneys continued to make Loewen's wealth and size an issue throughout the trial, in ways that had nothing to do with O'Keefe's "oppression" claim:

- Plaintiffs' witness Mike Espy testified that his prior jobs — with Central Legal Services and with the Mississippi Attorney General's office — involved "provid[ing] legal services to poor people." (Tr. at 1084-85, 1086.)
- O'Keefe's own carefully prepared testimony portrayed Ray Loewen as a pampered billionaire surrounded by servants on his yacht: "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. . . . Oh, yes, yes, we was 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 (emphasis added); *see generally* TLGI Mem. at 28-29.)
- O'Keefe also testified that he had a history of protecting "the little people." Afraid that the Mississippi Insurance Commissioner would "close our company up," O'Keefe testified about his efforts to prevent that. (Tr. at 2110.) When Gary interrupted to ask if these were "[t]he little people" who O'Keefe was protecting, O'Keefe responded, "Yes, sir and a lot of those were small funeral homes, both white and black owned all over the state of Mississippi, and they would have all suffered substantial loss, and I was willing to give up my interest in the company if [that] would assure the survival of Gulf National." (Tr. at 2111; *see generally* TLGI Mem. at 25-26 (discussing O'Keefe's testimony about his own small "family" business).)

82. Nor could O'Keefe's "oppression" claim justify Gary's many incendiary references in closing argument:

- "*He doesn't have the money that they have nor the power*, but he has heart and character, and he refused to let them shoot him down." (Tr. at 55-57 (emphasis added).)

- "You know your job as jurors gives you a lot of power. You have a lot of power. . . . *You have the power to bring major corporations to their knees* when they are wrong. You can see wrong, make it right. Suffering and stop it. You have that kind of power as jurors." (Tr. at 5794 (emphasis added).)

- "A message has to go to the defendants, and I'm not talking about Mr. John Wright, and I know they — it's not about anybody losing a job. This is about following the law, *because they're going to make a lot of money anyway*. And maybe what you do today won't completely — won't completely *rid them*, but I can tell you what. 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 the *old*, target the *debt ridden*, target young people *who are in disarray*, take their properties for no doubt much less than what it's worth, and then you're *gouging people*." (Tr. at 5797 (emphasis added).)

- "*Ray comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him.* Now, they've got to be stopped. It ain't about feeling sorry for them. They didn't feel sorry for those families. They don't feel sorry for them, members of the jury. . . . You have a rare opportunity, a rare opportunity, one that you may never get again, but you're going to have a verdict form that will represent you all. It will basically say that you were here, that you signed your name on a document that said to Ray Loewen, 'No more, no more.' And you ought to be proud of the fact that you have that opportunity. A lot of people never get an opportunity to make a difference, to make a difference, and I want you to be proud of the fact that you made a difference and don't have to. Do it, stop them so in years to come anybody should mention your service for some 50 some odd days on this trial, you can say, 'Yes, I was there,' and you can talk proud about it. You may be sitting around in the house, talking to your children or your grandchildren in a rocking chair, I don't care where it is, anybody question your service on this jury, you can say, 'I was there, and I stood up and did the right thing. I did the right thing.'" (Tr. at 5801-02 (emphasis added); TLGI Mem. at 46.)

83. O'Keefe's wealth-based incitement strategy continued all the way through Gary's final rebuttal argument — the last argument the jurors heard before deliberating on punitive damages:

> 600-160 million dollars is peanuts to these people. They spend that a month. You ain't going to do nothing to them by just coming back with 160 million. That ain't what your job is. If you're going to do it, do it. Do the job, do it right. You see, this ain't about emotions. They took the stand and told lies. They treated Jerry and the Riemanns, like they even said, like dogs in some cases, redheaded stepchildren. Ray Loewen doesn't care. He doesn't care. He's not even here today. That's the ultimate arrogance, and his people are here. He want them to talk them out of it. So you know what, he's up there still doing what he's doing. He did it to Al Clemons in Pennsylvania, he came out and they — Mr. Jack — they put Mr. Jack Robinson out of business. Do you know how long that man has been in business? You're talking about a family that's been in business 40, 50, 60, 70 years. He sweeps in days, months, and then they want to get away with it. Then they got up here and tried to snow you again. That 683, we borrowed that. Didn't you hear that for the first time? You see, smoke screen, they're snowing you. They're snowing you. . . .
>
> . . . .
>
> 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 *poor people, grieving families everywhere*. I urge you to put your foot down. Don't let them get away with it. Thank you, and may God bless all of you.

(Tr. at 5808-09 (emphasis added); *see* TLGI Mem. at 46-47; R. Loewen Mem. at 29.)

84. The post-trial Juror Report demonstrates the effectiveness of Gary's class-based incitement (and its independence from the supposed tort claim of "oppression"). One juror credited Gary's strategy: "*The plaintiffs wanted to focus on Jerry O'Keefe and his thirteen children, and that he was not a big corporation* ***and it worked.***" (App. at A3064 (emphasis added).) Another juror said she "admired [O'Keefe for] his stubbornness in fighting a *mammoth organization like Loewen which was used to running over people*." (App. at A3070 (emphasis added); *see also* App. at A3046 ("Willie Gary appears to have dominated the trial. A plaintiff strategy was clearly to seek juror identification with Jerry O'Keefe and his 13-children family."),

A3045 ("[Gary] developed a theme of a noncaring foreign corporation exploiting the bereaved families for profit and commented on Ray Loewen's absence from the courtroom.").)

85. The Juror Report also proves that Gary's juror-empowerment message had hit home. According to the Juror Report, "several of [the jurors] appeared almost 'drunk with power.'" (App. at A3088.) One juror "expressed the attitude that she was just a poor woman and that this was her one moment to have an impact and do something for good." (App. at A3092.) "[W]hen Judge Graves told them in a private session after the verdicts were in, that their verdict was the largest in the history of Mississippi and possibly the nation, [several jurors] seemed to 'swell with pride' in what they had done." (App. at A3092.) In the end, as the Juror Report demonstrates, "[t]here was a populist prejudice against a *giant foreign corporation* they came to view as a ruthless, price gouging monopolist." (App. at A3088 (emphasis added).)

2. "Me, I'm trying the case on the yacht theory!"

86. The United States' response to Claimants' showing (*see* TLGI Mem. at 34-35) regarding Willie Gary's irrelevant yet inflammatory cross-examination of Raymond Loewen and Loewen's ownership of a "yacht" is yet another reinvention of the facts. In essence, the United States claims that Loewen itself was responsible for the "yacht" cross-examination because it "called as a witness Peter Hyndman, who was then Loewen's Vice President of Law and Corporate Secretary," and "asked [him] a series of questions about Mr. Loewen's 'boat.'" (U.S. Counter-Mem. at 31.)

87. Although it buries the concession in a footnote, and attempts to characterize it as a "fleeting reference," the United States acknowledges (U.S. Counter-Mem. at 31 n.19) that Willie Gary's opening statement invoked Loewen's "million-dollars-a-year" yacht. (*See* Tr. at 64.)

88. Similarly, the United States omits, wholesale, the direct testimony about Loewen's "yacht" that Gary elicited from O'Keefe: "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. . . . Oh, yes, yes, we was 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.) This occurred three days before Loewen put on its first witness, sixteen days before Hyndman testified, and 22 days before Ray Loewen ever took the witness stand. Thus, the United States' is simply wrong to contend that Loewen started the "yacht" references.

89. In light of Gary's antics, Loewen was forced to explain that it legitimately used the yacht for business purposes. (*See* Tr. at 4401-05.) The United States asserts, "Significantly, when O'Keefe's counsel attempted to cross-examine Mr. Hyndman on the subject, Judge Graves *sustained* Loewen's objection and prevented the inquiry, concluding that 'we've heard enough about boats.' Tr. 4575-77." (U.S. Counter-Mem. at 31 (emphasis in the original).) The transcript of that exchange is illuminating as to Gary's tactics, and it does not support the United States' story:

> MR. GARY: Thank you, sir. Thank you. Now, let me just talk to you, if I can, for a moment about the *little boat* that you talked about yesterday with Mr. Blackmon. Do you remember that yesterday?
>
> MR. HYNDMAN: Yes.
>
> Q: Now, as I understand it from you testimony, y'all can put — socialize about 50 people on this *boat*, right?
>
> A: Up to 50 or so people.
>
> Q: And you have — you entertain your guests when they come to town to discuss business deals, right?
>
> A: Yes, there's socializing and business discussions as well.
>
> Q: On this *little boat*?

A: Correct.

Q: Now, this wasn't a *canoe*, was it?

A: No, sir, I think I gave the length yesterday, 110 feet.

Q: Who owned the boat?

. . . .

Q: Who owns the company that owns the boat?

A: Mr. Loewen.

Q: And that's him over here?

A: That is correct.

Q: Okay. All right. I want you to be straight. I know you're trying to give me the best answers you can. I want to help you. Now, and the stockholders pay him big money for the use of that *little boat*, right?

A: The company —

Q: Yes or no, sir?

A: Yes, well the company does, not the stockholders. The company, The Loewen Group, when it rents that boat, pays the rent, but it's the company, not the stockholders.

Q: But ultimately the stockholders, right, sir?

A: Yes, you could put it that way, if you want, but the short answer is it's the company that writes the check for the rental.

Q: And on this *little bitty boat*, he has a helicopter pad, too; is that correct?

A: That is correct.

. . . .

JUDGE GRAVES: Let me have everyone else be seated please. There is one other matter. The plaintiffs are attempting to introduce a portion of form 10-K filed with the [SEC] in connection with the amount of money paid to the company that owns the boat for the charter. The defendants have objected based on relevance. The Court is inquiring of the plaintiffs what the

relevance is of that information. Mr. Gary, do you have a response?

MR. GARY: Your Honor, one issue is, first of all, they brought it up and brought up the fact that —

JUDGE GRAVES: Now, *y'all* [meaning plaintiffs] *brought it up.*

MR. GARY: *Yeah*. With *this witness* they brought it up.

. . . .

JUDGE GRAVES: . . . You need to — *are you going to be able to connect all this up to some issue you've got in this case*?

MR. GARY: Oh, yes, Your Honor.

JUDGE GRAVES: *And what issue is that? What claim are you raising about we need to talk about about how much they paid for this boat in connection with that claim?*

MR. GARY: *The kind of money they spend on these four categories of people to lure them in, to cluster these funeral homes, Jack Robinson talked about it*.

JUDGE GRAVES: Here is my concern. I — I never thought it was relevant, but then *when y'all raised it, I assume they felt compelled to try to deal with it*.

. . . .

JUDGE GRAVES: I'm not following — I'm not following the logic of the argument. I think we've heard enough about boats.

MR. GARY: Well, Your Honor, it's — first of all, Your Honor, it at least goes to — it goes to — now, if this money — it goes to the issue of the whole pattern and the scheme that we've talked about. This is a widespread situation here in terms of this fraud, and *it goes to luring these people in.* It goes to getting them up to Canada, and basically talking them out of their life savings. That's the bottom line and using the boat to get there, and that's the kind of money that they spend on it to do it. They spend a lot of money on that. *That's the focus in this case. It's a big dollar that they spend on luring these people in.*

JUDGE GRAVES: Objection sustained.

(Tr. at 4572-78 (emphasis added).)

90. The actual exchange is telling for several reasons. *First*, it makes clear that it was O'Keefe who raised the issue of the "yacht," and that Loewen only then "felt compelled to try to deal with it" in an attempt to mitigate the prejudice. (Tr. at 4575-76.) *Second,* it contradicts the United States' assertion (U.S. Counter-Mem. at 30) that wealth was relevant because O'Keefe included allegations of "unequal bargaining position" in his complaints — Gary did not even *attempt* to justify his "yacht" baiting on this ground, but instead weakly claimed that it was relevant to some "luring" theory. *Third*, it proves false the United States' assertion that Judge Graves "prevented the inquiry" — the record is clear that he allowed Willie Gary to ask 14 venomous questions on an irrelevant subject. *Fourth,* it explains why it was necessary for Loewen to ask three factual questions about the "boat" or "yacht" during direct examination of Ray Loewen (Tr. at 5102), which were followed by *twenty* sarcastic cross-examination questions on the same subject by Gary. (Tr. at 5106-08.)

91. Willie Gary may have told the jury that the "yacht" issue "doesn't have nothing to do with the case" (Tr. at 5557), but that was surely preterition. As Gary himself later acknowledged, "'(Loewen) had these silk-stocking lawyers from Harvard, Yale and Princeton, and they're trying the case on legal theories about breach of contract. Me, I'm trying the case on the yacht theory!'" (App. at A3123.)

D. The Evidence Does Not Support Any Portion of The Excessive $500 Million Verdict

92. In their memorials, Claimants demonstrated that the damages awarded in the O'Keefe case were excessive, unsupported by the evidence, and the product of bias, passion, and prejudice. Claimants showed that the jury ignored the court's instructions regarding bifurcated trials, and imposed $160 million in punitive damages before any evidence in this regard had been presented. Claimants further showed that Judge Graves' "reformation" of this improper verdict,

as well as his statements to the jury regarding Loewen's failure to "accept" it, implied that $160 million was inadequate. Claimants also demonstrated that the ensuing $400 million award was grossly disproportionate to O'Keefe's actual damages, and the product of inflammatory statements, misinformation and rank speculation. (TLGI Mem. at 40-47; R. Loewen Mem. at 35-36.)

93. The United States replies that the verdict was "based on the jurors' good faith view of the evidence introduced at trial." (U.S. Counter-Mem. at 133.) With regard to the $100 million compensatory award, the United States, without mentioning the emotional damages that it concedes form the bulk of this award, asserts that "O'Keefe presented credible evidence of more than $35 million in economic damages." (*Id.* at 135.) The United States also argues that $400 million in punitive damages was permissible, given Loewen's net worth and alleged wrongful conduct, particularly when compared with other excessive awards handed out by U.S. juries. (*Id.* at 138-43.)

94. None of the three principal damage components — punitives, emotional distress, and economic damages — was in any way justified. The $400 million punitive damages award was driven by the stated desire of some jurors to "destroy" Loewen, and by unsupported speculation and fabrication concerning a contract with the National Baptist Convention. The $74.5 million award for emotional distress was based on less than two pages of testimony that Jerry O'Keefe had some stress and sleepless nights. And the award for economic damages included legally impermissible elements such as unforeseeable consequential damages and future lost revenues (as opposed to future lost profits). The jury was also utterly confused: It failed to differentiate between punitive damages and actual damages, awarded duplicate damages for the same claims, and awarded damages that even O'Keefe had not requested. What the jury did recognize was

that actual damages, if any, were quite modest: According to the jury foreman, "Maybe O'Keefe lost $1 million dollars, $6 to $8 million dollars I'd say was right." (App. at A3079.) Thus, nothing in the record even remotely justifies the grossly excessive $500 million verdict.

1. Punitive Damages

95. The $400 million punitive damages award rested largely on fabrications and speculative profit projections related to Loewen's contract with the National Baptist Convention ("NBC"). In his closing argument, Willie Gary repeatedly asserted that Loewen would make *$7.9 billion* in profits from this contract, but nonetheless refused to allow black NBC members into its funeral homes. (Tr. at 5554-55, 5577-78, 5704, 5798-99.) Both allegations were false.

96. The $7.9 billion profit figure finds no support in the record, but seems to rest on an absurd and unexplained extrapolation from vault prices and NBC membership statistics. To derive that figure, Gary apparently took the cost of a burial vault ($2,860) in one of the more expensive markets in Mississippi (the small town of Corinth) (Tr. at 1131-32, 1135, 4603-04), subtracted Loewen's wholesale price for that vault ($940) (Tr. at 1136), and multiplied the difference by 4.1 million, representing half of the NBC's 8.2 million members. (Tr. at 4589-90, 5554-55.) But there was no evidence at all that 4.1 million NBC members — or even a fraction of that number — would ever buy Loewen vaults. Gary also never bothered to account for a multitude of costs associated with such sales, including inventory, labor, health insurance, etc. And his calculation required that all 4.1 million NBC members buy their vaults in Corinth, Mississippi (population 11,820),[5] rather than in larger markets where vaults can cost more than $1,000 less. (Tr. at 1135-36.)

[5] Available at http://www.pe.net/~rksnow/mscountycorinth.htm.

97. When Gary first mentioned his absurdly speculative $7.9 billion profit figure (in closing argument), Loewen strenuously objected, but Judge Graves overruled the objection:

> MR. GARY: . . . [M]embers of the jury, if they take just half of them, they make 7.9 billion dollars off of the National Baptist convention. Baptist convention get 1 percent of this.
>
> MR. BLACKMON: Your Honor, I would object. This is way beyond the scope of any evidence introduced at this trial.
>
> JUDGE GRAVES: Overruled.
>
> MR. GARY: That's what I told you this case was about, it's about greed. It's about greed. We've been fighting for a long time now, and it's time that they get justice, get justice.

(Tr. at 5554-55.) Emboldened by Judge Graves' ruling, Gary then treated the $7.9 billion figure as an established fact:

> They took the advantage of the church, and the agreement say [sic] we have to buy all the unperforming cemeteries, and I asked Mr. Hyndman, I said, "Are you talking about the cemeteries of African Americans?" And I may have said black people. And he said, "Yes." And then he's going to get 8.2 million people to go out and sell their own property, property that their great grandfather's [sic] died and fought for and gave it to the church, and now it's going to end up in the hands of Ray Loewen. *He's going to make over 7. Something billion dollars offer of it [sic], and it ain't right.* It's not right.

(Tr. at 5704; *see id.* at 5577-78.)

98. Gary built on this impermissible speculation during the punitive damages phase. He elicited testimony from Bernard Pettingill that Loewen's net worth was actually $3.1 billion — almost twice Loewen's entire market capitalization of $1.8 billion. (Tr. at 5762.) To explain why the market had supposedly undervalued Loewen by some $1.3 billion, Pettingill rested entirely on the assertedly unrecognized — and entirely unproved — future "value of the contract . . . with the National Baptist Convention alone." (Tr. at 5763.)

99. In his punitive damages closing, Gary combined his made-up $7.9 billion figure with a new and incendiary allegation that Loewen, despite profiting from the NBC contracts, refused to bury black NBC members in its funeral homes. That allegation was an outright fabrication, but Gary used it with devastating effect:

> Members of the jury, they are getting over, they are getting over big time. You saw the numbers here on this Baptist Convention contract, one number showed, members of the jury, these people are just — members of the jury, they're just getting away with whatever they want to. . . .
>
> . . . .
>
> They make 757 million, and the Baptist, based on that contract as signed, they don't get a dime. They don't get a dime. They're smart, raking in the cash, raking in the cash. They sell vaults — they price to sell them in Corinth, Mississippi, to just over half of the Baptist Convention, and they had gotten an exclusive contract, locked them in, they can't even go anywhere else. *They make over 7.9 billion, that's off of that one contract, and that's just selling vaults*. Well, nobody's going to buy a vault with no place to put it. 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."*

(Tr. at 5798-99.)[6]

100. According to the juror interviews, Gary's fabrications regarding the NBC contract "inflamed" the jury to "destroy" Loewen:

---

[6] In fact, TLGI is a highly regulated company that never obtained any unfair economic advantage in the marketplace; it never made the type of wildly exaggerated profits alleged by Gary, but, rather, exhibited disciplined growth which in turn gained favor with investors. From 1991 to 1995, TLGI's net profits were 8.9%, 6.2%, 9.3%, 9.2% and (12.8%), respectively. The *average* net profits as a percentage of revenue during that five-year period was only 4.2%, and the average was 8.4% for the four years excluding 1995. (App. at A1749.)

- "The real clincher in the case on punitive damages was the Black [sic: Baptist] Convention contract, that's what put the number in some jurors [sic] minds up to $1 billion." (*Id.* at A3077.)

- The contract "really angered Akida [Emir] and some other jurors. They saw this as not particularly relevant to the trial, but just a good example of how Loewen exploited different groups and people." (*Id.* at A3072.)

- "Akida Emir said she wanted to *destroy*." "[She] was the ringleader. She said that this was her one chance to make a difference." (*Id.* at A3059-60 (emphasis added).)

- Ms. Emir felt that the contract "was a classic case of overreaching and exploitation by the Loewen Group, whereby the Loewen Group would sell burial plots to poor, ignorant black people *but not even handle the burials for them*. She said it really *outraged* her. . . This evidence *inflamed* her and she said it still makes her angry every time she thinks about it." (A3072 (emphasis added).)

- The jurors "viewed Loewen as a smart white man getting something out of blacks vis-à-vis the Convention contract." (*Id.* at A3061.)

101. The jury was also swayed by Gary's absurdly exaggerated arguments regarding Loewen's net worth:

- "Rhonda Johnson[] wanted to give $1 billion dollars in damages from the outset. When the punitive hearing was held, she wanted to give $3 billion dollars, *the entire net worth of The Loewen Group* per plaintiffs' testimony." (*Id.* at A3059 (emphasis added).)

- "Hugh Parker was good. Said Loewen was worth $3.1 billion dollars. . . . Said that Loewen was going to make $9 billion a year off the [NBC] contract; that's what did it." (*Id.* at A3078.)

102. Thus, the jury harshly punished Loewen on the basis of Willie Gary's fabrications about a lawful contract (*i.e.*, the NBC contract) that had absolutely no relevance to the O'Keefe contracts.

103. Finally, the $400 million punitive damages award was also grossly excessive in relation to the actual compensatory damages proved by O'Keefe. As the jury foreman admitted, those damages amounted to "[m]aybe . . . $1 million" — $6 to $8 million at most. (App. at

A3079.) Accordingly, there was no evidence in the record that would, under any theory, justify the $400 million punitive award. (*See* Hawkins Stmt. at 19-21; *id.* at 11.)

2. Emotional Damages

104. The $74.5 million award for emotional distress was also excessive. Like the punitive damages award, it also rested on unsupported and improper statements by Gary.

105. O'Keefe's third "Amended and Supplemental Complaint" sought a *total* of $625,000 in emotional damages for both Jeremiah O'Keefe, Sr. and Jeff O'Keefe. (App. at A202.) O'Keefe's counsel, Michael Allred, reaffirmed the pleaded damages in his opening statement. (Tr. at 42.)

106. The O'Keefes introduced almost no evidence to support these claims for emotional distress. Jeremiah O'Keefe, Sr. testified:

> Q. Now, with respect to your final efforts to settle this matter, at this point, had this whole ordeal caused you any grief?
>
> A. Yes, it had, a lot of sleepless nights and a lot of worry, and I don't like to be a cry baby, I'll tell you that, and I'm not one, but it wasn't easy, and it wasn't easy to go through that experience of giving up 37 years of effort to build this insurance company and then be willing to give it up.
>
> Q. When you say "sleepless nights", what are you talking about?
>
> A. Well, I mean that I was so much focused on trying to see that this company survived, that it deferred me and deferred my attention way from normal workday and just concentrating and focusing on trying to survive.
>
> Q. Did you worry?
>
> A. Yes, sir, certainly.
>
> Q. Was it stressful?
>
> A. Very stressful.
>
> Q. Was it emotional for you?

A. Yes, it was, very much so.

. . . .

Q. (By Mr. Gary) Now, Mr. O'Keefe, what has life been like for you and your family in the business community? Has this caused you any embarrassment?

A. Yes, it really has and —

Q. Why do you say that?

A. Well, I felt like I had to go to the bankers that I borrowed money from over the years and make an explanation to them on why things were the way they were and the cause of that, and the whole thing was a very tough, embarrassing time in my life.

Q. And is that still ongoing for you?

A. Yes, sir, it is.

(Tr. at 2114-16.)

107. O'Keefe's daughter, Susan Knight, testified:

Q. (By Mr. Gary) Now, has your dad worried about this? Has it caused him —

A. Yes, sir.

Q. Tell the jury what it's been like on your dad.

A. The past four years for the company, for the family, those of us that work in the business have literally been like a living nightmare, because we watched our father build this company for 40 years, and he's gone through good times and hard times. It hasn't been an easy road, but he's always managed to survive and work out any problems that came about. And as long as you're dealing fair and square, well, you say, "Yeah, whatever happens, that's — that's the way it falls. That's the breaks, you know." My dad has said over and over and over, "No one ever said life's going to be easy."

[Objection. Sustained.]

Q. (By Mr. Gary) Tell the jury what effect this has had on your dad.

> A. He's been under an unbelievable amount of stress, sleepless nights, worry, anxiety that his company was going to be lost because he was treated unfairly or dealt with someone that was dealing in bad faith and not being honest and telling one thing and doing another. I mean, it's the way anybody would feel if you had spent 40 years building a company and then all of a sudden you're treated like that. It's just unfair.

(Tr. at 176-77.) No other evidence supported the claim for emotional distress. In particular, there was no evidence of medical or psychiatric treatment, medication, or physical manifestation of illness or distress, and no expert testimony whatsoever. Nor was there any evidence of any kind as to *any* distress supposedly suffered by Jerry O'Keefe's son, plaintiff Jeff O'Keefe.

108. Nonetheless, in closing argument, Willie Gary asked for over $70 million in emotional distress damages. That amount included "$50,000 per day," every day, from the alleged contract breach in 1991 through the verdict in 1995. (Tr. at 5566.) Although Gary cited no evidence to support this outlandish figure, the jury nonetheless awarded it to O'Keefe.[7]

109. The United States nowhere even mentions, much less attempts to defend, the award of emotional distress damages. In fact, the United States addresses emotional distress damages only indirectly, through its failed attempt to inflate the economic damages. Specifically, the United States asserts (erroneously, *see infra*) that the record would support an award of up to $35 million in economic damages (U.S. Counter-Mem. at 135), which concedes an emotional distress damages award of at least $65 million. But a putative award of at least $65 million in emotional distress damages, based on minimal testimony "about loss of sleep and

[7] Gary asserted that his request for "$50,000 per day" totaled "70 some odd million" in emotional distress damages. (Tr. at 5713.) The trial transcript also records Gary's asking for emotional damages of "7,450,000." (Tr. at 5566.) Gary presumably asked for $74,500,000, which would represent $50,000 per day times 1490 days (or slightly more than four years) and the court reporter inadvertently dropped the last zero.

worry" is only marginally less absurd – and no less illegally excessive – than the actual emotional distress award of $74.5 million.

3. Economic Damages

110. During his opening statement for O'Keefe, Michael Allred asked the jury for "the approximate sum of 16 to 20 million dollars" in total "compensatory damages." (Tr. at 42.) Neither Willie Gary nor the jury, however, was so restrained. During closing argument, Gary demanded compensatory damages of over $105 million, including "70 some odd million" in emotional distress damages, and, therefore, approximately $30 to $35 million in economic damages. (Tr. at 5713-15.) Based on that request, and despite instructions and a special verdict form plainly limiting its focus to compensatory damages only (Tr. at 5521 (instructions); App. at A658 (special verdict)), the jury, in its November 1, 1991 verdict, nonetheless awarded O'Keefe $260 million in damages. That award is plainly excessive: it bears no rational relationship to the evidence presented at trial, the amount requested in Allred's opening, or even the amount requested in Gary's closing.

111. The special verdict form identified nine claims addressed to four distinct areas of alleged misconduct by Loewen. Questions one through four of the special verdict form addressed Loewen's alleged breach of the 1974, 1979, and 1987 contracts with Wright & Ferguson; those questions identified, respectively, claims for (i) breach of the contracts, (ii) intentional interference with the contracts, (iii) tortious breach of the contracts, and (iv) breach of implied covenants arising out of the contracts. (App. at A650-54.) Questions five through seven of the special verdict form addressed Loewen's alleged breach of the putative August 1991 settlement agreement with O'Keefe; those questions identified, respectively, claims for (v) wilful and malicious breach of the putative agreement, (vi) tortious breach of the putative agreement, and (vii) breach of implied covenants arising out of the putative agreement. (App. at A654-56.)

Question eight of the special verdict addressed a state antitrust claim (App. at A656-57), and question nine addressed a claim for fraud (App. at A657-58). Each question asked for a separate amount of compensatory damages; question ten asked for the total amount of compensatory damages "without duplication of any item of damages." (App. at A658.)

112. During closing argument, Gary made his various damages requests. For the four claims involving the Wright & Ferguson contracts, Gary requested a total of $980,000 in damages. (Tr. at 5710-12.) Gary recognized that the individual claims for (i) breach, (ii) intentional interference, (iii) tortious breach, and (iv) implied covenant breach encompassed the same contracts and the same damages, and he specifically warned the jury against quadruple-counting the damages:

> [W]ith the Wright & Ferguson contract, there are three [sic: four] causes of action and you're going to see this number on all three [sic: four] of them, but at the end of the verdict, you can't multiply all . . . of them by the different times. The verdict is going to say you can't duplicate them, but since they are the causes of action on each one of them, those are the damages.

(Tr. at 5711; *see also* Tr. at 5712 (addressing question four: "There again, identical causes of action on the different contracts. You're dealing with the three different [Wright & Ferguson] contracts. There again, total damages, $980,000 plus.").) For the three claims involving the putative 1991 settlement agreement, Gary requested a total of $104,852,000 in damages, including "70 some odd million" in emotional distress damages and the remainder in economic damages. (Tr. at 5713.) Again Gary recognized that the individual claims for (v) wilful and malicious breach, (vi) tortious breach, and (vii) implied covenant breach encompassed the same putative agreement and the same damages, and he specifically warned the jury against triple-counting these damages:

> $104,852,000. Now, you're going to see that number three more times, same procedure like it was before because you have the . . .

> three different claims. You have to deal with each claim. You'll check yes, you'll check yes, and right here on the damages, 104, $104,852,000.
>
> Same procedure. You have to do that, and when we get to the end, you will add the 980 to the 104 . . . .

(Tr. at 5713.) Gary requested *no damages* on either (viii) the antitrust claim or (ix) the fraud claim so trumpeted by the United States in this proceeding. (*Id.*) Finally, in addressing (x) total compensatory damages, Gary warned the jury a third time against multiple-counting the damages: "If you don't duplicate them, you go once, the total is going to be $105,832,000." (Tr. at 5715.)

113. In response to Gary's requests, the now-runaway jury awarded O'Keefe a total of $260,000,000. The jury broke down that total among the nine claims on the special verdict form as follows:

Wright & Ferguson Contracts		
i.	breach	$ 31,200,000
ii.	tortious interference	$ 7,800,000
iii.	tortious breach	$ 23,400,000
iv.	breach of implied covenants	$ 15,600,000
Putative 1991 Settlement Agreement		
v.	willful or malicious breach	$ 54,600,000
vi.	tortious breach	$ 54,600,000
vii.	breach of implied covenants	$ 36,400,000
State Antitrust Claim		$ 18,200,000
Common Law Fraud		$ 18,200,000
Total Damages		**$260,000,000**

(App. at A650-58.) Whether viewed in total or in its component parts, that award is in several respects unlawful, unsupported, self-contradictory and excessive.

114. *First*, the award on the Wright & Ferguson contracts is absurdly excessive on its face. According to O'Keefe's own witnesses, the value of those contracts was $980,000 (Tr. at 2367); and Gary requested only that amount in his closing (Tr. at 5711-12). Yet the jury awarded between seven and 32 times that amount in addressing the four individual claims on the

Wright & Ferguson contracts (App. at A651-54) and it ignored the repeated warnings on the special verdict form (App. at A658) and even by Gary himself (Tr. at 5711-12) to avoid quadruple-counting these damages. As a result, the jury rendered a total award on these contracts of $78 million — approximately 80 times the amount even plausibly supported by the record, and requested by Gary.

115. *Second*, the jury committed similar errors and indulged similar excesses in addressing the putative 1991 settlement agreement. Apart from his legally deficient and factually unsupported request for "70 some odd million" in emotional distress damages, which Claimants addressed in detail above, Gary sought approximately $30 to $35 million in actual economic damages flowing from Loewen's alleged breach of the putative settlement agreement. (Tr. at 5713.) Yet the jury awarded almost twice that amount in addressing the individual claims on the putative settlement agreement (App. at A654-56) and it again ignored the repeated warnings by the special verdict (App. at A658) and by Gary (Tr. at 5713-15) to avoid triple counting these damages. As a result the jury rendered a total award on this putative agreement of $145.6 million — approximately four to five times the amount of economic damages requested by Gary.

116. *Third*, the $30 to $35 million requested by Gary consisted primarily of legally impermissible damages. For example, that amount specifically included $20 million in allegedly lost "future revenue" from the Family Care Company (Tr. at 4848-64), $6 million in allegedly lost "future revenue" from certain Riemann Trust Funds (Tr. at 1400-01), and $4.5 million in allegedly lost "future revenue" from the Family Care Trust Rollover. (Tr. at 2366; *see also* Tr. at 5566-68 (closing argument).) Under Mississippi law, however, lost future *profits* (*i.e.*, lost revenue minus saved expenses) might be recoverable; but lost future *revenue* is not. *See*, *e.g.*,

Fred's Stores of Mississippi, Inc. v. M&H Drugs, Inc., 725 So. 2d 902, 914-15 (Miss. 1998). Moreover, virtually all of the requested items involved consequential damages, which, as Claimants have previously demonstrated (TLGI Mem. at 88), were not foreseeable and therefore as a matter of law not recoverable.

117. *Fourth*, the jury accomplished a legal impossibility in awarding damages *both* on the Wright & Ferguson claims *and* on the putative 1991 settlement agreement. The latter agreement by its terms extinguished all claims arising out of the then-pending litigation between Loewen and O'Keefe:

> It is hereby agreed by and between the parties hereto that all controversies between [them] are fully resolved [including] all claims, damages, demands, actions, causes of action or suits at law or in equity because of any matters or things done, omitted or suffered to be done by the other to and including the date hereof, *including but not limited to all claims made or which could have been made in* [the pending lawsuit].

(App. at A632 (emphasis added).) That pending lawsuit included claims for breach of the 1974, 1979, and 1987 Wright & Ferguson contracts. (App. at A20-23.) Thus, if the 1991 settlement agreement was enforceable, claims involving alleged breaches of the Wright & Ferguson contracts were not. On this ground alone, if *any* of the awards on the 1991 settlement agreement were valid, the *entire* $78 million award on the Wright & Ferguson contracts would be invalid.

118. *Fifth*, the damages awards on the antitrust and fraud claims were legally improper, factually unsupported, and excessive. As set forth in the jury instructions, the only fraud claim raised by O'Keefe involved alleged misstatements "about the contract" (*i.e.*, the putative 1991 settlement agreement) and its performance. (Tr. at 5515-16.) Thus, the fraud claim could support no distinct damages from the various other claims (wilful and malicious breach, tortious breach, and breach of implied covenants) involving the same putative contract. Moreover, as explained in detail below, O'Keefe presented legally insufficient evidence to establish liability

on either of these claims. Finally, even Willie Gary himself did not take these claims seriously; for, despite requesting over $105 million for the alleged breaches of the Wright & Ferguson contracts and the 1991 settlement agreement, Gary did not request *even one penny in damages* on either the antitrust or fraud claims. (Tr. at 5710-15.) The jury nonetheless awarded O'Keefe a total of $36.4 million on these claims. (App. at A656-57.) That award is plainly both gratuitous and excessive.

119. *Sixth*, the jury erred egregiously in its gratuitous and illegal inclusion of punitive damages in its $260 million verdict. The jury instructions (Tr. at 5520-21), the special verdict form (App. at A650-58), and even Willie Gary's closing argument (Tr. at 5565-68, 5710-15) all instructed the jury to consider only *compensatory* damages. Yet the jury, on its own motion, decided to award punitive damages and informed Judge Graves, in writing, that its $260 million verdict covered "both loss [*i.e.* compensatory] damages ($100,000,000), and punitive damages ($160,000,000)." (App. at A659.) That gratuitous award of punitive damages, rendered in obvious violation of Mississippi procedural law (*see* TLGI Mem. at 43-44; Miss. Code Ann. § 11-1-65(b)-(c)), was palpably illegal and excessive.

120. The United States says (U.S. Counter-Mem. at 52-53) that Judge Graves was within his rights to "reform [the verdict] 'at the bar' to cure any procedural defect," citing *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139, 151 (Miss. 1998). That rule does not help the United States, for "'the basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court.'" *Id*. (quoting cases). The jury's initial verdict here was neither "an intelligent answer" nor one addressed "to

the issues submitted to the jury" — in fact, it admittedly decided an issue *not* submitted to the jury, punitive damages.

121. The juror interviews confirm that the award was arbitrary, unreasoned, and excessive. Indeed, they confirm that the jury simply gave Gary what he asked for:

> "Willie Gary said he needed a $105 million dollar verdict, and that's what the jury wanted to give him." (App. at A3059.)
>
> "[B]ut . . . the lawyers kept saying $100 million and [the jurors] had to go with what was given them." (App. at A3077.)

122. Even worse, they rendered the award with full knowledge that the entire award ($260 million), the compensatory award ($100 million), and the economic damages awarded (approximately $25 to $30 million) were *all* grossly excessive relative to O'Keefe's actual injuries. According to the jury foreman, "Maybe O'Keefe lost $1 million dollars. $6 million to $8 million I'd say was right . . . ." (App. at A3079.) According to Jonathan Harr, whose article the United States repeatedly invokes, "[t]he award was, of course, outlandish and utterly out of proportion both to the damages and to Jeremiah O'Keefe's expectations." (U.S. App. at 193.)

E. *O'Keefe* Was, at Bottom, a Straightforward Contract Case

123. Claimants demonstrated (TLGI Mem. at 1) that the O'Keefe dispute "principally involved three contracts between O'Keefe and Loewen valued by O'Keefe at $980,000, and a proposed exchange of two O'Keefe funeral homes worth approximately $2.5 million for a Loewen funeral insurance company worth approximately $4 million." The United States does not dispute this showing directly; but it does repeatedly suggest that the *O'Keefe* jury awarded $500 million not because of the garden-variety contract dispute, but primarily because of Loewen's "monopolization of funeral-home markets and overcharging of grief-stricken consumers of funeral services." (U.S. Counter-Mem. at 10.)

124. Specifically, the United States seeks to use the presence of a peripheral and unsupportable antitrust claim to cloak an ordinary contract action in the garb of a complicated "monopolization . . . and overcharging" case. (*Id.*) This strategy serves two of the United States' goals. *First*, it seeks to legitimize Willie Gary's enormously prejudicial and irrelevant race baiting, which, in truth, was only intended to (and did) bias the jury. *Second*, the United States uses this revisionist account of the *O'Keefe* case to rationalize the enormous sums of actual and punitive damages awarded by the jury. (U.S. Counter-Mem. at 139-40.)

125. But the United States' tactic must be seen for what it is. Neither the trial record, nor the statements of the jurors themselves, supports the view that the *O'Keefe* case was anything but an ordinary contract dispute, made extraordinary only because of the rhetorical excesses of an unusual advocate.

1. The Trial Record

126. Jonathan Harr, the author of the *New Yorker* magazine article quoted extensively (though selectively) by the United States, described the *O'Keefe* case as

> at root, a contract dispute, similar to thousands that are filed in courts across the land each year, and in this respect it was unremarkable.

(U.S. App. at 171; *see also id.* at 180.) Even Jeremiah O'Keefe, *after* the jury returned its $500 million verdict, called his case "a *minor difference* that just kept escalating." (App. at A3127 (emphasis added).) News accounts of the case similarly described it as "a dispute over a deal to sell funeral and burial insurance," an "insurance contract row" (App. at A3127-28), and "a bloodless contract dispute." (U.S. App. at 27.)

127. Even the United States and its experts have previously recognized the centrality of the contract claims. U.S. expert Drew Days described the *O'Keefe* case as litigation that "alleg[ed] the breach of three contracts between Gulf National, an O'Keefe corporation, and

Wright & Ferguson ('W&F'), a Mississippi corporation owned by Loewen." (First Days Op. at 4 (citations omitted).) Days never mentioned antitrust or fraud claims. Similarly, the United States' Memorial on Jurisdiction described the *O'Keefe* case as a "suit in Mississippi state court alleging that Loewen had breached the exclusive contracts between the O'Keefe companies and Wright & Ferguson." (U.S. Juris. Mem. at 18 (citation omitted).) It similarly focused on the contract claims when describing the *O'Keefe* matter, noting only as an aside that "O'Keefe also alleged" antitrust claims. (*Id*. at 19.)

128. Claimants have extensively recounted the trial evidence (*see* TLGI Mem. at 13-49; R. Loewen Mem. at 15-36) and will not repeat that exercise. However, Claimants especially commend the Tribunal to the three areas of the trial record where O'Keefe's lawyers spoke directly to the jury — the voir dire (App. at A327-A389), opening statements (Tr. at 8-44, 49-79), and closing arguments. (Tr. at 5538-94, 5702-15.) A review of these items will make clear that the *O'Keefe* case was in fact an "unremarkable," "minor" contract dispute.

a. Voir Dire

129. Willie Gary's own publication (*Winning Words: Willie E. Gary's Voir Dire, Opening Statement and Closing Argument in the "Civil Trial of the Century"*) calls voir dire "one of the best opportunities for an excellent attorney to establish the theme of his case." (App. at A523.) In voir dire, Willie Gary repeatedly told the potential jurors that, in a "nutshell," the *O'Keefe* case "involves and centers around . . . breach of contract":

> They settled the case with us, and they backed out. That's the nutshell . . . .

(App. at A335.)

> Now, members of the jury, . . . this case involves and centers around a breach of an agreement that's done, breach of a contract after the lawsuit was filed, settled the case, still reneged on it.

> Jerry O'Keefe sued, they settled, and they reneged. They just didn't do it. In a casual way, you'll hear the evidence on it.

(App. at A354.) Indeed, Gary — whose *Winning Words* immodestly describes himself as "a master at using voir dire to the best advantage of his client . . . [to] orien[t] the remaining jurors to one's position" (App. at A523) — focused his voir dire predominantly on two main themes: breach of contract and punitive damages (*see* App. at A348-54, A363-65, A388-89). After posing a few introductory questions about the importance of jury service and the idea that this was a "big" and important case (App. at A329-30, A380) — a tactic that *Winning Words* says "prepares the jury for the prospect of a substantial award" (App. at A523) — Willie Gary turned immediately to the contract claims and his theme that "'a man or a woman's word should be their bond.'" (App. at A342.) He asked the same question in only slightly different form on at least eight more occasions. (App. at A342-45.)

130. Gary repeated this theme in the specific context of a settlement agreement (in reference to the alleged breach of the 1991 settlement). The point was still the same: "Do all of you agree that if you make a settlement then both sides should have to live up to it; is that correct?" (App. at A347; *see also* App. at A346-47, A363.) Gary also made sure that the prospective jurors agreed that a contracting party should be allowed to sue for breach: "Anybody have any problems with or have you ever heard of people suing for other people breaching their word, breaching a contract?" (App. at A354-55.) "Now, and it's all right with you if the law allows for a party to sue someone for breaching their word?" (App. at A355.)

131. Finally, Gary injected his allegations that Loewen had negotiated the contracts at issue with bad faith and failure to make full disclosure — in his words, "bad faith, prove fraud, prove deception, failure to disclose information according to the agreement, the agreement." (App. at A348; *see also* App. at A357, A365.)

132. *O'Keefe* was all about "the agreement, the agreement." The words "antitrust" or "monopoly" never appear in Willie Gary's voir dire of the jury pool. Not once. The only even arguable reference to what would become the basis for O'Keefe's "antitrust" claim was a solitary reference to "rais[ing] prices" (App. at A367), which (as we show below) could not possibly have been a valid basis for an antitrust claim.

b. O'Keefe's Opening Statements

133. Like the voir dire, O'Keefe's opening statements focused on contractual matters. Although both Michael Allred and Willie Gary *mentioned* the unprecedented antitrust violation of "raising prices," the bulk of *both* lawyers' opening statements went to the contract claims. This is no surprise: As Gary's own trial-tactics manual discloses, "Willie Gary uses the opening statement subtly and surely to develop the theme he established in the voir dire." (App. at A550.)

134. Allred's opening statement left little doubt as to the true nature of the *O'Keefe* case:

> The proof in this case is that Ray Loewen broke a solemn agreement with Jerry O'Keefe, got sued, made a settlement agreement, broke that solemn agreement with Jerry O'Keefe, then broke his word to the Riemann family, and he had a duty to each that he couldn't fulfill either without betraying them both. That's the proof in writing, ladies and gentlemen.

(Tr. at 32; *see also* Tr. at 42.)

135. Gary developed the same theme in his opening statement:

> This is going to be a long trial, but I told you we were going to keep it simple, and we will we're going to keep this simple because *this is about a man wouldn't keep his word, deceived people, would not deal with honor*. This is by a man, Ray Loewen, that thought he could bully people, he could cluster all the businesses and run the prices up. I trust that your verdict will say, "Ray Loewen, no more." Thank you.

(Tr. at 79 (emphasis added).)

c. Gary's Closing Arguments

136. The most telling portion of the trial was Willie Gary's closing argument — "money time," as he calls it. (App. at A3150**.**) His argument was fully consistent with his admitted strategy to "portray Jerry O'Keefe as an established member of the local community," and to "contrast" and "depersonalize" Loewen as "a ruthless monolith" from a foreign country. (App. at A563.) Willie Gary is predictably proud of his closing argument in *O'Keefe*: Not only did he reprint it in full in *Winning Words* for the benefit of "the legal community and others interested in the American system of justice" (App. at A522); he also reprised his performance for "a seminar where he lectured to a group of lawyers in North Carolina." (App. at A3130.) Claimants have supplied the Tribunal with copies of a videotape of Willie Gary reprising his closing argument in *O'Keefe*, along with a transcript of this presentation. (App. at A3129-49; App. at A3150.) We urge the Tribunal to view this videotape, as it captures Gary's rhetorical tactics (and excesses) even better than printed words.

137. When Gary turned to the substance of his case, it was about breach of contract. As Jonathan Harr writes, Willie Gary "brushed effortlessly aside" the "single weak link" of his case — "the terms of the contract between O'Keefe and Wright & Ferguson and whether Loewen had actually violated those terms." (U.S. App. at 189.) Instead, Willie Gary simplified the case to "they broke their word":

> Members of the jury, *the truth in this case is clear, it's clear, members of the jury. They broke their word.* You can go with a whole lot of fancy stuff, and I told you that I was just a country boy, and I said I might not use big fancy words like everybody else, and you said you wouldn't hold that against me because I wanted to talk common to you. *Well, the bottom line is they broke their word, you see, they broke their word*, and a man or woman's word should be their bond. That's the law of the universe because

> it's right, it's right, and they didn't do it, and they know they didn't do it.
>
> *They broke their word*, and it was intentional. It was malicious.

(Tr. at 5545-46 (emphasis added).) "They broke their word" — a simplified breach-of-contract theory — served as the major theme of Willie Gary's closing argument. (*See, e.g.,* Tr. at 5545-50, 5552-56, 5561-65, 5569, 5571, 5578-84, 5589-90, 5704-05, 5707-14.)

138. Gary, of course, did not entirely abandon his "raising prices" and "monopoly" themes, for those served his purpose of inflaming the jury. Even so, Gary's "raising prices" claim was relegated largely to an atmospheric role. Indeed, when Willie Gary concluded his rebuttal closing argument by addressing the specific claims on the verdict form, he specifically discussed all seven of the contractual claims, instructing the jurors to "[c]heck yes" for each one. (Tr. at 5709-14.) But the final two non-contractual claims (antitrust and fraud) were so irrelevant that Willie Gary *did not even mention them.* (Tr. at 5713-14.)

139. Gary went so far as to *attack* Loewen for arguing about anything *not* related to the contract claims, calling such irrelevancies "smoke screens":

> I knew Mr. Blackmon would come up here with the other sleaze advertising yelling and screaming advertising. *What that has to do with the breach [of] this contract*, ladies and gentlemen of the jury? You know it's nothing. We call them smoke screens.
>
> . . . .
>
> See, they want to get away from the deal. He want to get away from the settlement agreement. *This is about a settlement agreement*. National Baptist convention, Ensley property, Tops'l, advertising campaign, everything but the settlement agreement, the settlement agreement.

(Tr. at 5703, 5707-08 (emphasis added).)

140. To the very end, even Willie Gary recognized that this was just a contract case. Indeed, in the videotaped trial-techniques presentation Gary gave shortly after the *O'Keefe* trial,

he stated: "We tried that $500 million case out in Mississippi a few months back. And that case involved some predatory trade practices, breach of contract — malicious breach of contract, some antitrust issues. *But it was really a case of someone not keeping their word*." (App. at A3139, A3150 (emphasis added).) In a later interview, he minimized the case even more, ridiculing Loewen's lawyers for "trying the case on legal theories about breach of contract": Loewen "had these silk-stocking lawyers from Harvard, Yale and Princeton, and they're trying the case on legal theories about breach of contract. Me, I'm trying the case on the yacht theory!" (App. at A3123; *see* TLGI Mem. at 34-35.)

141. From beginning to end, the *O'Keefe* case was predominantly a contract action, dressed up with "price-raising" and other rhetorical excesses only to inflame the jury. At the beginning (during voir dire), Willie Gary told the jury pool that "this case involves and centers around a breach of an agreement." (App. at A354.) And at the end, in his rebuttal closing argument, Willie Gary told them: "This is about a settlement agreement." (Tr. at 5708.) It is useless for the United States to now suggest otherwise.

2. The Jurors Recognized That *O'Keefe* Was, At Heart, a Breach of Contract Case

142. The post-trial Juror Report — a source heavily relied on by the United States and its experts — demonstrates that the jurors, too, saw this case in contractual terms. The jury foreman said that "*[t]he monopoly issue didn't matter*." (App. at A3079 (emphasis added).) The juror who "led the jury" with a desire "to destroy" Loewen (App. at A3060, A3061) made no mention of antitrust or other claims; she "said the jury just did not believe that Ray Loewen abided *by his word or his contracts*." (App. at A3071 (emphasis added).)

143. The Juror Report summarized the general reactions of all interviewed jurors to "the different claims" as follows: "Except for the jurors' belief that Loewen overcharged for its

products and services, *the jury appeared to give no reasoned consideration to claims of monopoly and predatory pricing*." (App. at A3043 (emphasis added).) This was consistent with at least one juror's stated view: "The price of burial by The Loewen Group was outrageous." (App. at A3064.) Similarly, the Juror Report concluded that no "particularized attention was given to claims of fraud." (App. at A3043.)

144. Indeed, one juror took Willie Gary's strategy of simplification to an even higher level of abstraction: "*I don't care what the contract says*. If you pay somebody $1 million dollars for it, it's exclusive." (App. at A3065 (emphasis added).) Thus, the Juror Report concluded that "the post-trial interview process did not reveal any distinction in juror thinking between breach of contract, intentional breach or intentional interference with contract rights," and that "the jury was not reacting to a reasoned consideration of the various claims but more to their emotions and the result they had decided to reach." (App. at A3042-43.)

3. O'Keefe's Antitrust and Oppression Claims Were Legally Unsupported

145. O'Keefe's antitrust and "oppression" claims had, as a matter of law, no legitimate place in this contract case. The United States' own source, Jonathan Harr's *New Yorker* magazine article, recognized that O'Keefe's counsel had strategically "adorned an otherwise straightforward contract case" with "a multiplicity of legal theories." (U.S. App. at 182.) As Harr noted, the very beginning of the trial demonstrated this: When Willie Gary sought to introduce "an actual photograph, greatly enlarged, of the large O'Keefe family" on the first morning of trial, Loewen's counsel "object[ed] strenuously" to this tactic because "the issue in dispute . . . concerned a contract." (U.S. App. at 184.) Harr wrote that Loewen's objection was "absolutely right":

> *Sinkfield was, of course, absolutely right.* Gary made it *apparent from the outset that he intended to cast the trial as a morality play*,

> a case about "the oldest sin known to anybody, and that's greed." Jeremiah O'Keefe's role in this drama was that of a *man of honor and principle*, a man of "family values" who "would fight for what's right and what he believes in." Playing opposite O'Keefe, in the *role of the villain*, was the *foreigner from Canada, Ray Loewen*, "a man," Gary told the jury, who "*wouldn't keep his word, deceived people, and would not deal with honor,*" a man who *sought to "dominate markets, create monopolies, and gouge families that are grieving*."

(*Id.* at 184 (emphasis added).) Loewen's strenuous objection (*see* Tr. at 3-5) was overruled by Judge Graves. (*See* Tr. at 6.)

a. The "Antitrust" and "Monopolization" Claims

146. O'Keefe's "antitrust" claim was that Loewen increased its prices in certain regions of Mississippi — in the United States' words, "obtaining and abusing monopoly power in local funeral home markets to raise prices on the bereaved." (U.S. Counter-Mem. at 25; *see also id.* at 10.) This claim was so legally deficient that any fair-minded judge would have dismissed it prior to trial. But Judge Graves refused to do so.

147. O'Keefe grounded his "monopolization"/"antitrust" claim on a Mississippi statute, Miss. Code Ann. § 75-21-3. Subsection (e) of that statute provides that it is illegal for a corporation to

> destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines.

148. As the United States recognizes (U.S. Counter-Mem. at 10), O'Keefe's "antitrust" and "monopolization" claim was that Loewen "raise[d] prices on the bereaved." But under Mississippi law, to sustain a claim for impermissible pricing a plaintiff must show *precisely the*

opposite: "that the plaintiffs were injured because defendant charged a price for a product or service, sold in a market that the plaintiff competed with a defendant[,] that was *lower than that defendants' cost* for that product or service." (Tr. at 5526 (jury charge; emphasis added).) *See, e.g., Wagley v. Colonial Bakery Co.*, 45 So. 2d 717 (Miss. 1950), *decision on rehearing*, 46 So. 2d 925 (Miss. 1950) (violation of predecessor statute to § 75-21-3(e) required showing of conspiracy to destroy competition by charging prices below the cost of production in areas where defendant competed with plaintiff); *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey*, 5 So. 2d 227, 232 (Miss. 1941) (finding antitrust violation where competitor sold laundry services at "ridiculous" (*i.e.,* at a loss) and "temporary" low prices) (*see generally* App. at A3151).

149. But O'Keefe never produced a single piece of evidence — either in response to Loewen's pre-trial summary-judgment motion, or at trial — showing that Loewen sold *below* cost; indeed, the only response O'Keefe could muster before trial was a weak hypothesis that such "evidence . . . *might* exist in this case." (App. at A3271 (emphasis added).) O'Keefe's trial theory, in fact, was the exact opposite — that Loewen sold goods substantially above its cost. Thus, the only evidence on the point at trial — elicited by O'Keefe's lawyers themselves — established that Loewen never sold below its own cost. With respect to the "Wilbert Triune Copper Vault," which was the focus of Willie Gary's price-raising accusations (*see* Tr. at 1130-32, 1135-36, 1157, 2606, 5577; *see also* U.S. App. at 185-86), O'Keefe's witness Earl Banks testified that "the manufacturer's selling price, wholesale price" was $940 (Tr. at 1136); according to Banks, Loewen-owned funeral homes in Corinth, Mississippi and Jackson, Mississippi charged from $1,920 to $2,860 for that same vault (Tr. at 1134-37) — a differential, to be sure, but never "lower than [Loewen's] cost for the product," as Mississippi antitrust law required. (Tr. at 5526.)

150. Loewen tried to remove this frivolous antitrust claim from the case — before trial, by moving for summary judgment (App. at A3151-80); during trial, by moving for a directed verdict (App. at A3401-04, A3446-49); and after trial, by moving for judgment *n.o.v.* (App. at A696-703). Judge Graves denied all of these motions. (App. at A3347 (denying Loewen's motion for summary judgment); App. at A3472, A3474 (denying Loewen's motion for directed verdict); App. at A814, A816 (denying Loewen's motion for judgment *n.o.v.*).)

151. O'Keefe's antitrust claim for "raising prices" was also frivolous for an additional reason as well. Under Mississippi law, in order to recover damages on an antitrust claim, a private plaintiff must show not only that the defendant committed an antitrust violation, but also that the plaintiff suffered an "antitrust injury" as a result. (Tr. at 5527.) As a *competitor* of Loewen's, O'Keefe could not possible establish an "antitrust injury" flowing from Loewen's price *increases*. If anything, such price increases would only benefit, not harm, competitors such as O'Keefe. Thus, it is black letter antitrust law that, while a *consumer* may sue for price increases attributable to an antitrust violation, a *competitor* cannot precisely because "that competitor would generally stand only to gain from the increase in prices." *Allied-Signal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 576 (7th Cir. 1999). *See generally Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for the protection of competition, not competitors." (quotations omitted)). Here, O'Keefe could not possibly have suffered an "antitrust injury" from Loewen's supposed "gouging" of "grieving families like in Corinth, Mississippi." (Tr. at 5796.)

152. In permitting the unsupported and unsupportable price-raising theory to go forward, Judge Graves allowed Willie Gary to inflame the jurors with unsubstantiated cries of "It ain't right. Talking about a monopoly, deceptive trade practices." (Tr. at 5577; *see also* U.S.

App. at 186.) He further allowed Gary to make emotionally charged — but legally irrelevant — references to Loewen's supposed "gouging" of bereaved families. (Tr. at 5796.)[8] And to the extent that the United States tries to use this frivolous antitrust claim to justify Willie Gary's overt racial politicking, (*see, e.g.,* U.S. Counter-Mem. at 25-26), then the trial court's improper refusal to dismiss this unsupportable count was a direct cause of that repugnant trial tactic. *See* Section II(C), *infra*.

b. The "Tort" of "Oppression"

153. O'Keefe's "multiplicity of legal theories" (U.S. App. at 182) also included another unprecedented claim for the "tort" of "oppression." Prior to trial, Loewen moved for dismissal of O'Keefe's 'oppression' claim, on the ground that "[t]here is no claim under Mississippi law for 'oppression.'" (App. at A3151.) In response, O'Keefe argued only that "oppression" was "a relevant anti-trust *inquiry*" and "*conduct* which justifies punitive damages," but *not* that it was an independent actionable tort.

154. At the hearing on the motion, Loewen again argued to Judge Graves that there was no such thing as an "oppression" claim:

> [T]heir Count 8 oppression claim, which is on page 16, there is no claim recognized in this state for oppression. There is no civil claim. Plaintiffs admit as much. They say, oh, well, in some antitrust cases they use the word "oppression" some. There is no claim for oppression recognized in this state. We point that out in our brief. They haven't shown anything.

(App. at A3335-36.) O'Keefe did not even respond to this point. (App. at A3343-47.) Yet Judge Graves summarily denied the motion: "Motion is denied. What's the next motion?"

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[8] For much the same reason, the United States' and Professor Landsman's efforts to justify the jury's punitive damages award by painting O'Keefe's claims as "involv[ing] the handling of the dead and transactions with the bereaved" (Landsman Stmt. at 10; *see* U.S. Counter-Mem. at 140-42) misunderstands the difference between O'Keefe's commercial claims in this case and the sort of consumer-protection case that *O'Keefe* most assuredly was not.

(App. at A3347.) And he gave Loewen's argument similar short shrift when Loewen reurged this argument after trial (App. at A695-96): "All those motions are denied." (App. at A816.)

155. Despite those improper denials, even Judge Graves ultimately recognized that "oppression" is not a tort. Neither the jury instructions (Tr. at 5506-30) nor the special verdict (App. at A650-58) permit *any* recovery for the supposed tort of oppression. Rather, as explained above, the verdict form permitted recovery only for breaches of the Wright & Ferguson contracts (App. at A650-54), for breaches of the putative settlement agreement (App. at A654-56), for a derivative fraud claim (App. at A657) involving alleged misrepresentations "about the contract" (Tr. at 5516), and, finally, for the patently frivolous antitrust claim (App. at A656-57) for which Gary himself sought no damages (Tr. at 5713-15). Accordingly, there is nothing to support the United States' suggestion that the *O'Keefe* case was about, or that the *O'Keefe* verdict rested upon, generalized allegations of "oppression."

4. The Antitrust Claim Did Not Justify O'Keefe's Repeated References to Race

156. In an attempt to justify O'Keefe's numerous references to race during the *O'Keefe* litigation, the United States now asserts that, for purposes of the "antitrust" claims, "[t]o define Loewen's market power in certain areas . . . it was necessary to establish that the relevant markets for purposes of comparison included white funeral homes that Loewen owned and excluded African-American funeral homes with which they did not compete." (U.S. Counter-Mem. at 26.)

157. That is an obvious makeweight, a desperate attempt to justify Willie Gary's flagrant and unjustifiable appeals to racial jingoism. *First*, as Claimants have shown above, Judge Graves improperly retained the antitrust issue in the case despite the absence of any legal support for O'Keefe's price-raising theory. (*See* pp. 69-73, *supra*.) That alone defeats the

United States' sole excuse for this inexcusable trial strategy. *Second*, as Claimants also have demonstrated, there were numerous references to race made or elicited throughout the trial that could not possibly have been justified on the basis that it was "necessary" to establish market, monopoly, or antitrust proof. (*See, e.g.,* Tr. at 52-53, 139, 461, 1083-96, 1116-19, 1185-86, 2111, 2261, 5539-40.) Quite simply, this strategy was part of Willie Gary's deliberate and illegitimate scheme to win a verdict based not on any rule of law, but rather on passion and prejudice. *See* Section II(A), (B), (C), *supra*. The United States' *ex post facto* excuses cannot possibly justify the regrettable conduct of the trial.

III. THE UNITED STATES IS LIABLE FOR ITS NAFTA BREACHES

158. The United States asserts that Claimants bear a heightened and "substantial burden of proof [as to all issues] in this case," because they challenge "actions of a domestic judiciary," which in its view are "afforded a far greater presumption of regularity under customary international law than are legislative or administrative acts." (U.S. Counter-Mem. at 117-18.) Similarly, United States' expert, Professor Greenwood, asserts that because "Loewen's claims arise out of a decision of a Mississippi court," its Article 1102 and Article 1105 claims entirely "depend upon Loewen establishing . . . that there was a denial of justice." (Greenwood Op. at 5.) But the United States cites no authority for the sweeping proposition that *all* challenges to judicial acts, whether based on treaty provision or customary international law, are afforded a "far greater presumption" of regularity. Nor does the United States — or Professor Greenwood, for that matter — locate any textual support in NAFTA that would support different, special treatment for governmental acts arising from the judiciary. Indeed, this Tribunal's jurisdictional ruling, holding that "conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organization of the State" (*Loewen*, ¶ 70) — which the United States notes but deems irrelevant (U.S. Counter-Mem. at 118 n.85) — would seem to counsel like treatment for the acts of governmental organs of "whatever position." Certainly, nothing in NAFTA Chapter Eleven suggests otherwise.

159. As Sir Robert Jennings has stated, any customary presumptions toward judicial actions that may once have existed are not applicable here because "this is not at all a case brought under customary international law, but under the provisions of the NAFTA Agreement." (Third Jennings Op. at 27.) Moreover, the United States and its experts assume "that a decision on the merits would simply involve a question of denial of justice according to customary

international law. But the gravamen of the present case cannot be denial of justice according to customary international law. The Tribunal's jurisdiction is in respect of alleged breaches of the terms of the NAFTA Agreement," which provides Claimants with substantive protections far in excess of those imposed by "customary international law." (*Id.* at 26.)

160. Claimants readily agree that with regard to their assertions of denial of justice in violation of customary international law — as incorporated into Article 1105 — they must prove the customary standard for such a cause of action (although, as explained below, that standard is not nearly as "extreme" as the United States claims). But with respect to their other claims — discrimination in violation of Article 1102, denial of fair and equitable treatment and full protection and security in violation of Article 1105, and expropriation in violation of Article 1110 — Claimants' burden is, quite simply, to prove the requirements established in NAFTA Chapter Eleven. Those guarantees require neither proof of a denial of justice, nor heightened proof because judicial acts are involved. In any event, Claimants in this extreme case readily satisfy even the most onerous standard of proof that the United States can propose.

161. Claimants' responses to the United States' arguments follow. In Section III(A), Claimants show why the United States' submissions do not disprove Claimants' Article 1102 discrimination claim. In Section III(B), Claimants show why the United States' responses to our Article 1105 denial-of-justice claim are without merit. In Section III(C), Claimants explain why the United States' view of its obligation to provide "fair and equitable treatment" is contrary to Article 1105. In Section III(D), Claimants demonstrate why the United States' interpretation of its Article 1105 duty to provide "full protection and security" is similarly flawed. Finally, in Section III(E), Claimants show that the United States has offered no compelling response to

Claimants' Article 1110 expropriation claim. These showings confirm the United States' liabilities.

A. The Mississippi Litigation Discriminated Against Loewen And Violated Article 1102

162. Claimants showed (TLGI Mem. at 65-71; R. Loewen Mem. at 51) that the right of aliens to be secure from invidious discrimination, and from prejudicial appeals to juror biases in judicial proceedings — which have been condemned and prohibited by every leading nation — is a universally recognized element of international law codified in Article 1102 of NAFTA. The United States does not contest this settled principle of international law.

163. Claimants also established (TLGI Mem. at 71-73; R. Loewen Mem. at 50, 52) that the *O'Keefe* litigation was precisely the sort of discriminatory and biased judicial proceeding that is condemned by NAFTA Article 1102 and by international law — a seven-week trial infected by extensive, irrelevant, and highly prejudicial appeals to nationalistic prejudices that could not possibly have been made had Loewen been a local Mississippi corporation instead of a Canadian one. *See* Section II(B), *supra.* The Mississippi courts thus treated Loewen less favorably than it would have treated United States or Mississippi litigants "in like circumstances," violating Article 1102. These appeals to nationalistic animus, which admittedly resonated with the jurors, culminated in the *O'Keefe* jury's excessive verdict, the trial court's entry of an enforceable judgment based on that tainted verdict, and the Mississippi Supreme Court's effective denial of Loewen's right to appeal. All of these combined to force Loewen to incur a $175 million liability because it was Canadian. This was an explicit violation of Article 1102(4)(b).[9]

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[9] This same discriminatory conduct also violated the anti-discrimination principles incorporated into NAFTA Articles 1105 and 1110. *See* Sections III(B) and (C), *infra*.

164. The United States' response rests in substantial part on the theory that the discriminatory treatment suffered by Loewen was justified because Mississippi would have treated all non-local investors just as badly as it did Loewen. (*See* Bilder Op. at 10-11.) This legal theory is not only untenable on its face, but in fact *concedes* that Loewen's treatment in the *O'Keefe* case violated Article 1102 of NAFTA. The Tribunal need go no further to rule in Claimants' favor.

1. The United States Concedes a Violation of Article 1102

165. The United States' own expert, Bilder, confirms that Loewen "[c]ertainly" received substantially less than the best treatment accorded to domestic investors in Mississippi. He states:

> Certainly, part of plaintiff's argument was that Loewen was a non-local or "outside" company, deceptively portraying itself as a local company with local connections and local interests at heart. I understand that this was important in the funeral home business: bereaved families were more likely to trust long-established local funeral homes, rooted in the community, not to exploit or take unfair advantage of them at a time when they were most vulnerable. But this argument was based on Loewen's "non-localness", not its Canadian nationality; plaintiff's contentions would likely have been the same if Loewen was based in some other part of the United States rather than in Canada. *To the extent that the plaintiff's case against Loewen was based on the claim that Loewen was a predatory "outsider", unrelated to its specifically Canadian or foreign nationality, Loewen received treatment from the court and jury equivalent to, and certainly no worse than, similarly situated "predatory outside investors" from other states of the U.S. outside Mississippi — or indeed from another part of Mississippi — and would not in terms come under the protection of Article 1102.*

(Bilder Op. at 10-11 (emphases added).) "[T]he jury's sizable verdict . . . [was] likely explained by the plaintiff's counsel's successful persuasion of the jury that Loewen was a predatory, dishonest and exploitive company *from 'outside' the particular locality* . . . which was taking unfair advantage of a local company and the local people . . . ." (*Id.* at 18 (emphasis added).)

The United States thus admits that, at a minimum, Loewen suffered discrimination because it was a non-local investor.

166. Professor Bilder then provides his and the United States' interpretation of Article 1102:

> I read this article [1102(3)] as meaning that the Mississippi trial court judge could not, in his conduct of the trial, show bias or behave less favorably toward Loewen because of its Canadian nationality than he would toward an investor involved in similar activities and a similar commercial lawsuit from another state of the United States, such as New York or California, or *from another location* in Mississippi.

(*Id.* at 8 (emphasis added).) He concludes that "Article 1102 itself [does not] address other issues of alleged bias, based on considerations . . . such as . . . simply being non-local or an 'outsider.'" (*Id.*)

167. Professor Bilder and the United States are utterly incorrect in this assertion. In fact, Article 1102 by its terms protects foreigners from just such "us-versus-them" discrimination.

168. Article 1102 requires each Party to NAFTA to accord, to both investors and investments of another Party, "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments. NAFTA art. 1102(1), (2). "[W]ith respect to a state or province," the treatment required by Article 1102(1) and (2) means "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." NAFTA art. 1102(3) (emphasis added). This language means precisely what it says: Loewen was entitled to the "most favorable treatment" accorded by Mississippi to *any* U.S. investor, including local investors.

169. NAFTA tribunals have unanimously confirmed this meaning. The Tribunal in *Pope & Talbot, Inc. v. Canada* (Phase 2 Award Apr. 10, 2001 ("*Pope & Talbot II*")) held: "the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors." *Id.*, ¶ 41 (emphasis in original); *see generally id.* ¶¶ 39-42. The *Pope & Talbot* Tribunal further held that paragraphs (1), (2), and (3) of Article 1102 all provide "the right to treatment equivalent to the *'best'* treatment accorded to domestic investors or investments in like circumstances," and that "'no less favorable' means equivalent to, not better or worse than, the *best* treatment accorded to the comparator." *Id.* ¶ 42 (emphasis added).

170. The tribunal in *S.D. Myers, Inc. v. Canada* (Partial Award, Nov. 13, 2000), likewise held that under Article 1102(3), "the relevant comparison is between the treatment accorded to an investment or an investor and the *best treatment* accorded to investments or investors *within the jurisdiction of the sub-national authority*." *Id.* ¶ 240 (emphasis added).

171. This NAFTA principle is consistent with other international interpretations of the "most favorable treatment" standard. A WTO dispute resolution panel stated:

> The Panel did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same [discriminatory] treatment to products of other states of the United States as that provided to foreign products. . . . Article III [*i.e.*, the GATT most favorable treatment standard] consequently requires treatment of imported products no less favourable than that accorded to the most-favoured domestic products.

United States — Measures Affecting Alcoholic and Malt Beverages, BISD 39S/206, ¶ 5.17 (1992). Commentators have similarly noted the "familiar position of the capital exporting nations that an alien would not be prevented from having international relief merely because the defective local system was also equally applicable to nationals." 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, 85 (1976).

172. It is undisputed that Loewen did not receive "treatment equivalent to the 'best' treatment accorded to domestic investors or investments in like circumstances." *Pope & Talbot II*, ¶ 42. Professor Bilder and the United States explicitly concede that a "local" company from Jackson, Mississippi would not have received the same treatment from Judge Graves and the Jackson jury. (Bilder Op. at 10-11.) Indeed — and it is almost a tautology — *no* local Mississippi investor would *ever* be subject to the "non-local" or "outsider" rhetoric that was used to inflame the *O'Keefe* jury against Loewen.

173. The actual conduct of the trial, detailed above and in the Claimants' respective Memorials, bears this out: The jury favored O'Keefe because he was a local hero, while Loewen (particularly in the persona of Ray Loewen) was vilified for being a foreigner. The jury foreman's post-trial comments describing O'Keefe as "a good ole Mississippi boy" and Ray Loewen as a "rich, dumb, Canadian politician" (U.S. App. at 9) speaks volumes about the differential treatment. And the plaintiffs' trial strategy of continually reminding the jury that they had "no beef with" local businessman John Wright (*see, e.g.,* App. at A371-72; Tr. at 29-30, 65, 721, 5548, 5556, 5797) — despite the fact that John Wright was both a Loewen executive and the "Wright" of defendant Wright & Ferguson Funeral Home — only confirms that Loewen did not receive "the best" possible treatment. Judge Graves and the Mississippi courts reserved the "best" treatment for "local" investors in Jackson, Mississippi.

174. Although the jury also discriminated against Loewen because it was a Canadian company, not *just* because it was a non-local company, the Tribunal need go no further than the United States' own concession that Loewen was treated less favorably because of "Loewen's

'non-localness'" (Bilder Op. at 10-11) in order to conclude that Article 1102(3) was violated. Sir Robert Jennings is surely correct that this case "constitutes in express terms several times repeated, a breach of the requirement of national treatment (Article 1102), for the jury in the case were repeatedly told to be mindful of a distinction between local people and such people as 'Canadians.'" (First Jennings Op. at 21.) This establishes discrimination against the Claimants and their respective investments in violation of Article 1102.

2. The United States' Defenses to Article 1102 Liability Lack Merit

175. Despite its concession on this point, the United States nonetheless contends that Claimants failed to establish "like circumstances" for purposes of comparison, and that Claimants failed to demonstrate that they "received treatment that was less favorable." (U.S. Counter-Mem. at 118-20 (emphasis omitted).) Indeed, the United States suggests that Loewen has failed to assert even a *prima facie* claim under Article 1102. (*Id*. at 118-21.) Both arguments are meritless.

a. Loewen and O'Keefe Were In "Like Circumstances"

176. The United States contends that Claimants failed to identify any United States investor in "like circumstances" for purposes of comparison under Article 1102. (U.S. Counter-Mem. at 4.) Indeed, its theory of "like circumstances" is *so* narrow that the United States openly doubts whether it is even "possible" for a claimant to meet it — at least in the case of a judicial wrong arising out of a civil lawsuit. (*See id.* at 120-21.) The United States claims that the only instance in which the "like circumstances" requirement might be met is "where foreign and domestic parties are co-defendants comparably situated in the same case"; it further suggests that because "Loewen's co-defendants in the Mississippi litigation were U.S. companies" and because "the jury's verdict and the Mississippi court judgments made no distinctions among [them] and applied equally to all of them," Loewen *could not* satisfy the "like circumstances"

requirement. (U.S. Counter-Mem. at 120-21 n.89.) The United States' argument is frivolous, for the meaning of "like circumstances" under Article 1102 cannot possibly, and indeed does not, bear the crabbed and narrow meaning that the United States ascribes to it.

177. The *Pope & Talbot II* and *S.D. Myers* tribunals have interpreted the "like circumstances" requirement as having a flexible, case-specific definition. The *Pope & Talbot II* tribunal stated:

> It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, "circumstances" are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of "like" can have a range of meanings, from "similar" all the way to "identical." . . . An important element of the surrounding facts will be the character of the measures under challenge.

Id. ¶¶ 75-76. The *S.D. Myers* tribunal similarly noted that "the interpretation of 'like' must depend on all the circumstances of each case." *Id.* ¶ 244. *See also id.* ¶ 249 ("Whether individuals are 'similarly situated', and have been treated in a substantively equal manner, depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case."). The United States seemingly agrees with this case-by-case approach. (*See* U.S. Counter-Mem. at 120 ("Determining what the 'like circumstances' are for any Article 1102 analysis depends on the nature of the treatment at issue and all the relevant facts of the case.").)

178. In sharp contrast to the United States' proposed reading, however, NAFTA tribunals have interpreted "like circumstances" as broadly encompassing all investors or investments that compete in the same business or economic sector. *See*, *e.g.*, *S.D. Myers*, ¶ 250 ("The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. . . . [t]he word 'sector' has a *wide* connotation that includes the concepts of 'economic sector' and

'business sector.'" (emphasis added)); *id.* ¶ 251 ("It was precisely because [the Claimant] was in a position to take business away from its Canadian competitors" that it was discriminated against); *Pope & Talbot II*, ¶ 78 ("In evaluating the implications of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector."). Under the NAFTA decisions in *S.D. Myers* and *Pope & Talbot*, then, two businesses are in "like circumstances" if they are competitors or business adversaries.

179. It is clear that Loewen and O'Keefe were in "like circumstances." Both were competitors in the same general "business or economic sector," *i.e.*, the funeral services industry. Indeed, it was the competition between Loewen and O'Keefe — the fact that Loewen could "take business away" from O'Keefe — that led to the filing of the lawsuit. Moreover, once that lawsuit was filed, both were civil litigants competing in the same proceeding before the same judge and the same jury. Both were entitled and guaranteed the right to fair and impartial treatment, as well as the universally recognized right to present their respective cases free from bias or prejudice. (*See* TLGI Mem. at 65-71.) O'Keefe's desire to incite discrimination against Loewen arose out of these adversarial business and litigation relationships.

180. As Sir Ian Sinclair concludes: "In the context of the litigation in Mississippi in 1995, the Loewen Group, on the one hand, and O'Keefe, on the other hand, may have been in an adversarial relationship: it is amply clear, however, that, in the context of the pursuit of their economic activities, they were in like circumstances, in the sense that they were both engaged in the funeral homes business." (Sinclair Supp. Op. at 4.) Because O'Keefe and Loewen were

direct business and litigation competitors, they were surely "in like circumstances" for Article 1102 purposes.

b. The United States' Definition Is Contrary to Fundamental Precepts of Fairness

181. In view of existing NAFTA precedent, and in furtherance of NAFTA's objectives of protecting investments and ensuring equality of treatment, the Tribunal should reject the United States' crabbed suggestion that the only instance in civil litigation in which discrimination under Article 1102 could be proved is "where foreign and domestic parties are co-defendants comparably situated in the same case." (U.S. Counter-Mem. at 120-21 n.89.) The sole authority cited by the United States does not even arguably support its assertion. In *Jennie M. Fuller* (U.S. v. Cuba), 1971 *U.S. Foreign Cl. Settlement Comm'n, Ann. Rep.* 53 (June 24), a Cuban court sentenced the American co-defendants to death, but sentenced the Cuban co-defendants to life-imprisonment for the same crime. (*See* U.S. Counter-Mem. at 120-21 n.89.) While the Commission found that the Cubans' lesser sentences were *evidence* of discrimination, nothing in the decision even remotely suggests that illegal discrimination is *limited* to those circumstances. *Jennie M. Fuller*, *supra*, 56-59. The U.S. cites no other authority.

182. Under Article 1131, this Tribunal "shall decide the issues in dispute in accordance with . . . applicable rules of international law." NAFTA art. 1131(1). The United States' interpretation of "like circumstances" would violate numerous fundamental principles of international law. For example,

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . .

Article 10, U.N., Universal Declaration of Human Rights, G.A. Resp. 217A (III), U.N. Doc. A/810 at 71 (1948) *found at* http://www.umn.edu/humanrts/instree/bludhr.htm.

183. Furthermore, the United States' interpretation of Article 1102 would allow domestic courts free rein to discriminate against investors of another NAFTA Party so long as there is no domestic co-defendant in the case. Under the United States' proposed "civil litigation" restriction, for example, one United States citizen could sue one Canadian citizen in the U.S. courts for breach of contract, present only inflammatory proof of the defendant's Canadian nationality, and obtain an obviously tainted judgment, all without even implicating Article 1102's anti-discrimination requirement. Such an interpretation is so absurd — and so obviously contrary to the motivating purposes of NAFTA itself — that it cannot possibly be correct. (*See Loewen,* ¶ 53 (Chapter 11 should be given "an interpretation which provides protection and security for the foreign investor and its investment").)

184. Moreover, Loewen satisfies even the crabbed interpretation of "like circumstances" proposed by the United States. As described above, Willie Gary relentlessly stressed that all the Loewen companies were "foreign," had "come down from Canada," or were controlled by Canadians. Simultaneously, he emphasized that O'Keefe had no fight with Mr. Wright, who — although a member of Loewen's board — was to be treated as a "local" and "honorable" man. Because Loewen was treated less favorably than its "local co-defendant," Wright, it meets even the United States' proposed requirement.

c. Loewen Did Not Receive The Most Favorable Treatment

185. The United States cannot begin to justify the disparate treatment afforded to Loewen and O'Keefe by the Mississippi courts (or, for that matter, the disparate treatment afforded to Loewen and Wright). In *Pope & Talbot*, the tribunal held that all such differences in treatment violate Article 1102 unless the Respondent/Party can sustain its burden of proving that the disparate treatment is neutrally justified *and* consistent with the objectives of NAFTA:

> Differences in treatment will *presumptively* violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

Pope & Talbot II, ¶ 78 (emphasis added) (footnote omitted). That approach is consistent with international-law principles concerning the "most favorable treatment" standard, under which it is well established that, once discrimination is found to exist, the burden of justifying the challenged measure falls on the discriminating party. *See, e.g., United States — Section 337 of the Tariff Act of 1930*, BISD 36S/345 (November 7, 1989), ¶ 5.27 (citing the *FIRA* case, the Panel noted that "it is up to the contracting party seeking to justify measures" inconsistent with the most favorable treatment standard); *United States — Alcoholic and Malt Beverages*, BISD 39S/206 (June 19, 1992), ¶ 5.41 (noting the GATT practice of placing the burden on the party invoking a deviation from the most favorable treatment standard to justify its use).

186. Similarly, Article 1102 is plainly violated if there is any intent to discriminate. In *Pope & Talbot*, the tribunal relied upon the OECD declaration on *National Treatment for Foreign-Controlled Enterprises*, which states: "'[T]he key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control.'" *Pope & Talbot II*, ¶ 78 n.73. The tribunal noted that this approach was in line with the position of all three NAFTA Parties that "Article 1102 prohibits treatment that discriminates on the basis of the foreign investment's nationality." *Id.* ¶ 79.

187. In *S.D. Myers*, the tribunal found impermissible discrimination under Article 1102 where Canada implemented an export ban that was motivated not by environmental concerns

(the stated reason for the ban), but to protect a Canadian company from its U.S. competitor. *See S.D. Myers*, ¶¶ 193-95, 255-56.

188. Here, Loewen plainly suffered the sort of intentional discrimination said to violate NAFTA in *Pope & Talbot* and *S.D. Myers*. All civil litigants are guaranteed the right to present their cases free from bias and prejudice before an impartial judge and jury, but Loewen was denied that right in the *O'Keefe* case. And, moreover, the United States has not attempted to justify this discrimination as having any sort of nexus to a neutral governmental policy that is consistent with "the investment liberalizing objectives of NAFTA." *Pope & Talbot II*, ¶ 78. Indeed, if foreign investors could be subjected to excessive judgments by local juries inflamed to punish foreigners, the deleterious effect on unfettered cross-border investment would be dramatic.

189. Judge Graves ratified and contributed to the discrimination against Loewen in many ways. Among other things, he (1) refused to strike for cause a prospective juror who had openly stated that a foreign corporation should not receive a fair trial (App. at A487-91); (2) refused to act pursuant to his own "Tenth Commandment" and Mississippi law to prevent prejudicial evidence from infecting the trial (App. at A3476); (3) refused to give the jury an instruction specifically prohibiting anti-Canadian bias (App. at A2231-32; Tr. at 5447); (4) refused to set aside the biased and excessive verdict on Loewen's post-trial motions (App. at A816); and (5) refused to reduce the appeal bond to a reasonable level so that Loewen could effectively appeal the discriminatory judgment, (App. at A1078). As Sir Ian puts it:

> The failure of the trial judge to control these repeated and consciously distorted appeals to the natural, if misguided, sympathies and emotions of the jury constitutes a clear violation by the Respondent of its obligation to accord non-discriminatory treatment under Article 1102 of the NAFTA to the Claimants in the present proceedings – that is to say treatment no less

> favourable than it accords, in like circumstances, to its own investors."

(Sinclair Op. at 67 (citation omitted).)

190. The post-trial juror interviews confirm that the jury accorded "less favorable" treatment to Loewen than to O'Keefe. The Juror Report describes a jury so inflamed by Gary's rhetoric that, even before Loewen began its defense, "there was probably *not anything* [its counsel] could have done to sway the majority of the remainder of the jurors." (App. at A3088 (emphasis added).) Indeed, the jury "saw nothing wrong" with O'Keefe's bigoted advertising campaign (App. at A3091), and "[m]any of them said that is exactly what they would have done under the circumstances" (App. at A3045), including the jury foreman who told *The New York Times* that 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.'" (U.S. App. at 9.)

191. Finally, the United States suggests that Loewen's discrimination claim is "patently unsupportable" because the jury foreman was "born and raised in Canada and was a veteran of the Royal Canadian Air Force." (U.S. Counter-Mem. at 121-22.) But this juror (i) renounced his Canadian citizenship to become a U.S. and Mississippi citizen; (ii) voted to award O'Keefe $500 million despite conceding that O'Keefe's damages were "[m]aybe . . . $1 million" and "$6 to $8 million" at most (App. at A3079); (iii) was described by the United States' own source as a man who "hates Canadians and the Canadian government" (App. at A3061); and (iv) made overtly prejudiced remarks about Loewen to the *New York Times* immediately after the trial. (U.S. App. at 9.) These unrebutted facts conclusively refute the United States' claim that no discrimination took place.

192. In sum, Claimants have established that Loewen received "treatment that discriminates on the basis of the foreign investment's nationality." *Pope & Talbot II*, ¶ 79.

There is "clear evidence that the jury in the *O'Keefe* case were improperly and prejudicially influenced by the constant efforts of counsel for O'Keefe to stir up nationalistic emotions . . . against Ray Loewen and the Loewen Group." (Sinclair Op. at 67.) Finally the United States has conceded in other cases that such treatment constitutes a violation of Article 1102. *Pope & Talbot II*, ¶ 79.

3. Loewen Has Not "Abandoned" Any Part of Its Discrimination Claim

193. The United States also asserts that Loewen has "abandoned" its claim that the "Mississippi *judiciary*" was "'institutionally' biased against Loewen by virtue of Loewen's nationality." (U.S. Counter-Mem. at 122 (emphasis added).) The United States' supposition is unfounded. Claimants' contention is, was, and always has been that the verdict of the *O'Keefe* jury, infected as it was by base appeals to national, racial, and class biases, constituted impermissible discrimination under Article 1102, and that the judges who refused to set aside that verdict, but instead entered an enforceable judgment on it and declined to reduce the onerous bond requirement in order to allow an appeal, made this injury complete.

194. Where the United States feigns "bewilderment" at what it calls the "evolution of [Chief Justice] Neely's opinion" (U.S. Counter-Mem. at 123 & n.91), it juxtaposes Chief Justice Neely's earlier conclusion "that Loewen, because of its Canadian citizenship, was intentionally subjected to a complete denial of justice by the Mississippi trial court and the Mississippi Supreme Court" with his later amplification of that opinion (made necessary only because the United States had so misstated his position) which clarified that he was not alleging that he had proof that the Mississippi Supreme Court "was motivated by racial, nationalistic, or class bias." These two statements are not inconsistent or even evolutionary: The earlier statement speaks to the process by which the Mississippi Supreme Court parlayed the discrimination of the jury into

yet another denial of justice, the later one clarifies that the earlier statement meant what it actually said.

195. While there are perhaps some cases in which the line between permissible or impermissible discrimination may be unclear, this is not one of them. The extraordinary facts of this case easily support a finding of discrimination. O'Keefe's unfortunate jingoistic sentiments, the jury's wholesale embrace of those sentiments, Willie Gary's relentless denigration of defendants as "out of Canada," and Judge Graves' and the Mississippi Supreme Court's refusal of Loewen's requests for protection against such jingoism, all should lead this Tribunal to conclude, as a matter of fact, that Loewen did not receive "the most favorable treatment" mandated by Article 1102(3). Since the United States has failed to establish either that the discrimination was justified, or that it caused no injury, the Tribunal should conclude that the United States is liable to Claimants for breach of Article 1102.

B. The *O'Keefe* Litigation Resulted In Multiple Denials Of Justice In Violation Of NAFTA Article 1105

196. Claimants have demonstrated (TLGI Mem. at 74-75) that one of the protections afforded to investments under NAFTA Article 1105 is "treatment in accordance with international law," which guarantees that aliens receive certain minimum substantive and procedural protections, including the prohibition of judicial actions that constitute either substantive or procedural "denials of justice." Claimants also showed (TLGI Mem. at 75-90; R. Loewen Mem. at 50, 54-56) that the Mississippi judiciary committed both substantive and procedural denials of justice against Loewen throughout the *O'Keefe* litigation.

197. The United States attempts to defend the actions of the Mississippi judiciary by asserting that denial of justice is an "extreme" allegation that "is generally disfavored in customary international law." (U.S. Counter-Mem. at 130-31.) It asserts that a denial of justice

requires proof of a "clear and notorious injustice," "an outrage," "bad faith," "wilful neglect of duty, or . . . an insufficiency of governmental action recognizable by every unbiased man." (*Id*. at 131.) The United States further contends that Claimants "cannot support such an extreme claim." (*Id*. at 131-32.)

198. The United States erroneously seizes on cases holding extreme conduct *sufficient* to sustain a denial of justice claim, and paints these decisions as stating a rule that such extreme conduct is *necessary* to such a claim. But even if the standard were as extreme as the United States now claims — which it is not — the remarkable facts of the *O'Keefe* case more than satisfy even that burden.

1. The "Denial of Justice" Standard

199. The test for determining whether a denial of justice has occurred has been stated in a number of ways. The NAFTA Tribunal in *Azinian v. United Mexican States,* ICSID Case No. ARB(AF)/97/2 (Award of Nov. 1, 1999), stated that "[t]he responsibility of the State for acts of judicial authorities may result from" either a "decision of a municipal court *clearly incompatible with a rule of international law*" or "what is known traditionally as a 'denial of justice.'" *Id.* ¶ 98 (emphasis in original). For Chapter 11 purposes, "[w]hat must be shown is that the court decision itself constitutes a violation of the treaty." *Id.* ¶ 99 (emphasis omitted). The *Azinian* Tribunal defined two different types of denials of justice relevant here, both of which are less extreme than those proffered by the United States: *one,* where the courts "administer justice in a seriously inadequate way"; and *two,* where the courts commit a "clear and malicious misapplication of the law." *Id.* ¶¶ 102-03.

200. Other recent articulations confirm that the standard is not nearly as demanding as the United States asserts. A denial of justice will be found where a judicial decision constitutes a "denial of trial or other proceedings," "unfair trial or other proceedings," or an "unjust

determination." R. Lillich, *International Law of State Responsibility for Injuries to Aliens* 224 (1983) (citing *Restatement (Second) of Foreign Relations Law of the United States* §§ 179-82). *See also* Adede, *supra*, XIV Can. Y.B. Int'l L. at 91 ("denial of justice" includes "'unjust decisions'"); L. Sohn and R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* ("Sohn & Baxter, *1961 Draft Convention*"), art. 8, at 96 (12th Draft, 1961) ("A decision or judgment of a tribunal . . . is wrongful . . . if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world . . . .").

201. Discriminatory actions by local courts constitute a denial of justice. *See id.* (a judgment that is "a clear and discriminatory violation of the law of the State concerned" will constitute a denial of justice); Harvard Law School, Research in International Law, *Draft Convention on the Law of Responsibility of States for Damage Done In Their Territory to the Person or Property of Foreigners* ("1929 *Harvard Draft Convention*"), 23 Am. J. Int'l L. 133, 174 (Special Supp. 1929) (denial of justice exists where "the procedure or judgment is manifestly unjust, especially if it has been inspired by ill-will toward foreigners, as such, or as citizens of a particular state"); *id*. at 175, 180, 184 (similar); J. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice,* [1929] Brit. Y.B. Int'l L. 181, 183 (same); Adede, *supra,* XIV Can. Y.B. Int'l L. 91 & n.83 ("a procedural or substantive decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant"). The United States itself, at least when it comes to its own citizens, has previously asserted that a denial of justice is present where there is "[u]ndue discrimination against the petitioner as a citizen of the United States in breach of treaty obligations." Letter from Mr. Bayard, U.S. Sec'y of State, to Mr. Morrow, Feb. 17, 1886, *found at* 1929 *Draft Harvard Convention* at 179.

202. Procedural impediments and injustices can also constitute a denial of justice. For example, "[j]ustice may . . . be denied by . . . impediments in the proceedings, which in effect are equivalent to a refusal to do justice." 1929 *Harvard Draft Convention* at 182. According to one recent scholar, "[d]enial of justice means improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions." Adede, *supra*, at 91. Even the United States has previously asserted that "[t]he concept of 'denial of procedural justice' includes injury resulting from a denial of procedural fairness and due process in relation to judicial proceedings." *Case Concerning Elettronica Sicula, S.p.A.* (*ELSI*) (U.S. v. Italy), I.C.J. *Pleadings, Oral Arguments, Documents* (Vol. I), U.S. Memorial at 98 n.1 (citing The American Law Institute *Restatement* (*Second*), sec. 181 (1965); Tent. draft No. 7, sec. 711, cmt. a). Thus, in *Garrison's Case* (U.S. v. Mex.) (1871), 3 *Moore's Int'l Arbitrations* 3129 (1898), the umpire found a denial of justice where the "court or judge in Acapulco acted with great irregularity," and "an appeal from the Acapulco judge to a Mexican court of appeal was prevented by intrigues or unlawful transactions."

203. The United States' "extreme" formulations of the denial-of-justice standard are vestiges of a past in which only States could protect the rights of aliens through the extreme process of diplomatic espousal. (Third Jennings Op. at 7 ("governments were not anxious to extend the high level remedy of diplomatic protection, and eventually perhaps the cumbersome machinery of agreements to create a[n] ad hoc claims commission"); Sinclair Op. at 30 ("We are a long way from the situation which existed only fifty years ago when the parameters of the concept of 'denial of justice' had been broadly fixed, *but*, and the caveat is important, *only within the framework of an international legal system which was constructed on the basis that only States were subjects of international law, so that the claim of a private individual or corporation*

against a foreign State alleging breaches of international law could only be pursued if the national State of the injured individual or corporation took up (or 'espoused') that claim on the international level.") (emphasis in original).)

204. Moreover, the United States' verbal formulations of the standard represent a collection of the most "extreme statements" found in the diplomatic espousal context. As Freeman has written, however, substantive denials of justice are "a common form of official wrongdoing" that "may take shape at any time":

> It is necessary to bear in mind that in denial of justice we are not confronted with a mere excuse for theoretical speculation, but rather with *a common type of official wrongdoing* and a matter which is of deep concern to every private person or corporation engaged in activity within foreign States. [It] *may take shape at any time* to infringe the rights of those brought into contact with the local machinery of justice. . . . [T]he foreigner may . . . sustain injury by reason of a judgment inspired by malice toward aliens in proceedings brought against him as defendant by a citizen plaintiff. The precise nature of the cause is immaterial. . . . *[T]he possibility is ever present* that in the exercise of competences delegated to the State by international law there may appear a failure to perform the elementary obligation of providing an adequate judicial protection. Since this is so, one is faced with the disclosure that the concept of denial of justice may permit what was a local, even a wholly private issue, to be transposed from the domestic to the international plane; in a word, to provide the occasion for an international action.

A. Freeman, *International Responsibility of States for Denial of Justice* 71-72 (1970) (emphasis added).

205. Similarly, one of the United States' own sources notes that, in the context of diplomatic espousal, instances of denial of justice have been both "frequent and varied":

> A State must . . . be normally reluctant to interpose in an endeavor to interfere with the administration of justice as applied *impartially* to its nationals in a foreign country. On the other hand, a State will be quick to protest if the judicial system of another works palpable injustice to such individuals, either as a natural incident of procedure, or as a direct effect of adjudications.

> Instances are *frequent and varied*. The application to an alien of local laws sharply at variance with treaty stipulations contracted for his benefit, will arouse complaint; likewise any discrimination against him on account of his nationality, especially if he is subjected to criminal prosecution. . . . If [the] trial is conducted with gross injustice, if the local law be violated, . . . interposition is to be *anticipated*, unless local remedies afford a complete means of redress and are *within the reach of the victim*."

C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 731-32 (1945) (emphasis added).

206. Denial of justice is thus not the "extreme" claim the United States paints it to be.

2. Claimants Were Repeatedly Denied Justice

207. In the *O'Keefe* case, the denials of justice suffered by Claimants were multiple and manifest. They occurred at every phase of the proceedings and involved both the judgment and the procedures by which it was rendered, entered and, later, effectively affirmed.

a. The Excessive, Unjust, And Unsupported Verdict Was A Denial Of Justice

208. Claimants demonstrated in their Memorials (TLGI Mem. at 87-88, 90; R. Loewen Mem. at 54-55), and above (Section II, *supra*), that the $500 million verdict in the *O'Keefe* case was grossly excessive in its compensatory and punitive components, was unsupported by the evidence, and resulted from the jury's bias, passion and prejudice. Claimants also showed that the $500 million judgment so "unreasonably departs from the principles of justice recognized by the principal legal systems of the world," Sohn & Baxter, *1961 Draft Convention* at 96, that it must be considered a denial of justice. Indeed, Sir Robert Jennings has concluded that the judgment was so enormous as to be "almost . . . *res ipsa loquitur*" as to denial of justice. (First Jennings Op. at 4.)

209. The United States responds by arguing that (1) the compensatory award was not excessive because O'Keefe presented "evidence" of "tens of millions of dollars" of damages,

"not even counting the emotional distress for which O'Keefe was also entitled to recover" (U.S. Counter-Mem. at 134-35); (2) the punitive award was not excessive under domestic standards (*id.* at 136-42); and (3) the $500 million verdict is irrelevant because Loewen ultimately paid only $175 million in settlement. (*Id.* at 134.) None of these arguments has merit.

210. *First*, the United States offers no plausible defense of the $100 million compensatory portion of the judgment. Indeed, the best the United States can muster is a conclusory assertion that "O'Keefe presented credible evidence of more than $35 million in economic damages . . . the proof of which O'Keefe's counsel summarized with effectiveness during his closing argument." (U.S. Counter-Mem. at 135; *see also id.* at 160 (Loewen "caused *tens* of millions of dollars in damages to the *O'Keefe* plaintiffs" (emphasis added)).) In fact, as explained at pp. 54-62, *supra*, the compensatory damages awarded by the jury bore no natural relationship to either the record evidence, or even the amounts requested by Gary, and included obvious multiple-counting and legally improper recoveries.

211. The United States makes no attempt to defend the jury's award for "emotional distress" damages. Gary sought "70 some odd million" dollars in such "emotional distress" damages (Tr. at 5713) — probably $74.5 million (Tr. at 5566). Even under the United States' attempted reconstruction of the record, the jury awarded O'Keefe some $65 million in "emotional distress" damages ($100 million in compensatory damages minus $35 million in supposedly "proven" economic damages).

212. Whether $65 million, or $74.5 million, the "emotional distress" award was monstrously excessive. As explained above, the totality of the evidence of "emotional distress" was a few pages of testimony that Jerry O'Keefe had lost some sleep and was upset. *See supra* pp. 53-55. Yet the only authority that the United States can muster on this point, *Adams v. U.S.*

Homecrafters, 744 So. 2d 736 (Miss. 1999), specifically held that brief testimony "about loss of sleep and worry" is "insufficient to support an instruction or award of damages for emotional distress." *Id.* at 744. Thus, the United States' *own* authority makes clear that the "evidence" offered by O'Keefe at trial would not support *any* award for emotional distress damages. *See id.* at 743-44.[10]

213. The United States does not dispute that excessive awards for emotional distress violate international law. *See, e.g.*, *Lusitania Cases*, 7 R.I.A.A. 32, 40 (1923). By any conceivable measure, the emotional distress award in *O'Keefe* was grossly excessive.

214. Even the *jurors* did not believe that O'Keefe had proven anywhere near $100 million in damages. Rather, they simply awarded what they thought *Willie Gary* "needed."

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[10] As Loewen's counsel argued at the post-trial hearing (App. at A791-93):

> The Supreme Court [of Mississippi] has made it clear that in order for them to substantiate or uphold any verdict on emotional distress to pay anybody any money on emotional distress, there has to be some proof. Now, the proof that was put on by the Plaintiff . . . . They asked for $50,000 a day. What was the proof of the emotional distress? They had Susan Snyder get on the stand, Jeff O'Keefe get on the stand, and finally Jerry O'Keefe get on the stand and they testified that Jerry O'Keefe was under a lot of stress. When Jerry O'Keefe was asked what kind of stress he was under, he said there were some nights I didn't sleep. I was worried about my company. I spent 37 years building this company and now it looks like I may lose it. . . . Was there any proof? You've got a 72-year-old man. There was no heart attack, no ulcer; not even a headache. There wasn't even a bill that showed that he bought an aspirin because of his emotional distress. He just got on the stand and said I couldn't sleep some nights and I was worried. The Supreme Court has said that's not enough proof. . . .
>
> . . . .
>
> Seventy-five million dollars in emotional distress where there is no proof that meets any legal standard that could be substantiated and offered to do that.

(App. at A3059 ("Willie Gary said he needed a $105 million dollar verdict, and that's what the jury wanted to give him. . . . Akida Emir . . . said that this was her one chance to make a difference and we ought to double it."); *id.* at A3079 (jury foreman "feels bad about the amount of money . . . . [because] [m]aybe O'Keefe lost $1 million dollars. $6 to $8 million dollars I'd say was right, but even if you went up to $10 million and doubled that figure for punitive damage, $30 million tops would be a figure."); *see also id.* at A3069 ("because of the amounts involved, she is not sure the jury verdict will stand").)

215. *Second*, the United States does not seriously respond to Claimants' showing (TLGI Mem. at 87-88; R. Loewen Mem. at 54-55) that the $400 million punitive award violated international law. The United States does not deny that international tribunals have repeatedly held that excessive punishment of aliens constitutes a denial of justice. *See, e.g., Quintanilla (Mex.) v. United States*, 4 R.I.A.A. 101, 103 (1926); *Dyches (U.S.) v. Mexico*, 4. R.I.A.A. 458, 461 (1929); *Chattin (U.S.) v. Mexico*, 4 R.I.A.A. 282, 295 (1927); *Roberts (U.S.) v. Mexico*, 4 R.I.A.A. 77, 80 (1926); (TLGI Mem. at 79-80).

216. Nor does the United States dispute that the general principles of law in leading nations — which are themselves an important source of international law, *see, e.g.*, Article 38(1)(c) of the Stat. of the I.C.J.; *Sea-Land Service Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149, 168 (1984); B. Cheng, *General Principles of Law As Applied by International Courts and Tribunals* xiii (Preface) (1987) — likewise condemn excessive punitive damage awards. (*See* TLGI Mem. at 80-85.) In fact, even the United States' own expert concedes that "[t]he laws of many common law countries that allow for the awarding of punitive damages prohibit punitive damages awards that are excessive." (Gotanda Stmt. at 9.)

217. Instead, the United States sets up and knocks down a straw-man argument by asserting that punitive damages do not, "in and of themselves," or "as a general rule," "violate customary international law." (U.S. Counter-Mem. at 136-37; Gotanda Stmt. at 2.) However, Claimants' attack is not on punitive damages "in and of themselves," but on *this* excessive punitive damage award. (TLGI Mem. at 79-85, 87-88; R. Loewen Mem. at 54-55.)

218. The United States next argues that the excessiveness of a punitive damages award is a "'determination that should be made by the appropriate domestic court'" and that, "by domestic measures," the *O'Keefe* jury's award of punitive damages was not "'grossly excessive.'" (U.S. Counter-Mem. at 137-38.) The United States is wrong on both points.

219. The United States' own international authorities rebut its contention that domestic standards of excessiveness are dispositive in international law. The United States asserts that *Chattin v. United Mexican States* (U.S. v. Mexico), *supra*, holds that the imposition of a penalty does not violate international law "so long as such a penalty was permissible under local law, and in the absence of clear discrimination between similarly-situated [foreign] and U.S. defendants." (U.S. Counter-Mem. at 137.) In fact, the *Chattin* tribunal actually held that the "intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge" and awarded $5000 in damages. *Chattin*, *supra*, at 295.

220. The laws of leading nations demonstrate that, in the relatively few countries where punitive damages are allowed *at all*, disproportion between the actual damages suffered and the punitive damages awarded is a principal indicator of excessiveness. As the United States itself notes, English law forbids punitive awards where the damages awarded are "'so large . . . that twelve sensible men could not have reasonably given them' or that 'no reasonable

proportion existed between it and the circumstances of the case.'" (U.S. Counter-Mem. at 137 (citing *Cassell & Co. Ltd. v. Broome*, [1972] 1 All E.R. 801, 819 (quotation omitted)).) Canadian law similarly prohibits punitive damages that are "exorbitant and grossly out of proportion to the conduct of the [defendants]." *Lauscher v. Berryere*, [1999] 172 D.L.R. 4th 439, 445. Likewise, the High Court of Australia has stated that "[i]f an appellate court is convinced, not that in its own view the amount is too high or too low but that the amount awarded is so high or so low that it is outside the range of what could reasonably be regarded as appropriate to the circumstances of the case, the proper performance of its functions will require it to intervene to prevent a miscarriage of justice." *Carson v. John Fairfax & Sons Ltd. and Anor* (1993), 178 CLR 44, 61-62 (citing *Coyne v. Citizen Finance Ltd.,* (1991) 172 CLR 211, 215 (Mason CJ and Deane J)).

221. Even United States and Mississippi law prohibit unreasonable, disproportionate, or excessive punitive damage awards. The United States Constitution requires punitive damages to be reasonably related to the reprehensibility of the defendant's conduct, the amount of harm caused, and the sanctions authorized for comparable misconduct. *See BMW of North America v. Gore*, 517 U.S. 559, 574-85 (1996); (TLGI Mem. at 83-84).[11] Similarly, the United States itself notes that, under Mississippi law, a punitive damages verdict must be struck down where it "'is

[11] Given the propensity of United States juries to award excessive punitive damages, U.S. courts have been forced to apply *BMW* repeatedly to strike down such awards. *See, e.g., Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 465-70 (3d Cir. 1999) (reducing punitive award in business-tort case from $100,600,000 to $1,000,000 where injuries were "only economic" in nature); *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F. Supp. 535, 550 (S.D. Tex. 1997) ("the jury simply went too far and, it appears, blindly based its verdict solely in proportion to [the defendant's] balance sheet without also taking into consideration the actual damages sustained by [the plaintiff] and the relative degree of reprehensibility of [the defendant's] conduct"); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 113-24 (Ala. 1997) (per curiam) (reducing punitive award from $6 million to approximately $1.8 million in business-tort case because

so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.'" (U.S. Counter-Mem. at 137-38 (quoting *Parcelsus Health Care Corp. v. Williard*, 745 So. 2d 437, 444 (Miss. 2000)).[12]) The United States' expert, Gotanda, agrees that "'grossly excessive' punitive damages violate the Due Process Clause of the [U.S.] Constitution and, therefore, are invalid." J. Gotanda, *Supplemental Damages in Private International Law* § 6.3(2)(a) at 208 (1998).

222. These domestic U.S. standards, however, afford only limited protection against the kind of grossly excessive awards rendered in the United States with distressing regularity. Indeed, during negotiation of the Future Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters, it was noted that "punitive damages as awarded in the United States are in the centre of the international debate." Note on the Recognition and Enforcement of Decisions in the Perspective of a Double Convention with Special Regard to Foreign Judgments Awarding Punitive or Excessive Damages, at 9, *found at* U.S. State Department website, http://www.state.gov/www/global/legal_affairs/ (visited May 24, 2001). In fact, many delegates rejected a suggestion that domestic judicial review would rein in

(continued…)

defendant's conduct "does not exhibit the extremely high degree of reprehensibility that would indicate a $6 million punitive damages award," *id*. at 116).

[12] The propensity of Mississippi juries to award excessive punitive damages likewise requires frequent application of this settled principle. *See, e.g., Dixie Ins. Co. v. Mooneyhan*, 684 So. 2d 574, 585-86 (Miss. 1996) (striking down as excessive a $1 million punitive award imposed on a defendant insurance company charged with bad faith); *General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 275 (Miss. 1999) ($5,000,000 punitive award and $35,000 compensatory award found excessive in case involving only $762 in actual damages; *Mutual Life Ins. Co. of New York v. Wesson*, 517 So. 2d 521, 531-33 (Miss. 1987) (reducing $8 million punitive award to $1.5 million in case involving bad faith misconduct). (*See generally* TLGI Mem. at 84-85.)

what the United States itself acknowledged to be its practice of excessive punitive damages awards:

> The United States delegation, which is much concerned with judgments of this type ["judgments awarding excessive damages"] since many of them come from its courts, in view of the procedural and judicial features peculiar to its system, which do not require further comment, showed that the most recent case law, especially that of the Supreme Court, should in [the] future reduce considerably the risks of such judgments being delivered. However, a significant number of experts preferred not to take this optimistic view, and suggested that the future Convention should include one or more specific clauses on this subject.

Hague Conference on Private International Law, *found at* http://www.net/e/workprog/jdgm.html (May 24, 2001) (Future Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters, Preliminary Document No. 7), ¶¶ 192-93 (footnote omitted).

223. During these negotiations, Canada singled out the *O'Keefe* verdict as quintessentially excessive and unfair:

> In Canada, as in many other countries, the US practice of awarding punitive or multiple damages engenders strong reactions in the business and legal communities. . . . Th[e] story [of the *O'Keefe* case] has once again demonstrated the notable differences between the US and Canadian legal and judicial systems . . . . [and] highlighted the fears of many Canadian firms of doing business in the US with the consequent risk of being sued there. . . . Punitive or exemplary damages may be awarded in Canada in very limited circumstances and for very limited amounts.
>
> . . . .
>
> In Canada, the US practice of awarding punitive damages is frequently considered to create *unfairness* and to *eliminate the competitiveness* of Canadian firms by exposing them to extravagant awards if they have assets in the US as is the case of the Loewen Corporation.

Id., Canadian Annex 3, Information Note on Canadian Reactions to U.S. Practice of Judgments Awarding Punitive or Multiple Damages, at 1, 3 (emphasis added).

224. As Claimants demonstrated in their Memorials (TLGI Mem. at 87-88; R. Loewen Mem. at 54-55), and above, the $400 million punitive damages verdict in *O'Keefe* violates any formulation of the excessiveness prohibition. The $400 million award was entirely unrelated to the reprehensibility of the alleged conduct at issue (breaches of commercial contracts valued by O'Keefe at a few million dollars); it was completely unrelated to any actual or proven harm suffered by O'Keefe (at most $8 million, according to the jury foreman); and, as the largest award in Mississippi history by far, it perforce was entirely unrelated to sanctions imposed in Mississippi for similar conduct in other cases. (*See* TLGI Mem. at 87; R. Loewen Mem. at 54-55.) Moreover, the jury's punitive damages verdict was "so excessive" as to "'evinc[e] passion, bias, and prejudice" (which was hardly surprising in light of Willie Gary's trial strategy) and to "shock the conscience" of any fair-minded court. *See Dixie Ins. Co.*, 684 So. 2d at 586.

225. The juror interviews reveal that the punitive damages verdict was based on a desire to "destroy" Loewen (App. at A3060-61); a desire to please Willie Gary, whom the jurors "like[d]" (App. at A3088); a sense of empowerment against a big corporation that made them "'drunk with power'" (App. at A3088, 3092); and vindictiveness because Loewen had not accepted the facially improper original $260 million verdict. (App. at A3072**;** *see also* App. at A3065.) The award was "clearly disproportionate, arbitrary and unreasonable" (Sinclair Op. at 34), and "so bizarrely disproportionate as almost to defy belief." (First Jennings Op. at 13.) Under any standard, it plainly violated international law.

226. *Third and finally,* the United States erroneously contends that excessiveness should be measured not by reference to the $500 million verdict and judgment, but by reference

to the $175 million settlement. But the verdict and judgment are among the judicial measures challenged here by the Claimants (*see, e.g., Loewen*, ¶ 56); the ensuing settlement might have mitigated the amount of damages ultimately suffered by Loewen, but it did not, and could not, make the underlying verdict and judgment any less excessive or unlawful.

227. International tribunals have rejected analogous arguments. In *Fourth of July* (1842), 3 *Moore's Int'l Arbitration*, 3227, 3228, a lower court illegally condemned property held by aliens, and a court of appeals "ordered the restoration" of the property. Despite that restitution order, the tribunal permitted the claimants to pursue an international claim because the appellate court, by "'disallow[ing] the right to the claimants of suing for damages for costs,'" failed to afford them complete relief. *Id.* So too here: the settlement might have mitigated, but obviously did not eliminate, the damages flowing from the illegally excessive verdict and judgment.

228. To support its misguided argument, the United States cites *Dyches (U.S.) v. Mexico*, 4 R.I.A.A. at 460, for the proposition that "[a]ll the defects of procedure of which the claimant complains were, so to say, erased by the last decision [of the municipal courts] which rendered justice to him." (U.S. Counter-Mem. at 134.) But the $175 million settlement could not possibly "eras[e]" the defects or "rende[r] justice" to Loewen; all it could do was mitigate the devastation caused by the verdict and judgment. (And even so, the United States fails to acknowledge that the *Dyches* tribunal held that "the procedure was delayed longer than what it should reasonably have been," thus "constitut[ing] a denial of justice" for excessive imprisonment. *See Dyches*, 4 R.I.A.A. at 460-61.)

229. The United States' citation to Sohn & Baxter further undercuts its argument. The portion of the *1961 Draft Convention* relied upon by the United States establishes that, where the

court "imposes a particularly heavy fine because of ill will," "[t]he *measure of the wrong done* the alien is the difference between what the decision or judgment should have been and what it actually was." Sohn & Baxter, *1961 Draft Convention* at 97 (emphasis added). Plainly, "the measure of the wrong done" is a question of damages, not of international liability *vel non*.

230. In any event, the excessiveness claims here would be meritorious even if the proper benchmark for evaluating excessiveness were the $175 million settlement, or even what the United States claims to be the $85 million value of the settlement. As Claimants previously explained, "the $175 settlement was still 30 to 50 times greater than the amount at issue in the underlying commercial dispute." (TLGI Mem. at 61.) And even the alleged settlement value of $85 million is still more than *ten times* the maximum amount of damage, according to the jury foreman, that O'Keefe could possibly have suffered. (App. at A3079.) Like the verdict and judgment, the coerced settlement was also grossly excessive.

231. The jury's two biased and excessive verdicts and the trial court's entry of judgment on these obviously tainted verdicts were all "'unjust decisions'" that were "clearly at variance with the law and discriminatory." Adede, *supra,* at 91 & n.83. That is more than enough to demonstrate a denial of justice.

b. The Discriminatory Trial Was A Denial Of Justice

232. As explained in Sections II and III(A), *supra*, the *O'Keefe* trial constituted a denial of justice because it involved repeated and unconscionable appeals to national, racial and class prejudice. *See, e.g., In the Matter of Jennie M. Fuller* (U.S. v. Cuba), 1971 Foreign Claims Settlement Comm'n of the United States – Annual Report to the Congress 53, 58-59. Judge Graves allowed this to occur in violation of his own "Tenth Commandment" (App. at A3476), refused Loewen's request to excuse an admittedly-biased juror (App. at A490-91), refused to give a twice-requested anti-bias instruction to the jury (Tr. at 5390-91, 5447), and entered

judgment on (and made unbondable) an obviously tainted verdict. This too constitutes a denial of justice. *See Solomon (U.S.) v. Panama*, 6 R.I.A.A. 370, 372-73 (1933) (finding a "palpable injustice" where "[e]xamples of [a] hostile state of feeling [against the alien defendant] abound in the record of the trial"). Indeed, the *Solomon* tribunal found a denial of justice because "claimant's conviction was unconsciously influenced by strong popular feeling." *Id.* at 373 ("The unavoidable susceptibility of local judges to local sentiment is a matter of common knowledge. One of the primary purposes of international arbitration is to avoid just such susceptibility and to remedy its consequences.").

233. Sir Ian Sinclair has confirmed that Gary's pervasive appeals to anti-Canadian bias effected a "flagrant miscarriage of justice":

> The outcome of [the *O'Keefe*] trial was quite improperly influenced by the blatant efforts of counsel for the plaintiff to appeal to the anti-foreign (more specifically, anti-Canadian) prejudices of the jury and to play heavily upon the (not unnatural) sentiments of a predominantly black jury in wishing to favour a relatively small local enterprise engaged in the funeral homes business in a dispute against what was portrayed as a rich and overbearing foreign competitor in the same business. The conduct of the trial judge in failing to control the wholly improper actions of counsel for O'Keefe in pandering to, and even encouraging, these prejudices and sentiments, led to a *flagrant miscarriage of justice*. The result was a grossly inflated $260 million dollars verdict for the plaintiffs in the trial, supposedly comprising $100 million dollars by way of compensatory damages and $160 million dollars by way of punitive damages.

(Sinclair Op. at 25-26 (emphasis added); *see also* First Jennings Op. at 4 ("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.").)

234. Even domestic courts universally condemn the kind of incitement so brazenly exploited by Gary. In a strikingly analogous case, involving unobjected-to yet nonetheless "objectionable conduct by . . . counsel in the course of the trial," the U.S. Supreme Court condemned

> references to petitioner as an 'eastern railroad'; and statements that the railroad had 'come into this town' and that witnesses and records had been 'sent on from New York' for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country have been so often condemned as an appeal to sectional or local prejudice as to require no comment.

New York Cent. R.R. Co. v. Johnson, 279 U.S. 310, 319 (1929). The similarities between these "condemned" tactics and Willie Gary's references – to, *inter alia,* "Ray Loewen and his group out of Canada" (*see, e.g.,* App. at A373) and when Loewen "came to town like gang busters" (Tr. at 5548); and "Ray Loewen descended on the State of Mississippi" (Tr. at 58) — are striking.[13] The trial court could have corrected this gross injustice in any number of ways,

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[13] To the same effect, see, *e.g., Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-78 (5th Cir. 1998) (ordering a new trial where plaintiff's counsel repeatedly "reminded the jury that [Defendant] Kmart is a national, not local, corporation . . . . [and] contrasted that with his status as a Mississippi resident and, implicitly, his clients' similar status," despite the fact that "most of the challenged statements were not objected to"); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1021, 1023 (Fla. Dist. Ct. App. 1996) (ordering new trial where "[d]efense counsel's remarks during his closing impermissibly . . . appeal[ed] to the jurors' self-interest as . . . fellow Okeechobee residents and 'the conscience of the community,'" despite the "failure of plaintiffs' counsel to object during the entire litany of improper closing argument remarks"); *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1157, 1158 (Fla. Dist. Ct. App. 1994) (ordering new trial where closing argument was "pervaded with inflammatory comments and the personal opinion of counsel," even though "the offensive comments were not objected to"); *Pappas v. Middle Earth Condominium Assoc.*, 963 F.2d 534, 539, 540 (2d Cir. 1992) (ordering new trial because "defense counsel made a blatant 'us-against-them' appeal to the jury," noting that the trial judge has "the affirmative obligation to guard against improper trial tactics that might prevent a fair trial"); *Koufakis v. Carvel*, 425 F.2d 892, 900 (2d Cir. 1970) (ordering new trial where counsel repeatedly made "improper and prejudicial" statements to the jury because "[i]t was the trial judge's affirmative duty to protect appellants from the grossly improper tactics adopted by counsel for the appellee" and he "failed to do" so); *LeBlanc v. American Honda*

including by sustaining Loewen's post-trial motions for judgment *n.o.v.* or for a new trial, but it denied those motions in perfunctory manner. (App. at A816 ("All those motions are denied.").)

235. The United States' makeweight excuse for the introduction of much of the inflammatory evidence and argument — *i.e.*, O'Keefe's legally unsupported antitrust and oppression claims — demonstrates yet another denial of justice. Loewen repeatedly attempted to exclude those claims from trial, yet Judge Graves denied those motions in similarly perfunctory manner. (App. at A3347-49 ("Motion is denied. What's the next motion?"); App. at A816 ("All those motions are denied.").) If the presence of these frivolous and legally unsupportable claims indeed justified the prejudicial trial appeals to class and racial biases, as the United States erroneously contends, then the denials of justice began prior to the trial, when the judge refused to dismiss these legally insupportable claims.

c. The Supersedeas Bond Rulings Denied Loewen Justice

236. Accompanying this Reply are the statements of Charles Clark, the former Chief Judge of the United States Court of Appeals for the Fifth Circuit, and Armis Hawkins, the former Chief Justice of the Mississippi Supreme Court. Former Chief Judge Clark has opined that "the rulings of both Courts failed to follow the intended path set by Mississippi law. This was an appropriate case for both Courts to carefully examine the good cause shown by Loewen for posting all of the security it could muster through [a] $125 million supersedeas bond supplemented by other financial guarantees." (Clark Stmt. at 13-14.) Former Chief Justice Hawkins similarly concludes that, "[i]n my respectful view, a manifestly profound injustice was done these defendants in the Court's refusal to reduce this bond." (Hawkins Stmt. at 26.)

(continued…)

Motor Co., Inc., 688 A.2d 556, 559 (N.H. 1997) (ordering new trial based on closing-argument appeal to anti-Japanese sentiment, including "Pearl Harbor [and] the Japanese prime minister

237. These witness statements confirm Claimants' prior showings (TLGI Mem. at 89-90; R. Loewen Mem. at 61-62) that the arbitrary supersedeas bond rulings by both Judge Graves and the Mississippi Supreme Court, which had the effect of denying Loewen's right to appeal the manifestly unjust $500 million judgment, constituted a denial of justice. The United States offers two responses to these showings: that supersedeas bonds are common features of world legal regimes, and that the record in front of the Mississippi courts merited those courts' refusal to impose a lesser, reasonable bond. The former response is irrelevant, and the latter is erroneous.

238. To start: The United States' statement that "supersedeas bonds are a common feature of legal systems worldwide" (U.S. Counter-Mem. at 144-52; *see also* Dunbar Stmt. at 3) is entirely beside the point. This case is not a broad-based attack on supersedeas requirements generally, but a challenge to the manner in which they were applied to Loewen *on the facts of this case*. The excessive bond, and the Mississippi courts' failure to reduce it to a reasonable level, was a procedural denial of justice: "[A] denial of justice is a failure in local remedies." C. Eagleton, *The Responsibility of States in International Law* 113 (1928).

239. Indeed, as Claimants previously showed (TLGI Mem. at 90), leading international-law authorities have universally condemned the *application* of particular bonding requirements as prohibitive or excessive:

> [I]t may be that an alien in fact finds it difficult to employ an existing local remedy by reason of the existence of some other procedural barrier in the law, such as a requirement of posting excessive security for costs, *or, where the law leaves to the discretion of a court official the amount of security for costs to be posted, an order for the posting of a prohibitive amount*. Resort to a remedy might be foreclosed by a requirement that a fine must be

(continued…)

saying Americans are lazy and stupid").

> paid before an appeal can be taken, if the fine imposed in a particular case were far beyond the capacity of the alien concerned to pay.

Sohn & Baxter, *1961 Draft Convention* at 168 (emphasis added).

240. The United States, however, asserts that the Draft Convention "suggests only that a 'procedural barrier in the law, such as a requirement of posting excessive security for costs' can excuse the failure to exhaust local remedies before presenting an international claim." (U.S. Counter-Mem. at 143 n.106.) But the United States' quotation inexplicably (though conveniently) omits entirely the immediately following language in the Draft Convention: as highlighted above, an order to post "prohibitive" security, even if discretionary, will constitute a denial of justice. It was the trial court's and Mississippi Supreme Court's ostensibly discretionary orders, requiring "the posting of a prohibitive amount," that form the basis of Claimants' challenge. Indeed, those orders fit squarely within all of the traditional definitions of "procedural denial of justice."[14]

241. The United States' authorities do not address the illegality of an excessive or prohibitive bonding requirement such as the one imposed by the Mississippi courts in the *O'Keefe* case. The United States' authorities are the unexceptional cases where a "poor" or

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[14] *See, e.g.,* 4 League of Nations, *Acts of the Conference for the Codification of International Law*, art. 9(2), at 237 (1930) ("1930 Hague Draft Codification") ("International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact . . . [t]hat . . . the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles . . . implying a refusal to do justice."); 1929 *Harvard Draft Convention* at 185 (post-trial denials of justice include situations where courts "have unlawfully prevented an appeal by the alien"); A. Freeman, *Denial of Justice, supra*, at 224 ("prohibitive" securities for cost constitute "arbitrary obstacles" to judicial remedies giving rise to an international cause of action). *See also Burt Case* (U.S. v. Gt. Brit. 1923), *Nielsen's Report* 588, 598 (1926) (noting that the successful claimant had "diligently prosecuted his claim so far as the circumstances and his limited resources permitted"); *Jones Claim* (U.S. v. Spain 1880), 4 *Moore's Int'l Arbitrations* 3253-54 (awarding $5000 based on excessive bail requirement of $17,000 to $20,000).

"impoverished" claimant could not afford to pursue an appeal or obtain a standard security instrument; *none* of the United States' authorities even remotely applies to this case, where the claimant suffered an *excessive* verdict, which the court refused to reduce, which in turn led to the courts' *refusal* to reduce that bond requirement, which in turn foreclosed an appeal. *Compare Ferrara's Case* (1901), 6 Moore, *Digest of Int'l Law* 672, 674-75 (1906) (neutral requirement that a *plaintiff* pay a security "for costs" did not deny justice where an alien could not pay due to her "poverty"); *Jesse Lewis (U.S.) v. Great Britain*, 6 R.I.A.A. 85, 92-93 (1921) (tribunal did not "admi[t] any foundation in this case for a contended denial of justice" but nonetheless asked the Respondent State to "consider favorably the allowance as an act of grace . . . of adequate compensation" because Claimant "was a poor, aged man, who was possessed of no means of any moment or value other than the said schooner, that his wife was an invalid, and that after his vessel was seized he was compelled to go to sea to earn a living for himself and his wife"); *Sarah Starr*, 3 *Moore's Int'l Arbitrations* at 3158 (disallowing diplomatic espousal claim where claimant failed to appeal due to "becom[ing] impoverished . . . and [being] unable to incur further expense"); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, at art. VI (allowing for a "suitable security," but not an excessive security). The United States thus has no useful international support for its submission.[15]

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[15] The United States misstates its municipal support as well. Citing *Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987), the United States says: "Courts have interpreted this [suitable security] provision [of the New York Convention] to require security for the full amount of the arbitral award plus interests, costs, and fees." (U.S. Counter-Mem. at 148.) But that assertion is based on *dictum* in *Spier,* which actually *declined* to decide the issue: "Neither party at bar has briefed the question of security. Accordingly I will *not pronounce upon it now*. But my present *inclination* is to require Tecnica to *show cause* why it should not be required, as a condition for adjournment of these proceedings, to post security in the United States for the full amount of Spier's award together with interest and allowable costs

242. The United States' attempt to justify the Mississippi courts' refusal to reduce the supersedeas bond requirement (U.S. Counter-Mem. at 155-57), which rests on the premise that Loewen triply undermined its "credibility" with the Mississippi Supreme Court, relies on unsupported innuendo. The United States' submission ignores the compelling factual showings that Loewen made to those courts; misapprehends the rulings of the trial court and the Mississippi Supreme Court; misunderstands the requirements of Mississippi Appellate Rule 8; and finds no support in the record. As former Chief Judge Charles Clark and former Chief Justice Armis Hawkins have concluded, the Mississippi trial court and Supreme Court misapplied that Rule, and in doing so denied justice to the Claimants, by refusing to set a reasonable supersedeas bond amount.

243. Some discussion of the facts is necessary here to illuminate precisely how these courts denied justice to Loewen with respect to the supersedeas bond. As Claimants showed in their Memorials (TLGI Mem. at 49-52; R. Loewen Mem. at 61-62), Loewen made truly extraordinary showings in support of its request that the Mississippi courts impose a reasonable bond requirement under Mississippi Appellate Rule 8(b). Loewen submitted extensive affidavits from its Chief Financial Officer (App. at A976), its bankers (App. at A1000), one of its divisional Presidents (App. at A905), and the Vice President of the brokerage firm that Loewen retained to search, far and wide, for the financial backing that would allow the company to post a $625 million supersedeas bond. (App. at A989.) Each of these affidavits demonstrated that,

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and fees, should Spier ultimately prevail in the proceedings here." *Spier*, 663 F. Supp. at 876 (emphasis added). Additionally, since an international arbitral award almost certainly would not include punitive damages, *see* Gotanda, *supra*, at 194 ("punitive damages are rarely awarded by international tribunals"; only "[a] few maritime tribunals" have done so "in limited circumstances"), it is extraordinarily unlikely that any bond that might have been required in *Spier* would have been so excessive as to prevent an appeal.

despite Loewen's extensive efforts, the largest appeal bond that Loewen would be able to obtain was one in the amount of $125 million, and even then, that a bond in that lesser amount would be "very difficult." (App. at A891.) In addition to a bond of $125 million, Loewen offered factual assurances, and several alternative proposals, to ensure that O'Keefe's security for his judgment would be undiminished, if for whatever reason it were ultimately sustained on appeal. O'Keefe submitted no contrary affidavits to the trial court.[16]

244. The arguments before the trial court focused mostly on the legal requirements of Mississippi Appellate Rule 8. Rule 8(a) as it then existed called for automatic supersedeas of a money judgment whenever a bond in 125 percent of the amount of a money judgment is posted with the *clerk* of the court; no judicial action was therefore required for supersedeas under Rule 8(a).[17] Since it was undisputed that Loewen could not post a $625 million bond and thus gain automatic supersedeas under Rule 8(a), the arguments properly focused on what discretion, if

[16] O'Keefe's lawyers briefly urged that these affidavits "underline[d] the necessity of protection for these Plaintiffs. If the thing [apparently referring to the excessive judgment] is as hazardous as they say it is, we need to move now." (App. at A1060.) Even the United States does not endorse this argument. Indeed, in arguing Loewen "caused *tens* of millions of dollars in damages to the *O'Keefe* plaintiffs" (U.S. Counter-Mem. at 160 (emphasis added)), the United States all but concedes that a $625 million bond was unnecessary to protect O'Keefe during the pendency of Loewen's appeal.

[17] As it then existed, Rule 8(a) provided:

> **8(a) Stay by Clerk's Approval of Supersedeas Bond**.
>
> The appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125 percent of the amount of the judgment appealed from, conditioned that the appellant will satisfy the judgment complained of and also such final judgment as may be made in the case. The clerk of the trial court shall approve any such bond and the approval of the supersedeas bond by the clerk shall constitute a stay of the judgment.

any, Rule 8(b) afforded to the Mississippi courts. That rule provided then (as it does now) in pertinent part (with emphasis added):

> **(b)** . . . The court shall require the giving of security by the appellant in such form and in such sum as the court deems proper, and *for good cause shown* may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a). The ruling of the trial court on the motion shall be reviewable by the Supreme Court or the Court of Appeals.

245. Loewen urged the trial court that it had demonstrated "good cause" for a reduction of the bond under Rule 8(b). As the United States' own authorities provide, a court has good cause to impose a bond in less than the full amount of the judgment where, *inter alia,* "the posting of a full bond would impose an undue financial burden," and the appellant proposes "some other arrangement for substitute security through an appropriate restraint on the judgment debtor's [appellant's] financial dealings, which would furnish equal protection to the judgment creditor." *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.,* 600 F.2d 1189, 1191 (5th Cir. 1979) (per Clark, J.). But those are not the only circumstances in which a court may reduce or eliminate a supersedeas bond as a prerequisite to a stay of the judgment pending appeal; rather, a trial court can and should "exercis[e] a sound discretion to authorize unsecured stays in cases it considers appropriate." *Federal Prescription Ser., Inc. v. American Pharm. Ass'n,* 636 F.2d 755, 758 (D.C. Cir. 1980) (per MacKinnon, J.; joined by Robinson and Mikva, JJ.) (no supersedeas bond required at all) (citing *Poplar Grove*, 600 F.2d at 1191).

246. In order to show "good cause" for a stay on a lesser bond, Loewen demonstrated a willingness to provide alternative assurances that would adequately protect O'Keefe. Loewen offered to provide O'Keefe with (i) the maximum supersedeas bond that it could obtain, $125 million; (ii) covenants, of the same kind Loewen provided to its creditors and bank lenders, ensuring that the company would maintain its financial solvency and net worth (which O'Keefe

had alleged to be in excess of $3 billion in a contemporaneous post-verdict court filing, *see* App. at A826); and (iii) a monitoring and reporting procedure that would allow the trial court, and O'Keefe, to assure Loewen's compliance with these covenants and representations. (App. at A839-40.) This was exactly the sort of "objectiv[e] demonstrat[ion] [of] a present financial ability to facilely respond to a money judgment" and "financially secure plan for maintaining that same degree of solvency during the period of an appeal" that, under the United States' own authority, allows a court to reduce or eliminate a supersedeas bond as a condition for stay pending appeal. *Poplar Grove,* 600 F.2d at 1191. Indeed, all of the affidavit proof before the trial court demonstrated that O'Keefe's interest in his $500 million judgment would have been *more* secure under Loewen's proposed alternative plan. App. at A905, A976, A989, A1000; *see also* Clark Stmt. at 8-10.) Judge Graves, however, summarily rejected Loewen's proposed alternative plan, concluding that he was "not . . . inclined to consider" *any* covenants or *any* reporting and monitoring procedure, because Loewen "would be submitting stuff to me and I wouldn't know what I was looking at." (App. at A1067-68.)

247. O'Keefe submitted no contrary proof or alternative plan to the trial court. His lawyers made clear that he would not be satisfied with anything less than an order requiring Loewen to post a full $625 million bond — even though Loewen had presented undisputed proof that it could not do so. *Compare Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 786 F.2d 794, 799 (7th Cir. 1986) ("Maybe, then, this is all a big game of 'chicken' in which Olympia's object is to force a settlement before the appeal is heard. . . . "). In furtherance of this goal, and notwithstanding the clear "good cause" language of Rule 8(b), and its Official Comment (noting that a court "may, in appropriate cases, approve a supersedeas bond of less than 125 percent of the money judgment"), O'Keefe's lawyers urged Judge Graves that he had

no discretion whatsoever to set a lower supersedeas bond because, in their view, Rule 8(b) simply did not apply to cases involving "money judgments." (App. at A1055; *see also* App. at A1097.)

248. In his statement of reasons for rejecting Loewen's motion to set a lower and more reasonable supersedeas bond, Judge Graves did not take issue with Loewen's affidavit proof. And he even appeared to recognize his discretion to set a lower bond under Rule 8(b), noting that "it is appropriate to reduce an amount for good cause shown." (App. at A1074.) But the court did not in fact exercise discretion, for — as Chief Judge Clark explains in his Statement — the trial judge applied a circular logic that led him to conclude that the "good cause" showing allowed by discretionary Rule 8(b) meant that the bond had to be in the full 125 percent of the judgment called for by mandatory *Rule 8(a)*. (*See* Clark Stmt. at 10.) Judge Graves said: "[T]he law seems to clearly require that the bond has to be one in an amount to, quote, effect absolute security to the party affected by the appeal, the rule has indicated that amount is 125 percent of the judgment."[18] (App. at A1078.) By this illogical exercise the trial court was able to craft a rule of law that allowed it to effectively ignore the discretion afforded it under Rule 8(b), and in turn ignore Loewen's showings of judgment inability to meet a higher bond amount, as well as its alternative plan for securing O'Keefe's. Even so, as Chief Judge Clark explains in his Statement, the trial court abused its discretion by summarily rejecting Loewen's proposed alternative and thus refusing to consider whether Loewen's proposed alternative would have provided more "absolute" security than a $625 million bond. (Clark Stmt. at 13-14.)

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[18] The trial court accomplished this bizarre end with reference to *Estate of Taylor v. Thompson,* 539 So. 2d 1029 (Miss. 1989), which was the source of his "effect absolute security" requirement. But that case merely stated the unexceptional "general" proposition, reflected in Rule 8(a), that "*the general purpose* of the supersedeas bond . . . is to effect absolute security to the party affected by the appeal." *Id.* at 1031 (emphasis added).

249. Loewen appealed the trial court's bond ruling to the Mississippi Supreme Court, which initially allowed a stay conditioned on Loewen's posting of a $125 million supersedeas bond and its adherence to the covenants and other guarantees it had previously proposed to the trial judge. (App. at A1082-84.) While that appeal was pending, the Supreme Court received voluminous briefing from Loewen and from O'Keefe. (App. at A1085-1144, A2317-2986, A2988-3035.) The only response to Loewen's affidavits that O'Keefe ever presented to the Mississippi Supreme Court was an affidavit from a Jimmie E. Burkes (App. at A2740), attached to an early (December 1, 1995) filing in that court. (*See* App. at A2732.) Burkes, an accountant, opined that O'Keefe's interest in his judgment would be best served if Loewen were *not* allowed to continue operations. Loewen responded (App. at A2948) and submitted affidavits from another accountant (App. at A2841), and from Loewen's Chief Financial Officer (App. at A2800), which explained that Burkes' affidavit was based on "serious misunderstandings" of the company and its finances.

250. Despite several interim rulings favorable to Loewen, the Mississippi Supreme Court ultimately issued a perfunctory final ruling stating that it "f[ound] no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond, and that the trial court properly followed M.R.A.P. 8." (App. at A1176.) By ruling that "the trial court properly followed M.R.A.P. 8," the Mississippi Supreme Court thus endorsed the trial judge's interpretation of that Rule as effectively eliminating court discretion under Rule 8(b), and requiring instead "quote, absolute security" in the full amount prescribed by Rule 8(a). That was a manifestly unjust decision, for it had the effect of erasing the clear protections of Rule 8(b).[19]

[19] The Mississippi Supreme Court has confirmed this clear meaning of Rule 8(b) in a public statement issued in connection with a recent *sua sponte* amendment to Rule 8: "Trial courts also have the power to set the bond pending appeal at something less than 125 percent of

That Court's perplexing reference to "find[ing] no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond" (App. at A1176) certainly muddled the Supreme Court's order, since it is otherwise plain that the trial court viewed its hands as tied by his definition of "good cause" under Rule 8(b) — to effect "quote, absolute security" in the amount of "125 percent of the judgment" mandated by Rule 8(a).

251. Because the Mississippi Supreme Court's ultimate bond decision cannot be rationally explained on this record, the United States resorts to speculating about why that court must have denied the reduced bond that Loewen sought. It asserts that three supposed flaws in Loewen's submissions must have damaged Loewen's "credibility" before the Mississippi Supreme Court. None of these speculative submissions is credible.

252. The United States' first speculation (U.S. Counter-Mem. at 155-56), that Loewen failed to argue that bankruptcy was a viable alternative to a supersedeas bond, is based on both a factual error and a legal one. As we have previously shown (TLGI Final Juris. Subm. at 54 n.30), Loewen in fact did respond to these assertions by O'Keefe. But more fundamentally, the availability of a bond reduction was not, either as a matter of Mississippi law or federal constitutional law, preconditioned on a showing that bankruptcy "was not a reasonable means" of pursuing an appeal. (*See* U.S. Counter-Mem. at 155.) As to Mississippi law, both former Chief Justice Hawkins and former Chief Judge Clark explain that such a showing was not required by the law (Hawkins Stmt. at 26-27; Clark Stmt. at 14 n.8), and federal and other states' cases interpreting analogous supersedeas bond requirements have consistently declined to

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the overall damage award. Language that allows that discretion remains unchanged. The rule says the trial court 'shall require the giving of security by the appellant in such form and in such sum as the court deems proper, and for good cause shown may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a).'" (App. at A3483.)

impose a full supersedeas bond where doing so would remit the judgment debtor to bankruptcy. *See*, *e.g.*, *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501, 520-21 (E.D. Pa. 1973) (granting stay of execution without requiring defendants to post full bond where defendants, based on uncontradicted financial statements filed, were unable to obtain a bond in the amount of the $1.2 million judgment plus counsel fees and costs, and "[e]xecution of the judgment would place [defendants] in insolvency" and "terminate [the company] as a going concern and eliminate it as a competitor").[20] And as to federal constitutional law, O'Keefe's argument — which the United States parrots — was grounded entirely on a passage from a *concurring* opinion in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 22-23 (1987), authored by two Justices who were — as of November 1995 — retired from the U.S. Supreme Court. That

[20] *See also, e.g., Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986) (holding that district court properly granted stay without requiring defendant to post full bond in the amount of the $2.1 million judgment where defendant submitted an uncontradicted personal affidavit stating "that he did not have sufficient assets to post a supersedeas bond for [$1.6 million] above his malpractice insurance of $500,000" and that "execution of the judgment would cause him irreparable harm and place him in insolvency"); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d at 799 ("[W]e are reluctant to conclude that a district judge commits an abuse of discretion by refusing to allow a plaintiff to execute a judgment in circumstances where the execution may cause a billion-dollar bankruptcy, merely because the alternate security to a supersedeas bond that the defendant apparently cannot post provides a slightly inferior protection of the plaintiff's interest."); *id.* ("we cannot criticize the district judge for his unwillingness to risk throwing Western Union Telegraph into bankruptcy merely to increase (maybe) the probability that Olympia can collect all of its judgment if the judgment is affirmed"); *Hurley v. Atlantic City Police Dep't*, 944 F. Supp. 371, 378 (D.N.J. 1996) (concluding that "the strong likelihood that enforcement of this judgment would push [defendant] into bankruptcy is a factor which informs the court's discretion" in determining whether to waive or modify the bond requirement); *Teachers Ins. & Annuity Ass'n v. Ormesa Geothermal*, 1991 WL 254573, at * 3-4 (S.D.N.Y. 1991) (granting stay, even though defendants unlikely to prevail on appeal, where, *inter alia*, "requiring a supersedeas bond in the full amount of the judgment ($5,473,657) would have a severe impact on Defendants, perhaps leading to the acceleration of loans that could force Defendant Ormesa to cease operations and liquidate its assets"); *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996) (trial court did not abuse its discretion in granting defendant a stay based on alternate security to the full bond where defendant could not post the bond and "if alternate security was not allowed, [defendant] would

passage, which did not command a majority of the U.S. Supreme Court, thus did not have the force of law. *See also infra* pp. 203-04.

253. The United States' second speculation — the "suspicious coincidence" that Loewen's financial officers, bankers, and brokers all swore that they could not obtain a bond in excess of 125 percent of the actual damages award (U.S. Counter-Mem. at 156) — elevates a snide one-word aside contained in one of O'Keefe's submissions to the Mississippi Supreme Court (App. at A1109) to the level of legal argument. That sort of speculation requires little additional comment — except to note that the United States' argument in effect accuses three sworn affiants of committing perjury before the courts of Mississippi. Even O'Keefe's lawyers did not make that accusation, and nothing in the *O'Keefe* record even remotely suggests that the courts adopted it *sua sponte.*

254. Third and finally, the United States speculates (U.S. Counter-Mem. at 156) that the Mississippi Supreme Court was swayed by O'Keefe's insinuation that Loewen had told investors "that it could, in fact, post a full bond if necessary." That, too, parrots an argument made by O'Keefe to the Mississippi Supreme Court, which — as we show elsewhere in this Reply, *see infra* pp. 185-87, was itself based on an O'Keefe transcription of a public Loewen conference call with investors that showed a remarkable tendency to mistranscribe critical words. For example, where O'Keefe reported that Ray Loewen had said "we will be able to *pay for* this thing and win in the final, in the final judgment" (U.S. App. at 831 (emphasis added)), the official transcript reflected that Mr. Loewen had said "we will be able to *fight* this thing and win in the final judgement." (App. at A1383 (emphasis added).) Likewise, where O'Keefe reported

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be forced to file bankruptcy," and "the real parties would be left with a bankrupt judgment debtor and no posted security for any part of the judgment").

that Loewen Vice President Peter Hyndman had said that "we have the contingency *funds* for every possible contingency" (U.S. App. at 836 (emphasis added)), the official transcript reported that it was Loewen's Chief Financial Officer, Paul Wagler, who had said that "we have the contingency *plan* for every possible contingency," (App. at A1387 (emphasis added).) After Loewen showed the Mississippi Supreme Court these errors in translation (App. at A2950-52), O'Keefe stood silent on the point. In any event, the Mississippi Supreme Court reviewed Judge Graves' ruling only under an "abuse of discretion" standard, which necessarily limited its consideration to the record before Judge Graves. That trial-court record, of course, did not include these speculations. (*See* Clark Stmt. at 11 n.7; Hawkins Stmt. at 27.)

255. To the extent the Mississippi Supreme Court's motives are at issue, the record suggests a different reason for its ruling. The very last filing made in the Mississippi Supreme Court — made only two days before that court's final ruling denying a reduced supersedeas bond — was an *amicus curiae* brief authored by the Mississippi Trial Lawyers Association (MTLA), the leading organization representing Mississippi's plaintiffs' bar. (App. at A1146-74.) The MTLA "is an affiliate of the nationwide organization known as the Association of Trial Lawyers of America" (App. at A1158), and, as Chief Justice Neely explained in his Affidavit, "the Association of Trial Lawyers of America [is] the organization comprised primarily of plaintiffs' lawyers that advances the interests of those lawyers and their clients on all fronts." (Neely Aff. at 2.) The MTLA brief urged that the Mississippi Supreme Court had no power whatsoever to reduce the appellate bond from the $625 million amount imposed by Rule 8(a), and that *any* "reduction of supersedeas will pervert the appellate process of this State." (App. at A1168.)[21]

[21] The Mississippi Trial Lawyers Association's request to file its brief was technically denied in an order (App. at A3036-37) issued the same day that Loewen's request to reduce the appellate bond was finally denied by that court. (App. at A1176.) Justices Prather and Mills —

The fact that the Mississippi Supreme Court reinstated the full $625 million bond imposed by the trial court almost immediately after the plaintiffs' bar weighed in with their position gives much credence to the views expressed in Chief Justice Neely's Affidavit regarding the influence of campaign contributions from the plaintiffs' bar over elected state judiciaries. (Neely Aff. at 3-6.) Significantly, former Mississippi Chief Justice Hawkins — who retired from the Mississippi Supreme Court just days before these events unfolded — opines that "Chief Justice Neely's analysis of [the influences on the judiciaries of] state courts in the United States, especially Mississippi, is right on the mark." (Hawkins Stmt. at 2.)

256. Finally, a recent development in Mississippi sheds much light on just how unjust the Mississippi courts' bond rulings were to Loewen. On May 9, 2001, the Mississippi Supreme Court, *sua sponte,* amended its own Rule 8 "for the protection of small businesses in Mississippi." (App. at A3483.) This rule change now limits the bond required under Rule 8(a) for automatic supersedeas pending appeal, in cases involving punitive damages, to "the lower of" 125 percent of the punitive award, or 10 percent of the company's net worth under Generally Accepted Accounting Principles, or (absent unusual circumstances) $100 million. (App. at A3478.) The leading Mississippi newspaper, the Jackson *Clarion-Ledger,* featured this development, pointedly noting: "The $100 million cap would benefit cases in the future like The Loewen Group, which was forced to settle with Gulf Coast funeral home owner Jerry O'Keefe because it said it could not afford to post a $625 million appeal bond." (App. at A3481.)[22]

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the same two justices who dissented from the Supreme Court's refusal to reduce the bond — dissented from that order as well.

[22] The same article also noted that the plaintiffs' bar disagreed with this development: "Shane Langston, incoming president of the Mississippi Trial Lawyers Association, said, if a large corporation with billions in assets is hit with a judgment to the tune of a billion dollars, the corporation ought to post a bond to ensure it can pay the judgment." (App. at 3482.)

Indeed, that was one of the reasons behind the recent revision. In the words of Mississippi's present Chief Justice: "We did not want a case to have to be settled simply because of the bond." (App. at A3483.) As former Chief Justice Hawkins and Chief Judge Clark explain in their Statements, this recent development only underscores the denial of justice that Loewen suffered. (Hawkins Stmt. at 25; Clark Stmt. at 6 n.3.) Indeed, as Chief Justice Hawkins concludes, "Had there been no specific provision authorizing reduction, . . . I believe the court had the lawful authority and duty in the interests of justice to change the Rule so as to make some accommodation." (Clark Stmt. at 25; Hawkins Stmt. at 6 n.3.)

257. Unfortunately, the change came six years too late to deliver justice to Loewen. As a recent commentator notes:

> As illustrated by the Loewe[n] case, as a practical matter, the interaction between appellate bonding requirements and excessive punitive damage awards effectively may deny the right to appeal to a defendant faced with an excessive punitive damage judgment entered by a trial court. This scenario empowers a jury and a judge, no more than 13 people, to destroy a defendant that effectively is unable to appeal from the arbitrary and capricious actions of 13 people. Statistics concerning the frequency of excessive punitive damage verdicts provide no meaningful answer to defendants like Loewe[n] that are irreparably harmed by excessive punitive damage verdicts.

Lori S. Nugent, *Punitive Damages: A State by State Guide to Law and Practice* § 1.4 (2001 Supp.).

258. In sum, the $625 million supersedeas bond requirement imposed upon Loewen by the Mississippi judiciary was just the type of excessive and prohibitive security requirement that constitutes a procedural denial of justice under international law. As Sir Ian Sinclair has stated: "[s]urely if a situation arises, as in the Loewen case, where in practice the only means available to the foreign national for challenging the judgment of the trial court is to go bankrupt, there has been, even in Professor Greenwood's terms, a failure of the system." (Sinclair Op. at 33.)

Particularly in combination with the manifestly unjust and excessive judgment – which the bond requirement effectively prevented Loewen from appealing – the Mississippi bonding requirement was a "'clear and notorious injustice, visible, to put it thus, at a mere glance'" (U.S. Counter-Mem. at 159 (quoting *Putnam v. Mexico*, *Op. of Comm'n* 225 U.S.-Mex. Cl. Comm'n of Sept. 8, 1923)) — a denial of justice even under the United States' own unduly narrow standard.[23]

3. The Existence Of A "Highly Developed Procedural System" Does Not Immunize The United States From Liability For Denials Of Justice

259. The United States argues that no denial of justice occurred in Mississippi because "[t]he rules of procedure that governed the trial, as in all U.S. jurisdictions, were highly developed." (U.S. Counter-Mem. at 132.) But the fact that Mississippi had procedures available to it to prevent or correct injustices does not in any way excuse it from failing to use those procedures to protect Loewen; if anything, the presence of those procedures makes the denials of justice even less excusable. As Freeman has stated:

> [A]lthough the machinery of justice is so impartially and efficiently administered as to conform to the *procedural* standard of civilized nations, the substance of the judicial action taken during these proceedings may deprive the alien of benefits that are guaranteed to him by various rules which have developed concerning treatment to be granted to foreigners.

Freeman, *International Responsibility of States for Denial of Justice* at 51 (emphasis in original); *see id.* at 80 ("If the alien is submitted to local courts in the administration of justice, it is not only on the condition that these tribunals be so organized and operated as to provide a competent, impartial, and efficient *procedural* protection for the alien's substantive rights; it is

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[23] "[T]he failure of the trial court and the Mississippi Supreme Court to waive or reduce the massive bond requirement required to preclude execution on the $500 million dollar jury award had the *effect* of denying to the Claimants a possibility of remedy through access to the appellate process, even if that might not have been the deliberate intent of the courts concerned." (Sinclair Op. at 69 (emphasis in original; citation omitted).)

also on the equally important condition that those courts, in adjudicating cases, shall respect the rules laid down by the general law of nations on the status and treatment of aliens." (emphasis in original); *id.* at 68 ("And regardless of the *procedural* propriety of judicial activity, one must always look behind it to determine whether there has been compliance with the substantive international rules relative to the treatment of aliens.") (emphasis in original).

260. The mere existence of a highly developed procedural system excuses neither Mississippi's failure to use those procedures to protect Loewen, nor the substantive denials of justice that occurred there as a result of the manifestly unjust verdict and judgment.[24]

4. Claimants Have Proven a Denial of Justice Even Under The United States' Narrow And Incorrect Formulations Of The Standard

261. As we have shown above, the United States' "extreme" standard for denial of justice is nothing more than a collection of the most demanding cases taken from an era when the sole mechanism for raising an international claim — diplomatic espousal — was itself an "extreme" process. *See* pp. 96-98, *supra*. Moreover, Claimants have already shown that, although a showing of bad faith by the Mississippi courts would surely be *sufficient* to demonstrate that justice was denied (*see, e.g.,* 1929 *Draft Harvard Convention* at 175; *Rihani Claim,* Decision 27-C, *American-Mexican Claims Rpt.*, 254, 258 (1948)), such a showing is not a *necessary* element of a denial-of-justice claim. TLGI Mem. at 76; *see also, e.g.*, *Chattin, supra*, 4 R.I.A.A. at 295 (damages awarded where "intentional severity of the punishment [was] proven,

[24] Equally beside the point is the United States' observation that "supersedeas bonds are a common feature of legal systems worldwide." (U.S. Counter-Mem. at 144.) As explained above, Claimants do not contend that an appeal bond requirement is *generally* a denial of justice, only that the *application* of an appeal bond requirement to the unusual facts of the *O'Keefe* case was such a denial.

without its being shown that the explanation is to be found in unfairmindedness of the Judge").[25] Adede, *supra,* at 91 n.83 ("a procedural or substantive decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant, even if there is no ill will or corruption"); Freeman, *supra,* at 324 ("[I]t would be too much to require of a wronged claimant that he present, in addition to a judicial record which abounds in obvious and inexcusable errors, extraneous proof that the judge was influenced by ulterior motives."); *Solomon*, *supra*, at 373 (denial of justice where the "claimant's conviction was *unconsciously* influenced by strong popular feeling" (emphasis added)).

262. But even were the United States correct to urge that Claimants cannot "assert a denial of justice claim on the basis of an excessive verdict in the absence of bad faith on the part of the courts or the jury" (U.S. Counter-Mem. at 133), Claimants would more than adequately meet that standard. Indeed, the record here so abounds in evidence of bad faith, particularly on the part of the Mississippi jury, that it is difficult to imagine what case could possibly reflect bad faith if the *O'Keefe* case does not.

263. The Juror Report demonstrates that the *O'Keefe* jurors ignored the evidence, ignored the court's instructions, and awarded actual damages that even they themselves could not justify. Despite the centrality of the Wright & Ferguson contract, one juror said "I don't care what the contract says" and "It doesn't matter whether the contract stated in writing as to whether it was an "exclusive" contract or not." (App. at A3065, A3094.) Other jurors recognized that "[t]he monopoly issue didn't matter" (App. at A3079), yet awarded O'Keefe

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[25] Indeed, the *Chattin* tribunal's statement of the legal standard makes clear that bad faith, while *sufficient* to prove state responsibility, is not required to support a denial-of-justice claim. *See id*. at 288 (noting that state responsibility occurs for denial of justice where there is "outrage, bad faith, willful neglect of duty, *or* manifestly insufficient governmental action" (emphasis added)).

$18.2 million for monopoly damages. (App. at A656-67.) The jury as a whole "appeared to give no reasoned consideration" to any of the tort claims before it (App. at A3043), including the so-called "fraud" count for which the jury also meted out $18.2 million in damages. (App. at A657.)

264. The Juror Report also reflects that the jury's approach to damages was not to award O'Keefe the damages he had proved, but to award what "Willie Gary said he needed." (*See* App. at A3059; App. at A3088.) Even the supposedly judicious and formerly Canadian foreman of the jury, Millen — who voted to award O'Keefe $100 million in compensatory damages and $400 million in punitive damages because "the lawyers kept saying $100 million and they [the jury] had to go with what was given them" — said "he [felt] bad about the amount of money because "[m]aybe O'Keefe lost $1 million dollars. $6 to $8 million dollars I'd say was right, but even if you went up to $10 million dollars and doubled that figure for punitive damage, $30 million tops would be a figure." (App. at A3077, 3079.) The jury also returned a punitive verdict without even being asked to do so, in plain violation of Mississippi law and the initial jury instructions. (App. at A3069, A3059.) Once they were instructed to decide punitive damages, the jurors freely admitted that they were seeking not to punish Loewen, but to *destroy* it. (App. at A3060 ("Akida Emir said she wanted to destroy."); App. at A3088 (the jurors "appeared almost 'drunk with power'").)

265. The majority of the jurors also made up their minds to vote in favor of O'Keefe even before Loewen had presented a single witness. The foreman stated that by the time "the defense took over the case" the jury "had already decided that Loewen was a crook" (App. at A3078), and other jurors echoed that approach. (*See, e.g.,* App. at A3068 ("it was over by the third day"); App. at A3060 ("The case was decided the second or third week"); App. at A3077

("The trial was over in the first few days.").) In the words of one juror, the jury "really didn't want to know what was happening and didn't care." (App. at A3060.)

266. All of this is more than enough to show bad faith. As Sir Robert Jennings has asserted:

> [T]he claimants in this case have no need to wilt at the thought of any burden of proof. This is, after all, an extreme case. Even if it were necessary to show 'outrageous treatment' breaching even the traditional minimum standard, the Loewen case could serve as a text book example of a case that clearly breaches even that standard. The present availability of the jury interviews has made the evidence of this even stronger. The trial transcript and the jury interviews speak for themselves. That verdict of the jury was as outrageous as the methods by which that verdict was procured.

(Third Jennings Op. at 27.)

267. Finally, Claimants note that the United States' defensive strategy has been to dissect away each iota of this trial and argue that each action or inaction of the Mississippi judiciary, by itself, could not possibly amount to a denial of justice. (*See, e.g.,* U.S. Counter-Mem. at 124-70.) This strategy must fail because the numerous errors and excesses of the *O'Keefe* litigation were each so manifestly unjust that, even standing alone, they led to a denial of justice. But this case is fundamentally about the entirety of what was done to Loewen: In the words of Sir Robert Jennings, "the kind of denial of justice which Loewen suffered is, at minimum, that of 'a manifestly unjust judgment;' coupled with 'gross deficiency in the administration of judicial or remedial process;' and unwarranted 'obstruction of access' to the appellate court in Mississippi." (First Jennings Op. at 12.) This Tribunal can, and should, recognize and rectify these multiple denials of justice.

5. "Finality" Is Not a Substantive Element of Denial of Justice

268. The United States, largely through its expert, Professor Greenwood, argues that "finality" is a "substantive" element of denial of justice, and that a denial of justice can thus not

occur until there has been a final decision by the "court of last resort." (U.S. Counter-Mem. at 124-30; Greenwood Op. at 8-18.) In so arguing, however, Professor Greenwood relies on the now-familiar assertion that "finality" and the "local remedies rule" are two separate "concepts," and that "the difference between them is one of real practical importance," in cases – such as this – where the local remedies rule is waived. (Greenwood Op. at 13.) But the Tribunal's previous ruling that "the rule of judicial finality is no different from the local remedies rule" (*Loewen*, ¶ 71), plainly forecloses this "substantive finality" argument.

269. Even assuming that the question were still open, Loewen has already shown, in its earlier submissions, that the "concept" of "finality" as a substantive element of any denial of justice claim does not exist. *See* TLGI Juris. Subm. at 20-25; TLGI Final Juris. Subm. at 18-20; R. Loewen Final Juris. Subm. at 15-19; *see also* 1929 *Harvard Draft Convention* at 167 (noting that the "wrongful official acts" of judges "may render the state responsible if an actual injury is not remedied by higher courts *or* if there is a denial of justice" (emphasis added).[26] Sir Robert Jennings confirms this point:

> As to Professor Greenwood's suggestion that denial of justice is in a special position as requiring the exhaustion of the local legal 'system' to finality, this being in his view a substantive requirement which is itself an essential ingredient of the denial of justice, this, with great respect, seems to be almost exactly the reverse of what happened in the legal history of denial of justice. Thus, Trindade *The Application of the Rule of Exhaustion of Local*

[26] Regrettably, the United States reverts to eliding its quoted authorities to manufacture support for its "finality" argument. It quotes the *Pirocaco* case (U.S. Counter-Mem. at 129) as follows: "'As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort.'" *Christo G. Pirocaco v. Republic of Turkey* (1923), *reprinted in* Fred K. Nielsen, *American-Turkish Claims Settlement under the Agreement of December 24, 1923* 587, 599 (1937). However, the *very next sentence* of this case makes clear – as Loewen has already pointed out in its earlier pleadings (TLGI Final Juris. Subm. at 19, 20 n.15) – that "finality" is the same as exhaustion of local remedies: "A litigant must *exhaust* his remedies before it can be said that he has had that final judicial determination of his case which the law affords." *Pirocaco*, *supra*, at 599.

> *Remedies in International Law* (1983, at p. 283) refers to 'The traditional conception of the local remedies rule, found in such writers as Borchard and Eagleton, making international proceedings contingent upon exhaustion of local remedies *until the occurrence of a denial of justice*' (emphasis supplied).

(Third Jennings Op. at 22-23.)[27] Sir Robert further notes that Professor Greenwood's argument also ignores the express terms of Article 1105:

> [I]t seems that Professor Greenwood is throughout assuming that a decision on the merits would simply involve a question of denial of justice according to customary international law. But the gravamen of the present case cannot be denial of justice according to customary international law. The Tribunal's jurisdiction is in respect of alleged breaches of the terms of the NAFTA Agreement by a Party; and specifically in the present case over whether the Claimants enjoyed 'treatment in accordance with international law, including fair and equitable treatment and full protection and security.' Professor Greenwood has still to explain how he reads a substantive finality doctrine into those words.

(Third Jennings Op. at 26-27.)

270. Sir Ian similarly explains Professor Greenwood's error:

> There is . . . a certain confusion in seeking to import into the definition of a "denial of justice" within the framework of Chapter Eleven of the NAFTA elements of the local remedies rule which, as Sir Robert Jennings points out, is simply not applicable to claims brought by an investor of a State party to NAFTA against a foreign State also party to NAFTA alleging that the foreign State is in breach of its Chapter Eleven obligations and has thereby caused injury to the investor.

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[27] Indeed, Sir Robert gently suggests that Prof. Greenwood and the United States are simply making it up. *See* Third Jennings Op. at 21 ("This idea [of the United States] of the erection of judicial finality into a substantive requirement [of denial of justice] is an elegant pleading device; but although almost every possible variant of the definition of denial of justice can be found somewhere, it would have been helpful if Professor Greenwood had cited his authority for defining denial of justice generally and precisely in these terms. Also, with great respect, this redefinition of denial of justice creates its own difficulties, quite apart from its evident, purpose-built novelty."); *id.* at 23 (noting that despite the fact that Amerasinghe "identifies and lists no less than nine different meanings of denial of justice to be found in the sources and the commentaries," "[n]ot one of them . . . defines it in Professor Greenwood's terms").

(Sinclair Op. at 33-34); *see also Andrews Case*, 3 *Moore's Int'l Arbitration*, 3228 n.1 (awarding damages based on fraudulent judicial proceedings even though "there was no carrying of the case to a higher court than that of the first instance").

271. But even if "finality" were a substantive requirement of denial of justice, and even if denial of justice were the sole ground of relief urged here by Claimants, Professor Greenwood's argument still fails by its terms. Greenwood's conclusion is that "a judgment of a lower court which is *open to effective challenge on appeal* is [not] capable of amounting to a denial of justice." (Greenwood Op. at 18 (emphasis added).) The United States similarly argues that "[t]o ensure the coherent development of a domestic legal system, higher courts *must be permitted* to exercise the supervisory function with which they are entrusted." (U.S. Counter-Mem. at 129 (emphasis added).) Loewen affirmatively requested the Mississippi Supreme Court to review its case. It was that court itself, when it issued its arbitrary bonding decision, that denied its own ability to "exercise [its] supervisory function."

C. The Mississippi Litigation Violated Claimants' Right To "Fair and Equitable Treatment" Under Article 1105

272. Claimants showed (TLGI Mem. at 97-99; R. Loewen Mem. at 52-65) that the *O'Keefe* litigation, regardless of whether it constituted a "denial of justice," also violated the "fair and equitable treatment" requirement of Article 1105, which goes "far beyond" the minimum protections accorded to foreign investments under customary international law. F. Mann, *British Treaties for the Promotion and Protection of Investments,* 52 Brit. Y.B. Int'l L. 241, 244 (1981). In response, the United States urges that the requirement to provide "fair and equitable treatment" affords no protections above and beyond the "minimum" standard of "customary" international law, which, among other things, prohibits denials of justice. (U.S. Counter-Mem. at 170-71.) Notably, however, the United States makes no effort to contend that

the "treatment" of Claimants by Mississippi was either "fair" or "equitable." Thus, its entire argument on "fair and equitable treatment" rests on its attempted equation of that standard to the "customary" international-law prohibition against denials of justice.

273. The United States' interpretation of "fair and equitable treatment" is contrary to the plain text of NAFTA, to the decisions rendered by several NAFTA tribunals, and to the views expressed by several leading commentators. For all of these reasons, the United States has failed to make a case for its unjustifiably narrow interpretation of "fair and equitable treatment," and thus effectively concedes a violation.

1. The Ordinary Meaning of Article 1105 Forecloses the United States' Interpretation

274. It is by now common ground, as this Tribunal previously ruled, that "NAFTA is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." (*Loewen,* ¶ 51.) The "ordinary meaning" of Article 1105, in context, controls. *See, e.g.,* Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (May 23, 1969), art. 31(1); C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* 265-66 (1998); *S.D. Myers*, ¶ 202; *Pope & Talbot* (Interim award June 26, 2000), ¶ 69.

275. Article 1105(1) provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The United States views "fair and equitable treatment" and "full protection and security" simply as specific applications of the antecedent "international law," which the United States says is limited to the "minimum standard." (U.S. Counter-Mem. at 173.) And the United States further contends, as explained above, that the "minimum standard" encompasses only "extreme" misconduct that amounts to a "'clear and

notorious injustice.'" (U.S. Counter-Mem. at 131 (citation omitted).) Thus, while Article 1105 by its terms requires "fair and equitable treatment" and "full protection and security," the United States would restrict those provisions to "extreme" cases involving "notorious" injustices. *Id.* Not a shred of text supports that proposed restriction. *See, e.g.,* Mann, *supra*, 52 Brit. Y.B. Int'l L. at 244 (under the "fair and equitable treatment" standard a tribunal "will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable").

276. But the United States does not limit itself to reading terms *out* of the text of Article 1105; it also seeks to read terms *in*. Thus, even though Article 1105 requires "treatment in accordance with international law," the United States seeks to limit Article 1105's guarantee to treatment in accordance with "*customary* international law." (*See, e.g.,* U.S. Counter-Mem. at 174-75.) This is another unjustified departure from the ordinary meaning of Article 1105(1), for it is well-settled that the term "international law" encompasses far more than *customary* international law. For example, Article 38 of the Statute of the International Court of Justice defines "international law" as

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations; and
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Other leading sources agree:

> A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or

(c) by derivation from general principles common to the major legal systems of the world.

Restatement (Third) of Foreign Relations Law § 102(1); *accord*, *e.g.*, *id.* Introductory Note, at 18 ("International law is made in two principal ways — by practice of states ('customary law') and by purposeful agreement among states (. . . *i.e.*, law by convention, by agreement)."); *id.* § 101, cmt. d (international law "includes law contained in widely accepted multilateral agreements"); T. Franck, *Fairness in International Law & Institutions* 452 (1995) ("Multilateral conventions may also play a role in creating norms and processes . . . ."). Indeed, despite its current position, the United States itself had previously conceded that "[i]t is well-settled that 'the general principles of law recognized by civilized nations' may be regarded as a source of international law." (U.S. Juris. Resp. at 12 (quoting Stat. of I.C.J. art. 38(1)(c)).) Thus, as Sir Robert Jennings concludes: "The primary objection to [the United States' proposed interpretation] must be the tacit interpolation of the word 'customary' to qualify 'international law,' even though customary does not appear in the Article, nor indeed in any part of Chapter 11." (Third Jennings Op. at 18.)

277. The United States' proposed limitation of "international law" to "*customary* international law" also ignores the historical pedigree of the "fair and equitable treatment" standard, which was developed in the Model United States Bilateral Investment Treaty, and over 1500 BIT antecedents.[28] *See Pope & Talbot II*, ¶¶ 110-111; Daniel M. Price, *Chapter 11 —*

[28] A 1993 study of 335 BITs negotiated by most of the Western industrialized countries reported that 92% (308) of those BITS contained a "fair and equitable treatment" provision. M. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, Table C, at 233, 237, *in* I. Shihata, *Legal Treatment of Foreign Investments "The World Bank Guidelines"* (1993). *See also* K. Vandevelde, *United States Investment Treaties: Policy and Practice* 76-78 (1992) (absolute standards of the BITs require the host state to provide covered investment with fair and equitable treatment); R. Dolzer and M. Stevens, *Bilateral Investment Treaties* 58 (1995) ("Nearly all recent BITs require that investments and investors covered under the treaty receive 'fair and equitable treatment,' in spite of the fact that there is no general agreement on the precise meaning of this phrase.").

Private Party v. Government, *Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 Can. – U.S. L. J. 107, 108 (2000). Indeed, the United States' argument would exclude treaties — which "have become the principal vehicle for making law for the international system" — as a source of "international law." *Restatement (Third) of Foreign Relations*, Introductory Note, at 18. But Canada has acknowledged that bilateral commercial treaties are a "'principal source" of its general obligations to foreign investors, and therefore under NAFTA. *Pope & Talbot II*, ¶ 110 (citing Canada's Phase 2 Counter Mem. ¶ 246). Even the United States has acknowledged that "international law" includes such non-"customary" sources as "the Algiers Accords." *See Methanex Corp. v. United States*, U.S. Reply Mem. re: Juris. at 8; *see also* U.S. Statement of Administrative Action, *reprinted in North American Free Trade Agreements*, Booklet 8, at 133 (J. Holbein & D. Musch, eds., 1994). It is also worth noting that, even here, the United States relies upon a non-customary source, the 1967 OECD Draft Convention, to support its submission. (U.S. Counter-Mem. at 171-72.) As Sir Robert concludes: "In short there is no warrant for the use of international law in Article 1105 as meaning only customary international law." (Third Jennings Op. at 19; *see also* Sinclair Supp. Op. at 9 ("The term 'international law' embraces both conventional (*i.e.* treaty) international law and customary international law.").)

278. Article 1105 plainly requires "fair and equitable treatment," both by its express incorporation of that standard and by its unqualified reference to "international law." To prevail on its Article 1105 claim, Loewen need only show that it was denied "fair and equitable treatment," which it has amply done. In the words of Sir Ian Sinclair, there was a "self-evident failure of the trial judge to ensure that the trial was conducted in such a way as to ensure for the Loewen Group and Ray Loewen 'treatment in accordance with international law, including fair and equitable treatment and full protection and security.'" (Sinclair Op. at 12.)

2. NAFTA Tribunals Have Uniformly Rejected The United States' Argument

279. The United States "disagrees" (U.S. Counter-Mem. at 174) with two NAFTA decisions inconsistent with the crabbed interpretation of Article 1105 that it advances here. According to the United States, *Metalclad* was "wrongly reasoned," and *S.D. Myers* "plainly misconstrued" the fair-and-equitable-treatment requirement. (U.S. Counter-Mem. at 175.)

280. Both *Metalclad* and *S.D. Myers* support Claimants' interpretation of Article 1105. In *Metalclad*, the Tribunal emphasized the broad protection afforded by the "fair and equitable treatment standard," applied the requirement in accordance with its ordinary meaning, and held that "Metalclad was not treated *fairly or equitably under the NAFTA* and succeeds on its claim under Article 1105." *Id.* ¶ 101 (emphasis added). The *Metalclad* tribunal made no reference to "customary international law," and the United States is indeed correct to conclude that *Metalclad* "articulates a standard other than the international minimum standard." (U.S. Counter-Mem. at 175.) The United States is similarly correct to note (*id.*) that the tribunal in *S.D. Myers* endorsed the view of "fair and equitable treatment" urged by Claimants here. (TLGI Mem. at 97.)

281. A third NAFTA decision (*Pope & Talbot II*) has rejected the United States' proposed construction of Article 1105, and the United States has sought to disparage that decision also as "poorly reasoned and unpersuasive." *Methanex Corp.*, Reply Mem. on Juris. at 26. The *Pope & Talbot* tribunal concluded that under Article 1105, "investors . . . are entitled to the international law minimum, *plus the fairness elements*" of "fair and equitable treatment" and "full protection and security." *Pope & Talbot II*, ¶¶ 110, 118 (emphasis added). Without reference to *customary* international law, the tribunal leaned heavily on "the language and evident intention of the BITs" in concluding that NAFTA

> expressly adopt[s] the additive character of the fairness elements. Investors are entitled to those elements, no matter what else their

> entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.

Id. ¶ 111 (footnote omitted).

282. Intervening in *Pope & Talbot*, the United States advanced the same interpretive arguments that it now urges here, and the tribunal specifically rejected those arguments as contrary to the objectives of NAFTA, which include "'increas[ing] substantially investment opportunities.'" *Id.* ¶ 115. Finally, the tribunal noted that, because all other United States BITs *do* guarantee "fair and equitable treatment," the United States' narrow interpretation of Article 1105(1)

> would provide to NAFTA investors a more limited right to object to laws, regulation, and administration than accorded to host country investors and investments as well as those from countries that have concluded BITs with a NAFTA party. This state of affairs would surely run afoul of Articles 1102 and 1103, which give every NAFTA investor and investment the right to national and most favoured nation treatment.

Id., ¶ 117.[29]

283. The United States urges this Tribunal not only to reject the decisions in *Metalclad, S.D. Myers,* and *Pope & Talbot*, but also to defer to litigating positions *unsuccessfully* asserted by the NAFTA Parties in those cases. Specifically, the United States contends that these litigating positions establish a "subsequent practice" that must be considered in construing

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[29] As Sir Ian concludes: "The significance of the Award of 10 April, 2001, covering phase 2 of the *Pope & Talbot* case is that it confirms the view that the 'fair and equitable treatment' standard incorporated in Article 1105 of the NAFTA is an autonomous and independent standard which is not to be identified with what is alleged to be the minimum standard of treatment under customary international law. This award is in full accord with [my] views on this issue . . . ." (Sinclair Supp. Op. at 8.)

Article 1105. (*See* U.S. Counter-Mem. at 175-76 & n.96.) For several reasons, that argument must be rejected.

284. To begin with, although the Vienna Convention does provide for consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (art. 31(3)(b)), the United States provides no support for its remarkable assertion that a mere litigating position can constitute such "subsequent practice." "Subsequent practices" are a relevant interpretive aid only to the extent they provide "objective evidence" of how the parties interpreted the treaty *at the time it was concluded*. *See* György Haraszti, *Some Fundamental Problems of the Law of Treaties* 143 (1973) (emphasis added). Self-serving arguments proffered by a party after a dispute has arisen, and particularly after that dispute has been submitted to an international tribunal, hardly provide this necessary element of objectivity. *See, e.g.,* Lord McNair, *The Law of Treaties* 428 (1986) (subsequent practices are an "extraneous aid for the interpretation of a treaty" when they occur "'at any time *before* the controversy arose'") (emphasis added) (quoting from *The Franciska*, (1885) Spinks' Ecc. and Ad. Cases, 113, 150); Cheng, *General Principles of Law* at 309-10 ("Even where absolute sincerity and good faith are not in doubt, the statement of the facts in the pleadings by one of the interested parties, being a partial statement drawn up specially to present the case in the best possible light, cannot be considered as evidence and regarded as conclusive.") (footnote omitted); *see also* 1 L. Oppenheim, *International Law*, § 554(11) ("If the meaning of a provision is ambiguous, and one of the contracting parties, *at a time before a case arises for the application of the provision*, makes known what meaning it attributes to it, the other party or parties cannot, when a case for its application does occur, insist upon a different meaning unless it has previously protested . . .") (emphasis added); *Case Concerning Maritime Delimitation and*

Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1994 I.C.J. 112, 121-22 ("The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position *subsequently* to say that he intended to subscribe only to a 'statement recording a political understanding,' and not to an international agreement." (emphasis added)).

285. Moreover, it is well-settled that "[t]he value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common *and consistent*." *See* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 137 (1984) (emphasis added). Yet the Parties' respective positions on Article 1105 have been anything but consistent.

286. Until recently, Mexico had embraced precisely the construction of Article 1105 urged here by the Claimants. Before the *Azinian* and *Metalclad* arbitrators, Mexico acknowledged all of the key interpretive premises underlying Claimants' position:

- The standard of treatment prescribed by Article 1105 "can be divided into two express components, fair and equitable treatment and full protection and security, and one residual component, other standards of treatment mandated by international law." *Azinian* Counter-Mem. ¶ 247; *Metalclad* Counter-Mem. ¶ 833.

- The drafters of Article 1105 intended "to incorporate the public international law meaning" of both "fair and equitable" and "full protection and security." *Azinian* Counter-Mem. ¶¶ 251, 258; *Metalclad* Counter-Mem. ¶¶ 837, 872.

- Because NAFTA does not define the phrases "fair and equitable treatment" or "full protection and security," Article 31 of the Vienna Convention requires them to be "interpreted in good faith in accordance with [their] ordinary meaning, in [their] context, and in the light of [their] object and purpose." *Azinian* Counter-Mem. ¶¶ 248, 257; *Metalclad* Counter-Mem. ¶¶ 835, 871.

- "The fair and equitable treatment standard requires the Respondent to act in good faith, reasonably, without abuse, arbitrariness or discrimination." *Metalclad* Counter-Mem. ¶ 841.

- The "full protection and security" standard imposes an obligation of "due diligence" which requires states to "ac[t] reasonably in the protection of foreign property." *Azinian* Counter-Mem. ¶ 260; *Metalclad* Counter-Mem. ¶ 874.

To be sure, Mexico did change its interpretive position in *Metalclad* after the panel found that it had violated Article 1105 (U.S. Counter Mem. at 175 n.96), but such a belated and self-serving reversal lacks either the reliability or consistency to be worthy of serious consideration.

287. Canada's previous statements similarly support the principles urged here by Claimants. In the *S.D. Myers* arbitration, Canada's Statement of Defense never mentioned the word "customary" when discussing Article 1105. To the contrary, it observed that "Article 1105 provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law, *including* fair and equitable treatment and full protection and security." *S.D. Myers*, Statement of Defence ¶ 44 (emphasis added). Thus, the Parties' own past admissions have repeatedly contradicted the position currently urged by the United States.

288. Finally, and most fundamentally, the United States' argument ignores the basic distinction between interpretation and amendment. In contending that Article 1105 incorporates only "customary" international law (despite the explicit textual reference to "international law"), and thereby excludes requirements of "fair and equitable treatment" and "full protection and security" (despite the explicit textual incorporation of those standards), the United States seeks not to construe Article 1105, but to retroactively amend it. Such amendments can be accomplished only under the formal procedures specified in NAFTA Article 2202, not by blind deference to an *ad hoc* set of unsuccessful and unsupported litigating positions. Indeed, the Vienna Convention itself makes clear that "subsequent practices" are relevant only to help

construe existing treaty provisions (*see* art. 31(3)(b)) and cannot themselves effect a treaty amendment.[30]

3. Commentators Reject The United States' Interpretation

289. Commentators, too, have concluded that the "fair and equitable treatment" standard goes beyond the minimum standard of treatment imposed by customary international law. Kenneth Vandevelde, a leading expert on international investment law, confirms that the "fair and equitable treatment" standard is distinctly broader than the international "minimum standard of treatment":

> Th[e] phrase [fair and equitable treatment] is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the dispute provisions. This clause provides a baseline of protection which will be useful principally in situations *where other substantive provisions of international and national law provide no protection*.

Vandevelde, *United States Investment Treaties* at 76 (emphasis added). Other commentators similarly have noted that the "fair and equitable treatment" provision was designed precisely to solve some of "the deficiencies of customary international law." J. Johnson, *North American Free Trade Agreement: A Comprehensive Guide* § 7.3, at 277 (1994). And, of course, Dr. Mann has explained that "[t]he terms 'fair and equitable treatment' envisage conduct which goes *far*

[30] As originally drafted by the International Law Commission (ILC), proposed Article 38 of the Vienna Convention provided that: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify it[] . . . ." S. P. Jagota, "Vienna Convention on the Law of Treaties, 1969," *in Essays on the Law of Treaties* 187 (Agrawala, ed. 1972). But the U.N. Conference convened to consider the ILC draft ultimately *deleted* the proposed Article 38— the only provision in the entire ILC draft that the Conference deleted. *See id.* The United States itself favored deletion of proposed Article 38 out of concern that "an agreement might be deemed amended as a result of unauthorized actions by low-ranking officials." *Restatement (Third) of Foreign Relations* § 334 Reporters' Note 2. A majority of the Conference agreed, and proposed Article 38 was deleted to ensure that any treaty modification, even if agreed to by the parties, must be effected through formal amendment. Jagota, *supra*, at 187-88.

beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words." Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. at 244 (emphasis added).

4. Article 1105 Guarantees Non-Discrimination

290. Article 1105 prohibits all forms of invidious discrimination, whether based on nationality, race or class. That prohibition is apparent from the plain language of the "fair and equitable treatment" requirement, which "connotes the principle of non-discrimination and proportionality in the treatment of foreign investors," and prohibits "discriminatory or other unfair measures." P. Muchlinski, *Multinational Enterprises and the Law* ¶ 2.3.1 (1995). Moreover, even the United States concedes that "the general principles of law recognized by civilized nations" are an important source of "international law" (U.S. Juris. Resp. 12 (quoting Stat. of I.C.J., art. 38(1)(c)).) Claimants have previously demonstrated (TLGI Mem. at 67-70) that every leading nation has prohibited invidious discrimination against foreigners. Indeed, "[t]he rule against discrimination . . . involves a principle which does not seem to have been challenged in any country or at any time." F.A. Mann, *Studies in International Law* 476 (1973).

5. Loewen Was Denied Fair And Equitable Treatment

291. Under a proper construction of "fair and equitable treatment," the *O'Keefe* record demonstrates that Claimants' Article 1105 rights were violated. Indeed, even the United States does not contend that the Mississippi courts' treatment of Loewen was either "fair" or "equitable."

292. "Following standard dictionary definitions," as the United States urged in *ELSI, supra*, at 76-77, it is unquestionable that the Mississippi courts denied Claimants "fair and equitable treatment." Dictionaries define "fair" as "Free from bias, fraud, or injustice; equitable, legitimate." V *The Oxford English Dictionary* 671 (2d ed. 1989). "Equitable" means

"Characterized by equity or fairness. . . . That is in accordance with equity; fair, just, reasonable." *Id.* at 357. Claimants have demonstrated that the Mississippi courts violated fundamental principles of fairness and equity in permitting O'Keefe to foment "bias" based on nationality, race, and class; in refusing to instruct the jury about the inappropriateness of these specific biases; in encouraging the jury to increase its already excessive initial verdict; in entering judgment on a biased, excessive and procedurally defective verdict; and in foreclosing Loewen's appeal rights by arbitrarily refusing to reduce the bonding requirement. TLGI Mem. at 99, R. Loewen Mem. at 54-55, 61-62; *see generally* Section II, *supra.* As Sir Robert Jennings has stated, the *O'Keefe* litigation was "a travesty of the elementary notions of justice." (First Jennings Op. at 5.) Likewise, Sir Ian has concluded: "The conduct of the trial in 1995 before the Hinds County Circuit Court in the State of Mississippi . . . constituted a violation of the Claimants' right to 'fair and equitable treatment' . . . ." (Sinclair Op. at 61.) That is more than sufficient to establish a violation of Article 1105.

D. The Mississippi Litigation Violated Claimants' Right To "Full Protection and Security" Under Article 1105

293. Claimants showed (TLGI Mem. at 91-97; R. Loewen Mem. at 56-62) that the Mississippi courts failed to afford "full protection and security" to Loewen and its investments, thereby violating international law and NAFTA Article 1105. Claimants also showed (TLGI Mem. at 91) that, in the words of the ICSID tribunal in *Asian Agricultural Products. Ltd. v. Sri Lanka,* 30 I.L.M. 577, 601 (1991) ("*AAPL*"), "the addition of words like 'constant' or 'full' to strengthen the required standard of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law."

294. In response, the United States asserts that Claimants' construction of the "full protection and security" requirement would impose "strict liability" on Party signatories. (U.S. Counter-Mem. at 177-78.) That is incorrect. Claimants simply submit that "full protection and security" requires the state to take "all possible measures that could *reasonably* be expected to prevent . . . property destructio[n]." *AAPL*, 30 I.L.M. at 601, 616 (emphasis added). This standard imposes heightened affirmative duties on Party signatories, but does not remotely impose "strict liability."

295. As with its arguments respecting "fair and equitable treatment" (*see* Section III(C), *supra*), the United States urges that Article 1105's explicit textual guarantee of "full protection and security" "does not expand or otherwise modify the minimum standard of treatment under customary international law." (U.S. Counter-Mem. at 176.) The United States further submits that, under "customary" international law, the guarantee of "full protection and security" is "limited to those [cases] in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien." (U.S. Counter-Mem. at 176.) Because the United States attacks only the legal standard urged by Claimants, it effectively concedes that, under that standard, the Mississippi courts did fail to provide "full protection and security" during the *O'Keefe* litigation.

296. The United States' proposed interpretation of "full protection and security" is erroneous. It is inconsistent with this Tribunal's prior decision, with the plain language of Article 1105, and with the United States' own longstanding stance toward protection of its own citizens.

1. This Tribunal's Earlier Decision Forecloses The United States' Interpretation of Article 1105

297. The United States suggests (U.S. Counter-Mem. at 179) that the guarantee of "full protection and security" is "limited" to those cases where "a State failed to provide reasonable police protection against acts of a criminal nature that physically invad[e] the person or property of an alien," and does not "obligat[e] a government to prevent economic injury inflicted by private parties." (*Id.*) This Tribunal has already held otherwise.

298. In its Award on Jurisdiction, this Tribunal held that "Article 1105, in requiring a Party to provide 'full protection and security' to investments of investors, must extend to the protection of foreign investors from private parties when they act through the judicial organs of the state." (*Loewen*, ¶ 58.) This conclusion forecloses the United States' crabbed construction of Article 1105: actions by "the judicial organs of the state" rarely if ever constitute "acts of a criminal nature" that physically harm aliens' property, and it is highly dubious that "police protection" would be the appropriate means to secure investments against illegal judicial action.

299. In view of this Tribunal's prior ruling, the guarantee of "full protection and security" cannot be construed as merely the obligation to provide reasonable police protection against criminal invasion of real property.

2. The Ordinary Meaning Of Article 1105 Forecloses The United States' Interpretation

300. The United States' proposed construction of "full protection and security" must be rejected on the same grounds as its proposed construction of "fair and equitable treatment": — Article 1105 by its terms *does* impose a requirement of "full protection and security," and does *not* incorporate any reference or restriction to "customary" international law.

301. In urging that "full protection and security" means only police protection against criminal invasions of real property (U.S. Counter-Mem. at 176), the United States also ignores

the scope of coverage of Chapter 11, which protects "investments" broadly defined to include "enterprises," equity and debt securities of an enterprise, loans to an enterprise, profit or asset-sharing interests, and all tangible or intangible business property. NAFTA art. 1139. This "enormously broad" definition reflects the Parties' desire to create a sweeping liberalization of trade and investment. Price, *Chapter 11, supra*, 26 Can.-U.S. L. J. at 109. Yet under the United States' submission, many of these investments would be left without *any*, much less full, "protection and security." For example, it would be difficult or impossible to "physically invade" an equity or debt security, a loan, an interest in profit or asset sharing, or intangible business property. The United States' proposed interpretation would improperly deny protection and security to this expansive class of expressly protected investments.

302. In construing a "protection" obligation under the Argentine-Spain BIT, the ICSID Tribunal in *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Final Award, Nov. 9, 2000), rejected a contention that "protection" applies only against criminal trespass. In *Maffezini*, a quasi-governmental Spanish agency, without obtaining prior approval, unilaterally transferred 30 million pesetas from the bank account of an Argentine investor to that of a Spanish corporation. *Id.* ¶¶ 74-75. Despite the absence of any criminal trespass, the ICSID Tribunal held that this misappropriation amounted to a breach by Spain of its *obligation to protect* the investment." *Id.* ¶ 83 (emphasis added).

303. Professor Vandevelde similarly concludes that the term "full protection and security" is "certainly" broad enough to require "protection of investment (which includes intellectual property rights in most BITs) against injury by private parties in the form of misappropriation." Kenneth J. Vandevelde, *Investment Liberalization and Economic*

Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L. 501, 510 n.28 (1998) (citations omitted).

304. In sum, the ordinary meaning of "full protection and security" does not bear the narrow and archaic meaning that the United States ascribes to it.

3. The United States Has Long Insisted On Full Protection For Its Own Citizens' Investments

305. In order to protect American investors, the United States itself has led the effort to impose a heightened standard of full protection as a guiding principle of international law. The United States' present position is thus directly at odds with its official diplomatic positions, with its other treaty obligations, and with the positions it has urged before other international tribunals.

306. For almost 200 years, the United States' official diplomatic positions have required broad protection of aliens' property. As early as 1818, U.S. Secretary of State (later President) John Quincy Adams declared:

> There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by *all the efforts in his power*.

Letter of Mr. Adams, Sec. of State, to Mr. de Onis, Spanish Minister (1818) reprinted in John Bassett Moore, 4 *Digest Of International Law* § 535 (1906) (emphasis added). In 1837, in the *Case of Two French Citizens*, the U.S. Attorney General opined that "[i]t is the duty of the President . . . *to take all lawful measures for the protection of alien subjects*." 3 Op., 253, Butler (1837), *summarized in Digest of the Published Opinions of the Attorneys-General and Leading*

Cases on International Law 3 (1877) (emphasis added). Until this case, the United States' position in this regard had been unwavering.[31]

307. The United States also has entered into numerous treaties that specifically establish this heightened obligation of full protection and security for its own citizens. *See* Vandevelde, *United States Investment Treaties* at 14. The first treaties of Friendship, Commerce and Navigation (FCNs) "[t]ypically . . . guaranteed 'special protection' or 'full and perfect protection' to covered property." *Id.* at 15.[32] After each of the World Wars, the United States negotiated several uniform FCNs containing even greater investment protection, including a requirement that alien property be guaranteed "'the most constant protection and security,' as well as the protection 'required under international law.'" *Id.* at 17. More recently, the United States has executed over forty BITs containing a standard obligation of "full protection and

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[31] *See, e.g.*, Letter of Mr. Fish, Sec. of State, to Mr. Partridge, Minister to Brazil (1875) (*reprinted in* Moore, 6 *Digest of International Law* § 1023) (it is the duty of foreign states to protect alien property); Report of Dr. Francis Wharton, Solicitor of Dept. of State, affirmed by Mr. Bayard, Sec. of State (1885) (*reprinted in* Moore, 6 *Digest of International Law* § 1020) (foreign governments are responsible for *any* injury to the property of a U.S. citizen "which by the exercise of reasonable care could have been averted"); Conference for the Codification of International Law, *Bases of Discussion*, vol. III, supp. (League of Nations pub. C.75(a). M.69(a). 1929.V., p. 13), *reprinted in* Hackworth, 3 *Digest of International Law* 630 (international law *requires* the most constant protection and security for alien property); Instructions of Sec. Dulles to the American Embassy, Tripoli, No. A-101, May 21, 1957, MS. Dept. of State, *reprinted in* M. Whiteman, 8 *Digest of International Law* 831-32 (1967) (liability would be established under principles of international law if "the authorities failed to employ *all reasonable means at their disposal*" to prevent injury to alien persons or property) (emphasis added).

[32] *See, e.g., Treaty of Amity, Commerce and Navigation Between His Britannick Majesty and the United States of America* (*"The Jay Treaty"*), art. 14 (1794), http://www.yale.edu/lawweb/avalon/diplomacy/jay.htm; *Convention to Regulate the Commerce Between the Territories of the United States and of His Britannick Majesty*, Art. I (1815) (*reprinted in* Charles I. Bevans, 12 Treaties and Other International Agreements of the United States of America 49 (1974)); *Treaty of Friendship, Limits, and Navigation* (Spain-U.S.) Art. VI (1796); *Treaty of Friendship, Commerce and Navigation* (Argentina-U.S.) Art. II (1853), http://www.yale.edu/lawweb/avalon/diplomacy/argen02.htm.

security" for alien investments,[33] a formulation "equivalent to the modern FCNs' 'most constant protection and security' formulation and similar to the language used in nineteenth century FCNs." *Id.* at 77. Thus, the requirement of "full protection and security" arises out of the United States' longstanding and continuing effort to impose affirmative duties of care with respect to foreign investments. *See Pope & Talbot II*, ¶¶ 110, 111 (construing Article 1105 by reference to BITs).

308. For over a century, the United States has successfully enforced this obligation of full protection in proceedings before international tribunals. In the *Case of the "Montijo"* (U.S. v. Colombia) (1874), *reprinted in 2 Moore's International Arbitration* 1421, 1444 (1898,) a tribunal imposed liability on the Colombian government, at the United States' urging, for the seizure of a private American vessel by rebel Colombian forces. Rejecting Colombia's argument that it may not have had the power to recover the vessel, the tribunal responded: "If [the government] promises protection to those whom it consents to admit into its territory, *it must find the means of making it effective*." *Id.* (emphasis added). In the *Case of Home Insurance Co.* (U.S. v. Mexico), a tribunal similarly concluded — again, at the United States' urging — that "the Government of Mexico in its sovereign capacity owed the duty to protect the persons and property within its jurisdiction *by such means as were reasonably necessary* to accomplish that end." *Opinions of the Commissioners* 51, 57 (1927) (emphasis added). In 1979, the United States argued before the International Court of Justice ("ICJ") that the duty to provide "the most constant protection and security" under the U.S.-Iran FCN treaty was an "affirmative obligation" to "ensure" protection. *See* Memorial to the ICJ, *Case Concerning United States Diplomatic and*

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[33] *See Bilateral Investment Treaties: 1959-1999*, United Nations Conference on Trade and Development 117-18 (2000); "About Bilateral Investment Treaties" (sample BIT showing

Consular Staff in Tehran (U.S. v. Iran) (1980). The ICJ agreed, holding that the treaty provision at issue created a heightened duty of care "*in addition to* the obligations of Iran existing under general international law." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) 1980 I.C.J. 3, 31-32 (emphasis added). Finally, over the last decade, the United States has successfully urged ICSID tribunals that foreign countries had failed to "*take all measures necessary*" to "ensure" the protection and security of an American company's investments. *American Mfg. & Trading, Inc. v. Republic of Zaire*, 36 I.L.M. 1531, 1548 (1997) (emphasis added).

4. The Mississippi Courts Failed to Employ Reasonable Efforts To Protect Claimants' Investments

309. As detailed above in Section II, the Mississippi courts failed to afford "full protection and security" to Loewen and its investments. Among other things, Judge Graves refused to strike jurors who admitted their prejudices, to stop the "race card" from being played, to protect Loewen from O'Keefe's incessant jingoistic references, and to stop Gary from making fabricated allegations during closing argument. Moreover, Judge Graves entered an obviously tainted and excessive judgment, and the Mississippi courts, by imposing an arbitrary and excessive bonding requirement, effectively foreclosed Loewen's appeal rights. None of this afforded "full protection and security."

5. The United States Is Not Permitted to Impose an *Ex Post Facto* Reservation or *Ad Hoc* Amendment

310. Given that the United States' present litigating position is so contrary to its own long-held position in the world legal community, one might characterize its present submission

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(continued…)

"full protection and security" as a standard provision), website of the U.S. Trade Representative, at http://www.ustr.gov/agreements/bit-info.pdf.

as an effort to reform NAFTA by reservation or amendment. But the United States cannot accomplish that end by these means.

311. A reservation must be entered, in writing, "when signing, ratifying, accepting, approving or acceding to a treaty." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* Jan 27, 1980, art. 2(1)(d), art. 19; *see also Restatement (Third)* § 313, cmt. a (same), cmt. c. *Ex post facto* reservations (as would be the case here) are not recognized. The process of amendment similarly requires official notification, negotiation, formal agreement and, in many cases, re-ratification.

E. Mississippi Expropriated Loewen's Assets and Violated Article 1110

312. Claimants have shown (TLGI Mem. at 99-104; R. Loewen Mem. at 62-64) that the *O'Keefe* case resulted in a measure "tantamount to . . . expropriation" of its investments in violation of NAFTA Article 1110. The United States responds by urging that Claimants' expropriation claim is "incidental to" their other claims under Article 1102 and 1105 (U.S. Counter-Mem. at 182); that no case has ever found an expropriation in a civil judgment between private parties for money damages (*id.* at 181-82); that the phrase "tantamount to . . . expropriation" is a meaningless addition to Article 1110 (*id.* at 182-84); and that the *O'Keefe* case did not present a case of "indirect" expropriation. The first three of these arguments lack merit, and the fourth responds to a point that Claimants never advanced.

1. Claimants' Expropriation Claim Properly Implicates Their Article 1102 And 1105 Claims

313. The United States makes the straw-man argument that Claimants' Article 1110 expropriation claim, "standing alone" from its other claims, is unfounded. (U.S. Counter-Mem. at 182; *see also id.* at 186 (characterizing Claimants' Article 1110 claim as "incidental to their

primary claim”).) But an Article 1110 expropriation claim need not, and generally will not, “stand alone.”

314. An expropriation is actionable under Article 1110 of NAFTA unless it was made “(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.” Thus, discriminatory conduct that violates Article 1102 and a denial of justice that violates Article 1105(1) can be essential elements of any expropriation claim under Article 1110. The NAFTA tribunal in *Metalclad* recognized this:

> By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus permitting or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).

Metalclad, ¶ 104. Claimants have consistently maintained a similar position. (*See* TLGI Mem. at 102, 103-04; First Jennings Op. at 17 (“Nevertheless there has been in effect an expropriation of Loewen’s property by the vehicle of the bizarre trial falling far below any possible standard when judged by international law, or indeed by the NAFTA treaty. This expropriation is another aspect of the denial of justice.”).) Professor Greenwood agrees that “an award of damages, including an award of punitive damages,” can constitute an expropriation “if the court proceedings are so flawed as to amount to a denial of justice.” (Greenwood Op. at 5.) The tribunal need not pause long on this undisputed point.

2. Civil Judgments In Private Litigation May Be Expropriations

315. Although it relegates the point to a footnote, the United States ultimately agrees with Claimants that a judicial judgment can constitute an expropriation. (TLGI Mem. at 101

(citing *Oil Fields of Texas v. Iran,* 12 Iran-U.S. Cl. Trib. Rep. 308, 318-19 (1986)); U.S. Counter-Mem. at 182 n.99 (citing same).) The only distinction of *Oil Fields of Texas* offered by the United States is that it did not "concer[n] civil litigation between private parties." (U.S. Counter-Mem. at n.99.) This Tribunal has already established that the United States' proffered distinction makes no legal difference:

> Neither the definition of 'measure' in Article 201 nor the provisions of Chapters 10 and 17 relating to 'measures' and 'procedures' contain any indication that, in its application to judicial acts, the existence of a measure depends upon the identity of the litigants or the characterization of the dispute as public or private. An adequate mechanism for the settlement of disputes as contemplated by Chapter Eleven must extend to disputes, whether public or private, so long as the State Party is responsible for the judicial act which constitutes the 'measure' complained of, and that act constitutes a breach of a NAFTA obligation, as for example a discriminatory precedential judicial decision.

(*Loewen*, ¶ 54; *see also id.*, ¶ 45 (relying on *Oil Fields of Texas* to support the conclusion that "'measures' . . . include judicial acts").) This Tribunal should again reject the United States' attempt to exempt judicial acts in private-party litigation from the care substantive protection of Chapter 11.

3. The *O'Keefe* Judgment Resulted In A Transfer That Was "Tantamount To . . . Expropriation"

316. When Claimants filed their Memorials, no international tribunal had construed Article 1110 of NAFTA. Since that time, two NAFTA tribunals have done so. In *Pope & Talbot* and *S.D. Myers*, the tribunals held that the phrase "tantamount to . . . expropriation" does not broaden the traditional concept of expropriation under international law, and to the extent that Claimants had urged that the term "tantamount to" in Article 1110 "broadened" the protection against uncompensated expropriation (*see* TLGI Mem. at 99), those decisions would seem to reject that submission.

317. At the same time, however, both *Pope & Talbot* and *S.D. Myers* have interpreted "tantamount to . . . expropriation" in a way that conclusively establishes that the *O'Keefe* litigation resulted in an improper and uncompensated expropriation under Article 1110. In *Pope & Talbot*, the tribunal utilized a definition of expropriation that looks to the degree of "[i]nterference with . . . business." *Id*. (Interim Award, June 26, 2000), ¶¶ 98, 102 ("the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner.").[34] This analysis is directly in accord with the international-law precedents previously relied upon by Claimants, which hold that expropriation occurs where government action unduly interferes with an alien's use or enjoyment of property. *See* TLGI Mem. at 100-01 (citing cases); *Restatement (Third) of Foreign Relations Law* § 712, cmt. g (1987); L. Sohn & R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961).

318. The interpretation adopted in *S.D. Myers* further undercuts the United States' arguments. Although the United States "questions how a civil judgment for money damages that was never enforced could constitute an expropriation in any sense" (U.S. Counter-Mem. at 184), that analysis elevates form (the settlement with O'Keefe) over substance (the fact that the settlement was caused by, and in mitigation of, the unfair and excessive judgment). The tribunal in *S.D. Myers* rejected such a form-over-substance approach:

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[34] The United States misleadingly quotes the *Pope & Talbot* tribunal as saying: "the Tribunal does not believe that the phrase 'measure tantamount to nationalization or expropriation' in Article 1110 broadens the ordinary concept of expropriation under international law." (U.S. Counter-Mem. at 183 n.102.) The *Pope & Talbot* tribunal actually stated: "the Tribunal does not believe that the phrase 'measure tantamount to nationalization or expropriation' in Article 1110 broadens the ordinary concept of expropriation under international law *to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect*." *Pope & Talbot* (Interim Award), ¶ 96 (omitted portion of quotation emphasized).

> The primary meaning of the word 'tantamount' . . . is 'equivalent'. Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.

Id. ¶ 285. *See also id.* ¶ 217 (separate opinion of Bryan Schwartz) ("The phrase 'tantamount to expropriation' in Article 1110 does, however, require a tribunal to take a hard look at whether government conduct amounts *in substance* to an expropriation. The protection offered by Article 1110 does not cease to apply merely because an expropriation is dressed up in a more innocuous form, or accomplished by subtle or indirect means. The real purpose and real impact of a measure must be considered. . . .") (emphasis in original).

319. Another recent NAFTA decision again rejected a form-over-substance argument:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

Metalclad Corp. v. Mexico, ICSID Case No. ARB (AF)/97/1 (Award of Aug. 30, 2000), ¶ 103.

320. The United States nonetheless suggests — notwithstanding the massive deprivation of economic benefits that the *O'Keefe* judgment and resulting settlement caused — that Claimants have no expropriation claim because they "remained in full control of LGII and its other investments in Mississippi after [they] settled the *O'Keefe* lawsuit." (U.S. Counter-Mem. at 186.) But under Article 1110, an investor "does not need to prove that its subsidiary in the territory of another NAFTA Party has actually been taken over or shut down to seek compensation under Article 1110. It need only prove that some form of economic interest that

can be identified as its 'investment' under NAFTA Article 1139 has suffered from substantial interference as a result of the imposition of some government measure." Todd Weiler, *2000 in Review: NAFTA Investor-State Dispute Settlement Gains Steam* (2001) (soon to be published in *International Lawyer*) (author can be contacted at tweiler@naftalaw.org). Indeed, the United States 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 Co. Claim*, 1955 Int'l L. Rep. 333, 334.

321. Indeed, it appears that one of the "objectives" of the United States government, in negotiating NAFTA, was "[t]o get Canada and Mexico to agree that NAFTA should cover the **widest possible range of investment**." (U.S. App. at 267 (bold emphasis in original).) This would seem to be at odds with the United States' present, formalistic submissions on the scope of Article 1110.

322. Similarly, as Claimants have earlier shown, it is not a necessary condition of an illegal expropriation that the State itself acquire the expropriated property; all that is necessary is that the state have a hand in depriving the claimant of valuable property rights. *See* TLGI Mem at 101-02 (citing authorities); R. Loewen Mem. at 62; G. Aldrich, *The Jurisprudence of the Iran-U.S. Claims Tribunal* 188 (1996) (noting that "[t]he *Tippetts* Award established, and subsequent Awards confirmed, the Tribunal's rejection of the argument that a compensable taking under international law occurs only if the State has acquired something of value to it: on the contrary, a taking has occurred if the claimant has been deprived of property rights of value to him.").

323. The judgment, foreclosure of Loewen's appeal rights, and coerced settlement easily meet these formulations of the expropriation standard. The Mississippi courts severely interfered with Claimants' use and enjoyment of their investments, and effectively redistributed substantial portions of those investments to O'Keefe. Looking to "the degree of interference with [business]" (*Pope & Talbot II,* ¶ 102) and "the substance of what has occurred" (*S.D. Myers* ¶ 285), this state-compelled transfer of wealth from Loewen to O'Keefe plainly constituted an unlawful expropriation. Apart from its defenses to liability under Article 1102 and 1105, which we have already addressed, the United States makes no further attempt to justify the expropriation under Article 1110(1)(a) through (d).

IV. THE UNITED STATES' AFFIRMATIVE DEFENSES ARE MERITLESS

324. The United States puts most of its efforts into arguing that several affirmative defenses bar the Claimants' NAFTA claims. It urges that Article 1121 preserves a sufficient vestige of the "local remedies rule" to bar Claimants' claims (U.S. Counter-Mem. at 107-17); that Loewen's settlement with *O'Keefe* also waived Claimants' claims against the United States (U.S. Counter-Mem. at 73-106); and that Loewen failed to ask the Mississippi courts to act on the grounds that it alleges in this proceeding. (U.S. Counter-Mem. at 65-72.)

325. These affirmative defenses are without merit. *First,* Article 1121 is an unlimited waiver of any conceivable obligation to exhaust local remedies. *Second,* Loewen's settlement with O'Keefe, to which the United States was not a party, did not waive any of Claimants' rights to proceed with this arbitration, and in any event would not insulate the United States from liability because it was entered into under duress. *Third,* Loewen in fact took ample steps to protect itself, and the Mississippi courts had affirmative duties to protect it in any event. The failure of these defenses clears the way to the damages phase of this proceeding.

A. Article 1121 Waives Any Obligation To Exhaust Local Remedies

326. In its January 2001 Award on Jurisdiction, this Tribunal concluded that

> the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

(*Loewen,* ¶ 71.) This conclusion is amply supported by the authorities cited by the Tribunal (*see id.*, ¶¶ 61-70); by the authorities previously provided to the Tribunal by Claimants (*see* TLGI Juris. Subm. at 21-25; TLGI Final Juris. Subm. at 18-22; R. Loewen Final Juris. Subm. at 15-19); and by the opinions of Sir Robert Jennings and Sir Ian Sinclair. (*See* Second Jennings Op. at 12; Third Jennings Op. at 6-9; Sinclair Op. at 33-34.)

327. In view of this holding, it should be clear that NAFTA Article 1121 dispenses with any need for a claimant to seek local remedies, or to prosecute or defend a case to "finality." Article 1121 expressly provides that, in order for an investor and (where appropriate) an enterprise to "submit a claim . . . to arbitration," the investor and enterprise must

> waive their right to initiate or *continue* before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach [as provided in of NAFTA Articles 1116 and 1117].

NAFTA art. 1121(1)(b), (2)(b) (emphasis added). Claimants satisfied this requirement, *see* Claimants' Notice of Claim at Tab F, and thus did not need to "continue" with "any proceedings" within the domestic judicial system. This should be sufficient to answer the United States' various arguments that Claimants should have done something *more* in the courts of Mississippi and the United States.

1. The United States Fails To Address The Text Of Article 1121

328. The United States persists in the same arguments regarding the scope of Article 1121 that this Tribunal already has rejected. (*Compare* U.S. Resp. on Comp. & Juris. 28 ("Article 1121 . . . addresses only procedural matters, not substantive ones.") *with* U.S. Counter-Mem. at 109-10 ("Article 1121 . . . addresses nothing more than the procedural conditions precedent to the submission of a claim to arbitration."); *compare also* U.S. Mem. on Comp. & Juris. 53 ("if finality were not a prerequisite to stating a claim for judicial breach under NAFTA Chapter 11, recourse to international arbitration would always be available based on lower court action alone, no matter if or why a claimant failed to appeal") *with* U.S. Counter-Mem. at 112 ("[i]f the local remedies rule were waived for denial of justice claims, then any disappointed alien litigant in an inferior court could choose to have his case reviewed in the first instance by a

NAFTA Chapter Eleven Tribunal, even in cases where there was no question as to the adequacy and availability of an appeal through the domestic judicial system").)

329. Despite the Tribunal's invitation (*see Loewen,* ¶ 74), the United States has yet to set forth a complete and coherent interpretation of Article 1121 that would support its position. The United States fails to answer the Tribunal's concern about "the lack of specificity in [the United States'] acknowledgement that the Article partially relaxes the local remedies rule." (*Id.; see also id.*, ¶ 64.) Furthermore, it continues to simply ignore the Article's requirement that claimants waive their rights to "initiate *or continue*" domestic challenges to the measures; only one of its experts even mentions the "or continue" provision (*see* Bilder Op. at 35), and then only in passing; its other international-law expert avoids the issue entirely by paraphrasing Article 1121 as "provid[ing] that a claimant cannot, at one and the same time, *carry on* litigation in a national court." (Greenwood Op. at 20 (emphasis added).) In eleven pages of argument, and 79 pages of expert statements, the United States *not once* offers a coherent and complete interpretation that takes into account the text of Article 1121.[35]

330. "Nothing in the NAFTA authorizes the Tribunal to interpret the plain language of Article 1121 as having no effect." *Waste Management Inc. v. Mexico* (ICSID Case No. ARB(AF)/98/2), Mexico's Counter-Mem. Concerning Competence ¶ 89. The only plausible conclusion that the Tribunal can draw is that "or continue" means what it says — a NAFTA claimant is not required to exhaust all locally available remedies before presenting a Chapter 11 claim; otherwise, Article 1121 would be a cipher "having no effect." As Sir Robert has explained, the requirement "to waive the right 'to initiate or continue', which is manifestly

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[35] The United States also does not attempt to take into account NAFTA's negotiating history. Chapter 11 was plainly patterned on the model U.S. BIT, *see Metalclad v. Mexico*,

incompatible with the local remedies rule and *a fortiori* with any notions of 'finality,' . . . can only have been intended to comprise waiver of a local remedy even in the midst of the process." (Third Jennings Op. at 13.)

2. Other NAFTA Parties And Tribunals Have Rejected The United States' Position

331. The other NAFTA Parties have rejected the position urged here by the United States.

332. In *Waste Management*, both Mexico and Canada firmly took the position that "arbitration is a substitute for litigation, not a supplement to it." *Waste Management*, Mexico's Counter-Mem. Regarding Competence, ¶ 101. Mexico argued that a claimant, by appealing several adverse rulings of the Mexican courts after it had purportedly waived the right to do so under Article 1121, was barred from proceeding under Chapter 11. *Id.,* ¶¶ 81-85. Mexico concluded that Article 1121 requires a claimant not to *exhaust,* but to "forego otherwise available judicial remedies." *Id.,* ¶ 93. Canada agreed: "The same measure therefore cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor has a clear choice and can choose between one or the other — but not both." *Waste Management,* Canada's Submission Pursuant to Article 1128, ¶ 5; *see also id.,* ¶ 4. In contrast, only the United States contends that a NAFTA claimant must pursue both local appeals *and* international arbitration.

333. Similarly, the Tribunal in *Metalclad Corp. v. Mexico* arbitrated a Chapter 11 dispute even though, as Mexico itself explained, "[f]urther domestic remedies were available to Metalclad but it chose not to pursue them." *Metalclad Corp. v. Mexico,* Mexico's Outline of

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(continued…)

Mexico's Outline of Argument at ¶ 243, which does not require exhaustion of local remedies. *See* Vandevelde, *United States Investment Treaties,* App. C-1 at 166.

Argument, ¶ 104. The United States' suggestion that Metalclad had "nothing [left] to exhaust" (Hearing Tr. at 648) is belied by Mexico's own submission in *Metalclad* itself.

3. Commentators Reject The United States' Position

334. Commentators widely recognize that Article 1121 was designed to waive all vestiges of the local remedies rule. *See, e.g.,* Howard Mann, *NAFTA and the Environment: Lessons for the Future,* 13 Tul. Envtl. L.J. 387, 403 (2000) ("The [Chapter 11] process can be initiated at the sole discretion of the foreign investor."); Mark N. Sills, *Sauce for the Goose and Sauce for the Gander — But Which Sauce?,* North American Free Trade & Investment Report (Nov. 15, 1999) (Chapter 11 "creates an independent right to a foreign investor to contest the actions of foreign government . . . *without any obligation to first exhaust local remedies*") (emphasis added). Even Chapter 11's critics understand that Article 1121 "eliminates the necessity to exhaust local remedies provided by the host country's administrative or judicial courts." Bernardo Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction,* 19 Hous. J. Int'l L. 565, 574 (1997) (cited by the Tribunal in ¶ 63 of its January 2001 decision). As Sir Robert Jennings has explained:

> The logic of the language of Article 1121 is that the drafters of the provision were assuming that the local remedies rule . . . would have no application or relevance in an arbitration under the agreement.

(Third Jennings Op. at 13.)

4. The Historical Context Of NAFTA Refutes The United States' Position

335. The United States speculates — and it is rank speculation, given the absence of reliable *traveaux ṕreparatoires* (*see* Hearing Tr. at 660) — that the NAFTA Parties could not possibly have intended to allow an alien to submit a denial-of-justice claim to international

arbitration when local review was available. (U.S. Counter-Mem. at 112-13, 114.) The historical context of NAFTA shows otherwise.

336. "'NAFTA's wide-ranging protection for investors was aimed mainly at Mexico, whose legal system Canadian and American negotiators did not trust.'" Julia A. Soloway, *Environmental Trade Barriers Under NAFTA,* 8 Minn. J. Global Trade 55, 88 (1999) (quoting "NAFTA — The Sting in Trade's Tail," The Economist, Apr. 18, 1998, at 70). In particular, "it was well known that Mexico was subject, from time to time, to nationalistic storms that were not always good news for foreign investors," David R. Haigh, *Chapter Eleven — Private Party U.S. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve*?, 26 Can-U.S. L.J. 115, 131 (2000), and Mexico's judicial process was "generally considered corrupt or at least compliant with the will of the state." Mann, 13 Tul. Envtl. L.J. at 402. NAFTA therefore provided a means of "assur[ing]" that investment disputes could be settled "before an impartial tribunal," NAFTA art. 1115, an objective that is flatly "incompatible," as Sir Robert has explained, with the United States' invocation of the local remedies rule. (Third Jennings Op. at 12.) The most credible conclusion is that Article 1121 gave the United States exactly what it wanted, particularly vis-à-vis Mexico — an unfettered right for NAFTA claimants to depart from local court systems and seek international relief.

5. ***Headquarters Agreement* And Other International Authorities Refute The United States' Position**

337. The Tribunal's January 2001 decision suggested that "[t]he remarks of the International Court of Justice in *Headquarters Agreement* (Advisory Opinion) ICJ Reports 12 at 29, 42-43 . . . may have a bearing on the operation of Article 1121(2)(b) and also on the Claimants' submission that an agreement to arbitrate dispenses with any obligation to have recourse to municipal courts." (*Loewen,* ¶ 74.) The *Headquarters Agreement* further undercuts

the United States' position. As Judge Schwebel there explained: "It is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies." *Headquarters Agreement,* 1988 I.C.J. at 42-43 (opinion of Schwebel, J.).

338. The United States responds that *Headquarters Agreement* is inapposite because it did not involve an "alleged injury to an alien," and it contrasts that decision with the *Elettronica Sicula* (*ELSI*) case, which required exhaustion of local remedies under a supposedly similar agreement because the claim in substance was one presented by the United States on behalf of a U.S. national. (U.S. Counter-Mem. at 115.) But the *Headquarters Agreement* decision did not rest in any way on the presence, or absence, of an individual alien claimant. And, far from distinguishing *Headquarters Agreement* from NAFTA, the United States' own arguments in *ELSI* demonstrate why the local remedies rule is inapplicable here.

339. As the United States correctly argued in *ELSI*, the local remedies rule "is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals." 1989 I.C.J. at *42. Sir Robert Jennings confirms the point:

> [T]he earlier classical cases on the local remedies rule are from this earlier and very different period of international law when the notion of an individual, much less an investor, himself having international law rights which he himself could enforce, was inconceivable. They are therefore cases in which the individual was not and could not be a party, but are cases between two states, the plaintiff state being engaged in exercising diplomatic protection of a national. . . . And so indeed was the more recent *ELSI* case, before the International Court of Justice, between Italy and the United States.

(Third Jennings Op. at 8.) The NAFTA Parties' "agreement to arbitrate" thus "relieve[s] the necessity of having recourse to the local courts." Borchard, *Diplomatic Protection of Citizens Abroad* § 383, at 825 (1916).

340. Where an arbitration agreement guarantees claimants access to international panels, tribunals consistently conclude that the local remedies rule is inapplicable. Thus, in *Trumbull (Chile) v. United States* (1892), 4 *Moore's Int'l Arbitration* at 3569, 3571, the tribunal refused to apply the local remedies rule, despite an "argument that the claimant has a complete remedy in the courts of the United States," because the controlling arbitration clause provided that "[a]ll claims on the part of . . . private individuals, citizens of Chile, upon the Government of the United States, . . . shall be referred to three Commissioners." Convention for the Settlement of Claims, Aug. 7, 1892, U.S.-Chile, 6 *Treaties and Other International Agreements of the United States of America* (1776-1949) 535. The Commission ruled that, in light of this arbitration clause, the private investor did not need to exhaust its claims in the U.S. courts: "[T]he competency of this commission to take jurisdiction of this claim can not be denied under the authority to settle and adjust amicably all claims of citizens of Chile and of the United States against the government of either country." *Trumbull,* 4 *Moore's Int'l Arbitration* at 3571.

341. Similarly, in *Metzger (U.S.) v. Haiti*, 6 Moore, *Digest of Int'l Law* 689, the arbitrator concluded that the claimant had an international remedy despite not having sought a remedy "in the courts of Hayti." The arbitrator held: "Even had Metzger & Co. such a right, this would not affect the right to arbitrate the claim as has been done in this case. By the terms of the protocol the arbitrator is competent to take jurisdiction of the claim so far as the liability of Hayti is concerned." *Id.* at 690. And in *Young, Smith & Co. (U.S.) v. Spain*, 3 *Moore's Int'l Arbitration* at 3147, the local remedies rule was inapplicable because the governing arbitration clause "confer[red] upon this commission jurisdiction of all claims of that character," and

"ma[de] no exception against those parties who may not have resorted to or exhausted the remedies offered by the courts of Cuba." *Id.* at 3148.[36]

342. Finally, as Sir Robert Jennings explains, the arbitration rules relevant to NAFTA claims — UNCITRAL and ICSID — do not mention, or provide for the application of, the local remedies rule. (Third Jennings Op. at 16-17.) Indeed, as the Executive Directors on the ICSID Convention have recognized, "[i]t may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy." C.F. Amerasinghe, *Local Remedies in International Law* 266-67 (1990) (quoting Doc. ICSID/2).

343. In sum, *Headquarters Agreement,* along with other international authorities, confirms the longstanding principle that an agreement to arbitrate disputes between a claimant and a respondent State renders the local remedies rule inapplicable. Far from contradicting that principle, *ELSI* is, as Sir Robert has explained, simply a relic of a bygone era when private claimants were dependent on their governments to espouse claims on their behalf:

> Nor does it in the least follow from these earlier decisions that a case at the present time in which the plaintiff is himself the aggrieved individual, and pursuing a remedy provided for in a particular legal regime created by the terms of a treaty, is necessarily subject to the rules for the exhaustion of local remedies just because that was a necessary requirement in diplomatic

[36] *See also Case of Knowles*, 4 *Moore's Int'l Arbitration* at 3748 (availability of municipal remedy under U.S. law did not bar recourse to international tribunal, *see id.* at 3750 (Frazer, Comm'r, dissenting)); *Braithwaite (G.B.) v. United States*, 4 *Moore's Int'l Arbitration* at 3737, 3738 (claimant awarded compensation despite his "not having exhausted the ordinary remedies given him by the municipal laws and regulations of the United States"). The local remedies rule had no application in these cases because the relevant treaty — much like NAFTA — created a separate commission to decide the claims of each State's nationals against the other State. *See* Treaty of Washington, May 8, 1871, 13 *Treaties and Other International Agreements of the United States of America* (1776-1949) 170.

> protection cases belonging to a wholly different period of international law.

(Third Jennings Op. at 9.) NAFTA expressly eliminates the dependence of claimants on their own nations, and with it, eliminates the local remedies rule.

6. In Any Event, The Local Remedies Rule Does Not Apply To Claimants' Denial Of Justice Claims

344. Claimants have previously shown (TLGI Juris. Subm. 25; TLGI Final Juris. Subm. 23; Hearing Tr. 81-82) that, even in cases where the local remedies rule applies, it is unnecessary to exhaust local remedies where a denial of justice is present: "[L]ocal remedies must be sought *until denial of justice appears*." Eagleton, *The Responsibility of States in International Law* at 113 (emphasis added). Thus, no further exhaustion is required "if in the course of the pursuit of these local remedies the alien suffers a denial of justice." 1929 Harvard Draft Convention on State Responsibility, art. 6, comment at 150. As one recent commentator has explained, "the requirement to exhaust local remedies has been dispensed with when . . . a denial of justice is shown to have occurred." Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law,* XVI Can. Y.B. Int'l L. at 76 n.16.

345. The purposes underlying the local remedies rule are simply not implicated once a domestic court has committed a denial of justice. *First*, in the context of espousal, requiring the alien to first exhaust local remedies lessened the administrative burdens on espousing states, "[f]or governments were not anxious to extend the high level remedy of diplomatic protection." Third Jennings Op. at 7; *see also* Eagleton, *supra,* at 102 n.11 (quoting Mr. McLane, Sec'y of State, to Mr. Shain, *reprinted in* 6 Moore, *Digest of International Law* 259-60); Adede, XVI Can. Y.B. Int'l L. at 76-77 (noting that the local remedies rule is "essentially a rule of procedure relating to the admissibility of international claims *on behalf of* aliens") (emphasis added); Brownlie, *Principles of Public International Law* 497 (the local remedies rule "is justified by

practical and political considerations and not by any logical necessity deriving from international law as a whole"); Borchard, *The Diplomatic Protection of Citizens Abroad* 332 n.1 (same). Because NAFTA Chapter Eleven provides a direct private right of action, these "practical considerations" applicable to espousal cases are simply inappropriate.

346. *Second,* in most of the early cases, the alien was complaining of actions "by private individuals, often bandits, on that state's territory," such that "it was necessary for the victim to have sought local remedies in vain, so that the defendant state could then be held responsible for a secondary injury inflicted by its local courts, for 'denial of justice.'" Third Jennings Op. at 7; *see also* Eagleton, *supra,* at 93; *id.* at 93 n.1 ("no delict has been committed for which the state is responsible until its own agencies have participated either positively or by omission"); 1929 Harvard Draft Convention at 150-51 ("In order to obtain redress, both nationals and aliens must resort to the local remedies. . . . But if in the pursuit of these local remedies the alien suffers a denial of justice in the sense mentioned in Article 9, the right accrues to his state to advance an international claim."); J. Ralston, *The Law and Procedure of International Tribunals* ¶ 133 at 96 (1926) ("[R]arely has it been maintained that, the wrong being committed by the government or its agents . . . the party injured should proceed first in the courts of the offending government before the arbitral tribunal would take jurisdiction."). Here, however, Claimants challenge judicial acts by the State of Mississippi, so no further question of imputation arises.

347. The United States itself has endorsed these principles, at least when it comes to protecting its own citizens:

- "[T]he [local remedies] rule does not apply where the Respondent Government has committed an illegal act at the beginning of the underlying dispute." III I.C.J. *Pleadings*, *ELSI*, at 82.

- "[W]here the initial act or wrong of which complaint is made *is imputable* to the State, substantively it is unnecessary to exhaust local remedies in order to impute responsibility to the State." 8 M. Whitman (Ass't Legal Advisor, U.S. Dep't of State) at 789.

- There is no obligation to exhaust local remedies when a lower court acts in a "palpably arbitrary and unjust" manner. Report of Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49th Cong., 2d Sess., *reprinted in* 6 Moore, *Digest of Int'l Law* 667.

- The local remedies rule does not apply where "there is undue discrimination against the party injured on account of his nationality [or] where the local tribunals are appealed to, but justice was denied in violation of those common principles of equity which are part of the law of nations." Mr. Bayard, Sec'y of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. dom. Let. 138, *reprinted in* 6 Moore, *Digest of Int'l Law* 699.

Those principles should control this proceeding.

348. These principles apply with even greater force in the context of this case, where Claimants have suffered not one, but multiple denials of justice at every level of the Mississippi courts. But in any event, any one of those denials of justice is enough to impute responsibility to the state and preclude application of the local remedies rule, for "there is no conclusive authority to the effect that the double denial of justice should take place before relief could be asked." Ralston, *supra,* ¶ 115 at 86. *See also* Hyde, *International Law Chiefly as Interpreted and Applied by the United States* at 730 n.12 ("denial of justice can be predicated upon the decisions of judicial tribunals, *even* courts of last resort" (emphasis added)).

349. All that said, Claimants have already demonstrated, at the jurisdictional phase, that even if the local remedies rule were applicable, it has been amply satisfied. (TLGI Juris. Subm. 25-43; TLGI Final Juris. Subm. 26-57.) The Mississippi Supreme Court had ample opportunity to correct the wrong inflicted on Loewen, but refused to do so. Loewen gave Mississippi's judicial system multiple opportunities for self-correction; having been rebuked at every turn, Loewen was required to do no more. As Sir Robert concludes: "Far from being a

case where the local remedies were not exhausted, the international wrong committed by the United States actually arose from its response to the complainant's attempt to do precisely that." (Third Jennings Op. at 28; *see also* Sinclair Op. at 30.)

B. The Settlement With O'Keefe Did Not Waive Claimants' Rights To Pursue This Claim

350. The United States errs further in its efforts to cloak itself in the protections of Loewen's settlement with O'Keefe. According to the United States, Loewen's settlement with O'Keefe "br[oke] any possible causal link between the Mississippi judgments and Loewen's payment to O'Keefe" (U.S. Counter-Mem. at 104-05), and "disposed of" any liability that the United States might have in this NAFTA claim. (U.S. Counter-Mem. at 105-06). The United States' first argument is legally unsound; its second one is factually so. And even if the settlement with O'Keefe were otherwise applicable, the record amply supports the conclusion that the settlement was entered into under duress, for it was the only viable option available to Loewen.

1. The United States' "Causation" Argument Is Legally Unsupportable

351. Although the United States urges that Loewen's settlement with O'Keefe somehow broke the causal chain between the *O'Keefe* judgment and Claimants' damages, it does not even attempt to take account of the causation standard set forth in NAFTA, and it ignores the obvious and foreseeable connection between the judgment and the resulting settlements.

352. NAFTA Articles 1116 and 1117, which are phrased in the disjunctive, set forth two distinct causation standards. Those Articles make the NAFTA Parties liable for damages that "the investor (or enterprise) has incurred . . . by reason of, *or* arising out of, [the Party's] breach of a [NAFTA] obligation." (Emphasis added.) These two standards — "by reason of" and "arising out of" — are commonly understood to have distinct legal meanings, especially

when juxtaposed against each other. The term "by reason of" has generally been held to connote the traditional tort concept of proximate causation.[37] On the other hand, "arising out of" refers to a lesser degree of causal connection, as recognized by Canadian law,[38] British and Australian law,[39] and United States law.[40]

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[37] *See, e.g., Newcastle City Council v. GIO Gen. Ltd.* (1997), 149 A.L.R. 623, *27 (Austl.) ("The phrase 'by reason that' ordinarily suggests a direct and specific causal connection between two things"); *Holmes v. Sec. Inv. Protection Corp.,* 503 U.S. 258, 267-68 (1992) (interpreting "by reason of" in the U.S. Racketeer Influenced and Corrupt Organizations (RICO) Act to impose a proximate causation requirement) (citation omitted) (applying Massachusetts law); *Janssen-Cilag Pty. Ltd. v. Pfizer Pty. Ltd.*, (1992) 109 A.L.R. 638, *6 ("by reason of" means that "[l]oss or damage must directly result from or be caused by the respondent's conduct"); *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001) (phrase "by reason of" incorporates tort standard of proximate causation); *Sys. Mgmt., Inc. v. Loiselle*, 112 F. Supp. 2d 112, 114 (D. Mass. 2000) (same); *Medgar Evers Houses Tenants Ass'n v. Medgar Evers Houses Assocs.,* 25 F. Supp. 2d 116, 120 (E.D.N.Y. 1998) (same).

[38] *See, e.g., Amos v. Ins. Corp. of British Columbia,* [1995] 3 S.C.R. 405, ¶ 21 (Can.) ("With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase 'arising out of' is broader than 'caused by,' and must be interpreted in a more liberal manner"); *Strickland v. Miller*, [1998] A.C.W.S.J. 140499, ¶ 33 ("The words 'arising out of' require a causal or consequential relationship between the accident and the use or operation of the vehicle, although a direct or proximate causal relationship is not required."); *United States v. Friedland*, [1998] A.C.W.S.J. 140040, ¶ 98 (Ont. Ct.) ("'arising out of' does not demand proof of a direct causal relationship"); *Chan v. Ins. Corp. of British Columbia*, [1996] A.C.W.S.J. 78003, ¶ 20 (stating that "on the fundamental question of the meaning to be given to the words 'arising out of the use or operation' . . . . if the use or operation of the unidentified vehicle 'contributes' in some way to Ms. Chan's injuries, or if there is 'some connection' between its use or operation and her injuries, then Ms. Chan's claim would appear to fall within the ambit" of the phrase).

[39] *See, e.g., Dickinson v. Motor Vehicle Ins. Trust*, (1987) 74 A.L.R. 197, *4 (Austl.) ("The test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.") (citation omitted); *Repatriation Comm'n v. Law*, (1981) 36 A.L.R. 411, *10 (Austl.) (phrase "arising out of" is "satisfied by some less proximate causal relationship than the expression 'caused by' or 'resulting from'"); *Re Hamilton — Irvine and the Companies Act of 1985*, (1990) 94 A.L.R. 428, *5 (S. Ct. Norfolk Island) ("the words 'arising out of' import a relationship which has some causal element, even if not direct or proximate"); *Transport Accident Comm'n v. Jewell*, (1995) 1 V.R. 300, *28-29 (S. Ct. Victoria, July 7, 1994) ("there must remain a distinction between an incident 'directly caused by' and an incident 'directly arising out of' the driving of the motor

353. Under either causation standard, the settlement and the resultant injury inflicted upon Claimants were clearly "by reason of" or "arising out of" the Mississippi measures that breached Chapter 11; the settlement was a foreseeable, consequential link in the causal chain between the improper Mississippi measures and Loewen's injury. It should not require extensive proof or argument to establish that the *O'Keefe* settlement was proximately caused by, or at a minimum "ar[ose] out of," the State measures that are at the core of Claimants' complaint — even unaffiliated observers at the time of the *O'Keefe* litigation anticipated that the judgment could lead to a "settlement." (App. at A1182 ("The real question will be if this is not settled . . ."); *id.* at A1289 ("If Loewen's credit rating is affected, it may have an incentive to pay an excessive price to settle the case . . .").) And elsewhere in its Counter-Memorial, even the

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vehicle — otherwise there would be no point in preserving the two concepts . . . .Whatever is meant by the words 'directly caused by' the expression 'directly arising out of', appearing alongside them, is used in contrast to them and covers a wider field than 'directly caused by.'"); *Gov't Ins. Office v. R.J. Green & Lloyd Pty. Ltd.*, (1966) 114 C.L.R. 437, ¶ 10 (New South Wales) ("Bearing in mind the general purpose of the Act I think the expression 'arising out of' must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words 'caused by.'"); *Dunthorne v. Bentley,* 1996 R.T.R. 428*,* *3 (C.A. 1996) ("the phrase 'arising out of' contemplates a more remote consequence than is embraced by 'caused by'").

[40] *See, e.g.*, *Fed. Ins. Co. v. TRI-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998) ("the phrase 'arising out of' should be given a broad reading such as 'originating from' or 'growing out of' or 'flowing from' or 'done in connection with' — that is, it requires *some* causal connection to the injuries suffered, but does not require proximate cause in the legal sense") (emphasis added; citation omitted) (applying Oklahoma law); *United Nat'l Ins. Co. v. Penuche's, Inc.*, 128 F.3d 28, 32 (1st Cir. 1997) ("the concept of 'arising out of' is broader than proximate causation") (citation omitted) (applying New Hampshire law); *Linden v. Chicago, Burlington & Quincy R.R.*, 483 F.2d 29, 32-33 (8th Cir. 1973) ("The plain and ordinary meaning attributed to the phrase '*in any manner arising out of*'. . . does not . . . contemplate a showing of 'proximate cause,' . . . but instead contemplates only a causal connection. . . .") (citation omitted) (applying Nebraska law); *Acceptance Ins. Co. v. Syufy Enters.*, 69 Cal. App. 4th 321, 328 (Cal. Ct. App. 1999) (phrase "arising out of" "broadly links a factual situation with the event creating liability and connotes only a minimal causal connection or incidental relationship").

United States recognizes that civil litigation frequently leads to settlements even *after* a judgment is entered. (U.S. Counter-Mem. at 101 & n.67.)

354. Nonetheless, the United States contends that there can be no state responsibility because "the injuries alleged in this case flow directly from Loewen's payment of money, pursuant to a binding agreement, to settle a private dispute." (U.S. Counter-Mem. at 105.) But as this Tribunal has already recognized, in rejecting the United States' contention that judicial actions in private-party litigation are not Party "measures" under NAFTA, there was nothing "private" about the court action and inaction in the underlying dispute (*compare Loewen,* ¶¶ 53, 54), or the settlement, which Judge Graves himself ordered Loewen to pay on pain of execution. (App. at A1622-24; *see also* A1618-19; A1620-21.) Indeed, the United States elsewhere recognizes the state's involvement in this supposedly "private dispute." (U.S. Counter-Mem. at 106 n.71.)

355. Further, the *O'Keefe* settlement represented Loewen's efforts to mitigate its damages; even Willie Gary recognized that a settlement would "mitigat[e] future expenses." (App. at A1237.) Had Loewen rejected the opportunity to settle for less than the full judgment, the United States would surely be arguing that Loewen's damages be reduced to account for its failure to mitigate. *See* David J. Bederman, *Contributory Fault and State Responsibility*, 30 Va. J. Int'l L. 335, 358 (1990) (cited in U.S. Counter-Mem. at 105).

356. In all events, the issue raised by the United States — whether the settlement constitutes an intervening cause of damage that interrupts the causal chain — is its burden to prove. Bederman, *supra,* at 368 ("The burden of proof is placed on the respondent because contributory fault has more the qualities of an affirmative defense, rather than an element of the claim."). *See generally* Cheng, *General Principles of Law* at 334 ("the burden of proof rests

upon the party alleging the fact"); Dan B. Dobbs, *The Law of Torts* § 150, at 361 (2000) ("The defendant [has] the burden of proving any affirmative defense," including a claim that the plaintiff contributed to his own injury); *Kelley v. Wiggins*, 724 S.W.2d 443, 450 (Ark. 1987) ("the burden of proof on intervening cause rests with the party asserting it"). For the reasons set forth above, the United States has failed to carry that burden.

2. The United States Is Not A Beneficiary Of The *O'Keefe* Settlement

357. The United States further errs in its contention (U.S. Counter-Mem. at 105-06) that it is somehow the beneficiary of the *O'Keefe* settlement, *i.e.,* that Loewen's settlement actually waived this NAFTA claim. The benefits of the *O'Keefe* settlement ran only to the signatories to that agreement (Loewen and O'Keefe), not to the non-party United States.

358. Under settled principles of international law, settlement does not preclude a claimant from seeking international relief unless that settlement is with the respondent State *and* purports to extinguish the international claim. The United States' own international authority states the unexceptional rule that "[n]o claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled *the claim.*" Sohn & Baxter, *1961 Draft Convention 186* (emphasis added). An explanatory note confirms that this paragraph "does no more than to state the truism that a claimant is bound by any freely negotiated agreement by which he has waived, compromised, or settled his claim after the injury complained of." *Id.* at 190. *See also id.* at 191 ("[I]t is normal in municipal law for a respondent to require a release by a claimant of any further *claim against the respondent* as an incident of the settlement of the claim, and there is no valid reason for not extending *this principle* to *claims against States.*") (emphasis added)). In other words, a "claim" against a respondent state is barred (absent duress) only if the claimant previously settled *that claim* with the respondent state.

359. The Second and Third Restatements reiterate this point. *See Restatement (Second) of Foreign Relations* § 203 (1965) ("A waiver or settlement by an alien *of a claim against a state,* made after an injury attributable to that state but before espousal . . . , is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not made under duress.") (emphasis added); *Restatement (Third)* § 713 cmt. g (1987) ("A state's claim against another state for injury to its nationals fails if, after the injury, the person waives the claim or otherwise reaches *a settlement with the respondent state.*") (emphasis added).

360. This international law principle is in accord with municipal law in leading nations, under which the benefits and duties contained within a settlement agreement accrue only to the parties to that agreement, and only to the extent provided therein. *See, e.g., Canada v. St-Amand* (1994), 170 N.R. 317 (Fed. C.A.) ("An amount paid by a defendant to settle an action cannot be deemed to have been paid in settlement of claims different from those asserted in the action."); *University of Manitoba v. Sanderson Estate* (1998), 155 D.L.R. (4th) 40 (B.C.C.A.) (settlement could not be invoked by non-signatory defendant to defeat plaintiff's claims); *Mulholland v. Doneley* (1899) 9 Q.L.J. 260 (Q. Sup. Ct. F.C.) (same); *Laws of New Zealand*, Estoppel ¶¶ 2, 24 (1994) (judgment "does not raise an estoppel against third persons or strangers" or unrelated causes of action); *Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F.2d 685, 689 (D.C. Cir. 1963) (defendant who sued a third party for indemnity "did not lose its contract right to indemnification simply because it settled [the original] plaintiff's claim").[41]

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[41] *See also Chief Const. Co. v. McDonald* (1987) 3 W.W.R. 38, 76 A.R. 344 (Q.B.) (settlement with one defendant does not release the other); *United Dairies v. Felletti*, 1992 NSW LEXIS 7066, at *21 (NSW Ct. App., April 3, 1992) (settlement "only binds the parties to it" and "has no effect, as such, on the rights of another party"); *The French Civil Code*, Article 1165 (John H. Crabb, trans., Rev. ed. 1995) ("Agreements are effective only between the contracting parties; they do not harm a third party, and they benefit him only in the case [of a specifically identified third-party beneficiary]."); Laws of New Zealand, Estoppel ¶ 29 ("the only persons

361. Even aside from the fact that the United States was not a party to the *O'Keefe* settlement, that agreement cannot bar this NAFTA claim because the settlement did not purport to waive any claims beyond the *O'Keefe* litigation. The United States errs in contending that the settlement "disposed of" its liability. (U.S. Counter-Mem. at 106.) The United States grounds this claim in a release providing "a full accord and satisfaction of all claims and causes of action in the premises as against the Releasees and any and all other persons, firms, and/or corporations having any liability in the premises." (App. at A1609.) But the United States was not a "Release[e]" (a term defined in the Release (*see* App. at A1605-06) as O'Keefe and his affiliates and privies), and is not a "perso[n], fir[m], and/or corporatio[n]." Furthermore, the United States' NAFTA liability was not part of the "accord and satisfaction" of any "claims and causes of action in the premises" of the Mississippi courts.

362. The other provisions of the Release on which the United States relies are similarly unhelpful to it. The provision indicating that the Release sought "to end this matter forever" (App. at A1610) plainly refers to the "civil action" defined in the first sentence of the release, *i.e.,* the *O'Keefe* case. (App. at A1605.) Similarly, Loewen's waiver of future claims (App. at A1609) ran only to the benefit of the actual "Releasees," *i.e.,* the O'Keefe parties, their affiliates and privies. (*See* App. at A1605-06.)

363. Under United States law, a non-signatory may be treated as a third-party beneficiary of a settlement agreement only where the settlement reflects "the express or implied intention of the parties to benefit the third party." *Frank & Breslow, LLP v. United States*, 43 Fed. Cl. 65, 67 (Fed. Cl. 1999). There is no indication that the *O'Keefe* parties intended their

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who may take advantage of estoppel per rem judicatam are those who would have been bound by the decision had the question been decided the other way, that is to say, the parties and their

settlement agreement to benefit the United States in any way, and the United States would have to bear a particularly high burden of proof in order to establish that — despite its absence from the negotiations of the *O'Keefe* settlement, and despite the absence of any consideration flowing from the United States to Loewen — the settlement was implicitly intended to settle not only the dispute between Loewen and O'Keefe, but also a NAFTA Chapter 11 action against the United States of a kind that had never been brought as of January 1996.

364. Finally, the United States argues (U.S. Counter-Mem. at 106) that "Claimants cannot assert, on the one hand, that O'Keefe represented the State for purposes of the NAFTA but, on the other hand, did not for purposes of the settlement agreement." This reflects a fundamental misunderstanding of Claimants' arguments, and, indeed, of the very nature of the NAFTA breaches at issue here. Claimants do *not* assert — and have never asserted — that "O'Keefe represented the State for purposes of the NAFTA." What Claimants asserted was that "the threat of execution, even by a private party, constitutes 'state action' under federal law." (TLGI Juris. Subm. at 47.) That assertion does not even remotely suggest that O'Keefe "represented" the state of Mississippi for domestic-law purposes, much less that O'Keefe "represented" the United States for NAFTA purposes.

3. In Any Event, The Settlement Agreement Was Entered Into Under Duress

a. This Tribunal Need Not Reach The Duress Issue

365. The United States devotes the lion's share of its Counter-Memorial (at 73-104) to contending that the *O'Keefe* settlement was not made under duress. That issue arises only if the settlement purported to waive the Claimants' NAFTA claims against the United States, and only

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privies").

if Claimants nonetheless sought to avoid the waiver. Because the *O'Keefe* settlement did *not* cut off Claimants' rights against the United States, for the reasons set forth above, this Tribunal need not reach the question whether the settlement was made under duress, and it need not reach the related question whether Loewen had reasonable alternatives to the settlement.

366. Nonetheless, as Claimants demonstrated at the jurisdictional stage of this case and briefly reiterate below, the *O'Keefe* settlement is a textbook case of duress that would vitiate the agreement even if it did run in favor of the United States.

b. The United States' Version Of "Duress" Is Not Supported By Its Authorities

367. As Claimants have previously shown (TLGI Mem. at 124-34 (citing authorities)), a settlement is made under duress, and thus voidable, if it was the product of improper economic compulsion and left the settling party no reasonable alternative. The United States responds that "the mainstream of duress jurisprudence in the leading common-law jurisdictions is particularly restrictive" (U.S. Counter-Mem. at 76) and that Loewen was not under duress so long as "effective further resort to the courts was available" to it. (U.S. Counter-Mem. at 74).

368. The United States overstates its authority. Citing *Oxxford Clothes XX, Inc. v. Expeditors Int'l of Washington, Inc.,* 127 F.3d, 574, 579 (7th Cir. 1997), the United States asserts that "[t]he hallmark of any claim of duress is that the victim has *no alternative* to the agreement." (U.S. Counter-Mem. at 78 (emphasis added).) But the language of the actual holding is different: "The hallmark of duress or extortion is that the victim has *no feasible legal remedy*." 127 F.3d at 579 (emphasis added). The distinction is significant: "no alternative" is an absolute statement, while "no feasible legal remedy" necessarily requires an inquiry into the "feasibility," *i.e.,* the reasonability and effectiveness, of alternatives to the settlement.

369. Another United States source expressly requires the absence of "reasonably available" alternatives to settlement. *Undersea Eng'g & Constr. Co. v. ITT Corp.*, 429 F.2d 543, 550 (9th Cir. 1970) (cited in U.S. Counter-Mem. at 78-79). In *Undersea Engineering*, such alternatives were available because for more than 15 months the party seeking to void the settlement "threatened and could have filed suit but instead, chose to pursue the avenue of settlement." 429 F.2d at 550. In fact, the settling party was itself "using every threat of economic and moral pressure to coerce and force ITT to settle rather than face a law suit with threatened world-wide publicity." *Id.* at 549. Such alternatives are a far cry from the predicament faced by Loewen in late 1995 and early 1996.

370. The United States also cites (U.S. Counter-Mem. at 74 n.45) a law review article authored by the President of this Tribunal (Sir Anthony Mason, *The Impact of Equitable Doctrine on the Law of Contract,* 27 Anglo-Am. L. Rev. 1, 2 (1998)) for the proposition that, in England, "there has been an evident concern on the part of Judges to protect commercial transactions from an overdose of good conscience standards." But the United States omits Sir Anthony's conclusion that England is well outside the mainstream of other Anglo-American legal systems in this regard:

> This article describes how equitable doctrines concerned with unconscionable conduct are influencing the modern law of contract. That influence has been more extensive in Australia, Canada and New Zealand than it has been in England. The advances made in Australia, Canada and New Zealand have drawn heavily on the great American equity lawyers — Chancellor Kent, Story, Pomeroy, Cardozo and Learned Hand. *On the other hand,* in England, there has been an evident concern on the part of Judges . . . .

Mason, 27 Anglo-Am. L. Rev. at 2. In light of this difference, it is little surprise that so many of the duress authorities relied upon by the United States come from England. (*See* U.S. Counter-Mem. 76, 78-80.) Nonetheless, even the English law of economic duress, much like the United

States authority discussed above and in the United States' Counter-Memorial, looks to "whether or not the victim had a *reasonable alternative.*" *Chitty on Contracts* § 7-019 at 421 (section entitled "Reasonable alternative") (emphasis added).

371. Thus, even the United States' own authorities agree with the Claimants' position that, to negate a showing of duress, the proposed course of action must be both effective as a remedy and reasonably available to the claimant. *See, e.g.*, *Restatement (Second) of Contracts* § 175 cmt. b (1981) (duress exists where there is no "*reasonable* alternative"; the "mere availability of a legal remedy is not controlling if it will not afford effective relief to one in the victim's circumstances") (emphasis added) (cited in U.S. Counter-Mem. at 78).

372. This standard is manifestly no different from that prescribed by the inapplicable "local remedies rule" — a local remedy must be both "reasonably available" (*see* TLGI Juris. Subm. 27 (citing authorities)), and "effective," *i.e.,* "adequate to ensure the satisfactory reparation of the damage sustained." F.V. Garcia-Amador, *State Responsibility: International Responsibility: Report by F.V. Garcia-Amador, Special Rapporteur* [1956] II Y.B. Int'l L. Comm'n 173, 204. (*See generally* TLGI Juris. Subm. at 26-28; TLGI Final Juris. Subm. at 26-29.) We addressed each of the United States' proffered alternatives (then submitted as "local remedies"; now suggested as defenses to "duress") in our jurisdictional filings and at the October 2000 jurisdictional hearing. Those showings demonstrate that the United States' proposed alternatives were neither "reasonably available" nor "effective," but we address them briefly below.

c. Federal Injunctive Relief Was Not Reasonably Available To Claimants

373. The United States only briefly continues to press the theory, thoroughly refuted by Claimants in the jurisdictional phase of this case, that injunctive relief in the Supreme Court

of the United States was a feasible option to the Claimants in the face of the Mississippi Supreme Court's refusal to allow Loewen a supersedeas bond on reasonable terms. (U.S. Counter-Mem. at 81-82.)[42] Claimants will rely in largest part on their prior showings with respect to this issue (TLGI Juris. Subm. at 28-30; TLGI Final Juris. Subm. at 30-38), but add the following brief responses to specific statements contained in the United States' Counter-Memorial.

374. The United States cites several cases demonstrating that economic duress is not present where "an allegedly coerced party could have appealed and sought emergency injunctive relief." (U.S. Counter-Mem. at 80-81.) We have no quarrel with that unexceptional proposition. None of the cited cases, however, addresses whether a party such as Loewen, faced with an unpublished two-sentence order finding "no abuse of discretion" (App. at A1176), could possibly have obtained certiorari review in the U.S. Supreme Court under the extremely narrow standards of that Court's Rule 10. Nor do these cases address our unrebutted contention that, absent a "reasonable probability" of certiorari review, the U.S. Supreme Court would have refused to issue *any* interim injunctive relief. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice) (quoted in First Tribe Stmt. at 17). As Professor Fried has explained, "TLGI had nowhere to go" because the U.S. Supreme Court, which does not sit to remedy injustices in individual cases, "would not have heard them." (Fried Op. at 24.)

375. Citing other cases, the United States next suggests that economic duress cannot be present *even if* "the pursuit of alternatives would have been 'difficult,' 'futile,' or ineffective." (U.S. Counter-Mem. at 81.) That assertion contradicts the United States' own prior concession that economic duress *is* present if an improperly coerced agreement was "the only choice

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[42] The United States appears to have abandoned its even more fantastic suggestion that Loewen, despite the unanimous Supreme Court decision in *Pennzoil Co. v. Texaco, Inc.*, 481

reasonably available to the party challenging it" (*id.* at 78-79 (emphasis shifted and citation omitted)) or if, alternatively, "there was no real alternative." *Id.* at 79. In any event, the cited cases all squarely recognize the duress principles urged here by Claimants. *See*, *e.g.*, *Beijing Metals & Minerals Import/Export Corp.*, 993 F.2d 1178, 1184-85 (5th Cir. 1993) (duress requires wrongful threat "such as to destroy free agency without present means of protection"); *JPM, Inc. v. John Deere Indus. Equip.*, 94 F.3d 270, 272 (7th Cir. 1996) (duress requires wrongful threat "which deprives the victim of his unfettered free will"). Furthermore, as the United States itself urged in the *ELSI* case:

> [T]he principle of exhaustion of local remedies does not require an injured national to pursue a highly speculative and unlikely means of redress. The principle is satisfied if there is no effective local remedy 'as a matter of reasonable possibility.' . . . In this case, local counsel advised Raytheon that a suit based on the Treaty could not succeed.

ICJ *Pleadings* (Vol. II), U.S. Reply at 376 (quoting *Norwegian Loans* case, I.C.J. Reports 1957, p.39 (separate opinion of Judge Lauterpacht) and *Barcelona Traction* case, Second Phase, I.C.J. Reports 1970, pp. 144-45, 284 (separate opinion of Judge Gros)). *See also Chitty on Contracts* § 7-019 at 421 (where there is "reason to think that [redress at law] would not protect or compensate" the plaintiff, there is no "reasonable alternative"). As Claimants have demonstrated, that standard is readily satisfied here.

376. Finally, citing the opinion of Professor Greenwood — who admits that he himself is "not in a position to assess" whether Loewen could have obtained review in the U.S. Supreme Court (Greenwood Op. at 27) — the United States invites this Tribunal to simply refuse to resolve issues of municipal law as to which there is conflicting expert testimony, and decide

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U.S. 1 (1987), could have obtained injunctive relief by collaterally attacking the Mississippi

those issues based on the asserted allocation of the burden of proof to the Claimants. (U.S. Counter-Mem. at 82.) Because the United States would bear the burden of proving the availability of an alternative remedy, that approach would favor the Claimants. Even so, Professor Greenwood's approach is misguided. As the *ELSI* tribunal explained:

> Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law.'

ELSI, ¶ 62. Here, municipal jurisprudence makes clear that the intercession of the Supreme Court of the United States, to review an unpublished opinion stating only that a trial court had not "abuse[d] its discretion" under state law (A1176), was at best a "highly speculative and unlikely means of redress." *ELSI*, I.C.J. *Pleadings* (Vol. II), U.S. Reply at 376.

d. A Supersedeas Bond Was Neither Reasonably Available Nor Effective

377. In its Counter-Memorial, the United States does *not* contend that a supersedeas bond in the amount of $625 million was ever available to Loewen, or that the availability of a supersedeas bond in that amount precludes a finding of duress. Nonetheless, in the "Background" section of its Counter-Memorial (at 57-64), the United States makes several erroneous factual assertions regarding Loewen's efforts to obtain a supersedeas bond.

378. *First,* the United States recounts portions of a filing made by O'Keefe in the Mississippi Supreme Court, which accused Loewen of "perpetrat[ing] a fraud on the court by claiming an inability to post the full bond." (U.S. Counter-Mem. at 61-62 (citing U.S. App. 0798).) But, as we have earlier shown, this filing by O'Keefe was itself fraught with misleading

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Supreme Court's bonding decision in a federal district court.

statements, as demonstrated in Loewen's response to that filing, which the United States does not mention. Although O'Keefe represented to the Mississippi Supreme Court that Ray Loewen had said, in a conference call with investors, that "we will be able to deal with the very worst case scenario, and we will be able to *pay for* this thing and win in the final, in the final judgment" (App. at A2881, emphasis added), Loewen's official transcript of that conference call, which it submitted to the Mississippi Supreme Court, made clear that he had actually said "we will be able to deal with the very worst case scenario, and we will be able to *fight* this thing and win in the final judgment." (App. at A2977 (emphasis added); *see also* App. at A1383.)

379. This was not the only critical misstatement in O'Keefe's filing. O'Keefe also represented that Loewen official Peter Hyndman had reported to the investors that, "being a responsible corporation, we have the contingency *funds* for every possible contingency." (U.S. App. at 0836 (emphasis added); *see also* U.S. App. at A0801-02.) The correct statement, spoken by Loewen's Chief Financial Officer Paul Wagler, was this: "[B]eing a responsible corporation, we have the contingency *plan* for every possible contingency." (App. at A2981; *see also* A1387.) As Loewen explained to the Mississippi Supreme Court: "Nothing said in the transcript suggests that one of those plans includes the availability of funds with which to make a $625 million bond." (App. at A2951.) In fact, a contemporaneous report authored by U.S. declarant Steve Saltzman — which was attached to Loewen's responding brief before that court (App. at A2984-86) — showed that Loewen's description of its "financial picture" was "entirely correct." (App. at A2951-52.)

380. The Mississippi Supreme Court thought nothing of O'Keefe's meritless "fraud-on-the-court" allegations. After hearing those allegations (on December 15, 1995), and Loewen's defense (on December 19, 1995), the Mississippi Supreme Court ruled in Loewen's

favor by indefinitely extending Loewen's $125 million bond (App. at A1394 (Dec. 19, 1995)). Then, in its final bond ruling on January 24, 1996, the Mississippi Supreme Court ruled only that it "f[ound] no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond, and that the trial court properly followed M.R.A.P. 8." (App. at A1176.) That ruling could not have credited O'Keefe's "fraud" argument, which had never been presented to "the trial court" for its consideration. (*See* Clark Stmt. at 11 n.7.)

381. *Second,* the United States suggests that, while the bond issue was pending before the Mississippi Supreme Court, Loewen improperly "continued with its plans to raise more capital." (U.S. Counter-Mem. at 62.) The United States' assertion is at best ironic. As their own citation (U.S. App. at 0653) makes clear, Loewen was at the time struggling to determine how to finance $200 million worth of "pre-November 1 acquisition obligations" in the face of the *O'Keefe* judgment. Loewen had to go through with these "pre-November 1 acquisition obligations," as to which it was already under contract. (*See generally* TLGI Mem. at 53-54; App. at A1193.) Indeed, the document cited by the United States, a letter from corporate counsel Wynne Carvill to Ray Loewen, points out that the only way Loewen would be able to avoid breaching its existing contractual obligations was (a) "a favorable bond decision" from the Mississippi Supreme Court, (b) "post[ing] a $625MM bond," or (c) "we settle *O'Keefe*." (U.S. App. at 655.) The first option evaporated the next day, and the second was never viable, as Claimants already have demonstrated.

e. Appeal Without Supersedeas Was Not Effective

382. The United States, along with its expert witness Jack Dunbar, argues that Loewen could have effectively appealed the *O'Keefe* judgment without a supersedeas bond, because O'Keefe's execution on the judgment was not "the 'menacing and imminent reality' Claimants

allege." (U.S. Counter-Mem. at 89; *see* Dunbar Stmt. at 53.) The United States' assertion is impossible to square with the law, and contradicted by the facts.

383. As the United States concedes (U.S. Counter-Mem. at 90), the Uniform Enforcement of Foreign Judgments Act (UEFJA)[43] was specifically designed to provide "'speedy and economical'" execution of the Mississippi judgment in all "forty-plus states where Loewen held virtually all of its U.S. assets." (*See* App. at A1992-93.) Indeed, as U.S. case law states, "[t]he UEFJA is intended to be a speedy and economical method of recognizing foreign judgments consistent with the United States Constitution." *Rion v. Mom and Dad's Equip. Sales and Rentals, Inc.*, 687 N.E.2d 311, 313 (Ohio Ct. App. 1996).[44] Yet from this premise, the United States inexplicably concludes that the threat of execution outside Mississippi was neither "realistic" nor "imminent" because the UEFJA procedure is "not automatic," but would have required O'Keefe to follow several procedural steps. The flaw in the United States' submission is its portrayal of these ministerial steps as complicated and time-consuming.

384. It is undisputed that O'Keefe's lawyers stated early, and often, their desire to begin dismembering Loewen as soon as possible:

> "[I]f they can't post bond within 10 days (Nov. 30) we'll take over and start operating the business throughout North America, Canada and Puerto Rico," says [Willie] Gary. "I'll start embalming next week."

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[43] All references to the UEFJA refer to the 1964 revision; the UEFJA was originally drafted in 1948.

[44] *See also, e.g., Citibank (South Dakota), N.A. v. Phifer*, 887 P.2d 5, 6 (Ariz. Ct. App. 1994) ("The purpose of the Uniform Act is to provide the enacting state with a speedy and economical method of enforcing foreign judgments so as to prevent the cost of harassment that would result if further litigation were required."); *Firstar Bank Milwaukee, NA v. Cole*, 678 N.E. 2d 668, 670 (Ill. App. Ct. 1997) ("The purpose of the Act is to implement the full faith and credit clause of the United States Constitution and to facilitate the enforcement of interstate judgments by providing a summary procedure through which a party in whose favor a judgment has been rendered may enforce the judgment expeditiously in any jurisdiction where judgment debtor is found.").

(App. at A1133 (quoting a funeral industry publication); *see also* App. at A1470-71; U.S. App. at 191-92.)

385. The first step for out-of-state execution under the UEFJA would have required O'Keefe to enroll the Mississippi judgment in those other states. (U.S. Counter-Mem. at 91.) But enrollment requires nothing more than filing an authenticated copy of the judgment "in the office of the Clerk of any [District Court of any city or county] of" the foreign state. *See* UEFJA § 2, 13 U.L.A. 154 (1986) (brackets in originals); *see also* Ga. Code Ann. § 9-12-132 (1993).[45] That is immediate, and no obstacle at all.

386. The United States then observes (U.S. Counter-Mem. at 91) that enrollment must be followed by service of notice that the judgment has been enrolled. But the UEFJA requires the clerk of court to mail such notice "promptly," and does *not* suspend execution until such mailed notice has actually been received. *See* UEFJA § 3(b), 13 U.L.A. 172; *see also* Ga. Code Ann. § 9-12-133. In fact, there is generally no requirement that notice be served at all, so long as it was mailed, and even then it is sufficient that notice be sent by regular mail to the judgment debtor's last known address. *See, e.g., Tri-Steel Structures, Inc. v. Hackman,* 883 S.W.2d 391, 394 (Tex. Ct. App. 1994). Moreover, the judgment creditor may elect to accelerate the process by mailing the required notice himself, and then filing proof of mailing with the Clerk when enrolling the judgment. *See* UEFJA § 3(b). Thus, notice is also no obstacle to speedy execution.

387. The United States next contends (U.S. Counter-Mem. at 91-92) that foreign execution was not imminent because, after enrollment and notice, "O'Keefe would have had to wait a prescribed period of time . . . to allow Loewen time to appear and either challenge the judgment as invalid under Mississippi law, or seek a stay of enforcement." Although some states

impose such a waiting period, the United States fails to point out that several states do not. The states with *no* waiting period include Georgia (where Loewen had 44 funeral homes and 16 cemeteries in 1995), *see* Ga. Code Ann. § 9-12-133, and Texas (where Loewen had 66 funeral homes and 11 cemeteries at the end of 1995). *See* Tex. Civ. Prac. & Rem. § 35.003;[46] *see generally* U.S. Counter-Mem. at 91 (stating that Loewen held significant property, and was thus "most concerned about execution proceedings in" Georgia and Texas, among others).

388. Pennsylvania, too (where Loewen had just completed a major acquisition in 1995, *see* App. at A1963), likewise imposes no statutory waiting period. 42 Pa. Stat. Ann. § 4306(c); *see also Everson v. Everson*, 431 A.2d 889, 895 (Pa. 1981) (Pennsylvania law "provides that *at any time after the filing of a foreign judgment,* a levy may be made on any property of the judgment debtor subject to execution *regardless of whether final judgment has been obtained*" (emphasis added)). Six other states, where Loewen held a total of 49 funeral homes and 15 cemeteries (App. at A1992-93), likewise impose no statutory waiting period. *See* D.C. Code Ann. § 15-353 (1981); 735 Ill. Comp. Stat. Ann. § 5/12-653 (West Supp. 2001); Kan. Stat. Ann. § 60-3003 (2000); Mo. R.C.P. 74.14 (2001); S.D. Codified Laws § 15-16A-5 (2000); Va. Code

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[45] The precise language of this section of the UEFJA may vary from state to state, although the requirements remain essentially the same.

[46] Although acknowledging the absence of a statutory waiting period in Texas, the United States avers (U.S. Counter-Mem. at 92 n.59) that the Texas Court of Appeals' decision in *Moncrief v. Harvey,* 805 S.W.2d 20 (Tex. Ct. App. 1991), "suggest[s a] 30 day time period under Texas law." In fact, the court in *Moncrief* noted that it had "remarked before that the absence of express statutory procedures for defending against a foreign judgment leaves the judgment creditor in a 'procedural quandary.'" Although the court in *Moncrief* held that the judgment debtor there was entitled to challenge enforcement of the foreign judgment that was at issue, it *did not* hold that execution on the judgment was barred until the judgment debtor had an opportunity to mount a challenge. And a later decision issued by the same court held that a judgment debtor who claimed that he had never received notice of execution was not denied an adequate opportunity to defend because it could raise the same defenses *after* a writ of garnishment had issued. *See Tri-Steel Structures,* 883 S.W.2d at 394-95.

Ann. § 8.01-465.3 (2000). And New York, where Loewen held 25 funeral homes and two cemeteries (App. at A1992-93), imposes a 30-day waiting period on the distribution of proceeds from execution, but still allows immediate execution. *See* N.Y.C.P.L.R. § 5403. In other states where Loewen had property, the waiting period is only five days,[47] or ten days.[48]

389. The United States also says (U.S. Counter-Mem. at 92) that execution was not imminent because "a judgment debtor generally can seek a stay of execution under the laws of the foreign state." But under the UEFJA, a stay could be granted only under two circumstances, neither of which would have been realistically available to Loewen. Section 4(a) of the UEFJA authorizes stay of execution if the judgment debtor shows that it has appealed *and* "furnished the security for the satisfaction of the judgment[s] required by the state in which it was rendered." UEFJA § 4(a), 13 U.L.A. 175. Such "security" — *i.e.*, the $625 million bond — simply was not available. Section 4(b) of the UEFJA authorizes a stay if the judgment debtor shows grounds for a collateral attack judgment — which are limited to lack of jurisdiction, procurement of the judgment by fraud, or a facial and nonamendable pleading defect showing that the judgment was void on its face. UEFJA § 4(b); Ga. Code. Ann. § 9-11-60(d); *Dep't of Human Resources v. Fenner*, 510 S.E.2d 534, 536 (Ga. Ct. App. 1998); *Firstar Bank Milwaukee, NA v. Cole,* 678 N.E.2d 668, 670 (Ill. App. Ct. 1997). None of these extremely narrow grounds was applicable to the *O'Keefe* judgment. Moreover, Loewen still would have had to satisfy the bonding requirement of any state in which it sought a stay. UEFJA § 4(b)

390. Finally, the United States' argument suffers from a lack of any real-world perspective. The theoretical availability of retrospective remedies for "wrongful execution" in

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[47] *See, e.g.*, Idaho Code § 10-1303(c); Or. Rev. Stat. § 24.125(3) (1999); Wyo. Stat. Ann. § 1-17-704 (2000).

the event of reversal (U.S. Counter-Mem. at 89; Dunbar Stmt. at 5-6, 8-9) would have little practical significance to a publicly traded company like Loewen. As all the stock-market analysts immediately recognized, the mere prospect of uncertainty was working devastation on the company's public value, and thus its shareholders. (*See, e.g.,* App. at A1177 (advising investors to "HOLD" with respect to Loewen stock trading and noting that it might "revisit our rating once we have more information and more comfort"); A1182 ("The timing of process remains the major unknown, as it is not within the Loewen Group's control."); A1248 ("We are maintaining our HOLD investment rating on Loewen's stock due to the continued uncertainty regarding the size of the judgment in the Gulf National case . . ."); A1271 ("we need to see resolution of these issues"); A1293 ("the increased uncertainty has us concerned"); A1309 ("we remain concerned, and need resolution of important issues"); A1341 (same); A1358 (same); A1415 (same).) And as we explained to the Tribunal at the jurisdictional hearing, allowing a state-supervised execution of the *O'Keefe* judgment on even a single funeral home or cemetery would have risked crippling the company's standing and goodwill in the eyes of its stockholders, lenders, employees, and customers. A company cannot possibly be compelled to take that risk — indeed, to risk its very corporate existence — as a precondition to international relief.

f. Bankruptcy Was Not Effective

391. Claimants have demonstrated, in their prior submissions and at the September 2000 jurisdictional hearing, that bankruptcy was not a reasonable or effective local remedy. Those same showings demonstrate that bankruptcy does not, as the United States claims, "defeat an economic duress claim." (U.S. Counter-Mem. at 83.) In its few new arguments, the United

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[48] *See, e.g.,* Colo. Rev. Stat. Ann. § 13-53-104(3) (West 2000); N.D. Cent. Code § 28-20.1-03(3) (1999).

States still offers *no* international law authority for the proposition that bankruptcy is a reasonable remedy, and it offers no municipal authority from *any* country other than the United States. The most that it can muster are a handful of U.S. cases that do not even reflect the mainstream of U.S. law.

392. *First,* the United States cites a series of lower U.S. federal-court cases that, it says, "'h[o]ld that bankruptcy is a valid legal option sufficient to defeat an economic duress claim.'" (U.S. Counter-Mem. at 83 (quoting *Capizzi v. Fed. Deposit Ins. Corp.,* 1993 WL 723477 at *9 (D. Mass. 1993)).) In point of fact, the three cases primarily cited by the United States — *Capizzi; Freedlander, Inc. The Mortgage People v. NCNB Nat'l Bank of N.C.,* 706 F. Supp. 1211 (E.D. Va. 1988); and *Fed. Deposit Ins. Corp. v. Linn,* 671 F. Supp. 547 (N.D. Ill. 1987) — simply rely on *Linn*'s statement that "[a]ny resulting *financial embarrassment* from declaring bankruptcy is not sufficient to explain why such legal redress would be inadequate." *Linn,* 671 F. Supp. at 560 (emphasis added), cited in *Freedlander,* 706 F. Supp. at 1220, and in *Capizzi,* 1993 WL 723477 at *9-*10. Even assuming that bankruptcy were an effective option for plaintiffs claiming little more than "financial embarrassment," *see Linn,* 671 F. Supp. at 560-61; *Freedlander,* 706 F. Supp. at 1220-21; *Capizzi,* 1993 WL 723477 at *10, as we have earlier detailed, Loewen, had it been forced to file for bankruptcy, would have suffered economic devastation far greater than the mere "embarrassment" at issue in these cases.

393. Moreover, *Capizzi* and *Freedlander* expressly noted that the state law of duress in Massachusetts and Virginia, respectively, was uncharacteristically narrow. *Capizzi,* 1993 WL 723477 at *9 (relying on *Freedlander's* view of Virginia law to interpret Massachusetts law because "economic duress under Virginia law . . . is substantively similar to Massachusetts' treatment of the defense"); *Freedlander,* 706 F. Supp. at 1221 n.5 ("it doesn't appear that in the

field of contracts the doctrine of unconscionability has progressed in Virginia beyond the protection of widows and weak-minded from those who would prey upon them"). Whatever may be said of these three cases, they plainly do not constitute an "overwhelming weight of authority." (U.S. Counter-Mem. at 85.)

394. Perhaps because the law of duress in Massachusetts, Virginia and Illinois is unduly harsh, the cases cited by the United States are plainly outside the mainstream of United States and international law. Williston, the esteemed contracts scholar, concludes that "[t]he mere existence of several choices open to the victim does not preclude the possibility of duress. It is only necessary that the instigator force the victim to choose between distasteful and costly situations, i.e., *bow to the duress or face bankruptcy,* loss of credit rating, or loss of profits from a venture." *Williston on Contracts* § 1617, at 706 (3d ed. 1970) (emphasis added). And the more significant body of United States law holds that the mere threat of bankruptcy is *precisely* the sort of "dire business necessity" that will sustain a claim of duress. *Becker v. New Haven Sav. Bank,* 1985 WL 5965, at *7 (D. Conn. 1985) (holding that "dire business necessity, such as impending foreclosure or bankruptcy," could "establish grounds for a finding of duress if defendant's behavior is shown to have been unreasonable"); *Rich & Willock, Inc. v. Ashton Dev., Inc.,* 157 Cal. App. 3d 1154, 1158-61 (Cal. Ct. App. 1984) (holding that settlement and release "were the products of economic duress" because plaintiff "succumbed to [coercive tactics of defendants] only to avoid economic disaster to [itself] and the adverse ripple effects of their bankruptcy on those to whom [it was] indebted"); *Litten v. Jonathan Logan, Inc.*, 286 A.2d 913, 915-918 (Pa. 1972) (economic duress established where the plaintiffs' only recourse to avoid bankruptcy "was to sign the [less favorably] written agreement."); *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 24 (Alaska 1978 (duress proven where, among

other things, claimant "was faced with impending bankruptcy");[49] *see also Leeper v. Beltrami*, 53 Cal. 2d 195, 204-05 (Cal. 1959) (characterizing as "unsound" defendant's argument that plaintiff was not under duress because she could have allowed her home to be sold at a foreclosure sale and then contested the foreclosure action; "a reasonably prudent person would not have taken such action").

395. The United States' efforts to dismiss non-U.S. sources on the remedial nature (or, more accurately, the *non*-remedial nature) of bankruptcy as "entirely irrelevant" (U.S. Counter-Mem. at 85 n.50) are not well taken. The United States itself has conceded that "'the general principles of law recognized by civilized nations' may be regarded as a source of international law." (U.S. Juris. Resp. at 12 (quoting Stat. of I.C.J., art. 38(1)(c).) And it is highly significant that these non-U.S. sources are in accord with the majority view of the nature of U.S. bankruptcy.

396. *Second,* the United States dismisses as "entirely obsolete" (U.S. Counter-Mem. at 85) the U.S. Supreme Court's decision in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), which held that bankruptcy was an "irreparable injury" that would support the granting of an injunction. The United States dismisses that decision because, in its view, the 1978 amendments to the U.S. Bankruptcy Code transformed bankruptcy under U.S. law from an "irreparable injury" to "a formula for success." (U.S. Counter-Mem. at 86 (quoting Bradley & Rosenzweig,

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[49] In a footnote, the United States speculates that in *Northern Fabrication Co., v. UNOCAL*, 980 P.2d 958 (Alaska 1999), the Alaska Supreme Court "seem[s] to [have] retreat[ed] from the activist principle tacitly endorsed" in *Totem Marine, supra.* (U.S. Counter-Mem. at 77 n.47.) That is incorrect. In *Northern Fabrication*, the court concluded that a company's assertion, "that it had no other alternative to signing the release and taking the offered money because further delay would have meant sure bankruptcy for it and some of its creditors," created "at least a question of fact as to the feasibility of available alternatives." *Id.* at 960-61. Here, claimants have demonstrated that bankruptcy was not feasible both under international legal standards and under the facts of the *O'Keefe* litigation.

The Untenable Case for Chapter 11, 101 Yale L.J. 1043, 1047 n.20 (1992), in turn quoting DeMaria, *Market Place; An Overemphasis on Bankruptcies,* N.Y. Times, Apr. 13, 1989, at D8).) Yet the United States fails to disclose that numerous post-1978 decisions reaffirm *Doran*'s holding that bankruptcy is an irreparable injury. *See, e.g, Country Kids 'N City Slicks, Inc. v. Sheen,* 77 F.3d 1280, 1289 n.11 (10th Cir. 1996) ("[W]e do note that the legal standard of irreparable injury can be satisfied through a showing lesser than the threat of bankruptcy.");[50] *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (bankruptcy is an "irreparable harm" that cannot be remedied by financial compensation); *Tri-State Generation & Transmission Assoc., Inc., v. Shoshone River Power, Inc.*, 805 F.2d 351, 355-56 (10th Cir. 1986) (plaintiff "has adequately shown . . . irreparable harm" because it "would be unable to repay its debts to the REA, would be forced into bankruptcy, and would likely collapse"); *Sperry Int'l Trade, Inc. v. Israel*, 670 F.2d 8, 12 (2d Cir. 1982) ("movant shows that the loss would force him into bankruptcy" and thus demonstrates "irreparable injury"); *Prudential Ins. Co. v. BMC Indus.,* 662 F. Supp. 436, 439 (S.D.N.Y. 1987) ("the threat of possible bankruptcy constitutes irreparable harm"); *Progressive Restaurant Sys., Inc. v. Wendy's Int'l, Inc.,* 1990 WL 106719, at *2 (N.D.N.Y. 1990) ("the threat of bankruptcy or loss of a party's business . . . constitutes irreparable injury").

397. The United States' submission that *Doran* is obsolete rests not on any judicial decisions, but on a single *footnote* in a law review article. That footnote merely reports how a

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[50] The United States says that the court in *Country Kids 'N City Slicks* "did not purport to analyze whether Chapter 11 reorganization, or the threat thereof, would constitute 'irreparable injury.'" (U.S. Counter-Mem. at 85 n.50.) This is quibbling, for the court there clearly stated that "the legal standard of irreparable injury can be satisfied through a showing *lesser* than the threat of bankruptcy," which necessarily implies that a *greater* showing, such as "the threat of bankruptcy," would also satisfy the irreparable injury requirement. 77 F.3d at 1289 n.11 (emphasis added).

certain view of Chapter 11 bankruptcy "has been widely chronicled in the popular press." Bradley & Rosenzweig, 101 Yale L. J. at 1047 n.20. Even so, the United States does not report the conclusions reached by Bradley and Rosenzweig. We shall:

> In sum, our empirical results indicate that both stockholders and bondholders of bankrupt firms suffer *dramatically greater losses* under the 1978 Act than previously.

Id. at 1049 (emphasis added). Avoiding bankruptcy was the only choice consistent with Loewen's fiduciary obligations to its shareholders, *see, e.g., Quadrangle Offshore (Cayman) LLC v. Kenetech Corp.,* 1999 WL 893575, at *7-*8 (Del. Ct. Ch. 1999); *see also* Turner Decl. at 7-9. It was not a bar to international relief.

398. In light of the weakness of the United States' present submission, we simply remind the Tribunal of our prior showings, both in the jurisdictional briefing and at the jurisdictional hearing, that even its own experts — at least when writing elsewhere — support the Claimants' submission. *See, e.g.,* Elizabeth Warren, *Bankruptcy is a Better Alternative*, Nat'l L.J., Apr. 20, 1992, at 16 ("[B]usinesses give up a good deal in Chapter 11. . . . A Chapter 11 process may oust management from control and may wipe out equity interests. It is . . . a time bomb planted in the center of a business, ... For most companies, Chapter 11 is the beginning of the end. More than eight out of 10 companies never emerge. . . . The decision to file for Chapter 11 is one fraught with danger for the business, and for its management.").

399. *Third and finally,* the United States has submitted a new statement from its remaining bankruptcy expert, Trost, which asserts that — contrary to Claimants' earlier showings (TLGI Final Juris. Subm. at 54-57) — O'Keefe would not, in fact, have been in a position to take over Loewen's assets as a result of a bankruptcy filing. The sworn statement of Kenneth Klee, submitted along with this Reply, rebuts Mr. Trost's showing. As Professor Klee explains, this is exactly the strategy that was successfully used against the United States' own

declarant, Harvey Miller, *in In re Marvel Entertainment Group, Inc.*, 1998 U.S. Dist LEXIS 1308 (D. Del.), *aff'd in part and rev'd in part on other grounds,* 140 F.3d 463 (3d Cir. 1998).[51]

400. Perhaps the last word on bankruptcy should come from the United States' own cited authority (*see* U.S. Counter-Mem. at 157):

> An unaffordable bond requirement may operate to foreclose appellate review to an indigent or a judgment debtor. To prosecute her appeal, the judgment debtor may be forced into a possibly premature bankruptcy proceeding. *This prospect may be so dire as to force the judgment debtor to reach a settlement even though she has good grounds for seeking reversal.* Even if the judgment debtor does not settle, *the costs of bankruptcy will often be high. For a corporate debtor, relations with creditors will be severely disrupted, requiring renegotiation of loan agreements. Transaction costs will be significant, including not only the fees of bankruptcy specialists such as lawyers but also the risk that judges will err in deciding whether to ratify management's business decisions.* For an individual indigent debtor, there is the added stigma associated with filing a bankruptcy petition.
>
> Of course, "there is no reason to treat bankruptcy as a bogeyman, as a fate worse than death." Bankruptcy is the recognized mechanism for adjustment of one's debts. The difficulty in forcing a judgment debtor to enter bankruptcy pending appeal, however, is that it puts the cart before the horse. In permitting stays of execution pending appeal, the law recognizes the "element of unfairness in depriving a person of his money or property before his liability has been conclusively adjudicated." This same concern gives rise to a strong and legitimate interest on the part of the judgment debtor in not being needlessly forced into a premature bankruptcy proceeding by application of a supersedeas bond provision.

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[51] Trost also suggests that Loewen would not in fact have suffered "irreparable harm" by filing Chapter 11 because the bankruptcy would have been "strategically planned" to "resolve a specific legal or operational problem." (Trost Decl. at 5.) Trost's assertion demonstrates a considerable lack of understanding of the actual circumstances in which Loewen found itself after the *O'Keefe* judgment. As Claimants have already demonstrated (TLGI Mem. at 59; R. Loewen Mem. at 36-37), Loewen found itself facing threats of imminent execution of its assets. (App. at A1470-71.) Bankruptcy would have been hurried, desperate, and injurious — not exactly the stuff of "strategic planning."

Gary Stein, *Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?*, 61 N.Y.U. L. Rev. 463, 499-500 (1986) (emphasis added and footnotes omitted).

g. The United States' Other Duress Arguments Are Meritless

401. The United States offers three miscellaneous arguments which, it says, defeat any claim that Loewen settled the *O'Keefe* case under duress. All of these are erroneous.

402. *First,* the United States urges that O'Keefe's threat of execution on the judgment was legitimate pressure which cannot sustain a claim of duress; otherwise, every civil settlement would be subject to voiding on duress grounds. (U.S. Counter-Mem. at 99-102.) But O'Keefe's threats were *not* illegitimate, because the source of his power was an excessive judgment, obtained by his own successful efforts to inflame and bias the jury, and Loewen was inequitably prevented from appealing that judgment. *See* TLGI Mem. at 134-35 & n.17; *Restatement (Second) of Contracts* § 176(2)(b) and (c) ("A threat is improper if the resulting exchange is not on fair terms and . . . (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or . . . (c) what is threatened is otherwise a use of power for illegitimate ends."); *see also id.* cmt. f ("Where, however, a party has been induced to make a contract by some power exercised by the other for illegitimate ends, the transaction is suspect."); *Rich & Willock*, 157 Cal. App. 3d at 1158-59 ("The underlying concern of the economic duress doctrine is the enforcement in the marketplace of certain minimum standards of business ethics . . . . [that] include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value."). The United States has no answer to Claimants' prior showing that an agreement coerced by denials of justice is voidable for duress. (TLGI Mem. at 124-34.)

403. *Second,* the United States argues that Loewen cannot claim duress because Loewen was itself responsible for its own financial predicament. (U.S. Counter-Mem. at 95-99.) That is factually and legally wrong. The *Wall Street Journal,* a leading barometer of the American business community, noted immediately *after* the *O'Keefe* verdict that, "[d]espite Loewen's fondness for spending on acquisitions, analysts agree that the company is well-managed and in sound financial shape." (App. at A1216.) One analyst quoted in the article described the company: "Loewen's been very clean, very consistent." (*Id.)* And the law is equally clear that duress will be found where, as here, the unconscionable conduct (the excessive and biased verdict, the Mississippi courts' refusal to allow a reasonable bond, etc.) was a contributing factor to the precarious situation Loewen found itself in as of January 1996. *See, e.g.,* 13 *Williston on Contracts* § 1617, at 708 (3d ed. 1970) (duress will be found where the party's financial difficulty "was contributed to or caused by the one accused of coercion"); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 57 (1st Cir. 1986) ("the person alleging financial difficulty must allege that it was *contributed* to or caused by the one accused of coercion" (internal quotation marks omitted; emphasis added)); *Carr v. Armstrong Air Conditioning, Inc.*, 817 F. Supp. 54, 58 (N.D. Ohio 1993) (duress is shown where the "financial difficulty . . . was *contributed to* or caused by the one accused of coercion" (emphasis added)); *Doctors Hospital v. Hazelbacker*, 665 N.E.2d 1175, 1180 (Ohio Ct. App. 1995) (same); *In re Romano*, 175 B.R. 585, 598 (W.D. Pa. 1994) ("A highly relevant factor in determining whether economic distress has occurred is whether the party exerting pressure has *contributed to* the other's financial distress." (emphasis added)); *Aircraft Assoc. & Mfg. Co. v. United States*, 357 F.2d 373, 378 (Ct. Cl. 1966) ("if the Government's wrongful actions had not caused or *contributed to* plaintiff's financial

difficulties, the exaction of a release from plaintiff under a threat to exercise the Government's contractual right would not vitiate the release on the ground of duress." (emphasis added)).

404. *Third,* the United States suggests that there can be no duress here because Loewen did not "manifest its intention to avoid the contract within a reasonable time." (U.S. Counter-Mem. at 102-03.) This argument only points up why "duress" is not an issue in this case. The "black letter law" on which the United States relies provides that a party must "within a reasonable time manifest *to the other party* his intention to avoid [the contract]" on grounds of duress. *Restatement (Second) of Contracts* § 381(1) (emphasis added). The United States does not suggest to whom Loewen should have manifested this intention, and it would be truly bizarre if, to seek international relief against the *United States*, Loewen was forced to manifest that intent to *O'Keefe.* Indeed, repudiating the *O'Keefe* settlement would not have accomplished anything vis-à-vis this NAFTA claim, but would only have restored the *O'Keefe* case to the Mississippi courts' dockets (App. at A1590, A1621), thereby allowing O'Keefe to begin dismembering a defenseless Loewen via execution. To the extent that Claimants had to "manifest" anything within a reasonable time after the settlement in order to bring its claim, Claimants did so by making the required filings within the time periods specified by Chapter 11 of NAFTA. *See* arts. 1116(2), 1117(2), 1119, 1120(1). These timely filings perforce manifested Claimants' intent within a "reasonable time."

C. Despite Loewen's Requests, The Mississippi Trial Court Failed in Its Duty to Provide Loewen a Fair Trial

405. The United States now argues that Claimants' case should be dismissed because Loewen did not object to each of the innumerable references to nationality, wealth, and race, and because Loewen did not urge a reduction of the appellate bond requirement on the specific ground that "corporate reorganization [*i.e.,* bankruptcy] was not an effective means of protection

for the company." (U.S. Counter-Mem. at 65 & n.38; *see generally* U.S. Counter-Mem. at 65-72.) This argument is meritless, since Loewen in fact *did* repeatedly request judicial action "on the grounds that it alleges in this arbitration." And in any event NAFTA, United States law, and Mississippi law each imposed an affirmative duty on the Mississippi courts to protect Loewen, even absent a specific request for protection.

406. *First,* all of this discussion is largely irrelevant, for it is clear from the record that Loewen did more than enough to protect its rights, and to apprise the Mississippi courts of the abusive tactics of Willie Gary and the other *O'Keefe* lawyers. Although the United States continues to portray Loewen as "never" seeking to protect itself from these acts, its real position is plainly that Loewen did not object *enough* to these tactics. (*See* TLGI Final Juris. Subm. at 58-59; R. Loewen Final Juris. Subm. at 34.) Even the United States' expert, Landsman, will not go so far as to say that Loewen "never" objected, but merely concludes that Loewen's use of "protective devices" (which is apparently the jargon used by academics to describe trial objections) was "exceedingly modest." (Landsman Stmt. at 23, 33.) That is not true, and the efforts that Loewen expended to protect itself were more than sufficient to apprise the trial court of the problem (if indeed the trial judge needed any apprisal, which he did not), and to preserve the points for appeal. Chief Justice Neely (Neely Decl. at 1-6), Chief Justice Hawkins (Hawkins Stmt. at 29-30), and Mississippi trial lawyer John Corlew (Corlew Stmt. at 6-7) all conclude that Loewen objected more than sufficiently to preserve its rights. Indeed, as former Mississippi Chief Justice Hawkins explains, had Loewen been given the opportunity to appeal this judgment to the Mississippi Supreme Court, a wholesale reversal of the excessive judgment almost certainly would have been accomplished. (Hawkins Stmt. at 28.)

407. The United States does not anywhere deny that such a wholesale reversal would have been in order. Moreover, it does not and cannot assert that Judge Graves prevented the improper appeals to nationalism, racism, and populism. As Claimants explained in detail during the jurisdictional stage of these proceedings (TLGI Final Juris. Subm. at 61-63; *see also* TLGI Juris. Subm. at 45-46), Judge Graves allowed O'Keefe's cross-examination of Ray Loewen to emphasize his nationality, and to accuse Loewen of failing to publicize the foreign ownership of Riemann Holdings. He did nothing to stop O'Keefe's closing appeal to anti-Canadian sentiment by reading the previous anti-Canadian testimony of Mike Espy, former U.S. Secretary of Agriculture. He did nothing to stop O'Keefe from comparing Loewen's competition with O'Keefe to the bombing of Pearl Harbor by the Japanese. And he refused to excuse a prospective juror for cause who believed that a foreign company should not be given a fair trial, forcing Loewen to use one of its limited peremptory challenges to have the juror removed.

408. Moreover, Willie Gary's deliberate trial strategy to portray Loewen as a racist was so obvious that Judge Graves himself acknowledged that Gary had played the "race card" early in the trial. (*See* Tr. at 3595-96.) Yet, Judge Graves never stopped that unconscionable tactic. Instead, Judge Graves allowed O'Keefe's lawyers to present wholly irrelevant and highly prejudicial testimony by a prominent black politician that O'Keefe was not a racist. (Tr. at 1096.)

409. The United States' similar assertion that, "[a]fter the verdict, . . . Loewen never argued . . . that Chapter 11 reorganization was not a reasonable means of protection in the event that the company could not afford to post the full bond" (U.S. Counter-Mem. at 72), has already been rebutted factually. (*See* TLGI Final Juris. Subm. at 54 n.30.) As a legal matter, the United States' sole authority for the notion that Loewen even had such a burden is the concurring

opinion of Justices Brennan and Marshall in *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 22-23 (1987) (cited in U.S. Counter-Mem. at 60), which represented a minority view of only two of the nine justices and thus had no legal force. And, as we have demonstrated above (pp. 120-22), there is no legal requirement that a judgment debtor must first endure bankruptcy before obtaining a reduced supersedeas bond.

410. *Second,* Article 1105's guarantee of "full protection and security" imposed on the Mississippi judiciary on affirmative duty to protect Loewen and its United States investments. As Claimants have demonstrated in Section III(D), *supra,* the United States' contrary interpretation of "full protection and security" is entirely unsupported. The United States' error in this regard is alone sufficient to defeat its submission on this point.

411. *Third,* consistent with the controlling international obligation to afford "full protection and security," United States and Mississippi law both impose an affirmative duty on the courts to conduct fair trials, even absent objections from trial counsel. Thus, even absent any objection, the Supreme Court of the United States has condemned rank appeals to class and local biases as so obviously illegal as to "require no comment." *New York Central R.R. Co. v. Johnson,* 279 U.S. 310, 319 (1929). The Supreme Court in *Johnson* stressed that it is the "power and duty" of a court — "of its own motion" — to ensure that verdicts are "uninfluenced by the appeals of counsel to passion and prejudice." *Id.* at 318. Indeed, this duty is so great that *Johnson* reached out to decide the question even though the petitioner had not even raised the point in his briefs to the Supreme Court, an omission for which the Supreme Court specifically chided the lawyers. *Id.* at 319.

412. Numerous other United States courts have also sustained challenges to improper appeals to jury biases — most in cases far less egregious than the one presented here — on the

ground that judges have an independent "duty" to conduct a fair trial without regard to whether objections were stated at trial. (*See, e.g.,* TLGI Final Juris. Subm. at 60-61 & n.33.) Mississippi appellate decisions repeatedly acknowledge a judicial "duty" to correct egregious errors and miscarriages of justice even absent objection. *See, e.g., Robbins v. Berry,* 47 So. 2d 846, 848 (Miss. 1950); *Burnett v. Mississippi,* 285 So. 2d 783, 784 (Miss. 1973). The plain error rule of Miss. R. App. P. 28(a)(3) may well be discretionary in cases involving ordinary, technical, or non-prejudicial errors, but the Mississippi courts plainly impose a "duty" to prevent and correct egregious appeals to local prejudices. (*See* Hawkins Stmt. at 29-30; Neely Decl. at 5; *see also* Clark Stmt. at 6-8.) These bedrock principles of United States municipal law are fundamentally consistent with the international duty to provide "full protection and security" under Article 1105.[52]

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[52] The United States Court of Appeals for the Fifth Circuit, which has jurisdiction over the Mississippi federal courts, held in *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) that it was necessary to determine the cause of an excessive jury verdict even absent an objection below. Other state jurisdictions, as well as federal courts, similarly recognize a judicial duty to prevent or correct appeals to illegitimate prejudices. *See, e.g., State v. Croft*, 635 P.2d 972, 974-75 (Kan. Ct. App. 1981) ("'where counsel refers to pertinent facts not before the jury, or appeals to prejudices foreign to the case, *it is the duty of the court to stop him then and there. The court need not and ought not to wait to hear objection from opposing counsel*.'") (emphasis added; citation omitted); *State v. Gutekunst*, 1880 WL 976, at *2 (Kan. 1880) ("We . . . call[] attention to *the duty of the district courts in jury trials to interfere in all cases of their own motion, where counsel forget themselves so far as to exceed the limits of professional freedom of discussion* . . . . The dignity of the court, the decorum of the trial, the interest of truth and justice forbid license of speech in arguments to jurors outside of the proper scope of professional discussion") (emphasis added); *Belfield v. Coop*, 134 N.E.2d 249, 259-60 (Ill. 1956) ("So much of [plaintiff's counsel's] argument was prejudicial and unwarranted that *a duty devolved upon the court to inject itself into the proceedings sufficiently* to see that the litigants received a fair trial. It is *always the duty of a trial court to control the proceedings* to the extent necessary to ensure this result.") (emphasis added); *State v. Davis*, 290 S.E.2d 574, 587 (N.C. 1982) ("[W]hen a prosecutor's comments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial, the trial court has the duty to act *ex mero motu*."); *Borden, Inc. v. Young*, 479 So. 2d 850, 851 (Fla. 3d Dist. Ct. App. 1985) (counsel's improper conduct "was so prejudicial as to be incapable of cure by rebuke or retraction; it thus constituted fundamental error which needed no objection to preserve"); *Nazareth v. Sapp*, 459 So. 2d 1088,

413. So, too, the municipal law of other leading nations requires courts — even absent objection — to provide full protection from improper appeals to jury biases. As Claimants previously showed (TLGI Mem. at 69-70), the leading Canadian case is *Gage v. Reid* (1917), 38 O.L.R. 514, 34 D.L.R. 46 (S.C.-A.D.), an action for false imprisonment. At trial, defense counsel had stressed the fact that the plaintiff was from Austria, a state with which Canada was then at war. The jury award was a scant $3.00. On appeal, Meredith C.J.C.P., for the majority, awarded a new trial. Of the defense counsel's submission, he observed:

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

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(continued…)

1089 (Fla. 5th Dist. Ct. App. 1984) ("[T]he law of Florida is to the effect that 'if the prejudicial conduct in its collective import is *so extensive that its influence pervades the trial*, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, a new trial should be awarded regardless of the want of objection.'") (citation omitted); *Aetna Life Ins. Co. v. Kelley*, 70 F.2d 589, 594 (8th Cir. 1934) ("It is true that counsel for appellants did not object to many of the [prejudicial] statements quoted above as illustrating the general nature of the closing arguments. But the failure to take affirmative action is not conclusive. *The court should intervene sua sponte when necessary to secure a fair trial*.") (emphasis added); *Igo v. Coachmen Indus., Inc.*, 938 F.2d 650, 654 (6th Cir. 1991) ("A trial court cannot sit quietly while counsel inflames the passions of the jury with improper conduct, even if opposing counsel does not object."); *Brown v. Walter*, 62 F.2d 798, 799-800 (2d Cir. 1933) ("A judge, at least in federal court, is more than a moderator; *he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary*. . . . Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge.") (emphasis added). *See generally* Robert S. Hunter, *Federal Trial Handbook: Criminal*, Vol. 2, § 74.7 at 988 (3d ed. 1993) ("The tendency . . . is for the courts to find plain error, reviewable without objection, when the conduct of counsel is particularly reprehensible or prejudicial to the opposing party.").

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

38 O.L.R. at 50. Concerning the Austrian plaintiff's failure to object at trial, Meredith C.J.C.P. had this to say:

> Some point has been made of the failure of counsel for the plaintiff to interrupt and object, at the moment, to the misconduct of counsel for the defendant in his address to the jury; but what has that to do with such a case as this? It is true that, in things affecting a party's rights in the action only, it may be said, and generally is said: "You should have objected at the time, when all you complain of might have been avoided; you cannot let such things pass as right at the trial, and take your chances of a verdict in your favour, and afterwards insist upon another chance, through that always regrettable, sometimes oppressive, method, a new trial." But the Court has power to grant or direct a new trial, whether objection has been made or not; and I know of no case in which a new trial should be more promptly directed than in this case, in which the wrong done not only worked an injustice to the plaintiff, but affects the administration of justice generally and is a blot upon the Court, in which all men, entitled to its protection and aid, must be upon an equality, notwithstanding nationality, colour, or creed. The Court not only may but must keep its own skirts clean.

Id. at 52. *See also DaCruz v. Vancouver (City)* (2000), 74 B.C.L.R. (3d) 244, 250-52, 2000 BCCA 279 (new trial ordered where defense counsel stated that plaintiff's Portuguese origins suggested his "cultural propensity to, you know, exaggerate a bit"; this "hint of an appeal to racial prejudice" was "objectionable," and "increased the likelihood that the fairness of the trial on the issue of credibility was unacceptably compromised"); *Bickel v. John Fairfax & Sons Ltd.* [1981] 2 NSWLR 474, 501 (it remains the duty of the trial judge throughout the conduct of the trial to ensure that a fair trial is had and any verdict is not affected by misconduct of counsel; "how could the public have had any confidence that such a verdict had not been affected by the prejudice created by what had been said?"); *Wishart v. Mirror Newspapers* [1964] NSWR 231, 273 (a party "aggrieved" by prejudice need not seek a discharge of the jury; he "none the less . . .

may still have a new trial if he can satisfy the appellate court that there is reasonable ground for supposing that there has been a miscarriage of justice"). The United States has offered no response to Claimants' showings in this regard. (TLGI Mem. at 67-70.)

414. Consistent with the widely recognized judicial duty, even Judge Graves recognized his power and duty to intercede when necessary. Judge Graves openly lays down the law of his courtroom with his very own "Ten Commandments." Notably, his Tenth Commandment states:

> The Court may exercise its discretion pursuant to Rule 611 of the Rules of Evidence and intervene **sua sponte** to deal with matters affecting the interrogation of witnesses and the presentation of evidence.

(App. at A3476.) Judge Graves invoked this power, even if only selectively, on several occasions. For example, as discussed above, he intervened during cross-examination to protect O'Keefe, just as Loewen was about to show that O'Keefe had been less than truthful about Loewen's bank being "Japanese." (Tr. at 2176; *see also* Hawkins Stmt. at 29-30.)

415. In the face of these authorities, the United States persists in relying upon a non-Mississippi case, *United States v. Olano,* 507 U.S. 725, 735 (1993), for the proposition that "the plain error rule is discretionary, not mandatory." (U.S. Counter-Mem. at 70 & n.42.) But the controlling international requirements of fairness and equity, and full protection and security, are not discretionary. Moreover, *Olano*, which does not purport to apply Mississippi law, is off-point in any event. There, the U.S. Supreme Court held that a trial court's decision to allow two alternate jurors to attend jury deliberations in a federal criminal case, although improper, was not "plain error" because it was not prejudicial to the defendant's interests. *Id.* at 741. The same cannot possibly be said about the arguments made and testimony elicited by Willie Gary.

416. As support for its holding, *Olano* cited an article from the *Mississippi Law Journal*, which establishes that the "plain error" rule "emanate[s] from . . . the *duty* of all courts to dispense, administer, and promote justice." Note, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 Miss. L. J. 42, 44 (1951) (emphasis added) (citing, *inter alia*, *Brooks v. State*, 209 Miss. 150 (1950)). By contrast, neither of the two Mississippi cases cited by the United States, *Barnett v. State,* 725 So. 2d 797 (Miss. 1998) and *Hogan v. State,* 741 So. 2d 296 (Miss. Ct. App. 1999), even involved this well-established judicial "duty."[53]

417. The United States also argues (U.S. Counter-Mem. at 71 n.43) that some of the evidence at issue here was introduced by Loewen during the trial, and that "[t]he principle of 'invited error,' which is related to the contemporaneous objection rule, thus further eliminates any alleged 'duty' of the Mississippi courts. . . ." But the doctrine of "invited error" is not part of international law, and the United States does not pretend otherwise. Moreover, as Claimants have previously demonstrated, *see* Section II, *supra,* Loewen was forced to respond to many of the improper remarks and irrelevant testimony elicited by O'Keefe's lawyers and allowed by the trial court. In any event, the United States' assertion is incorrect as a matter of law: The principle of "invited error" would not eliminate the duty of the trial court to protect Loewen. *See* *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) ("the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole."). Finally, as demonstrated by Chief Justice Hawkins and Mississippi trial lawyer John Corlew, as a matter of Mississippi law, Loewen invited no error by its conduct. (*See* Hawkins Stmt. at 29-30; Corlew Stmt. 7.)

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[53] The same can be said for the several non-Mississippi cases cited by the United States in

418. Since the United States' position finds no support in the applicable law, international or municipal, it relies primarily on declarations from academics, one of whom (Landsman) opines that the proper role of judges in United States courts is a "fundamentally passive" one. (Landsman Stmt. at 5; *see also id.* at 3, 4.) These scholastic statements do not address a judge's duty under NAFTA and international law to provide full protection and security, nor do they address analogous Mississippi jurisprudence that imposes a judicial "duty" to conduct a fair trial. Such academic theorizing also carries little, if any, weight when placed against the statements of three distinguished former jurists — Richard Neely, former Chief Justice of the West Virginia Supreme Court of Appeals; Armis Hawkins, former Chief Justice of the State of Mississippi, and Charles Clark, former Chief Judge of the United States Court of Appeals for the Fifth Circuit. Each of these judges has testified that it was the Mississippi courts' "duty" or "obligation," even absent objection, to prevent or correct the miscarriage of justice that was the *O'Keefe* trial. (*See* Neely Decl. at 5 ("judges [must] be vigilant protectors of litigants' rights, not merely sleeping arbiters who only awaken when a lawyer yells 'Objection!'"); Hawkins Stmt. at 29 ("The judge is not a potted plant, or an ornament of the courtroom; rather, his duty is to assure justice and fairness to the parties before him."); Clark Decl. at 6 (quoting Mississippi law: "It is the duty of the trial judge to guide the procedure of the trial, and in so doing he is not merely an umpire or referee.").)

419. Case law authored by judges, not by academics, similarly establishes that "it is no longer — if it ever once was — acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing, and then, on the ground that the loser has asked for what he received, obediently raise the hand

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(continued…)

a footnote. (*See* U.S. Counter-Mem. at 71-72 & n.43.)

of the one who emerges victorious." *Borden, Inc. v. Young*, 479 So. 2d 850, 851 (Fla. 3d Dist. Ct. App. 1985). *See also McWilliam v. Sentinel Pub. Co.*, 89 N.E.2d 266, 275 (Ill. App. Ct. 1949) (quotation omitted) ("a trial court is not a robot"; "he must act in the public interest of justice to curb inflammatory arguments productive of verdicts resting on passion and prejudice"). Thus, in *McWilliam*, the court held that where it became apparent at an early stage of the trial that the trial court was going to "leave the propriety of the arguments to the jury and the self-discipline of counsel," the defendants' counsel was not required to constantly object to the improper conduct of opposing counsel because the objections "would have aggravated the situation and tended to prejudice the jury against them." *Id.*

420. In sum, Loewen did more than enough to protect itself in Mississippi; the fact that protection was not forthcoming from the State constituted a violation of international law, as well as Mississippi law.

V. CONCLUSION

421. This is an unusual case, based on extreme facts that are unlikely to recur. In violation of every applicable principle of equity and justice, the Mississippi trial court failed to provide a fair trial. Despite Loewen's protests, it allowed Willie Gary and the inflamed jury to discriminate against Claimants because they were foreigners, because they were deceptively portrayed as rich, racist, and ruthless, and because, as the United States concedes, they were not from Jackson, Mississippi. The inevitable result was a monstrous verdict that was so excessive when compared to the underlying contracts that it cannot possibly comply with international law, or with fundamental standards of fairness and due process accepted by virtually every nation on earth. And then the appellate process failed as well, when the Mississippi Supreme Court effectively foreclosed Loewen's appeal rights. While it may be sometimes be difficult for a tribunal to determine when an injustice rises to the level of an international wrong, this unusual combination of discrimination, excessiveness, and an inability to appeal presents no such problem: What happened in Mississippi was a palpable, egregious wrong, visible at a glance to any fair-minded person. Under any standard of justice, the United States is liable.

422. NAFTA's Chapter 11 was designed to provide an impartial, international tribunal when municipal governments discriminate against NAFTA investors or deny them justice. This is just such a case, and one of the United States' own NAFTA negotiators, Daniel M. Price, has placed this proceeding in its proper legal and international context:

> The United States has long been the champion of international investment rules. It has fought hard for recognition of the international rule of law and for respect for international dispute resolution bodies. The United States has enjoyed enormous benefits from invoking dispute settlement provisions to break down trade barriers or redress injuries to investors. Indeed, of the approximately 30 claims under BITs that have come before the International Centre for Settlement of Investment Disputes ("ICSID"), about one-third have been brought by U.S. investors.

> And of the 16 claims that have been brought under NAFTA's investment provisions, 11 have been brought by U.S. investors. It would be ironic if the United States, long the advocate for subjecting sovereign actions to scrutiny under international law, were now to retreat from the very international principles it worked so hard to enshrine.
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> . . . .
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> Nevertheless, critics of the NAFTA investment chapter point to cases against the United States that have not yet been decided — such as the *Methanex* or *Loewen* cases — and have speculated about how tribunals in those cases might rule. Indeed, those critics find troubling the very initiation of these claims. I do not express a view on the merits of these pending cases. However, the mere fact that cases have been brought against the United States in no way undermines the legitimacy or integrity of the dispute settlement process. Indeed even frivolous cases may be brought before a NAFTA panel just as they are brought in United States courts every day, but this does not mean that either the court system or the arbitration mechanism is flawed. If claims are found to be frivolous, then they will be rejected. If claims are justified, then the respondent, including the United States as the case may be, should pay compensation. This is the price of living in an international system governed by the rule of law.

Statement of Daniel M. Price, *Before the Subcomm. on Trade of the House Comm. on Ways and Means, Hearing on Summit of the Americas and Prospects for Free Trade in the Hemisphere*; May 8, 2001.

423. As we have shown, the United States' liability for these NAFTA breaches is consistent with the text of NAFTA, with the objectives of NAFTA, with the rulings of prior NAFTA tribunals, with the United States' own prior espousals of international law, and with basic notions of justice and equity. A contrary ruling would be none of these. Thus, for all the reasons stated above, and in the Claimants' prior submissions, this Tribunal should establish the United States' liability for the claims at issue, and this arbitration should proceed to its damages phase.

Respectfully submitted,

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DATED: June 8, 2001

WA:1246485

CERTIFICATE OF SERVICE

I, Gregory Andrew Castanias, certify by my signature below that I caused a true and correct copy of the foregoing JOINT REPLY OF CLAIMANTS THE LOEWEN GROUP, INC. AND RAYMOND L. LOEWEN TO THE COUNTER-MEMORIAL OF THE UNITED STATES and the accompanying VOLUMES VII & VIII OF CLAIMANT'S APPENDIX to be served upon the following individual by hand delivery on this 8th day of June, 2001:

Kenneth L. Doroshow, Esq.
United States Department of Justice
Civil Division
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